

The implications of *ukuthwala* on South Africa's regional and international law obligations

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DEDICATION

I dedicate this work to my dad, Selaledi Frans Gaanakgomo. My heart is filled with great sadness because you are not here to witness milestones like these. Ke lebogela kgodiso ya gago, lerato le thotloetso yaka metlha. Ke motho o keleng ene gompiono ka ntlheng ya gago. Ke a leboga morwa mosadiwatlala le mosimanyana. Tswelela go robala ka kgotso motlhaping.

I also dedicate the work to my son, Lethabo Oboikanyo Gaanakgomo. I hope I am raising you to become a principled young man. I hope I have managed to teach you to never see females as inferior beings. I also hope you never feel entitled to another human being. I hope I raise you well enough.

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LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
CRC	Convention on the Rights of the Child
CILSA	Comparative and International Law Journal of Southern Africa
EJCL	Electronic Journal of Comparative Law
NHS	National Health Service
OAU	Organisation of African Unity
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
POLS	Public Library of Science
RBJ	Rochester Business Journal
SAJAL	South African Journal of African Languages
SAJBL	South African Journal of Bioethics and Law
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
Stell LR	Stellenbosch Law Review
THRHR	Journal of Contemporary Roman-Dutch Law
UNCRC	United Nations Committee on the Rights of the Child

ABSTRACT

This study examined the South African legislative frameworks directly or indirectly dealing with the practice of *ukuthwala*. The focus was on cases of *ukuthwala* involving children under the age of 18 years and not on women who freely choose to be married through *ukuthwala*. The *Constitution*, *Recognition of Customary Marriages Act*, *Children's Act*, *Sexual Offences Act* and the *Trafficking Act* were identified as relevant to this context. These frameworks were studied in order to determine whether South Africa has taken effective measures to combat *ukuthwala* in compliance with its obligations under the *Convention on the Rights of the Child (CRC)* and the *African Charter on the Rights and Welfare of the Child (ACRWC)*.

The *CRC* and the *ACRWC* find application in South Africa through section 39(1) of the *Constitution*. Under the *CRC* and the *ACRWC*, South Africa is obliged to take all appropriate measures, not limited to but including legislative measures, to ensure the rights protected in these instruments to every child within its jurisdiction. Upon an examination of both instruments, it was found that *ukuthwala* violates a number of rights enshrined therein, including the right to non-discrimination, life, survival and development, the best interests of the child and the right to be heard.

It was also found that, although South Africa has legislative frameworks in place which prohibits *ukuthwala*, the practice remains prevalent despite the existence of such frameworks. In this regard, recommendations which could supplement the legislative measures were duly raised.

Keywords: *ukuthwala*; children's rights; cultural rights; constitutional rights; international law; regional law.

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Chapter 1: Introduction

South Africa is a diverse country with different cultures. The *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the *Constitution*) recognise cultural diversity since it protects the right of every person belonging to a cultural group to practice their culture.¹ Additionally, the *Constitution* does not deny the existence of any other freedoms or rights recognised or conferred by customary law.² The constitutional recognition of cultural rights can be attributed to the history of colonialism and apartheid where black people were denied the enjoyment of basic human rights and the right to adhere to their cultural customs where they were deemed immoral.³

Although the importance of the constitutional protection of cultural rights, there is often conflict between cultural rights and other constitutionally protected rights. The *Constitution* makes it clear that the practice of any cultural or customary practices may not in any way infringe on the rights of others.⁴ Nonetheless, there still exists customary practices in direct conflict with the rights of children protected in the *Constitution*. *Ukuthwala* is one such practice. For the purposes of this study, the focus is on the infringement of the rights of girls who have been *forced* to marry through *ukuthwala* and not on women who have agreed to be married through *ukuthwala*.⁵

In order to determine the specific rights of the girl child infringed by *ukuthwala*, reference is made to the *Convention on the Rights of the Child (CRC)*, 1989 and the *African Charter on the Rights and Welfare of the Child (ACRWC)*, 1990. South Africa has ratified these instruments which seek to protect the rights and welfare of children.⁶ In terms of section 39(1) of the *Constitution*, courts are obliged to consider international law when interpreting the Bill of Rights. Courts may additionally consider regional law in its interpretation process. As signatory to both the *CRC* and the *ACRWC*,

¹ Section 31 of the *Constitution of the Republic of South Africa, 1996*.

² Section 39(3) of the *Constitution of the Republic of South Africa, 1996*.

³ Herbst and Du Plessis 2008 *EJCL* 1.

⁴ Section 31(2) of the *Constitution of the Republic of South Africa, 1996*.

⁵ The study focuses on girls since children are generally perceived as vulnerable and in need of protection. There is therefore a need to establish the effect of *ukuthwala* on children and the resultant duty of the State to combat the practice.

⁶ South Africa ratified the *CRC* on 16 June 1995 and the *ACRWC* on 7 January 2000.

South Africa is obliged to ensure their implementation by adopting appropriate measures aimed at the realisation of the rights contained therein. Below is a background into the cultural practice of *ukuthwala* and an insight into the evolvement of the practice.

1.1 Background of the study

South African girls living in cultural communities are often victims of the practice *ukuthwala*.⁷ *Ukuthwala* means "to carry".⁸ It is a legitimised abduction of a female by a man prior to a customary marriage.⁹ The main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage.¹⁰ Although the practice originated from the *Xhosa* ethnic group, it has been adopted by other ethnic groups such as the *Sothos* and the *Mpondes*.¹¹ Koyana and Bekker have described *ukuthwala* as:

an acceptable practice with which the community rarely interferes, even in the event that the girl resisted the *thwala*.¹²

South African cultural communities which observe *ukuthwala* believe that the practice serves reasonable cultural purposes.¹³ For example, they believe that the practice is an effective measure to force the father of the girl to give his consent to the proposed marriage, as well as to quicken matters in cases where the female is pregnant.¹⁴ *Ukuthwala* has also been used to defer the payment of *lobola* to an agreed upon date in cases where the suitor and his family are unable to afford the set amount.¹⁵ There are different forms of *ukuthwala*.

Mwambene and Sloth-Nielsen differentiate between three forms of *ukuthwala*. Firstly,

⁷ Nhlapo 2017 https://www.huffingtonpost.co.za/2017/12/04/ukuthwala-forced-marriage-girls-are-so-vulnerable-during-the-festive-season_a_23295925/. In 2016, it was reported that more than 90,000 South African girls between the ages of 12 and 17 were either married, divorced, separated, widowed or living with a partner as husband and wife as a result of *ukuthwala*.

⁸ Koyana and Bekker 2007 *De Jure* 139.

⁹ Koyana and Bekker 2007 *De Jure* 139.

¹⁰ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 4.

¹¹ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 3.

¹² Koyana and Bekker 2007 *De Jure* 139.

¹³ Monyane 2013 *South African Review of Sociology* 68.

¹⁴ Monyane 2013 *South African Review of Sociology* 68.

¹⁵ Monyane 2013 *South African Review of Sociology* 68.

ukuthwala can occur as a result of a prior agreement between the girl and her suitor.¹⁶ In this type of *ukuthwala*, the girl gives her consent to the *thwala* (abduction). Her consent is presumed to exist throughout the negotiations and forms the basis for the validity of the resultant customary marriage.¹⁷ However, there can be no valid customary marriage in the absence of the consent of the girl's.¹⁸

Secondly, *ukuthwala* can occur as a result of an agreement between the suitor and the girl's families. This type of *ukuthwala* might arise in cases where the girl would possibly refuse to marry the suitor chosen by her parents or where the girl attracts no suitor.¹⁹ Following the girl's *thwala* and once both families have consented to the prospective marriage, the girl is guarded to ensure that she gets used to the concept marriage.²⁰ In this case, it might be difficult to argue that the bride and groom consented to the marriage since their views are not considered when the agreement is concluded.²¹

Thirdly, *ukuthwala* can occur against the will of the girl. In this case, there is no prior consent from either the girl, her parents or guardians.²² The girl is taken by force to the suitor's family home, thereafter representatives are sent to the girl's family to commence marriage negotiations.²³ The third form of *ukuthwala* is typically the most abusive since it exposes the girl to rape and violence by her suitor in order to keep her in the relationship.²⁴ For the purpose of this paper, the focus is on the second and third forms of *ukuthwala*.

Customarily, the *thwalad* girl would be placed under the supervision of senior women in the boy's family soon after the *thwala*.²⁵ Those who carried the *thwala* would then be required to report to the girl's family to assure them of her safety. They are additionally required to specify the amount of cattle they propose to pay as *lobola*.²⁶

¹⁶ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 6.

¹⁷ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 6.

¹⁸ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 6.

¹⁹ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²⁰ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²¹ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²² Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²³ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²⁴ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²⁵ Monyane 2013 *South African Review of Sociology* 68.

²⁶ Monyane 2013 *South African Review of Sociology* 68.

Thereafter, a friendly relationship is formed between the two families and the girl is recognised as a wife.²⁷ As soon as the agreed *lobola* is paid, the girl would be released to go to her father's home to prepare to be formally handed over to her husband.²⁸ The *lobola* agreement and the handing over of the wife can thus be viewed as requirements for the validity of the customary marriage.

Ukuthwala in its traditional form did not involve sexual activities, consensual or otherwise, between the abducted girl and the suitor prior to the conclusion of the marriage.²⁹ The practice was additionally intended for people of the same age. As a result, older men never partook in the custom and the practice never applied to minors.³⁰ The practice of *ukuthwala* has however undergone recent changes. While the practice still affects both women and young girls, it has been reported that a majority of the victims are young girls aged 10 to 14 years.³¹ Moreover, the practice has recently been dominated by the abduction and rape of minor girls as young as 12 years by older men.³² This form of *ukuthwala* has been referred to as the aberrant or modern form of *ukuthwala*.³³

As a result of the change in the practice, the former Transkei and KwaZulu Natal provinces have banned *ukuthwala* since it was difficult to verify the girl's consent to the abduction.³⁴ The practice however remains dominant in Eastern Cape primarily because chiefs and parents from some communities believe that *ukuthwala* is an essential part of their culture.³⁵ They submit that the practice should be respected and not be interfered with.³⁶

²⁷ Monyane 2013 *South African Review of Sociology* 68.

²⁸ Monyane 2013 *South African Review of Sociology* 68.

²⁹ Department of Justice and Constitutional Development 2009 http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html.

³⁰ Monyane 2013 *South African Review of Sociology* 68.

³¹ Monyane 2013 *South African Review of Sociology* 66.

³² Monyane 2013 *South African Review of Sociology* 66.

³³ Mabasa 2015 *De Rebus* 30. The focus of this paper is on the aberrant form of *ukuthwala* and not on the traditional form of the practice.

³⁴ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 15.

³⁵ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 16.

³⁶ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 16.

1.2 Aim of study

The aim of this study is to examine the legal position of *ukuthwala* in South Africa and its impact on South Africa's various regional and international law obligations. The study further examined the South African legislative frameworks indirectly or directly prohibiting *ukuthwala*. The *Constitution of the Republic of South Africa*, 1996, the *Children's Act* 38 of 2005, the *Prevention and Combating of Trafficking in Persons Act* 7 of 2013, the *Recognition of Customary Marriages Act* 120 of 1998, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 5 of 2015 are relevant for the purposes of this study.

1.3 Methodology

The South African legislative measures were examined in this study in order to establish whether South Africa has undertaken effective legislative measures to combat *ukuthwala* in order to comply with its obligations under *Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of the Child*. The author undertook a literature study of relevant textbooks, law journals, legislation, case law and internet sources relating to the practice of *ukuthwala* as observed among the South African *Xhosa* ethnic group.

In order to adequately answer the research question one needs to analyse the children's rights protected in the *Convention on the Rights and Welfare of the Child* and the *African Charter on the Rights and Welfare of the Child*.

Chapter 2: International and regional instruments

2.1 Introduction

This chapter discusses and analyses children's rights protected in the *Convention on the Rights and Welfare of the Child* and the *African Charter on the Rights and Welfare of the Child*.

2.2 *Convention on the Rights of the Child (CRC) 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) 1990*

The *CRC* was adopted by the General Assembly of the United Nations on 20 November 1989.³⁷ The Convention is the most unanimously ratified human rights treaty, with only the United States yet to ratify it.³⁸ As a result, the *CRC* is the most widely accepted framework dealing with the fundamental rights of children.³⁹ The *CRC* applies to every child within the jurisdiction of a State which has ratified the Convention. South Africa ratified the Convention on 16 June 1995.⁴⁰

Similar to the *CRC*, the *ACRWC* aims to promote and protect the rights and welfare of African children. The Charter was adopted by the Organisation of African Unity (AOU) in 1990.⁴¹ The *ACRWC* is context specific to Africa, considering the diverse cultural and socio-economic conditions of African children.⁴² South Africa ratified the *ACRWC* on 7 January 2000.⁴³

In their respective preambles both the *CRC* and the *ACRWC* recognise that children should be brought up with dignity, freedom and equality.⁴⁴ Moreover, the preambles recognise that children need special care and protection by reason of their mental and

³⁷ Doek 2009 *Child Abuse & Neglect* 971.

³⁸ Doek 2009 *Child Abuse & Neglect* 971.

³⁹ Hodgkin and Newell *Implementation handbook for the Convention on the Rights of the Child* 28.

⁴⁰ Mosikatsana 2003 *SALJ* 112.

⁴¹ The OAU was formed in 1963 with the aim of promoting unity among African States and promotion of independent of African States. The organization later extended its mandate to the protection of human rights.

⁴² Preamble to the African Charter on the Rights and Welfare of the Child (1990).

⁴³ Mosikatsana 2003 *SALJ* 112.

⁴⁴ Preamble to the Convention on the Rights of the Child (1989); preamble to the African Charter on the Rights and Welfare of the Child (1990).

physical immaturity.⁴⁵ Both instruments define a child as every human being below the age of eighteen.⁴⁶ The *CRC* and the *ACRWC* confer a number of rights upon children, including the right to non-discrimination and the right of children to have their best interests considered as a primary consideration.⁴⁷ The following section examines certain rights enshrined in both instruments and evaluates the extent to which the cultural practice of *ukuthwala* violates such rights

2.2.1 Best interests of the child

Article 3 of the *CRC* and article 4 of the *ACRWC* creates an obligation on State Parties to ensure that the best interests of the child are a primary consideration in all actions concerning the child.⁴⁸ The best interests of the child is one of the four general principles of both the *CRC* and the *ACRWC*.⁴⁹ The principle thus applies to the interpretation and implementation of all the other rights protected in both instruments.⁵⁰ The principle of the best interests of the child aims to ensure both the enjoyment of children's rights and the development of the child.⁵¹

The *United Nations Committee on the Rights of the Child (UNCRC)* has identified the

⁴⁵ Preamble to the Convention on the Rights of the Child (1989); preamble to the African Charter on the Rights and Welfare of the Child (1990).

⁴⁶ A 1 of the Convention on the Rights of the Child (1989); A 2 of the African Charter on the Rights and Welfare of the Child (1990). It should however be noted that the *CRC* provides that a child is anyone under the age of 18 unless the majority is attained earlier in terms of the law applicable in the State within whose jurisdiction the child is resident. While the *ACRWC* provides no exception to the age of the majority. In that regard, the *ACRWC* sets a higher standard than the *CRC*.

⁴⁷ See A 2 of the Convention on the Rights of the Child (1989) on non-discrimination and A 3 of the Convention on the Rights of the Child (1989) on the best interests of the Child; Also see A 3 of the African Charter on the Rights and Welfare of the Child (1990) on non-discrimination and A 4 of the African Charter on the Rights and Welfare of the Child (1990) on the best interests of the child.

⁴⁸ A 3 of the Convention on the Rights of the Child (1989); 4 of the African Charter on the Rights and Welfare of the Child (1990).

⁴⁹ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 1; Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage (2017) 6.* The other three general principles include non-discrimination, life, survival and development and the right to be heard.

⁵⁰ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 1; Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage (2017) 6.*

⁵¹ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.*

concept of the best interests of the child as a threefold concept.⁵² The concept consists of a substantive right, a fundamental interpretative legal principle and a rule of procedure.⁵³ Firstly, a substantive right entails that the best interests of the child be evaluated and taken as a primary consideration when different interests are being assessed. It comprises of an assurance that the best interests of the child will be applied whenever a decision is made regarding a child.⁵⁴ Different interests which need to be evaluated in cases of *ukuthwala* are the cultural interests of the community on the one hand and the best interests of the child on the other. The interests of the community include the freedom to practice their culture and to adhere to their cultural customs. On the other hand, the interests of the child include the right to be protected from treatment detrimental to her well-being. As well as the freedom to belong to a cultural group of her choice and to freely choose to adhere to the practices of that group. Since the best interests of the child is a flexible concept, the evaluation process will not be uniform in every case.⁵⁵

Secondly, the fundamental interpretative legal principle requires that legal provisions be interpreted in a manner that best serves the interests of the child.⁵⁶ This entails that courts should as far as possible prefer an interpretation which advances the best interests of the child over an interpretation which does not.⁵⁷ The fundamental interpretative legal principle would thus require *ukuthwala* to be construed in terms of the best interests of the child. While *ukuthwala* itself is not a legal provision in the literal sense, it is a practice grounded in customary law. A common characteristic of

⁵² *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.* The *UNCRC* was established in terms of article 43 of the CRC. The mandate of the Committee involves monitoring the implementation of the Convention and insuring protection of the rights enshrined therein.

⁵³ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.*

⁵⁴ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.*

⁵⁵ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 5.* The concept is thus defined and adjusted on a case-by-case basis, taking into account the precise situation of the child concerned.

⁵⁶ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.*

⁵⁷ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.*

customary law is that it is generally unwritten.⁵⁸ However, the unwritten nature of customary law, including *ukuthwala*, should not exempt the duty to interpret its customs in line with the best interests of the child.

Thirdly, the rule of procedure requires that procedures involving children should be child sensitive. This requires that, whenever a decision is to be made that will affect a child, the decision making process must assess the probable impact of the decision on the child concerned.⁵⁹ This would require the decision to subject a girl child to *ukuthwala* to take into account the typical effects of the practice on the girl.⁶⁰

The *UNCRC* has affirmed that the words "shall be" as used in article 3 of the *CRC* attach a strong legal obligation according to which State Parties may not apply any discretion as to whether the best interests of the child are to be evaluated in a particular case.⁶¹ The expression "primary consideration" on the other hand requires that the best interests of the child not be considered on the same level as competing considerations.⁶² In light of this interpretation, it is submitted that, in cases of *ukuthwala*, the interests of the child to be protected against treatment prejudicial to their health, development and well-being should rank higher to the interests of the broader community to practice their culture.⁶³

It should however be noted that, while the remarks of the *UNCRC* and the *African Committee of Experts on the Rights and Welfare of the Child*, contained in its general comments are useful in the implementation of the instruments, they are not binding

⁵⁸ Herbst and Du Plessis 2008 *EJCL* 3.

⁵⁹ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 2.*

⁶⁰ As discussed throughout this study, these include school drop-out and early pregnancy.

⁶¹ *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 5.* Since article 4 of the *ACRWC* contains the same wording as the article 3 of the *CRC*, it is submitted that the articles can be interpreted in the same manner.

⁶² *General comment No. 14 on the right of the child to have his or her best interests taken a primary consideration (art.3, para.1) CRC/C/GC/14 (2013) 6.*

⁶³ Preamble to both the *CRC* and the *ACRWC* emphasis the need to protect children due to their vulnerability, as such the interests of children should arguably be highly protected compared to those of adults who are mainly well informed and experienced to make informed life choices.

on State Parties.⁶⁴ As such the application of the best interests principle might be different within State Parties. For instance, in South Africa the best interests of the child constitutional right is not superior to other constitutional rights of and is subject to limitations on the same basis as other rights.⁶⁵

In order to give effect to the best interests of the child in the context of child marriage, the state is required to adopt redress and preventive measures to help those at jeopardy and those already affected by *ukuthwala*.⁶⁶ In that regard, the *African Committee of Experts on the Rights and Welfare of the Child* (hereafter referred to as the Committee on the Rights and Welfare of the Child) has cautioned against the interpretation and use of the principle of the best interests of the child as a justification to permit child marriage.⁶⁷ It thus cannot be argued that a child would be better off economically or avoid dishonour if married.⁶⁸

Since the best interest of the child applies to the interpretation of all the rights enshrined in both the *CRC* and the *ACRWC*, the rights discussed in the following sections must be interpreted in light of the principle of the best interests of the child.

2.2.2 Non-discrimination

In terms of article 2 of the *CRC* and article 3 of the *ACRWC*, State Parties must ensure the rights enshrined in these instruments to every child within their jurisdiction without discrimination. In particular, State Parties are obliged to ensure that no child shall be

⁶⁴ Meyer 2010 *Journal of Legal Analysis* 175. The General Comments are discussed in this study because they provide an interpretation on what is expected of State Parties in the implementation of the instruments.

⁶⁵ See paragraph 3.2.6 of this paper.

⁶⁶ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 7. The *ACERWC* uses the term child marriage, however, the Committee expressly recognises *ukuthwala* in page 17 as one of the practices facilitating child marriage.

⁶⁷ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 7. The *ACERWC* was established in terms of article 32 of the *ACRWC*. The mandate of the Committee is to protect and promote the rights enshrined in the Charter, as well as to formulate and lay down principles aimed at promoting the right of the children. Additionally, the Committee also monitors the implementation of the rights protected in the Charter.

⁶⁸ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 7.

discriminated against based on sex.⁶⁹ Sex and gender-based discrimination include any differential treatment or exclusion grounded on sex or gender and which hinders the enjoyment of a human right.⁷⁰

Regarding the principle of non-discrimination, the *UNCRC* has declared that discrimination based on any of the grounds listed in article 2 of the *CRC* offends the human dignity of the child.⁷¹ Furthermore, discrimination against girl children is a severe violation of their rights, affecting their survival and restricting their ability to contribute to society.⁷² As such there is an international commitment to use the provisions of the *CRC* to identify ongoing forms of discrimination against the girl child.⁷³ As well as to eradicate harmful practices and customs which infringe on the girl child's rights.⁷⁴ In that regard, the specific focus on the girl child is crucial in eradicating the cycle of harmful traditions and prejudices against women.⁷⁵

Ukuthwala is one such practice. *Ukuthwala* is a manifestation of gender inequality and discrimination. According to McQuoid-Mason, the practice discriminates against girls since it is impossible to *thwala* boys in terms of African customary law.⁷⁶ Practices such as *ukuthwala* supports structures of patriarchy and entrenches enduring patterns of discrimination.⁷⁷ Radical feminist discourse regards patriarchy as the main cause of the

⁶⁹ A 2 of the Convention on the Rights of the Child (1989); A 3 of the African Charter on the Rights and Welfare of the Child (1990).

⁷⁰ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 8.

⁷¹ Hodgkin and Newell *Implementation handbook for the Convention on the Rights of the Child* 17. These grounds include discrimination based on on the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

⁷² Hodgkin and Newell *Implementation handbook for the Convention on the Rights of the Child* 20.

⁷³ Hodgkin and Newell *Implementation handbook for the Convention on the Rights of the Child* 28.

⁷⁴ Hodgkin and Newell *Implementation handbook for the Convention on the Rights of the Child* 28.

⁷⁵ Hodgkin and Newell *Implementation handbook for the Convention on the Rights of the Child* 28. In the past, most women were denied opportunities to go to school or work. With the result that their main role was to remain home and look after children and the man was the sole provider. Such situations maintained patriarchy and the subordination of women. Thus, equal treatment and opportunities for girls would empower them to change the status quo of women depending on men and women being subordinate to men.

⁷⁶ Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 253.

⁷⁷ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child*

oppression of females.⁷⁸

Ukuthwala is rooted in patriarchy, hence girls are disproportionately at risk and affected by the practice compared to boys.⁷⁹ If it was not for patriarchy, *ukuthwala* would have no place in society. So long as young girls are forcibly married through *ukuthwala* and forced to depend on men, females will always be inferior to males who will continue to dominate the economy. *Ukuthwala* thus hinders the commitment to achieve equality of all sexes and maintains the subordination of females.

Non-discrimination is connected with the principle of the best interests of the child since it can never be in the child's interests to be discriminated against. The interests of the girl child would be best promoted by the equal treatment to boys and by the continued commitment to eradicate the gender bias of viewing females as subordinate to males. Accordingly, the commitment to non-discrimination against girls requires South Africa to recognise *ukuthwala* as a form of sex and gender-based discrimination and to take appropriate measures towards its elimination.

2.2.3 Survival and development

Under article 6 of the *CRC* and article 5 of the *ACRWC* respectively, State Parties are obliged to ensure the right to life, survival and development of the child to the maximum degree possible.⁸⁰ The right to life, survival and development of the child is also a general principle of the both the *CRC* and the *ACRWC*.⁸¹ The primary responsibility for ensuring the development of the child rests with her parents. The State however holds a secondary obligation to assist parents in realising this obligation.⁸² It is important to consider the interpretation of the right to survival and

Marriage (2017) 8. Patriarchy refers to the culturally and customarily attained power by men over generations which preserves male domination and superiority along with female inferiority.

⁷⁸ Ndindwa *The experiences of Cultural Marriage Practices (Ukuthwala) amongst Young African Women: A case study of Libode, Eastern Cape* 42.

⁷⁹ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage (2017)* 3-4.

⁸⁰ A 6 of the Convention on the Rights of the Child (1989); A 5 of the African Charter on the Rights and Welfare of the Child (1990).

⁸¹ Manfred *A Commentary on the United Nations Convention on the Rights of the Child* 1.

⁸² Morag 2014 Michigan State International Law Review 548.

development in order to determine the resultant duty created by the right on the State.

The *UNCRC* has mandated States to interpret the right to survival and development broadly as a concept encompassing the child's physical, mental and moral development.⁸³ The right stresses the need to ensure the full development of the child and aims to ensure that the child develops her abilities fully and thus preparing the child to live her life to the best of her capabilities.⁸⁴

Ukuthwala curtails the girl child's right to survival and development since child marriage is linked with early and recurrent pregnancy, which in turn is linked to high rates of maternal morbidity and mortality.⁸⁵ The practice further exposes the child to sexual transmitted infections such as HIV/AIDS and thus decreases the girl child's chances of surviving into adulthood.⁸⁶ Moreover, girls who marry young are frequently forced to drop out of school or are excluded from partaking in economic, social, political and other activities.⁸⁷ It is thus submitted *ukuthwala* poses significant threat to the survival and development of the girl child.

Ukuthwala further deprives the girl child the enjoyment of her childhood since it burdens her with the duty to be a wife with a husband and at times in-laws and children to look after.⁸⁸ *Ukuthwala* also traps the girl child in a cycle of poverty as dropping out of school denies the girl educational opportunities and skills acquisition without which she will fail to empower herself economically.⁸⁹ Lastly, the practice has undesirable emotional and mental implications for the girl child who is violently separated from her

⁸³ Sutherland 2015 STELL LR 281.

⁸⁴ Sutherland 2015 STELL LR 281.

⁸⁵ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 9.

⁸⁶ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 21.

⁸⁷ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 9.

⁸⁸ Department of Justice and Constitutional Development 2010
<http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html>.

⁸⁹ Department of Justice and Constitutional Development 2010
<http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html>.

family and forced into a marriage.⁹⁰

2.2.4 The right to be heard

Article 12 of the *CRC* and article 7 of the *ACRWC* oblige State Parties to ensure to a child capable of forming her views, the right to freely express those views in all matters affecting her.⁹¹ Additionally, those views should be given due weight taking into account the age and maturity of the child.⁹² Moreover, State Parties are under a strict obligation to undertake appropriate measures to fully implement the right of the child to express his or her views.⁹³ The phrase "capable of forming her views" does not function as a restriction but is rather an obligation on State Parties to evaluate the ability of a child to form an independent opinion to the utmost extent possible.⁹⁴ The State is thus under a positive obligation to assess whether a child in a particular case has the capacity to form an autonomous view. It is submitted that, should the assessment reveal that the child is capable of forming an autonomous view, the child would be entitled to an opportunity to have her views heard.

Contrary to article 12 of the *CRC* and article 7 of the *ACRWC*, the second and third forms of *ukuthwala* make it difficult for the girl child to express her views regarding the proposed marriage. The marriage is negotiated and concluded by male family members of the girl's family without enquiring her views on the proposed marriage.⁹⁵ The full realisation of the right of the child to express her views requires those negotiating the marriage to inform her of the negotiations, the possible outcomes and the likely consequences of the outcome.⁹⁶ It is difficult to reconcile this requirement with cases of *ukuthwala* where the child is merely informed that she has been married

⁹⁰ Kheswa and Hoho 2014 *Mediterranean Journal of Social Sciences* 2808.

⁹¹ A 12(1) of the Convention on the Rights of the Child (1989); A 7 of the African Charter on the Rights and Welfare of the Child (1990).

⁹² A 12(1) of the Convention on the Rights of the Child (1989); A 7 of the African Charter on the Rights and Welfare of the Child (1990).

⁹³ *General comment No. 12 on the right of the child to be heard (art. 12) CRC/C/GC/12* (2009) 6.

⁹⁴ *General comment No. 12 on the right of the child to be heard (art. 12) CRC/C/GC/12* (2009) 6.

⁹⁵ Customarily in African communities, a girl whose marriage is being negotiated is called in during negotiations to come attest to knowing the family seeking her hand in marriage. If she confirms knowing the family, she is regarded to consent to the proposed marriage and negotiations continue. If however she denies knowing the family, marriage negotiations cease. Such is not the case with *ukuthwala*.

⁹⁶ *General comment No. 12 on the right of the child to be heard (art. 12) CRC/C/GC/12* (2009) 8.

and that she is going to live with her husband.⁹⁷ The child is in no way informed of the incumbent consequences of the early marriage such as school drop-out, early pregnancy, risks of HIV/AIDS infection and domestic violence.⁹⁸

The right of the child to express her views is additionally violated when a child is betrothed or married without her personal, free and full consent.⁹⁹ The child's consent is also required in cases where religious or customary law regard the consent of parents or guardians as decisive.¹⁰⁰ *Ukuthwala* thus violates the right of the girl child to express his or views since the girl's resistance to the *thwala* is ignored and merely seen as an concealing act aimed at preserving her maiden dignity.¹⁰¹ Further objection to the marriage such as running away from the suitor's home is also ignored and seen as a disgrace.¹⁰² The act of running away can be illustrative of the girl's reluctance to be party to the proposed marriage.¹⁰³ The girl can thus be seen to express her views by conduct and such views ought to be taken into account.

Lastly, the right of the child to express her views can give effect to the best interests of the child since it gives the child an opportunity to elaborate on her interests. It also ensures that the best interests of the child are not solely established from their parents

⁹⁷ *Jezile v S* 2015 3 All SA 201 (WCC) paras 7-8; Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 12.

⁹⁸ Modisaotsile *Pabanzuka News* 3.

⁹⁹ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 9-10. Betrothal means an engagement or a promise to marry. It also extends to the act of promising or offering a child or young person in marriage whether by a parent, guardian or family elder.

¹⁰⁰ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 9-10.

¹⁰¹ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 12

¹⁰² Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 19. In a media interview held in 2009, one chief (a woman) in the region where *ukuthwala* is practiced was quoted saying that young girls who escape from the houses where they are detained whilst awaiting marriage were embarrassing their village.

¹⁰³ *Jezile v S* 2015 3 All SA 201 (WCC) para 81. In this case the court regarded the complainant's conduct of running away to be illustrative of her reluctance to be party to the customary marriage which had been concluded through *ukuthwala*. However, the court in this case considered the fact that the complainant had ran away from her suitor's home at night and that she had slept in the bush that night to infer her reluctance since she would not have gone to such length had she been a willing party to the marriage. It is thus clear that the study aimed to answer the question of whether running away constitutes objection to the marriage on a case-by-case basis.

or guardians' views and thus safeguards against substitution of interests.

2.2.5 Protection against child abuse and torture

Article 16 of the *ACRWC* protects children against torture, degrading or inhuman treatment.¹⁰⁴ This article specifically prohibits the sexual abuse of children. Sexual abuse is evident in cases of the modern practice of *ukuthwala* since a man who has sexual intercourse with a *thwalad* girl, with or without her consent, is customarily required to pay an additional beast in addition to the sum of *lobola* cattle agreed upon.¹⁰⁵

Moreover, the act of sexually assaulting a *thwalad* girl to make her succumb to marriage is often regarded as legitimate because of the potential marriage.¹⁰⁶ In most instances *thwalad* girls are raped shortly after the *thwala* in order to induce them to not return home.¹⁰⁷ A girl who has been raped by her suitor is likely to agree to the proposed marriage by the suitor since virginity is highly valued in cultural communities and girls who have lost their virginity are seen as tainted with no prospects of marriage.¹⁰⁸ It is therefore submitted that the modern *ukuthwala* contributes to the sexual abuse and rape of girls. Acts of sexual abuse and rape are detrimental to the girl child since they frequently result in depression and low self-esteem.¹⁰⁹ Furthermore, sexual abuse victims frequently experience post-traumatic stress disorder, self-harm and substance abuse.¹¹⁰

2.2.6 Protection against harmful social and cultural practices

Article 21 of the *ACRWC* obliges State Parties to take all appropriate measures to eradicate harmful social and cultural practices affecting the normal growth and development of children.¹¹¹ In particular, State Parties are under a duty to eradicate

¹⁰⁴ A 16 of the African Charter on the Rights and Welfare of the Child (1990).

¹⁰⁵ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 5.

¹⁰⁶ Kharimakwenda <https://mg.co.za/article/2014-03-06-the-cultural-roots-that-condone-rape>.

¹⁰⁷ Kheswa and Hoho 2014 *Mediterranean Journal of Social Sciences* 2811.

¹⁰⁸ Mhlongo *Reasons for undergoing virginity testing: A study of young people in rural KwaZulu- Natal, South Africa* 4.

¹⁰⁹ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 12

¹¹⁰ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 12.

¹¹¹ A 21(1) of the African Charter on the Rights and Welfare of the Child (1990).

customs and practices prejudicing the health or life of children. As well as those customs and practices discriminatory to any child on the basis of sex.¹¹² State Parties are specifically obliged to prohibit child marriage and the betrothal of children.¹¹³ In that regard, they are obliged to prescribe the minimum age of marriage to be 18 years and to make registration of all marriages in an official registry compulsory.¹¹⁴

Harmful practices refer to all behaviour or attitude which negatively affect the fundamental rights of girls, such as the right to education and physical integrity.¹¹⁵ *Ukuthwala* has been expressly classified as a harmful cultural practice by the *Committee on the Rights and Welfare of the Child*.¹¹⁶ The State's obligation to abolish *ukuthwala* must be balanced with the right of girls to live in a positive cultural setting and the parallel duty on the state to promote positive cultural environments.¹¹⁷

In order to abolish harmful traditional and cultural practice, the *Committee on the Rights and Welfare of the Child* requires State Parties to adopt legislation requiring that both parties to a marriage give full and free consent.¹¹⁸ The requirement of free and full consent must extend to all forms of marriage and the free and full consent of both parties to a marriage cannot be replaced by the consent of their parents or legal

¹¹² A 21(1) of the African Charter on the Rights and Welfare of the Child (1990).

¹¹³ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 5. The Committee defines child marriage as a marriage in which either one of the parties, or both, is or was a child under the age of 18 at the time of union. On the other hand, betrothal is defined as an engagement or a promise to marry. it also extends to the act of promising or offering a child or young person in marriage, whether by a parent, guardian or family elder.

¹¹⁴ A 21(2) of the African Charter on the Rights and Welfare of the Child (1990).

¹¹⁵ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 5.

¹¹⁶ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 15.

¹¹⁷ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 28.

¹¹⁸ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 15. In South Africa, the specific legislation is the *Recognition of Customary Marriages Act* 120 of 1998. The Act is discussed in more detail in Chapter 3 of this study.

guardians.¹¹⁹ Furthermore, the *Committee on the Rights and Welfare of the Child* has indicated that persons under the age of the 18 years are unable to give free and full consent to a marriage.¹²⁰ Thus *ukuthwala* involving children under the age of 18 is a direct violation of article 21 of the *ACRWC*.

2.2.7 Sale, trafficking and abduction of children

Every State Parties to the *CRC* and the *ACRWC* is obliged to take measures to prevent the abduction, traffic or sale of children.¹²¹ Trafficking was first defined in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Trafficking Protocol)* 2000. The protocol defines trafficking as the transfer, harbouring or receipt of individuals by use of force or threat with the aim of exploiting those individuals.¹²² It also includes the giving of benefits or payments to influence the consent of an individual having control over another.¹²³

Ukuthwala has certain elements of trafficking. Firstly, there is an actual abduction of the girl by the suitor and his friends who thereafter transfers the girl to his home. Secondly, actual force is used when the *thwala* takes place. For instance, Mwabene and Sloth-Nielsen have described the *thwala* procedure as one where the prospective bridegroom and his friends *forcibly* take the intended bride to his home.¹²⁴ Thirdly, coercion is also an element of *ukuthwala* in some cases since some parents or

¹¹⁹ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 15.

¹²⁰ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 15.

¹²¹ A 35 of the Convention on the Rights of the Child (1989); A 29 of the African Charter on the Rights and Welfare of the Child (1990).

¹²² A 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000). The Protocol defines trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

¹²³ A 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000).

¹²⁴ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 4.

guardians influence their children to endure marriage through *ukuthwala* by threatening to disown them should they run away from their marital home.¹²⁵

Fourthly, the *lobola* paid to the parents or guardians of the *thwalad* girl is abused by those who wish to turn young girls into wives to persuade the girl's parents or guardians to agree to their proposals.¹²⁶ For that reason, the *Committee on the Rights and Welfare of the Child* declared that the payment of *lobola* in relation to children compromises the ability to give consent and increases the vulnerability of girls.¹²⁷ The payment of *lobola* is therefore equivalent to parents or legal guardians receiving benefits in exchange for their consent to the proposed marriage. Poor families cannot afford to support their children's needs and as such the financial gains linked to *lobola* may motivate them to condone the marriage of their child, while shifting the financial burden connected to the care of the girl to the husband.¹²⁸ South Africa must thus take measures to prohibit and condemn the payment of *lobola* in respect of children.¹²⁹

2.3 Summary

It was illustrated from this chapter that *ukuthwala* infringes on the girl child's rights protected in both the *CRC* and the *ACRWC* as per the interpretation accorded to the various rights by both the *UNCRC* and the *Committee on the Rights and Welfare of the Child*. As such, there is a need to consider whether South Africa has taken effective measures to combat the practice. Below is an analysis of the South African legislative measures prohibiting *ukuthwala*, either directly or indirectly.

¹²⁵ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 19.

¹²⁶ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 19.

¹²⁷ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017).

¹²⁸ Modisaotsile *Pabanzuka News* 2.

¹²⁹ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 29.

Chapter 3: South African legislative frameworks against *ukuthwala*

3.1 Introduction

This chapter discusses various South African legislative frameworks protecting children's rights. The aim with this chapter was to determine the extent to which these frameworks adequately prohibit and eliminate the practice of *ukuthwala*.

3.2 Constitution

The *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the *Constitution*) is the supreme law in the country and any law or conduct in conflict with it is invalid.¹³⁰ The *Constitution* seeks to rectify the divisions of the past caused by discrimination and produce a society centered on human dignity, equality and human rights.¹³¹ It also confers children with rights which the State is obliged to respect, protect and promote.¹³² The *Constitution* does not only protect children from the State. In certain circumstances, it also guards against the abuse of their rights by other individuals.¹³³ Section 8(2) of the *Constitution* deals with circumstances in which the conduct of individuals can be challenged for being inconsistent with any provision of the Bill of Rights.¹³⁴ This section requires individuals to not impair the enjoyment of the constitutionally protected rights of others.¹³⁵ The following subsections examine the rights of children protected in the *Constitution* and the extent to which such rights are violated by *ukuthwala*. There is also an analysis of the constitutional provisions which can be invoked to limit the right to culture.

3.2.1 Human dignity

Dignity is both a foundational value of the *Constitution* and an enforceable and justiciable right.¹³⁶ Everyone has inherent human dignity and the right to have their

¹³⁰ Section 2 of the *Constitution of the Republic of South Africa, 1996*.

¹³¹ Section 1 of the *Constitution of the Republic of South Africa, 1996*.

¹³² Section 7(1)(2) of the *Constitution of the Republic of South Africa, 1996*.

¹³³ Currie and De Waal *The Bill of Rights Handbook* 41.

¹³⁴ Currie and De Waal *The Bill of Rights Handbook* 41.

¹³⁵ Arendse 2011 *PELJ* 103.

¹³⁶ De Vos, Freeman and Brand *South African Constitutional Law in Context* 460.

dignity respected and protected.¹³⁷ Dignity as a foundational value of the *Constitution* informs the interpretation of most rights in the Bill of Rights.¹³⁸ The right to dignity on the other hand is commonly relied on where none of the other constitutional rights protect the interest at stake.¹³⁹

Former Chief Justice Chaskalson has defined human dignity to mean

...that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context of their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within society.¹⁴⁰

At the core of human dignity is the assumption that every human being has incalculable human worth and should be treated appropriately.¹⁴¹ Sachs J maintains that human dignity entails that everyone has equal moral value and that every human being should be regarded as worthy of respect.¹⁴² Furthermore, dignity entails that females are valued as human beings and are not perceived as property of others or solely defined by their sexual or reproductive role.¹⁴³ The dignity of females is upheld when they have the freedom to choose their sexual and reproductive roles and appreciated as part of an independent being.¹⁴⁴

Ukuthwala infringes on the human dignity of girls since it reduces them to objects which can be acquired by men. The practice does not value girls as individuals worthy of respect and concern. It imposes marriage on young girls against their will and thus

¹³⁷ Section 10 of the *Constitution of the Republic of South Africa*, 1996.

¹³⁸ *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) paras 816C-816D; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

¹³⁹ *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

¹⁴⁰ De Vos, Freeman and Brand *South African Constitutional Law in Context* 457.

¹⁴¹ De vos *South African Constitutional Law in Context* 457.

¹⁴² *S v Makwenyane* 1995 3 SA 391 (CC) para 28.

¹⁴³ Albertyn 2009 *Constitutional Court Review* 188.

¹⁴⁴ Albertyn 2009 *Constitutional Court Review* 188.

gives the impression that only men are due of respect and concern and that the needs of men trump the right of girls to be treated as worthy individuals.

Ukuthwala is premised on the idea of dignity as status and reputation in terms of which the value of a girl lies in the fact that she is a respectable and obedient wife who takes care of her husband and children.¹⁴⁵ Albertyn rejects this idea of dignity since it is often used to restrict women to specific gender roles and tends to prefer traditional interpretations of gender relations that hold females and males in prearranged roles.¹⁴⁶

Ukuthwala also violates the right to equality discussed below

3.2.2 *The right to equality*

A discussion on equality and non-discrimination was already conducted in Chapter 2 of this study. As such, this section briefly discussed the Constitutional provision on equality without reiterating the arguments to avoid repetition.

The right to equality is an important right in the South African context considering its history of discrimination.¹⁴⁷ As with dignity, equality is not only a justiciable constitutional right, it is also one of the fundamental values of the *Constitution*.¹⁴⁸ The *Constitution* prohibits discrimination and provides that everyone is equal before the law and has the right to equal protection and benefit of the law.¹⁴⁹

The *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)* 4 of 2000 was enacted as a result of section 9(4) of the *Constitution* which states that no person may unfairly discriminate against anyone based on their sex or gender.¹⁵⁰ *PEPUDA* defines discrimination to include any act or omission, including a policy, law or practice which disadvantages any person based on one or more of the prohibited

¹⁴⁵ Albertyn 2009 *Constitutional Court Review* 188.

¹⁴⁶ Albertyn 2009 *Constitutional Court Review* 188. Rather, Albertyn views dignity as the idea of humanity in terms of which all human beings are of equal worth. Dignity as humanity does not tolerate practices such as *ukuthwala* which treats girls or women less worthy to men.

¹⁴⁷ De Vos, Freeman and Brand *South African Constitutional Law in Context* 418.

¹⁴⁸ De vos, Freeman and Brand *South African Constitutional Law in Context* 418.

¹⁴⁹ Section 9(1) of the *Constitution of the Republic of South Africa, 1996*.

¹⁵⁰ Section 9(4) of the *Constitution of the Republic of South Africa, 1996*.

grounds.¹⁵¹ Moreover, *PEPUDA* expressly classifies any customary or traditional practice which harms the dignity of the girl child and undermines gender equality as a form of unfair discrimination.¹⁵² *Ukuthwala* fails under this ambit.

There is a connection between the enforcement of the right to equality and the value of dignity.¹⁵³ This was recognised by the Constitutional Court in *President of the Republic of South Africa v Hugo*,¹⁵⁴ where the court affirmed that, at the heart of our constitutional order, is the establishment of a society in which all human beings will be accorded equal dignity and respect irrespective of their membership to a particular group.¹⁵⁵ *Ukuthwala* also infringes on the right of the girl child to freedom of security as discussed below.

3.2.3 The right to freedom and security

The *Constitution* protects the right of everyone to freedom and security.¹⁵⁶ This right is sub-divided into two basic rights.¹⁵⁷ The first subdivision is the right to freedom and security of the person which requires that an individual should not be deprived freedom arbitrarily, should not be treated in a cruel, inhumane or degrading manner and that they should be free from all forms of violence.¹⁵⁸

Ukuthwala deprives the girl child her constitutional right to freedom and security since the girl is usually subjected to humiliation, violence and unpleasant treatment while in her suitor's custody.¹⁵⁹ The practice also deprives the girl child the pleasure to live in an environment free from fear and violence since the child has to live in constant fear

¹⁵¹ Section 1 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. The prohibited grounds those grounds listed in section 9(3) of the *Constitution* and include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁵² Section 8 of the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000.

¹⁵³ De vos, Freeman and Brand *South African Constitutional Law in Context* 418.

¹⁵⁴ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

¹⁵⁵ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

¹⁵⁶ Section 12 of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁷ Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 246.

¹⁵⁸ Section 12(1) of the *Constitution of the Republic of South Africa*, 1996.

¹⁵⁹ Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 254.

of being abducted and married through *ukuthwala*.¹⁶⁰ Moreover, the practice is inhumane to the girl child since she is at times forced to have unprotected sexual intercourse with her suitor who might be HIV positive or infected with other sexually transmitted diseases.¹⁶¹

Ukuthwala does not only deprive the girl child her choice to decide whether or not she wishes to adhere to the practice but she is also deprived of the conditions that enable choice since *thwalad* girls are usually kept in locked and guarded huts in order to prevent them from running away from their suitor's homes.¹⁶² The girls are thus deprived freedom of movement.¹⁶³ It would be easier for the girl to object to the proposed marriage if she was not locked up because then she would be able to freely return home. This would be the case where the girl is still a virgin since she would have nothing to be ashamed of.

The second subdivision is the right to bodily and psychological integrity which entails that everyone should be able to freely make decisions concerning reproduction.¹⁶⁴ This right is infringed by *ukuthwala* since pregnancy is likely to result from the forced unprotected sexual intercourse between the girl and her suitor.¹⁶⁵ The girl is therefore denied the choice to decide whether or not she is ready to have children. The decision is merely imposed on her.

3.2.4 *The best interests of the child*

One of the most important legal protections guaranteed to children under the *Constitution* is the guarantee that the child's best interests must be of paramount

¹⁶⁰ *S v M* 2008 3 SA 232 (CC) para 19; Nkosi and Buthelezi 2014 *Stud Tribes Tribals* 446.

¹⁶¹ McQuoid-Mason argues that, in such cases of *ukuthwala*, the girl child's constitutional right to live in an environment that is not harmful to her health and well-being is also infringed. See Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 253.

¹⁶² Albertyn 2009 *Constitutional Court Review* 191.

¹⁶³ Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 253. It was submitted earlier in section 2.1.4 of this paper that *thwalad* girls usually run away from their suitor's place hence measures are now taken to ensure that the girl is locked and guarded in order to prevent them from running away.

¹⁶⁴ Section 12(2) of the *Constitution of the republic of South Africa, 1996*.

¹⁶⁵ Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 248.

importance in every matter concerning the child.¹⁶⁶ The best interests of the child is both a constitutional right and a principle.¹⁶⁷ The significance of the best interests of the child was considered by the court in *Grootboom v Oostenberg Municipality*¹⁶⁸ where it was asserted that the best interests of the child can become a yardstick under which decisions concerning children are reviewed.¹⁶⁹ The Constitutional Court in *Juma Masjid*,¹⁷⁰ also affirmed that the ambit of section 28(2) is undeniably wide. The language used in section 28(2), therefore requires courts to be child-sensitive.¹⁷¹

When deciding on the best interests of the child, reference is made to section 7 of the *Children's Act* 38 of 2005 which provides a comprehensive list to be taken into account when applying the best interests of the child standard.¹⁷² The section 7 factors are however predominantly based on the care and guardianship of the child, as such they do not aid much in cases where the best interests of the child have to be considered within the broader cultural context such as in cases of *ukuthwala*. Nonetheless, the factors listed in section 7 stress the importance of family care of which *ukuthwala* denies a girl child by separating her from her parents or guardians.¹⁷³

3.2.4.1 Paramount importance

It is important to note that the *Constitution* imposes a much stricter requirement in section 28(2) in respect of the best interests of the child than the standard applied in terms of article 3(1) of the *CRC* and article 4(1) of the *ACRWC* respectively.¹⁷⁴ These articles respectively require the child's best interests to be "a primary consideration" and "the primary consideration" in matters concerning the child.¹⁷⁵ There has been

¹⁶⁶ Section 28(2) of the *Constitution of the Republic of South Africa*, 1996. The *Constitution* defines a child as anyone below the age of 18 years.

¹⁶⁷ Reyneke 2016 *PELJ* 4.

¹⁶⁸ *Grootboom v Oostenberg Municipality* 2000 3 BCLR (C)

¹⁶⁹ Visser 2007 *THRHR* 460; *Grootboom v Oostenberg Municipality* 2000 3 BCLR (C) para 288I.

¹⁷⁰ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761(CC).

¹⁷¹ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761(CC) para 67. This approach would require courts to have regard to the vulnerable nature of the child when deciding whether or not her best interests were given proper weight in a particular case.

¹⁷² Visser 2007 *THRHR* 461.

¹⁷³ The right to family care is a constitutional right protected right in section 28(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

¹⁷⁴ Boyd *The Determinants of the Best Interests in Relocation Disputes* 16.

¹⁷⁵ Boyd *The Determinants of the Best Interests in Relocation Disputes* 16.

much deliberation on the effect of the contextual difference between these instruments and the *Constitution*.

Heaton argues that the expression paramount importance as used in section 28(2) of the *Constitution* elevates the best interests of the child to be supreme in every matter concerning the child.¹⁷⁶ Likewise, Visser favours literal interpretation and argues that something is literally of paramount importance "when it is more important than something else or of supreme importance".¹⁷⁷ According to him, the application of section 28(2) would require other competing interests to be ignored in so far as they are in conflict with the best interests of the child.¹⁷⁸ This would require the interpretation of existing law in a manner that gives effect to the child's interests.¹⁷⁹ This can arguably also apply to existing customs and practices. Therefore, requiring practices such as *ukuthwala* to be developed to give effect to the best interests of the child.

Contrary to Visser, Bonthuys argues that paramount importance does not necessarily imply that the best interests of the child are the sole consideration and override all the other rights and interests.¹⁸⁰ She argues that such an approach would render pointless the need to reflect on competing rights and interests of others and would consequently defeat the purpose of the best interests principle.¹⁸¹ Although the importance of the principle of the best interests of the child in protecting the interests of children cannot be understated, Bonthuys' argument is plausible in light of the fact that the constitutionally protected rights of others are equally important and should not be trumped or limited unless such a limitation is in accordance with the *Constitution*.¹⁸² This approach was confirmed by the Constitutional Court in *S v M (Centre for child law*

¹⁷⁶ Boyd *The Determinants of the Best Interests in Relocation Disputes* 16. Also See Heaton 2009 *JJS* 4.

¹⁷⁷ Visser 2007 *THRHR* 461.

¹⁷⁸ Visser 2007 *THRHR* 461-462.

¹⁷⁹ Visser 2007 *THRHR* 462.

¹⁸⁰ Sisilana *The best interests of the child; a critical evaluation of how the South African court system is failing to use section 7 of the Children's Act accordingly in divorce proceedings* 23.

¹⁸¹ Sisilana *The best interests of the child; a critical evaluation of how the South African court system is failing to use section 7 of the Children's Act accordingly in divorce proceedings* 23.

¹⁸² See paragraph 3.2.6 of this paper on how constitutional rights can be limited.

as amicus curiae)¹⁸³ that the paramountcy principle must be applied in a meaningful manner without ignoring other valuable and constitutionally protected interests.

In cases of *ukuthwala*, this approach would require courts to not ignore the rights of the suitor, the community and anyone involved to practice and adhere to their culture solely because those rights conflict with the best interests of the child. The court would however need to have regard to constitutional provisions enabling it to limit the right to culture in order to uphold and further the best interests of the child. Below is a discussion of the Constitutional provisions enabling courts to limit the right to culture.

3.2.5 Internal limitations

Cultural rights protected in the *Constitution* are not absolute. Section 7(3) of the *Constitution* recognises this by providing that rights enshrined in the Bill of Rights are subject to limitations contained in section 36 or any other provision of the Bill of Rights.¹⁸⁴ The limitation of cultural rights is further authorised by the constitutional provisions which provides that no one exercising cultural rights may do so in a manner inconsistent with the Bill of Rights.¹⁸⁵ Thus in essence, an individual or group can be prohibited from exercising his constitutional right to culture.

The court in *Mhlekwu v Head of the Western Tembuland Regional Authority: Feni v Head of the Western Cape Tembuland Regional Authority*¹⁸⁶ considered the application of the internal limitations. In this case, Van Zyl J held that cultural rights are qualified since every individual must willingly choose to be part of a cultural group and its customs and practices. As a result, no individual should be forced to be part of a particular cultural group.¹⁸⁷ Should an individual freely choose to be part of a particular

¹⁸³ 2008 3 SA 232 (CC) para 25.

¹⁸⁴ Section 7(3) of the *Constitution of the Republic of South Africa, 1996*.

¹⁸⁵ Section 15(3)(b) of the *Constitution of the Republic of South Africa, 1996*; section 30 of the *Constitution of the Republic of South Africa, 1996*; section 31(2) of the *Constitution of the Republic of South Africa, 1996*; section 211(3) of the *Constitution of the Republic of South Africa, 1996*.

¹⁸⁶ 2011 1 SA 574 (TK) para 629i.

¹⁸⁷ *Mhlekwu v Head of the Western Tembuland Regional Authority: Feni v Head of the Western Cape Tembuland Regional Authority* 2011 1 SA 574 (TK) para 630A.

cultural group, the customs of that group should not be forcibly imposed on her.¹⁸⁸ Likewise, the individual is entitled to object if cultural customs and beliefs grounded on discrimination are imposed on her against her wishes.¹⁸⁹ It is thus clear that cultural practices and beliefs are only upheld as far as they do not infringe on fundamental rights of others. It is also clear that belonging to a cultural group does not automatically infer that an individual consents to conform to all the customs and practices of that group. Thus for a girl to be of *Xhosa* ethnicity does not necessarily mean that she consents to the practice of *ukuthwala* by default. Moreover, as already submitted, *ukuthwala* invades on the rights of the girl child protected in the *Constitution* and therefore, the practice can be limited in terms of the internal limitations limiting the right to culture.

Apart from the internal limitations discussed above, the right to culture can also be limited in terms of the general limitation clause in section 36 of the *Constitution*.

3.2.6 Section 36 limitation

The *Constitution* also contains a general limitation clause in section 36 which recognises that no right contained in the *Constitution* is absolute and therefore, the rights may be limited.¹⁹⁰ Rights can however only be limited where exceptional reasons justifying the limitation exist.¹⁹¹ The significance of section 36 was stressed in *Coetzee v Fourie*¹⁹² where Sachs J held that the best way to remain true to the *Constitution* was by to balance the rights protected in the Bill of Rights within a "holistic and value-based case-oriented framework".¹⁹³ Section 36 lists certain requirements which must be met before a right can be limited.

Section 36 provides that:

¹⁸⁸ *Mhleka v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Cape Tembuland Regional Authority* 2011 1 SA 574 (TK) para 630A.

¹⁸⁹ Matthee J *One Person's Culture is another Person's Crime: A Cultural Defence in South African Law?* 259.

¹⁹⁰ Section 36(1) of the *Constitution of the Republic of South Africa*, 1996.

¹⁹¹ Currie and De Waal *The Bill of Rights Handbook* 164.

¹⁹² 2004 6 SA 485 (SCA).

¹⁹³ *Coetzee v Fourie* 2004 6 SA 485 (SCA) para 46.

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - a) the nature of the right;
 - b) the importance of the purpose of the limitation;
 - c) the nature and extent of the limitation;
 - d) the relation between the limitation and its purpose; and
 - e) less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the Bill of Rights.¹⁹⁴

It is clear from this section 36 that general limitation litigation is divided into two stages. Firstly, the court must decide whether or not the law or conduct complained of infringes a constitutional right.¹⁹⁵ Should the answer to this question be affirmative, the court will further examine whether the infringement can be warranted.¹⁹⁶ The second stage is thus dependent on a positive answer to the first question. In the first stage, the onus is on the person alleging that her rights are infringed by the law or conduct in question.¹⁹⁷ On the other hand, the person seeking to uphold the law or conduct in question has the onus of justifying the infringement in the second stage.¹⁹⁸ Below is a further analysis of the two stages of the limitation provision coupled by arguments for and against the limitation of *ukuthwala*.

3.2.6.1 Law of general application

Section 36 makes it clear that only a law of general application can limit a constitutional right. This requirement contains two components. Firstly, the requirement entails that there must be lawful authority for any action or decision taken.¹⁹⁹ The Constitutional Court has declared that lawful authority can be derived from any legislation, common

¹⁹⁴ Section 36 of the *Constitution of the Republic of South Africa, 1996*.

¹⁹⁵ Currie and De Waal *The Bill of Rights Handbook* 166.

¹⁹⁶ Currie and De Waal *The Bill of Rights Handbook* 166.

¹⁹⁷ Woolman and Botha "Limitations" 42.

¹⁹⁸ Woolman and Botha "Limitations" 44. The authors raise concern whether unfair discrimination under section 9 of the Constitution can ever be justified.

¹⁹⁹ Currie and De Waal *The Bill of Rights Handbook* 168.

law or customary law and that ordinary practice or policy does not qualify as law.²⁰⁰ Although *ukuthwala* is a practice and not law in itself, it is grounded in customary law.²⁰¹ Koyana and Bekker describe the custom as a "customary law practice".²⁰² The custom of *ukuthwala* has been observed among the *Xhosa* tribe from as early as 1911.²⁰³ It is often referred to as an age old traditional custom.²⁰⁴ It is thus clear that *ukuthwala* is part of the *Xhosa* customary law.

Secondly, the requirement requires that the law must be adequately clear, precise and easily accessible in a manner that those it affects can determine the nature of their rights and obligations.²⁰⁵ It also entails that the law should apply equally and its application must not be arbitrary since arbitrariness often results in unequal treatment.²⁰⁶ This part of the requirement is linked to the prohibition of unfair discrimination.

It is evident that people in rural Eastern Cape know of the existence of *ukuthwala* and the manner in which the custom is practiced.²⁰⁷ However, it might be difficult to know the precise requirements of *ukuthwala* due to the uncodified nature of customary law.²⁰⁸ For instance, in *Jezile v S* the accused submitted that he believed that the *thwala* itself constituted the conclusion of a customary marriage in contradiction to customary law experts who maintain that *ukuthwala* is neither an engagement nor the

²⁰⁰ Currie and De Waal *The Bill of Rights Handbook* 169. Also see *Du Plessis v De Klerk* 1996 3 SA 850 (CC) paras 44 and 136; *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 41.

²⁰¹ South African Law Reform Commission 2014 <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>.

²⁰² Koyana and Bekker 2007 *De Jure* 142. Customary law refers to the traditions and customs customarily observed amongst the native African people and which is part of the values and beliefs of those people.

²⁰³ See Koyana and Bekker 2007 *De Jure* 141 who referenced a case involving *ukuthwala* which was heard by the Native Appeal Court in 1911 and thus illustrating that *ukuthwala* already observed then.

²⁰⁴ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 2; Van der Watt and Ovens 15.

²⁰⁵ Currie and De Waal *The Bill of Rights Handbook* 169.

²⁰⁶ Currie and De Waal *The Bill of Rights Handbook* 169-170. This is a proportionality analysis which was not applied uniformly in every case.

²⁰⁷ *Jezile v S* 2015 3 All SA 201 (WCC). In this case, the girl had pleaded with her uncle to never force her into a customary marriage since she knew that the practice had happened to a number of other young girls and she feared the same would happen to her.

²⁰⁸ Herbst and Du Plessis 2008 *EJCL* 3.

conclusion of customary a marriage.²⁰⁹ Moreover, it might be difficult to argue that *ukuthwala* is law of general application since the practice raises equality concerns as already discussed in section 2.1.2 and section 3.2.3 of this study.

Once it is established that the law authorising the limitation is a law of general application, the court must establish whether the limitation is justified.

3.2.6.2 Justification

In terms of this requirement, the reasons justifying the limitation of a constitutional right must be reasonable and grounded in equality, human dignity and freedom.²¹⁰ This is a proportionality analysis which will not apply uniformly in every case. In order to determine whether a limitation is justified, the purpose, importance and effects of the limitation is evaluated against the nature of the infringed right or rights and the effect of the infringement.²¹¹ These five factors are discussed below.

Firstly, there is an examination of the nature of the infringed right or rights. Currie and De Waal contend that some rights weigh more than others due to their nature.²¹² As such, the infringement of those rights which are important to the constitutional goal of achieving equality and the advancement of human dignity will be difficult to justify.²¹³ The crucial rights infringed in cases of *ukuthwala* include the right to human dignity, equality and freedom of security.²¹⁴ Without these rights the *Constitution* cannot achieve its goal of advancing human rights.²¹⁵

Secondly, the limitation must serve an important purpose.²¹⁶ The importance of customary law and its practices under the new constitutional dispensation cannot be understated given the South African history where indigenous black people were denied the right to adhere to their customs as far as they were deemed offensive to

²⁰⁹ *Jezile v S* 2015 3 All SA 201 (WCC) para 85. Mwabene and Sloth-Nielsen 2011 *AHRLJ* 3.

²¹⁰ Currie and De Waal *The Bill of Rights Handbook* 176.

²¹¹ Currie and De Waal *The Bill of Rights Handbook* 176.

²¹² Currie and De Waal *The Bill of Rights Handbook* 178.

²¹³ Currie and De Waal *The Bill of Rights Handbook* 178.

²¹⁴ These rights are fully discussed in section 3.2.1- 3.2.3 of this study.

²¹⁵ Section 1 of the *Constitution of the Republic of South Africa, 1996*.

²¹⁶ Currie and De Waal *The Bill of Rights Handbook* 179.

morality and justice.²¹⁷ Likewise, the liberty of indigenous people to freely chose and adhere to their different cultures cannot be understated since the *Constitution* envisages a society where everyone is equal and treated with respect and dignity. *Ukuthwala* gives effect to the cultural freedom protected in the *Constitution*.

The primary purpose of *ukuthwala* itself, viz the achievement of a customary marriage, is a significant objective since historically customary marriages were not recognised as valid.²¹⁸ Notwithstanding the important purpose of the practice, it cannot be inconsistent with the *Constitution* and cannot perpetuate historical disadvantage and prejudice.²¹⁹ It has already been submitted earlier in this study that *ukuthwala* maintains the subordination of girls and entrenches their discrimination.²²⁰

Thirdly, there is an evaluation of the nature and extent of the limitation. This factor is grounded in proportionality and requires that the limitation must not infringe rights further than necessary to accomplish its purpose.²²¹ As such, a limitation cannot be justified where the detriment caused is disproportionate to the benefits.²²² As part of this analysis, the court has to determine the extensiveness of the limitation and its impact on those affected by it.²²³ With reference to *ukuthwala*, the infringement resulting from the practice is severe since it does not only infringe a single constitutional right but extends to a number of rights most of which the *Constitution* is founded on.²²⁴ Similarly, the practice has irreversible consequences on the girl child. The girl is denied basic forms of education without which she will struggle later in life since the basic forms of work or employment require some formal education. The girl also suffers detriments such as early pregnancy, sexual abuse and possible HIV

²¹⁷ Herbst and Du Plessis 2008 *EJCL* 1.

²¹⁸ Herbst and Du Plessis 2008 *EJCL* 7. This was the position in terms of the *Black Administration Act* 38 of 1927 which made a formal provision that Black people could conclude common law marriages but did not recognise customary marriages due to their polygamous characteristic.

²¹⁹ Woolman and Botha "Limitations" 74.

²²⁰ See paragraph 2.1.2 of this paper.

²²¹ Currie and De Waal *The Bill of Rights Handbook* 176.

²²² Currie and De Waal *The Bill of Rights Handbook* 181-182.

²²³ Woolman and Botha "Limitations" 81; Currie and De Waal *The Bill of Rights Handbook* 182.

²²⁴ These includes the right to equality, dignity and freedom.

infection resulting in sexual, physical and mental scars which could affect her throughout her life.²²⁵

Fourthly, there is an analysis of whether the approach used to achieve the identified purpose is rationally connected to such purpose or reasonable capable of achieving such purpose.²²⁶ In order to satisfy this part of the analysis, the law or conduct in question must usually achieve its intended purpose.²²⁷ Notwithstanding the irregularities that often occur where the consent of the *thwalad* girl to the proposed marriage is not obtained, *ukuthwala* often results in the conclusion of a customary marriage.

Lastly, there is an analysis of whether the means adopted to achieve the identified purpose were reasonable. This part of the enquiry is arguably the most important part of the limitation analysis and it requires that the means adopted to facilitate the achievement of the identified purpose must be reasonable.²²⁸ Thus if least restrictive but equally effective means of achieving the purpose exists, those means should be preferred.²²⁹ There are less restrictive methods which can be utilised to achieve a customary marriage such as the traditional method of sending a letter or a messenger to the prospective wife's family asking for permission to engage in marriage negotiations.²³⁰ Similarly, cultural communities adhering to *ukuthwala* could prohibit the *thwala* of girls and restrict the application of the practice to women who agree to the *thwala* beforehand. Such an approach would not only guard against the violation of constitutional rights currently evident in the modern *ukuthwala* involving girl children, but would also ensure the continued constitutional protection of the practice since it would be observed in accordance with the *Constitution*.²³¹

²²⁵ Modisaotsile *Pabanzuka News* 2-3.

²²⁶ Woolman and Botha "Limitations" 84.

²²⁷ Currie and De Waal *The Bill of Rights Handbook* 183.

²²⁸ Woolman and Botha "Limitations" 85.

²²⁹ Currie and De Waal *The Bill of Rights Handbook* 184.

²³⁰ Thekiso 2016 <http://www.cityblock.co.za/understanding-lobola/>.

²³¹ See section 15(3)(b) of the *Constitution of the Republic of South Africa, 1996*; section 30 of the *Constitution of the Republic of South Africa, 1996*; section 31(2) of the *Constitution of the Republic of South Africa, 1996*; section 211(3) of the *Constitution of the Republic of South Africa, 1996*. The

While it is clear that *ukuthwala* gives effect to one's constitutional right to culture and that the practice enables the conclusion of a customary marriage, the practice disproportionately infringes on the girl child's constitutional rights and such an infringement is unreasonable and unjustifiable since there are less restrictive methods which could be used to achieve the conclusion of the customary marriage. *Ukuthwala* can thus be limited in terms of section 36 of the *Constitution*.

The *Constitution* is not the only legislative instrument which promotes the right to culture. The *Recognition of Customary Marriages Act* 120 of 1998 also regulates the conclusion of customary marriages.

3.3 Recognition of Customary Marriages Act (RCMA)

Before the enactment of the *Recognition of the Customary Marriages Act* 120 of 1998 (hereafter referred to as *RCMA*) customary marriages were subject to marital power in terms of which a woman was regarded to be a minor and of lower status than her husband.²³² In 1998 the *RCMA* was passed in terms of section 15(3) of the *Constitution* which mandates parliament to pass legislation recognising customary marriages. For the first time in South Africa, profound legal recognition was extended to customary marriages.²³³ One of the purposes of the *RCMA* was to advance the position of women in customary marriages by providing for equal capacity and status of spouses in customary marriages and thus bringing customary law in line with the constitutional value of equality and ending the patriarchy which long characterised customary marriages.²³⁴

A customary marriage can be defined as a marriage concluded in accordance with the customs and traditions of African customary law.²³⁵ A customary marriage extends to

Constitution makes it clear that anyone practicing his cultural may do so in a manner inconsistent with any provision of the *Constitution*.

²³² South African History Online 2016 <https://www.sahistory.org.za/article/customary-marriages-south-africa-understanding-recognition-customary-marriages-act-1998>. This was the position in terms of section 11(3) of the Repeal of the *Black Administration Act* (BAA) and the *Natal Code of Zulu Law* of 1985.

²³³ De vos 2006 <https://constitutionallyspeaking.co.za/customary-marriages-unconstitutional/>.

²³⁴ Preamble to the *Recognition of Customary Marriages Act* 120 of 1998.

²³⁵ Section 1 of the *Recognition of Customary Marriages Act* 120 of 1998.

the families of the respective spouses and thus unites the two families.²³⁶ Unlike civil marriages, customary marriages are concluded progressively and every stage of the process is important.²³⁷ Section 3(1) of the *RCMA* sets out three requirements for the validity of a customary marriage. Firstly, both the prospective spouses must be over the age of 18 years. Secondly, both the prospective spouses must consent to the marriage. Lastly, the marriage must be negotiated and entered into or celebrated in accordance with customary law. Failure to meet any of these requirements results in the invalidity of the resultant marriage. These requirements are discussed in detail below.

3.3.1 Age requirement

In terms of this requirement, parties to a customary marriage must be 18 years or older when the marriage is concluded.²³⁸ Should one or both of the parties be under the age of 18, the parents or guardian of the minor or minors is required to consent to the marriage.²³⁹ The Minister of Home Affairs is also required to consent to the marriage.²⁴⁰ The Minister's consent must be in writing and he or she must consider whether the proposed marriage is desirable and in the best interests of the parties.²⁴¹ This provision is very important since it ensures that the best interests of the child as protected in the *Constitution* are guarded because the Minister, unlike parents, does not have any personal gain from the marriage such as *lobola* and the glorification that often comes with the marriage of one's daughter in rural and cultural communities.²⁴²

Ukuthwala violates the age requirement when girls under the age of 18 years are forced to enter into marriages without ministerial consent. Although parents or

²³⁶ Mwabene and Kruuse 2018 *Stell LR* 34.

²³⁷ Barratt *et al Law of Persons and the Family* 381. Also see *Matsotsoane v Roro* 2010 JOL 26460 (GSJ) para 17 where the court held that "marriage is not an event but a process that comprises a chain of events".

²³⁸ Section 3(1)(a)(i) of the *Recognition of Customary Marriages Act* 180 of 1998.

²³⁹ Section 3(3)(a) of the *Recognition of Customary Marriages Act* 180 of 1998.

²⁴⁰ Section 3(4)(a) of the *Recognition of Customary Marriages Act* 180 of 1998.

²⁴¹ Section 3(4)(a) of the *Recognition of Customary Marriages Act* 180 of 1998.

²⁴² Nsingi *Ending Child Marriage in Africa: A Multi Disciplinary Perspective* 13. It has been reported that economic reasons are the main cause of child marriage and that parents prefer their daughter to get married at a young age in order to avoid the disgrace that often occurs when their daughters have children out of wedlock.

guardians might approve of the marriage, the *RCMA* clearly states that ministerial consent is required in addition to parental consent.²⁴³

3.3.2 Consent requirement

Historically, it was unnecessary for two marrying parties to agree to a customary marriage since marriage was viewed as a union between two families and not between two individuals.²⁴⁴ The *RCMA* however changed this position by demanding that both parties to a marriage must agree to be married to each other under customary law and accordingly prohibiting forced marriages.²⁴⁵ According to customary law, it is permissible, through *ukuthwala*, to abduct a girl to another family home in order to force the girl's family to agree to a proposed marriage.²⁴⁶ Since it is challenging to ascertain the girl's consent in such cases, it is likely that a girl could find herself in a marriage she did not consent to. Likewise, it will often be challenging to establish whether a *thwalad* girl's consent is voluntary, informed and uncoerced since following the *thwala* the girl is guarded until she gets accustomed to the idea of marriage.²⁴⁷

3.3.3 Negotiation and celebration requirement

This requirement provides that the validity of a customary marriage is dependent on the negotiations preceding the celebration of the marriage.²⁴⁸ The negotiations take place among the families of the two spouses.²⁴⁹ Maithufi and Bekker argue that the negotiations may be concluded before one or either of the spouses reaches the age of 18 years and that an engagement preceded by *ukuthwala* can be permitted provided that the parties consent and are of a required age.²⁵⁰ Thus in terms of this argument, which the author agrees with, *ukuthwala* can be rightly accommodated provided that

²⁴³ Barratt *et al* *Law of Persons and the Family* 380. The authors emphasise that minors under the age of 18 are only permitted to marry if "they have the consent of both their parents and the Minister of Home Affairs".

²⁴⁴ Herbst and Du Plessis 2008 *EJCL* 6.

²⁴⁵ Section 3(1)(a)(ii) of the *Recognition of Customary Marriages Act* 180 of 1998; Herbst and Du Plessis 2008 *EJCL* 6.

²⁴⁶ Herbst and Du Plessis 2008 *EJCL* 6.

²⁴⁷ Mwambene and Sloth-Nielsen 2011 *AHRLJ* 7.

²⁴⁸ Maithufi and Bekker 2002 *CILSA* 185.

²⁴⁹ Maithufi and Bekker 2002 *CILSA* 185.

²⁵⁰ Maithufi and Bekker 2002 *CILSA* 185-186.

both parties are over the age of 18 at the time of the conclusion of the marriage and both consent to the marriage.

It could be argued that *ukuthwala* satisfies the requirement that a customary marriage must be negotiated and concluded in terms of customary law since the girl's *thwala* is usually followed by *lobola* negotiations and the handing over of the new bride to her in-laws. This inference follows from the fact that, although the way in which customary marriages are negotiated and entered into or celebrated differs from culture to culture, there seems to be consensus that at least the following requirements must be present:

- a) the families of the bride and groom must negotiate and agree to the marriage;
- b) the families must negotiate and agree on the amount of *lobola* to be paid in respect of the marriage;
- c) there must be a formal handing over of the bride to the groom's family.²⁵¹

However, as the author has already submitted, failure to meet any of the requirements set out in section 3 of the *RCMA* results in the invalidity of the resultant customary marriage. Thus, notwithstanding the fact that a marriage preceded by *ukuthwala* is negotiated and entered into or celebrated accordingly, the marriage will be invalid if the parties did not consent to the marriage or the parties are under the age of 18 years and the required parental and ministerial consent was not obtained.

In addition to the *RCMA*, the *Children Act* 38 of 2005 also regulates marriage where either of the parties is under the age of 18 years.

3.4 Children's Act

The *Children's Act* 38 of 2005 (hereafter referred to as the *CA*) was enacted to give effect to the constitutionally protected rights of children and to comprehensively regulate the care and protection of children.²⁵² The Act applies to all children under the age of 18 years. The *CA* is important for the purposes of this study because the Act prohibits child marriage and child trafficking. There is however concern whether

²⁵¹ Barratt *et al Law of Persons and the Family* 380; *Mabuza v Mbatha* 2003 4 SA 218 (C) para 14; *Fanti v Boto* 2008 (5) SA 405 (C) para 19-21.

²⁵² Kruger and Oosthuizen 2012 *PELJ* 303.

the *CA* can effectively combat these offences since the Act is civil and not criminal in nature.²⁵³ Below is an analysis of the provisions of the *CA* prohibiting child marriage and trafficking.

3.4.1 Child marriage

While the *CA* expressly prohibits other harmful cultural practices such as female genital mutilation and regulates practices such as virginity testing and male circumcision, the Act does not mention *ukuthwala*. Mwabene and Sloth-Nielsen contend that the omission by the legislature to refer specifically to *ukuthwala* indicates that the practice did not necessitate regulation.²⁵⁴ However, the authors submit that the practice is not entirely protected from legal scrutiny since it is possible that some of the provisions in the *CA* could impact on *ukuthwala* so far as the custom affects a girl child.²⁵⁵ Notwithstanding the failure to make express mention of *ukuthwala*, section 12(2) of the *CA* provides that no child below the minimum marriageable age can be given out in marriage or engagement.²⁵⁶

The language used in section 12(2) could be problematic in cases of *ukuthwala* for three reasons. Firstly, the Act fails to set the minimum age of marriage and thus creates a loophole since there is a legal discrepancy regarding the minimum marriageable age set out in different South African legal rules.²⁵⁷ For example, the *RCMA* sets out the minimum age of marriage at 18 years. On the other hand, minimum marriageable age according to unwritten customary law, is usually the age of puberty.²⁵⁸ The minimum age set out in the *RCMA* is acceptable since it is in line with the *Constitution* and the *CA* as it promotes the well-being of the child since it permits child marriage only in cases where the marriage is in the best interests of the child. It seems unlikely that it

²⁵³ SALRC 2014 <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>.

²⁵⁴ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 16.

²⁵⁵ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 16.

²⁵⁶ Section 12(2)(a) of the *Children's Act* 38 of 2005.

²⁵⁷ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 18.

²⁵⁸ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 18.

would be in the best interests of a girl child as young as 11 years, which is usually the age of puberty, to be given away in marriage.²⁵⁹

Secondly, the girl is usually "taken" rather than "given out".²⁶⁰ Mwabene and Sloth-Nielsen contend that the provision was not aimed at the conventional *ukuthwala* but was rather aimed at early marriages and the family-to-family negotiations that may precede it.²⁶¹ The authors fail to recognise that, although girls are not directly "given out" but rather "taken" through *ukuthwala*, the said giving out of the child can subsequently occur when the parents negotiate the marriage of the girl, agree to the marriage and accept her *lobola*. Since the conclusion of the customary marriage cannot occur in the absence of the family's consent, when the family does consent, they "give out" the girl in marriage. Thus, *ukuthwala* results in the giving out of the girl child in marriage.

The *CA* also emphasises the importance of the child's consent to marriage.²⁶² The Act further requires that the views of the child be given due consideration in matters concerning her.²⁶³ This provision is distinct since it does not only enshrine a right not expressly protected in the *Constitution*, it also enshrines an internationally protected right and a fundamental principle.²⁶⁴

Similar to the *Constitution*, the *CA* also safeguards children's rights by requiring that all matters concerning the child must not only promote the best interests of the child but also uphold the child's intrinsic human dignity and treat the child equitably.²⁶⁵ The *CA* thus affirms the rights of children to human dignity, equality and the best interests of the child protected in the *Constitution* and serves as an indication of the continued commitment to protect children as a vulnerable group.

²⁵⁹ NHS 2016 <https://www.nhs.uk/live-well/sexual-health/stages-of-puberty-what-happens-to-boys-and-girls/>.

²⁶⁰ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 18.

²⁶¹ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 18.

²⁶² Section 12(2)(b) of the *Children's Act* 38 of 2005.

²⁶³ Section 10 of the *Children's Act* 38 of 2005.

²⁶⁴ See A 12 of the Convention on the Rights of the Child (1989) and a 7 of the African Charter on the Rights and Welfare of the Child (1990) discussed in section 2.1.4 of this paper.

²⁶⁵ Section 6(2) of the *Children's Act* 38 of 2005.

3.4.2 Prohibition of child trafficking

In addition to the above provisions, the *CA* also prohibits the trafficking of children. The Act provides that no one may traffic a child or permit a child to be trafficked.²⁶⁶ Likewise, a person cannot justify the trafficking of a child by submitting that the child, parent or guardian of the child consented to the intended exploitation of the child.²⁶⁷ The *CA* defines exploitation to include forced marriages.²⁶⁸ Trafficking on the other hand, is defined in the same terms used in the *Trafficking Protocol* and includes the supply or forcible transfer of a child within or across South Africa for purposes of exploitation.²⁶⁹ A person who contravenes this provision can be charged with a criminal offence and may be imprisoned for up to 10 years.²⁷⁰ Criminal liability can act as a deterrent to parents who could otherwise be incentivised to give out their under age children in marriages. It is also clear that men who prey on girls and force them into marriages through *ukuthwala* cannot rely on the conclusion of the marriage and the accompanying consent of the girl's parents in justifying the trafficking of the girl. The High Court confirmed this in *Jezile v S*²⁷¹ where it denied the accused's defence that the family of the girl, her uncle in particular, was aware that he intended travelling with the girl to Cape Town and did not object to the relocation.²⁷²

In addition to the rights of children protected in the *CA*, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act*²⁷³ also protects children by prohibiting the sexual abuse and sexual exploitation of children.

²⁶⁶ Section 284(1) of the *Children's Act* 38 of 2005.

²⁶⁷ Section 284(2)(a)(i) of the *Children's Act* 38 of 2005.

²⁶⁸ Section 1 of the *Children's Act* 38 of 2005.

²⁶⁹ Section 1 of the *Children's Act* 38 of 2005.

²⁷⁰ Section 305(1)(s) of the *Children's Act* 38 of 2005; section 305(8) of the *Children's Act* 38 of 2005.

²⁷¹ *Jezile v S* 2015 3 All SA 201 (WCC). This case is discussed in detail under the section on the *Trafficking Act*.

²⁷² *Jezile v S* 2015 3 All SA 201 (WCC) para 83.

²⁷³ *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007; *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 05 of 2015.

3.5 Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015. (hereafter referred to as the *Sexual Offences Amendment Act*) was assented into law on 3 July 2015.²⁷⁴ The *Sexual Offences Amendment Act* repeals certain sections of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (hereafter referred to as the *Sexual Offences Act*). The *Sexual Offences Amendment Act* recognises the vulnerable nature of children which makes them susceptible to sexual violations.²⁷⁵ As such, it aims to adequately deal with sexual offences perpetrated on children and protect children from sexual abuse and sexual exploitation.²⁷⁶ Similar to the *CA*, the *Sexual Offences Amendment Act* defines a child as anyone below the age of 18 years.²⁷⁷ Below is an analysis of the manner in which *ukuthwala* violates certain provisions in the *Sexual Offences Act and the Sexual Offences Amendment Act* pertaining to the sexual abuse and exploitation of children.

3.5.1 Rape and statutory rape

Section 3 of the *Sexual Offences Amendment Act* provides that anyone who unlawfully and intentionally has sexual intercourse with another without the latter's consent is guilty of rape.²⁷⁸ Regarding consent, the age of consent is 16 years and children below the age of 12 years are entirely incapable of consenting to any sexual act.²⁷⁹ A sexual act is defined as "an act of sexual penetration or an act of sexual violation".²⁸⁰ The *Sexual Offences Amendment Act* criminalises all acts of sexual penetration and sexual

²⁷⁴ Mahery 2015 *SAJBL* 4.

²⁷⁵ Preamble to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015.

²⁷⁶ Preamble to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015.

²⁷⁷ Section 1 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015; also see section 1 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

²⁷⁸ Section 3 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act* 5 of 2015.

²⁷⁹ Maluleke 2012 *PELJ* 8; section 57(1) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

²⁸⁰ Section 1 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

violation committed by any person on a child below the age of 12 years.²⁸¹ Thus, having sexual intercourse with a child below the age of 12 years subsequent to her *thwala* constitutes rape in violation of section 3 of the *Sexual and Offences Amendment Act* and the suitor cannot claim that a marital relationship existed between him and the girl.²⁸² On the other hand, having sexual intercourse with a child over the age of 12 years but younger than 16 years following her *thwala* constitutes statutory rape in violation of section 15 of the *Sexual Offences Act*.²⁸³

The *Sexual Offences Act* also prohibits the sexual exploitation of children.

3.5.2 Sexual Exploitation

Section 17 of the *Sexual Offences Act* prohibits sexual exploitation of children by any person, including their parents and relatives.²⁸⁴ Sexual exploitation refers to any offence that is sexual in nature.²⁸⁵ Accordingly parents, relatives or others who collude in or aid in the *thwala* of a girl child commit the crime of sexual exploitation.²⁸⁶ This provision is admirable since it does not only focus on the suitor who sexually exploits a child, but extends liability to those who make the exploitation possible. These persons may not only be charged for sexual exploitation but may also be charged of involvement in trafficking of the child under section 71 of the *Sexual Offences Act*. The *Sexual Offences Act* makes provision for mandatory reporting of the sexual exploitation and sexual abuse of children in order to effectively detect and deter these offences.

²⁸¹ Stevens 2016 *PELJ* 5.

²⁸² Section 56(1) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

²⁸³ Section 15 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. Also see section 56(2)(a) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. This is the case regardless of whether the girl consented to the sexual act or not.

²⁸⁴ Section 17 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

²⁸⁵ Section 1 of the *Prevention and Combatting of Trafficking in Persons Act* 7 of 2013.

²⁸⁶ Maluleke 2012 *PELJ* 8.

3.5.3 Mandatory reporting

The *Sexual Offences Act* obliges anyone who has knowledge regarding the sexual violation of a child to immediately report such knowledge to a police official.²⁸⁷ Thus anyone who fails to report the sexual abuse of a girl child resulting from *ukuthwala* may be charged with a criminal offence.²⁸⁸ While this provision could deter *ukuthwala*, the people surrounding the *thwalad* girl and having knowledge of the *thwala* often do not see anything wrong with the forced marriage of the girl and often embrace the fact that *ukuthwala* is part of their culture as such there is often no interference with the practice.²⁸⁹

Thus, although this provision is very wide encompassing "everyone", it seems it will have close to no effect in cases of *ukuthwala* in communities where almost everyone has knowledge of the abduction of girls taking place and where no one sees the need to interfere. Another factor which might affect the implementation of this provision is the attitude of the police in cultural communities towards *ukuthwala*. Where the police officer is of the same cultural background as the child, he might also be reluctant to interfere with the custom.²⁹⁰

The protection of children against practices which expose them to sexual abuse and sexual exploitation is further discussed below.

3.6 Prevention and Combating of Trafficking in Persons Act

Human trafficking is a universal problem and a major human rights concern.²⁹¹ It is a human rights violation that is premised on exploitation.²⁹² A human trafficking report

²⁸⁷ Section 54(1)(a) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

²⁸⁸ Section 54(1)(b) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. Upon conviction, the person is liable to a fine or imprisonment for a period not exceeding five years or both a fine and such imprisonment.

²⁸⁹ See Koyana and Bekker 2007 *De Jure* 139 where the authors explain that the community rarely infers with *ukuthwala*. Also in *Jezile v S* 2015 3 All SA 201 (WCC) the accused's brother went as far as holding down the accused while his brother raped her instead of helping and rescuing the victim.

²⁹⁰ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 18.

²⁹¹ Kreston 2015 *SALJ* 20.

²⁹² Zimmerman and Kiss 2017 *PLOS Med* 2.

released by the United States' State Department's office in June 2018 has placed South Africa on a watch list for trafficking.²⁹³ It has also been claimed that South Africa is a top 10 trafficking route globally.²⁹⁴ According to Van der Watt, it is difficult to gather reliable statistics on human trafficking in South Africa since many cases go unreported.²⁹⁵ It is thus possible that human trafficking statistics are higher than reported. Human trafficking risk factors include violence against women and children and forced marriage.²⁹⁶

In response to human trafficking, *the Prevention and Combatting of Trafficking in Persons Act*²⁹⁷ (hereafter referred to as the *Trafficking Act*) was assented into law in 2013. The *Trafficking Act* became operational on 9 August 2015 and is the primary framework dealing with human trafficking in South Africa.²⁹⁸ Although the Act does not exclusively deal with the trafficking of children, some of its provisions extend to children. These provisions are discussed below.

3.6.1 Trafficking of children

Although the *Trafficking Act* prohibits the trafficking of children, it fails to define child trafficking.²⁹⁹ However, it does prohibit the forced marriage of a child for purposes of any form of exploitation.³⁰⁰ The *Trafficking Act* defines exploitation to include trafficking of a person for sexual exploitation and child bearing.³⁰¹ These elements are

²⁹³ Africa Check 2013 <https://africacheck.org/reports/are-30000-kids-trafficked-into-south-africas-sex-trade-every-year-the-claim-exaggerates-the-problem/>.

²⁹⁴ Africa Check 2013 <https://africacheck.org/reports/are-30000-kids-trafficked-into-south-africas-sex-trade-every-year-the-claim-exaggerates-the-problem/>.

²⁹⁵ Kreston 2015 *SALJ* 23; Saturday star 2018 <https://www.iol.co.za/saturday-star/sa-slips-up-on-human-trafficking-16118928>.

²⁹⁶ Kreston 2015 *SALJ* 23; Saturday star 2018 <https://www.iol.co.za/saturday-star/sa-slips-up-on-human-trafficking-16118928>.

²⁹⁷ 7 of 2013.

²⁹⁸ Goliath 2016 *De Rebus* 23; Cave 2016 *the Centre for Civil and Human Rights* 4.

²⁹⁹ Kreston 2015 *SALJ* 26.

³⁰⁰ Section 4(2)(b) of the *Prevention and Combatting of Trafficking in Persons Act* 7 of 2013. The Act defines exploitation to include sexual exploitation but does not expressly include forced marriage.

³⁰¹ Section 1 of the *Prevention and Combatting of Trafficking in Persons Act* 7 of 2013.

prevailing in cases of *ukuthwala*. Like the *CA*, the *Trafficking Act* makes it clear that consent is not a defence to trafficking.³⁰²

In addition to prohibiting forced marriage, the *Trafficking Act* also prohibits abuse of power which takes advantage of a child's vulnerability and convinces her that she has no choice but to submit to exploitation.³⁰³ It is generally accepted that abuse of power often emanates from parents or someone having control over a child.³⁰⁴ In the case of *ukuthwala*, the abuse would emanate from a parent or guardian (usually the uncle) imposing marriage on a girl child against her wishes.

It has been acknowledged that there is a link between *ukuthwala* and trafficking. Judge Patricia Goliath of the Western Cape High Court has submitted that the custom of forced marriage concluded as a result of *ukuthwala* is frequently abused for purposes of human trafficking.³⁰⁵ The important recognition of *ukuthwala* as a form of human trafficking occurred in 2009 when the then Minister of Police, Nathi Mthethwa, condemned the practice as "just simple human trafficking" which calls for immediate abolition.³⁰⁶ Another important legal recognition of *ukuthwala* as a form of human trafficking occurred as a result of the 2015 decision of *Jezile v S*.³⁰⁷

3.6.2 *Jezile v S*

In *Jezile v S* the court referred to the provisions of the *Trafficking Act* notwithstanding the fact that the Act only came into force almost five months after the judgment was delivered. This case was an appeal against conviction on trafficking and sexual abuse charges arising from the *thwala* of a 14-year-old girl (the complainant) by a 28-year-old man (the appellant). Both parties were from the Eastern Cape and of *Xhosa* ethnicity. Unlike other *ukuthwala* cases where *lobola* negotiations usually takes place

³⁰² Section 11(1) of the *Prevention and Combatting of Trafficking in Persons Act 7* of 2013.

³⁰³ Kreston 2015 *SALJ* 25; section 1 of the *Prevention and Combatting of Trafficking in Persons Act 7* of 2013.

³⁰⁴ Kreston 2015 *SALJ* 25-26. Kreston also argues that children are universally regarded as vulnerable by reason of being children.

³⁰⁵ Goliath 2016 *De Rebus* 23.

³⁰⁶ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 15.

³⁰⁷ *Jezile v S* 2015 3 All SA 201 (WCC).

after the *thwala*, in this case the *thwala* took place after *lobola* negotiations had already been concluded.³⁰⁸ The complainant's *thwala* was facilitated by her uncle who not only negotiated and received her *lobola* but also physically and forcibly handed her over to the appellant.³⁰⁹ Upon the complainant's arrival at the appellant's home, she was instructed to take part in various customary ceremonies during which she allegedly become the appellant's customary wife.³¹⁰

Soon thereafter, the complainant ran away from her "matrimonial" home and conveyed her wishes against the marriage to her mother. She was however returned to the appellant's home by her male family members upon discovering that she had ran away.³¹¹ On sanction by the said family members, the appellant travelled with the complainant to Cape Town against her wishes.³¹² The complainant alleged that the appellant physically and sexually assaulted her following the Cape Town trip.³¹³

The court was faced with three issues. Firstly, it had to decide whether the complainant travelled willingly to Cape Town or whether the trip was a result of trafficking for sexual exploitation or abuse.³¹⁴ Secondly, it had to decide whether sexual intercourse took place and if so, if it the complainant had consented thereto.³¹⁵ Thirdly, the court had to decide whether the complainant sustained physical injuries due to the appellant's conduct.³¹⁶ The appellant denied accountability for all charges claiming that the complainant willingly travelled with him to Cape Town and that her physical injuries were self-inflicted.³¹⁷ He further submitted that the complainant had freely engaged in sexual intercourse with him.³¹⁸ However, the appellant later relied on the aberrant

³⁰⁸ *Jezile v S* 2015 3 All SA 201 (WCC) para 7.

³⁰⁹ *Jezile v S* 2015 3 All SA 201 (WCC) para 8.

³¹⁰ *Jezile v S* 2015 3 All SA 201 (WCC) para 9.

³¹¹ *Jezile v S* 2015 3 All SA 201 (WCC) para 10.

³¹² *Jezile v S* 2015 3 All SA 201 (WCC) para 10.

³¹³ *Jezile v S* 2015 3 All SA 201 (WCC) para 11.

³¹⁴ *Jezile v S* 2015 3 All SA 201 (WCC) para 12.

³¹⁵ *Jezile v S* 2015 3 All SA 201 (WCC) para 12. Since the complainant was only 14 years, her age was relevant for purposes of the determination of an appropriate sentence. Also, the respondent claimed that the complainant had told him she was 16 years old and thus negating statutory rape.

³¹⁶ *Jezile v S* 2015 3 All SA 201 (WCC) para 12.

³¹⁷ *Jezile v S* 2015 3 All SA 201 (WCC) para 37-41.

³¹⁸ *Jezile v S* 2015 3 All SA 201 (WCC) para 40.

form of *ukuthwala* and submitted that the practice allowed coercion with regard to sexual acts and that the complainant's family had duly negotiated and accepted her *lobola* and had failed to object to her Cape Town departure.³¹⁹ The appellant also argued that *ukuthwala* constitutes living customary law which exempted the requirements of consent and the prescribed age as determined in the *RCMA*.³²⁰

The High Court held that the appellant could not justify his conduct by alleging that he had acted on the belief that he had concluded a valid customary marriage which permitted sexual coercion with the complainant.³²¹ The court further held that the appellant could not rely on the traditional *ukuthwala* to justify the trafficking and sexual assaults since those acts occurred after the *ukuthwala* had already taken place.³²² With regard to the aberrant form of *ukuthwala*, the court held that acts connected to the aberrant form of *ukuthwala* cannot secure legal protection.³²³ The court consequently confirmed the trafficking and sexual assault convictions imposed by the lower court.³²⁴

While the court's judgement is plausible for holding that *ukuthwala* cannot justify the trafficking and sexual assault of another, it seems to imply that abducting and forcibly transferring a girl from one village to another is not severe enough to constitute trafficking. The focus of the court was on the removal of the girl to Cape Town and not on the forcible removal of the girl to the appellant's home following the *thwala* and preceding the Cape Town trip. Notwithstanding the error of the court, *Jezile v S* marked a significant milestone in the prohibition against human trafficking in South Africa. As a result of the judgment, *ukuthwala* has been incorporated into the *Trafficking Act* as a form of human trafficking.³²⁵

³¹⁹ *Jezile v S* 2015 3 All SA 201 (WCC) para 92.

³²⁰ *Jezile v S* 2015 3 All SA 201 (WCC) para 94.

³²¹ *Jezile v S* 2015 3 All SA 201 (WCC) para 92.

³²² *Jezile v S* 2015 3 All SA 201 (WCC) para 90 and 92.

³²³ *Jezile v S* 2015 3 All SA 201 (WCC) para 95.

³²⁴ *Jezile v S* 2015 3 All SA 201 (WCC) para 96.

³²⁵ Go legal 2016 <https://www.golegal.co.za/forced-marriage-ukuthwala-criminal/>.

3.3 Summary

It is evident from this chapter that South Africa has legislative frameworks in place dealing with *ukuthwala*. The far-reaching framework is the *Constitution* which gives protection to the rights of children and ensures that their best interests are upheld. It is also clear that *ukuthwala* is prohibited under the *Trafficking Act* which demonstrates a continued commitment to preventing the trafficking and abduction of children. Although the other frameworks do not expressly make mention of *ukuthwala*, they effectively prohibit the marriage of a child, forced or otherwise, under the age of 18 years and the abduction and sexual exploitation of a child.

Chapter 4: Conclusion and recommendations

4.1 Conclusion

The focus of this study was to determine whether South Africa has taken effective legislative measures to combat the practice of *ukuthwala* in compliance with its obligations under the *CRC* and the *ACRWC*. The focus was on the *CRC* and the *ACRWC* since these instruments deal comprehensive and exclusively with children's rights. South Africa is a signatory to both instruments hence the need to consider whether the Government is complying with its obligations contained therein.

As illustrated, the objective of both the *CRC* and the *ACRWC* is to protect children. The instruments assert the right of children to live in an environment that promotes their well-being, development, best interests and protects them from discrimination. Under both the *CRC* and the *ACRWC* South Africa is obliged to develop legislative measures in order to eliminate any conduct or practice that poses a threat to the rights of children.

It is clear that the aberrant or modern form of *ukuthwala* violates the girl child's rights protected in the *CRC* and the *ACRWC*. The practice has since brought human rights concerns. From the three forms of *ukuthwala* explained by Mwabene and Sloth-Nielsen, the second and third forms result in numerous human rights violations since they usually results in the abuse, rape and impregnation of young girls.³²⁶

It is also clear that numerous provisions contained in different statutes indirectly address the practice of *ukuthwala*. In particular, the *Constitution* enshrines the principle of the best interests of the child as the overarching yardstick in terms of which every action or decision regarding a child can be reviewed. The *Constitution* also prohibits conduct which is discriminatory, demeaning and inhumane towards a child. *Ukuthwala* thus fails constitutional scrutiny.

³²⁶ Mwabene and Sloth-Nielsen 2011 *AHRLJ* 7.

Likewise, the provisions of the *CA* could deter *ukuthwala* since the Act prohibits harmful traditional practices in respect to a child. The provisions of the *CA* are however inadequate for three reasons. Firstly, whereas the Act prohibits harmful cultural practice, which could include *ukuthwala*, the prohibition is merely civil and not criminal.³²⁷ Secondly, the Act prohibits the "giving out" of a child in marriage. As already discussed, there is discrepancy regarding whether a *thwalad* girl is given out or taken. Thirdly, although the Act prohibits the marriage of a child under the minimum marriageable age, it fails to set out the minimum age of marriage.

On the other hand, the *Sexual Offences Act* and the *Trafficking Act* can effectively eradicate *ukuthwala* since the statutes are criminal in nature. These Acts render it a criminal offence to engage or assist in child trafficking, including forced marriage of a child for purposes of exploitation and sexual abuse of a child. The criminal liability stretches to a lot of persons including those inducing the child into submitting to trafficking and those having knowledge of the child's sexual abuse and exploitation and failing to report such knowledge to the police.³²⁸

A marriage concluded through *ukuthwala* fails the requirements of a customary marriage under the *RCMA* notwithstanding the fact that the practice is centred on culture.³²⁹ The Act requires parties to a customary marriage to consent to the marriage and to be over 18 years, which is seldom the position in cases of *ukuthwala* involving children. While it is conceded that *ukuthwala* is not a customary marriage itself, the resultant customary marriage is not excepted from the prescribed requirements for a valid customary marriage.

³²⁷ South African Law Reform Commission *Discussion Paper 132* 40.

³²⁸ See section 1 of the *Prevention and Combatting of Trafficking in Persons Act 7* of 2013 on abuse of power discussed in section 3.6 of this paper and section 54(1)(a) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5* of 2015 discussed in section 3.4 of this paper.

³²⁹ Koyana and Bekker 2007 *De Jure* 139. It is conceded that *ukuthwala* is not a marriage in itself but is rather a procedure preliminary to a customary marriage.

Lastly, it is clear that *ukuthwala* constitutes trafficking under the *Trafficking Act* as incorporated by *Jezile v S*. The case also affirmed that a marriage relationship cannot justify sexual coercion and that the aberrant form of *ukuthwala* cannot secure legal protection.

In conclusion, it is clear that *ukuthwala* violates the *Constitution*, *RCMA*, *CA*, *Sexual Offences Act* and the *Trafficking Act*. It would however be constitutionally inaccurate to hold that the practice should be entirely abolished since the *Constitution* protects cultural rights. It is thus possible for the practice to be accommodated as far as it does not violate the constitutionally protected rights of others. Where it violates the rights of others, section 36 of the *Constitution* can be applied to limit the practice.

4.2 Recommendations

It is clear from this study that South Africa has legislative framework in place which prohibits the practice of *ukuthwala*. However, the practice remains prevalent despite the existence of such frameworks. It is thus clear that legislation alone cannot adequately combat the practice. Below are recommendations which could be implemented to complement the legislative measures in eradicating *ukuthwala*.

4.2.1 Poverty alleviation

Many authors agree that, although *ukuthwala* is premised on a long-standing cultural tradition, poverty contributes to the predominance of the practice.³³⁰ It has been reported that poverty is one of the key factors contributing to the prevalence of the practice.³³¹ Research also reveals that the majority of *ukuthwala* victims are girls from poor families.³³² Poverty and unfortunate economic circumstances motivate families to give away their daughters through *ukuthwala* in exchange for *lobola*.³³³ Poverty alleviation could thus diminish *ukuthwala*. The State should efficiently fund basic social

³³⁰ Modisaotsile Pabanzuka News 2; South African Law Reform Commission 2014 Discussion Paper 132 20.

³³¹ SALRC 2014 <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>.

³³² Department of Justice and Constitutional Development 2009 http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html.

³³³ Mabasa 2015 *De rebus* 30.

services like education, adequate housing and health care services in order to eliminate poverty.³³⁴ Provision of adequate education can help eradicate poverty and thus *ukuthwala* since lack of education is the root cause of poverty.³³⁵ Education is often referred to as an empowerment right with which individuals can empower themselves economically while ending generational poverty.³³⁶

4.2.2 Promote change in attitude

Legislation on its own cannot effectively deal with *ukuthwala*. Key role-players must also take part in the elimination of the practice. The State must promote and educate parents and the general community of the effects of *ukuthwala* on the girl child. They must also be made aware that *ukuthwala* does not only violate the girl child's constitutional rights but could also result in criminal liability. It was reported that the State has previously engaged with some Eastern Cape communities regarding the criminal aspects of *ukuthwala*. Those communities later discontinued the practice.³³⁷ It is thus possible that the continued commitment on the part of the State to raise awareness of the practice can aid in its elimination.

In addition to raising awareness, there must be a change in attitude by police officials in areas where *ukuthwala* is dominant. Distressed citizens always report to and seek assistance from the police as the first line of response against a crime.³³⁸ Speedy response and investigation of cases of *ukuthwala* by the police could thus discourage *ukuthwala*. It is imperative that the girl receives prompt assistance when she reports her matter to the police since no one else is likely to rescue her.

Lastly, traditional leaders have a very important role to play in eradicating *ukuthwala*. People in rural and cultural areas value the authority of the chief. As such, if chiefs were to condemn and prohibit *ukuthwala* in relation to children, the community would

³³⁴ *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on The Rights and Welfare of the Child (ACERWC) on ending Child Marriage* (2017) 27.

³³⁵ RBJ 2018 <https://rbj.net/2015/03/13/lack-of-education-is-root-cause-of-poverty/>.

³³⁶ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 41.

³³⁷ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 16.

³³⁸ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 22.

most probably obey. Additionally, traditional leaders should promote gender equality within their communities and abolish all practices which subordinate women. Moreover, they should encourage parents to raise their sons to view the opposite gender as equals. Boys who are raised in an environment conducive to equality of sexes and respect for females would be less prone to engage in discriminatory and demeaning practices such as *ukuthwala*.

4.2.3 Provision of counselling to victims

While the State should focus on eradicating *ukuthwala*, it should not neglect those girls who have already fallen victim to the practice. Victims of *ukuthwala* usually resort to prostitution since they cannot return home after leaving the marriage.³³⁹ The State should fund centres which provide counselling to *ukuthwala* victims in order to rehabilitate and ensure their integration into society. The State should also provide the necessary training to the personnel working at these centres.

³³⁹ Van der Watt and Ovens 2012 *Child Abuse Research: A South African Journal* 19-20.

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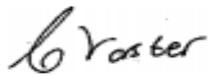
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LETTER FROM LANGUAGE EDITOR

DECLARATION

I, C Vorster (ID: 710924 0034 084), Language editor and Translator and member of the South African Translators' Institute (SATI member number 1003172), herewith declare that I did the language editing of a mini-dissertation written by Ms LB Gaanakgomo (student number: 25415492) from the North-West University.

Title of the mini-dissertation: The implications of *ukuthwala* on South Africa's regional and international law obligations



8 December 2018

C Vorster

Date

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Higher Degrees Administration

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