Constitutionality of the South African state's software procurement "policy"

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April 20, 2011[1]

Abstract

A government department has issued a document purporting to set out software policy for the entire South African Government. As a procurement policy it shows overwhelming preference for F&OSS. If this document correctly reflects government procurement policy for software there can be little doubt, based on international precedent, that this policy is unconstitutional.

1 PROBLEM

A government department issued a document purporting to constitute *Policy on Free and Open Source Software use for [the] South African Government* (F&OSS 2006).[2] This was not the first 'policy'[3] document on the subject.[4] The 'policy' relied on Cabinet resolutions[5] as authority. It can be argued, although this is not clear, that some of the specific policies contained in the F&OSS (2006) document subsequently have been translated into legislation.[6]

In common with much of the free and open source software debate, the F&OSS (2006) document is unclear in many regards. It suffers from a problem of interpretation; much of what the document says is

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1 This article has benefitted from comments received at a number seminars and meetings arranged by the Free Market Foundation including a *Colloquium on Government's Software Procurement Policy* April 19, 2011 Pretoria University; the 4th IP Indaba held at the Sandton Indaba 26th November 2010; and a conference on the 29th April 2010.

2 F&OSS (2006) 'Policy on Free and Open Source Software use for [the] South African Government' Department of Public Service and Administration, August 2006.

3 The word policy is in inverted commas because the basis of the policy is numerous cabinet resolutions. It is unclear what the constitutional status of a cabinet resolution is. In theory if the cabinet decision is to be implemented as binding on the country it should be translated into legislation. The matter if to be binding on the country should progress from the Cabinet to a Bill placed before parliament and then passed as valid legislation. Besides the uncertain nature of a Cabinet resolution, problems of interpretation and enforcement of a Cabinet approved document also arise. It should be noted that South Africa is not alone in recent years of working via Cabinet minutes.

4 'Open Software and Open Standards in South Africa - a critical issue for addressing the digital divide' National Advisory Council on Innovation January 2002 Version 1.0; revised 2004 (v2.6.9).

5 The matter has been approved by the Cabinet at least three times 2002, 2003 and 2007. The Statement on Cabinet meeting of 21 February 2007 notes the 'Cabinet approved a policy and strategy for the implementation of Free and Open Source Software (FOSS) in government. All new software developed for or by the Government will be based on open standards and government will itself migrate current software to FOSS. This strategy will, among other things, lower administration costs and enhance local Information Technology (IT) skills. The meeting noted that all the major IT vendors in the country have both supported the initiative and made contributions to the development of FOSS. Government departments will incorporate FOSS in their planning henceforth. By April 2007, a project office will be set up by the Department of Science and Technology, the Council for Scientific and Industrial Research (CSIR) and State Information Technology Agency (SITA) to ensure smooth implementation of FOSS throughout the country.'

6 Intellectual Property Rights from Publically Financed Research and Development Act 51 of 2008.

unclear. It is unclear as to who is responsible for policing the policy, if indeed it is to be policed or who is supposed to be bound by the policy; or if indeed the document merely defines general government policy; or if the document defines government procurement policy. For example, the document was issued by the Department of Public Service and Administration but, does this mean that other departments including the Department of Defence also are bound by the policy?

Some of the policy provisions of the F&OSS (2006) document taken individually or several read in conjunction with each other can be interpreted as embodying state procurement policy for software. This article accepts as a point of departure that F&OSS (2006) *inter alia* defines government procurement policy and this paper examines the constitutionality of this procurement policy. As such it can be said the 'policy' mandates that the government show overwhelming blanket preference for Free and Open Source Software (F&OSS) over Priority Software (PS). Since the document is unclear some may argue that it does not define government procurement policy but is merely a general guide. But this argument is not persuasive since, even if correct, in the absence of clear guidelines on how to interpret the document, many government officials who are responsible for software procurement will accept that it defines government procurement policy and that they are bound by this policy.

This paper attempts to crystallise some constitutional aspects of this 'policy' assuming that the document defines procurement policy.

The F&OSS debate is complex and can be viewed from a number of different perspectives. But when it comes to procurement of goods or services the debate has to be cast in a property rights and a contractual framework. The issues can then be cast in a constitutional framework which allows for a resolution. Within this framework the state is involved in two separate capacities. Firstly, the state operates as the state [state *qua* state], ie the body which exercises executive authority within the country in terms of the Rule of Law. In this capacity it also influences the appropriate laws or the rules of the game. The second capacity is the state as a consumer [state *qua* consumer] and as such a consumer of software. The state is probably the largest single consumer of software products; contracts of the order in excess of R1bn are not unknown within state entities. Many of these contracts are now known to be fraught with irregularities.

2 STATE *QUA* STATE

2.1 Central purpose of the state as the state – protection of life, liberty and property?

In the modern state, especially an African state, it is not at all clear what the central purpose of the state is. Historically philosophers and economists had a clear idea of the purpose of the state. The English philosopher John Locke (1632-1704) expressed this role as, 'The great and chief end ... of men's uniting [to form a state] is the preservation of their property.'[7] Historically, then the preservation of life, liberty and property is the central purpose of the state.[8] In the modern state there may be different and often conflicting agendas. It is doubtful whether citizens of modern states see the purpose of the state as that of protecting life, liberty and property. Since the time of Locke many states have become socialist concentrating more on re-distribution than the protection of property. At the extreme there is the communist state which in theory does not recognise private property, let alone protecting it. Many

7 *Second Treatise of Government*: Chapter 9.
8 Locke makes it clear when he refers to property in the sense used in the quotation he is referring to life, liberty and property.

African states, if not most, are by nature kleptocratic which in essence is the antithesis of protecting private property.[9]

2.2 Origin of property rights

Locke's view of the origin of property rights is important. Starting from basic principles Locke argued that property is the product of human endeavour. He wrote, 'The labour of his body, the work of his hands, we may say, are properly his.'[10] What man creates, that he owns. What he owns he can exchange in an exchange economy via contract. The state therefore has a duty to protect the fruits of human endeavour and contracts.

2.3 Purpose of the state defined in the constitution

The purpose of a state may be gleaned from its constitution. It is by no means clear that the South African Constitution does in fact set-out to protect or in fact protects ownership of property. S25 which forms part of the Bill of Rights states, 'no one may be deprived of property except in terms of a law of general application'. This section does not state that everyone has an inalienable right to life, liberty and property. In fact it contains the assumption that the state can, and indeed should, take property but must do so in terms of laws of general application. The Constitution institutionalises an attack on private property, as indeed all socialist provisions must, with a host of socialist entitlements; s26 the right to housing, s27 the right to health care, food and social security; s29 the right to basic education and further education. As Milton Friedman pointed out there is no such thing as a free lunch. All these free things can only be provided if the property of some other members (or even all members) of society is taken. It is by no means clear that a state which is focussed on taking property can at the same time protect property. As is often pointed out 'No man can serve two masters.'[11] For the purpose of the paper, however, it is assumed that the historical position applies in South Africa; a fundamental purpose of the state, as contained in its Constitutions is to protect life, liberty and property in terms of laws of general application. Laws which are of general nature are neutral and impartial. If they were not, they would not be of general application. As noted below the specific provisions of the Constitution endorse this view.

2.4 Conclusion

The state *qua* state is the protector of rights, and in the commercial context especially property rights including the right to contract. The state in this role should be impartial (neutral) protecting the rights of all to trade impartially through law and the courts enforcing the rights of contract, permitting free trade to take place.

3 STATE *QUA* CONSUMER

The state is not only the protector of constitutional rights it is also a purchaser, and, in this case the purchaser of software goods and services. The state as consumer may however not compromise its role as state *qua* state. This may well be forgotten or overlooked in the F&OSS debate. In order to understand the state procurement debate the history of the development of software as goods and services must be understood. It is this aspect which is now examined.

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9 Concerning the kleptocratic nature of African states consult, D Acemoglu, T Verdier and JA Robinson (2004) 'Kleptocracy and divide-and-rule: a mode of personal rule' Alfred Marshall Lecture, *Journal of the European Economic Association* 2 (2-3); Roger Southall (1999) 'Re-forming the State? Kleptocracy and the Political Transition in Kenya' *Review of African Political Economy* 79.

10 Locke's view is recognized in much of modern legislation protecting intellectual property. This legislation is aimed at protecting individual works.

11 Matthew 6:24.

3.1 Historical development of Open Source Software issues

With this background the issue of Free and Open Source Software[12] can be examined.[13] To isolate the issues the history of software market and procurement should be understood. Because the computer is historically speaking a modern phenomenon, the history is within the memory of many living today. Initially, compared to current position, there were very few computers. Those which did exist were large and very expensive, which explains the then low number of computers. The programmes used to run computers were not regarded to be of any significant commercial value. Programmes were written by a few professional programmers and academics who freely exchanged information and ideals and tools of the trade with each other working towards a common goal, providing the ultimate efficient programme. The more successful the programme was the more convincing it was that the expense of the computer could be justified and the more computers would be sold. Programmes were not the end to the means but the means to the end – the means of selling expensive efficient workable computers. There was a free exchange of programmes; free in the sense of uninhibited, and at the time also free of charge. So, one can say software development started in the Open Source mode.[14] Programmers were more than happy to exchange the code they had written, the tools of the trade they had used and specifically algorithms.[15] The growing widespread use of computers required a common platform and interchangeability. Programmers could reduce their own workload and increase their efficiently if programmes were interchangeable and programmers co-operated with each other. All this favoured an open source culture. However a different idea was evolving; that programmes were products in themselves which could be sold and rights to programmes including source code protected.[16]

The nature of computing had radically changed, post 1980s, with the development of the internet and the advent of personal computers (Konovalov 2002:8;13). Now instead of a few expensive computers the world used millions of inexpensive computers. Each inexpensive computer required software to run the computer, the operating system, and software applications for specific applications. Software became a product to be purchased and sold; proprietary software. And so the current situation was reached where software is a product capable of being sold and owned.

More recently the business model for priority software has developed to include the notion of leasing of software. The owner of the software, in receipt of the leasing (or licensing) fee continues to develop the software product and provides regular updates. In the case of the Microsoft latest Operating System (OS) say Windows 7 the programme is updated every few days. This process obviates the need for a final programme to be designed and released. The owner of the software uses the regular income to fund the further development of the software.

A different view has evolved about software, that it is not a product to be owned and sold. According to this view more efficient programmes could be made available as a result of worldwide collaboration by programmers working as a community, generally free of charge, which could compete and undermine proprietary software. An example of this is Linux, an open source operating system which can compete

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12 Open-source may be described as follows: 'The most basic definition of open-source software is a software programme for which the source code is available. The price of the software is irrelevant to this definition', Konovalov (2002:5).

13 The Free in the phrase does not mean Free of charge but Free as in the expression Freedom of Expression.

14 'IBM's mainframes originally all ran open-source operating systems, which IBM would collaborate on with its clients.' Konovalov (2002:13).

15 Much the same system exists today with academic research - free collaboration exists around the world between academics Konovalov 2002:6.

16 The protection of the rights was evidenced by the *AT&T v Berkeley* litigation.

with Microsoft's Windows programme. The advocates of Free and Open Source software hold source code should be distributed as part of freedom of expression and as such the supplier of the software should hand over the source code when use of the programme is acquired. Once the codes are received the receiver is then free to change and develop the code as he or she thinks fit. It is, so the argument goes, via a huge worldwide collaborative network of independent programmers the best software programmes can be developed.

If this history is understood then the proposal to have free and open source software is but a return to the beginning – free and open source is where programming all started.

There are thus two different views, ownership of software (Proprietary software) and Free and Open Source Software. It is not unusual or unhealthy for different systems to spontaneously evolve and exist. These two systems can co-exist. What should not happen is coercion for or against either system.

3.2 State as purchaser of software

The state as a purchaser should be seeking the best deal in a competitive world.[17] To do this it issues a tender and the best deal contained in the tender should win the contract. In this sense, the purchase of software is no different to the purchase of other goods or services.

However, when it comes to the purchase of software, an extraordinary event occurred, which, before the issue of the tender, favoured open source. The fact that the cabinet made these decisions indicate that the state is not neutral but that the state should prefer one over the other; Free and Open Source Software (F&OSS) over proprietary software. No logical reason for this decision can be identified. If one tender offer is better than the other this will be apparent from the tendering process and the best will be chosen. There is no need to have a policy prejudging the outcome. Almost always, when one product is discriminated against by decree, it is because that product is inferior. If this were not the case, the decree would be unnecessary. The superior product would drive the inferior product out of the market.

4 CONSTITUTIONALITY OF THE PROCUREMENT POLICY

4.1 Provisions in the SA Constitution

There are probably more provisions in the Constitution dealing with the State *qua* Consumer than there is dealing with the State *qua* State and it can be argued that the provisions dealing with the State *qua* consumer are probably far less contentious. S2 makes it clear that the Constitution is the supreme law and binds the state. The prime function of the constitution is vertical. S7 (part of the Bill of Rights) binds the state, individuals and companies. S9 holds that everyone is equal before the law, the right to equal protection and benefit of the law and specifically may not unfairly discriminate directly or indirectly. S33 holds that everyone is entitled to administrative action which is lawful reasonably and procedurally fair. The state therefore, as a consumer, has a constitutional obligation to act impartially in accordance with the law and especially in accordance with the precepts of the constitution. There can be little doubt that the policy to prejudge and favour one product over the other is unconstitutional. If the state favours one over the other, the state is not neutral in the purchase process but discriminates against propriety property seller. The mere decision to favour one over the other is an unjust administrative action. The discriminatory practice cannot be justified in terms of any of the constitutional grounds to do so; the

17 The position of the F&OSS debate in South Africa is set-out by Lerner and Herman (2005).

discriminatory practice does not fall within the exceptions contained in s36 of the Constitution which allows discrimination as argued below.

s9 Equality

(1) Everyone is equal before the law and has the right of equal protection and benefit of the law.

The cabinet policy means that Proprietary suppliers are not equal with Open Source suppliers, nor do proprietary suppliers have the equal protection and benefit of the law. The right to trade is one of the oldest rights but if the cabinet policy is accepted, the proprietary suppliers will have no right to trade, let alone equally. As indicated the policy prejudges the tender adjudication. The Proprietary suppliers' offer is not open to consideration, let alone impartial consideration.

(2) Equality includes the full and equal enjoyment of all rights and freedoms.

The cabinet policy precludes proprietary suppliers the freedom to trade, let alone on an equal footing.

(3) The state may not unfairly discriminate directly or indirectly against anyone ...

Clearly the cabinet policy discriminates against proprietary suppliers.

s22 Freedom of trade, occupation and profession

As indicated one of the oldest commercial rights is the right to trade, recognised in terms of s22 of the constitution. If the policy as a procurement policy is implemented the right to trade would be denied to Proprietary Suppliers.

s33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

It can be argued that the decision of the cabinet constitutes administrative action taken against proprietary suppliers. As such it constitutes unjust action. The rules of natural justice would have to be applied. The suppliers would have to be given written notification of the proposed decision, an opportunity to respond and so on. Any unilateral decision by the government to favour one supplier over another, before the tender stage, is in all probability a breach of the Just administrative action of the Constitution.

s195 Basic values and principles governing public administration

(d) Services must be provided impartially, fairly, equitably and without bias.

As pointed out the policy, as a procurement policy, *prima facie*, clearly is not impartial, not fair, not equitable and not without bias.

s217 Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

It should be clear that the cabinet 'policy' is unfair, inequitable, not transparent, anti-competitive and unlikely to be cost effective.

4.2 International experience

Putting out a government document giving an advantage to F&OSS software is not unique to South Africa. A similar thing has happened in many governments around the world. Since constitutional provisions, in nature protecting rights, are fairly similar it is not surprising to note that the pro-F&OSS policies have been challenged in various parts of the world.[18] Rather than carrying out a detailed analysis of the South African Constitution, highlighted above conclusions arrived at in international jurisdictions will be noted.

In Brazil the matter went beyond a dubious 'policy' document. The state legislature of Rio Grande do Sul passed a law giving preference to F&OSS software. The policy was challenged and in April 2004 the Brazilian Supreme Court voted unanimously to bar enforcement of the law Sieverding (2008) summarises the Court's decision as follows:

> 'Thus, the Court concluded, the law interferes with constitutionally mandated principles of equal treatment and non-discrimination. ... The Court also made clear that determination as to the superiority of one product over another must be made on a case-by-case basis and that before-the-fact preference would not be tolerated.'

In 2006, the city of Rio de Janerio unpersuaded by the Supreme Court's ruling decided to pass an OSS Bill. It was vetoed by the Mayor. The city then overturned the Mayor's veto and the Bill became municipal law. The Mayor filed a Claim for the Declaration of Unconstitutionality with the state court. In May 2007, unsurprisingly, the Court of Appeals unanimously held that the OSS preference law was unconstitutional (Sieverding 2008).

A similar outcome happened in Belgium. In February 2003 the Budget Commission of the Assembly of the French speaking community of Brussels adopted a pro-OSS policy. The President of the Assembly requested a legal opinion of the Belgian Supreme Administrative Court on the pro-OSS policy. The Court had no difficulty in deciding that the policy violated a whole range of constitutional provisions. Sieverding (2008) summed up the import of the Court's decision as follows:

> "The Belgian Supreme Administrative Court opinion made clear that such [pro-OSS] procurement decisions must be made on a case-by-case basis."

It is not constitutionally possible to prejudge the tender process.

It is not necessary to examine all jurisdictions which have considered pro-OSS policies. That pro-OSS

18 For a detailed discussion of legal challenges see Sieverding (2008).

policies are unconstitutional is accepted in most (if not all) jurisdictions and countries have adjusted their pro-OSS policies to take constitutional issues into consideration. It can be argued that pro-OSS policies are not only bad law, they are also bad policies. Sieverding summarises the world-view as follows:

> "However, governments around the world ... as well as leading scholars and institutions ... have increasingly concluded that procurement preferences for specific technology solutions or software licensing/business models, whether overt or implicit, are bad public policy and do not reflect the realities of the current IT marketplace."

4.3 Conclusion regarding the policy and the constitution

It is doubted if anyone will seriously contest the proposition that the cabinet 'policy' as a procurement policy, if implemented would be unconstitutional.

5 POSTSCRIPT: INTERNATIONAL CONSIDERATIONS – REGULATORY CAPTURE

It should be pointed out that the debate between Proprietary Software and F&OSS is not a domestic debate. It is very much an international debate of which South Africa plays but a small part. This in and of itself is a matter of concern. The issue becomes a politicised issue much in the same way that the environment and Climate change issues are politicised issues.

If the software debate is reduced to a matter of property rights and the constitutional protection of these rights then it does not matter in which jurisdiction the debate takes place the same conclusion, if the debate is engaged impartially, will be reached. The state may not discriminate in favour of one system against the other. The two suppliers should be allowed to trade neutrally in the market place. The market will determine which is preferable. This may result in the driving out of F&OSS but the view has been expressed that the two will co-exist for a long time. Those who favour the F&OSS over PSS and fear that PSS will drive out F&OSS then seek state intervention. Without state intervention, so the fear goes, the one will drive the other out. The motivation for this state intervention must be the fear that PSS will drive F&OSS out of the market. If state intervention supports F&OSS over PSS then the sceptre of regulatory capture emerges which is more often than not the purpose of regulation.

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