THE BALANCE OF RIGHTS

groundWork

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the groundWork Report 2004

The groundWork Report 2004:

The Balance of Rights -

Constitutional promises and struggles for environmental justice.

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Cover

1. Houses of Parliament, Cape Town, South Africa
2. School children from south Durban protesting against environmental injustice on Earthday 2002. Settlers Primary School which is located in south Durban has borne the brunt of many industrial “events” and ongoing pollution which government does little to stop or control. The asthma rate amongst the children at Settler's Primary School, which stands at 52% of the pupils, is the highest for any school recorded worldwide.
3. South African Police watch the protest from the steps of the Durban City Hall where the mayor of Durban accepted a petition from the marchers.

Photos of the march by Bobby Peek and Chris Albertyn

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Also at the workshop were the following staff from groundWork: Ferrial Adam, Gill Addison, Llewellyn Leonard, Bobby Peek, Ardiel Soeker.

Perhaps more than previous groundWork Reports this one owes a huge debt to extraordinary ordinary people involved in struggles against injustice across the country. Without their 'input', our report would be pious rubbish. But because they struggle, they sustain our hope for justice and transformation and give meaning to the report.

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Foreword

By Bobby Peek, groundWork Director

The groundWork Report 2004 is groundWork's third report and was born out of the idea of producing a sound alternative to the state of environment reports produced *ad nauseum* by various institutes and government departments.

Being the tenth year of our democracy it is significant that the groundWork Report 2004 questions whether the South African constitutional order can deliver environmental justice. The South African constitution has been hailed worldwide for its commitment to socio-economic rights and for creating a balance in post apartheid society. However, it remains nothing more than a piece of paper and ink, if we do not choose to use it. This report indicates that the cost of not using the Constitution is to lose it because the power to define the meaning of rights will be left to conservative instincts of the state and to corporate interest. Thus, we must "claim our space".

For many local communities calling for state provision of services, fending off multinational environmental polluting practices and organising for change, the first point of departure is to refer to Section 24 of the Bill of Rights. This states, "[e]veryone has the right to an environment that is not harmful to their health or well-being". It is a good rallying position, and indeed one that has united people across ethnic and class divisions. Section 24 of the Bill of Rights is not a progressive right, i.e. its realization is not conditional on the availability of state resources, nor subject to time delay. It must be delivered upon immediately, unlike the other socio-economic rights, which are dependent on availability of state resources and time. Community campaigners therefore have an even stronger rallying position. Government and industry purposely ignore this reality.

Environmental justice is based on a set of relationships between various interests, and power is important in defining how the Constitution and society rights are going to be interpreted. As people who suffer from environmental injustices caused by poor government policy and industry's domination, we are presently marginalized and there is a strong need for us to build a movement that would affectively challenge this domination and claim environmental justice.

Already evident is a movement in local communities from Boipatong, Sasolburg, Secunda, south Durban, Table View, Richards Bay putting pressure on government in February 2004 to call for the Air Quality Bill to be amended before been passed as an Act. This was no mean achievement considering that industry was happy to accept the proposed Bill that allowed them to continue their polluting practices. It was even mentioned that the Bill was a step backwards from the apartheid created air pollution legislation, which still endures.

groundWork views The groundWork Report as part of our contribution to movement building in SA. President Thabo Mbeki was welcoming of the groundWork Report 2002: Corporate Accountability in South Africa. This report was part of the movement building that ended up challenging for better policy in the Air Quality Bill. It is my hope that this report will be the basis for challenging government to give meaning to our Bill of Rights with specific reference to Section 24, and in a particular context of environmental justice.

This is not going to happen by itself; we are going to have to put pressure on government to ensure that this occurs and that the frontiers of poverty and inequality are reversed. This is only achieved on the foundation of Environmental Justice, and this report questions whether the present order can deliver while lacking the foundation of Environmental Justice.

Chapter 1:
Introducing environmental justice

1.1 Introduction

This groundWork Report looks at South Africa's democratic constitutional order and asks: Can it deliver environmental justice?

The idea of human rights, set down in the Bill of Rights, is at the heart of the Constitution. The Bill of Rights promises political and personal freedom and dignity: everyone should be free to participate in deciding how South Africa will be governed and no-one should be abused - they should not, for example, be subject to torture, forced labour or arbitrary imprisonment. It promises that everyone should be able to live decently, that they should have decent housing, clean water and enough to eat, that they should have access to health care and education and that they should get support if they do not have enough to support themselves and their families. They won't necessarily get these things immediately, but they will get them as soon as is reasonably possible. The Bill of Rights also promises that they will not be harmed by their environment and that the environment itself will be nurtured for the benefit of present and future generations.

On the face of it, this looks very much like a promise of environmental justice. But what matters for ordinary people is not the promise but the realisation of rights. The demand for environmental justice arises because people experience environmental injustice. So it is not only a question of what the Bill of Rights says, but also of whether the political and economic system that is given legitimacy by the Constitution as a whole will make those rights real. This larger system is what this report calls the 'constitutional order'.

The first chapter looks at what environmental justice means. Government's own document, 'Towards a Ten Year Review' [SAG 2003], claims that it has performed well in alleviating poverty and reducing inequality. These claims are contrasted with people's experience of environmental injustice during the first ten years of democracy. This chapter then locates this experience within the global context and draws the connection between ecological debt, environmental injustice and unsustainable development. Finally, it attempts to turn the question around, to build from the description of environmental injustice a tentative definition of environmental justice.

The second chapter looks at the Constitution and the Bill of Rights. It opens with a brief description of the political transition that led to the framing of the democratic Constitution. It then describes the principles on which it is based and how the Bill of Rights is supposed to work and, finally, explores the meaning of the rights that are specifically relevant to environmental justice: social and economic rights, the property right and the environment right.

The third chapter draws on the experiences of activists and organisations who have pursued the realisation of rights associated with environmental justice. It highlights the yawning gap between Constitutional promise and people's experience, explores the relationship between rights to and struggles for environmental justice, and suggests some ways in which the analysis and strategy underpinning many current struggles could and should be deepened in dialogue with an environmental justice approach.

The last chapter highlights the relations of power that shape development and the ambiguities of the Bill of Rights. It then explores the challenge for civil society to work for the transformation of relations of power necessary for the material realisation of rights. It argues that the use of Constitutional avenues for action must be embedded in a broader strategy of building democratic power. The environmental justice perspective offered in this report hopefully contributes to the emancipatory potential of debate and action within civil society.

1.2 South Africa ten years on

Inequality

In the broadest terms, environmental injustice is evident in that the rich receive the major benefits of development while the poor bear the brunt of environmental degradation caused by development.

Ten years after the first democratic elections in 1994, South Africa remains one of the most unequal countries in the world but is a little less unequal than the world as a whole. Levels of poverty are extreme and poverty is still defined by race, class, gender and geographical location. Thus the poorest people are rural women living in the former Bantustans. The richest 20% of South Africans earn just short of 65% of income. The poorest 40% increased their income between 1991 and 1995, mainly as a result of the equalisation of pensions and other welfare grants. Between 1995 and 2000, however, everyone in the bottom 60% lost ground. Together, they earned only 15% of national income and the poorest 20% earned a mere 1.6% in 2000 [see Table 1].

Table 1: Household inequality

	1975	1991	1995	2000
Gini coefficient*, all households	0.68	0.67	0.56	0.57
Percent of total income going to:				
Top 10% of earners	49.2	51.2	46.8	45.2
Bottom 10%	n.a	n.a	0.5	0.4
Percent of total income going to:				
Top 20%	70.9	70.5	65	64.9
2nd top 20%	23.9	25.6	18.2	20.1
Middle 20%			9.6	8.9
2nd bottom 20%	5.2	3.9	5.4	4.5
Bottom 20%			1.9	1.6

Source: Gelb 2003.

* The Gini coefficient is a measure of inequality:
0.0 = absolute equality (everyone earns the same);
1.0 = absolute inequality (1% of people earn everything)
Figures appear to represent the gini after tax. The pre-tax gini in 1997 was 0.68.

These figures refer only to household inequality, to what the Constitution calls 'natural persons'. It does not refer to 'juristic persons', that is, to corporations. Some of South Africa's biggest corporations are now listed abroad while more foreign investors and speculators are taking home profits and royalties from money made in South Africa. So at least part of the difference between global and South African inequality is made up by South Africa's contribution to the global rich: it may be that the richest South Africans have lost more to the global rich (including some relocated South Africans) than to poorer South Africans.

In 2003, Government published its own assessment of the first ten years of democracy in 'Towards a Ten Year Review'. It claims a marked decrease in inequality as a result of government's social spending [SAG 2003: 90]. This includes increased welfare, such as pensions which are now targeted only at the poor, but also spending on housing, water, electricity, education and health care. Social spending that benefits the richest 40% has been reduced while spending on the poorest 60% has increased. Taking this spending into account, government claims that the gini coefficient for 1997 was 0.44 and in 2000 was 0.35[1].

[1]The 1997 figure was produced by an independent analyst, Servaas van der Berg, and based on information from the Household Survey. The 2000 figure was produced by the Presidency using Van der Berg's method but based on information from the Income and Expenditure Survey. It has been argued that the two sets of data cannot produce comparable results and the second figure has been widely disputed. Whatever the merits of the method, these figures obviously cannot be compared with other countries where it is not used. For example, UNDP gives the gini coefficient for the UK as 0.36 (in 1995). The UK is a notoriously unequal society, but income distribution in South Africa is clearly a lot more unequal.

Table 2: Inequality: government's claim

	1997	2000
Gini coefficient after social transfers	0.44	0.35

Source: South African Government 2003

Marketing environmental injustice

Government approved just less than 2 million housing subsidies between 1994 and 2003 and claims that the value of a house to the occupant equals "the replacement cost" [SAG 2003: 25]. This seems an exaggerated claim, particularly where the poor remain crowded together far from public amenities or job opportunities on land which is not highly valued in the market. This is merely reproducing slums. And, whatever saving is made by neglecting even the basics of environmental design, the cost of this saving is passed onto the 'beneficiaries': houses are not designed to be energy efficient and poor people must either incur additional costs in warming or cooling their homes or they must live with extreme cold or heat.

Government attributes the proliferation of informal settlements to a decrease in the average size of households resulting in "an increase of two million additional households over and above that generated by population growth" [SAG 2003: 26]. This trend has perhaps been encouraged by the size of houses provided by the housing programme: two small rooms including kitchen and washing areas and limited space for extension. Informal settlements are particularly vulnerable to fire and flood. Shacks are made of flammable materials, energy sources are unsafe and crowding increases the risks of accidents and contagion. Most settlements are also located on land that is not valued by the market, including on steep land subject to mud-slides and on flood plains. Households headed by women are more likely to be poor than those headed by men and more likely to be located in informal settlements.

Government's water and electricity roll out figures are impressive, with 9 million more people gaining access to clean water bringing the total to 85% of the population. However, the poor pay very dearly for their electricity and water and many cannot afford it. By 2002, about 10 million people had experienced periodic water cut-offs and 10 million had experienced electricity cut-offs[2]. In 2000, under pressure from civil society and with local elections looming, government announced a 'free life-line' supply of water. Durban was one of the first cities to implement the decision but, in 2003, the municipality "admitted to disconnecting or 'restricting' as many as 1,000 households per day from their water supply for non-payment of services" [Pithouse 2004: 5].

[2]See McDonald 2002c

In many places, the water supply has been erratic whether or not it is paid for. In 2000, the Rural Development Services Network estimated that "as many as 90 percent of the water delivery schemes provided by government since 1994 are no longer operational" [McDonald 2002 b: 293]. Problems include technical breakdowns and shortfalls in operating funds. The unpaid 'ecological debts' of past water use are also threatening the supply. In this season (2003-2004) in Limpopo Province, for example, dams and wells have run dry and this has been attributed exclusively to drought. Yet it has as much to do with the appropriation of water for irrigated agriculture which, over several decades, has dramatically lowered the water table[3]. Community water projects have simply tapped into this diminishing resource. Despite 'integrated' water management policies, 'market opportunity' continues to drive development thinking in Limpopo. The provincial government is supporting a water intensive sugar project proposed for the drought prone Blyde River area[4] while several dams, or dam extensions, are to be built "to cope with the increasing water demand generated by platinum mining developments in Limpopo and Mpumalanga" [SAG 2004: 660]. Such developments are likely to aggravate the ecological debt.

Environmental problems are also reproduced in the design, or neglect, of sanitation and waste systems. Waste management is not mentioned in the Ten Year Review. Under apartheid, black areas were largely neglected while white areas received very high standards of service. While services have now been expanded in black urban areas, research carried out in 2003 for the South African Municipal Workers Union (SAMWU) showed that, "Wealthy and working-class areas did not receive the same quality of service - apartheid still existed" [Samson 2003: 100]. This is largely because cost-cutting and privatisation has been imposed unevenly: the suburbs are generally still serviced by municipalities or commercialised companies owned by municipalities, while townships are frequently serviced by private contractors. Cleaning streets and open spaces are most likely to be neglected because this service cannot be charged to individual households. Samson shows that the costs of privatisation fall heaviest on women, both as workers and residents.

Over 1.5 million households, mainly in rural areas, have no sanitation. About 3 million use unventilated pits or the bucket system[5]. People settled in new housing that is distant from mains sewage lines must generally make do with pit latrines which are prone to flooding. Many of those who are connected to the sewage infrastructure find that the cost of water to flush the loo is more than they can afford[6]. Government claims it will "eradicate the backlog" in sanitation by 2010 [SAG 2004: 653]. Much ingenuity has gone into making delivery cheap, but the opportunity to rethink sanitation and waste systems in a way that would recycle bio-energy and create local jobs is being missed.

[3]This is a classic case of 'technological enclosure': water is available to those with the most powerful pumps. The concept of enclosure is discussed under 'The global scale of ecological debt' below.

[4]Mail & Guardian online at www.mg.co.za: Sugar venture not so sweet, 27 August 2003.

[5]Census 2001: www.statssa.gov.za/SpecialProjects/Census2001/DigiAtlas

[6]Environmental justice strategy workshop, Elijah Barayi Memorial Training Centre, 9 March 2004. See also Fiil-Flynn and Naidoo 2004.

Poor sanitation and waste management in poor and crowded areas contributes to catchment degradation. The ecoli count in the Mgeni river catchment above Inanda Dam, which supplies water to Durban, is over 10,000 ppm. In domestic water, ecoli should not be detectable. The catchment is also polluted by industrial and agricultural chemicals while sugar and plantation forests make it vulnerable to drought.

As with other black rural areas, the Mgeni valley received numerous refugees displaced by the apartheid division of land. Effectively, people were crowded together as they were impoverished. Social conflict and environmental degradation inevitably followed. In areas of the former Transkei, the land is eroded to bed-rock and people's livelihoods are eroded with it. Post-apartheid reform has not affected this basic distribution of land and poverty, and current land policy does not have this intention. The 'homelands' still operate as the last refuge for many of those excluded from the formal economy and women's labour still subsidises the low wages paid to male migrant workers.

It is not clear if the social spending used to recalculate the gini co-efficient includes environmental spending, but the Ten Year Review does include a section on 'preserving the environment' under the social theme. It focuses exclusively on nature conservation. Parks and tourism are major themes but the document also recognises the contribution of 'biological resources' to local livelihood strategies and as a buffer against poverty. It asserts that natural resource management has moved "squarely into an arena concerned with human rights, equity and environmental sustainability" [SAG 2003: 30].

This is not always evident on the ground where people are increasingly subject to market forces. In many black rural areas, cash crops have displaced diverse food crops as sugar, cotton and forestry corporations have promoted outgrower schemes while "recent proposals ... open the door to placing communal land onto the market" [Butler and Philpott 2003: 30]. Redistribution of white farm land now focuses on "fitting emerging black farmers into the existing agricultural sector, without fundamentally restructuring that sector" [Lahiff 2003: 37]. Under the sign of the market, poor people will certainly be excluded from land while a significant proportion of emerging farmers are likely to be bankrupted[7]. Production will be industrialised: it will be capital and chemical intensive and will favour mono-cropping.

The Ten Year Review does not mention the word pollution. The country's economy was built on cheap energy and cheap labour. Pollution is strongly associated with energy production and intensive energy use by mining, minerals processing and industry. South Africa as a whole is a global warming hot spot, being one of the top 15 carbon emitters even before figures are adjusted relative to the size of the economy. According to UNEP [2002: 218] it was responsible for 42% of Africa's total carbon emissions in 1998. The groundWork Report 2003 showed that present government policy is entrenching this pattern of industrial development.

[7]See, for example, Butler and Philpott [2003: 27]: "... the question must be posed as to how [emerging farmers] will fare in a deregulated and highly competitive global market."

People in communities neighbouring big polluters are mostly poor and mostly black. They live with an alarming mixture of toxics in their air and water and suffer a high incidence of diseases associated with pollution. Illness in a poor family often produces a 'shock' to the household economy from which many do not recover.

Climate change may possibly result in less rainfall in South Africa. It will almost certainly result in more extreme weather - more droughts and more floods. The degradation of environments will amplify the effects. Those who are vulnerable now will become even more exposed. For example, the level of risk to informal settlements that are already exposed to floods and mud slides will increase. Finally, however, the costs of environmental damage cannot be confined to the poor. As shown in Box 2, everyone will feel the consequences.

1.3 The global scale of ecological debt

While South Africa is one of the most unequal countries in the world, the world as a whole is even more unequal. The richest 20% of the world's people "account for 86% of total private consumption expenditure" [UNEP 2002: 35]. They consume "68% of all electricity, 84% of all paper, and own 87% of all automobiles" [Sachs et al 2002: 19]. It follows that they produce a similar proportion of polluting waste. This creates an ecological debt owed by the rich to the poor.

Counting carbon emissions alone, Christian Aid [1999] calculated that this debt is growing by US$ 13 trillion per year using 1990 figures. Despite international agreements to reduce emissions, the gap between rich and poor country emissions continues to grow. Since the industrialised countries have been burning fossil fuels for far longer than poor countries, the historical debt is obviously enormous. Although emissions from industrialising countries, particularly in East Asia, have grown substantially over the last 50 years, the rich countries remain responsible for most of the increased concentration of carbon in the air. The poor, however, are most vulnerable to the consequences of climate change:

> Poor people in poor countries suffer first and worst from extreme weather conditions linked to climate change. Today, 96% of all deaths from natural disasters occur in developing countries. By 2025, over half of all people living in developing countries will be 'highly vulnerable' to floods and storms. [Simms 2001].

The cost of production is thus much greater than the costs paid by producers and consumers. The difference is the cost imposed on the environment and on other people. This is known as the externalised cost but it is not the only form of ecological debt.

Box 1: Calculating the carbon debt

Christian Aid's calculations are based on the principles of environmental justice. The annual ecological debt of the rich to the poor is equivalent to the externalised costs of production. The figure is arrived at by establishing an equal entitlement of every person on earth to emit 0.4 tonnes of carbon a year. This is the amount that can be allowed if the climate is to be stabilised. Countries that use more than this per person are carbon debtors and those using less are carbon creditors. The U.S., for example, emits 12 times this amount while Bangladesh uses only one tenth of it. The carbon is priced according to the average value of GDP for every tonne of carbon emitted: $3,000 at 1990 prices.

Rich countries have not accepted the equality of people as a basis for calculating emissions. They have argued that countries should be allowed to emit in proportion to their national GDP. There are two obvious implications to this position: First, the rich would be granted rights to more environmental space than the poor; second, the present unequal distribution of wealth would be enshrined in international law.

Capitalism grew up alongside imperialism. Its development depended on appropriating the resources of other people and other systems of production. In the first place, the imperial powers took people's land and labour. People were forced to work either by being captured and sold as slaves or because they were dispossessed of any other means of survival. In most cases, those who were not killed defending their resources then had to take work that paid them less than the cost of living. The landscape has also been transformed on a massive scale across the world. Production systems that relied on a diversity of biological resources have been replaced with systems that focus on single crops and heavy inputs of energy (in the form of fertiliser) and toxins (herbicides and pesticides). This second form of ecological debt is called enclosure. The historical debt here cannot be calculated because the process of enclosure involves putting a monetary value on resources which were not previously valued by money.

Enclosure is an ongoing process. To give some examples: People are still forced to take cheap work because capitalism produces unemployment. This is discussed in the section on property in Chapter 2. At the same time, resources necessary to life, such as water and energy, are now being enclosed through cost recovery and privatisation, discussed in Chapter 3. Finally, various productive resources are now being enclosed through a combination of legal and technological means. The most obvious example is seeds. Corporations have developed genetically modified (GM) seeds as a means of extending their control over food production. Technology is itself a significant weapon of power, but control requires the sanction of the state. This is being developed through new forms of intellectual property intended to give legal force to the forms of control enabled by the technology. It is for this reason that the international agreement on Trade Related Intellectual Property rights (TRIPs) is bitterly contested.

The ecological debt is growing rapidly. The debtors, however, have no intention of paying this debt. The reason for this is simple. Even if the historical debt is cancelled, capitalist production makes massive losses if it is held responsible for its year on year ecological debt. The price of sustaining this form of production is that the creditors, whether as poor countries or as poor people, must be impoverished. Unsustainable development is visible not only in the extinction of species or the melting of glaciers, but also in poverty and inequality. Conversely, sustainable development is not possible except on the foundation of environmental justice.

1.4 Towards environmental justice

Environmental injustice is thus produced through the social and economic relations which constitute development and through the relation of development to the environment. The call for justice is a call to change these relations.

This opens the question of what relations would produce environmental justice. The groundWork Report uses a working definition of environmental justice:

> Environmental justice obtains where relations between people, within and between groups of people, and between people and their environments are fair and equal, allowing all to define and achieve their aspirations without imposing unfair, excessive or irreparable burdens or externalities on others or their environments, now and in the future.

This statement itself relies on a number of underlying assumptions (like what are 'fair and equal' relations), but is rather long and complex. A simpler version might read:

> Empowered people in relations of solidarity and equity with each other and in non-degrading and positive relationships with their environments.

Central to these working definitions, and to the idea of environmental justice, is the understanding that 'environment' is about relationships - it is not just something 'out there'. The Charter for the Participation of People's Organisations in Environmental Governance in Southern Africa puts it like this: "All people at all times live and work in relationship to their environments because their environments provide the resources by which they can live."[8]

The South African Government has repeatedly emphasised that it took 400 odd years for colonialism and apartheid to produce the levels of poverty and inequality that are so visible in South Africa and that this malign heritage cannot be reversed in a mere ten years. This is a fair point. The real question, however, is whether present policies are taking us in the right direction. Does the conception of development, on which these policies are based, produce relationships that will enable people to realise their rights?

[8]The Charter was provisionally adopted by organisations from Angola, Botswana, Lesotho, Kenya, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe at a Conference on Regional Co-operation in Environmental Governance hosted by the Environmental Justice Networking Forum (EJNF) in September 1996.

Box 2: Crisis?

In late February, a Pentagon report was leaked to the press[9]. It said that climate change is now the biggest threat to US security. President Bush has consistently suppressed environmental information and supported oil industry claims that climate change is not happening. The leak was apparently intended to prevent him from keeping the Pentagon report under wraps.

The report highlights the probability that environmental systems will 'flip': the environment absorbs a variety of pressures until a threshold is reached at which point dramatic change takes place. For example, it is possible that the Gulf Stream - the Atlantic ocean current that flows from the tropics to northern Europe - may shut down. This current carries heat northwards and without it Europe will freeze. On the other side of the world, the Indian monsoon system may falter creating severe and prolonged drought. The Pentagon report sees such events as possible in the short term - between now and 2020.

The report draws on intensive scientific research carried out over the last two decades. This research has been collected together in a book by the International Geosphere-Biosphere Programme (IGBP) called Global Change and the Earth System: A Planet Under Pressure. The authors argue that the influence of human activity on the global environment is now such that "a new geological era, the Anthropocene, has begun" [Steffen et al 2004: 6]. The impact of modern industrial development is so decisive that the earth system as a whole is now operating outside its 'normal' parameters.

'Normal' here is defined by the limits within which the system has operated over the last million years or so. It accommodates extreme changes dominated by regular alternations between ice-ages and temperate conditions[10]. There have been four ice-ages in the last 420,000 years and the change in temperature is mirrored by the change in carbon dioxide and methane concentrations in the atmosphere. In that time, carbon dioxide concentrations in the atmosphere have varied between 180 ppm[11] during the cold periods and about 280 ppm in the warm periods. The present concentration is close to 370 ppm.

[9]See Townsend and Harris, 2004. Disaster Looms, Mail and Guardian Feb 27 to March 4.

[10]The alternation of 'glacial' (ice-age) and 'interglacial' (temperate) periods happens in a more or less regular cycle over about 100,000 years.

[11]ppm = parts per million

Exactly when a major environmental system will flip is uncertain - especially now that the earth system has been driven beyond its normal operating limits and therefore beyond comparison with anything in the geological record. There is, however, a growing sense that we are close to a major threshold. That is the basis for the Pentagon report writing its scenarios into the near future. In the meantime, climate change is already affecting everyone's lives as extreme weather events - floods, drought and heat waves - intensify.

In recent years, large corporations have spent much energy trying to persuade us that they are part of the solution to environmental problems. It is clear however, that modern industrial development is not sustainable. The name given to that development is 'capitalism'[12]. It grew up alongside imperialism and it has incurred a massive 'ecological debt'.

Corporations are the key organisations of capitalism but the combination of all corporations does not add up to capitalism. Despite the neo-liberal rhetoric that pits the private sector against government, the key institution of capitalism is in fact the modern nation state - or rather, the international system of nation states under the hegemony of the U.S. It is the state that guarantees capital, that creates its rights to appropriate resources and enforces those rights either through law or, finally, through violence - by sending in the police or the army. It is also the state that, at least in theory, regulates capital to prevent the individual interests of corporations, or of industrial sectors, from damaging the overall interests of capitalism.

As the groundWork Report 2003 made clear, there is good reason to believe that capitalism is approaching a major crisis which is quite distinct from the ecological crisis. Globalisation means that, for the first time in history, the world economy is more or less integrated within a single economic and political system[13]. This system, however, is facing a crisis of 'over accumulation'. The symptoms of this crisis are that production has outstripped consumption and, for this reason, money is increasingly invested in money (financial speculation) rather than production. So far, the crisis has been managed by deflecting its most damaging effects onto weaker southern economies and by the transfer of wealth from the rest of the world to the U.S.[14] But there is a real possibility that it will lead to a full scale depression.

[12]This is not an attempt to write the Soviet Union out of history. In practice, Soviet state socialism was a response to capitalism, it copied the Fordist model of big factory industrial development [see the groundWork Report 2003] and was driven by competition with western capitalism. It lost that competition because, finally, it lacked the dynamism of capitalism. In theory, classical Marxism always assumed that the 'forces of production' marshalled by capitalism would create the material conditions for socialism. Socialism would be born of resistance to capitalism in order to go beyond it, not to undo it. Capitalism was progressive precisely because it 'emancipated' human development from the limits imposed by nature.

[13]This does not imply that globalisation imposes uniformity. It can be argued that it in fact requires difference. Either way, the system would have no force if it were not also embedded in the local and subject to local dynamics.

[14]As reported in the groundWork Report 2003, the US economy then required $1 billion per day to remain in business. That figure is now $1.5 billion.

There is now the further possibility that this internal crisis of capitalism will coincide with the environmental crisis. If this happens the consequences will be doubly catastrophic. Their combined effect would give the ultimate meaning of the concept of 'unsustainable development'. It hardly needs saying that either of these events on their own would precipitate a cascade of social crises and a global political crisis that would threaten U.S. and northern hegemony.

The Pentagon's take on the environmental crisis is one dimensional and militaristic. It sees only the threat posed to the orders of power. In contrast, people's organisations participating in the World Social Forum see the crisis already present in the lives of the poor. Their slogan - 'another world is possible' - calls for an approach based on social, economic and environmental justice. The political struggle for a just order is now more urgent than ever.

Chapter 2:
Right and Just

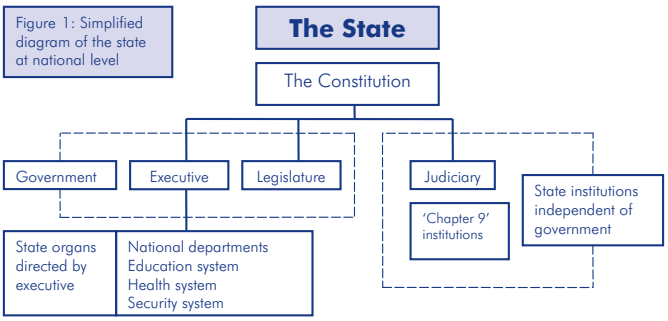
2.1 Introduction

This chapter opens with a brief description of the political transition that led to the framing of the democratic Constitution. The next section gives an overview of the Constitution, the principles on which it is based and how the Bill of Rights is supposed to work. The last section explores the meaning of the rights that are specifically relevant to environmental justice: social and economic rights, the property right and the environment right.

Since the Constitution is fundamentally about 'the state' and 'government', it is worth noting how we use these words. 'Government' is commonly used in three different ways. First, it is used to mean all the institutions of the state - so people talk of 'government departments' and 'government schools'. Second, it is used to mean the institutions that preside over the state - that is, the legislative bodies, the executive (the President and cabinet) and the courts which are then known as the three branches of government. Third, it is used to mean the political leadership elected into power - so people talk of the ANC government.

For the purposes of this paper, we will mostly use government in the third sense: the political leadership who interpret 'the interests of the nation' or 'the will of the people' by deciding policy and hence the use of state resources. Government (at national level) thus includes the majority in parliament and the executive (cabinet and the ministries). Government is part of the state, but the state also includes the courts, the permanent 'Chapter 9 institutions' such as the Human Rights Commission and the Independent Electoral Commission, the departmental bureaucracies and all other institutions of state such as the state education system and the police and army. So, while governments may change, the state lives on unless it is overthrown by revolution or war.

Figure 1: Simplified diagram of the state at national level



2.2 Politics in transition

South Africa's transition to democracy has variously been hailed as a miracle and the democratic Constitution is seen as one of the most progressive in the world. From the perspective of the majority of South Africa's people, there is indeed much to celebrate: they are no longer excluded from the formal definition of citizenship and the state is no longer at war with them.

The struggle against the apartheid state mobilised people across the full spectrum of social relations: through labour and civic organisations, religious bodies, women's organisations, human rights groups and in struggles for land. There were many strands to the way in which apartheid was criticised but the dominant strands, pulled together under the flag of the African National Congress (ANC) and, in the 1980s, under the umbrella of the United Democratic Front (UDF), centred on race and class. Maré notes that "the gendered nature of the apartheid state was discussed far less often" [2003: 28] and it may be added that environmental relations were scarcely mentioned.

However 'miraculous', the new constitutional order is a product of struggle. A negotiated political transition came about because, as Govan Mbeki said, "the two major political forces in South Africa had fought to a draw" [cited in Marais 2001: 85]. While the resistance was not able to overthrow the apartheid state, the state was unable to contain the resistance. Further, the apartheid economy, based on racial capitalism, was in crisis. The costs of war were escalating, international isolation was driving up the cost of trade and access to technology, the racially restricted skills base was too narrow and the racially defined domestic market too small to enable growth. For capital, this meant that the state was no longer able to secure a basis for future accumulation: a radical restructuring of the economy was needed and the apartheid regime did not have the legitimacy to carry it out.

In the late 1980s, meetings between business delegations and the exiled ANC leadership signalled that capital was looking for alternatives. The problem with the ANC, however, was its perceived attachment to socialism. As it prepared for government between 1990 and 1994, and as political violence escalated, it was subject to intense pressure to adopt business friendly policies. This was reinforced by the collapse of the Soviet Union and the dynamic of economic globalisation under the hegemony of the U.S.A. International institutions of capital, notably the World Bank, led the argument that 'there is no alternative' to neo-liberal capitalism.

Being a 'broad church' movement, elements within the ANC responded positively to this pressure. Those who thought apartheid was primarily about racial exclusion favoured a 'national democratic revolution' that would enable an aspirant black "bourgeoisie to emerge as the prime beneficiaries of the new state" [Maré 2003: 33]. The present politics of black economic empowerment focused on changing the racial composition of capital stems from this.

Those who emphasised class and argued for socialism - including the ANC's alliance partners, the South African Communist Party (SACP) and the Congress of South African Trade Unions (Cosatu) - found themselves on the defensive. They had, moreover, already conceded the primacy of race. Thus the SACP argued that there would be a 'two-stage revolution': first the national democratic revolution which would pave the way for a later transition to socialism led by the working class. This line "would immediately dilute ... radical demands within the transitional negotiations" [Maré 2003: 34].

In this context, the transitional negotiations shaped a liberal democratic constitutional order which guaranteed the continuity of capital. It also guaranteed the continuity of the state itself. Some examples of this continuity are as follows:

- It is the state that guarantees property relations (see the section on property below) and the democratic state has maintained the legal basis for capitalism;
- While the legitimacy of the apartheid state was challenged, the legality of the state has been maintained. The 'new' state has therefore taken on all the obligations of the 'old' state including its debt and its international obligations.
- A primary function of the state is to maintain control of the territory defined by its borders. The boundary of the country, created by the colonial power of Britain, is unquestioned.

Despite this continuity of the state, there are still good reasons for calling it a 'new' state. It is no longer founded on racism and coercion, the 'bantustans' have gone (at least in formal terms), everyone is recognised as a citizen and the rights of citizens have been expanded. These are profound changes, not merely of government but in the nature of the state itself, and they represent a substantial victory for those who were previously excluded. It is also a victory that has been claimed by the majority of people through their participation in elections.

The Constitution itself is in many ways the symbol of this victory. It does indeed reflect the limitations of transition but it is also deeply informed by the human rights culture that evolved within the broader anti-apartheid struggle. It is therefore not merely a symbol but also an instrument that can be used by people to assert rights. Equally, however, it can be used by those already possessed of power (see 'Interpreting rights' below).

It is also a legal document and inscribes a legal framing of the discourse of human rights. This chapter sets out, in the first place, to describe the Constitution in its own terms as it is supposed to work. It therefore describes it within this legal framing of human rights and makes use of a number of commentaries that carry this perspective. In particular it uses 'The Bill of Rights Handbook' [de Waal et al 2001] which is regarded as an authoritative commentary although not the last word. The final chapter of this report will take a more critical stance on this perspective but this chapter will simply add one or two notes of criticism.

Secondly, this chapter views the Constitution, and the state itself, as sites of struggle. The Bill of Rights is constantly interpreted - in the courts, in parliament, by government ministries and state bureaucrats, and by business and civil society. These interpretations represent claims to power, in decision making and in the allocation of social benefits, made by or on behalf of different social constituencies. They are part of broader struggles to maintain or change relations of power. This chapter describes those rights that are specifically relevant to supporting or limiting the realisation of environmental justice. It looks at how they appear to be interpreted by the courts or government and it also advances an interpretation founded in environmental justice, particularly in relation to the environmental right itself.

2.3 The Constitutional frame

The Bill of Rights is at the heart of the Constitution. The other chapters of the document define the powers of government, and of particular organs of state, and the basic rules of procedure that they must follow. Below we look at the principles underlying the Constitution and at the overall framing of rights - who they apply to, how they are interpreted and what limitation can be put on them.

Constitutional Principles

The Constitution as a whole is founded on a number of basic principles which give it overall coherence but also influence the way it will be interpreted.

Constitutional supremacy

Constitutional supremacy means that all branches and organs of the state are bound by the Constitution: "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" [s 2]. So any decision or action by any branch of the state must be constitutional and, in formal terms, the Constitutional Court is the final judge of the matter. This contrasts with the parliamentary supremacy of the old regime which allowed government to decide its own powers.

The **rule of law** follows from this. Not only must agents of the state obey the law, but they can exercise power only where the law gives them authority to do so. What this means exactly has not yet been clarified in the courts but, to simplify a complex issue, it comes down to one of two meanings: either there must be specific laws "authorising everything the state does" or decisions must be made according to "known and general principles of law" [De Waal et al 2001: 10]. One effect of this is that departmental officials now talk in terms of their 'legal mandates' to carry out their work.

Democracy

The principle of democracy is enshrined in the preamble to the Constitution and makes the "will of the people" the basis of state legitimacy. "Rather than state power, the consent of the governed is the defining characteristic of the relationship" between state and citizen [De Waal et al 2001: 14]. There is an obvious difference between 'will' and 'consent'. The former presumes 'the people' are one and can express a unified 'will'. This is obviously a fiction, but it is on this fiction that the notion of state sovereignty rests. 'Consent' is a rather slippery idea. It may be withdrawn from a particular government through the vote but, in the last resort, it can only be withdrawn from the state as a whole through revolt. So constitutional democracy is what happens somewhere in between the fiction of a unified will and the final limit of revolt.

De Waal et al argue that the Constitution appears to recognise "three forms of democracy" [2001: 16]:

- Representative democracy is based on people electing representatives - or really, political parties - to power and it is this form of democracy that "the Constitution is primarily aimed at establishing and safeguarding ..." [ibid].
- Participatory democracy is specifically invoked by the Constitution. It is held to enable people to engage with decision making processes within national [s57, s70] and provincial legislatures [s116], local government [s152] and in administrative processes of policy making [s195]. There are, however, no provisions for participation in executive decision making.
- Direct democracy is provided for in the right to 'assembly, demonstration, picket and petition' [s 17].

The Constitution thus seems to create space for a diversified struggle of 'wills'. However, this presents a rather thin version of participatory and direct democracy. It allows the expression of 'voice', which may or may not influence decisions, rather than direct participation in making decisions. This form of participation does encourage more open government but it is clear that representative democracy is the real business.

Clearly the extension of the vote makes a difference, but it does not follow that the interests of the majority are represented in decisions. Representative democracy permits the supervision of political processes, with the state defining where and how participation will happen. At the same time, 'the will of the people' is interpreted in relation to 'the national interest' which tends to be defined in relation to dominant national and global interests. Thus, for example, critical economic policy has been formulated without consultation.

Openness and accountability are intrinsic to the principle of democracy. Government must respond to people and explain (or 'justify') its decisions. According to Mureinik, the Constitution promotes "a culture in which every exercise of power is expected to be justified: in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command" [quoted in De Waal et al 2001: 19].

This is a very powerful statement of democratic principle and the role of rational debate in democratic process. Nevertheless, it must be noted that there is not a single rationality that operates in society. Any particular rationality is framed in a particular way which allows some things to be said and not others. The rationality defined by 'free market' economics, for example, would exclude any concept of economic equality as irrational or a symptom of economic illiteracy. Obviously, this rationality is linked to particular interests in society. When government defends its decisions then, the framing of its argument will be as much of an issue as the cogency of its argument.

Separation of powers

The separation of powers allocates the legislative, executive and judicial functions of the state to different 'branches' so as to prevent the concentration of power within any one branch of the state: the legislature makes law, the executive implements law and the courts interpret and enforce law.

The independence of the courts is well established but the line between the legislature and the executive is blurred. Together they represent the political leadership and they come to power through the same electoral process. According to the Constitution, the National Assembly "is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action" [s 42 (3)].

The President is head of the executive and appoints the cabinet. The executive has the power to develop policy and introduce legislation to parliament. Once legislation is passed, the executive is responsible for implementing it and is accountable to parliament for doing so.

To date, however, parliament has tended to be subservient to the executive. This is not surprising since formal politics is organised through parties and the leadership of the majority party is represented in cabinet. Any serious conflict between legislature and executive would thus reflect an internal party conflict.

Co-operative government

The Constitution defines a "co-operative form of federalism [in that] the different levels of government share the same responsibilities" [De Waal et al 2001: 23]. To make this work, the principle of co-operative government obliges national, provincial and local government to support each other and respect each other's integrity. This appears to be as much about how power is exercised as what power is exercised.

Application of rights

Most rights can be claimed by 'everyone'. For the most part, this means everyone who comes within the jurisdiction of the South African state whether they are citizens or not. Certain rights, such as the political rights to participate in the formal political process - to form parties and participate in elections - are reserved for 'all citizens' or 'all adult citizens'. Depending on the nature of the right, 'everyone' may also include 'juristic persons'. Juristic persons are organisations that have a legal identity and can therefore appear before the courts in their own name. They include corporations and any formally constituted organisation such as trade unions, community organisations or NGOs.

All rights are binding on all organs of state. The state must therefore uphold people's rights and people can demand that it does so. This is called the **vertical application** of rights because it concerns the relationship between 'persons' and the state.

The Constitution imposes four basic **obligations** on the state: to "respect, protect, promote and fulfil the rights in the Bill of Rights" [s 7 (2)]. 'Respect' means the state may not itself violate people's rights; 'protect' means that it must protect people from violations by others; 'promote' means it must create conditions that enable people to exercise their rights, for example, by raising awareness and tolerance; 'fulfil' means that it must ensure that people's rights are realised or that they will be realised over time.

The rights also apply to all law, meaning that laws must be consistent with the Bill of Rights. Legislation (laws passed by parliament or provincial legislatures) can be challenged if it is not. The courts will define what part of the law fails to meet the constitutional test and why. It will then be up to the legislature to find a way of correcting the law. Before doing this, however, the courts will seek to interpret the law in a way which is consistent with the Constitution. For the most part, this will also be their approach to common law.[15]

Aspects of the rights may also be binding on "natural or juristic persons" depending on the nature of the right. This is called the **horizontal application** because it concerns relationships between persons. At a minimum, it means that no person can violate the rights of another, for example, by subjecting them to slavery. For the most part, it seems that persons are not obliged to take positive action to ensure the rights of another. In general, the horizontal application will be decided by the courts on a case-by-case basis and will depend on the particular circumstances.

[15]Common law is law that has been developed by the courts over time

Interpreting rights

The meaning of rights develops over time and is influenced by the demands made by people or juristic persons. Such demands may be articulated through the democratic processes described above or through the courts. Those who use the Constitution most actively are therefore likely to have more influence in what the rights come to mean than those who do not use it. It is particularly important that it should be used by public interest groups because the development of law generally tends to reflect social power. Thus, while the Constitution is committed to equality, the Chairperson of the SAHRC remarks, "In practice however we have seen how those with more resources and influence have been able to use the Constitution to advance themselves while the poor and the marginalised find it difficult to access the various benefits and rights that the new dispensation offers" [SAHRC 2003b: ii].

The meaning that courts give to rights must be seen as part of the broader and ongoing social struggle over their meaning. Their interpretations have a specific importance as they determine the 'official' meaning of rights - the meaning that the state is obliged to uphold and enforce.

The Constitution itself gives the following guidance in the section on the Interpretation of the Bill of Rights:

> 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum
>
> a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> b. must consider international law; and
>
> c. may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

In various judgements, the Constitutional Court has also indicated a number of criteria for interpreting the Bill of Rights. The starting point is the literal - or ordinary - meaning of the text of any specific right. This textual meaning, however, does not stand alone. It is located within the Constitution as a whole document. Within the Bill of Rights itself, any particular right must be read in relation to other rights. The document as a whole opens with the Pre-amble which contains a statement of the purpose of the Constitution while Chapter 1 begins by stating the founding values of the Republic [s 1]. These statements are particularly significant and the sentiments expressed in them are echoed in the equally important opening statement on Rights:

> 7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

This statement is deliberately invoked in the section on interpretation [s 39] above and it leads to a further criterion: that interpretation should be 'purposive'. This means that a right must be interpreted in a way that promotes the core values of the Constitution because these values say something about the purpose of the right. The Constitutional Court recognises that this implies that it must make value judgements and also that values are not static but change over time. In principle, such judgements should not be based on the individual values of the judge. Judges must argue the case: they must be able to show that the judgement is based on national and international norms and that those norms advance the understanding of the Constitutional values.

As this implies, the Court must take the social context, including changing social values, into account. In rejecting demands for the death penalty, however, the Court indicated that this does not mean simply following public opinion, particularly when public opinion is at odds with Constitutional values.

The social context is shaped by history and the Pre-amble makes specific reference to healing "the divisions of the past". The Court itself sees the Constitution as a product of South Africa's history and the struggle for liberation:

> The Constitution ... represents a radical and decisive break from that part of the past which is unacceptable. ... The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'.[16]

Purposive interpretation must therefore address this history and seek to redress the legacy of inequality. We shall return to this theme in the section on social and economic rights below.

Limitation

> 'Limitation' is a synonym for 'infringement' or, perhaps, 'justifiable infringement'
> [De Waal et al 2001: 145]

The Limitation of Rights [s 36] applies to all rights in the Bill of Rights. A right may be limited "only in terms of law of general application" and the limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...".

[16]State v Mhlungu 1995 (CC), quoted in De Waal et al 2001: 135.

The phrase, 'law of general application' means two things. First, no organ of the state can act in a way that limits a right unless there is a law that says it can. This point derives from the principle of the rule of law discussed above. Second, 'general application' means the law must be "clear, accessible and precise" [De Waal et al 2001: 148] so that people can understand exactly how the right is limited and what is left of it. It must also apply equally to all who hold the right - it cannot target particular people or groups of people - and it must be implemented impartially and according to strict legal standards.

To be 'justifiable', the law must have a purpose that is constitutionally acceptable and important in itself, it may not limit the right more than is necessary, and the benefits of the limitation must be weighed against the loss of benefits in the right.

In any particular case before the court, a person claiming that a right has been infringed has to show that this is the case. If the court agrees, it is up to the state to justify the infringement in terms of this section of the Bill of Rights. It should be emphasised that any legal action based on the Bill of Rights is likely to be subject to this test.

2.4 Rights and environmental justice

Human rights are conventionally divided into two groups:

- Civil and political rights include, for example, the rights to life, to vote, to freedom of speech and freedom of association, and to a fair trial. These are sometimes called 'first generation rights'.
- Economic, social and cultural rights may include, for example, rights to work and to fair working conditions, to a decent standard of living including housing, clean water and enough food, to education and to participate in cultural life. These are sometimes called 'second generation rights'.

As is evident from the overview of environmental injustice in Chapter 1, the realisation of social and economic rights is critical to the project of environmental justice. This section looks first at what these rights mean. It then goes on to examine the property right. Property is not generally considered a social and economic right but, in a very real way, it is the original social and economic right and has major implications for environmental justice. Finally, we look at the environmental right itself and consider those civil and political rights that are directly relevant to environmental justice in that context.

Social and economic rights

Social and economic rights were recognised in the United Nations' Universal Declaration of Human Rights following the Second World War. To give teeth to the Declaration, two separate and binding treaties were developed - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). South Africa is a party to both covenants.

The status of social and economic rights

Although the UN has affirmed that all the rights are 'indivisible and interdependent', and that social and economic rights are as important as the civil and political rights, the ICCPR in fact has stronger enforcement mechanisms than the ICESCR. A new protocol to the ICESCR is now being written to strengthen enforcement. Some national constitutions written since the Second World War follow the implicit bias of the Covenants. They treat civil and political rights as 'fundamental rights' and put social and economic rights into a different chapter, giving them the lesser status of guidelines for state policy.

The South African Constitution does not do this. The Bill of Rights does not label the rights as civil and political or social and economic rights and makes no distinction between them. All the rights in the Bill of Rights are 'fundamental' and this distinguishes them from ordinary legal rights conferred by legislation or common law. Describing certain of these rights as social and economic is therefore partly a matter of tradition or convention and partly a matter of convenience. There are three possible ways of deciding what, in South Africa, is a social and economic right.

First, it could be decided by comparing the Bill of Rights with the ICESCR. However, the Bill of Rights does not simply reproduce the rights contained in the Covenant. For example, a right to work is given in the ICESCR but not in the Bill of Rights. On the other hand, the ICESCR does not contain a specific environmental right, but makes a rather weak provision for "the improvement of all aspects of environmental and industrial hygiene" as part of the right to health [Article 12].

Second, the South African Human Rights Commission (SAHRC) is obliged to monitor what the state is doing to realise "the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment" [s 184 (3)]. The Commission has grouped these rights, together with the provisions for land reform within the Property right [s 25], under the name of social and economic rights. Several rights which are obviously economic in nature - including Freedom of trade, occupation and profession, Labour relations and the Property right itself - are excluded from the list.

Third, it could be decided by the kind of 'qualification' placed on the right. Several of the fundamental rights are 'qualified'. In each case, the qualification is written into the text of the right itself. Thus, the right to free speech - which is regarded as a civil and political right - excludes war propaganda, incitement to violence or 'hate speech' such as racist or sexist declarations.

The qualification placed on the rights of access to housing, health care, food, water and social security concerns the obligation placed on the state. It reads as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."[17] These rights are therefore qualified only in so far as the state does not have the means to deliver on them. For the rest of this section, we will use 'social and economic rights' to refer specifically to these rights. Despite the fact that it is on the SAHRC list, the environmental right itself is not qualified in this way and is discussed separately below.

Obligation of the state

The Bill of Rights imposes four basic obligations on the state: it must respect, protect, promote and fulfil all rights[18]. When it comes to social and economic rights, the first three obligations are relatively uncontroversial. In terms of the right to housing, for example, 'respect' means the state should not act in a way that prevents people from finding housing and may not evict people unless it gets a court order, 'protect' means that it must prevent violations by others, such as landlords, and 'promote' means it must create awareness of the right or be supportive of organisations that are working to realise the right.

Budlender comments that the last obligation - to fulfil social and economic rights - has been most contentious, leading some people to conclude "that these are not rights at all, but simply aspirations" [2001: 18]. This conclusion recognises that any right guaranteed by the state has substance only if it is founded in law and can, in principle, be defended in court. If this is not so, the state can ignore the right and people cannot enforce claims made on the basis of the right.

[17]A similar qualification is placed on the right to further education, but the right to basic education is not qualified.

[18]Another way of describing the difference in the obligation on the state, is to distinguish between negative and positive rights. Most of the 'first generation' rights are traditionally described as negative rights. Within this traditional discourse, negative rights are then also associated with 'fundamental' rights. They are negative rights because they prevent the state from doing something - like subjecting people to torture or interfering with their free speech. A positive right obliges the state to do something - like take steps to ensure access to housing.

However, because 'respect, protect, promote and fulfil' applies to all rights, this traditional distinction is blurred. The obligation to respect is always a negative obligation even when applied to social and economic rights: the state cannot arbitrarily deprive someone of their home. But 'protect, promote and fulfil' are positive obligations even when applied to civil and political rights: not only is the state prevented from interrupting free speech, it must act to ensure that all people are able to exercise their right to free speech.

However, several judgements of the Constitutional Court have now shown that these social and economic rights are in fact 'justiciable' (meaning that they can be enforced by the courts) "in a variety of different ways" [Budlender 2001: 31]. These judgements include the Certification judgement (the Court's original validation of the Constitution), the Grootboom case[19] concerned with the right to housing, and the Treatment Action Campaign case[20] concerned with the right to health care. The Court has also established the principle that social and economic rights are indivisible from and interdependent with civil and political rights. The right to food may therefore be reinforced by its association with the right to life.

These judgements make clear that the qualification placed on social and economic rights does not prevent people claiming these rights, but acknowledges that the state cannot deliver on them immediately. The state must remedy the infringement of other rights immediately and must make adequate resources available to do so, whereas it must remedy the infringement of these rights over time. But policies and measures designed to realise these rights must be developed immediately, implemented expeditiously and resourced adequately.

Democracy and the Court

Policies and measures fall under the political authority of government - they are the responsibility of the legislature and the executive. How these rights will be fulfilled - or realised - is therefore a political decision. Since the Constitutional Court is not elected, it is reluctant to interfere with the democratic authority of parliament to decide on what policies are best calculated to realise them. Nevertheless, all legislative and executive decisions are potentially subject to judicial review on procedural or substantive grounds because policies, laws and programmes cannot be in contradiction with the Constitution. Devenish remarks that the "Constitutional Court must therefore be perceived as part of the democratic process" [Devenish 2000: 12].

The Court itself does not initiate legal action: it is up to people to do that. What it does do is provide a broad avenue through which civil society organisations[21] (CSOs) can challenge government. Moreover, a relatively expansive definition of locus standi[22] enables class actions to the benefit of those who do not have easy access to the justice system. It should be emphasised that this is only one of several strategies open to CSOs and Chapter 4 takes a broader view of the struggle for the realisation of rights. Here, however, we want to explore what does happen when a case involving social and economic rights is brought to court so as to understand the 'official' meaning of these rights.

In the words of the Grootboom judgement, the question for the courts is "how to enforce [social and economic rights] in a given case."[23] The relevant international law - which must be considered in interpreting the rights - is the ICESCR and the Constitutional Court has paid attention to the authoritative interpretation of this Covenant contained in the General Comments of the UN Committee on Economic, Social and Cultural Rights.

[19]Government of the Republic of South Africa and others v Grootboom and others.
[20]Minister of Health and others v Treatment Action Campaign and others.
[21]We use this term to cover all non-state and non-profit organisations, whether NGOs or CBOs.
[22]A person who has locus standi, or legal standing, has the right to appear before a court on a particular matter.
[23]Grootboom, para 20 cited by Budlender [2001: 32].

According to the General Comment, each right imposes a 'minimum core obligation' on the state and therefore a minimum entitlement for people. If the state claims it does not have 'available resources' to fulfil this minimum core, "it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[24] On this basis, it would appear that even government's overall budgetary allocations can be challenged.

The Constitutional Court has not as yet used this concept on the grounds that it has not had adequate information to define a minimum core obligation. It is, moreover, acutely aware of the scale of the backlog to realising social and economic rights as well as the limits to state resources. It has therefore preferred the concept of 'reasonableness' when called on to judge the policies and measures government has taken to realise the right. In the Treatment Action Campaign judgement it indicated that, where a minimum core is defined, it will be used as a measure of the reasonableness of government action to realise the right rather than as an entitlement that people could demand immediately[25].

Reasonableness

How then, will 'reasonableness' be judged? In the Grootboom judgement, the Court argued that:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.[26]

This indicates what the Court sees as the proper boundary between the authority of government and the authority of the Court. It will not enter the policy arena by deciding what would be the most appropriate measure for realising the right. It will only decide if the actual measures adopted by government are reasonably calculated to realise the right over time.

Nevertheless, the Grootboom judgement affirmed that reasonableness must also take account of the immediate needs of disadvantaged people whose rights are most at risk:

> It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right.... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[27]

[24]General Comment 3, para 10 cited by Budlender [2001: 28]
[25]See SAHRC [2003: 12]
[26]Grootboom, para 41 cited by Budlender [2001: 21]
[27]Grootboom, para 44 cited by Budlender [2001: 22]

It argued that, because of the time scales involved in the 'progressive realisation' of the right, "the desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme"[28]. It concluded that medium- and long-term planning must be supplemented by budgeted short-term plans to fulfil immediate needs and manage crises so as to "ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately."[29] The Court thus refused to allow that the realisation of rights for marginalised people could be forever in the future.

Nevertheless, the decision that policies and measures must be judged in their own terms would appear to limit any challenge to the allocation of resources between budget lines. Thus it may be argued that a particular policy or programme is under-resourced and there cannot be any reasonable expectation that implementation will enable the progressive realisation of the right in question. In contrast to what is implied by the General Comment, it would seem more difficult to argue that government's overall budget priorities are unconstitutional - for example, that housing is under-funded because defence is over-funded or because corporate tax has been reduced. Similarly, a legal challenge to government's overall developmental approach on the basis, for example, that neo-liberal capitalism is incompatible with the realisation of rights, would appear to be out of court.

Property rights

Before turning to the environmental right, it is necessary to consider the property right. In its broad sense, property is "an institution which creates and maintains certain relations between people" [Macpherson 1978: 1]. Property is central to the way resources are distributed and used. It concerns rights to resources of production - that is, land (or natural resources in general), capital and labour - and of consumption - that is, rights related to social reproduction such as food, shelter and education. It is therefore critical to the project of environmental justice.

The inclusion of a property right [s 25] in the Constitution was itself a controversial issue in the political negotiations that led to the first democratic election[30]. Land activists in particular saw it as maintaining the existing racist distribution of land rights and so inhibiting land reform. Property, however, is not only about land or even about things which can be possessed. The meaning of property in the Bill of Rights covers "those resources that are generally taken to constitute a person's wealth" [De Waal et al 2001: 415]. It should be recalled that a 'person' here includes 'juristic persons' such as corporations.

[28]Grootboom, para 65 cited by Budlender [2001: 23]
[29]Grootboom, para 68 cited by Budlender [2001: 24]
[30]See Chaskalson 1995.

In legal terms, property is not a thing that is possessed. It is rights in things and in anything else that can be converted to money or that provides an income. It may include, for example, rights to income from a pension or a wage, from shares in a company, from the sale of products[31] or from another persons' use of an idea or an invention (intellectual property). To be a right, a claim to property must be enforceable. In modern property regimes, it is the state that both creates and enforces property rights. For this reason, "property is a political relation between persons" [Macpherson 1978: 4].

In real terms, there is a big difference between a wage or a pension that hardly covers people's daily needs, and property that accumulates. Property becomes wealth when it produces enough income to create a surplus that is re-invested to create yet more wealth. It is this accumulated wealth that becomes capital and it is, finally, based on people's labour.

To make people work, two things are necessary. First, they cannot access enough resources to survive unless they work for persons with accumulated property. Second, wages must be low enough to ensure that most workers are not able to accumulate wealth. In colonial South Africa, the first condition was created by dispossessing people of land and it was reinforced by imposing taxes to ensure that they needed money. The second condition is now created automatically because so many people have no property of their own and are unemployed.

Box 3: Poverty and property

In 1815, a London magistrate by the name of Patrick Colquhoun published a *Treatise on the Wealth, Power and Resources of the British Empire*. He argued that poverty is both necessary and beneficial:

> Poverty is that state and condition in society where the individual has no surplus labour in store, or, in other words, no property or means of subsistence but what is derived from the constant exercise of industry in various occupations of life. Poverty is therefore a most necessary and indispensable ingredient in society, without which nations and communities could not exist in a state of civilisation. It is the lot of man. It is the source of wealth, since without poverty, there could be no labour; there could be no riches; no refinement, no comfort, and no benefit to those who may be possessed of wealth.

Source: Monthly Review Vol.52, No.8, January 2001.

[31] For a manufacturer, ownership of the products as things is entirely irrelevant. The manufacturer has no use for, say, a million plastic tea cups. His or her interest is in the income from the sale of the tea cups.

The political relation maintained by the state is thus between persons with accumulated property and those without property. In this context, the demand for jobs - which is really a demand for access to the regime of property - becomes the most compelling political demand.

The inclusion of the property right therefore has far wider significance than the issue of land reform. It effectively sanctions the inherited distribution of wealth in its totality. It is, however, qualified by the right of the state to expropriate property in the public interest, subject to compensation [s 25 (2)], and "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" [s 25 (4) a]. The following clauses of the right treat access to land in the manner of a qualified economic and social right as discussed above.

While the right allows for the expropriation of all kinds of property, it seems significant that it singles out land and natural resources for redistribution. This perhaps indicates a sense that colonialism and apartheid deprived people of a birth-right not only in land but in all natural resources (including, significantly, minerals). But because expropriation must be compensated - i.e. the present owners must be paid out - comprehensive land reform would be very expensive. To date, only 2.7% of land has in fact been redistributed.

Globalising property

The meaning of property changes over time. In 17th Century England, for example, property in land was not exclusive since people other than the owner had different rights in the same piece of land and property was associated with a variety of social duties. It was therefore not private property in the modern sense - a sense that has been produced by replacement of feudal with early capitalist property relations.

In the present period of globalisation, it is significant that property is increasingly created not by individual nation states, but by the international system of states. Property rights are now being written, amended and contested in a variety of international institutions. The World Trade Organisation (WTO) is particularly significant because it not only provides a forum for negotiating new forms of property rights but also provides a formal mechanism for enforcing these rights.

Thus, even as the Constitution re-writes the rights of South Africans, property rights are being re-written on a global scale and with effects that conflict with the stated intentions of the Constitution.

Box 4: Fabricating global property

The Trade Related Aspects of Intellectual Property Rights (TRIPS) were negotiated during the Uruguay Round of international trade negotiations and given force with the establishment of the World Trade Organisation (WTO) in 1995. Globalised production means that any particular product is put together from components made all over the world. Physical production is frequently located in Southern countries where it is cheaper. Intellectual property gives dominant corporations legal rights that enable them to monopolise high value activities, particularly innovation, to control production even if they do not themselves make anything, and to decide who gets what profits.

As the NGO Grain puts it: "patents are now more valuable than factories, and the strength of companies is increasingly measured not by their productive capacity, but by the value of their patent portfolios" [2003a: 2]. Intellectual property rights are necessary to a "neo-colonial world order ... based not on free competition but on monopoly privileges granted to global corporations by the princes of the major military powers" [10].

The effect of intellectual property is that knowledge and access to knowledge is privatised. This ends a long tradition in which knowledge has been held as a public good that should in principle be open to everyone. Agriculture provides a good example. Traditionally, innovation in crop varieties took place because farmers shared their knowledge and their seeds. During the 20th Century, governments drove a process of industrialising agriculture and public science institutions took the lead role in innovation, developing hybrid seeds for industrialised production. In the 1980s, public institutions began to be privatised just as the new bio-technologies of genetic science emerged. Using these technologies, private corporations have been able to insert their commercial interests into the actual seed itself. Intellectual property gives legal force to the technological control of life, creating an entirely new form of property.

The first patents on life were granted in the U.S. in the mid-1980s. TRIPS substantially extends these rights throughout the world. Where genetically modified (GM) varieties come to dominate in the production of any particular crop, the right of farmers to produce that crop will be granted by the corporations that hold the patents: "Intellectual property rights (IPR) applied to seeds give breeders, or whoever claims to have discovered or developed a new plant variety, an exclusive monopoly right in relation to the seed" [Grain 2003b: 1].

The justification of property

Legal theorists apparently agree that property must be 'justified': any particular property relation remains legitimate only to the extent that it is socially sanctioned:

> ... property is a right in the sense that it is an enforceable claim ... [but,] while its enforceability is what makes it a legal right, the enforceability itself depends on society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. [Macpherson 1978: 11, his emphasis]

Property is a profoundly ambiguous concept. On the one hand, individual property in consumable goods is necessary to survival - a person who has no right to food will starve. Whether property is formally guaranteed by law or informally guaranteed by custom, some form of property is necessary in any human society. Thus, "the ultimate justification of any institution of property ... has always been the individual right to life ... a right to the flow of consumable things needed to maintain a [commodious][32] life" [Macpherson 1978: 12]. In this sense, property is the original and fundamental social and economic right and the rights of access to food and housing etc. are simply details of the property right.

On the other hand, this defence of property in general is easily fudged with the defence of a particular regime of property. The justification of the modern capitalist regime of property does this in two ways. First, it suggests that an individual property right is the same thing as a private property right. The essence of the modern sense of private property, however, is that people can be excluded. The means of exclusion is 'the market' - if an individual has no money, s/he has no right to food. Second, the difference between property in 'consumable things' and accumulated property which allows control of productive resources is conveniently forgotten. In particular, it is forgotten that the creation of wealth within this regime of property is inseparable from the creation of poverty.

To the contrary, as poverty deepens so it is proclaimed ever more loudly that the modern regime of property is the best hope for the poor. That is, it is justified in the name of the poor. What it is has to offer, and what it always promises, is jobs. Yet what it cannot offer is full employment - either nationally or globally. Full employment would create a 'sellers market' in labour which would drive up inflation and threaten profits. Ultimately, it would prevent the accumulation of property necessary to renew the system. Unemployment is also necessary to create a labour reserve to respond to changing demands for labour.

[32]Macpherson takes the word 'commodious' from 17th Century English theorists. The modern equivalent is 'decent'. What passes for decent in the minds of policy makers and in the measurements of development has become so mean as to debase the word. Commodious seems much more generous - not that the English poor of the 17th Century had much joy of it.

It then becomes the function of the state to maintain "the reserve army of workers". At the same time, it must ensure that "escape routes are closed" so that people cannot survive outside of capitalism and are compelled "to sell their labour power when they are needed by capital" [Meiksins Wood 2003: 18]. The political demand for jobs clearly indicates that the escape routes are indeed closed. It is also, ironically, a demand that legitimates the very institution of property that requires a reserve of unemployed poverty. Yet the scale of dispossession, nationally and globally, is now such that millions of people scarcely make it even into the reserve army. In this context, the inclusion of social and economic rights signals the failure of the institution of property to ensure 'the flow of consumable things needed to maintain life'. [See Chapter 4 for a discussion on the way that globalisation is restructuring labour.]

In a final twist, the national economy as a whole also competes with other national economies. Individual countries are defined as much by their position in the international state system as by their internal dynamics. The 'developed' countries dominate this system and come closest to full employment and the satisfaction of the needs of their populations. They can rely on a smaller reserve of poverty at home as long as there is a larger reserve in 'developing' countries.

In countries which aspire to become 'developed', the state must not only maintain the reserve army of labour, but must seek to empower the population as a whole, to enlarge its productive potential and promote its vitality so as to enable the country to compete in this international order. In this context, the rights to life, to health, to education etc. - rights which are in themselves desirable - must also be seen as an effect of this requirement of the state.

Box 5: Property and development

Just as the regime of property is justified in the name of the poor, so too is the discourse of development. Indeed, poverty is usually represented as the result of an absence of development. Development means many things to many people, but it is worth distinguishing three uses of the word.

The first use is concerned with how capital is accumulated and reinvested and it takes economic growth as the key indicator of success. The key institution of accumulation is 'the market' - which is another word for the capitalist institution of property. Thus, at the International Conference on Funding for Development (FfD) "the U.S.A. delegate …commended the capitalist model [of development] … as the only model that works. The goal of the FfD process, he claimed, should not be to negotiate changes in the system but to integrate countries into it …" [IISD: 17 October 2001]. The state may intervene more or less actively in the economy but with the purpose of maintaining and expanding the capitalist property regime. Economic policy is thus central to development and, in South Africa, GEAR directly expresses this meaning of development. We will call this usage 'core development'.

The second use of the word relates to the multiplicity of projects and programmes aimed at poor people or poor (developing) countries and concerned with 'delivery'. Development in this sense is a supplement to core development: it promises what the modern institution of property has patently failed to deliver or, to use the language of the World Bank, it compensates for 'market failures'. Thus, if the property right is concerned with core development, the economic and social rights are concerned with supplementary development.

This doubled use of development has this effect: it dissociates the making of poverty from the making of wealth and so suggests that poverty results from an absence of development. It thus serves to 'justify' the property regime that constitutes core development.

There is a third and dissident use which treats 'development' as a term of contestation - as a means of challenging or opposing official development policies. In this use, development is about changing power relations in society and mobilising people in support of a more equal distribution of resources. Mobilisation may be intended to act on core or on supplementary development but, where it is targeted at supplementary development, it will aim at a strategic intervention intended to challenge broader relations of power and the conception of core development. In short, such interventions will contest any definition of development which dissociates the making of poverty from the making of wealth.

Environment

The environment section reads:

24. Everyone has the right
    a. to an environment that is not harmful to their health or well-being; 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.

This discussion of the environmental right opens by looking at the way it is supported by several other rights. It does this by briefly outlining particular aspects of the history of environmental injustice and showing how these rights promise to reverse the situation.

It then goes on to look at the environmental right itself. The right has two parts to it and each is discussed by turn. Thus far, the courts have not heard cases which require them to interpret the environmental right in any substantial way. The discussion therefore focuses on the text and makes use of comment by legal academics to draw out its meaning.

However, it does not aim at a legalistic understanding. As pointed out in the section on property above, the right touches the way in which resources are distributed, used and controlled and therefore is concerned with all dimensions of development. Government policies and actions on development thus imply a practical interpretation of the right, whether or not this interpretation is intended or even thought of. The discussion tries to show the key elements of this interpretation and argues that it does not measure up to what the right actually says. Rather, a proper reading of the text suggests an interpretation founded on environmental justice.

Equality and political power

Macpherson remarks that social concerns about the environment have created substantial pressure for regulating, and thus limiting, the use of private property. Up to the 1990s in South Africa, corporate property included a virtually unlimited right to pollute land, air, fresh water and the oceans. Laws such as the Atmospheric Pollution Prevention Act of 1965 were not only limited and increasingly dated, but were implemented in a manner which secured the right to pollute. Since air and water carried pollution into neighbouring areas, the unlimited right in the use of corporate property was exercised even at the expense of the private property rights of neighbours.

Box 6: Pollution unlimited

Beginning in 1961, steel giant Iscor has leaked toxic effluent into the groundwater from unlined slimes dams at its flagship plant in Vanderbijlpark. In 2002, Patrick Bond reported that, "Cancer has spread into the communities through what activists term 'vast lakes of toxic waste' stretching for 140 hectares. The seven kilometre plume of poisoned water will probably reach Boipatong township where tens of thousands of people are at risk" [12]. Residents suspect that this prediction has come true. Informal houses in Boipatong have no flooring other than the earth. In wet weather, water seeps up and people fear that it carries toxics into their homes. In the path of the plume, several small farms have been ruined and properties have been made virtually uninhabitable. Bond noted that, "Repeatedly, and as recently as April 2002, government water officials granted [Iscor] exemptions from the Water Act" [12]. Iscor is by no means an isolated offender. South African industry, big and small, was scarcely troubled by the concept of environmental management until the 1990s.

Sources: Bond 2002; Environmental justice strategy workshop, Elijah Barayi Memorial Training Centre, 9 March 2004.

The ability to defend against such infringements has generally rested on the political power of the neighbours. Apartheid excluded black people from political power and actively prevented them defending their rights. It also subordinated black people to the needs of economic development while excluding them from the benefits. Planning decisions founded on this basis had the effect of ensuring that dirty industries are mostly located in poor and black communities. At the same time, the provision of services to these communities - sanitation, water, energy, waste management etc. - was neglected. The effect is that the poor bear the brunt of environmental degradation while the rich reap the major benefits of dirty development. This is the foundation of environmental injustice and environmental racism.

The right to **Equality** prohibits direct or indirect 'unfair' discrimination against any particular section of the population by the state [s 9 (3)] or by other persons [s 9 (4)]. The unequal distribution of environmental harm should therefore be seen as unconstitutional[33]. The Constitution also has the purpose of preventing political exclusion. This is expressed through the rights to **Freedom of expression** [s 16] and **Freedom of association** [s 18], the right of **Assembly, demonstration, picket and petition** [s 17], and the **Political rights** concerned with the election of political representatives [s 19]. Further, the equality right requires the "full and equal enjoyment" [s 9 (2)] of these rights (as well as all other rights).

[33]The Equality clause prohibits 'unfair' discrimination. It is possible that the courts would find that the unequal distribution of pollution is discrimination, but that this discrimination is not 'unfair'. This would be a scandalous finding and, in our view, difficult to reconcile with the environment right.

Box 7: Racist planning

Sasolburg's second oil-from-coal refinery was built in the early 1980s near the highveld town of Driefontein. The town was renamed Secunda and black residents were removed to the purpose built apartheid township of eMbalenhle. Secunda became a white middle class town with a good infrastructure, effective municipal services, several shopping centres and a variety of other amenities. It remains the economic heart of the area. eMbalenhle on the other hand is home to mainly poor African people. It is downwind of Sasol's polluting plant, surrounded by mines and adjacent to the local dump. The infrastructure is generally poor, although the main roads are being upgraded, and there are no banks and just one or two small shopping centres. Many of the people live in informal settlements with a limited electricity supply and must burn low-grade coal as the main source of domestic energy.

Just administration and information

Even where concentrated industrial pollution affected white people - as at Table View in Cape Town or the Bluff in Durban - industries were protected both by the administrative action of the state and by laws requiring secrecy. Large industries had to have permits regulating their air emissions, liquid effluent and solid waste. However, officials followed industry's own views of what measures to prevent or reduce pollution were affordable or practical. Permits gave generous permission to pollute and were confidential and no-one was ever prosecuted for breaking their permit conditions. Most large plants were also subject to the Key Points Act which, in the name of national security, prohibited publication of all information about the operation of plants including information about pollution. Management thus operated behind a wall of secrecy free from any effective scrutiny.

Two rights guard against the collusion of state and industry. The right to **Just administrative action** [s 33] requires that the state administration has to be fair, open and accountable. Officials have to be ready to justify their decisions in writing if they are asked. This right is further supported by Chapter 10 of the Constitution governing public administration. The right of **Access to information** [s 32] has both vertical and horizontal application. People have the right to "any information held by the state" and to information held by others if it "is required for the exercise or protection of any rights". Most information about the operation of a plant is relevant to the environmental right so communities can demand such information from the state or directly from management.

Legal standing

From about the beginning of the 20th Century, no South Africans could mount a legal challenge to environmental abuse unless s/he could show a direct interest: "some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general."[34] Any legal defence was thus bound to be based on the NIMBY principle - not in my backyard. Yet, as Robert Bullard showed in the U.S., it is easier for the wealthy to take NIMBY actions and "private industry and public officials responded with the PIBBY principle - Place In Blacks' Backyard" [cited in Alston 1993: 188]. Restricted legal standing is therefore likely to reinforce environmental injustice.

The section on **Enforcement of rights** [s 38] reverses this. In any matter concerning an infringement of the rights in the Bill of Rights, it gives legal standing to anyone acting for a group or class of persons; for an association; or in the public interest. This underscores that people have a common interest in their rights and, in relation to the environmental right, enables solidarity: 'not in anyone's backyard'.

Box 8: Environmental health impacts

People living in South Africa's petrochemical hotspots are using the 'bucket brigade' community monitoring system to take air samples testing for a range of volatile organic compounds and 'total reduced sulphur' compounds. In 2000, they found 23 compounds, 17 of which are listed as hazardous air pollutants by the U.S. Environmental Protection Agency. Seven samples taken at Sasolburg found a total of 15 such listed pollutants, and single samples taken at Table View and south Durban respectively found 13 and 9. Readings for benzene were particularly high at the majority of sites.

These chemicals are associated with a very wide range of ailments including cancers, asthma and allergic reactions. Many of them affect whole body systems such as the immune system, the cardio-vascular system and the reproductive system. While the effect of many individual chemicals is known, their combined effect is not.

Formal research on actual health impacts is in its infancy in South Africa. An informal investigation in south Durban suggested that the incidence of leukaemia is as much as 24 times higher than in other parts of South Africa. A formal study at a local primary school found that 52% of the study population suffered from asthma and noted that this was the highest rate recorded in the scientific literature world wide.

Source: groundWork Air Quality Report 2003.

[34]Von Moltke v Costa Aerosa (1975) cited in Glazewski 2002: 186.

The first part of the environmental right

The first clause of the environmental right is concerned with the impact of environmental harm on people. It is striking in two respects:

First, it is not subject to any qualification either to the substance of the right or to the state's obligation. People's right 'to an environment that is not harmful to their health or well-being' is therefore subject only to the general limitation in s 36. Unlike most other social and economic rights, its realisation is not conditional on the availability of state resources, nor is it subject to delay ('progressive realisation'). The state is therefore bound to respect, protect, promote and fulfil the right immediately. This clause of the right also has 'horizontal application'[35]. Thus, while the state has an obligation to protect people against infringements of the right by third parties - such as polluting industries - those parties themselves are bound by the right and people can make direct claims against them for any infringement.

It should be emphasised that the right is not 'to a healthy environment'. This phrasing would be vague in comparison to 'not harmful'. It would also make the object of the right the health of the environment rather than the environmental impact on people's health.

Noting the negative phrasing of the right, De Waal et al conclude that "it enshrines a certain minimum standard and does not grant a positive right of indeterminate extent" [2001: 405]. This interpretation seems limited. There is a danger that 'not harmful' will be defined by the minimum standard set by government rather than the actual impact on people's health. The right can then come to mean 'harmful within acceptable limits'. The present use of such tools of environmental management as risk assessments and environmental impact assessments (EIAs) suggest that this is indeed government's interpretation of the right.

In contrast, an environmental justice interpretation of the right must hold that 'not harmful' means exactly that. It cannot mean 'harmful within acceptable limits' and leave it to government to decide what is acceptable. Where 'a certain minimum standard' is used, it can only be as a tool enabling the state to 'respect and protect' the right. Further, government would have to be able to justify the standard by showing that it is compatible with the ordinary meaning of 'not harmful'.

Beyond this, it should be noted that all Constitutional rights have both negative and positive aspects. The state is obliged not merely to "respect and protect", but also to "promote and fulfil" all rights [s 7 (2)]. To promote the right, government must ensure that people are aware of the right and have full information about actual or potential environmental harm so that they can make their own assessment. If government itself does not have this information, it should enable people to access it themselves. Finally, fulfilling the right must mean that, taken together, government actions result in the realisation of the right.

[35]This has not been tested in court, but legal comment agrees that the right will have horizontal application: see De Waal et al 2001: 405 and Glazewski 2002: 177.

Second, the addition of 'well-being' to health indicates that the right must be read generously. The concept, however, is undefined and legal comment seems largely speculative. De Waal et al, argue that it admits "important concerns of environmental law such as the conservation of fauna and flora or the maintenance of bio-diversity" as an aspect of the right. They suggest it does so by including "spiritual or psychological aspects such as the individual's need to commune with nature" [2001: 406]. Bio-diversity is certainly important, but this interpretation seems oddly reminiscent of the pre-democratic idea that the environment is only about nature conservation, an idea that led to the perception that environment "is a white, middle-class issue ... not relevant to ... social justice" [Whyte 1995: xviii].

Glazewski remarks that well-being "provides environmentalists with a potentially powerful weapon" [2002: 175]. He argues that it points beyond the 'instrumental value' of a clean environment - such as good health or increased tourism revenues - and indicates an 'intrinsic' value that flows from "a sense of environmental integrity". It also implies a "sense of stewardship": that people must look after the environment for the benefit of future generations [176]. This interpretation implies that 'natural and juristic persons' share the responsibilities given to the state in the second part of the right.

In our view, the association of health and well-being implies a certain intimacy of people with their environments in the places where they live, work and play. Well-being must therefore refer to people's domestic, neighbourhood, work and recreational environments - and recreation must include but cannot be reduced to communing with nature. The right thus cuts across both the system of production and of social reproduction. Within the Bill of Rights, it relates to 'fair labour practices' [s 23 (1)], the distribution and use of property, and all other economic and social rights.

Well-being thus suggests that people's living should be 'commodious'. For example, in terms of land reform it indicates that tinkering at the edges of the apartheid division of land is not adequate. In terms of housing, it indicates that RDP houses are inadequate and, critically, that undue service costs should not be imposed on the poor through the neglect of the basic tenets of environmental design or through unaffordable charges. The SAHRC points out that harm to health and well-being is also produced "when communities have no toilets, no water and no sanitation" [undated: 17]. Other services such as energy and waste management should certainly be added to the list.

It is from this understanding of people situated in particular environments that a broader 'sense of environmental integrity' can flow. More than this, it is from this perspective that a sense of social integrity can flow. It should be emphasised that the right is not just about the poor - it is about societal relations as a whole. It may be argued that the middle classes already enjoy commodious living - in excess. Yet that living is surrounded by walls and security systems which are the costs of economic privilege. Excessive consumption is often a compensation for insecurity as the term 'shopping therapy' suggests. But it is also an expression of the power to consume a disproportionate share of resources at the cost of both the poor and the environment.

Excessive consumption also puts in question how the consumables are produced - particularly the energy and water used and the waste produced. Since the environmental consequences of production cannot finally be confined to the poor, insecurity becomes pervasive: even the wealthy no longer trust the food they eat or the air they breathe. If middle class living provides a model to which the poor aspire, the poor provide the middle classes with an image of what may become of them if they loosen their grip on resources. Development that yields these two options - barricaded consumer or economic outcast - cannot produce well-being.

This first part of the right must also be considered in the interpretation of other chapters of the Constitution. Specifically, the National Assembly, the National Council of Provinces and the Provincial Legislatures must have regard for "representative and participatory democracy, accountability, transparency and public involvement" [s 57, s 70, s 116]. In Chapter 7, the objects of local government [s 152] are concerned with sustainable services, a healthy environment, social and economic development and democratic, accountable and participatory government. And in Chapter 10, the basic values and principles governing public administration [s 195] likewise speaks of development and of fairness, accountability, transparency and participation in policy making. It is participation that we want to emphasise here. It is not in itself written into the Bill of Rights, but is required by the Constitution as a whole. If, as Glazewski argues, 'well-being' includes a sense of stewardship, then genuine participation in political and economic decision making is an evident necessity. People cannot care for their environments if decisions on the use or abuse of resources are made over their heads.

The second part of the environmental right

Whereas the first part of the right is concerned with the impacts of environmental harm on people, the second is concerned with the environment itself and the nature of development. The right "to have the environment protected" is nevertheless vested in people. It thus provides further justification for the expansion of legal standing discussed above. It is also to benefit both "present and future generations". De Waal et al assert that this "constitutionalises the notion of intergenerational equity" [2001: 406]. It thus refers to the concept of sustainable development, but does so in a way that gives equal weight to present and future generations[36]. This does not imply a trade-off between present and future needs. Unsustainable development produces both poverty and environmental degradation in the present. Intergenerational equity can only be achieved if present development is productive of growing social and economic equality together with environmental integrity. The second part of the right therefore resonates strongly with the first and further emphasises that social development is integral to the environment right.

[36]The established international definition of sustainable development was given in the report of the World Commission on Environment and Development (the Brundtland Report): Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The second clause is indeed subject to a qualifying phrase, 'through reasonable legislative and other measures'. It thus imposes a positive obligation on the state in the manner of a social and economic right but, unlike the social and economic rights discussed above, it is not qualified by 'progressive realisation' or the availability of the state's resources. The phrase merely indicates that this is a 'vertical' right and "is unlikely to have a direct horizontal application" [De Waal et al 2001: 405].

The additional sub-clauses stipulate the purposes of protecting the environment for the benefit of present and future generations. Taken together, they define what the state's obligations to 'respect, protect, promote and fulfil' this right should mean.

First, the state must 'prevent pollution and ecological degradation' - that is, it must respect and protect the right. This must clearly be read in conjunction with the first part of the right in that pollution and degradation inevitably harm people's health and well-being.

The second sub-clause obliges the state 'to promote conservation'. It should be emphasised that conservation cannot be read to refer only to proclaimed conservation parks. It must also refer to and reinforce the meaning of 'ecologically sustainable' in iii. Conservation must therefore relate not only to bio-diversity of indigenous species but also of agricultural species, not only to bio-diversity but also to the conservation of land and water, and not only to natural resources but also to produced resources such as energy or packaging. Conservation thus applies to all forms of production, marketing and consumption and indicates an approach that minimises the production of waste and pollution rather than one which only treats waste at the end of the pipeline.

The third sub-clause obliges the state to 'secure ecologically sustainable development and use of natural resources'. This is the means of fulfilling the right. It is important to pay attention to the implications of time in this phrasing. 'Secure' is given in the present tense indicating that state must act without delay. 'Development', however, is a human process that unfolds over time and is forever open to the future - there is no end to development. What the state must do now then, is to ensure a particular approach to development: one that is 'ecologically sustainable'.

Since development is a human process, this does not imply that ecological systems should be as if untouched by human hands. Rather, it indicates that development concerns a relationship between the way people sustain themselves and the ecological functioning of the environment. At a minimum, this means that development should allow "renewable resources to re-accrue" [De Waal et al 2001: 406] but it goes much further than this. Human activity is an increasingly important part of the overall functioning (or failure) of ecological systems. Development, as it has been conventionally conceived, not only destroys or depletes renewable resources but also produces huge volumes of wastes and so contaminates ecological systems to the point where they no longer function properly. This is the case, for example, with climate change. If this right

is to be realised, it is no longer enough to think in terms of a 'balance' or trade-off between environment and development. Rather, development must be reconceived such that human activities positively enhance the regenerative capacities of the environment.

The interpretation of the final part of this sub-clause is then vital: 'while promoting justifiable economic and social development.' And the critical word here is 'while': does it mean 'subject to' or does it mean 'at the same time as'?

In the first interpretation, ecologically sustainable development is subordinate to economic and social development and there is no necessary logic linking these orders of development. Economic or social developments may then be 'justifiable' according to their own internal logics and without reference to ecologically sustainable development. The environment does not therefore need to be integrated in the original conception of economic or social policies, programmes, planning or projects. In practical terms, economic development is justified only at project level: major developments are required to undergo Environmental Impact Assessments (EIA) at the end of the planning pipeline after a project has been proposed. The meaning of 'justifiable' is thus embodied in the performance of an EIA. Ecologically sustainable development is regarded as having been secured on the basis of whatever mitigation of environmental impacts is required by the EIA.

Box 9: Is GEAR unconstitutional?

The interpretation that ecologically sustainable development is 'subject to' economic and social development is evident in all major economic policy documents: the Ministry of Finance's (MoF) macro-economic policy, GEAR, makes no reference to ecologically sustainable development. It mentions "protection of the environment" just once, and as one of a number of sectoral policies which "cannot be outlined comprehensively here" [MoF 1995: 15]. The Department of Trade and Industry's (dti) micro-economic policy makes no reference to the environment whatsoever, while its Integrated Manufacturing Strategy makes just one reference, and that in the context of the King Report on corporate (self) governance. In these policies, the environment is not considered even in the language of 'trade-offs'.

There are several reasons why this interpretation is unsatisfactory. First, had the Constitution meant 'subject to', it would have said it. Second, this interpretation places a major qualification on government's obligation to protect the environment for the benefit of present and future generations. Had this been intended, it would have been included in the initial statement of the right rather than in a sub-clause. Third, this interpretation contradicts the first part of the right to "an environment not harmful to [people's] health or well-being". The context shows that subsection (b) is intended to give effect to that right, not to limit it[37]. Fourth, this is the only right that specifically obliges government to promote economic and social development. An interpretation that separates this obligation from its context seems particularly wilful. Moreover, the social dimension is already included in the initial statement that the right is to benefit present and future generations.

The Constitution surely requires a particular kind of economic and social development: it must be ecologically sustainable development. Further, this meaning must apply when the concept of development is used elsewhere in the Constitution - specifically under the 'objects of local government' [s 152], the 'developmental duties of municipalities' [s 153] and the 'basic values and principles governing public administration' [s 195].

This conclusion fits with the second and ordinary meaning of the word 'while'. In this interpretation, ecological sustainability must be taken as the ground on which all state policies and programmes concerned with economic and social development are based - starting with macro-economic policy. These policies cannot therefore be 'justifiable' without specific reference to ecological sustainability. This means, at the very least, that people can oblige government to defend its economic and social policies on environmental grounds. A stronger reading of the right would create the basis for arguing that the Constitution requires sustainable development based on environmental, social and economic justice.

[37]Thanks to Jon White for this observation

Box 10: Separating environmental and social development

The environmental right is as much social as it is environmental. The first part of the right concerning 'health and well-being' cannot be understood except in social terms. The second part of the right introduces the social dimension through the phrase 'present and future generations'.

Government, however, has shown considerable determination to attach social development to economic development and to separate it from environmental development. Ironically, this has been expressed most explicitly by the most senior environmental officials. In the run-up to the World Summit on Sustainable Development (WSSD), the Director General of the Department of Environmental Affairs and Tourism (DEAT) told the parliamentary portfolio committee on environment that "developing countries were 'taken for a ride' [at the 1992 'Earth Summit'] in Rio with all the emphasis on environment and no focus on economic and social issues" [d'Angelo 2002]. A similar view was repeated by the Minister himself in an interview following WSSD [Turok 2002: 14].

In fact, the Rio documents are distinctive in their social approach to environmental issues. The framework document is Agenda 21. It describes an agenda for global change which aims to "fulfil basic human needs, improve living standards for all and better protect and manage ecosystems" [Keating 1993: 1]. The document has four sections. Section One addresses precisely the social and economic dimensions and includes a chapter titled 'Combating Poverty'. Section Two is titled 'Conservation and Management of Resources'. It deals with environmental issues but treats environmental goods as resources for development. Section Three concerns the role of major groups such as workers, businesses, scientists, women and NGOs. It is, in short, broadly inclusive of social actors in development. The last section is about implementation.

The Rio agreements do indeed have many faults - privileging the environment at the expense of social and economic development is just not one of them. It is difficult to avoid the conclusion that government's representation of Rio is aimed at subordinating environmental concerns to the requirements of capital accumulation. This aim is consistent with a reading of the environmental right that makes ecologically sustainable development 'subject to' social and economic development.

Chapter 3:
Struggles for environmental justice in democratic South Africa

3.1 Introduction

On the face if it then, as a result of struggle, South Africans have secured an impressive array of constitutional and legal freedoms and rights. But after a decade of democracy, many material aspects of the lives of ordinary South Africans still look pretty much the way they did under apartheid - indeed, some things have gotten worse. Fledgling environmental justice and 'social movements' amongst poor working class people across the country are focussing attention on areas of real discontent that are relevant to the environmental justice agenda. As the Environmental Justice Networking Forum put it in 1997:

> Environmental justice is about social transformation ... In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others ... [and the approach recognises that] environmental damage has the greatest impact upon poor people. [quoted in McDonald 2002 a: 4]

Through the lens of some of the actions and campaigns currently being waged in South Africa, and often in the words of the movements and organisations themselves, this section:

- highlights the yawning gap between the people's life experiences and their legitimate expectations of enjoying real rights to a better life after apartheid,
- explores different aspects of the complex relationship between rights to, and struggles for, environmental justice, and
- suggests some ways in which the analysis and strategy underpinning many current struggles could and should be deepened in dialogue with an environmental justice approach.

The preceding sections of this report make it clear that in principle, the 'environmental justice agenda' is very wide since it concerns the relationships between people, resources and each other in their working, living and recreational environments[38]. As McDonald suggests, environmental justice "necessarily encompasses the widest possible definition of what is considered 'environmental' ... [and places] ... people, rather than flora and fauna, at the centre of a complex web of social, economic, political and environmental relationships" [2002 a: 3]. But it has also been remarked that in practice the environmental justice agenda exists in and through struggles for it - particularly in struggles against environmental injustice that impact the lives and environments of the poor.

Bobby Peek of groundWork argues that, in the context of democratic South Africa, the interpretation of environmental justice emerges in the challenges facing the poor and the vulnerable "to translate their hard-won democracy into reality" [Peek 2002: 202]. He shows how this approach broadens the scope of 'environmental' debate and emphasises a human rights centred approach. The 'Poverty and Environment' hearings convened in 1998 as part of a multi-sectoral 'Speak Out on Poverty' programme initiated by the South African NGO Coalition (SANGOCO) broadly reflected this approach:

> During these hearings environmental issues were interpreted broadly: poor provision of services; land degradation in rural areas; the harmful affects of acute exposure to poisonous chemicals and/or pollutants from dirty industries and mining operations; exposure to hazardous waste sites, incinerators, and informal dumping sites; and poor forestry practices. [Peek 2002: 205]

In many ways, South Africa's history wrote the basic script - a history of economic, patriarchal and racial exclusion, of exploitation (of people and natural resources), of grossly uneven distribution of resources and capital, and of services and benefits which were massively concentrated in the hands of a small minority. The struggle against apartheid was a struggle for radically transformation, a reversal of history. As McKinley reminds us in the context of the provision of basic services:

> During the initial years of South Africa's first phase of its post-1990 political transition, the anti-capitalist hopes, aspirations and struggles of millions around the globe (and particularly in Southern Africa) were, in one way or another, connected to the radical political and economic possibilities that might emerge in a post-apartheid South Africa. Central to such connections was the expectant belief that the forces of liberation in South Africa would, by pro-actively exercising popular, mass power through the institution of a new revolutionary people's state, begin to fundamentally transform the inherited apartheid-capitalist system by reclaiming public (i.e., people's) ownership and control of economic production and socio-economic distribution. [McKinley 2003: 1]

[38]Providing a comprehensive account of experiences and conditions that describe South Africa's 'environmental justice agenda' is beyond the scope of this report.

3.2 Justice struggles

In March of 2003, a number of organisations of the poor jointly initiated a 'people rights campaign'. It illustrates well the scope and depth of discontent about the failure to deliver rights effectively - and the insistence on claiming those rights. The campaign was initiated by the Landless People's Movement (LPM), Anti-Eviction Campaign (AEC), Anti-Privatisation Forum (APF), Concerned Citizens Forum (CCF) and the Land Access Movement of South Africa (Lamosa). In a press statement, the organisations commented that,

> Almost nine years ago, South Africa's Constitution was celebrated as 'one of the world's most progressive' for its inclusion of wide-ranging 'human rights' protections, which included socio-economic rights provisions. Yet real 'human rights' are still denied to the poor and landless majority, and even the most basic rights are being progressively eroded through neo-liberal programmes such as market-led land reform, privatisation and cost-recovery. We demand People's Rights Now!

Reflecting some of the priority issues for the organisations involved, the campaign highlighted the following areas (adapted from their press statement) where they argued that action is required to extend "basic human rights to the country's poor and landless majority":

- More than seven million poor and landless urban people living on the edges of our cities in informal settlements are threatened by apartheid style forced removals carried out at gunpoint by private security companies on instructions from our elected government.
- In rural areas across the country, a culture of gross human rights abuses against the country's seven million farm dwellers continues unabated. When farm workers and labour tenants are fired from their exploitative jobs, they are evicted from the land of their ancestors by white farmers who have not changed since apartheid and still control most of the land.
- More than 10 million people have been denied water because they were too poor to pay.
- More than 2 million people have been evicted from their homes because they did not pay their water bills.
- Millions more have had their electricity disconnected because they are poor.
- The privatisation of Eskom has ensured that electricity prices will rise above inflation, and that poor people pay more for power than rich people. The Eskom thugs turn the lights off in millions of poor homes when people cannot afford to pay, and criminalise the poor when they fight against these policies.
- From Cape Town to Durban to Jo'burg, and in other cities across the country, poor people are being forced out of apartheid 'low-cost' public housing into smaller and smaller places because they are too poor to keep paying the rent they have paid for long enough to own the property. Poor people are also being evicted from their own private homes when they are too poor to pay for water and electricity.

- In the South Durban Industrial Basin, where poor people were dumped by apartheid forced removals laws and then forced to accept polluting industries, like the Engen refinery, as their new neighbours, the poor are forced to watch their children suffering from respiratory diseases so that corporations can make a bigger profit. Now the big companies and the council are planning to forcibly remove the poor to even worse conditions.
- When our movements take action to demand our basic rights, we are harassed, arrested and assaulted. We are even forced to obey draconian bail conditions that are just like apartheid banning orders.
- Now the government is building its arsenal of repressive tactics to use against the poor and landless people of our country. From forced removals at gunpoint to intelligence surveillance, phone taps and banning orders, the old days are seeping back into the new South Africa. A new law, the Anti-Terrorism Bill, is about to make it an act of 'terrorism' to intimidate the enemies of the people, so a march for land could become an act of terrorism against a white farmer. The sentence: life imprisonment.

The list could no doubt be expanded and debated but it is eloquent testimony to growing anger across a wide range of inter-related conflicts and issues that impact on the environments of the poor. Contrary to Finance Minister Trevor Manuel's assertion that "The privilege we have in a democratic South Africa is that the poor are unbelievably tolerant" [quoted in the e-M&G, 27 February 2004], the anger and issues raised in the campaign could be taken as a provisional sketch of the unfolding agenda for environmental justice in South Africa. The campaign's statement concluded that: "South Africa's 'Human Rights Day' cannot be celebrated while the majority of poor and landless South African's are denied real People's Rights! We will continue to demand People's Rights in the streets of our country until our demands are met!"

Below we look at some of these points of conflict in more detail.

Struggles for land

The land question is central to the broader struggle for environmental justice. The historic Freedom Charter proclaimed that "the land shall be shared among those who work it" and specified not only that "[r]estrictions of land ownership on a racial basis shall be ended, " but also that "all the land [shall be] re-divided amongst those who work it to banish famine and land hunger". Although the 1996 Constitution (in the hotly contested Property right) commits the state to taking qualified measures to "enable citizens to gain access to land on an equitable basis", post-apartheid land reform has failed to significantly transform the racially skewed and class-based patterns of land access - indeed, it is patently not designed to achieve this.

The National Environmental Management Act (NEMA) actually appears to offer a stronger basis (though its principles are of course not at the same authoritative level of the Bill of Rights) since it promises "equitable access to environmental resources ... to meet basic human needs and ensure human well-being ... and special measures may be taken to ensure access thereto by persons disadvantaged by unfair discrimination" [NEMA 2.4.d.]. Indeed, since land must surely be considered part of the 'environment', then a further NEMA principle applies: that it is "held in public trust for the people" and its use must serve the public interest - it is part of the people's 'common heritage' [NEMA, 2.4.o.].

The Landless People's Movement (LPM) was formed in July 2001 "by leaders of various landless people's structures from the different provinces of South Africa who believed that all the landless people of South Africa needed to organise together to get back the land that was stolen from us during colonialism and apartheid. ... It is only an organised movement of landless people that will struggle for land and human rights for the landless. ... Land is a basic human right" [LPM pamphlet].

At the World Conference against Racism (WCAR) held in Durban in 2001, the LPM and others made a strong argument that linked landlessness with racism in the South African context. In a pamphlet drafted for the WCAR, the land activists argued that land dispossession under colonialism and apartheid was foundational to racism in South Africa and that therefore, "racism cannot be defeated without destroying the grid of private property created by that dispossession":

> The continued landlessness of the majority of black South African women and men - both rural and urban - is rooted in our country's history of colonialism and apartheid, but has been reinforced by the policy prescriptions of the World Bank, International Monetary Fund and other organs of international finance capital which have defined a narrow neo-liberal macroeconomic strategy for post-apartheid South Africa ...
>
> South Africa's transition is premised on a human rights approach to socio-economic issues. Our Constitution advances a range of progressive socio-economic rights, and to some extent our new institutions have created statutory laws to give effect to these. Yet this approach has demonstrably failed to deliver the fundamental socio-economic transformation needed to defeat our racist legacy. This approach has especially failed to deliver land reform. The landless people of South Africa have waited patiently for seven years for the land reform programme to deliver on its promises. In that time, less than 2% of the nation's land has changed hands from white to black. It is now clear to the landless - for whom seven years of human potential have been lost - and to anyone else who looks closely at the prospects for improvement within the current neo-liberal paradigm, that the only way land reform - and with it the defeat of racism - will succeed in South Africa, is through the pressure of the people themselves, from below.

Recent indications from within the LPM suggest a recognition that this pressure from below also needs to be linked with radical direct actions that go beyond militant protest and link struggles to points of production (a theme that is picked up more generally in the last section of this chapter). In an interview with Stephen Greenberg [2004], the Gauteng chairperson of the LPM, Maureen Mnisi, comments:

> The LPM needs to do the strong action.... We're marching all along, but no response. People are ready to occupy. I can talk about Gauteng. Many comrades are pushing me that they want to occupy the land. There is this training that we've been given by the people in Brazil [from the MST][39]. If we are going to take the land, how must we do it? People must have the resources. If we are going to take the land we must not just take the land and sit down. We must build. We must have a strategy about how we can just take that land. But many communities are ready to do this. In the rural areas, they are ready to, but it's just that they need the training.

Energy struggles

Apartheid's 'uneven' patterns of development and discriminatory provision of services severely limited access to electricity by black South Africans. As a result, many turn to burning solid and liquid fuels in poorly ventilated houses. This creates high levels of indoor pollution (and contributes to outdoor air pollution) with huge health costs, especially relating to respiratory conditions. In informal settlements, the added risk of fire is so high it has become virtually an integral characteristic of life for people living there. After apartheid, many more homes have been connected to the electricity grid but many remain excluded and 'cost recovery' principles determine who remains connected. Promises of a free 'lifeline' electricity supply have proved woefully inadequate - the offer of 50kwh free per month is equivalent to less than 10% of the average electricity consumption of a low income household in South Africa and would power a light bulb and a few small appliances.

In late 2000 the Soweto Electricity Crisis Committee (SECC) was formed by residents angry at the failure of the post-apartheid government to deliver on their election promises (in 1994 and again in 1999) of affordable electricity. The SECC has campaigned against widespread disconnections meted out to those households who cannot pay their domestic energy bills, and for provision of affordable electricity. Discussing the SECC demand for a 'flat-rate' payment system, SECC chairperson Trevor Ngwane has said that:

> We consider this flat-rate demand a return to our tradition of anti-apartheid struggle, because that was the demand that emerged during the 1980s in Soweto. ... It is sad that we are using old demands against the apartheid regime in dealing with the democratic government. This is a short-term demand, reflecting growing alienation in the present circumstances, whilst we await a more equitable, sane system. [quoted in Bond 2002: 326]

[39]The MST is the Brazilian Movimento Sem Terra, highly regarded as a radical and effective social movement for land

Water struggles

Whereas the Bill of Rights does not directly address rights to energy, South Africa is the only country in the world to specify people's right to access sufficient water [s 27 (1) b][40]. Although the infrastructure for providing water has been extended and the ANC repeatedly promises free water, even those now within reach of potable water struggle to access it. Instead of ensuring the provision of water as a right to all citizens, it has been made subject to pressures to 'marketise' the sector (with growing involvement of the private sector) and to recover costs - and even profits - from consumers. "[C]itizens are first and foremost being considered as customers" [Lumsden and Loftus 2003: 11].

Like electricity, this means that effective access to water depends on the ability to pay for it. Obviously this excludes vast numbers of poor and unemployed South Africans[41] - and provokes resistance and rights-based struggles for water. The logic of cost recovery results in aggressive programmes of disconnecting those who cannot pay. When cost recovery excludes poor people from accessing potable water, the results are devastating. This was illustrated in recent years in KwaZulu-Natal province when cholera broke out amongst poor communities who had been forced to draw polluted river water after their access to piped water was commodified and charged beyond their ability to pay for it.

Technologies associated with the commodification of water have become a point of resistance too. Pre-paid meters are being installed so that consumers effectively do the dirty work of limiting and cutting off their water supplies at levels that reflect their 'ability to pay'. In Phiri (Soweto), residents argue that:

> ... the installation of pre-paid water meters is an illegal act of privatising the provision of the most basic resource of life. ... The simple fact is that the privatisation of water through the installation of pre-paid water meters will mean that poor people unable to afford access will die. ... The community of Phiri, along with the SECC and the APF, are taking up the struggle against pre-paid water meters because it is every South African's (and human being's) right to have water. We cannot and will not accept that it is only those who can afford privatised water who can enjoy that right. [Anti-Privatisation Forum, press statement September 2003]

[40]As with most of the socio-economic rights in the Constitution - though not including the Environment right - this right is a 'right to have access to' but it is qualified, and demands of the state only that it "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights" [s 27 (2)].

[41]As just one example: In Lumsden and Loftus' study of water issues in Inanda (Durban), they note that 50% of people there live below the poverty line and unemployment is as high as 70% in some areas [2003: 4].

Struggles for clean air

There is some irony in the fact that, while on the one hand communities fight for affordable household energy, really cheap electricity encourages energy-intensive industries which pollute the air that people breathe in their households, their neighbourhoods and in their workplaces. The Environment right in the Bill of Rights has been discussed extensively in this report, it grounds much of the activism of environmental justice organisations like groundWork - and people organising to protest industrial pollution accuse government of failing to protect their rights in this regard.

Over the years, numerous groundWork actions, reports and publications have focussed on south Durban. A thriving market gardening area until the 1940s, the area was designated an industrial estate served by black working class residential areas. 'Development' facilitated through expropriations, forced removals and rezonings had made south Durban extremely polluted:

> ... home to two petrochemical refineries (owned by Shell, BP, Petronas, and Engen), and seven recorded hazardous waste dumps (including a chrome dump) within, or adjacent to, black residential areas. The area is also home to various fibre plants, a paper mill, hazardous chemical storage facilities, an airport, and more than 150 smokestack industries which are largely dependent on crude oil imported via an offshore buoy through South Durban. [Peek 2002: 207]

Sick, threatened and angry residents have engaged multiple struggles against these conditions. In the post-apartheid period, many of these struggles have foregrounded the human rights argument for environmental justice. For example, in their resistance against the dumping of hazardous coal ash by multinational Mondi, a petition from residents called for the "community's civil and human rights to be redressed and for environmental injustices to be challenged through effective implementation of appropriate legislation" [quoted in Peek 2002: 213].

These struggles continue and are paralleled in a growing number of locations across the country. As the previous groundWork Report focussing on government's industrial strategy makes clear, the policy orientation and underlying structure of the country's industrial economy will ensure ongoing reproduction of sites of struggle against industrial environmental injustices. Recently residents representing civic organisations of south Durban (Wentworth, Isipingo, Bluff, Merebank), Clare Estate, Richards Bay, Pietermaritzburg, Chatsworth, Sydenham, Potchefstroom, Table View (Cape Town), Sasolburg, Boipatong and Secunda presented a 'People's Memorandum' to the 8th World Congress on Environmental Health held in Durban during February 2004. Under the title "Ours is not perception: Environmental injustice and racism is a reality", the Memorandum pointed out that industries and particularly multi-national industrial corporations (MNCs) in South Africa, many of whom had put on exhibitions at the Congress, are:

- dumping hazardous chemicals and pollution in our neighbourhoods that lead to death and injury of workers and residents, and the retardation of our population;
- driven by greed to maximise profits at the cost to community health;
- not taking responsibility for their pollution and use public platforms to shift the environmental health debates to vehicle pollution and domestic pollution;
- undermining the community environmental health concerns by using employment as a bargaining tool for their unsustainable and polluting developments, and compromising community struggles by pushing industrial led social development projects; and
- transferring dirty technology, such as incinerators to South Africa and increasing the pollution burden on poor and vulnerable communities.

The Memorandum argued that government, amongst other things, is:

- failing the people by refusing to challenge MNCs for their polluting practices;
- allowing an industrial sector to develop that is holding our democracy at ransom by its continued pollution and injury to free South Africans;
- allowing the development of a sick and malformed society because children are exposed to pollution daily in their learning as well as their living environments;
- colluding with industry to promote unsafe expansion of industrial development; and
- marginalising communities due to improper consultation processes.

The activists charged that government (local, provincial, and national) is "[n]ot giving meaning to its commitments of Section 24 of the Bill of Rights in our Constitution which guarantees us an environment that is not harmful to our health and well-being."

Struggles for information

The Bill of Rights speaks of access to information [s 32] and gives to everyone the right to access any information being held by the state, or being held by others where that information is required for the exercise or protection of any rights. Government was required to enact legislation to give effect to this right within three years of the Constitution taking effect. In the interim period, an early form of the National Environmental Management Act (NEMA) extended rights to information in a way that appeared to match the demands of environmental justice activists. They had argued that people have a right to know about the environment they live in and that full information is necessary to enable meaningful participation in decision making processes. However, when government enacted legislation codifying the constitutional right to information, it became clear that this openness was being clawed back in favour of a rather more restrictive approach. Those sections that would have allowed for a more open approach in NEMA (section 31) were subsequently removed and access to information on environmental management and everything else became subject to the new, general law on information - the Promotion of Access to Information Act.

In March 2003 - at the same time as groundWork and other organisations were resisting the removal of NEMA's access to information clauses - groundWork director Bobby Peek, in an editorial headed 'Access Denied!', argued that:

> Contrary to our constitutional rights, big industries and the South African government have taken steps to prevent civil society from having full access to information on pollution and other environmental matters that affect our daily lives. ... [W]e have industry and government working hand in hand to ensure that environmental information is kept away from the very people that are living on the fence-line of polluting industrial development. ...
>
> Last year [2002], during the legal challenge by community people against the South African steel giant Iscor, Iscor sought a gagging order against community people in the affected area. ...
>
> [T]he Ministry of Defence in late 2002 decided to unilaterally extend the National Key Point Act around the Engen refinery, resulting in encroachment upon people's houses and the local mosque. ... [T]he Ministry of Defence, in a letter to a local industry, stated that environmental information must be regarded as 'extremely sensitive'. To whom I ask? Has there been pressure from industry on government to take such extraordinary measures? ... Other industries are following suit and denying civil society access to environmental health risk assessment information. ...
>
> The picture is grim. ... Where is our constitution?
> [Peek 2003: 3-4]

groundWork and others continue to ask that question. Ebrahim Harvey is investigating the impacts on water delivery of new development policies in Johannesburg under the municipality's 'Igoli 2002' plan. The plan is controversial as it commercialises services such as water and electricity, leading to the disconnection of many poor residents who could not afford the rising costs of these services [FXI 2004]. In terms of the plan, the municipal water authority, Johannesburg Water (JW), has contracted Johannesburg Water Management (JOWAM) to provide water & waste water management services on behalf of JW. Despite its official sounding name, JOWAM is actually a private company wholly owned by Suez, a French multinational corporation. The deal has been promoted as a Public-Private-Partnership.

In March 2003, Harvey requested documentation from JW which refused it. At the beginning of 2004, Freedom of Expression Institute (FXI) launched legal action in the High Court in terms of the Promotion of Access to Information Act on Harvey's behalf to secure the documentation. In late February, JW agreed to release 3 of the 16 sets of documentation. The legal action by Harvey and the FXI in this instance is relevant in a number of ways.

In the first place, Harvey's research questions emerge from the context of struggles for access to water:

> Most of the documents requested explain the operational duties and evaluate the performance of JOWAM and JW. They will throw light on policies relating to disconnections, pricing, service priorities and plans to remove inequalities in service provision. Others will contain information regarding current inequalities in service consumption and the provision of infrastructure. Access to the documents will also allow an investigation of whether the transfer of responsibilities for water provision to contractors such as JOWAM may negatively impact on access to water, including through increases in prices for water, failures to remove inequities in service provision or through unjustified disconnections. Finally, access to the documents is necessary to investigate whether JW is fulfilling its constitutional obligation of providing access to water. [FXI 2004]

Secondly, some of the central questions - both in terms of information and documentation sought and the substantive water delivery issues - revolve around the corporatisation of Johannesburg's water provision and the role of JOWAM specifically. In refusing Harvey's requests, JW insisted that they would not release documents that contain 'confidential methodology of a third party', namely JOWAM.

> Harvey and the FXI have argued that JOWAM is not a third party under the Act. According to the Act, private companies that perform public functions are not regarded as third parties in relation to those functions. Given the fact that JOWAM performs a public function, it must be regarded as a public body for the purposes of the Act. The FXI and Mr Harvey have therefore asserted that JW's basis for refusing many of the relevant records is improper. [FXI

Finally, the legal action by Harvey and the FXI illustrates well some ambiguities and dynamics of activism in an apparently 'rights rich' constitutional context. At one level, the action is clearly an instance of using a legal basis (through the Promotion of Access to Information Act) to attempt to secure a constitutional right (in this case the right to information). But the FXI makes clear in a press statement that the legal action is intended to "secure the release of the outstanding documents and to challenge the constitutionality of the Promotion of Access to Information Act on the basis that it limits the constitutional right of access to information" [FXI 2004]. The argument here is that:

> ... if the court finds that any of the documents cannot be disclosed on any of the grounds referred to in the Act, then the Act's public interest override clause should be invoked. This clause requires the body concerned to disclose documents if two public interest requirements are met. The first requirement is that the disclosure of the document(s) would reveal evidence of either a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk. The second requirement is that the public interest in the disclosure of the record clearly outweighs the harm resulting from the disclosure. Harvey and the FXI have argued that this clause is unconstitutional. Rather the clause should ensure that only one of the requirements has to

be met for documents to be disclosed in the public interest. The Act, by stating that both requirements must be met, does not strike an appropriate balance between disclosure and non-disclosure, as the grounds for mandatory refusal are broad and the override is too narrow. If this challenge is accepted by the High Court, it will have to be confirmed by the Constitutional Court; if not, then Harvey and the FXI will be in a position to appeal against the High Court judgment in the Constitutional Court. [FXI 2004]

Civil rights and struggles for people's rights

Struggles for the realisation of material rights to a decent life are in principle given legitimacy by political and civil rights. The repressive nature of apartheid which denied the majority their basic freedoms and smashed and harassed their organisations is well known. The transition to democracy is considered by most to have marked a transition away from this repressive system to embrace a new context characterised by political and civil freedoms and rights.

This new context was symbolically highlighted in the multi-million rand opening ceremonies of new premises for the Constitutional Court at Constitutional Hill in Johannesburg in March 2004. The appalling irony is that at the same time, 52 members - including 6 children - of the Anti-Privatisation Forum (APF) were arrested and charged with participating in an illegal gathering (the charge is based on apartheid era legislation) when they attempted to protest peacefully at Constitutional Hill. APF members who followed their comrades to the police station were subsequently shot at. As the APF noted: "It is ironic that people's constitutional right to assembly and protest are being violated exactly at the time that the government celebrates these same rights" [press statement, 21 March 2004].

The suppression of dissent in post-apartheid South Africa came to global attention during the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg when a candle-light march of South African social movement activists and global allies was "violently disrupted by police recklessly throwing eight percussion grenades into the crowd and injuring at least three international visitors" [Ngwane 2003]. The marchers were trying to secure the release of activists from the LPM and APF who were being held in police cells after demonstrations the week before.

At the same time, the South African government was threatening to ban a major protest march aimed at exposing weaknesses and hypocrisy in the WSSD and highly critical of the ANC government. As it happens, public revulsion at the action against the smaller 'candle-light' march made it politically too expensive to ban the big march. The government backed down and allowed the march - but organised its own counter march on the same route on the same day under the banner of the ANC! This strategy simply reinforced the humiliation as the ANC sponsored march was notably smaller, drawing between 1,500 and 4,500 compared to the estimated 20-25,000 who marched under the banner of 'Social Movements United'.

Salim Vally introduces his recent analysis of the political economy of state repression in South Africa with reference to the events during the WSSD. He suggests that "for many foreign environmental justice activists at the WSSD the aura surrounding the post-apartheid state was sullied by both the connivance of South Africa's ruling class with big business and the extent of police brutality aimed at those who expressed dissent. ... The trumpeting of enshrined civil, political and socio-economic rights in the 'most progressive constitution in the world' sounded decidedly off-key" [2003: 1].

Although the post-apartheid era has seen the franchise and other liberal democratic rights extended to all, Vally argues that there are also major continuities in the nature of the state - and apartheid capitalism has simply changed to post-apartheid capitalism. In post-apartheid capitalism, the key roles of the ANC government are to facilitate the construction of a new African middle class with an interest in reproducing capital while also managing and dissipating discontent to secure the interests of local and international capital. In this context, rights and constitutional guarantees are tenuous and limited. They are first and foremost severely circumscribed by the socio-economic and political framework within which they exist. But they are also liable to be jettisoned in times of crisis when the state believes that the fundamental capitalist order may be under threat:

> Human rights under capitalism are ephemeral and can be undermined when they are inconvenient or when the ideological state apparatus no longer is adequate to confirm subservience to class rule. Mandel captures this well: 'The security of bourgeois political rule requires an acceptance of economic compulsion on the part of the great majority of the population who are not capitalist. This might be possible under normal circumstances. But from time to time sections of the masses rebel against the conditions of subordination, exploitation, and oppression in which they are locked. ... In order to reduce the risks or to see it through explosive moments, the bourgeoisie needs both an apparatus of repression ... and an apparatus of ideological indoctrination of the exploited and oppressed above all of the wage earning proletariat. The bourgeois state thus plays a vital role for the reproduction of capitalist relations of production, without which capital accumulation cannot take place'. [Vally 2003: 2]

In the current South African context, where capitalist democracy and limited social reforms are seen by growing numbers of people as insufficient, conditions are being created that will see more and more sectors effectively withdrawing their consent to be ruled - conditions that in turn induce a growing reliance on authoritarian rule by the state and a tighter, more restrictive definition of the 'legitimate' bounds of opposition and dissent.

Government's recent adoption of 'anti-terror' legislation is a chilling pointer to this tendency. Its timing and content clearly reflects a desire to fall in line with the United States' attempts to globalise its imperialist 'war on terror'. A range of critics within the country, led initially by the Freedom of Expression Institute but substantially broadened as resistance and criticism of the legislation grew, agree that the legislation fundamentally undermines democratic rights and civil liberties by infringing rights to association, expression, legal process and so on. Human rights advocate George Bizos, for the Legal Resources Centre, has argued that the proposed legislation is unconstitutional and could be used to muzzle political protest because the deliberately wide definition of 'terrorism' could cover ordinary political actions like protest marches, defiance campaigns, and even some strikes.

It is surely no coincidence that it is precisely these forms of political action that are most common in the activist arsenal of progressive social movements and organisations of poor and working class people. In a submission to parliament, the Congress of South African Trade Unions (COSATU) rejected the Bill pointing out that:

> U.S. President George Bush and British Prime Minister Tony Blair also use the 'terrorist threat' to justify their invasion of Iraq. Ariel Sharon, the Prime Minister of Israel, routinely refers to the leader of Palestinian Liberation Organisation, Yasser Arafat, and the struggles of the Palestinian people as 'terrorist' ... If enacted in its current form the Bill is likely to make serious inroads into Constitutional rights and freedoms. The broad definition of what constitutes a 'terrorist act' poses a serious threat to our hard won democracy, allowing for legitimate mass action by workers or other social movements at some time in the future to be demonised and categorised as 'terrorist'". [quoted in Stoppard 2003 'Anti-Terror Bill Draconian', IPS 26 June 2003]

Notwithstanding calls for the scrapping of the Bill, all the parliamentary parties approved the adoption of the Orwellian 'Protection of Constitutional Democracy Against Terrorist and Related Activities Bill' in November 2003. The Anti-War Coalition picketed parliament saying: "Today the state and all parliamentary parties are ushering in what can only be described as a permanent state of emergency, under the guise of 'defence of constitutional democracy'" [quoted in AFP 'South African parliament backs sweeping anti-terror law', 20 November 2003]. COSATU gave notice they would mobilise a national strike if the Bill were passed into law and, with national elections looming, the ANC shelved the Bill on the 27th of February 2004.[42]

[42]Personal communication, Simon Kimane, Freedom of Expression Institute.

3.3 Facing the crisis of the poor

> People have been putting their bodies in harm's way and fighting revolutionary struggles to stay in places where apartheid put them[43], to retain access to basic services like water and electricity and resist exclusion from education. Not even the most cynical anticipated that the millennial hopes that fuelled the mass and micro struggles against apartheid would be crushed this quickly and this brutally.
> [Desai and Pithouse 2003: 2]

Using people's struggles to explore the realisation of rights in our current context has exposed serious contradictions between 'rights on paper' and 'rights on the ground'. Before proceeding to consider 'where to from here?' for the environmental justice movement (in Chapter 4), it remains to draw out some provisional conclusions and consolidate some general themes.

The energy that drives so many of our contemporary struggles emerges in locations of real crisis in the lives of the poor and the vulnerable. It is they who carry the costs of capitalist 'development' while they are excluded from its benefits. As Desai and Pithouse comment: "life in neo-liberal South Africa remains, for the poor, a permanent state of emergency" [2003: 23]. As people define and articulate those struggles, the notion of rights, the idea that a decent society should organise itself first and foremost to ensure dignity and well-being for all, continues to provide a positive, mobilising and legitimating discourse. However, there is growing scepticism that liberal rights enshrined in a democratic constitution are anywhere near sufficient. Increasingly when the 'new social movements' speak of rights, they emphasise 'people's rights' to reflect the political insight that their material realisation requires going beyond the capitalist political-economy - and that they will only be secured through sustained organisation and pressure 'from below'.

This signals also the recognition that, without building new social forces that express political power, the existing balance of social forces that sustain and reproduce the status quo will remain more or less intact. Environmental justice activists now reflect with some bitterness on their experiences of taking up strategies of participation to try and resolve local crises through processes and forums where polluting industries and their allies remained firmly in the driving seat. Environmental Impact Assessments (EIAs), for example, were considered a possible strategy to give substance to people's right to participate in decision making that affects their lives and at least prevent proliferation of yet more toxic industrial sites for profit making. But EIAs are driven by the needs of industrial 'developers', facilitated by expensive consultants in the pocket of the 'developers', and undertaken within the rules set by a pro-industry capitalist government. Community based activists have found themselves nearly exhausted in the bureaucratic mazes of these and similar processes, by the weight of technical data and sheer numbers of EIAs - only to have their perspectives largely ignored and their 'participation' taken as some sort of legitimation of industrial development.

[43]The reference here is to resistance against removals by anti-eviction activists

Often occupying an intermediate space somewhere between the poor 'below' and forces of the status quo 'above' are non-governmental organisations (NGOs) which command fairly substantial organisational, material and intellectual resources. This sector is quite diverse but in general NGOs consciously shifted 'from resistance to reconstruction' and adopted a position of 'critical solidarity' in relation to the post-apartheid government. In practice this has often meant working within the broad frameworks set by government - and in some cases playing the role of an implementing agent barely distinguishable from government. An example from the water sector is Mvula Trust.

'Partnerships' have become a dominant idea in the language of the neo-liberal state and facilitate both the withdrawal of the state from social responsibilities as well as a bigger role for private capital in social services. In this approach, an 'NGO' like Mvula is presented as bringing on board 'the community'. In reality, it's operational and ideological overlap with the state (and in the case of Mvula, with the World Bank too) make it look more like a parastatal - "with a vested link to the state and the neo-liberal policies promoted by the World Bank, this organisation can be viewed as deflecting communities' attention away from the possibilities for genuine redistribution ... [and] acting to avert popular discontent away from powerful institutions" [Lumsden and Loftus 2003: 7, 8].

Not all NGOs are quite as closely and uncritically aligned to government policies as Mvula, but the danger that "civil society becomes a transmission belt for the current political and economic order" [ibid: 9] applies to all. Reflecting on similar questions in the land sector, Greenberg notes that NGOs tend to support 'developmentalism' with, at best, a mobilisation of the grassroots to access government programmes, and that this is increasingly contrasted with independent mobilisation outside the official framework of development. There is no inherent contradiction between the existence of 'civil society' and the neo-liberal project:

> In the advanced capitalist countries, civil society takes over the responsibility for providing services previously performed by the welfare state and abandoned by the neo-liberal state. In countries that never had a welfare system, civil society plugs the leaks and patches over the damage created by the most recent bout of restructuring. Not only does an autonomous practice of solidarity get converted into a social obligation but social organisation outside the state is also drained of its political content. [Greenberg 2002: 5]

Like the rights discourse itself, NGOs and civil society can play the role of stabilising and reproducing the status quo or contribute to more fundamental transformation.

Power and production

But if the realisation of people's rights demands building people's power that can start to shift existing relations of power, then it is necessary to ask 'what is the existing system of power relations?', 'what is it that needs transformation?'. The short answer is contemporary industrial capitalism and the neo-liberal state. This becomes clear from a cursory review of the factors that create the conditions against which the various struggles discussed above take place:

- The full realisation of 'people's rights' to land is impossible without a radically different set of property relations and political-economic policies and priorities. Government's land reform agenda, by contrast, is on the one hand subordinate to its agricultural reform agenda aimed at creating a capitalist agrarian economy integrated into the global economy, and simultaneously aimed at stabilising social and property relations in the countryside by deflecting and demobilising popular discontent and supporting the creation of a black commercial farming class.
- People's rights to affordable household energy and healthy and safe domestic environments are sacrificed whilst energy-intensive industries are provided with the cheapest electricity in the world. At the same time, the basis for providing services is perverted - social goods are commodified and citizens with rights to basic services are turned into consumers with or without cash.
- People's right to - and absolute necessity for - water is similarly turned into market-based transactions over a commodity. Where it is possible to make profit out if this need, 'partnerships' with private capital become the preferred mechanism - the rest who can't afford it get red lined out of the market place.
- People's rights to clean air and safe and healthy living and working environments are continually assaulted by the environmental 'externalities' of industry, where profitability is the bottom line and sets the parameters of what's possible in terms of steps to avoid ongoing pollution.
- People's rights to information are increasingly subordinate to the rights of private capital to define the scope of legitimate confidentiality and to protect 'competitive information' - even where private capital is directly impacting people's environments and/or effectively part of the machinery of delivering services.
- People's civil and political rights are circumscribed within the parameters of managing dissent and securing the broad stability of post-apartheid capitalism.

Since the specific locations of the various struggles that make up the de facto environmental justice agenda emerge in and from particular crises and injustices, these struggles often have a 'defensive' and reactive character.

> There are generally periodic mobilisations around single issues that don't develop into an ongoing mass-based confrontation with the ANC's neo-liberal juggernaut. The lack of resources and the ANC's ability to enforce repression and make strategic concessions all feed into the inability to sustain mobilisation. Moreover, for many community movements the need to fight defensive battles in courts exhausts resources ... rapidly. [Desai and Pithouse 2003: 23]

Greg Ruiters has argued that the environmental justice approach is particularly vulnerable to remaining trapped in a defensive mode "that relies too heavily on juridical definitions of justice and fails to pay adequate attention to the spatial and production sides of environmental inequalities. The emphasis (wrongly) falls on the distribution of environmental hazards; the struggle for improved regulations; stricter enforcement; and better access to information.... A deeper approach to environmental justice, however, requires a focus on the production and prevention of injustices" [2002: 112]. He comments that "since the negotiated political settlement in 1994, 'the struggle' has been straightjacketed into juridical and corporate channels" and that "[t]he new 'weapons' are, more often than not, the laws, the Bill of Rights, and the Constitution. ... Ideals of deep changes in property and social relations ... are receding" [ibid: 113].

As the struggles currently being waged for people's rights clearly demonstrate, their concrete and material realisation depends on fundamental transformation, far more radical than current government policy can offer. When particular struggles for environmental justice are understood in this context, the question must be confronted as to the place of 'rights' when they are mobilised in legalistic forms and within the bounds of liberal constitutionalism. As Ruiters remarks "the pursuit of justice through litigation and more effective regulation does not address the problem of class injustices; ... it in fact entrenches private property rights" [2002: 118].

He goes on to point out that a rights discourse can then be a double-edged sword: it can enable and mobilise but it can also have the opposite effect of weakening popular movements by allowing the exercise of rights to the degree that the state permits, thus allowing the state to define the movement's goals.

He does not suggest that legal routes to addressing environmental injustices should be abandoned, but warns that they can contain resistance against the reproduction of environmental injustice and keep it within a defensive mode that loses sight of the imperative of deeper transformation.

"Across the country community movements are linked by what Kim Voss called a 'fortifying myth', 'an explanation of defeat that linked current failure to future triumphs, keeping hope alive'" [Desai and Pithouse 2003: 23 and 26]. It is to the task of linking current struggles with future triumphs that we turn in the final chapter of this report.

Chapter 4:
Towards environmental justice

This chapter opens with a summary of the story so far, pointing up the relations of power that shape development and the ambiguities of the Bill of Rights. It then explores the challenge for civil society to work for the transformation of relations of power necessary for the material realisation of rights. It sums up the avenues for action made available within the Constitution but argues that the use of these avenues has limited meaning unless it is embedded in a broader strategy of building democratic power. Debate is at the heart of democracy, and the final sections hope to contribute to the emancipatory potential of the social movements with a reading of environmental justice that opens a path beyond distributional demands.

At an environmental justice strategy workshop, held at the Elijah Barayi Centre in Johannesburg in March, participants debated the context and content of environmental justice struggles and strategies for taking them forward. They have deeply informed the reflections in this chapter.

4.1 The story so far

South Africa's democratic constitutional order was won at considerable cost. It terminated a system of brutal repression and so represents a substantial victory for the majority of people. The institution of 'western' democracy framed by a liberal and 'rights rich' constitution marked a decisive change from the racist and authoritarian apartheid regime and a significant step forward towards greater political freedom. As is so often the case in struggles against oppression, however, what has been won is very far from what many South Africans imagined they were fighting for. The negotiated outcomes of the political transition from apartheid have been ambiguous at best in relation to expectations of a future radically different from racial capitalism under apartheid.

Apartheid not only robbed the majority of political rights and freedoms but also of access to goods, services and resources. A small racially defined minority commanded privileged access to political power and to wealth while the majority were forced to carry the social, economic and environmental costs of producing the wealth. For the majority then, apartheid was not just about exclusion from decision making: exclusion was the means by which they were dispossessed and impoverished to secure cheap labour for capital. Similarly, democracy was not an end in itself but the means by which the majority would gain freedom from want through their control of production. Thus, the Freedom Charter called for the return of the land to those who worked it and the people's control of the 'commanding heights' of the economy. These demands picked up a strand of socialist thinking within the liberation movement.

The environment was not central to the imagination of liberation. Indeed, the association of environment with conservation, and of conservation with the dispossession of land, provoked some hostility. Moreover, classical socialism assumed that the working class would inherit the modern industrial economy built by capitalism but did not question the technologies of industrial production. Nevertheless, many of the demands articulated during the 1980s responded to environmental injustice: unions demanded health and safety at work; civics demanded water, energy and waste services; and everyone demanded the total transformation of South Africa's spatial regime - an end to pass laws and urban influx controls and comprehensive redistribution of land. So in many ways, the struggle against apartheid was implicitly a struggle for environmental justice.

Shaping development

The negotiated transition was not just a compromise with apartheid's ruling elite or even with the representatives of racial capitalism. Negotiations took place in the context of profound change in the global order of power. The collapse of the Soviet Union marked the end of the cold war and left the U.S. as the only 'super power'. The victors proclaimed the triumph of capitalism and aggressively redefined 'development' in line with neo-liberal ideology. Behind the scenes at the South African negotiations, the institutions of global capital profoundly influenced the terms of the economic debate. They emphasised that 'there is no alternative' to an export oriented economy integrated into global relations of production and marketing and this message was strongly endorsed by those sectors of South African industry that saw profits in the world market. Voices representing the interests of the poor, of the black working class both urban and rural, were marginalised.

Responding to this pressure, in the six years from 1990 to 1996 dominant thinking within the Congress movement shifted from a somewhat vague social democratic commitment to the ANC led government's adoption of the neo-liberal, and misnamed, Growth, Employment and Redistribution policy. In the process, "the working class [was] forsaken as the agent of the National Democratic Revolution in favour of the state and a black bourgeoisie" [Chipkin 2003: 35]. Government's agenda for transformation has thus centred on Black Economic Empowerment aimed at creating a black capitalist class.

What remains consistent is the vision of a modern industrial economy. Yet the neo-liberal strategy accepts global, rather than national, capital as the agent of modernising development. The state's own investments are then geared to attracting capital and particularly transnational corporations (as at Coega). It was claimed that benefits to workers, to women and to the poor would then flow from economic growth. The actual effects, however, have been to expose these supposed beneficiaries to the full blast of globalisation.

Government claims that 2 million jobs have been created since 1994 and that the problem is that population growth is outstripping the demand for labour. This claim conceals a massive restructuring of labour within the regime of globalisation. Two million full-time formal sector jobs have been lost while most of the jobs 'created' have been temporary, part-time, outsourced or informal. Work has thus been made insecure, particularly for women workers. At the same time, total unemployment has grown. In 2001, "more people were unemployed [7.7 million] than were working in the formal sector [7.5 million]" [Altman 2003: 171]. Insecurity is taken home with alcohol abuse and conflicts over who spends what. The household becomes a fragile refuge, a place "to hide your poverty" [Webster 2004: 19].

If the intention was to create jobs, the strategy has failed. If the intention was to secure profits rather than the well-being of people, the strategy can claim some success. Yet it is doubtful if success, even measured in these terms, will be sustained. Webster argues that:

> ... the restructuring of work ... may result in an enclave of development in a sea of poverty and social stagnation - but it seems more likely that such an enclave itself would founder in the waves of social crisis ... [2004: 25].

The apartheid legacy of environmental injustice certainly weighs heavily on the present. Government argues that its social spending, particularly on welfare, has alleviated poverty in some degree. However, its neo-liberal growth strategy "has resulted in a gradual decline in real per capita social provisioning" [UNDP 2004: 6] and this spending is confined to 'supplementary development' while policies that define 'core development' create poverty [see Box 5: Property and development]. Indeed, core policies include such measures as cost recovery and 'public-private-partnerships' which erode even the gains of supplementary development. The delivery of services thus comes at a cost that many poor people cannot afford. At the same time, the apartheid regime's focus on capital and pollution intensive industries has been reinforced rather than challenged and poor people still live in the path of pollution. Overall then, government policies are reproducing environmental injustice.

Injustice provokes resistance. New social movements have emerged criticising government policy and demanding at the very least that the poor should have somewhere to live, that they should get affordable services and that they should not have to live with pollution. These demands point to the beginnings of a new phase of struggle for a better life for all. And they are articulated in dialogue with the emerging global movement proclaiming that 'a better world is possible', that there is an alternative to the agenda of global capital and the reproduction of injustice on a global scale. This global 'movement of movements' is actively contesting the hegemony of neo-liberalism and challenging its claim that global capitalism will 'lift' people out of poverty.

Struggle and rights

At a profound level, apartheid was based on depriving people of rights to dignity and civil freedoms and dispossessing them of social and economic rights. This provoked an intense debate on people's rights within the resistance movement. The struggle against apartheid thus became also a struggle for a democratic regime of rights.

The Constitution reflects this culture of rights in a powerful but partial way. It makes it very clear that the state has no right to abuse people and it sets up a system of checks and balances to try and prevent the abuse of power. In respect of the social and economic rights, it reflects people's deep concerns with issues such as land and housing. The precise phrasing of these rights, however, allows their realisation to be delayed in time and the Constitutional Court itself has expressed the concern that, for vulnerable people, this might lead to them being delayed forever. Nevertheless, the Court has not used the concept of a 'minimum core obligation' and its decisions do not encourage the view that government's overall priorities and budget allocations can be challenged on the basis that they inhibit the realisation of social and economic rights.

The Bill of Rights does not seem able to prevent the process whereby people are made vulnerable. This process is set in motion by capitalism and it is effectively enabled by the Property right in the Constitution. While it enables pro-capitalist policies, however, this right does not require them. It says nothing about what kind of capitalism is permissible nor would it prevent progress towards a different economic system although it might inhibit such progress. In the event, under pressure from global institutions, government has chosen neo-liberal policies which represent the harshest variant of capitalism.

Given that the environment was not central to the debate on rights, it is ironic that the Environment right does in fact provide an alternative vision of development. Even a weak reading of the right suggests that government's economic and social policies must be 'justified' on the grounds that they "secure ecologically sustainable development". If this were done, environmental issues would be addressed at the start of the economic policy and planning pipeline rather than only at the end of that pipe. It is regrettable then that government has ignored this requirement, that civil society has not challenged this dereliction and that the courts have consequently made no ruling on this.

Beyond this, a much stronger reading of the Environment right is fully justified by the wording. This is the only right that specifically obliges government to promote development. The first part of the right links environmental and social well-being, the second part reinforces this link by invoking "the benefit of present and future generations", and the final sub-clause - which indicates how government is to fulfil the right - adds the further link to economic development. Reading the two parts of the right together creates a very strong case for the idea that the Constitution requires sustainable development based on environmental, social and economic justice.

The Environment right thus creates the strongest Constitutional basis for challenging the overall direction of development chosen by government.

Since its adoption, a very wide range of legislation has been passed to give effect to the Constitution. There is considerable concern that key rights are being whittled down in the process. In particular, the Promotion of Access to Information Act and the Promotion of Just Administration Act have introduced procedures that make it more difficult to secure the relevant rights. The proposed anti-terrorism legislation has also been widely criticised as a catch all limitation on civil rights. Further, the Key Points Act has not been rescinded and has been reactivated in the context of the so called 'war on terror'. This act was used by the apartheid government to prevent public scrutiny of 'strategic' industrial plants, most of which were (and still are) large scale polluters.

On the other hand, the National Environmental Management Act (NEMA) introduces a set of legally enforceable principles that appear to endorse a moderately strong interpretation of the Environment right. The principles include environmental justice, sustainable development, people-centred development, ecological integrity and participation in governance. It also requires a range of departments concerned with development and resource management to develop environmental implementation plans and environmental monitoring plans. The Department of Finance, however, is not included. Significantly, NEMA followed from the Consultative National Environmental Policy Process which represented the high water mark for public participation in the development of policy. Yet implementation remains weak and the impact of NEMA is difficult to discern.

4.2 The challenge for civil society

What is now abundantly clear is that environmental justice, including the material realisation of people's rights, will only be achieved on the basis of a fundamental transformation of economic, social and political conditions. Participants in the environmental justice strategy workshop argued that this transformation can only emerge from struggle and that the struggles start from the everyday crisis in the lives of the poor. At the same time, they noted that many of these struggles are isolated, poorly resourced and vulnerable to repression or co-option. They concluded that it is important to think through the context, shape, direction and content of environmental justice struggles. In particular, they noted the need to:

- articulate a vision of broad transformation - creating an alternative to the capitalist imagination that sees “driving a 4x4 in Sandton” as the ultimate symbol of 'progress', while also searching out paths of change within the longer term political processes;
- expose contradictions inherent in the current order, particularly by showing the costs of environmental injustice and the people who bear those costs;

- link people's disparate issues and struggles, both locally and globally, to construct a more coherent movement against the current order and for a genuinely better, and radically different, world; and
- review the forms of struggle and the content of demands to avoid channelling people's energy and time either into dead-end reformism - which promises much but delivers only the repression of hope by deflecting popular anger away from real transformation and in fact consolidating the underlying relations of power and production - or into demanding 'rights' in a way that actually reproduces the violation of rights.

Using the Constitution

Liberal constitutionalism carries real ambiguities for transformative struggles. On the one hand the state has the function of maintaining capitalist property relations. The institutions of democracy established under the Constitution therefore function to secure political legitimacy for an economic regime that creates poverty and inequality. Activists who engage with the state therefore risk co-option. On the other hand, the Bill of Rights does speak to the experience of environmental injustice and it formally protects people's rights to organise and mobilise in defence of the rights won through the struggle against apartheid.

Below we will summarise the avenues of action offered by the Constitution, noting some of the ways in which activists can and do use them and also the manner in which these avenues are being closed in. It is vital that they are kept open and that the possibilities offered by the Constitution are actively engaged so that the effective interpretation of rights is made a matter of progressive contestation. The cost of not using the Constitution is to lose it because the power to define the meaning of rights will be left to the conservative instincts of the state and to corporate interests.

This understanding of the relation between civil society, the Constitution, and government is, as Colm Allan of the Public Service Accountability Monitor puts it, "inspired by a spirit of ... 'Constitutional fundamentalism'" [2003: 2]. This amounts to taking the Constitution at its word. In this view, civil society has not made full use of the Constitution and specifically the provisions for accountability. Constitutional mechanisms for accountability include the oversight role of parliament and the provincial legislatures, the 'Chapter 9 institutions' - the Human Rights and Gender Commissions, the Auditor General etc. - and the courts. Despite their weaknesses, or rather because of their weaknesses, civil society should build institutional relations with these bodies in order to strengthen accountability. Social activists should therefore avoid partnerships with the executive, because such partnerships tend to co-option, but should form partnerships particularly with law makers whose Constitutional duty is to represent the people. In short, CSOs should hold them accountable for holding the executive accountable for delivering on socio-economic rights. And CSOs must themselves be accountable to the people they serve to ensure the link with people's needs and demands.

In this pro-constitutional perspective, people can realise socio-economic rights if some basic conditions are met:

- People must know their rights and be able to assert them;
- They must mobilise for their rights through organisations and social movements;
- They must have access to the Courts when their rights are not realised; and
- They must have access to information in order to hold politicians to account.

Participants in the environmental justice strategy workshop noted that progressive civil society is weakly organised, poorly resourced and substantially fragmented along sectoral lines with organisations confined to working on issues like housing, land, human rights, gender and environment and not making the links between them. It is thus weakly positioned to challenge the underlying relations of power and, for the foreseeable future, the present constitutional order will produce the context for environmental justice struggles. Civil society should therefore 'walk on many legs', using and defending the democratic spaces provided by the Constitution but also mobilising demands to expand democracy, particularly into the sphere of economy.

In formal terms, the Constitution grants people rights to take action through a variety of avenues:

Demanding Information

The right to know is fundamental to any struggle for justice. As is documented in Chapter 3, information has itself become a significant site of struggle. What information is collected by the state is also significant. In many cases, departments with regulatory responsibilities do not have information demanded by civil society. Thus, the lack of credible information on pollution has been used both by industry and the state regulator to dismiss the concerns of neighbour communities as uninformed. Community monitoring - using the inexpensive 'bucket brigade' system - has substantially shifted the terms of this argument.

The state's instinct for secrecy is matched by business and industry who have used the concept of 'commercial confidentiality' to head off disclosure. This allegedly concerns information that would be of advantage to a competitor. It seems even more useful, however, in enabling industry to retain the power to decide what information it will make public.

Exercising freedom of speech

The media is central to public debate in modern societies. Since the mid-1990s, CSOs have won increased media space for industrial pollution issues, particularly where they involve major incidents. Generally speaking, publicity has proved more powerful in moving government than direct representations. The media, however, creates exclusions and well as inclusions. There is little debate on the underlying causes of environmental injustice located in the broader regime of production and people marginalised by this regime are similarly marginalised in the media.

If naming and shaming is a key strategy of CSOs, those named would rather not be. Silencing is the other side of secrecy. In 2002, Iscor sought a gagging order against local people claiming legal redress for the pollution of groundwater in the Vaal Triangle. In 2003, the managing director of the Mondi paper mill in Durban suggested that he could use personal influence with "key figures in the media" to prevent local activists publicising "information on worker injury and death at the plant" [Peek 2003: 3]. The Ministry of Defence's use of the Key Points Act around the Engen refinery potentially inhibits community monitoring and publication of the results.

Of course, governments and corporations are shamed only in so far as their actions transgress public morality or their own public claims to legitimacy. So a key part of public debate is about contesting the meaning of what is right and wrong.

Demanding just administration

According to the Constitution, people can demand written reasons for any administrative action that adversely affects their rights.

In June 2003, Durban activists took the KwaZulu Natal environmental department to court. The department had exempted paper giant Mondi from certain requirements of the EIA regulations in relation to the corporation's expansion plans. The plans included a highly controversial waste incinerator. The court found against the department and Mondi was forced to start the authorisation process from scratch.

Representatives of community organisations have also gained direct access to the annual process of licensing production at the Durban oil refineries on the basis of administrative justice.

Demanding justification

The principle that government must justify its actions - that it must be able to argue why it has taken particular decisions - runs through the Constitution. Insisting that it does so is critical to holding government to account and to contesting policy.

Economic policy has been widely contested, not least by the ANC's partners in the 'tripartite alliance'. The justification has been largely framed in neo-liberal terms, even when the neo-liberal label has been rejected, and critics have been denounced as 'far left'. More recently, government has conceded that the performance on jobs has been inadequate. The ANC's 2004 election campaign therefore promised an infrastructure development programme which it claims will create a million jobs. These jobs, however, will be temporary and short term and it is difficult to see what real difference this will make except, perhaps, to statistics. To date, civil society has not demanded that government justify economic and industrial policies on the basis of the Environment right.

Government was not, however, able to justify its position on HIV/Aids and the incoherence of its arguments was ultimately exposed in the Constitutional Court. In this case, Mureinik's assertion that "the leadership given by government rests on the cogency of the case offered in defence of its decisions" [quoted in De Waal et al 2001: 19] is vindicated.

Holding politicians to account

Environmental justice organisations have made representations to parliamentarians. Most recently, submissions on the Air Quality Bill resulted in it being held over for the newly elected parliament to decide. Organisations have also provided the environmental portfolio committee with information to support their capacity to hold the executive and the department to account.

For the most part, however, decision making power is seen to rest with the executive and its capacity to subordinate parliamentary structures was graphically demonstrated during the arms deal saga. Critical CSOs have therefore sought more direct means of holding the executive to account - through direct representations, public protest and publicity.

Going to court

The Treatment Action Campaign (TAC) took legal action to prevent mother to child transmission of HIV/Aids only when it appeared that government was determined to block a programmatic medical response. The action was particularly effective for being one element in a broader campaign founded on social mobilisation. According to National Secretary Mark Haywood:

> For TAC, litigation both emerges from and feeds back into a social context. Resort to litigation is not exclusive of other strategies. Litigation can also help to catalyse mobilisation and assist public education on the contested issues, as well as to bring about direct relief to individuals or classes of applicants. ... TAC engaged in intensive public mobilisation, attracting enormous support and media interest.
>
> However, support within TAC for a strategy of litigation could not be taken for granted. Internally numerous workshops were conducted with TAC volunteers to explain the case. Externally, and amongst some of TAC's main allies, particularly the Congress of South African Trade Unions (COSATU), there was reluctance publicly to endorse taking 'our' government to court. Therefore the right of civil society to use litigation to claim and enforce rights had to be argued in meetings and workshops against those who considered it 'disloyal' or 'unpatriotic'. [2003: 304]

Legal action is generally based on very specific issues. As a tool for change, its use rests on three strategic assumptions:

1. In terms of law, it provides specific redress for individuals or groups, and legal precedents build up over time to create new norms in the regulation of society.
2. Within civil society, people's perceptions of their rights will change so they make effective demands on the state or other social actors.
3. In formal politics, the legislature and executive will respond to 1 & 2.

Often these interventions are defensive in nature - at minimum they aim to defend people who would otherwise be exposed to harm or violation, mostly within the frameworks of the dominant development regime. Environmental justice activists have not, however, seriously explored the possibilities of strategically chosen, precedent setting legal and constitutional interventions. Such actions might aim to expand the positive content or potential of existing rights, or expose contradictions between rights and the capacity of the current order to deliver on them satisfactorily.

Despite the Constitutional commitment to equality, the Chairperson of the SAHRC remarks that, "In practice ... we have seen how those with more resources and influence have been able to use the Constitution to advance themselves while the poor and the marginalised find it difficult to access the various benefits and rights that the new dispensation offers" [SAHRC 2003b: ii]. It may be concluded that, if the democratic value of the Constitutional Court is not exercised, it will be forfeited to interests opposed to social justice.

Protest

Environmental justice protests have been directed at both industry and government. Activists celebrated the new democracy with a protest against the Engen refinery. President Mandela was visiting the plant and the protest was also an appeal to the new government. This was an optimistic moment vindicated by Mandela's immediate response. This optimism was also carried through in civil society's formal participation in the Consultative National Environmental Policy Process.

Following the announcement of GEAR in 1996, however, government was increasingly seen as part of the problem rather than the solution. Protests against the effects of this policy have mobilised people in most sectors. They have also united people on the streets, most dramatically at the World Summit on Sustainable Development (WSSD). Unity on the streets however, has not translated into organisational coherence across sectors.

Disturbingly, the Constitutional right to protest is being closed in by administrative means. Activists report that police permission for marches is being withheld from groups that do not meet with political approval, or is simply delayed long enough to disrupt organisation. The effect is to criminalise the legitimate expression of dissent. If passed, anti-terrorism legislation will add a further twist by eroding the distinction between illegal protest and terrorism. Human rights lawyer John Dugard comments, "I understand that the Government's recent decision to withhold anti-terrorism legislation until after the election is largely due to opposition from COSATU which, correctly, points out that the current proposal could be used to label unlawful strikes as acts of terrorism" [2004: 6].

Politics and power

This report has emphasised the political character of environmental justice and its location in a complex of struggles over power. The many and powerful interests that reproduce environmental injustice are ranged against the relatively weaker forces for environmental justice. Warren Buffet, the second richest man in the world, is reputed to have put it bluntly: "If there is such a thing as class war, my side is winning."

Participants in the environmental justice strategy workshop argued that civil society has given away power in favour of government. In consequence government has been able to define the arenas of struggle, framing them within a pre-defined set of assumptions. Within the limits established by those assumptions, everything can be challenged. The assumptions themselves, however, cannot be challenged or even discussed. Thus, for example, Environmental Impact Assessments (EIAs) confine discussion to the costs and benefits of specific projects, but do not permit discussion of the form of development within which the project makes sense.

Broader processes, such as Strategic Environmental Assessments (SEAs), appear to be situated at the start of the planning pipeline and to admit broader questions. The experience thus far, however, is that they too are framed by the assumption that development is defined by capital and, increasingly, by global capital[44].

Such processes are therefore already biased in favour of established power. They use up popular energy but limit its capacity to shift relations of power. In these circumstances, it is understandable that some activists are increasingly ready to reject formal participation because it yields little return on substantial investments of energy and time. Nevertheless, it cannot be assumed that people's energy can simply be transferred from formal processes to other forms of struggle that would be more productive of systemic change. Participation has provided information about issues on which ordinary people have been ready to act and it is often a last line of defence, however compromised.

As with legal action, formal participation "emerges from and feeds back into a social context" and should not exclude other strategies. To be productive, it needs to be accompanied by processes that build people's power to organise themselves, to understand and debate the developmental and environmental issues that confront them, to decide their own direction and mobilise to realise it, and to forge links of solidarity with others. This approach recognises that formal participation may provide specific points of entry into development debates but cannot be made a substitute for democratic practice.

At the same time, the frustrations of formal participation need to be used to enhance understanding rather than allowed to drain people's energies. Many people experience participation as failure because these formal processes do not result in them realising their rights. This report has argued that development produces environmental injustice, creating both wealth and poverty, and that the process of development is produced through relations of power in society. 'Failure' is then the mirror of power and can be used to examine how particular interests are embedded in development. It can be used to show why capitalist development promises what it will not and cannot deliver.

The relevance of learning from these experiences goes beyond matters of organisational strategy and activist tactics. It goes to the heart of the ambiguity between rights and environmental justice. In Chapter 2, we argued that property rights are the original social and economic rights, but that the institution of capitalist property fails to ensure 'the flow of consumable things needed to maintain life' and therefore fails the traditional test for 'the justification of property'. The inclusion of social and economic rights then becomes the alibi for the institution of property. Similarly, the liberal discourse of the 'rule of law', of the equality of all before the law and of universal rights in law, is emptied of meaning in the face of the poverty that is both created by and required for capitalist development. More, it is complicit in the process.

[44]An analysis of the south Durban SEA is given in the groundWork Report 2002, page 54ff

This does not mean that rights based demands for environmental justice are wrong. Indeed, participants in the environmental justice strategy workshop noted that when people see their needs as rights, their power grows. Rather, the limits to which demands for the realisation of rights can be satisfied within the current political, economic and legal order must be recognised. This agenda stands in contrast to the 'developmentalism' of much of civil society. Developmentalism turns rights into 'basic needs' and takes the politics out of development. It is precisely the false promise that people's legitimate expectation of a materially better life is best served within the possibilities offered by dominant interests. In post-apartheid South Africa, it serves the purpose of "absorbing the potentially threatening anti-systemic movements thrown up in the struggle against apartheid, by channelling their energies into an apolitical fight" [Greenberg 2002: 3] that leaves the foundations untouched and unchallenged.

Finally, what is learnt about the limits imposed on the realisation of rights points to the need to envision and work towards transforming relations of power. If the present order cannot deliver on the rights it promises, then people need to turn again not only to the question of what rights they are fighting for, but also to how they can institute those rights as people's rights.

Locating the environment

The idea of environmental justice is based on the recognition that the current regime of production abuses people and their environments and that the costs of environmental degradation are visited disproportionately on the poor. As noted in Chapter 3, however, addressing only the distribution of environmental abuse does not prevent its production. Nor is it sufficient to consider only the social and institutional control of production while ignoring the ecological and technological conditions that underpin environmental injustice. Doing so will yield a partial analysis and flawed strategies which, if successful, would themselves become responsible for future environmental abuse or degradation.

This report has argued that post-apartheid struggles over the use and distribution of resources are inherently concerned with environmental justice despite the fact that the environment is not always explicitly addressed. Social movements concerned with land or services are primarily focused on distribution but have created a potential social basis for a broader demand for environmental justice. This potential can only be realised if production and the environment are also brought into focus through constructive debate and in the practice of concrete struggles. Some examples may serve to illustrate the challenges and opportunities.

Land

The Landless People's Movement (LPM) represents a militant voice protesting the inadequacy of post-apartheid land reform and the ongoing denial of basic human rights to farm dwellers, farmworkers and the rural poor. Agrarian reform is critical for the environmental justice agenda because both the distribution and the productive use of land is unsustainable. Debate within land movements has foregrounded the skewed ownership of land and unequal relations of power. Environmental groups, on the other hand, have focused on production technologies, particularly genetic modification. An important aspect of this debate concerns the relation between modernising technologies and the concentration of power in the market and in land ownership. At the conceptual level, these debates are complimentary. The first challenge is to link them socially and politically.

Energy

Social movements demanding affordable (and sometimes free) access to public services are also primarily concerned with equitable distribution.

In the energy sector, the relatively high cost of electricity to poor households has been contrasted with lower costs to wealthy households and the massive discounting that subsidises heavy industries. Social movements have demanded that the flow of subsidy should be reversed to support the poor. They have also argued that, in the absence of affordable electricity, poor people are forced to rely on more affordable but dirty or hazardous energy sources such as coal and paraffin. And they have forcefully linked this with the local environmental impacts on people's health.

But the environmental justice challenge is not sufficiently addressed through a demand only for affordable access to electricity for all. Energy production and use have substantial local impacts and South Africa is already hugely implicated in the crisis of global warming. Environmental groups have called for a national focus on renewable energies, disincentives to profligate industrial energy use as well as equitable access and a commitment to household energy security. At the same time, the urgency of global warming has tempted some groups down the path of reformism.

Water

Problems of water provision parallel those of energy provision. Cost recovery and privatisation - or what government prefers to call public-private-partnerships of water services has met with stiff resistance both from municipal workers and poor citizens.

Former Water Affairs minister, Ronnie Kasrils, has made the charge that: "Attempts by misguided activists such as the [Anti-Privatisation Forum] to stop municipalities from managing their water systems will probably undermine people's water supplies and turn the hard won 'right to water' into an empty tap, the right to a healthy environment into an open sewer" [Sunday Independent, 18 April 2004].

This response itself evades some pertinent questions, including how municipalities are in fact managing the resource, the implications of privatisation, the priority for cost recovery over household water security, the use of pre-paid meters to secure cost recovery, the many empty taps at the end of existing government water projects, and a continuing bias in favour of industrial and agricultural users. Nonetheless, it does point to the necessity that demands for a rights based approach must be articulated with an environmental perspective that recognises the need to manage water as a common and limited environmental resource.

In addition to distributional issues, environmental groups have raised the debate on the large scale engineering of big dams, linking with communities dispossessed of land and, in many cases, water. The recent emergence of a national water caucus indicates that the debates on supply and distribution may yet come to be politically integrated within the social movements.

Pulling it together

In many cases, integrating these debates conceptually is not that difficult. The first challenge is integrating them politically, both within social movements and across the divide between different sectors. A second challenge is to deepen the terms of the debate. McKinley provides a good starting point. His argument is concerned with public services but can be extended to the broader regime of production and consumption:

> As long as the primary bases for the production and distribution (i.e., provision) of basic services revolve predominately around the demands and needs of a global and domestic capitalist elite, there can be no meaningful 'public' character and content to so-called 'public services'. ... Arguing for 'solutions' that are symbiotically embedded in the same contextual institutions of power and political & socio-economic processes as those we are trying to fundamentally change might well bring about better managed processes and policies that lead to short-term improvements in the lives of the poor majority. However, they cannot, and will not, bring about the structural redistribution of, and qualitative change in, ownership and resources that can re-insert the 'public' into every aspect of social relations [McKinley 2003].

This concern about the social relations of production and consumption is critical. In this account, state ownership might be preferred to privatised ownership but does not in itself equate to 're-inserting the public'. State enterprises, as they are now called, might well be used to put profits before people. Beyond this, it must be remarked that this account does not address the environmental dimension. To take this debate further, the relationship between institutional control and technologies must be addressed for social as well as environmental reasons.

For example, state ownership of large scale coal fired electricity generating plants does nothing to reduce pollution. At the same time, technology choices and managerial interests are closely entwined: these technologies are favoured by centralised managements because they require centralised managements. As is the case with Eskom, management can then monopolise strategic information on the sector and substantially define the terms of the policy debate to reflect its own interest. This interest in turn is situated by the 'minerals-energy complex' that dominates South Africa's economy and has led government to its preference for energy and capital intensive projects[45].

The current pricing of electricity thus expresses the class and political structure of South Africa's political economy. Government has consistently argued that cheap energy for big industry is a source of competitive advantage in the global market. This fits with its commitment to export led capitalist industrialisation as the 'engine' for economic growth and it appears ready to maintain this advantage at almost any cost. Present debates indicate that it may even delay, perhaps permanently, privatising Eskom on this account.

Demands for price reforms to reverse the flow of subsidies and provide affordable energy, as well as resistance to Eskom's privatisation, are certainly important. They may achieve some relief for poor people as well as an assertion of a modicum of national economic sovereignty within the global market. Nevertheless, so long as these demands are fought for within the present institutional and technological frame, they will remain defensive. And they will leave the global and national economic interests that presently shape South Africa's industrial economy to determine the limits within which price reforms can be extracted as well as society's choice of future technologies.

Additionally, the old socialist assumption that the working class should inherit the means of production developed by capitalism is untenable. Technology is not simply the neutral servant of whatever power holds sway. GMOs, for example, are patently being used as a weapon of struggle for control of global agricultural production and consumption. This struggle has many dimensions, including the competition between transnational corporations, the imperial interests of the U.S., and the interests of global capital as a whole. At the same time, the costs of research and development associated with this technology are such that it cannot be maintained without a massive concentration of power. The technology is, in a sense, the hard-wiring of power.

[45]This is discussed in more detail in The groundWork Report 2003

The South African development debate does indeed address issues of technology. In response both to the levels of unemployment and the paucity of hi-tech skills, the unions have long argued for the choice of labour intensive rather than capital intensive technologies wherever possible. Government has picked up this theme in its promise of a public works programme to develop infrastructure. This is good as far as it goes, but the debate is reduced to the issue of jobs - and dumb jobs at that, since they will be temporary, short term, ill-paid and with little prospect of skills development. A supervisor with fake leopard skin trimmings to his hat and a sjambok in his hand would complete the picture in traditional South African style.

Again the institutional and environmental dimensions are missing. These mildly reformist demands cannot raise questions about the purpose of the infrastructure or who should decide that purpose. They do not challenge the restructuring of labour within the frame of globalisation - indeed, government specifically aims to avoid interfering in the labour market by paying below the minimum wage. They do not put in question what kind of production will be supported by the infrastructure - whether it should serve global markets or the economic and environmental security of local households. They avoid any question of democratic control over technology choices, appropriate forms of 'ownership' and access to resources, or of that ecological and social sustainability which the Constitution requires as the frame of development.

Creating people's rights in environmental justice

The social and environmental context gives urgency to these questions. If they are not addressed, the gains made by the social movements or by labour are likely to blasted away by the economic pressure of globalisation or eroded to bed-rock along with the environment. The social movements have created the political space in which these questions can be debated. As suggested earlier, a first task is to link existing debates within and across sectors. The second task is to move the debate beyond reformist demands to put the radical demand for environmental justice up-front and centre-stage. This is a challenging agenda but there are some modest starting points.

The first concerns the issue that has mobilised people to take action within the social movements - the issue of people's security. The Self Employed Women's Association (SEWA) in India is an organisation of some 400,000 informal workers. It measures its activities against ten questions concerned with people's security [see Box 11]. In developing a response to natural disaster, the organisation notes that the poor understand disaster because they live in a permanent state of crisis. When disaster registers on the official scale, the poor are most exposed and hardest hit, more through the loss of livelihood rather than of possessions. Finally, there is little that is natural about most natural disasters.

Box 11: SEWA's ten questions:

1. Have more members obtained more employment?
2. Has their income increased?
3. Have they obtained food and nutrition?
4. Has their health been safeguarded?
5. Have they obtained child care?
6. Have they obtained or improved their housing?
7. Have their assets increased?
8. Has the workers' organisational strength increased?
9. Has workers' leadership increased?
10. Have they become self-reliant both collectively and individually?

Source: Vaux and Lund 2003: 141

Thus, a severe drought in rural Gujarat in 2000 was more the result of industries and commercial farmers pumping out the groundwater reserves than because of low rainfall. Indeed, it was estimated that the wells were dry in "two thirds of the settlements in the drought affected area ... even in normal times" [Vaux and Lund 2003: 146].

SEWA mobilised local members as emergency workers, defining and responding to their own needs. On that basis, it mobilised to persuade government to enter into a partnership and took over the operation of the state's emergency programme. Although SEWA's relationship with government is frequently tense, this may be taken for a reformist programme. It has, however, used partnerships with official bodies to win power over resources for its members. Otherwise it has refused them.

For the longer term, it is putting pressure on the state to partner it in disaster management based on livelihoods and water security, including support to people's 'livelihoods security funds' and measures such as household rainwater harvesting and environmental rehabilitation. The big challenge must be environmental rehabilitation. SEWA's analysis of the cause of the disaster indicates that meeting this challenge requires moving the focus up the production pipeline to confront the institutions and technologies of capitalist production. It also implies the question of what institutions and technologies would support environmental security together with collective and individual self-reliance.

A second starting point for re-inserting the 'public' into the control and management of environmental resources is to understand these resources as 'commons'[46] rather than as commodities. 'Commons' regimes are created by people rather than by the state or capital and are as diverse as the people that create them. They express and defend people's rights and responsibilities to commonly held resources and define the rules of access. These rights are inclusive and so contrast with the exclusive rights of the private property regime. The latter commodifies resources, strips away broader rights of access and ownership and makes the market the dominant (if not exclusive) mechanism of access.

For much of history, most people have related to resources through commons regimes. In modern societies, the commons has been pressed to the margins but simultaneously recreated in the in-between spaces in the centres of production and consumption. Very often, the commons is associated with survivalist strategies and equated with poverty and backwardness. This mistakes the effect for the cause. The commons looks poor because the people have been made poor but it survives because it is resilient and serves people's needs in the face of adversity. In this it is somewhat like bio-diversity - it survives in the margins where mono-cultures fail and enhances the resilience of species, collectively and individually.

This fundamental mistake is repeated in President Mbeki's metaphor of two economies - the first world market economy and the 'survivalist' economy. The metaphor serves to obscure the link between the creation of wealth and the creation of poverty so as to make the claim that the poor need development defined by access to capitalism. The social movements may prefer to consider how to expand the commons as the expression of people's rights.

A similar mistake associates the commons with environmental degradation. The economists' 'tragedy of the commons' is in fact a tragedy of open access systems pioneered by capital. Thus, fish are now taken by whoever has the most powerful boat, water is appropriated by whoever has the most powerful pumps, and environmental space is occupied by the force of economic and political dominance. This is done wherever resources cannot be defended either by states or commons regimes.

The real tragedy lies in the political subordination and destruction of people's rights vested in the commons. The broken commons becomes the scene of conflict over rights and the system of rights itself, allowing open access through the gaps. In South Africa, the rural commons has been maintained in broken form, subject to the dictates of bureaucrats and local despots, precisely to absorb the externalised costs of capitalist production. Yet commons rights are still asserted. They remain active in the social memory and imagination of future justice. The idea of the democratic commons is thus both restorative and creative.

[46]For a full discussion of the commons, see Hildyard et al. 1995

The Environment right in South Africa's Constitution, as well as certain principles enshrined in the National Environmental Management Act (NEMA), retain echoes of a commons approach. While the broader thrust of post-apartheid developmental policy has drowned these echoes, they may nonetheless resonate with and be amplified in ongoing and new struggles for environmental justice and people's rights. Many of the ordinary heroes who engage local struggles around immediate issues of rights to water, energy, land and so on, may not label their issues as environmental, nor necessarily articulate their agenda as environmental justice. But an inclusive understanding of environmental justice can contribute to building a common and broad movement that builds on these 'militant particularisms' and aims to secure the material conditions for realising people's rights to a better world.

References

Allan, C. *Accountability and social activism: A new strategy for achieving socio-economic rights in a democratic South Africa*. Paper presented at Idasa Conference on Social Activism and Socio-Economic Rights: Deepening Democracy in South Africa, 11-13 August 2003, Gordon's Bay.

Alston, D. 1993. *Environment and development: an issue of justice*, in D. Hallowes (ed), **Hidden Faces: Environment, development, justice; South Africa and the global context**, Earthlife Africa.

Altman, M. 2003. *The state of employment and unemployment in South Africa*, in J. Daniel, A. Habib and R. Southall (eds), **State of the Nation: South Africa 2003-2004**, HSRC Press.

d' Angelo, A. 2002. *Politics stands to undermine effectiveness of world summit*, Business Report, May 8, 2002.

Budlender, G. 2001. *Workshop for judges on the justiciability of economic, social and cultural rights,* New Delhi, 17 November 2001.

Butler, M. and G. Philpott, 2003, *Land in South Africa: Gift for all or commodity for a few?* Church Land Programme, Pietermaritzburg.

Chaskalson, M. 1995. *Stumbling Towards Section 28: Negotiations over the protection of property rights in the Interim Constitution*, South African Journal of Human Rights.

Chipkin, I. 2003. *The South African Nation*, Transformation, No. 51.

Christian Aid, 1999. *Who owes who: Climate change, debt, equity and survival*.

Desai, A. and R. Pithouse, 2004. *'But We Were Thousands': Dispossession, Resistance, Repossession and Repression in Mandela Park*, Centre for Civil Society, University of KwaZulu Natal.

Devenish, G. 2000. *Constitutional and political developments*, in **South African Human Rights Yearbook 1997/98**, Centre for Socio-legal Studies.

De Waal, J., I. Currie and G. Erasmus, 2001. **The Bill of Rights Handbook**, Juta.

Dugard, J. 2004. *Terrorism and Human Rights: A plea for a clearer understanding of the meaning of terrorism*, Rhodes University Centenary Lecture Series, 23 March 2004.

Fiil-Flynn, M. and P. Naidoo, 2004. *Nothing for Mahala: The forced installation of prepaid water metres in Stretford, Extension 4, Orange Farm, Johannesburg*, Public Citizen, Anti-Privatisation Forum, Coalition Against Water Privatisation.

FXI 2004. Press statement, 03/01/04, Freedom of Expression Institute, Johannesburg.

Gelb, S. 2003. *Inequality in South Africa: Nature, causes, responses*. DfID policy initiative on addressing inequality in middle-income countries.

Glazewski, J. 2002. *The Rule of Law: Opportunities for environmental justice in the new democratic legal order*, in D. McDonald (ed), **Environmental Justice in South Africa**, Ohio University Press & University of Cape Town Press.

Grain, 2003 (a). *One global patent system? WIPO's Substantive Patent Law Treaty*, at www.grain.org downloaded 30 March 2004.

Grain, 2003 (b). *Farmer's privilege under attack*, at www.grain.org downloaded 30 March 2004.

Greenberg S. 2002. *Making rights real: Where to for the South African landless movement after the WSSD?* Pan African Programme on Land & Resource Rights 3rd workshop, Nairobi, Kenya, 18-20 November 2002.

Greenberg, S. 2004. *'If we are going to take the land, how must we do it?': Maureen Mnisi of the LPM interviewed*, Debate 10: Mind the Gap, May 2004.

The *groundWork* Report 2003: *Forging the Future: Industrial Strategy and the making of environmental injustice in South Africa*, (by) David Hallowes and Mark Butler, *groundWork*.

Haywood, M. 2003. *Preventing Mother to Child Transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health*, South African Journal of Human Rights, No.19.

Hildyard, N., L. Lohmann, S. Sexton and S. Fairlie, 1995. *Reclaiming the Commons,* paper presented to annual Conference of the Political Studies Association of the United Kingdom, York. Corner House.

International Institute for Sustainable Development (IISD), 2001. *Earth Negotiations Bulletin: International Conference on Funding for Development*, 17 October 2001.

Keating, M. 1993. **The Earth Summit's Agenda for Change: A plain language version of Agenda 21 and the other Rio agreements**, Centre for Our Common Future.

Lahiff, E. 2003. *The politics of land reform in Southern Africa*. Sustainable Livelihoods in Southern Africa Programme.

Lumsden, F. and A. Loftus 2003. *Inanda's struggle for water through pipes and tunnels: Exploring state-civil society relations in a post-apartheid informal settlement*. Centre for Civil Society, Research Report 6.

McDonald, D. 2002 (a). *What is environmental justice?*, in McDonald, D. (ed) 2002. **Environmental Justice in South Africa**. Ohio University Press and University of Cape Town Press, Athens and Cape Town.

McDonald, D. 2002 (b). *Up Against the (Crumbling) Wall*, in D. McDonald (ed), **Environmental Justice in South Africa**, Ohio University Press and University of Cape Town Press, Athens and Cape Town.

McDonald, D. 2002 (c). *The bell tolls for thee: Cost-recovery, cut-offs and the affordability of municipal services in South Africa*. HSRC.

McKinley, D. 2003. *The crisis of public services in Southern Africa*. Paper prepared for Conference on 'Managing public goods in favour of the people', Rosa Luxemburg Foundation, Johannesburg.

Macpherson, C.B. 1978. *The Meaning of Property*, in Macpherson (ed) **Property Mainstream and Critical Positions.**

Marais, H. 2001. **South Africa Limits to Change: the political economy of transition**, Zed Books & UCT Press.

Maré, G. 2003. *The state of the state*, in J. Daniel, A. Habib and R. Southall (eds), **State of the Nation: South Africa 2003-2004**, HSRC Press.

Meiksins Wood, E. 2003. **Empire of Capital**, Verso.

Ministry of Finance (MoF), 1995. *Growth, Employment and Redistribution: A macroeconomic strategy*.

Peek, B. 2002. *Doublespeak in Durban: Mondi, waste management, and struggles of the South Durban Community Environmental Alliance*, in D. McDonald (ed), **Environmental Justice in South Africa**, Ohio University Press and University of Cape Town Press.

Peek, B. 2003. *Access denied*, groundWork Newsletter, March 2003.

Pithouse, R. 2004. *Water disconnections: the saga continues*, Municipal Services Project Newsletter No.4, February 2004.

Ruiters, G. 2002. *Race, place and environmental rights: A radical critique of environmental discourse*, in D. McDonald (ed), **Environmental Justice in South Africa**, Ohio University Press and University of Cape Town Press.

Sachs, W., H. Acselrad, F. Akhter, A. Amon, T. Egziabher, H. French, P. Haavisto, P. Hawken, H. Henderson, A. Khosla, S. Larrain, R. Loske, A. Roddick, V. Taylor, C. von Weizsacker, S. Zabelin. 2002. *The Jo'burg Memo: Fairness in a Fragile World: Memorandum for the World Summit on Sustainable Development*, Heinrich Boll Foundation.

Samson, M. 2003. **Dumping on Women**, South African Municipal Workers Union and Municipal Services Project.

Simms, A. 2001. *Ecological debt: Balancing the environmental budget and compensating developing countries*. International Institute for Environment and Development (IIED) pamphlet for the World Summit on Sustainable Development.

South African Government (SAG), 2003. *Towards a ten year review*.

South African Government (SAG), 2004. **South Africa Yearbook 2003/2004**.

South African Human Rights Commission (SAHRC), 2003 (a). *Fourth Annual Economic and Social Rights Report: 2000-2002*.

South African Human Rights Commission (SAHRC), 2003 (b). *Inquiry into Human Rights in Farming Communities*.

South African Human Rights Commission (SAHRC), undated. *Socio-economic rights; Know your rights*.

Steffen, W., A. Sanderson, P. Tyson, J. Jager, P. Matson, B. Moore, F. Oldfield, K. Richardson, H. Schellnhuber, B. Turner, R. Wasson, 2004. **Global Change and the Earth System: A planet under pressure**, The IGBP Series, Springer Press.

Turok, B. 2002. *Battle for the WSSD: Valli Moosa, Minister of Environment, talks to Ben Turok*. New Agenda, Issue 8, Fourth Quarter 2002.

United Nations Development Programme (UNDP), 2004. **South Africa Human Development Report 2003: The challenge of sustainable development in South Africa: Unlocking People's Creativity**. Oxford University Press, Oxford.

United Nations Environment Programme (UNEP), 2002. **Global Environment Outlook 3**. UNEP & Earthscan.

Vally, Salim 2003. *The political economy of state repression in South Africa*. Education Policy Unit, University of the Witwatersrand.

Vaux, T. and F. Lund, 2003. *Human security of working women: Response to crisis*, in L. Chen, S Fukuda-Parr and E. Seidensticker (eds), **Human Insecurity in a Global World,** Global Equity Initiative, Harvard University Press.

Webster, E. 2004. *Making a living, earning a living: the changing nature of work in South Africa*. Rhodes Centenary lecture, 21 April 2004.

Whyte, Anne V. (ed), 1995. *Building a New South Africa: Volume 4: Environment, Reconstruction and Development: A Report from the International Mission on Environmental Policy*, International Development Research Centre.

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