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Evaluating the impact on the girl child through the criminal activities associated with the practice of ukuthwala

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Prepared under the Supervision of

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## Declaration

I Asanda Mbete declare that this research paper is my own work and all the sources I have used or quoted have been indicated and acknowledged as complete references.

I have quoted and acknowledged my sources where I obtained my information.

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Signature.....



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I would first like to give my big thanks to the Almighty God for giving me this great opportunity and determination to see it through.

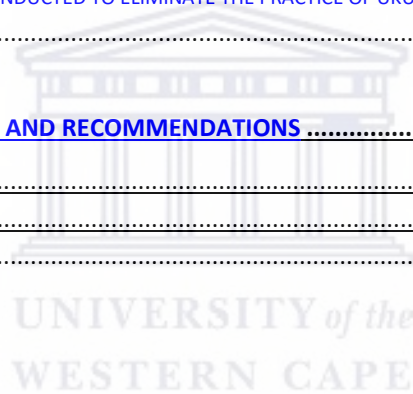
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## Keywords

Ukuthwala

Culture

Tradition

Customary Law

Lobolo (dowry) negotiations

Criminal Activities

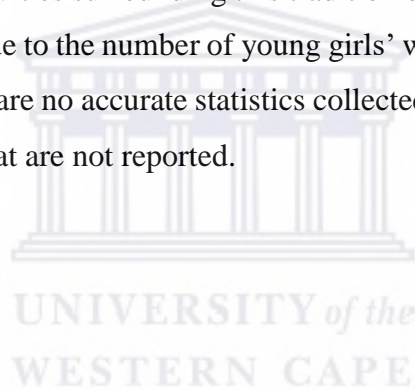


## Executive Summary

The world is composed of people who come from different walks of life and they practice various traditions that are informed by their way of life. In South Africa we have a cultural practice of ukuthwala which is my main research topic. The aim of this topic is to research and find practical solutions that can be used to combat criminal matters surrounding the practice of ukuthwala.

The kind of research methodology used is desk top research. The information contained in this research is mostly coming from researchers, articles, journals, online sources has been combined to compile this thesis. This research will empower and educate victims of ukuthwala about their rights and responsibilities and further prevent future occurrences of this nature.

The prevalence of criminal activities surrounding this tradition of ukuthwala has created many more questions than answers due to the number of young girls' who are victims of this practice especially in rural areas. There are no accurate statistics collected by the authorities since there are other cases of ukuthwala that are not reported.



# Chapter 1: Introduction

## 1.1 Background to the study

Ukuthwala is an ancient cultural practice that has been exercised in various parts of South Africa, especially in the Eastern Cape. It occurs in different communities and is informed by traditional beliefs. The man's family devises a plan to bring the girl to their compound without her knowledge. In some instances, this plan is formulated together with the girl's family, but when the man's family acts without the prior knowledge of the girl's family, they are obligated to inform them by means of a letter, or by delegating a family member, that their daughter is not missing. Furthermore, the man's family will request a day with the girl's family for lobolo (dowry) negotiations for the girl. The girl's family will oversee the process of ukuthwala to ensure that all the requirements are met and that there is mutual understanding between the families; however, this is done without the involvement of the girl child (Mjwara, 2014).

Koyana and Bekker (2007) defines ukuthwala as a genuine acceptable practice which is used to abduct woman in order to establish traditional marriage. Traditional marriage is relationship which entails not only the husband and wife however it includes also family members to which the parties belong before the marriage.

According to the South African Law Reform Commission, (2014) mentions that the Gender Directorate identify that ukuthwala is practised predominately in parts of the Eastern Cape such as Bizana, Flagstaff and Lusikisiki. SALRC (2014) further notes that news coverage also discloses other crucial aspects of this practice:

- The victims of ukuthwala are affected from the ages of 12 and 15 years old.
- They are sometimes forced into marriages with HIV-positive men.
- Several young girls fearful of becoming victims of ukuthwala decided to disappear, ending up living in areas such as Gauteng and KwaZulu-Natal.
- The process of ukuthwala usually takes place when young girls are getting water from streams, wood from fields and are on their way to school.



- The practice of ukuthwala permits the perpetrator to abduct the girl child even without proposing love for her (South African Law Reform Commission, 2014 (hereafter SALRC). There is no prior existing interaction between the minor and the perpetrator since her views are not considered.

According to SALRC (2014), the Gender Directorate of the Department of Justice and Constitutional Development requested that the investigation of ukuthwala should prioritise the following issues:

- The challenges the girl child faces;
- Determining the place of ukuthwala in the contemporary legal framework; and
- Determining if the laws protect the human rights of the girl child and her well-being.

## **1.2 Problem statement**

Criminal elements associated with ukuthwala over the past years have placed this cultural tradition under a spotlight due to the violations of a girl child rights that takes place when this practice is being executed. The economic gains associated with this practice makes some families to agree with the process of ukuthwala without considering the best interest of the girl child such as age, education, well-being and development of the child.

Koyana and Bekker (2007) illustrates that girls ages 12 to 15 are the point of focus and these young girls are forced to get married to grown up man through the traditional practice with the consent of their parents. The researcher discovered that these young girls are used to improve the living conditions of the family by being sold to the older man under the disguise of the traditional practice of ukuthwala.

Mwambene and Sloth- Nielsen (2011) argues that the practice of ukuthwala has lost its original meaning through the introduction of acts that are detrimental to the well-being, development and rights of the girl child. Likewise, South African Law Reform Commission (2014) notes the following:

- Victims of ukuthwala are subjected to all forms of abuse by their spouses and the latter's families.

- When incidents are reported to the authorities, victims are not given the necessary assistance due to the belief that ukuthwala is acceptable.
- Parents are reluctant to report cases of ukuthwala to the police for fear of retaliation from community members, and hence ukuthwala cases are seldom reported.
- In certain instances, the minor will be abducted by the family of the potential spouse and removed to his home
- A child of 12 years will be subjected to accepting a 40-year-old man as her husband

In certain scenarios, the kidnapping takes place with the permission of the biological parents who are driven by prospect of economic gain in the form of lobolo.

### **1.3 Significance of the study**

This study explores court cases and judgments regarding ukuthwala and the criminal elements associated with it. The research will enhance the understanding of different stakeholders, among them scholars, traditional leaders, community members, parents or legal guardians, police officers, social workers, and lawyers, who are involved in cases of this nature. This study will also educate the girl child about her rights when confronted by the process of ukuthwala.

### **1.4 Research question**

What are the criminal activities associated with ukuthwala in South Africa?

### **1.5 Literature review**

#### **1.5.1 Culture**

According to Giddens (2001), culture relates to the ways of life that societal groups follow. This involves, for instance, their attire, the way their weddings are conducted, their family lives and spiritual occasions, the work they perform and what they do in their leisure hours. He states that cultural norms are guidelines as to how people should conduct themselves and point to a group's social ethics as to how its members should interact with others and their environment.

Boezaart in turn notes that an individual has the right to partake in traditional activities, which express the group's uniqueness, morals and customs; therefore, this right safeguards the cultural values of a wider community (Boezaart, 2013). The researcher notes that when the girl child arrives in the man's homestead, she is instructed to remove her normal clothing and replace it with the new bride's attire which is regarded as acceptable to her new role of being a wife in the family.

African tradition has undergone enormous change ever since colonialism. Modern African culture is a combination of cultural elements and alien features. Furthermore, local African culture was for long suppressed by white South Africans, whose cultural foundations are based on those of the Western world. Western cultures are characterised by emphasis on personal interests and African culture, by emphasis on collective, community-oriented interests (Maluleke, 2012).

Hamman (2011) states that while culture seeks to preserve societal values and norms, it should not undermine human independence or attempt to replace the law. Culture must not be implemented to nullify the existence of human rights. Furthermore, in the case of ukuthwala, the emergence of harmful activities around it needs to be addressed by discussion about its evolving challenges and impact on community interests. Such an exercise is undertaken to safeguard those who are exposed to exploitation under the disguise of tradition.

The researcher views that ukuthwala is one of the traditional practices in South Africa that is used as a pretext for denying the rights of the girl child, a situation which has led to it being associated with criminal activities.

### **1.5.2 Tradition**

Tradition is defined as way of life acceptable for a specific community. Thompson (1993) states that customs are adopted ways of living that symbolise how communities expect certain activities to be performed. In this research paper, these two notions culture and custom are used interchangeably to refer to how people's lives and decisions are influenced by their beliefs. The research is aware that each culture has a right to self-determination, and it is within their right to adopt their way of life.

### 1.5.3 Ukuthwala

Bennett (2004) describes ukuthwala as an irregular abduction of the bride aimed at accomplishing a customary marriage. Koyana and Bekker (2007) elaborates that the main aim of ukuthwala is to compel families to facilitate lobolo (dowry) negotiations in order to conclude the arrangements of customary marriage. Rice (2014) maintains that the core purpose of ukuthwala is to subject the girl's family to participating in lobolo (dowry) discussions to finalise a customary marriage. Its origins lie in the aim to bring two families together to reach agreement on the obligatory lobolo price: these negotiations make the groom aware of the amount he is required to pay.

Ncube (2018) argues that ukuthwala grants parents the opportunity to conduct the bridal ceremony of their children it was never intended to violate the rights of the children. There are, in other words, competing perceptions surrounding ukuthwala:

- traditional bridal abduction is a custom used to open bridal discussions; or
- it entails an act of unlawful misconduct that amounts to exploitation (Buthelezi, 2006).

Mwambene and Sloth Nielsen (2011) note that there are several forms of ukuthwala. One is the original form in which both families determine the girl's fate and she is made aware of the arrangement that will take place. This occurs where families have approved the expected bridal ceremony; however, the minor is not part of the arrangement.

Mshweshwe (2018) illustrates that in this form of ukuthwala the girl child is monitored until she familiarises herself with the notion of marriage. The researcher indicates that in the African culture when you get married there is an adult woman that is assigned to assist you with the wifely duties in the family and it is normally the aunt of the husband. Therefore, in the case of ukuthwala the girl child will be supervised by the assigned adult woman by educating her with the necessary wifely duties in the household.

Each household has a structured way of doing things; the new bride must be placed under supervision in order to learn how the household duties are done. Another form, however, takes place without the knowledge or involvement of the minor. This happens when she is sent to the man's family home without her consent and knowledge, after which a delegation is dispatched to the bride's family to initiate bridal discussions.

This form of ukuthwala is associated with criminal activities detrimental to the well-being and development of the young girl. It entails crimes and rights violations, such as rape and terrorisation that infringe her self-respect, liberty, bodily integrity and right to safety (Mwambene and Sloth Nielsen, 2011).

SALRC (2014) indicates the following reasons for the practice of ukuthwala to take place:

- To avoid the set marriage expense.
- To evade parental disapproval of the potential competition which may likely occur since the girl has been betrothed to marry someone else.
- To accelerate bridal discussion in instances where timing is an issue (for instance, where the girl is pregnant).
- To place responsibilities on parents of the prospective husband is unable to afford lobolo.
- Speed up the processes which led to immediate matrimonial agreement.
- To speed up the marriage processes in order to maintain the set agreement by at least one set of parents in which case ukuthwala takes place with parental involvement.

According to SALRC (2014), throughout the cultural process certain standards are set to clarify the rules of engagement between families and maintain mutual respect and understanding; as such, it is anticipated that this relationship would extend to the entire family. Nevertheless, there are variations due to the dynamics of the contemporary world, as with any other traditional practice.

For example, in the past the bridal price was paid in the form of cattle since most community members were rich in cattle. Parents who had no cattle in their kraals would hope that one day they could obtain their own cattle in exchange for their daughters. Nowadays, lobolo is no longer paid through cattle only, but it is also paid in monetary value in an amount approved by both families. In view of this, parents are violating the privileges of the minor by using the culture of ukuthwala as a pretext for selling their children to older men who use them for their amusement and pleasure (SALRC, 2014).

It is said that accurate statistics regarding the criminal activities associated with ukuthwala are not available and that this creates problems in assisting victims, given that matters are not reported. SALRC (2014) indicates that between 2009 and early 2014 it was a challenge to gather statistical data on the incidence of ukuthwala. Nevertheless, it said that statistics show that, far from being on the decrease, the practice of ukuthwala is growing in popularity among those falling under customary law.

Due to these circumstances, the South African Law Reform Commission (2014) has undertaken the following:

- Investigated about ukuthwala;
- Liaised with relevant stakeholders through a tool developed by the Commission; and
- Analysed the laws to identify gaps in addressing the problem of ukuthwala in its negative form and assisting victims (SALRC, 2014).

Ukuthwala has been negatively characterised by the media due to the criminal acts associated with it. It is the researcher's view that ukuthwala was meant to be a noble practice that has been surrounded by criminal elements that makes this practice harmful to women thus it becomes a violent practice which end up depriving the rights of the girl child. Mwambene and Sloth-Nielsen (2011) identifies that ukuthwala shifted from a traditional to a custom of abuse and violation of human rights.

As this implies, it is a grey area as to whether ukuthwala is crime or social practice tolerable in society.

#### **1.5.4 Customary law**

According to the ruling in *Bhe v Magistrate, Khayelitsha* (2005), a challenge in developing customary law is that it is not written, making it hard to determine if it is being correctly adhered to in society. The court further stated that customary law does not vary amongst nations; however, it varies between cultural groups within those nations, and amongst tribes within those traditional groups. Customary law is handed down by word of mouth, which creates a complex situation in which each tribe and each person has a differing understanding of it (*Bhe v Magistrate, Khayelitsha* (2005)).

*Bhe v Magistrate, Khayelitsha* (2005) suggests that the law is occasionally referred to as existing customary law. Since ukuthwala is an ancient practice which is acceptable to many communities who are embracing it but criminal elements surrounding it are creating a negative impact in the practice. Relevant documentation, such as statutes, textbooks and case law, does not reflect the existing law. Nowadays, ukuthwala is practiced in a form that involves violence against females in general and young girls specifically. It is stated that, with Westernisation and modern education, traditional customs have died a natural death as they have become unfashionable or obsolete.

### **1.5.5 Lobolo**

Oppermann (2006) states that lobolo (dowry) is monetary value that is given to the bridal family and dispensed by the potential husband to finalise customary marriage. Lobolo has several social meanings that entail transference of the generative rights of the woman from the bride's family to the potential husband's family (Bond, 2014). Moreover, once the lobolo requirements have been met, any children that are born then traditionally belong to the husband's family (Knoetze, 2010). Baloyi (2016) argues that one of the unique resolutions of lobolo was to give the husband admission to his wife. It is recognised as acceptable since families have met and agreed upon this union. Yllo and Torres (2016) indicate that lobolo plays a role in determining notions of sexual coercion and approval. When lobolo is being paid, the prospective husband is expecting the new bride to perform wifely duties and cater for everything his heart desires.

The researcher is of the view that when lobolo negotiations have been conducted amongst both families and the minor sent to the in-laws with the minor's consent granted. Therefore, sexual consent must be given even if the two parties are recognised as husband and wife. If this takes place, it also eliminates what is known as marital rape.

### **1.5.6 Best interests of the child**

Section 28 of the Constitution gives rights to young girls and is recognised as supreme in all matters concerning the child. Several legal documents place emphasis on protecting the rights of the child. This principle mandates relevant stakeholders with the responsibility to protect the child's best interests and ensure that child's voice is heard in decisions affecting her.

## **1.6 Methodology**

This study was carried out by means of a desktop literature review of journal articles, legislations, case law, legal journals, books, media, researchers and internet sources relating to ukuthwala. The focus is on South African law, given that ukuthwala is practised mainly in certain areas in the Eastern Cape Province.

## **1.7 Chapter Outline**

- Chapter 1 Is an introduction to the mini thesis. It sets out the study problem, the significance of the study, literature review and its methodology.
- Chapter 2 Analyses the legal frameworks applicable to the practice of ukuthwala.
- Chapter 3 Examines the causes and consequences of ukuthwala.
- Chapter 4 Focuses on criminal activities with ukuthwala and highlights the legal procedures that need to be taken into consideration.
- Chapter 5 Contains concluding remarks and the recommendations of the study.

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# Chapter 2: Legal Frameworks

## 2.1 Introduction

This chapter discusses the legal instruments relevant to ukuthwala, it begins with the International Legal Framework, Domestic Legal Framework and concludes with Laws on Customary Marriages. All these legal documents are meant to protect the rights of the girl child. Furthermore, this chapter seeks to equip victims, communities, traditional leaders, scholars and organizations with knowledge and understanding of the legal instruments that may be utilised when young girls are deprived of their freedom. The argument is that criminal activities surrounding ukuthwala conflict with the law and do not reflect the values stated in the Bill of Rights and International Conventions (Mwambene and Sloth-Nielsen, 2011). This indicates that laws protecting the girl child are contradicting with the supreme legislation of this country and that makes it challenging to eradicate these criminal activities associated with this practice.

Snyman (2008) observes that there is need to check whether the current legal framework is effective in providing safety and combating any form of ukuthwala. This chapter thus sets out to assess if there is a need for new laws to be passed to prevent criminal conduct that misuses the custom of ukuthwala, to determine how such legislation should be structured and to examine how the legislation can be brought about.

In South Africa there are law-makers that regulates marriage processes. South Africa is a signatory of international legal frameworks which protects several customary practices. The foundation of international law regarding marriage rights such as forced marriage, abduction for marriage, child marriage are forms of harmful traditional practice. This constitutes gender-based discrimination and violation of human rights by negatively affecting women and children. Each woman has a right to choose who, when and whether to get married is safeguarded by numerous international instruments including to those South Africa approved or sanctioned (Commission on Gender Equality, undated).

## **2.2 International Legal Frameworks**

### **2.2.1 Universal Declaration of Human Rights (1948)**

Article 16(2) of the Universal Declaration of Human Rights affirms that free and full agreement of the proposing spouses must be mandatory when marriage is entered. The researcher notes that the adopted declaration of Human Rights has been violated by the enforcers of this practice since there was no prior arrangement between both parties meaning that proposing of spouses did not take place. As a result, on the day of the abduction it is the first encounter the girl child is making contact with the perpetrator.

### **2.2.2 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)**

This Convention wants an agreement to be uttered by the potential spouses in person; it also forbids wedding ceremonies that are not entered into with the full and voluntary agreement of both parties. Furthermore, it appeals for judicial action when it comes to stipulating the minimum age of the marriage. When an age dispute has been brought forward to the court it is within their right to determine an acceptable age and provide a course of action that shall be taken by the parties involved. It is indicated that a knowledgeable expert permits a determination of age by considering the importance of the prospective spouses as well as solemn motives. A person vested with information on how to tackle situations of this nature is required to provide guidance to the court in order to find an amicable solution. The researcher notes the disregard of age and consent of the girl child by the executors of ukuthwala, as a result her rights were violated.

### **2.2.3 United Nations General Assembly (1954)**

The United Nations General Assembly accepted a resolution that eradicates traditional practices that are not reliable with the Universal Declaration of Human Rights by safeguarding the freedom of choosing their own spouse, eradicating child marriages fully and engagement of young girls before they have reached their puberty stages and formulating suitable forfeits where required.

The researcher points that the girl child's right were violated when she was not afforded an opportunity to choose her spouse of choice, as a result her fate in marriage was determined on her behalf when the executors of ukuthwala abducted her. Moreover, the girl child age and state of readiness for marriage was not considered, since she was forced to get married before reaching her puberty stages.

#### **2.2.4 International Covenant on Economic, Social and Cultural Rights (1966)**

Article 10(2) gives rise to provision indicating that marriage must be entered with the full and express permission of the proposing spouses. This article put emphases that the State is under a detailed legal requirement to adopt measures to eradicate detrimental practices affecting the well-being and development of the girl child including early marriage. The researcher views that the continuous negligence portrayed by the executors of ukuthwala impacts negatively in the well-being and development of the girl child.

#### **2.2.5 Convention on the Elimination of all forms of Discrimination against Women (1979)**

Article 16(1) upholds the rights to the public to participate to all the applicable measures to eradicate discrimination against women in all matters concerning marriage. All general views provided by communities with regards to matters affecting women are important to determine the public perception so that the court may consider all their views before reaching a decision. This is done based on equality between men and women, who have the same right to select a spouse and enter marriage with full consent. Article 16(2) provides that the bridal ceremony of a child shall have no lawful effect and that all obligatory action involves regulation and shall be granted to clarify the minimum age of the bridal ceremony. Before any bridal ceremony takes place consent for a girl child to participate in this marriage shall be granted by the parents or any other authorized person who has considered the best interest of the girl child. The researcher views that societal dominance of patriarchy overshadows the laws which are supposed to protect vulnerable children who are not fully developed to make their decisions on their own. This provides power to those who consider themselves strong and powerful within the society to do as they please because they believe that their actions are justified by cultural practices.

### **2.2.6 Convention on the Rights of the Child (1989)**

This Convention requires the adoption of suitable measures to eliminate traditional practices that are detrimental to the well-being of children, including early marriage. It includes four pillars: non-discrimination, the best interests of the child, child participation, and the child's right to life, survival and development. The Committee states that the State must increase the minimum age for marriage, with or lacking agreement of the public, to 18 years for both parties. Furthermore, the Convention calls for measures to address prevalent gender roles and attitudes that contribute to harmful traditional practices. The researcher notes the suppression of voices for vulnerable children in communities where this practice is prevalent, as a result basic element of the girl child such as age, consent, child's well-being, development, expression are not priorities before implementing this practice.

### **2.2.7 African Charter on the Rights and Welfare of the Child of (1990)**

This legal document affirms protective rights and measures to eradicate the activities that harm the child's well-being, self-esteem and development. It prohibits child marriage and sets the minimum age of marriage as 18 years. According to Curran and Bonthuys (2005) indicates that Article 2 of the African Charter explains a child as a minor who is below the age of 18 years. Article 4 stipulates that the best interest of the child concerned shall be the primary consideration, this gives rise to every child to express their own views freely in any matter concerning them. Article 11 cites that every child has a right to education, promotion and growth of the child's personality.

Article 21 of the African Charter states that suitable methods shall be taken into place in order to eradicate harmful social and cultural practices affecting the well-being, dignity, normal growth and development of the child specifically those customs and practices prejudicial to the health of the child (Curran and Bonthuys, 2005). The Protocol to the African Charter on Human and People's 'Rights on the Rights of Women in Africa' (2003) states that it is mandatory to consider certain measures to undertake when it concerns the judicial as well as other relevant measures utilized to eradicate all systems of harmful practices which have a negative impact of the rights of women.

The Protocol calls for nationwide statutory measures to ensure that no marriage takes place without the agreement of both parties and that the minimum age of marriage for women is 18 years.

Similarly, the African Youth Charter (2006) calls on the public to take suitable steps to eradicate harmful practices that affect the self-respect and well-being of the youth. The researcher cites that the existence of this cultural practice will continue to violate the girl child rights since the girl child's age, well-being, development and self-esteem is not considered when this practice is implemented.

## **2.3 Domestic Legal Framework**

### **2.3.1 Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)**

This legal document provides measures to ensure that the girl child is protected from illegal activities. It prescribes essential principles that need to be considered in decision-making, namely respect for life, equivalence of growth and expansion of human rights and self-determination. The disregard of the minor personal circumstances and views is a clear reflection that is used to serve the interest of the perpetrators and suppression of the girl child voice. An assessment needs to be conducted to prove the consequences for forced and child marriages as well as to illustrate the violence attached to the practice, taking into consideration the guidance of the Constitution. The Constitution provides protective rights appropriate for the girl child; and these rights are applicable to adults as well. The outcome of the assessment will provide a clear indication of the risk levels that the girl child is exposed to and also assist the relevant stakeholders who are working with the victims of ukuthwala to determine the type of intervention needed (Martin and Mbambo, 2011).

Elements of the Constitution are listed below:

The Constitution provides measures that protect the girl child and promote self-determination. The researcher understands the importance of preserving cultural customs however such acts must not be conducted to undermine the rights of the young and vulnerable children.

It safeguards the girl child's right to equality which must be in conjunction with the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) which prohibits customary practices that impair the dignity of women and undermine the dignity and well-being of girls and sexual harassment. The researcher notes the crucial role of the Constitution as a supreme law of the country which supersedes any existing law that has been adopted by any societal tribes with cultural heritage. Furthermore, it prohibits any criminal activities that are conducted under the name of promoting cultural practices.

The Constitution provides the right to education. The researcher understands that education is a liberating tool for someone's life, hence there must be no one who has audacity to force the girl child to drop out of school and be subjected to fulfil wifely obligations.

The Constitution accords young girls with the right to human dignity. The researcher supports one's freedom to self – determination as enshrined in the Bill of Rights, violation of this right may lead to prosecution by the laws of this country.

The Constitution provides rights to freedom and security of the person, which includes the right to be free from all forms of violence. The researcher encourages safety and security of the girl child hence they must be no one who subjects vulnerable children to customary marriage without her consent.

The Constitution provides the rights of children, these rights include the right to be protected from maltreatment, neglect, abuse and degradation not to be required or permitted to perform work or provide services that are inappropriate for a person of the child's age. Furthermore, this section takes note of the age of the child; by doing so, it avoids certain elements that may place the child at risk in consideration of her welfare, intellectual ability, mental wellness, spiritual or social development. The maturity and stage of development of the girl child are crucial when considering her well-being and development (Children's Act 38 of 2005).

Most importantly the Constitution enjoins everyone to consider the child's best interests in every matter involving a child. The Children's Act elaborates what the principle of the "best interests of the child" entails, by providing, for example, that in matters concerning a child, the child's age, maturity and stage of development, and the need to protect a child from any physical or psychological harm must be taken into account.

The Constitution is the ultimate law that shields, promotes and respects the privileges of the girl child. It also safeguards the right of people to practice their cultural customs; however, these customs must not violate the laws and regulations of South Africa. Irrespective of the privileges granted to protect vulnerable children, customary law remains to endorse negative elements that affect the well-being and development of the girl child (Ntlokwana, 2009).

There is a high level of disregard when the practice of ukuthwala is executed because they continue to subject the girl child to the process of this practice without her consent. This has led men to remain as the head of the house and to obtain custody rights over women and children (Ntlokwana, 2009).

### **2.3.2 Criminal Law (Sexual Offences and Related Matters Amendment) Act No. 32 of 2007**

According to Section 15 of this Act illustrates that engaging sexually with a child without her permission, following kidnapping and abduction constitutes to violation of rape. Moreover, this Act forbids sexual engagement without their permission. The required age to consent is 16 years old however if sexual intercourse is conducted with under the age of 16-year-old then this crime is known as statutory rape. In respect of engaging sexually with a 12-year-old and below that constitutes rape since the age of the girl child is lawfully unable of consent.

Furthermore, Section 16 and 17 of this Act forbids other sexual activities with the minor including sexual grooming in Section 18. Section 17 of this Act prohibits the sexual exploitation of minors by parents and others. The crime of sexual exploitation of children is done by parents or relatives who act against the will of the girl child. Therefore, these parents and relatives are charged with Trafficking in Person under Section 71 of the Sexual Offences Act (Kruger and Oosthuizen, 2012). The researcher indicates that the rights and violation of the girl child's life are non-existence when she reaches the perpetrators homestead since she is subjected to render sexual activities without her consent.

## **2.4 Law on Customary Marriages**

### **2.4.1 The Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)**

It is made known that the practice of ukuthwala is a predecessor towards the establishment of customary marriage hence it is vital that required steps toward consummation of a valid customary marriage must be submitted with, as set out in the Recognition of Customary Marriages Act. It is indicated in the Act that both parties must grant permission to the proposed customary marriage and must be above the age of 18.

This Act further cites that there are other provisions designed in making it possible for the people under the age of 18 in order to conclude a valid customary marriage and this is done by approaching the Minister of Home Affairs. The Act provides if either of the potential spouses is a minor, both his and her parents or if he or she has no parents, his or her legal guardian must give permission to the marriage. In that case Section 25 of the Marriage Act, 1961 (Act No, 25 of 1961) applies if for whatever reason the permission of the parents or legal guardians of the minor is not granted. It is crucial that the authority of endorsement given to the parents, guardians and government officials must be executed in the best interest of the child. If by any chance a minor has entered a marriage without permission as required by the Recognition of Customary Marriages Act therefore the parent, guardian or the minor have a right to approach the court for the dissolution of the marriage.

According to CRL Rights Commission (1996) cites that application of this nature must be made before the minor reaches the age of 18 years and within a period of six weeks of the date that the parent became aware of the existence of the marriage. If a minor decides to place such an application on his or her own therefore, she is expected to do it before he or she turns 18 years or within a period of three months. In addition to the obligation of permission, this Act also have several protective measures aimed at ensuring that the parties involved in customary marriages comply with the essentials set out in the Act. The Recognition of Customary Act requires customary marriages to be registered. The marriage office may accept a birth certificate, identity document or sworn statement as proof of that person age in the case of a minor.



The Act indicates that there is indecisiveness in respect of the age of a minor, this means that the registering officer may escalate the matter to the Presiding Officer which must then establish the age of the person in question. In addition, the Act permits children under the age of 18 years to get married although certain conditions. As it will be realized when we deal with the Children's Act, the marriageable age is in dispute especially within the context of custom where there was no numerical age adhered to. Moreover, this is the main motive why the Recognition of Customary Marriages Act regulates 18 years as an age of marriageable however at the same time permits marriages below 18 years of age. The researcher believes that there must be a stipulated age limit for the practice of ukuthwala which will be used as an acceptable standard to determine the state of readiness of the girl child when entering marriage, instead of using other legal frameworks that protect the rights of the girl child.

#### **2.4.2 The Children's Act, 2005 (Act No. 38 of 2005)**

According to CRL Rights Commission (1996) indicates that the requirements of the Recognition of Customary Marriages Act as argued above must be read in concurrence with the provisions of the Children's Act in relation to marriages entered by children. According to the Children's Act it is stipulated that children below the age of 18 years should not be subjected to social, cultural and religious practices which are detrimental to their well-being.

In addition, it is indicated that a child below the minimum age set by law for a valid marriage may not be given out in marriage and that a child above that minimum age may not be given out in marriage without his or her permission. If these provisions are not adhered to then this constitutes a criminal offence (CRL Rights Commission, 1996). The research views that societal norms and values shall be set to promote and protect the lively hood of the girl child more than exposing them to criminal elements associated with ukuthwala for economic benefits

#### **2.4.3 Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)**

The introduction to the Traditional Leadership and Governance Framework Act indicates that the state proposes to transform and reinstate the integrity and legitimacy of the institution of traditional leadership in line with indigenous African Law and practices however subject to the Constitution.

According to Section 4 (1a) of this Act it permits a traditional councillor to administer the affairs of traditional community in agreement with customs and tradition. According to Section 4 (1b) of this Act stipulate that traditional leaders and councils may accomplish the functions discussed upon them by indigenous African Law, customs and statutory law consistent with the Constitution. Section 20 (1) of the Act give rise among other things that a traditional leader may perform functions in relation to arts and culture as delegated to him or her by the relevant organ of the state or national or provincial government department (CRL Rights Commission, 1996).

The researcher understands the role and responsibly bestowed upon the shoulders of traditional leaders as custodians of traditional practices. Traditional leaders have a responsibility to protect and preserve their way of life to ensure that all practices are performed to advance the lives of their constituencies furthermore, to protect the vulnerable groups against harmful criminal elements that are in existence in the society.

## **2.5 Conclusion**

It is evident that the practice of ukuthwala violates international human rights, domestic legal rights as well as laws on customary marriages as indicated in the discussions of this chapter. Therefore, the researcher is irritated by the continuous preservation of the practice by communities although it has a negative impact to the development of the girl child. The overwhelming criminal activities associated with this custom makes it difficult for a girl child to develop and prosper because her constitutional rights as not valued by the enforces of ukuthwala. The issue in respect of the right to consent in marriage is unable to be achieved if one of the parties is not sufficiently matured for this union. Parents, guardians and communities at large must not take marriage as a child's play by enforcing their selfish desires with the disguise of the custom and disregarding the best interest of the girl child.

# **Chapter 3: Causes and Consequences of ukuthwala**

## **3.1 Introduction**

This chapter discusses the causes and consequences of ukuthwala and highlights the measures used to curb criminal activities associated with the practice. Le Roux (2006) notes that factors driving the harm visited on women and children under the disguise of the traditional practice of ukuthwala have been escalating at an alarming rate. Research findings show that discrimination and violence against women and children are influenced by certain traditional practices and principles (Le Roux, 2006).

As argued, ukuthwala has been detrimental to the life of the girl child in that it has lost the original purpose it was meant to serve and is being used to infringe upon her rights and future development. According to Hamman (2011), ukuthwala was initially meant to apply to a group of people who were likely to marry each other because they were in the same age group; traditionally, older men were never involved in ukuthwala, nor did the custom apply to under-age girls. In the contemporary world, however, ukuthwala has been contaminated by violent behaviour, such as kidnapping, sexual abuse, and minors being forced to marry old men without their agreement (the minors').

Hamman's study shows that the ancient practice of ukuthwala has shifted from its initial purpose, which was to create unity between families, to serving the interests of perpetrators who abuse this tradition to suit their own needs. The researcher recognises the initial ideology behind the existence of ukuthwala and the purpose of its existence when it was established, in the same breath we must recognise the criminal activities that have contaminated this practise and brought tyrant to innocent young girls (Hamman, 2011).

## **3.2 Causes of ukuthwala**

Occurrences of ukuthwala are motivated by several factors, including poverty; myths about HIV-infection; gender inequality; lack of awareness; and failure to enforce legislation and exercise control over sexuality.

### 3.2.1 Poverty

Poverty is known as the main influencer behind the tradition of ukuthwala. In most families, ukuthwala is used for their self-enrichment rather than its original purpose of joining two families in matrimony. Marriage preparations and provisions such as lobolo (dowry) are the driving force behind ukuthwala. The dowry provision frequently increases according to the quality and social status of the child (International Planned Parenthood Federation and the Forum on Marriage and the Rights of Women and Girls, 2007).

Bower and Hansungule (2017) indicate that the practice is most prevalent in areas with lower levels of economic activity, such as the Eastern Cape, Limpopo and Kwa-Zulu Natal, where some 75 per cent of children live in poverty, compared to 39 per cent in Gauteng and the Western Cape. In other words, child poverty is the uppermost in rural areas of the former homelands at 84% compared to 68% in informal urban areas. This clearly indicates children who are raised in rural areas are mostly affected by this practice due to family influence and expectations of economic gains when this practice is executed, as compared to children raised in urban areas where this practice is not prevalent.

Myers and Harvey (2011) notes that for families that endure poverty, marriage appears to be the best method to safeguard the girl's future and alleviate their financial burden. Moreover, it is believed that young girls who are in support of ukuthwala are accepting this practice to better their conditions and change how they are perceived by the public. However, Thomas (2009) states that arranged marriage trespasses on the rights of children to a future and as such preserves the status quo of poverty: the custom reduces the girl's prospects and restricts her personal growth, livelihood and education.

Similarly, Maluleke (2009) argues that this custom denies the girl child further self-development; as a result, it entrenches her poverty and entrapment in the poverty cycle. It is believed that many girls who are affected by the custom of ukuthwala come from less fortunate families and that this will cause children born in these families to be poor. Therefore, the custom perpetuates the poor societal environment common in the rural areas where it is prevalent. The researcher has taken into consideration all the influencing aspects of poverty that lead to the girl child rights being comprised for the benefit of the family. The desires of such families are self-interested rather than concerned with the girl child developmental needs for education and independence, or her constitutional right to choose the partner of her choice.

### 3.2.2 Myths about HIV/AIDS

The myth of ‘virginity cleansing’ has put young children at risk of early marriage. The belief is that having sexual intercourse with a virgin can cure a man of HIV/AIDS, even though in the process the girl will be infected (Mdlala, 2012). Van der Watt and Ovens (2012) note that the myth has a negative impact, as it contributes to health issues, such as HIV and sexually transmitted infections (STIs) and can lead to pregnancy. The researcher views this myth as the most detrimental act against the lives of young girls who are subjected to toucher and rape for the sake of serving older man’s greedy desires.

### 3.2.3 Gender equality

Whisnant (2009) notes that the core debate of dominance and influence in communities is the main reason why young girls are marrying without their agreement, by using the practice of ukuthwala to justify their actions. The defendant states that men within communities like to keep things that are going to give them an added advantage compared to female counterparts. By targeting young girls who are no match to them affords them an opportunity to be dominant in all levels of marriage. There is a belief that men seek to marry a young girl for the benefit of getting a loyal wife. The reasoning is that marrying a girl at a tender age affords a man an opportunity to gain control and dictate terms in their marriage. Male dominance is seen as prevalent in areas where the practice of ukuthwala is rife. It is stated that insufficient lobolo paid benefits mostly males, more than the rest of the family (Whisnant, 2009). The researcher cites the fact that men are the ones in charge of lobolo negotiations gives them an opportunity to manipulate the processes to their advantage. It is noted that gender equality has been a particularly challenging subject when it comes to culture. Even today men assume their superiority over women, they are regarded as the heads of households, and many families validate this by attaching more value to the boy than the girl child. In African communities, sons are regarded as more valuable than girls because they will be the ones to carry a family name and be the providers for their families. Consequently, sons are socialised to ensure that there is a continuation of the family name and lineage. Ncube (2018) notes that the causes of ukuthwala are similar to those that underlie the perpetration of violence against women and involve affording more control and resources to male than female counterparts. By the same token, girls are exposed to gender discrimination and their rights are infringed upon, which makes them vulnerable to this harmful traditional practice.

### **3.2.4 Lack of awareness and failure to enforce legislation**

Myers et al (2011) find that families are often not aware that they are acting against the law when they agree to the bridal ceremony of the young girl; similarly, girl children are not informed about their privileges and legal status. This points to a need to educate communities and local authorities about the rights and responsibilities of each citizen, as stipulated in the Constitution of the country and other legal documents that relate to the abuse of woman and children's rights.

*Jezile v S and Others* indicated that the family thought that the criminal conviction was based on conviction for following his custom, ukuthwala and that the ensuing assaults were domestic arguments. The family assessment was limited based on what they know according to the custom of ukuthwala; they did not understand the criminal elements committed by the accused. Therefore, it was clear that both families lacked knowledge about the offences of which Jezile was convicted. The researcher has noted arguments raised about lack of awareness in defence of the defendant on the case mentioned above but their lack of knowledge can never justify violence and terror this girl was subject to by the perpetrator and his delegation. Mwambene and Kruuse (2017) argues that there is a vast gap between what the law says and what society knows and does. This involves misunderstanding since the society conducts debates without considering the requirements which provides guidance to the customary marriage. The basic understanding of communities is that ukuthwala is an acceptable practice. The society does not understand the rights and responsibilities entrenched in the constitution of this country which protects the rights of the girl child. The researcher believes that educating communities about the legal policies in place that are created to protect the girl's rights can improve the situation especial when they are enforced correctly by law enforces within the prescribed justice system.

### **3.2.5 Control over sexuality and protecting family honour**

Sagade (2005) argues that early marriage is used as a means of controlling a girl's sexuality and reproduction. Moreover, the eagerness to preserve family standing and respect centres on traditional notions to do with protecting the girl's virginity. Marrying a girl at a tender age is, from this perspective, an attempt to preserve the family name by reducing the chances of unacceptable sexual behaviour by her. Ukuthwala can thus be regarded as a reflection of decisions that parents make about their offspring without considering the personal consequences these decisions have (Wadesango, Rembe, and Chabaya, 2011).

According to Shelly (1993), the young girl is not in control of her reproduction; instead, the husband dictates her reproductive cycle. In other cultures, the virginity of the young girl is perceived as a source of honour in the family. This influences families to arrange the marriage of the young girl before she is engaged sexually with other men. The researcher recognises the family desire to preserve the girl child purity and their marital intentions they wish to achieve but they are not allowed to force her into marriage she did not consent to for economic gains or any other justifiable reason the family might regard as valid.

### **3.2.6 Conclusion**

The life of a girl child will remain a struggle if these challenges surrounding ukuthwala are not addressed properly. There is an urgent need for law enforcement agencies, such as South African Police Services and Department of Justice and Constitutional Development, to work hand in hand to ensure the successful prosecution of perpetrators who are using this practice to violate the rights of the vulnerable young girls.

## **3.3 Consequences of ukuthwala**

### **3.3.1 Post traumatic stress disorder**

Post-traumatic stress disorder is an anxiety disorder which advances after experiencing a terrifying ordeal in which physical harm occurred or exposed to threats. These traumatic events include personal assaults such as sexual abuse (Comer, 2013, Swartz, de la Rey, Duncan, Townsend and O'Neil, 2011). Physical and sexual abuse of girls is on the increase and often unreported to the police said Masimanyane Women's Support Centre (2008). The researcher argues that traumatic events occurring during the process of ukuthwala makes young girls to be vulnerable and experiencing feelings of hopelessness which might led to suicidal attempts especially if these traits are not noticed early.

### **3.3.2 Sexual abuse**

The adverse consequences of ukuthwala are that girls are subjected to violent behavior, such as physical abuse and forced sexual penetration to humiliate them; as a result, parents end up being afraid to return the girls or report the matter to the relevant authorities. The violation of these girls through forced sexual penetration is performed to ensure that the male counterpart obtains more power over the female counterpart.

Moreover, forced sexual penetration is used to ensure that she agrees to the entire exercise regardless of her initial viewpoint (Soucie, 2011). The researcher views this as the most humiliating and degrading act conducted against the innocent young girls by the perpetrators of this practice, sexual activities carried warrants arrest, prosecution and conviction. The parents who are aware of this act and not reporting this matter are equally guilty of playing part in this terrible crime because they ignored their parental duty of safeguarding the rights of their children.

### **3.3.3 Physical abuse**

Physical abuse is characterized by punching, kicking and punishing to inflict pain on the abducted. Some of the symptoms of the PTSD reported by girls in forced marriages are: insomnia, dysphoria, suicidal ideation, irregular menstrual periods and eating disorders (Sikkema, Hanse, Kochman, Tarakeshwar, Neufeld, Meade & Fox, 2006). Jenson and Thornton (2003) observe that the violations young girls undergo are so brutal that they consider that is how things are supposed to be in their marriage. The experience has long-term psychological implications for their lives. The girls become outcasts within the community due to lack of support, as a result having low self-esteem and feeling helpless (Myers et al, 2011). Mesatywa (2011) explains that some victims of gender based violence might experience physical injuries that might lead to post traumatic stress disorder. The researcher indicates that if the development of the girl child is disrupted, it may lead to her withdrawal or to her being subjected to a highly stressful environment, all of which could result in suicide attempts or fatality. The most unfortunate part is that the bride's family is not there to witness the consequences of their actions and monitor the well-being of the girl child as a wife.

### **3.3.4 Psychological damage and social isolation**

Ukuthwala impacts negatively on young girls by reinforcing their emotional damage and social separation, hence affecting their personal growth. Because they are not ready, they do not have the capacity to perform their duties and meet the expectations on them as wives. This can result in depression since they are not able to meet the required standard ([www.consultancyafrica.com](http://www.consultancyafrica.com)). Domestic Violence Act (1998) refers to psychological abuse as a pattern of undignified behaviour against women. This may entail name calling to cause emotional pain, insults, integrity and security (Abraham, Jewkes and Laubsher, 2010).



The researcher notes the negative impact which may lead young girls to feel as if they are outcasts within the society because of horrible experiences they were subjected to, hence this may cause lack of self-confidence and development of hatred towards the enforcers of this practice.

### **3.3.5 Dysfunctional child development**

The young girls find it difficult to adapt to their role since they operate within the set standard of being wives and the entire system deprives them of independence in being able to establish their philosophy about their wifely duties (Louw and Louw, 2007). Maluleke (2009) states that the growth pattern of the young girls is delayed due to the shift in role from child to wife. The researcher cites that the early developmental stages of the girl child is compromised since she is obligated to transform from a being child and be someone's wife, this role brings bigger responsibility towards the young girl who is expected to fully function in her newly assigned wifely role.

### **3.3.6 Pregnancy**

Maphalala (2016) cites that young girls forced into marriage in their early childhood stages where they fall pregnant even before their bodies are fully developed to handle reproduction. Subsequently, several women and young girls pass away due to difficulties faced during pregnancy and childbirth. Maluleke (2009) states that the main causes of death among girls between 15 and 19 years of age are pregnancy related. Furthermore, the child born out of these marriages may be affected by early birth and face problems of physical growth. The researcher views that pregnancy related issues of young girls may lead to secondary trauma and have negative impacts that are harmful to their development.

### **3.3.7 Drop-out of school**

In the Eastern Cape, the matrimonial status of girls still at school is a barrier to primary education (MDG2) and promoting gender balance between boys and girls in rural areas ([www.childfund.org](http://www.childfund.org)). In a nutshell, these young girls are psychologically affected by being denied the right to education and being forced to assume the unfamiliar role of being a wife and a mother. It is apparent, then, that ukuthwala trespasses on the girl child right to education and subjects her to wifely duties without her consent.

This is supported by the findings documented in the report of the Portfolio Committee for Education, which met with the victims of ukuthwala who had attended a school in Pamerton in Lusikisiki. The report indicates that, more than 200 girls affected by ukuthwala, only eight had remained in school over the previous two years and were struggling even so with their schoolwork ([www.dabhishe.org.za](http://www.dabhishe.org.za)).

The researcher views that the custom of ukuthwala is a contributing factor to young girls' dropping out of school. They are expected to leave their homes of origin and move to the husband's home to play the new role of being a wife, and in the process their education is compromised. Furthermore, the right to education is violated and this creates disruption in the well-being and development of young girls.

### **3.3.8 Feelings of hopelessness**

Campbell (2003) states that the unwillingness of affected girls to report the mistreatment they endure stems from their feelings of powerlessness. Curran and Bonthuys (2004) note that the psychological damage of ukuthwala can leave girls depressed or suffering from post-traumatic stress disorder. The researcher believes that young girls experience a lot of emotional distress since they are exposed to harm and parents who were supposed to protect them did not adhere to their parental responsibilities hence they end up feeling miserable and vulnerable.

### **3.3.9 Sexual Transmitted Infections and HIV/AIDS**

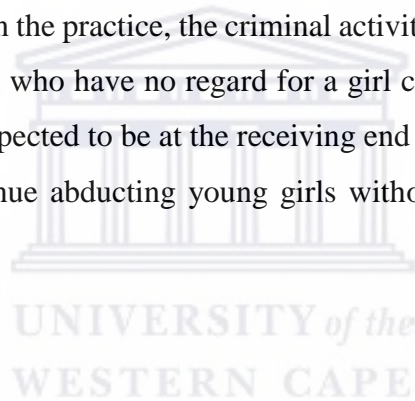
According to Rembe et al (2011) and Walker (2012) cites that early marriage has an impact in the increase of young girl's risks of HIV/AIDS and other sexually transmitted infections (STIs). This is led by the decision of engaging sexually against her will, therefore this makes the girl child not to enjoy sex or negotiate the use of condoms in order to prevent STIs such as gonorrhoea, syphilis including HIV/AIDS. It is reported that a sum of over fifty percentage of affected HIV/AIDS victims are women with age ranging between 12 and 19 years and these young girls have been forcibly married through the practice of ukuthwala (Medical Research Council, 2011). The researcher has noted the detrimental elements caused by health effects that affects the girl child during the process of ukuthwala. The transmission of HIV/ AIDS during sexual intercourse exposes the girl child to greater health risks which may lead to her being vulnerable and suffering from sicknesses.

### 3.3.10 Social stigma

Thomas (2009) states that young girls anticipate escaping even if there were abducted since her virginity will be questioned. In order to dodge shunning and social stigma the girl child decides to remain in the perpetrators homestead since even her family may treat her with disapproval since she shall have disgraced the culture. In addition, the young girls abducted are raped immediately after they have been taken to the abductors houses and this contributes to avoiding of returning to the parents' homes. The researcher noticed that young girls end up not having any choice but rather endure the suffering in the perpetrators homestead since they are escaping from humiliation which may be demonstrated by the family members or community members at large.

### 3.11 Conclusion

Ukuthwala has a negative impact on the development of the girl child. Although the consequences are evident within the practice, the criminal activities still continue being fuelled by the enforcers of this custom who have no regard for a girl child's well-being. There mere fact that the girl child is still expected to be at the receiving end of this practice provides more power to perpetrators to continue abducting young girls without being prosecuted for their actions.



# **Chapter 4: Criminal activities associated with ukuthwala**

## **4.1 Introduction**

Maduna (2017) cites that even if the practice of ukuthwala has been criminalised and merged into the Trafficking in Persons Act some people still perceive it as a usual form of tradition and custom. Bryne reported that there are still contradictions in the law although forced marriages through ukuthwala has been criminalised. Ukuthwala is unlawful because it is statutory rape if the child is engaged sexually under the age of 16 however there is also a legislation indicating that a minor can get married if their parent's gives consent. The harmful actions surrounding ukuthwala can be classified as criminal conduct. This chapter explores these criminal activities and identifies procedures that can be used to curb them. There is a need for dedicated regulations that address the crimes and consequences related to ukuthwala. Developing these regulations would entail the review and reform of the legal measures in place now. The current system of regulation is unable to deal with the criminal activities surrounding this traditional practice, especially given that the activities have features that are not covered by the law (Women's Legal Centre, 2010). Furthermore, such new legislation would give a clear explanation of forced marriage and child marriage as well as a clear description of the traditional practice of ukuthwala, and thereby assist in outlawing these abuses.

Our research adopts Chanock's bottom up approach which seeks to advance empirical knowledge about legal reality. This bottom up approach is basically the idea, rather ironically that focusing on the Constitution and rights guarantees may not be the finest initial point in order to promote constitutionalism in this context. Instead, Chanock recommends a reflexive process where societies, social experiences are made known as well as taken into consideration adequately in order to inspire not only figurative however as well as systemic change. We think that understanding social practice is an important starting point in the domain of customary law, specifically ukuthwala since a failure to do so has questionably resulted in misunderstanding about key concepts and directing reform efforts in the wrong direction (Mwambene and Kruuse, 2017).

The researcher shares the same sentiments with Chanock's viewpoint that the development of legislative laws should be informed by material conditions on the ground which serves as true reflection and reality faced by the girl child who are experiencing the consequences of ukuthwala.

## **4.2 Crimes related to ukuthwala**

The misconduct of kidnapping is the focus of this chapter's discussion. Snyman (2008) describes the key elements of this form of misconduct: a person commits the misconduct of kidnapping when he or she removes the child from the care of her parents without their permission. Furthermore, it is rape when the supposed groom engages in a bridal ceremony or sexual intercourse with the girl child without her permission. Rautenbach and Matthee (2010) observe that the custom of ukuthwala results the crime of rape if sexual intercourse took place without woman or girl's permission.

Similarly, according to Rautenbach and Matthee, (2010), the two elements that constitute a crime are the physical removal of the minor from the care of the parents and removal's taking place without the permission of the parents or custodians. In other words, when the child is taken from the care of the parents under the pretext of the traditional practice of ukuthwala, this constitutes the crime of abduction. Likewise, according to Koyana and Bekker (2007) state that when the tradition of ukuthwala is wrongfully executed without following proper procedures, this amounts to the crime of abduction.

Bennet (2004) identifies that there are several protective measures that needs to be taken into consideration in order to ensure that the custom was not misused.

The protective measures are as follows:

- The bridegroom's family has to convey a message to the family of the girl child on the day of the kidnapping or early the next morning.
- The bridegroom's family is expected to specify what value in livestock or money they are offering to pay and by when.
- Engaging sexually with the girl child who is kidnapped is contrary to customary law.

- The bridegroom has to account for his activities to the head of the family; furthermore, the girl child has to be referred to a woman who assists in guiding her into womanhood.

The researcher has a different perspective pertaining to following proper procedures of the practice, what the researcher has observed is that the crime of abduction has been executed even though the enforcers of this practice taught they were following their custom however by virtue that the girl child has been forcibly removed without her consent that clearly indicates to me that her rights has been deprived. The researcher cites that following the procedures of this practice does not guarantee the protection of girl child from any illegal sexual activities since it is noted that when she arrives at the perpetrators homestead sexual penetration may be conducted.

McQuoid and Mason (2009) note that reports have shown that young girls have been abducted under the pretext of the practice and are expected to get married to adult males. The issue of consent should be prosecuted as an unlawful charge of abduction since the minor is removed from the control of her parents without her consent (Burchell Criminal Law 764). The researcher elaborates that the girl child rights are violated by the enforcers of this traditional practice when they are advancing their personal agenda and by so doing, they commit a serious crime. Snyman (2008) mentions the crimes committed because of this tradition which promotes the crime of assault on the young girls, resulting to the violation of having a negative effect on their bodily integrity. Furthermore, the crime of abduction undermines the rights of the girl child to exercise the freedom of independence. The researcher illustrates that the violation of child's rights through forced marriage exposes the girl child to greater risks of being exploited and reduced to an organ that can be used by men whenever they please.

Morabito, Williams and Patavina (2019) states that the majority of occurrences are challenging to demonstrate elements of crime of kidnapping since the suspect would have not be aware of the girl child if she is objecting her refusal to go with the suspect or whether or she is acting the resistance process sometimes deemed necessary by the practice. Moreover, it is stated that it would be simple to determine if she was a willing spouse, when agreement dictates that she should pretend unwillingness. The researcher cites that a stipulated law that focuses on kidnapping with regards to the criminal elements surrounding ukuthwala should be in place to provide guidance to the relevant stakeholders who are dealing with reported incidences.

Men in South Africa do not have the mandate to negotiate a bridal ceremony by abducting young girls, attacking and engaging sexually with them, and then justifying their behaviour in the name of tradition. However, nowadays this custom has led to rape charges (Morabito, Williams and Patavina, 2019).

Jezile case will be utilised to demonstrate Justice system in terms of explaining further how crimes are imposed, fines and on what grounds these crimes are prosecuted in. According to *Jezile v State* (2015) cites that Jezile was found guilty on 13 February 2014 by the Regional Magistrate Court, of all the offences charged and sentenced him to twenty years' imprisonment on the three rape counts, ten years' imprisonment for human trafficking, six months on the assault with intent to cause grievous bodily harm and thirty days' imprisonment on the count of common assault. Moreover, the court ordered that eight years of the sentence for human trafficking as well as the sentences imposed for the two assault's, could be served simultaneously with the sentence imposed for rapes. Well, Jezile was given a total of 22 years' imprisonment. Jezile's case escalated to the High Court and it was finalized that his convictions on both counts of assaults were set aside but confirmed the magistrate court decision with regards to the convictions and sentences for the offences of rape and human trafficking (*Jezile v State*, 2015).

Furthermore, the custom of ukuthwala has outlawed the crime of forced sexual conduct. It has been highlighted that proof of sex has resulted in a fine against a man regardless of consent granted (SALRC, 2014). Previously, rape was a crime in terms of South African common law (Kemp et al, 2012), but nowadays it is regulated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Bennett (2010) notes that the custom of ukuthwala did not entail sexual intercourse until the point at which the girl's status as a bride was finalised. The author also states that when the girl arrived at the family home of the prospective husband, she would be placed under the supervision of a woman in his family. If the prospective husband were to engage sexually, he would be required to pay reimbursements in addition to the lobolo cattle.

SALRC (2014) indicates that the consent of a woman is a vital part of ukuthwala, whether before or during the process entailed by the custom. If a woman refused the love of a man when the process of ukuthwala had been executed, a fine would be payable to the family. Mabeka highlights that it is of the utmost importance to submit to the provision of section 3 of the Recognition of Customary Marriage Act, (1998) meaning that a woman with concerns must express agreement for such marriage ceremony to take place, hence the girl was not supposed to be abducted or *twala'd* at all. The girl child views are vital in decision making leading to the marriage ceremony in order to ensure that the child is not exposed to risk factors.

The Center for Child Law made a submission with regard to the Marriage Act to the effect that no minor should be subjected to getting married until all necessary arrangements have been made. Furthermore, it said that South Africa should respond to the call made internationally for setting a standard age limit for young girls, which is 18 years without compromising (SALRC, 2014). The researcher notes that the set age limit must be stipulated in order to protect the best interest of the girl child. SALRC (2014) notes that non-legislative procedures are a crucial mediation strategy. Proposals for the development of a law against ukuthwala were made by certain participants, such as Gauteng consultative groups. Moreover, several instruments that are already in existence can be used to bring about the changes necessary to reflect the accepted legal marriageable age. SALRC (2014) also points out that there are several supporting ways that are representative of new judicial measures as a mediation strategy. These relevant stakeholders include the projecting class of South African Catholic Bishops Conference, Parliamentary Liaison Office (SACBC) and the South African Police Services (SAPS). Moreover, these organisations upheld the progress of a new ruling which would outlaw inaccurate distorted ukuthwala agreeing that the recent regulation focusing on traditional weddings is silent to matters of age and agreement. The continuous disregard of a set age limit exposes the girl child to a lot of violation due to the fact that older men gain access easily to the girl child. The NPA suggested that parents of these children should also face criminal prosecution for their role in allowing their children to be subjected to this traditional practice (SALRC, 2014). The researcher indicates that biological parents or families involved in crimes against the girl child should be held liable for their actions. This would also help to address the problem of under reporting of criminal activities, because the community turn to perceive these activities as normal behaviours rather than crimes.



### 4.3 Criminal appeal of Jezile

The custom of ukuthwala was raised in public debate in the case of *Jezile v S and Others*. The accuser, Mvumeleni Jezile was handed a sentence of 22 years' detention, after he was found guilty of rape, human trafficking and one count of assault with intent to do grievous bodily harm after forcibly marrying a 14-year-old minor from the Eastern Cape and trafficking her to Cape Town. The researcher views this judgement as a strong message to all the perpetrators who are promoting these criminal elements surrounding this practice, that violation of young girls right will not be tolerated by the justice system of this country. The suspect appealed his conviction by arguing that marrying a 14-year-old minor was something he did in sincere observance of his traditional practice. In this regard, the girl was informed by men in a gathering that she was to be married, and was sent to her prospective husband and his helpers in the customary way; lobolo negotiations were adhered to by both families, and hence the minor was converted to be the customary wife of the accused (*Jezile v S and Others*).

Furthermore, the girl child was made to undertake new duties of being a customary wife. *Jezile v S and Others* states that during the investigation it was found that the minor was unhappy and had returned to her family a few days later. She decided to sleep in a forest near her home and was instructed by her biological mother to hide in another home. The minor was later discovered and returned to the accused home by her maternal uncles. There, she was physically abused by the suspect and his uncle for declining to wear (*amadaki*) clothing, the traditional garb of new brides.

Moreover, it is noted that immediately on her return, the accused left with her to reside in Philippi in Cape Town. In Philippi, the minor declined to engage sexually with the accused. It is further reported that, despite her protests, the accused engaged sexually with her with the assistance of his brother. During the assault, the girl suffered an open wound. She managed to escape and find assistance at a taxi rank, where two women helped her to a police station (*Jezile v S and Others*). As it was stipulated this examination is based mainly on the local procedures as well the context issues of Jezile case as perceived in the eyes of the family and community at large. As much as ukuthwala is recognised as a traditional practice it is also important for people who are practising this custom to take in cognisance that we live in a country that is guided by the Constitution which is the supreme law in any practice that takes place in the society (*Jezile v S and Others*).

Karimakwande (2013) identify that it is crucial to point out that the themes that emerged from the focus groups held by Mwambene raised concerns that echoed issues in the accused's case regarding ukuthwala, consensus and the law, and illustrate the community's views.

In expanding on the community views, we found the following themes evident as a result of the case (Mwambene and Kruuse, 2017). In respect of the Jezile case, the community members indicated their uneasiness with and estrangement from the legal procedures that were conducted in Wynberg Magistrate's Court. They firmly believed that if the matter were handled by local courts and given to a local magistrate who understands the practice, then the judgment in this matter would have been different (Jezile's family groups discussions, 2015).

#### **4.3.1 The idea of continuing consent/ conjugal debt**

The perspective of both families was misunderstood of the idea of consent as a result families had their own personal deduction about consent of sex if parties are recognised as married (Swarts, 2015). The viewpoint of families concurs with Karimakwenda's opinion in respect of sexual assault under customary law when she cites that it is not frequently considered to be immoral particularly when it is serving a purpose of advancing process leading to marriage (Karimakwenda, 2013). Wood on the other hand share the same sentiments with regards to consent that when there is lack of consent it does not mean that forced sex amounts to rape, and was, in fact part of the process (Wood, 2005).

The family members raised concerns of the complainant sleeping in one bed for approximately two weeks before moving to Cape Town. Therefore, both families' felt unease of the idea of the husband seeking consent to have sex with his own wife. It is proven that the perpetrator shared the same sentiments when it comes to marriage and sex as well since when the three following questions were posed to him in the court of law by the prosecutor that "As your wife did it mean that she had to do as you told her? Was she a subordinate to you? Did she have to listen to you as being your wife and Jezile responded by saying yes that is right Sir" (Jezile v State, 2015). The researcher notes that family views were based on their shared experiences and knowledge instead of considering the best interest of the child concerned hence their views were in conflict with the law since they ignored the rule of law which promotes the rights of the girl child.

### 4.3.2 Misinformation or lack of knowledge

The issue to misinformation was a huge challenge in the case of Jezile as a result after the appeal judgment against the conviction of rape, trafficking and assault was handed down both families perspectives were led by misguided beliefs on the case. The perpetrators family taught that their son was convicted since he was following his custom (Jezile's family group discussions, 2015). On the other hand, the complainant family assumed that the perpetrator was convicted because of a domestic argument (Girls family group discussions, 2016). Therefore, this gives indication that both families lacked knowledge about what offences Jezile was charged with and what he was convicted of and why they deemed this fair or unfair. The researcher noticed that there was a vast contradiction between the families' perspectives as well the law thus it caused a havoc and misinterpretation of the convictions the perpetrator was sentenced for.

### 4.3.3 Jurisdiction, language and legal representation

In respect of jurisdiction, the community felt that if the matter was held at Engcobo and not in Cape Town as they regard this court as a "white man's court" hence this case would have had a different result (Jezile's family group discussions, 2016). This was further clarified that the Presiding Officer at Engcobo would have understood the circumstances of this matter and not regard this case as an offence. It was further expressed that the relevant stakeholders such as presiding officer, prosecutor, defence attorneys are familiar and understand the practice it's not like something new to them and there is no hype since cases of this nature are common in their communities. Had the matter been heard in the Eastern Cape, greater numbers of witnesses among the community would have been present at court proceedings, in addition to which the legal authorities in the Eastern Cape would have treated the matter differently (Jezile's family group discussions, 2015). The researcher cites that the family are ignorant since there are forgetting that sexual crime was continuously perpetrated against the will of the girl child and she had a right to report this matter in Cape Town since she has moved at Engcobo. The family cannot expect someone residing in Cape Town to report a matter at Engcobo but Cape Town is within their jurisdiction where they reside.

The family was concerned of the legal representation that was not familiar with the custom therefore, they expressed that this created a negative outcome of the case. The family viewpoint was based on the case which is influenced by a cultural practice in a Xhosa background which made them to have problem of a coloured person representing a Xhosa case where he has no knowledge of the custom at all (Jezile's family group discussions, 2015). The researcher notes that the families' views shared exposes them that they are out of touch with reality, the families are mixing custom based practice which determines their way of life versus the rule of law which is a supreme law of the country.

Another element that was raised was an issue of language that the perpetrator did not understand during court proceedings. The community also shared similar sentiments since there was lack of understanding when it comes to court procedures, concerns such as lack of education was raised since the cross questioning might be a challenge as well as legal attorney not Xhosa speaking and not understanding the culture (Jezile's family group discussions, 2015). The research notes that the court of law provides legal assistance for the defendant hence the services of court interpreter were rendered in order to ensure that communication during court proceedings was effective.

#### **4.3.4 The state against culture**

The viewpoint of the families indicated that the custom and ways of their doings were not taken into consideration nor safeguarded by the state (Jezile's family group discussions, 2015). The family members further indicated that their custom was not taken into consideration however the role of the state was puzzling as well as their socio-economic situation was jeopardise as a result of the state stance against their practice (Jezile's family focus group discussions, 2015). Moreover, the community viewed that the state failed to convey out a clear communication to the community as to sexual conduct of children (Women focus group discussions, 2015). This made the community members feel that the state disregarded sexual activity by children for certain reasons but not for others. The result of the case was viewed as an attack on the community oriented way of decision which they value as a social control mechanism and cohesion within the community (Jezile's family group discussions, 2015).

The researcher's notes that the views of the community were informed by the ways they conduct their affairs and not taking into consideration the girl child well-being and development. It is my personal deduction that there is no value in protecting the custom of ukuthwala if it subjects the girl child to danger. The researcher cites that the prosecution of Jezile case gained media attention because it was conducted in Cape Town, where child abduction is not tolerated; if it were held in the Eastern Cape, the context would have favoured the perpetrator regardless of overwhelming evidence as to the prevalence of similar cases not reported and understood by authorities as reported.

Rautenbach and Matthee (2010) state that the defendant expressed similar ideas pertaining to engaging sexually with the minor; this was established through his testimony during his court appearance for the trial matter. Moreover, in the process of investigation, the prosecutor posed questions to the suspect to establish if consent was granted or not. In response, the accused said his wife had to comply with what he as the husband told her to do. In addition to which she was a minor in relation to him and had an obligation to pay attention to him.

Rautenbach and Matthee (2010) notes that the accused expressed the notion that he perceives that the court of law misguidedly settled that the complainant had knowledge with regards to illegality as her actions demonstrated the routine of the behaviour as the suspect personally trusted that he was performing a traditional practice and not committing an offence. The authors remark that it is unfortunate when offences related to customary practices are attended by a Presiding Officer who is guided by a different philosophy than that of the suspect, particularly since he or she has to make the final decision by comparing what the accused actually did and what he was supposed to have done. The magistrate will again have to choose the purpose of the suspect during the charge of offence hence there is a huge gap between the two systems but the magistrate understands the importance of the best interest of the girl child.

## **4.4 Legal and Non-legal actions conducted to eliminate the practice of ukuthwala**

Various stakeholders are involved in eradicating ukuthwala. The following are some of the measures they have been taken: On 26 June 2009, the Minister of Women, Children and People with Special Needs, Ms Mayende, made a visit to the Great Place in Lusikisiki (SALRC, 2014).

The Minister of Justice and Constitutional Development, Mr Radebe, in 2010 encouraged the National Prosecuting Authority to apply strict procedures in respect of forced marriage (Annual Report, 2011/2012).

The Department of Justice and Constitutional Development distributed a pamphlet to raise awareness of regulations that forbid ukuthwala, the practice's negative impact, and support services that are rendered (CEDAW, 2011).

A police response unit was established to address the growing number of reported cases in Bergville District related to traditional practices (Commission for Gender Equality, undated).

Traditional leaders have spearheaded initiatives to encourage authorities to take decisive action to end the rights violations inflicted on girls. They have also volunteered to attend community gatherings related to Chapter 9 institutions. Chapter 9 institutions maintain their independent role to monitor the actions of relevant government departments and to garner necessary information on the states handling of ukuthwala cases (Commission on Gender Equality, undated).

Whisnant (2009) indicates that attempts to combat the criminality surrounding this traditional practice could be perceived by traditional leaders and communities as an invasion of traditional practice. Educating young girls and women about their rights is vital to their empowerment. Schools have a role to play in helping girls to obtain information about their rights and where to access appropriate support.

Furthermore, the practice of ukuthwala raises fears when it comes to lawful procedures that it might not reflect the gradations of culture, this includes a decree imposed by the family in a form of penalty directed to a man who has forcefully taken the girl without her consent. These challenges are not common in traditional communities hence they need to be integrated (Whisnant, 2009).

Whisnant (2009) states that the societies can continue practicing the custom but it must be done in line with the laws of this country in order to ensure that the best interests of the girl child are safeguarded.

Awareness campaigns have been conducted by various bodies such as NGO's and state actors to educate communities where these incidents are prevalent.

The Department of Social Development obtained a court order granting it the authority to remove children from Shembe church to a place of safety. Churches is another place where the practice of ukuthwala is used as a scapegoat in order to violate the girl child's rights (Department of Social Development report, 2009).

Capacity-building programmes are conducted through the offices of provincial premiers. These have been held in Bergville, Loskop, Zwelibomvu, Harding, Vulindlela and Jozini. The researcher views capacity building as another form of intervention when it comes to the practice of ukuthwala by rendering educational programmes to the mentioned areas as well to the hot spot areas identified where this practice is still prevalent (SALRC, 2014).

## **4.6 Conclusion**

The criminal activities associated with ukuthwala are the key problem contributing to its negative publicity. While justice is being done to protect the girl child, more proactive interventions are needed to safeguard the interest of vulnerable young girls who are continuously subjected to the practice of ukuthwala. The court of law has a constitutional mandate to protect the victims of crime and reinstate order to the society hence Jezile's case was prosecuted when charges were brought forward to the attention of the court.

## **Chapter 5: Concluding Remarks and Recommendations**

### **5.1 Conclusions**

The safety of the girl child will remain at risk until communities and law enforcers come together to eradicate the criminal activities associated with ukuthwala. In this research paper, different authors have shared their perspectives on how this traditional practice was conducted in the past, mindful of its original purpose, and how it has developed the criminal elements it has nowadays. This has created confusion among the public, which is especially problematic given that people are still practicing this custom and minors are still targets.

This research highlighted the legal frameworks that are applicable when instances of ukuthwala occur; its negative effects, especially with regard to the rights to health and education; the causes of ukuthwala and its consequences for the girl child; and the criminal activities associated with it.

Maluleke (2012) states that although justice is being served, the justice system needs improvement. Communities have discovered the significance of advancing systems to tackle harmful traditional practices, including those affecting young girls. This is not applicable only to young girls, who have a right to be protected from harmful traditional practices, but to communities and society more widely – ukuthwala has an adverse impact on both the individual and the community (Maluleke, 2012).



## 5.2 Recommendations

The practice of ukuthwala is a complicated issue and eradicating it will require a variety of stakeholders to address multiple social and economic drivers. The diversity of shareholders includes Department of Justice and Constitutional Development, Department of Social Development, South African Police Services, Traditional Leaders, Community members and so forth. Laws and policies need to be developed; regulations and procedures are necessary to bring about change; and greater public awareness will assist in this regard (Maluleke, 2012).

The literature reveals a strong relationship between poverty and ukuthwala. SASSA needs to continue assisting families with food parcels and child support grants, which can make a difference in the family if there is no breadwinner – children can be afforded an opportunity to grow independently without being subjected to harmful activities for the sake of benefiting their families. Bower and Hansungule (2017) state that the high degree of poverty is one of the biggest challenges that South Africa faces; hence, social assistance programmes are required to assist poverty-stricken families. When SASSA issues social grants to any family member in South Africa they conduct a screening of the families in order to determine which social grant will the family qualify for.

The Women's Legal Centre (2010) argues that it would be much better if there is a specified section that handles the crimes and legal consequences that will focus mainly on the practice. This will provide clear guidance to be done in the court of law in order to curb the criminal elements surrounding the practice of ukuthwala. The practice conflicts with the Constitution. The challenges associated with ukuthwala – namely, kidnapping, sexual abuse, forced marriage, and conduct of custodians – are of such a degree that clear regulation is essential.

In addition, SALRC (2014) encourages the new legislation along the following lines. The new legislation must offer a clear declaration against forced marriages, describe the required process and address the question of a suitable age for marriage. It should merge the appropriate values in the same instrument. It should refer an authoritative symbolic indication in protection of women's rights. These laws must be designed to send a strong message to the perpetrators of gender based violence.

SALRC (2014) states that an unlawful regulation should be established and propose the following criteria to be used. This regulation must outline involuntary and minor's marriage.

It must describe in detail the guidelines relevant to custodial agreement in respect of a minor's marriage. It must outlaw the act of compelling someone into marriage without his or her agreement. It must prohibit the behavior of people who facilitate these marriages. It must prohibit the behavior of offenders irrespective if the wedding did not transpire. The mere fact that they attempted to infringe the girl child rights alone is a sign of defiance of the legislation which is a supreme guiding document of all citizens of this country. It must curb, a serious crime, the behavior in relation to a person below the age of 18 years (SALRC, 2014).

The protection of the minor is paramount to guarantee their safety up until they are matured enough to make decisions on their own. In terms of additional methods, it would be essential to have the existing regulations expanded to improve the main frameworks such as the Recognition of Customary Marriage Act and the Children's Act. Furthermore, these amendments would precisely focus on the consequences concerning the abuse of the traditional practice. These amendments will help to strengthen, advance and clarify certain shortcomings to this legislation and further simplify the interpretation of these laws. The shareholders will not perform their usual duties to limit the practice or assisting victims except insofar as these responsibilities are described in the law. Within this notion to expand the new law to cover the involvement of social services and address the victims which consists agents such as SAPS, Department of Justice and Constitutional Development and Department of Co-operative Governance and Traditional Affairs, amendments are necessary. These institutions have power to change the current status core of ukuthwala if they can work hand in hand in ensuring that they speak in one voice and create awareness in communities that are mostly affected by this practice. Moreover, community awareness campaigns can be conducted to educate the public about the rights of the girl child, focusing on the unlawful actions surrounding this practice (SALRC, 2014).

Constitutionally inspired interventions include services such as education programs, awareness workshops and broadcasting awareness based on the following grounds. These interventions are used as a tool to create positive reinforcement in various communities and further empower community members with knowledge and skills to combat the criminal elements surrounding the practice of ukuthwala (SALRC, 2014).

In our days the dilemma confronting female counterparts is not prioritized since it is only transferred to the stakeholders on the ground to involve society at large to deal with the detrimental effects directed to women and children (SALRC, 2014). The involvement of men where ukuthwala is mostly practiced will play a role to ensure that criminal elements surrounding ukuthwala is reduced drastically; and so the men will no longer keep quiet in the eyes of injustice where they are involved in the fight against gender based violence.

Working relations need to be established with community stakeholders such as faith-based organizations, traditional leaders and societal structures focusing on authority and leadership. It is paramount to develop programmes within communities and schools that educate women and girls about their rights and responsibilities and thereby reduce the incidence of ukuthwala. Furthermore, it is crucial to refer them to institutions that provide safety and support when needed. The central mechanism to safeguard vulnerable women and children whose rights are violated by customary practices would be a transformed customary law arrangement that is in line with legislation (*Bhe and Others v Khayelitsha Magistrate*, 2004).

There is a need for intergovernmental relations between the Departments of education and social development. This would improve the quality of services rendered in schools and serve as a meaningful contribution to combating the incidence of ukuthwala (Strategic Plan for 2015–2020).

According to SALRC (2014), awareness-raising campaigns are needed to mobilise the participation of community members in conjunction with state actors such as the Department of Social Development and SAPS. Statistics must be collected by the relevant stakeholders to enable an accurate measure of the number of affected victims. Training should be conducted to support the survivors of ukuthwala. In particular, the victims of this practice in remote areas must be equipped with knowledge of the Domestic Violence Act and the relevance it has to their lives.

Ndindwa (2014) refers to the necessity of certain aspects to be regarded to contain the detrimental surrounding the tradition of ukuthwala, this includes establishing the causes that conceding children's rights. The plans contained in learning charts can be used as a contribution to the woman affected by the tradition of ukuthwala; this includes finding the psycho-social effects instigation the tradition of ukuthwala directed to female counterparts.

The involvement of community members and victims of ukuthwala will help to identify challenges they face during the process of this practice and also provide possible solutions which can be used to combat these criminal elements (Ndidwa, 2014).

It is submitted that awareness campaigns can play an essential role in curbing the harmful practice of ukuthwala by equipping victims, community members and biological parents or custodians with knowledge of this practice and its consequences for young girls.

Maluleka (2012) states that black woman in general must be made aware of the matters that affect the existence of minors who are subjected to ukuthwala in communities.

Moreover, Ndidwa (2014) states that child-care plans are needed to inform parents about the duties they have to their children, while therapy should be provided to those affected by the culture of ukuthwala. This research finds that there is a great need for the victims of ukuthwala to have a place of safety. This would protect the minor from further harm, seeing as most families return the minor to the perpetrator's residence in view of the lobolo they have received. According to Masetywa (2011), there is a need to create places of safety for abused women and children. Public authorities should thus execute programmes for the betterment of minors. Authorities have a responsibility to provide security and a healthier environment for the minor (CGE B +20 Report, 2015). Authorities should pursue a strategy on teenage sexual and reproductive health (Department of Social Development, 2015).

The welfare of the girls should not be at risk of harm. Accordingly, male partners should be empowered in regard to abuses and cultural practices that are detrimental to women, and should be encouraged to participate in anger management programmes. In view of the myth that engaging sexually with a virgin is a cure for HIV/AIDS, men should be tested for HIV prior to ukuthwala to identify those who are infected or not.

Maluleka (2012) states that misuse of minors must lead to convictions, as young girls may be infected by HIV/AIDS during sexual abuse. That is to say, ukuthwala in the case of minors must be treated as misconduct, as this breaches the way that the tradition was practised in the past. It is also submitted that victims should seek legal assistance, which can be done in a form of a request for a protection order against the alleged perpetrator. A request for a protection order or court interdict will assist the victim with the abuse that is taking place.

More widely, each stakeholder that assists clients with the practice of ukuthwala must establish their role and responsibility. The beliefs and views of the community also need to be taken into account if court trials related to ukuthwala are to succeed as a means of curbing the practice. Legal regulation, belief systems and social practice should interact with each other in an integrated way (Maluleke, 2012).

Communal exercises are a crucial initial phase in the field of customary rule; the tradition of ukuthwala subsequently is unable to do so hence it has questionable confusion about the core idea and directing reform which attempts to lead to the wrong path (Mwambene, 2017).

The National Adolescent Sexual and Reproductive Health and Rights Framework Strategy (2015) states that the strategy is based on five key elements:

1. Improvement in organisation and partnership.
  - Evidence distributed between shareholders.
2. Establishing creative methods to complete coordinated sexual and reproductive health and independence evidence.
  - Awareness and therapy for young girls.
3. Consolidation of young girls with their sexual and reproductive health and rights to provision of services and assistance on various health concerns.
  - Equipping health practitioners with knowledge and skills to be able to deal with vulnerable victims of ukuthwala who are in need.
4. Formulating efficient societal assistance with methods for young girls.
5. Amending laws, guidelines, methods and indicators on adolescence of sexual and reproductive health and rights.
  - To accommodate the girl who has been subjected to the practice of ukuthwala.

All five of these elements would impact positively on the development and welfare of the minor. The criminal activities that are associated with the practice of ukuthwala have created a loophole that needs to be addressed in the best interests of the girl child.

Community-support networks play a vital role in the life of the girl child. The legislation and policies establish guidelines that protect, promote and empower the girl child in the process of ukuthwala.

Having this legislation in place serves as justice for the girl child, and the existing frameworks, policies and sections assist the higher authorities that handle the matters in making a judgement based on the decision in court.

The fear that victims have about reporting abuse to relevant stakeholders is causing a crisis at present because it means both that accurate statistics are not available and that the legislation and policies in place will not provide justice for the girl child.

At the same time, the views of community members are vital in sustaining ukuthwala since these members are involved in lobolo negotiations and believe they are following correct procedures as laid down by traditional leaders.

There is a saying that one person's culture is another one's crime, and this well describes the situation of ukuthwala as it has come to be through its evolution over time. Time plays a significant role, and the practice of ukuthwala has escalated to another level as it has been associated with criminal activities. This is matter of grave concern: there have been far fewer cases reported regarding ukuthwala than are taking place in reality, which suggests that the way ukuthwala is practised in the modern age is being accepted as normal by communities – notwithstanding the harm it causes to the well-being of the girl child.

It is hoped, then, that victims, parents and community at large can change their mind-set in how they view the criminal activities associated with the practice and consider not only their self-interested desires but the welfare of the minor. For this to happen, there has to be collaboration between parents and the community to protect minors irrespective of their family circumstances. In turn, criminal activities must be contested to protect, promote and empower the life and well-being of the girl child. Reporting crime is everybody's business, and people must not keep quiet in the sight of injustice. Enough is enough: girls suffer pain, and this needs to come to an end.

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