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4. Institutional and legislative framework

The scope of the present paper does not extend so far as to define a comprehensive policy for achieving sustainable development in South Africa. Much less does it attempt to describe a strategy for achieving sustainable development. However, we believe that planning and regulatory structures which provide:

- a) for public participation in, and for the incorporation of environmental principles into, development planning; and
 - b) for an effective system of environmental management;
- are a precondition for the achievement of sustainable development in South Africa.

(a) An outline of current problems

South Africa has historically been characterised by a very inefficient, bureaucratic and undemocratic planning structure, intrinsically related to its apartheid policies. Moreover, there is no formal link between environment and development authorities, and although there have been recent attempts to introduce Environmental Impact Assessments for development projects, there is no legal requirement for them. This is to a large extent related to the relatively low priority accorded to the environment in South Africa's legal and constitutional system. As a direct result of its apartheid policies, the South African state has historically given highest priority to such departments as Defence, and Minerals and Energy Affairs, while the Department of Environment Affairs has had secondary status in the hierarchy of government departments. This status is reflected in the Environment Conservation Act (73 of 1989), in theory the centrepiece of environmental legislation in South Africa, which stipulates that certain key provisions of the Act may only be enacted with the concurrence of other government departments which may be affected by its actions.

In addition to this, all government departments together constitute one legal persona, thus preventing one department from taking legal action against another. This only exacerbates the fact that very little environmental law is actually administered by the Department of Environment Affairs. Rather, the administration of environmental law is scattered through virtually every government department, and with the devolution of power, also the provincial administrations and local authorities. As a result, the functional and regulatory responsibilities of certain aspects of administration are carried out by one and the same department. For example, the Department of Agriculture whose chief purpose is to increase agricultural production is also the department which administers the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act (36 of 1947) which is concerned, inter alia, with the control of harmful pesticides. Similarly, Mineral and Energy Affairs which promotes mining is also charged with policing the environmental effects of mining. At the same time, the devolution of certain administrative functions to provincial and local authority level has resulted in a failure on the part of the environmental management structure to ensure adequate monitoring of activities at a local and regional level.

The effectiveness of environmental management is further hindered by certain aspects of the environmental legislation. Roman Dutch common law, for example, is particularly sophisticated and well developed in the field of private law, such as contract, delict and family law. Its public law by contrast has never been well developed which is partly why South Africa adopted the UK Westminster constitutional model. This combination has resulted in an unsophisticated body of Roman Dutch public law. Consequently, the relatively new requirements of

Highlands Water Project, which it is financing. Despite ideological changes within the Bank, its activities need to be monitored very carefully, and challenged wherever necessary. Decision makers on national economic, environmental and development questions should maintain a healthy independence from the Bank. Projects should not be undertaken with the Bank without extensive reference to the Bank's global record in implementing similar projects in other developing countries. South Africa should emulate Zimbabwe in keeping control over research projects whose reports form the basis for World Bank evaluations.

While recognising the intractable nature of the struggle against some of these forces, if sustainable development is to be effective, they must be overcome. This can only be done if the strategy adopted recognises these structures and power relations, and operates with an awareness of the constraints acting upon it. Fortunately, the concept of sustainable development, despite the variety of definitions and applications, is gaining ever-wider acceptance internationally. Its principles are more often being incorporated into social and economic planning, and business and other groups are beginning to recognise that they will have to begin to conform with such principles. Vested interests in the old order will gradually be reduced and isolated, and will ultimately have to change.

(f) Summary

In the final analysis, significant movement towards the goal of sustainable development will require major intervention by the state in the economic system, with the following general objectives:

i) a change in focus from a goal of rapid and indiscriminate growth, to an integrated development approach. This will involve the stimulation and encouragement of production of

goods and services that will satisfy the basic needs of the whole population;

ii) elimination of high levels of inequality which are presently defined primarily along lines of race, but which in the future might be defined according to class, location and gender;

iii) regulation of, and promotion of effective pricing policies in the use of renewable and non-renewable resources, both within the country and for export, to achieve a better balance between present and future consumption needs, and to ensure adequate protection of the environment;

iv) reduction of the current dependence of the economy on the exploitation of non-renewable resources;

v) the restructuring of trade relations to facilitate the extension of sustainable development policies to neighbouring countries in Southern Africa and elsewhere; and

vi) the creation of a just and effective legal and constitutional framework for the achievement of the goals of sustainable development. This will be addressed further in the next section.

It is clear that these are far-reaching proposals. It should also be clear that, given the present situation in South Africa - the uneven but rapid population growth; significant disparities in income, education and lifestyle; the inefficient distribution of the population in relation to resources; the dependence of the economy on non-renewable resources; and the already significant environmental problems - the path towards sustainable development will not be an easy one. We believe, however, that it is an essential step for the future prosperity of this country.

environmental law are not easily accommodated in the existing structure. The requirement of locus standi (legal standing), which limits access to courts, has made environmental offenders notoriously difficult to prosecute. In addition, fines for environmental offences are inconsistent, and generally inadequate.

South Africa's system of environmental management has, in fact, been the focus of a recent President's Council Report (President's Council, 1991). The report, however, although it is a useful compilation of factual evidence on the country's environmental problems, makes recommendations on re-structuring the management system which fall far short of what is required to meet the above objectives.

b) Recommendations

i) General

It is necessary to stress the fundamental importance, for the achievement of sustainable development, of a truly democratic society, in which the government is held accountable to all the people of the country, and in which the business sector is accountable to both its employees and to the wider society. Sustainable development therefore accords an important role to civil society in ensuring that those holding economic and political power, act in the broad and long-term interests of society. More specifically, this refers to non-governmental organisations (NGO's) (including environmental groups, research bodies, development agencies, and special interest groups), civic organisations and communities. An active and informed civil society, in conjunction with enforceable constitutional rights, and an accessible and progressive legal system, is essential for achieving sustainable development.

As far as the institutional framework is concerned, it is clear that it should be structured so as to facilitate the integration of economic activity and social transformation with environmental principles, within the context of an overall development strategy. This requires the establishment of a centralised senior government ministry or department with the function of development planning. This development authority must necessarily have a close relationship with the central environmental authority in order that no contradictions arise between development planning and environmental management. In fact, in the longer term the division between development and environmental planning should be eliminated, with the incorporation of development and environmental planning into a single department. Regulation of environmental matters, however, should be the responsibility of an independent agency comparable to the Environmental Protection Agency in the United States.

Both the planning department and the regulatory agency should be adequately staffed and financed, and should have specific and effective powers. They should include a central office - responsible primarily for policy development - as well as regional and local structures in which the participation of the public is provided for, and with efficient lines of communication between these levels. Responsibility for policy implementation and regulation should rest, as far as possible, with local bodies, acting under the guidance of regional and national authorities. The national authority should monitor activities undertaken at a decentralised level to ensure compliance with the national policy. Mechanisms should exist to allow for appeal against any decisions taken by higher authorities which conflict with those taken at the regional and local levels. In this way, responsibility for environmental issues can be devolved as far as possible to the grassroots level, in the context

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* Personally, I would like to see the establishment of a Dept. of Planning, Development + the Environment as soon as possible.

of a coherent and efficient institutional structure at national, regional and local levels.

. Finally, efficient operation of the state bureaucracy may require the establishment of appropriate watchdog bodies, including for example, an ombudsman. Together with a measure of authority to ensure grievances are followed up, the appointment of an independent ombudsman can help prevent abuse of bureaucratic institutions for private or short-term, unsustainable gain.

ii) Legal

Constitutional implications

The principles of sustainable development can be incorporated into national statutes dealing with specific environmental management issues. Indeed, there is currently a unique opportunity to incorporate the principles of sustainable development in the new South African constitution. Recognition in the constitution of the themes of respect for the environment and of ecological systems may take many forms (LHR n.d.). Firstly, the preamble to the constitution should establish the context of nature within which South African people live, and the common bonds flowing from the principle that South Africa belongs to all who live in it. Secondly, the constitution should contain a clause in the section dealing with the aims of the state, which sets out the objective of conserving the environment, and of providing all South Africans with a clean and healthy environment in which to live and work. These provisions relate to the so-called third generation rights (or green rights), which include also such rights as the right to peace, the right to information, the right to development and the right to control over resources. Thirdly, the constitution should acknowledge that South Africa is part of the African continent, and that environmental issues have a regional and continental dimension which extends beyond the

borders of our country. The integration of a democratic and non-racial South Africa into African organisations such as SADCC and the OAU should facilitate the harmonisation of approaches to dealing with common environmental problems.

Inclusion of these principles in the new constitution of a democratic, post-apartheid South Africa would serve, firstly, to firmly establish the commitment of the state to the environment and the legal standing of environmental issues in court actions, and secondly, to ensure that any ambiguities in the interpretation of other statutes will be interpreted in favour of the environment.

Legal implications

In addition to the over-arching principles of sustainable development which are appropriate for inclusion in the constitution, several more specific legislative aspects arise. The first of these is the need to rewrite the body of environmental law in such a way as to accommodate in an integrated and consistent way, the issues addressed throughout this paper, and particularly in section 4(b). This includes the need to establish environmental law and the administration thereof as a senior government ministry which does not have to seek the consent of other departments to adequately perform its own duties. Secondly, legislation should remove the discretionary power of the Minister to perform such fundamental duties as the declaration of an environmental policy or code, and should, instead, incorporate such provisions directly in the statutes. Thirdly, there is a need to give legal standing and effect to a system such as Integrated Environmental Management (IEM), which is intended to prescribe responsible environmental management procedures, in a realistic manner, appropriate to a developing country such as South Africa. Fourthly, a separate unit within the Attorney-General's office should be established to deal specifically with

prosecutions related to environmental law. Linked to this, and to the concept of 'green rights', is the need to liberalise the requirement of locus standi, in order that non-government organisations, community based organisations and the general public, may take up environmental issues in the courts. Sixthly, alternative dispute resolution procedures should be investigated in order that environmental disputes can be resolved in a manner which is less costly and more accessible to the majority of people, than full litigation. Finally, an environmental ombudsman should be appointed to receive complaints regarding abuse of the environment (corresponding to third generation rights - refer (i) above). Such a person would have the power to investigate public and private activities, and to report such activities to the environmental authority for further action where breaches of law or public rights are likely.

The administrative structures which are needed to implement and monitor this legal and constitutional framework have been discussed in section 4 (b). It can be stressed again however, that the central and most immediate need is for a strong, adequately financed and well staffed central government environmental agency with specific and effective powers. This agency should operate with autonomy, but should nonetheless co-operate closely with those departments responsible for (inter alia) Development and Economic planning. In addition to implementing these new provisions, a new administration in South Africa will also have the task of undertaking rehabilitation of the environment and of correcting the historical deficiencies of the apartheid past.

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5. Sectoral Policy Issues

a) Land and Rural Development

Historically, South Africa's patterns of land-use and land ownership have been determined primarily by the discriminatory practices of successive white governments, rather than by ecological realities or the legitimate demands of the majority of the people. Some 50 000 white farmers own approximately 85% of the agricultural land - which accounts for 89,7% of the total surface area - while the estimated 700 000 black farmers are crowded into the remaining 15%. Moreover, while South Africa is essentially self-sufficient in the production of field and horticultural crops, the agricultural sector is, arguably, both economically inefficient and environmentally unsustainable in several respects. Similarly, the approach historically adopted by conservation authorities to the declaration and management of conservation areas - which make up 4,7% of the land - has been subject to serious problems inherent in the apartheid policies of the state. We believe therefore, that there is an urgent need for an extensive restructuring and reorientation of South Africa's rural land-use patterns in order to realise the goals of sustainable development: equity, efficiency and sustainability.

i) Agriculture

The agricultural sector in South Africa operates in a natural environment which is not especially conducive towards most of its activities. South Africa is classified as a semi-arid country, with a mean annual rainfall of 497mm (Cowling, 1991), compared with a global average of 860mm (Huntley et al, 1989). Within this average, are large spatial and temporal fluctuations, which, together with a large amount of mountainous terrain, restrict the amount of arable land suitable for dryland agriculture to approximately 13.5% of the total land area (Cowling 1991). In addition, South Africa generally has a very thin layer of

top soil (P.C.Report,1991), which in some areas is highly erodable (Cooper, 1988).

Unfortunately, as will be argued below, farming policies and practices in South Africa have largely failed to take cognisance of the constraints imposed by these environmental features, and have thus contributed to the degradation of the very resource base on which agriculture is dependent. One indication of the fragility and sensitivity of the land to agricultural and land-use practices, was seen in the floods of 1987 and 1988, which followed a prolonged period of drought (Cooper 1988). Because river catchments had been denuded of ground cover through overgrazing, rivers and dams were silted up with eroded soil, and wetlands had been filled in, the land was generally unable to absorb the heavy rains that fell. Consequently, river levels were higher than they might otherwise have been, and the silt-laden floodwaters broke the banks of many rivers and dams, causing enormous damage, as well as loss of human life. The floods were therefore not simply an unavoidable 'natural' disaster, but rather, were situations caused, or, at least, aggravated by poor agricultural and land-use practices.

Other examples of environmental degradation linked to agriculture will be discussed within the context of the three distinct, but related, sub-sectors of South African agriculture (Cooper 1988). The core of the sector is a relatively small group of large, productive white-owned commercial farms which has developed through a process of concentration of land ownership over the past few decades. This has seen an approximate halving of the number of white farmers on the land since the 1950s, and a concentration of production on an increasingly small class of wealthy farms, to the extent where the top 0.9% of farmers produced 15.9% of gross farming income in 1983, and the top 5.8% produced 38% of gross farming income (Van Zyl and Van Rooyen 1991).

The remainder of white farms comprise a second, less developed sector, made up of mainly smaller, less productive farms, often occupying ecologically marginal land, and producing poor quality crops and low-value livestock. These have become increasingly marginal, and face severe economic and environmental problems of their own. The third component in South African agriculture is that of the communally-owned land in the bantustan areas. Whilst these three divisions will be discussed separately below, it must be emphasised that they have in reality not functioned in an independent manner, and that in fact, the relative economic success of the commercial core is attributable at least partly to the underdevelopment of the black areas.

The productive core of white commercial farms

At the centre of South African agriculture is a group of productive, white-owned farms, which together constitute only about 30% of white farms in the country, yet produce approximately 80% of the marketed output, and supply virtually the entire export market (Cooper 1991). This sector is often portrayed as, or is assumed to be efficient, productive and environmentally sound, partly due to the fact that South Africa is, on average, a net exporter of important field crops such as maize, wheat and lucerne (Van Zyl and Van Rooyen 1991). This impression, however, serves to hide many of the problems inherent in the sector.

Firstly, there is dispute over its efficiency as a food producer. Some argue, in support of its apparent efficiency, that South Africa was one of the six cheapest food producers in the world in the early 1980s (Vink and Kassier 1991). Others by contrast, point to the general inefficiency of commercial farming in terms of both capital and labour inputs (Marcus 1991), as well as the lower than world-