

MEMORANDUM V

SECTION 6 AMENDMENT: CAPE COMMITTEE RESPONSE TO ISSUES RAISED BY DURBAN CHAPTER IN THE MEETING HELD ON 26 MAY 2008 DETAILED IN MEMORANDUM IV AND TO THE CONSTITUTIONAL ISSUE RAISED AT THE 2008 AGM

The constitutional issue

1. David Gordon has drawn attention to s 39(1) & (2) of the Constitution and emphasises that any amendment of s 6 will have to comply with the Constitution. It is pointed out that those sections provide for the application of international and foreign law and that other legislation may not alter or diminish these supreme directions. The enquiry is whether a provision making English law compulsorily applicable does so.
2. Section 39 (1) of the Constitution provides that in interpreting the Bill of Rights a court must consider international law and may consider foreign law. Section 39 (2) provides that

When interpreting any legislation, and when
developing the common law . every court
. must promote the spirit, purport and objects
of the Bill.

The requirements that a court must consider international law and may consider foreign law apply to the Bill of Rights and not to any legislation. Section 39 (2) merely provides that in interpreting any legislation a court must promote the spirit, purport and objects of the Bill.

A court is not in terms required to consider (and presumably apply) international law or foreign law in respect of ~~any~~ legislation and a provision making English law compulsorily applicable to certain matters does not therefore oust or diminish the provisions of s 39.

3. It accordingly seems to me that the constitutional provisions which David Gordon has asked us to consider do not render the existing section, or any amended section in terms of which English law is compulsorily applicable, unconstitutional and liable to be struck down.

The fundamental decision

4. On the basis that the Durban proposal is not contrary to the above constitutional provisions, the fundamental question which arises is whether modern English law should be compulsorily applicable or whether, apart from retaining existing law, we should avoid being inexorably bound by English law for ever and a day, but may in the future, where appropriate, deviate from it in the development of our own law. I have no doubt that we should adopt the latter alternative rather than the former which is represented by the Durban draft. The latter alternative can be achieved in two ways, either by a draft along the lines of the draft originally put forward by the Cape and Durban committees (reflected in Annexure ~~A~~q to Memorandum I) or, as suggested by John Hare, by simply repealing the existing section 6.
5. On neither of the two occasions when this Association considered the form which the section should take (see paras 6 and 11 of Memo I) was there any suggestion that the modern English law should be made compulsorily applicable. On the contrary, on both occasions a discretionary approach providing for the development of our own law was advocated. The South African Law Commission in its Report in 1982 adopted that approach. The

wholly different approach reflected in the existing section which was simply thrust upon us, was not recommended by this Association.

6. Nevertheless, if good reason exists to depart from the approach originally adopted by this Association and the South African Law Commission in 1982 and again by this Association in 1988, there is no reason why we should not do so. My own view is that there is no good reason to depart from this approach and there is good reason not to perpetuate the present situation where English law in its entirety simply becomes our law in respect of the great majority of the heads of jurisdiction. I deal below with what appears to me to be the respective merits of the two approaches represented by the draft which flowed from the Durban workshop and the draft set out in Annexure A to Memorandum I. The latter view, as I have said, which eschews the wholesale adoption of modern English law as our law, can also be achieved by simply repealing s 6 - an approach also canvassed by me below.

7. It seems to me that a decision must be made in regard to this fundamental issue before further progress can be made and a draft settled.

The Durban draft

8. This draft fails to address the main defect in the section as it has been interpreted - the application of English law in its entirety as opposed to the application of English *admiralty* law. In Memorandum IV the apparent justification for this is the view that in most instances the courts will not be called upon to apply English law at all, but will simply be called upon to apply the proper law or the law chosen by the parties in their contract. This overlooks two aspects. First, in contracts other than contracts of carriage there may well be no nomination of the law to be applied in the event of

dispute. Second, in local contracts where there is no significant foreign element, private international law and the question of a proper law does not arise at all, and English law will simply have to be applied. Thus, for example, as previously pointed out, if goods are supplied by a South African supplier to a South African ship pursuant to an order made by or on behalf of a South African owner in respect of a local voyage, not only would the English admiralty remedies be applicable but the underlying contract would be governed by English common law. Thus, for example, the English law of consideration, agency, the passing of ownership and misrepresentation would apply - a result which the parties would never have intended. Moreover, local delicts would be governed by the English common law and the South African law of quasi-contract would not apply. All this is clearly untenable. Moreover, I do not subscribe to the view that the existing section has not given rise to significant problems. Having to delve into English common law in respect of a transaction or event which is entirely local (as we have had to do up till now) seems to me to be so artificial and unsatisfactory as to constitute a significant problem with the application of the existing section.

9. The Durban draft envisages that it is English law as it existed in 1983 which must be applied, that is, English law as it existed some 24 years ago. Practitioners using modern English text books will increasingly in the future have to make sure that statements as to what the English law *is* correctly reflects what the law *was* in 1983. This may become an increasingly confusing and time consuming task which we should not inflict upon ourselves and future practitioners. (By contrast the determination of the limited *general principles* of English *admiralty* law as at 1890 - the suggestion in the draft in Annexure A to Memorandum I - is, as pointed out below, easily ascertainable.)

10. There is a related difficulty. The Durban workshop felt that in making English law applicable this should exclude English statutes. However, English common law in particular is interlaced with statutory amendments to that law (misrepresentation affords a good example). South African practitioners would have to ignore the statutory provisions and ignore modern English cases reflecting those provisions, and would have to ascertain what the English common law was prior to the particular statutory modification. This problem will, with the passage of time, become more acute. Again, should we inflict this upon ourselves and future practitioners?
11. If an attempt is made to alleviate the difficulty referred to in paragraph 9 above by incorporating English law as it exists from time to time but excluding statutory law, this will serve to exacerbate the problem referred to in paragraph 10 above.

The Durban Workshop's response to the draft annexed to Memorandum I as Annexure Aq

12. The view was expressed that it would be difficult, if not impossible, to identify and apply the general principles of admiralty law applicable in the Republic prior to the commencement of the Act i.e. the general principles of English admiralty law prior to 1890.
13. I wonder if this represents the considered view of the more experienced practitioners. Prior to 1890 admiralty law in England was at its formative stage. The general principles of that law were relatively confined, were related to the limited heads of jurisdiction then existing, are well documented in the numerous relevant texts which exist, represented the law in this country prior to the commencement of the Act and form the basis of the more complex modern English Admiralty law. I have difficulty in appreciating why it is thought to be more

difficult to ascertain the English admiralty law existing immediately prior to the date of the commencement of the Act than the more developed English admiralty and common law in existence at the date of its commencement. We as practitioners have, in relation to the existing Act, never had any real difficulty in determining the jurisdiction existing prior to 1890. There can be even less difficulty in establishing the general principles of admiralty law applicable to that jurisdiction. In this regard it is important to note that Annexure A does not simply require the application of these general principles. It requires their application together with the application of these principles in the Republic since the commencement of the Act, thus preserving existing case law and providing, essentially, a continuum without any real disruption of the *status quo*.

14. Memorandum IV refers to the disappearance of the admiralty courts after 1875. It is not spelt out how this was thought to be relevant or to detract from the draft in Annexure A. I can only assume that the point sought to be made was that the choice of the English law prior to 1890 as a springboard for development is not entirely appropriate because of common law influence between 1875 and 1890. If this is so, the point is not, in my view, well made. The changes which accrued between 1875 and 1890 because of common law influence related to practice and procedure. It was only in 1892 with the advent of an admiralty judge with an almost exclusively common law background that the substantive law took a direction which changed the nature of the action *in rem*. I do not know of any notable substantive change to admiralty principle as a result of common law influence prior to 1890. (See generally Wiswall, *Development of Admiralty Jurisdiction since 1800* and 1982 *Acta Juridica* 36.)
15. With regard to the notion that South African courts may develop, supplement or modify the general principles of admiralty law, there was apparently some concern expressed at the Durban workshop as

to whether or not this provision infringed constitutional provisions to the effect that courts cannot create law but can only interpret what the legislature enacts. Specific provisions were not mentioned and I am not aware of any. It is true that our constitution is based on a general separation of powers - the legislature enacts and the courts interpret. But notwithstanding this, and despite the old maxim *judicis est ius dicere non facere* it is generally now accepted that in the exercise of their judicial function judges do and can legitimately make law. The duty of the courts to develop the common law is moreover specifically provided for in s 8 (3), s 39 (2) and s 173 of the Constitution. The latter section provides that the Constitutional Court, the Supreme Court of Appeal and the High Court have the inherent power to develop the common law taking into account the interests of justice. I have little doubt that s 173 envisages the development of our common law to cover both the abrogation and supplementation of the existing law so as to modify it. That being so, I can see no reason why our courts should be precluded from doing so in respect of the law referred to in the draft contained in Annexure A. In the circumstances, it seems that the concern expressed at the Durban Workshop is not well founded.

16. While I accordingly do not think that the criticisms of the draft in Annexure A expressed at the Durban Workshop are well founded, it does not follow that this draft is necessarily the answer. There may be other and better drafts which achieve the same result. But for reasons already given my view at this stage is that it is infinitely preferable to the Durban draft which does not address the main difficulties with the existing section and plays down its drawbacks.

John Hare's Proposal

17. John Hare has suggested that the existing s 6 should simply be repealed.

The question which this suggestion gives rise to is on what basis would existing admiralty principles remain applicable? While this *lacuna* initially struck me as a very real problem, it can be argued that we will not be left with an insurmountable *lacuna*. Existing case law, while no longer binding, would be persuasive and would in practice be followed. The Act uses the phrases *action in rem* and *maritime lien* and refers to various heads of jurisdiction in existence prior to its commencement. The courts, as a matter of interpretation, could be expected to give those and similar concepts the content and meaning they had at the date of the commencement of the Act. My difficulty with John's suggestion has, however, always been that in the absence of a statutory provision making some other law applicable, the old Roman-Dutch maritime law, however incomplete, would remain part of our law. It is however arguable that as Roman-Dutch law has since 1983 been ousted in respect of the great majority of the current heads of jurisdiction, and the Act provides for English law concepts and remedies, Roman-Dutch law has been abrogated by disuse, at least in respect of those heads of jurisdiction and in respect of the competing Roman-Dutch remedies such as the various hypothecs enforceable against ships. (Compare Hosten *et al* *Introduction to SA Law and Legal Theory* 236 *et seq.*) The other aspect is that some may feel that John's suggestion in leaving the court to deal with the *lacuna* created by the repeal of the section will create too much uncertainty.

18. Unfortunately there was no time to debate the amendment of s 6 at the 2008 AGM. I thought, however, that it would be helpful if I set out my present views in regard to the Durban response in order to provide focus on the fundamental decision referred to in paragraph 4 above and the essential issues to be debated.

GYS HOFMEYR

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28 August 2008