FROM ENVIRONMENTAL LAW TO GOVERNANCE FOR SUSTAINABILITY: EXPERIENCES IN DEVELOPING SUSTAINABLE DEVELOPMENT LEGISLATION FOR THE WESTERN CAPE

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Abstract

This paper explores how the challenge of ecological sustainability is changing the nature of environmental law. The development of new sustainable development legislation for the Western Cape is the focus of the law reform project initiated by the Western Cape Department of Environmental Affairs and Development Planning as a means of fulfilling its obligation to promote sustainable development. The proposed Bill will set out principles and procedures for the management of land-use planning, environment and heritage resources which provide an integrated approach to decision making oriented toward achieving ecologically sustainable development. The new Bill represents a shift away from traditional, reactive environmental law-making towards a new system of environmental governance.

1. INTRODUCTION

The Constitution places the State under an obligation to take reasonable measures to protect the environment, including legislative and other measures that “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”2 The challenge of securing ecologically sustainable development has the potential to change significantly the nature and scope of environmental law and the role of environmental lawyers, and in our view, that process has already begun. In our view, the field of environmental law in South Africa is quietly undergoing a metamorphosis from the field of law that has as its primary concern the conservation of the natural environment, to a field that embraces those aspects of formal governance systems that seek to re-orientate human society towards ecologically sustainable modes of existence. Although potentially profound, the shift is a subtle one and may yet be reversed by countervailing political and social currents, such as the drive to increase the annual growth of Gross Domestic Product to at least 6%. On the other hand, this shift may prove to be the beginnings of a longer term transition towards the recognition that one of the main purposes of human governance systems ought to be to ensure that human behaviour is regulated in a manner that is consistent with the natural order of the planet as advocated by the Earth Jurisprudence school of thought.3

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2 Constitution, section 24.
In order to make the case that such a change is occurring we must first define what we are shifting from, and what we might be shifting to.

2. WHAT IS ENVIRONMENTAL LAW?

The very existence of the Environmental Law Association indicates a common belief among its members that such a thing as environmental law exists. This was an issue much debated in the early years of environmental law in South Africa, mainly as a result of the fact that the concept of “environment” is inherently all-embracing and holistic and defies attempts to contain it within neat legal categories. In 1992 Professor Rabie concluded that an all-embracing concept of the environment is not workable as it will result in all law being regarded as environmental law.

Professor Michael Kidd discussed the issue in more detail in his 1997 book on environmental law. Kidd advocates following what Professor Denis Cowen has referred to as the “subject-matter” approach to defining environmental law. This advocates that environmental law is identified by the subject matter that it governs. He also discusses the evolution of distinctive environmental law principles such as the polluter pays principle, the precautionary principle, the “preventative” or “preventive” principle, and the duty of care.

Professor Jan Glazewski also discusses the issue in his book Environmental Law in South Africa but avoids attempting to define environmental law and instead states that he takes the approach that environmental law encompasses “three distinct but inter-related areas of general concern: land-use planning and development, resource conservation and utilisation, and waste management and pollution control.” For the purposes of this paper, we have assumed that most environmental lawyers would regard environmental law as encompassing all laws that seek to protect or conserve natural systems and their component parts, including land, water, the atmosphere and living organisms.

3. LAW FOR ECOLOGICALLY SUSTAINABLE DEVELOPMENT

Environmental lawyers often point to the existence of the environmental right contained in section 24 of the Constitution as one of the cornerstones of environmental law in South Africa. However, it is interesting to consider what the effect might be if we defined environmental law in

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7 Cowen, op cit.
10 “24. Everyone has the right
   (a) to an environment that is not harmful to their health or wellbeing; and
   (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
       (i) prevent pollution and ecological degradation;
       (ii) promote conservation; and
       (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”
South Africa as encompassing those laws or legal provisions that give effect to the environmental right contained in section 24. We would probably all agree that legislative measures that prevent pollution and ecological degradation and promote conservation of the environment would fall within any definition of environmental law. However there may well be disagreement as to whether or not all legislative and other means that are intended to secure an environment that it not harmful to human health or wellbeing (section 24(a)) or to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (section 24(b)(iii)) should be considered to be environmental laws. For the sake of discussion, it is convenient to refer to laws that give effect to the environmental right as "laws for ecologically sustainable development" or "ESD law" in order to distinguish this category from the (arguably) narrower category of environmental laws.

Section 24 appears to envisages that in order to uphold the environmental right, all legislative measures concerned with economic and social development or that may affect the health or well-being of humans or the conservation and protection of the environment, must have the effect of securing ecologically sustainable development and use of natural resources. This means that in order to determine whether or not a legal provision constitutes ESD law we would have to evaluate the effect of the provision rather than what it deals with. If this is so, then it arguably requires a radical shift in perspective. As environmental lawyers, we have traditionally stood on the firm ground of what is indisputably environmental law, such as the National Environmental Management Act,11 ("NEMA") and argued about the extremities of our domain. For example, to what extent should we concern ourselves with the conservation of the built environment, or health and safety issues? In fact, it may be more important for us to look at our legal system as a whole and to ask whether every aspect of it can meet the standard of securing ecologically sustainable development and use of natural resources.

In other words, the key question may not be "What is the domain of ‘green law’?" but rather "How green is our legal system as a whole?" Instead of discussing whether or not, for example, a provision in tax legislation that provides a rebate for solar heating systems, constitutes environmental law, it is likely to be more productive to ask whether our tax system as a whole meets the section 24 test.

4. SHIFTING FROM “LAW” TO “GOVERNANCE”

An important aspect of the shift that we are proposing revolves around the adoption of a systems-thinking approach to these issues rather than the traditional legal reductionist approach which considers component parts of the legal system independently. Systems thinking draws attention to the fact that one cannot fully understand the functioning of a system by considering the parts in isolation. Experience, particularly of the natural world, teaches us that how a particular component of a system functions is determined to a large degree by the system, or context, within which it is found. In other words, in many instances, the system determines how the part functions rather than the reverse. What this means in the present context is that instead of looking at individual legal provisions in isolation in order to determine whether or not they fall within the province of environmental law, we should be looking at how laws function within the context of governance systems. This is obviously clearly influenced by a range of factors that affect the extent of which a legal provision is effective in modifying human behaviour, including public perceptions, how the institutions that implement and enforce the legislation function, and administrative and enforcement policies and practices.

The nature of the transition discussed in this paper, can therefore be characterised as a shift from focusing on those laws that are concerned with the conservation of the environment or with environmental management, to a focus on developing our governance systems as a whole to reflect the purpose of securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

5. IMPLICATIONS OF THE SHIFT

One of the obvious implications of making such a shift is that we return to what Rabie shied away from, namely the prospect of all law becoming “environmental law”. On the face of it, this is very threatening to environmental lawyers since the loss of defined boundaries around the field within which we claim expertise, carries with it a risk of losing our distinct identity as environmental lawyers. However, in our view we should embrace our potentially expanded role as persons with expertise in those aspects of governance that are intended to encourage people to behave, and society to develop, in a manner that it ecologically sustainable.

The shift also places greater emphasis on the question of integration. The importance of integrating environmental concerns into the development process has long been recognised. Indeed, principle 4 of the 1992 Rio Principles states that:

“In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

This recognition is to already reflected in South African environmental law which uses a number of mechanisms to give effect to this principle, notably environmental impact assessment procedures and the obligation posed by section 2 of NEMA on a wide range of officials to consider and apply the environmental management principles in making decisions that may affect the environment. However, in moving towards a wider environmental governance approach, the issue of integration becomes a key issue in reforming both planning and decision-making systems. It also raises challenging institutional and cooperative governance issues, particularly in designing decision-making structures that bring together all relevant decision-makers without reducing efficiency, and in relation to appeals.

6. RE-ORIENTATING GOVERNANCE SYSTEMS TO ACHIEVE ECOLOGICALLY SUSTAINABLE DEVELOPMENT

If we are serious about developing South Africa in an ecologically sustainable way, the first challenge is to put in place procedures and mechanisms for producing strategic plans that have as their primary purpose the achievement of ecologically sustainable development (as opposed to sectoral goals such as transport, housing, etc.). The existence of a coherent and mutually consistent set of strategic plans to achieve ecologically sustainable development, within each sphere of government is essential for promoting an integrated approach. Harmony is difficult to achieve without a single song-sheet.

This initiative is already well under way in South Africa, apparently spurred on by the 2004 World Summit on Sustainable Development in Johannesburg. The President’s office is driving the development of a national spatial development perspective, which will then be cascaded down
into provincial growth and development strategies (PGDSs) supported by provincial spatial development frameworks (PSDFs) which in turn will inform the ongoing refinement of municipal integrated development plans (IDPs) and spatial development frameworks (SDFs).

Obviously, strategic plans have no influence on the environment unless the specific decisions that determine whether or not a particular activity will be permitted, are aligned with, and give effect to, the goals and objectives set in those strategic policies. This means that legislative frameworks must be reformed and institutions restructured, to ensure that decision-making is informed by ecologically sustainable development goals, and occurs in the manner that is procedurally integrated in the sense of ensuring that all relevant decision-makers contribute to the process in a manner that facilitates coherent decision-making. Furthermore, in view of the Accelerated and Shared Growth Initiative of South Africa (“ASGISA”) which aims to achieve a GDP growth rate of at least six percent per annum, it is imperative that any proposed reform of decision-making systems can demonstrate that the proposed system will be efficient and will not impede desirable development unnecessarily.

7. THE WESTERN CAPE BILL

The issue of how to achieve integrated decision-making in a manner that gives effect to ecologically sustainable development goals and objectives has been one of the main challenges in developing the Western Cape Bill. Indeed the draft Bill is not yet in the public domain as planned because of discussions within government on how to deal with some issues or overlapping jurisdiction. However, we hope that the fact that the project has now been adopted as a national pilot project will mean that it will eventually have an influence beyond this Province.

7.1. Introduction

The underlying purpose of the Bill is to re-orientate both strategic planning in the Province that affects the use of land, and the development consent processes in order to “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”, as required by section 24 of the Constitution. The Bill aims to do this primarily by “establishing long-term planning and decision-making systems based on co-operative governance principles that … promote ecologically sustainable, economically efficient, culturally appropriate and socially just uses of land.12

The Bill approaches this task in three main ways:

1. by prescribing an integrated strategic planning system for the Province that is oriented towards the attainment of ecologically sustainable development;

2. integrating the separate consent procedures under environmental, heritage and land-use planning legislation into a single development consent process guided by sustainable development criteria; and

3. by consciously aiming to bring about a change in social attitudes to land-use through the recognition that private land rights must be balanced against a duty of care for the land in the common interest.

12 Long title to the Bill.
Ecologically sustainable development is defined in Chapter One of the Bill as “using, conserving and enhancing the environment so that ecological processes on which life depends, are maintained, people are able to enjoy a good quality of life now and in the future, and the well-being of the whole community is improved”.  

### 7.2. Sustainable development principles

The heart of the Bill is in Chapter Two which sets out fundamental principles for sustainable development, explains how the principles are to be interpreted and imposes a general duty to care for land. The intention is that these provisions will be important mechanisms for promoting more integrated and consistent decision-making.

The four sustainable development principles are intended to consolidate and rationalize the many similar principles expressed in the National Heritage Resources Act,\(^{14}\) NEMA,\(^{15}\) the National Water Act,\(^{16}\) and the National Environmental Management: Biodiversity Act (“the Biodiversity Act”).\(^{17}\) They are:

- that the wise use of land must be encouraged and promoted and unwise uses of land must be prevented and discouraged (this concept of wise use is discussed more fully in section 7.3);
- that every generation must act as the trustee of land for succeeding generations and the State has a legal obligation to protect, conserve and manage the use of land in the interests of the whole community;
- that cultural heritage plays a fundamental role in shaping and must be carefully managed to ensure its survival because it is valuable, finite, non-renewable and irreplaceable; and
- that decision-making in relation to granting rights to develop, use or alter land must be: integrated; participatory; administratively fair; equitable; environmentally responsible; and efficient.

The Bill not only sets out the principles but also explains how they should be interpreted. For example, “the interests of the whole community” means that the collective interest of all the inhabitants of the Province as a whole should be prioritised over those of a particular group or sector, but that the interests of future generations, of ecological communities and other living organisms (particularly indigenous ones) and even the interests of other South Africans and the global communities should also be considered. A detailed discussion of all the guidance that the Bill provides to decision makers is beyond the scope of this paper. However, the concept of “wise use” in the first sustainable development principle merits a closer look as the second important sustainability tool.

### 7.3. “Wise use” of land

One of the key challenges facing societies in the 21\(^{st}\) century is how to decide what uses of land are sustainable and should be permitted and which should be restricted or prohibited because they are ecologically or socially harmful. These issues are encapsulated in the Bill in the concept

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\(^{13}\) Section 1.  
\(^{14}\) Act 25 of 1999; see section 5(1)(a) and (b).  
\(^{15}\) Act 107 of 1998; see section 2(4)(o).  
\(^{16}\) Act 36 of 1998; see section 3.  
\(^{17}\) Act 10 of 2004; see section 3.
of “wise use”. At the present stage of drafting, the Bill provides that a wise use of land would include a use that:

- will not undermine the integrity of the ecosystems within which it occurs;
- optimises the use of resources and avoids wasteful and inefficient uses;
- is socially just and will not result in unacceptable discrimination or unfairly prejudice the ability of current or future generations to provide for their health and well-being;
- promotes the establishment and maintenance of viable communities and improves the quality of relationships within human communities and between people and the ecological communities within which they exist;
- promotes the well-being and quality of life of communities; and
- prioritises the interests of the whole community.

It is anticipated that the concept will develop further over time through decisions and guidelines but we believe that the Bill must give a minimum content to the term for it to be an effective tool for promoting ecologically sustainable development.

7.4. The duty to care for land

The Bill provides that “A person who owns, occupies, has the right to use, occupies, or is in control of land must care for that land in the interests of the whole community”. The expression of this duty is seen as an important counter-balance to the over-emphasis on rights in relation to land.

The idea of a statutory duty to care for land is not a new one. Similar duties exist in various forms in other legislation, perhaps the most familiar being section 24 of NEMA.

The Bill nevertheless seeks to consolidate and amplify these into a more comprehensive concept which is expressed as a duty to care for land “in the interests of the whole community” and which includes the duty—

- to ensure that land provides a safe and healthy habitat for people and ecological communities;
- to take reasonable measures, including any measures prescribed by the Provincial Minister, to establish whether or not any development that the person under the duty wishes to undertake may result in a significant adverse impact;
- to conserve cultural heritage forming part of land for present and future generations; and
- to allow people to continue to exercise customary rights of access, particularly for spiritual purposes.
Land is very widely defined in the Bill to include not only land in the strict definition of the word, but the environment, the cultural heritage associated with a place and also buildings and structures.

7.5. The planning regime
The Bill will repeal the Land Use Planning Ordinance\(^\text{18}\) (“LUPO”) and establish a new system of development planning that includes:

- the Provincial Growth and Development Strategy (“PGDS”) which is envisaged as an overarching Provincial policy and strategy to achieve ecologically sustainable development;
- a Provincial Spatial Development Frameworks (“PSDF”);
- regional plans; and
- municipal spatial development plans (“SDPs”).

The Bill avoids duplicating existing statutory planning obligations on local and provincial government and instead seeks to promote the development of integrated and mutually consistent strategic plans. For example, at the municipal sphere it provides a mechanism whereby the Province can simply certify that an integrated development plan (“IDP”) prepared under the Local Government Municipal Systems Act\(^\text{19}\) is consistent with the PGDS and the requirements of the Bill. If it does, no further work will be necessary. If it does not, the IDP will merely be supplemented. The Bill also requires all of the above plans to take account of other relevant statutory plans or such as those required by the Biodiversity Act and the National Water Act,\(^\text{20}\) ultimately resulting in a system of strategic plans that are both mutually consistent and take account of all statutory planning requirements. The PGDS must be reviewed at least every five years.\(^\text{21}\)

7.6. Bioregional planning
The Bill defines a bioregion as being an identifiable geographical area that contains one whole or several nested ecosystems. A bioregion must function as a relatively self-sustaining community characterised by specific landforms, vegetation or human culture and history. The definition includes bioregions which are declared in terms of section 40 of the Biodiversity Act.

Bioregional planning means planning of human activities within the context of a bioregion that –

- prioritises maintaining and enhancing the functioning of the life supporting functions of the bioregion; and
- takes account of the specific natural and cultural characteristics of the bioregion and aims to define and implement development options that ensure that human needs are met in an ecologically sustainable way.

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\(^{18}\) Ordinance 15 of 1985.

\(^{19}\) Act 32 of 2000.

\(^{20}\) For example, bioregional plans provided for in section 40 of the Biodiversity Act and catchment management strategies required by section 8 of the National Water Act.

\(^{21}\) Section 28(3) of the Bill.
One of the requirements of the PGDS is that it must promote a bioregional approach to planning to reflect the fact that sustainable development requires consideration not only of species but of the integrity of ecosystems.

7.7. The integration of consent procedures

The final “sustainability tool” discussed in this paper is the integration of consent procedures for developments. One of the ways in which the Bill aims to make the process of considering and deciding on development applications more efficient and more effective (i.e. more aligned with strategic goals) is by providing for a development consent system which comprises a single process for application for any authorisation that involves land use, heritage resources and/or environmental impacts. It is envisaged that the process will minimise duplication and streamline the decision-making process by providing for a single:

- entry point for development applications (either at the municipal or provincial level);
- entry form;
- assessment process (although the form that this takes might vary according to the type of development proposed or its location);
- public participation process;
- set of sustainable use criteria to guide decision-making process;
- a single decision issued in the form of a single land use permit; and
- a single appeal process.22

We believe that one of the main strengths of the Bill is that it gives flesh to the concept of ecologically sustainable development. This together with a streamlined and efficient planning process will, we believe, help planners and decision-makers to make the shift towards a new system of environmental governance.

8. CONCLUSIONS

The development of national environmental law systems typically progress through various stages. Initially, specific laws are passed to deal with particular issues of social concern, such as the passage of clean air legislation in response to acute air pollution incidents. As environmental issues become more and more apparent, the number of different laws dealing with different environmental concerns tends to increase until the authorities recognise that the different environmental concerns have much in common and ought to be dealt with in a more coherent manner. In many countries this recognition has been reflected by the passage of so-called “framework” environmental legislation. Although framework environmental legislation has generally made the environmental law field more coherent, the proliferation of environmental laws has usually continued in response to the increasing number of environmental concerns and increasing knowledge about human impacts on the environment. Some countries, such as Sweden, have responded by codifying their environmental laws in an attempt to simplify the

22 The last point may not be achievable as it is likely to require amendments to national legislation.
system. The influence of environmental concerns on other aspects of legal systems, such as tax laws, is now becoming more pronounced in many countries.

In South Africa, NEMA is a partial example of framework legislation but was always incomplete in that it did not establish a comprehensive regime for the prevention, control and management of air pollution, waste; for the conservation of biological diversity and natural ecosystems, or for the integrated management of coastal areas. It appears that this was largely due to the fact the requisite policies were not in place when NEMA was drafted. The Department of Environmental Affairs and Tourism is still engaged in the law reform process that commenced with NEMA. National Acts dealing with protected areas, biological diversity and air quality have been enacted over the last two years, while Bills on integrated coastal management and waste management have been placed on the Parliamentary agenda for this year. This is an important process that must be completed. However, in our view, the very strong development imperatives within South Africa mean that it is essential that South Africa recognise that it is misguided to design its governance framework to promote development *per se*, without distinguishing between development that is environmentally sustainable and socially beneficial in the long term, and that which is not. What is required is for our governance system as a whole to be reoriented in the short to medium term towards the attainment of explicit ecologically sustainable development goals. This challenge will require environmental lawyers to rethink their role and to be bolder and more imaginative than ever before.