Part 22

Bad law

By Ian Cox

I have said that the Alien Invasive Species regulations are unlawful and consequently not worth the paper they are printed on. This is by no means an isolated case. In fact I think there is good reason to be concerned that a great deal of what passes for environmental law making is also unlawful and thus "not worth the paper" it's printed on. Indeed I expressed the view early on in these articles - see **"**The importance of participation" – that "we have a bit of a crisis on our hands".

I intend looking deeper into more of these bad laws in the next few articles. These will include the recently promulgated Marine Threatened and Protected species regulations, the recent amendments to the Cites Regulations as well as the provision in the National Environmental Management Act that allows for warrantless searches.

This is a small selection of obvious cases selected from what is a distressingly long list of environmental laws that are probably bad.

My focus, as usual will be a constitutional rights based one that drives home the serious differences that exist between what the Constitution and the law require DEA to do and what DEA is actually doing.

However I need to explain how the law deals with bad laws before I do this. I need to do so for two reasons. First readers need to know that the mere fact that a law is bad does not mean that one may legally ignore it. The second is to explore the flip side of that coin which is that the consequences of enforcing bad laws are equally dire.

The legal position regarding the enforceability of bad laws is simple enough. Our courts have consistently ruled ever since the decision in the Oudekraal case those laws apply until they are set aside. This applies even where there was deliberate law breaking or malfeasance in the making of the law.

The operation of the Oudekraal rule means that you must first successfully challenge a law if you want to avoid it being applied against you. A claim that a law is invalid is not in itself a defence to a charge brought in terms of that law. This is why those charged with crimes sometimes seek to delay the prosecution of these cases so that they can challenge the legitimacy of the underlying law. A number of alleged cases of rhino poaching are being delayed as a consequence of this.

Our courts normally set aside bad laws ab initio, that is from the beginning, as if the law had never happened. However this is not always the case. The Constitution gives courts discretion to limit the retrospective effects that normally flow from setting aside a bad law.

Courts apply this discretion sparingly in cases where real harm or injustice will result. They refused to do so in the case of the rhino horn moratorium despite the fact that a number of people had already been arrested, charged and in some cases convicted for contravening the moratorium.

It is unlikely that a court will ever exercise this discretion where there has been deliberate wrong doing on the part of the law maker or where constitutional safeguards, such as the right to consult, have been ignored. This is because our courts take the view that the state is under a higher duty "to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights". Courts also are generally revolted by the notion of convicting people in terms of law that are themselves unlawful.

But this does not mean that law makers should take a chance in the hope they will get away with it. The limitation of liability against damages claims arising out of loss or damage airing from the exercise of state power do not apply where the cause of that lose arises from unlawfulness, negligence or bad faith. It follows therefore that the risk of the state and officials being sued personally for damages arising from the enforcement of unlawful environmental laws is very high indeed.

This is the flip side of the coin that requires the public to obey bad laws until they are set aside.

It is not good enough for officials in DEA to simply apply laws they know are bad because those laws are still law. The Constitutional Court had occasion to look at this in the pension's pay-out case. The Minister's failure to address the Cash Paymasters problem could result in her being held personally liable for costs. She could not just carry on regardless as she did. She should have remedied the problem timeously or if this was not possible she should have approached the court timeously for appropriate interim remedial relief.

Officials who knowing enforce bad environmental laws on the basis they are still officially law are not only doing wrong, they expose themselves and the state to massive claims in damages.

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