



# The cultural practice of ukuthwala in South Africa

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## **DECLARATION**

I, Bridget Joyce Machaka, Identity Number BN834996 and Student Number 30995140, hereby declare that this dissertation titled '**The cultural practice of *ukuthwala* in South Africa**' is my own original work. The dissertation is hereby humbly submitted to the North-West University (NWU) in partial fulfilment of the requirements for the degree LLM in Comparative Child Law. This dissertation has not been submitted anywhere before.

.....  
**BRIDGET JOYCE MACHAKA**

**Date:** 23 November 2018

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## **ABSTRACT**

### **Title:     **The cultural practice of *ukuthwala* in South Africa****

It has been argued that the practice of *ukuthwala* is one of the forms of child marriage in South Africa. The practice is widely spread, especially in the Eastern Cape among the Xhosa Communities. The practice of *ukuthwala* involves the marriage of young girls below the age 18 years, mostly to older men. That is below the minimum age requirement for marriage as set by the national law as well as international and regional instruments to which South African is a party. This type of marriage is often arranged by the family of the bride and the groom without the bride's consent. The way in which the customary practice of *ukuthwala* is performed has led to constant violation of children's human rights. Some of the rights which have been violated include the right to education, the right to health, the right to the survival and development of the child, and the right to dignity. So the cultural practice of *ukuthwala* has negative effects on the well-being and development of the girl child. Hence it has been arguably regarded as a harmful cultural practice.

International and regional instruments address the need to protect children's rights from harmful cultural practices such as *ukuthwala*, which have negative effects on children. One of the most significant treaties to address the issue of such harmful practices is the *African Charter on the Rights and Welfare of the Child*, which also provides for principle of the consideration of the best interest of the child in all matters affecting the child. South Africa has ratified these treaties and as a member state it has an obligation to comply with the standards set by the instruments. The *Constitution of the Republic of South Africa*, 1996 provides for the protection of the rights of children, and the very same Constitution affords everyone the right to culture. However, the right to culture need not violate any other constitutional rights. There is also a legislative framework provision in the *Children's Act* 38 of 2005, which prohibits child or forced marriage. Despite such provisions, children's rights are

constantly violated through *ukuthwala* in the guise of a constitutional cultural right.

**Key terms:** *Ukuthwala*, child marriage, culture, children's rights, traditional practices.

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## LIST OF ABBREVIATIONS

African Charter	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AIDS	Acquired Immunodeficiency Syndrome
Birkbeck LR	Birkbeck Law Review
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
Harvard LR	Harvard Law Review
HIV	Human Immunodeficiency Virus
HRQ	Human Rights Quarterly
Hum Soc Sci J	Human and Social Science Journal
ICESCR	International Covenant on Economic, Social and Cultural Rights
Interd J Soc Sci	Interdisciplinary Journal of Social Science
Int'l J Hum R	International Journal of Human Rights
Int'l Soc Sci J	International Social Science Journal
J Comp L Afr	Journal of Comparative Law in Africa
J Int'l Afr Ins	Journal of the International African Institute
J Jur Sci	Journal for Juridical Science
J Rel Soc	Journal of the Religion and Society
J Soc Sci	Journal of Social Sciences
Marriage Convention	Convention on Consent to Marriage, the Minimum Age for Marriage and the Registration of Marriage
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriage Act
SA Rev Soc	South African Review of Sociology
SAJ	South African Journal
SALJ	South African Law Journal
SALRC	South African Law Reform Commission

The Protocol	Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa
UDHR	Universal Declaration on Human Rights
UNCHR	United Nations High Commissioner for Refugees
UNFPA	United Nations Population Fund
UNICEF	United Nations International Children's Emergency Fund
US-China LR	US-China Law Review

## CHAPTER 1: INTRODUCTION

### ***1.1 Introduction and problem statement***

Every societal group has specific traditional cultural practices and beliefs, some which are beneficial to the society and others which may be harmful to individuals and the society.<sup>1</sup> Amongst many of the cultural practices in South Africa, this study seeks to specifically examine the practice of *ukuthwala* as a form of child marriage.<sup>2</sup> In this dissertation, as in South African law, a child is any person below the age of 18 years.<sup>3</sup> *Ukuthwala* custom originated from Xhosa culture, so it is predominantly practised among Xhosa-speaking tribes in South Africa.<sup>4</sup> They regard it as a possible preliminary procedure to a customary marriage.<sup>5</sup> Although the custom is practised among Xhosa-speaking tribes, it has been adopted by other ethnic groups such as the Zulus.<sup>6</sup>

Before customary marriages were recognised in South Africa the Cape Colonial Government prohibited the practice of customary marriage among African people.<sup>7</sup> This government was of the view that customary marriages contained an element of *ukuthwala*, which the government believed amounted to the crime of abduction.<sup>8</sup> However, despite the criminalisation, *ukuthwala* was and is still practised in some of the communities in South Africa, in particular Xhosa communities.<sup>9</sup>

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<sup>1</sup> Maluleke 2012 *PELJ* 2.

<sup>2</sup> Child marriage is often referred to as early marriage, and is define as any marriage carried out with a below the age of 18 years mostly before the girl is physically, physiologically. And psychologically ready to shoulder responsibility of marriage and child bearing. Ukuthwala is often practiced on children below the age of 18 years hence it is equated to child marriage in this regard. Discussed in figure 1.3 below.

<sup>3</sup> Section 28(3) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the Constitution).

<sup>4</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 3.

<sup>5</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 3.

<sup>6</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 3.

<sup>7</sup> Koyana and Bekker 2007 *De Jure* 139.

<sup>8</sup> Koyana and Bekker 2007 *De Jure* 139.

<sup>9</sup> Choma 2011 *US-China LR* 874.

*Ukuthwala* has been defined as a form of "abduction" that involves the kidnapping of a young woman by the groom, with the intention of persuading the family of the bride to agree to marriage.<sup>10</sup> Koyana and Bekker described this practice as follows:

The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her home, quite late in the day, towards sunset or at early dusk, and they will forcibly take her to the young man's home. Sometimes, the girl is caught unawares, and at times she is will be aware. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will.<sup>11</sup>

Previously, the African cultural practice of *ukuthwala* was more socially oriented than it is today.<sup>12</sup> Maluleke suggests that the practice of *ukuthwala* was done in accordance with the spirit of *Ubuntu*, which underscores the importance of agreement or consensus.<sup>13</sup> Every African cultural and customary practice were based on *Ubuntu*.<sup>14</sup> The prospective husband had no evil intention, no sexual intercourse or violence took place during *ukuthwala*, and the bride would willingly consent, and the prospective husband would pay *lobola* (the bride price).<sup>15</sup> According to Kate Rice, the payment of *lobola* involves "the transfer of wealth in the form of cows or cash from the groom's family to the bride's parents".<sup>16</sup> This exchange legitimises the marriage and it is rather like a compensation of the bride's family for the loss of their daughter.<sup>17</sup>

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<sup>10</sup> Mashao 2014 *Justice Today* 8.

<sup>11</sup> Koyana and Bekker 2007 *De Jure* 139.

<sup>12</sup> Kugara, Mathidze and Mdhluli 2017 *Hum & Soc Sc J* 9007.

<sup>13</sup> Maluleke 2012 *PELJ* 3.

<sup>14</sup> Maluleke 2012 *PELJ* 4. *Ubuntu* means "I am what I am because of who we all are." One of the quotes by Desmond Tutu says "A person is a person through other persons. None of us comes into the world fully formed. We would not know how to think, or walk, or speak, or behave as human beings unless we learned it from other human beings. We need other human beings in order to be human." Desmond Tutu Peace Foundation 2004 <http://www.tutufoundationusa.org/>.

<sup>15</sup> Van der Watt and Ovens 2012 *SAJ* 12.

<sup>16</sup> Rice 2014 *J SA Stud* 387.

<sup>17</sup> Rice 2014 *J SA Stud* 387.

However, the practice of *ukuthwala* has changed from its original form and now leads to the constant violation of children's human rights.<sup>18</sup> The custom of *ukuthwala* is now done without the girls' consent and this has negative effects on the child's life and has led to constant violation of children's rights in South Africa.<sup>19</sup> It is because of this cultural resilience that numerous girls' rights have been violated through kidnapping, human trafficking, sexual exploitation and rape, and children have been made vulnerable to HIV/AIDS and other diseases.<sup>20</sup> Around 2009, it was reported that more than 20 girls drop out of school every month to follow the traditional custom of *ukuthwala*, and some of those girls were said to be as young as 12 years.<sup>21</sup> Commenting on the matter of *ukuthwala* in 2011, NPA spokesperson Tyali posited that "There were more than 10 cases of *ukuthwala*, were girls as young as 14-years-old, were abducted and forced to marry to older men."<sup>22</sup> Hence *ukuthwala* has been described as bride abduction.<sup>23</sup> Rampete Ntibidi, Deputy Director at Department of Justice and Constitutional Development, posits that what is happening lately is a distortion of the customary practice of *ukuthwala*, as young girls are married to older men without their consent.<sup>24</sup> This is also inconsistent with the terms of the *Recognition of Customary Marriages Act*, which states that both spouses should be above the age of 18 years and must consent to the marriage.<sup>25</sup>

South Africa has adopted a Constitution which aims to protect children's rights.<sup>26</sup> The Constitution also safeguards the right to participate in the cultural life of one's choice.<sup>27</sup> The latter constitutional right seems to be exercised in a

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<sup>18</sup> Kugara, Mathidze and Mdhluli 2017 *Hum & Soc Sc J* 9008. The historical development of the practice of *ukuthwala* and changed which has occurred will be discussed further in chapter 3 sub-paragraph 3.2.

<sup>19</sup> Nkosi 2014 *J Soc Sci* 442.

<sup>20</sup> Maluleke 2012 *PELJ* 12.

<sup>21</sup> Peterson *Citizen* 24. See also Matya *The Herald* 1; Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 2.

<sup>22</sup> Anon Media24.com 2011 <https://www.news24.com/SouthAfrica/News/Bride-kidnap-pings-tribe-pomises-to-stop-20110323>.

<sup>23</sup> Nkosi 2014 *J Soc Sci* 443.

<sup>24</sup> Mashao 2014 *Justice Today* 8.

<sup>25</sup> Article 3(1)(a)(i)-(ii) of the RCMA.

<sup>26</sup> Section 28 of the Constitution.

<sup>27</sup> Section 31(1)(a)-(b) of the Constitution.

way that is repugnant to all other provisions of the Bill of Rights.<sup>28</sup> It has been observed that whilst participating in cultural activities, people often go against the enshrined human rights embraced in national laws and international instruments.<sup>29</sup>

In 2015 the case of *Jezile v State* 2015 A217/2014 ZAWCHC (hereinafter the *Jezile* case) was brought before the High Court of South Africa (Western Cape Division) with regard to the cultural practice of *ukuthwala*.<sup>30</sup> The appellant in this matter was arrested and charged with one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm, and one count of common assault, which occurred after the traditional practice of *ukuthwala*.<sup>31</sup> He contested the charges and argued that whatever that had happened during the *ukuthwala*, his actions were justified since *ukuthwala* was and is a recognised customary practice. *In casu*, the court held that the cultural practice of *ukuthwala* forms a gross violation of human rights, and that it cannot be allowed that the practices involved in the aberrant form of *ukuthwala* could be protected under any law.<sup>32</sup> The court expressed the opinion that one cannot rely on the aberrant form of *ukuthwala* as living customary law to justify a misconduct.<sup>33</sup>

Despite the different laws which have been put in place to protect children's rights, these rights continue to be violated through *ukuthwala*, disguised as a customary practice.<sup>34</sup> The challenge in South African lies in the contradiction that is raised between individual rights guaranteed in the Bill of Rights and long-cherished traditional practices which often violate the rights contained in the Bill of Rights.<sup>35</sup> This research aims to find out whether the practice of

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<sup>28</sup> Kugara, Mathidze and Mdhluli 2017 *Hum & Soc Sc J* 9007.

<sup>29</sup> Kugara, Mathidze and Mdhluli 2017 *Hum & Soc Sc J* 9008.

<sup>30</sup> *Jezile* case.

<sup>31</sup> *Jezile* case para 1.

<sup>32</sup> *Jezile* case para 95.

<sup>33</sup> *Jezile* case para 90.

<sup>34</sup> Laws protecting children's rights include the *Convention on the Rights of the Child* (1989); the *African Charter on the Right and Welfare of the Child* (1990); the Constitution; the *Children's Act* 38 of 2005.

<sup>35</sup> Van der Watt and Ovens 2012 *SAJ* 11.

*ukuthwala* can still be regarded as a harmful practice if done in line with the *Recognition of Customary Marriage Act* 120 of 1998. To achieve this aim, this paper will explore the cultural practice of *ukuthwala* and how it has deviated from a traditional practice to merely a harmful act violating children's rights. Poverty and gender inequality will form part of the study, as they impact directly on the practice of *ukuthwala* in South Africa. The study will consider South African legal systems as a whole and suggest a set of comprehensive legal and policy reforms that could help in reducing the incidence of child marriages with particular reference to the traditional culture practice of *ukuthwala*. The study will also recommend other non-legal measures that could be used to give effect to national legislation in order to end the harmful cultural practice of *ukuthwala*. The main research question that ought to be answered in this discussion is to what extent can culture be used to justify the cultural practice of *ukuthwala*? It should be noted, though, that the focus of this dissertation is not on *ukuthwala* in the historical sense but on those instances where the actions equate to criminal acts.

## **1.2 Chapter outline**

The study comprises of five chapters. Chapter One includes the introduction and presents the problem statement. It highlights the initial motivation for performing this study.

Chapter Two provides an overview of the legal frameworks that inform the study. In particular, international and regional instruments will be reviewed. Various international and regional instruments that deal specifically with children's human rights and issues of marriage are discussed here. These include, amongst others, the *Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of the Child*.

Chapter Three scrutinises numerous causes of the practice of *ukuthwala*. It also explores the adverse consequences that *ukuthwala* has on the enjoyment

of fundamental human rights, such as the right to education and the right to health.

Chapter Four provides a broad and general discussion of *ukuthwala* as a cultural practice in South Africa. An assessment of the practice of *ukuthwala* and the national legal framework that governs human rights and customary marriages will also be conducted in this chapter. The South African cultural practice of *ukuthwala* will be discussed in detail in this chapter.

Chapter Five provides the conclusion and recommendation. This is where our research question will be dealt with and where we will discuss the extent to which culture can be used to justify the cultural practice of *ukuthwala*.

### ***1.3 Ukuthwala and child marriage.***

Armstrong defines child marriage as:

... a practice of coercing or deceiving or forcibly giving a child into a marriage at an age when she is incapable of understanding the nature of marriage.<sup>36</sup>

Vogelstein posits that child marriage is "a formal customary union in which both parties are under the age of eighteen",<sup>37</sup> whereas *ukuthwala* is regarded as a preliminary procedure for a customary marriage where the young man forcibly takes an underage girl to be his wife.<sup>38</sup> In both cases the marriage occurs when the female spouse is under the age of eighteen, a girl forcibly taken by a male counterpart for marriage. Henceforth, the word child marriage will be used in this context to refer to *ukuthwala*, since *ukuthwala* is considered a form of child marriage.

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<sup>36</sup> Armstrong *Child marriage in Nigeria* 10.

<sup>37</sup> Vogelstein *Ending child marriage* 3.

<sup>38</sup> Monyane 2013 *SA Rev Sos* 64.



## CHAPTER 2: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS PROTECTING CHILDREN'S RIGHTS

### *2.1 Introduction*

Children's rights are protected at both international and regional levels. The international and regional instruments alike urge state parties to end harmful cultural practices.<sup>39</sup> Gaffney-Rhys believes that international and regional instruments are benchmarks for the normative standard that state parties must adhere to in their internal policies and laws.<sup>40</sup>

When applying international and regional laws to municipal law, two methods are commonly used, which are the monist and the dualist methods.<sup>41</sup> According to the former approach, international laws and municipal law are considered to be one, meaning that there is no need to enact legislation in order to incorporate international law in municipal law. The ratification of the international instrument automatically makes it part of national law.<sup>42</sup> The second approach instead considers international law and national law as being different, meaning that legislation must be enacted to incorporate international law into national law.<sup>43</sup> Justice Mosekene gave his opinion of the dualist approach when he stated that:

... according to this approach international law may apply only if and to the extent that it is incorporated by the overt legislative act into municipal law.<sup>44</sup>

In its application of international law, South African law adopts the dualist approach.<sup>45</sup> It has signed and ratified the basic human rights instruments which protect children's rights. "When interpreting the Bill of Rights the courts

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<sup>39</sup> Centre for Human Rights 2018 "A report on child marriages in Africa" 10. See for instance a 19(1) of the *Convention on the Rights of the Child* and a 21 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>40</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 359.

<sup>41</sup> Dugard *International Law* 40.

<sup>42</sup> Dugard *International Law* 40.

<sup>43</sup> Dugard *International Law* 40.

<sup>44</sup> *Glenister v President of the Republic of South Africa* [2011] ZACC.

<sup>45</sup> Dugard *International Law* 40.

must consider international law" - this is in accordance with section 39 of the Constitution.<sup>46</sup> The use of the word "must" imposes an obligation on the courts to consider international laws.<sup>47</sup> Section 233 also provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>48</sup>

International and regional instruments protecting children's rights will be looked at to that end, especially those provisions which have the most immediate consequences for South Africa. This is done so as to determine the lawfulness of the cultural practice of *ukuthwala*. This study will, therefore, examine what international and regional law provides with regard to cultural practices and marriage.

## **2.2 International instruments**

### *2.2.1 Universal Declaration on Human Rights (hereinafter UDHR)*

The *Universal Declaration on Human Rights* aims to protect and respect everyone's cultural rights, including those of children. The UDHR was the first international instrument to be adopted by the United Nations which enumerates cultural rights.<sup>49</sup> In essence, the UDHR articulated the basic human rights, which include civil, political, economic, social and cultural rights that every individual should enjoy and embrace.<sup>50</sup> Article 27 of the UDHR provides that everyone has the right to freely participate in the cultural life of the community, to enjoy such and share the advancement and benefits of such culture.<sup>51</sup> This shows that the right to one's culture is recognised

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<sup>46</sup> Section 39(1)(b) of the Constitution.

<sup>47</sup> *Azanian Peoples Organisation v the President of South Africa* 1996 68 BCLR 1015 (CC).

<sup>48</sup> Section 233 of the Constitution.

<sup>49</sup> Symonides 1998 *Int'l Soc Sci J* 559.

<sup>50</sup> *Universal Declaration on Human Rights* (1948).

<sup>51</sup> Article 27 of the *Universal Declaration on Human Rights* (1948).

internationally. *Ukuthwala* is one of the cultural practices recognized in South Africa and it is observed as a preliminary procedure to customary marriage.<sup>52</sup>

In so far as marriage is concerned, article 16 of the UDHR provides as follows:

- 16 (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, and its dissolution.<sup>53</sup>
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.<sup>54</sup>
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.<sup>55</sup>

The United Nations General Assembly in 1954 urged all states to:

... abolish customs and practices that are inconsistent with the UDHR, by ensuring complete freedom in the choice of spouse, by eliminating child marriages and the betrothal of young girls before the age of puberty, and by establishing appropriate penalties where necessary.<sup>56</sup>

The UDHR considers everyone's rights to culture but at the same time does not overlook certain harmful cultural practices related to marriage, which is why it had to set certain standards when it comes to marriage practices.

### 2.2.2 *Convention on the Rights of the Child (hereinafter CRC)*

The CRC is one of the international instruments which specifically address children's rights. It recognises that children as human beings are entitled to rights of their own.<sup>57</sup> It shifts away from the previous general practice of regarding children as objects of the family, community and state, to an era in which children are bearers of their own legal rights.<sup>58</sup> It has set four principle which ought to be considered whenever children's rights are pertinent. These

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<sup>52</sup> Wadesango, Rembe and Chabaya 2011 *Anthropologist* 123.

<sup>53</sup> Article 16(1) of the *Universal Declaration on Human Rights* (1948).

<sup>54</sup> Article 16(2) of the *Universal Declaration on Human Rights* (1948).

<sup>55</sup> Article 16(3) of the *Universal Declaration on Human Rights* (1948).

<sup>56</sup> United Nations General Resolution 1954 *Status of women in private law: customs, ancient laws and practices affecting the human dignity of women* A/RES/843IX: A 2879.

<sup>57</sup> *Convention on the Rights of the Child* (1989).

<sup>58</sup> De Silva-de-Alwis *Child Marriage and the Law* 5.

four core principles include the protection of children from discrimination,<sup>59</sup> devotion to the best interests of the child,<sup>60</sup> upholding the right to the survival and development of the child (the right to life),<sup>61</sup> and the right to be heard.<sup>62</sup> One should note that all these rights are inherent in the right to the human dignity and development.

The CRC places a duty on South Africa as a state party to safeguard the rights of children and protect them from all forms of abuse, exploitation and violence.<sup>63</sup> There is, however, no direct or specific provision in this treaty which specifically addresses the issue of *ukuthwala* or child marriage. Hence, the cultural practice of *ukuthwala* is connected to other rights, for instance the right to protection from all forms of abuse.<sup>64</sup>

The most important clause which can be invoked against the traditional cultural practice of *ukuthwala* is article 24 (3) of the CRC, which provides that states should "take measures to abolish traditional practices prejudicial to the health of the child".<sup>65</sup> In other words, the state is under an obligation to abolish traditional practices that are detrimental to the health of the child and the physical integrity of the child. This provision is perhaps the most relevant instrument to use against *ukuthwala*, given that *ukuthwala* is a customary traditional practice and has been considered to be detrimental to the health of children.<sup>66</sup>

Article 19(1) of the CRC provides that:

States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or

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<sup>59</sup> Article 2 of the *Convention on the Rights of the Child* (1989).

<sup>60</sup> Article 3(1) of the *Convention on the Rights of the Child* (1989).

<sup>61</sup> Article 6 of the *Convention on the Rights of the Child* (1989).

<sup>62</sup> Article 12 of the *Convention on the Rights of the Child* (1989).

<sup>63</sup> Achan-Okiria *The internal displacement crisis in Africa* 30.

<sup>64</sup> Article 34 of the *Convention on the Rights of the Child* (1989).

<sup>65</sup> Article 24(3) of the *Convention on the Rights of the Child* (1989).

<sup>66</sup> Braimah 2014 *AHRLJ* 477.

exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.<sup>67</sup>

The above provision obliges state parties to take measures to ensure that children's rights are respected and protected.

Moreover the CRC in article 3(1) provides for the principle of the best interest of the child.<sup>68</sup> In context, the best way to interpret this principle is that children should be protected from all harmful cultural practices. The best interest of a child generally translate into the well-being of a child, and this is determined by circumstances such as the age and level of maturity of the child, the child's environment and the child's experiences.<sup>69</sup> If we are to consider the age and level of maturity of the child at the time of the aforesaid marriage, then this practice is in violation of the best interest of the child. Moreover, the acts of abduction, forced marriage, child marriage, rape and trafficking which take place in most cases of *ukuthwala* are in violation of the best interests of the child. The CRC also provides that children have the right to health<sup>70</sup> and education.<sup>71</sup> The way in which *ukuthwala* is currently practised violates these rights, but this will be discussed in more detail in Chapter Three.

The CRC Committee is obliged to ensure that all the rights enshrined in the CRC are implemented.<sup>72</sup> The United Nations Committee on the Rights of the Child is a body of independent experts that monitors and reports on the implementation of the *Convention on the Rights of the Child* by governments that ratify the Convention.<sup>73</sup> The Committee of the CRC asks state parties to enforce laws to prevent child marriages and to develop programmes involving traditional religious leaders and the community so as to discuss issues

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<sup>67</sup> Article 19(1) of the *Convention on the Rights of the Child* (1989).

<sup>68</sup> Article 3(1) of the *Convention on the Rights of the Child* (1989).

<sup>69</sup> UNHCR 2008 *Guidelines on Determining the Best Interest of the Child* 14.

<sup>70</sup> Article 24 of the *Convention on the Rights of the Child* (1989).

<sup>71</sup> Article 28 of the *Convention on the Rights of the Child* (1989).

<sup>72</sup> UNICEF date unknown <https://www.unicef.org/crc/files/Committee-fact-sheet.pdf>.

<sup>73</sup> UNICEF date unknown [https://www.unicef.org/crc/files/Committee\\_fact-sheet.pdf](https://www.unicef.org/crc/files/Committee_fact-sheet.pdf).

pertaining to harmful cultural practices.<sup>74</sup> The CRC Committee notes that child marriage is a harmful practice that negatively affects girls and they advise states to set a minimum age for marriage at 18 years.<sup>75</sup>

The family has a duty to protect children from abuse, but when the family fails to do so the state has an obligation to protect the children.<sup>76</sup> As a state party to the CRC, South Africa is under an obligation to "adopt legislative measures" relating to the practice of *ukuthwala*. So far there is no binding legislation addressing the cultural practice of *ukuthwala*, but steps have been taken to draft such. There is a draft bill titled the *Prohibition of Forced Marriages and Child Marriages Bill* which was proposed by the South African Law Reform Commission (SALRC) in 2014, in its publication the *Revised Discussion Paper on Project 138: The Practice of Ukuthwala*.<sup>77</sup> The Bill defines child marriage and forced marriages, clearly provides offences against forced marriages, and includes civil remedies in the form of forced marriage protection orders.<sup>78</sup> A marriage performed through the practice of *ukuthwala* is explicitly classified as forced marriage in the draft Bill.<sup>79</sup> However, the SALC has to issue a report which need to be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament, and this is still in process.<sup>80</sup> Hence the Bill has yet to be finalised.

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<sup>74</sup> Joint general recommendation/general comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18 para 14.

<sup>75</sup> General Comment No 13 of the CRC 'The right of the child to freedom from all forms of violence' CRC/C/GC/2011/13.

<sup>76</sup> Articles 20 and 22 of the *Convention on the Rights of the Child* (1989).

<sup>77</sup> South African Law Reform Commission 2015 Revised Discussion Paper 138 (Project 138).

<sup>78</sup> South African Law Reform Commission 2015 Revised Discussion Paper 138 (Project 138) 57-60.

<sup>79</sup> South African Law Reform Commission 2015 Revised Discussion Paper 138 (Project 138) 57-60.

<sup>80</sup> South African Law Reform Commission 2015 Revised Discussion Paper 138 (Project 138).

### 2.2.3 *Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW)*

The CEDAW is one of the international treaties which specifically focusses on women's rights. Achan-Okiria describes the CEDAW as an instrument which expressly and directly prohibits child marriage.<sup>81</sup> The CEDAW notes that there has been an imbalance between women and men in society in relation to cultural practices.<sup>82</sup> Therefore, it requires the state to change social and cultural patterns so as to eliminate prejudices and customary practices which bring about imbalances in the roles of men and women.<sup>83</sup> It further requires the state to take measures to eliminate discrimination against women in matters relating to marriage; for instance, to ensure equality in the right to choose a spouse and to enter marriage with full and free consent.<sup>84</sup>

Article 16(2) further states that

The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify the age for marriage and to make the registration of marriages in an official registry compulsory.<sup>85</sup>

The cultural practice of *ukuthwala* is one of the traditional practices in which children are married even before the child has reached adolescence.<sup>86</sup> However, CEDAW does not define a child, so it is unclear which marriages are actually forbidden.<sup>87</sup>

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<sup>81</sup> Achan-Okiria *The internal displacement crisis in Africa* 30.

<sup>82</sup> Preamble of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979), CEDAW was ratified by South Africa in 1995.

<sup>83</sup> Article 5(a) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>84</sup> Article 16(1)(a)-(b) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>85</sup> Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>86</sup> United Nation Population Fund 2012 [http://www.unfpa.org/annual report](http://www.unfpa.org/annual%20report).

<sup>87</sup> Graffney-Rhys 2011 *Int'l J Hum R* 15.

The practice of *ukuthwala* also disrupts girls' right to education, as guaranteed in article 10 (a-h) of the CEDAW.<sup>88</sup> One of the most vital characteristics of the CEDAW is that it obliges state parties to amend customary practices which promote any stereotyped roles for men and women.<sup>89</sup> The United Nations Human Development Report also observed that:

Disadvantages facing women and girls are a major source of inequality. All too often, women and girls are discriminated against in health, education and the labour market- with negative repercussions for their freedoms.<sup>90</sup>

Moreover, in 1994 the CEDAW Committee urged state parties to amend existing laws and put a stop to practices which discriminate against girls.<sup>91</sup> It further suggests that since children do not have full maturity, marriage below 18 years of age should be disregarded.<sup>92</sup> CEDAW directly seeks to protect children from child marriages and harmful cultural practices but, as mentioned above, it does not define a "child" in any provision. Hence, it is extremely difficult to determine the exact age to which the protection extends.

#### 2.2.4 *Convention on Consent to Marriage, the Minimum Age for Marriage and the Registration of Marriage (hereinafter the Marriage Convention)*

The *Marriage Convention* in its preamble provides that: "States should ensure complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty. They should also take measures to eliminate or abolish harmful customs and practices and appropriate penalties should also be put in place."<sup>93</sup>

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<sup>88</sup> Article 10(a) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>89</sup> Article 2(f) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>90</sup> Oxford Poverty and Human Development Initiative 2010 *Gender Inequality Index (GII): Construction and Analysis* 3 (also available at [hdr.undp.org/en/content/gender-inequality-index-gii](http://hdr.undp.org/en/content/gender-inequality-index-gii)).

<sup>91</sup> CEDAW Committee 1994 CEDAW General Recommendation No 21: Equality in Marriage and Family Relations para 36.

<sup>92</sup> CEDAW Committee 1994 CEDAW General Recommendation No 21: Equality in Marriage and Family Relations para 36.

<sup>93</sup> *Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriage* (1964). South Africa ratified this treaty in 1993.



The state has to take legislative action to specify a minimum age for marriage.<sup>94</sup> The article further provides that:

No marriage shall be legally entered into by any person under age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.<sup>95</sup>

In other words, the *Marriage Convention* urges state parties to abolish marriage of underage girls and calls upon states to set a minimum age for marriage. The *Marriage Convention* also urges that all marriages be legally registered.<sup>96</sup>

#### 2.2.5 *International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR)*

Article 10(2) of the ICESCR states that marriage must be entered into with the full and free consent of the spouses.<sup>97</sup> The Committee on Economic, Social and Cultural Rights states in its General Comment 14 that:

State parties are under a specific legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage.<sup>98</sup>

With *ukuthwala* being practised on girls under 18 years-below the legal minimum age, and affecting the health of children, it is clear that there is an obligation on the state to take measures to ensure that such contraventions are addressed. As mentioned at point 2.2.2 above, the state is in the process of drafting a bill embodying its compliance with its international obligations.

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<sup>94</sup> Article 2 of the *Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriage* (1964).

<sup>95</sup> Article 2 of the *Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriage* (1964).

<sup>96</sup> Article 3 of the *Convention on Consent to Marriage Minimum Age for Marriage and Registration of Marriage* (1964).

<sup>97</sup> Article 10(2) of the *International Covenant on Economic, Social and Cultural Rights* (1976).

<sup>98</sup> General Comment 14 of the *International Covenant on Economic, Social and Cultural Rights* (1976) para 24. South Africa ratified the ICESCR in 2015.

The next chapter will look at the necessary measures, such as the legislative measures, that South Africa has taken to abolish harmful traditional practices.

### **2.3 Regional instruments**

#### *2.3.1 African Charter on the Rights and Welfare of the Child (hereinafter African Charter)*

The African states decided to enact a treaty which would protect and uphold the rights of children at a regional level, soon after the CRC. They drafted the *African Charter*, which came into force in 1990 and is a regional instrument for Africa dealing with children's rights.<sup>99</sup> The *African Charter* is considered to be the most comprehensive instrument in Africa, as it focusses on children's rights from an African cultural point of view.<sup>100</sup> It also develops agreed standards at a regional level, where there is greater cultural, economic and political similarity between states.<sup>101</sup>

Article 2 provides that "a child means every human being below the age of 18 years".<sup>102</sup> Unlike any other relevant instrument, the *African Charter* explicitly sets the age of childhood at below 18 years, without affording the states an opportunity to decide otherwise.<sup>103</sup> Warner notes that the *African Charter* explicitly sets the minimum age of marriage at eighteen and that no provision is made for exceptions of for any party to decide otherwise.<sup>104</sup>

Unlike other instruments, the *African Charter* explicitly prohibits child marriages. Article 21(1) of the *African Charter* obliges state parties to:

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<sup>99</sup> *African Charter on the Rights and Welfare of the Child* (1990). This instrument was ratified by South Africa in 2000.

<sup>100</sup> Mukombachoto *The best interest of the child* 25.

<sup>101</sup> Lowe and Douglas *Bromley's Family Law* 23.

<sup>102</sup> Article 2 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>103</sup> Article 2 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>104</sup> Warner 2004 *Journal of Gender, Social Policy and the Law* 254. The African Charter unequivocally fixes the minimum age of marriage at eighteen and allows no exceptions for local religious or other cultural practices. Nor does it allow for exception based upon the consent of a local authority or the parents or guardians of the child concerned.

Take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex and other status.<sup>105</sup>

Furthermore, in article 21 (2) the Charter goes on to explicitly prohibit child marriages and provides that:

Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.<sup>106</sup>

It is evident in the above provision of the *African Charter* that the international view of child marriages is that they are harmful, that they infringe on the welfare and dignity of children, and there are to be no exceptions permitting early marriages, such as the consent of third parties such as parents. The cultural practice of *ukuthwala* has been found to be discriminatory to the girl child and prejudicial to her health and life.

The *African Charter* also establishes a framework to eliminate gender discriminatory practices in article 3.<sup>107</sup> It prohibits discrimination against children in any form and guarantees the rights and freedoms recognised in the *African Charter* to all children.<sup>108</sup> The *African Charter* further strengthens its position of protecting children's rights by providing that "in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration".<sup>109</sup>

In conformity with article 20(1) of the *African Charter*, parents or other people responsible for the child such as the State or guardians have the responsibility

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<sup>105</sup> Article 21(1)(a)-(b) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>106</sup> Article 21(2) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>107</sup> Article 3 of the *African Charter on the Rights and Welfare of the Child* (1990). Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

<sup>108</sup> Article 3 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>109</sup> Article 4(1) of the *African Charter on the Rights and Welfare of the Child* (1990).

to protect the child and to do so in line with the best interest principle.<sup>110</sup> Article 16 also provides that state parties should take measures to protect the child from all forms of torture and inhuman or degrading treatment.<sup>111</sup> Therefore, states members of the *African Charter* have an obligation to adopt such legislative, administrative, educational and other measures as may be necessary to give effect to the provisions of the Charter.<sup>112</sup>

Although the *African Charter* is one of the most comprehensive instruments addressing child marriages and cultural practices, not every country has ratified it. For those that are signatories, there is a need to take measure to enforce the laws, because it is the state's duty to make sure that international and regional laws are imposed. Chapter Four will examine the legal measures South Africa has taken as a signatory to the *African Charter* to curb the harmful cultural practice of *ukuthwala*.

### 2.3.2 *Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa (hereinafter The Protocol)*

The Protocol to the *African Charter on Human and Peoples' Rights* was adopted in 1998 and came into effect in 2005.<sup>113</sup> This instrument is a protocol to the Banjul Charter, and is referred to as the *African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.<sup>114</sup>

*The Protocol* requires the state parties to implement laws and other measures, especially those which prohibit all forms of discrimination, especially harmful practices which jeopardise the health and general well-being of women.<sup>115</sup> *The Protocol* in article 5 requires states to prohibit harmful practices which are in conflict with international standards and negatively affect the rights of

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<sup>110</sup> Article 20(1)(a) of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>111</sup> Article 16 of the *African Charter on the Rights and Welfare of the Child* (1990).

<sup>112</sup> Commission for Gender Equality 2012 <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com>.

<sup>113</sup> *Protocol to the African Charter on Human and Peoples' Rights* (2005).

<sup>114</sup> Centre for Reproductive Rights 2006 <http://www.reproductiverights.org/sites/crr.civicactions.net>.

<sup>115</sup> Article 2 of the *Protocol to the African Charter on Human and Peoples' Rights* (2005). As a member state to this instrument South Africa ratified it in 2004.

women.<sup>116</sup> *The Protocol* further urges that states take measures to eliminate such harmful practices.<sup>117</sup> It is worthy of note that it encourages equality between men and women. *The Protocol* goes further to address the issue of marriage. It requires that both parties' consent should be sought when a marriage takes place, and that the marriageable age be set at 18 years.<sup>118</sup> *The Protocol* was drafted because there was recognition of the imbalance between men and women in the context of marriage and other cultural practices. So there was a need to protect the values and dignity of women.

## **2.4 Conclusion**

It should be borne in mind that although the international and regional instruments have provided laws regarding child marriages, it is always up to the state parties to enforce and implement such laws. The state parties have an obligation to effectively enforce such laws. There has been pressure from both the international and the regional human rights bodies on states to abolish all harmful cultural/customary practices guised as culture. Although many instruments encourage states to totally abolish harmful cultural practices, not all states are prepared to do that, due to their desire to preserve their cultural diversity. What may seem to be a harmful cultural practice to one state maybe an ancient, cherished cultural norm to another.

UN General Comment 31 observes that:

The constructive prevention and elimination of harmful practices towards children require the setting up of a well-defined, rights-based and locally relevant holistic strategy, which includes supportive legal and policy measures, including social measures that are combined with a commensurate political commitment and accountability at all levels.<sup>119</sup>

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<sup>116</sup> Article 5 of the *Protocol to the African Charter on Human and Peoples' Rights* (2005).

<sup>117</sup> Article 5 of the *Protocol to the African Charter on Human and Peoples' Rights* (2005).

<sup>118</sup> Article 6(a)-(b) of the *Protocol to the African Charter on Human and Peoples' Rights* (2005).

<sup>119</sup> CEDAW General Comment 31 and CRC General Comment 18 2014 CEDAW/C/GC/31CRC/C/GC/18.

The state is under an obligation to prohibit and prevent harmful cultural practices through legislative means and other measures. Since South Africa has ratified the international and regional instruments, appropriate measures have to be taken to eradicate harmful cultural practices. South Africa has a duty to ensure that all cultural practices which violate children's rights are abolished and that the perpetrators of such practices are severely punished. Failure to do so is likely to be interpreted as failure by the state to comply with the obligations imposed by the international and regional instruments it has ratified. The next chapter will examine the reasons motivating the practice of *ukuthwala* and children's rights violated through cultural practice of *ukuthwala*.

## **CHAPTER 3: OVERVIEW OF THE CHILDREN'S RIGHTS VIOLATED THROUGH UKUTHWALA**

### ***3.1 Introduction***

According to a research project conducted by the United Nations Children's Fund (hereinafter UNICEF) millions of girls get married before the age of age of 18 years globally, and 42 per cent of them are from Africa.<sup>120</sup> The African continent has issues different from those of European countries, which issues dispose children to child marriages, and in South Africa one of the reasons is cultural beliefs.<sup>121</sup> Not all child marriages occur as a result of *ukuthwala*, and this dissertation specifically look at *ukuthwala* as an act resulting in child marriage. Moreover, although there are various types of *ukuthwala* as will be mentioned in chapter 4, one form will predominantly be discussed throughout wherein *ukuthwala* is done without the girl's consent and forcibly so.

*Ukuthwala* occurs mainly in rural areas where traditional attitudes towards women and marriage are deeply rooted.<sup>122</sup> A girl child is equated to a mere commodity which can be bought or sold.<sup>123</sup> Apparently the indigenous customary practice of *ukuthwala* has led to common law crimes such as abduction, kidnapping, human trafficking, rape and common assault.<sup>124</sup> The discussion below will firstly explore the causes or reasons underpinning the practice of *ukuthwala* and then provide a brief overview of the children's rights violated through the practice of *ukuthwala*.

### ***3.2 Reasons underpinning the cultural practice of ukuthwala***

A comprehensive knowledge of the root cause of *ukuthwala* will help institutions such as the state, non-governmental organisations and human rights organisations to implement suitable measures to end the harmful

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<sup>120</sup> UNICEF 2005 [https://www.unicef.org/publications/file/Early\\_Marriage\\_12.lo.pdf](https://www.unicef.org/publications/file/Early_Marriage_12.lo.pdf).

<sup>121</sup> Ramnath *Traditional African practices relating to child marriages 2*.

<sup>122</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 360.

<sup>123</sup> Van der Watt and Ovens 2012 *SAJ* 10.

<sup>124</sup> SALRC 2015 <http://www.justice.gov.za.salrc/dpapers/ dp132-ukuthwalarevised.pdf>.

cultural practice of *ukuthwala* more effectively. As mentioned in chapter 1 *ukuthwala* custom originated from Xhosa culture, and it was widely practiced by the Nguni and Xhosa-speaking tribes in South Africa.<sup>125</sup> Traditionally, in indigenous African communities a marriage was initiated through an approach from the groom's family to the bride's family.<sup>126</sup> Ideally such a request would be followed by a period of courtship between the intended spouses and the ensuing negotiations would thus occur with the full consent of the couple.<sup>127</sup> The intended bride would be taken to the young man's home late in the day, at times the girl would be caught unaware but in most instances she would be caught according to a prior plan and agreement.<sup>128</sup> Importantly, the groom was mandated to report to the bride's family and advise the girl's parents that the bride was safely in their care.<sup>129</sup> They also had to indicate how many cattle they proposed to pay to compensate, and how soon that could be performed.<sup>130</sup> Some of the reasons which underpin the practice of *ukuthwala* which are arguably cogent and weighty were, to avoid expense wedding and to protect the girl's dignity, amongst others.<sup>131</sup>

In recent years, the practice of *ukuthwala* has come to be viewed as a form of gender-based violence or harmful cultural practice, it is nothing more than rape and forced child marriage.<sup>132</sup> Initially, the culture did not involve raping or having consensual sex with the girl until marriage requirements had been concluded.<sup>133</sup> While traditionally the girl or woman would consent to the abduction, recently men are now abducting young girls and forcing them into marriage without their consent, *ukuthwala* is now used by older men to target

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<sup>125</sup> Commission for Gender Equality 2012 <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com>.

<sup>126</sup> South African Law Reform Commission 2015 Discussion Paper 132 (Project 138) 4.

<sup>127</sup> South African Law Reform Commission 2015 Discussion Paper 132 (Project 138) 4.

<sup>128</sup> Commission for Gender Equality 2012 <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com>.

<sup>129</sup> Commission for Gender Equality 2012 <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com>.

<sup>130</sup> Commission for Gender Equality 2012 <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com>.

<sup>131</sup> Ndindwa *The experience of cultural marriage practice* 19.

<sup>132</sup> Scheepers A 2016 <http://www.w24.co.za/selfcare/wellness/mind/ukuthwala-forced-childmarriage-in-sa-20160202>.

<sup>133</sup> Ndindwa *The experience of cultural marriage practice* 19.



and abuse vulnerable girls as young as 11 years of age.<sup>134</sup> The culture is currently abused, in that it increasingly involves the kidnapping, rape and forced marriage of minor girls as young as twelve years, by grown up men old enough to be their grandfather.<sup>135</sup> Mwambene and Sloth-Nielsen mentioned that ukuthwala has "changed radically" and is "an old custom being wrongly practised."<sup>136</sup> Nowadays the groom do not consult the girls family beforehand, hence destitute families will normally accept the forced child marriage out of a desire to receive bride wealth.<sup>137</sup> While financial reasons contribute to their succumbing to *ukuthwala*, it is also mainly the stigma attached to marriage that coerces child marriages hence cultural belief is also a contributory factor to the practice of ukuthwala.<sup>138</sup> Hence some of the reasons underpinning the practice of *ukuthwala* include, poverty, gender inequality, and cultural beliefs as will be discussed below.

### 3.2.1 *Ukuthwala and poverty*

The UNICEF Innocenti Research Centre is a centre established by the UNICEF board whose main objective is to improve international understanding of issues relating to children's rights and children's wellbeing.<sup>139</sup> Research conducted by the Innocenti Research Centre explains that one of the main reasons underpinning the practice of *ukuthwala* is poverty.<sup>140</sup> Poverty drives families to marry off their daughters in the hope that this will lessen the family burden.<sup>141</sup> Young girls are regarded as an economic burden, and marrying them off is a family survival strategy which is often considered to be in the best interest of the child.<sup>142</sup> *Ukuthwala* is seen as a way to escape the cycle of poverty.<sup>143</sup> Many families are of the view that giving away their girl-child for

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<sup>134</sup> Scheepers A 2016 <http://www.w24.co.za/selfcare/wellness/mind/ukuthwala-forced-childmarriage-in-sa-20160202>.

<sup>135</sup> Choma 2011 *US-China LR* 876.

<sup>136</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 5.

<sup>137</sup> Karimakwenda 2013 *Acta Juridica* 340

<sup>138</sup> Choma 2011 *US-China LR* 876.

<sup>139</sup> Umemoto 2001 *Innocenti Digest* 6.

<sup>140</sup> Umemoto 2001 *Innocenti Digest* 6.

<sup>141</sup> De Silva-de-Alwis *Child Marriage and the Law* 32.

<sup>142</sup> Umemoto 2001 *Innocenti Digest* 6.

<sup>143</sup> De Silva-de-Alwis *Child Marriage and the Law* 32.

marriage is a way of economically balancing their livelihood and that of the child.<sup>144</sup> So poor families marry off young girls to reduce the number of children who need to be fed, clothed and educated.<sup>145</sup> Although poverty is regarded as one of the underlying root causes of the practice of *ukuthwala*, the practice is not restricted to families who are poverty stricken. Hence there are also other reasons behind the practice of *ukuthwala*.

### 3.2.2 *Ukuthwala and gender inequality*

*Ukuthwala* is also caused by severe gender discrimination, as it stems from the deep patriarchal attitudes of a society where a man is regarded as superior to a woman and a wife is seen as an object to be used by her male counterparts.<sup>146</sup> Generally, families and societies treat girls and boys differently, with girls disproportionately facing lower levels of investment in their health, nutrition and education.<sup>147</sup> The society places a woman in an inferior position. Usually women are deprived of their right to participate equally in their marriages, and are deprived of sexual and reproductive rights.<sup>148</sup> The male members of the family are regarded as the heads of households and of society at large. They make decisions on behalf of their girl children in relation to marriages and other activities.<sup>149</sup> Moreover, religious teachings such as the Christian teachings to which most Africans subscribe rule that a man is the head of the family.<sup>150</sup> These factors are so influential that they result in the promotion of gender-based paternalism in society.<sup>151</sup> In other words, a man's decisionary authority is unquestioned. Hence, most young girls do not have a say regarding their marriages. Mostly, if their fathers

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<sup>144</sup> Evans-Pritchard 1950 *J Int'l Afr Inst* 132.

<sup>145</sup> Mtshali 2014 *Child Abuse Research in South Africa* 55.

<sup>146</sup> Wadesango, Rembe and Chabaya 2011 *Anthropologist* 121.

<sup>147</sup> De Silva-de-Alwis *Child Marriage and the Law* 33.

<sup>148</sup> De Silva-de-Alwis *Child Marriage and the Law* 33.

<sup>149</sup> Aziz and Moussa "The due diligence principle and the role of the State" 19.

<sup>150</sup> Dodo, Banda and Dodo 2014 *J Rel Soc* 7. For example, according to Christians the Bible points out in Ephesians 5:23 and 1 Timothy 2:11-15 that: For the husband is the head of the wife even as Christ is the head of the church and Let a woman learn quietly with all submissiveness. I do not permit a woman to teach or to exercise authority over a man; rather, she is to remain quiet, respectfully.

<sup>151</sup> Dodo, Banda and Dodo 2014 *J Rel Soc* 7.

consent to the marriage then they are supposed to obey.<sup>152</sup> Therefore, cultural belief is another cause of *ukuthwala*, which is embedded in the patriarchal attitudes of a community which celebrates the notion of men's superiority over women.<sup>153</sup>

### 3.2.3 *Ukuthwala and cultural beliefs*

Cultural belief is another reason behind the continuity of the practice of *ukuthwala*. *Ukuthwala* has been practised since time immemorial. As a result, people believe that it ought to be respected and upheld because it serves a useful purpose within the family and the community.<sup>154</sup> It is believed that *ukuthwala* serves an important cultural purpose amongst families and people who live their lives according to cultural norms.<sup>155</sup> Amongst the fervent Xhosa and Nguni tribes, the cultural practice of *ukuthwala* is deeply entrenched in their, psyche and consciousness.<sup>156</sup> The unadulterated ancient cultural practice of *ukuthwala* is seen as one of the ways in which a young girl can start a family in a respectful manner.<sup>157</sup> *Ukuthwala* is also seen as a cultural practice that protects the girl's virginity and preserve her from sexual exposure.<sup>158</sup> A female will thus be married at a young age to ensure that she is a virgin when she marries and to guarantee that she does not become pregnant before marriage, which would bring shame on the family.<sup>159</sup> *Ukuthwala* is seen as a way of preserving the so called honour of the family, hence trying to discredit it will be regarded as cultural erosion.<sup>160</sup> However, the cultural practice of *ukuthwala* has been distorted from its original cultural form, into a harmful cultural practice ,hence the demonization of this cultural practice.

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<sup>152</sup> Dodo, Banda and Dodo 2014 *J Rel Soc* 7.

<sup>153</sup> Wadesango, Rembe & Chabaya 2011 *Anthropologist* 124.

<sup>154</sup> Ndindwa *The experience of cultural marriage practice* 47.

<sup>155</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 5.

<sup>156</sup> Kugara, Mathidze and Mudhluli 2017 *Hum & Soc Sc J* 9007.

<sup>157</sup> Kugara, Mathidze and Mudhluli 2017 *Hum & Soc Sc J* 9007.

<sup>158</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 360

<sup>159</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 360.

<sup>160</sup> Kugara, Mathidze and Mudhluli 2017 *Hum & Soc Sc J* 9007.

### ***3.3 Children's rights violated through ukuthwala***

Although *ukuthwala* is a cultural practice, it leads to constant violation of children's rights. The current practice of *ukuthwala* violates the Constitution and other national legislation which protects children's rights in South Africa. Section 28 of the Constitution specifically provides for the rights of children in South Africa, which ought to be respected, protected and promoted.<sup>161</sup> In that sense the way *ukuthwala* is practised currently is in violation of children's rights such as right to education,<sup>162</sup> the right to health,<sup>163</sup> the right to survival and development,<sup>164</sup> the right to equality and non-discrimination,<sup>165</sup> the right to freedom and to the security of the person,<sup>166</sup> and the right to dignity.<sup>167</sup> The discussion below gives a brief overview of how these rights are violated through the cultural practice of *ukuthwala*.

#### *3.3.1 Ukuthwala and the right to education*

Dr. James Emmanuel Kwegyir-Aggrey, one of the leading figures in the history of education in Africa, in one of his speeches once said, as quoted by Suen:

If you educate a man, you educate an individual, but if you educate a woman you educate an entire nation.<sup>168</sup>

He stressed the importance of educating women. Section 29(1) of the Constitution grants everyone the right to basic education. The right to education is regarded as a fundamental human right, which is not liable to limitation. Hence no one should be denied access to it.<sup>169</sup> Section (3)(1) of the

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<sup>161</sup> Section 28 of the Constitution.

<sup>162</sup> Section 29 of the Constitution.

<sup>163</sup> Section 27(1)(a) of the Constitution.

<sup>164</sup> Article 6(2) of the *Convention on the Rights of the Child* (1989).

<sup>165</sup> Section 9 of the Constitution.

<sup>166</sup> Section 12(2) of the Constitution.

<sup>167</sup> Section 10 of the Constitution.

<sup>168</sup> Suen 2013 *Interd J Soc Sci* 61.

<sup>169</sup> McConnachie, Skelton and McConnachie "The Constitution and the right to a basic education" 26.

*South African Schools Act* 84 of 1996 provides that school attendance is compulsory for every child from the age of seven to the age of fifteen years.<sup>170</sup>

The Constitution does not give a definition of basic education, but in defining the right to "basic education" the World Declaration for Education for All posits that the acquisition of a basic education is synonymous with the satisfaction of basic learning needs:

These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem-solving) and the basic learning content (such as knowledge, skills, values and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions and to continue learning. The scope of basic needs and how they should be met varies with individual countries and cultures and inevitably changes with the passage of time.<sup>171</sup>

The right to education is a basic need which unlocks the enjoyment of other human rights and empowers a person to play a meaningful role in society.<sup>172</sup>

Instead, the practice of *ukuthwala* is associated with low levels of schooling, as most of the girls involved end up dropping out of school after being married.<sup>173</sup> In the sub-Saharan countries most surveys conducted with married girls between twenty and twenty-four years old show that the reason behind their dropping out of school was because of marriage.<sup>174</sup> Most of them were married before reaching 18 eighteen years.<sup>175</sup> As mentioned in Chapter 1 around 2009, it was reported that more than 20 girls drop out of school every month to follow the traditional custom of *ukuthwala*, and some of those girls were said to be as young as 12 years.<sup>176</sup>

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<sup>170</sup> *South African Schools Act* 84 of 1996.

<sup>171</sup> *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990).

<sup>172</sup> Arendse 2011 *PELJ* 101.

<sup>173</sup> De Silva-de-Alwis *Child Marriage and the Law* 20.

<sup>174</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 361.

<sup>175</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 360.

<sup>176</sup> Peterson *Citizen* 24. See also Matya *The Herald* 1; Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 2.

The practice of *ukuthwala* curtails girls' education and it leads to an increase of school drop outs. In most cases, the girl's access to education is at stake, due to the fact that she will be obliged to take care of domestic work, bear children and help the extended family with house chores.<sup>177</sup> Moreover, unlike boys, in many cases a girl's education is terminated because the family cannot afford to keep her at school, and a girl's education is not considered essential as she is destined to get married anyway and to have children for the family.<sup>178</sup> The victims of *ukuthwala* are deprived of the opportunity to educate themselves, and their futures are compromised as they are taken out of school and lose out on their education.<sup>179</sup> Education is crucial to every individual as it is a pathway to a brighter future. When a woman is educated the benefit will be magnified and will be enjoyed by the nation at large.<sup>180</sup> Once a woman receives education she would have gained the ability to improve her well-being.<sup>181</sup> Moreover, usually women are primary caregiver of the household, as such their abilities are transferred to the children, and there will be an intergenerational transmission of knowledge.<sup>182</sup> The practice of *ukuthwala*, however, deprives girls of such fundamental rights.

### 3.3.2 *Ukuthwala and the right to health*

The right to health is provided for in section 27 of the Constitution, which states that everyone has a right to have access to health care services, which include reproductive health care.<sup>183</sup> This rights comprise of both freedoms and entitlements, such as the freedom to control one's body (sexual and reproductive rights).<sup>184</sup> The entitlements include the "right to a system of health protection that gives everyone an equal opportunity to enjoy the highest

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<sup>177</sup> De Silva-de-Alwis *Child Marriage and the Law* 21.

<sup>178</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 362.

<sup>179</sup> Ndindwa *The experience of cultural marriage practice* 87.

<sup>180</sup> Suen 2013 *Interd J Soc Sci* 61.

<sup>181</sup> Suen 2013 *Interd J Soc Sci* 62.

<sup>182</sup> Suen 2013 *Interd J Soc Sci* 62.

<sup>183</sup> Section 27(1)(a) of the Constitution.

<sup>184</sup> Committee on Economic, Social and Cultural Rights 2000 E/C 12/2000/4 para 8.

attainable level of health".<sup>185</sup> However, as things stand, the practice of *ukuthwala* is in violation of the right to health care.

*Ukuthwala* is often practised on young girls before they are physically and emotionally ready to bear the responsibility of marriage and child bearing.<sup>186</sup> At a young age they are under an obligation enter into sexual relationships and to bear children when they are not physically and psychologically ready for that.<sup>187</sup> Most of them become pregnant at an early age due to the need to demonstrate their fertility or due to pressure from the family, yet this affects their health.<sup>188</sup> From a medical point of view, Nour states that due to the fact that girls aged between 10 to 15 years have small pelvises and are not ready for child bearing, there is a high mortality rate during labour.<sup>189</sup> He further states that woman under the age of 18 have a 55 per cent higher risk of delivering a low-birth weight infant than mothers older than 19 years, and the mortality rate is 60 per cent higher when the mother is under 18 years.<sup>190</sup> The dangers of early motherhood affect not only the mother but the unborn child as well.<sup>191</sup>

The practice of *ukuthwala* has also led to an increase in the transmission of HIV/AIDS and other sexually transmitted infectious diseases.<sup>192</sup> An observation made by the United Nations Population Fund (hereinafter UNFPA) was that teenage girls contract HIV at a faster rate than sexually active adults.<sup>193</sup> This is mainly because their husbands are several years older than them and may have had many sexual partners.<sup>194</sup> Guardians who force children to marry early and partake in the traditional practices such as *ukuthwala* expose children to

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<sup>185</sup> Committee on Economic, Social and Cultural Rights 2000 E/C 12/2000/4 para 8.

<sup>186</sup> United Nation Population Fund 2012 [http://www.unfpa.org/annual report](http://www.unfpa.org/annual%20report).

<sup>187</sup> United Nation Population Fund 2012 [http://www.unfpa.org/annual report](http://www.unfpa.org/annual%20report).

<sup>188</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 361.

<sup>189</sup> Nour 2009 *Reviews in Obstetrics and Gynecology* 54.

<sup>190</sup> Nour 2009 *Reviews in Obstetrics and Gynecology* 56.

<sup>191</sup> Nour 2009 *Reviews in Obstetrics and Gynecology* 56.

<sup>192</sup> Grant and Hallman 2008 <http://www.ncbi.nlm.nih.gov/pubmed/19248721>.

<sup>193</sup> UNFPA 2005 [http://www.unfpa.org/swp/2005/presskit/factsheet/facts\\_child\\_marriage.htm](http://www.unfpa.org/swp/2005/presskit/factsheet/facts_child_marriage.htm).

<sup>194</sup> UNFPA 2005 [http://www.unfpa.org/swp/2005/presskit/factsheet/facts\\_child\\_marriage.htm](http://www.unfpa.org/swp/2005/presskit/factsheet/facts_child_marriage.htm).

harmful health consequences. *Ukuthwala*, therefore, affects the right to health, especially the freedom to control one's body in respect of one's sexual and reproductive rights.

### 3.3.3 *Ukuthwala and the survival and development of the child*

According to section 6(2) of the *Convention on the Rights of the Child* it is provided that states parties should ensure the survival and development of the child.<sup>195</sup> This right is not specifically provided for in the Constitution, but it is attached to other rights such as the right to be protected from maltreatment, neglect, abuse or degradation.<sup>196</sup> The practice of *ukuthwala* has negative effects on the survival and development of the child. The moment a child is *thwala'd* she is exposed to abuses such as forced sexual activity, which traumatises her and affects the physical and emotional development of the child.<sup>197</sup> Such girls suffer physical harm through being beaten by their husbands to coerce them to sex, and they do not usually go to hospitals for medical care due to fear.<sup>198</sup> Mostly they are forced to marry men between 55 and 70 years old who are HIV positive and in most cases abusive.<sup>199</sup> Thy long-term emotional abuse inflicted on them may produce post-traumatic stress disorder and mental illness.<sup>200</sup> Such maltreatment and abuse violates the rights listed in section 28(1)(d) above.

Moreover, they are forcibly separated from their own family and friends at an age when they need to establish good family relations and develop psychologically, physically and emotionally.<sup>201</sup> The fast-tracking of a child from childhood to adulthood usually skips some phases of a child's life and disturbs the child's personal growth.<sup>202</sup> Also, they are forced to find a place in a new family structure, and this often leads to moody tantrums and enmity between

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<sup>195</sup> A 6(2) of the *Convention on the Rights of the Child* (1989).

<sup>196</sup> Section 28(1)(d) of the Constitution.

<sup>197</sup> Kugara, Mathidze and Mudhluli 2017 *Hum & Soc Sc J*9009.

<sup>198</sup> De Silva-de-Alwis *Child Marriage and the Law* 32.

<sup>199</sup> Umemoto 2001 *Innocenti Digest* 6.

<sup>200</sup> Van der Watt and Ovens 2012 *SAJ*21.

<sup>201</sup> Kugara, Mathidze and Mudhluli 2017 *Hum & Soc Sc J*9009.

<sup>202</sup> Ndindwa *The experience of cultural marriage practice* 32.



the girl and her in-laws.<sup>203</sup> The stress associated with such issues affects her emotional growth. The practice of *ukuthwala* in this regard leads to emotional, physical and psychological abuse, and the maltreatment of young girls mostly by their husbands. All these factors affect the child's general well-being and deprive them of their rights to survival and development.

### 3.3.4 *Ukuthwala and the right to equality and non-discrimination*

Section 9 of the Constitution affords everyone the right to equality and not to be unfairly discriminated against on the basis of gender.<sup>204</sup> This right denotes that everyone should be treated equally, in the same manner, and no action or omission should on the basis of gender impose a burden or withhold benefits directly or indirectly on anyone.<sup>205</sup> *Ukuthwala* aggravates gender inequality in society. As mentioned at point 3.3.2, young girls are forced to marry men old enough to be their fathers and even their grandfathers.<sup>206</sup> The writer submits that this age difference between the spouses creates power imbalance. Often young brides are likely to be beaten, sexually harassed and made to believe that since the husband is the head of the household he is justified in doing so.<sup>207</sup> They are not educated and they lack confidence and have low self-esteem, which increases their powerlessness and vulnerability.<sup>208</sup> Because of their vulnerability and powerlessness, they cannot compete with men, which increases the levels of inequality and the gender discrimination.<sup>209</sup> Furthermore, the practice of *ukuthwala* has often led to girls being equated to mere commodities, as mentioned in the introduction at point 3.1 of this

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<sup>203</sup> Kugara, Mathidze and Mudhluli 2017 *Hum & Soc Sc J*9012.

<sup>204</sup> Section 9(1)-(5) of the Constitution.

<sup>205</sup> Department of Justice and Constitutional Development 2014 "What does the South African Constitution say about your Human Rights" [http://www.justice.gov.za/bronchure/2014\\_ConstitutionalRights](http://www.justice.gov.za/bronchure/2014_ConstitutionalRights).

<sup>206</sup> Van der Watt and Ovens 2012 *SAJ* 12.

<sup>207</sup> UNFPA 2005 [http://www.unfpa.org/swp/2005/presskit/factsheet/facts\\_child\\_marriage.htm](http://www.unfpa.org/swp/2005/presskit/factsheet/facts_child_marriage.htm).

<sup>208</sup> Ndindwa *The experience of cultural marriage practice* 34.

<sup>209</sup> Ndindwa *The experience of cultural marriage practice* 34.

chapter.<sup>210</sup> Their husbands believe that they own them, simply because they paid *lobola*.<sup>211</sup>

Another point to be noted is that early marriages often lead to early divorces.<sup>212</sup> Also, due to age difference, the women became widows at an early age. Divorced women and widows who are in most cases not financially stable receive poor treatment and are socially discriminated against because of their poor status.<sup>213</sup>

Since they are deprived of their right to education, as stated in point 3.3.1 of this chapter, their chances of employment are reduced.<sup>214</sup> Men will always have this edge over women since they are the breadwinners.<sup>215</sup> Gender inequality and discrimination against women is a barrier against the achievement of the objectives of equality, peace and development. Men should be part of the joint effort to curb gender inequality generally, and in traditional practices particularly.<sup>216</sup> *Ukuthwala* prolongs a vicious cycle of inequality as the wives trapped in this process, ill-educated as they are, are also trapped in the cycle of patriarchy, which places them in a detrimental situation where their rights are never respected or protected.<sup>217</sup> To be utterly direct, the practice of *ukuthwala* is a celebration of men's power over women, and it violates women's and girl children's right to dignity,<sup>218</sup> equality,<sup>219</sup> and non-discrimination.<sup>220</sup>

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<sup>210</sup> Wadesango, Rembe and Chabaya 2011 *Anthropologist* 121.

<sup>211</sup> UNFPA 2005 [http://www.unfpa.org/swp/2005/presskit/factsheet/facts\\_child\\_marriage.htm](http://www.unfpa.org/swp/2005/presskit/factsheet/facts_child_marriage.htm).

<sup>212</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 362.

<sup>213</sup> Gaffney-Rhys 2011 *Int'l J Hum R* 363.

<sup>214</sup> Ndindwa *The experience of cultural marriage practice* 86.

<sup>215</sup> Ndindwa *The experience of cultural marriage practice* 86.

<sup>216</sup> Mesatywa *Perceptions and experience of African Women* 168.

<sup>217</sup> Mesatywa *Perceptions and experience of African Women* 153.

<sup>218</sup> Section 10 of the Constitution.

<sup>219</sup> Section 9(1) of the Constitution.

<sup>220</sup> Section 9(3) of the Constitution.

### 3.3.5 *Ukuthwala and the right to freedom and security of the person*

This rights to freedom and security of the person mean that everyone has the right to bodily and psychological integrity - for instance, the right to make decisions regarding reproduction.<sup>221</sup> Girls are barely granted the right to freely express themselves and consent when it comes to marital issues.<sup>222</sup> In most cases the consent of a child when it comes to *ukuthwala* is not valued. Her parents are granted the capacity, authority and power to consent on behalf of the girl child in relation to marital issues.<sup>223</sup> This is done so as to secure the protection of their traditional customs, to secure the family's name, and to protect the family from the humiliation of poverty.<sup>224</sup> Moreover, the number and spacing of the children to be born is mostly determined by the husband or his family. This deprives the woman of her right to make decisions regarding reproduction.<sup>225</sup>

Wadesango, Rembe and Chabaya observe that children are usually forced into marriage for health reasons, for protection against promiscuity, and for protection against poverty.<sup>226</sup> Therefore, they do not get to choose whom to marry. Instead their parents and other family members decide on that and consent to such issues.<sup>227</sup> It should be borne in mind that, just like a man, a woman needs to have the capacity to choose her future spouse and to do so with freely.<sup>228</sup> Women are entitled to make informed decisions concerning their bodies and reproduction, and they should be granted their rights with joy.<sup>229</sup> Instead, as has been shown here, *ukuthwala* violates on the child's right to freedom and security of the person, and condemns her to a life of misery.

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<sup>221</sup> Section 12(2)(a)-(b) of the Constitution.

<sup>222</sup> Maluleke 2012 *PELJ* 13.

<sup>223</sup> Martin and Mbambo 2011 *Save the Children* 64.

<sup>224</sup> Diala and Diala 2017 *J Comp L Afr* 81.

<sup>225</sup> De Silva-de-Alwis *Child Marriage and the Law* 4.

<sup>226</sup> Wadesango Rembe and Chabaya 2011 *Anthropologist* 121.

<sup>227</sup> Wadesango Rembe and Chabaya 2011 *Anthropologist* 121.

<sup>228</sup> Article 16(1)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979).

<sup>229</sup> Section 12(2)(a)-(b) of the Constitution.

### 3.3.6 *Ukuthwala and the right to dignity*

Everyone's dignity ought to be respected and protected, as stated in section 10 of the Constitution.<sup>230</sup> This basically entails that no one should be perceived or rather treated merely as instruments or objects of the will of others.<sup>231</sup> This right is the founding right of our Constitution, meaning that all other rights are derived from the inherent dignity of being human.<sup>232</sup> Girls who are married through *ukuthwala* usually have low self-esteem. They struggle to recognise their value and self-worth, which lack affects their dignity as women.<sup>233</sup> The denial of access to education, the deprivation of their right to health, the deprivation of their right to freedom and security, equality and non-discrimination, as well as negative effects that stem from the deprivation of right to survival and development of the child - all of these things violate the child's right to dignity. The right to dignity also works hand in hand with principle of the best interests of the child, which is a fundamental right of all children.<sup>234</sup>

### **3.4 Conclusion**

It can be seen in the discussion above that the practice of *ukuthwala* has led to gross violations of human rights. Poverty, gender inequality and cultural beliefs seem to be the dominant causes of *ukuthwala*. So steps need to be taken to eradicate the root causes of *ukuthwala*. The cultural practice of *ukuthwala* deprives girls of the opportunity to obtain education, which helps one to live an economically rewarding life. Moreover, young girls are even deprived the right to consent to their marriages. Their right to freedom and

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<sup>230</sup> Section 10 of the Constitution.

<sup>231</sup> Department of Justice and Constitutional Development 2014 "What does the South African Constitution say about your Human Rights" 9 [http://www.justice.gov.za/brochure/2014\\_ConstitutionalRights](http://www.justice.gov.za/brochure/2014_ConstitutionalRights).

<sup>232</sup> Department of Justice and Constitutional Development 2014 "What does the South African Constitution say about your Human Rights" 9 [http://www.justice.gov.za/brochure/2014\\_ConstitutionalRights](http://www.justice.gov.za/brochure/2014_ConstitutionalRights).

<sup>233</sup> Nkosi 2014 *J Soc Sci* 442.

<sup>234</sup> Section 28(3) of the Constitution. A child's best interests are of paramount importance in every matter concerning the child.

security, their right to survival and development, their right to equality and non-discrimination, and their right to health are all negatively affected by the practice of *ukuthwala*. The fact that *ukuthwala* has some negative impacts on the rights of the child shows that it is in contrary to the best interest principle, which that is the founding right of all children.

This chapter has presented one side of the argument. Chapter Four below contains the national laws and provisions which are contravened by the practice of *ukuthwala*. Hence, the cultural practice of *ukuthwala* will be discussed in more detail in the next chapter.

## CHAPTER 4: CULTURAL PRACTICES WITHIN THE SOUTH AFRICAN FRAMEWORK

### 4.1 Introduction

Onyango described culture as:

An integrated pattern of human knowledge, belief and behaviour which is dependent upon the capacity of human society to learn and transmit knowledge about their values, ideas and beliefs to succeeding generations.<sup>235</sup>

In other words, culture reflects the values and beliefs held by members of a community for a period time, and is transmitted from generation to generation.<sup>236</sup>

The *African Charter on Human and Peoples Rights* provides that:

The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognised by the community.<sup>237</sup>

An inference can be drawn that it is through the family that children are taught and experience cultural values, and from birth they are required to follow a certain cultural path of development.<sup>238</sup> Bennett states that

a core value of culture is the fact that a person is viewed in his or her relation to his family and his community, and the practising of one's culture is mostly tied to that of the entire community's culture.<sup>239</sup>

Customary law is recognised as part of the law in South Africa.<sup>240</sup> South Africa is characterised by its multicultural nature.<sup>241</sup> The practice of *ukuthwala* is one of the cultural practices still recognised and in some parts of the country.<sup>242</sup>

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<sup>235</sup> Oloka-Onyango 2005 *HRQ* 3.

<sup>236</sup> Bennett 2004 *Customary Law* 87.

<sup>237</sup> Article 18(2) of the *African Charter on Human and Peoples Rights* (1986).

<sup>238</sup> Hanzi *Sexual abuse and exploitation of the girl child* 20.

<sup>239</sup> Bennett 2004 *Customary Law* 87.

<sup>240</sup> Ngidi "Upholding the best interest of the child" 226.

<sup>241</sup> Matthee *One person's culture is another person's crime* 9.

<sup>242</sup> Anon 2012 <http://www.southafrica.com/blog/the-nguni-people-of-south-africa>.

As previously said in Chapter 1, it is generally practised by the Xhosa, community mostly in the Eastern Cape.<sup>243</sup>

Maluleke states that:

The revival of traditions, culture and customs and the practices derived from them, after the demise of colonialism, imperialism and apartheid will definitely require us to enter into a dialogue on the character of our ancestors and what is really indigenous. The process should take the context into consideration. Some of the cultural practices that were necessary then are unnecessary now due to development, globalisation and other factors.<sup>244</sup>

Hence, he believes that some of these cultural practices need to be scrutinised. Therefore, the forms of *ukuthwala* will be examined in the discussion below.

#### **4.2 Forms of ukuthwala**

The general perception about *ukuthwala* is that it is carried out with the girls' or her guardian's consent.<sup>245</sup> There are basically three forms of *ukuthwala*. Firstly, the practice occurs where a girl is aware of the intended abduction and there is an agreement between the parties.<sup>246</sup> In this case the girl will fully consent to the arrangements. The man is not supposed to have any sexual intercourse with the girl before *ukuthwala* is finalised. If he does so, then that is in contravention of the customary law.<sup>247</sup> The issue of consent here is important because *ukuthwala* is regarded as a preliminary procedure to a customary marriage, and as such should be done in line with the requirements of the *Recognition of Customary Marriage Act* 120 of 1998.

In the second form, both families will consent to the girl's being abducted, but they do not seek the girl's consent.<sup>248</sup> This mostly happens where the girl would not agree with her parents' choice.<sup>249</sup> Under such circumstances the girl

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<sup>243</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 3.

<sup>244</sup> Maluleke 2012 *PELJ* 9.

<sup>245</sup> Ndindwa *The experience of cultural marriage practice* 20.

<sup>246</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 7.

<sup>247</sup> Commission for Gender Equality "date unknown" <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/130320ukuthwala.pdf>.

<sup>248</sup> Matthee *person's culture is another person's crime* 165.

<sup>249</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 7.

is usually not aware of the plan between the two families and if she refuse to marry the suitor there will be remedies payable.<sup>250</sup> Since the suitor has the permission of the girl's father, he can actually seduce her into sexual intercourse and no compensation in the form of heads of cattle is required.<sup>251</sup>

The third form is where *ukuthwala* is done against the will of the girl. She is totally forced into it and there won't be any consent from either the girl or her parents or guardian.<sup>252</sup> The girl will be taken to the family home of the suitor by force, and representatives are sent to the family of the girl open negotiations.<sup>253</sup> The girl's family may agree to or refuse the marriage. In the event that they refuse, then a head of cattle is payable and the girl is taken back home.<sup>254</sup> So a marriage can be concluded only after the suitor obtains the consent of both the girl and her family. These are examples of the forms of *ukuthwala*. As noted, in some instances the girl may be unwilling to marry, or forced into marriage without her consent. In such circumstances there is a violation of human rights arising from the infringement of the freedom and security of person,<sup>255</sup> and a violation of the right to dignity.<sup>256</sup>

### **4.3 The right to practice one's culture in South Africa**

The right to practice one's culture and participate in traditional cultural practices is one of the fundamental rights in South Africa. The Constitution, which is the supreme law of the country, aims to ensure, recognise, protect and respect the rights of its citizens.<sup>257</sup> In that regards it respects the differentiation of cultural beliefs. The preamble of the Constitution expressly

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<sup>250</sup> Matthee *One person's culture is another person's crime* 165. Example of such remedies are that she smears her face with her own excrement.

<sup>251</sup> Labuschagne and Schoeman 1988 *J Jur Sci* 34.

<sup>252</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 7.

<sup>253</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 7.

<sup>254</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 7.

<sup>255</sup> Section 12 of the Constitution.

<sup>256</sup> Section 10 of the Constitution.

<sup>257</sup> Section 2 of the Constitution.



states that "South Africa belongs to everyone living in it, united in our diversity."<sup>258</sup> Section 30 of the Constitution provides that:

Everyone has the right to use their language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.<sup>259</sup>

This provision allows people to participate in their cultural practices as long as doing so does not violate any right in the Constitution. Section 31(1)(a)-(b) of the Constitution further stipulates that people belonging to a cultural group should be allowed the right to enjoy their culture and to "form, join and maintain cultural associations".<sup>260</sup> In addition, section 211(3) instructs the courts to apply customary law whenever it is appropriate, but such application has to be in accord with the Constitution and any legislation dealing with customary law.<sup>261</sup> Section 15(3) of the Constitution allows for the legislative recognition of customary marriages and authorises the State to give effect to such marriages in terms of a system of traditional law.<sup>262</sup> Such recognition must be consistent with the Bill of Rights, since *customary* law is recognised, respected and protected in the Constitution. It is quite clear that provisions of the Constitution put it beyond doubt that customary law should be accommodated, not merely tolerated, provided that it does not violate any right contained in the Bill of Rights.<sup>263</sup>

#### ***4.4 Ukuthwala and the contravention of legal frameworks in South Africa***

This brief overview of the nature, causes and consequences of the cultural practice of *ukuthwala* suggests that the practice violates the following legislation: the Constitution, the *Children's Act*, the *Sexual Offences Act* and the *Recognition of Customary Marriages Act*. Besides international laws, South

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<sup>258</sup> Preamble of the Constitution.

<sup>259</sup> Section 30 of the Constitution.

<sup>260</sup> Section 31(1)(a)-(b) of the Constitution.

<sup>261</sup> Section 211(3) of the Constitution.

<sup>262</sup> Section 15(3) of the Constitution.

<sup>263</sup> Choma 2011 *US-China LR* 877.

Africa has its own national legal framework which protects children's rights. The practice of *ukuthwala* seems to be in violation of the following national legislations.

#### 4.4.1 *The Constitution, 1996*

Firstly, section 7 of the Constitution provides that the Bill of Rights is the cornerstone of democracy in South Africa.<sup>264</sup> It enshrines the rights of all people, including children, and upholds the right to human dignity, equality and freedom.<sup>265</sup>

Furthermore, section 28 of the Constitution specifically caters for children's rights. The inclusion of such provision in the Constitution marks the constitutional importance of protecting the rights of children.

Section 28(1) of the Constitution states that every child has the right:

- To family care or parental care or to appropriate alternative care when removed from the family environment.<sup>266</sup>
- To basic nutrition, shelter, basic healthcare and social services.<sup>267</sup>
- To be protected from maltreatment, neglect, abuse or degradation.<sup>268</sup>

Furthermore and most importantly, the Constitution enjoins everyone to take into account the child's best interests in every matter involving a child.<sup>269</sup> The Constitution states that in every act or decision involving a child, the best interests of the child should be of paramount importance.<sup>270</sup> Of course, any violation of children's rights places at risk the child's wellbeing, education, physical or mental health, or spiritual, moral or social development.<sup>271</sup> Moreover, the Constitution explicitly states that a child is "any person under

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<sup>264</sup> Section 7(1) of the Constitution.

<sup>265</sup> Section 7(1) of the Constitution.

<sup>266</sup> Section 28(1)(b) of the Constitution.

<sup>267</sup> Section 28(1)(c) of the Constitution.

<sup>268</sup> Section 28(1)(d) of the Constitution.

<sup>269</sup> Section 28(2) of the Constitution.

<sup>270</sup> Section 28(2) of the Constitution.

<sup>271</sup> Section 28(f)(ii) of the Constitution.

the age of 18 years."<sup>272</sup> The cultural practice of *ukuthwala* seems to be in violation of the best interests of the child and other rights referred to in Chapter 3 above. It also deprives children of their section 28 rights mentioned above.

#### 4.4.2 *Children's Act 38 of 2005 (hereinafter the Children's Act)*

The *Children's Act* also regards a child as any person below the age of 18 years.<sup>273</sup> It further states that in all matters affecting a child, the best interests of the child are of paramount importance.<sup>274</sup> An elaboration of what the principle of the best interests of the child entails is provided in section 7. The *Children's Act* states that the following factors must be taken into account when considering the best interests of the child: *inter alia*, the child's age, maturity and stage of development,<sup>275</sup> and the need to protect the child from any physical or psychological harm.<sup>276</sup>

The *Children's Act* makes it clear that children should not be subjected to social, cultural and religious practices which are detrimental to their wellbeing.<sup>277</sup> The cultural practice of *ukuthwala* is associated with the abduction and rape of a minor – a child.<sup>278</sup> This constitutes a harmful practice which is detrimental to the wellbeing of a child and is inconsistent with section 12 of the *Children's Act*.<sup>279</sup> On the other hand, not all forms of *ukuthwala* are detrimental to the well-being of the child. So a determination of whether the practice is detrimental will inevitably be related to the actual circumstances which are laid before the court for adjudication.<sup>280</sup>

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<sup>272</sup> Section 28(3) of the Constitution.

<sup>273</sup> South African *Children's Act*.

<sup>274</sup> Section 9 of the *Children's Act*. S 7 of the same Act provides for the standards which need to be taken into consideration when applying the best interest standard.

<sup>275</sup> Section 7(g)(i) of the *Children's Act*.

<sup>276</sup> Section 7(l) of the *Children's Act*.

<sup>277</sup> Section 12 of the *Children's Act*.

<sup>278</sup> Van der Watt and Ovens 2012 *SAJ* 13.

<sup>279</sup> Section 12 of the *Children's Act*.

<sup>280</sup> Mwambene and Sloth-Nielsen 2011 *J Fam L & Prac* 17.

Section 12(2)(a) of the *Children's Act* goes on to provide that a child below the minimum age set by law should not be given out for marriage.<sup>281</sup> As the *Children's Act* explicitly prohibits child marriages, *ukuthwala* as a form of child marriage is blatantly in violation of the provision. Any act in contravention of section 12(2) is deemed an offence in terms of section 305(1)(a) of the same *Children's Act*.<sup>282</sup> This means that any contravention of the provision constitutes a criminal offence. It is noteworthy that the above provision shows South Africa's commitment to its international obligation to ban child marriages.<sup>283</sup> It has complied with the prescription of the *African Charter*, which requires the abolition of child marriages and sets the marriageable age at 18 years.<sup>284</sup> So parents who marry off their children to older men in the guise of culture should be dealt with in accordance with the law. There is an obligation to respect, protect and promote the rights afforded to children in terms of the *Children's Act*.<sup>285</sup>

#### 4.4.3 *Criminal Law (Sexual Offences and Related) Amendment Act 32 of 2007 (hereinafter Sexual Offences Act)*

Sections 16 (1) of the *Sexual Offences Act* provide that:

A person ('A') who commits an act of sexual violation with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.<sup>286</sup>

In relation to sections 16(1) and 15(1) of the *Sexual Offences Act* a child is defined as someone between the ages of 12 and 16.<sup>287</sup> A child of that age is

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<sup>281</sup> Section 12(2)(a) of the *Children's Act*.

<sup>282</sup> Section 305(1)(a) of the *Children's Act*.

<sup>283</sup> Mahery "Special child protective measures" 242.

<sup>284</sup> Mahery "Special child protective measures" 242.

<sup>285</sup> Preamble of the *Children's Act*.

<sup>286</sup> Section 16(1) of the *Sexual Offences Act*. S 15(1) also states that a person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.

<sup>287</sup> Chapter 1(b) of the *Sexual Offences Act*.

legally incapable of consenting to sex. Hence, having sex with a child without her consent, following her abduction (*ukuthwala*), constitutes rape.<sup>288</sup>

Section 17 of the *Sexual Offences Act* goes further to state that

Any person who unlawfully and intentionally engages the services of a child complainant, with or without her consent, for financial or other reward, favour or compensation to the child or to a third person is guilty of the offence of sexual exploitation of a child.<sup>289</sup>

In this regard parents or relatives and other parties who negotiate or collude in the *ukuthwala* of a girl-child commit the crime of the sexual exploitation of children. The current practice of *ukuthwala* violates this provision.

#### 4.4.4 *Recognition of Customary Marriages Act 120 of 1998 (hereinafter RCMA)*

It should be noted that the RCMA fully recognises, respects and upholds customary marriages. According to section 1 of the RCMA, a "customary marriage" is defined as a "marriage concluded in accordance with customary law."<sup>290</sup> Customary law is defined in the same RCMA as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.<sup>291</sup> In South Africa *ukuthwala* is regarded as a customary marriage traditionally observed among a certain community.

However, the RCMA lists the requirement of concluding any customary marriage and provides that the prospective spouses –

- (i) Must both be above the age of 18 years; and
- (ii) Must both consent to be married to each other under customary law; and

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<sup>288</sup> Commission for Gender Equality "date unknown" <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/130320ukuthwala.pdf>.

<sup>289</sup> Section 17(1) of the *Sexual Offences Act*.

<sup>290</sup> Section 1 of the RCMA.

<sup>291</sup> Section 1 of the RCMA.

- (iii) The marriage must be negotiated and entered into or celebrated in accordance with customary law.<sup>292</sup>

The *RCMA* further provides that if one of the parties is under the age of 18 years, parental consent is an additional requirement for a valid marriage.<sup>293</sup> If this cannot be obtained, the permission of the Minister of Home Affairs must be sought.<sup>294</sup> This provision is rather biased and has been questioned by the opponents of *ukuthwala* practice. They argue that more often than not, parents or guardian use parental consent as leverage in cases of *ukuthwala*.<sup>295</sup>

The current practice of *ukuthwala* includes a parent's or guardian's choosing a husband for the girl. In most cases this is done against the girl's will.<sup>296</sup> The girl does not give her consent but is forcibly taken to the husband and kept there until she gets used to the marriage. Moreover, *ukuthwala* involves girls as young as 12 years being forced to marry older men.<sup>297</sup> This is in contrast with the listed requirements of a customary marriage. Section 4 requires all customary marriages to be registered,<sup>298</sup> yet in most cases of *ukuthwala* the marriages are never registered.

#### ***4.5 Court decisions regarding the cultural practice of ukuthwala***

The offences for which the appellant was charged took place after the performance of the traditional practice of *ukuthwala*.

The appellant (Jezile), according to his custom, went to his village to find a girl to marry and found a 14-year old girl (the complainant), whom he wanted as his wife.<sup>299</sup> Accompanied by his family the appellant went to the complainant's family to engage in marriage negotiations. The two families agreed to the

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<sup>292</sup> Section 3 of the *RCMA*.

<sup>293</sup> Section 3(3)(a) of the *RCMA*.

<sup>294</sup> Section 3(4)(a) of the *RCMA*.

<sup>295</sup> Ndindwa *The experience of cultural marriage practice* 51.

<sup>296</sup> Mtshali 2014 *Child Abuse Research in South Africa* 51.

<sup>297</sup> UNFPA 2005 [http://www.unfpa.org/swp/2005/presskit/factsheet/facts\\_child\\_marriage.htm](http://www.unfpa.org/swp/2005/presskit/factsheet/facts_child_marriage.htm).

<sup>298</sup> Section 4 of the *RCMA*.

<sup>299</sup> *Jezile* case para 5-6.

marriage without the complainant's consent.<sup>300</sup> The complainant's family forcibly took the girl to the appellant's place, where she was told that the appellant was going to be her husband.<sup>301</sup> Whilst there she protested against the marriage on the basis that she wanted to continue with her studies and she did not want to get married.<sup>302</sup> However, her family forcibly made her undergo the relevant traditional ceremonies and eventually she became the complainant's wife according to customary law, although she was unhappy and unwilling.<sup>303</sup> Accordingly a sum of R8 000 was paid as a bride price.<sup>304</sup>

Soon after that the appellant forcibly took the complainant (his wife) to Cape Town, where he resided, despite her unwillingness to go.<sup>305</sup> On their arrival the complainant was forced into sexual intercourse several times against her will.<sup>306</sup> Not long after her arrival in Cape Town she ran away from the appellant, but she was returned to her husband by her family.<sup>307</sup> On her return she reported the matter to the police. After the matter had been reported the appellant was arrested and charged with one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm, and one count of common assault.<sup>308</sup> Jezile was found guilty of the charges against him, took the judgement on appeal where he argued that his actions were justified since what he had done was a customary practice. It was in accordance with customary law.<sup>309</sup> In making its decision the court had to take into account the legal framework regulating customary law, which includes constitutional provisions, legislation, and international and regional instruments. The court reviewed the *Children's Act*, for instance, section 1 of which defines trafficking (one of the consequences of ukuthwala),<sup>310</sup> section

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<sup>300</sup> *Jezile* case para 5-6.

<sup>301</sup> *Jezile* case para 7.

<sup>302</sup> *Jezile* case para 7.

<sup>303</sup> *Jezile* case para 10.

<sup>304</sup> *Jezile* case para 9.

<sup>305</sup> *Jezile* case para 9.

<sup>306</sup> *Jezile* case para 11.

<sup>307</sup> *Jezile* case para 10.

<sup>308</sup> *Jezile* case para 1.

<sup>309</sup> *Jezile* case para 51.

<sup>310</sup> *Jezile* case para 61; s 1 of the *Children's Act*. Trafficking is the transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic by any

12(1) of which forbids exposing children to cultural practices that are harmful to their wellbeing,<sup>311</sup> and section 284(1) of which prohibits child trafficking.<sup>312</sup>

The *Sexual Offences Act* was also discussed, particularly in the context of the issue of rape, as well as section 56(1) of the *Sexual Offences Act*.<sup>313</sup> The RCMA, which provides for the recognition of customary marriages and the requirements for contracting a valid customary marriage, was also considered.<sup>314</sup>

The *Convention on the Rights of the Child* (CRC), which urges state parties to abolish traditional practices which are harmful to the child was taken into account,<sup>315</sup> as was the *African Charter on the Rights and Welfare of the Child*, which prohibits child marriage.<sup>316</sup>

In addition to that, the court had to evaluate the information which was provided by the parties and the *amici curiae* regarding this cultural practice.<sup>317</sup>

The *amici curiae* pointed out that the custom of *ukuthwala* generally requires:

- (a) the woman to be of marriageable age, typically of child-bearing age,<sup>318</sup>
- (b) the consent of both parties, though there are instances in which the woman's acquiescence in the process occurs after the fact,<sup>319</sup>
- (c) a mock abduction of the woman at dusk, during which the woman would feign protest but would have agreed beforehand,<sup>320</sup>

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means, including the use of force or other forms of coercion, abduction... abuse of power or benefits to achieve the consent of a person having control of a child or due to a position of vulnerability for the purpose of exploitation.

<sup>311</sup> *Jezile* case para 62.1; s 12(1) of the *Children's Act*.

<sup>312</sup> *Jezile* case para 62.2; s 284(1) of the *Children's Act*.

<sup>313</sup> *Jezile* case para 63; s 56(1) of the *Sexual Offences Act*, which provides that it is not a defence to the charge of rape to rely on a marital or existing relationship.

<sup>314</sup> *Jezile* case para 65-66.

<sup>315</sup> *Jezile* case para 68.5.

<sup>316</sup> *Jezile* case para 68.6.

<sup>317</sup> *Amici curiae* is a Latin phrase which means "friend of the court", a person who is not actually involved in a case as a party but who brings a matter to the attention of the court. Collins Dictionary of Law 2006 available at <https://legaldictionary.thefreedictionary.com/amicus+curiae>.

<sup>318</sup> *Jezile* case para 72.1.

<sup>319</sup> *Jezile* case para 72.2.

<sup>320</sup> *Jezile* case para 72.3.



- (d) a smuggling of the woman to the man's homestead,<sup>321</sup> and
- (e) an invitation sent to the woman's homestead to inform the woman's family that she was with the man's family, which was supposed to signal the desire of the man's family to enter into marriage negotiations.<sup>322</sup>

The *amici curiae* expressed the opinion that, based on the facts given, this instance of *ukuthwala* had not been performed in accordance with customary law, especially taking into account the facts that the girl was under age, that she did not consent to the marriage, and that the bride price was paid before *ukuthwala* occurred.<sup>323</sup>

Moreover, the court had to take into account the views of other parties such as Professor Nhlapo and Inkosi Mahlango, who thoroughly differentiated between the traditional and the aberrant forms of *ukuthwala*.<sup>324</sup> They argued that in the traditional form of *ukuthwala* the consent of the bride was always sought, yet the aberrant form does the opposite.<sup>325</sup> In its findings the court found that Jezile had used the aberrant form of *ukuthwala* as his customary practice.<sup>326</sup> The aberrant form of *ukuthwala* did not comply with standards of the *RCMA*; hence the appellant could not rely on it.<sup>327</sup>

The Court also pointed out that:

Its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children as young as eleven years by older men.<sup>328</sup>

In conclusion the appeal court set aside only the appellant's convictions on the counts of assault with intent to cause grievous bodily harm, and common assault.<sup>329</sup>

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<sup>321</sup> *Jezile* case para 72.4.

<sup>322</sup> *Jezile* case para 72.5-6.

<sup>323</sup> *Jezile* case para 75.

<sup>324</sup> *Jezile* case para 77.

<sup>325</sup> *Jezile* case para 77.

<sup>326</sup> *Jezile* case para 77.

<sup>327</sup> *Jezile* case para 77.

<sup>328</sup> *Jezile* case para 56.

<sup>329</sup> *Jezile* case para 106.

It is at this point that one would want to assess whether the court was fair in coming to its decision. The court did not take fully into account the submissions made by the appellant. Instead, it relied implicitly on the submissions made by Professor Nhlapo and Inkosi Mahlango. According to Xhosa custom, once a girl starts to show breasts, indicating that she has reached puberty, then that means that she is an adult who can be married.<sup>330</sup> Under such circumstances, her majority is attained not by her reaching a certain age but by her signs of puberty, which demonstrate that she is of marriageable age.<sup>331</sup> The appellant probably did not take into account the fact that the complainant was below the age of 18, but only considered the fact that she was marriageable.

There are quite a number of treaties and laws regulating marriage, but in this case the court ought to have looked at issues such as whether the accused was educated enough to know the law, yet alone the existence of such laws.

In addition, according to the Xhosa custom sexual intercourse with the bride was an essential step which had to be taken during the practice of *ukuthwala*.<sup>332</sup> Whether it was done willingly or coerced, to them it was considered the transformation of the bride from being a girl to being a wife.<sup>333</sup> In one of the interviews conducted by Kate Wood on *ukuthwala*, she quotes a statement made by an elderly wife as follows:

Some guys would hold you down for your husband to be. If a girl has strength the men would turn out the light, holding your legs open for the guy to sleep with you. Whatever you may try to do, they are holding you down even if you cry, old people wouldn't care, and they knew what was going on.<sup>334</sup>

This suggests that sexual intercourse with the girl with or without her consent was not regarded as rape, but was just a normal customary procedure. Although the accused's behaviour or his violation of the constitutional human rights can never be condoned, the courts should have applied the subjective

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<sup>330</sup> Van Tromp *Xhosa law of persons* 342.

<sup>331</sup> Van Tromp *Xhosa law of persons* 342.

<sup>332</sup> Wood 2005 *Int'l J Res Int & Care* 313.

<sup>333</sup> Wood 2005 *Int'l J Res Int & Care* 313.

<sup>334</sup> Wood 2005 *Int'l J Res Int & Care* 313.

test in this matter wherein they evaluate issues such as what was in the accused's mind at the time of the commission of the crime.<sup>335</sup> Only if it is established that he intentionally committed an unlawful act being fully aware that it was unlawful can he be held liable.<sup>336</sup>

One should also bear in mind that whilst he was committing the said crimes he was at the same time complying with the rules of his customary practice.<sup>337</sup> Whatever the appellant did was in accordance with his traditional customary beliefs. Hence in cases that involve customary practices the court should by all means find a way of developing culture in line with the values of the Constitution without in any way undermining or totally banning the traditional customs.<sup>338</sup> South Africa is a democratic nation which aims to build a fair, democratic and just society where the rights of each person are supposed to be prioritised, including cultural rights.

#### ***4.6 Crimes emanating from ukuthwala practice***

The cultural practice of *ukuthwala* leads to various crimes being committed. One of the crimes committed through this practice is "abduction." Snyman defines the crime of abduction in this context as follows:

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.<sup>339</sup>

In the case of *R v Sita* the court held that the abduction through the cultural practice of *ukuthwala* was unlawful and the perpetrators should be punished by the law.<sup>340</sup> As noted above, the cultural practice of *ukuthwala* is to be found chiefly in rural areas where there are many uneducated people. These people

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<sup>335</sup> Nzimande *Cultural defences in an open and democratic South Africa* 28.

<sup>336</sup> Burchell *Principles of Criminal Law* 438.

<sup>337</sup> Nzimande *Cultural defences in an open and democratic South Africa* 28.

<sup>338</sup> Nzimande *Cultural defences in an open and democratic South Africa* 28.

<sup>339</sup> Snyman *Criminal Law* 403.

<sup>340</sup> *R V Sita* 1954 4 SA 20 (E) 9.

are so used to the cultural practice that some of them are not even aware that it's a form of abduction, which is an unlawful crime. In his article Nzimande expresses the opinion that:

When looking at abduction in relation to the custom of *ukuthwala* the courts should look at the knowledge of unlawfulness factor so as to assess the criminal liability of the accused.<sup>341</sup>

Another form of crime is "child trafficking", which is described in the *Children's Act* as the:

- (a) Recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic;<sup>342</sup>
- (b) By any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payment or benefits to achieve the consent of a person having control of a child; or
- (c) Due to a position of vulnerability, for the purpose of exploitation.<sup>343</sup>

The cultural practice of *ukuthwala* is one of the forms of exploitation in the commission of the crime of trafficking. This practice is usually classified as exploitation, because the child is forced into a marriage, mostly with an adult.<sup>344</sup> A girl child is regarded as a commodity which may be sold to any interested party in order to establish a family.<sup>345</sup> Such children are deprived of their rights, which include the development of their personalities.<sup>346</sup> Nowadays the practice of *ukuthwala* is used to bring profit to the families of the girls or to third parties, and hence this constitutes human trafficking.<sup>347</sup> This practice has become more of a business than a culture practice. Therefore, it constitutes the crime of human trafficking.

Furthermore, the cultural practice of *ukuthwala* has led to statutory crimes such as "rape." According to the *Sexual Offences Act* any person who is below

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<sup>341</sup> Nzimande *Cultural defences in an open and democratic South* 21.

<sup>342</sup> Chapter 1 of the *Children's Act*.

<sup>343</sup> Chapter 1 of the *Children's Act*.

<sup>344</sup> Božić 2017 *EU and Comparative Law Issues and Challenges Series* 48.

<sup>345</sup> Božić 2017 *EU and Comparative Law Issues and Challenges Series* 48.

<sup>346</sup> Božić 2017 *EU and Comparative Law Issues and Challenges Series* 48.

<sup>347</sup> Human Trafficking Search 2017 <http://www.humantraffickingsearch.org/2017530contributing-factors-to-child-marriage-in-developing-countries/>.

the age of 12 years is incapable of consenting to a sexual act.<sup>348</sup> In addition sections 15 and 16 of the same act provides that a person who has sex with a child or sexually violates a child without his/her consent commits rape.<sup>349</sup> In most cases of *ukuthwala* the practice is associated with coercing children into sexual intercourse without their consent, and some of the girls involved are below the age of consent anyway. The greatest problem facing the courts today is that when the groom has sexual intercourse with the girl during *ukuthwala*, this is regarded as a customary practice and not rape. This is because the majority of people doing that have absolutely no knowledge about the existence of acts/laws which prohibit such actions.<sup>350</sup> Moreover, parents are often involved in the furthering of the sexual exploitation of their children because they believe that having sexual intercourse transforms the girl from being a child to a wife.<sup>351</sup> Rape is the most common criminal offence associated with the cultural practice of *ukuthwala*.

#### **4.7 Cultural defence in South Africa**

When people of diverse customs and values live together and are governed by one set of legal standards, some degree of conflict, hostility, disagreement and differentiation seems to be unavoidable.<sup>352</sup> In the South African legal system a cultural defence is usually relied upon when an offence has been committed by a certain individual believing in a certain culture.<sup>353</sup> The individual would have to put forward an argument based on the right to culture and hope to be discharged of the criminal charges, since the right to culture is formally guaranteed in sections 30 and 31 of the Constitution.<sup>354</sup> This defence is often raised to show the absence of the *mens rea* element in a crime.<sup>355</sup> Rentel argues that:

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<sup>348</sup> Section 57(1) of the *Sexual Offences Act*.

<sup>349</sup> Sections 15 and 16 of the *Sexual Act*.

<sup>350</sup> Nzimande *Cultural defences in an open and democratic South Africa* 22.

<sup>351</sup> Nzimande *Cultural defences in an open and democratic South Africa* 22.

<sup>352</sup> Fisher 2013 *Birkbeck LR* 281.

<sup>353</sup> South African Law Reform Commission 2015 Discussion Paper 132 (Project 138) 45.

<sup>354</sup> South African Law Reform Commission 2015 Discussion Paper 132 (Project 138) 45.

<sup>355</sup> Nzimande *Cultural defences in an open and democratic South Africa* 45.

In states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>356</sup>

Rentel further asserts that the state has an obligation to protect the right to culture, and that this right should therefore entitle individuals to a cultural defence.<sup>357</sup> For a fair trial to be conducted, the cultural beliefs of the accused should be taken into consideration when determining his criminal liability.

Nevertheless, no right is absolute. There is a limitation clause attached to the cultural right, the observance of which should *inter alia* be reasonable, justifiable and in line with the values of human dignity, equality and freedom.<sup>358</sup> The issue of cultural defence seems to be controversial because recognising "right to culture" as a cultural defence infringes on the right to dignity of the victims, yet not recognising it would deprive the accused of his/her right to the dignity derived from practising his or her culture.<sup>359</sup> However, the courts do not easily accept this defence due to the fact that they are of the view that accepting a cultural defence would weaken the deterrent effect of the law.<sup>360</sup> This means there is not yet a formal recognition of a cultural defence in the South African legal system. This has given rise to difficulty in determining whether or not the right to culture can be used as a cultural defence. The issue of the cultural defence takes us to the research question, which will be addressed in the next chapter which asks if "culture" can be used to justify the practice of *ukuthwala*.

#### **4.8 Conclusion**

There are different forms of *ukuthwala*, all of which are practised in South Africa. Different pieces of legislation addressing children's rights have also been put in place in South African law. The aim of all the legislation is to

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<sup>356</sup> Renteln *Cultural Defence* 213.

<sup>357</sup> Renteln *Cultural Defence* 213.

<sup>358</sup> Nzimande *Cultural defences in an open and democratic South Africa* 15.

<sup>359</sup> Nzimande *Cultural defences in an open and democratic South Africa* 15.

<sup>360</sup> Anon 1986 *Harvard LR* 1303.

protect children from any practice that is detrimental to their well-being. Yet *ukuthwala* continues to be practised, although it seems to contravene with most of the relevant laws. Different opinions have been put in place by those who are for the cultural practice of *ukuthwala* and also those who find it to be abhorrent. Some are of the view that the practice is a cultural norm that does no harm to anyone if conducted carefully. For example, Nomagugu Ngobese, the head of the Nomkhulwane Culture and Youth Development Organisation, believes that *ukuthwala* has been practised since time immemorial, where a boy and a girl would arrange for the abduction, especially when their parents did not approve of that marriage, so the abduction would force the parents to permit the marriage.<sup>361</sup> In this regard he suggests that *ukuthwala* is just a form of marriage negotiation - an event leading to marriage. Yet other writers such as Van der Watt and Oven call it a harmful cultural practice which is an aberration and a distorted cultural practice.<sup>362</sup> At the end of it all, the questions would be whether or not *ukuthwala* constitutes a harmful cultural practice, and whether or not one can use culture as a constitutional right to justify the cultural practice of *ukuthwala*, since in South Africa there is no legislation that exclusively and specifically deals with the issue of *ukuthwala*.

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<sup>361</sup> The New Age Newspaper 2011 <http://www.thenewage.co.za>.

<sup>362</sup> Van der Watt and Ovens 2012 *SAJ* 17.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### ***5.1 Findings and conclusion***

*Ukuthwala* is a customary practice that has gained recognition because of the effects it has on children, particularly girl children. The objective of this study was to determine whether culture can be used to justify the cultural practice of *ukuthwala*. As mentioned in the previous chapters, South Africa is governed by the Constitution, which is the supreme law of the land, and every act or custom should be consistent with the Constitution. Laws or customs which are found to be inconsistent with the Constitution are declared unconstitutional and invalid. Culture as a way of life for people in South Africa is given a place in the Constitution, but it should be consistent with other Constitution rights.

In South Africa all customary marriages should be practised in line with the *RCMA*, including the practice of *ukuthwala*. Regardless of the religion or culture practice taking place, marriages in South Africa requires the full consent of both parties. *Ukuthwala* in its current form does not meet that requirement; neither does it meet the age requirement provided in the *RCMA*, which is 18 years. The current practice of *ukuthwala* is discriminatory against the girl child. As noted in Chapter three, the practice of *ukuthwala* deprives girl's opportunity to obtain education which is a basic Constitutional right. It also affects their health and diminishes the girl's dignity. The custom of *ukuthwala* has had demoralizing consequences, especially amongst young girls who have fallen victim to the practice. It has resulted in kidnapping, human trafficking, sexual exploitation and rape, and has exposed the victims to HIV/AIDS and other deadly diseases. Other than violating the Constitution and other legislations mentioned in chapter four the practise of *ukuthwala* is also in violation of international and regional instruments discussed in chapter two. As noted in chapters one and four, the current practice of *ukuthwala* has resulted in the abduction and rape of young girls, and these are crimes punishable by law. The laws in South Africa, as shown in Chapter four, allow prosecution for the abduction of anyone of any age, and for sex between an adult and a girl under



the age of 16. Even if the victim is over the age of 16 and is forced into marriage and sex without her consent, the perpetrator can still be prosecuted.

This study has demonstrated in chapter three that the practice of *ukuthwala* is influenced by cultural beliefs based on a law which gives individuals the right to practise their culture. Nevertheless, there is a qualification to this right: this right (to culture) may not be practised in such a way as to violate other constitutional rights. In answering the research question as to whether culture can be used to justify the cultural practice of *ukuthwala*? One would note that the *Constitution* in section 31 explicitly protects cultural rights however, the right to culture may not be exercised in a manner inconsistent with any provision of the Bill of Rights. *Ukuthwala* and the harm it inflicts on the girl child amounts to deprivation and violation of other constitutional rights, hence it is inconsistent with the values enshrined in the Bill of Rights.

The study's general finding is that the practice of *ukuthwala* exposes girl child to discrimination, gender inequality, and many other children's rights are violated through *ukuthwala* guised as a customary practice. Therefore, culture cannot be used as a justification for the practice of *ukuthwala*. Particularly in South Africa a constitutional democratic State that protect and promote the best interest of the child.

However, it is submitted on the other hand that the practice of *ukuthwala* should not be totally abolished. *Ukuthwala* is a custom that contributes to the sense of identity of the people who practise it. Therefore, abolishing it would mean that those people lose part of their identity and sense of belonging. Other people's sense of self-worth and dignity is attached to their culture. Abolishing a cultural practice also means disrespecting the standards that have been set in the Constitution. The Constitution itself values culture, hence custom/culture should be developed in such a way that it is consistent with the Constitution and other legal frameworks. Therefore, the practice of *ukuthwala* should be in conformity with customary marriage laws, and thus in

line with the RCMA in particular. The custom of *ukuthwala* therefore should not be done in such a way that it jeopardise other rights in the Bill of Rights.

## **5.2 Recommendations**

This study has shown that there have been gross violations of human rights through the practice of *ukuthwala*. There is, therefore, an obligation both on the State and on society to eliminate the distorted cultural practice of *ukuthwala*. Standards have been set by international and domestic legal instruments, but there is still a need to implement such laws. The recommendations made below are, therefore, intended to lead to such implementation and to help to curb the harmful cultural practice of *ukuthwala*.

The State should enact sound and effective legislation which specifically deals with the issue of *ukuthwala*. It is difficult to combat *ukuthwala* effectively without a sound legislative foundation enabling such action. Clear legislature should be drafted which inhibits the practice of *ukuthwala* and outlining the punishment for anyone found guilty of such practice, this would have a strong deterrent effect. Moreover, victims might be encouraged to report the crime when there is a sound legislative framework to rely on.

Given that *ukuthwala* is predominant in the rural areas, when drafting the act, the State should involve traditional leaders such as kings, chiefs, as well as academics so that they may contribute to aligning cultural practices with the principles entrenched in the Bill of Rights. Apparently, there seems to be a clear conflict between the African cultural practices supported by the right to cultural practice entrenched in the Constitution and the human rights in the Bill of Rights. Such broad participation in dealing with the issue would help to create a common understanding of the customs and create the missing link between the right to culture and the other rights contained in the Bill of Rights. Thereafter the said traditional leaders and academics could promote awareness among other members of society of what is acceptable as well as the limitation of their right to cultural practices.

The community should be educated on their constitutional rights and how to institute claims when their rights are violated. Generally, education of this kind should be made compulsory. Education should be sufficiently adaptable, accessible, available and acceptable to meet the needs of all people in the society. The South African educational system should include a cultural curriculum where children should be educated from grade one about *ukuthwala*. Moreover, there should be relevant educational campaigns and awareness programmes at each and every school. This would raise awareness to families and children about the unlawful nature of the practice of *ukuthwala* and the criminal implications thereof for the perpetrators as well as for those who support the practice. Also occasional parenting seminars should be held so that parents are educated on the rights of their children so as to avoid the continued practice of *ukuthwala*.

The government should also intervene and cater for the most vulnerable children, such as orphans and those in extreme poverty. Education is a pathway to employment, once a child is employed, she will be able to take care of other needs such as rent, food and health facilities. The State also has an obligation to provide educational resources for such children so that do not become the prey of male predators and so that they are not used by relatives for *ukuthwala* in exchange for wealth. As was noted in Chapter three there is a link between poverty and *ukuthwala*. The State should extend economic opportunities to those in need, especially in those areas where *ukuthwala* is prevalent. International support should be sought so that financial support can be given to families.

Lastly, it is recommended that all customary marriages should be performed in accordance with the requirements of the *RCMA* and in accord with the values enshrined in the Constitution. In making decisions the courts should also incorporate the provisions of the international and regional instruments.

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