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CASE NOTE

The Law Applicable to Demand Guarantees and Standby Letters of Credit

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1 INTRODUCTION

The commercial letter of credit was first employed by merchants to effect payment and to finance their transactions in the early part of the nineteenth century.[1] Since then, the law of documentary credits has developed mainly through practice and customary usage.[2] Therefore many of its operative rules, irrespective of geography or legal system, have emerged from the customs of bankers dealing with importers and exporters, and with shipping and insurance companies. Since 1933,[3] the International Chamber of Commerce (hereafter "ICC")[4] has drafted and issued Uniform Customs and Practice for Documentary Credits (hereafter "UCP").[5] The UCP[6] is a set of rules issued and regularly revised by the ICC. The UCP was last revised in 2007.[7] In the 1980s, the ICC promulgated the first version of the UCP (1983 version) to provide that the UCP would also apply to standby letters of credit, to the extent to which they may be applicable to standby letters of credit. In 1993, the ICC revised the 1983 version and promulgated the 1993 version with a similar scope provision.[8] The 1993 version was similarly revised and promulgated in 2007.

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1 For a discussion of the history of commercial letters of credit, see Hugo *The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (LLD-thesis, University of Stellenbosch, 1996) ch 2, 51–75.

2 Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 2ed (2006) 306.

3 See *ICC Publication* No 82, Paris (1933).

4 See also part 2 1 below.

5 When reference here is made merely to "the UCP" it does not refer to a specific version thereof.

6 For a discussion of the UCP, see part 2 2 below.

7 See Gorton "Draft UNCITRAL Convention on Independent Guarantees" May 1997 *Journal of Business Law* 240 242 and Van Niekerk and Schulze 306. See also Jeffery "The New UCP 600" 2008 *Banking and Finance Law Review* 189.

8 Dolan "The UN Convention on International Independent Undertakings: do states with mature letter-of-credit regimes need it?" 1998 *Banking and Finance Law Review* 1 2.

Besides this, the ICC has also introduced other uniform rules that may apply to demand guarantees[9] and standby letters of credit,[10] namely the Uniform Rules for Contract Guarantees (hereafter "URCG"), the Uniform Rules for Demand Guarantees (hereafter "URDG")[11] and the International Standby Practices (hereafter "ISP98"). In addition to these rules, the United Nations Commission on International Trade Law (hereafter "UNCITRAL") has adopted a universal legal framework for demand guarantees and standby letters of credit called the "United Nation's Convention on Independent Guarantees and Stand-by Letters of Credit" (hereafter "UNCITRAL Convention" or "the Convention").[12]

General sources of the law of commercial and standby letters of credit and demand guarantees, due to their highly international nature, are also often international banking practice and usages in international trade.[13] These are often set out in the abovementioned rules issued by the ICC.

In most countries, both of common and civil law origins, there are no explicit statutory rules for demand guarantees and standby letters of credit.[14] Therefore, disputes must primarily be addressed under explicit contractual provisions, unwritten rules, principles of contract and commercial law and case law.[15]

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9 A "demand guarantee" is usually a concise and simple instrument issued by a bank (or other financial institution) under which the obligation to pay a beneficiary a fixed or maximum sum of money arises merely upon the making of a demand for payment in the prescribed form and sometimes also the presentation of documents as stipulated in the guarantee within the period of validity of the guarantee (see Warne and Elliott *Banking Litigation* 2 ed (2005) 277; Kurkela *Letters of Credit and Bank Guarantees Under International Trade Law* 2 ed (2008) and O'Donovan and Phillips *The Modern Contract of Guarantee* English Edition (2003) 525). See also the definition of a demand guarantee in art 2(*a*) of the Uniform Rules for Demand Guarantees (*ICC Publication* No 458, Paris (April 1992)).

10 Although the standby letter of credit is in essence the same type of instrument as the demand guarantee (see Oelofse *The Law of Documentary Letters of Credit in Comparative Perspective* (1997) 62), the standby letter of credit has a very different historical development than the demand guarantee. Standby letters of credit were developed by banks in the United States as an extension of the idea of the traditional (commercial) letter of credit that has been used in international sales contracts (see Bertrams *Bank Guarantees in International Trade: The Law and Practice of Independent (First Demand) Guarantees and Standby Letters of Credit in Civil Law and Common Law Jurisdictions* 3 ed (2004) 2). Banks in the United States developed the use of standby letters of credit as a result of the accepted construction of the United States' National Bank Act of 3 June 1864 (as amended) which precluded United States banks from giving guarantees as part of their banking business. As United States banks were initially not permitted to issue guarantees, they adopted the term "standby letter of credit" to avoid the language of guarantees (Bertrams 5–6). Although standby letters of credit were initially developed in the United States, they are now used worldwide.

11 When reference here is made merely to the "URDG" it does not refer to a specific version thereof.

12 See Xiang Gao *The Fraud Rule in the Law of Letters of Credit: A Comparative Study* (2002) 15.

13 Ellinger "The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions" 2007 *Lloyd's Maritime and Commercial Law Quarterly* 152.

14 Schwank "Electronic international bank guarantees and letters of credit" 1991 *Comparative Law Yearbook of International Business* 317 320.

15 De Ly "The UN Convention on Independent Guarantees and Stand-by Letters of Credit" Fall 1999 *International Lawyer* 831 833.

However, owing to the highly international nature of demand guarantees, standby letters of credit and commercial letters of credit, certain individual countries have introduced special legislation governing these instruments. Usually where there is any legislation in this regard in a country, with the exception of art 5 of the Uniform Commercial Code (hereafter "UCC") in the United States, "it tends to consist of only a few provisions often of a general nature".[16] In the United States, art 5 of the UCC specifically governs commercial letters of credit. Disputes relating to the United States' standby letters of credit are also decided under art 5 of the UCC.[17]

Another important source of the law of demand guarantees and standby letters of credit in certain jurisdictions is case law. Also often supplementary to the law in this area are legal writings.[18]

There is a lack of legislative regulation for demand guarantees and standby letters of credit in South Africa. Therefore, in this article attention is given to the possible sources of law for demand guarantees and standby letters of credit. Due to the highly international nature of these instruments specific attention is also given to all the international rules that are available for incorporation into demand guarantees and standby letters of credit by the parties to these instruments.

2 RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE

2 1 Introduction

In light of the highly international character of the market for demand guarantees and standby letters of credit, and the possibility of regulatory competition between various countries, there have only been a few initiatives at the national (domestic) level to create regulations. Therefore, initiatives have mainly been developed at the international level where a distinction should be made between self-regulation and official regulation. As regards the former, one should concentrate on the uniform rules promulgated by the ICC.[19]

In 1919 a few business leaders founded the ICC. The ICC is an international, non-governmental organisation consisting of thousands of member companies and associations from over 130 countries. It operates through its numerous specialist commissions based in Paris and through its national committees[20] in all major capitals, and collaborates with their membership to address the concerns of the business community and to put across to their government the business views formulated by the ICC. The ICC's aim is to promote an open international trade and investment system and the market economy worldwide. One of its most vital functions is to harmonise international trade practices through uniform rules and trade terms incorporated into contracts and through the publication of guides devoted to specific fields of activity or specific problems areas. In other

16 See Xiang Gao 15 and Schwank 1991 *Comparative Law Yearbook of International Business* 320.
17 Xiang Gao 15.
18 *Ibid*.
19 De Ly Fall 1999 *International Lawyer* 834.
20 For details on the ICC's national committee in South Africa, see the official website of the South African Chamber of Business http://www.sacob.co.za (accessed 17-03-2010).

words, it represents the diverse interests of the world business community and makes rules that govern the conduct of business globally. The ICC is the international business organisation and it is the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. It also provides essential services, the most important among them being the International Court of Arbitration. Within a year of the creation of the United Nations, the ICC was granted consultative status at the highest level with the United Nations and its specialised agencies.[21]

Some of the universal rules (standard guidelines) promulgated by the ICC have become cornerstones of international commercial law and, as such even indispensable. One such set, discussed below, is the UCP (1993 revision, hereafter "UCP 500").[22] It is also expected that the same success will be achieved with the latest 2007 version. However, as will be seen from this discussion, not all the ICC's projects have been successful. A few have been only slightly significant.[23]

2 2 Uniform Customs and Practice for Documentary Credits[24]

2 2 1 Introduction

Owing to the international character of documentary credits (ie. commercial letters of credit), there have been various attempts in the past to create uniform rules governing documentary credits. Pioneering efforts were made on a national basis from as early as the 1920s in the United States, Germany, France, Norway, Czechoslovakia, Italy, Sweden, Argentinia, Denmark and in the Netherlands.[25]

The 1929 Congress of the ICC held in Amsterdam initiated the first real international attempt at standardising commercial letters of credit. This attempt proved to be unsuccessful as the ensuing regulations were adopted only in

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21 See *ICC Publication* No 645, Paris (2003) "ICC at a glance" 101; Goode "Abstract payment undertakings and the rules of the International Chamber of Commerce" 1995 *Saint Louis University Law Journal* 725 and Van Niekerk and Schulze 274. See also the official website of the ICC http://www.iccwbo.org (accessed 17-03-2010).

22 While the 1993 version of the UCP (hereafter the "UCP 500") was in operation, it was incorporated into a vast majority of commercial letters of credit issued worldwide (see Van Niekerk and Schulze 274).

23 Ellinger "British business law: banking law" 2005 *Journal of Business Law* 704.

24 For a comprehensive discussion of the development of the UCP from the beginning until the 1993 version, see Hugo "The development of documentary letters of credit as reflected in the Uniform Customs and Practice of Documentary Credits" 1993 *SA Merc LJ* 44; and Hugo *The Law Relating to Documentary Credits* 77–128 and for a brief discussion, see Van Niekerk and Schulze 274–275. On its legal nature see Stassen "The legal nature of the Uniform Customs and Practice for Documentary Credits (UCP)" 1982 *Modern Business Law* 125–138; Hugo "The legal nature of the Uniform Customs and Practice for Documentary Credits: lex mercatoria, custom, or contracts?" 1994 *SA Merc LJ* 143 and Van Niekerk and Schulze 275–277. For a publication that contains all the rules of the UCP from the earliest rules to the current 2007 revision ("UCP 600") and which provides a brief history of the development of the rules, see Tayler (ed) *The Complete UCP: Texts, Rules and History 1920–2007* (2008) *ICC Publication* No 683, Paris.

25 See Ellinger "The Uniform Customs – their nature and the 1983 Revision" 1984 *Lloyd's Maritime and Commercial Law Quarterly* 578; and Ellinger "The Uniform Customs and Practice for Documentary Credits – the 1993 Revision" 1994 *Lloyd's Maritime and Commercial Law Quarterly* 377–378.

Belgium and France. Later, in 1933, the ICC in Vienna made another attempt and issued the first version of the UCP.[26] This was considered to be the first important step towards achieving uniformity in the field of international letters of credit. The 1933 version of the UCP, which formed the basis for subsequent revisions, was adopted by bankers in some European countries and on an individual basis by some banks in the United States. However, banks in the United Kingdom and most Commonwealth countries refused to adopt it.[27]

For the next few years there were no significant developments until the 1933 version of the UCP was revised and a new version adopted in 1951.[28] This version was adopted by bankers of various jurisdictions in Europe, Asia, Africa and the United States. However, bankers in the United Kingdom again rejected this version, although "many Commonwealth banking communities toed the line".[29]

In 1962 the UCP was revised again.[30] One of the main purposes of this revision was to evolve a system that could be applied universally. To this end, it was necessary to adapt the UCP to the needs of Britain and Commonwealth countries. The 1962 revision accomplished this breakthrough. This version solved most of the specific problems that had been the cause for the rejection of the 1951 version by banks in the United Kingdom. The 1962 version was adopted by all the previous participants, as well as by the banks in the United Kingdom and the Commonwealth of Nations.[31]

Technological advances, in particular the far-reaching container revolution and the entry of new banks into the market led to a further revision of the UCP in 1974.[32] The UNCITRAL assisted the ICC with this version. Banking organisations in socialist countries, which were not members of the ICC, made contributions through an *ad hoc* Working Party.[33] The 1974 draft was a considerable improvement on earlier versions. The 1974 version was adopted by banking organisations and individual banks in nearly 170 countries. This version attained world-wide acclaim and undoubtedly became the cornerstone of the law pertaining to letters of credit.[34]

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26 *ICC Publication* No 82, Paris (1933).

27 Ellinger 1984 *Lloyd's Maritime and Commercial Law Quarterly* 579; Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 378 and Van Niekerk and Schulze 274.

28 *ICC Publication* No 151, Paris (1951). For a critical analysis of this version see Mentschikoff "Letters of credit: the need for uniform legislation" 1956 *University of Chicago Law Review* 571.

29 Ellinger 1984 *Lloyd's Maritime and Commercial Law Quarterly* 579. See also in particular Ellinger's discussion of the objections raised by the banks in the United Kingdom against the 1951 version of the UCP (579–580) and Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 378–379.

30 *ICC Publication* No 222, Paris (1962), which was effective from 01-07-1963.

31 See Xiang Gao 16; Ellinger 1984 *Lloyd's Maritime and Commercial Law Quarterly* 580; Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 379 and Van Niekerk and Schulze 274.

32 *ICC Publication* No 290, Paris (1974), which was effective from 01-10-1975.

33 See the introduction to the 1974 version of the UCP (*ICC Publication* No 290, Paris (1974)).

34 See Ellinger 1984 *Lloyd's Maritime and Commercial Law Quarterly* 578 and 580; Xiang Gao 16; Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 379–380 and Van Niekerk and Schulze 274. For a further discussion of the 1974 version of the UCP, see

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In order to keep up with changes in the law relating to letters of credit and further developments in technology, it was necessary to revise the UCP again in 1983 ("UCP 400").[35] The UCP 400 widened the scope of their application and introduced changes necessitated by technological developments. The 1983 version specifically extended the scope of the UCP to cover standby letters of credit. Article 1 of the UCP 400 provided that their articles would "apply to all documentary credits, including, to the extent to which they may be applicable [to] standby letters of credit". The 1983 version of the UCP was the first to indicate expressly that it applied to both commercial letters of credit and standby letters of credit. The UCP 400 was adopted by banking associations and individual banks in more than 160 countries.[36]

A few years later, in 1993, the ICC again revised UCP 400 in an attempt to address new developments in the transport industry and new technological applications. This revision was also intended to improve the functioning of the UCP. In the past the UCP was a product of bankers, but with the 1993 revision it was the first time that law professors and lawyers also participated in the revision process.[37] The ICC promulgated the revised version as UCP 500.[38] The UCP 500

Jhirad "Uniform Customs and Practice for Documentary Credits, 1974 Revision: The Principle Emendations of the 1962 Text" 1976 *Uniform Commercial Code Law Journal* 109 and Wheble "Uniform Customs and Practice for Documentary Credits (1974 Revision)" 1975 *Journal of Business Law* 281.

35 *ICC Publication* No 400, Paris (1983) (hereafter the "UCP 400"), which was effective from 01-10-1984. For a comparison with the 1974 Revision, see Wheble *ICC's Documentary Credits: UCP 1974/1983 Revisions Compared and Explained ICC Publication* No 411. However, for a full discussion of the 1983 version of the UCP (ie, the "UCP 400") see Ellinger 1984 *Lloyd's Maritime and Commercial Law Quarterly* 578; Schmitthoff "The New Uniform Customs for Letters of Credit" 1983 *Journal of Business Law* 193; Cannon "The Uniform Customs and Practice for Documentary Credits: the 1983 Revision" 1984 *Uniform Commercial Code Law Journal* 42; Byrne "The 1983 Revision of the Uniform Customs and Practice for Documentary Credits" 1985 *Banking Law Journal* 151; Del Busto "Operational Rules for Letters of Credit: effect of new Uniform Customs and Practice Rules" 1985 *Uniform Commercial Code Law Journal* 298; Kozolchyk "The 1983 UCP Revision, trade practices and court decisions: a plea for a closer relationship" 1984 *Canadian Business Law Journal* 214; Wayne "The Uniform Customs and Practice as a source of documentary credit law in the United States, Canada, and Great Britain: a comparison of application and interpretation" 1989 *Arizona Journal of International and Comparative Law* 147; Chapman "The 1983 Revisions to the Uniform Customs and Practice for Documentary Credits" 1985 *Commercial Law Journal* 13; Harfield "An agnostic view" 1990 *Brooklyn Law Review* 1; Šarčević and Volken (eds) *International Contracts and Payments* (1991) (contribution No 4); Rosenberg "The Law of International Documentary Credits: Principles, Liabilities and Responsibilities" 51 and Lipton "Uniform regulation of standby letters of redit and other first demand security instruments in international transactions" 1993 *Journal of International Banking Law* 402.

36 See Xiang Gao 16–17 and Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 381.

37 See Xiang Gao 17 and Buckley "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" 1995 *Journal of Banking and Finance Law and Practice* 77.

38 *ICC Publication* No 500, Paris (1993) (hereafter the "UCP 500"). The use of UCP 500 was – just as for the previous revisions of 1962, 1974 and 1983 – recommended by the UNCITRAL (see UNCITRAL Doc A/CN.9/395 of 29-04-1994 and XXV UNCITRAL YB 1994 28). For more discussion about the UCP 500 see, Buckley 1995 *Journal of Banking and Finance Law and Practice* 77; Buckley "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" 1995 *George Washington Journal of International Law and Economics* 265; Goode 1995 *Saint Louis University Law Journal* 725; Goode

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came into effect on 01-01-1994. The UCP 500 applies to all documentary credits, including to the extent to which they may also be applicable to standby letters of credit where these are incorporated into the text of the credit. If UCP 500 is incorporated into the text of the credit, it is binding on all parties thereto, unless otherwise expressly stipulated in the credit.[39] Therefore, like their predecessor from 1983,[40] UCP 500 also applies to standby letters of credit, provided that the UCP is at all applicable (usually incorporated by reference). Until 30-06-2007, the UCP 500 was the latest version that was in operation.

In May 2003, the ICC authorised the ICC Commission on Banking Technique and Practice (hereafter "the Banking Commission") to begin a revision of the UCP 500. The general objective was to address developments in the banking, transport and insurance industries. The Banking Commission appointed a Drafting Group to do the revision. A second group, known as the Consulting Group was also established that reviewed and advised on earlier drafts submitted by the Drafting Group. A draft version was sent out to all the national committees of the ICC during 2005 and their comments had to be submitted before 05-11-2005. A full draft was again sent out to the national committees during March 2006. A meeting was scheduled in Vienna during May 2006 to discuss the revised UCP. Final comments on the draft revision were due in June 2006 whereafter a final draft was compiled during July/August 2006.[41] On 25-10-2006 the Banking Commission, by a unanimous vote (this included the South African National Committee's vote), approved a final version of the UCP.[42] This latest revision (the 2007 version), which came into effect on 01-07-2007, is commonly referred to as the "UCP 600".[43] It is understood that this

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"Abstract payment undertakings in international transactions" 1996 *Brooklyn Journal of International Law* 1; Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 377; Dolan "Weakening the letter of credit product: the new Uniform Customs and Practice for Documentary Credits" 1994 *International Business Law Journal* 149; Kozolchyk "Towards new customs and practices for documentary credits: the methodology of the proposed revision" 1993 *Commercial Law Annual* 371; Hugo "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" 1996 *SA Merc LJ* 151; Oelofse "Developments in the law of documentary letters of credit" 1996 *SA Merc LJ* 56; Oelofse "Developments in the law of documentary letters of credit" *ABLU* 1995 (a paper delivered at the 1995 Annual Banking Law Update held at the Indaba Hotel, Johannesburg) (unpaginated) and Van Niekerk and Schulze 274–277. For a detailed comparison of the UCP 500 and the UCP 400 see Del Busto *Documentary Credits: UCP 500 and UCP 400 Compared* (*ICC Publication* No 511, Paris (1993)).

39 See art 1 of the UCP 500.

40 For a comparison of the 1983 version ("UCP 400") with the 1993 version ("UCP 500") see Ellinger 1994 *Lloyd's Maritime and Commercial Law Quarterly* 377.

41 Oral presentation made by Smith "UCP 600 Topics" at the Institute of International Banking Law and Practice Inc's *2006 Annual Survey of Letter of Credit Law and Practice* held in Miami, Florida on 01-03-2006. Smith was also a member of the Consulting Group which worked on the revision of the UCP 500. See also the Electronic Newsletter *Letter of Credit Update* (LCU) (21-03-2006) Issue 4 issued by Institute of International Banking Law and Practice Inc 1.

42 See Note "Reflections Prior to the UCP Vote" January–March 2007 *ICC's DCInsight* 2.

43 See *ICC Publication* No 600, Paris (2006) (hereafter the "UCP 600"). The UCP 600 were officially endorsed by the UN Commission on International Trade Law (UNCITRAL) at its 42nd annual session in Vienna (see ICC "UN Endorses ICC Documentary Credit Rules" 20-07-2009 (http://www.iccwbo.org (accessed 17-03-2010)). For a discussion of UCP 600, see Hugo and Lambertyn "Documentary Credits and Independent Guarantees" *ABLU* 2007

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revision was the work of bankers rather than of lawyers. The new rules are the result of more than three years of intensive work by the Banking Commission.[44] The 2006 revision incorporates a number of changes from UCP 500, for example, new sections on "definitions" and "interpretations" have been added to clarify the meaning of ambiguous terms.[45]

As the UCP 500 was still in operation until 30-06-2007, it is possible that many letters of credit and standby letters of credit might still be in operation that were issued subject to UCP 500.[46] This article therefore deals with both UCP 500 and the UCP 600. Furthermore, it appears that some banks are still issuing letters of credit subject to UCP 500 despite the fact that UCP 600 has come into operation.[47]

The UCP is a set of rules issued by the ICC in an attempt to create a uniform and standard set of conditions under which banks may issue documentary credits. The UCP further attempts to standardise the interpretation of documentary credit practice and govern most aspects of documentary credits, except for the relationship between the applicant for a documentary credit and the issuing bank. More accurately, the UCP is a compilation of internationally accepted banking customs and practices regarding documentary credits.[48] To the extent that the UCP applies to documentary credits themselves, it is also

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(a paper delivered at the 2007 Annual Banking Law Update held at the Indaba Hotel, Johannesburg on 18 April 2007) 177 (hereafter "*ABLU* 2007"); Drafting Group of the UCP 600, *Commentary on UCP*, *ICC Publication* No 680, Paris (2007) (in this book the Drafting Group of the UCP 600 fully explain the reasons behind the provisions contained in the UCP 600); Heiskanen "Should B/Ls Have Been Excluded from UCP 600 Article 17?" July–September 2007 *ICC's DCInsight* 16; Andrle "Ambiguities in the New UCP" July–September 2007 *ICC's DCInsight* 17; Ellinger "The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions" 2007 *Lloyd's Maritime and Commercial Law Quarterly* 152; Debattista "The New UCP600 – changes to the tender of the seller's shipping documents under letters of credit" 2007 *Journal of Business Law* 329; Ulph "The UCP600: documentary credits in the twenty-first century" 2007 *Journal of Business Law* 355; Isaacs and Barnett "International trade finance – letters of credit, UCP 600 and examination of documents" 2007 *Journal of International Banking Law and Regulation* 660; Ford "Issues and challenges under UCP 600" October–December 2007 *ICC's DCInsight* 1; George "Loss of Documents and UCP 600 Article 35" October–December 2007 *ICC's DCInsight* 3; Katz (ed) *Insights Into UCP 600: Collected Articles from DCI 2003 to 2008* (2008) *ICC Publication* No 682; Jeffery "The New UCP 600" 2008 *Banking and Finance Law Review* 189; and Dolan and Baker *Users' Handbook for Documentary Credits Under UCP 600* (2008) *ICC Publication* No 694. See also the different articles discussing UCP 600 and issues related to it by different authors that have been reprinted in Barnes and Byrne "Letters of credit" 2007 *Business Lawyer* 1607 (as reprinted in Byrne and Byrnes (eds) *2008 Annual Survey of Letter of Credit Law and Practice* (2008) (hereafter "*2008 Annual Survey*") 29–53, 118–120, and 121–171. For a detailed discussion of a comparison of the UCP 500 and UCP 600, see Byrne *The Comparison of UCP600 & UCP500* (2007).

44 See the "Introduction" to the UCP 600 (*ICC Publication* No 600, Paris (2006) 11).

45 See http://www.iccwbo.org/iccjcde/index.html (accessed 17-03-2010).

46 DCI Interview: Smith "The Insight Interview: Donald Smith" July–September 2007 *ICC's DCInsight* 5 7 (hereafter "DCI Interview: Smith").

47 Dobáš "Issues and Question Marks" January–March 2008 *ICC's DCInsight* 3 3; and DCI Interview: Smith 7.

48 Van Niekerk and Schulze 275.

applicable to standby letters of credit.[49] The UCP applies only to documentary credits, including standby letters of credit that are specifically issued by banks.[50] The UCP is the most successful harmonising measure in the history of international commerce thus far, and it has removed a vast number of technical problems that could have undermined the smooth operation of letters of credit. The UCP 500 has been a remarkable success and most banks have incorporated them into their documentary credits.[51] It remains to be seen whether the same success will be achieved with the UCP 600.[52]

The UCP, like any other set of rules promulgated by the ICC, is primarily intended to guide banking practice relating to documentary credits. It is not intended to provide a comprehensive treatment of legal rights and duties. In accordance with this, the UCP provides no more than a very generalised statement as to the compliance standard; and it does not prescribe the exceptions to the principle of autonomy of the credit, leaving these and related issues to be dealt with by the courts in the various jurisdictions.[53]

Although UCP is widely accepted and used due to the international good standing of the ICC, it is technically not law. The UCP is neither a statute nor a

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49 Articles 1 and 2 of the UCP 500 express the ICC's intention that the rules should apply to standby letters of credit issued by banks to the extent that they may be so applicable. Article 1 of the UCP 600 also provides that it applies to any documentary credit (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to the rules of the UCP 600.

50 See art 2 of the UCP 600 and art 2 of the UCP 500.

51 See Xiang Gao 18 and Lipton 1993 *Journal of International Banking Law* 402. South African commercial banks have also accepted the UCP 500 through their banker's organisation, and almost invariably incorporate it into the text of the letters of credit they issue (see Van Niekerk and Schulze 275–276).

52 There are indications that the UCP 600 will be widely used and the general feeling among bankers regarding the latest version has been positive so far (see eg. Wunnicke "A Lawyer's Personal Welcome to the New UCP" April–June 2007 *ICC's DCInsight* 3–4; Christensen "A Practical Approach to the New UCP" April–June 2007 *ICC's DCInsight* 9–10; Iftikhar "Correspondents' Views from Three Countries: United Arab Emirates" July–September 2007 *ICC's DCInsight* 15 15; and Andrle July–September 2007 *ICC's DCInsight* 17). For example, it has been stated that there are strong indications that the UCP 600 will be used widely by the Chinese Banks (see Laprès and Mo "L/Cs, Collections, Guarantees and Other Instruments in the PRC" October–December 2007 *ICC's DCInsight* 21). However, although the UCP 600 were adopted unanimously, it appears that not all banks are in favour of the new rules. There seems to be a trend among some banks to exclude the operation of certain provisions of the UCP 600 (particularly, arts 7(c), 12(b), 14(d), (e), (j), (k) and (l), parts of 16(c)(iii), 28(h) and (i); and 35) in the letters of credit that they have issued thus far (see Iftikhar July–September 2007 *ICC's DCInsight* 15; Dobáš January–March 2008 *ICC's DCInsight* 3; Andrle "Excluding Articles: A Troublesome Trend" January–March 2008 *ICC's DCInsight* 4; Reynolds and Smith "Reports from the UCP Seminars (Part 2)" January–March 2008 *ICC's DCInsight* 6; and Keller "More on Those Troublesome Exclusion Clauses" April–June 2008 *ICC's DCInsight* 6). In this regard, Hugo and Lambertyn have said: "The UCP is one of the most successful instruments of harmonization of international trade law. It would be a pity if the harmonizing effect of the UCP 600 is diminished by banks excluding or modifying certain provisions allowed under article 1" (see Hugo and Lambertyn *ABLU* 2007 192). Only time will reveal whether the UCP 600 will be just as successful as its predecessor.

53 Goode 1996 *Brooklyn Journal of International Law* 6.

code.[54] Rather, it is the work of the world banking community (under the auspices of the ICC) aiming to unify banking customs in respect of letters of credit law.[55] Therefore, the UCP will apply only if the operating banks, in particular the issuing banks, make the credit subject to the UCP.[56] However, practically all evidence indicates that the UCP rules constitute a defined and reliable supranational code that is commonly given the force of law. Although the UCP is technically only a set of standard terms, it has evolved to fulfil the function of law.[57] The UCP contains definitions, the treatment of party liability and responsibility and sets norms normally expected of law. The UCP is considered to be "*de facto* law" or "*quasi*-law" and the cornerstone of the law pertaining to letters of credit.[58] In fact, over time the UCP has gained universal acceptance in international trade. Many domestic courts and legislatures recognise the UCP because it reflects existing industry practice.[59] So pervasive is its use that art 5 of the UCC of the United States specifically refers to the UCP, providing that art 5 is not to apply to the extent that the parties expressly adopt the UCP.[60] It appears that the UCP is in every sense the centrepiece of law and practice in the area of letters of credit.[61]

In order to deal with the various concerns being raised regarding the wording and certain provisions of the UCP, the Banking Commission of the ICC often publishes their (ie. the ICC's) opinions and Position Papers in an attempt to address these issues without having to amend the UCP.[62] In the Banking

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54 Van Niekerk and Schulze 275.

55 Wayne "The Uniform Customs and Practice as a source of documentary credit law in the United States, Canada, and Great Britain: a comparison of application and interpretation" 1989 *Arizona Journal of International and Comparative Law* 147 148.

56 See art 1 of the UCP 500 and art 1 of the UCP 600.

57 Buckley June 1995 *Journal of Banking and Finance Law and Practice* 78.

58 See Ellinger 1984 *Lloyd's Maritime and Commercial Law Quarterly* 578; Barnes "Internationalisation of Revised UCC Article 5 (letters of credit)" 1995 *Northwestern Journal of International Law and Business* 215 216; and Buckley 1995 *George Washington Journal of International Law and Economics* 267–268.

59 For a discussion of whether or not the UCP could be considered to be part of a South African rule of custom or trade usage, see Van Niekerk and Schulze 275–277.

60 South Africa has no specific legislation dealing with commercial and standby letters of credit or demand guarantees. It also has not enacted legislation to incorporate the UCP as part of domestic law. However, it has also become standard practice in South Africa, just like in the rest of the world, to incorporate the UCP expressly in contracts relating to documentary letters of credit (see Van Niekerk and Schulze 276; and *Transcontinental Procurement Services CC v ZVL and ZKL International AS* 2000 CLR 67 (W) 87).

61 See Xiang Gao 18; and Goode 1996 *Brooklyn Journal of International Law* 5.

62 For interpretative opinions on issues arising under the UCP 400, see ICC, *Opinions of the Banking Commission (1984–1986)* (*ICC Publication* No 434, Paris (1987)); ICC, *Opinions of the Banking Commission (1987–1988)* (*ICC Publication* No 469, Paris (1989)); and ICC, *Opinions of the Banking Commission (1989–1991)* (*ICC Publication* No 494, Paris (1992)). Under the leadership of Gary Collyer, the ICC Banking Commission also issued a series of interpretive opinions arising under the UCP 500. In this regard, see Collyer (ed) *Opinions of the ICC Banking Commission (1995–1996): Responses to queries on UCP 400, UCP 500 and URC 522* (*ICC Publication* No 565, Paris (1997)); Collyer *More Queries and Responses on UCP 500 (1997): Opinions of the ICC Banking Commission 1997* (*ICC Publication* No 596, Paris (1998)); Oelofse "Developments in the Law of Documentary Letters of Credit" *ABLU* 2000 (a paper delivered at the 2000 Annual Banking Law Update held at the Indaba Hotel, Johannesburg) (unpaginated) at 1–3 of his arti-

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Commission's published opinions it records particular problems that were raised, the points made in the discussion of the problem and conclusions as to whether or not the problem does, in fact, lie within the ambit of the UCP and if it does, the meaning and effect of the relevant UCP provision. Over the years the opinions of the Commission have been very helpful in clarifying points on which the UCP provisions have been unclear. Furthermore, these opinions have an independent value in helping to ensure that the UCP is applied in a consistent manner from one country to another. However, although these opinions are influential, they do not, of course, bind courts or arbitrators, and merely provide a useful tool in the application and interpretation of the UCP.[63]

2 2 2 Application of the UCP to standby letters of credit and demand guarantees

As already mentioned, UCP 400 introduced an innovation by extending the UCP to standby letters of credit. Subsequently, the UCP 500 and the UCP 600 retained this extension. The extension was motivated by a concern on the part of banks in the United States that their courts might confuse a standby letter of credit with a suretyship guarantee which most banks in America were initially legally prohibited from issuing. American banks, therefore, naturally pressed for standby letters of credit to be included in the UCP, so that standby letters of credit would be visibly equated with autonomous documentary credits (and not with suretyship guarantees) to which the prohibition did not apply.[64]

However, despite the fact that the UCP did not address standby letters of credit until the 1983 version (ie. UCP 400), standby letters of credit had frequently been issued subject to both the 1962 and 1974 versions of the UCP. Banks in the United States and other countries that were influenced by United States banking practices often referred to the UCP when issuing standby letters of credit long before letters of credit were incorporated into the UCP. One of the reasons for this was that since the UCP was a set of practice rules, the provisions of which relating to its scope could be varied and the rules incorporated into any

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cle; Collyer and Katz (eds) *ICC Banking Commission Collected Opinions 1995–2001 on UCP 500, UCP 400, URC 522 and URDG 458* (*ICC Publication* No 632, Paris (2002)); ICC "Three Opinions from the Singapore Commission Meeting" July–September 2007 *ICC's DCInsight* 10–13; ICC "More Queries from the Singapore Banking Commission Meeting" October–December 2007 *ICC's DCInsight* 8–10; and Collyer and Katz (eds) *ICC Banking Commission Opinions 2005–2008* (*ICC Publication No 697*, Paris (2009)). For the first opinions under the UCP 600, see, eg, ICC "First Banking Commission Opinions Under UCP 600" January–March 2008 *ICC's DCInsight* 7–10; ICC "Two More Recent Opinions on UCP" April–June 2008 *ICC's DCInsight* 9–12; and Collyer and Katz (eds) *ICC Banking Commission Opinions 2005–2008* (*ICC Publication* No 697, Paris (2009)).

63 Goode 1995 *Saint Louis University Law Journal* 742. See also, in general, Collyer and Katz *(eds) Collected DOCDEX Decisions 2004–2008 ICC Publication No* 696 (2008).

64 Goode1995 *Saint Louis University Law Journal* 729 and Goode 1996 *Brooklyn Journal of International Law* 16. The power of the American banks to issue letters of credit and other independent undertakings (ie. demand guarantees) to pay against documents without factual investigation into the underlying relationship was finally recognised in the revised Interpretive Ruling of the Comptroller of the Currency of 09-02-1996 (see the United States Comptroller of the Currency Interpretive Ruling at 12 CFR section 7.1016 (as revised on 01-07-2008)). Although banks in the United States have been freed from the prohibition on giving guarantees, they still use standby letters of credit because of their familiarity with those instruments (see Bertrams 5).

undertaking. Another was that as most standby users regarded standby letters of credit as a derivative of the commercial letter of credit; they saw no difficulty in issuing standby letters of credit subject to the UCP.[65] This could also be explained by the fact that they had the desire to dismiss any doubt as to the independent and documentary nature of the standby letter of credit, and possibly by the fact that a suitable uniform set of rules other than the UCP did not exist until the International Standby Practices ("ISP98") came into operation on 01-01-1999.[66]

The incorporation of standby letters of credit into the UCP did not result in specific rules for this form of letter of credit being included into the UCP. In fact, a large part of the UCP does not even apply to standby letters of credit or is inappropriate, while other issues that are vital in a standby letter of credit context are not addressed at all in the UCP.[67] The UCP was drafted with traditional form documentary credits in mind. It was drafted to apply primarily to international sale transactions, which included documentary credits as a method of payment under a contract of sale. There are thus a number of shortcomings in the application of the UCP to standby letters of credit which is not a payment method under a contract of sale, but a standby payment method in case of default under some underlying transaction.[68] Therefore, the application of the UCP to standby letters of credit merely implies that the UCP's general letters of credit principles are expressly made applicable to standby letters of credit.[69] It is also often necessary for the standby letter of credit to exclude large parts of the UCP expressly if the provisions of the UCP are not applicable to a specific kind of transaction. There are also many standby letters of credit that exclude the UCP in its entirety.[70]

Although the UCP applies to documentary credits and standby letters of credit, by implication it also applies to demand guarantees since demand guarantees, though not mentioned in the UCP, are the same from a legal viewpoint as standby letters of credit.[71] Most English demand guarantees are not subject to the UCP at all, because their terms are not necessary or are sometimes even inappropriate for the particular transaction.[72]

For many years the UCP was the only set of rules that could govern standby letters of credit. However, that was only until 1992 when the ICC published their

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65 Byrne "The International Standby Practices (ISP98): new rules for standby letters of credit" 1999 *Uniform Commercial Code Law Journal* 153 fn 8.

66 Bertrams 33–34; and for a discussion of the ISP98 see part 2 6 below.

67 Bertrams 33–34. The assimilation of standby letters of credit into documentary credits in the UCP has been severely criticised; for the reasons why, see Goode 1995 *Saint Louis University Law Journal* 730.

68 Lipton 1993 *Journal of International Banking Law* 403. For a full discussion of which of the UCP 500 provisions are unsuitable or problematic for standby letters of credit and important issues relating to standbys that are not addressed in the UCP 500 see Byrne 1999 *Uniform Commercial Code Law Journal* 155–162.

69 De Ly Fall 1999 *International Lawyer* 835.

70 Warne and Elliott 275.

71 See Goode 1995 *Saint Louis University Law Journal* 729 fn 20 and Goode *Guide to the ICC Uniform Rules for Demand Guarantees* (1992) *ICC Publication* No 510 (hereafter the "*Guide to the URDG"*) 8.

72 Warne and Elliott 275.

Uniform Rules for Demand Guarantees (hereafter "1992 URDG"), which applied to demand guarantees specifically and also to standby letters of credit. So, in the past, from a legal viewpoint, standby credits and demand guarantees could be governed by two sets of rules – the UCP and the 1992 URDG. They were then governed by whichever set of rules was incorporated into the documents. However, the banking sector, in particular in the United States, was inclined to apply to standby letters of credit many of the practices in current use for documentary credits, including issuance for the guarantor's own account, confirmation of the standby credit by a second bank and payment otherwise than at the counters of the issuing bank. For this reason, the UCP was used for many years in preference to the 1992 URDG. This was even signalled by the introduction to the 1992 URDG.[73] Later, a separate set of rules, the ISP98, came into operation on 01-01-1999. The ISP98 were created for sole application to standby letters of credit. Today, standby letters of credit may be governed by either the UCP, URDG or the ISP98. In addition to these rules, it is also possible that the United Nation's Convention on Independent Guarantees and Stand-by Letters of Credit may apply to standby letters of credit.[74] However, since the coming into effect of the ISP98 in 1999, many standby letters of credit are no longer issued subject to the UCP.[75]

It is submitted that the UCP 600 should not have incorporated standby letters of credit, because the ISP98 was published specifically for standby letters of credit[76] and today it would appear that most standby letters of credit are issued subject to the ISP98 rather than subject to the UCP.

2 3 Supplement to the Uniform Customs and Practice for Documentary Credits for electronic presentation

At its meeting in May 2000, the Task Force of the ICC's Banking Commission indicated that it was going to focus more on electronic transactions. Later the need was identified to develop a bridge between the UCP 500 and the processing of the electronic equivalent of paper-based credits. The UCP 500 was unclear as to whether or not it allowed electronic presentations of credits and some of the provisions were incompatible with electronic presentations.[77] Therefore, with the current evolution from paper to electronic credits, it was established that the market was looking at the ICC to provide guidance in this transition. The ICC's Banking Commission established a Working Group consisting of the necessary experts to prepare the appropriate set of rules as a supplement to the UCP 500.[78]

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73 See the *Guide to the URDG* 16; and Byrne 1999 *Uniform Commercial Code Law Journal* fn 16 153. For a further discussion of why the UCP was preferred to the 1992 URDG, see Goode 1996 *Brooklyn Journal of International Law* 16–17.

74 *Guide to the URDG* 16. In this regard see also part 3 below for a discussion of the Convention.

75 DCW Feature "LC Practice Trends: International Standby Practices (ISP98) and Uniform Rules for Demand Guarantees (URDG)" September 2004 *Documentary Credit World* 17–23.

76 For a similar view, see DCW Interview with Maulella "Should Reference to Standbys Remain in UCP?" September 2004 *Documentary Credit World* 23–26.

77 Cauffman "The eUCP, an E-supplement to the Uniform Customs and Practice for Documentary Credits (UCP 500)" 2002 *European Transport Law* 737.

78 For background information see Barnes and Byrne "E-Commerce and Letter of Credit Law and Practice" Spring 2001 *International Lawyer* 23 26–28.

In 2002 this resulted in the ICC publishing an electronic supplement to the UCP 500 called the "Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation, version 1.0" ("eUCP version 1.0")[79] to be used for part-electronic or all-electronic presentations of documents tendered under letters of credit.[80] The eUCP version 1.0 came into effect on 01-04-2002, but was later replaced with the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation, version 1.1 ("eUCP version 1.1")[81] when the UCP 600 came into operation on 01-07-2007.

The eUCP versions 1.0 and 1.1 deal with the electronic presentation of documents under documentary credits. They do not address any issues regarding the issuance or advice of credits electronically, because market practices and the UCP have allowed for electronic issuance and advice of documentary credits for a number of years and no specific problems have arisen in this regard.[82] The eUCP versions 1.0 and 1.1 are meant to deal with cases in which electronic records are presented as well as cases in which electronic records are presented in combination with paper documents.[83] The eUCP version 1.0 was not an amendment of the UCP 500, but was merely a supplement to the UCP 500 which would have, when used together with the UCP 500, provided the necessary rules for the presentation of the electronic equivalents of paper documents under letters of credit.[84] Similarly, the eUCP version 1.1 is a supplement to the UCP 600.[85]

The eUCP version 1.0 applied as a supplement to the UCP 500 where the credit indicated that it was subject to the eUCP version 1.0.[86] Therefore, the eUCP version 1.0 did not automatically apply to a credit subject to the UCP 500. The eUCP version 1.1 will also not automatically apply as a supplement to the UCP 600, unless the credit indicates that it is subject to the eUCP version 1.1.[87] However, a credit subject to either the eUCP version 1.0 or version 1.1 would automatically be subject to either the UCP 500 or UCP 600 (whichever version of the eUCP was referred to) without express incorporation of the UCP 500 or UCP 600. A credit subject to either the eUCP version 1.0 or version 1.1 is called an "eUCP credit".[88]

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79 *ICC Publication* No 500/2, Paris (2002) (hereafter the "eUCP version 1.0"). For a full discussion of this, see Hugo "The eUCP" (a paper delivered at the Law and E-commerce Conference held at the University of Stellenbosch on 30-04-2004) (unpublished).

80 See also the "Introduction" to the eUCP version 1.0 (see *ICC Publication* No 500/2, Paris (2002)) 53 paras 1–2.

81 *ICC Publication* No 600, Paris (2006) (hereafter the "eUCP version 1.1").

82 See the "Introduction" to the eUCP version 1.0 (see *ICC Publication* No 500/2, Paris (2002)) and the "Introduction" to the eUCP version 1.1 (see *ICC Publication* No 600, Paris (2006)). See also Cauffman 2002 *European Transport Law* 738 and Barnes and Byrne Spring 2001 *International Lawyer* 23.

83 See art e1(a) of the eUCP version 1.0 and art e1(a) of the eUCP version 1.1.

84 See the "Introduction" to the eUCP version 1.0 (see *ICC Publication* No 500/2, Paris (2002)) 53 para 3.

85 See the "Introduction" to the eUCP version 1.1 (see *ICC Publication* No 600, Paris (2006)) 53 para 2.

86 See art e1(b) of the eUCP version 1.0.

87 See art e1(b) of the eUCP version 1.1.

88 See art e2(a) of the eUCP version 1.0 and eUCP version 1.1. See also Cauffman 2002 *European Transport Law* 738. The eUCP is issued in version numbers. The current version

continued on next page

Although the eUCP version 1.0 had the approval of the ICC, it appeared that in practice it had not been generally accepted.[89] Despite various workshops, conferences and professional literature attempting to explain and promote its use, the guidelines have remained of theoretical value only. It is not clear what the reasons for this failure were, but writers have speculated regarding possible reasons.[90] At the end of 2005, it had been said that the eUCP version 1.0 remained a futuristic voyage without any discernable practical landing whatsoever.[91]

While the UCP 500 was under revision, the opinion was expressed that if the eUCP version 1.0 were to be constituted as a new part of the latest version of the UCP (ie UCP 600), many banks would include in their standard forms a clause excluding the operation of the respective provisions (as they were allowed to do by virtue of art 1 of the UCP 500).[92] In the end, however, the drafting team of the UCP 600 decided not to incorporate the eUCP's treatment of electronic presentations in the UCP 600, but rather to keep the eUCP as a supplement to the UCP 600. The eUCP version 1.0 was therefore solely updated to reflect the changes made in the UCP 600 with regard to terminology and style of presentation.[93] In terms of art 1 of UCP 600, parties are still allowed to exclude the operation of certain provision of the UCP, including the provisions of the eUCP version 1.1. However, whether banks will in fact, exclude the operation of the latest version of the eUCP as they have threatened to do, remains to be seen. Only time will tell whether the new eUCP version 1.1 will be used more widely.

The eUCP is a source of law of the commercial letter of credit, as well as of the standby letter of credit (and by implication also the demand guarantee). The eUCP merely provide the necessary rules for the presentation of the electronic equivalents of paper documents under letters of credit and standby letters of credit.

2 4 Uniform Rules for Contract Guarantees

2 4 1 Introduction

Over the years tender, performance and repayment guarantees for international projects became an important feature of world trade practice. This caused the ICC's Commissions on Banking and on Commercial Practice to commence development of uniform rules governing the issuing of such guarantees. On the one hand, the Banking Commission is concerned with bringing together world bankers for the purpose of harmonising and defining practices and terminology

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is version 1.1. A credit must indicate the applicable version. If it does not do so, it will be subject to the version in operation on the date on which the credit is issued or, if made subject to eUCP by an amendment accepted by the beneficiary, on the date of that amendment. See art e1(c) of the eUCP version 1.0 and article e1(c) of the eUCP version 1.1.

89 See the "Introduction" to the eUCP version 1.1 (see *ICC Publication* No 600, Paris (2006)) 53 para 2.

90 For a full discussion of possible reasons for the failure of the eUCP, see Ellinger November 2005 *Journal of Business Law* 706–707 and Cauffman 2002 *European Transport Law* 739–741.

91 Byrne "Overview of Letter of Credit Law and Practice in 2005" in Byrne and Byrnes (eds) *2006 Annual Survey of Letter of Credit Law and Practice* (2006) 6 9.

92 Ellinger November 2005 *Journal of Business Law* 707.

93 See the "Introduction" to the eUCP version 1.1 (see *ICC Publication* No 600, Paris (2006)) 53 para 2.

used in international banking, and on the other hand, the Commission on Commercial Practice is generally concerned with standardising commercial usage.[94] In an attempt to draft a set of uniform rules for these guarantees, the two Commissions of the ICC convened a Working Party whose members represented different interest groups in both industrialised and developing countries. In close co-operation with the intergovernmental and international commercial organisations concerned, in particular the UNCITRAL, the Working Party drafted the set of uniform rules. It took the ICC about 12 years to complete a set of standardised rules and in 1978 the ICC approved and published the Uniform Rules for Contract Guarantees ("URCG").[95] This was followed in 1982 by another publication namely the "Model Forms for Issuing Contract Guarantees".[96]

2 4 2 Aim and application

The application of the URCG is voluntary and will only apply if parties incorporate them into a guarantee. Therefore, if a party desires that these rules should be applicable, the guarantee itself must contain a specific statement that it is subject to the URCG. In such a case, the URCG is binding on all parties to the guarantee, unless otherwise expressly stated in the guarantee or any amendment thereto.[97] Therefore, it follows that the parties to the guarantee may agree on partial application of the URCG. Hence, art 1 provides that:

> [t]hese Rules apply to any guarantee, bond, indemnity, surety or similar undertaking, however named or described ("guarantee"), which states that it is subject to the Uniform Rules for Tender, Performance and Repayment Guarantees ("Contract Guarantees") of the International Chamber of Commerce (Publication No 325) and are binding upon all parties thereto unless otherwise expressly stated in the guarantee or any amendment thereto.

The term "contract guarantees" as used in the URCG refers to three types of contract guarantees. First, *tender guarantees* whereby a party inviting tenders (the beneficiary) is assured of a specific sum if a party submitting a tender (the principal) fails to sign a contract if his or her tender is accepted, or fails to meet some other specified obligation arising from the submission of a tender. A second type is the *performance guarantee* which gives the beneficiary recourse against the guarantor (ie. payment of a specified amount or, if the guarantee so provides, at the guarantor's option, to arrange for performance of the contract) if the principal fails to perform a relevant contract between him or her and the beneficiary. The URCG therefore applies to a performance bond as a type of demand guarantee, as well as to a performance guarantee as a type of surety bond. A third type of contract guarantee is the *repayment guarantee* which assures the beneficiary of the repayment of advances, or payments if the principal fails to fulfil a relevant contract.[98]

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94 Parsons "Commercial Law Note: ICC (International Chamber of Commerce) Uniform Rules for Contract Guarantees" 1979 *Australian Law Journal* 224 226.

95 *ICC Publication* No 325, Paris (1978). See also the "Foreword" to the URCG 6. For a full discussion of the URCG see Parsons April 1979 *Australian Law Journal* 224 and Šarčević and Volken (eds) *International Contracts and Payments* (1991) (contribution No 5) Hjerner "Contract Guarantees" 69.

96 *ICC Publication* No 406, Paris (1982). See also Šarčević and Volken 71.

97 See para 1 of art 1 of the URCG.

98 Parsons 1979 *Australian Law Journal* 224. See also paras (a)–(c) of art 2 of the URCG and see also Šarčević and Volken 69–70.

Although party autonomy is the main principle in the URCG, it may happen that in some countries there are mandatory regulations in the field of guarantees. For instance, mandatory rules of national law may require that claims under the guarantee be made within the limitation period prescribed by national law, irrespective of other limitation periods set out in the URCG or in the guarantee itself. In this regard, art 1(2) of the URCG provides that the mandatory rules must prevail.[99]

The aim of the URCG was to create uniformity and to achieve a fair balance between the legitimate interests of the three parties concerned – the beneficiary, principal and the guarantor – and define the rights and obligations of the three parties with precision to avoid disputes, while observing the commercial purpose of the tender, performance and repayment guarantees (contract guarantees), that is to ensure the availability of funds with an independent third party in the event of the beneficiary having a justified claim against the principal.[100]

Article 2 of the URCG defines various terms already mentioned above: "tender guarantee", "performance guarantee", "repayment guarantee", "principal", "beneficiary", "instructing party" and the "guarantor under the guarantee". The URCG does not deal with the issue of the nature of a contract guarantee nor does it attempt to define its nature. In this regard, it does not stipulate whether the guarantee is a primary and independent obligation, or whether it is a secondary and accessory one; nor does it indicate the legal consequences of such characterisation. However, the link between performance of the guarantor's undertaking and default by the principal is established in the definitions.[101] Instead, attention has been given to the prerequisites for payment under a contract guarantee which goes to the beneficiary–guarantor relationship and the objections and defences available to the guarantor. Furthermore, save for a few exceptions,[102] the URCG does not specifically deal with the relationship between the principal and the guarantor.[103]

The URCG also aimed at encouraging more equitable practices in the area of contract guarantees (demand guarantees), especially by limiting the problem of unfair calling of these guarantees. The URCG attempted to protect the principal from unjustified calls on the guarantor by the beneficiary by stipulating the need for appropriate documentation to support a claim in art 9. Therefore, it was considered desirable that the URCG should not provide for on-demand guarantees, that is guarantees payable on simple or first demand without any (independent) evidence of default.[104] It is true that all guarantees are payable only on demand; however, the term "on-demand guarantee" normally signifies that the only condition stipulated for payment is simple demand on the part of the beneficiary. Therefore, guarantees of this type are sometimes referred to as "unconditional guarantees". However, this term is sometimes inadequate because there may be some restrictive conditions. For instance, payment may be effected only if the claim is submitted before the expiry date of the guarantee.[105] As mentioned

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99 Šarčević and Volken 71–72.
100 See the "Introduction" of the URCG 8.
101 Šarčević and Volken 72.
102 See arts 7(3), 8(2) and 11(2) of the URCG.
103 See the "Introduction" of the URCG 9.
104 See the "Introduction" of the URCG 8–9.
105 Šarčević and Volken 71.

above, the parties may agree on partial application of the URCG and therefore these rules may be applied also to simple or first demand guarantees, but this would require exclusion of those articles relating to documentation necessary to perfect a claim under a guarantee (in particular art 9 of the URCG).[106]

The URCG therefore sought to deal with the problem of unfair calling of contract guarantees (demand guarantees) by requiring in art 9, as a condition of the beneficiary's right to payment, the production of a judgment or arbitral award or the principal's written approval of the claim and its amount. Although the object of this requirement was commendable, it did have the effect of limiting the acceptability of the URCG. It resulted in the exclusion of the simple on-demand guarantee from the scope of the URCG that accounted for the great majority of documentary guarantees issued by banks.[107] Furthermore, although the requirement to produce a judgment or arbitral award was theoretically a documentary requirement, practically it meant that beneficiaries had to prove default by the principal by way of litigation or arbitration and this tended to defeat the objective of the demand guarantee to provide the beneficiary with a speedy monetary remedy.[108] This requirement was unacceptable to importers, and because of their strong bargaining position it resulted in the URCG seldom being incorporated. This requirement also did not gain general acceptance because it proved to be too far removed from the current banking and commercial practice. It has been contended that another reason why the URCG failed to gain general acceptance in the market is because the rules are rather general, vague, fragmentary and conceptually fragile.[109]

Therefore, in summary, the ill-fated URCG was in theory intended to cover tender, performance and repayment guarantees (demand guarantees). However, the requirements for a judgment or arbitral award as a condition of entitlement to pay were too far removed from international practice to be acceptable, coming close to crossing the line between a documentary guarantee and a suretyship guarantee.[110]

2 5 Uniform Rules for Demand Guarantees

2 5 1 1992 URDG

2 5 1 1 Introduction

In light of the dissatisfaction with the 1978 URCG, the Committee of London and Scottish Bankers (hereafter "CLSB") (subsequently merged into the British Bankers' Association (hereafter "BBA") submitted a draft Code of Practice for Contract Guarantees or Bonds to the ICC for consideration in 1985. This was

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106 Parsons 1979 *Australian Law Journal* 225.

107 Penn "On-demand bonds – primary or secondary obligations?" 1986 *Journal of International Banking Law* 224 230; and Perrignon "Performance bonds and standby letters of credit: the Australian experience" 1991 *Journal of Banking and Finance Law and Practice* 157 160 and O'Brien "Letters of Intent and Demand Guarantees" *ABLU* 1993 (a paper delivered at the 1993 Annual Banking Law Update held at the Indaba Hotel, Johannesburg) 161–162.

108 *Guide to the URDG* 6.

109 Bertrams 28 and De Ly Fall 1999 *International Lawyer* 833–834.

110 Goode 1995 *Saint Louis University Law Journal* 726.

followed in 1987 by a new edition of the draft.[111] The ICC was therefore prompted to work on a new set of uniform rules due to the limited acceptance of the 1978 URCG. The idea was that the inclusion of first demand guarantees, in addition to a more comprehensive and detailed set of rules, would encourage wider adoption in practice.

The ICC's Commission on Banking Technique and Practice (the creators of the successful UCP) joined forces with the Commission on International Commercial Practice to create a Joint Working Party to draft the new uniform rules. The Working Party carried out extensive work in this regard and a smaller Drafting Group eventually completed the rules. The UNCITRAL Working Group on International Contract Practices also contributed to the process by reviewing the draft rules and making numerous recommendations for changes and improvements. A major difficulty experienced in formulating the uniform rules was the balancing of the interests of banks, exporters and industrialised countries – which tended to be at the account party's (principal's) end of guarantee deals – with the rights of importers and developing countries – which were usually at the beneficiary's end. This was one of the reasons why the project took longer than was initially anticipated.[112] The uniform rules were eventually approved by the two commissions and endorsed by the ICC in December 1991. In the end the rules embodied the collective knowledge and experience of the ICC's two commissions, professional and commercial associations and individual specialists across the world. In April 1992 the URDG were officially published.[113] This was followed in 1994 by another publication namely the "Model Forms for Issuing Demand Guarantees".[114]

The 1992 URDG were created to be more in line with established international bank guarantee practice under which the great majority of documentary guarantees are payable on first written demand, with or without supporting documents. The 1992 URDG also aim to provide some safeguards against unfair calling of the demand guarantees.[115]

The 1992 URDG appear effectively to have superseded the 1978 URCG. Initially, it was the intention to repeal the 1978 URCG, but since this is still being used in certain sectors, in particular outside banking, the decision was made to leave the rules in force for the time being. For that reason, the 1978 URCG is still available for incorporation should parties choose to do so.[116]

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111 Šarčević and Volken 78.

112 For details of the preliminary work and the key issues that had to be resolved, see Goode "The New ICC Uniform Rules for Demand Guarantees" 1992 *Lloyd's Maritime and Commercial Law Quarterly* 190.

113 *ICC Publication* No 458, Paris (April 1992). The 1992 URDG were provided with an ICC commentary prepared by Goode (see *Guide to the URDG* 68). See also Bertrams 28–29. The Banking Commission has also adopted more than twenty opinions on the 1992 URDG, but they are not widely known outside the Banking Commission (see DCI Interview: Affaki "On Revising the Uniform Rules for Demand Guarantees (URDG)" January–March 2007 *ICC's DCInsight* 18 19).

114 *ICC Publication* No 503(E), Paris (1994).

115 *Guide to the URDG* 6–7.

116 *Guide to the URDG* 7. See also the "Introduction" to the 1992 URDG 5.

2 5 1 2 Aim and application

The 1992 URDG is intended to apply worldwide to the use of demand guarantees, specifically guarantees, bonds or other payment undertakings, however named or described, under which the duty of the guarantor/issuer (ie. a bank, insurance company or other body or person)[117] to make payment arises on the presentation of a written demand and any other documents specified in the guarantee (eg. a certificate by an engineer) and is not conditional on actual default by the principal in the underlying transaction.[118] Although the 1992 URDG applies to demand guarantees rather than to standby letters of credit, standby letters of credit may also be governed by the 1992 URDG. However, it was felt that the UCP was a more suitable set of rules for standby letters of credit than the 1992 URDG.[119] That was, of course, until the ISP98 came into operation in 1999, which specifically deals with standby letters of credit.[120]

Article 2(b) of the 1992 URDG confirms the independence of the guarantees to which the URDG applies: "guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they may be based". However, the 1992 URDG does not apply to suretyships, conditional bonds, guarantees or other accessory undertakings under which the guarantor's duty to pay arises only on actual default by the principal. Although these instruments are widely used, they fall outside the scope and purpose of the URDG because they are different in character from demand guarantees.[121]

The 1992 URDG applies to a demand guarantee solely by way of explicit incorporation into the guarantee by the parties to the guarantee.[122] As the 1992 URDG operate solely by way of contract, the parties are free to exclude or alter any of these rules to the extent permissible by the law applicable to their agreement. The main purpose of the 1992 URDG is to codify rules of good practice to which parties subscribe by expressly incorporating these rules into their contracts.

The 1992 URDG therefore provides a contractual framework for dealings between guarantor and beneficiary, between instructing party and guarantor, and (in a few respects only) between principal and guarantor or instructing party. Therefore, the 1992 URDG does not only cover the relations between guarantor and beneficiary, but also those arising under counter-guarantees. However, the 1992 URDG does not deal with the rights and duties of the parties to the underlying contract (namely the principal and the beneficiary), nor does it regulate the internal mandate given by the principal to the guarantor or to the instructing party.

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117 Unlike the UCP that apply only to documentary credits and standby letters of credit that are issued by banks, the 1992 URDG apply to demand guarantees and standby letters of credit that are issued by banks, insurance companies or other bodies or persons.

118 See art 2(a) of the 1992 URDG. Standby letters of credit unquestionably fall within the definition of "demand guarantee" as set out in art 2(a) of the 1992 URDG. Therefore, parties to standby letters of credit may elect to incorporate the 1992 URDG into these instruments.

119 A point also stressed in the "Introduction" to the 1992 URDG, 4. See also the *Guide to the URDG* 7.

120 See discussion of the ISP98 in part 2 6 below.

121 See the "Introduction" to the 1992 URDG 4–5.

122 See art 1.

The 1992 URDG also does not deal with issues that are the proper preserve of national laws and national courts, such as the circumstances in which the principal may obtain injunctive (interdictory) relief against payment of a demand suspected to be fraudulent or otherwise abusive. These are issues of positive law, not of contract, and the 1992 URDG like other ICC rules, deals only with issues that can properly be regulated by agreement between the parties.[123]

In the end, the success of the 1992 URDG depends on the extent to which the international business society is willing to adopt the rules in practice. During the first couple of years of its existence, it seemed that the 1992 URDG was not widely accepted.[124] At the end of 2005, the 1992 URDG still had not gained wide acceptance and was not frequently used in practice. The exact reason for this limited acceptance is not clear.[125] However, one reason appears to be the fear that the 1992 URDG might conflict with the standard guarantee texts that banks employ or the particular provisions that banks and beneficiaries wish to include or exclude. It has been said that this fear is unfounded, since the 1992 URDG does not contain guarantee texts or specific provisions.[126] Furthermore, any of these rules may be excluded or altered by contractual clauses in the guarantee as agreed by the parties. Another reason appears to be that certain banks in a number of countries raise the objection that art 20(a) of the 1992 URDG, which provides that the payment condition be a written demand for payment supported by a specific statement of default, is contrary to the "simple demand" guarantees that do not require such a statement. In this regard it has also been said that such an objection was unfounded, because the difference between these two types of demand guarantees was small and that demand guarantees requiring a statement of default were increasingly becoming common practice. Furthermore, art 20(c) also allowed parties to exclude the requirement of a statement of default. A third reason for the limited acceptance of the 1992 URDG, according to banks, is that the market – the principals and in particular the beneficiaries – does not request the incorporation of these rules. Nonetheless, banks have indicated that they are prepared to comply with parties' requests for the incorporation of the 1992 URDG.[127]

In recent years, however, it seems that the 1992 URDG has grown in popularity and is currently being used by banks worldwide.[128] The rules were adopted in

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123 Bertrams 24–25.

124 Turner "New rules for standby letters of credit: the international standby practices" 1999 *Banking and Finance Law Review* 457 458 fn 3.

125 *Ibid*. For a discussion of possible reasons see Ellinger November 2005 *Journal of Business Law* 705.

126 However, the ICC has prepared standard texts (see in general, the ICC's Model Forms for Issuing Demand Guarantees *ICC Publication* No 503(E), Paris (1994)). In this regard, see also Ellinger November 2005 *Journal of Business Law* 705.

127 Bertrams 29–30 and fns 25–27.

128 For example, Chinese Banks generally issue their demand guarantees subject to the 1992 URDG (see Laprès and Mo October–December 2007 *ICC's DCInsight* 21), and in 2004, the Central Bank of Iran (Bank Markazi Jomhouri Islami Iran) issued a circular indicating that Iranian banks could use the 1992 URDG (see DCI Interview: Tazhibi, "The URDG and Demand Guarantees in Iran" January–March 2008 *ICC's DCInsight* 11). See also DCI Interview: Hauptmann "Insights on the URDG Revision" October–December 2007 *ICC's DCInsight* 5. However, in a fairly recent survey conducted by SITPRO (a non-departmental public body for which the United Kingdom's Department of Trade and

continued on next page

1999 by the International Federation of Consulting Engineers in their model guarantee forms and later in 2002 also by the World Bank.[129] A few national lawmakers have even taken the 1992 URDG as a model for independent guarantee statutes.[130] Seminars worldwide on the rules have also started to attract enthusiastic audiences.[131] It has taken more than a decade for the 1992 URDG to achieve its objective of being accepted internationally (although it is not nearly as widely used as the UCP).

2 5 2 2010 URDG[132]

2 5 2 1 Introduction

In 2007, the ICC Banking Commission and the Commission on Commercial Law and Practice gave the go-ahead to begin a revision of the 1992 URDG.[133] The revision was entrusted to a Drafting Group consisting of guarantee experts from a wide range of countries and the revision process was fast-tracked. The chair of the Drafting Group, Georges Affaki, stated that the time was right for a revision of the rules. He said: "[T]he rules were drafted two decades ago and need to keep up with current practice". He also indicated that many of the provisions of the 1992 URDG would benefit from a rejuvenation that would make them clearer and more precise.[134]

The ICC Task Force on Guarantees (established in 2003) monitored the international guarantee practice and also acted as the consultative body to the Drafting Group responsible for the revision of the URDG. The Drafting Group submitted a first draft to the ICC Task Force on Guarantees in October 2007.[135] The first and second drafts were also sent out to the ICC's national committees. The Drafting Group received numerous comments and feedback on their first two drafts.[136] Document 470/1101rev3 public draft was made available in early

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Industry has responsibility) it was shown that in the United Kingdom the 1992 URDG were not often used and the respondents (ie. exporters and banks) to the survey indicated that they preferred to issue demand guarantees that were subject to UCP 500. Banks that took part in the survey indicated that the 1992 URDG did not reflect United Kingdom or international banking practice (see SITPRO's *Report on the Use of Demand Guarantees in the UK* (July 2003) 8 and 10 www.sitpro.org.uk (accessed 17-03-2010)).

129 DCI Interview: Affaki "On Revising the Uniform Rules for Demand Guarantees (URDG)" January–March 2007 *ICC's DCInsight* 18 18.

130 See, eg the Uniform Act Organizing Securities (adopted on 17-04-1997 and enforced by derogation on 01-01-1998) as adopted by the 16 African states belonging to the Organization for the Harmonization of Business Law in Africa. See also Taneja "The URDG Revision and Islamic Banking" April–June 2008 *ICC's DCInsight* 14.

131 See "ICC to Revise its Uniform Rules for Demand Guarantees" (24-05-2007) on the official website of the ICC http://www.iccwbo.org (accessed 17-03-2010).

132 *ICC Publication* No 758, Paris (2010) (hereafter the "2010 URDG").

133 For a full discussion of the reasons for the current revision, see the report prepared by ICC Banking Commission's Task Force on Guarantees "The business case for the revision of the URDG" (06-02-2006) Document 470/1090 available at http://www.iccwbo.org (accessed 20-09-2009).

134 See "ICC to Revise its Uniform Rules for Demand Guarantees" (24 May 2007) on the official website of the ICC http://www.iccwbo.org (accessed 17-03-2010).

135 See Tazhibi January–March 2008 14 *ICC's DCInsight* 12.

136 See DCI Interview: G Affaki "URDG and UCP 600: similarities and differences" July–September 2008 *ICC's DCInsight* 6; and DCI Interview: R Goode "The main issues in the URDG revision" January–March 2009 *ICC's DCInsight* 8 9.

2009. In the end a total of five comprehensive drafts were sent out to the national committees. Over 600 sets of comments were received from a total of 52 countries and were examined thoroughly by the Drafting Group.[137] The objective was to have a final text approved by the ICC Commissions in November 2009, or early in 2010, and to implement it during 2010 or at the end of that year. They succeeded in their aim and in December 2009, the ICC announced a revised version of the URDG. The revised rules, the first in 17 years, were formally adopted by the ICC Executive Board at its meeting in New Delhi on 03-12-2009 and entered into force on 01-07-2010.[138] A guide to these new rules explaining the rationale, preparatory work and interpretation of each article will also soon be published.[139]

2 5 2 2 Aim and application

The 2010 URDG, just like its predecessor, applies to all demand guarantees; from those payable on simple written demand to those requiring the presentation of a judgment or arbitral award. It also applies to intermediate forms of guarantees, such as those requiring a statement of default by the beneficiary with or without an indication of the nature of the default. The revised rules apply to those guarantees where the rules are incorporated by reference in the text.[140] Although the 2010 URDG is specifically aimed at applying to demand guarantees (and/or counter-demand guarantees)[141] rather than to standby letters of credit, there is no reason why standby letters of credit may not also be governed by the 2010 URDG.

The 2010 URDG clearly confirms the independence of the guarantees to which the rules apply. Article 5(a) provides:[142]

> "A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary."

Therefore, the 2010 URDG just like its predecessor, does not apply to suretyships, conditional bonds, guarantees or other accessory undertakings under which the guarantor's duty to pay arises only on actual default by the principal.

However, the revised 2010 URDG is not merely an updated version of its predecessor. The new set of rules consist of 35 articles and is clearer (a drafting style similar to that of the UCP 600 was used), more precise and more

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137 See the "Introduction" to the 2010 URDG 8.

138 See Goode January–March 2009 *ICC's DCInsight* 9; and Byrne "Overview of international banking & practice" 3 10 in Byrne, Byrnes & Davis (eds) *2009 Annual Review of International Banking Law & Practice* (2009); and ICC "ICC announces new rules for demand guarantees" http://www.iccwbo.org/iccdeajf/index.html (accessed 19-03-2010).

139 See the "Introduction" to the 2010 URDG 10.

140 See art 1.

141 See the "Introduction" to the 2010 URDG 8.

142 The rules also confirm the independence of the counter-demand guarantee to which they apply (see art 5(b)).

comprehensive than its predecessor. The language used is also simpler and more user-friendly. It contains new definitions and interpretation rules to provide greater clarity and precision.[143] The rules set out the liabilities and responsibilities of the different parties at each stage of the duration of the demand guarantee; the expiry circumstances; and the governing law jurisdiction for the guarantee or counter-guarantee.[144]

The 1992 URDG does not deal with all the different demand guarantee practices. The 2010 URDG has attempted to correct this flaw. The revised rules also stipulate how to deal with non-documentary conditions,[145] asymmetrical guarantees and counter-demand guarantees,[146] multiple, incomplete and partial demands,[147] and many other controversial demand guarantee practices not previously dealt with in these rules. The new rules also provide a comprehensive coverage of advising of guarantees,[148] amendments,[149] the standards and time for examination of presentations,[150] electronic documents, transfers, and other innovative aspects of demand guarantee practice.[151] The revised rules also contain more precise language for determining whether a presentation made under a demand guarantee or counter-guarantee, whether paper-based or electronic, is a complying presentation.[152] In addition to this, the rules also now deal with counter-demand guarantees in more detail.

The revised rules also contain a comprehensive provision on dealing with *force majeure* (eg. where acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor prevent it from paying in terms of the guarantee) that triggers an extension of a guarantee for 30 calendar days.[153]

Set out in appendices to the revised rules there are ready-to-use model demand guarantee and counter-guarantee forms. In the appendices, provision is also made for optional clauses that may be inserted in the provided model form for a demand guarantee. These model forms and optional clauses are not part of the 2010 URDG, but are merely provided by the ICC for guidance. If banks make use of these standardised model forms they will be able to avoid unfortunate situations where ambiguous terms caused by sloppy drafting lead to uncertainty regarding the independent nature of their guarantees and courts then incorrectly interpreting these guarantees as accessory obligations or suretyships.

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143 See arts 2 and 3.
144 See arts 34 and 35.
145 See art 7.
146 See art 19.
147 See arts 17 and 18.
148 See art 10.
149 See art 11.
150 See arts 19 and 20. In terms of the 1992 URDG a guarantor has a "reasonable time" in which it can examine the demand and the documents presented, extend the guarantee or suspend the payment in terms of a guarantee (see arts 10 and 26 of the 1992 URDG). In the 2010 Revision, the rules have replaced a "reasonable time" with fixed periods for the examination of demands, the extension of guarantees and the suspension of payments (see arts 20, 23 and 26 of the 2010 URDG).
151 See, eg arts 21 and 25(c).
152 See arts 2 (for the definitions of "complying demand" and "complying presentation"), 14 and 15.
153 See art 26.

With the changes made in the 2010 URDG it is hoped that the rules will assist in curbing the rate of rejection of demands and increase the certainty of the instrument. It is also expected that these rules will be more popular internationally than their predecessors. However, in the end we will have to wait and see whether the 2010 URDG will be an improvement on its predecessor and more acceptable internationally.

2 6 International Standby Practices

2 6 1 Introduction

As mentioned above, standby letters of credit were brought within the scope of the 1983, 1993 and 2007 versions of the UCP. Approximately half of all standby letters of credit were initially governed by the UCP, but could also later be governed by the 1992 URDG. However, it was felt that the UCP was a more suitable set of rules for standby letters of credit than the 1992 URDG; a point also stressed in the introduction to the 1992 URDG. Therefore, in the past, standby letters of credit were capable of falling within two sets of rules, either the UCP or the 1992 URDG and could be governed by whichever set of rules was incorporated into the credit.[154]

Later during 1996, the UNCITRAL published their "Convention on Independent Guarantees and Stand-by Letters of Credit" applicable to international standby letters of credit and demand guarantees.[155] During negotiations regarding the Convention, the United States expressed its concerns[156] about the application of the Convention to the American standby letter of credit[157] and suggested that specific rules on standby letters of credit should be included. This proposal was rejected. These developments, in addition to the fact that there was no effort under way to formulate standby rules, and the decision of the ICC Banking Commission not to make any of the adjustments for standbys requested by the United States letters of credit community in the UCP 500 revisions, led the United States Department of State to request that the letters of credit community take the lead in formulating standby rules in consultation with letters of credit communities throughout the world. This effort was coordinated by the International Financial Services Association (hereafter "IFSA", formerly the United States Council on International Banking, Incorporated (hereafter "USCIB")),[158] the trade association representing the major banks in the United States in this field and the Institute of International Banking Law and Practice Incorporated. This eventually resulted in the Institute of International Banking Law and Practice Incorporated (based in the United States), with the support of the IFSA, embarking on a project to formulate self-regulatory rules for the American standby letter of credit market. This International Standby Practices Project (hereafter "ISP Project") was started in the United States and was

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154 *Guide to the URDG* 7.

155 For a discussion of the UNCITRAL Convention see part 3 below.

156 These concerns were already mentioned in 1992 by the United States delegation to the UNCITRAL working session: see UNCITRAL Doc A/CN.9/WG.II/WP.77 (1992).

157 For a discussion of what the position under the standby letter of credit law will be in the United States if the Convention is adopted by the United States, see Turner "The United Nations Convention on International Standby Letters of Credit: how would it change existing letter of credit law in the United States?" 1997 *Banking Law Journal* 790.

158 See the website of IFSA http://www.ifsaonline.org (accessed 17-03-2010).

aimed at providing self-regulatory rules that were more appropriate than the UCP to address standby letter of credit problems. The Institute of International Banking Law and Practice Incorporated interacted with hundreds of people over a five-year period and looked at various comments received from individuals, banks, and national and international associations. The ICC's Commission on Banking Technique and Practice also formed an a*d hoc* Working Group chaired by Gary Collyer (which led to the ICC's endorsement of the ISP98) who also provided their assistance with the ISP Project. Various sponsorships and support were received from banks, a firm of attorneys and the National Law Centre for Inter-American Free Trade. The Secretariat of the UNCITRAL also played an active role in this project.[159]

Eventually, it resulted in the creation of a separate set of rules, namely the "ISP98".[160] The IFSA adopted the ISP98, after which they were also submitted to the ICC for approval. Although the ICC Banking Commission did not initiate this ISP Project, it did endorse the rules on 06-04-1998 and the rules came into operation on 01-01-1999. The ISP98 have gained considerable acceptance as they have been adopted by major banks in the United States.[161]

To address inevitable questions and to provide for official interpretation of the rules of the ISP98 and to assure their proper evolution, the Institute of International Banking Law and Practice Incorporated created a Council on International Standby Practices which is representative of the various constituencies that have contributed to the ISP98. This Council is charged with the task of maintaining the integrity of the ISP98 in co-operation with the Institute, the ICC Banking Commission, the IFSA and various supporting organisations.[162] The Council is charged with the duty of explaining the intentions of the drafters and providing official interpretations of the ISP98. It also has to monitor the ISP98 and assure its application, interpretation and revision in a manner consistent with sound standby practice.[163]

As there were no specific rules for standby letters of credit in the past, most standby credits were issued subject to various versions of the UCP. However, it was commonly accepted that the UCP was not appropriate for standby letters of credit, because the UCP was originally written for use only in commercial letters of credit and therefore did not contain any specific provisions relating to standby

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159 See Byrne "New rules for standby letters of credit: the International Standby Practices/ ISP98" May 1998 *Business Credit* 32; Byrne "ISP98: New Rules for Standby Letters of Credit" September-October 1999 *Treasury Management Association's (TMA's) Journal* 66 67–68; and Byrne 1999 *Uniform Commercial Code Law Journal* 162–163.

160 These rules have been published in booklet form as *ICC Publication* No 590, Paris (1998) under licence from the Institute of International Banking Law and Practice, Incorporated which holds the copyright. See also the "Preface" to the ISP98. For a detailed commentary on these rules, see Byrne (edited by Barnes) *The Official Commentary on the International Standby Practices* (1998) (hereafter "*The Official Commentary on the ISP98*"); Byrne 1999 *Uniform Commercial Code Law Journal* 149; Turner 1999 *Banking and Finance Law Review* 457 and Dolan "Analysing Bank Drafted Standby Letter of Credit Rules, the International Standby Practice (ISP98)" 2000 *Wayne Law Review* 1865. Furthermore, see also the ISP98 website http://www.ISP98.com (accessed 17-03-2010).

161 See Ellinger November 2005 *Journal of Business Law* 704; De Ly Fall 1999 *International Lawyer* 836; and Xiang Gao 20.

162 See the "Preface" to the ISP98.

163 Byrne 1999 *Uniform Commercial Code Law Journal* 180.

letters of credit. Furthermore, many of the provisions were either not applicable or inappropriate in a standby letter of credit context.[164] Contrary to this, the ISP98 rules were specifically and exclusively drafted for standby letters of credit and were intended to be complementary to the UNCITRAL Convention in order to address the above-mentioned concerns on the part of the United States. The ISP98 are intended as a replacement for the UCP for standby letters of credit. Seen from this perspective, the ISP98 is welcomed, because the rules were written explicitly for standby letters of credit and are generally better suited to govern standby letters of credit than the UCP.[165] Notwithstanding the coming into effect of the ISP98, the UCP 500 was still available for incorporation into a standby letter of credit (and now the UCP 600 is too).[166] It was expected that with the publication of the ISP98, standby letters of credit would no longer be made subject to the UCP 500 or other later versions of the UCP. It was stated that, if the ISP98 turned out to be successful, which it already appeared to be, one might even consider excluding standby letters of credit from future revisions of the UCP altogether. If that were done, the UCP could then solely apply to commercial letters of credit and the ISP98 to standby letters of credit. However, if by some chance the ISP98 turned out to be unsuccessful, parties might then still have the option of issuing standby letters of credit subject to the UCP. It was hoped that some novel provision in ISP98 might have influenced the revision of the UCP 500 in this regard,[167] but unfortunately it has not, and the UCP 600, just like UCP 500, was also made available for incorporation into a standby letter of credit.[168]

As discussed above, standby letters of credit may also still be issued subject to the URDG that govern demand guarantees. Although standby letters of credit and demand guarantees are different in form, they are functionally equivalent. In fact, courts have applied standby letter of credit law to the demand guarantee[169] and scholars are in general agreement that the same law should apply to them.[170] However, it has been stressed that the application of the UCP to standby letters of credit is preferred to the application of any version of the URDG to them.

It follows that at present the UCP 600, ISP98 and the URDG are all available for incorporation into a standby letter of credit. However, it would appear that

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164 For instance, arts 23–37 of the UCP, relating to transport and insurance documents, would normally not be applicable to a standby letter of credit, while the rules relating to instalment obligations (art 41), "stale" shipping documents (art 43), and *force majeure* (art 17) would typically be not only inappropriate, but potentially harmful to the beneficiary in a standby context (see Turner 1999 *Banking and Finance Law Review* 459–460). See also Byrne "New Rules for Standby Letters of Credit: The International Standby Practices/ISP98" May 1998 *Business Credit* 32; Byrne "ISP98: New Rules for Standby Letters of Credit" September-October 1999 *Treasury Management Association's (TMA's) Journal* 66 66–67 and Dolan "Analysing Bank Drafted Standby Letter of Credit Rules, the International Standby Practice (ISP98)" 2000 *Wayne Law Review* 1865 1874.

165 See Bertrams 31 and also the "Preface" to the ISP98.

166 For a discussion of the significant differences between the rules of ISP98 and the rules of the UCP, see Turner 1999 *Banking and Finance Law Review* 457.

167 De Ly Fall 1999 *International Lawyer* fn 25 837.

168 For a view on this, see DCW Interview: Maulella "Should Reference to Standbys Remain in UCP?" September 2004 *Documentary Credit World* 23–26.

169 See Dolan 2000 14 *Wayne Law Review*, in particular the case law cited in fn 40 1873.

170 See Dolan 2000 14 *Wayne Law Review*, in particular the authorities cited in fn 41 1873.

widespread use of ISP98 continues in sophisticated financial standby letters of credit and independent undertakings.[171]

2 6 2 Scope and application

The ISP98 reflect generally accepted practice, custom and usage of standby letters of credit that can either be accepted or modified. To the extent that the rules may be unclear, incomplete or become outdated, they should be interpreted and supplemented by reference to standard standby practice, because the rules do not perfectly and completely state all practices for all times.[172] The ISP98 is intended to apply to domestic and international standby letters of credit and not to commercial letters of credit. The ISP98 provides separate rules for standby letters of credit in the same sense that the UCP does for commercial letters of credit and the URDG does for demand guarantees.[173]

Rule 1.01 outlines the scope and application of the ISP98, and indicates the types of undertaking for which the rules are intended. Rule 1.01 provides:

> "a. These Rules are intended to be applied to standby letters of credit (including performance, financial, and direct pay standby letters of credit).
> b. A standby letter of credit or other similar undertaking, however named or described, whether for domestic or international use, may be made subject to these Rules by express reference to them.
> c. An undertaking subject to these Rules may expressly modify or exclude their application.
> d. An undertaking subject to these Rules is hereinafter referred to as a 'standby'."

Although the intended use of the ISP98 is for international and domestic standby letters of credit, it is not limited to standby letters of credit. Theoretically, any international or domestic undertaking,[174] however far removed from a standby letter of credit, may be issued subject to the ISP98. The use of ISP98 for dependent undertakings (such as suretyship guarantees) and *quasi*-independent undertakings (such as commercial paper or negotiable instruments) is not intended or suitable and will lead to confusion. However, it may be used for independent undertakings, such as demand guarantees, although the URDG was specifically drafted for this type of undertaking.[175] The ISP98 rules apply to a letter of credit or independent undertaking that incorporates the rules by express reference, such as "this letter of credit is subject to ISP98" or "subject to ISP98".[176] Therefore, like the UCP and the URDG, the ISP98 also applies to any

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171 Byrne "Overview of Letter of Credit Law and Practice in 2005" as printed in Byrne and Byrnes (eds) *2006 Annual Survey of Letter of Credit Law and Practice* (2006) (hereafter "*2006 Annual Survey*") 9. However, in a survey conducted by SITPRO in 2003 it was shown that in the United Kingdom standby letters of credit were more often issued subject to the UCP 500 than to the ISP98 (see SITPRO's *Report on the Use of Demand Guarantees in the UK* (July 2003) 8 and 10 www.sitpro.org.uk (accessed 17-03-2010)).

172 See *The Official Commentary on the ISP98* Official Comment 3 to rule 2.01 63; and the "Preface" to the ISP98 and see also Byrne "The International Standby Practices (ISP98): New Rules for Standby Letters of Credit" Fall 1999 *Uniform Commercial Code Law Journal* 149 163.

173 See the "Preface" to the ISP98.

174 See rule 1.01(b).

175 See *The Official Commentary on the ISP98* Official Comment 2 to rule 1.01 1–2.

176 Turner 1999 *Banking and Finance Law Review* 458; and *The Official Commentary on the ISP98* Official Comment 10 to rule 1.01 4–5.

independent undertaking, such as demand guarantee issued subject to it.[177] So therefore parties themselves are allowed to choose the applicable set of rules. In other words, a party may choose to use the ISP98 for certain types of standby letters of credit, the UCP for others and the URDG for still others.[178]

The ISP98 use the term "standby" in two distinct senses. Subrules (a) and (b) of rule 1.01, refer to a "standby letter of credit". No definition of standby letter of credit is provided in the ISP98. It has been said that this approach avoids the impractical and often impossible task of identifying and distinguishing standby letters of credit from commercial letters of credit. Therefore, it was decided not to provide a technical definition and to leave it to the market to decide which undertakings should be governed by the ISP98. Subrule (d) indicates that an undertaking is a "standby" for purposes of ISP98 if it is issued subject to it.[179] Rule 1.11(b) (Interpretation of these Rules) recognises that the terms "standby letter of credit" and "standby" have different meanings in the rules. A "standby letter of credit" is the type of letter of credit that is understood to be a letter of credit. A "standby" is any undertaking subject to the ISP98. If the issuer of a standby credit incorporates ISP98, the credit is a "standby" credit for purposes of the rules. Hence, a demand guarantee issued subject to ISP98 would be a "standby" for purposes of these rules.[180]

Unlike the UCP that applies only to documentary credits, including standby letters of credit, which are specifically issued by banks, the ISP98 will also apply to standbys that are issued by other institutions or persons.[181]

The ISP98 was designed to be compatible with the UNCITRAL Convention and also with local law, whether statutory or judicial, and to embody standby letter of credit practice under that law. If the rules of the ISP98 conflict with the mandatory law on an issue, the applicable law will prevail.[182]

2 6 2 1 Exclusions from the Scope of the ISP98

Rule 1.05 of ISP98 provides that questions of capacity (eg who may issue a standby credit), formal requirements (eg whether the issuer's undertaking must be contained in a written document) and the issue of fraud are left to the applicable jurisdictional law. In other words, these questions are therefore beyond the scope of the ISP98. In addition to these issues, many other issues regarding standby credits, for example, choice of law, legal remedies and recovery of damages, are also excluded from the scope of the ISP98 and are left to the applicable jurisdictional law.[183]

2 7 International Standard Banking Practice for the Examination of Documents Under Documentary Credits

2 7 1 The original ISBP

Another ICC publication relating to documentary credits is the "International Standard Banking Practice for the Examination of Documents Under Documentary

177 See rule 101(b) of the ISP98.
178 See Xiang Gao 20–21; and see also the "Preface" to the ISP98.
179 See rule 1.01(d).
180 See *The Official Commentary on the ISP98* Official Comment 3 to rule 1.01 2.
181 Turner 1999 *Banking and Finance Law Review* 462.
182 See "Preface" to the ISP98 and rule 1.02(a).
183 Turner 1999 *Banking and Finance Law Review* 462–463.

Credits" (hereafter "ISBP"), which was drafted by a Task Force of the Banking Commission and approved on 30-10-2002.[184] The detailed provisions of the ISBP aimed to stipulate the requirements of the documents normally called for in documentary credit transactions. It was originally created to help reduce the large number of documents refused for discrepancies on first presentation.[185] It was aimed at all parties involved in a documentary credit transaction. Furthermore, it also aimed to fill in many voids and uncertainties left unanswered by the UCP 500.[186] The ISBP provided an insightful checklist of items that document checkers could refer to in determining how the UCP 500 applied in daily practice.[187]

Since the publication of the UCP 500 in 1993, it has been said that various articles (in the UCP 500) were open to ambiguity and the high level of rejections of documentary presentations had done little to comfort exporters concerned about the likelihood of prompt payment when this age-old method (ie. letters of credit) was used. One of the main problems voiced was that banks did not have a common standard covering the checking of the various documents that could be presented under a letter of credit. Article 13(a) of the UCP 500 provided that "compliance of the stipulated documents on their face with the terms and conditions of the credit shall be determined by international standard banking practice as reflected in" the UCP 500. The lack of such a published international practice has resulted in a situation where various banks have different rules on acceptability, or otherwise, of documents.[188]

The ICC then attempted to address this problem by publishing the ISBP. Contrary to the UCP 500 and the eUCP version 1.0, the ISBP was not designed to be incorporated into a documentary credit. Instead, it was created in an attempt to define the international banking practice regarding the examination of documents tendered under documentary credits. In view of that, the ISBP could not be regarded as comprising standard terms governing the contractual relationships created in documentary credit transactions. The ISBP's effect was bound to depend on its being accepted as a declaration – or an authoritative statement – of the international practice developed by banks and referred to in art 13(a) of the UCP 500.[189]

It cannot be stated with confidence whether the courts have, in fact, accepted that the ISBP has declared or stated the nature of international standard banking practice. The drafting of the ISBP was not based on an extensive study of the existing practice. Its purpose was, rather, to explain how practices set out in the UCP 500 were to be applied by documentary practitioners. In fact, the drafters of

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184 *ICC Publication* No 645, Paris (2003).

185 Anecdotal evidence suggests that this objective has been partially achieved (see the "Foreword" to the International Standard Banking Practice for the Examination of Documents Under Documentary Credits, 2007 Revision for UCP 600, *ICC Publication* No 681 (E), Paris (2007) 3).

186 Ellinger November 2005 *Journal of Business Law* 707–708.

187 See the "Foreword" to the International Standard Banking Practice for the Examination of Documents Under Documentary Credits, 2007 Revision for UCP 600, *ICC Publication* No 681 (E), Paris (2007) 3.

188 Walden "Letters of credit – International Standard Banking Practice (ISBP)" September 2003 *Credit Management* 23.

189 Ellinger November 2005 *Journal of Business Law* 708.

the ISBP even recognised that the law in certain countries might compel a practice different from that stated in the ISBP.[190] Moreover, the ISBP even recognised that it was impossible to deal with all the documents that might be called for in documentary credits. However, it did attempt to cover terms commonly seen on a daily basis and the documents most often presented under documentary credits.[191]

The ISBP recognised that it did not provide a complete guide to the banking practice concerned and also accepted the existence of local variants of international banking practice. Up to a certain point, these are dictated by the prevailing local laws with which the ISBP might have been inconsistent. Therefore, if a certain practice described by the ISBP was in conflict with the local laws, the latter would have prevailed.[192]

It has been said that a weakness in the ISBP was the express reference to determinations of the Banking Commission. Although the influence of these decisions was acknowledged, it should have been remembered that banking practice changes itself too and that it develops in accordance with the changes in international business. It is a common fact that banking practice is not static and therefore determinations of the Banking Commission will serve only as a guideline as long as the point of practice remains the same.[193]

This also applies to the ISBP generally. If the ISBP were not amended regularly, courts may in future be inclined to wonder if the ISBP's specific statements are current. Fortunately, this is happening as is clearly seen from its 2007 revision.[194] Therefore, it is to be expected that expert evidence which has always played such a major role in commercial credit cases will continue to be crucial in future cases. Since banking practice is generally an issue of fact, it has to be determined by appropriate evidence on the current precepts. Furthermore, courts may be convinced that particular practices, outlined or defined in the ISBP, do not apply in the local practice relevant in a case before them.[195]

As a result, the ISBP could not be viewed as an ultimate statement of banking practice universally applicable to documentary credits. The publication of the ISBP has understandably attracted conflicting opinions on the effectiveness of the publication. Some commentators have proclaimed that it was a solution to all the problems experienced with the presentation of purportedly discrepant documents, while others have stated that this publication could only intensify and enhance the confusion surrounding the UCP 500 and the ICC's subsequent policy statements, position papers and decision papers.[196] However, it did appear that the majority of countries and banks appeared to have been encompassing the

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190 See the "Introduction" to the ISBP 8 para 2.

191 See the "Introduction" to the ISBP 8 para 3. See also Ellinger November 2005 *Journal of Business Law* 708.

192 Ellinger November 2005 *Journal of Business Law* 708.

193 Ellinger November 2005 *Journal of Business Law* 708–709.

194 See part 2 7 2 below.

195 Ellinger November 2005 *Journal of Business Law* 709.

196 For example, some of the commentators stated that the ISBP's application had no clear relationship with the UCP 500 (see the "Introduction" to the International Standard Banking Practice for the Examination of Documents Under Documentary Credits, 2007 Revision for UCP 600, *ICC Publication* No 681 (E), Paris (2007) 11).

ISBP.[197] A concern was even expressed that the ISBP might possibly also have turned out to be yet another unsuccessful effort on the part of the ICC.[198] Fortunately, it does not seem to have been a failure. The ISBP has apparently evolved into an essential companion to the UCP 500 for determining compliance of documents presented with the terms of letters of credit.[199]

2 7 2 The revised ISBP

As the UCP 500 was replaced with the UCP 600 it also became necessary to update the ISBP to bring it in line with the new UCP rules.[200] The same Drafting Group that created the final version of UCP 600 was tasked with the development of the new update, after the UCP 600 had been approved in October 2006. The Drafting Group entertained comments from various countries of the ICC Banking Commission during the drafting process. During the ICC Banking Commission's April 2007 meeting held in Singapore, the International Standard Banking Practice for the Examination of Documents Under Documentary Credits, 2007 Revision for UCP 600 (hereafter "ISBP (2007 revision)")[201] was adopted by a vote of 71 to 0.[202]

The ISBP (2007 revision) is viewed merely as being an updated version of the original ISBP published in 2002, rather than a revision thereof.[203] However, although much of the ISBP (2007 revision) remains unchanged from the first version, certain alterations (some technical or merely cosmetic) had to be made to bring the wording in line with UCP 600. Furthermore, certain paragraphs also had to be removed from the original version where they had been incorporated into UCP 600.[204]

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197 See Walden September 2003 *Credit Management* 23 and see also DCI Interview: Smith July–September 2007 *ICC's DCInsight* 5–7.

198 Ellinger November 2005 *Journal of Business Law* 704 and 709.

199 See the "Introduction" to the International Standard Banking Practice for the Examination of Documents Under Documentary Credits, 2007 Revision for UCP 600, *ICC Publication* No 681 (E), Paris (2007) 11; and see also DCI Interview: D Smith July–September 2007 *ICC's DCInsight* 5–7.

200 For a speculation on what effect UCP 600 will have on the ISBP, see Byrne "Overview of Letter of Credit Law and Practice in 2005" in *2006 Annual Survey* 9.

201 *ICC Publication* No 681 (E), Paris (2007) (hereafter "the ISBP (2007 revision)"). See also the "Foreword" to the ISBP (2007) Revision 3. For a discussion of the ISBP (2007 revision), see Erdemol "A Summary of the Updated ISBP" July–September 2007 *ICC's DCInsight* 3; and see also DCI Interview: D Smith July–September 2007 *ICC's DCInsight* 5–7. As already mentioned in part 2 2 1 above, there are still letters of credit in operation that are subject to UCP 500, and some banks are also still issuing letters of credit subject to UCP 500, despite the coming into operation of the UCP 600. It is also possible that some countries will rather choose to continue to use the original version of ISBP (with which they are familiar) than the updated 2007 version (see Dobáš January–March 2008 *ICC's DCInsight* 3; and see also DCI Interview: D Smith July–September 2007 *ICC's DCInsight* 7). Therefore, this article will refer to/deal with the UCP 500, UCP 600, ISBP, and ISBP (2007 revision) respectively.

202 For a full discussion of the approval of the ISBP (2007 revision), see Note "ISBP 681 Approved Unanimously" July–September 2007 *ICC's DCInsight* 2.

203 See the "Introduction" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 11.

204 See the "Foreword" and the "Introduction" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 3 and 11.

In the introduction to the ISBP (2007 revision) it is mentioned that the international standard banking practices that are documented in this publication are consistent with the UCP 600 and the Opinions and Decisions of the ICC Banking Commission. It also clearly stated that the ISBP (2007 revision) does not amend UCP 600. It is merely explained how the practices articulated in the UCP 600 are applied by documentary practitioners. Therefore, it is suggested that the ISBP (2007 revision) and the UCP 600 should be read together and not in isolation. The ISBP (2007 revision), just like its predecessor, also recognises that the law in some countries may compel results different from those set out in this publication.[205]

It should be remembered that the term "standard banking practice" as incorporated in the UCP 600 encompasses more than can be found in the ISBP and ISBP (2007 revision).[206] This is also made clear by the introduction to the ISBP (2007 revision). In the introduction it was stated that no single publication can anticipate all the terms or the documents that may be used in connection with documentary credits or their interpretation under UCP 600 and the standard practice they reflect. However, the Task Force that had prepared the original version of the ISBP endeavoured to cover terms commonly seen on a daily basis and the documents most often presented under documentary credits. [207]

As already stated, the ISBP was originally created to help reduce the large percentage of documents refused for discrepancies on first presentation. Anecdotal evidence suggested that this objective had partially been achieved.[208] Participants in ICC seminars and workshops have also indicated that rejection rates have dropped due to the application of the practices detailed in the ISBP.[209] The ISBP apparently evolved into an essential companion to the UCP 500 for determining compliance of documents generally presented with the terms of letters of credit. It is also hoped that the ISBP (2007 revision), and subsequent revisions thereof, would also be such a companion to the UCP 600 while the UCP 600 is in operation.[210] However, only time will tell to what extent a universal application of the ISBP (2007 revision) will be realised.

It follows that the ISBP and the ISBP (2007 revision) are both sources of the law of the commercial letter of credit and to the extent to which these rules may be applicable also of the standby letter of credit (and by implication the demand guarantee).

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205 See the "Introduction" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 12.

206 See Note "ISBP 681 Approved Unanimously" July–September 2007 *ICC's DCInsight* 2.

207 See the "Introduction" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 12.

208 See the "Foreword" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 3.

209 See the "Introduction" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 11. See also DCI Interview: D Smith July–September 2007 *ICC's DCInsight* 5.

210 See the "Introduction" to the ISBP (2007 revision) in *ICC Publication* No 681 (E), Paris (2007) 11.

3 THE UNCITRAL CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

3 1 Introduction

From 1988 to 1995 the UNCITRAL[211] worked on a Uniform Law on Independent Guarantee. This eventually resulted in the drafting of the UNCITRAL Convention.[212] The UNCITRAL adopted this Convention and opened it for signature by the General Assembly by its resolution 50/48 of 11-12-1995.[213] States were given a two-year period to sign the Convention, whereafter they had to accede to it. The Convention could only come into effect after it had been ratified by five states. Furthermore, in terms of art 28 of the Convention, it could also only enter into force on the first day of the month following the expiration of one year from the deposit of the fifth instrument of ratification. As a result of this, the Convention only came into effect on 01-01-2000.[214]

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211 In 1966, the United Nations created the UNCITRAL because it desired to play a more active role in reducing and removing legal obstacles to the flow of international trade. UNCITRAL's aim is to further the progressive harmonisation and unification of the law of international trade and its mandate is to be the main legal body in the field of international trade law within the United Nations system. UNCITRAL was initially composed of 29 states, but was expanded in 1973 to 36 states by a General Assembly resolution. Membership is structured so that a specified number of seats are allocated to each of the various geographic regions. Therefore, UNCITRAL is an intergovernmental body of the General Assembly that prepares international commercial law instruments designed to assist the international community in modernising and harmonising laws dealing with international trade. Various legal instruments have since been prepared by UNCITRAL. See the Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, UN Doc A/CN9/431 (4 July 1996) which accompanies the text of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1996) (hereafter the "UNCITRAL Explanatory Note") fn 2 13; and *cf.* Trager "Towards a predictable law on international receivables financing: the UNCITRAL Convention" 1999 *Journal of International Law and Politics* 611 614–615.

212 See the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1996). For a discussion of the background to this UNCITRAL convention and a discussion of a previous draft of this Convention see Bergsten "A new regime for international independent guarantees and stand-by letters of credit: the UNCITRAL Draft Convention on Guaranty Letters" 1993 *International Lawyer* 859. For a further legislative history of the UNCITRAL Convention, see Byrne Fall 1999 *Uniform Commercial Code Law Journal*, in particular the authorities cited in fn 2 150–151; The Draft Convention on Independent Guarantees and Stand-by Letters of Credit, *Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Eigth Session*, 2–26 May 1995, General Assembly, Official Records, 50th Session, Supplement No 17 (A/50/17), as reprinted in Dolan *The Law of Letters of Credit: Commercial and Standby Credits* Revised Edition (loose-leaf edition) (1996) at SAPP F–1 and Horn *German Banking Law and Practice in International Perspective* (1999) in ch 11 "The UN Convention on independent guarantees and the *Lex Mercatoria*", in particular the authorities cited in fn 2 189.

213 See the UNCITRAL Explanatory Note 13. For a full discussion of the UNCITRAL Convention see Gorton "Draft UNCITRAL Convention on Independent Guarantees" February 1996 *Lloyd's Maritime and Commercial Law Quarterly* 42; Gorton May 1997 *Journal of Business Law* 240; Dolan "The UN Convention on International Independent Undertakings: Do States with Mature Letter-of-Credit Regimes Need It?" 1998 *Banking and Finance Law Review* 1; De Ly Fall 1999 *International Lawyer* 831 and Horn 189.

214 As of 01-07-2006, the Convention was ratified (acceded to) by Ecuador, El Salvador, Kuwait, Panama, Belarus, Tunisia, Gabon and most recently (on 16-09-2005) by Liberia. Although the United States had already signed the Convention on 11-12-1997, they have

continued on next page

In view of the URDG, it may at first sight appear to be strange that the UNCITRAL has invested such time and effort in producing its own convention dealing with demand guarantees and standby letters of credit. The reason for this is historical. Soon after the UNCITRAL first began to look at demand guarantees, the ICC embarked on its project to formulate a set of demand rules, the 1992 URDG, intended to be more accommodating of prevailing practice than the URCG. Thereupon, UNCITRAL agreed to stop further work and to abide by the ICC project. Unfortunately, this proceeded slower than had been anticipated and when, after the lapse of a number of years, it showed no signs of reaching finality, the UNCITRAL justifiably decided to proceed with its own proposals for a convention or uniform law. By the time the ICC got back on track with the 1992 URDG, the UNCITRAL project was considered too far advanced to be abandoned. Furthermore, being a work designed to lead either to a convention or to a uniform law capable of adoption in national legislation, it was able to deal with matters that could not properly be the subject of contractually incorporated rules, particularly the effect of fraud and the granting of interim injunctive relief.[215]

3 2 Application and force of the UNCITRAL Convention

The UNCITRAL Convention applies to an international undertaking such as a demand guarantee or a standby letter of credit, (1) where the place of business of the guarantor/issuer at which the undertaking is issued is in a contracting state[216] or (2) the rules of private law lead to the application of the law of a contracting state,[217] unless the undertaking excludes its application. The Convention may also apply to commercial letters of credit if the parties expressly state that their credit is subject to it.[218]

Article 2(1) of the Convention describes the type of undertaking regulated by it in the following terms:

> "For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ('guarantor/ issuer') to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the

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not yet acceded to it. In this regard, see http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995Convention_guarantees_status.html (accessed 17-03-2010). In order for the US to ratify the Convention, it will require the advice and consent of the US Senate. After many years of inaction, there are now signs that the US might possibly ratify the Convention soon. Recently a delegation from the Uniform Law Conference of Canada met with a delegation from Mexico and delegates invited by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), the organisation which oversaw the drafting of the art 5 of the American UCC, to discuss the implementation of the Convention in North America. NCCUSL, Mexico and Canada all expressed interest in adopting the Convention (see *2008 Annual Survey* 13). The Secretariat for UNCITRAL has explained the main objectives of the Convention in the UNCITRAL Explanatory Note 195. The UNCITRAL has announced that it will maintain on its website a record of court rulings applying the Convention, see http://www.un.or.at/uncitral/clout/index.htm (accessed 19-01-2010).

215 See Goode 1996 *Brooklyn Journal of International Law* 19.

216 See art 1(1)(a) of the UNCITRAL Convention.

217 See art 1(1)(b) of the UNCITRAL Convention.

218 See art 1(2) of the UNCITRAL Convention.

> terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person."

Article 2 of the Convention concerns an undertaking that "is an independent commitment". The independence (autonomy) of the undertaking is of basic importance for the applicability of the Convention and art 3 describes the independence of the undertaking as follows:

> "For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not:
>
> (*a*) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or
>
> (*b*) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations."

From the above, it is clear that ancillary undertakings such as suretyships, are specifically excluded from the Convention.

It was decided that the application of the UNCITRAL Convention should be limited to international undertakings (demand guarantees or standby letters of credit) in particular, since it was felt that the inclusion of domestic instruments would adversely affect the global acceptability of the Convention.[219] Article 4 defines what is meant by "international character of the undertaking". According to art 4(1), an undertaking is international if the places of business (or residence) specified in the undertaking of any two of the following persons are in different states (countries): guarantor/issuer, beneficiary, principal/applicant, instructing party or confirmer. Therefore, the UNCITRAL Convention extends only to independent undertakings that are international in origin.[220]

The Convention is shaped around both the UCP and the 1992 URDG, but it is distinctive in that both the UCP and the URDG were drafted by the ICC, a private organisation, as voluntary rules or self-regulation, whereas the Convention is drafted by the UNCITRAL as a uniform law or official regulation for those countries who adopt it. Therefore, a state's adoption of the Convention has the effect of making it law in that state, in contrast to the URDG and other ICC rules which take their force from incorporation into the contract of the parties.[221] The Convention, in addition to being essentially consistent with the solutions found in the rules of practice, supplements their operation by dealing with issues beyond the scope of such rules. It does so especially regarding the question of fraudulent or unfair demands for payment and judicial remedies available in such instances.[222] In other words, because the legal status of the Convention is distinctive from the ICC rules, the Convention includes provisions relating

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219 See Bergsten 1993 *International Lawyer* 863 and see also De Ly Fall 1999 *International Lawyer* 838.

220 Dolan 1998 *Banking and Finance Law Review* 9.

221 *Guide to the URDG* 7.

222 See the UNCITRAL Explanatory Note fn 5 15.

to the fraud rule.[223] In its treatment of contractual relations between the parties, the Convention follows the 1992 URDG rather closely in scope and effect, although its drafting is fairly different and the Convention does not contain any equivalent of art 20 of the 1992 URDG.[224]

Since the adoption of the UNCITRAL Convention no major trading nation[225] has acceded, although the ICC[226] and World Bank have indicated their approval.

4 NATIONAL LAWS AND PUBLIC POLICY

4 1 The impact of mandatory national laws and public policy requirements

Although most jurisdictions accord a high degree of autonomy to the parties to a demand guarantee in making their own bargain, demand guarantees like other contracts, are subject to any mandatory rules imposed by the law applicable to the guarantee and are also subject to the mandatory law of the country before whose court the dispute is being heard (*lex fori*), even if those rules apply to contracts governed by foreign law. Whether the mandatory rules of the *lex fori* are overriding in their effect or can be displaced by the selection of a foreign law to govern the contract is a matter to be determined by the *lex fori*. Likewise, the terms agreed between the parties give way to rules of public policy denying or limiting the effect of demand guarantees when such rules are imposed by the applicable law or the *lex fori*. In the latter case, they are given overriding effect.[227]

When the overriding mandatory rules of a country provide that a guarantee is to remain in force for a particular period, or until return of the guarantee document, notwithstanding any provisions of the guarantee to the contrary, those rules will prevail over the guarantee where it is governed by the law of the country concerned. This is also the case where proceedings to enforce the guarantee are brought in that country; its overriding mandatory rules have effect although the guarantee is governed by foreign law.[228]

4 2 Special legislation governing standby letters of credit and demand guarantees

Owing to the highly international character of demand guarantees, standby letters of credit and commercial letters of credit, only a few individual countries in the world have introduced special legislation governing these instruments.[229] For instance, neither South Africa[230] nor England has specific national legislation

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223 Xiang Gao 21.

224 Goode 1996 *Brooklyn Journal of International Law* 19.

225 See fn 214 above.

226 The ICC endorsed the UNCITRAL Convention on 21-06-1999 In this regard, see *ICC Publication* No 500/2, Paris (2002) 69.

227 *Guide to the URDG* 20–21.

228 *Ibid*.

229 For a discussion of a few countries that have statutory provisions regarding documentary credits, see Schütze and Fontane "Documentary Credit Law Throughout the World: Annotated Legislation from More than 35 Countries" (2001) *ICC Publication* No 633 43–140. For a discussion of a few countries that have statutory provisions regarding demand guarantees, see Bertrams 35–36 and also fns 41–42.

230 In the absence of legislation, the legal relationships between the parties to a commercial letter of credit, demand guarantee and standby letter of credit are generally governed by the law of contract (see Van Niekerk and Schulze 273).

governing commercial letters of credit, standby letters of credit or demand guarantees.

Normally where a country has any legislation governing demand guarantees, commercial letters of credit or standby letters of credit, it often tends to consist of only a few provisions, often of a general nature.[231]

However, one such exception is art 5 of the UCC of the United States of America. Article 5 of the UCC deals with letters of credit and it encompasses both the commercial letter of credit and the standby letter of credit. Therefore, disputes relating to an American standby letter of credit are decided under art 5 of the UCC. Article 5 of the UCC is an important source of law for commercial letters of credit and standby letters of credit in the United States. In addition to this, the United States Comptroller of the Currency, the main regulator of United States banks, regularly issues Interpretive Rulings[232] dealing with independent undertakings. These rulings extensively expand the authority of the United States banks to issue demand guarantees (independent undertakings) and create standards of good banking practice for them.

5 CASE LAW AND LEGAL WRITINGS

In certain jurisdictions, for example, South Africa, England and the United States, court decisions have constituted an important part of the law of demand guarantees, standby letters of credit and documentary credits. In common law countries the law on demand guarantees has developed especially in case law. Owing to the international nature of most commercial and standby letters of credit and demand guarantees, the decisions of courts from other jurisdictions, especially English courts, have played, and will continue to play, an important role in the judicial interpretation of these instruments issued by South African banks.[233] Legal writings are also regarded as supplementary to the law of demand guarantees, standby and commercial letters of credit.

6 CONCLUSION

In most jurisdictions, such as South Africa and England, there are no explicit statutory rules for documentary credits, demand guarantees and standby letters of credit and therefore disputes must be primarily addressed under explicit contractual provisions, unwritten rules, and domestic principles of contract and commercial law. Then again in other countries, such as the United States (eg art 5 of the UCC – regulating commercial letters of credit and standby letters of credit), there are statutory provisions for documentary credits, standby letters of credit and demand guarantees. Important sources of law for demand guarantees and standby letters of credit in certain jurisdictions – such as South Africa, England and the United States – are, of course, case law and legal writings.

Today it appears that in relation to demand guarantees and standby letters of credit, the following ICC instruments (uniform rules) for self-regulation are available: (1) the UCP (ie. UCP 600, the version currently in force); (2) the ISP98; (3) the URCG (for demand guarantees); and (4) the URDG (ie. the 1992

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231 Xiang Gao 15.

232 See, eg the United States Comptroller of the Currency's Interpretive Ruling of 01-07-2008 12 CFR s 7.1016. See also Bertrams 6.

233 Van Niekerk and Schulze 273.

version and from 01-07-2010 also the 2010 version). None of these uniform rules has the force of law in any jurisdiction. The ICC is a private commercial organisation not a law-making body and its uniform rules have no independent force of their own; they take effect by incorporation into contracts. Each set of rules provides that parties to the relevant transaction may elect to incorporate the relevant set of rules into the relevant transaction in whole or in part. To the extent that such incorporation is not inconsistent with domestic legislation applicable to the demand guarantee and standby letter of credit, courts will normally uphold provisions of the UCP, URDG, URCG or the ISP98 where specifically incorporated into the guarantee or credit.

The first version of the UCP was published in 1933, and since then there have been a few revisions (the latest in 2006). In essence, the UCP is a set of rules issued by the ICC governing all aspects of documentary credits, except for the relationship between the applicant for a documentary credit and the issuing bank. Initially, the UCP only applied to letters of credit, but from 01-01-1984 it also applies to standby letters of credit. However, the incorporation of standby letters of credit into the UCP did not result in specific rules for this form of letters of credit being included; in fact, the larger part of the UCP does not apply to standby letters of credit or is inappropriate, while other issues that are vital in a standby letter of credit context are not addressed at all in the UCP. In reality, the application of the UCP merely implied that the UCP's general letters of credit principles were expressly made applicable to standby letters of credit. Initially, banks in the United States and other countries that were influenced by United States banking practices, issued standby letters of credit subject to the UCP. However, since the ISP98 came into operation on 01-01-1999, the majority of standby letters of credit are no longer issued subject to the UCP.

South African banks are already issuing commercial letters of credit subject to UCP 500. It is expected that they will also use the latest version, UCP 600. It is submitted that this is a good practice and banks should continue to do so. Owing to the lack of legislative regulation for commercial letters of credit, South Africa should also consider following the approach used in the United States, to make the UCP part of our local law.

Presently the South African banks are not generally issuing demand guarantees subject to the 1992 URDG. Since there is a lack of legislative regulation for demand guarantees in South Africa, and because of their highly international nature, South African banks should seriously consider making use of the available international rules, such as the 2010 URDG. Therefore, it is recommended that South African banks should investigate the possibility of making their demand guarantees subject to the 2010 URDG that became operative on 01-07-2010.

In addition to the above-mentioned instruments of self-regulation, it is also possible that the UNCITRAL Convention may apply to demand guarantees and standby letters of credit. If the UNCITRAL Convention is adopted by a state, it will acquire the force of law in that contracting state. Unfortunately, South Africa has neither signed nor acceded to the UNCITRAL Convention and it also seems that South Africa has no immediate plans to do so.[234]

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234 Telephonic information received from the South African Department of Foreign Affairs: Multi-Lateral Division based in Pretoria on 24-09-2009.

It is submitted that South African banks should use the different international rules of the ICC. By incorporating them into the demand guarantees and standby letters of credit, it will be easier for banks, lawyers and courts to interpret these instruments, and to learn about their exact use, as this would provide them with some form of international standard of comparison.

The Constitution as a Source of Accountability: the Role of Constitutionalism

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1 INTRODUCTION

Most good governance, accountability and constitutionalism indicators suggest that, whilst African countries have made considerable strides since the tidal wave of democratisation and liberalisation reached the African shores in the 1990s, the institutional foundations and framework for effective and sustainable change remain shallow.[1] It thus comes as no surprise that the "born again" dictators of yesteryears and the post-1990 democrats of the new era are now using the rapidly spreading dominant parties to threaten to reverse the progress towards genuine constitutional democracy all over the continent. The cancer of corruption, incompetence, poor governance, political instability and economic mismanagement which result in conflict, poverty and disease continues to plague the continent.

The notion that entering into, and participation, in politics is for the noble purpose of service to the people and to improve their lot is almost, but not quite, unknown in Africa.[2] The recalcitrant "born again" dictators of the past who have

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1 For an analysis which compares the general freedom trends in Africa for the period 1980–1989 with the period 1990–1999, see Fombad "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism" in Nhema and Zeleza, *The Resolution of African Conflicts: The Management of Conflict Resolution and Post-Conflict Reconstruction.* (2008) 184–187. The main indicators are: freedom of the world survey of civil and political rights published by Freedom House since 1972 at http://www.freedomhouse.hu/index.php?option=com_content&view=article&id=221:freedom-in-the-world-2009-survey-release&catid=47:freedom-in-the-world&Itemid=102 (accessed 20-10-201), freedom of the press survey also published by Freedom House at: http://www.freedomhouse.org/template.cfm?page=470 (accessed 20-10-2010).

2 Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" Occasional Paper No 27 Governance and APRM Programme (March 2009) http://www.ifaisa.org/current_affairs/Balancing_Majority_Rule_and_Minority_Rights.pdf (accessed 20-10-2010).

stubbornly stuck to power, and also the "new wave democrats" have turned out to be as greedy, unreliable, opportunistic, corrupt and bent on entrenching themselves in power today as was the case before the 1990s.[3] The new or substantially revised constitutions which carried a promise of constitutionalism do not appear to have stemmed the slow but steady resurgence of authoritarianism on the continent. Is Africa doomed to be ruled exclusively by politicians who once in power turn out to be corrupt, greedy and sometimes murderous in their desire to perpetuate their hold on power? Are these inherent and incorrigible traits of most African leaders? Can this process never be reversed?

As Gerald Caiden rightly points out, people usually get the government they deserve. If the people are diligent, demanding, inquisitive and caring, they will get a good government. However, if they allow themselves to be intimidated, bullied, deceived and ignored, then they will get a bad government.[4] Politicians are ordinary mortals and not saints.[5] Africans, in most cases, do not elect bad leaders. They elect potential Nelson Mandelas, such as Julius Nyerere of Tanzania, Kenneth Kaunda of Zambia and Ahmadou Ahidjo of Cameroon, but either close their eyes, lean back, relax and hope to enjoy the promised land of democracy and good governance, or transform these ordinary mortals into infallible, indispensable and irreplaceable saviours whose departure from power must be viewed with trepidation.[6] In South Africa, the African National Congress is so adored that it can do no wrong in the eyes of the people. Hence, its leaders are also seen to be unable to set a foot wrong. Any accusations of impropriety against its leaders can only be the machinations of those suffering from the hangovers of apartheid. In other African countries, any criticism of a leader is viewed as the diabolical ploy of people who do not belong to the leader's tribe and who want to replace the incumbent with a tribesman of their own. In many of these countries, the opposition – where it is real – are regularly castigated by the government media as unpatriotic dreamers and adventurers whose advent to power must be prevented at all cost.[7] As in the past, we have continued to deify our leaders once they are elected to power, whereafter they forget about those who had elected them and rely only on the small cliques that repressively keep them in power. The leaders lose touch with the electorate and are accountable only to themselves. Today we are haunted by the old demons of authoritarian rule which we had hoped to have exorcised through constitutional reforms and multiparty democracy in the 1990s.

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3 For a balance sheet after a decade of democratisation, see Fombad "The African Union, democracy and good governance" 2006 *Current African Issues* 10–18.

4 Caiden "Public Maladministration and Bureaucratic Corruption" in Mackinney and Johnston (eds) *Fraud, Waste and Abuses in Government: Causes, Consequences and Cures* (1986).

5 "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." This citation from *The Federalist Papers* No 5 is taken from Diamond, Plattner and Schedler "Introduction" in Schedler, Diamond and Plattner *The Self–Restraining State. Power and Accountability in New Democracies* (1999) 3.

6 This is not fantasy. See some of these arguments raised when presidents wish to remove constitutional term limits, discussed Fombad and Inegbedion "Presidential Term Limits and their Impact on Constitutionalism in Africa" in Murray and Fombad (eds) *Fostering Constitutionalism in Africa* (2010).

7 Fombad 2006 *Current African Issues* 10–18.

It is contended that the constitutional rights revolution of the 1990s did not break the perpetual cycle of transforming potentially good leaders into unaccountable despots. To ensure that the good people we elect today do not become the tyrants and dictators of tomorrow, constitutions must be devised that do not only promote constitutionalism, but also guarantee accountability and responsibility.

This article will first briefly examine concept of constitutionalism and its core elements as this is currently understood. This will be followed by discussion of the concept of accountability and its links to modern constitutionalism. Because of Africa's poor record on constitutionalism, the third part of the article considers ways in which the critical elements of accountability can be entrenched within the core elements of constitutionalism.

In this era of liberalisation and globalisation that is now compounded by a global recession, only those African countries that are ready to entrench credible accountability mechanisms constitutionally can hope to attract the few foreign investors that still have the wherewithal to invest on the continent. Besides, there is no turning back on an increasingly restive but rights-conscious people who are bound to have their way at some point. For as the late American president, John F Kennedy said, "those who make peaceful revolution impossible, will make violent revolution inevitable".[8]

2 THE CONCEPT OF CONSTITUTIONALISM AND ITS CORE ELEMENTS

2 1 The concept of constitutionalism

It is necessary to start by pointing out that constitutionalism must be distinguished from the notion of a constitution. In its broadest sense, a constitution consists of a collection of rules, whether written in a formal document or not, that limits both government and the governed with respect to what may or may not be done. The very essence of a constitution is to prevent both tyranny and anarchy. To achieve this, it must sufficiently empower the government to enable it to be strong enough to operate effectively, whilst imposing reasonable restraints on it that do not make it too weak and create the risk of anarchy.[9] Nevertheless, it must be recognised that some apparent restraints, especially on governments, may actually be a sham. It is thus no surprise that many tyrants and dictators in Africa and elsewhere, have, whether individually or collectively, often used constitutions as a convenient smokescreen behind which they have dissimulated their despotism. The absence of meaningful restrictions therefore made it almost impossible for many countries to practice constitutionalism. This raises the question of what exactly is meant by constitutionalism.

The distinction between a constitution and constitutionalism, it has been said, is more than a simple exercise in semantics.[10] Constitutional scholars, political

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8 Cited in Anderson (compiler) *Great Quotes from Great Leaders* (1989) 39.

9 Holmes *Passions and Constraint: On the Theory of Liberal Democracy* (1995) 270–271, aptly captures the paradox thus: "How can we exit from anarchy without falling into tyranny? How can we assign the rulers enough powers to control the ruled, while also preventing this accumulated power from being abused?"

10 See Curry, Riley and Battistani *Constitutional Government: the American Experience* (1997) 4.

scientists and other social scientists have had great difficulties defining the concept of constitutionalism. Some have even confused it with the very notion of a constitution.[11]

The concept of constitutionalism certainly defies any easy and simple definition or description. It clearly means something far more than the mere attempt to limit governmental arbitrariness, which is the premise of a constitution, and which attempt may fail, as it has done several times in Africa.

The concept today can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limits. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. The modern concept therefore rests on two main pillars. First, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on a certain clearly defined set of core values. Secondly, it relies on the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, constitutionalism has a certain core, irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable. The most recent literature on the topic suggests that the following can be identified as the core elements of constitutionalism: [12]

(i) the recognition and protection of fundamental rights and freedoms;
(ii) the separation of powers;
(iii) an independent judiciary;
(iv) the review of the constitutionality of laws;
(v) the control of the amendment of the constitution; and
(vi) institutions that support democracy.

There are, however, three important points to note about constitutionalism as defined above. First, constitutionalism is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.[13] Second, the presence and institutionalisation

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11 See for example Nwabueze *Constitutionalism in the Emergent States* (1973) 1 and Gloppen *South Africa: the Battle over the Constitution* (1997) 43.

12 See Henkin "Elements of constitutionalism" 1998 *The Review* 11–22 who identifies nine "essential elements"; Sartori *The Theory of Democracy Revisited* (1987) who lists five elements of what he terms liberal constitutionalism, although he lays emphasis on the rule of law; Bo Li "What is constitutionalism?" http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm (accessed 20-10-2010). And the same author in "Constitutionalism and the rule of law" http://www.oycf.org/Perspectives/7_083100/constitutionalism_and_the_rule_o.htm (accessed 20-10-2010); Murphy "Constitutions, Constitutionalism and Democracy" Greenberg, Katz, Oliviero and Wheatley (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 3–25. Gloppen *South Africa: the Battle over the Constitution* 23–57 and Nwabueze *Constitutionalism in the Emergent States* 1–22.

13 In this regard, one could add as an emerging core element, the institutions supporting constitutional democracy, found in Chapter 9 of the South African Constitution. For one can not agree more with Klug "Constitutional law" in *Annual Survey of South African Law* (1995) 1–11, when he states that Chapter 9 of the South African Constitution is probably South Africa's most "important contribution to the history of constitutionalism".

of these core elements do not necessarily guarantee constitutionalism. Nevertheless, their presence makes the prospects for constitutionalism better. In the absence of such provisions, the chances of constitutionalism are very bleak. Finally, it is the cumulative effect of these core elements that enhance the chances for constitutionalism.

The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic shams or ornamental documents that could be easily manipulated by politicians, but rather documents that could promote respect for the rule of law and democracy.

2 2 Constitutionalism in post-1990 African constitutions

At independence, most African countries adopted constitutions that had been crafted by the departing colonial powers. The British parliamentary or Westminster model to which elements of the United States of America's presidential system were added was widely adopted in most of Anglophone Africa. The other major Western constitutional model that was adopted was the Gaullist constitutional system based on the French Fifth Republic Constitution of 1958. This model was essentially an admixture of the Westminster parliamentary and the US presidential system. This model has been widely adopted in Francophone Africa and variations of it were adopted in Lusophone Africa. Within a short while after independence, most of these constitutions were brazenly suspended, circumvented or disregarded arbitrarily by the different governments.

The new or revised constitutions adopted in the 1990s attempted to usher a new era of constitutionalism. We shall briefly see how this is manifested in a number of selected countries representative of the different constitutional models received in Africa.[14]

2 2 1 Fundamental human rights

The protection of fundamental human rights and freedoms has now become a standard of constitutionalism recognised and accepted by all countries. Two main patterns emerge in the incorporation of fundamental rights provisions in the constitutions examined in this paper.

The first pattern which reflects the Gaullist style is by way of incorporation of international human rights instruments by reference. This was the system adopted by many Francophone constitutions upon independence. But of the post-1990 constitutions examined, only the Cameroonian Constitution has maintained this style. The Constitution itself, unlike all the other constitutions studied, contains no Bill of Rights or provisions recognising and protecting fundamental rights and freedoms. The preamble thereof affirms the peoples' "attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the

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14 To ensure a balanced representation of the different constitutional traditions operating in Sub Saharan African, the analysis that follows will be based mainly on the constitutions of the following countries, Angola of 25-08-1992, Cameroon of 18-01-1996, Republic of Congo of 15-03-1992, Eritrea of 07-1996, Gabon of 26-03-1991, Ghana of 07-01-1993, Mali of 26-03-1991, Mauritania of 12-07-1991, Mozambique of 11-1990, Namibia of 02-1990, Niger of 18-07-1999, Nigeria of 1999 and South Africa of 04-02-1997. Unless otherwise stated, any references to the constitutions of these countries should be taken as references to the constitutions on or after these dates.

Charter of the United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto", it then proceeds to state as "principles", but in often obscure and circumlocutory language, some of the standard rights and freedoms found in a Bill of Rights.

The more common pattern that features in almost all the other constitutions examined is the inclusion of provisions under the heading "Bill of Rights",[15] or "Protection of fundamental rights and freedoms",[16] which set out in some details the specific rights and freedoms recognised and protected.

Hence, apart from Cameroon and to a certain extent Mauritania, where the fundamental rights and freedoms are merely listed in art 10 of that Constitution, the general pattern that is discernible is that most post-1990 African constitutions now clearly recognise and protect fundamental human rights and freedoms and also provide for their judicial enforcement.

2 2 2 The separation of powers

The separation of powers as one of the fundamental preoccupations of modern constitutionalism is driven by the suspicion and distrust of power in general, and the concentration of power in particular. As Lord Acton had observed several centuries ago, "all power tends to corrupt, and absolute power corrupts absolutely".[17] The abuse of the often exorbitant powers that many African leaders arrogated to themselves has been one of the major causes for the continent's woes.

The doctrine of separation of powers, in its simplest and probably extreme form, basically requires that the three branches of government, namely the executive, legislative and judiciary, should be kept separate from each other.[18] African constitutional engineers, in incorporating the doctrine, had three main Western models to choose from. The first model is the semi-rigid presidential form of the US Constitution. Notwithstanding the emphatic, and in some instances unqualified terms in which the doctrine is expressed in the US Constitution, it is clear that the regime contemplated is far from a rigid separation of powers. In practice, it turns out to be an elaborate system of checks and balances. The Westminster model of the doctrine, whilst recognising the three branches of government, provides for extensive fusion and overlapping, especially between the legislative and executive powers and it basically centres on the independence of the judiciary. The third model is the French, which is essentially a mix of the other two and provides for a close collaboration, rather than a strict separation of powers with the only peculiarity being the dominance of the executive and the subordinate position of the judiciary.

The prevention of tyranny is the common thread that ties all three models although the approaches adopted in achieving this common goal are quite different. All the constitutions examined in this study expressly or implicitly provide for a separation of powers. Most of the constitutions of Francophone African countries

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15 See for example Chapter 2 of the Constitution of South Africa.

16 See for example, Part II of the Constitution of Angola; Title II of the Constitution of Republic of Congo; Chapter 5 of the Constitution of Ghana; Title I of the Constitution of Mali; Part II of the Constitution of Mozambique; and Title II of the Constitution of Niger.

17 Cited in Curry, Riley and Battistani *Constitutional Government: the American Experience* 4.

18 See generally Fombad "The separation of powers and constitutionalism in Africa: the Case of Botswana" 2005 *Boston College Third World Law Journal* 101–139.

have copied the French model. A typical example of this is the Cameroon Constitution that has adopted *holus bolus* the French Fifth Republic Constitution approach. Whilst purporting to introduce a separation of powers, it provides for an all-powerful and "imperial" president of the republic who appears to exist and operate outside the classic division of legislature, executive and judiciary. The whole idea of a separation of powers under the Cameroonian Constitution becomes more of a farce in the face of a number of provisions that enable the president not only to dominate the legislature but also to control the judiciary completely.[19]

Insofar as the separation of powers is concerned, most modern Anglophone African constitutions, whilst predominantly influenced by the Westminster model, have infused many elements of the US approach. There are extensive variations.[20] In spite of the apparently dominant position of the executive, there are provisions that ensure legislative control over the executive through the principles of individual and collective responsibility before Parliament.[21]

The main conclusion that can be drawn here is that most post-1990 constitutions do provide for a separation of powers in the sense of checks and balances that has the potential to reduce the risks of despotism and thus enhance the chances of constitutionalism. The provisions dealing with this in the constitutions of Anglophone African countries do allow for a partial and limited intermixing of powers, but on the whole are capable of preventing executive excesses. By contrast, the provisions in most Francophone African constitutions are unlikely to be very effective, even though most have tried to improve on the rather defective French model, with the exception of Cameroon where the purported separation of powers is purely symbolic. However, the possible effectiveness of any separation of powers provision depends on the extent to which the judiciary is independent.

2 2 3 The independence of the judiciary

An independent judiciary is a necessary and logical corollary to the doctrine of separation of powers. A formal constitutionally entrenched independent judiciary is absolutely essential and a necessary precondition to functional and substantive judicial independence.

From a formal perspective,[22] all African countries have provisions which, in varying degrees of effectiveness, provide for judicial independence.[23]

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19 As regards the extensive powers of lawmaking, see arts 27 and 28 of the Cameroon Constitution, and as regards the judiciary, see the part on judicial independence below.

20 See s 32 of the Botswana Constitution; s 86(1) of the South African Constitution and also arts 40 and 41(1) of the Constitution of Eritrea. Contrast this with art 28(1) of the Constitution of Namibia and art 63 of the Constitution of Ghana.

21 See for example, s 50(1) of the Botswana Constitution; art 82 of the Constitution of Ghana; and s 92(2) of the South African Constitution.

22 For a more detailed account of this, see Fombad "A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions" 2007 *Public Law* 233–257 and Madhuku "Constitutional protection of the independence of the judiciary: a survey of the position in southern Africa" 2002 *Journal of African Law* 32–45.

23 See arts 120–133 of the Angolan Constitution; ss 96–104 of the Botswana Constitution; ss 47 and 118–133 of the Lesotho Constitution; arts 97–124 of the Madagascan Constitution; ss 103–109 of the Malawian Constitution; ss 76–86 and 113–119 of the Mauritian

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Determinants of such formal constitutional independence include[24] vesting judicial functions exclusively on the judiciary,[25] qualifications for prospective judges, the independence of the appointment process, the independence of the Judicial Service Commissions, security of tenure, judicial remuneration, promotion processes, disciplinary processes and immunity from criminal and civil suits.

Most recent constitutions have, in dealing with the judiciary, either adopted the Westminster or Gaullist model. To the extent that the executive appoints members of the judiciary under both, it can be said that that the executive controls the judiciary.

The French model that has been widely copied in most Francophone African countries and Lusophone African countries have been significantly influenced by the Gallic obsessive fear of the threat of legal dictatorship through a "government of judges". Thus art 64 of the French Constitution, which provides that the "president of the Republic is the guardian of the independence of the judiciary", clearly suggests that the judiciary is not on the same par as the executive but rather below it. This conclusion is reinforced by the powers given to the president to appoint, promote, transfer, and dismiss judicial personnel, which effectively compromises their personal independence. Similar provisions are found in the constitutions of most Francophone African countries.[26] The very strong political interference in the process of judicial appointments, promotions, transfers and dismissals is often mildly disguised by provisions that require the President to act on the "advice" of, or receive the "opinion" of the Higher Judicial Council or similar bodies, which are controlled and dominated by the executive.

By contrast, Anglophone African countries have made tremendous strides towards making the judiciary independent of both the executive and the legislature. For example, although appointments, as well as certain decisions on the transfer, promotion and dismissal of judicial personnel are taken by the executive, the latter is often required to act on the recommendations of a Judicial Service Commission or similar body. Unlike similar bodies provided for in the constitutions of Francophone and Lusophone countries, these bodies are usually

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Constitution; arts 161–175 of the Mozambican Constitution; arts 78–85 of the Namibian Constitution; ss 165–180 of the South African Constitution; ss 62 and 138–160 of the Swazi Constitution; arts 901–98 of the Zambian Constitution; and ss 79–92 of the Zimbabwean Constitution.

24 For a detailed discussion of this, see Autheman "Global best practices: judicial integrity standards and consensus principles", IFES Rule of Law White Paper Series, http://66.249.93.104/search?q=cache:TVdXJQ6CriwJ:www.ifes.org/searchable/ifes_site/ (accessed 20-10-2010).

25 Although this is not a very common constitutional provision, it is still important to spell it out. The Zimbabwe Constitution provides the very opposite of this in s 79(2)(a) which gives Parliament the right to vest "adjudicating functions in a person or authority other than a court". In October 2004, Roy Bennett, a member of the opposition party in Parliament, became the first person to be convicted and sentenced outside of the judicial process and under the judicial authority of Parliament in terms of the Privileges, Immunities and Powers of Parliament Act.

26 See for example, art 37(3) of the Cameroon Constitution; art 69 of the Constitution of Gabon; art 89(1) of the Constitution of Mauritania; and art 100 of the Constitution of Niger.

composed of specified independent legal experts who are more likely than not to act objectively and impartially.[27] It is also unlikely that the executive will disregard their recommendations. Perhaps the wording that best enhance the chances of objectivity, fairness and impartiality in the appointment of judicial personnel is found in the South African Constitution. [28]

One can thus conclude that the majority of recent African constitutions recognise and sometimes purport to protect the independence of the judiciary. However, because of the substantial scope for political interference, the prospects for effective judicial independence in Francophone and Lusophone countries are quite limited. By contrast, many Anglophone constitutions, especially those of Ghana and South Africa, contain provisions that can considerably enhance the chances of the judiciary operating relatively independently. A judiciary that operates without pressure, threats or intimidation will clearly enhance the prospects for constitutionalism in the country.

2 2 4 Control of the constitutionality of laws

A constitution is only as good as the mechanism provided within it for ensuring that its provisions are properly implemented and that any violations of it are promptly sanctioned. An important bulwark of constitutionalism is therefore the existence of an efficient and effective mechanism for controlling and compelling compliance with the letter and spirit of the constitution. In the absence of this, the constitution is not worth the paper on which it is written and it is probably as good as being non-existent. Besides this, it is the only way in which the supremacy of the constitution, which most constitutions explicitly[29] or implicitly[30] provide for, has meaning.

Although most African independence constitutions adopted different methods for controlling the constitutionality of laws, the choice was mainly between the American system of judicial review based on *Marbury v Madison*,[31] and the French system of quasi-administrative/quasi-judicial review before a Constitutional Council.

The latter is the model which is usually associated with continental Europe and more specifically, the *Conseil Constitutionnel* (Constitutional Council) of the French Fifth Republic Constitution of 1958 which has been widely adopted in the constitutions of Francophone African countries and in slightly modified form in Lusophone countries such as Angola,[32] and

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27 See for example ss 103–104 of the Botswana Constitution; arts 153–154 of the Constitution of Ghana; and art 85 of the Constitution of Namibia.

28 See s 174 of the Constitution of South Africa.

29 For example, art 1(2) of the Constitution of Ghana states: "This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provisions of this Constitution shall, to the extent of the inconsistency, be void." See also, s 1(1) and (3) of the Constitution of Nigeria; art 1 (1) of the Constitution of Namibia; s 1(c) of the Constitution of South Africa; s 2 of the Lesotho Constitution; ss 5 and 10(1) of the Malawian Constitution; s 2 of the Mauritian Constitution; art 200 of the Mozambican Constitution; art 2(1) of the Zambian Constitution; and s 3 of the Zimbabwean Constitution.

30 See art 153(1) of the Angolan Constitution; ss 18(1) and 105–106 of the Botswana Constitution; and art 122 of the Madagascan Constitution.

31 1 Cranch 137 (1803).

32 See arts 134–157. Although these provisions refer to it as a "Constitutional Court", factors such as the nature of its jurisdiction and its access clearly indicate that it is only such a court in name but not in function.

Mozambique.[33] The majority of these countries introduced some changes to this model in their post-1990 constitutions in an attempt to remedy some of the serious defects of this model. But in its 1996 constitutional amendment, Cameroon copied the French model in its pure and undeveloped form with all its defects and weaknesses.[34] The original and congenital defect of this model, namely its quasi-administrative rather than judicial nature, renders the entire mechanism flawed. For the Constitutional Council is comprised of political appointees who are not necessarily judges which compromises the chances of effective review. In fact, the Council may be seized by the very politicians who made the unconstitutional laws. Further, from a functional point of view the Council's pre-promulgation review is a weak form of review and therefore ineffectual. Because the key pillar of judicial review is absent, the prospect for constitutionalism in these three countries is very bleak indeed. This is perhaps accentuated by the enormous scope that these constitutions often allow for direct executive law-making[35] which makes it easy for dominant parties in these countries to enact legislation that may entrench their hold on power with little fear of judicial oversight.

Most Anglophone African countries adopted the American system of judicial review. The review is done either by the ordinary courts or by specially created constitutional courts.[36] The pattern of review by ordinary courts appears in diverse forms under the constitutions of Botswana,[37] Lesotho,[38] Malawi,[39] Mauritius,[40] Namibia,[41] Swaziland[42] and Zimbabwe.[43]

This second pattern, review by a specially created court or what may be described as a mixed model, may take various forms. One form appears in the

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33 See arts 180–184.

34 See generally Fombad "The new Cameroonian Constitutional Council in a comparative perspective: progress or retrogression" 1998 *Journal of African Law* 172–186 and Fombad "Protecting constitutional values in Africa: a comparison of Botswana and Cameroon" 2003 *Comparative and International Law Journal of Southern Africa* 83–105.

35 For example, in the Angolan Constitution, what is usually referred to as the exclusive legislative domain is defined in art 89 (which actually says "full and sole legislative powers" and art 90 (which also refers to "relative sole legislative powers") whilst the residual legislative domain reserved for the executive is defined in art 91 (under what it refers to as "laws of authorisation"). See provisions on the executive law-making domain in art 83 of the Madagascan Constitution and art 157 of the Mozambican Constitution.

36 An example of the former is provided for in art 2 of the Constitution of Ghana. It provides that "a person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment; or any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect". See further arts 130–131 of that Constitution, and similar provisions in arts 79 and 80 of the Constitution of Namibia and art 49 of the Constitution of Eritrea.

37 See ss 18(1) and 105–106.

38 See ss 22 and 129.

39 See ss 11(3) and (4), 103(2) and 108(2).

40 See ss 17 and 83–84.

41 See arts 25 and 80(2).

42 See ss 35, 139(2) and 146(2)(a).

43 See s 24. The constitutional scope for judicial review of constitutionality appears to be very narrow as Section 24 restricts review only to matters dealing with the declaration of rights provided for in arts 11–23.

South African Constitution, which combines elements of both a diffuse and concentrated system. Despite the fact that there is a specialised Constitutional Court specifically created to deal exclusively with constitutional adjudication, parties may raise constitutional issues before the lower courts. Another example that of s 27 of the Zambian Constitution which provides for the creation of *ad hoc* special tribunals to deal with pre-promulgation preventive review of constitutionality whist reserving repressive *a posteriori* review of constitutionality to the high court.[44]

The excessive powers conferred upon the executive branch (or which it arrogates to itself) in African constitutions means that an efficient mechanism for reviewing the constitutionality of laws needs to be firmly in place as a check against any abuses. It clearly defies all logic to think that the executive, led by the president, who generally initiates almost all laws that go through Parliament, will want to impugn these very laws as contemplated by some African Francophone constitutions. The effective removal of the review of constitutionality of legislation from the ordinary courts of law and placing it before anomalous quasi-administrative bodies whose composition is determined wholly or partly by politicians, compromises the chances of ensuring that the constitution is not violated. As the analysis has shown, the Anglophone constitutions that have adopted the American system of judicial review provide a more credible mechanism for reviewing the constitutionality of laws. If it is accepted as legitimate to establish in a constitution certain guarantees designed to protect citizens as well as control the government as to what to do or not do, then it must also be considered as legitimate to build into the constitution the measures to ensure that the guarantees contained in it are respected. It is therefore contended that there can be no constitutionalism, in the sense of respect for the constitution and the values and principles that underlie it, if there is no secure mechanism, whether it takes the form of judicial review by ordinary courts or other specialised courts or bodies, that can independently and impartially enforce the provisions of this constitution and check and control any abuses of its provisions. On the other hand, any system of control of constitutionality of laws which makes the control to a large extent dependent on the lawmaker or the executive is clearly a sham and defeats any prospects of constitutionalism.

2 2 5 The control of constitutional amendments

A constitution is or should be an enduring document. It is a law, but as we saw above, it is unlike any other law and is usually declared explicitly or implicitly as the supreme law of the land based on the sovereign will of the people. It will lose its value as the supreme law of the land and the will of the people will be subverted if it can be altered easily, casually, carelessly, by subterfuge, or by implication, through the acts of a few people holding leadership positions. Constitutionalism implies that the constitution should not be suspended, circumvented or disregarded arbitrarily by the political organs of government. If the constitution is to be amended, this should be through a clearly laid down procedure that ensures that the will of the people is not defeated in the process. The existence of a constitution that is not overtly vulnerable to governmental manipulations through arbitrary amendments provides a sense of certainty and predictability that enhances the prospects for constitutionalism.

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44 See s 94(1).

The problem of controlling the frequent and arbitrary constitutional changes that were so common prior to the 1990s appears to have been on the minds of the constitutional reformers. Insofar as the restrictions placed on constitutional amendments are concerned, almost all the constitutions examined in this study can be placed in the semi-rigid category. The exact extent varies from country to country. A good number of constitutions require that these amendments are approved in Parliament by a special majority of two-thirds or three-quarters,[45] or that failing such a majority the proposed amendment be put to a referendum.[46] In some constitutions, amendments must not only get the approval of a special parliamentary majority but must also be submitted to a referendum.[47] The Ghanaian Constitution distinguishes between amendments of what it refers to as "entrenched" provisions and "non-entrenched" provisions. The former are listed in art 290(1) and include provisions dealing with matters considered as very important and which in some of the other constitutions are listed in so-called "unamendable"[48] provisions. The procedure provided for dealing with these entrenched provisions is quite cumbrous, stringent and complex.[49] This is in sharp contrast with the procedure provided for amending the non-entrenched provisions, which although less stringent are still fairly rigorous. Nevertheless, the general rigidity of the process is such that it is unlikely that any alterations may be made to the Ghanaian Constitution lightly and without due notice, elaborate consultations and the full and active participation of the people.

The Cameroonian Constitution is at the other end of the amendment spectrum since it can be amended by an ordinary law. Apart from the obvious weakness that this Constitution can be altered at the whims of the government, one common feature that this Cameroonian Constitution shares with some of the others discussed here is that it contains an "unamendable" provision. Two observations need to be made about the concept of unamendable provisions and the significance of a controlled procedure for amending a constitution and constitutionalism.

First, nothing is completely immune from change. The purpose of a controlled amendatory procedure is not to prevent changes but rather to prevent the process being abused by dictators to serve their own ends. It is contended that the concept of unamendable provisions is an illusion. One constituent body cannot make constitutional provisions that prevent a future constituent body from repealing the constitution, even where it introduces an express provision that

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45 See for example art 158 of the Angolan Constitution; art 135 of the Constitution of Niger; and art 116 of the Constitution of Gabon, which in addition, requires that proposals be put before the Constitutional Council for an opinion, although it is not clear what the purpose of such an opinion is. For example, will an adverse opinion mean that Parliament should not be allowed to discuss the proposal or that it should not be put to a referendum?

46 See, art 116 of the Constitution of Gabon and art 135 of the Niger Constitution.

47 See for example s 89 of the Botswana Constitution; art 178 of the Constitution of the Republic of Congo; and art 118 of the Constitution of Mali. Under art 99 of the Constitution of Mauritania, the President may avoid the inconvenience of a referendum by ensuring that he obtains three-fifths votes of Parliament convened in congress.

48 See for example, arts 178(4), (5) and (6) of the Constitution of the Republic of Congo; art 117 of the Constitution of Gabon; art 118, proviso 3 and 4 of the Constitution of Mali; art 99(3) of the Constitution of Mauritania; and art 136 of the Constitution of Niger.

49 See art 290 (2) of the Constitution of Ghana.

purports to do this. Arguably, a constituent body is omnipotent in all, save the power to destroy its own omnipotence.[50] A constitution or constitutional provisions could with time become antiquated and if there is no procedure for amending it or if this is too cumbersome, this may provoke violent changes through revolutionary means. A better approach, it is submitted, is to strictly regulate and control the manner in which amendments may be made, in order to ensure that this is done with due notice, with deliberation, not lightly and wantonly, and in consultation with the people to ensure that the general will of the people is not subverted by a few selfish individuals.

Secondly, the mere fact that a constitution contains a number of legal obstacles to its amendment that make it harder to alter does not necessarily mean that it will be less frequently altered than one which contains fewer or no special obstacles. The ease or frequency with which a constitution is amended will depend not only on the provisions which prescribe the method for effecting changes, but also the predominant political and social groups within the community and the extent to which they are satisfied with or acquiesce in the organisation and distribution of power within the constitution.[51] Nevertheless, the existence of a defined process for effecting changes and the nature of this process indicate the extent to which the popular will counts and to that extent indicates the prospects for constitutionalism in the country.

2 2 6 State institutions that support and sustain constitutionalism

Implanting and sustaining constitutionalism in Africa's fledgling democratic transitions needs something more than the mere entrenchment of the core elements discussed above. There is a need to establish a solid basis upon which a new constitutional culture would emerge that can transform the constitution into a "living document, building ownership around it, making it available and accessible to all in society and encouraging the people to deploy it in defence of their individual and collective rights".[52] Africa and Africans do not have any history, tradition or culture of constitutionalism to build on and they have to develop and nurture this almost from scratch, especially because the basic political and social substratum on which the present democracy is built on is very weak and tenuous. Constitutional design must therefore include a framework for cultivating the ethos of constitutionalism. There are already many promising signs of this in some of the constitutions examined in this study.

What has rightly been described as probably South Africa's most "important contribution to the history of constitutionalism"[53] appears in Chapter 9 of its Constitution, under the title, "state institutions supporting democracy". As will be shown below, these provide for the establishment of a number of institutions with the avowed purpose of strengthening constitutional democracy and accountability in the country.

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50 By analogy from the analysis of the supremacy of Parliament by Sir Robert Megarry his judgment in *Manuel v Attorney-General* [1982] 3 AER 833.

51 See Wheare *Modern Constitutions* (1966) 17.

52 See Ihonvbere "Politics of constitutional reforms and democratization in Africa" 2000 *IJCS* 22.

53 See Klug in *Annual Survey of South African Law* 1–11.

3 THE CONCEPT OF ACCOUNTABILITY AND ITS LINKS WITH CONSTITUTIONALISM

3 1 The concept of accountability

The concept of accountability has long been both a key theme and a key problem not only in constitutional scholarship, but also in other areas such as political science.[54] The concept has been defined by public lawyers in many diverse and complex ways.[55] These diverse definitions underscore the complex nature of the concept, of which an exact definition remains elusive. The boundaries of this concept are fuzzy and its internal structure confusing.[56]

Be that as it may, what is now abundantly clear is that the concept of accountability can no longer be confined to the traditional view that it is simply a process of calling someone to account to some authority for one's actions or omissions,[57] or that it is synonymous with a set of particular processes such as ministerial responsibility and judicial review. Most of the literature on the subject attempt to make a distinction between different types of accountability, such as legal, financial, democratic, political, administrative and electoral accountability.[58] Some writers also note that accountability can be internal or external, formal or informal, vertical or horizontal, and direct or indirect.[59] A consideration of these different perceptions of accountability illustrates that the concept has now been extended in a number of directions well beyond its core sense of calling someone to account for his or her actions or omissions. According to Richard Mulgan, there are four senses in which the word "accountability" is used in public law which cut across the different perceptions highlighted above.[60]

These senses provide a useful basis for attempting to understand the nature and scope of the concept.

What is usually referred to as the "core", "primary" or "traditional" sense of accountability is the process of calling someone to account for his or her actions or omissions and which necessarily involves retribution. In this sense, accountability involves a process of asking questions, demanding answers and imposing sanctions if the need arises. Core accountability commonly covers issues like voters deciding whether or not to vote out an incumbent government based on their satisfaction or dissatisfaction with the government's policies and performance, Parliament scrutinising the actions of civil servants, and the different ways in which members of the public can seek redress from government agencies and officials. Accountability has now been extended beyond these core areas to cover matters such as the sense of individual responsibility and concern

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54 See Scott "Accountability in the regulatory state" 2000 *Journal of Law and Society* 38.

55 *Ibid* and see the elaborate analysis of the several senses in which the word is used by Mulgan "'Accountability': an ever-expanding concept" 2000 *Public Administration* 555–573.

56 See Schedler "Conceptualizing Accountability" in Schedler, Diamond and Plattner *The Self-Restraining State: Power and Accountability in New Democracies* (1999) 13.

57 What Mulgan 2000 *Public Administration* 555 refers to as the "the original or core sense" with "the longest pedigree in the relevant literature".

58 See Harlow *Accountability in the European Union* (2002) 1–2.

59 See for example Oliver *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (1991); Schedler in Schedler, Diamond and Plattner *The Self-Restraining State: Power and Accountability in New Democracies* 13.

60 Mulgan 2000 *Public Administration* 555.

for the public interest expected from public servants which is sometimes referred to as professional or personal accountability.[61]

The second sense in which accountability is used, is an extension on the traditional meaning of accountability. In this sense, accountability refers to the various institutional checks and balances through which the action of government is controlled in a democracy. Some writers, however, try to distinguish between accountability and control, and they view the latter as implying *ex ante* involvement in a decision-making process, and the former as being restricted to *ex post* oversight.[62] The better view is that control and accountability are closely linked concepts which operate in a continuum.[63] Whilst Uhr sees accountability and control as so intimately linked because the former is a vital mechanism of the latter,[64] it would seem better to view accountability as control in itself.[65] The question then becomes one of designing appropriate institutions that will guarantee that public officials are appropriately constrained. Viewed from this perspective, accountability therefore involves the institutions that aim to control or constrain government to prevent it from acting in an arbitrary manner.

The third sense in which accountability is used is similarly an extension of the core meaning of this word. This view equates accountability to the responsiveness of public agencies and officials to their political masters and the public. Like control, the aim of responsiveness is to ensure that the action of government officials reflects the will of the people, but it is different in that whilst control stresses the coercive role of external pressure, responsiveness reflects the public servant's general compliance to popular demands. This could be indirect by public officials responding to the politicians elected by the people, or directly when public officials respond directly to the people themselves rather than through elected officials.

In the fourth sense in which the term is used, it refers to the public dialogue that is seen as an essential part of democracy. In this sense, it requires officials to answer, explain and justify while those holding them to account engage in questioning, assessing and criticising their action or inaction.[66] Accountability in this sense involves open discussion and debate about matters of public interest, which is a critical aspect of modern deliberative democracy. It can also be argued that the requirement that politicians and other public officials publicly account for their actions, whether to the legislature, the courts, or in the media is a form of public dialogue.

3 2 Accountability within and through constitutionalism

It is in the extended sense of control that accountability has its closest links with constitutionalism. This is not surprising, for most public lawyers regard traditional accountability mechanisms as inadequate to deal with the problems of today's

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61 Mulgan 2000 *Public Administration* 556.
62 See Birkinshaw "Decision-making and its Control in the Administrative Process – An Overview" in McAuslan and McEldowney (eds) *Law, Legitimacy and the Constitution* (1985) 152.
63 Scott 2000 *Journal of Law and Society* 39.
64 Uhr "Redesigning accountability" 1993 *Australian Quarterly* 6.
65 Mulgan 2000 *Public Administration* 563.
66 Mulgan 2000 *Public Administration* 569–570.

society.[67] In this respect, accountability involves a series of mechanisms and institutions which, like constitutionalism, are designed to control and constrain government in order to prevent both anarchy and arbitrariness. As one writer points out, both constitutionalism and accountability are "intellectual constructs" by which one can "organise the milestones and landmarks within the landscape (indeed, determine what is a landmark or milestone)".[68]

Three main mechanisms of control have been identified by writers viz., political mechanisms, legal mechanisms and administrative mechanisms.[69] The primary political accountability mechanism is free and fair elections. Elections force elected officials to account for their performance and provide opportunities for challengers to offer citizens alternative policy choices. Where voters are not satisfied with the performance of any officials, they may vote them out of office when their term expires. Legal accountability mechanisms include the constitution and other legal instruments, such as laws, decrees, rules, codes and regulations which define actions that public officials may or may not take and how citizens may take action against those officials whose conduct is considered unsatisfactory. The effectiveness of legal liability depends on the existence of independent courts and the power of judges to review the decisions and actions of public officials and governmental agencies. Administrative accountability mechanisms include ombudsmen agencies responsible for hearing and addressing citizen's complaints, independent auditors who scrutinise the use of public funds, and administrative courts and tribunals which hear citizens' complaints about the decisions of government departments and agencies.

Some writers have argued that only a few institutions, such as the audit offices, ombudsmen and administrative tribunals can properly be described as institutions of accountability because their primary responsibility is to call public officials to account. Others, such as courts whose primarily responsibility is enforcing the law, and Parliament whose primary responsibility is making laws, only exercise accountability functions in an incidental and indirect manner.[70] Courts, just like the legislature, play a very important part in upholding respect for the constitution and it is irrelevant that this is not their primary responsibility. There are also other equally important, and in fact crucial, institutions of accountability which can not easily be placed under the threefold classification above, but which are very essential in governmental accountability even if this is not their primary business. Examples of these are the media and civil society organisations which act as watchdogs.

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67 See Graham "Is there a Crisis in Regulatory Accountability?" (1995) reproduced in Baldwin, Scott and Hood *Socio-legal Reader on Regulation* (1998).

68 See Fisher "The European Union in the age of accountability" 2004 *Oxford Journal of Legal Studies* 498 and Weiler *The Constitution of Europe: Do the New Clothes Have an Emperor?* (1999) 223.

69 See for example Scott 2000 *Journal of Law and Society* 42; Richard Mulgan 2000 *Public Administration* 563–564; and "Government Accountability" http://www.america.gov/st/democracy-english/2008/May/20080609214957eaifas0.82 (accessed 20-10-2010).

70 See Mulgan 2000 *Public Administration* 565.

4 REINFORCING ACCOUNTABILITY BY CONSTITUTIONALISING THE FUNDAMENTAL ACCOUNTABILITY MECHANISMS

The major challenge today is not merely designing constitutions that promote constitutionalism, but also ensuring that these constitutions also entrench accountability measures and mechanisms in an effective manner. It is no accident that in recent years the concept of accountability has been considerably expanded beyond its traditional core sense.

Many post-1990 African constitutions do make direct or indirect reference to accountability and transparency measure and even provide for such measures. In almost every country, there are similar measures and mechanisms that have been introduced through ordinary legislation. In most cases, these measures and mechanisms have not worked, mainly because the legal safeguards to protect them from being abused or manipulated by the governments were weak or more often absent. For example, the ombudsman institution has now generally been accepted in Africa as one of the essential components of good governance and accountability and many recent constitutions or, more often, legislation provided for it in one form or another. In many instances, these institutions end up like prize champion fighters whose hands have been tied behind their backs.[71] Whilst the absence of sufficient accountability measures and mechanisms remains a fundamental problem, it is also a fact that, even where they exist they are unable to operate effectively and check governmental abuses. The tenacity of the one-party mentality within the new dominant parties that are entrenched in power, coupled with weak and ineffective civil societies in many African countries have steadily diminished the prospects for good governance and democracy in Africa.

It is contended that the only way to lay a solid foundation for promoting any credible and effective accountable and transparent governments in Africa, is for the well-established and accepted accountability institutions to be constitutionalised. A word of caution is appropriate here. It is true that a constitution should not be cluttered and overloaded with trivia and that one should not attack the vice of inadequate breadth with the equally fatal infirmity of over breadth. Whilst a good number of African constitutions have indulged in such lengthy, programmatic and convoluted details that defy the wisdom of both Wheare and Marshall,[72] there is a need to start by recognising the fact that African constitutions can not be as brief as Western constitutions. Whilst the written constitutions in Africa almost contain every relevant and applicable constitutional principle, Western constitutions rarely embrace all the constitutional principles

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71 See Fombad "The enhancement of good governance in Botswana: a critical assessment of the Ombudsman Act" 2001 *Journal of Southern African Studies* 57–77.

72 One is therefore mindful of the advice of Wheare *Modern Constitutions* 33–34, that a constitution should contain "the very minimum, and that minimum [should] be rules of law". Or, as Chief Justice Marshall put it in the celebrated United States' case of *McCulloch v Maryland*, 4 Wheat 316, 407 (1819), a constitution by its very nature requires that only its "great outlines" be marked and its "important objects" designated, and that it not descend into the "prolixity of a legal code". For example, see the Swaziland Constitution which has 279 sections and 19 chapters, which are essentially a chaotic catalogue of contradictions that make no sense of the essentials of constitutionalism whilst dwelling on matters which should normally be found in ordinary legislation. Another example is the Nigerian Constitution of 1999 which has 318 sections and 7 schedules, which may be understandable for such a large and complex society but with its own traits of trivia.

that apply. The shorter Western constitutions are normally complemented by a number of usages, understandings, customs and conventions that may apply, as well as judicial precedents. Over and above this, most Western constitutions are greatly strengthened and supported by centuries of political behaviour, political culture and political tradition and history, which is generally lacking under many African constitutions. The constitutionalisation of certain accountability principles and institutions may look like a superfluous aberration to a Western constitutionalist or in a Western setting, but in Africa it must now be regarded as one of the essential elements in the emerging constitutional rights culture of today that should seek to bury the ghost of the one-party dictatorships of the past. The critical question remains that of defining what form and what content these accountability mechanisms should take.

We no longer need to go abroad for examples of good practice. There is an excellent example in Africa that even some Western countries can learn from. As indicated earlier, the South African constitution in its Chapter 9 creates a phalanx of institutions to uphold constitutional democracy and promote accountability.[73] This provides for the establishment of a number of institutions with the avowed purpose of strengthening constitutional democracy in the country. The mere listing of these institutions on their own is not novel, for many constitutions do provide for some of them. What is perhaps unique about the South African approach is that there are four legal principles that are spelt out to ensure that these institutions are effective and not a political charade of symbolic value only. The four guiding principles provide that:

(i) These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(ii) Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(iii) No person or organ of state may interfere with the functioning of these institutions.

(iv) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.[74]

Something similar to these principles are referred to in some constitutions as "directive principles of state policy",[75] but these directive principles, unlike the principles in the South African Constitution, are stated in purely hortatory terms.

The six institutions provided for under the South African Constitution are:

(i) the Public Protector (commonly referred to elsewhere as ombudsman);

(ii) the Human Rights Commission;

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73 A lot has been written about these institutions. See for example Govender "The reappraisal and restructuring of Chapter 9 institutions" 2007 *SA Public Law* 190–209.

74 See ss 181(1), (2), (3) and (4) of the South African Constitution.

75 See for example, arts 34–41 of the Constitution of Ghana; and ss 13–24 of the Constitution of Nigeria.

(iii) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities;

(iv) the Commission for Gender Equality;

(v) the Auditor General; and

(vi) the Electoral Commission.

Many of the other constitutions provide for one or more of these institutions,[76] but what distinguishes the South African institutions is that they have been constitutionally entrenched in such a way that they can operate as independent sites of oversight, supervision as well as enforcement of the constitution. In this way, they not only support, but also help to sustain constitutionalism.

Three cases will suffice to illustrate how the guiding principles spelt out in the constitution have protected the South African oversight institutions from political interference. In *Independent Electoral Commission v Langeberg Municipality*,[77] the Constitutional Court had no hesitation in pointing out that, as a result of the constitutional guarantees of the independence and impartiality of the Independent Electoral Commission (hereafter "IEC"), Parliament had a duty in making the legislation regulating its activities to ensure its manifest independence and impartiality, and that such legislation was justiciable for conformity to the Constitution. In the absence of the constitutional guarantees of independence and impartiality, courts will lack the power to review legislation on electoral commissions to ensure that it is not biased in favour of ruling parties. In *New National Party of South Africa v Government of the Republic of South Africa*,[78] questions were raised about the independence of the IEC and possibility of governmental interference with its proper functioning. The Constitutional Court, although concluding that the allegations had not been proven by the facts, pointed out that the IEC was one of the institutions provided for under chapter 9 of the South African Constitution and as such a product of a "new constitutionalism"[79] whose independence had to be jealously preserved by the courts. Two factors that were relevant to this independence were highlighted by the court. First, it pointed out that independence implied financial independence which required that the IEC should be given enough money to discharge its functions. This had to come, not from government but from Parliament and the IEC had to be "afforded an adequate opportunity to defend its budgetary requirements before Parliament and its relevant bodies".[80] Second, the IEC's status also implied administrative independence which implied that the IEC was subject only to the Constitution and the law, and answerable only to Parliament

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76 See for example, the Ghanaian Constitution which provides for an Electoral Commission (arts 43–54), a Commission on Human Rights and Administrative Justice (arts 216–230), a National Commission for Civil Education (arts 231–239), a National Media Commission (arts 166–173) and the Auditor-General (arts 187–189). The Namibian Constitution provides for an Ombudsman (art 142) and an Auditor-General (art 127); and the Eritrean Constitution provides for an Auditor-General (art 54) and an Electoral Commission (art 57); whilst the Angolan Constitution provides for a judicial protectorate (an Ombudsman, in art 142).

77 2001 9 BCLR 883 (CC).

78 1999 3 SA 191 (CC).

79 *New National Party* per Langa DP 224.

80 *New National Party* 231.

rather than to the executive. The ability of the Constitution to control the way the IEC discharges its functions was again in issue in another South African case *August and Another v Electoral Commission*.[81] The IEC had refused to make arrangements for registering prisoners to enable them vote, citing amongst other reasons the immense logistical, financial and administrative difficulties that this entailed. A prisoner and an awaiting trial prisoner launched an unsuccessful application seeking appropriate relief before the high court, which agreed with the arguments put forward by the IEC that the predicament of the applicants was of their own making. On appeal, the Constitutional Court held that the Constitution did not contain any provision allowing for disqualification of voters to be prescribed by legislation and Parliament had not made any such legislation. The IEC therefore had no powers to make an administrative decision that had the effect of disenfranchising a certain category of electors because this violated the guarantees of political rights in s 19 of the Constitution. The court pointed out that the positive duties imposed on the IEC by the Constitution required them to take every reasonable step to create the opportunity to enable eligible persons to register and vote.

By way of contrast, the South African Constitution also provides for the establishment of a National Prosecuting Authority (hereafter "NPA"). This however, is not one of the Chapter 9 institutions that have been carefully protected from political interference. Although s 179(4) of the Constitution says that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice", the ability for the courts to intervene and prevent interference with the NPA is limited by s 179(5)(a) which states that the National Director of Public Prosecutions "must determine, with the concurrence of the cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process". Because of this weak constitutional foundation, there has been frequent interference in the work of the NPA. For instance, at its 2007 Polokwane conference, the ruling African National Congress passed a resolution to dissolve the NPA's Directorate of Special Operations, popularly known as the Scorpions. This was deliberately designed to destroy this independent unit of crime and corruption fighters that had been very successful in its campaign against corruption and racketeering against people in high places, including many prominent politicians. Legislation to dissolve the Scorpions was easily approved by Parliament. The weaknesses of the NPA was further underscored when its Director was suspended and later dismissed because as one critic put it, he took his responsibility to act "without fear, favour or prejudice", too seriously for those who would prefer to have a less independent person in his office.[82]

It is therefore clear that in spite of its solid Constitution, there are still weaknesses in the South African constitutional framework. In fact, because of the political turmoil of the last two years leading to the election of Jacob Zuma as president, many of the Chapter 9 institutions, especially the Public Protector and the Human Rights Commission have come under pressure.[83] A commission

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81 1999 4 BCLR 363 (CC).

82 See Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" 5.

83 Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" 5–6.

established in 2007 under the former minister, Kader Asmal, to examine the effectiveness and efficiency of these institutions recommended the abolition of some of these institutions, such as the Commission for the Protection of Cultural, Religious and Linguistic Minorities and their rationalisation under the aegis of the Human Rights Commission.[84]

Three important conclusions can be drawn from the experiences of the South African Chapter 9 institutions with respect to the best ways to make these accountability institutions effective and to shield them from manipulation by the opportunistic dominant parties of today. First, the basic structure of the institution, as well as its composition and powers must be laid down in the constitution in a manner that will ensure that they cannot be manipulated by government. Second, they must be given powers to be both reactive and proactive. These institutions can only be credible if they provide what has been described as "low" or "retail" constitutionalism which will address the rampant impunity and abuse of power by officials at the most basic level of the public administration, as opposed to "high" or "wholesale" constitutionalism that addresses the concerns of the elites.[85] These institutions will need to deal with the pervasive and perennial abuses of discretionary powers involving unjustified discrimination and extortion of money which a many Africans are subjected to on a daily basis. This includes, for example, the extraction of bribes by police officers at road blocks and the bribes extracted by civil servants in order to process official documents. Third, these institutions will be more effective if they are made easily accessible to the poor and marginalised in society. For instance, ombudsmen and anti-corruption institutions should be decentralised and have offices in as many districts as possible and not merely in the capital city. In addition to this, there is a need for considerable investment in educating the public about the constitution in general and the protection provided by these institutions.

Another measure that is needed to promote accountability is that of constitutionalising the rights of political parties. This will provide a number of advantages. First, from the perspective of constitutionalism this may be regarded as a bulwark to the looming threat of dictatorship resulting from the *de facto* one-party resurgence in the form of dominant parties. Second, this will mean that although they remain essentially private associations freely created and run by the membership in pursuit of a political goal, they are unlike all other private associations because of the potentially wide-ranging reach of their activities in the public domain. This means that political parties can no longer simply be allowed to do

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84 See "Report of *Ad Hoc* Committee on Review of Chapter 9 and Associated Institutions", http://www.pmg.org.za/node/14142 (accessed 20-10-2010). Many commentators are agreed that to avoid duplication of functions, save cost and enhance efficiency, it might be a good idea to merge three of these institutions viz., the Human Rights Commission, the Commission for the Protection of Cultural, Religious and Linguistic Minorities and the Commission for Gender Equality. Although the government seems to have accepted the main thrust of the Kader Asmal report, they don't seem to be in any hurry to implement its recommendations. The political fallout from merging these institutions at a time of high unemployment is considered too high a price to pay by a Government that promised employment but has been struggling to reduce the numbers of jobs that are being lost as a result of the global recession.

85 This is discussed by Prempeh "Africa's 'constitutionalism revival': false start or new dawn?" 2007 *ICON* 469.

their own things their own way. Constitutionalising their status necessarily means that their actions will come under public scrutiny at all times and not just during elections. The traditional approach to actions against political parties which allowed them to enjoy a high degree of immunity from legal action by disaffected members on the grounds that their internal rules were considered as those of an unincorporated non-profit society and thus unenforceable as a contract, should have no place under the modern constitutional dispensation.[86] Perhaps the greatest merit of this process is that it will promote internal democracy and ensure that personal actions can be brought against political parties which break their own rules as they are often apt to do when they find this politically expedient.[87] Finally, constitutional provisions should lay down criteria for elections within all political parties to ensure that persons with criminal records, or who are subject to the legal process, should be excluded from political office.

Constitutional provisions should clearly define the role of each of the three branches of government and provide clear legal principles which will guide subsequent laws, regulations, rules and codes of conduct which lay down measures, mechanisms and systems of checks and balances to strengthen accountability, transparency and good governance. In particular, each branch of government must be required to adopt codes of ethics for its members.

A number of institutions of oversight, either of a general nature or of specific branches of the government have become an absolute necessity in any constitutional design that aspires to promote both constitutionalism and accountability. These are:

(i) the ombudsman;
(ii) a human rights commission;
(iii) a public accounts committee;
(iv) an auditor-general;
(v) an access to information commission;
(vi) a media commission;
(vii) an independent prosecuting authority;
(viii) an anti-corruption agency;
(ix) a judicial service commission;
(x) a minority rights commission;
(xi) an independent electoral commission; and
(xii) an electoral boundaries commission.

On their own these institutions cannot achieve much unless there is the political will to make them work and the necessary safeguards to protect them from

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86 For the common law perspective on this see Forbes "Judicial Review of Political Parties" (1995–1996) *Research Paper* 21 http://www.aph.gov.au/LIBRARY/pubs/rp/1995-96/96rp21.htm (accessed 20-10-2010) and for a civilian perspective, Ipsen "Political Parties and Constitutional Institutions" in Starck (ed) *Studies in German Constitutionalism* (1995) 195–243.

87 This in no way underestimates the value of using the sometimes quite sophisticated internal rules for settling disputes that are found in the constitutions and rule books of political parties. The processes are, however, often slow and could sometimes be abused by party bosses.

political interference. In addition to the four constitutional principles that govern the South African institutions that support democracy, the constitution must also define their structure, functions and composition in a manner that will ensure that none of the three organs of government may interfere with their operations.[88] Perhaps the main safeguard against any abuse would be a general limitation clause which provides that any legislation, measures or mechanisms introduced to regulate any of these institutions, which undermines the essential purpose of accountability and transparency that the institution is designed to achieve must be declared null and void by the courts.

In order to ensure that the institutions of accountability are not only proactive and reactive, but are also able to tackle both petty and grand corruption there is need for the constitution to lay down the basic principles for effective whistle-blower legislation[89] and legislation requiring mandatory declaration of assets for all political office holders and senior public officers. The whistleblower provision should require that legislation should, *inter alia*, provide incentives for citizens to freely report corrupt or improper conduct and to prohibit retribution against those who make such disclosures. There should also be waivers from criminal and civil penalties for those who disclose secret information. Such legislation should impose penalties on those who harass whistleblowers. Many countries, such as South Africa have introduced codes of ethics, or legislation that requires all political office holders to declare their assets. Unfortunately, in most cases the legislation is weak, or as in the case of South Africa, the codes of ethics are not legally enforceable and therefore fail to check against any abuses.[90]

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88 In spite of the commendable attempt to limit political interference, the South African Chapter 9 institutions have been criticised because of political interference. The Human Rights Institute of South Africa (HURISA) in a report on these institutions in 2008 concludes that "the majority of people believe the Public Prosecutor to be either ineffective or obedient to the interests of the African National Congress (ANC)". It went further to state that "it is worrying that there is a culture of absolving any wrongdoing, especially in cases such as the arms deal, the Oilgate, as well as Phumzile Mlambo-Ngcuka's controversial trip to the United Arab Emirates in 2005". See "Do or Die for Chapter 9 Institutions", http://www.ngopulse.org/Article/do-or-die-chapter-9-institutions (accessed 20-10-2010). Also see the Report on Parliamentary Oversight and Accountability, http://www.pmg.org.za/bills/oversigh&account.htm (accessed 20-10-2010).

89 On 03-03-2011 the Ugandan Parliament approved a comprehensive whistleblowers bill and Uganda is the third African country with such legislation. South Africa regulates this under the Protected Disclosures Act 26 of 2000.

90 In South Africa, the Code of Ethics for Members of Parliament and the Executive Members' Ethics Act requires members of Parliament, ministers and deputy ministers as well as the president to disclose details of their financial interests, assets and gifts received. In spite of this, President Zuma only complied with this requirement some eight months after the sixty day deadline stipulated in the Executive Members Ethics Act and after considerable public pressure. See "DA Wants Urgent Party Question on Zuma Assets Issues" 12-03-2010 *The Citizen*. By way of contrast, art 66 of the Cameroon constitution provides for a declaration of assets by "the President of the Republic, the Prime Minister, Members of Government and persons ranking as such, the President and Members of the Bureau of the National Assembly, the President and Members of the bureau of the Senate, Members of Parliament, Senators, all holders of an elective office, Secretaries-General of Ministries and persons ranking as such, Directors of the Central Administration, General Managers of public and semi-public enterprises, Judicial and Legal Officers, administrative personnel in-charge of the tax base, collection and handling of public funds, all managers of public votes and property". This has never been done since this constitution came into force in 1996.

The basic principles requiring strict declaration of assets by all office holders with sanctions such as removal from office for non-compliance will go a long way to control the rising political corruption that is fast undermining the fragile democratic transition in Africa, even in countries such as Botswana and South Africa[91] that have regularly been classified by Transparency International as the least corrupt countries on the continent.[92]

5 CONCLUSION

The burden of getting the African democratic train back on the rails falls squarely on the shoulders of the citizens of each country. We are in an era of democratisation and constitutionalism in which one of the missing blocks has been that of accountability. Until recently, not much attention has been paid to the important role that the constitution can play in securing governmental accountability and transparency. The best example of the entrenchment of accountability is currently provided by South Africa's "state of the art" constitution. The fact that it is neither a perfect nor foolproof guarantee against governmental abuse is evident in the controversy leading to the resignation of former president, Thabo Mbeki and the recent election of a person against whom corruption charges were dropped by the National Prosecuting Authority only weeks before the elections were held. Constitutional democracy requires constant vigilance not just by some people some of the time, but by all the people all the time. However, whether or not governments can be effectively made to account depends very much on what the constitution says.

Constitutional democracy can not successfully and effectively be established in the absence of a constitution that promotes both constitutionalism and accountability; reliance on one or the other alone is not sufficient. Many African constitutions have made some progress on the path towards constitutionalism. It is

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91 The 2009 survey shows that Botswana ranked 37 in the world, remains the least corrupt country in Africa, whilst South Africa, ranked 55 in the world, is the fifth least corrupt country in Africa. See http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (accessed 20-10-2010).

92 The ANC's business arm, Chancellor House, as a 25% shareholder in Hitachi South Africa stood to gain about R9.625bn because of its stake in the company from a contract that the government awarded to Eskom, the national electricity supplier. Last year, the former Public Protector, Lawrence Mushwana concluded that the then Eskom chairman and ANC executive committee member had acted improperly in the award of the contract to Hitachi SA. See Brown "Inside Resources: ANC must exit Hitachi to fulfil its manifesto" 18-03-2010 http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=5394938 (accessed 20-10-2010). Da Costa in "ANC chief's fat-cat deals" reports how the chairperson of the ANC's biggest and most influential region in KwaZulu-Natal is alleged to have been awarded tenders worth at least R40million by the eThekwini municipality http://www.iol.co.za/index.php?set_id=6&art_id=201003120425266 (accessed 20-10-2010). In the last few months, after allegations about how several prominent members of the ANC and its youth wing have enriched themselves through the regular awarding of government contracts to companies that they owned, calls for lifestyle audits were rejected by the government and its supporters termed it a "smokescreen" masking "racist narratives". See "BMF: Calls for lifestyle audits mask 'racist narrative'" http://www.mg.co.za/Article/2010-03-23-bmf-calls-for-lifestyle-audits-mask-racist- (accessed 20-10-2010). See also Good, "The Presidency of General Ian Khama: The Militarization of the Botswana Miracle" http://afraf.oxfordjournals.org/content/early/2009/12/14/afraf.adp086.full (accessed 20-10-2010).

contended that the ominous signs of dominant party dictatorships emerging all over the continent has been facilitated by the absence of or weak accountability mechanisms in the constitutions. It is for this reason that it is suggested that the fundamental accountability mechanisms and institutions need to be embedded in the constitution. The nature, scope and functions of these institutions should be constitutionally defined in such a way that any legislation or measures taken by the government which threatens the ability of these institutions to operate effectively as independent sites of oversight should be nullified by the courts. This, it is argued, will create a solid foundation for a vigilant society that will be able to regularly call the government to account. The threat posed by efficient and effective institutions of oversight will tremendously enhance constitutionalism. As Paul Hoffman rightly points out, what makes constitutions work is accountability.[93]

93 Hoffman "Democracy and Accountability: Balancing Majority Rule and Minority Rights" 2.

Traditional Muslim Family Law and the Compatibility of the Proposed Muslim Marriage Legislation with *Shari'ah*

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INTRODUCTION

The South African Law Reform Commission compiled a draft Bill on Muslim Marriages in 2003.[1] Similar to the Recognition of Customary Marriages Act of 1998[2] with regard to customary marriages, the draft Bill proposes recognition of all Muslim marriages irrespective of the date of commencement of the proposed Act. Different from the Recognition of Customary Marriages Act the proposed Act is not automatically applicable to all Muslim marriages. The parties have the option to elect that the proposed Act should be applicable to their marriage.[3] A Muslim marriage entered into after the commencement of the proposed Act will have to comply with the requirements for a valid Muslim marriage contained in the proposed Act.

Although the legislature has not responded to the publication of the draft Bill on Muslim marriages, the draft Bill still forms the only indication of the intended framework in which Muslim marriage law will be recognised in South Africa.[4] There are numerous publications on the compatibility of Muslim family law with the Bill of Rights.[5] The publications usually focus on the question of whether

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* BLC LLB LLD.

1 South African Law Reform Commission *Islamic Marriages and Related Matters Project 106* (2003) Appendix A.

2 Act 120 of 1998.

3 Clause 2(1). However, parties in an existing Muslim marriage will have to opt out of the draft Bill if they do not want the proposed Act to be applicable to their marriage (clause 2(2)).

4 A second Bill, entitled "Recognition of Religious Marriages Bill", was drafted by the Commission on Gender Equality in 2005. The Bill is more generic in nature and does focus on all religious marriages and not only Muslim marriages.

5 Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" 1993 *THRHR* 401; Moosa "Muslim personal law – to be or not to be" 1995 *Stell LR* 423; Motala "The draft bill on the recognition of Muslim marriages: an unwise, improvident and questionable constitutional exercise" 2004 *CILSA* 327; Denson and Carnelley "The awarding of post-divorce maintenance to a Muslim ex-wife and children in the South African courts: the interaction between divine and secular law" 2009 *Obiter* 679; Carnelley "Enforcement of the maintenance rights of a spouse, married in terms of Islamic law, in the South African courts" 2007 *Obiter* 340; Goolam and Rautenbach "The legal status of a Muslim wife under the law of succession: is she still a whore in terms of South African law?" 2004 *Stell LR* 369; Gabru "Dilemma of Muslim women regarding divorce in South Africa" 2004 *PER* 1.

Muslim family law may be recognised in a constitutional dispensation. The focus of this contribution is not merely to evaluate the principles of Muslim family law against the Bill of Rights but to ascertain whether the draft Bill is compatible with the basic principles of traditional Muslim family law. The question that arises is whether the content of the draft Bill is compliant with *Shari'ah*.[6] *Shari'ah* does not differentiate between religious and legal issues. There is a higher duty on every Muslim to follow the laws of Allah above any secular laws. It is therefore imperative that legislation recognising Muslim marriages should comply with the principles of *Shari'ah*. If the proposed Act is not compliant parties will not opt for the proposed Act to be applicable to their marriage and will mean that the proposed Act will be mere paper law which will not be adhered to by the community it intends to serve.

In this article traditional Muslim marriage law of the *Sunni* schools of thought is examined and compared to the provisions in the draft Bill.[7] Thereafter an alternative to the draft Bill is proposed and briefly discussed. Due to a constraint of space the proposal will be expounded upon in a future publication.

2 *SHARI'AH* AND THE DRAFT BILL ON MUSLIM MARRIAGE

2 1 Introduction

The general family law principles of the different *Sunni* schools are mostly similar although they vary in detail of application.[8] It is therefore possible to use similar aspects as common denominator in determining whether the draft Bill and *Shari'ah* are compatible. Under this heading the basic principles of *Shari'ah* with regard to marriage is compared to the principles contained in the draft Bill on Muslim Marriages.

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6 *Shari'ah* can be described as an "...all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects": Schacht *An Introduction to Islamic law* (1964) 1. See also Vesey-Fitzgerald *Muhammadan Law* (1931) 55; Nadvi "Islamic legal philosophy and the Qur'anic origins of the *Shari'ah* law" 1989 *TRW* 90; Badawi "Islam" in Holm J (ed) *Women in religion* (1994) 84.

7 Islam consists of two main sects, namely the *Sunni* and *Shi'ah* sects. 85% of the world's Muslims are *Sunni*. The *Sunni* sect consists of four schools: *Hanbali, Hanafi, Shafi'i* and *Maliki*. In South Africa the Muslim community consists of 1,4 % of the total South African population according to the figures of the 1996 Census (Simalane "The population of South Africa: an overall and demographic description of the South African population based on Census 1996" *Occasional Paper* 2002/01 www.statssa.gov.za (accessed 19-03-2010)) . The majority of South African Muslims are *Sunni*. The margin of South African followers of the *Shi'ah* sect in context to worldwide statistics is negligible. The publication is therefore limited to a discussion of the *Sunni* sect.

8 The four schools of thought are *Hanbali, Hanafi, Shafi'i* and *Maliki*. Of these schools the *Hanafi, Shafi'i* and *Maliki* schools are present in South Africa. The majority of South African Muslims are *Hanafi* or *Shafi'i* (Vahed "Should the question: 'what is in a child's best interest?' be judged according to the child's own cultural and religious perspectives? The case of the Muslim child" 1999 *CILSA* 373; Dangor "The establishment and consolidation of Islam in South Africa: from the Dutch colonization of the Cape to the present" 2003 *Historia* 210). For a detailed discussion see Khan *The Schools of Islamic Jurisprudence* (1991). For a discussion of the sources of Islamic law see Tanzil-ur-Rahman *A Code of Muslim Personal Law* (1978) 3; Hodkinson *Muslim Family Law* (1984) 2.

2 2 Requirements for a valid Muslim marriage

2 2 1 Capacity

The draft Bill sets the marriageable age at 18 years for prospective spouses[9] which coincide with the age of majority in accordance with the Children's Act.[10] The marriageable age is in accordance with international requirements.[11] Eighteen is further the marriageable age in terms of the Recognition of Customary Marriages Act and the Civil Union Act.[12]

Criticism from certain Muslims quarters against the marriageable age set by the draft Bill is that no minimum marriageable age is required in *Shari'ah* and that a person is marriageable if he or she comprehends the consequences of marriage.[13] According to *Shari'ah* however parties do not only have to comprehend the consequences of their actions but also have attained puberty to be able to contract a valid marriage.[14] There are however two exceptions to this rule; a guardian may ratify a marriage entered into before puberty after the child attains puberty and a child may be contracted into marriage before puberty but will only move in with his or her spouse after attaining puberty. Majority was traditionally attained at puberty in *Shari'ah*.[15] The age of puberty and majority therefore usually coincided. The *Sunni* schools disagree on the age when a minor can be presumed to have reached the age of puberty.[16] Irrespective of this disagreement most Muslim countries have legislation determining the marriageable age.[17] If legislation determining the marriageable age is acceptable in predominantly Muslim countries it cannot be regarded as contrary to the principles of *Shari'ah*.

Marriage below the predetermined marriageable age is allowed in *Shari'ah* if puberty was attained before the predetermined age, usually on request of the guardian (*wali*) with consent of the court.[18] The draft Bill contains similar provisions in clause 5(6):

> "The *Minister* or any *Muslim* person or *Muslim* body authorised in writing thereto by him or her, may grant written permission to a person under the requisite age to enter into a *Muslim marriage* if the *Minister* or the said person or body considers such marriage desirable and in the interests of the parties in question."

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9 Clause 5(1)(d).
10 Act 38 of 2005.
11 Article 1 United Nations Convention on the Rights of the Child (1989); art 21 of the African Charter on the Rights and Welfare of the Child (1990).
12 Act 17 of 2006.
13 The criticism was against clause 5(1)(a) in the draft Bill on Islamic Marriages of the South African Law Reform Commission *Islamic Marriages and Related Matters Project 59 Discussion Paper 101* (2001) see *Collation of Submissions on Discussion Paper 101* 12. The clause appears *verbatim* in the draft Bill on Muslim Marriages as clause 5(1)(d).
14 Tanzil-ur-Rahman 62; Esposito *Women in Muslim family law* (1982) 16; Hodkinson 92; Pearl *A Textbook on Muslim Personal Law* (1987) 42.
15 Tanzil-ur-Rahman 62; Esposito 16; Hodkinson 92; Pearl 42.
16 Tanzil-ur-Rahman 63; Hodkinson 92; Pearl 42.
17 Algeria; Iraq; Jordan; Lebanon; Palestine; Israel; Libya; Syria; Indonesia; Pakistan ("Islamic family law" http://law.emory.edu/ifl/index2.html (accessed 07-01-2010); Mahmood *Statutes of Personal Law in Islamic Countries* (1995)). The most progressive personal status code is the Moroccan Family Code (*Moudawana*) 70 of 2003 which was promulgated on 05-02-2004. Section 19 requires that both spouses have to be 18 years of age.
18 "Islamic family law" http://law.emory.edu/ifl/index2.html (accessed 07-01-2010). See for example s 20 of the Moroccan Family Code *(Moudwana*) 70 of 2003.

In accordance with the draft Bill a Muslim marriage entered into without the required consent may be ratified by the minister of home affairs. The minister may also authorise a Muslim body or person to provide such ratification in terms of clause 5(8). This clause is similar to s 26(1) of the Marriage Act[19] which allows the minister or officer in the public service with delegated power to consent to a marriage of a female under 15 years of age and a male under 18 years of age.[20] Civil marriages concluded by minors under 15 or 18 without ministerial consent may be ratified.[21] Consent in terms of this section may only be provided if such a marriage is desirable. It might, however, be advisable not to delegate the power to non-governmental entities or religious bodies but keep the provision similar to s 26 of the Marriage Act. Such delegation could create opportunity for abuse of power.[22]

Marriage below the age of puberty is possible in *Shari'ah*. A marriage may be ratified by a child's guardian at the time that the child reaches puberty if the child entered into a marriage before attaining puberty without the consent of his or her guardian. This is only allowed if the child understood the consequences of his or her actions at the time of marriage.[23] In *Shari'ah* the guardian of a minor may also contract the minor into marriage before puberty.[24] Under such an arranged marriage the child will only move in with her spouse on attaining puberty.[25] Such a marriage may be repudiated by the minor on attaining puberty if the marriage was not consummated before the age of puberty.[26] Although child marriages before puberty are allowed in traditional *Shari'ah*, it is prohibited by most Islamic countries.[27] Such a prohibition can therefore not be regarded as against the basic principles of *Shari'ah*. Child marriages are prohibited by art 16(2) of the Convention on the Elimination of all Forms of Discrimination against Women to which South Africa is a party and should not be allowed.

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19 Act 25 of 1961.

20 The draft Marriage Amendment Bill *GG* 30663 (14-08-2008) proposes that the differentiation between sexes should be removed and that ministerial consent for both boys and girls of 15 is required.

21 Section 26(2).

22 Delegated power of consent to a Muslim body was a compromise made by the SALRC after objections where made regarding the set minimum age of marriage (SALRC *Islamic Marriages and Related Matters Project 106* (2003) par 3.117).

23 Tanzil-ur-Rahman 62; Hodkinson 92; Pearl 42.

24 Tanzil-ur-Rahman 62; Hodkinson 92.

25 Tanzil-ur-Rahman 467; Hussain *Islam* (2004) 78. The marriage cannot be consummated before the child reaches puberty (al-Hibri and Mubarak "Marriage and Divorce" *The Oxford Encyclopedia of the Islamic World. Oxford Islamic Studies Online* http://www.oxford-islamicstudies.com/article/opr/t236/e0507 (accessed 21-12-2009)).

26 The option is only available if the marriage of the minor was prearranged by a guardian other than her father or grandfather: Vesey-Fitzgerald 60; Tanzil-ur-Rahman 467; Esposito 17; Hodkinson 92; Pearl 44; Rahim *The Principles of Islamic Jurisprudence: according to the Hanafi, Maliki, Shaf'i and Hanbali schools* (1994) 315.

27 Hodkinson 92 and Pearl 42. Child marriages are illegal in Algeria, Iraq, Kuwait, Lebanon, Libya, Malaysia, Morocco, Somalia, Syria, Tunisia, and Yemen even if permission is provided by the child's father: al-Hibri and Mubarak "Marriage and Divorce" *The Oxford Encyclopedia of the Islamic World. Oxford Islamic Studies Online* http://www.oxfordislamicstudies.com/ article/opr/t236/e0507 (accessed 21-12-2009).

The draft Bill does not contain a minimum marriageable age and the common law will therefore be applicable.[28] Boys younger than 14 and girls under 12 will not be competent to enter into a Muslim marriage. The minimum marriageable age in *Shari'ah* is puberty and this coincides with the minimum marriageable ages in common law. It is highly unlikely that a person will have attained puberty below the common law ages.

According to the *Sunni* schools, with exception of the *Hanafi* school, women do not have the capacity to enter into a marriage contract without the assistance of a guardian.[29] The exception to the rule is that divorced women and widows may contract a marriage without assistance.[30] According to the *Hanafi* school men and women are equal in their capacity to act.[31] Therefore, when a girl reaches majority she can contract her own marriage without the assistance of a guardian.[32] It is however preferred that she enter into marriage negotiations with a guardian's assistance.

Under the draft Bill women will be able to contract their own marriage without the assistance of their guardian.[33] The clause is contrary to the approach of three of the four *Sunni* schools. The *Hanafi* school allows a girl who has reached puberty to conclude her own marriage. However nothing in the draft Bill prevents a woman from appointing a guardian (*wilayat-il-ujbar*)[34] to assist her in

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28 Muslim personal law does not enjoy the same recognition as customary law. Customary law is recognised on the same level as the common law, whereas no official recognition of Muslim personal law exists. If there is a gap in the Recognition of Customary Marriages Act 120 of 1998 the traditional customary law can be applied whereas the same does not hold in respect of Muslim personal law. Legislation validating Muslim marriages codifies Muslim personal law and therefore an amendment or extension of the common law and customary law. If there is a deficiency in the legislation recognising Muslim marriages, the common law or customary law will have to be applied and not Muslim personal law. See ss 39(2)–(3) of the Constitution of the Republic of South Africa, 1996; Lourens "Inheemse reg: aard en inhoud ingevolge die Grondwet" 1994 *De Rebus* 856; Himonga and Bosch "The application of African customary law under the Constitution of South Africa" 2000 *SALJ* 306; Pieterse "Killing it softly: customary law in the new constitutional order" 2000 *De Jure* 36; Bakker "Towards the recognition of diversity: Muslim marriages in South Africa" 2009 *THRHR* 396–398). See *contra* Bakker "Toepassing van Islamitiese reg in Suid-Afrika" 2008 *Obiter* 537.

29 Vesey-Fitzgerald 58; Tanzil-ur-Rahman 38; Pearl 43; Nasir *The Status of Women Under Islamic Law* (1994) 9; Rahim 314.

30 Tanzil-ur-Rahman 38, 43; Esposito 17; Hodkinson 92; Pearl 43; Nasir 10; Al-Jaza'iri *Minhaj al-Muslim* (2001) 321; Rushd *The Distinguished Jurist's Primer vol 2* (2003) 5.

31 Tanzil-ur-Rahman 38; Hussein 81; Rahim 314.

32 Vesey-Fitzgerald 57; Tanzil-ur-Rahman 38; Hussein 81. The guardian is the nearest male relative of the woman entering into a marriage, determined in the order of inheritance. The guardian is usually the father or grandfather of the woman. In absence of such a male, a judge (*qadi*) will be appointed as guardian: Schacht 161; Tanzil-ur-Rahman 192; Nasir 10, Al-jaza'iri 322; Hussein 81. Section 29 of the Moroccan Family Code 70 of 2003 provides that a major woman may enter into her own marriage or delegate the power to her father or another relative. She has the choice of her guardian and may make the choice in her interest (s 24).

33 Clause 5. In Morocco a woman may contract her own marriage at the age of majority (s 25 of the Moroccan Family Code 70 of 2003).

34 There are two forms of guardianship, namely: compulsory guardianship (*wilayat-il-ujbar*) and voluntary guardianship (*wilayat-un-nadb*). The *il-ujbar* form is utilised where the woman has limited or no capacity to act, whereas the *un-nadb* form is applicable where the woman has full capacity to act but still wants a male representative. A *wilayat-il-ujbar* may

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concluding the marriage contract. This clause can therefore be seen as a compromise between the different *Sunni* schools of thought. A woman can elect whether she wants to enter into a marriage with or without a guardian in accordance with the Muslim tradition she follows. Valid criticism against this approach is that it appears that the legislature prefers the approach of the *Hanafi*-school above the other *Sunni* schools.

2 2 2 Agreement

The draft Bill requires that Muslim marriages have to be contracted in terms of the formulae prescribed in *Shari'ah*.[35] In *Shari'ah* the marriage contract (*nikah*) is concluded through two essential requirements of offer (*ijab*) and acceptance (*qabul*) by two competent parties or their proxies.[36] Marriage by proxy is allowed in the draft Bill but the marriage officer has to ascertain from the proxy whether the parties have consented to the marriage.[37]

The draft Bill requires that witnesses as determined by *Shari'ah* have to be present at the time of conclusion of the marriage.[38] In accordance with *Shari'ah* the witnesses have to be two competent Muslim witnesses. According to the *Hanafi* school the witnesses do not need to be Muslim where the marriage is between a Muslim man and a woman of "the people of the Book" (*kitabiya*).[39] In *Shari'ah* the witnesses have to be two male witnesses or one male and two female witnesses.[40] *Shari'ah* equates the evidence of one male to that of two females. The draft Bill therefore requires two male or one male and two female witnesses.[41] The current clause is in accordance with *Shari'ah* but it is highly unlikely that it will withstand a constitutional attack on the ground of gender discrimination. The principle comes from *Qur'an* 2:282:

> "...[a]nd get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her..."

The verse refers to commercial matters. Women were traditionally not part of commercial transactions and did not have any knowledge thereof and it is therefore clear why two women witnesses were required.[42] However, it can be argued that the verse merely considers the competence of the witness in the relevant matter and not necessarily the sex of the witness. Competence is therefore determined by the knowledge a person has in the relevant transaction irrespective of the person's sex. Where a woman is actively involved in commercial transactions

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conclude a marriage contract without the permission of his pupil. See Vesey-Fitzgerald 57; Schacht 161; Hodkinson 92; Pearl 43 and 98; Esposito 17; Nasir 10; Hussein 81.

35 Clause 6(4).

36 *Qur'an* 2:228, 2:282; Vesey-Fitzgerald 37; Hodkinson 112; Esposito 16; Nasir 6; Pearl 41; Hussain 83.

37 Clause 5(1)(b). With regard to consent see part 2 2 3.

38 Clause 5(1)(c).

39 A person of the Christian or Jewish faith: Tanzil-ur-Rahman 82; Hodkinson 112; Nasir 13; Hussain 79.

40 *Qur'an* 2:282.

41 Clause 5(1)(c).

42 Dangor "Historical perspective, current literature and an opinion survey among Muslim women in contemporary South Africa: a case study" 2001 *Journal of Muslim Minority Affairs* 114; Mustapha "Law: Women as Witnesses" *Encyclopedia of Women & Islamic Cultures* (2010) http://www.brillonline.nl (accessed 04-01-2010).

she will be competent to act as witness without the assistance of another female witness.[43] This will also apply to witnesses to a marriage. If a woman is competent to act as witness on her own, an additional witness will not be required. To merely require two competent witnesses regardless of gender is compatible with a modern approach to *Shari'ah* but will be highly controversial for conservative Muslims. However, clause 5(1)(c) merely states that "witnesses must be present as required by Islamic law" and does not truly qualifying how many witnesses are required this will enable the parties to determine the nature and number of witnesses they would choose to be present in accordance with their preferred tradition.

2 2 3 Consent

The Muslim marriage is a contract and consent of both parties is therefore required.[44] Consent can be tacit or express. In certain circumstances only express consent is allowed. Express consent is required from a woman when another person than her father or grandfather acts as guardian.[45] A divorced woman or widow can enter into a marriage agreement without the assistance of a guardian. Her express consent is required if she acts without a guardian.[46] The draft Bill requires consent of the prospective spouses to the marriage.[47] The Bill does not clearly indicate whether consent needs to be express. It can therefore be presumed that tacit consent can be provided. The clause complies with *Shari'ah.*

2 2 4 Registration

The draft Bill provides for the registration of a marriage contract.[48] Registration is however not a requirement for a valid Muslim marriage, even though a marriage officer is required.[49] *Shari'ah* does not provide for the registration of marriages, but does not prohibit it either.[50] Registration is not unfamiliar to *Shari'ah* and is required in some of the Islamic countries.[51]

2 2 5 Polygyny

Limited polygyny is practised in *Shari'ah*.[52] A man may not marry more than four wives. In accordance with *Shari'ah* the legislature is allowed to limit polygyny to protect women against hardship, abuse and oppression.[53] The draft Bill

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43 Hussain 73.
44 Ali *A Manual of Hadith* (1944) 271; Vesey-Fitzgerald 37; Tanzil-ur-Rahman 67; Schacht 161; Hussain 80. The consent of both parties is required in Algeria (s 9 Family Code 1984); Indonesia (s 6 Law of Marriage 1974); Malaysia (s 8 Islamic Family Law [Federal Territory] Act 1984); and Morocco (s 12 and s 13 Moroccan Family Code 70 of 2003).
45 Tanzil-ur-Rhaman 38.
46 See n 29.
47 Clause 5(1)(a).
48 Clause 6.
49 Clause 6(10).
50 Tanzil-ur-Rhaman 88; Hodkinson 112; Pearl 42.
51 Registration is required in Bangladesh (s 3 Muslim Marriages and Divorce (Registration) Act, 1974); India (s 5(3) Muslim Family Laws Ordinance, 1961); and Morocco (s 65 of the Moroccan Family Code 70 of 2003).
52 Qur'an 4:3.
53 South African Law Reform Commission *Islamic Marriages and Related Matters Project 106* (2003) para 2.25; Mansurizade Sa'id "The Muslim Woman: Polygamy Can Be Prohibited in Islam" *Oxford Islamic Studies Online* http://www.oxfordislamicstudies.com/ article/ book/ islam-9780195154672/islam-9780195154672-chapter-24 (accessed 14-09-2010).

recognises polygyny, but limits its application. If a man intends to conclude a second or further Muslim marriage under the draft Bill, he has to approach the court for approval of a contract which will regulate the future matrimonial property system for all his marriages.[54] This clause is similar to s 7(6) of the Recognition of Customary Marriages Act. There is however an additional requirement in the draft Bill. A Muslim man has to prove to the court that he will treat his wives equally before such a contract will be approved.[55] On approval the existing matrimonial property system will be terminated and the property will be divided if the first marriage is a marriage in community of property or subject to the accrual system.[56] This provision is problematic. It is unclear what the consequences will be if a man concludes a second marriage without approaching the court for approval.[57] It would be detrimental to the second wife if her marriage is declared void. The second wife has no control over the actions of her husband yet she is punished for his inaction if such a marriage is void.[58] Equal treatment of all the wives in a Muslim marriage is part of *Shari'ah*. It is however not required of a man to prove that he will be able to treat all wives equally before he is allowed to conclude a further marriage.[59] There are however countries which require such proof.[60] No such limitation exists in the Recognition of Customary Marriages Act where a second customary marriage is concluded. The burden on a Muslim man to prove equal treatment of his wives can be regarded as discrimination due to the fact that no similar duty exists for a man entering into a second customary marriage.

Further uncertainty with regard to the appropriate property system for polygynous marriages exists.[61] The default matrimonial property system in the draft Bill is complete separation of property.[62] If a further marriage is concluded the property system of the first marriage is dissolved and a new property system is determined by contract. The only suitable matrimonial property regime for polygynous marriages seems to be the exclusion of community of property and the exclusion of accrual.[63] The proposed Act should determine that all Muslim marriages are out of community of property. The process of changing the matrimonial

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54 Clause 8(6).
55 The principle of equality is discussed in part 2 3 5.
56 Clause 8(7).
57 Heaton *South African Family Law* (2010) 212; Bakker "The new un-official customary marriage: application of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998" 2007 *THRHR* 481; Maithufi and Moloi "The need for the protection of rights of partners to invalid matrimonial relationships: a revisit of the 'discarded spouse' debate" 2005 *De Jure* 152; Maithufi and Moloi "The current legal status of customary marriages in South Africa" 2002 *TSAR* 609; Bronstein "Confronting custom in the new South African state: an analysis of the Recognition of Customary Marriages Act 120 of 1998" 2000 *SAJHR* 562. In *MM v MN* 2010 4 SA 286 (GNP) the North Gauteng High Court found that a further customary marriage concluded without consent in terms of s 7(6) is void.
58 Contrary to this, court in *MM v MN* para 32 held that the first wife's rights are more worthy of protection than the second or further wife under s 7(6) of the Recognition of Customary Marriages Act and that a voidable second or further marriage will lead to a "morass of uncertainty".
59 Pearl 77.
60 For example Morocco, Iraq and Pakistan: Hussain 87.
61 See fn 57.
62 Clause 8(1).
63 Heaton 212-214.

property regime should take place on conversion of an existing marriage to a Muslim marriage and all marriages concluded after the promulgation of the Act should be out of community of property with exclusion of the accrual. The accrual cannot be included due to practical problems with regard to the calculation of the accrual in polygynous marriages.[64] A marriage out of community of property corresponds with the traditional Islamic property system.[65]

2 3 Consequences of a Muslim marriage

2 3 1 Maintenance (nafqah)

In *Shari'ah* a wife's right to maintenance is absolute.[66] Her husband has to maintain her irrespective of her means and she has no duty to maintain him.[67] The wife's right to maintenance receives preference above children from the marriage and other relatives.[68]

There is no express indication in the draft Bill that *Shari'ah* is applicable to maintenance. However, clause 12(2) incorporates *Shari'ah* maintenance principles into the draft Bill. For example clause 12(2)(a) states that in determining the amount of maintenance to be paid the court has to take into consideration the fact that the husband is obliged to maintain his wife during the subsistence of their marriage in accordance to his means and her reasonable needs.[69] The court has to consider the principles under clause 12(2) in making a maintenance order. It is, however, not under an obligation to make such an order. Although a reciprocal duty of maintenance is unknown under *Shari'ah* it would be possible for a husband in a Muslim marriage to succeed with a maintenance claim against his wife if he is in need of maintenance and she can afford to pay maintenance. Maintenance under the draft Bill is regulated by the Maintenance Act.[70]

In *Shari'ah* a *w*oman is entitled to maintenance[71] during the subsistence of a valid (*sahih*) marriage if her husband has access to her at all lawful times and if

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64 Pienaar "African customary wives in South Africa: is there spousal equality after the commencement of the Recognition of Customary Marriages Act?" 2003 *Stell LR* 265; Heaton 213–214; Bakker 2007 *THRHR* 486. Van Schalwyk "Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 of 1998" 491–492 argues that a polygynous marriage can be in community of property and that accrual can be part of a polygynous matrimonial property regime.

65 Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" 1993 *THRHR* 401; Moosa "Muslim personal law – to be or not to be" 1995 *Stell LR* 423. In terms of clause 9(7)(b) of the draft Bill the court has a wide discretion to divide the assets equitably upon divorce if one spouse has contributed towards the growth of the other spouse's estate.

66 Vesey-Fitzgerald 95; Tanzil-ur-Rahman 259; Esposito 62; Hodkinson 147; Pearl 69; Nasir 63.

67 Vesey-Fitzgerald 95.

68 Vesey-Fitzgerald 97; Esposito 26; Hodkinson 147.

69 With regard to the calculation of maintenance during the subsistence of a Muslim marriage see Tanzil-ur-Rahman 269; Hodkinson 147; Ibn Rushd 63; Pearl 69; Nasir 66.

70 Act 99 of 1998 is incorporated by clause 12(1).

71 Maintenance includes the provision of food, clothes, accommodation and other necessities. A woman is entitled to her own private residence and cannot be forced to share accommodation with other wives: Vesey-Fitzgerald 95; Schacht 167; Tanzil-ur-Rahman 258; Esposito 26; Hodkinson 147; Pearl 69; Nasir 59; Al-Jaza'iri 387.

she obeys all his lawful commands.[72] The draft Bill does not contain any provisions regarding the right of a husband not to pay maintenance if his wife does not follow his lawful commands.[73] To succeed with a maintenance claim the wife will have to prove the normal common law requirements for maintenance, that is the existence of a valid marriage, a need for maintenance and that her husband is able to provide such maintenance. This is opposed to the requirements under *Shari'ah* were she will only succeed if she is available to her husband at all lawful times and obeys all his lawful commands. It is clear why such a provision cannot be included in the draft Bill as it will not hold under constitutional scrutiny.

Upon divorce section 7 of the Divorce Act is applicable.[74] The parties may therefore enter into a settlement agreement providing for maintenance which may be made an order of court or in the absence thereof the court may make an order with regard to maintenance. In terms of clause 12(2) of the draft Bill the court will have to consider that the husband is only obliged to maintain his wife during *iddah* or for two years if she breastfeeds. Payment during the time the wife breastfeeds is in the strictest sense not maintenance but remuneration for the fact that she takes care of their child. Where the wife has custody of the child the husband will be obliged to provide his wife with a separate residence if she does not own a residence and remunerate her for the period of custody. The principles of *Shari'ah* are therefore incorporated in clause 12. Although the court is obliged to consider these principles, it does not necessarily have to abide by them.

The traditional Islamic position is therefore significantly changed. The common law maintenance principles are applied to Muslim marriages. If such a clause is passed into law it will place a moral duty on Muslim spouses not to claim more than they are entitled to under *Shari'ah*.

2 3 2 The husband's right of control

A Muslim husband has an extensive right of control over his wife. The right is, however, not absolute.[75] He can for example determine where his wife should live but he cannot force her to share her home with other family members or wives.[76] The husband can prohibit his wife from having a career but he cannot force her to work.[77] The wife loses her right to maintenance if she ignores reasonable demands of her husband without a valid excuse.[78] The draft Bill does not contain any provisions regarding the husband's right of control. In fact clause 3 provides that a wife is equal in status and capacity.

2 3 3 Patrimonial consequences

The draft Bill provides that the default matrimonial property system is out of community of property without accrual.[79] The parties are however free to enter

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72 *Qur'an* 4:34; Tanzil-ur-Rahman 260; Esposito 26; Hodkinson 148; Pearl 69; Nasir 64; Hussein 92.

73 *Qur'an* 4:34; Vesey-Fitzgerald 95; Tanzil-ur-Rahman 265, 267; Esposito 26; Hodkinson 147; Pearl 70; Nasir 65.

74 Clause 9(7)(a).

75 Schacht 166; Hodkinson 146; Pearl 59.

76 Vesey-Fitzgerald 44; Hodkinson 146; Pearl 60; Nasir 67.

77 Hodkinson 146; Nasir 62.

78 *Qur'an* 4:34; Schacht 166; Vesey-Fitzgerald 95; Tanzil-ur-Rahman 265, 267; Esposito 26; Hodkinson 147; Pearl 70; Nasir 63.

79 Clause 8(1).

into an agreement regarding the patrimonial consequences of their marriage or a partnership agreement recognised in *Shari'ah*.[80] Community of property is unknown in *Shari'ah* and it therefore complies with *Shari'ah*.[81] The wife has full control and ownership over her own property, including *mahr*.

2 3 4 Mahr

All forms of *mahr* are recognised by the draft Bill.[82] *Mahr* is money paid or property delivered to a woman by her husband as a result of their marriage contract (*nikah*).[83] The draft Bill describes *mahr* as an *ex-lege* consequence of the marriage contract.[84] *Mahr* is payable to the wife and not her father or guardian.[85] In *Shari'a* the duty to pay *mahr* is an obligation arising from the marriage and a consequence thereto, it is however not a requirement for a valid Muslim marriage.[86] This is also the position in the draft Bill as *mahr* is not listed under the requirements for a valid Muslim marriage. The draft Bill acknowledges the existence of *mahr* by referring to it in the definitions clause and by providing for a marriage officer to register the agreed *mahr*. The draft Bill does however not contain the requirements and practices surrounding *mahr.* It is presumed that the *Shari'ah* principles surrounding *mahr* will be applicable.[87] If these principles are not applied the inclusion of the definition of "dower" in the Act becomes meaningless.[88]

2 3 5 Equality of the wives

A man may marry more than one wife, up to a maximum of four, if he can treat them equally.[89] The test for equality of the wives is objective in nature. All the wives are entitled to maintenance and an equal amount of their husband's time.[90] A spouse can claim restitution of her marital rights or even request a divorce if her husband does not treat her equal to the other wives.[91] She is entitled to leave the family home and still claim maintenance from her husband if he treats her unequal to the other wives.[92] The draft Bill makes provision for a divorce under these circumstances in terms of clause 1(x)(h) and under clause 8(7) regarding the application by the husband for permission to conclude a further

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80 SALRC Islamic Marriages and Related Matters Project 106 (2003) par 2.33.

81 *Qur'an* 4:7; Schacht 167; Esposito 24; Hodkinson 131; Pearl 75; Hussain 98. See discussion in part 2 2 50 with regard to the possible matrimonial property systems of polygynous marriages.

82 The draft Bill refers to *"mahr"* as "dower": clause 1 definitions of "dower", "deferred dower" and "prompt dower" and clause 6(4)(a).

83 Tanzil-ur-Rahman 218; Esposito 24; Hodkinson 132; Nasir 46.

84 Clause 1 definition of "dower".

85 Vesey-Fitzgerald 62; Hodkinson 132.

86 Hodkinson 132; Nasir 47.

87 For general principles regarding *mahr* see *Qur'an* 4:4, 30:50; Vesey-Fitzgerald 63; Tanzil-ur-Rahman 233; Schacht 167; Hodkinson 132; Pearl 64; Ali (vol 2) 187; Nasir 45; Diwan *Dowry and protection to married women* (1995) 142; Ibn Rushd 20.

88 However see n 28 with regard to the application of *Shari'ah* in South Africa.

89 Vesey-Fitzgerald 44; Hodkinson 151; Pearl 77.

90 The amount of maintenance is determined by the living standard the wife was accustomed to before the marriage. Equality with regard to maintenance does therefore not imply that the wives should receive equal amounts of maintenance: Vesey-Fitzgerald 44; Hodkinson 151.

91 Hodkinson 151.

92 *Ibid*.

marriage. The word "justly" is used instead of "equally" under the divorce clause but reference is made to "equality" under clause 8(7). Although no explanation is provided by the SALRC for the use of "justly" under the definition of "*faskh*" one can presume that it intends to cover more matters than merely the equality of spouses. The grounds for divorce under clause 1(x) are an open list and equality can be recognised as a ground for divorce if it does not fit under clause 1(x)(h).

2 4 Dissolution of the marriage

In *Shari'ah* a marriage can be terminated by *talaq* (repudiation), agreement, a court order or death. The draft Bill recognises all four forms of termination of a Muslim Marriage.

2 4 1 Talaq (repudiation)

Talaq is an express unilateral repudiation by the husband of his wife.[93] Only the husband has a right to use *talaq*.[94] He may delegate his right to one of his wives or a third party.[95] There are three forms of *talaq*: *as-sunna*; *al-bida* and *tawid*. The draft Bill recognises all three forms of *talaq*.[96]

The only limitation placed on *talaq* in the draft Bill is the requirement that an irrevocable *talaq* has to be registered.[97] The same limitation exists in Egypt.[98] An irrevocable *talaq* has to be registered with a marriage officer in the magistrate's district where the wife lives within 30 days of its invocation.[99] In terms of clause 1(xii) a revocable *talaq* becomes irrevocable after the expiry of the wife's *iddah*. The *talaq as-sunna* therefore has to be registered within 30 days after the expiry of the wife's *iddah*, whereas the *talaq al-bida* and *tawid al-talaq* have to be registered within 30 days after its invocation. The wife or a duly authorised representative and two witnesses have to be present.[100] If the wife or her duly authorised representative is not present the marriage officer will register the *talaq* only if the man can prove that notice in the prescribed form was duly served on his wife.[101] It is unclear from the draft Bill whether failure to register an irrevocable *talaq* will lead to invalidity

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93 Vesey-Fitzgerald 73; Tanzil-ur-Rahman 309; Hodkinson 220; Pearl 100.

94 Schacht 163; Vesey-Fitzgerald 73; Tanzil-ur-Rahman 309; Esposito 31; Hodkinson 220; Pearl 100.

95 Vesey-Fitzgerald 77; Tanzil-ur-Rahman 339; Hodkinson 222; Pearl 100; Nasir 72.

96 Clause 9. The forms are the *talaq al-ashan*; *talaq al-hasan*; *talaq al-bida*; *tawid al-talaq*. *Talaq al-ashan* and *talaq al-hasan* are both forms of the *talaq as-sunna*. The *talaq al-ashan* is pronounced once during the wife's *thur* cycle, *iddah* (waiting period) starts immediately and the marriage dissolves immediately after *iddah*. This is the most acceptable form of *talaq*. The *talaq al-hasan* is pronounced in the wife's *thur* cycle and then in each *thur* cycle during *iddah*. The marriage is terminated at the end of *iddah*. *Talaq al-bida* is the most reprehensible form of *talaq*. The *talaq* does not comply with the requirements of the *talaq as-sunna* due to some form of deficiency. It is however still a valid form of divorce. The marriage is terminated immediately after pronunciation and cannot be recalled during *iddah*. Where the husband has delegated use of *talaq* to his wife it is known as *tawid al-talaq*.

97 An irrevocable *talaq* is a first or second *talaq* after the period of *iddah* has expired or a third *talaq* or *talaq al-bida*.

98 "Islamic family law" http://law.emory.edu/ifl/index2.html (accessed 07-01-2010).

99 Clause 9(3)(a).

100 Clause 9(3)(a).

101 Clause 9(3)(b).

thereof.[102] In the light of the imperative language of the clause and the fact that a fine is payable on failure to register the *talaq*,[103] the *talaq* should be invalid if not registered within the prescribed period.

The draft Bill does not clearly stipulate when a Muslim marriage is terminated by *talaq*. Traditionally a Muslim marriage is terminated upon the pronouncement of a *talaq al-bida*, a third *talaq* or after *iddah*. However, if the draft Bill requires registration for the validity of an irrevocable *talaq* a Muslim marriage will only be terminated upon registration.

Where there is a dispute regarding the validity of a *talaq* the marriage officer is not allowed to register the *talaq* until the dispute is dissolved by written agreement, by arbitration or by court order.[104] Within 14 days from registration of the *talaq* a spouse has to institute legal proceedings for a court order confirming the dissolution of the marriage by *talaq*.[105] Legislation in Tunisia,[106] Somalia[107] and Pakistan[108] limits the *talaq* to such an extent that only a court order can give effect to the *talaq*. The draft Bill only requires that the *talaq* has to be confirmed by the court.[109] The rationale behind the confirmation of *talaq* by court is merely to provide the court with an opportunity to ensure that maintenance and proprietary issues are properly regulated and the best interests of the children are safe guarded. This will also provide the court with an opportunity to provide ancillary relief.[110] A Muslim marriage is therefore terminated extra judicially through *talaq.* The marriage is terminated on registration of an irrevocable *talaq*.[111] The court can only provide a declaratory order that the marriage has indeed resolved and provide further relief as prescribed in clause 9(7). The validity of the *talaq* will therefore not be affected by the failure to approach a court within 14 days after registration of the *talaq*. The same procedure is followed if the wife uses *tawid al-talaq*.[112]

2 4 2 Divorce by agreement

Marriage is contractual in nature and can be terminated by agreement between the contracting parties: the husband and wife.[113] There are two forms of divorce by agreement: *khula'* and *mumbara'a*.

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102 Clause (9)(3)(e) implies that the validity before registration of the *talaq* is determined by *Shari'ah*.
103 Clause 9(3)(d).
104 Clause 9(3)(e). An option for mediation of the dispute should be added to this clause.
105 Clause 9(3)(f).
106 Personal Status Code of 1956.
107 Family Code 23 of 1975.
108 Muslim Family Laws Ordinance 8 of 1961.
109 Clause 9(3)(f).
110 SALRC *Islamic marriages and related matters Project 59 Discussion Paper 101* (2001) para 5.32.
111 The position of Muslim marriages is similar to customary marriages concluded outside Kwa-Zulu Natal before the Recognition of Customary Marriages Act, see *Khoza v Nkosi* 1980 NAH 82 (N–O).
112 Clause 9(3)(c).
113 *Qur'an* 2:229; Vesey-Fitzgerald 78; Hodkinson 228; Pearl 121; Moinuddin 96.

If the wife initiates the agreement to divorce it is known as *khula'*.[114] The wife offers compensation in return for an agreement with her husband to terminate the marriage.[115] The compensation is usually not more than the agreed upon *mahr* if the full amount was paid.[116] If the husband did not pay the full amount, compensation would normally not be more than the paid amount of *mahr*.[117] If the divorce agreement is initiated by both parties it is *mumbara'a*.[118] The husband is not entitled to compensation under *mumbara'a*.[119]

The consequences of a divorce by agreement are the same as the consequences of an irrevocable *talaq*.[120] The draft Bill provides for consequences similar to the irrevocable *talaq* for divorce by *khula'*.[121] Similar to the irrevocable *talaq*, *khula'* has to be registered and confirmed by court order.[122] A marriage will therefore terminate on registration of *khula'* irrespective of whether the court is approached for a declaratory order.[123]

The draft Bill does not recognise *mubara'a* as a form of termination of a Muslim marriage. If a marriage is therefore terminated by agreement it will always be considered that the wife initiated divorce. The wife will be responsible for compensation unless the spouses agreed that she does not have to pay compensation. This is clearly an oversight by the Commission. Provision should be made for *mubara'a*.

2 4 3 Judicial divorce (tafriq)

2 4 3 1 *Faskh*

In *Shari'a* the wife may terminate her marriage by court application on certain grounds, this is known as *faskh*.[124] The draft Bill provides for termination of a Muslim marriage by court order or *faskh*.[125] Either the husband or wife can apply. It is unlikely that a man would use *faskh* if he is able to terminate his marriage by *talaq.* A woman may terminate her marriage on any ground recognised by *Shari'ah*. Most of the traditional grounds are listed under clause 1(x) of the draft Bill. The list is not a *numerus clausus* and therefore leaves opportunity for development.

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114 Schacht 164; Vesey-Fitzgerald 78; Bulbulia "Women's rights and marital status: are we moving closer to Islamic law?" 1983 *De Rebus* 432; Hodkinson 228; Pearl 121; Moinuddin 96.

115 Schacht 164; Tanzil-ur-Rahman 520; Vesey-Fitzgerald 78; Esposito 33; Hodkinson 228; Pearl 121; Mionuddin 96.

116 Esposito 34; Hodkinson 228; Pearl 121.

117 Pearl 121. Muslim jurists have different opinions concerning the question whether compensation can be more than the agreed amount of *mahr*: see Tanzil-ur-Rahman 518; Hodkinson 229; Pearl 121.

118 Vesey-Fitzgerald 78; Tanzil-ur-Rahman 552; Schacht 164; Esposito 34; Hodkinson 228.

119 *Qur'an* 4:20.

120 Tanzil-ur-Rahman 552; Esposito 34; Hodkinson 228.

121 Clause 9(5) states that the provisions of clause 9(3)(c) which requires registration of the irrevocable *talaq* is applicable to *khul'a*.

122 Clause 9(5).

123 See part 2 4 1.

124 The procedure has it origin in *Qur'an* 4:35. On the nature of *faskh* see Bakker 2008 *Obiter* 534.

125 Clause 9(4).

2 4 3 2 *Li'an*

Under *li'an* the marriage is terminated by court after the husband accused his wife of adultery without sufficient evidence and does not want to withdraw his accusation.[126] The draft Bill does not provide for this form of divorce.

2 4 4 Death

In *Shari'ah* death of one of the spouses terminates the marriage.[127] A widow has to maintain her *iddah* before she can remarry.[128] Deferred *mahr* has to be paid.[129] A widow is not entitled to maintenance.[130] She is expected to support herself from the deferred *mahr* and inheritance received from her deceased husband's estate.[131] The draft Bill provides for termination of marriage on death of one of the spouses and provides for *iddah* after divorce. In terms of clause 9(8) the widow may claim unpaid *mahr* from her deceased husband's estate.

2 4 5 Apostasy

The *Sunni* jurists agree that a marriage is terminated if one of the spouses denounces Islam.[132] The marriage terminates automatically and no court order is necessary.[133]

Automatic dissolution of a Muslim marriage by apostasy is not recognised by the draft Bill. It will however not be possible to add such a clause to the Act as this will severely limit the spouses' right to freedom of religion. The husband will have to use *talaq* to terminate his marriage. Where the husband changes his religion his wife will have to use the *tawid al-talaq* or if the power of *talaq* was not delegated to her she will have to end the marriage with *faskh*. Although apostasy is not one of the listed grounds for *faskh* under clause 1(x) it is a permitted ground under *Shari'ah* for divorce and would therefore be allowed.[134]

2 4 6 Iddah

Iddah is the mandatory waiting period in which a woman is not allowed to marry after divorce or death of her husband.[135] *Iddah* is recognised by the draft Bill.[136] *Iddah* performs three functions: to determine whether the wife is pregnant and to confirm paternity; to enable reconciliation where the divorce is revocable and to provide for a period of mourning.[137]

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126 Vesey-Fitzgerald 82; Schacht 165; Tanzil-ur-Rahman 504; Esposito 34; Hodkinson 234.
127 Hodkinson 219.
128 *Qur'an* 2:234.
129 Hodkinson 133; Pearl 63; Nasir 49; Diwan 146.
130 Hodkinson 219.
131 The widow is entitled to a quarter of her husband's estate if no children were born from the marriage. If there are children she is entitled to an eight of his estate: Vesey-Fitzgerald 121; Hodkinson 219.
132 Schacht 165; Vesey-Fitzgerald 84; Tanzil-ur-Rahman 653; Esposito 35; Hodkinson 233.
133 Tanzil-ur-Rahman 653.
134 Clause 1(x) provides for *faskh* on "any ground or basis permitted by Islamic law".
135 *Qur'an* 2:228; 2:234; 2:235; 65:4; Schacht 166; Vesey-Fitzgerald 52.
136 Clauses 1(xi), (xii) en (xxii); 9 and 12(2).
137 *Qur'an* 2:228; *Qur'an* 2:234; Vesey-Fitzgerald 52; Esposito 36.

Iddah starts immediately after divorce or death of the husband, even where the woman is not aware of the divorce or death of her husband.[138] *Iddah* of a divorced woman lasts for three menstrual cycles or three months if she does not menstruate.[139] If a woman is pregnant her waiting period will last until birth of the child.[140] A widow's *iddah* lasts for four months and ten days, irrespective of whether her marriage was consummated.[141] These periods are contained in the draft Bill.[142]

A woman is entitled to maintenance during her *iddah*, including accommodation.[143] The draft Bill under clause 12 provides for maintenance during *iddah.* A rule 43 application can be brought for maintenance during *iddah*.[144]

2 5 Minor children

A divorced woman receives custody over her male children until they are seven years of age and her female children until puberty.[145] The *Maliki* school allows male children to stay with their mothers until puberty and the *Shafi'i* school allows a male child of seven to decide whether he wants to stay with his mother until puberty or move in with his father.[146] After the age of seven or puberty depending on the facts custody settles in the father's family. The family household traditionally consisted of sufficient women to care for the children.[147] No male is allowed custody over a female child who does not fall in the prohibited degrees of affiliation.[148] The father is the guardian of his minor children.[149]

Clause 11 of the draft Bill emphasises that the best interest of the child is the determining factor when considering care and guardianship. This is in compliance with s 28(2) of the Constitution and s 9 of the Children's Act. The court has to determine the best interest of the child by considering *Shari'ah* and the report of the family advocate. *Shari'ah* can therefore be considered but the best interest of the child will be the determining factor.

3 POSSIBLE ALTERNATIVE TO THE DRAFT BILL[150]

The draft Bill is an attempt to codify Muslim marriage law. Codification of Muslim marriage law might not be the correct route to the recognition of Muslim marriages. Where the law is codified it does not leave space for development.

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138 Tanzil-ur-Rahman 683.

139 *Qur'an* 2:228, 2:234, 2:235, 65:4; Schacht 166; Vesey-Fitzgerald 52. Ito the Shafi'i school *iddah* lasts for three periods of *thur* and not three menstrual cycles: Tanzil-ur-Rahman 685.

140 *Qur'an* 65:4; Schacht 166; Vesey-Fitzgerald 52.

141 *Qur'an* 2:234; Schacht 166; Vesey-Fitzgerald 52; Pearl 54; Nasir 102.

142 Clause 1(xi).

143 *Shafi'i* jurists are of the opinion that a woman is not entitled to maintenance during her *iddah* if the divorce is irrevocable. The *Hanafi* jurists state that she is indeed entitled to maintenance. Majority of countries today follow th*e Hanafi* principle: *Qur'an* 65:1; Vesey-Fitzgerald 52–53; Nasir 105; Ahmed *The Muslim law of divorce* (1978) 850.

144 Clause 9(3)(f).

145 Vesey-Fitzgerald 99; Tanzil-ur-Rahman 718; Esposito 37; Hodkinson 311; Pearl 92.

146 Vesey-Fitzgerald 99.

147 Vesey-Fitzgerald 99; Tanzil-ur-Rahman 718; Esposito 37; Hodkinson 311; Pearl 92.

148 *Ibid*.

149 Pearl 97.

150 This is merely a cursory glance at an alternative to the draft Bill which will be developed further in future.

Traditionalists create the impression that *Shari'ah* is immutable but there are reformists who argue for change.[151]

A cursory glance at the content of the draft Bill clearly indicates that Muslim women will be at a disadvantage and some of the clauses might not survive constitutional scrutiny. This will lead to the striking down of sections of the Act, leaving a lacuna that will need to be filled with legislation, common law or customary law. A secular institution will consequently have to amend religious doctrine.

Further criticism against the draft Bill is that preference is provided to certain schools of thought above others and that the state thereby implies that the relevant schools are preferred, which will lead to discrimination on the ground of religion and freedom of association and thought. An Act codifying Muslim marriage law therefore creates a judicial minefield.[152]

It is however important to recognise Muslim and other religious marriages to provide protection for disadvantaged persons, usually women and children, in strong patriarchal religious systems. It might be preferable to create one secular law recognising all marriage and marriage like relationships in South Africa.[153] Provision should be made for a marriage contract in which the parties can regulate the consequences of their marriage according to their own culture or religion. No preference will exist to any particular system of law. Such an Act will provide the parties with a choice to approach their religious institutions or the court during a dispute. It is however true that parties to a marriage are usually not in the same bargaining position. The creation of a default contract providing basic protection to the disadvantaged spouse may partly alleviate such inequality. With regard to marriage there will unfortunately always be an inequality in bargaining power. True forum shopping will not exist due to the weaker bargaining power of women. They will be forced to resolve disputes through the traditional religious councils which are usually patriarchal in nature. However, by recognising religious marriages the option at least exists to take the matter to court.

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151 The reformist approach differentiates between religious and secular aspects of *Shari'ah*. This is done by distinguishing between eternal and immutable aspects of *Shari'ah* and aspects that were the result of human interference and therefore subject to change. The traditionalists however prefer to regard *Shari'ah* in its totally as eternal and immutable and disregard the fact that a majority of aspects in family law where the result of human interpretation: An-Naim *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990) 11; Cotran and Sherif *Democracy, the Rule of Law and Islam* (1999) 444; Kamali *Freedom, Equality and Justice in Islam* (2002) 77; Esposito "Contemporary Islam" *The Oxford History of Islam* Esposito (ed) *Oxford Islamic Studies Online* http://www.oxfordislamicstudies.com/article /book/islam-9780195107999/islam-9780195107999-div1-132 (accessed 20-12-2009). A strong argument for reform can be found in the article by *Syekh Ahmad Surkati (1872–1943)* in "Ijtihad and Taqlid" *Oxford Islamic Studies Online* http://www.oxfordislamicstudies.com/ article/book/islam-9780195154672/islam-9780195154672-chapter-48 (accessed 20-12-2009).

152 Motala 2004 *CILSA* 327.

153 See Bakker "Die Civil Union Act, Draft Domestic Partnership Bill en moontlike deregulering van die huwelik" 2009 *JJS* 45 in this regard. A similar Act was proposed by the Commission on Gender Equality in 2005 called the "Recognition of Religious Marriages Bill". The proposed Act does however not contain a default marriage system but merely applies the religious patrimonial system to religious marriages unless the parties exclude it by ante-nuptial contract.

A further drawback might be the lack of knowledge on the part of judges in respect of religious law. This can only be addressed through training of the judiciary.[154]

CONCLUSION

The draft Bill largely complies with *Shari'ah.* There are, however, problem areas where the draft Bill does not comply with *Shari'ah* or where it proposes liberal reforms to the traditional position, or where it complies with *Shari'ah* but the relevant section will not pass constitutional scrutiny. These problem areas include the following:

(a) On majority a woman does not need her guardian's consent to enter into a valid Muslim marriage.[155]

(b) The requirement of competent Muslim witnesses in the traditional sense discriminates on the grounds of sex and infringes on the right of dignity and will not be valid under the Constitution.[156]

(c) The husband's right of control over his wife is not recognised, although such a right will not withstand constitutional scrutiny should it be included.[157]

(d) A Muslim marriage is terminated by registration of an irrevocable *talaq* and not by the mere declaration thereof.[158]

(e) The common law principles of maintenance and the Maintenance Act are applicable to spouses in a Muslim marriage. Section 7 of the Divorce Act is applicable with regard to post divorce maintenance. In both instances the wife can be required to pay maintenance which is unknown in *Shari'ah.* The wife will be able to claim maintenance even where she is *nashiza*.[159]

(f) *Mumbara'a* and *Li'an* are not recognised forms of divorce under the draft Bill.[160]

(g) Apostasy does not dissolve a Muslim marriage automatically although the parties will still be able to divorce each other by *talaq*, agreement or court order.[161] Such a clause will however amount to severe limitation of the right to freedom of religion.

Cultural and religious pluralism is a reality in South Africa and protected under the Constitution. The Muslim community will live in accordance with their religion irrespective of whether it is legally recognised. It is however desirable to recognise Muslim marriage law. True protection to those in a weaker position can only be provided if their personal legal system is recognised. The proposed draft Bill might not provide the desired results. The approach to the legislating of marriage and marriage like relationships should be reconsidered.[162]

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154 Bakker 2008 *Obiter* 533.
155 See part 2 2 2.
156 *Ibid*.
157 See part 2 3 2.
158 See part 2 2 4.
159 See part 0.
160 See parts 0 and 0.
161 See part 0.
162 Bakker 2009 *JJS* 28.

Ukuthwala: Structured for Relevance

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1 INTRODUCTION

South Africa is a diverse community with different cultures; each of which has its own customs, beliefs and values. Within diverse communities, one group usually regards its values, beliefs and laws superior to those of others. Historically, indigenous customary law was regarded as primitive rules for uncivilised savages.[1] The emphasis on social equilibrium and the idea of *ubuntu* were consequently disregarded and replaced with ideas from the western civilisation.[2]

With the colonisation of Africa by the western world, European public and criminal law was imposed on all new colonies without exception and private indigenous law was recognised as long as it was not in conflict with the European sense of morality or justice.[3] The Cape Colony and Natal followed an approach of indirect rule which meant that "native" chiefs were appointed as agents of government to rule the indigenous population under the supervision and control of a colonial administrator.[4] In this system, customary law was used as an administrative tool to deal with black people. In time, indigenous customary law was codified in order to simplify its application.

The application of African custom law was subjected to European values and notions of morality which were used to purge customary law of perceived undesirable attributes.[5] This resulted in the juridical rejection of certain customary traditions which did not compare favourably with European values and notions of morality.[6]

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1 Pieterse "'It's a black thing': upholding culture and customary law in a society founded on non-racialism" 2001 *SAJHR* 364 366.
2 Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* (2001) 209.
3 Pieterse 2001 *SAJHR* 369.
4 Pieterse 2001 *SAJHR* 370.
5 Sanders *The Internal Conflict of Laws in South Africa* (1990) 2.
6 Pieterse 2001 SAJHR 374; Thomas and Tladi "Legal pluralism or a new repugnancy clause" 1999 *CILSA* 354–363; Koyana "The indomitable repugnancy clause" 2002 *Obiter* 98–115; Taiwo "Repugnancy clause and its impact on customary law: comparing the South African and Nigerian position – some lessons for Nigeria 2009 *Journal of Juridical Science* 92.

Most of these traditions were concerned with personal freedom, sexual immoralities or injustices.[7]

The colonisation of Africa by European countries embedded law[8] in a positivist fashion.[9] Legal norms were imposed by the state upon its subjects and regarded as an indispensable ingredient of organised society.[10] This was done regardless of the multicultural nature of the society.

South Africa remains a multicultural society. Irrespective of any contempt that some members of society may have for customary law, it remains the law which is adhered to in many areas by many people.[11] Indigenous law is constitutionally recognised as part of the South African legal system and is seen "as standing alongside the Roman-Dutch common law".[12] In line with the Constitution,[13] indigenous law must be retained and developed by the courts.[14]

Pieterse calls for a different approach to customary law and its integration and harmonisation with common law:

> "one which would not only address the most glaring issues of racial inequality relating to legal dualism, but could also assist in the development of a legal system which reflects the culture of the majority of South African population while remaining true to the constitutional vision of a unified nation".[15]

The purpose of this article is to describe the custom of *ukuthwala* as a form of customary marriage in its historical context. Historically, *ukuthwala* has been held to constitute either of the common law crimes of abduction, kidnapping, assault and rape. We explore the conflict between this custom and the common law by way of critical analysis of the interpretation of the custom by the criminal courts. Currently there is a call for the abolition of the custom because it infringes on the rights of, and contributes to the violence against women and girl children. We concede that there are certain aspects of *ukuthwala* which challenge the underlying principles and values of the Constitution and we agree that these aspects of the custom should be abolished, but there are portions which do not undermine the values of the Constitution and these parts should be considered, developed and kept as part of indigenous law.

2 A historical overview of *ukuthwala*

According to Bennett,[16] customary marriages have five distinguishing features, one of which is that the "union was achieved gradually over time, not immediately

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7 Bennett *Customary Law in South Africa* (2004) 68.
8 Johnson *et al Jurisprudence: a South African Perspective* (2001) 75 and 210.
9 According to Johnson 131 legal positivism is seen as a scientific, rational approach to the law with a separation of law and morality.
10 Sanders 2.
11 Sanders 2.
12 Section 39 (2) provides that in interpreting any law and applying and developing common law and Customary law, the courts must have due regard for the spirit, purport (purpose) and objects of the Bill of Rights. this is clear that customary law, like common law, is subject to the Bill of Rights.
13 The Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").
14 Section 211(3) of the Constitution reads: " The courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law."
15 Pieterse 2001 *SAJHR* 365.
16 Bennett 188.

with the performance of a particular ceremony".[17] Different tribes and cultures had different customary ceremonies in relation to marriage. In 1947, Tromp stated in his treatise on the Xhosa law of persons that:

> "marriage and the formation of a family unit is the essence of Xhosa social life; it is the basis of the social structure of the amaXhosa. Every marriageable man and woman is expected to marry and to procreate. It is considered to be a disgrace not to be married; unmarried people are laughed at and looked upon with disapproval."[18]

Another feature of the customary marriage is family involvement.[19] Family life, as an important part of customary culture, makes the marriage between individuals a concern of the entire family groups. Both family groups participate not only in the matter of choice of marriage partners, but also in the preceding negotiations, the agreement, the transfer of marriage goods and the ceremonies.[20] In marriage negotiations, the girl is normally expected to submit to the wishes of her father and family and marry the man chosen by her parents.[21] Marriage can only take place once the girl has reached the age of puberty.[22]

There are different ways of contracting a marriage and most marriages are pre-negotiated with a number of standardised customs and ceremonies linked to it.[23] In contrast to these forms of regular marriages, there are also a number of irregular ways of contracting a legally binding marriage. Most of these forms of marriage have no or very few customs and ceremonies attached to them and are commonly referred to as *ukuthwala*. This irregular form of marriage is:

> "a custom whereby, preliminary to a customary marriage, a young man will forcibly take the girl to his home. He, accompanied by one or two friends, will waylay her when she goes to the river to fetch water, or to the forest to get a head load of firewood."[24]

Even though the girl is aware that the abduction will result in a marriage, she usually puts up some resistance, and the degree of resistance differs.[25] The resistance is normally feigned, as explained by Bekker when he states that "the girl, to appear unwilling and to preserve her maidenly dignity, will usually put up a strenuous but pretended resistance for, more often than not, she is a willing party".[26]

Later that day or the following day, the suitor or his people will send a delegation to the girl's family home, reporting that the girl is safe, that she was taken for the purpose of marriage and that the families should proceed with marriage

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17 *Ibid*.
18 Van Tromp *Xhosa Law of Persons* (1947) 28.
19 Bennett 188.
20 Van Tromp 33; Myburgh *Papers on Indigenous Law in Southern Africa* (1985) 2–9.
21 Van Tromp 33. She was, however, not without any remedy if she did not wish to marry the man of her family's choice and could either appeal to her parental uncles or clearly show her discontent at the *umzi*.
22 Van Tromp 35. Bennett 203 also states that the persons normally were considered marriageable only after their initiation; Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 105–122.
23 Van Tromp 62.
24 Koyana *Customary Law in a Changing Society* (1980) 1.
25 Koyana 1.
26 Bekker 98; Koyana and Bekker "The indomitable u*kuthwala* custom" 2007 *De Jure* 139.

negotiations and the payment of *lobolo*.[27] Immediately a responsive association is established between the two families and the girl's status is instantly raised to that of a young wife.[28]

It appears that in some communities practicing the *ukuthwala* custom, the girl is *thwalaed* to the homestead of the future husband after the completion of *lobolo* negotiations.[29]

The custom of *ukuthwala* is divided into three forms,[30] namely:

(1) where the girl is aware of the *ukuthwala* that will take place, in other words, that is where there is conspiracy between the girl and her suitor;

(2) where there is an agreement between the family of the girl and the family of the groom and the girl is unaware of such an agreement; and

(3) where neither the girl nor her family has prior knowledge of the *ukuthwala*.

2 1 *Ukuthwala* by mutual consent (*ukugcagca*)[31]

In this form of *ukuthwala* the girl consents to the intended carrying away and the intended marriage, but her parents and family did not consent and were normally unaware of it until after the *twala.* This marriage is based on mutual love and the parties would resort to *ukuthwala* because they feared that their families would not agree to their marriage, or the man was not in a position to give an *ikhazi*, in which instance he had a way of marrying his loved one but could wait to arrange and pay the *lobolo*.[32]

2 2 *Ukuthwala kobulawu*

In the second form of *ukutwala* the parents of the girl consent to the marriage. The parents of both parties have negotiated and agreed on the *thwala* which may take place forcibly or with the girl's co-operation. The girl is not previously consulted in respect of the marriage or the planning of the *thwala*.[33] There are a few reasons why this form of *ukuthwala* is used. First, the families may fear that the girl will refuse to marry the man and that an appeal to her uncles may succeed, the man may fear another suitor may take the girl before he can finalise negotiations with her parents or it may be for financial reasons.[34]

Once the girl has been *thwalaed,* her father would normally send a member of the family to inform her that the *thwala* was with his consent and that she should not refuse the man. If the girl refuses the man and the marriage, she needs to shout out her refusal, which is enough and she will be returned to her family. It is also accepted that the man may, if the girl continues to refuse him, have sexual intercourse with her to establish a connection, or bond in an attempt to persuade her to consent to the marriage. This sexual intercourse is done with the consent of the girl's father and is not seen as rape.[35]

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27 Koyana 1.
28 Koyana and Bekker 2007 *De Jure* 141.
29 Olivier *et al Indigenous Law* (1998) 20.
30 Bekker *et al Introduction to Legal Pluralism in South Africa* 2ed (2006) 31.
31 According to Van Tromp 64 this form of *ukuthwala* is seen as elopement (*ukugcagca*).
32 Van Tromp 66.
33 Van Tromp 67.
34 Van Tromp 68.
35 Van Tromp 69.

2 3 *Ukuthwala* without any consent

Here there is no consent and the girl is usually taken to the man's *umzi* with brutal male force. He would have to pay a penalty beast before he could begin with any negotiations with her family and the female may resist the marriage. If the man had sexual intercourse with the girl before he received the consent of her parents, it is seen as rape and he is heavily punished.[36]

In all forms of *ukuthwala* the girl should, after being *thwalaed* immediately be placed with the women of the suitor's family where she is treated in a kind and respectful manner. The suitor does not have sexual relations with the girl after she was *thwalaed* and if he seduces her, he must pay a seduction beast as penalty. If the girl is *thwalaed* and no marriage offer is made the man will be fined a *thwala* or *bopha* beast for the insult caused to the girl and her family.[37]

In all three forms, the marriage will only be considered complete and valid once

(1) the man, and his family, the girl and her family, all consented to the marriage;

(2) there is an agreement between the parties as to the *ikhazi*;

(3) the transfer or handing over of the bride is complete; and

(4) the girl is put through the *ukutyis' amasi* ceremony where a goat is slaughtered and a piece of its roasted meat given to her with a few sips of milk from the goat's milk-sack, introducing her into the family of the man.[38]

3 THE CONFLICT BETWEEN *UKUTHWALA* AND COMMON LAW

Sir Theophilus Shepstone remarked in 1883 that:

> "it is impossible, I think, to govern people satisfactorily without knowing their customs and modes of thought; magistrates who do not possess or soon acquire a knowledge of these, are dangerous persons to be entrusted with the charge of native populations".[39]

When *ukuthwala* is viewed through the European sense of morality and justice, it can be seen as constituting either of a number of common law crimes such as abduction, kidnapping, assault and even rape.

3 1 *Ukuthwala* and abduction

Snyman defines abduction as:

> "[a] person, either male or female, commits abduction if he or she unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor".[40]

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36 Van Tromp 72.
37 Koyana and Bekker 2007 *De Jure* 141.
38 Van Tromp 69–70.
39 Van Tromp 1.
40 Snyman *Criminal Law* 5ed (2008) 403.

Abduction is a common law crime with its origin embedded in the constitutions of Justinian, which penalised the removal or *raptus*, with or without violence, of a woman from the control of her guardian for the purpose of marrying her or to have sexual intercourse with her. Germanic law also acknowledged the guardian's parental right and pecuniary interest in the women under his control.[41] Roman-Dutch law also included abduction as an act which infringed on the guardian's rights, but some authors only viewed it as a crime if the abduction was without the consent of the minor. If the abduction was consensual for the purpose of marriage, the guardian would only have a civil claim against the abductor.[42]

In South African law, the crime of abduction is committed against the parent or guardian, and not against the minor child. Force is not a requirement for the crime, and the minor's consent is no justification for the abduction.[43] The removal must be either permanent or for a prolonged period of time. A temporary removal for the purpose of having sexual intercourse is not abduction. The intention to have sexual intercourse with the minor or to marry her must be present at the time of the removal.[44]

Abduction was neither defined as a crime, nor declared as one by the Native Penal Code,[45] which applied in the "native territories" (known as the Transkeian territories) which were annexed to the Cape Colony by the British authorities in 1879. Section 169 of the Code only prohibited the kidnapping of children under the age of fourteen years.

According to Van Tromp:

> "[t]he term *ukuthwala*, literally meaning "to carry away", has always been translated and taken to mean "abduction". This is a most unfortunate translation for, though it is literally correct, the English term "abduction" invariably implies the commission of a crime, which implication is not contained in the Xhosa term *Uthukwala.* The Xhosa term implies a marriage by carrying the girl away, which implication is again lacking in the English term abduction."[46]

In 1906 the Eastern Division of the Cape High Court[47] was asked to rule on the question of whether or not the abduction of a female, older then fourteen but younger than twenty-one, for the purpose of marriage or carnal connection, would constitute a crime in light of the limitation of s 169 to children below the age of fourteen years. Relying on s 269 of the Native Penal Code, which stated that any act which, if committed in the colony, constituted a crime would also constitute a crime in the "native territories", the court held that such conduct indeed constituted the crime of abduction in the "native territories" and was punishable as such. The accused, who was unrepresented at the time, pleaded guilty to the crime of abduction for removing a girl, older than fourteen but younger then twenty-one years, from the possession of her parents without their consent, for the purpose of having carnal connection.

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41 Milton *South African Criminal Law and Procedure: Volume II Common Law Crimes* 2ed (1992) 572.
42 Milton 573.
43 Snyman 404.
44 Snyman 405; *S v Sashi* 1976 2 SA (N) 446.
45 Act 24 of 1886.
46 Van Tromp 64.
47 *Rex v Njova* 1906 EDC 71.

In *Ncendani v Rex*,[48] three accused appealed their conviction and sentence for abduction. The three men took a girl, under the age of twenty-one but older than fourteen years, with force and without consent from the custody of her lawful guardian, for the purpose of marriage to another male. Their defence was first, that neither of the accused had the intention to either have sexual relations with the girl or to marry her, secondly they relied on the fact that "this case does not constitute a crime by the law in force in the native territories, inasmuch as section 169 of the Penal Code refers only to the stealing or abduction of children under the age of fourteen years".[49] The court rejected the first defence in light of s 77 of the Code, which provides for the conviction of anyone who aided and abetted another to commit a crime. The court found that the three accused deliberately took the girl with the intention that another man should have carnal relations with her. Secondly, also relying on s 269 of the Code, the court found that the facts indeed did a crime, namely common-law abduction. The judge stated that:

> "[t]he abduction of an unmarried girl under the age of twenty-one for the purposes of marriage or carnal knowledge has long been held to be a crime in this colony (*The Queen v. Schut* 1 A.C. 37, and *The Queen v. Matali and Buchenroerder*, 6 C.T.R. 175), and I am of the opinion that the enactment of sec 169 of the Code was not intended to deal with the crime of abduction, as known to the law of this colony. It must not be forgotten that the Penal Code in force in the Transkei is applicable to both Europeans and natives; consequently the argument used by the appellant's counsel, to the effect that, the native custom of *thwala* having long been recognised in the territories, the legislature deliberately intended to legalise the carrying off of unmarried girls for the purposes of marriage, appears to me to be of little weight. I cannot for one moment assume that the legislature intended to limit the crime to offences specified in sec 169. If this were so, it would enable a native to abduct an European girl between the ages of sixteen and twenty-one or an European to abduct a native girl of the same age, in each case for the above-mentioned purposes, and escape the ordinary consequences of their actions."[50]

This judgment clearly reflects the imposition of European values and notions of morality on an African custom which was found to be repugnant merely because it did not fit with those values and notions. The custom, and its application and value to the indigenous community were not considered at all.

In *R v Sita*[51] the question of whether the custom of *ukuthwala* can be pleaded as a defence on a charge of abduction came before the high court. In this case the state appealed against the acquittal of the accused on a charge of abduction, where the magistrate found that the custom of *ukuthwala* was a defence against the charge. In this instance the magistrate considered the custom of *ukuthwala*, and in relying on s 169 of the Code as not specifically declaring abduction a crime where the girl is between the ages of fourteen and twenty-one years of age, found that *ukuthwala* did not constitute abduction. On appeal, the high court, relying on s 269 declared that abduction was a crime applicable to "natives" and that s 169 was not for the purpose of abducting a girl for the purposes of marriage or sexual intercourse but was in fact applicable to all children, boys and girls,

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48 1908 EDC 243.
49 *Ncendani* 244.
50 *Ncendani* 245.
51 1954 4 SA 20 (E).

younger then fourteen, for any purpose. The judge stated: "I am at a loss, however, to see how a custom can, in a criminal case, override clear common law whether that custom be a legal or an illegal one."[52] The appeal succeeded and the matter was referred back to the magistrate's court.

In *S v Mxhamli*[53] the appellant was convicted in the magistrate's court of abduction and received a sentence of four months' imprisonment. He was found guilty of the fact that he and two companions removed a 16-year-old girl, whom he had not previously courted from her grandmother's home to the home of the applicant's mother with the intention that the applicant would marry the girl. The appellant seduced the girl during the night. On appeal against his sentence he contended that he was merely practising the custom of *ukuthwala* and that the prison sentence was therefore inappropriate.[54] The court dismissed the appeal on two grounds namely, first that the applicant was not a "suitor" to the girl and that the custom was only available to "suitors" and secondly, that the sexual intercourse with the girl was contrary to the custom.[55] The court did, however, concede that if the custom were followed in the correct manner then it would be a mitigating factor in a sentence for abduction. In close analysis of the custom of *ukuthwala*, it is apparent that the court's argument was inaccurate. According to Whitfield, "[c]ourtship as it exists with Europeans is almost unknown" and "[s]weet-hearting is much practised by the Natives but it is seldom that the love affair leads to matrimony".[56] Seduction of the young woman, although undesirable, was not unfamiliar to the custom of *ukuthwala* and it was customary in many tribes to pay a *bopa* or seduction beast.[57] The seduction did not render the *thwala* invalid.

In *Busiswe Nobulumko Feni v Ntombekhaya Mguudlwa*[58] the court acknowledged the validity of the custom of *ukuthwala* as constituting a valid customary marriage.[59]

The conflict between the common law crime of abduction and *ukuthwala* is clear. In terms of the common law if one removes a minor from the control of her guardian for the purpose of marriage or to have sexual intercourse with her, one commits a crime. In terms of the custom of *ukuthwala*, if one removes a girl from the control of her guardian for the purpose of marriage one enters into a valid and binding customary marriage. Yet it appears as if a person who practices the custom of *ukuthwala* will be guilty of abduction. However, if the custom is recognised by law as a valid and existing custom then there is no reason why the unlawful conduct required for the crime of abduction cannot be justified. Furthermore, as explained by Dukada,[60] if the person who practises *ukuthwala* is unaware of the unlawfulness of his conduct in terms of the

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52 *Sita* 23E–F.
53 1992 2 SACR 704 (Tk).
54 *Mxhamli* 705.
55 *Mxhamli* 706.
56 Whitfield *South African Native Law* (1929) 79.
57 Whitfield 80.
58 2004 JDR 0330 (Tk).
59 *Feni v Mguudlwa* 8.
60 Dukada "Some thoughts on the 'ukuthwala' custom vis-à-vis the common law crime of abduction" 1984 *De Rebus* 359.

common law, he does not have the required knowledge of unlawfulness as required for a conviction of abduction. In all but *Sita's* case the courts failed to recognise the existence of the customary law and in most cases refused to consider it because it was in direct conflict with the common law.

3 2 *Ukuthwala* and kidnapping

Kidnapping is defined as the unlawful and intentional depriving of a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child.[61] This is a crime against the person's freedom of movement and can be committed against adult males and females and against children. When a child is kidnapped, it is not just the child who is deprived of freedom of movement but also the child's guardian who is deprived of control over the child. It follows that, should a child consent to be removed from his or her guardian's control, kidnapping is still committed as the guardian is still deprived of control of the child.[62] The main difference between kidnapping and abduction is that in abduction the removal from the guardian's control is normally with the intention of someone marrying the minor or having sexual intercourse with her. In the case of kidnapping the reason for the removal is immaterial.[63]

As with abduction, the conduct of *ukuthwala* can be equated with the conduct required for kidnapping. In all three forms of *ukuthwala* the conduct is to "carry away" and is normally done literally.[64] Such conduct is kidnapping except in the instance where the girl consents prior to the *ukuthwala* and she is a major. In such instance there would be no intention of depriving the young woman of her freedom as is required for kidnapping, and the guardian would no longer control her and could therefore not be deprived of control over his child.

If a girl is *thwalaed* without her knowledge and consent, but with the consent of her guardian as in the second form of *ukuthwala*, or as in the last instance without her or her family's consent, she is taken by the groom and his assistants, who will "lay hands on her"[65] and forcibly take her to his home. If she puts up resistance, which she normally does, "she is sometimes overwhelmed by brutal force".[66] She is normally locked up and closely guarded. Should she refuse to accept the man as her husband, she may shout out loud so that the people could hear that she objects and then she must be released.[67] If she is not released, the continued deprivation of her freedom will constitute kidnapping. If she consents, and a marriage follows, the conduct with which she was taken may constitute kidnapping but is not viewed as such by the *amaXhosa*.[68]

3 3 *Ukuthwala* and rape

The Criminal Law (Sexual Offences and Related Matters) Amendment Act[69] consolidated the common law crime of rape as well as a number of different

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61 Snyman 479.
62 *Ibid*.
63 Snyman 480.
64 Van Tromp 64.
65 Van Tromp 68.
66 *Ibid*.
67 Van Tromp 69.
68 Van Tromp 73.
69 Act 32 of 2007 (hereafter referred to as "the Act").

sexual offences.[70] Section 3 of the Act defines rape as the unlawful and intentional commission of an act of sexual penetration of any person without his or her consent. Sexual penetration is defined[71] and includes any act that causes sexual penetration. Consent is also defined[72]and must be voluntary or an uncoerced agreement.

Chapter 3 of the Act contains sections that deal with sexual offences against children. Our law has always acknowledged and criminalised consensual sexual intercourse with a child under the age of 16 years and this crime was commonly known as statutory rape.[73] Statutory rape is now defined in s 15 of the Act as the commission of an act of sexual penetration with a child, despite the child's consent to such act. A "child" is defined as "a person 12 years or older but under the age of 16 years".[74] If the child is under the age of 12, he or she is deemed unable to give valid consent.[75] Therefore, a person who commits any act of sexual penetration with a child under the age of 12 years will be guilty of rape.

The Native Penal Code contained both rape and statutory rape as crimes, with the only difference being that statutory rape in terms of the Code was only committed if the act was against a child under the age of 12 years.

During the *ukuthwala* process the seduction or deflowering of the girl is undesirable[76] but not always absent. The man who seduced a girl he *thwalaed* has to pay a seduction beast to her family as penalty for such seduction. The seduction is viewed differently in each of the three forms of *ukuthwala*.

If the girl has consented to her *thwala* without her parents' knowledge, a penalty for seduction had to be paid to her family. If she consented to the seduction and was over 12 years of age her suitor would not have been liable for rape. Today, if she were over the age of 12 but under the age of 16 he would be committing statutory rape.

If the girl was unaware of the *thwala* but her parents consented, sexual intercourse with the girl to persuade her to consent to the marriage was not uncommon.[77] Van Tromp[78] states that:

> "[i]t is not unusual for him to have sexual intercourse, *udibane ngegazi*, because once he succeeded in having connection the girl will usually no longer refuse him. Under this form of *ukuthwala* it is understood that the father of the girl tacitly consents to carnal connection between his daughter and the young man with the object of marriage, and of trying to induce the girl to submit. The young man is therefore not guilty of *ukudlwengula* (rape). By having sexual intercourse the young man forms a bond, *intambo*, between himself and his bride."

Today, the young man will be liable for rape should he have sexual intercourse without her consent, regardless of the guardian's consent. Furthermore, if a girl consents, but such consent was as a result of force, intimidation, threat or an

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70 Common-law crimes such as indecent assault, incest, bestiality, intercourse with a corps and statutory define crimes contained in the Sexual Offences Act 23 of 1957.
71 Section 1(1) of Act 32 of 2007.
72 Sections 1(2) and 1(3) of Act 32 of 2007.
73 Section 14 of the Sexual Offences Act 23 of 1957.
74 Section 1(1) of Act 32 of 2007.
75 Section 1(3)(d) of Act 32 of 2007.
76 *S v Mxhamli* 706; Koyana and Bekker 141; Bekker 89.
77 Van Tromp 69.
78 *Ibid*.

abuse of power or authority, such consent will be deemed to be invalid consent.[79] According to the new statutory definition of rape, the agents or friends normally employed by the young man to *thwala* the girl, may also be liable for rape should the young man have unconsensual sexual intercourse with the girl.

3 4 *Ukuthwala* and assault

"Assault consists in any unlawful and intentional act or omission

(a) which results in another person's bodily integrity being directly or indirectly impaired, or
(b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place."[80]

Section 155 of the Native Penal Code defined assault as:

> "the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose."

The conduct that will cause an impairment of another's bodily integrity can take different forms, with the most common being the application of force to his or her body. The conduct must be accompanied with the required intention to impair another's bodily integrity.[81]

The very nature of *ukuthwala* is comparable to assault. The "carrying away" of the girl will always include some force being applied to her body. Whether the *ukuthwala* amounts to a criminal assault will depend on the circumstances of each case. There is no doubt that, especially in the instances where the girl does not consent, the conduct of taking her amounts to an assault against her. A trait of the custom was and still is for the girl to resist the taking and "[i]f she hits, shouts and tries to get loose, she is sometimes overwhelmed by brute force".[82] Even though the conduct is clearly one of assault, it is condoned in the spirit of the custom. In this regards Van Tromp[83] states:

> "[t]his kind of *ukuthwala* is not uncommon among the *amaXhosa*, and it is of great importance to draw attention here to the peculiar feature of Xhosa legal conceptions that the element of brute force employed at the initial stage of the proceedings does not forthwith determine and stigmatise the whole issue of these proceedings as a crime, as would be the case according to our legal conceptions. In Xhosa Law, a series of connected acts is viewed as a whole and is judged retrospectively from the viewpoint of the object sought and attained. Consequently a previous act in the sequence can be condoned and the whole issue be retrieved by a later act."

The effect of this would be that the girl's later consent to marriage would condone the brute force and assault used in taking her. In reality the courts did not view the custom through the eyes of the *amaXhosa,* nor did they apply the Xhosa law to interpret the conduct of the young man who was normally convicted of assault.[84]

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79 Section 1(3) of Act 32 of 2007.
80 Snyman 455.
81 Snyman 456.
82 Van Tromp 68.
83 Van Tromp 72.
84 *Rex v Swartbooi* 1906 EDC 170.

4 THE CONFLICT BETWEEN THE CONSTITUTION AND *UKUTHWALA*

4 1 The right to human dignity

The right to human dignity is well established in international law as is evident from the various ratifications of instruments protecting this right.[85] Section 1 of the Constitution stipulates that the Constitution is founded on the values of human dignity, equality and advancement of human rights and freedoms.[86] The value of human dignity is also affirmed by s 7.[87]

Human dignity is one of the core constitutional rights that ought to be respected and protected. The protection of human dignity appears in the wording of the limitation clause,[88] which provides that when limiting any right in the Bill of Rights, that limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 10[89] provides that "everyone has inherent dignity and the right to have their dignity respected". The wording of the latter section is clear; it does not exclude women and children from enjoying the right. Therefore, "respect and protection for the inherent dignity of the girl children and women requires recognising that they have freedom to make choices on when and who they marry".[90] The Constitutional Court is clear on this. It confirmed that the Constitution protects the right of persons to choose whom they marry and to raise a family.[91] In *Dawood v Minister of Home Affairs*[92] the court held that:

> "[t]he decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of an individual to achieve personal fulfillment in an aspect of life that is of crucial significance…it is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity."

The second form of *ukuthwala* custom where there is an agreement between the family of the girl and the family of the groom where the girl is unaware is a clear violation of the right to human dignity. This form of *ukuthwala* deprives a girl of her right to choose when and who to marry and it violates the right to dignity.

The third form of *ukuthwala* where neither the girl nor her family has prior knowledge of *ukuthwala* is a clear violation of the right to human dignity.

4 2 Right to equality

The right to equality has been described as the overriding human rights principle that is the "obvious starting point in operationalising human rights".[93] The right

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85 Article 1 of the Universal Declaration of Human Rights; art 26 of the European Social Charter; art 5 of the African Charter on Human and Peoples Rights.

86 Section 1 of the Constitution of the Republic of South Africa, 1996.

87 Section 7 of the Constitution.

88 Section 36 of the Constitution.

89 Section 10 of the Constitution.

90 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" http://www.fwdklerk.org.za/cause_data/images/2137/sub_09_11_26_Ukuthwala_Custom.pdf (accessed 10-04-2010) 9.

91 In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 28.

92 Para 28.

93 Tomasevski "Indicators" in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* 2ed (2001) 533.

to non-discrimination is protected in various formulations, in instruments such as the Charter of the United Nations;[94] the Universal Declaration to Human Rights;[95] the International Covenant on Civil and Political Rights;[96] the International Covenant on Economic, Social and Cultural Rights;[97] the Convention on the Rights of the Child;[98] the International Convention on the Protection of the Rights of Migrant Workers;[99] the African Charter on Human and Peoples Rights;[100] the American Convention on Human Rights[101] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[102]

Some international instruments are designed or aimed at addressing specific prohibited grounds of discrimination, such as the International Convention on the Elimination of all Forms of Discrimination Against Woman and the International Convention on the Elimination of all Forms of Racial Discrimination.

The principle of non-discrimination prohibits both direct and indirect forms of discrimination. Thus, any discrimination the "purpose" or "effect" of which is to nullify or impair the equal enjoyment of rights is prohibited in terms of non-discrimination provisions.

The new South African legal order has at its core, a commitment to substantive equality and it embraces constitutional democracy based on equality. The following provisions cumulatively seek to realise a vision of a society that is based on equality. The preamble to the Constitution recognises that one of the functions of the Constitution is to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law and s 1 identifies human dignity, the achievement of equality and the advancement of human rights and freedoms as some of the basic values upon which the Republic of South Africa is founded. Section 9 protects the right to equality before the law, guarantees that the law will both protect people and benefit them equally and prohibit unfair discrimination.

The limitation clause only allows a right in the Bill of Rights to be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[103] Courts, tribunals and forums are directed, when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[104]

The question thus arises whether *ukuthwala* violates the right to equality of girls? It violates the right to equality if it unfairly discriminates against girls. The Constitutional Court concluded that discrimination in South Africa means "treating people differently in a way which impairs their fundamental dignity as

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94 Articles 1(3), 13(1)(b), 55(c) and 76.
95 Articles 2 and 7.
96 Articles 2, 3 and 26.
97 Articles 2(1), (2) and 3.
98 Article 2.
99 Article 7.
100 Articles 2, 3, 18 and 28.
101 Articles 1(1) and 24.
102 Article 14.
103 Section 36 of the Constitution.
104 Section 39 of the Constitution.

human beings".[105] The *ukuthwala* custom constitutes a differentiation on a specified prohibited ground of discrimination (ie. discrimination based on sex and gender). If there is differentiation on one or more of the seventeenth grounds specified in s 9(3), then discrimination is established.[106] Section 9(5) provides that once discrimination on one of the specified grounds is established then it is presumed to be unfair.

In *Harksen's* case,[107] the court provided some guidelines on what constitutes unfair discrimination. The impact on the complainant is the determining factor regarding unfairness. The court held that the following factors must be taken into account in making this determination:

(a) the position of the complainant in the society and whether they have suffered from past patterns of discrimination;

(b) the nature of the provision or power and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal and an attendant consequence of that was an infringement of the applicant's rights; and

(c) the context to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

It has been argued that the second and the third form of *ukuthwala* violates the right to human dignity in terms of international law and our municipal law, and that the right to human dignity is one of the core values of the Constitution.[108] The key value upon which the entire provision revolves is that of dignity. As O' Regan J[109] put it:

> "Human dignity therefore informs constitutional adjudications and interpretations at a range of levels. It is a value that informs the interpretation of many, possible all, other rights. The court has acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman and degrading way, and the right to life."

In order for the *ukuthwala* custom to pass constitutional muster, it must be proved that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The second and third forms of *ukuthwala* fail to pass constitutional muster as they violate the right to dignity and equality and therefore ought to be declared unconstitutional.

4 3 Freedom and security of the person

The right to freedom and security is found in various instruments such as the International Covenant on Civil and Political Rights;[110] the European Convention for the Protection of Human Rights and Fundamental Freedoms;[111] the American Convention on Human Rights;[112] and the African Charter on Human and

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105 *Prinsloo v Van Der Linde* 1997 3 SA 1012 (CC) para 31.
106 *Harksen v Lane NO* 1997 11 BCLR 1489 (CC) para 46
107 Paras 50–51.
108 See 4 1 above.
109 *Dawoo*d para 35.
110 Article 7.
111 Article 3.
112 Article 5.

Peoples Rights.[113] This right is also protected by the South African Constitution[114] and this right "includes the right to be free from all forms of violence either public or private sources".[115] Violence against an individual constitutes a grave invasion of personal security. Section 12(1)(c) imposes both a negative duty and a positive duty upon the state in protecting individuals. The state has a duty to avoid violence and a duty to discourage private individuals from invading the right to personal security.[116] The second and the third forms of *ukuthwala* violate the right to freedom and security of the person and it is not justifiable in terms of the limitation clause.

5 THE EFFECT OF THE CONFLICT BETWEEN LAW AND CUSTOM

Due to the early misinterpretation of *ukuthwala*, our courts have continuously and indiscriminately applied the European common law, leading to the branding of *ukuthwala* as a crime and its treatment as such.[117] *Ukuthwala* that ends in a marriage was never intended to be a crime, but was always a customary way of concluding a lawful marriage albeit in an irregular manner.[118] The reference to a barbarous custom was often made in court. In *Swartbooi,*[119] the judge stated:

> "I have pointed out on other occasions, this court will not recognise the barbarous custom of *thwalaing* as a defence to a charge of assault which may be committed upon a girl whom it is desired to *thwala*."

These unfortunate views of the custom remain. Where the custom is still practised today, it is being blamed for forced child marriages,[120] the high incidence of HIV[121] and the cause of violence against woman and children. Recently the minister responsible for children and persons with disabilities declared that the custom is to be viewed as illegal and immoral by all government departments.[122]

The truth is that *ukuthwala* was merely an irregular way of forming a marriage. Marriage by negotiation was common and girls were often married off to older men when they reached puberty[123] without the use of *ukuthwala*.

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113 Articles 5 and 6.
114 Section 12.
115 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 9.
116 Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 258–259.
117 Van Tromp 72.
118 *Ibid*.
119 1906 EDC 170.
120 Victim Empowerment Programme, *ukuthwala*: Departmental briefing "*Ukuthwala* Briefing by DSD" http://www.pmg.org.za/report/20090915-victim-empowerment-programme (accessed 21-09-2009).
121 SABC "Mothlanthe condemns *ukuthwala* practice" http//sabcnews.com/portal/sites/SABCNews (accessed 21-09-2009).
122 SABC "*Ukuthwala* marriage custom declared illegal: Minister" http://sabcnews.com/portal/sites/SABCnews (accessed 21-9-2009).
123 Van Tromp 28.

Statistical evidence shows clearly that the custom of *ukuthwala* is gaining popularity among the followers of customary law. As far back as 1990, Bekker[124] stated that:

> "[t]he marriages by *ukuthwala* which have been increasing from the 1920's have increased even further during the past few decades…[*u*]*kuthwala* marriages increased from 14.6% of all marriages in the 1920's to 18.3 % in the 1930's and reached 30.3% in the 1940's…it can be seen that these marriages have increased further and constitute 55.9% of all marriages since 1950."

More recent news reports indicate that up to 20 young girls are forced to leave school per month to follow the custom of *ukuthwala*.[125]

Even though the custom has gained popularity among the followers of customary law, there are those critical of the custom and who agitate for its abolition. Ntlokwana, in his submissions to the South African Law Reform Commission on the *ukuthwala* custom[126] points out that the custom is currently distorted and relied upon when a girl as young as 12 years is forced into a marriage with a much older man, often one with a HIV-positive status, and that this is not *ukuthwala* as it is traditionally known. The author states that, "*thwala* was traditionally intended for people of the same age group who, in normal course of events, would have been expected to marry each other. Old men were never engaged in *thwala*. *Ukuthwala* was never meant to apply to minors."[127] The fact that a man who abducts a minor child for sexual gratification and enslavement, or a parent who sells his minor child to an older man for sexual enslavement, erroneously calls this conduct a marriage by way of *ukuthwala* does not change the underlying principles of the custom and does not justify the criminal conduct of such man or parent. There can be no *ukuthwala* if it does not fully comply with the requirements of the custom.

The fact that customary law is constitutionally recognised[128] as part of the South African legal order. The fact that it is not a subservient system as in the past means that its continued existence is desirable. This does not mean that customary law will remain static.[129] Customary law needs to be developed so that it will be in line with the Constitution.

6 DEVELOPMENT OF *UKUTHWALA*

Section 39 of the Constitution provides that:

> "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.

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124 Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 190.

125 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 5.

126 *Ibid.*

127 *Ibid*. Although this seems to be the unsupported view of the author, we agree with it and support for this view can be found in the work of Van Tromp.

128 Section 211 of the Constitution, gives a clear and unambiguous recognition to customary law. Recognition is also expressed indirectly in various other provisions of the Constitution such as section; s 8(1) and s 39(2).

129 Church and Church "The constitutional imperative and harmonisation in a multicultural society: a South African perspective on the development of indigenous law" 2008 *Fundamina* 6.

> 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 object of the Bill of Rights.
> 3 The Bill of Rights does not deny the existence of any other right and freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

The courts' obligation in terms of the above section is emphasised in the case of *Carmichele v Minister of Safety and Security*[130] where the Constitutional Court stressed that:

> "[t]he obligation of courts to develop common law in the context of the section 39 objectives is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately."

The *Carmichele* case "applies equally to the development of indigenous law. Where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation".[131] The development of indigenous law is important because "once a rule is struck down, that is the end of that particular rule, yet there may be many people who observe the rule".[132] The *ukuthwala* custom has gained popularity and there are people still practising it today.[133]

Section 3(1) of the Recognition of Customary Marriages Act[134] provides that the consent of both prospective spouses of a customary marriage is necessary for the validity of a marriage. The requirement of consent is essential to prevent the conclusion of a forced marriage. The Act also provides that both prospective spouses must be 18 years or older and that the marriage has to be negotiated and entered into or celebrated in accordance with customary law.

A valid customary marriage, including one concluded by way of *ukuthwala*, requires the consent of both parties and their families, the agreement between the parties as to the *ikhazi*, the transfer or handing over of the bride and the *ukutyis' amasi* ceremony.[135] It follows that if the girl who was *thwalaed* does not consent to the marriage, there cannot be a marriage, and if she is kept at the house of the man who *twhalaed* her, he will be guilty of kidnapping. Should he have non-consensual intercourse with her, he will also be guilty of rape. If force was used against her in the process of taking her, he will be guilty of assault. Where the custom is applied in a *bona fide* manner to accelerate the negotiation of a marriage, and even to enter into a customary marriage before the *lobola* is paid in full, there is no reason why it cannot be recognised as a valid customary marriage. Where the custom was applied in a *mala fide* manner there cannot be a valid customary marriage and the conduct against the woman will, apart from being criminal in nature, constitute a gross infringement of her human rights just as any other criminal conduct of such nature would.

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130 2001 4 SA 938 (CC) para 39.
131 *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of RSA* 2005 1 BCLR 1 (CC) para 215.
132 *Bhe* para 215.
133 Bennett 190; Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 5.
134 Act 120 of 1998.
135 Van Tromp 69–70.

The fact that many people, especially younger people, still follow the custom creates a need for the development of the true customary usage rather than its abolition. Furthermore, the exploitation of the custom for justification of criminal conduct indicates the need for proper education and the implementation of programmes in respect of the correct application of customary laws from a young age, especially in rural areas where abuse of the custom is common. A girl who is educated on her human rights from an early age would be able to escape what she might otherwise have been perceived as her traditional fate.

We acknowledge gender-based violence in Africa and agree with Ntlokwana[136] that South Africa has an international duty to respect and protect the rights of all woman and children. We also agree with his submission that, despite the constitutionally guaranteed rights, customary law continues to affect the personal life and rights of woman and children. This, however, should rather lead to further research into the general application of customary law rather than striking down one custom, which, in itself will not change gender-based violence and abuse of rights.

7 CONCLUSION

Ukuthwala is a custom developed in Xhosa law for use by the amaXhosa people. Due to the irregular means used in the custom, measured against the morality and value system of a foreign entity such as the European laws, it was criticised, criminalised and branded as barbarous. This stigma stayed with the custom which is still widely practised today. As a result, there has been strong criticism of it and calls have been made for its abolition.

It is our submission that there is a need to return this custom and to subject to it major development. We cannot fault the first form of *ukuthwala* which can be equated with western elopement. Keeping in mind that we are dealing with customary law where customs such as *lobola* are still widely practised, acknowledged and enforced, an outright abolition of *ukuthwala* will remove a legal and binding way for two people to enter into a customary marriage without the strict and expensive customary rituals associated with a customary marriage.

The second form of *ukuthwala* may still be relevant, but only if it does not have a direct impact on the human rights of the girl. Should she consent to the marriage at the time of, or just after the *thwala,* there can be no real harm in the initial conduct leading to the *thwala*. If the conduct involved in the process of *thwala* was reasonably necessary and did not include extreme violence or rape, it should be justified in light of the custom and the subsequent marriage should be acknowledged in terms of the Recognition of Customary Marriages Act.

Due to its violence and consequent impact on the human rights of women, the third form of *ukuthwala* must be abolished and the community should be educated in this respect. No conduct of such extreme and unreasonable violence against women and children should be tolerated and disguised under the guise of custom. In these instances, normal criminal law principles must apply and be enforced.

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136 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 7.

In a recent article in the *Mail and Guardian*[137] the following comments were made:

> "[t]he second example illustrates an instance where society should not tolerate a cultural practice that can never be rendered constitutionally compliant. It involves the *ukuthwala* ('abduction') practice, which involves abducting girls as young as 12 and forcing them to marry men who are old enough to be their grandfathers. This practice is unconstitutional and unlawful, and no amount of development will permit it to pass constitutional muster. It violates the rights and dignity, the right to education and the right to freedom and security of the person, and it is not in the best interest of the child."

It is our submission that the above statement was made based on these misconceptions created by our courts, combined with a total lack of knowledge of the history, purpose and development of the custom. Clearly there is a need and duty to research and establish the true nature of the indigenous customs, to educate the people regarding the true nature of such customs, to evaluate, and if necessary, to acknowledge and develop the customs to be relevant in our constitutionally modern society. In the case of *ukuthwala* it is our submission that it is a custom, albeit not without its problems, that at the very least, deserves to be considered before it is banned and abolished outright.

137 Ntlokwana "Bound by the Bill of Rights" (15-01-2010) *Mail and Guardian* 25.

"The Truth, the Whole Truth *or* Nothing …" Is the Competency Inquiry Applicable to Child Witnesses an Evidentiary Barrier to Truth Finding?

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1 INTRODUCTION

In terms of s 162 of the Criminal Procedure Act[1] all witnesses shall testify under oath, subject to the exceptions provided for in ss 163 and 164. Section 163 allows a court to receive the evidence of a person who has moral or religious objections to the taking of the oath or the oath in the form prescribed in s 162,[2] or who does not regard the oath as binding upon his or her conscience, under solemn affirmation that the witness shall speak the truth, the whole truth and nothing but the truth.

Section 164(1) enables a court to receive the evidence of someone who does not understand the nature and importance of the oath or solemn affirmation, without such a witness having to swear to tell the truth or to give a solemn undertaking to do so. The court must still admonish such a person to speak the truth. This option of receiving evidence was qualified by providing that the failure to understand the oath or affirmation be ascribed to "ignorance arising from youth, defective education or other cause".

Section 164(1) was, however, amended recently by the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[3] and now reads that any person who is found not to understand the nature and import of the oath or the affirmation, may be permitted to give evidence in criminal proceedings without taking the oath or making the affirmation, provided that such person shall be admonished by the presiding officer to speak the truth.

In the case of *S v Moekoena; S v Phaswane*,[4] Bertelsmann J held that the proviso requiring that a person who does not understand the nature and import of the oath or the affirmation, must still be admonished to speak the truth was unacceptable and unconstitutional, and that it should be struck out.

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* B Juris, LLB, LLD.

1 Act 51 of 1977. Hereafter referred to as "the Criminal Procedure Act".

2 In terms of this section, the prescribed oath reads: "I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God."

3 Act 37 of 2007.

4 2008 5 SA 578 (T) para 135.

According to the court, the proviso prevents a child who is unable to distinguish between the concepts of truth and falsehood from testifying in criminal proceedings. It was accordingly held that a court may allow evidence of witnesses who are competent, even though they do not understand the concepts of truth and falsehood without the admonition. This, it was held, removes the impediment against accepting the evidence of a child who is unable to explain the difference between truth and falsehood, but who still is competent to testify. By removing this impediment, the court held that the constitutional imperative of affording paramountcy to the rights of the child will be met.[5]

The Constitutional Court, however, did not confirm the above finding. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,[6] Ngcobo J held that the proviso to s 164(1) of the Act does not violate s 28(2) of the Constitution and the striking out of the proviso was not confirmed.

In this article the competency of children to testify in criminal proceedings will be examined with specific reference to the formal requirements of the oath or affirmation. It will be argued that the so-called competency inquiry[7] which must precede the child testifying under oath or affirmation, may lead to exclusion of the evidence of a child before the court had an opportunity to hear what the child has to say and to evaluate the truthfulness of the evidence. It will be advanced that competency questioning should be developmentally appropriate and more child-sensitive. In conclusion it will be argued that there is an over-emphasis on the right of the accused to a fair trial,[8] and an under-emphasis on the paramountcy of the rights of children.[9]

2 THE COMPETENCY OF CHILDREN TO TESTIFY

Children are competent witnesses if, in the opinion of the court, they are able to understand what it means to tell the truth. When a child witness is called upon to testify, the duty rests on the presiding officer to determine first of all whether the child understands the nature and religious sanction of the oath. [10] There is no particular age over which children are competent to testify, and the evidence of children as young as three or four have been received in court.[11]

A child will be considered competent to testify if, in the opinion of the court, he or she understands what it means to tell the truth. In the *Director of Public Prosecutions* case, Ngcobo J emphasises that it is implicit, if not explicit, in the proviso to s 164(1) that the witness must understand what it means to speak the truth.[12] It thus follows that a child who does not understand what it means to speak the truth or who is not able to distinguish between the abstract concepts of truth and falsehood, cannot be admonished to speak the truth and is therefore an incompetent witness.[13]

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5 Para 138.
6 2009 4 SA 222 (CC) para 166.
7 See part 3 below.
8 Compare s 35 of the Constitution.
9 Compare s 28 of the Constitution and part 3 below.
10 Zeffert, Paizes and St Q Skeen *The South African Law of Evidence* (2003) 671.
11 Compare in this regard *R v Manda* 1951 3 SA 158 (A), *R v Bell* 1929 CPD 478 and *R v J* 1958 3 SA 699 (SR).
12 *Director of Public Prosecutions* para 164.
13 *Ibid*.

In *S v V*[14] it was held that what is required of a witness who takes the oath, is to have not only a sufficient comprehension of the oath in its prescribed form, but also an understanding of the religious obligation of the oath, an understanding of the meaning of the truth, as well as an understanding of the difference between speaking the truth and falsehood. The court held in addition that in order to procure the evidence of a child the court first have to make the necessary finding that the child does in fact understand the nature and import of the oath. To this end a formal or separate inquiry must take place.[15]

In *S v L*[16] the purpose of the oath was said to be that it will impress on the conscience of the witness and his or her religious convictions, with the aid of criminal sanctions, to ensure that only the truth is told in our courts. In *Henderson v S*[17] it was seen as self-evident that this purpose cannot be attained where a witness lacks the capacity to understand and assume the religious obligation of the oath. A court should thus, before administering the oath to a child or to any person who is lacking in formal education, or who for any other reason does not have the required capacity, enquire whether such a witness understands the meaning of and possesses the capacity to appreciate and accept the religious sanction of the oath.[18]

In *S v N*[19] Van Reenen J emphasised the fact that a sufficient understanding of the religious obligation imposed by the oath is necessary before a child is to be regarded competent to testify under oath. Moleko AJ in *S v Malinga*[20] accepted that the court must make a finding before a child can be allowed to give unsworn evidence after an inquiry has been conducted. The court held in *S v V*[21] that such a finding may be dispensed with if the child is so young that it is obvious that he or she will not be able to understand the nature of the oath. In *S v Stefaans*[22] the court accepted that the section only finds application where the witness is unable to take the oath or give affirmation and that it is "not an option to be applied at the whim of the magistrate".[23] It was further accepted that a magistrate could rely on his or her own observation of a witness in coming to the conclusion whether s 164 should be used and that it therefore was not necessary for a formal finding to be made. It was suggested though that the presiding officer should record his decision and reasons therefore.[24]

It was held in *S v B*[25] that an inquiry is not always necessary in order to make the finding required by s 164 and that mere youthfulness of a witness may justify such a finding. This *dictum* was approved of and applied in *Director of Public Prosecutions, Kwazulu-Natal v Mekka*.[26]

In the *Director of Public Prosecutions* case the Constitutional Court accepted that some of the questions a judicial officer has to put to a child in order to determine

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14 1998 2 SACR 651 (C).
15 *S v V* 652 F–G.
16 1973 1 SA 344 (C) 347H.
17 1997 1 All SA 594 (C).
18 *S v Henderson* 597.
19 1996 2 SACR 225 (C) 229.
20 2001 1 SACR 615 (N) 617D.
21 *S v V* 652F–G.
22 1999 1 SACR 182 (C).
23 *S v Stefaans* 185E.
24 185J–186A.
25 2003 1 SACR 52 (SCA) 563.
26 2003 2 SACR 1 (SCA).

whether the child understands what it means to speak the truth are very theoretical, and that these questions may at times be very confusing and even terrifying for a child. The result may be that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence.[27] With skilful questioning, a child may be able to convey in his or her own language to the presiding officer that he or she understands what it means to speak the truth. What the section therefore requires is not the knowledge of the abstract concepts of truth and falsehood, but that the child will speak the truth. It is sufficient if the child does not know the meaning of the intellectual concepts of truth or falsehood, but understands "what it means to be required to relate what happened and nothing else".[28]

The reason for receiving evidence under oath, affirmation or admonishment is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. This is in fact a precondition for admonishing a child to tell the truth in order that the child can comprehend what it means to tell the truth.[29] The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the right of an accused to a fair trial is such evidence were to be admitted. Rejection of such evidence does not, according to Ngcobo J does not amount to a violation of s 28(2) of the Constitution.[30] The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify, which would have serious consequences for the administration of justice.[31]

When a child cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution, according to the court, lies in the proper questioning of children, in particular of young children. What is to be determined by means of the questioning is not the ability of the child to demonstrate knowledge of the abstract concepts of truth and falsehood, but to determine whether the child understands what it means to speak the truth.[32] The court points out that the manner in which the child is questioned is crucial and the role of the intermediary becomes vital.[33]

The court accepts that the questioning of a child requires a special skill, and that not many judicial officers have this skill. There is accordingly a need for properly trained intermediaries who are pivotal in ensuring the fairness of the trial. The integrity of intermediaries will ensure that innocent people are not wrongly convicted and that guilty people are held to account.[34] The court is therefore of the opinion that skilful questioning by a presiding officer will ensure that a child who knows what is means to tell the truth, will be able to tell his or her story in court. The court accordingly concluded that if properly construed, the invalidated provisions are not inconsistent with the Constitution.[35]

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27 *Director of Public Prosecutions* para 165.
28 *Ibid*.
29 Para 166.
30 *Ibid*.
31 *Ibid*.
32 Para 167.
33 *Ibid*.
34 Para 168.
35 Para 169.

3 THE OATH AND THE COMPETENCY INQUIRY

According to Zeffertt, Paizes and Skeen[36] the vital inquiry is whether a child is old enough to give evidence at all. If the presiding officer is not satisfied that the child understands the nature of an oath, he or she must go on to inquire whether the child is competent to give unsworn evidence. In each case the presiding officer must be satisfied that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false and to appreciate the "danger and wickedness" of lying, he or she cannot be admonished to tell the truth and is accordingly not a competent witness.[37]

According to Schwikkard[38] the so-called competency inquiry amounts to a presumption of incompetency as the evidence of children will only be admissible once they are found to be competent. She correctly argues that no such presumption applies to convicted perjurers or other persons convicted of crimes involving dishonesty.[39] She points out that truth and the duty to tell the truth are abstract concepts which young children might not be able to understand or explain. This does not mean that they are unable to give a reliable account of the relevant events.[40]

When determining the competence of an adult to testify, the court will first determine the ability of the witness to understand the nature of the oath, and secondly the ability of the witness to communicate.[41] The primary purpose of the oath is to encourage the witness to tell the truth.[42] Schwikkard correctly points out that in assessing credibility, a court will place little weight, if any, on the fact that the witness took the oath or was admonished to tell the truth.[43] According to Lyon,[44] the oath is intended "to impress upon the witness the importance of telling the truth in court, and subjects the witness to prosecution for perjury should he or she lie on the stand". The religious sanction of the oath became watered down during the 19th century and this has contributed to the fact that there is no guarantee that all children receive moral or religious instruction in school or church.[45]

Schwikkard[46] correctly argues that the fact that a child cannot understand or articulate his or her understanding of the duty to tell the truth does not necessarily hinder a court in its assessment of the credibility of the evidence tendered. The second stage of the inquiry is far more important, namely the ability of the child to communicate coherently. Once the court has heard the child's story, the court will evaluate the evidence, determine its credibility and decide what weight to attach to it.

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36 *The South African Law of Evidence* (2003) 627.
37 *Ibid*.
38 Schwikkard "The abused child: A few rules of evidence considered" 1996 *Acta Juridica* 148 149. Compare also Robinson *Law of Children and Young Persons* (1997) 181–182. See also Songca and Le Roux "The evidence of young children: establishing the truth in South African criminal courts." 2004 *SACJ* 310 315.
39 Schwikkard 1996 *Acta Juridica* 149.
40 Spencer and Flin *The Evidence of Children* (1990) 58.
41 Schwikkard 1996 *Acta Juridica* 149.
42 *S v Munn* 1973 3 SA 734 (W) 734.
43 Schwikkard 1996 *Acta Juridica* 150.
44 Lyon "Child Witnesses and the Oath: Empirical Evidence." 2000 *Southern California Law Review* 1017 1020.
45 McGough "Commentary: sexual abuse and suggestibility in the suggestibility of children's recollection" 1991 *American Psychological Association* 102.
46 Schwikkard 1996 *Acta Juridica* 150.

The competency inquiry therefore attempts to measure the degree of trustworthiness of a child's evidence *a priori*, and to distinguish the point at which it ceases to be totally incredible and acquire some degree of credibility.[47] Wigmore states that it is important to recognise that a child's disposition is proned to "weave romances and to treat imagination as verity".[48] On the other hand, he correctly points out that one must accept the "rooted ingenuousness of children and their tendency to speak straightforwardly what is in their mind".[49] Wigmore suggests that the sensible way would be to put the child on the stand to testify and receive the evidence for what it may seem to be worth. He is of the opinion that a strict application of the competency inquiry is either impossible or unjust, as our demands are contrary to the facts of child nature.[50]

Bertelsmann J in *Mokoena* reasoned along similar lines as Wigmore when he held that s 164 does not take into account that a witness may not be able to understand or verbalise an understanding of the abstract intellectual concepts of truth or falsehood, yet nonetheless be perfectly able to convey the experience that is the subject of his or her evidence.[51] Such a witness would more often than not be a young child, who could explain, with the help of devices such as anatomical dolls, what has happened to him or her without knowing what the word "truth" means.[52]

Bertelsmann J held that it was the paramountcy of the rights of children that obliges the court to remove as many obstacles as possible that might prevent the evidence of a child from being received.[53] In *Director of Public Prosecutions* the solutions advanced are a proper child-appropriate explanation of the competency inquiry and the employment of intermediaries.[54] Ngcobo J is mindful of the fact that questioning a child is a "special skill which not many judicial officers have".[55] It is submitted that this is indeed the danger inherit to this approach. A child might indeed know what it means to tell the truth, but the questions used to determine this result in the presiding officer concluding that the child does not know what it means to tell the truth. This will have the effect that the child is not heard at all, as the presumption of incompetence would therefore not have been rebutted. In the case of an adult testifying no such presumption is in operation even where the adult does not understand the nature of the oath. The adult will be admonished to tell the truth, without an inquiry whether he or she knows the difference between truth and falsehood. The evidence of the adult will be admissible, even if it is full of lies, inaccuracies and improbabilities. This does not mean that the evidence of the adult will be accepted as truthful. If evidence is

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47 Wigmore *Evidence in Trials at Common Law Vol* 1 (1983) 719.
48 *Ibid*.
49 *Ibid*.
50 *Ibid*.
51 *Mokoena* para 139.
52 Para 140.
53 Para 142. It is submitted that this approach is in line with s 10 of the Children's Act 35 of 2005 which provides that every child that is of such an age, maturity and stage of development to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. It is submitted that this provision applies to child witnesses in criminal proceedings.
54 *Director of Public Prosecutions* para 168.
55 *Ibid.*

found to be unreliable, the court will reject such evidence.[56] Why could a similar process not be followed in the case of the evidence of children? Songca and Le Roux[57] point out that most adults are of the view that children lack the maturity required to answer questions truthfully. Young children are still regarded as untruthful despite research findings to the contrary. It is submitted that the presumption of incompetence is a result of the perception that young children are as a rule untruthful.

Du Toit *et al*[58] find the approach of Bertelsmann J vulnerable to attack on a number of fronts. They question the helpfulness of the "explanation" of a child who is unable to distinguish truth from falsehood as such evidence would be without probative value. The real danger, according to them, is the prejudice that an accused may suffer after a damning explanation given by a witness who is unable to tell truth from invention or fantasy. If such evidence is admissible, it will violate the right of an accused to a fair trial in general, and in particular the right to be presumed innocent and to challenge evidence. The authors question whether it is right to speak about the "paramountcy" of children's right in this context when the main concern of the court should be that an innocent person is not convicted. Du Toit *et al* concede that the concepts "truth" and "falsehood" are to a certain extent abstract, but are of the opinion that there is nothing abstract about a finding that a child knows or does not know what it means to tell the truth in the context of a criminal trial. Such a finding is "central to the proper workings of the adversarial trial".[59] The authors express doubt as to whether the removal of the proviso to s 164(1) would not have the effect of making a child who cannot pass the competency inquiry, a competent witness. They argue that it would at most allow a court to receive the evidence of a child who is able to understand what it means to tell the truth, but does not understand the meaning of the oath or affirmation.[60] The reason for this is that the Act does not contain a comprehensive determination of all the circumstances under which witnesses are held to be incompetent and one therefore has to look at the common law as it was on 31-05-1961. From the case law, they argue, it is clear that a child who does not understand what it means to tell the truth is not a competent witness.[61]

In *Director of Public Prosecutions* it was held that when a child is not able to convey an appreciation of the abstract concepts of truth and falsehood, the solution was not to allow every child to testify in court, but rather in the proper questioning of the child in order to determine if the child understands what it means to tell the truth.[62]

The current legal position is therefore that presiding officers are obliged to decide upon the competence of witnesses before they testify in terms of s 193 of

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56 Evidence is not evaluated in isolation, but holistically. It was held in *S v Sauls* 1981 3 SA 172 (A) 180F that it is task of the presiding officer to decide whether evidence is trustworthy and whether, despite the fact that here are shortcomings or defects or contradictions in testimony, he or she is satisfied that the truth has been told.

57 Songca and Le Roux 2004 *SACJ* 311.

58 Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (2009) 22–20.

59 Du Toit *Commentary* 22–20A.

60 *Ibid*.

61 Du Toit *Commentary* 22–20A. Compare in addition Zeffertt, Paizes and Skeen *Evidence* 671–672.

62 Para 167.

the Act. According to Du Toit *et al*[63] this requirement does not merely aim to establish whether the child can give an accurate and coherent account of what happened, but whether he or she can distinguish between what is truth and falseness and whether he or she understands what it means to speak the truth.

Lyon[64] points out that the courts assess children's understanding of the meaning of truth and lies in various ways. Children are asked to describe the difference between the truth and lies; to define the two terms; or to identify specific statements as truth or lies. Lyon argues that the defining and describing tasks require an abstract understanding of the proper use of a word across different contexts and requires that one generate, rather than merely recognise the proper use of a word.[65] In one experiment, researchers interviewed 96 four- to seven-year-old children who still had to testify in court regarding alleged parental abuse and/or neglect. Each of the children was given three tasks; an identification task, a difference task and a definition task. It was established that even the youngest children were above chance on the identification task. By the age of five, most children were answering four out of four identification questions correctly. The research found that it was not until the age of seven that the majority of the children could provide a definition of either "telling the truth" or "telling a lie", and that less than half of the seven-year-olds could explain the difference between the terms.[66] Lyon argues that young children ought not to be asked to define the truth and lies or asked to explain the difference as a prerequisite of taking the oath. It is submitted many children fail the competency inquiry as the test applied by our courts require young children define and explain the difference between the truth and lies. Lyon's findings clearly indicate that if a competency inquiry is applied, the questions asked should be developmentally age-appropriate.

4 THE RIGHT TO A FAIR TRIAL VERSUS THE PARMOUNTCY OF THE RIGHTS OF CHILDREN

As was indicated above[67] a child has to pass the barrier of the competency inquiry before the court may hear his or her evidence. Damaska[68] identifies certain evidentiary barriers against truth-finding in the accusatorial system such as testimonial privileges and exclusionary rules. The author points out that the accusatorial system sometimes places a higher value on certain values than on other values. This may have the result that this system is less "truth orientated". An example of such an evidentiary barrier in our law of criminal procedure is marital privilege.[69] It is submitted that in the case of marital privilege, our

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63 Du Toit *Commentary* 22–20B.

64 Lyon "Child Witnesses and the Oath" in Westcott, Davies and Bull (eds) *Children's Testimony: a Handbook of Psychological Research and Forensic Practice* (2002) 246.

65 *Ibid*.

66 Lyon in Westcott, Davies and Bull (eds) *Children's Testimony: a Handbook of Psychological Research and Forensic Practice* 248.

67 Part 3 above.

68 Damaska "Evidentiary barriers to conviction and two models of criminal procedure: a comparative study" 1973 *University of Pennsylvania Law Review* 506 579.

69 Compare s 198 of the Criminal Procedure Act. As to the reasons for marital privilege compare Zeffert *Evidence* 619–620. Also compare Naudé "Spousal competence and compellability to testify: a reconsideration" 2004 *SACJ* 325.

adversarial system places a higher value on the sanctity of marriage than on truth-finding. It is submitted that the competency inquiry whereby a child's evidence may be excluded from a trial, before the child has had a chance to tell his or her story, is also such an evidentiary barrier. Evidence which may be found to be reliable and truthful may not be heard by the court, as this may impact on the fairness of the trial of the accused.

When a court has to consider the competency of a child to testify, two competing values are assessed; the right of accused to a fair trial[70] versus the best interests of the child.[71] According to the *dictum* of the Constitutional Court in *Director of Public Prosecutions*[72] and Du Toit *et al*,[73] the main concern in a criminal trial is not the paramountcy of children's rights, but the concern that innocent persons should not be convicted.

In practice, the right to a fair trial as envisaged in s 35 of the Constitution is defined and applied narrowly. Schwikkard[74] correctly points out that the scope of the right to a fair trial is not infinitely elastic and that it applies only to persons who are accused persons in criminal trials. The concept of a fair trial does therefore not extend to civil trials or interrogation procedures outside of the criminal process. The claimant of the rights entrenched in this section must be an accused in criminal trial proceedings.[75] It has therefore been held that an accused in bail proceedings is entitled to claim the rights of arrested and detained persons, but not fair trial rights.[76] The object of the proceedings where the "fair trial" standard is applicable should thus be a determination of the guilt or innocence of an accused. The fact that it is the accused that is on trial has led to an approach where the fairness of the trial has only been answered with reference to whether the trial is fair to the accused. There have however been increasing calls to make the court process fair to other role players such as witnesses and victims of crime.[77] Why must the evidence of a child be excluded because an inexperienced presiding officer was not able to properly question a child in order to determine *a priori* whether the child knows what it is to speak the truth?

Section 28(1) lists the rights afforded to children by the Constitution. These rights include the right to parental care, family or alternative care, to be protected against abuse and ill-treatment, socio-economic rights relating to shelter, health care, nutrition and rights to have legal practitioners assigned to them under specific circumstances.[78] Section 28(2) of the Constitution determines that a child's best interest is of paramount importance in every matter concerning the

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70 See s 35 of the Constitution.
71 See s 28(2) of the Constitution.
72 *Director of Public Prosecutions* para 166.
73 Du Toit *Commentary* 22–20.
74 Currie and De Waal *The Bill of Rights Handbook* (2005) 742.
75 Currie and De Waal *The Bill of Rights Handbook* 744.
76 *S v Dlamini* 1999 4 SA 623 (CC) 670C–D.
77 Scottish Executive Consultations "Redressing The Balance in Cross-examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document" 1 http://www.scotland.gov.uk/consultations/justice/rtb-04.asp. (accessed 20-07-2010).
78 Internationally the best interest standard is also accepted, and it forms the foundation stones of the Convention of the Rights of the Child. Compare in this regard Clark "A 'golden thread'? Some aspects of the application of the standard of the best interest of the child in South African family law" 2000 *Stellenbosch Law Review* 3.

child. It is submitted that "every matter" includes the right of a child victim to have a court hear his or her story.

In *S v M (Centre for Child Law as amicus curiae)*[79] Sachs J held that the provisions of s 28 are undoubtedly wide and comprehensive. The emphatic language used in this section is indicative that just as law enforcement must always be gender-sensitive, it must also be child-sensitive. The section has the further consequence that statutes must be interpreted and the common law be developed, in a manner which favours protecting and advancing the interests of children. Courts should therefore function in a manner which at all times exhibits due respect for the rights of children.[80] The court held that s 28(1) provides a list of enforceable substantive rights which goes well beyond anything catered for by the common law or statutory law. In dealing with the interpretation of s 28(2), the court commented that it creates a right that is independent of those specified in s 28(1). With reference to the case of *Sonderup v Tondelli*,[81] the court held that s 28(2) is an expansive guarantee that a child's best interest will be paramount in every matter concerning the child.[82]

It is submitted that the competency inquiry is not child-sensitive as it has the effect that truthful and reliable evidence of a child may be excluded due to poor, inadequate and developmentally inappropriate questioning by a presiding officer. This will have the effect that the child does not even have a chance to relate to the court what had happened to him or her.

As set out above, Bertelsmann J indicated that it was in the paramountcy of the rights of children to remove as many obstacles as possible that might prevent the evidence of a child from being received as evidence in a court of law.[83] This approach, it is submitted, is more in line with the provisions of s 28 of the Constitution and it is child-sensitive. The approach is also in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime adopted by the United Nations Economic and Social Council.[84] In terms of art 10 of the Guidelines, child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity. In terms of art 14, all interactions with child victims and witnesses should be conducted in a child-sensitive manner. Such interaction should take place in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity.

It is submitted that a narrow application of the right to a fair trial, loses sight of the provisions of s 28(2) of the Constitution that a child's best interests are of paramount importance in every matter concerning the child. It is submitted that a child victim who is a witness in criminal proceedings is also entitled to a fair trial. A fair trial for such a witness would include an opportunity to be heard in court.

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79 2008 3 SA 232 (CC).
80 Para 15.
81 2001 2 BCLR 152 (CC) paras 27–30.
82 *S v M* para 22.
83 *Mokoena* para 142.
84 Adopted by Resolution 2005/20 http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf (accessed 20-07-2010).

5 CONCLUSION AND RECOMMENDATIONS

The current position on our law relating to the competency of witnesses to testify in court is that presiding officers are obliged to decide upon the competence of witnesses before they testify as is provided for in s 193 of the Criminal Procedure Act. In the case of child witnesses, a competency inquiry must be conducted in order to establish whether the witness appreciates what it means to tell the truth. This inquiry is conducted by questioning the child in order to establish whether the child knows the difference between the truth and falsehood. Only if the court is satisfied that the child appreciates the above difference, will it continue to allow the child to testify under oath, or if the child does not appreciate the nature and impact of the oath, allow the child to testify under affirmation. It was held in *S v Swartz*[85] that the above requirements are not merely to determine that a child can give a coherent and accurate account of the event that happened, but that he or she can distinguish between truth and falsity.

As argued above[86] the competency inquiry aims to determine the credibility of a child witness *a priori*. The inherent danger in this procedure is that a presiding officer might not adequately question a child or put age inappropriate questions to a child witness. This may have the effect that the presiding officer comes to the conclusion that the child does not know what it means to tell the truth, thereby rendering the evidence that the child is about to give inadmissible. The effect is that the child is not heard at all. In *Director of Public Prosecutions* Ngcobo J conceded that the proper questioning of a child witness is a special skill which not many presiding officers may possess.[87] In the *Swartz* case, Steyn AJ held that competency requirements cannot be abandoned simply because they appear to operate unfairly.[88]

It is however submitted that the competency requirements in the case of child witnesses do in fact operate unfairly, as it can exclude the evidence of a child due to poor questioning by a presiding officer. It has been pointed out[89] that traditional perceptions about the evidence of children contribute towards the scepticism attached towards their evidence. Cashmore and Bussey[90] correctly point out that although the actual ability of children to provide accurate and reliable evidence is critical to their role as witnesses, so too is their perceived reliability. Unless children are perceived as reliable witnesses, their evidence will not be effective and may not even be heard.

A further constraint to the admissibility of the evidence of child witnesses it the fact that the right to a fair trial is interpreted narrowly as applicable only to the accused.[91] It is submitted that the paramountcy principle applicable to the rights of children, as well as international law, requires that judicial proceedings involving child witnesses should be child-sensitive.[92]

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85 2009 1 SACR 452 (C) 458f.
86 Part 3 above.
87 *Director of Public Prosecutions* para 167.
88 *Swartz* 458e.
89 Compare part 3 above.
90 Cashmore and Bussey "Judicial Perceptions of Child Witness Competence" 1996 *Law and Human Behaviour* 313.
91 Compare part 4 above.
92 *Ibid*.

It is accordingly recommended that approach of Wigmore and Bertelsmann J[93] in terms whereof a child should be allowed to testify, even if the child cannot understand or articulate his or her understanding of the duty to tell the truth. Such a child should have the opportunity to tell his or her story "for what it may seem worth". The evidence so tendered by the child witness, will then be evaluated together with all the other evidence, in order to establish it truthfulness.

In conclusion, it is submitted that the competency inquiry is indeed a barrier to truth finding, as it can exclude the evidence of a child due to poor questioning by a presiding officer. This excluded evidence, may in fact be the only evidence, which if admitted, would have secured a conviction. It is therefore imperative, as pointed out by Lyon,[94] that if the courts insist on some or other form of competency inquiry, such an inquiry should be developmentally age-appropriate and child-sensitive. In this regard it is suggested that child psychologists and linguists work with court officials in order to develop a competency inquiry which is both developmentally age-appropriate and child-sensitive.

93 Compare part 3 above.
94 *Ibid*.

Taking it Back to Basics: Examining the Role of Labour Law in the Twenty First Century

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1 INTRODUCTION

South Africa's economy has recently been strained by the industrial action taken by various workers. The months of April and May 2010 saw municipal workers and Transnet employees embarking on industrial action that affected local government and halted the movement of commercial trains. These actions not only impacted negatively on the general public and South Africa's economy and investors, but they also had the cumulative effect of placing an already stressed economy under further pressure.[1] It is no wonder that businesses have called time and time again for the deregulation of the labour market.

Labour law began in a specific social and economic context. Its development took place during the industrial revolution which marked a clear shift and change in the world's economy. It was a change in human production comparable only to the Neolithic revolution which saw the end of hunting and gathering as the means of production and the emergence of agriculture as the basic form of production.[2] The change in the means of production precipitated a corollary change in the way in which people worked and organised themselves for work.[3] There was a move from fields to factories, thus making factories the symbolic "organisational facet of the industrial revolution".[4] This scene has changed somewhat in the last few decades. Most economies have experienced a shift from industrialised to service-based economies.[5] There has been a rise in international and regional integration which has been accompanied by a decline in the autonomy of the nation-state.[6] These various changes have had an effect on the structure of businesses worldwide and have led to employers insisting on the

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1 Moodley, Tau and SAPA "SA counts cost of Transnet strike http://www.citizen.co.za/index/article.aspx?pDesc=128261,1,22 (accessed 01-06-2010); SAPA "Municipal workers march countrywide" http://www.mg.co.za/article/2010-04-12-municipal-workers-march-countrywide (accessed 01-06-2010).

2 Stearns *The Industrial Revolution in World History* (1993) 5.

3 Stearns 5.

4 Stearns 6.

5 Mills "The situation of the elusive independent contractor and other forms of atypical employment in South Africa: balancing equity and flexibilisation?" 2004 *ILJ* 1203 1206.

6 Klare "The Horizons of Transformative Labour and Employment Law" in Conaghan, Fischl and Klare (eds) *Labour Law in An Era of Globalization: Transformative Practices and Possibilities* (2005) 5.

deregulation and flexibilisation of the labour market economy.[7] Individual firms and businesses have had to participate in the global market place under continuously pressurised conditions, whilst simultaneously remaining relevant and competitive on a global scale. Generally, employers view labour laws as onerous and welcome flexibilisation and deregulation as a chance to ensure their competitive edge in the global economy. They argue that deregulation benefits both employers and employees thereby eradicating the need for unions or governments to intervene by concluding collective agreements and enacting laws which protect employees from exploitation and abuse.

This article will discuss labour law's role in light of the pressures that exist in today's global economy. Labour law intervenes in the labour market economy with the aim of protecting employees. It does this by regulating the imbalance of power that exists between employers and employees and by managing the perpetual conflict that exists between employers and employees. Although the economic context within which labour law began has changed, the issues labour law initially addressed are still the same. Globalisation and flexibilisation have led to the demise of standard employment and the increase in atypical employment. In most instances workers in atypical working environments are more vulnerable than those in the standard working environment. For this reason, the imbalance of power and the conflict still exists between employers and employees.

2 BACKGROUND

The scope of labour law can be said to extend:

> "from the individual to the collective, from the contract of employment to relations between the institutions of organised labour and capital, and to the conduct and resolution of conflicts between them."[8]

It is created by the state, as well as by autonomous groups such as trade unions and employers.[9] In addition to this, it is important to add the international legal order which has been significant in promoting the development of labour law from the twentieth century.[10] Labour law can be defined broadly as the legal framework which provides for the "existence and operation of all the institutions of the labour market: the business enterprise, trade unions, employers' associations and, in its capacity as regulator and as employer, the state".[11] It regulates the existence, operation and interaction of the above institutions whilst keeping dependent labour[12] as its main concern. In fact, it has been said that the "development of this branch of law over the years can be measured by the extent to which dependent workers were brought within its ambit".[13] It is important to note however that labour law's focus on dependent labour consequentially excludes independent workers and self-employed individuals from its ambit.[14]

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7 Hayter "Regulated flexibilisation: The impact of South African labour market policy in the global context" 1999 Twelfth Annual Labour Law Conference 2.
8 Deakin and Morris *Labour Law* (2005) 1.
9 Hepple "The Social Question" in Hepple (ed) *The Making of Labour Law in Europe* (1986) 10.
10 Hepple in Hepple (ed) *The Making of Labour Law* 10.
11 Deakin and Morris *Labour Law* 1.
12 These are workers in permanent, full time employment.
13 Hepple in Hepple (ed) *The Making of Labour Law* 11.
14 *Ibid.*

3 THE ROLE OF LABOUR LAW

In the late nineteenth and early twentieth centuries South Africa experienced an influx of British settlers and entrepreneurs who moved to South Africa with their technology, law and economic ideologies.[15] This included the introduction of industry such as rail, electricity and manufacture,[16] the imposition of British labour laws along with the imposition of the concept of collective *laissez-faire*[17] and trade liberalism.[18] This British inheritance still forms a part of twenty first century South Africa and as a result, the legal theories developed within the British context are still applicable to the South African context.

Kahn-Freund's legal theories have been influential within the South African context. His theories focus on power and how it plays a pivotal role in labour relations.[19] According to him labour law's fundamental purpose is based on two universal truths.[20] The first universal truth notes the implicit inequality that exists during the conclusion and performance of a contract between employer and employee, an inequality which is not "admitted by the classical liberal understanding of the contract: an agreement freely reached between two parties negotiating at arm's length".[21] Thus Kahn-Freund states that:

> "[t]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the contract of employment."[22]

The second universal truth highlights the inherent conflict which exists between the aims of management and those of labour.

> "This conflict involves the matter of the distribution of profits of an enterprise: management's priority is to maximize investment, and labour's is to maximize consumption."[23]

If one analyses these two universal truths one finds the two characteristics of the employment relationship. First, there exists an inequality in bargaining power between employer and employee, and thus there also exists a need to balance this relationship. Second, there is an eternal conflict between management and labour which, for the sake of enterprise, must be regulated and contained.[24] The law can fulfil each of these needs. It is from this one can then say that labour law's purpose is to act as a:

> "countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship, in addition [it] can

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15 Potter "From industrial to information revolution: grandfather to grandson" 2006 *Civil Engineering* 8.
16 Potter 2006 *Civil Engineering* 8.
17 Collective *laissez-faire* was characterised by employers and employees regulating their relationship of employment on their own whilst government took a spectator-like role.
18 Kalula "Labour Market Regulation and Labour Law in Southern Africa" in Barnard, Deakin and Morris (eds) *The Future of Labour Law* (2004) 280.
19 Mischke "Approximations – epistemologies of labour law in the fin de siecle part 1: labour law in the fin de siecle of post modernity" 1998 *SA Mercantile Law Journal* 20 32.
20 Dukes "Constitutionalising employment relations: Sinzheimer, Kahn-Freund, and the role of labour law" 2008 *Journal of Law and Society* 341 352.
21 Dukes 2008 *Journal of Law and Society* 352.
22 Davies and Freedland *Labour Law* 3ed (1983) 18.
23 Dukes 2008 *Journal of Law and Society* 353.
24 *Ibid*.

> be used to support and restrain the power of management and the power of organised labour."[25]

This purpose has been acknowledged by the Constitutional Court in two landmark judgments. In the *Certification* judgment the Constitutional Court noted that:

> "employers enjoy greater social and economic power than individual workers… [and] may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace."[26]

In *Chirwa* Skweyiya J noted that:

> "[t]he purpose of labour law…is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes."[27]

Kahn-Freund describes three ways in which labour law can fulfil its dual purpose. The first role labour law can play is as a support for the autonomous system of collective bargaining.[28] Most legal systems allow collective bargaining in one form or the other. The second role labour law plays is a normative one. It can provide a code of substantive laws to govern terms and conditions of employment.[29] Third, the law can provide the rules of the game and these rules would protect the interests of the parties and the community in general.[30] These roles are generally accepted and can still be found in most legal systems today.

4 THE UNIVERSAL TRUTHS

4 1 The balancing act

The employment relationship is born out of the conclusion of a valid employment contract stating the obligations of the employer to the employee and *vice versa*. In terms of the common law, freedom of contract means that each party is "free to decide whether, with whom and on what terms to contract".[31] Kahn-Freund states that this is not strictly true in the context of labour.[32] The imbalance of power that exists between an employer and an employee when the parties are negotiating the terms of the contract and when they perform on the contract, means that the employee is no longer free to "decide whether, with whom and on what terms to contract".[33] The law of contract does not consider the inherent inequality in bargaining power between the employer as the "owner of the means of production and employees, who are entirely dependent on supply and demand for their

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25 *Ibid*.
26 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) 794.
27 *Chirwa v Transnet Ltd* 2008 2 BLLR 97 (CC) 112.
28 Kahn-Freund "Industrial relations and the law: retrospect and prospect" 1969 *BJIL* 301 302.
29 Kahn-Freund 1969 *BJIL* 302.
30 *Ibid.*
31 Van der Merwe *et al Contract: General Principles* (2004) 10.
32 Dukes 2008 *Journal of Law and Society* 352.
33 Van der Merwe *Contract* 10.

welfare and job security".[34] This may effectively amount to a form of "economic duress" which encourages the exploitation and abuse of employees.[35] When this became apparent, governments decided to intervene by introducing labour laws which would regulate the inequities that arose from the consequences of the law of contract.

Labour law intervenes in this context by encouraging systems of collective bargaining which are facilitated by trade unions. Over the years unions have been responsible for improving the overall well-being of employees through the negotiation and conclusion of collective agreements with the employer.[36] These collective agreements, once concluded, would improve workers' wages and terms and conditions of employment.[37]

Collective agreements cannot protect the interests of all the employees within an industry.[38] In the beginning the majority of union members were male, which left women, children and young people vulnerable to exploitation and abuse, as they were often excluded from collective agreements.[39] In addition, certain sectors of industry were not conducive to collective bargaining and the conclusion of collective agreements.[40] For this reason, governments realised that there was a need to establish some basic conditions of employment which would be available to all employees regardless of age, race or industry.[41] Labour law thus took on a normative role and introduced legislation regulating discrimination. These statutes were aimed at ensuring that those individuals excluded from the benefits of collective bargaining agreements due to reasons of sex, age, race, *etc.* were protected from exploitation by employers.[42]

The introduction of these various types of legislation signalled a definite move away from collective *laissez-faire*,[43] and it also signalled the emergence of "workers' rights" as a central concern of modern labour law.[44] In South African labour law, for instance, the Labour Relations Act (hereafter "LRA")[45] mitigated the effects of contract law on the employee by enacting provisions which protect the worker against unfair dismissals and against unfair labour practices.[46] Protection against unfair dismissals ensures that the employee is only dismissed for a fair reason and that the dismissal procedure is conducted in a fair manner,[47] whilst the prohibition of unfair labour practices ensures that the employee is protected from any unjust discrimination throughout the duration of his contract of employment.[48] The LRA encourages employers and unions to bargain over

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34 Grogan *Workplace Law* 9ed (2007) 5.
35 Van der Merwe *Contract* 10.
36 Davies *Perspectives on Labour Law* (2004) 4–5.
37 Hepple in Hepple (ed) *Making Labour Law* 76.
38 *Ibid.*
39 *Ibid.*
40 Hepple in Hepple (ed) *Making Labour Law* 111.
41 Davies *Perspectives* 5.
42 Davies *Perspectives* 4–5.
43 *Ibid.*
44 Davies *Perspectives* 6.
45 Act 66 of 1995.
46 Chapter VIII LRA.
47 Sections 187 and 188 LRA.
48 Section 186(2) LRA.

"earnings, conditions of service and other matters of mutual interest". The LRA states that collective agreements effectively alter the terms and conditions of employment[49] and "supersede existing individual contracts of employment".[50] Collective bargaining and collective agreements therefore guarantee the continual improvement of the terms and conditions of employees throughout the duration of their employment.

In addition to protecting employees against the inequities arising from the consequences of the law of contract, labour law also protects workers rights. It views these rights as fundamental and deserving of protection regardless of union membership and regardless of collective bargaining.[51] Hepple notes that the:

> "subjects of state protection in labour in the narrow sense are nearly all the same in all nations: the protection of children, of women, protection against special abuses of the power of the employer like the truck system, the home worker and the general protection of the adult worker."[52]

South Africa has the Constitution[53] and a number of statutes dedicated to guaranteeing the protection of workers. The Basic Conditions of Employment Act (hereafter "BCEA")[54] establishes, enforces and regulates the basic conditions of employment.[55] The BCEA establishes a minimum floor of rights for issues such as leave[56] and working hours,[57] and guarantees these rights to every worker. The Occupational Health and Safety Act (hereafter "OHSA")[58] provides "for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery".[59] This ensures the employer maintains the general safety of employees at the workplace.

The LRA has a provision which protects employees from unfair dismissals which occur when an employer discriminates against an employee, whether:

> "directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."[60]

The abovementioned statutes recognise the imbalance of power between employers and employees and within that the employees' inability to protect themselves from exploitation or abuse at the work place. They also illustrate labour law's commitment to counteracting the inequality of bargaining power which is inherent in the employment relationship.

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49 Section 23(3) LRA.
50 Grogan *Workplace Law* 368.
51 Davies *Perspectives* 6.
52 Hepple in Hepple (ed) *Making Labour Law* 76.
53 Constitution of the Republic of South Africa, 1996.
54 Act 75 of 1997.
55 Section 2 BCEA.
56 Section 7 BCEA.
57 Sections 20–27 BCEA.
58 Act 85 of 1993.
59 Long title of the OHSA.
60 Section 187(1)(f) LRA.

4 2 Managing conflict

Kahn-Freund's second universal truth highlights the inherent conflict which exists between the employer and the employee.[61] According to this theory the inherent conflict exists because employers have a vested interest in increasing the "rate of investment"[62] whilst employees have a vested interest in increasing the "rate of consumption".[63] Kahn-Freund also observes that whilst it is important to note that this conflict between employers and employees exists, it is more important to develop rules that regulate the conflict, thus fulfilling labour law's third role.[64] Despite the differences in vested interests existing between employers and employees, there is one interest both sides have in common. Both sides have a vested interest in the regulation of conflict via "reasonably predictable procedures".[65] These procedures should aim "to promote negotiation, to promote agreement, and to promote its observance and ... to regulate the use of such social pressure as must be available to both sides as weapons in the conflict".[66]

Most countries have some form of dispute resolution mechanism in their labour legislation. South Africa, for instance, sets out provisions in the LRA which establish the rules governing disputes between employers and employees. These provisions regulate the right to strike and the recourse to lock-out in conformity with the Constitution.[67] In addition to this they provide:

> "simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration [was] established), and through independent alternative dispute resolution services accredited for that purpose."[68]

These provisions thus regulate and manage the conflict that naturally exists between employers and employees. Ultimately this results in the reduction of conflict and protects the economy.[69]

5 LABOUR LAW IN TODAY'S GLOBALISED WORLD

It has been established thus far that labour law was developed with the aim of balancing power and managing the inherent conflict that exists between employers and employees. Labour law was limited to those workers that could be classified as dependent labour in its development. Consequently, most labour laws exclude those individuals classified as independent and self-employed workers.[70] South Africa inherited its labour law from Britain and as a result most of our labour laws, with the exception of a few, offer protection to dependent labour and exclude independent contractors and self-employed workers. This focus on dependent labour posed no problem until the nature of the world economy changed.[71]

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61 Dukes 2008 *Journal of Law and Society* 353.
62 Davies and Freedland *Labour Law* 27.
63 *Ibid*.
64 Davies and Freedland *Labour Law* 28.
65 *Ibid.*
66 *Ibid.*
67 Long title of LRA.
68 Long title of LRA.
69 Hyde "What is Labour Law?" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 52.
70 Hepple in Hepple (ed) *Making Labour Law* 11.
71 Mills 2004 *ILJ* 1203.

5 1 Defining globalisation

> "Globalisation is one of the most used, but also one of the most misused and one of the most confused, words around today."[72]

Globalisation is a term that is familiar to most, although its exact meaning remains elusive. It takes on different meanings in different contexts, however, for our purposes globalisation will be examined in the context of labour.

There are a number of changes taking place on a global scale. There has been an "intensification of international economic and political integration".[73] This global economic and political integration is usually termed globalisation and is usually accompanied by:

> "trade liberalisation and a rising volume of international trade; currency market liberalisation and an enormous increase in international currency transactions; liberalisation of the rules governing foreign investment and cross-border capital flows; the emergence and dominance of multi-national enterprises; increased manufacturing in developing nations; heightened international wage competition; and steady increases in cross-border labour migration."[74]

Globalisation can thus be described as "a process of restructuring the world economy…[as] a response to the crisis in the capitalist economic system which began in the early 1970s".[75] Globalisation processes consist of development policies that are market-based rather than state-based.[76] It also consists of "fewer and fewer activities that are oriented towards local or even national markets... [with] [m]ore and more hav[ing] meaning only in a regional or global context".[77] Globalisation has also led to the "fragmentation of many production processes and their geographical relocation on a global scale in ways that slice through national boundaries". [78] The cumulative effect of this new phenomenon has been the introduction of a new dynamic where:

> "[c]apital and labour live in different places and times. While capital is global, exists in the space of flows and lives in the instant time of computerised networks, labour inhabits the local, exists in the 'space of places' and lives by the clock time of everyday life."[79]

Ultimately globalisation signifies the "emergence of a new division of labour",[80] the "call for deregulation, privatisation…and the withering away of the welfare state".[81]

5 2 The effects of globalisation

South Africa simultaneously entered into democracy and the global economy.[82] This left the new government of 1994 with the task of removing racism and

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72 Dickens *Global Shift: Mapping the Changing Contours of the World Economy* 5ed (2007) 7.
73 Klare in Conaghan, Fischl and Klare (eds) *Labour Law in An Era of Globalization* 5.
74 Klare in Conaghan, Fischl and Klare (eds) *Labour Law in An Era of Globalization* 5.
75 Olowu "Globalisation, labour rights, and the challenges for trade unionism in Africa" 2006 *Sri Lanka Journal of International Law* 132.
76 Munck *Globalisation and Labour: The New 'Great Transformation'* (2002) 109.
77 Du Toit *et al Labour Relations Act Law: Comprehensive Guide* (2006) 1408.
78 Du Toit *Labour Relations Act* 408.
79 Munck *Globalisation* 57.
80 Du Toit *Labour Relations Act* 1408.
81 Klare in Conaghan, Fischl and Klare (eds) *Labour Law in An Era of Globalization* 6.
82 Mills 2004 *ILJ* 1210.

gender biases from the market place and attracting foreign investment in order to ensure economic growth.[83] The government first considered regulating "the labour market and redistribution as called for by the Reconstruction and Development Plan (RDP)". The Reconstruction and Development Plan was a socio-economic policy focused on redressing the imbalances inherited from apartheid. However, in 1996 it opted for the Growth, Employment and Redistribution Policy (GEAR).[84] This new policy emphasised trade liberalisation and flexibility, and it was aimed at attaining macro-economic stability in order to attract investment.[85]

Two of South Africa's main statutes embodying the traditional purpose of labour law, namely the LRA and the BCEA, aim to regulate the imbalance of power present between employer and employee, as well as manage the conflict that is inherent between the employer and his employees. This legislation soon came under attack from employers as "perpetuating and increasing rigidities in the labour market with the deleterious effect on global competitiveness".[86] Employers argued for the introduction of labour market flexibility[87] as there was a feeling that the labour laws introduced since 1994 had introduced rigidities into the South African labour market, which deterred investors and impeded the flexibility needed to compete globally.[88] An argument was made for "wage and numerical flexibility" which would allow for businesses to function as freely as possible without any interference from trade unions, in the form of collective agreements, or government in the form of statutes and policies.[89] Labour flexibility would reduce labour costs and introduce more flexible production methods in response to increased competition or globalisation.[90] In addition to flexibility, employers argued for the deregulation of the market. They justified this argument by stating that "the deregulation of the labour market, in theory, should move it towards a perfectly competitive ideal in which everybody who wants a job can find one at a wage equal to his contribution to society".[91] This, in turn, would empower workers by increasing the number of jobs available, and thus the demand for workers. It would also allow workers to structure their employment as they wished, thus creating an independent workforce able to negotiate on its own, without the assistance of labour laws.

5 3 Flexibilisation and deregulation

A country study on South Africa conducted by the International Labour Organisation has shown that these assertions are not necessarily true.[92] The growth of globalisation and the employers' need for the flexibilisation of labour has led to the rise of "atypical" or non-standard employment. "Atypical" employment is

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83 Mills 2004 *ILJ* 1210.
84 *Ibid*.
85 *Ibid*.
86 *Ibid*.
87 Hayter "Regulated flexibilisation: The impact of South African labour market policy in the global context" 2.
88 *Ibid*.
89 *Ibid*.
90 *Ibid*.
91 *Ibid*.
92 Davis "Death of a Salesman" in Conaghan, Fischl and Klare (eds) *Labour Law in An Era of Globalization* (2005) 160–161.

employment lacking one, or some of the characteristics found in a standard employment relationship. This form of employment has been described as:

> "part-time work, casual work, home work, subcontract work, unstable irregular employment, disguised wage work, family labour, moonlighting, illegal work or work in illegal, short-term contractual or fixed employment, work that entails combining pre-capitalist and/or traditional non-market social relations with market related ones – and so on".[93]

Therefore, whereas the standard employment relationship may be described as indefinite, full-time and, in most cases, conducted at the workplace of the employer, an atypical employment relationship is one where the terms and conditions of employment do not comply with at least two of the three criteria.[94] The studies that have been conducted in the South African labour market show that this increase in non-standard or "atypical" employment, has led to the creation of casualisation, externalisation and informalisation.[95] Flexibilisation has created a new class of vulnerable and relatively powerless workers who are in need of more rather than less protection from labour laws.

5 3 1 Casualisation

Casualisation is the result of temporal flexibilisation. This arises from the employer's desire to replace employees in a standard employment relationship with temporary or seasonal labour and/or part time employees. This changes the standard employment relationship by altering the employment relationship between employer and employee from on going to temporary and from full-time to part-time. Although the use of temporary, seasonal and/or part-time labour has always been around, it has become evident that the use of these labour arrangements is becoming more and more predominant.[96] It is also important to note that in the industrialised economy these workers would have been considered as part of the core function of the business and thus important to the survival of the business. However, in the era of globalisation, these workers are now considered to be dispensable and are now found at the periphery of the business.[97]

5 3 2 Externalisation

Externalisation occurs when "employment regulated by a contract of employment is…displaced by employment that is regulated by a commercial contract".[98] Externalisation is caused by the employer's need to achieve numerical employment flexibility. It may occur when an employer retrenches various sections of his or her workforce and uses contracted workers, or workers from a temporary employment service (hereafter "TES") to do the work instead. If an employer chooses to engage contractors, the contract of employment between the employer and the employees is replaced with a commercial contract between the employer and an independent contractor or the employer and a self-employed individual.[99]

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93 Theron and Godfrey "Protecting workers on the periphery" 2000 *Development and Labour Monographs* 1 1–2.

94 Bezuidenhout, Godfrey, Theron with Modisha *Non-Standard Employment and its Policy Implications* Report submitted to the Department of Labour (2003) 5.

95 Bezuidenhout, Godfrey, Theron with Modisha *Non-Standard Employment* 5.

96 Theron and Godfrey 2000 *Development and Labour Monographs* 6.

97 Theron and Godfrey 2000 *Development and Labour Monographs* 7.

98 Bezuidenhout, Godfrey, Theron with Modisha *Non-Standard Employment* 6.

99 *Ibid.*

In this instance, the retrenched employees find themselves in precarious employment positions as either workers in the informal sector or workers for "small service suppliers"[100] such as subcontractors or TES. Externalisation therefore forces employees to trade relatively permanent and secure employment with their employers for either "short term highly insecure contracts"[101] or unemployment.

Another form of externalisation occurs when an employer chooses to use a labour broker or a TES.[102] In this case, the employment contract between the employer and the employees is replaced with a commercial contract between the employer and the service provider employing the worker who will work on the employer's premises.[103] Externalisation in this form creates a triangular employment relationship in which the worker has a nominal employer and a real employer. The nominal employer is the service provider who supplies the client with workers and assumes the risk of employment, and is thus legally accountable, whilst the real employer is the client who uses the services of the nominal employer, but is ultimately the one who determines the terms and conditions of employment. [104] The triangle is completed by the commercial contract that ties the nominal employer (service provider) to the real employer (client).[105] This form of employment is not only highly precarious, but it changes the standard employment relationship by obscuring who the employer is and by moving the worker's place of work from the employer's premises, to those of the client's.

5 3 3 Informalisation

The combination of casualisation and externalisation has led to informalisation. Informalisation occurs when employment becomes increasingly unregulated, either in part or altogether.[106] Informal work in South Africa has been described as work which occurs at businesses that are not registered in any way. Thus, it is work which "takes place outside the formal wage-labour market…including various forms of self-employment".[107] It is usually conducted from homes, street pavements, and in some rare cases business premises. In general, the informal sector tends to attract entrepreneurs because it enables them to conduct business outside of the rules that apply to most. These entrepreneurs, who may employ their own part-time or temporary workers, usually escape "state regulation in terms of taxation, labour regulations and other general rules that are applicable in the conduct of business".[108] This means that although labour regulations theoretically apply to workers in the informal sector, most workers in this sector tend to find it difficult to *de facto* rely on labour regulations for protection.

5 4 Labour law in the twenty first century

It is evident from the above paragraphs that the context in which labour law operates today is different from the context in which it was developed.

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100 Olowu 2006 *Sri Lanka Journal of International Law* 141.
101 *Ibid*.
102 Bezuidenhout, Godfrey, Theron with Modisha *Non-Standard Employment* 6.
103 *Ibid.*
104 Theron "Employment is not what it used to be" 2003 *ILJ* 1247 1255.
105 Theron 2003 *ILJ* 1255.
106 Bezuidenhout, Godfrey, Theron with Modisha *Non-Standard Employment* 6.
107 Munck *Globalisation* 112.
108 *Ibid*.

Participation in the global economy has placed certain pressures on business. Business has tried to alleviate some of these pressures by restructuring the composition of their workforce, and consequently the number of atypical workers has increased. Although the economic context has changed, the two universal truths identified by Kahn-Freund are still present. The imbalance of power between employers and employees remains. Atypical workers find themselves in precarious employment conditions which do not offer the job security or protection generally found in a standard employment relationship. They are thus more vulnerable to exploitation and abuse than those workers who find themselves in a standard employment relationship. Furthermore, the inherent conflict which exists between employers and employees is present in atypical employment. The bottom line has become more important than ever for employers and as a result some employers are now disguising employment in order to avoid the financial and legal consequences of having a workforce. Therefore, the two main needs labour law seeks to address are still present. Unfortunately, while workers in atypical employment are in theory, protected by labour legislation; they find it difficult to rely on labour law in practice. This means that workers in these precarious employment positions are more vulnerable but less protected than workers in standard employment relationships.

Workers tend to rely mostly on the LRA and collective bargaining to protect them from unfair labour practices. It is, however, becoming increasingly evident that atypical workers find it difficult to rely on the LRA and collective bargaining for protection for two main reasons. First, labour legislation was designed to exclude those workers who cannot be defined as an employee from its ambit. Therefore any independent or self-employed workers are excluded from labour legislation. Initially, this did not raise any issues. But the situation changed when the effects of the changes brought about by globalisation began to blur the distinction between the two categories. The reality today is that there are a growing number of workers who are now found in the murky area between employment and self-employment.[109]

Second, the mechanism created by the LRA was designed with the standard employment relationship in mind. Consequently, unions are finding it difficult to organise workers in atypical employment. Atypical employment is usually short term which means a large number of workers enter and exit a particular sector over a short space of time. This creates a high turn-over of workers within a particular sector which makes recruitment by unions difficult. Workers are employed sporadically and for short periods of time which affects the representivity levels of unions, as well as administrative matters such as the payment of subscriptions. This again impacts negatively on union recruitment and membership. Atypical workers who are not organised are thus unable to come together as a collective and to use collective bargaining as a means of improving their employment terms and conditions.

The role played by the LRA and collective bargaining mechanism can be described as an autonomous role within the labour law context. Together they provide a framework which can be accessed as and when employees need

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109 Benjamin "An accident of history: who is (and who should be) an employee under South African labour law" 2004 *ILJ* 787 789.

assistance. This type of protection is formulated on a rights-based model[110] and it is becoming increasingly evident that atypical workers find it difficult to rely on these rights. The need for protection therefore exists; however if labour laws are going to offer the necessary protection they must need to adjust accordingly in order to meet the needs of atypical workers.

Kahn-Freund states that labour law can play a normative role. This means that labour laws can provide a code of substantive laws which govern the terms and conditions of employment. These laws can, amongst other things, impose "minimum conditions of employment for employees generally or on particular classes of employees".[111] This would result in an emphasis on social protection rather than rights.[112] This type of model can be used to assist workers in precarious employment conditions that are unable to improve their terms and conditions of employment. South Africa's labour laws have made provision for this via the BCEA.

The BCEA was enacted with the purpose of advancing economic development and social justice by establishing and enforcing basic conditions of employment and regulating the variation of basic conditions of employment.[113] The BCEA makes use of various mechanisms which allow the protection of the Act to be extended to include vulnerable workers.[114] The Act does not differentiate between casual, temporary or seasonal employees, and it extends protection to all, except employees who work for less than 24 hours a month for an employer.[115] Section 50 of the BCEA allows the Minister of Labour to make a determination to replace or exclude any basic condition of employment as provided for by the Act. These sectoral determinations can be used to "introduce minimum wage levels … for those in unorganised sectors and areas where there is very little or no collective bargaining".[116] The sectoral determinations which have been made in the past have improved the basic conditions for atypical workers. For instance, the sectoral determination made for the retail sector has provided part-time workers with an option to receive benefits similar to those of employees in full-time employment.[117] July 2005 saw the sectoral determination establishing conditions of employment and minimum wages for the taxi sector come into force.[118]

> "[T]he determination, apart from setting minimum wages, primarily reaffirm[ed] the labour and social security protection that applied only in theory to the taxi sector. The protection which it affords [came] with entitlements that benefit taxi sector employers as well as their employees." [119]

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110 Benjamin "Labour Law and the Challenge of Social Protection" http://muse.jhu.edu (accessed 23-04-2010) 39.
111 Grogan *Workplace Law* 5.
112 Benjamin "Labour Law and the Challenge of Social Protection" 39.
113 Section 2 BCEA.
114 Fourie "Non-standard workers: the South African context, international law and regulation by the European Union" 2008 *PER* 110 124.
115 BCEA s 6(1)(c).
116 Fourie 2008 *PER* 124.
117 *Ibid*.
118 Mpedi "Taxi sectoral determination: (re)affirming social security and labour law protection for the taxi sector" 2006 *TSAR* 787.
119 Mpedi 2006 *TSAR* 594.

Reliance on social protective labour legislation like the BCEA ensures that those workers who find it difficult to rely on more rights-based legislation such as the LRA and who find themselves *de facto* excluded from the systems of collective bargaining have some form of minimum protection. However, it is important to note that if the BCEA is to fulfil its purpose, the definition of employee used in the BCEA should be interpreted generously. It should be extended to apply to all forms of work performed for others, and not merely to subordinate work.[120] In addition, the success of sectoral determinations depends on the enforcement of such determinations. There must be support from an effective system of labour inspection accompanied by speedy access to the judicial system.[121]

Labour law is not only created by the state and autonomous groups such as trade unions and employers, [122] but it is also a product of the international legal order.[123] It is therefore important to look to the international legal order for guidelines and solutions. The United Nations is currently promoting the concept of decent work. According to the International Labour Organisation "decent work" amounts to "the clear adoption of a valuating position very closely related to the dignity and the quality of life of human beings". Vocational training is seen as a foundational part of the concept of decent work. It is viewed as a fundamental human right and as "an instrument that promotes and facilitates exercising the other rights that also constitute decent work".[124] The Organisation's Recommendation 195 implies that governments bear a responsibility regarding the training and enhancement of the employability of the population.[125]

Labour law can play a facilitative role in the labour market. It can establish a mechanism which assists unskilled workers gain the necessary skills, thereby creating a better equipped workforce. This would meet the needs of employees, employers and the economy. Training and enhancing the skills of the employable population is especially important when it comes to flexibility within the employment context. Benjamin notes that:

> "[a]t the high end of [the employment relations] spectrum are knowledge workers associated with the rise of the 'new economy' and networked organisations… these workers are employed primarily in managerial, professional and technical occupations. At the other end of the spectrum are 'precarious' or vulnerable workers associated with the informal economy and sub-contracted labour… These workers are poorly paid and employed in unstable jobs, which more often than not fall outside the scope of collective representation or legal regulation."[126]

Skilled workers are therefore better able to cope and to protect themselves in an atypical employment context. South Africa's labour legislation includes the Skills Development Act 97 of 1998 (hereafter "SDA") and the Skills Development Levies Act 9 of 1999 (hereafter "SDLA") which were enacted to "provide an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African work

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120 Benjamin "Labour Law and the Challenge of Social Protection" 39.
121 Fourie 2008 *PER* 124–125.
122 Hepple in Hepple (ed) *The Making of Labour Law* 10.
123 *Ibid*.
124 ILO Recommendation 195 "Human resources development: education, training and lifelong learning" 2004 22.
125 ILO Recommendation 23.
126 Benjamin "Labour Law and the Challenge of Social Protection" 35.

force".[127] These Acts cater for the creation of Sectoral Education and Training Authorities (hereafter "SETAs").[128] SETAs are tasked with establishing learnerships which provide a flexible framework for skills development for both existing employees and new entrants into the workforce.[129] These learnerships create a structured learning component and practical work experience for the workforce.[130] Increased use of learnerships and internships will help grow and develop unskilled labour.[131] The scope of the SDA is limited to employees, similar to other labour legislation. It is therefore necessary, in light of this, to interpret the definition of employee used in the skills development legislation generously. A generous interpretation will ensure the legislation applies to all forms of work performed for others, and not merely to subordinate work.[132] This will not only better equip the labour force, but also meet the goals outlined by the International Labour Organisation.

6 CONCLUSION

Labour law now operates in a global economy which is different from the industrial economy in which it was developed. There have been numerous cries from the owners of capital for the flexibilisation and deregulation of the labour market in order to increase their competitive edge globally. Business argues that this will in turn create jobs and empower workers to structure their employment in a way that is suitable to them. However, it has been shown that these arguments hold true for very few. Flexibilisation has led to the growth of atypical employment, which has resulted in the exploitation and abuse of a vulnerable class of workers. Deregulating the labour market under such conditions would leave these workers unprotected and open to abuse.

Despite the economic changes that have taken place, there still is a need for labour law to act as a "countervailing force to counteract the inequality of bargaining power" and to manage the inherent conflict in the employment relationship.[133] Labour law has to adjust the role it plays. There needs to be greater emphasis on the social protection of workers who are unable to access the rights granted by the LRA and the benefits provided by collective bargaining. Greater use of social protectionist legislation such as the BCEA will ensure that the minimum terms and conditions of employment and wages of certain classes of workers are set at an acceptable level. This would prevent the exploitation of atypical workers. Labour law also has a facilitative role to play. The SDA and SDLA can be used to train and equip the South African workforce. This will eventually create a workforce able to successfully operate within the atypical employment context. Greater emphasis on these two roles will assist the workforce in dealing with the pressure of a global economy.

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127 Preamble of SDA.
128 Section 9(1) SDA.
129 Benjamin "Labour Law and the Challenge of Social Protection" 50.
130 *Ibid.*
131 *Ibid.*
132 Benjamin "Labour Law and the Challenge of Social Protection" 38.
133 Dukes 2008 *Journal of Law and Society* 353.

Regulating Human Cloning – A Commonwealth Comparison

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"I have never met a human being worth cloning."[1]

1 INTRODUCTION

Cloning is the scientific name that describes the process of genetic duplication which results in the creation of an organism that is genetically identical to another. The process by which cloning is achieved is called somatic cell nuclear transfer (hereafter "SCNT"). The nucleus from a body cell (which is referred to as the "donor" cell, since it is "donating" its DNA to another cell) is transferred to an "empty" egg cell to create an embryo that is genetically identical to the original body cell from which the nucleus was taken.

A distinction must be drawn between body cells and sex cells. Sex cells are produced by male and female animals. They refer to the oocyte, or egg cell, that is produced by the ovaries in a female mammalian animal and sperm cells which are produced in the testes of a male mammalian animal. Sex cells do not have a complete set of DNA, but have a half set each. When an egg cell and sperm cell unite during the fertilisation process, the resulting embryo receives half its DNA from the egg cell and the other half of its DNA from the sperm cell. DNA from sex cells is not used during the cloning process, as these cells have only half the DNA that is necessary to create an embryo. A body cell already has a complete set of DNA and scientists can use this DNA to create an embryo that is genetically identical to the organism from which that body cell was obtained.

There is wide potential use for cloning in research, therapy and reproduction. What is done with the embryo after SCNT marks the point of divergence for research, therapeutic and reproductive cloning. However, as much as the potential uses for cloning have been recognised, there serious concerns regarding the implications of the process have been raised. Most of these arguments have an ethical basis; but some arguments are based on the potential for violation of legal principles.

This article seeks to provide an introduction to the science of cloning, to highlight the ethical and legal arguments for and against the process in the South African context and to identify applicable comparative legislative provisions regarding cloning from selected Commonwealth countries.

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1 Westhusin "Written statement presented to the US House of Representatives on Energy and Commerce, Subcommittee on Oversight and Investigations" (28-03-2001).

2 THE SCIENCE

2 1 Somatic Cell Nuclear Transfer

In this process, the nucleus of a body (somatic) cell such as a skin cell is removed and then inserted into an egg cell from which the original nucleus has been removed. The egg cell is then artificially induced to divide and become an embryo that is genetically identical to the somatic cell.

2 2 Research cloning

The first stage is the use of SCNT to create embryos. However, in research cloning, embryos are not afforded the opportunity of completing their gestation and development. The importance of cloning in research lies in the importance of a particular type of cell called the "stem" cell. Stem cells are found in the bodies of mammals. They have the ability to divide indefinitely and produce genetically identical daughter cells. What makes stem cells particularly special is their ability to differentiate into other cell types. Stem cells can be obtained from foetal tissue, human embryos and adult tissues. However, there is a preference for embryonic stem cells rather than adult stem cells, because embryonic stem cells are pluripotent, meaning that they are more suitable for differentiation into different types of tissue than an adult stem cell is. Scientists then use these extracted stem cells in order to research new therapies.

The ethical concern for cloning in research lies in the fact that in the process of removing these stem cells from a developing embryo, that embryo is destroyed. In *Christian Lawyers Association of South Africa v Minister of Health*[2] the court held that an embryo has no legal status until it has been born alive. The *Pinchin*[3] case stated that once born alive a child enjoys legal rights including those which were violated whilst still in the womb. Until such time as a child is born alive, the worth it enjoys is moral.

2 3 Therapeutic cloning

In therapeutic cloning the stem cells that are obtained through SCNT are induced to differentiate into specific tissue. The importance of this type of cloning is that it could provide a person with a genetically matched tissue implant. This type of cloning is currently pursued on non-human animals.

2 4 Reproductive cloning

In reproductive cloning the embryo that was created through SCNT is transferred to a uterus to create offspring that is genetically identical to the organism from which the donor nucleus was obtained. This type of cloning has been used to clone a variety of animals. In 1996 scientists at the Scottish Roslin Institute successfully cloned a six-year old sheep, which was affectionately named Dolly.[4]

2 4 1 Reproductive cloning in non-human animals

Although the birth of Dolly aroused worldwide interest because of its ethical implications, it also highlighted a number of potential benefits of cloning, such

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2 1998 4 SA 1113 (T).

3 *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 2 SA 254 (W).

4 Wilmut *et al* "Viable offspring derived from foetal and adult mammalian cells" 1997 *Nature* 810.

as a way to preserve endangered species, and the manner in which human diseases could be better understood and treated. However, the main reason that cloning of human beings is prohibited worldwide lies in the fact that the cloning of non-human animals has shed light on the risks and problems associated with the process.

Dolly the sheep appeared and acted like a normally-conceived sheep. However she was euthanised in 2003 after developing a series of health problems which raised the question of whether SCNT was an efficient process at all. Most embryos created by SCNT do not implant at all, and most embryos that do implant, do not complete gestation. When embryos do successfully implant, only 1%–4% of those embryos lead to live births. Cloning also brings with it a higher incidence of miscarriage and newborn death, and a higher rate of severe birth defects. One of the major setbacks that researchers found was that cloned animals tend to age faster. When scientists studied Dolly, they found that her cellular condition did not truly reflect that of a normal sheep of her age. Instead, researchers found that Dolly had aged in accordance with the sheep from which she had been cloned. This meant that cloned animals have shorter life expectancies than animals created through normal reproduction.

3 ARGUMENTS FOR AND AGAINST HUMAN CLONING

There is no doubt that cloning has some merit. The issue has been approached by almost equal support and disdain.[5] As will be discussed further, cloning is allowed to some extent in South Africa, and some of society's viewpoints are supported by the South African Constitution.[6] These far-ranging views are based on varying underlying ethical values such as:

(a) the moral worth of a human embryo;

(b) conceptions of human dignity and personhood;

(c) the importance of human identity;

(d) the imperative to heal the sick;

(e) the right to reproductive autonomy; and

(f) the proper role of government in issues that affect society.

The arguments for and against reproductive cloning, as well as research and therapeutic cloning, are discussed below.

3 1 Arguments to prohibit reproductive cloning

3 1 1 It leads to the destruction of human embryos

Animal experience with SCNT demonstrates that the process is very inefficient. Is the loss of many embryos in order to achieve a single birth justified? Does this loss amount to human experimentation?[7] There is also a concern over the abnormalities that have been seen in animal cloning. Westhusin[8] argues that

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5 Harris "'Goodbye Dolly' The ethics of human cloning" 1997 *Journal of Medical Ethics* 353.

6 The Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

7 Harris "Clones, Genes and Human Rights" in Burley (ed) *The Genetic Revolution and Human Rights* (1999) 63.

8 Westhusin "Written statement presented to the US House of Representatives on Energy and Commerce, Subcommittee on Oversight and Investigations" 1.

based on observations and evidence from research on mice, cloning as a form of assisted reproduction at present is both risky and extremely irresponsible. This argument is also important in the religious context, where some religions regard human beings as human even at the embryonic stage. Even if an embryo is not regarded as a person or even a human being at the embryonic stage, its potential as a human life has some moral worth.

3 1 2 Cloning upsets the natural order

Some religions argue that cloning does not meet divine standards for procreation. In the biblical context, for example, children are "begotten" and not made. There is also great interference with the natural order, because in the cloning process the genetic contribution of only one individual (and not two) is needed. This argument also predicts that cloning will lead to a change in human reproduction, where human beings are simply manufactured, and life is dehumanised as a result.[9]

3 1 3 Violation of human dignity

Advocates of this argument see cloning as undermining human dignity in that it treats human beings as commodities that can be manufactured. The intrinsic value of a person is also not respected, because a cloned individual will always have been created with a specific genetic makeup for a reason, and not for their value as a person. Proponents of this argument ask us to look at the manner in which we value ourselves as human beings before resorting to a process like cloning.[10]

Human dignity is one of the fundamental rights protected by the South African Constitution. Section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected. The question that then arises is "whose right to dignity is being violated?" A response to this question could well be that cloning violates the clone's right to human dignity, once that clone has been born alive and is a legal entity that is capable of acquiring rights. Human dignity is owed to every individual by the mere fact that he or she is a "member of the human family". This intrinsic worthiness is widely recognised in international law as the source of all human rights. In this respect, both the national Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966 affirm that human rights "derive from the inherent dignity of the human person".

3 1 4 The risk to human health

Cloning poses a great risk to human health, by reason of the high mortality rates and abnormalities that have been seen from animal research. The inefficiency of the process itself predicts that a large number of egg cells would be required to perform the process. This would cause a demand for human egg cells and could very well lead to the exploitation of women to meet this requirement. A further ethical concern is that human cloning would subject a person (the cloned embryo) who is unable to consent to the risks involved in the process.

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9 Harris *Clones, Genes and Immortality* (1998) 209.

10 Edwards and Beard "How identical would cloned children be? An understanding essential to the ethical debate" 1998 *Human Reproductive Update* 805.

This argument can be viewed against s 12(2)(c) of the Constitution which states that everyone has the right not to be subjected to medical or scientific experiments without their informed consent. An embryo or unborn child is not a legal entity in its own right and it has no rights and will incur no duties until it has been born alive. Once that child has been born, it acquires all the rights which the Bill of Rights seeks to protect. If a child has been born by means of the cloning process and displays a birth defect caused by the risks associated with the process, it should be entirely arguable that s 12(2)(c) has been violated.

A further concern is the exploitation of women through the illegal sale of ova through the "black market". The sale of any human tissue is strictly prohibited. However, it is envisioned that the demand for ova might be so extensive that it would result in the buying and selling of ova. It is submitted that it would be the poverty-stricken and disadvantaged who are most likely to be exploited. In South Africa, s 60(4) of the National Health Act[11] makes it an offence for any person to receive any financial or other reward for the donation of tissue, gametes, blood or blood products. In terms of s 28 of the Human Tissues Act of 1998, payment in respect of the import, acquisition or supply of tissue, blood, blood products or gametes is prohibited.

3 1 5 The adverse effect on the life that is created

Cloning might have a "typecasting" effect on the clone itself. The fact that a clone is genetically identical to its parent, might place a burden of expectation on that clone and lead further to the clone not developing an individual identity due to the fact that its life has already been "lived" by another – its parent. As one academic stated:

> "[d]uplicating yourself is sterile, self-absorbed and ultimately destructive. Moreover, creating a clone in your own image is to curse your child by condemning it to be only an echo".[12]

The principle set out in the Universal Declaration on the Human Genome and Human Rights (1997) that "everyone has a right to be respected for their dignity and for their rights regardless of their genetic characteristics and that dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity" must be observed.[13]

3 1 6 Modification of the parent-child relationship

Parents exert authority over their children. SCNT would offer parents control over their child's genome, a power which they never had before. There is also concern over the fact that a person would be cloned for a specific reason and that parents might fail or even refuse a clone who fails to meet those reasons and expectations.[14]

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11 Act 61 of 2003.

12 Annas "Human Cloning: A Choice or an Echo?" 1998 *U Dayton L Rev* 247.

13 Health Professions Council of South Africa *Guidelines for Good Practice in the Health Care Profession* (2007) http://www.hpcsa.co.za (accessed 16-03-2008).

14 It must be noted that the cloning process only results in an organism that is genetically identical to the parent organism. Cloning cannot result in an organism that is emotionally, intellectually and characteristically identical to the parent organism. The concern with this argument lies in the fact that should cloning become a readily available avenue to parents, parents may choose to clone themselves to produce children for the wrong reasons, for

continued on next page

3 1 7 Discrimination against clones

Would cloned individuals have the same rights, freedoms and protection as all human beings do? The issue has not been addressed in our law. However in the United States, the House of Delegates created a presumption that a live birth resulting from reproductive cloning is a human being and such human being is a person, legally separate and distinct from its biological progenitor, with the rights accorded to any other live human being born under existing law.[15] The fact that a clone has been created for the benefit of others[16] rather than for its worth as a human being, introduces the possibility of domination and control of clones.

It is not anticipated that this would be an issue in South Africa. In terms of the National Health Act, the cloning process can only be utilised for research and therapeutic purposes. However, it is submitted that if reproductive cloning was to be permitted in South Africa at some stage in the future, cloned individuals would be treated in the same manner as individuals created by assisted methods of reproduction.[17] However, one important distinction that we can draw between a cloned individual and an individual created using any other method of assisted reproduction, is that a cloned individual does not have a distinct genetic identity, whereas the other does. The right to a genetic identity as well as protection against discrimination based on genetic identity does not feature in the South African Constitution, and perhaps these are issues that would have to be addressed.

Westhusin[18] raises an interesting point. He points out that cloning can be seen as a means of elaborate assisted reproduction. However, it is the risks involved in the process set cloning apart from other assisted methods.[19]

3 1 8 The decline in human diversity

Cloning reduces the genetic diversity that occurs through sexual reproduction. Although clones would be created out of a desire to duplicate a genetic makeup, it is impossible to predict which genetic makeup would offer advantages. Human diversity is something to be celebrated,[20] and South African law recognises that

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instance, creating a clone in their own image. Although genetically identical to the parent, the clone cannot be expected to display the same intellect, feeling, emotion and character of the parent. A misunderstanding of this aspect of cloning could have dire effects for the clone who could be ostracised for not living up to its parent's standards and expectations.

15 American Bar Association "House of Delegates Resolution on Cloning" 09-08-2004 – 10-08-2004.

16 The reason for cloning a human being can be for research, therapeutic or reproductive purposes.

17 In terms of s 9(3) of the Constitution, discrimination against an individual on the ground of birth is prohibited. Individuals created using assisted methods of reproduction such as in-vitro fertilisation and surrogacy are afforded the same rights in the Constitution as individuals created out of conventional means. It is submitted that the procedure utilised in reproductive cloning can be seen as another form of assisted reproduction, and therefore cloned individuals would also have the same rights as those individuals created using other methods of assisted reproduction.

18 Westhusin "Written statement presented to the US House of Representatives on Energy and Commerce, Subcommittee on Oversight and Investigations".

19 According to existing research, more than 90% of pregnancies end in abortions, the health of the surrogate mother is put at risk, and a significant portion of the offspring that are born are developmentally abnormal and most die.

20 Preamble to the South African Constitution.

diversity as a unifying factor among its entire people. Although the Constitution is not specifically referring to genetic diversity, it is submitted that the term diversity is all-embracing and would therefore refer to diversity in all its forms, be it racial or genetic.

3 2 Arguments to permit reproductive cloning

3 2 1 Cloning would allow couples who cannot have children to have children that are genetically related to themselves

Cloning would allow same-sex couples the opportunity to have a child that is genetically related to one of them. If one half of a couple displays genetic mutations or a hereditary condition that they do not desire to pass onto the next generation, cloning would allow the couple to produce a child in which that condition or mutation can never occur.[21] In the same vein, cloning would allow single parents to have children without the introduction of another party.[22]

3 2 2 Cloning should be permitted as part of reproductive freedom

This argument states that people should have the right to reproduce as they choose. It also responds to the argument that cloning deprives the cloned individual of the right to an identity as proponents believe that it is only experience that will create a personality, and a clone is only identical to its parent in genetics, and not emotion, intellect or personality.[23] Placed in a South African context, this argument is supported by the Constitution which provides that –

> "Everyone has the right to bodily and psychological integrity, which includes the right to make decisions regarding reproduction…"[24]

Against the background of this provision, every person has the right to choose the manner in which they choose to reproduce; cloning should be an option available to individuals who want to exercise it.

3 3 Arguments to prohibit research and therapeutic cloning

3 3 1 The process requires the destruction of human embryos

A clone that is created for therapeutic or research purposes has been created for its stem cells and nothing more. It therefore has no prospect of normal development and, whereas a clone produced for reproductive reasons will develop into a human being, one that is created for research or therapy is created only to be doomed to die. This encroaches on the philosophical argument that it is immoral to use a person[25] as a means to another end, as a person is an end in itself.[26] Creating human embryos and systematically destroying them amounts to a massacre of life and the use of human life as "spare parts".

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21 This can be achieved by cloning the partner that does not display the genetic mutation or condition.

22 This can be achieved by simply cloning that person.

23 Libertarian Party "Don't play God with human cloning, Libertarian Party warns politicians" 25-02-1997 http://www.lp.org/press/releasetool.php (accessed 11-11-2006).

24 Section 12(2)(a).

25 This argument can be extended to embryos, provided that one sees embryos as potential human beings and with moral worth.

26 Kant *Fundamental Principles of the Metaphysics of Morals in Great Books of the Western World Volume 42* (1952) 275.

3 3 2 The exploitation of women and harm to their health

This argument has been discussed in part 3 1 4 above. Research and therapeutic cloning also introduces an additional ethical issue relating to the use of sex cells for purposes that have nothing to do with reproduction.

3 3 3 There are alternative therapies and options for research that would not require the destruction of embryos

If research is to be conducted on stem cells, advocates of this arguments ask that the stem cells be sourced from sources other that an embryo. Stems cells can be sourced from adult human beings, as well as from the umbilical cord. Unlike an embryo, the extraction of stem cells from both these sources does not result in the harm or death of the human being from which the cells are obtained. While saving lives and healing the sick are fundamentally important, these cannot be pursued at the expense of weak, early and vulnerable forms of human life. Therefore, stem cells should be sourced without destroying a human embryo if possible.

3 3 4 Therapeutic and research cloning would inevitably lead to reproductive cloning

Once cloning is conducted on embryos for therapeutic and research purposes, those who seek to clone human children would be able to do so. There have been periodic allegations that this line has already been crossed. However, due to lack of evidence none of these allegations have been confirmed.

3 4 Arguments to permit research and therapeutic cloning

3 4 1 It would provide an opportunity to research human diseases

Scientists propose that a study of human embryonic stem cells may help them learn how diseases develop, and that cloning will help them develop and understanding of diseases by studying the stem cells from patients that have those diseases. This could present an opportunity to develop therapies for these conditions and maybe even prevent them from occurring in the future.

3 4 2 It could provide genetically matched tissue for transplantation

Persons seeking organ and tissue implants would no longer need to search for a viable donor. The cloning process would provide them with genetically matched tissue that their body will not reject.[27]

3 4 3 Cloning should be permitted as part of the freedom of scientific inquiry

This argument proposes that cloning is just the next step in scientific advancement, and a ban on cloning prevents that advancement. This has a negative impact on the scientific enterprise.[28] Dhai *et al*[29] suggest the effect should be given to the right to freedom of scientific research and this right can only be limited if such limitation is found to be reasonable and justifiable in an open and democratic society.[30]

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27 Bryan "A spare or an individual? Cloning and the implications of monozygotic twinning" 1998 *Human Reproductive Update* 813.

28 Section 16(1)(d) of the Constitution recognises the right to freedom of scientific research.

29 Dhai, Moodley, McQuoid-Mason and Rodeck "Ethical and legal controversies in cloning for biomedical research – a South African perspective" 2004 *SAMJ* 906.

30 Dhai, Moodley, McQuoid-Mason and Rodeck 2004 *SAMJ* 909.

4 COMPARATIVE LEGISLATION

4 1 The United Kingdom

The United Kingdom has dedicated legislation to cloning. The Human Reproductive Cloning Act of 2001 makes it an offence to place a human embryo that has been created otherwise than by fertilisation in the body of a woman.[31] Persons found guilty of this offence are liable to a fine, imprisonment for a term not exceeding ten years or both.[32]

The Human Fertilisation and Embryology Act of 1990 which governs the use of embryos and gametes, also contains prohibitions on the use of human embryos. Section 3 of the Act prohibits the issuing of licenses for specific procedures involving human embryos. Section 3(3)(d) prohibits the granting of a license for a procedure involving the replacing a nucleus of a cell of an embryo with a nucleus taken from a cell of any person, embryo or subsequent development of an embryo. It is submitted that this section implicitly prohibits cloning procedures.

The law regulating assisted reproductive procedures is currently under reform. The Human Tissues and Embryos (Draft) Bill which was submitted to Parliament in May 2007, aims to regulate new procedures involving gametes and embryos that are now possible due to the advancements in medical technology more directly. Part 2 of Bill proposes extensive changes to the 1990 legislation. One of the proposed amendments is the meaning of "embryo" and "gamete" by the provision which states that:

> "An embryo will continue to be defined under the new section 1(1) in broad terms as a 'live human embryo' but the definition no longer assumes that an embryo can only be created by fertilisation. This brings the term 'embryo' up to date with technologies that have been developed since the time of enactment of the 1990 Act, such as cell nuclear replacement, sometimes referred to as therapeutic cloning."[33]

The effect if this clause is that once promulgated, the Human Tissues and Embryos Act will address cloning in a direct way. Clause 16 of the Bill which proposes to amend s 3 of the 1990 Act governing prohibitions in connection with human embryos provides that:

> "Section 3(2)(a) of the 1990 Act is also amended to prevent the placing in a woman of any human embryo other than a "permitted embryo". A permitted embryo is defined as an embryo formed by the fertilisation of a permitted egg with a permitted sperm. Permitted eggs are defined by new section 3ZA as eggs produced or extracted from the ovaries of a woman and permitted sperm as sperm produced or extracted from the testes of a man. These eggs and sperm must not have been subject to any nuclear or mitochondrial alterations and similarly a permitted embryo must not be subject to such alterations. This clause therefore ensures that other forms of embryos or gametes including artificial gametes, genetically modified gametes, genetically modified embryos and embryos created by cloning cannot be placed in a woman."

Whereas s 3 of the 1990 Act implicitly prohibited cloning, clause 16 of the Bill expressly prohibits it. It is clear that in the United Kingdom, cloning is regulated in an articulate way and the proposed reforms aim to clarify and amend the current legislation in order to incorporate new medical advancements.

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31 Section 2(1).
32 Section 1(2).
33 Clause 14, Human Tissues and Embryos (Draft) Bill, 2007.

4 2 Australia

Australian legislation passed in 2002, banned human cloning and the creation of embryos for scientific purposes. The Prohibition of Human Cloning for Reproduction Act 2002[34] addresses the use of human embryos and prohibits certain practices.[35] Section 9 of the Act creates the offence of placing a human embryo clone in either a human or animal body[36] and imposes a maximum penalty of 15 years imprisonment for such conduct. Section 10 imposes the same penalty for a person who intentionally imports or exports a human clone into or from Australia. Section 20 of the Act prohibits the importing,[37] exporting[38] or placing a prohibited embryo in the body of a woman.[39] In this section, a "prohibited embryo" includes:

(a) a human embryo created by a process other than the fertilisation of a human egg by human sperm; or

(b) a human embryo created outside the body of a woman, unless the intention of the person who created the embryo was to attempt to achieve pregnancy in a particular woman; or

(c) a human embryo that contains genetic material provided by more than two persons; or

(d) a human embryo that has been developing outside the body of a woman for more than 14 days excluding any period when development was suspended; or

(e) a human embryo created using precursor cells taken from a human embryo or a human fetus; or

(f) a human embryo that contains a human cell (within the meaning of section 15) whose genome has been altered in such a way that the alteration is heritable by human descendants of the human whose cell was altered; or

(g) a human embryo that was removed from the body of a woman by a person intending to collect a viable human embryo; or

(h) a chimeric embryo or a hybrid embryo.

4 3 South Africa

South African legislation addresses cloning in the National Health Act of 2003.[40] The Act strictly prohibits the manipulation of genetic material of human gametes, zygotes or embryos,[41] as well as any activities for the purpose of reproductive cloning of a human being.[42] While the Act effectively prohibits reproductive

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34 Sections 1 and 2 of the Act came into effect on 19-12-2002 and ss 3 to 26 and schedule 1 came into effect on 16-01-2003.

35 Part 2 of the Act lists practices in connection with human embryos that are prohibited.

36 Section 14 of the Act prohibits the development of a human embryo (including a human embryo clone) outside of the body of a woman for more than 14 days. A maximum penalty of 15 years imprisonment will be imposed for such offence.

37 Section 20(1).

38 Section 20(2).

39 Section 20(3).

40 Section 57 of the Act specifically deals with the issue of the cloning of human beings.

41 Section 57(1)(a).

42 Section 57(1)(b).

cloning of human beings, it does allow therapeutic cloning.[43] This provision is however curtailed, as it provides that therapeutic cloning may only be conducted using adult or umbilical cord stem cells. There is therefore an implicit prohibition of the use of embryonic stem cells. However, the Act allows the Minister, on application, to permit such research provided that the stem cells are not more than fourteen days old, the research is documented for scientific purposes, and the consent of the donor of such stem cells is obtained.[44] Section 57(5) of the Act creates an offence for contravention of s 57, and creates a penalty for offenders.[45]

Chapter 8 of the National Health Act and its regulations will replace the Human Tissues Act of 1983. Until Chapter 8 is brought into force the existing provisions of the Human Tissues Act continues to apply. Unfortunately this existing legislation is not adequate in the face of existing medical technology as it fails to address the cloning procedure completely. Section 39A of the Human Tissues Act states:

> "Notwithstanding anything to the contrary contained in this Act or any other law, no provision of this Act shall be so construed so as to permit genetic manipulation outside the human body of gametes or zygotes."

The question is whether s 39A prohibits human reproductive cloning. Both Jordaan[46] and Lupton[47] submit that it does not. Lupton argues that nuclear substitution which is the integral part of the cloning procedure does not involve the use of gametes and zygotes and is therefore not within the scope of s 39A. Jordaan takes the view that it s 39A is inapplicable for vagueness, as it refers to "genetic manipulation" which is not defined in the Act.

It was inevitable that further regulations would be necessary to supplement the existing provisions of the National Health Act. One area of concern that needed to be addressed was the discretion of the Minister to allow cloning for research purposes. According to s 11 of ch 1 of the Regulations Regarding the use of Human DNA, RNA, Cultured Cells, Stem Cells, Blastomeres, Polar Bodies, Embryos, Embryonic Tissue and Small Tissue Biopsies for Diagnostic Testing, Health Research and Therapeutics,[48] any competent person wishing to utilise adult, foetal and umbilical cord stem cells for purposes of therapeutic cloning must apply for the approval of the Minister, whose consent must be supported by a recommendation of the National Human Genetics and Stem Cell Research and Ethics Subcommittee.[49]

5 CONCLUSION

It is submitted that the cloning process has not been adequately legislated in South African law. It is evident that a "piecemeal" approach has been adopted in

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43 Section 57(2).
44 Section 57(4).
45 Persons guilty of an offence are liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and imprisonment.
46 Jordaan "Human reproductive cloning: a policy framework for South Africa" 2002 *SALJ* 303.
47 Lupton "Artificial reproduction and the family of the future" 1998 *Medicine and the Law* 111.
48 Regulation 7, *GG* 29526 05-01-2007.
49 A subcommittee of the National Health Research Ethics Council.

terms of which the issues that have not been adequately dealt with in the Act are rather addressed "piecemeal" in the regulations as issues arise. Section 57 of the Act should be more comprehensive and cater not only for the issues that the cloning process will create, but also the issues that could conceivably arise. As Hippocrates wrote, "as to disease, make a habit of two things – to help, or at least do no harm".[50]

It is submitted that as a more direct approach, as adopted by other Commonwealth countries, is necessary in South Africa. Legislation dedicated to specific new medical technologies such as assisted reproduction and cloning should be enacted.

Jordaan proposes that a new legislative framework be adopted in South Africa.[51] Such a framework should include:

(1) A moratorium, subject to a sunset clause of at least three to five years, being placed on human reproductive cloning.[52]

(2) Efforts to educate the public regarding the facts about human reproductive cloning, therefore encouraging public opinion on the issue.[53]

(3) If the issue of safety is resolved, cloning must be permitted for reproductive purposes[54] provided that –

   (a) a very limited number of individuals are created using a specific genome;

   (b) the donor of genetic material must consent to the use of their genetic material; and

   (c) the donation of genetic material must be kept non-commercial.[55]

The benefits of such an approach is that cloning would have a distinct regulatory framework which would be much better suited than the implicit "reading-in" of the regulation of cloning procedures into the National Health Act and its regulations.

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50 Hippocrates "Epidemics, Book I, Ch 2" in *Encyclopedia Britannica (Britannica)* vol V13 Online Encyclopedia 519 (accessed 20-10-2008).

51 Jordaan 2002 *SALJ* 303.

52 As suggested by the Clinton report, national bio-ethics Advisory Commission *Cloning Human Beings Executive Summary* (1997).

53 Jordaan 2002 *SALJ* 304.

54 *Ibid*.

55 *Ibid*.

Towards a Theoretical Framework of Fiduciary Principles: *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 4 All SA 497 (SCA)

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1 INTRODUCTION

Certain relationships have become clearly established as fiduciary relationships. Well-known examples include those relationships between agent and principal, employee and employer, directors and their company, trustee and trust beneficiary and the relationship between partners. It is also clear that the list of "established" fiduciary relationships is not a closed one.[1] It remains open to the courts to recognise other relationships as having a fiduciary nature and as giving rise to fiduciary duties in appropriate circumstances. What is not at all clear, however, is the theoretical basis on which they will and should do so. There is no generally accepted theory, and very few clear principles regarding the meaning of a "fiduciary relationship" or how such a relationship should be identified in cases outside the established categories. This uncertainty is not due to lack of extensive academic attention and debate in relation to these matters. Rather, it is the result of a tendency by the courts to avoid direct engagement in issues of theory, and the tendency to recognise relationships as fiduciary with insufficient articulation of the principles underlying their decisions. As such, a review of the case law reveals little more than repeated references to broad notions of trust, power, vulnerability and their abuse. When the courts of equity first applied the fiduciary principle, as Waters[2] points out, they never felt the need to spell out the criteria for fiduciary relationships in any great detail and things have not been much different since then. The consequence is that to a large extent "fiduciary" remains an ill-defined and misleading term; a vague elusive "concept in search of a principle".[3]

It may well be impossible to formulate a unified theory capable of explaining and governing the wide and diverse range of fiduciary relationships. There are certainly some fundamental conceptual difficulties that would need to be overcome. For example, it is not clear what, if any, distinguishing features the relationships within the established list have in common with each other, or whether it is necessary for there to be any relationship between the established

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1 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA).
2 Waters "Bankers' fiduciary obligations and unconscionable transactions" 1986 *Canadian Bar Review* 37 55.
3 Mason "Themes and Prospects" in Finn (ed) *Essays in Equity* (1985) 246.

fiduciary relationships and the recognition of new ones. There is also a strong argument that any attempt to formulate a unified theory is inadvisable on policy grounds and that the courts have been correct in judiciously guarding the fiduciary concept's flexibility from theoretical constraints.[4] Despite these compelling arguments, some explicit guidance, even if general, regarding the principles and criteria relevant to the recognition of fiduciary relations is desirable. The need for clearer fiduciary principles is furthermore increasing. The twentieth century witnessed "an unprecedented expansion and development of fiduciary law"[5] and there has been significant growth in "the extent to which fiduciary relationships are being asserted and sometimes established in commercial relations which are outside the traditional fiduciary categories".[6]

Various competing and often overlapping theories as to the essential features of fiduciary relationships and the criteria by which they are to be recognised have been suggested. Some of these theories evident from our case law are the reliance theory, the contractual or voluntary assumption theory, the vulnerability or unequal relationship theory and the property theory. According to the reliance theory, a fiduciary relationship exists when one person places trust, confidence or reliance in another. The contractual or voluntary assumption theory builds on the reliance theory by adding a requirement that the trusted person must have expressly or impliedly voluntarily agreed to accept that trust, confidence or reliance and to act in the trusting person's interests. The vulnerability or unequal relationship theory identifies a relationship as fiduciary where one of the parties has some power or dominion over the other. The latter occupies a position of relative vulnerability and there is a possibility of that vulnerability being exploited or abused. In terms of the property theory, it is one person's control over property or any other advantage that is beneficially owned by another that gives rise to a fiduciary relationship.

The decisions of the court *a quo* and the Supreme Court of Appeal in *Volvo (Southern Africa) (Pty) Ltd v Yssel* are considered against this background.

2 VOLVO (SOUTHERN AFRICA) (PTY) LTD V YSSEL

2 1 The facts

The facts of the case were relatively simple. Volvo required a manager for its information technology (hereafter "IT") division. In 2000, a personnel placement agent introduced Volvo to Yssel, whom Volvo agreed to appoint to the position. For tax-related and other reasons, Yssel did not want to enter into a contract of employment with Volvo but wished instead to be employed by a labour broker, Highveld Personnel (Pty) Ltd (hereafter "Highveld"), which would then assign his services to Volvo. Volvo agreed to that arrangement which was then implemented and renewed through a series of written contracts which provided for Volvo to pay Highveld a monthly amount for Yssel's services and for Highveld in turn to remunerate Yssel. Volvo had no direct dealings with Highveld and entered into all these contractual arrangements

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4 *Hospital Products Ltd v United States Surgical Corporation* 1984 55 ALR 417.
5 Frankel "Fiduciary law" 1983 *California LR* 795 796.
6 Austin "The corporate fiduciary: *Standard Investments Ltd v Canadian Bank of Commerce*" 1986–1987 *Canadian Business LJ* 96 100.

through Yssel. Material terms of the contracts included a description of the services to be provided by Yssel to Volvo (which contained no express reference to liaising with labour brokers for the purpose of negotiating or concluding contracts for the provision of labour to Volvo) and a number of provisions confirming that Yssel was not an employee of Volvo.

This arrangement remained in place for a number of years. By 2004 there were six other people working in the IT division who were similarly employed by labour brokers that had assigned their services to Volvo. In mid-2004 Yssel approached Volvo's human resources manager and informed her that some of the personnel in the IT division were unhappy with their current labour brokers and that he could arrange for them to transfer to Highveld at no extra cost to Volvo. He made the same suggestion to the IT personnel, pointing out that their remuneration could be structured more favourably if they moved to Highveld. Both Volvo and the individuals agreed to the proposal and Yssel made the necessary arrangements. These were subsequently recorded in a written agreement between Volvo and Highveld which provided for Highveld to supply the services of the personnel to Volvo in return for a monthly fee. Over a period of approximately nine months Yssel accompanied each of the IT personnel to Highveld's offices where they signed a "confirmation of assignment". They all gave evidence that they were given to understand that from the amounts that Volvo paid for their services, Highveld would retain a fixed charge of about R425 per month plus an administration fee of 3% of their earnings. None of them was aware of the amount that Highveld was charging Volvo for their services.

Volvo again had no direct contact with Highveld in making these arrangements and acted at all times through Yssel as a "facilitator" or "intermediary". Once the arrangements were in place, Highveld sent the monthly invoices to Yssel who presented them to Volvo for payment. Unbeknownst to both Volvo and the personnel concerned, Yssel had agreed with Highveld that Highveld would pay him a "commission" for arranging for the personnel to transfer to Highveld and that this commission would not be mentioned to either Volvo or the personnel. The amounts involved were substantial. In most cases Yssel received about 40% of the monies that Volvo paid to Highveld for the services of the personnel. Investigations by an internal auditor at Volvo revealed that from August 2004 to January 2006 Volvo had paid R1 976 900 to Highveld for the services of the personnel (excluding that of Yssel). Of this, the personnel received R1 087 650, Highveld deducted its own commission of R114 143 and the balance of R775 107 had been paid to Yssel.

Once the payments to Yssel were discovered, Volvo sued Yssel in the high court for payment of the R775 107 on the basis that it was a secret profit that Yssel had earned in breach of a fiduciary duty that he owed Volvo to act in its interests and not in his own. Yssel argued that, because he was not an employee of Volvo and had no other contractual relationship with Volvo, he did not stand in a fiduciary relationship with Volvo. As such he was of the view that he did not owe Volvo a fiduciary duty.

The primary issues were thus whether Yssel did owe any fiduciary duty to Volvo to act only in its interests and, if so, whether he had earned the undisclosed commission payments from Highveld in breach of that duty.

2 2 The judgment of the court *a quo*

The court *a quo's* judgment contains little indication of the specific considerations that the court considered in determining whether the relationship was a fiduciary one, or why those criteria were relevant.

The court commenced its reasoning by rejecting the proposition that some form of contractual relationship is necessary for a fiduciary relationship to exist. After a brief reference to the "helpful but not decisive" considerations of power, discretion and vulnerability, it decided that, given the nature and scope of Yssel's responsibilities as manager of Volvo's IT department, and the relatively high level at which he rendered his services, he did have a relationship of trust with Volvo. Unfortunately there was no explanation as to what about those factors made the relationship a fiduciary one.

Once a fiduciary relationship had been identified, the next issue was to determine the nature and extent of the fiduciary duties that it imposed on Yssel. Here the court held that Yssel's fiduciary duties were limited to the specific functions and duties that had been assigned to him as manager of the IT department. Since those functions and duties did not extend to the recruitment, employment or acquisition of staff neither did his fiduciary duties. He was therefore under no duty to act in Volvo's interests when he engaged in those activities.

On this basis the court *a quo* rejected Volvo's claim and Volvo took the matter on appeal to the Supreme Court of Appeal.

2 3 The judgment of the Supreme Court of Appeal

At the outset, the Supreme Court of Appeal outlined certain general principles. It held that the question of whether a relationship outside of the recognised categories should be regarded as a fiduciary one will depend on the facts. There are a number of features and characteristics that may impart fiduciary qualities to a relationship. These include the discretion that one party may have in relation to the affairs of another, the influence that he or she is capable of asserting, the vulnerability of one person in relation to another, and the reliance and trust that is placed by one person in the other. All of these criteria are, however, merely factors that may be relevant in particular cases but they are neither essential nor decisive. The suggestion that some form of mutual understanding in terms whereof one party agrees to relinquish his or her own interests and act solely on behalf of the other, as a prerequisite for a fiduciary relationship is too restrictive in the view of the court. Similarly, contractual duties owed by one party to the other may go a long way towards defining whether a relationship is one of trust, but are not necessary for such a relationship. Quoting from *Hodgkinson v Simms*,[7] the court identified the essential enquiry as being whether there is a state of affairs "which impels or induces one party 'to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger'" having regard to all of the facts. This relaxation or reliance must however be "justified in the circumstances".

Turning to the facts, the court held that it was the nature of Yssel's position, rather than any contractual relationship with Volvo that defined what Volvo

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7 *Hodgkinson v Simms* 1995 117 DLR (3d) 371.

could expect of him. He had not been brought to Volvo "so as to provide him with an opportunity to hawk his own wares" but in the interests of Volvo. That his functions did not include recruiting, employing or acquiring staff was, in the view of the court, immaterial. What was material was that he in fact engaged in those activities and, when doing so, he did not act as a stranger conducting his own affairs but as an incident of his function as manager of the division. There was no doubt that it was because he was the manager of the division that Volvo was induced to "relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger". Yssel was also well aware that Volvo's human resources manager had made no independent enquiries regarding the arrangement with Highveld and that the manager was relying solely on what Yssel had told her. The fact that he found it necessary to keep his commission secret made it abundantly clear that he was aware that she believed that he was arranging matters as part of his ordinary managerial duties and not for his own account. In short, he knew that she did not consider herself to be dealing at arm's length with an independent party but with a manager of a Volvo division. Indeed, it was only because Yssel was the IT manager that the arrangement came about at all.

The court accordingly concluded that Volvo had justifiably relied on Yssel to act in its interests. This placed Yssel in a position of trust and under a duty not to allow his own interests to prevail over those of Volvo. He had breached that duty and was thus liable to disgorge his secret commissions plus interest.

3 COMMENTARY

The theoretical starting point of the Supreme Court of Appeal's judgment was the reliance theory. This is not surprising. It is the theory that has featured most prominently in case law ever since Innes CJ declared that the test for a fiduciary relationship "rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests … at the other's expense".[8] Despite its popularity with the courts, there are some obvious difficulties with the reliance theory, at least in its most basic form. The first is that it focuses exclusively on the conduct of the beneficiary without due regard to that of the proposed fiduciary. The second is that its underlying criteria of trust, confidence and reliance are far too broad and simplistic. We place trust, confidence and reliance in others on a daily basis in a variety of situations but this does not necessarily or automatically lead to fiduciary relationships.[9] It is clear that the reliance theory cannot be accepted without qualification. Something more than bare, unilateral beneficiary-centred trust, confidence or reliance is required. It is in attempting to determine what that might be that the more nuanced difficulties inherent in the theory are revealed. Various refinements have been suggested in order to counterbalance the emphasis on the beneficiary. The simplest of these is the addition of a requirement that the proposed fiduciary must have been aware that the beneficiary was placing trust, confidence or reliance in him or her. This is one of the qualifications that the Supreme Court of Appeal imposed when it referred to the fact that Yssel knew that Volvo's human resources manager had

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8 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 179.

9 Gautreau "Demystifying the fiduciary mystique" 1989 *Canadian Bar Review* 1 9.

made no independent enquiries relating to the arrangement with Highveld and was relying solely on what Yssel told her.

Others have gone slightly further by requiring that the proposed fiduciary must not only have been aware of the trust, confidence or reliance but must also have agreed to undertake it. This agreement may be express or it may be implied from the fiduciary's knowledge of the other's trust, confidence or reliance and failure to object to it. This proposition of deemed acceptance by silence is of course out of line with our law's general approach of requiring positive or active consent for the acquisition of obligations. In any event, once the fiduciary's assent is required, the reliance theory merges into the contractual or voluntary assumption theory.

It is interesting to note that requirements of mutual understanding and assumption of trust have recently found favour in other jurisdictions. The English courts, for example, have recognised:

> "growing judicial support for the view that a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relation of trust and confidence that … gives rise to a legitimate expectation … that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal".[10]

However, in *Volvo (Southern Africa) (Pty) Ltd v Yssel* it was held that this is going too far and that to suggest that a mutual understanding between the parties is a prerequisite for a fiduciary relationship is to "approach the matter too restrictively".

There have also been attempts to qualify the trust, confidence or reliance element by requiring a pre-existing relationship between the parties. Another approach is to turn the focus to the risk that the beneficiary's trust, confidence or reliance may be exploited or abused. Such abuse or exploitation would generally happen where the beneficiary becomes more vulnerable to attack or exploitation by lowering their guard and the proposed fiduciary is aware that this has occurred because of the beneficiary's trust, confidence or reliance in them. The basis for the imposition of fiduciary consequences is then not the actual trust, confidence or reliance, but rather its abuse. Although the Supreme Court of Appeal did not articulate this in much detail, it was one of the main factors that led it to classify the relationship between Yssel and Volvo as a fiduciary one. This is reflected in the references to the fact that Yssel had a pre-existing relationship with Volvo, that Volvo did not consider itself to be dealing with an independent party at arm's length and that Volvo was accordingly induced to relax the care and vigilance that it would ordinarily have exercised in dealing with a stranger. This introduces aspects of the vulnerability or unequal relationship theory. The Supreme Court of Appeal however also added a further qualification, namely that the beneficiary's trust or reliance must have been "justified in the circumstances". Unfortunately it did not explain what the test for "justified" reliance is. It will presumably be based on some objective standard of reasonableness, but it is not clear from whose perspective that reasonableness should be assessed.

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10 *Ultraframe (UK) Ltd v Fielding* 2005 EWHC 1638 (Ch) 1285 quoting from *Snell's Equity* (31st ed) 7–07. See also *Bristol & West Building Society v Mothew* 1998 Ch 1 and *Arklow Investments Ltd v Maclean* 2000 1 WLR 594.

Although these qualifications address some of the criticisms of the reliance theory, there are some remaining difficulties. Even if one construes the fiduciary obligation as a duty not to abuse or exploit the beneficiary's trust, confidence or reliance it still does not fully explain its nature or the remedies that flow from its breach. The fiduciary's duty is not limited to a simple negative duty to refrain from abusing the beneficiary's trust, confidence or reliance, or from acting contrary to their interests. It goes further by requiring that if and when the fiduciary acts, they must do so in the beneficiary's interests. Shepherd[11] argues that if the fiduciary duty is really a duty not to abuse or exploit the beneficiary's trust or reliance then logically the remedies for its breach should aim to put the beneficiary in the position in which they would have been had there been no breach. These would be remedies of restitution and compensation. Yet the beneficiary also has a claim for disgorgement of any profits made by the fiduciary which "does not necessarily flow from the conceptualisation of the relationship".[12]

These outstanding issues do not however detract from the Supreme Court of Appeal's useful confirmation of a number of principles. The first is that a mutual understanding in terms of which one party agrees to relinquish his or her own interests and act on behalf of the other is not a prerequisite for a fiduciary relationship. The second is that there must be a state of affairs that caused the beneficiary to "relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger". The third is that such relaxation or reliance must have been justified in the circumstances.

These principles need to be considered together with those established in other relatively recent cases. For example, the court in *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*[13] confirmed that a relationship of agency is not necessary for a fiduciary relationship. *Silent Pond Investments CC v Woolworths (Pty) Ltd*[14] is authority for the principle that contracting parties can create a fiduciary relationship by including a provision to that effect in their contract. Another significant case is P*hillips v Fieldstone*[15] where the court referred to the following three characteristics of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be used unilaterally so as to affect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power.

4 CONCLUSION

The judgment of the Supreme Court of Appeal in *Volvo (Southern Africa) (Pty) Ltd v Yssel* is useful for a number of reasons. It expressly confirmed some of the principles that have been implicit but unexplained in previous judgments. It also defined some new requirements for the recognition of a fiduciary relationship on the basis of one party's trust, confidence or reliance in another. This is a significant step in the development of a much-needed framework of clear guiding principles for the recognition of fiduciary relationships outside the established categories.

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11 Shepherd "Towards a unified concept of fiduciary relationships" 1981 *LQR* 51.
12 Shepherd 1981 *LQR* 60.
13 *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 4 All SA 190 (T).
14 *Silent Pond Investments CC v Woolworths (Pty) Ltd* 2007 JOL 2008 (D).
15 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA).