A new tradition in legislating

The South African government has created a new tradition in drafting and processing legislatior through parliament. This tradition manifests itself in the drafting of half-baked legislation with littl or no regard to the provisions of the constitution and then fighting a huge public outcry against t legislation on the grounds that it is unconstitutional.

By Owen Dean 4 Oct 2012

In some instances, the government then concedes that aspects of the legislation are unconstitutional and seeks to undertake the revision of that legislation on the floor of parliament in an attempt to circumvent the claims of unconstitutionality. In many, if not all, cases, the problems are not completely removed and give rise to the possibility of the legislation becoming the subject of litigation before the Constitutional Court at enormous cost to all parties concerned, including, and most of all, to the South African taxpayer. This tradition of legislating is not welcome. By and large the government adopts the departure point that it is the fountain of all knowledge on what is constitutional and what is not and pooh poohs the views of independe experts.

Constitutional transgressions

Glaring examples of this new tradition in legislating are the Protection of State Information Bill (the so-calle "Secrecy Bill"), the Traditional Courts Bill, and the Intellectual Property Laws Amendment Bill (referred to a the "Traditional Knowledge Bill"). There has been much debate in parliament and in the media about these bills and their constitutional transgressions.

It seems that in the case of all three of the mentioned bills, the government appears to have another or second agenda. It is widely believed that a principal objective of the Secrecy Bill is to silence media comment and criticism of actions and circumstances that do not stand up well to public scrutiny. In the cas of the Traditional Courts Bill and the Traditional Knowledge Bill, the objective of the government appears t be to ingratiate itself with traditional leaders and peoples living in rural circumstances. The forthcoming elections for the leadership of the ANC and the parliamentary elections in 2014 may be in the background this objective.

The Traditional Courts Bill and the Traditional Knowledge Bill have in common that their effects will be to place traditional leaders and rural peoples in a favoured position and one that is at variance with the norma laws that apply to the remainder of the population in their fields of application. In so doing, they ride roughshod over individual rights that are protected in the constitution. There can be little doubt that these t bills, in their present form, are at variance with the constitution and ought to be struck out by the Constitutional Court if they come before it.

In both instances there have been strong pleas from interested and knowledgeable parties that the bills should either be abolished or radically redrafted so as to rid them of their iniquities. In the case of the Traditional Courts Bill, parliament is still grappling with this dichotomy. On the other hand, in the case of the Traditional Knowledge Bill, parliament went ahead regardless and, spurning informed comment, passed th bill last year. Thereupon it proceeded to the State President for signature and assent. The shortcomings c the Traditional Knowledge Bill and its harmful effect on intellectual property law were discussed in an earlie article on this blog under the title "Mad Hatter in Wonderland".

Declined to assent

To his credit, the State President has, perhaps, paid greater heed to the serious objections voiced against the Traditional Knowledge Bill and it has now been announced that he has declined to assent to it and has referred it back to parliament. This development is as welcome as it is unexpected.

The official notification issued by the government in regard to this development states that the bill has been sent back to Parliament on the following grounds:

- "(i) The Bill ought to have been referred to the National House of Traditional Leaders as required in terms of Section 16 of the Traditional Leadership and Governance Framework Act, 2003
- (ii) The provisions of the Bill will affect certain matters listed in Schedule 4 of the constitution (which are not necessarily the main subject matter of the Bill), in particular, traditional leadership and cultural matters, and should therefore be dealt with in terms of Section 76 of the Constitution."

President Zuma is quoted as saying in this regard: "I have considered the Bill, the submissions and the legal opinion on the matter. I am of the view that the Bill as it is now cannot be constitutional."

One cannot but question why parliament, and in particular the Trade and Industry Portfolio Community, to whom these arguments and others castigating the Bill on its merits were advanced ad nauseam by a multitude of different parties, could not have reached the same (correct) conclusion. With respect, the Trade and Industry Portfolio Committee (with the notable exception of those members representing opposition parties) displayed an inability and/or unwillingness to give proper attention and weight to the comments and objections to the Traditional Knowledge Bill that were placed before it and it displayed arrogance in dismissing out of hand the clamour of critical views expressed to it by acknowledged experts in the field of the intellectual property law (after all what do they know about the subject?!).

A fundamental re-evaluation

When parliament reconsiders the Traditional Knowledge Bill at the behest of the State President, it ought to subject the Bill to a fundamental re-evaluation. It should be chastened by the vote of no confidence in it on this issue expressed by the State President. Furthermore, it should ask itself whether, now that the intellectual property legal experts have been shown to have been correct in their criticism of the Bill on constitutional issues, they might perhaps also be equally correct in their unequivocal condemnation of it or its substantive merits (it has variously been politely described inter alia as fundamentally flawed and as inoperable).

Is there not a salient lesson to be learned from this episode, namely that in a highly technical and esoteric field, there is a lot to be said for paying due regard to the views of the experts? Above all, the government should give serious consideration as to whether the objectives of the Bill, both the stated and unstated one can remotely justify doing inestimable harm to intellectual property law in South Africa. In the long term, the harm done by the Bill to intellectual property law will greatly outweigh the perceived short-term benefits and expediencies of the Bill.

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