

**RELEVANCE OF THE CUSTOM OF ‘UKUTHWALA’
IN MODERN XHOSA SOCIETY**

BY



UNIVERSITY *of the*
WESTERN CAPE

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2019

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IN MODERN XHOSA SOCIETY**

By



A Thesis is submitted in partially fulfilment of the requirements for the degree: MASTERS IN ISIXHOSA LITERATURE in the Department of Xhosa, Faculty of Arts at the University of the Western Cape

Supervisor: DR. L.K Mletshe

2019

ACKNOWLEDGEMENTS

I would like to thank God Almighty for giving me strength to continue with this journey. I am also grateful to my parents for being so understanding and letting me further my studies and the support they gave me.

I am also deeply grateful to my supervisors, Ms T.V Mabeqa and Dr.L.KMletshe who made critical comments that were difficult to understand sometimes but gave me an opportunity to look at the thesis from a different point of view.



DECLARATION

I hereby declare that ‘Relevance of the Custom of *Ukuthwala* in modern Xhosa society’ is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

SIGNED.....

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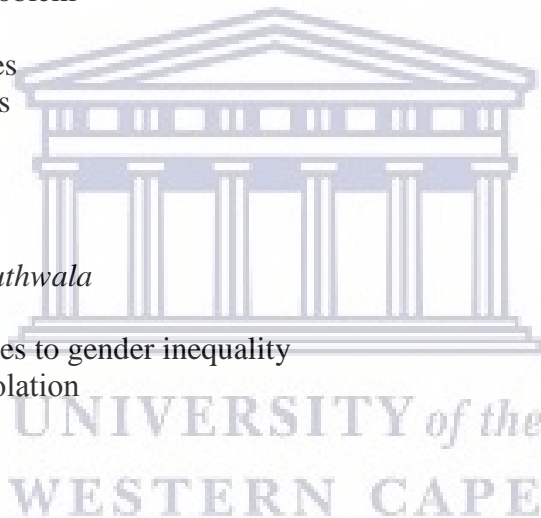
ABSTRACT

The study argues that *ukuthwala* is an old cultural practice that had been practised in the past by Xhosa people and other tribes. *Ukuthwala* traditionally does not involve rape, force and underage girls. The media revealed misuse of the *ukuthwala* practice by men and what these men are doing is purely crime. *Ukuthwala* is a cultural practise that was used to abduct girls into marriage with the consent of the girl and the parents. In this case the cultural practice of *ukuthwala* is deemed as one of the factors preventing progress while oppressing the women and children involved as media and government have reported that *ukuthwala* has markedly resurged in an insidious form that is exploitative and violent (Karimakwenda,2005:340). This thesis focuses on *ukuthwala* experienced by Xhosa women as a form of marriage and the recent increasing *ukuthwala* incidents currently. This form of marriage is ancient among its people. Nowadays people are modernised and the custom is labelled with many words.

In doing this study, court case, case law reports, and some newspaper articles which were published material from the library, government websites and from the internet (Google Scholar) were used as part of data collection. The study has used newspaper articles that are relevant to the study court case on *ukuthwala* as it is practiced in our societies. These reports are reliable sources of information and they have provided the study with a clear background about the topic. The selection of these newspaper articles and reports was based on their relevance to the study and their publication period. Recent news is more suitable for the study.

The study has found out that although the practice of *ukuthwala* has deteriorated through changing times, there are many cases of abduction of underage girls reported. Unlike in the past women and children are being harmed and individuals who are caught abducting are jailed according to the present laws. The Constitutional laws are very clear and strict in protecting the violation of Human Rights. *Ukuthwala* is a social problem of our time and is a threat to many democratic societies experiencing it. It is in this premise that the researcher has decided to investigate the practice of *ukuthwala* tradition in modern society.

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KEYWORDS

Culture

Custom

Ukuthwala (abduction of girls for marriage)

Utsiki (the ritual acknowledging the acceptance of the daughter in-law or bride)

Lobola

Tradition

Marriage

Abduction

Human Rights

Gender Equality



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CHAPTER 1

1.1 Introduction

The general discourse about *ukuthwala* practice reveals that the practice denotes rape and forced sex, this study argues that there is mixed understanding about the practice from different generations and ethnic groups which are attached to the practice nowadays. *Ukuthwala* is an old cultural practice that has been practised in the past by Xhosa people and other tribes. *Ukuthwala* traditionally does not involve rape, force and kidnapping of underage girls. This practice was once relevant in the past in communities where it was practiced as there were no arrests for individuals who had abducted girls. The transition from the apartheid era to democratic state led to many customs losing their value and completely vanishing in their communities where they were practiced. Unfortunately press reports have drawn attention to the fact that offences are committed against girls under the pretence of the *ukuthwala* custom (Boezaart, 2013). Nowadays girls under the age of 18 years are being abducted and abused physically and emotionally by men claiming to be following the custom of *ukuthwala*.

In doing this study, mass media products, case law reports and court cases will be used as part of data collection. These reports are reliable sources of information as they will provide the study with a clear background about the topic. The selection of these newspaper articles and case law reports will be based on their relevance to the study and their publication period. Most recent news on *ukuthwala* will be the best suitable option for the study.

1.2 Aims of the study

The study intends to:

- a) Explore the legitimacy of *ukuthwala* custom as it was practiced in the past and as it is in the modern era.
- b) Investigate and/ understand if there are changes and misconceptions attached to this custom.
- c) To reveal some cultural features of the Xhosa culture that is embedded on *ukuthwala* in Xhosa people's pursuit of their livelihood.

1.3 Background to *Ukuthwala* tradition

In South Africa, *Ukuthwala* is still practiced among some Nguni tribes including amaXhosa. Nguni cultures include Xhosa culture which is the focus of the study. In most nations, bride kidnapping is considered a sex crime rather than a valid form of marriage and South Africa also considers *ukuthwala* a crime. According to Koyana (1980:1) this is an old marriage custom of which very little or nothing is heard nowadays. Under it, a beast called the *ileqe* was sent with the bride to be slaughtered at the woman's new home. In this case the beast is a cow which is brought to the home of the girl where the father welcomes it from the people who have come to ask for the girl. Upon dissolution of the marriage and refund of the *ikhazi*, the *ileqe* beast was also to be refunded. The marriage is dissolved when the parents of the girls are not satisfied about the treatment their child is receiving. In this case, the marriage is dissolved when two partners separate after *ikhazi* has been paid then there is a need to return back. This custom was last heard of in the sphere of litigation in many years ago.

Ukuthwala also refers to the act of enforcing the opening up of the marriage negotiation process when it seems difficult to do so under normal circumstances. In a crude sense this is done by the actual carrying away of a young woman by a group of young men to the house of a young man who aims to marry her. In most cases, during the process of *ukuthwala* the prospective husband is there with a group of his peers to identify the woman he loves and whom he intends to carry away for marriage purpose (Nkosi and Wassermann, 2014:133). Kaschula and Nosilela (2010: 1) define the concept of *ukuthwala* as an age-old Xhosa marriage custom which involves the legal abduction of the bride-to-be. The custom entails the abduction of the unsuspecting bride to be by the suitor's friends once the marriage has been negotiated between the two families. In other cases, girls are abducted unknowingly without any agreement by the involved families. In this instance, men from the suitor's family will go to the girl's home to apologise as a courtesy of tradition (Ndungane, 1992:46). Ndungane explains the practice exactly the way it is done in the Xhosa culture.

There are also cases where the girl has agreed to be abducted by her boyfriend. The two are already in an intimate relationship and may be ready to get married. Mwambene and Sloth-Nielson (2011:6) in their three forms of *ukuthwala* explain this case as the first form. They say that this is where the girl is aware of the intended abduction and there is collusion between the parties. They further allude that that is where the girl or woman being abducted

conspires with her suitor. The ‘force’ used in the act of abduction is therefore for the sake of appearances only.

The suitor’s family has to bring cows to the girl’s family. Her parents are alerted of their daughter’s whereabouts. The two families try and build a relationship between them. It is unlikely to find an abducted girl returning home. The reason can be twofold, that is, respecting her parents and/or culture. According to Gcingca-Ndolo (2008:120) parents’ words were respected in the past. A child had to respect what she or he is told by the elders. After everything has been settled the girl wears long dresses, headgear on her head and is prepared for “*utsiki*”. *Utsiki* is marked by the spilling of the blood of a goat or a sheep sometimes a cow and home-brewed beer. The gall or bile juice of the slaughtered animal is taken from the liver and poured on the head and hands of the newly-married woman (Mcetywa,1991 :71-72). *Utsiki* is performed at the new home by the in – law members and the bride being present. After this, a girl is officially a bride or daughter-in-law (*umakoti*) to that homestead. Her name also changes to the one given by the in-laws.

This practice is still practiced in the democratic dispensation where women and children have rights. Contemporarily *ukuthwala* seems to be practised in different ways as it is marked by violence, rape and, others. Men seem to be more powerful than women although there is an Act on gender equality. In many parts of South Africa this practice is common including Eastern Cape Province, KwaZulu Natal Province and others. Media has reported many cases of *ukuthwala* whereby people treat young girls in an abusive manner. Some of the parents are portrayed as exposing their children to harmful doings for all the wrong reasons. They claim to be preventing them from getting pregnant outside marriage and some are greedy. They aim to gain at the expense of their children.

South Africa’s rich cultural diversity is acknowledged and considered in Sections 30 and 31 of the Constitution of 1996 with certain provisions suggesting that customary law should be accommodated in South African law; provided that specific procedures or provisions are not in conflict with the Constitution (Van der Watt, 2012:11). In the media *Ukuthwala* custom has received a lot of criticism especially from other ethnic groups. It seems as if these traditions and customs are not protected as claimed in the constitution.

In post-apartheid South Africa; some laws which were enacted and/or the existing ones were amended. These laws include human rights laws that seek to protect people from being harmed. Chapter 2(7) in the Bill of Rights states that the Bill of Rights is central to this as it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. This law perceives this practise of *ukuthwala* as illegal and is against the practice. This practice has been portrayed as violating human rights and also raises issues of gender inequality. Other cultures may interpret or view Xhosa culture as giving preferences to certain gender. Women and young girls are the victims or the ones who experience the process other than men. There are also issues of abuse and violence where women are being raped, assaulted by men who kidnap them.

The media tends to take a sensationalist approach that focuses on the most grotesque examples of the custom (Maphalala, 20:149). Recent developments have shown that people commit types of crime using *ukuthwala* practise. These are revealed through the media reports. These reports have portrayed the negative side of this custom to other ethnic groups. Makisto (2010: 45) concurs by saying sexual pervers have diverted the meaning of *ukuthwala* to suit and justify their horrible deeds. These allegations also portray Xhosa culture as oppressive with no concern for gender equality.

Nowadays media coverage offsets the agenda for our lives and determines our perceptions. The topic of *ukuthwala* has been on the news recurrently. The same cannot be said in the past when this practice started. This might be the influence of the changing times or society. Some people view it as contradicting with the human rights laws while others take it as a cultural phenomenon. The *ukuthwala* custom is defined differently by different authors.

Ukuthwala is another form of marriage in the Xhosa culture. According to Ndungane (1992: 45) a young man had no right to choose a girl to be his wife as he was inexperienced. The family would send some male members to the home of the girl they have chosen to ask for *ubuhlobo* (a hand in marriage). In addition, in Xhosa culture one was married because of his father's name, and known of his good behaviour (Soga, 1979:790).

In other cases the young man cannot afford the *uduli* (traditional wedding ceremony). In this case the family will allow him to *ukuthwala intombi* (*abduct a girl*). The group of young men will agree about the place where they will meet and abduct the girl even if she refuses. A girl

who gets married through this practice never returns home because she respects her home, explains (Ndungane, 1992:45). Ndungane's explanation of the tradition gives an idea to an individual regarding the custom. Tradition as defined by many is a conscious model of past life ways that people use in the construction of their identity (Linnekin1982:241). This is the part of the shared life experience of the traditional African person where social cohesion and social solidarity are part of the human psyche (Van der Watt and Ovens (2012: 12). Recently, there have been accounts of minor girls being married to older men and it is doubtful that criminal charges being laid are truly forms of *ukuthwala* explains (Van der Watt and Ovens, 2012:12). Mwambene and Sloth-Nielson (2011:1) elucidate as follows, these cases may be indicative of the changing dynamics of this practice. With reference to the abduction and rape of women and girls, the commission for Gender Equality labels *ukuthwala* as an "unlawful practice disguised as a custom" (Commission for Gender Equality 2010:42). The usual way of doing something or behaving is called custom, according to (Oxford Dictionary, 1996). This means people can behave differently according to what they usually practice.

1.4 Statement of the problem

In contemporary South Africa there is a continuation and persistence of *ukuthwala*. The study investigates the factors that influence the continuation of *ukuthwala*, an old tradition of the Xhosa people.

1.5 Research Questions

- (a) What is the difference between the manner in which *Ukuthwala* was performed in the past and the manner which is performed today?
- (b) What are the implications of continuing this practice?
- (c) What are the cultural features embedded in people's pursuit of their livelihood through the custom of *ukuthwala*?

1.6 Research procedures

1.6.1 Qualitative methods

This method is used for various reasons including the following:

- (a) It offers techniques in obtaining in-depth responses about how people feel and what they think about particular issues.
- (b) It enables the researcher to gain insight in the attitudes, beliefs, motives and behaviour of the target group or population.
- (c) It is interpretive rather than descriptive.
- (d) It involves a small number of respondents who are not sampled on a probability basis.
- (e) It gives greater depth of responses, and therefore greater consequent understanding.
- (f) It enables the researcher to tie together clusters of behaviour.
- (g) A qualitative research method enables the retention of major subjective or intuitive elements.

1.7 Chapter outline

The study consists of five chapters:

Chapter 1: This will give the background of the study and. The background is also given on *ukuthwala* tradition and the relevant information on the topic will be highlighted. Aims of the study will also be stated clearly, and the statement of the problem on the changing of *ukuthwala* tradition in modern days from its origin. Hypothesis of the study will also be stated.

Chapter 2: This chapter consists mainly of literature review. Theories or other studies related to the study will be investigated in order to support the views of the researcher and put them into perspective.

Chapter 3: This chapter will consist of methodology. The collection of data will be presented in detail.

Chapter 4: This chapter consists of court cases reviewed in the study. These cases give a clear background for the study. It also provides the discussion of the study. It discusses further the findings of the collected data. It also looked more on the type of data that is collected.

Chapter 5: This chapter is a summary of the study. Conclusion is presented highlighting some important points of the research. Recommendations regarding the study are also provided.

CHAPTER 2

2.1 Introduction

Ukuthwala is an ancient custom that has been practiced by many cultures around the world. The people who practised it regarded it as part of their living or as normal among them. The custom seems to have lost value in the new or modern society represented by constitutional laws. The current constitutional laws take into consideration so many issues regarding the custom. The study is going to review the literature that is obtainable on the subject of *ukuthwala* in support of the ideas. It is also going to view the custom under the constitutional laws of the countries. Court cases and law reports will be used as evidence to see the actual application of laws in such cases.

2.2 Conceptualising *ukuthwala*

Ukuthwala custom has been in existence for decades in South Africa, particularly among Xhosa, Zulu and others. The custom has distorted the country for its harmful components where young children are involved. *Ukuthwala* is known as the custom that originated from Xhosa culture and is regarded as primary procedure to customary marriage (Machaka, 2018:1). This means that although the practice does not seem as normal it is acceptable to its members. They treat it as one of their traditions where it did not involve raping or having consensual sex with the girl until marriage requirements had been concluded.

Following this Choma (2011:874) says *ukuthwala* is one of the methods of the formation of customary marriages; however, the Cape colonial government during the union of South Africa denied the recognition of the customary marriages of the African people. The error of the colonial government transitioned the state in which Africa was. For example; if someone *thwalad* a girl he is going to face jail.

The *ukuthwala* practice is an old custom that is once acceptable to indigenous laws and its people. It has been common in African countries and been in existence since back then. Those women are still with their partners for many years now and have children together. Mwambene and Sloth (2011:4) observe that the main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage.

Karimakwenda (2013:342) adds that the practice is common than its acknowledgement to the people and is actually practised throughout Africa, Central, South and East Asia and Eastern Europe. This means that the issue is more globally recognised than one continent issue. For example; the reports on do not show all the cases of bride abduction as some were never reported and remain unknown to the public.

Nkosi and Buthelezi (2013:169) explain that traditional (positive) *ukuthwala* is done by powerful men from powerful families. These men are powerful in terms of having enough resources and enough money thus they afford to pay lobola immediately. They are therefore accorded the status of real men in the communities they live in. This shows that having a wife is one of the greatest achievements in such communities. Seymour (1970:94) concurs by saying that no self-respecting man will seduce a girl he has abducted *or ayithwalileyo*, in any case it is contrary to the custom to do this. The custom allows the suitor to report the act of *ukuthwalato* his kraal head, who thereupon takes the girl into the care of the women of his kraal, and sends a report of the matter to the girl's guardian. This view shows that there was no harm intended to the girl that was abducted.

The practice of the custom of bride abduction was not regarded as a criminal offence because the young woman is not harmed in any way and often she would have colluded with the young man in that situation (Nkosi, 2014: 165). Abduction in its legitimate cases, the girl's parents most often consented, however the girl expected that at some time or other, she would be taken for her anticipated duties of marriage. Once at the home of the man she was treated with utmost respect and kindness. (www.gendercrossborders.com:05/11).

Karimakwenda (2013:344) further states that, the harmful forms of *ukuthwala* refer to those where the girl's consent is not obtained. In one type the marriage is preapproved by the man's and girl's families without the girl being informed. In the past *ukuthwala* was resorted to by poor families to avoid wedding expenses or they feared that the girl would object. This view implies that there were marriages that took place without including abduction of the girl. This might prove that people might have a choice of choosing their partners to marry.

Today *ukuthwala* is practised in different ways from the original tradition, as it is marked by violence and rape (DoJ and CD, 2016). Eastern Cape Commission of Gender Equality states that, *ukuthwala* has no place in South Africa because the country has a constitution

(Makwabe 2015:27). The constitution has laws that are in place which protect girls or young children from any harmful causes and child marriages contribute to the violation of their rights. For example; when a girl is abducted, she did not agree and does not love the person getting married to. Secondly the girls are always underage in most cases and they have to drop out of school.

Following this Nkosi (2014:442) concurs that although the practice is said to have disappeared due to social transformation. However, evidence suggests that it is prevalent at least in deep rural areas of South Africa such as in KwaZulu Natal and Eastern Cape provinces and possibly in other areas. The evidence reflects that some other communities are still holding on to their ancient customs regardless of the social transformation. For example; in the court case of Jezile vs State, he left the city in search of a wife to some deep rural village where he knows he will be supported and the family of the young girl welcomed his request of marrying their daughter.

Mwambene and Sloth (2011:3) elucidate as follows *ukuthwala* in South Africa originated from the Xhosas. However, although the custom is predominantly practised among Xhosa speaking tribes, the practice has expanded into different ethnic groups. For example; AmaZulu do have *ukuthwala* practice. They continue to say that the practice enjoys popular support in the areas where it is practised. This shows that although it might be unlawfully under the democratic legislatures but there are individuals who are still practising it. For example, in Lusiki-siki cases of children's abductions have been reported and some of the residents are not remorseful. They publicly expressed on national television that the government is messing up with their lives by intervening on the practices of *ukuthwala* that took place there.

2.3 Criminal *ukuthwala*

Child marriage is often referred to as forced or early marriage since children given their age, are not able to give free, prior and informed consent to their marriage partners or to the timing of their marriage. In 2010, 158 countries reported that 18 years was the minimum legal age for marriage for women without parental consent or approval by a pertinent authority (UNFPA, 2012:12). South Africa is among those countries that signed up that law,

but the same country is also experiencing underage marriages among its communities. If the child is below the age of 18 years she cannot marry without the parent's consent.

In addition, Razak and Gangoli (2009:419-420) elucidate that it has been suggested that rights discourses on marriage can also include in some cases rights of parents, and communities, to preserve their identity which may rest on assumptions of early marriage as a normative. In this case parents are shown as having rights on when their children should get married. Children's rights alone are not considered as they are made of their communities and parents and that could be the reason for early marriage becoming a norm among them. It seems that the act is normal among some communities and its people. They further states that the legal position in the UK places the legal age of marriage at 18 although children over the age of 16 can get married with parental consent. In South Africa children who are 18years are also considered as able to consent to marriage in a court of law. The countries resorted to age restriction policies to protect their young citizens from harmful surroundings. This law is one of the solutions in the Constitution that is trying to eradicate high rate of children being involved in adult activities and harmful practice like *ukuthwala*.

According to statistics, young teenage girls are 10 to 14 times more likely to die of pregnancy related causes than those between the ages of 18 and 34 (A21 Campaign). The reason can be they are not physically fit or ready for carrying babies than those who are older than them. Their bodies are still at developing stages. These figures indicate high increase rate of child mortality especially in countries practising forced marriages. Forced marriages do not have good effects on children's development instead it hinders their development in the future.

In relation to forced marriages, Proudlock (2014:169) says that children's experience of violence occurs in a variety of settings, including the home, school, community, alternative care and justice system, and has serious implications for their development and well-being. In South Africa the most commonly reported forms of violence are physical and sexual violence in the home, community and school. People need to create safe environments for their children to prevent harm among them. For example: young girls are forced into marriage with strangers by their parents and are also raped or hurt physically.

2.4 *Ukuthwala* and gender equality

Gender inequality is one of the leading issues facing our societies. The issue of gender inequality results from the different treatment of the two genders as categorized in many communities. It is said that South Africa remains one of the most unequal country in the world when measured in terms of wealth and that it overlaps with social economic disadvantaged, poverty and race according to Research Brief on Gender Equality in South Africa (2013:6). Gender equality observes that early marriage is a symptom of and exacerbates gender inequality. If it were not for gender inequality and child abuse, *ukuthwala* custom would have no place in our society. The subordinate position of the girl or young woman is reinforced by the fact that in most documented cases the girl-children have been forced to marry older men old enough to be their fathers or grandfathers (DoJandCD,2015). The explanation exposes the fact that girls are the most victims of mistreatment especially in this case of *ukuthwala*.

Maluleke (2012:6-7) is of the view that the right to equality, including gender equality, is one of the fundamental pillars of the Constitution, and it is enshrined in the Bill of Rights, which is justiciable. Men and Women deserve to receive same treatment in many societies and that is important to our Legislature. The constitution serves as the prime source of laws in the new democratic society. It is also the main lead to better our societies and retrieve them of many injustices. He further states that Customary practices such as *Ukuthwala*, virginity testing, widow's rituals, and others are entrenched, and in practice take precedence over equality in the villages where they are carried out. It is therefore questionable whether the constitutional protection of gender equality is making a difference to women living in communities with a strong commitment to traditional norms and practices. They take over equality because of the reasons they are made for, these customs are entitled to a certain type of gender and where women are usually the victims although there is gender equality clause in our Constitution.

According to Watson and Rhoda (2002:25) since South Africa's transition to democratic governance, gender equity has been a key factor within the process of drafting legislation and government policy and in determining developmental strategies. Issues of gender inequalities are the core issues facing societies. This gender equity factor is for minimising the inequalities.

Following this Nhlapo (1994:52) argues that many commentators have pointed out that the equality clause is set for a head- on conflict with indigenous law. According to this view, equality clause exists in order to limit some certain activities in taking place. It is believed that it might not be in favour of indigenous laws including its activities. For example; *ukuthwala* in the Xhosa culture involves the abduction of a girl child or young woman not boys or male individuals. This clause might question and view this act as gender discrimination according to gender caused by inequalities among communities, if women do not benefit from equality in the communities where they stay. There cannot be any justice for all without women's justice in a country. Justice for women and girls provides foundation and sustainable development for better living (Justice for women, 2019:11). Male dominance existed long ago in many communities and it is still a challenge nowadays. For example; in the past in Xhosa culture, women had no say in meetings held whether in their homes or communities. Girls were also not allowed to be educated like male children their value was in marriage when their parents benefit at their expense.

Following this United Nations International Children's Emergency Fund (UNICEF) Reports that where prevalent, child marriage functions as a social norm. Marrying girls under the age of 18 years old is rooted in gender discrimination, encouraging premature and continuous child bearing and giving preference to boys' education. Aikman and Unterhalter (2007:11) observe that Gender Inequality in societies is a huge issue that cannot be tackled by education alone; however, education systems and schools can contribute to gender equality rather than sustaining inequalities. Areas of fruitful action include curriculum change, tackling sexual harassment in and around school, the training of gender – sensitive teachers and attention to diverse learning styles. This suggests that people should look at gender issues in a broader context and that it should be handled in a manner benefitting both genders.

Girls and women were generally not offered many educational opportunities and access to secondary and, especially, higher education for women came as late as the twentieth century in the (over) developed world (Weiner et al.,1997). Gender inequality issues might have resulted from the past experiences in many societies. In other cases, a girl child does not grow up as an individual who is going to be independent and an educated individual in other societies. Our countries especially developing countries are still facing serious issues of gender inequalities, where women have fewer opportunities especially in education, work environment and many others due to social standards or expectations. These communities are

still trying to improve educational accessibility to everyone after democracy and better working conditions for both genders.

The Convention on the Elimination of Discrimination Against women (1979:26) states that in our societies male power dominance is proficient from long ago. Women tend to be subordinates from men and that is found in their treatment. The Human Rights laws are violated continuously. This convention has been established to close the gap between genders in our societies. This law applies to all the laws that the state might have in place, that everyone must receive the same treatment regardless of his or her gender. The aim might be to end gender differences that are encountered among people.

According to Devine, Leeman and Murray (1991:25) customary norms enforcing gender discrimination are foremost amongst the offenders against human rights. It is also probably true to say that throughout sub-Saharan Africa women are expected to defer to men. This can be recognised in some of the practices that are anticipated for women.

Meintjies (2005:260- 261) observes that in the new South African democracy, transforming apartheid-based institutions or building new post-apartheid institutions meant developing them from the artefacts of past struggles for democracy and future visions of the good life – the hopes and dreams, the values, principles and practices that drove the change in the first place. This view shows that the principles and values existed in the past before the transformation of the state and were adopted in the new error for future purposes. For example: customs and traditions were practised by indigenous people before and the new laws had to recognise and protect them in the democratic society and its changes. The Constitution itself steers an ambiguous course between the different rights that it protects and promotes on the one hand the Equality clause in the Bill of Rights prohibits discrimination on the grounds mentioned above, but also supports the enjoyment of cultural practices.

The lack of gender equality in the law's treatment of the issue of consent reinforces social norms that dictate it is somehow acceptable for girls to marry earlier than boys (UNFPA, 2012). There is no emphasis in terms of consent of the girl. In most communities, women do not have that much power to decide what they want. This situation has been like this before; women seem to be always under men power in our societies even after democracy.

Democratic laws fail to put an emphasis on ensuring that all genders are equally treated in our societies.

According to United Nations (2011) traditionally, indigenous women were generally respected by indigenous men and had equal access to and control over collective land and natural resources. However, with the gradual loss of collective ownership of lands and other natural resources and the introduction by dominant outsiders of institutions of private property, indigenous women progressively lost their traditional rights to land and natural resources. Indigenous women were not treated unequally in the past as they also had access to many things. The change in societies led to women being subordinates to men and losing their rights to be treated equally. This is in contradiction to many theories that suggest that women had been subordinates to men.

Isaac (2008:17) explains that unequal power relations between men and women may render especially vulnerable, young women to be coerced into unwanted sexual relations as well as impact on their capacity to have input as to the how, where and when sexual relations occur. Sexual intercourse necessarily implies a social activity that includes negotiating sexual practices with a partner (Holland et al, 1994:62). The women and children involved in forced marriages do not have a say on their sexual matters and sometimes everything is forced. They might find themselves being victimised by men who forces them to have sexual intercourse without their permitting and might not be enjoying their sexual life.

2.5 Women's rights violation

Women's rights remain a core issue among many societal needs. These rights need to be attended to or acknowledged just like any other human rights in our societies. The final Constitution, Act 108 of 1996, was based upon the idea of promoting a national human rights culture, based on non-racialism and non-sexism, while also acknowledging that the state would have to provide a bridge for the creation and protection of new socio-economic rights for previously excluded and disadvantaged sections of society (Mentjies, 2005: 261). This Act was brought to improve the quality of lives in South Africa in a manner that ensures their social unmet needs are met.

Tomasevski (1993:17) says that Human Rights require that women do not have to earn societal recognition and protection through motherhood, that women are, as much as men, entitled to full protection of their rights and freedoms because they are human beings. Both genders in our societies deserve equal treatment. Women are capable to do as much as men can, society should not divide anything between the two genders.

Following this Fredman (2002: 104) elucidates that women reaped few benefits from the fundamental social and economic transformations of the eighteenth and nineteenth centuries. Instead, the traditional status ascriptions of women were reformulated in new ways, entrenching women's disadvantage both within and outside of the family. This implies that women in the past did not have many choices concerning their lives. For example; women had certain careers which were not the same as men. The transition from the eighteenth and nineteenth centuries created a gap between the two genders where the other one became dominant than the other, leaving women at a disadvantaged position.

Kristen, Baber, Allen (1992:17) concur that Men and their roles in women's lives are constructed in ways that are less distorted by dualistic thinking and more of the complexities of female male relationship. Obviously, men are important players in most women's family lives. Men are the heads of many households and women serve as domestic workers who look after the house and the family. This pattern of social living existed in many generations and this is a typical example of women having less opportunities and being treated as dependent individuals

Watson and Rhoda (2002:26) are of the view that black women have been subject to multiple layers of oppression as they have been discriminated against both along the lines of their race and by their sex. The manifestation of inequity in their lives in systematic ways has therefore entrenched their position of subordination in our society. Black women have not been enjoying any freedom. This means that women are going to be prevented from being maltreated by laws favouring men. The aim of this law is to reduce gender inequalities especially among black women who have experienced many different kinds of oppression because of their gender.

Handrahan (2000:3) adds that faith in the fundamental human rights and the dignity and worth of the human person is violated by treating women as property to be stolen, brought,

traded, and /or passed on between family members. There is no dignity for either men or women involved in stealing the human person. The entire cultural milieu is affected when half of the population lives without worth and dignity as human beings and is not free to make fundamental decisions such as where to live and whom to marry. According to this view abduction is regarded as an abnormal thing for a person to do. It also focuses on human dignity of an individual; it does not justify how one in his or her right state of mind can just kidnap a person like she is a property or an object. Kidnapping for marriage is also viewed as the worst or senseless thing that has ever occurred.

UNESCO (2000:1) reports that Gender functions as an organising principle for society because of the cultural meanings given to being male or female. This is evident in the division of labour according to gender. In most societies there are clearer patterns of women's work and men's work both in the household and in the wider community and cultural explanations of why this should be so. The patterns and the explanations differ among societies and change over time. This might be the core issue leading to societies facing gender inequalities. The separation of these genders in terms of roles to be performed might lead to another gender becoming superior or less important than the other. For example: it is common or expected to behave in a violent manner for men than women. A boy child is always involved in fights than girls and some societies take it as a normal behaviour and something to be proud of.

According to Himes (1968:339) the social structure functions to allocate available personnel to existing roles and statuses and to prepare individuals for the performance of these roles. Assignment of individuals to roles and statuses is accomplished through ascription and achievement. The preparation of individuals for existing social roles results from socialization. Everyone needs to be in contact with others in order to obtain social stability, or to learn about his or her social roles. The contact people keep with their communities maintains their ability to belong in a certain group or society.

Inglehart and Baker (2000:19) are of the view that a core concept of modernization theory seems valid today: industrialization produces pervasive social and cultural consequences, from rising educational levels to changing gender roles. Industrialization is seen as the central element of a modernization process that affects most other elements of society. Our country has undergone change a long time ago since colonisation times and after that. These changes

include developments in some areas of the citizen's lives. These areas include the traditions and norms and many others.

Following this Armstrong (1987: 195) says that during the colonial period, the status and capacity of African women was always determined by reference to customary law. Customary law was defined as the legal principles and judicial practices of any particular African tribe except in so far as such principles or practices were repugnant to:

- a) Natural justice or morality, or
- b) The provisions of any enactment

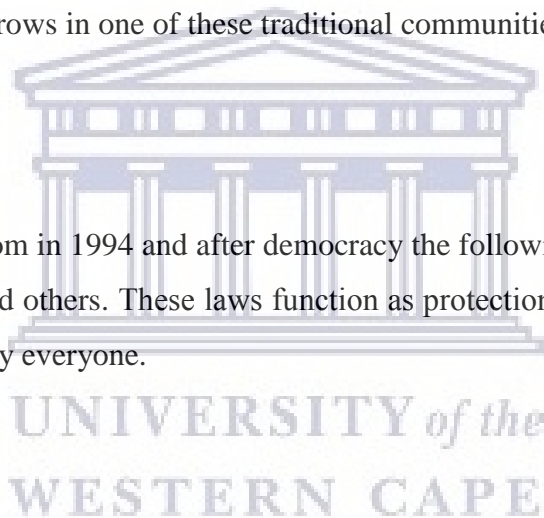
Mfono (2000:77) explains that the 1994 political changes and all the talks about women having rights appears to be a myth as it does not bring much of a change for the South African Girl child, if she grows in one of these traditional communities.

2.6 Constitution

South Africa gained freedom in 1994 and after democracy the following laws were enacted to promote human dignity and others. These laws function as protection to the country's citizen and they must be obeyed by everyone.

2.6.1 Human rights

According to Jaco, Smit, and Notermans (2015:35) the introduction of individual human rights through the Constitution of South Africa in 1996 thus has serious implications for individuals: law enforcement officers now refer to men and women who were married through *ukuthwala* as "rapists" and "rape" victims, respectively, even if they may share a happy married life. The constitution seems to interpret issues in a different way from the original form. According to the statement the couples who are involved in *ukuthwala* are living a normal life like all the other married couples. The laws that are in place do not consider the feelings of the individuals involved. The cases might differ in the manner in which these were handled. *Ukuthwala* marriages are successful and those individuals are living normal lives with their big families.



Terry (2007:45) observes that customs and traditions are not sacrosanct, and cultures, whether we like it or not, are changing all the time as people develop and adapt new ideas, some from within their own societies and some from outside. The custom of *ukuthwala* might also have undergone change because of the changing times. Culture is supposed to build and is not meant to limit developmental opportunities for our children and it is never part of African culture to deny the children full opportunities and freedoms to make their choices, (<https://www.sanews.gov.za/south-africa/traditional-leaders-praised-den...1/12/17>).

Marriage remains a deeply valued practice that not only maintains or secures community relations and a family's social standing, but is also emblematic of a commitment to the continuity of cultural traditions, the retification of gender norms surrounding domesticity, purity, sexuality, fertility, and the protection of honour (UNICEF 2017:31). For example; in the Xhosa culture, it is of importance that a woman gives birth to a baby boy who is going to continue with the family legacy and clan name. If the wife is barren, she brings disappointment to the family she is married to.

In line with the Human Rights, each person has same and equal rights in a given community or society. Because human rights are innate and not dependent upon others for their legitimacy, these rights can be demanded where they are denied, according to (Mahmud, 1993:486). Okonofua (2013:9) says that clearly child marriage is one of the most intolerable and serious human rights and social justice issue of our time. This statement is in line with South African Constitutional laws that regard forced marriage or treat forced marriage as an offence because it is harmful to human rights.

2.6.2 Children's rights

Waheeda and Paul (1998: 166) identify children's rights and observe that all teachers should be qualified and should treat children with patience, respect and dignity. All teachers should be evaluated and monitored to ensure that they are protecting the rights of the child. It is within the children's rights that the teachers should keep an eye to children experiencing abuse. For example; teachers can also report a case of abduction of a child. They must make it their responsibility to look after the child's welfare especially within the school premises. The teachers are people who play a parental role in their student's lives, it is of this reason that they should be trained enough to cope with situations like these.

Nkosi (2014: 442) firstly, observes that schools are affected by bride abductions nothing has been done to investigate how schools respond to the effects of bride abductions on education of their learners. This shows that the matter is not taken seriously by the communities and the government. The communities affected are slowly in responding to such cases or they turned a blind eye to the matter. Forced marriages hinder the future of the nation at large denying women their right to education and limiting them from opportunities. Education is believed to be the key to success in life. Secondly, parents have the duty to become involved in their children's education and development and to participate in their children's education at school and at home. Parents are the primary source of knowledge to their children. They teach their children about issues concerning their well-being and life in general. Children have to know what is wrong and right starting from home where everything starts. Parents also have to educate children about practices that are harmful to them and protect them as it is their responsibility.

All children have the right to play and to free and adequate sports and recreational facilities so that children can be children (Waheeda, 1998:166). In line with this right, *ukuthwala* custom is denying children their childhood, for example; the girl now has responsibilities of an adult like bearing children, cooking for the family and many others. These people are still vulnerable, they need to be looked after or be guided by their parents and society in many life spheres. According to South African Constitution: Children's Act 38 of 2005:

- (i) Every child has a right to be protected from maltreatment, neglect, abuse or degradation.
- (ii) To be protected from exploitative labour practices,
- (iii) Not to be required or permitted to perform work or provide services that is inappropriate for a person of that child's age, place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development.

The constitution prohibits people from exploiting children. *Ukuthwala* is violating these rights, because children are beaten, raped and damaged physically and psychological. The constitution is the supreme law of the country and must take precedence.

According to Proudlock (2014:101) the government of South Africa has committed, as a signatory to UNESCO's education for all (EFA) and the United Nation's Millennium Development Goals Campaigns, to prioritize spending and measures to secure the rights of all children to basic education as a developmental priority, especially for the most marginalized children. This initiative shows that the government does act in ensuring that education is accessible to the future children.

The South African Schools Act 3 No 84 of 1996 (1) stipulates that compulsory school attendance by every learner from the age of seven to the age of 15 is mandatory. That means absence of a child from school is unacceptable and education is one huge opportunity to improve lives. Forced marriage is denying children an opportunity to a bright future and independence. Following this Okonofua (2013:10) says despite the traumatic effects of child marriage in Sub Saharan Africa, there have been little concerted efforts by researchers, social advocates, policymakers and public health practitioners in the region to deal with the problem. Lack of intervention from government policies creates a rift and making it difficult to end the issue. These stakeholders are doing so little in fighting the injustices faced in our societies.

2.6.3 Children's Act

Children are young human beings who evidently have a certain moral status and there are things that should be avoided to them simple because they are human. It seems reasonable to think that there are things children may not do that adults are permitted to do (Williams, 2003:1). Children are innocent and vulnerable human beings at their early stages of life and cannot be exposed to certain things like adults are. This means that marriage should be something that is intended for adult's not young children

The Children's Act 38 of 2005 provides that in all matters involving children, the best interests of the child and also stipulates the age of consent to marriage as 18 years. In this case the child's right to marry at the age of 18 has been violated. The victim is still vulnerable to make her own choices or to consent to marriage at this stage. Criminal Law Act Amendment 32 of 2007 allows a girl or a woman that is subjected to *ukuthwala* to lay a charge of abduction, kidnapping, rape and trafficking in persons. This Act ensures that women are not victimized by harmful traditional practices and emphasises especially on the

cases of *ukuthwala* by encouraging the victims not to keep quiet. Children also have a right to privacy, where they can make their own choices. According to Fakier (2003: 23) children's right to privacy within the family would go according to family structures, living conditions and socioeconomic factors determining the private space available to the child. This right can be protected by allowing the child to have a say in decisions concerning her life.

2.6.4 Marriage

Ukuthwala as another marriage form also receives the same devotion to its people. Traditional African customs required that the elders, the old men, instruct the youth in native law and custom. As instructors, the elders were expected to be of good behaviour and comport themselves to serve as role models for the youth. Consequently, contraventions of the law by elders were viewed more seriously and punished more severely because the elders were expected to know the law (Ayittey, 2006). In the past elders in most African societies were regarded as suitable to set laws among the people. In this case young people are expected to obey what the elders say; they might also be regarded as inexperienced or clueless about life. For example; in Xhosa culture a young man did not really have an experience when it comes to choosing a wife, his parents were the suitable candidates. There were also behaviours which were also regarded as unacceptable for a young person to portray and respect for elders was valued more, disobedient was not tolerated.

2.6.5 Marriage Act

Marriages in the past were not constructed under legal foundation. According to marriage Act 120 of 1998, both spouses must be 18 years and older to consent to marriage and neither of them is married under marriage act. It also observes that spouses are obliged to register their marriage with the Department of Home Affairs within three months. However, customary marriage is valid even if it is not registered, and there is no penalty for failure to register (Department of Justice and Constitutional Development, 2015). Ndulo (2011:88) reminisces that the pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people. When referring to customary laws, these laws are not written or recorded down in any form. People pass information from generation to generation orally among their groups where they live and the knowledge become acknowledged.

The nature of many customary marriages conducted in most communities does not follow the criteria of customary marriages act. These marriages are often conducted according to the norms of that particular group and that can result in many marriages not recognized under customary marriage act that deals with matters of this nature. These unrecognized marriages can be ruled as non-existing. Customary marriages are recognised in Act 120 of 1998. This Act afforded overdue recognition, for all intents and purposes of customary marriages both monogamous and polygamous with retrospective effect (Jansen, 2002: 116). This Act exists to protect customary marriages taking place in South Africa, by adding it to the Constitution of the country so that it can be given recognition. Marriages conducted under this Act gain recognition in the book of laws in a country where they take place.

According to *Jezile vs State* court case the recognition of Customary Marriages Act 120 of 1998 was enacted to recognize customary marriages in accordance with South Africa's constitutional obligation and contains mandatory requirements for a valid customary marriage. Marriages conducted outside the court are unlikely not to be recognized as valid under customary law. In order for the marriage to be valid there are procedures to be followed.

2.6.6 Customary law and Indigenous law

Bennett (1985:17) explains that customary law rules are generated by a community's acceptance of certain standards of behaviour whereas, in the case of Western law, the rules are derived from legislative fiat and the authoritative decisions of the court. For example: *ukuthwala* is a custom among Xhosa that was accepted long ago by many communities of its existence. The courts have not made any decision concerning this; it is the people from these communities who decide that it was good or suitable for their living arrangements. Legislature and courts are equivalent to the chiefs, elders or anyone who is involved in the law making in the past.

Cultural conceptions of childhood and adolescence also play an important role in determining when a female is ready to be married. Usually after puberty, a girl was seen as able to bear children, and this contributes to their tribe by entering a new role in family life, (www.genderacrossborders.com). It seems as if the aim of getting married here is for a girl child to bear children for the new family and adolescent stage is close to adulthood in life.

Herbs and Du Plessis (2008:6) concurs that customary law does not have specific age requirement for marriage but that puberty and initiation ceremonies are viewed as prerequisite for accepting someone as an adult by the community. In most SADC states the onset of puberty is seen as a cut-off point between childhood and womanhood (UNICEF 2007). This stage is where a girl's body starts to develop and can be able to carry a child in her womb, which is also the initial plan for marriage.

Rembe and Chabaya (2011:124) agree that girls who have reached puberty are recognised and treated as adults although they have not attained the age of maturity. This is the stage where girl's bodies develop change and preparing them for adulthood. Pregnancy and many others are likely to occur and that leads to childbearing. Child-bearing in this case means that the family legacy will continue and that is why it is regarded as important to get married. Olivier et al (1995:5) explain that in terms of customary law age as such is not an automatic criterion for the determination of majority, and thus for the possession of rights, privileges and obligations. Puberty and the accompanying ceremonies and rites of passage were essential prerequisites for adulthood and for acceptance as an adult in the community and for the exercise of legal and political rights and obligations. Custom does not recognise age as in numbers; it only looks at the development of the individual.

In South Africa a customary marriage is understood as being entered into in accordance with the traditions and customs of indigenous African Customary Law, (www.sahistory.gov.org). In order for a marriage to be valid there are certain procedures that need to be considered, which are customary related. For example; In Xhosa culture, when a young man wants to marry a girl, he sends his elders to the girl's family to ask for a hand in marriage (*ukucela*) and *lobola* is paid. In this case both families are involved; the matter now does not belong to the two getting married.

Women have a lot to lose if the marriage is not recognised. Recognition of Customary Marriages Act 120 of 1998 Section 4(2) specifically allows either spouse to register a marriage on behalf of both spouses. The purpose was to ensure that spouses who are reluctant to register their marriage do not frustrate the other or the purpose of the Act. Because customary marriage is a process that occurs over time and may involve more than a ceremony, it is easy to challenge its existence. This law is for protecting women who are in customary marriages. It is put in place to ensure that women's rights in marriage are not

violated by any means. There are many marriages that are not registered, but are conducted in the communities and celebrated by all the parties involved and that makes these types of marriages not to be recognised under the Customary Law Act in the Constitution of South Africa.

According to Armstrong and Ncube (1987:197) Customary law, like all law, grew out of a specific social situation, and as the social situation changed it was necessary for the law to change. Customary law must be in line with the existing laws especially indigenous laws of its people. Its development depends on the changing dynamics of cultures or their traditions by its members. For example: circumcision tradition among Xhosa is a recognised tradition by the law. A customary union is a relationship which concerns not only the husband and wife, but also the family groups to which they belonged before marriage.

Ndulo (2011:88) clarifies that in a typical African country, the great majority of people conduct their personal activities in accordance with and subject to customary law. In South Africa, the most convenient place at which to start an account of customary law is the Law of Evidence Amendment Act. It provides that; any court may take judicial notice of Indigenous law in so far as such law can be ascertained readily and with sufficient certainty (Bennett, 2010). Indigenous laws systems must be used as a foundation before customary law can be put into place especially in cases where customs are concerned. The courts are the places where most laws are passed and gain authority to function in our societies as well as setting standards under which the people must live.

Following this Sander (1987:407) says that the colonial legislature accordingly outlawed a number of customary practices and Institutions, and conferred on the central courts the power to declare custom invalid whenever they considered it to be contrary to natural justice or morality. This may mean that people living in the colonial era, some of their customs or indigenous laws are not considered or regarded as proper. Indigenous laws like traditional practices that are practiced under this era are not valid as they do not hold any importance to new institution.

Ayittey (2006:97) says that in traditional Africa, ignorance of the customary law, in general, was no excuse in many court cases. But extenuating circumstances were often considered. This was due to the fact that the judge's decision was partly shaped by the opinions of these

present in court. There was thus a tendency for judgments to be based more upon recognized principles than upon specific decisions of the past. This in turn means that the law is not rigid but flexible, and can be readily adopted to meet new situation, or if need to be, to reject customary norms that are now considered as obsolete.

Bennett (2010:5) observes that customary law (and African culture) held sway in the sphere of domestic relationships, but in the public realm, colonial laws and values were to provide uniform standards for everyone in the state. There is no recognition of other laws other than the ones in place. Everyone's behaviour is shaped and expected to be in line with the present time. Precolonial laws were determined by a group of communities in line with their needs and expected people to behave according to the present laws. For example; in the democratic state, people have rights. No one is superior than the other they are all equal before the law.

According to Swiderska (2006:2-3) customary laws are rarely recognized by governments or reflected in policy and law, and need to be strengthened in the face of growing threats to culture, biodiversity and traditional economic systems. Not only customary laws promote ecologically sustainability and social equity, but they provide the basis for development which is endogenous, rather than externally driven and is therefore more appropriate, effective and sustainable in the long term. They are also fundamental to indigenous self-governance and self-determination. He further expresses that customary laws are usually orally held other than written down or codified, which is important to maintain flexibility. But in order to be recognized externally some elements of customary law may have to be written down.

Customary laws and practices may not exist for a particular purpose; e.g. Regulating external access to bio-resources which means that derivatives may need to be identified to apply to a new situation, which reflect broader underlying customary values. Customs and traditions are developed as a way of living among that particular group who perceive them as important in their lives. These function as rules or laws that need to be followed by everyone involved and, in most cases, they are not written down where an individual can access it through reading. This view suggests that some elements must be transformed and be in writing for exposure of some elements maybe to the public or to be in line with modern society.

Ntlama (2012:27) clarifies that the recognition of customary law as an acknowledgement of South Africa's rich diversity, which is deeply entrenched in the preamble to the Constitution, as it seeks to build a united and just society based on democratic values, social justice and fundamental human rights. Recognition of Customary law enhances the development of the country and ensuring that unity is restored among its societies. The values and everything that is included in the customary laws transferred to the democratic state.

Mattias (2004: 63) mentions that customary law distinguishes itself from statutory law only by being more closely attached to a people's culture than statutory law. Unlike statutory law, customary law does not gain its authority from formal acts such as a vote of an assembly. Rather it derives its existence and content from social acceptance. This difference alone, however, does not justify a lack of respect for indigenous legal systems. This suggests that this law is developed to meet social needs of the people but taking into consideration indigenous knowledge systems that already exist.

South Africa's Constitution accommodates most of the needs of its citizens. In line with many laws developed, in our Constitution customary law is recognized. Colonial era does not take notice of the local laws available. Central government agencies tend to be ignorant of what happens locally. This was true, in particular of colonial administrations, which to the end had only superficial contact with the local population. They were not in contact with the local people and that means their practices may have not been recognized. Initially reliance had to be placed on reports from travellers, traders, missionaries and specially appointed reliance. The information within communities is not enough for the government laws to recognize. It has to be from outside or certain sources of information to be considered as reliable. Post- colonial government subscribes to a renaissance of "traditional" notions of law and government, mainly with a view to strengthening its own position and promoting national development. The new government intends to improve the living arrangements of its people by also recognising their traditions (Sanders, 1987: 407).

Ayittey (2006:98) says that most Native Africans believed wrong doing strained social relationships and displeased the ever- present spirits of the ancestors. Thus, while the concept of Justice was clearly known, it was pursued within certain parameters or with additional objectives repairing frayed social relationships and pacifying the ancestral spirits. Thus, unlike the Western legal system, the indigenous African Arbitration process laid a great deal

of emphasis on reconciling the disputing parties to promote social harmony rather on the punishment or the settlement. Justice was pursued with broader societal and spiritual objectives. Africans are people who have a strong hold over their beliefs and values.

Ndulo (2011: 94) agrees that the normative force and legitimacy of customary law is derived from the idea that it is ancient, unchanging and passed on from generation to generation, that it is part and parcel of people's identity and culture. Some might claim that *ukuthwala* practice has been practised by many generations in the past. It is therefore regarded as part of their culture and that no one may question its existence. Culture contains ideas or stuff that is understood by the in-group members. For example; *ukuthwala* is an ancient tradition that was practised before among Xhosa and it is not an individual idea that can be criticized instead people adopted it and form part of their living.

According to Ouzgane and Morrell (2005:7) indigenous knowledge systems that have origins in the social formations of pre-colonial Africa still organise thought and exercise the imagination of many of Africa's people. African people are still holding on to their values and beliefs, although they undergone many influences, their processes remain significant. It will be difficult to just obliterate some systems that originated long time ago. Following this Swiderska (2006:4) says that over eleven United Nations agencies are carrying out activities on the protection, preservation and promotion of traditional knowledge, within their particular mandates and spheres of competency. While many valuable activities are underway, it is evident that there are also gaps in their alignment with indigenous people's perspectives, needs and aspirations. Preserving and protecting indigenous knowledge will ensure that people's needs are considered as the knowledge is serving as the foundation to their existence.

Falola and Salm (2005:407) argue that it would be unfair to describe indigenous laws as a stumbling block on the way to the full reception of a dispensation of human rights, but one cannot ignore the reality that traditional laws and institutions are founded on a worldview with origins and foundations that are completely different from those that gave rise to the doctrine of human rights. Furthermore, colonial interventions, apartheid, and modernization introduced culture in a traditionalist society. This view suggests that one cannot demoralise indigenous law as they have shaped the people in many societies where it exists, it is the primary system of the laws. The new human rights knowledge is built on the existing

indigenous knowledge and that it should not be viewed as blocking any developments of the new laws.

World Health Organization report (2009:9) says that legislation can be a key tool in changing behaviour and perceptions of cultural and social norms. Legislation is the ruler in each and every society; its contents dictate a specific purpose on how people should conduct themselves around others. For example; *ukuthwala* custom can be abolished in the constitution. Bennett (2011:9) concurs that African traditions perceive the centre of the socio-political order as the family, which provide for all of an individual's material, social and emotional needs. Interests were subversive to the family unit, and individual duties were stressed rather than individual's rights. For example; in the Xhosa culture, a boy child while growing up sense of responsibility is instilled every day. He is groomed to be able to take care of his family or to look after it. In other cases, he is expected to find work and get married with so many kids to restore the family name, so one has to be considerate of his family.

2.7 Culture

South Africa prides itself for having diverse cultures, where each and every culture is unique from the other. Its uniqueness lies in the features it contains and is understood by its members. Kidd (2002:5) defines culture as the way of life of a group of people. In other words, how they live their lives. Rembe and Chabaya (2011:121) elucidate that culture is like a fabric which is woven together with numerous colours, with each colour representing aspects such as customs, practises and beliefs. South African constitution also considers cultures and its practices of its citizens by allowing individuals to enjoy and practice their cultures. Act No 108 of 1996 stipulates that people have a right to:

- i) Enjoy their culture, practice their religion and use their language and
- ii) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

People practising *ukuthwala* might claim that the constitution agrees with them, because it does allow them to perform their cultural practices not realising that harmful practises are prohibited.

It is suggested that while parents are forcing young people into marriage believe that they are upholding the cultural practices of their own country of origin, in reality practices and traditions in home countries have moved on (Razak and Gangoli, 2009:419). People in many societies fail to stop these cultural practices that are harmful because they claim to be restoring or respecting culture. It appears as if culture is at some degree unchanging and its rules cannot be broken to be appropriate in the contemporary time.

Kidd (2002:5) also observes that cultures are shared and are also a form of constraint since they predate those who are brought up in them. Nonetheless they are a “human enterprise”, they exist because of humans. The explanation entails that one cannot remove culture from human beings. They are made of culture; where culture does not exist, no human beings exist. Culture gives identity to humans. Each culture exists to give each group of individual’s identities, because these groups differ in their way of doing things or living. For example; in the Xhosa culture, a man who wants to take a wife must pay lobola. While in the Western culture lobola does not exist. Following this Maluleke (2012:2) advances the notion that every social grouping in the world has a specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others have become harmful to a specific group, such as women. Some traditional practices tend to favour certain group of gender and these gender-based traditions are reinforced to that particular gender they are meant for. It is also expected that those practices must be obeyed by the individuals.

Cultural practises must not harm or contradict with the law. According to Justice and Constitutional Development (DoJ and CD, 2015) culture as a way of life for a group of people, is also given a place in our constitution. Section 31 of the Constitution recognises cultural rights of communities and groups provided that such rights are not exercised in a manner inconsistent with any of the provisions of the bill of rights. For example; *ukuthwala* of young girls is a violation of many human rights and people who practise it might be prosecuted. According to South African Constitutional laws, this cultural practise is contradicting with the law by violating human rights.

Mwambene and Sloth (2011:6) observe that for many supporters of *ukuthwala*, the practice serves to promote legitimate cultural goals, at least one of which is to force the father of the girl to start marriage negotiations. For this group, criminalisation or prohibition would abrogate a cultural practice with considerable legitimacy, and impair the right to culture. In

this case the communities feel that if *Ukuthwala* might be prohibited that will mean that the country's law does not favour their culture as it claims to do. The law recognises every customs and traditions for its people but is in conflict with those practices that are harmful.

It is observed that culture that does not evolve risks being irrelevant to its people. This means that all cultures undergo change for relevance of time. For example: women are allowed to work and become leaders in organizations unlike before. This statement suggests that cultural rules or practises can also change to be relevant in the present times. Culture belongs to people; it's their behaviour that determines which culture is practised, (<https://www.tvsa.co.za/user/blogs/viewblogpost.aspx?blogspotid=29553,05/2015>).

African culture has experienced rapid change since the colonial invasion. Contemporary African culture is a mixture of traditional elements and alien features. Local African culture was oppressed for many years by white South Africans, who find their cultural roots in Western countries. Western cultures tend to be more individualistic and focused on individual achievements and personal interests, whereas African cultures are collectivistic, group oriented and concerned with the welfare of their community (Maluleke, 2012:4). African traditions can be understood as including the whole community instead of an individual. People believe in a group's doing. For example; in the Xhosa culture if one family is having a ceremony everyone is welcome whether from the same community or not. There is not much need for an invite, they enjoy and celebrate together.

Bennett (1995:9) adds that what is considered culturally typical can obviously never comprise the totality of a group's material output or behaviour. Only a limited number of traits- be they clothing, language, values or habits are chosen as the emblems of cultural uniqueness, and these emblems change as a culture evolves. This shows that cultures are different according to features each culture contains, but the features also undergone change.

Terry (2007:47) further states that discrimination against women, whether direct or indirect is one of the most destructive forces in the world today and that many cultures have traditionally exercised strict control over girls and women, reflected in a wide range of customs and practices. For example; *ukuthwala* in Xhosa is meant for women or young girls.

2.7.1 Cultural relativism

An individual's culture contains information that is relevant to each group practising it and other cultures may criticize. Cultural relativism is a doctrine that holds that (at least some) such variations are exempt from legitimate criticism by outsiders, a doctrine that is strongly supported by notions of communal autonomy and self-determination (Donnelly, 2009:400). A person's belief and value system should be understood in the context of his own culture rather than against the criteria of another culture. Cultural relativism is based on the fact that there is no specific ground rule for what is good or evil, (<https://www.worldatlas.com>articles>what-is-cultural-relativism,25/10/17>). For example: other cultures might criticise *ukuthwala* as presented on media but to its members that will always be their tradition or unique way of doing things. Their view is in line with the uniqueness of each group's practices. They do not stress much on how others view the other culture and one must endure his culture. Cultural relativism is a doctrine that holds that (at least some) such variations are exempt from legitimate criticism by outsiders, a doctrine that is strongly supported by notions of communal autonomy and self-determination.

Bennett (1995:9) concurs that the myth and artifice is the very stuff of culture, and it is pointless to test them as true or false. Cultural features are only understood by its own members; others also understand their own cultures. Recent media reports demonstrate the custom of *ukuthwala* as violating human rights and other negative statements where it is said to be committing crime and related to human trafficking and rape. In addition, he says that South Africa, a country of diverse culture, is in no position to reject cultural relativism. The country is still at its development stages and is a country with diverse cultures. This view suggests that the country should be in a position where it accommodates new changes among its cultures as they evolve with changing times. Geraldine (2007:47) views cultural relativism as an especially dangerous idea when it comes to women's rights.

Greiff (2010:9) observes that despite these international norms and standards, the tension between universal human rights and cultural relativism is played out in the everyday lives of millions of women throughout the globe. This proves that there is still a gap that needs to be filled. The laws that are in place need to be implemented throughout the societies especially in ensuring the safety of women.

Geraldine (2007:47) continues by saying that cultural relativism is simplistic and that it fails to acknowledge that cultures are permeated by power relations, and that they are dynamic, sophisticated and constantly interacting with one another. For example; Men still practice *ukuthwala* especially in the rural Eastern Cape, because of ignorance to changing times. They hide under the name of traditions, not noticing that cultures also change due to some factors that have intervened.

2.8 Child marriage

Following this United Nations Population Fund (2012) on marrying too young reports that child marriage also violates girl's rights and it does so in a number of ways. It effectively brings a girl's childhood and adolescence to a premature and unnatural end by imposing adult roles and responsibilities before she is physically, psychologically and emotionally prepared. This practice might hinder the child's well-being, or is denying the girl childhood.

Razak and Gangoli (2009:425) concurs that respondents who had been forced to marriage found the experience difficult irrespective of age, the consequences for the women who had been forced into marriage at an early age were perhaps more serious. Marrying early might have negative effects to the women, because some of them are still in their early stages of development in life and they have little experience especially about marriage. Marriage is an institution that should be entered willingly and with happiness.

According to Okonofua (2013:9) Child marriage is currently one of the most challenging issues affecting children and adolescent development in substantial parts of Africa. Many countries are still facing this issue even after democracy, including South Africa. Child marriage occurs when one or both spouses are below the age of 18 years and boys can be subjected to child marriage; the practice affects girls in greater numbers and with graver consequence. These consequences may include physical or bodily harm through rape and others (United Nations Population Fund, 2012:10). Although boys in this case experience hurt but girls are the most harmed individuals in bride abduction cases.

UNFPA (2012:11) reports that married girls are often under pressure to become pregnant immediately or soon after marriage, although they are still children themselves and know little bit about sex or reproduction. This also is in contrary with the constitutional right, the

right to make decisions concerning reproduction (Constitution of the Republic of South Africa Act, No. 108 of 1996). In this case they are not given any option or choice to choose whether to have children or not.

Hamman (2019:5) explains as follows Forced marriages taking place in other parts of the world and the current *ukuthwala* in South Africa contributes to crime and is most certainly classifiable as human trafficking.

2.8.1 Health

Ukuthwala is a form of human trafficking and directly impacts maternal and child health and young girls find themselves battling with STDs and HIV. Many also suffer from pregnancy related issues such as an infant and maternal mortality (A21 Campaign, Razak and Gangoli, Mc Carry). Trad (1999) describes pregnancy as a time of emotional upheaval for the expectant mother, even under the most optimal conditions. Women undergo a wide spectrum of physical and psychological changes at this time. This shows a difficult time for women and children who experience pregnancy. Most abducted women and girls do not receive health care and this might result in them being harmed.

There is a concern that desperate parents sell their children for money to forced marriages and ignoring the responsibility of HIV/ AIDS. The partners whom they marry their children to might be infected by the disease from previous sexual relationships (Oyeke, 2010). These parents seem to care less of their children instead of supporting them they are destroying them in the name of tradition. These children experience difficult situations in these marriages as they are also inexperienced. They do not put first their children's wellbeing; instead they are led by their selfish reasons to get money and some status.

Modisaotsile (2013:8) elucidates that the other belief that makes young children vulnerable to early marriage and HIV/AIDS is the virginity cleansing myth. There is a belief that sexual intercourse with a virgin can cure a man of HIV/AIDS but that the girl will not be infected in the process. The statement shows that Young women are at higher risk of being abducted by these old men and this might also increase chances on the spread of the disease. The belief that having intercourse with a virgin places the young virgin at high risk of being harmed and that shows lack of knowledge among our communities. This places a need for educational causes on the impact of this behaviour. Victims of sexual abuse may experience depression,

guilt, self-blame, poor self-esteem, and feelings of inferiority in their later life (Briere and Runtz, 1987: 368).

2.8.2 Poverty

In addition, Isaac (2008:44) is of the view that Adolescents born in poverty therefore develop attitudes of helplessness and defeat which impairs their ability to interpret and deal with life in an acceptable way. It is for this reason that parents sell their young girls to older men in exchange for money. This puts those adolescents in a compromising situation of being forced into marriage. The idea of helplessness is instilled in their brains and they are treated as vulnerable dependant factors.

Okonofua (2013:9- 10) believes that girls married as children are known to experience educational, social and personal disadvantages as compared to those that marry later. He also observes that child marriage prevents girls from reaching their full educational achievements, enjoying optimal work and health opportunities, and bonding with their peers, maturing with full range of competencies and having the ability to choose their life partners. Clearly, child marriage is one of the most intolerable and serious human rights and social justice issue of our time. Child marriage is one of the factors contributing to slow progress in many democratic states, where it is taking place. The freedom of these states will remain unstable as long as such issues are not addressed properly and be implemented daily.

Child marriage is also a strategy for economic survival as families marry off their daughters at an early age to reduce their economic burden. Poverty might be the leading issue to these premature marriages. Most families that seem to be involved in their children being given away for marriages are really looking out for themselves; they intend to benefit from these marriages. These parents think that marrying off their young girls might reduce poverty from their households as they gain something (Mfono, 2000: 76).

2.8.3 Education

Pupils are deprived of their educational right after they have been abducted as they have to drop out of school. A teacher in one of Lusikisiki' school says, there is a 46% of dropout of pupils from school Makisto (2010). This number only indicates the estimated number of

reported cases not including the others which remained unreported. Lusikisiki is one of the deepest rural areas in the Eastern Cape Province that contributes to the increasing number of *ukuthwala* incidents. The place has been reported on the news on several occasions for abduction of young girls.

2.8.4 Parents role in *ukuthwala*

According to United Nations Population Fund (2012) report marrying of children may be part of local tradition, parents may believe it safeguards their daughter's future, poverty or conflict may propel it. But more often than not, child marriage is the outcome of fewer choices.

Rice (2014:388) observes that parental attitudes towards abduction marriage, as well as some men's willingness to resort to this to procure a wife, may be motivated in part by the concern that their daughters will not marry at all. For example: among Xhosas a young man is expected to have a wife at certain age, if that stage passes you without a wife that is embarrassing even among the community. It is also the same for girls; it is every parent's wish for her daughter to get married one day. This reason can be one of the encouraging factors for an individual to abduct a young girl.

The other traditional factor that puts young girls at risk of being married at young age is the belief that marriage will ensure her safety by preventing marital sex and out of wedlock. These parents claim that their daughters give birth out of marriage and they are left to be their responsibilities by their boyfriends. They resort to selling them away to men who marry them as long as they pay lobola which is the bride price (Modisaotsile 2013:7).

2.9 Prevention

According to UNFPA (2012:7) Alternatives to child marriage that build up girl's assets, coupled with activities to change harmful social norms, must be introduced and implemented so that girls can enjoy their childhood to which they are entitled and have the space to grow, learn and be a girl. This means that laws must be strict especially when it comes to situations of children being married and destroyed. A child is meant to be brought up in harmless environment. Modisaotsile (2013:8) concurs that improving access to education for both girls

and boys and eliminating gender gaps in education are important strategies in ending the practice of child marriage. This entails that if societies can work together in improving the lives of the children the world will be a better place. Opportunities must be created for these children in order for them to have a better future.

Okonofua (2013:10) suggests that going forward the extent to which countries address social justice issues such as the prevention of child marriage must be used as a benchmark for measuring the quality of governance in the African region in the coming years. These suggestions need to be implemented to build a better society. Government laws must be strict to cultural practices that harm citizens and the community involvement will be vital. The quality of governance depends on how much efforts are put in eradicating all social injustices faced by the continent. Good leadership also contributes to healthy and quality governance.

The United Nations International Children's Emergency Fund (2016) reports that it is committed to efforts to end child marriage and is able to use its global leadership position, its mandate to provide data and evidence on child marriage, and its broad field-based programming in various sectors to bring about change on this issue. In 2012, UNICEF was instrumental in organizing the inaugural International Day of the Girl Child, which had child marriage as its theme. The event raised awareness of the issue and helped refocus attention on this harmful practice. UNICEF programmes alone can only assist with additional support to other governmental programmes to end child marriage instead of functioning on its own.

Geraldine (2007:44) observes that among the Ibibios of Eastern Nigeria, girls can be married off as young as 13 years and poor, uneducated girls usually marry in their early teens. The tradition survives because women have few options except marriage and motherhood, and there are various pressures on girl's parents to conform with. For example; many African traditional parents believed that a girl child must not attend school and learn house chores. Schooling was seen as a waste of time and money, because the girl will leave and get married to another family.

2.10 Traditional *ukuthwala* and Lobola

Seymour (1970: 93) explains that a Bantu man chooses his own wife, but for his Great wife he is usually politic enough to choose a woman approved of by his father, by whom the greater part of dowry is normally paid. He also observes that among the Xhosa, a girl's father may lawfully receive engagement cattle from two suitors at one time; this puts the suitors on their mettle, not only in suing for the girl's affections, but also in obtaining her father's consent and, subject to the rule that a girl cannot be forced into a union. The highest bidder undoubtedly has the better chance and there is no form of forced marriage in this case.

In addition, Bennett (2010:7-9) observes that to avoid the arranged marriage, the girl would steal off to her preferred mate after dark. If the girl's family were to accept the proposal, further negotiations could proceed. If not, the suitor would be deemed wrongful- although far from criminal and the suitor would have to pay *bopha* (a fine). This is in contrary with the reports on media that labels the custom as crime. Some view it as defence to rape, human trafficking assault and many others. It was, in fact, unusual in African customs for young people to be forced to marry, because everyone was well aware that unhappy matches ultimately resulted in discord, with unhappy implications for the whole family. According to this view although forced marriage occurs in some African countries, it was not of their origin. They really considered happiness within the marriage, forcing it was not a good idea. This view also contradicts with the reports that have shown incidents where girls were forced into marriage by relatives and others.

Following this Olivier and Bekker (1995:17) argue that traditionally the consent of the man or of the girl was not required, although families would be loath to force a marriage against his or her will. Very often, in practice, the negotiations would be opened as a result of a request by the man or the girl. Nowadays the consent of the two individuals is required. In this case parents are the best to choose partners for their children whom they think are best for them. There has to be an agreement when the negotiations are taking place from the bride's side.

Mwambene and Sloth (2011:4) concur that if a man abducts a girl but fails to offer marriage, or if he does offer marriage but is deemed by the girl's guardian to be unacceptable as a suitor, a fine of one beast is said to have been insulted by the thwala without a consequent

offer of a marriage, or having been *thwala*'d by an undesirable suitor. This is proof that *ukuthwala* was not forced as it is portrayed by the media. The people involved in *ukuthwala* have a choice of agreeing to it or not.

Du Plessis (2008:14) observes that a break from tradition may have resulted in weaker social control mechanisms which in turn may have contributed to crime when the individual felt a lesser level of social cohesion and belonging. People might turn to criminal activities due to many social influences surrounding the really tradition. There is no clear knowledge on what is considered correct or not.

Du Plessis (2008:15) is of the view that Traditional African religion does not focus on the individual but rather on the community to which the individual belongs. This means that individual's opinion was not given much attention.

Following this, Bekker and Olivier (1995:17) agree that traditionally most marriages are arranged by the family groups, very often without the knowledge of the young man or girl (that is, in the case of a first wife); usually the family group of the future husband takes the initiative in making representations to the family of the girl, through emissaries. The negotiations in which all kinds of rules of etiquette have to be observed, are often protracted. The actual agreement is made between the two-family groups, and not between the two individuals concerned. The elders initiate the marriage of the two individuals involved.

Bennett (2010:94) elucidates that the reasons for resorting to *thwala* were many, and its popularity is perhaps easier to understand when thought of not as abduction but rather as an elopement. *Thwala* typically prefigured a lovelorn swain. This practice receives bad publicity based on criminal acts, but, Seymour (1970:94) in addition to Bennett observes the practice as more romantic, or at any rate rougher procedure resorted to when there is some obstacle to a marriage.

Outspoken cultural analyst Nomboniso Gasa enhances that in another instance, *ukuthwala* is a means of a man who cannot speak for himself with the opposite sex. Then consultations with the family of a woman he will like to marry will begin and the woman will marry the man. The man does not have much right to just abduct a woman without any consent. In this case *ukuthwala* is necessary because there is a

need for marriage but it proves to be difficult doing so. A girl was never forced to marry a man she did not want. Abducting and forcing a girl to marry you is a crime act, but not *ukuthwala*. This indicates many incidents of crime in the name of *ukuthwala*. People seem to be not so mindful of the actual practice (<https://www.news24.com/.../forced-marriages-sold-for-cows-20121111> Accessed: 16/11/2016).

Van Der Watt and Ovens (2011:14) observe that it is important to understand the foundation of *Ukuthwala* and to identify the spirit of Ubuntu behind the practice. In many African societies Ubuntu is the foundation of all social activities. For example; in the Xhosa culture sharing things among others is a good gesture. It is believed that you cannot enjoy being rich while others are poor or suffering.

Du Plessis (2008:15) observes that Modernisation has led to the destruction of the solid religious base of African culture which in turn, has led to people struggling with the conflict of losing their historical roots. Most people commit crime in the name of tradition, this shows that they have less knowledge concerning their tradition. People's ideas of their traditions have other stimuli; they are not as pure as before. The next generation will not be lucky enough to learn more of their history if such confusion still exists among African societies.

Following this Seielstad (1999:138) says there are a variety of cultural contexts around the world in which unwritten custom and tradition and oral transmission of those principles are the predominant source of law. Such traditions delineate dispute resolution methods and other systems of justice, define the limits of appropriate conduct, prescribe the substantive and procedural rules that should apply in a variety of circumstances and establish sanctions and other methods for enforcement. These contexts provide useful insights into the way's human groups with rich oral traditions, generate transmit, transform and enforce legal rules and codes of conduct. They illustrate how unwritten codes can operate in either the presence or absence of written codes, in some cases even supplementing or nullifying formal written rules.

Mireku (2011:519) states that indigenous law is a dynamic system of law with values and norms which continue to change and evolve within the context of the Constitution. That entails that the constitution is the ruler of all the laws available within a country. Laws must be drawn to be in line with the changing times, they must not remain the same as in the past

times. According to Nhlapo (1994:53) customary law and indigenous law is the system of norms which governs the lives of African people, particularly (but not exclusively) in the rural areas. It is a custom based system and its legitimacy lies largely in its claims to a direct link with the past and with tradition. Nowadays it is accepted that indigenous law has undergone profound changes through various kinds of interaction with European culture and with both the colonial and apartheid states. This means that indigenous law is a mixture of both Western and indigenous knowledge. It cannot be interpreted as pure in the present time.

For many years' parliament and the courts found it difficult to refer to marriages concluded in terms of customary law as "Marriages" and the term customary union was preferred due to its polygamous nature (Du Plessis,2008:4). Customary marriages in the past were conducted not under the present Constitutional laws; they only existed to their communities. The wife in a customary marriage has in all respects a status equal to that of her husband, (Recognition of Customary Marriages Bill). Women are victims of inequality regardless of the many laws made to protect them. Most cultural practices hinder their wellbeing and they are accepted by the societies. For example; amaXhosa adopted the practice of *ukuthwala* and women are groomed from young age for marriage at later stages and they are not given much opportunity like education, leadership and many others.

According to Bennett (2010:12) the court held that "we wish to make it very clear that a man, who forces a woman to have connection with him after marriage ceremony that has taken place without her consent, commits the crime of rape. This constitutes to the reason why men who abduct young girls are sentenced. The law is against abduction practice; it sees it as a crime. Colonial authorities insisted on the full consent of both spouses involved in a marriage, not by force.

Following this Mwambene and Sloth (2011:6) say that on the other hand courts have suggested that if there is a belief by the abductor that the custom is lawful and that the parents or guardians consented to the taking, it would not be abduction because it is a crime against parental authority. In other cases, people may perceive child marriage depending on where they come from, their beliefs, values and knowledge (Kasjim, 2016:98).

Bennett (2010:9) observes that, any customary marriage contracted without the spousal consent was deemed "repugnant to our civilised conscience. This law emphasises consent

between two parties involved in marriage. It regards marriage as a site of agreement between the two people getting married other than others. For example; arranged marriage in most cases is arranged whether by parents or relatives and the husband without the girl's permission where both spouses don't consent.

According to Nhlapo (1994: 49) both the colonial and settler states intervened in indigenous law only when such intervention was deemed necessary to control the African population or to advance some segregationist policy. In addition to official inattention, indigenous law was shunned, ironically, by liberal anti-apartheid circles precisely because of its association in their minds with apartheid politics. Indigenous law does not hold much importance in this case. The colonizers aim was to take over and rule the African population according to its own legislatures.

Rice (2014:387) asserts that *Lobola* is a central component of marriage. Suffice to say that no marriage of any sort is considered legitimate without *Lobola*. This is used to show the validity of marriage. This exchange formally transfers any children born of the union from the bride's lineage to the groom's, legitimize the marriage, compensates the bride's family for the loss of their daughter's productive labour, and often allows the family to acquire a daughter in-law of their own by using the daughter's *lobola* to pay bride wealth for a son. Moreover, marriage with *lobola* indeed there is no other sort raises the status of a female to full womanhood, and acquiring a wife by paying *lobola* confers considerable status on men. This entails that *Lobola* is very important in customary marriages to build a relationship between the families and ancestors.

Bronstein (1998:391) elucidates one of the consequences of *lobola* is that customary law wives do not have the power to prosecute their own divorces. She does not negotiate the bride wealth, and she may not tender its return. Theoretically, whether the bride wealth has to be returned on divorce depends to a significant extent on fault, but the wife is vulnerable to pressure to stay in her marriage if her family cannot or will not return the *lobola*. *Lobola* is more than just building a relationship between the two families involved but it also ensures that the two partners will not end the marriage whenever they want, especially the women. In this case, the emphasis to keep this union stable is put on the wife; she must maintain stability because she is sustaining her family's wealth and name. The man in this case might be proven to have more power than the women because if she leaves her husband, the family has

to return the lobola or she must remain there forever. Lobola can mean that one is bound into marriage and some have to endure pain if she cannot return it.

Bennett (2010:9) adds that customary law treated marriage as an agreement between families, to be negotiated by senior males and sealed by payment of *lobola*. Moreover, the rituals of courtship and the complex marriage negotiations gave brides-to-be a fair opportunity to voice their objections. It is in this instance where women or girls are given an opportunity to say something about the marriage their parents have arranged. This view shows that there is freedom involved here and that no one was forced.

Many cultures have traditionally exercised strict control over girls and women, reflected in a wide range of customs and practices. For example; virginity testing among Zulus is performed only on girl children except boys. These young girls are the only group expected to behave themselves and not involve themselves in sexual activities while boys live freely. It can be argued that the right to privacy for these girls is violated as the results are also shown to the public.

Most authors focused on the Colonial era when looking at *ukuthwala* practice. There are also few or no literature on the incidents of *ukuthwala* in the past. Some authors have highlighted how traditional practices harm individuals involved. They are not clear in the *ukuthwala* practice that is still meaningful to its people. The only available literature is more focused on the criminal acts of *ukuthwala* and its negative effects, especially on young children. Constitutional laws that prohibit Child marriage must be implemented and put more emphasis on stopping the harmful practices. There should be an implementation of laws to stop these forced marriages than only being written down.

In conclusion, the literature review confirms the many reasons surrounding *ukuthwala* of young girls and women and constitutional laws protecting the citizens from maltreatment. These include abduction as a tradition and abduction a criminal offense, issues of gender inequality in the context of a new society a democratic state. It was also argued that many changes in many African states were the results of colonization that took place. Indigenous laws and customary laws ruled many institutions in the context of Africa. The following chapter is a methodology chapter. It is going to provide the research design for the study while also analysing the data collected at the end.

CHAPTER 3

3.1 Introduction

This chapter focuses on methodology for the study. In this chapter the researcher discusses important issues on how the study was conducted. Hagan (2000:14) postulates that methodology entails the philosophy of the research process which includes assumptions and values as a rationale for research as well as the criteria used for interpreting data. All research methods should be regarded as bounded opportunities to gain knowledge about some set of phenomena, some substantive domain. All methods used to gather and to analyse evidence offer both opportunities not available with other methods, and limitations inherent in the use of those particular methods (Mc Grath, 1994: 154). This chapter looked at the research method, design, sampling, ethics consideration type of data collection that is used and also explains how the data is collected and analysing it for the study.

3.2 Research Method

Based on the nature of the problem, Qualitative method was used to comprehend all contributing factors to the problem. The purpose is to gather as much information as possible. The use of this technique assisted in development of the study and avoided generalizing ideas and providing the researcher with quality data.

Golafshani (2003:597) describes qualitative research as allowing the researcher to familiarize himself with the problem or concept to be studied, and perhaps generate hypotheses to be tested. Henning, van Rensburg, Smit (2004:3) explain that in qualitative study the variables are usually not controlled because it is exactly this freedom and natural development of action and representation that we wish to capture. Qualitative research is an umbrella concept covering several forms of inquiry that help us understand and explain the meaning of social phenomena as little disruption of the natural setting as possible, according to Meyers and Sylvester (2006:1). The study is qualitative in nature and it uses published information. These products included the following; newspaper articles, internet material on the topic and some court cases. These reports were reporting on bride abduction from different countries around the world. This information was already collected by the authors and been published.

The purpose of this study is to review related literature on the practice of *ukuthwala* in the past in comparison to modern practices. This study will employ court cases, law reports and media articles to make the research valid. It is hoped that this research will give *ukuthwala* a new view wholly different from the picture the media had given.

3.3 Research Design

Meyers and Sylvester (2006:1) define qualitative research as an umbrella concept of covering several forms of inquiry that help us understand and explain the meaning of social phenomena with as little disruption of the natural setting as possible.

The study has used qualitative approach with Ethnographic design. Ethnographic design is described as a procedure for describing, analysing and interpreting a cultural group's shared patterns of behavior, beliefs, and language that develop over time, where the researcher provides a detailed picture of the culture sharing group, drawing on various sources of information (Cresswell,2012:21). The ethnographic design best suits the study as it focuses on people's culture and the researcher's experience is also included. The study was undertaken to look at the custom of *ukuthwala* that is practiced in South African societies specifically among Xhosa communities. In this case the researcher will be exploring behaviours or cultures shared by people from their different communities where *ukuthwala* is practiced. In order to answer the research questions, court cases, law reports and newspaper articles on *ukuthwala* will be used.

3.3.1 Sampling

The study comprises of court cases, law reports and some newspaper articles which are reported on *ukuthwala*. The number of cases will be one court case on *ukuthwala* which was reported in Western Cape Province in 2014, three newspaper articles, KZN report conducted by Commission for Gender Equality, two law reports on the practice of *ukuthwala*.

3.3.2 Data collection

The study makes use of published material on *ukuthwala* which are in line with the objectives and the research question of the study. The material consists of court case, case law reports,

and some newspaper articles which were published material from the library, government websites and from the internet (Google Scholar). The selection of the material was based on their content which reports the incidents of *ukuthwala* practice and how the Constitutional laws of the country were applied to handle it.

3.3.3 Ethical consideration

The design of this research involves an extensive literature review. This means that ethical considerations to address and maintain confidentiality of participants will not be required. There will be no participants except literature to be analysed for discussion. Given that this research will involve the extensive use and review of different textual or internet based sources, the researcher will acknowledge in textual and footnote references all the sources used in conformity with the University of Western Cape policy on research. This is going to prevent any form of plagiarism in the study.

3.4 Data analysis

Henning, Rensburg, Smit (2004:128) cite Dey (1993) who describes data analysis as a process of resolving data into its constituent components, to reveal its characteristics elements and structure. In regard to this study, the unit of analysis is *ukuthwala*. One of the aims of an analysis is to describe both the data or the objects or events to which the data refer, (Henning, Rensburg, Smit, 2004). Analysis of data is an arrangement, ranking and ordering of data according to their categories and similarities for a common goal to be achieved (Mc Millan and Schumacher, 1993). The analysis was based on the court cases and other mass media products.

3.5 Reflexivity and Subjectivity in doing this Research

The topic is close to the researcher; the researcher is a product of *ukuthwala*. This is an old custom that was practiced in many Xhosa societies and others. But the researcher focuses on Xhosa culture. The researcher developed interest in the topic because of its nature and wanted to know or learn more about the practice. When my mom first told me about her marriage to my father, I asked her a question as to how did they meet. She replied by saying, “I was

abducted from the mealie field by your father and other men. I did not know him and never had been in a relationship before with anyone.”

I was shocked with mixed emotions and could not get around my head the idea that I am a product of *ukuthwala* and that my father was capable of doing such a terrible thing. It took time to sink in my head that it was tradition and people accepted it back then. Both my parents explained to me that it was tradition and that my mom was not the only girl who was abducted. Most of her friends and her neighbours were also abducted and they also have children and living a normal life. I had to accept it and understand because there was nothing I could change. I also regard myself and my siblings as children from a normal family and a blessing from God. In pursuing this study, the researcher wanted to raise awareness that there is a difference in a manner that the practice is conducted in modern days than before. Corrupt individuals are using the practice to satisfy their needs. Young children are being harmed, and this shows that the custom has deteriorated with time. Our societies have evolved into a democracy where everyone has rights and some traditions have to change.

In conclusion, this chapter dealt with the research methodology and process where the methods of qualitative were discussed in detail that best suited the aims and objectives for the study. Qualitative methods included the use of published material on the topic, like journals, case law reports and some court cases. Data analysis is also presented in this chapter. The results are discussed in chapter four, where the information will be provided. The following chapter deals with the discussion and findings of this study. It discusses the type of data that is collected and giving findings based on the information from the case law reports, court cases.

CHAPTER 4

4.1 Introduction

The court cases will be looked at, particularly, the evidence and decisions that were arrived at for this study. This chapter is also going to discuss the contents of the reports on the practice of bride abduction or *ukuthwala*. This practice is an ongoing process that seems to affect not only South Africa but other countries at large. Media seem to have played a huge part in exposing different views concerning the practice of abduction or *ukuthwala*. Societies affected by this practice are facing challenges of trying to protect their citizens from harmful traditional practices. Cultural practices existing in many communities cause conflict among the people and the government when they are harmful. The reports on the incidents of bride abduction are the evidence that this practice is still prevalent.

4.2 Jezile vs State

The first court case is the case of *Jezile vs State*. “The appellant was convicted of human trafficking, rape and common assault with intent to cause grievous bodily harm, and was serving sentence. This was an appeal against the conviction and sentence.” This is the case of a young man who forced a young girl into marriage with him and he abused her in the process and got caught in the end and is serving jail time for his actions. Jezile’s defence argued that he had married the girl according to tradition hence he did not see anything wrong because he had paid lobola and negotiated with the girl’s elders.

The court sentenced the young man after reviewing his case under the following: Practices associated with the aberrant form of *ukuthwala* do not comply with the requirements of the Recognition of Customary Marriages Act 120 of 1998 and cannot be protected under the law. The Act does not support abnormal practices in its purpose. The Act stipulates that both spouses:

- (i) Must both be above the age of 18 years; and
- (ii) Must both consent to be married to each other under customary law; and
- (iii) The marriage must be negotiated and entered into or celebrated by following customary law.

The girl in question is below the age of marriage, that is, 18 years. She is only 14 years old and there is no consent from the girl. Her uncles arranged her marriage with the accused Jezile and reached a decision without the young girl in question.

“During January 2010 the appellant noticed the complainant, then 14 years old, and decided that she would make a suitable wife. They had neither spoken to nor ever been introduced to each other at that stage, and the complainant was entirely unaware of who the appellant was or what his intentions were.”

Section 284(2) provides that it is no defence that the child or the person having control over the child consents. When a child is abused it does not matter whether her Guardian has agreed to it. The important thing is that the child’s rights have been violated, that is what the Act is saying. Many laws depend on the fact that if the child is not in a position to consent then she can be preceded by her parents, but this Act prohibits that with the fact that the person in question is a minor. For example; most girls being abducted do not consent to it but their parents have consented with the other party to abduct their daughter. In this case, the girl’s family had agreed and arranged for her to be abducted or married to the appellant.

The court also reviewed several international human rights treaties and South Africa’s obligations in relation to them, including the Convention on the Rights of the Child which stipulates that member states take measures to abolish traditional practices prejudicial to the well-being of children and also protect children from exploitation, and the African Charter on the Rights and Welfare of the Child which prohibits child marriage and betrothal. These are African charters dealing with human rights especially protecting the welfare of the children. The aim might have been to end child marriage and betrothal that is found in other countries.

United Nations Population Fund (2012) stipulates that girls most likely to marry before the age of 18 years reside in rural and remote areas, have little or no education, and reside in the poorest households. To assess the patterns and prevalence of child marriage, a precondition for effective policy and programmes, each country should collect and analyse its own data so that it can identify and target areas with high proportions of girls at risk. Rural girls are the most targeted children for marriage around the countries, the evidence is found in many cases that are reported. In this case, the Young man went to the rural areas of the Eastern Cape to search for a wife who was still a child that was under the age of 18 years. The appellant must

have known that his intentions were going to be supported by many. The report suggests that communities must be taught about issues concerning child marriage. Programmes must be created to enhance lives and try to stop or end the practice of *ukuthwala*. The places with high risks of *ukuthwala* must be the first to be targeted in these programmes.

United Nations recognises that early forced marriage is a harmful practice that violates abuses and impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls. Women and girls are the most group affected by this practice. The practice has negative impact on their lives as it changes them rapidly. They can be damaged physically and emotionally in the process as they are raped and abused.

The court also looked at Section 56(1) that stipulates that it is not a defence to the charge of rape to rely on a marital or existing relationship. It also refers to the provisions of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 on rape. It stipulates that any person, who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of (B), is guilty of the offence of rape. The appellant raped the victim because he claimed that they were married. He forced himself into her and beat her when she refused to sleep with him because he believed that when you are married you can have sex anytime. Whether you are in a relationship or not, rape is not acceptable, a person must consent to sex.

The court referred to the prevention and Combatting of Trafficking in Persons Act No 7 of 2013, which at the time of the judgment had been passed but had not yet entered in to force. However, the Court stated that its various provisions pointed to the intention of the Legislature to comply with its obligations under international human rights law. This law though new the court saw it as relevant to the case. The case included the forcible removal of a child from home by a stranger. In reference to the case, the girl that the appellant abducted did not know him. He also took her forcefully from her home to his place, the situation is the same where children were being abducted to be sold in other countries for many purposes including money and drugs. These young children were being exploited because they cannot fight back.

Recognition of Customary Marriage Act 120 of 1998 is also recognized by the court that stipulates that:

- I. A customary marriage existing at the commencement of this Act is for all purposes recognized as marriage.
- II. A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognized as a marriage.
- III. If a person or spouse is more than one customary marriage, all such marriages entered into before the commencement of this Act are for all purposes recognized as marriages and all such customary marriages entered into after the commencement of this Act, which comply with the provision of this Act, are for all purposes recognized as marriages.

The practice of *ukuthwala* on which the appellant relied for his defence was not customary marriage itself; rather it is one of the processes leading to negotiations for a customary marriage. The appellant has abducted the young girl to marry. The court found him guilty and sentenced him to 22 years in prison. The court was against the procedure he had followed; the man seems to have ignored other steps in process of *ukuthwala*. The court did not regard what he had done as tradition, therefore, he was punished.

Nhlapo explained in an affidavit that it was critical to understand that customary law posits both regular and irregular means of initiating and conducting a customary marriage. *Ukuthwala* is one such irregular method which would, if the precepts of the custom were correctly followed, eventually lead to the conclusion of a valid marriage under customary law. People take the traditional of *ukuthwala* lightly, they do not consider the rules that it comprises of. The current forms of *ukuthwala* are not considered as valid under customary law as they do not follow the correct procedure.

Section (8) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits discrimination on the grounds of gender. *Ukuthwala* undermines and impairs the dignity of a girl. She loses her self-esteem in the process; this law is against that. Women feel ashamed of themselves especially among their peers. They cannot act normal as before

due to what they have experienced. Lastly the appeal against the conviction for trafficking and rape was dismissed.

Ntlama (2012:26) observed that the Constitutional protection of the customary law system conveys nothing more than the institutionalised dominant status of common law principles over those of customary law. It reduces the significance of customary law rules to a system in which it is a stepchild to common law that has to be “merely tolerated”. This entails that when there are customary law common law rules precedes it. Although customary law is expected to have changes in it to accommodate present times, but is sometimes superseded by the common law rules.

The courts must be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for rested rights, and the protection of Constitutional rights. There must be a balance between the laws of the communities and the legal laws. Customary exist to deal with the customary issues of the citizens as their practices were customary in nature.

4.3. KZN Report

This is a report conducted in KwaZulu Natal Province by the Commission for Gender Equality on *ukuthwala* cases in that area. The Commission wanted to see intervention and policy response implemented by the provisional government. It defines the practice as;

“*Ukuthwala* was traditionally intended for people of the same age group, who already have intentions of marrying each other. Older men never engaged in *ukuthwala* and the custom was never intended to young children, against their will. Their sexual assaults were unknown.”

The commission for gender equality is alarmed by the low number of cases successfully reported, investigated, prosecuted despite evidence of the widespread practice of *ukuthwala* in certain communities. The following findings were made from different departments within the KZN government:

Department of Education

- ❖ Holding meetings with parents and the SAPS to conscientize the learners and the community about the dangers of the practice and steps that should be taken to address this;
- ❖ The Department of Education has a unit called Special Needs Education Services which offers counselling services to schools, particularly schools in areas where girls are vulnerable to abduction;
- ❖ Learner performance is closely monitored and focused support provided where essential;
- ❖ The issue of *ukuthwala* is infused in the normal teaching of life orientation as a subject;
- ❖ The Department of Education is engaged in a partnership with the Department of Justice and Constitutional Development, which also visits schools to bring awareness to learners about the dangers of *ukuthwala* and its implications;
- ❖ Workshops are held by SAPS who warn the community that those supporting *ukuthwala* will face the full might of the law;
- ❖ An *imbizo* (public meeting) was held wherein all government departments and *Amakhosi* were invited to discuss this matter.

Department of Health

The department has failed to make a report that was expected on the 16th of August 2012. It is the only provincial department forming part of the CGE's investigation that has failed. They only reported on the 16th of September stating that they do not collect data relating to the *ukuthwala* practice and that all other sexual assault cases are routinely managed and recorded without the cause being indicated.

Department of Cooperative Governance and Traditional Affairs (COGTA) and Provincial House of Traditional Leaders

The department reports that it is not in any place to provide statistical evidence on *ukuthwala kwezintombi* in KZN. The Department stated that its Traditional Affairs Branch is tasked with ensuring the implementation of and compliance with laws, policies and regulations affecting *Amakhosi* and their traditional communities, but no further information was provided on whether the practice of *ukuthwala* in such communities was receiving the attention of this Branch.

Office of the Premier

- ❖ The Province has no statistics on *ukuthwala* which can be handed over to the CGE. In this regard, the Premier's Office noted that research on *ukuthwala* and affected issues should be undertaken;
- ❖ Capacity building led by the Office of the Premier should be on-going. It was indicated that capacity building and awareness raising was already conducted at Bergville, Loskop, Zwelibomvu, Harding, Vulindlela and Jozini;
- ❖ It was indicated that there is no media strategy in place to raise awareness on the issue of *ukuthwala*. The Office of the Premier noted that this should be undertaken by the Ukuthwala Provincial Task Team.

Department of Social Development

- ❖ Social workers, when coming across *ukuthwala*, reportedly deal with such cases the same way they deal with any other case where the rights of children are violated, such as child abuse and neglect, offering the necessary counselling services;
- ❖ There are no specific guidelines or standard operating procedures for dealing with *ukuthwala*. Existing procedures in relation to child abuse, neglect and exploitation are deemed applicable;
- ❖ Currently the Department does not have statistical data on cases of *ukuthwala*. The Department notes that since *ukuthwala* is an arrangement between parents of the girl and the boy or young man in question, there is never any reporting by the families concerned. *Ukuthwala* was reported in one instance in Umzimkhulu when the *induna*, who is conscious of children's rights, reported an individual case to the local SAPS. After a discussion was held on the same day with the respective families, about the disadvantages of *ukuthwala* for an underage girl, the families accepted that they had violated the girl child's rights. The child was brought back home to continue with her schooling;
- ❖ The Department will deal with reported cases of *ukuthwala* through the application of section 110 of the Children's Act 38 of 2005. Should any adult be convicted of an offence against a child his name will be included in both the child protection register in accordance with the Act as well as in the Sexual Offences register in accordance with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- ❖ Continuous prevention and awareness programmes will be conducted particularly in areas where *ukuthwala* is still rife in order to ensure that the rights of children are upheld.

National Prosecuting Authority (NPA)

- ❖ Prosecutions are undertaken in relation to *ukuthwala*. Perpetrators are charged in terms of the common law offences of kidnapping and assault with intent to do grievous bodily harm, and the statutory offence of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- ❖ The NPA representative on the Provincial Task Team on *Ukuthwala* under the auspices of the Office of the Premier reported that the draft provincial action plan has not been finalized and to date, it has not been implemented.
- ❖ As no separate statistics are retained in respect of *ukuthwala* cases, the NPA reported that it is not in a position to provide statistical data on possible cases of *ukuthwala* in KZN.

South African Police Service (SAPS)

- ❖ The Family Violence, Child Protection and Sexual Offences Unit (FCS) members are mandated to investigate *ukuthwala* cases in terms of their FCS mandate
- ❖ The standing operating procedures for reporting of FCS related to crimes provide the investigating officer with guidelines on investigating *ukuthwala* cases
- ❖ Members have received the necessary training on FCS, including matters relating to sexual offences and child justice. Other ongoing training includes multi-sectoral training with other government departments and NGOs.
- ❖ In relation to abduction and rape for 2011 and 2012 as received at Ladysmith FCS, SAPS reports as follows:

	Received	Court	Withdrawn	Undetected	J 50 issued
2011	5	3	3	1	1
2012	2	1	1	1	

- ❖ Awareness campaigns are held with other government departments and NGOs in relevant areas. A joint *imbizo* was held and pamphlets distributed in the area. SAPS reports that communities are encouraged to report these cases to the police, and that talks are held at some local schools regarding the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children's Act.

Recommendations

- ❖ That the *Ukuthwala* Provincial Task Team finalizes the provincial action plan and oversee its implementation, which the CGE will monitor.
- ❖ All departments develop the necessary protocol, guidelines and training for district staff on how to recognize, respond to and report cases of *ukuthwala*.
- ❖ Adopt a multi-sectoral approach where all departments and the NPA work together to gather and track statistics and data in relation to *ukuthwala* to enable the province to monitor its incidence. This should be used to assess the impact of the provincial action plan.
- ❖ Further awareness raising initiatives with more collaborative outreach interventions by schools, amakhosi, SAPS and other stakeholders to speak out against *ukuthwala* and provide communities and children with information on what steps to take to report and address incidents.

4.4 Case law by Moore and Himonga on *ukuthwala*

They report that the practice of *ukuthwala* seem to have surfaced in some parts of the country. The South African Law Reform Commission got concerned about the recovery of recent *ukuthwala* practices and started investigation.

It is found out that *ukuthwala* is being practiced in destructive ways that for example; enabled older men to violate young girls. The current literature discovered that the practice is linked to poverty, gender-based violence and criminality, while other scholars believes that the practice is rooted deep in the rural of Eastern Cape and has always been violent back in the 1800s. The Jezile case is the first case on *ukuthwala* based conviction in the Western Cape.

They referred from Mwambene and Sloth as follows;

Forced marriage fails the Constitutional compatibility test on a number of grounds, including Freedom and Security of the Person (Section 12), the right to dignity (Section 9), and the best interest of the child (Section 28(2)).

These two authors advocate against the blanket criminalising the practice instead recommend positive things about the *ukuthwala* that can be recognised. Lastly the Recognition of

Customary Marriage Act requirements including consent are also overlooked. Consent is regarded as an important factor.

4.5 Law report by Boezaart

The report explains *ukuthwala* as widely practiced in the rural areas especially prevalent in the Nguni group among the Xhosa. According to the custom the girl will be treated with utmost respect and kindness and *ukuthwala* does not amount to forced marriage. The media has drawn attention to the fact that offences are committed in pretence of the *ukuthwala* custom.

“Unfortunately press reports have drawn attention to the fact that offences are committed against girls under the pretence of the ukuthwala custom. Maluleke avers that ukuthwala nowadays involves the kidnapping, rape and forced marriage of girls by much older men. In both international law and common law, the state bears the responsibility to protect the child from violence, injury and abuse. Accordingly, this matter is under investigation.”

It was identified that the custom be distinguished from the common law as abduction. Abduction entails the removal of a girl or a boy child from parental care with the intension of having intercourse with her or him. Contrary to that only girls are taken away in the custom, usually with the parents' consent and without the intention of seduction.

Issues of inequality in all the three cases appear. The women are overtaken by men and many traditional practices or laws seem to favour men more than women. Women seem to be treated as subjects and are not equal to men. The courts have considered the indigenous laws and want to make sure that they are in line with the Constitutional Rights.

Ndulo (2011:88) stated that customary law has a great impact on the lives of the majority of Africans in the area of personal law in regard to matters such as marriage, inheritance and traditional authority. In both cases customary laws has been applied. In Jezile's case it is relevant because the case involved marital issues; the man had forced a girl to marry him.

Traditions have existed for decades to its people. They exist for a specific purpose in each group where they are being practiced. Ending or excluding them in our societies might result

in social destruction. One cannot separate an individual from her or his tradition as they determine a sense of belonging. The government laws must take into consideration the people's needs for their traditions. The country's constitution contains Bill of rights that protects everyone against any form of injustice. The 1996 Constitution's s 9(1) (c) provides that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, Language and birth.

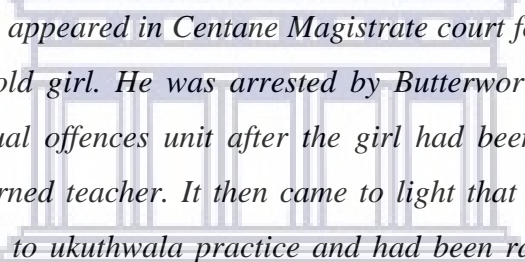
Ukuthwala might be ruled unlawfully under Section 9 of 1996of the Constitution. Section 9 ensures that everyone is treated equally and can exercise his or her rights everywhere. Children and women are included and *ukuthwala* is violating this right as it involves crime. The victims of *ukuthwala* in this case are mostly forced, raped, drop out of school and many others. This practice is seen as violating human rights undermining the democracy in many countries. Most authors argued that the practice has deteriorated with time. It is seen as irrelevant to the present time (Okonofua 2013, Bennett 2012 & Terry 2007). Media portrayed the practice as a criminal offence. People who practice it are seen as individuals who are violating children and women's rights. Many incidents that are argued about include young children who are under the age of 18 years. In ancient times where, indigenous knowledge and laws were relevant, information was passed from generation to generation orally. This practice received attention when the media intervened and displayed scenes that left questions about the practice in the public.

Forced marriages are still taking place in our societies across the globe, although there are precautions or laws that are in place to reduce the increasing numbers of bride abductions or forced marriages of young people. The report below is a case from the United States on forced marriages that took place there. (<https://www.nytimes.com › 2017/10/14 › Americas-child-marriage-problem>) report as follows:

Forced and child marriages happen almost everywhere, yet only 10 states or jurisdictions have specific laws that can be used to prevent or punish forced marriage.

In this case forced marriages are taking place among immigrants that are in America. This case is similar to many that have been reported in other countries, where the victims are harmed physically and psychologically. Here the victims are also killed for refusing to be forced in those marriages. This suggests that these children are not safe at all and that they are facing extremely hard time of their lives as there are few laws specific related to the issue.

Men who abduct young girls often face jail time once they are caught. In most cases the men who abduct young girls are much older than them enough to be their fathers and grandfathers. In the rural Eastern Cape cases of *ukuthwala* are very high and some villages tend to conceal the practice of *ukuthwala*. In most cases the parents of the children are the ones who give away their children to these men in exchange for money/Lobola as they claim. There seems to be conflict of interests on the part of the parents in rural areas more especially when there is an exchange of money or lobola along the way. Makwabe (2015:27) reported on this issue:



“A 36-year-old man appeared in Centane Magistrate court for alleged abduction and rape of a 16-year-old girl. He was arrested by Butterworth family violence, child protection and sexual offences unit after the girl had been reported missing from school by he concerned teacher. It then came to light that the young girl had been abducted according to ukuthwala practice and had been raped by the suspect. The involvement of the parents remains unclear. Another 43-year-old appeared in court from Sisonke Township for the same charges. In this case the lobola was paid to the 15year old girl’s family. Gender Commission has called for abolishment of the practice claiming that it violates a myriad of laws, including Children’s Act and the country’s Constitution.

The incidents in the report indicated several issues around this *ukuthwala* practice. Firstly, the issue of age appears where these young girls seem to be abducted by older men than them and secondly; they have been raped and the parents were involved in the other case. Both these men were sentenced after their actions were discovered. Gender Commission is also reported to be of the view that this cultural practice should be abolished as it violates children’s rights.

Ukuthwala hinders the well-being of individuals among societies. This cultural practice is reported to be exploiting young children and women in many communities and violating their

rights by doing so. Many organisations are against this cultural practice as it is associated with crime. Commission for Gender Equality KZN report (2011);

As evident, the practice of ukuthwala and concomitant forced marriages violate international human rights of instruments to which the South African government is a signatory and is therefore obliged to uphold.

South Africa is a state ruled by mixed legal system, which consists of customary law, and Roman Dutch law. Each law has its components and functions that make it unique from the other. Customary law is said to be the primary law of the various ethnic groups of Africa. It also has a great impact on the lives of its people especially in areas such as marriage and others (Ndulo, 2011:8). In order for an individual to understand the difference, one must take into consideration the formation of these laws.

There will always be a conflict between customary laws and Roman Dutch law because of their nature. The systems of the country functions more under Roman Dutch law than Customary. In the case of *ukuthwala* the conflict may relate negatively where an individual is going to view it under Roman Dutch law. This practice is purely indigenous on its own in the South African context. One cannot view *ukuthwala* under the new modern society as there are components that cannot be defined under Roman Dutch law. It can only be viewed looking at historical background of the people who practice it.

Rural areas of South Africa are one of the underdeveloped parts of the country, where people still follow an old traditional living state. It is where marginalised individuals are found, although there are little improvements. These people hold dearly some of their practices because some are not exposed to civilisation, some are less or uneducated. Roman Dutch law was imposed on African countries and is perceived to be superior to the indigenous laws.

They further state that the colonisation of Africa by the western world meant the imposition of European public and criminal law in the new colonies without exception, and the private indigenous law was recognised as long as it was not in conflict with the European sense of morality and justice. This statement suggests that our laws became subservient laws. This means that the values instilled on communities might be of Western culture for example, *ukuthwala* custom, holds value to Xhosa culture and the custom contains a lot of their cultural material where these people are concerned. The indigenous people in the African land had no

desire or volunteered in changing their laws or being imposed. Although indigenous laws are recognised in the constitution they do not hold equal status with the Western law where there is conflict of the two.

There are still communities or individuals who promote *ukuthwala*. They claim that the practice is part of their social living. Traditional practices mark a significant role in a society where they are practised. (<https://www.iol.co.za-news-opinions-divided-over-ukuthwala-1791001:04/12/16>).

The commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities believes that ukuthwala must be protected.

This commission's argument is that *ukuthwala* is a cultural practice that must be protected and those who commit crime using it must be arrested. The pure form of the practice does not involve crime. They perceive it as one of their lawfully tradition that must be taken in to consideration by others. The commission believes that what these reports say is a different version of the original custom.

Democratic countries are guided by the Constitution on how to deal with its affairs. Human Rights mark an important role of freedom. They play a huge role in ensuring that people enjoy as much freedom as they want in their country and that people are encouraged to exercise them in their everyday interactions. These rights focus specifically on the well-being of women and children. Jacobs and Hervish (2011:1) reports that:

It is estimated that 85 million young women have been married before 18 years in developing countries and without their consent.

Studies reveal that abduction practices targets girls under the age of 18. The reports show that these young children are forced into marriage even before they are able to make their own decisions. According to other traditions puberty is the suitable stage of life for a girl to get married. This is where the girl starts to experience changes in her body. This applies in most traditional African societies where age is not understood in numbers. It seems other countries give credence to age as a determinant factor when it comes to marriage.

The same problem of bride abduction is also experienced in Kyrgyzstan as *alakachu*. *Alakachu* is a practice that allows young adults who want to marry, to do so when their marriage is not approved by their parents for financial or social reasons such as different class status or the parents having arranged their marriages to others (Kleinbach, Ablezova and Aiteva, 2006:192). The case is similar to many reports that were viewed, where parents arranged marriages or the couple is not financially stable to pay for ceremonial arrangements. For example, *ukuthwala* whereby the parents agreed for their daughter to be abducted or the daughter agreed with her suitor. Forced marriages appear as a threat to human rights laws and to a democratic state.

Ukuthwala at times follow the cultural practice of virginity testing. Olson and Moreno (2017:1) define virginity testing as a practice some communities use to detect which women or girls are virgins. This practice is often used among young girls and women to ensure that they are not involved in sexual activities especially before marriage. The purpose of this practice might be to prepare a girl for marriage. This might lead to higher or increasing number of girls being abducted by men because of what it stands for.

According to Le ClerckMadlala (2001:535) many rural women, see virginity testing as the only way to preserve what they view as the lost cultural values of chastity before marriage, modesty, self-respect, and pride. For them, imbuing girls with these lost values represents the surest way to repair the frayed moral fabric of society that has led to the ever-increasing problems of teenage pregnancies, STIs, and HIV/AIDS. Contrary to the view there are myths surrounding the practice of virginity testing where some men think that sleeping with a virgin girl reduces the risk of getting the HIV/AIDS virus. This means that the purpose somehow might not be fulfilled as expected. There are other issues that need to be considered like ensuring that the young girls are not exposed to harmful acts by those with different or hidden agenda for them. For example: when a girl is a virgin, men sees an opportunity to make that girl a wife and it is the same reason why these men abduct young girls in the practice of *ukuthwala*.

Virginity tests have been recognized internationally as a violation of human rights, particularly the prohibition against “cruel, inhuman or degrading treatment” under article 7 of the International Covenant on Civil and Political Rights (ICCPR) and article 16 of the Convention against Torture, both of which many countries have ratified. Ratification of

virginity testing as violating Human rights has not been the solution as there are still reports on the issue like the increasing *ukuthwala* cases.

These practices contradict with the democracy laws that encourage freedom of an individual. Another similarity with forced marriage is that there is also no consent from the victims and their privacy is not respected especially in the case of virginity testing. According to United Nations Educational Scientific and Cultural Organization (200:1) expectations about attributes and behaviours appropriate to women or men and about the relations between women and men in other words, gender are shaped by culture. This means that how a certain gender behaves is determined by which culture the individual comes from. Cultural influences on individuals might put them under a lot of pressure leading them into giving in with the expectations.

A shift from the past to modernisation has caused a rift in shaping people's identities. Peoples' past histories can determine their future as they can be used as the foundation of an individual. *Ukuthwala* among Xhosa society can be regarded as one of the historical components that has an important significance among its people. Few individuals might feel that their history is important and that some traditions be still practised.

Section 31 Act 108 of 1996 stipulates that people have a right to:

- iii) Enjoy their culture, practice their religion and use their language and
- iv) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Recent incidents of *ukuthwala* are dominated by crime and are being criticised by the public and some cultures might be labelled as abnormal with harmful traditional practices. This view shows that although the Constitution allows the enjoyment of different cultures by its people but it might condemn some traditions by individuals that are harmful in nature. It is not clear on what exactly people should do or avoid under certain circumstances. This view also supports that people can enjoy their cultures as it is also stated in the Constitution.

The conflict between culture and the changing times is evident in South African lives. It has become a challenge to find solutions regarding the issue. Change also results from deliberate efforts to influence values through changes in the law or government policy, often due to pressure from civil society (UNESCO, 2000:1). The policy making process should consider

the many life aspects of its recipients to avoid clashes. In this case the change is obstructed by cultural boundaries, whereby some people consider their cultures more very important than the social change that is reinforced to them.

She continues to describe culture as something that was never defined before. Instead people created their societal needs. Culture may never be used as an excuse to violate a person's inalienable human rights. This is contrary to the views of those who believe that *ukuthwala* and forced marriage is a cultural practice and that they should be excused as they are acting within their rights. She's also in recognition of the fact that cultures should be valued and passed on.

Political factors, economic and social factors play a huge role in the changed practice of *ukuthwala* in South Africa. Transitioning of the state from its original form to the new democratic state also brought up its influences and changes. South Africa before colonization was purely based on customary laws which were not determined by any court. People from different societies set laws suitable for their state of living. The politics of the country changed. People became modernised and some get educated and their way of thinking advanced, and *ukuthwala* in this case might be a hindrance to their development. Poverty on the other side might also be a contributing factor whereby parents marry off their children in exchange for money. This means what was relevant before might be irrelevant in the present living. Most practices are irrelevant because the cultures have evolved and the times have changed in which we are living in. Many societies adopted new living conditions according to the influences from the surroundings.

Marriage is social in the sense that it is publicly recognised and regulated by civil or religious authorities in virtually every culture (Duvall and Miller, 1985:6). This explains that marriage is an acceptable practice in our societies and that people rejoice in it. The Constitution in the Recognition of Marriage Act 120 Of 1998 also recognises it. The Children Act no 38 of 2005 states that children must be protected. Child marriage does not seem to be complying with the above component of the mentioned view.

Nguyen and Wodon (2014: 1) state that the incidence of child marriage is dropping, but only very slowly. In many countries; laws have been adopted to prevent marriage below 18 years of age, but they're often not well-enforced and more needs to be done. South Africa like

those states mentioned above is also facing the issue of laws to end child marriage but not well implemented in the daily living. The issue of *ukuthwala* is still an issue as some communities find it relevant to them and they have less or no knowledge at all about human rights violation or laws that prevent them from doing so.

There is still a gap in finding the balance between the traditions and breaking the law. Many traditional practices contain elements of crime which makes it difficult to regard them as pure. Tradition on its own is pure hence the Constitution recognises their existence in our societies. *Ukuthwala* practice in its traditional form has been argued as an ancient practice that people resorted to when normal marriage proves difficult to do so. The cases presented on media are unique cases of the practice which had so many factors that had led to the individuals doing it. They are different from the actual traditional practice, as there is no tradition that allows harming the people.

4.6 Case studies

It has been found in some cases that most parents conform to the abduction of their children because of poverty. It also seems that some parents are irresponsible and greedy that they will sell their children to the devil in order to receive money. Looking at most of the reports many children were asked from their parents. For example; in Jezile's case he went to talk to the uncles of the girl child and paid R8 000.00 to them and then they agreed that he may forcibly marry the young girl. In the case of Lusikisiki most parents claim that these kids become pregnant before time and that increases more responsibility to their homes. They claim that no one takes responsibility after the child is born, their boyfriends dump them.

The girls are deprived of many opportunities and empowerment of themselves and that they will end up being unskilled workers. In order to stop the cycle of generational poverty in these families a step needs to be taken to avoid this affecting the next generation.

Gender inequality issues are never ending in South Africa and other states around the globe. In the case of *Jezile vs State*, Jezile went to the Eastern Cape in search of a wife and he found a young girl who cannot defend herself and then he proceeded with lobola negotiations with the uncles and they agreed. When the young girl attempted to leave him, her uncles brought her back with violence. Instances of this nature impact negatively on systems of the country

including Gender Equity Acts that fights for equality among the people. Gender Acts needs to reinforce its laws to the people to protect many victims from the societies where masculinity is dominant. Equality implementation in real life still remains the issue in some communities. Feminist approaches on social roles which women and men acquire in the society, their experiences and many others. These theories view women as being the most misrepresented, undervalued patronised victimised silenced and many others.

4.7 Traditional provisions in the Constitution

There are Acts where these traditions are recognised in the constitution. It seems as if making democracy works for everyone in South Africa is a daunting challenge that creates a rift especially where traditions are concerned, (Mfono,2000: 79). Tradition is good because it is old, carries the ancestors' wisdom and arouses positive sentiments. In the English-speaking settler democracies, indigenous people have a better chance of success of asserting rights presented as traditional, part of their indigenous culture (Rigsby, 2006:115). It is proving to be difficult to end some harmful traditions in practice. The country has only drawn clauses preventing people from practising them but there are still individuals who are still resistant and holding on to their traditions without evolving them. In this case forced marriage might also result from what Anju (2013:3) explains as marriage often determine the status of a woman in many societies where parents tend to worry about meeting social expectations and marriage being the cement to tribal connections or settling obligations.

The abuse of children hinders their well-being and might exploit them for the rest of their lives. Child marriage is a contributing factor to the disrupted childhood of many, building a society of broken families in the future and tarnishing the image of a democratic society. Although cultures have evolved, in reality it is still a challenge for some changes to take over. It seems that there are few individuals who enjoy the benefits of freedom. It is also clear that there are things that remain unchanged where individuals are concerned. Values and beliefs provide an identity to people and that person's behaviour is determined on those beliefs, they are very strong in shaping an individual and changing them might prove difficult. Cultures are portrayed as very oppressing to women especially when it comes to decision making. These cultures do not practise democracy in their existence and that is shown in the

In the South African context where there is plural legal system, Customary and Roman Dutch law do clash. There is a huge conflict between the two and that affects the smooth operation of democratic principles. Bekker, Labuschagne, Vorster (2002:4) explain that Legal pluralism may be interpreted in different ways. The narrow interpretation is based on a dual systems theory of legal pluralism. In a simplistic sense it may be described as the joining of European or Western and traditional forms of law. Both or all legal systems recognised in a single society operate within the colonial framework of official law.

People are still practising customs that are regarded as harmful in the Constitution. *Ukuthwala* will never be viewed as custom relevant to the people living in the new modern society for its contents. This practise is indigenous to its people and its value is carried out in their hearts. This view also highlights that it is also not possible for an individual to understand the origins of the custom without looking back at the time before Colonisation took over in our societies when indigenous law was the only ruling law.

In conclusion, this chapter reviewed decisions that were taken by the courts on different cases reported on *ukuthwala* and other related cases. These cases were used to give a clear background to the study. Violation of human rights is still an issue that is facing so many societies. Child marriage cases have not been proven to be decreasing or ending anytime soon, that still brings about so many questions about the safety or future of the young generation. The court cases and reports served as evidence of the incidents of bride abductions and gender inequality issues that are increasing daily in our societies. It is also evident that the implementation of the Constitutional laws is slowly making progress. The following chapter is going to provide conclusion of the study. The conclusion gives an overall summary of the whole study. Recommendations of the study will also be provided.

CHAPTER 5

This chapter provides the summary of the study. The study established out that this old practice is still on-going in a different manner. It is now dominated by criminal acts. These include rape, abduction and human trafficking and many others. Many Human Rights Organizations are disputing this cultural practice while others are of the view that it must be protected.

The first chapter revealed that the custom was an ancient custom that had been practiced by many cultures including Xhosa Culture. The custom is now dominated by criminal acts including harming young girls and women. The media reported some incidents of the practice with bad consequences. Many young girls are reported everyday having been abducted by older men to them and some claiming to be practicing their culture.

Chapter three focused on the methodology of the study. It presented information on methods that were used to collect the data for the study. The study was literature-based and the information that was used mostly was published material which was discussed further in chapter four.

Chapter two dealt with the *ukuthwala* tradition as still active to many communities around the world and that young girls as young as twelve years of age are forced into marriage some by their parents and relatives. These young girls are harmed physically and emotionally by the men abducting them. Children have rights and some laws are in place to protect them from harm like children's Act no 38 of 2005. According to most countries' constitutions, a child is someone under the age of eighteen years. They emphasized that this is the age of consent for marriage.

Gender inequality issues that arise in many societies were revealed. Most communities are still practising manpower over women and that is common also in the South African context whereby women and children are abused by their partners and forced into marriages. *Ukuthwala* tradition has also been displayed as one constituting to gender inequality, as women are the ones who are victimized by the Practice. Some authors argued that there is a traditional *ukuthwala* that does not include criminal acts. These authors based their argument on the customary laws that are in place today and some other indigenous laws. These laws

explain or give an idea to an individual about the living arrangements that took place in the past. These authors view the practice as illegal in the democratic sphere.

Chapter four focused on discussion and findings where court cases, journals, media reports and other case law reports that were available and relevant to the topic. This is a widespread practice that African societies are facing. The countries have developed Constitutional laws that prohibit it. The court cases revealed gender inequality issues where women are treated as subordinates. The application of customary law acts in their decision making; Acts on indigenous laws; children's acts; marriage acts; and many others were also considered in the decision making by the courts and newspaper articles which form part of mass media is also considered. Reports revealed that although state developed laws to protect women and children that are not enough as there are still increasing incidents where women are victimised specifically in *ukuthwala*. It was also revealed that bride abduction might be influenced by many other traditional practices like virginity testing. In this case, young girls are tested in preparation for marriage to their spouses.

Chapter five is the last chapter of the study which is the conclusion. It provides the study with a summary of each chapter that is available to give a reader an insight into what has been discussed in the study. It also gave the conclusion and recommendations of the study to be researched for future purposes.

The study has find out that democratic society prohibits *ukuthwala* of young girls. It claims that this custom violates the Rights of children especially young girls. Some cultural practises are no longer in use as they are not relevant to the present time. *Ukuthwala* is also one of the practises that are not relevant in modern society under the Constitutional laws that are in place. Many reported incidents of *ukuthwala* are characterised by criminal acts and media may be responsible for such acts according to the way it portrays incidents to the public. Many authors argued about *ukuthwala* in their different studies. The tradition of *ukuthwala* is acceptable as a cultural practice but other authors argued on the current incidents that include crime and concluded that it is not relevant anymore.

There is still a gap in finding ways to end the practice of *ukuthwala*. The Constitutional laws also do not specifically focus on the abduction of young children. This proves it difficult to end forced marriages in many societies. Young children and women continue to be victims of

male dominance. They practise their powers over them although there are some organisations developed to improve their lives. It seems that democracy has areas which it does not reach, that is proven by the failure to stop violence against women and children by ending harmful practices. Secondly, culture should be preserved for future generations as it educates or gives them more knowledge about their backgrounds.

5.1 Recommendations

- Existing policies and the legislature should be improved by implementing its laws in real life.
- Young women including parents at home must be educated about the implications of marrying their children to older men and with partners they do not love.
- The laws that are in place must protect the customs of the citizens and also the people must stop misusing them. Customs do change with time and people must understand that.
- Further, explore the conflict between Customary and Dutch Law. - Conducting interviews among women who experienced *ukuthwala* in the past and the young girls in the present might prove useful in exposing the difference.
- Explore how indigenous cultures have evolved since the modern era.
- Women's and children's rights can be explored further in the African context.
- Reasons why the custom resurfaced again in most South African communities, especially after democracy.

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