UNIVERSITY *of the*
WESTERN CAPE

Should South Africa criminalise *ukuthwala* leading to child and forced marriages?

A mini-thesis submitted in fulfilment of the requirements for the degree of Human Rights Protection Master of Law (LLM) in the Faculty of Law of the University of the Western Cape

By Roberta Hlalisa Mgidlana

Student Number 3133337

Prepared under the supervision of

Professor Lea Mwambene

Professor Julia Sloth-Nielsen

Date: 12 June 2020

Declaration

I declare that '***Should South Africa criminalise ukuthwala leading to child and forced marriages?***' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Full name: Roberta Hlalisa Mgidlana (3133337)

Signed: _____

Date: _____

Supervisor: Professor Lea Mwambene

Signed: _____

Date: _____

Co-supervisor: Professor Julia Sloth-Nielsen

Signed: _____

Date: _____

ACKNOWLEDGEMENTS

I would like to convey my heartfelt thanks to Professors Julia Sloth-Nielsen and Lea Mwambene. Without your invaluable guidance and patience, this thesis would have never seen the light. I cannot express enough thanks for your continued support. I greatly and genuinely appreciate the learning opportunity.

The financial assistance of the National Research Foundation (NRF), (Grantholder-Linked Student Support - Prof Lea Mwambene Unique Grant No. 99216), towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the NRF.

TABLE OF CONTENTS

KEYWORDS/PHRASES vi

LIST OF ABBREVIATIONS vii

CHAPTER ONE: INTRODUCTION AND OVERVIEW OF THE STUDY 1

1.1 Introduction 1

1.2 Problem Statement 3

1.2.1 *The State v Jezile* 4

1.3 Significance of the Study 7

1.4 Objectives of the Study 9

1.5 Research Questions 9

1.6 Methodology 10

1.7 Literature Review 10

1.8 Overview of Chapters 13

CHAPTER TWO: THE NORMATIVE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS WHICH CAN BE USED IN ADDRESSING FORCED MARRIAGES AND CHILD MARRIAGES IN SOUTHERN AFRICA 15

2.1 Introduction 15

2.2 International and Regional Legal Frameworks 16

2.2.1 Definition of the child and minimum age of marriage 16

2.2.2 Consent to marry 19

2.2.3 Registration of Births and Marriages 22

2.3 International and Regional Jurisprudence on Forced Marriage and Child Marriage 25

2.3.1 Joint General Recommendation/General Comment no. 31 of the Committee on the Elimination of Discrimination against Women and no. 18 of the Committee on the Rights of the Child on Harmful Practices (2014) 25

2.3.2 Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage 28

2.4 Case Law 32

2.5 Conclusion 38

CHAPTER THREE: THE SOUTH AFRICAN LEGAL FRAMEWORK AND DEVELOPMENTS IN ADDRESSING THE MALPRACTICES SURROUNDING *UKUTHWALA* 40

3.1 Introduction 40

3.2 South African Legislative Measures 40

3.2.1 Pre-constitutional jurisprudence on *ukuthwala* 40

3.2.2 Constitutional protection 44

3.2.3 Criminal Protection 49

3.2.4 Civil Protection 53

3.2.5 Prohibition of Forced and Child Marriages Bill: Overview & Critical Analysis 58

3.3 Conclusion 64

CHAPTER FOUR: THE ADVANTAGES AND DISADVANTAGES OF CRIMINALISING FORCED MARRIAGES AND CHILD MARRIAGES RESULTING FROM *UKUTHWALA* 65

4.1 Introduction 65

4.2 Community Perspectives on *Ukuthwala* 66

4.2.1 The process of *ukuthwala*: marriageable age and consent 66

4.2.2 Criminal offences surrounding *ukuthwala* 67

4.2.3 Government and courts against culture: 68

4.3 Theoretical Perspectives on the Criminalisation of Harmful Practices Generally 69

4.3.1 Feminists condemnation of harmful cultural practices 70

4.3.2 Cultural relativism 71

4.3.3 Universalism (Human Rights) 74

4.3.4 Reconciliation of Universalism and Cultural Relativism 75

4.4 Advantages and Disadvantages of Criminalising Forced Marriages and Child Marriages 77
4.4.1 Arguments against criminalisation 77
4.4.2 Arguments for criminalisation 80
4.5 Conclusion 80
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS 81
5.1 Conclusion 81
5.2 Recommendations 82
BIBLIOGRAPHY 84

KEYWORDS/PHRASES

Abduction

Child marriage

Children’s rights

Cultural defence

Forced marriage

Girl child

Ukuthwala

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and People's Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of all Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-Governmental Organisation
RCMA	Recognition of Customary Marriages Act
SADC	Southern African Development Community
UNICEF	United Nations Emergency Fund
UDHR	Universal Declaration on Human Rights
WHO	World Health Organisation

CHAPTER ONE: INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Introduction

Forced marriages and child marriages[1] are a global and major concern when dealing with girl children's and women's rights. UNICEF statistics[2] show that in South Africa alone 1% of girls were married by 15 years and 6% by 18 years.[3] While these numbers are insignificant, they arguably contribute to a global crisis where girls of primary school age are forced into marriage.[4] This mini-thesis will focus on *ukuthwala*, a customary practice which is prevalent in the rural parts of South Africa, where girls and young women are married off. Moral reasons exist for the custom, however in recent years it has changed radically.[5]

Ukuthwala is most prevalent in the Eastern Cape and Kwa-Zulu Natal provinces.[6] It has been described as a 'romantic mock abduction' of an unmarried woman by a man who intends to marry her.[7] According to Bekker and Koyana[8] the procedure for *ukuthwala* is as follows:

---

[1] A forced marriage is a marriage where one or both parties have not personally expressed their full and free consent to the union. A child marriage is any marriage where at least one of the parties is under 18 years of age. See Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), hereafter CEDAW/C/GC/31-CRC/C/GC/18 (2014) para 6.2.

[2] 'About UNICEF' available at http://www.unicef.org/about/ (6 April 2019).

[3] UNICEF 'Access the Data' available at https://data.unicef.org/topic/child-protection/child-marriage/ (accessed 15 May 2019).

[4] 'Current Status+ Progress: Child Marriage is a Violation of Human Rights, but is all too common' available at http://data.unicef.org/child-protection/child-marriage.html (accessed 15 May 2019).

[5] South African Law Reform Commission Revised Discussion Paper (Project 138) *The Practice of ukuthwala* (2015), hereafter SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (2015)

[6] What is *ukuthwala*? available at http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html (accessed on 15 May 2020) & Mtshali V 'Forced Child Marriage Practices under the Pretext of Customary Marriage in South Africa' (2014) 15 *Child Abuse in South Africa* 51.

[7] Mofokeng L *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (2009) 57.

[8] Koyana DS & Bekker JC 'The Indomitable *Ukuthwala* Custom' (2007) 40 *De Jure* 139.

> ‘The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day, towards sunset or at early dusk, and they will “forcibly” take her to the young man’s home. Sometimes the girl is “caught” unawares, but in many instances, she is caught according to plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when in fact, it is hardly ever so’.

While *ukuthwala* involves kidnapping a girl or young woman, the intention is to compel her or her family to endorse marriage negotiations.[9] This therefore means, by custom, the suitor should report the *thwala* to his kraal head in order to commence *lobolo*[10] negotiations.[11] During this time consensual sex with the young girl is forbidden. Koyana and Bekker further explain that the girl or young woman is immediately placed in the midst and care of the womenfolk; and is treated with ‘utmost kindness and respect’,[12] until such time that the marriage requirements are met.[13]

From the above, it can be seen that *ukuthwala* is not in itself a customary marriage or an engagement. Therefore:

> ‘Once the girl has been taken to the man’s village, her guardian or his messenger will then follow up on the same day or the next day and possibly take her back if one or more cattle are not handed to him as an earnest promise for a future marriage. Consequently, if the guardian does not follow up to take her back, tacit consent to the marriage at customary law can be assumed’.[14]

---

[9] Mofokeng L (2009: 57).

[10] *Lobolo* means the property in cash or kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage. See Recognition of Customary Marriages Act 120 of 1998 (“**RCMA**”), Section 1.

[11] Mofokeng L (2009: 58).

[12] Koyana DS & Bekker JC (2007: 141).

[13] Maluleke MJ ‘Culture, Tradition, Custom, Law and Gender Equality’ (2012) 15 *Potchefstroom Electronic Law Journal* 11. See also S3 of the RCMA.

[14] Koyana DS & Bekker JC (2007: 141).

There are three types of *ukuthwala*, (i) *ukuthwala ngemvumelwano/ukugcagca*, (ii) *ukuthwala kobulawu* and (iii) *ukuthwala okungenamvumelwano*.[15]

(i) In the first instance, the practice occurs where a girl is aware of the intended abduction and there is collusion between the parties.

(ii) Secondly, *ukuthwala* also takes the form of where families would agree on the union, but the girl is unaware of such an agreement.

(iii) The third version is where the custom occurs where neither the girl nor her family has prior knowledge of the impending *ukuthwala*.[16]

Mwambene and Sloth-Nielsen argue that not all of these can be labelled as objectionable, harmful or detrimental. For example, where the requirement of the consent of the bride is met, where she colludes in or is aware of the mock abduction the practice can be accommodated.[17]

1.2 Problem Statement

Although a legitimate customary practice, *ukuthwala* is used by older men to target and abuse vulnerable young females.[18] In 2013, Nvumeleni Jezile (Jezile) was convicted in the Wynberg Regional Court on a count of human trafficking, three counts of rape, one count of assault with intent to do grievous bodily harm, and one count of common assault. In 2014, Jezile was sentenced to an effective 22 years direct imprisonment on all counts. In addition, the trial court ordered that his details be included in the National Register for Sexual Offenders.

On appeal against the conviction in the Western Cape High Court, as part of his defence in court Jezile maintained that he was in a customary marriage with the

---

[15] Oosthuizen T & Ngema NS '*Ukuthwala*: Structured for Relevance' (2010) 2 *Speculum Juris* pages 87-88. See also, Rautenbach C & Matthee J 'Common Law Crimes and Indigenous Customs: Dealing with the Issues in South African Law' (2010) 61 *Journal of Legal Pluralism* 119.

[16] Oosthuizen T & Ngema NS (2010: 87). See also, Mwambene L & Sloth-Nielsen J 'Benign Accommodation? *Ukuthwala* 'Forced Marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 6-7.

[17] Mwambene L & Sloth-Nielsen J (2011: 7).

[18] Mwambene L & Sloth-Nielsen J (2011: 2); De Waal M 'Limpopo child bride: Sold into marriage, kept there by the system' (2013) available at http://www.dailymaverick.co.za/article/2013-02-01-limpopo-child-bride-sold-into-marriage-kept-there-by-the-system/#.VxdeN_l97IU (accessed 6 April 2019).

complainant, which was preceded by *ukuthwala*; therefore, this negated the intent required to be held responsible for committing the crimes.[19] A summary of the case is provided below.

1.2.1 *The State v Jezile*

During December 2009 or early January 2010, a 28-year-old-Jezile, travelled from Philippi to his rural home in the Eastern Cape. His intention was to find a girl or young woman to marry according to his tradition. He was looking specifically for someone around the age of 16, with no children.[20] He met the complainant who was then 14 years old, a complete stranger, and decided that she would make a suitable wife. She was still attending primary school and had just started Grade 7. She stayed with her extended family and maternal grandmother as her father was deceased and her mother worked in a nearby village or town.[21]

He requested his family to start traditional *lobola* negotiations with the male family members of the complainant on the same day that the he first saw the complainant. In one day, negotiations were completed. The complainant was called to a meeting with male members of the two families the following morning. She was informed that she was to be married in another village.[22] She was instructed by her uncle to take off her school uniform and to put on different clothes. Her resistance to this instruction was ignored. Her uncle and another man took her by the hand to Jezile's house and on the way, she met Jezile and was first introduced to him.[23]

On arrival at Jezile's house, the complainant was immediately dressed in *amadaki.*[24] She was instructed to participate in various traditional ceremonies as well as to attend to certain household duties for Jezile. It was during one of these ceremonies that the complainant allegedly became Jezile's customary law wife. In addition, an amount of R8000 was paid as *lobola* to the complainant's maternal grandmother, who

[19] *S v Jezile* 2015 (2) SACR 452 (WCC). See also Mabasa D '*Ukuthwala*: Is it all culturally relative?' (2015) *De Rebus* 28-30.

[20] *S v Jezile 2015 (2) SACR 452 (WCC)* para 5.

[21] *S v Jezile 2015 (2) SACR 452 (WCC)* para 6.

[22] *S v Jezile 2015 (2) SACR 452 (WCC)* para 7.

[23] *S v Jezile 2015 (2) SACR 452 (WCC)* para 8.

[24] A specially designed attire for a new bride (*makoti*).

subsequently gave it to the complainant's mother. Thereafter, she allegedly became Jezile's customary law wife.[25]

The complainant was unhappy, fleeing from her new marital home a few days later, hiding first in a forest, then in another house. She was discovered by her own male family members and promptly returned to Jezile. Soon afterwards, she was taken to Cape Town in a taxi by Jezile.[26] Sexual intercourse took place on various occasions against her will between the two of them. Within the same period, Jezile and the complainant argued and during one of their arguments the complainant sustained an open wound to her leg. It was shortly thereafter that the complainant fled from Jezile in March 2010.[27]

At the trial, it was questioned (i) whether the complainant travelled with Jezile at her own accord and remained willingly until she fled or whether she was trafficked for purposes of exploitation or abuse of a sexual nature; (ii) whether sexual intercourse took place without the complainant's consent and (iii) whether the injury she had sustained to her leg was caused by Jezile.[28]

The complainant testified that she was taken to Cape Town against her will; that she refused to have sexual intercourse with Jezile and he beat her severely and simply proceeded to rape her. She also testified that she suffered open septic wounds as a result of the assaults. She eventually managed to escape to a nearby taxi rank where two women accompanied her to the nearest police station.[29]

Jezile maintained that he was in a customary marriage with the complainant, which was preceded by *ukuthwala*; therefore, this negated the intent required to be held responsible for committing the crimes.[30] His essential contention was that the trial court had misdirected itself in not proceeding from the premise that the merits should have been determined within the context of the practice of *ukuthwala*, or customary

[25] *S v Jezile 2015 (2) SACR 452 (WCC)* para 9.

[26] *S v Jezile 2015 (2) SACR 452 (WCC)* para 10.

[27] *S v Jezile 2015 (2) SACR 452 (WCC)* para 11.

[28] *S v Jezile 2015 (2) SACR 452 (WCC)* para 12.

[29] *S v Jezile 2015 (2) SACR 452 (WCC)* paras 28-36.

[30] *S v Jezile 2015 (2) SACR 452 (WCC)* para 51.

marriage. It was submitted that 'consent' within the practice of *ukuthwala* was a concept that had to be determined in accordance with the rightful place which customary law had in our constitutional dispensation, because it was an integral part of *ukuthwala* that the bride may not only be coerced, but would invariably pretend to object (in various ways), since it was required, or at least expected, of her to do so.[31]

In light of the important cultural and constitutional implications raised by this defence, the court invited several organisations and experts on the practice of *ukuthwala* in customary law to assist as *amici curiae*, and to present oral submissions. These organisations included the National House of Traditional Leaders, the Women's Legal Centre Trust, the Centre for Child Law, the Commission for Gender Equality, the Rural Women's Movement, Msimanyane Women's Support Centre, and the Commission for the Promotion and Protection of the Cultural, Religious and Linguistic Communities.[32]

In addition, in an affidavit filed by renowned customary law expert Professor Nhlapo, the court was informed about the South African Law Reform Commission's (SALRC) investigation into the practice of *ukuthwala*, its impact on girl children, as well as the appropriateness and the adequacy of the current laws on *ukuthwala*.[33]

The court found that it was apparent from the expert evidence and the submissions of the *amici* that, because the trafficking and sexual assaults took place after the customary marriage, the offences for which Jezile was charged with took place after a traditional *ukuthwala* would have occurred. Therefore, he could not in any event have placed reliance on the practice of *ukuthwala* as a justification for his conduct. The court held that he relied on the 'aberrant' form of *ukuthwala* to justify his conduct.[34]

The court held further that the trial court had correctly found that he had not asserted any customary law precept to have justified his conduct, or that he had acted in the belief that he had entered into a customary marriage that permitted sexual coercion.[35] It could not be countenanced that the practices associated with the 'aberrant' form of

[31] *S v Jezile 2015 (2) SACR 452 (WCC)* para 52.

[32] *S v Jezile 2015 (2) SACR 452 (WCC)* para 55.

[33] *S v Jezile 2015 (2) SACR 452 (WCC)* para 70.

[34] *S v Jezile 2015 (2) SACR 452 (WCC)* para 90.

[35] *S v Jezile 2015 (2) SACR 452 (WCC)* para 92.

ukuthwala could secure protection under our law. His defence was, therefore, rejected.[36] The convictions on the counts of assault were set aside, but the court confirmed the convictions and sentences for the offences of rape and human trafficking.[37]

This robust victim centred response to these criminal acts has caused an inquiry into the practice of *ukuthwala*, especially within policy and academic fields, to consider the criminalisation of *ukuthwala*. Due to its nature, the custom has come to be viewed as a violation of constitutional rights of women and girl children on the grounds of equality, the right to freedom and security of the person, the right to education, the right to live in an environment that is not harmful to health or well-being, the right not to be subjected to slavery, servitude or forced labour and other constitutional safeguards aimed at protecting children.[38]

Ukuthwala is also viewed as a practice to legitimise and validate gender-based violence against women and girls.[39] Research has shown that several of these abductions feature harsh accounts of experiences of assault and forced sexual intercourse;[40] and as a result, women and girl children have been experiencing hardships in the name of culture.

1.3 Significance of the Study

In view of the above, in 2009, the Gender Directorate[41] called upon SALRC to investigate the practice of *ukuthwala*. The aim was to assess the impact of *ukuthwala* on the girl child and to explore whether there are appropriate and adequate laws on the practice, which uphold the human rights of the girl child, taking into consideration

[36] *S v Jezile 2015 (2) SACR 452 (WCC)* para 102.

[37] *S v Jezile 2015 (2) SACR 452 (WCC)* para 106.

[38] s9, s12 and s29, s24(a), s13 and s28 of the Constitution, respectively.

[39] SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (2015) 14.

[40] Rice K '*Ukuthwala* in Rural South Africa: Abduction Marriages as a Site of Negotiation about Gender, Rights and Generational Authority among the Xhosa' (2014) 40 *Journal of Southern African Studies* 381-399.

[41] Gender Directorate in the Department of Justice and Constitutional Development (now Department of Justice and Correctional Services).

the principle of the best interests of the child.[42] This was in response to concerns expressed by the Gender Directorate regarding the violations of civil rights of women and girl children during the practice of *ukuthwala*.

The Gender Directorate argued that children affected by *ukuthwala* have their rights to personal safety and well-being violated and are at risk of lifelong development burdens including HIV infection and other physical, emotional and social problems. It was also stressed that South African values, beliefs and practices must be consistent with the Constitution, which specifically guarantees the rights of children, and of course women.

Based on these assertions, on 14 June 2011, the Minister appointed an advisory committee to assist the SALRC in developing the Discussion Paper. The SALRC investigated and produced two Discussion Papers on the practice of *ukuthwala*.[43] This process culminated in the Prohibition of Forced Marriages and Child Marriages Bill (Prohibition Bill) which will be discussed in chapter 3 of this dissertation.[44]

In April 2016, I joined an already on-going research project in the community of Jezile.[45] The aim of the research was to explore the opinions and experiences of community members of *Jezile* where the case originated. One of our major findings was that whilst many participants saw the current malpractices surrounding *ukuthwala* as unacceptable, little support was expressed for criminalising the custom.[46] Therefore, it is also against this background that I will investigate whether or not South Africa should criminalise forced marriages and child marriages resulting from *ukuthwala*.

---

[42] SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (2015) para 1.1.

[43] South African Law Reform Commission (SALRC) Discussion Paper 132 (Project 138) *The Practice of ukuthwala* (May 2014) & SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (2015). The revised Discussion Paper includes a chapter on public consultations and the Prohibition Bill draft.

[44] Prohibition of Forced and Child Marriages Bill in SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (2015) 57.

[45] My role was a legal research assistant to Professor Mwambene.

[46] Field Research: 'Community Perspectives on *Ukuthwala*' in Engcobo, 2016. The field work forms part of the Thutuka grant of Professor Mwambene, for which ethics clearance was granted.

In recent years, the practice of *ukuthwala* has become a hot bed of controversy. Much of the old research conducted has focused on reconciliation of the traditional gap that exists between women and children's rights versus cultural rights.[47] This study will therefore, contribute to the current research which has been conducted by the SALRC regarding the prohibition of forced and child marriages in South Africa. In essence, this study is significant in assessing whether an approach concentrating on criminalising the particular aspects of the practice, which perpetuate violence against women and girl children, will be effective and sustainable in protecting their constitutional rights against malpractices surrounding *ukuthwala*.

1.4 Objectives of the Study

The aim of this research is to add the perspectives and voices of community members, to the existing opinions of policy makers and law enforcement officials, and to the current debate on *ukuthwala* and strategies on the current research question i.e. '**Should South Africa criminalise *ukuthwala?***'. The study reveals the divergent views between policy makers, researchers, victims and community members with the aim of providing better ways to address the distortions surrounding *ukuthwala*.

1.5 Research Questions

The main question that the study attempts to ask is whether forced marriages and child marriages resulting from *ukuthwala* should be criminalised. The study confronts various questions related to the criminalisation of harmful cultural practices. An attempt is made to answer the following sub-questions:

1. Whether the criminal elements associated with the practice justify a need for the enactment of a new legislation regulating *ukuthwala*;
2. What are the advantages and disadvantages of criminalisation of the *ukuthwala*?
3. If *ukuthwala* is criminalised, what does this then mean for the victim, particularly girl children?

[47] See for example, Mafhala VR *Child Marriage Practice: A Cultural Gross Violation of Human Rights of Girls in a Free South Africa* (Unpublished LLM thesis, University of Pretoria, 2016) & Matthee JL *One Person's Culture is Another Person's Crime: A Cultural Defence in South African Law* (Unpublished LLD thesis, North West University, 2014).

Answers to these questions are provided in the various chapters of the study and these will be built up to answer the main question. I will therefore investigate whether the extent of the problem warrants the enactment of a stand-alone statute.

1.6 Methodology

The thesis is conducted through library and field research. The author will use applicable case law and legislation as primary sources. In addition, the thesis is conducted by reviewing the literature published through secondary sources, which include articles in academic journals and books, newspaper articles and website pages. Lastly, research by NGOs and independent researchers is also referred to in this thesis.

1.7 Literature Review

Forced marriages and child marriages have received global attention. International children's rights organisations like UNICEF and Girls Not Brides have conducted research and published reports on the issue of child marriages focusing on countries internationally.[48] UNICEF has published statistics on the prevalence of child marriages. They have observed that Africa presents the most extreme scenario of child marriages due to, *inter alia*, the recognition of cultural or traditional practices. UNICEF observers also raised concerns that the number of child marriages in Africa will double by 2050.[49]

Children and women's rights legal scholars have also highlighted the impact of the Children's Act 38 of 2005 on detrimental cultural practices against children. *Ukuthwala* is not explicitly mentioned in the Children's Act. By not referring to *ukuthwala*, it seems reasonable to assume that previously, no constitutional implications necessitated legislative intervention against the practice, although, as argued by Mwambene and Sloth-Nielsen, the practice is not immune from legal scrutiny.[50]

---

[48] 'About Girls Not Brides' available at http://www.girlsnotbrides.org/about-girls-not-brides/ (accessed 6 April 2019).

[49] UNICEF 'Ending Child Marriage: Progress and Prospects' (2013) available at https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf (accessed 6 April 2019).

[50] Mwambene L & Sloth-Nielsen J (2011: 16).

In addition, one of the most compelling arguments is presented by Rice. Citing her 2014 research, she argued that whilst this issue has recently been debated in the legal sphere and in the popular media, these discussions lack grounding in the lived experiences of people in communities where *ukuthwala* is practiced.[51] Thus, there is a growing need for fieldwork research on why malpractices surrounding cultural practices such as *ukuthwala* continue.

Rice's view is supported by Mwambene and Kruuse who opine that an understanding of the legitimate cultural goals which the communities wish to achieve with practices such as *ukuthwala* is imperative.[52] They found that in communities where *ukuthwala* is practiced, families often decide for their girl children or young women to go through *ukuthwala* because doing so will, *inter alia*, ensure that they stay vigilant in their traditions and customs.

It is generally suggested that the traditional custom of *ukuthwala* is often carried out with the knowledge and consent of the girl or her guardian.[53] She puts up a 'pretended struggle' to preserve her maidenly dignity when in fact she is a willing party. Hence, onlookers never interfere or try to stop *ukuthwala* because of the 'crocodile tears' that the girl sheds in the process.[54] Koyana and Bekker strongly argue that this does not mean that *ukuthwala* is tantamount to a forced marriage because the 'pretended struggle' is to secure her own 'empire' as a married woman.[55]

Arguably, the right to consent to a marriage cannot be invoked or achieved if one of the parties is not consulted and is immature to contemplate such a union. Also, because no guidance is provided on how to obtain legitimate consent in a customary marriage, the 'crocodile tears' during the process of *ukuthwala* obscure the requirement of consent,[56] as *per* the Recognition of Customary Marriages Act (RCMA).

---

[51] Rice K (2014: 399).

[52] Mwambene L & Kruuse H 'The Thin Edge of the Wedge: *Ukuthwala*, Alienation and Consent' (2017) 33 *South African Journal on Human Rights (SAJHR)* 1-21.

[53] Field Research:'Community Perspectives on *Ukuthwala*' in Engcobo, April 2016.

[54] Koyana DS & Bekker JC (2007: 139).

[55] Koyana DS & Bekker JC (2007: 140).

[56] SALRC Discussion Paper 74 *Customary Marriages* Project 90 The Harmonisation of the Common Law and the Indigenous Law August (1997) para 4.2.6.

Karimakwenda's research is also useful to the debates on *ukuthwala*.[57] The author depicts that the violence in *ukuthwala* and marriage is not just part of an insular way of life, but part of a culture that allows justifications for rape and violence against women. She opines that the abusive forms of the practice cannot be addressed in isolation, and therefore it is important to understand how the practices are linked to other cultural and social norms and other practices. [58]

Her evidence seems to be strong that sexual violence is likely to occur more commonly in cultures that foster beliefs of perceived male superiority and social and cultural inferiority of women,[59] even though such is criminalised. Therefore, deeply held beliefs and views of the community must be seriously considered if attempts to address the challenges that come with *ukuthwala* are to succeed.[60]

During the interviews with the families of Jezile and the complainant, they failed to grasp how Jezile was found liable for raping his own wife. According to them, consent to marriage amounted to consent to sexual intercourse.[61] Thus, the most troubling aspect of the case was the gap between the communities' lived realities and existing laws or law reform.[62]

Not much research has been conducted specifically on the criminalisation of forced marriages and child marriages resulting from *ukuthwala*. Nonetheless, the long and strong held view by authors such as Himonga is that although punitive measures may be seen as an integral part of protecting women and girl children, enforcing such

---

[57] Karimakwenda N 'Today It Would Be Called Rape: A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape' (2013) 2013 *Acta Juridica: Marriage, Land and Custom* 339-356.

[58] Karimakwenda N (2013: 355-356).

[59] See also, Kalra G & Bhugra D 'Sexual Violence against Women: Understanding Cross-Cultural Intersections' (2013) 55 *Indian Journal of Psychiatry* 244.

[60] Mwambene L & Kruuse H (2017: 2). Diala J & Diala A 'Child Marriage, Bridewealth and Legal Pluralism in Africa' (2017) 4 *Journal of Comparative Law in Africa* 95.

[61] Field Research: 'Community Perspectives on *Ukuthwala*' in Engcobo, 2016. Mwambene L & Kruuse H (2017: 9).

[62] Field Research:'Community Perspectives on *Ukuthwala*' in Engcobo, 2016. Mwambene L & Kruuse H (2017:15).

measures may cause problems and consequently turn such legislation into paper law.[63]

1.8 Overview of Chapters

The structure of the thesis is set out below.

CHAPTER ONE: INTRODUCTION AND OVERVIEW OF THE STUDY

The first chapter of the thesis is this introductory section. The purpose of this chapter is to present the problem statement and provide a brief overview of the research on *ukuthwala*. This chapter also provides a description of the aims and significance of the research, the research question, the methodology and literature review. An outline of the chapters of the study is provided at the end of the chapter.

CHAPTER TWO: THE NORMATIVE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS WHICH CAN BE USED IN ADDRESSING FORCED MARRIAGES AND CHILD MARRIAGES IN SOUTHERN AFRICA

South Africa is a signatory to international and regional legal instruments which can be used to address forced and child marriages including those resulting from *ukuthwala*. The core instruments will be discussed briefly under this section. For example, emphasis will be placed on the provisions of the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) since forced and child marriages mainly affect girl children.[64]

CHAPTER THREE: THE SOUTH AFRICAN LEGAL FRAMEWORK AND DEVELOPMENTS IN ADDRESSING THE MALPRACTICES SURROUNDING *UKUTHWALA*

The third chapter focuses mainly on the South African legal framework and developments in addressing the malpractices surrounding *ukuthwala*. Importantly, the chapter presents a discussion and critique of the Prohibition Bill.

---

[63] Himonga C 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 85.

[64] South Africa ratified the CRC on 16 June 1995 and ratified the ACRWC on 7 January 2000.

CHAPTER FOUR: THE ADVANTAGES AND DISADVANTAGES OF CRIMINALISING *UKUTHWALA*

The purpose of this chapter is to present the findings of the field research conducted in the community of Jezile and surrounding areas. This entails a discussion on *ukuthwala* as seen through the lens of the Jezile community. This will be followed by the theoretical perspectives of outlawing harmful cultural practices generally and finally the advantages and disadvantages of criminalising *ukuthwala* will be discussed.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

The final chapter will draw the discussions in the thesis to a close. This will be done by providing a summary of the different chapters and linking the chapters to each other. The recommendations made throughout the dissertation will be summarised in this chapter. Lastly, the author's view for the way forward in fulfilling the rights of children in South Africa will be laid out.

CHAPTER TWO: THE NORMATIVE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS WHICH CAN BE USED IN ADDRESSING FORCED MARRIAGES AND CHILD MARRIAGES IN SOUTHERN AFRICA

2.1 Introduction

The prevalence and effect of child marriage on the African continent is a major concern. While the issue of child marriage is a worldwide problem,[65] Sub-Saharan Africa is expected to become the region with the largest number and global share of child marriages by 2050.[66] Despite the fact that child marriage is prevalent across Africa, it has been reported that in Southern Africa, between 2010 and 2017, 9% of girls were married by 15 years and 35% by 18 years.[67]

As part of the move to alleviate the problem, binding and non-binding, international and regional legal instruments have been adopted and promulgated.[68] The aim of this chapter is to discuss these legal instruments, to which South Africa is a party, focusing specifically on marriage provisions. Part one commences with a discussion of the essential marriage requirements. In part two I discuss the international and regional

[65] Child Marriage Atlas available at https://www.girlsnotbrides.org/where-does-it-happen/atlas/#/ (accessed 15 May 2019).

[66] UNICEF, Ending Child Marriage: Progress and Prospects (2013: 7).

[67] UNICEF 'Access the Data' available at https://data.unicef.org/topic/child-protection/child-marriage/ (accessed 15 May 2019).

[68] Universal Declaration of Human Rights, 1948 ("**UDHR**"), Convention on Consent to Marriage, Minimum age for Marriage and Registration of Marriages, 1962 ("**Marriage Convention**"), International Covenant on Civil and Political Right, 1966 ("**ICCPR**"), International Covenant on Economic, Social and Cultural Rights, 1966 ("**ICESCR**"), Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("**CEDAW**"), Convention on the Rights of the Child, 1989 ("**UNCRC**"), International Labour Organisation Convention on the Worst Forms of Child Labour, 1999, No. 182 ("**ILO**"), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000 ("**Trafficking in Persons Protocol**"), UNCRC Optional Protocol on the sale of children, child prostitution and child pornography ("**UNCRC Optional Protocol II**") (2002), African Charter on the Rights and Welfare of the Child, 1990 ("**ACRWC**"), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003 ("**Maputo Protocol**"), African Youth Charter, 2006, and the Southern African Development Protocol on Gender and Development, 2008 ("**SADC Gender Protocol**").

jurisprudence pertaining to the CRC and ACRWC by the United Nations Committee on the Rights of the Child (CRC Committee) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Part three discusses recent case law to show how these legal frameworks have been applied in instances where children have been subjected to forced marriages and child marriages. The final part completes the chapter by way of a conclusion.

2.2 International and Regional Legal Frameworks

2.2.1 Definition of the child and minimum age of marriage

International laws such as the CRC, CEDAW[69] and Marriage Convention[70] do not specify a minimum age for marriage. However, article 1 of the CRC defines a child as a person under the age of 18 years unless under the law applicable to the child, majority is attained earlier.[71] Marrying off persons below the age of 18, therefore, amounts to child marriages.

In response to threats where children were married off, the CEDAW Committee in General Recommendation No. 21 stipulated that the minimum age for marriage should be 18 years for both men and women.[72] The CRC Committee in General Comment No. 4, similarly stated that the minimum age for marriage should be 18 years.[73] Despite this, however, the Committees jointly took a stance in General Comment No. 18, that although 18 is the requisite minimum age, child marriages are permissible with judicial consent.[74]

Exceptions to minimum age in marriage laws can substantially undermine the legal protection against child marriage established in countries' laws. In their study, Arthur et al found that legal exceptions to minimum age provisions based on parental consent and customary and/or religious laws create loopholes that lower the legal minimum

[69] South Africa ratifed CEDAW on 15 December 1995.

[70] South Africa acceded to Marriage Convention on 29 January 1993.

[71] Art 1 of the CRC.

[72] Para 36 of the General Recommendation 21 on Equality in Marriage and Family Relations (1994), hereafter CEDAW/C/GC/21 (1994).

[73] Para 20 of the General Comment No. 4 on Adolescent health and development in the context of the Convention on the Rights of the Child (2003), hereafter the CRC/GC/2003/4.

[74] Para 20 of the CEDAW/C/GC/31-CRC/C/GC/18 (2014).

age of marriage below the age of 18 in many countries worldwide.[75] They found that 59 countries currently permit girls to be married at younger ages than boys with parental consent.[76] They also found that girls in 30 countries may not be legally protected from marriage before the age of 18 when exceptions under customary and religious laws are considered.[77]

In 2016, the CRC Committee considered the second periodic report of South Africa. In this context of the minimum age for marriage, South Africa was urged to harmonise all its relevant legislation setting the minimum ages for marriage, in order to ensure that the minimum age for marriage is established at 18 years for both girls and boys.[78] At the time of writing, the SALRC has published an Issue Paper titled 'Single Marriage Statute'.[79] The SALRC sought comments on whether age discrepancies should be remedied and whether 18, without exceptions, should be the minimum age for marriage.[80] Proposals have been made and the SALRC is yet to issue a Discussion Paper.

Regionally, in article 2 of the ACRWC, a child is unequivocally defined as a person under the age of 18 without attaching any limitation. In addition, the ACRWC prohibits the betrothal or marriage of children in article 21(2) as follows:

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

[75] Arthur M et al 'Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities' (2018) 39 *Journal of Women, Politics & Policy* 51-74.

[76] Arthur et al (2018: 66).

[77] Arthur et al (2018: 67).

[78] Para 22 of the Concluding observations on the second periodic report of South Africa (2016), hereafter CRC/C/ZAF/CO/2 (2016).

[79] SALRC Issue Paper 35 (Project 144) on Single Marriage Statute (2019).

[80] SALRC Issue Paper 35 (Project 144) on Single Marriage Statute (2019) 24. The comments will provide direction on the proposed scope and focus of the investigation and on the strength of the responses a Discussion Paper will be prepared, setting out the SALRC's provisional proposals.

Gose observed that, unlike the CRC, this provision adds a totally new obligation for States which raises the level of protection for children.[81] The formulation in this article requires legislative prohibition of child betrothals and child marriages. That legal reform to standardise the minimum age of marriage at 18 is required is clear. Moreover, according to the plain language of the ACRWC, no exceptions are permitted and therefore any legal requirements which permit marriage before the age of 18 would violate the provisions of the ACRWC.

The Maputo Protocol[82] in article 6(b) and SADC Gender Protocol[83] in article 8(2)(a) similarly impose a clear obligation on States to set the minimum age of marriage for women to be 18 years. These provisions are intended to apply to marriages in all its forms, whether civil, religious or customary, as neither the Maputo Protocol nor the SADC Gender Protocol provide for any exceptions to the minimum marriageable age of 18 years.

In the Joint General Comment of the ACERWC and ACHPR, it was stated that in line with the best interests of the child principle, States Parties must adopt and enforce legislation that sets the minimum age of marriage at 18 for both boys and girls.[84] Odala posits that setting a legal minimum age for marriage recognises that children do not have the maturity to consent to marriage, and offers them legal protection from the abuse, violence and exploitation they risk within child marriage.[85]

Insofar as the minimum age of marriage is concerned, from the above it is evident that there is international and regional consensus that this should be set at 18 years. Although the CRC internationally allows for exceptions, the ACRWC is unequivocal and provides a stronger protection for the prohibition of marriage of children in Africa.

---

[81] Gose M 'The African Charter on the Rights and Welfare of the Child' (2002) *Community Law Centre, University of the Western Cape* 54-55.

[82] South Africa ratified the Maputo Protocol on 17 Decmber 2004.

[83] South Africa signed the SADC Gender Protocol on 17 August 2008.

[84] Para 9 of the Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage (2018), hereafter ACHPR/ACERWC/GC (2018).

[85] Odala V 'How Important is Minimum Age of Marriage Legislation to End Child Marriage in Africa' (2013) in https://www.girlsnotbrides.org/how-important-is-minimum-age-of-marriage-legislation-to-end-child-marriage-in-africa/ (accessed 16 March 2020).

2.2.2 Consent to marry

The Marriage Convention and CEDAW provide for marriage not to be concluded without the free consent of both parties.[86] With particular reference to discriminatory customary family practices at the point of contracting a marriage, article 16(1)(a) and (b) of CEDAW, provide:

> 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) the same right to enter into marriage;
> (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent.'

Articles 16(1)(a) and (b) of CEDAW, ensure equality between spouses from the onset of entering marriage. Thus, the relationship of a man and wife within marriage is no longer based on hierarchy or power. The CEDAW Committee in General Recommendation 21, emphasised that the obligation on a State is to ensure that a woman's right to choose when, if, and whom she will marry is protected and enforced at law.[87]

The CEDAW and CRC Committees have also recommended that States Parties adopt or amend legislation with a view to effectively addressing and eliminating harmful cultural practices.[88] In doing so, they should ensure marriage is accompanied by free and full consent of the intending spouses,[89] failing which such marriage would amount to a forced marriage.[90] Examples of forced marriages include, marrying girls too young when they are physically and psychologically incapable of making informed decisions.

---

[86] Art 1 of the Marriage Convention and Art 16(1)(b) of CEDAW.

[87] Para 16 of CEDAW/C/GC/21 (1994).

[88] Para 21 of the Concluding Observations of the CEDAW (2011), hereafter CEDAW/C/ZAF/CO/4 (2011) & para 40 of CRC/C/ZAF/CO/2 (2016).

[89] Para 55(f) of CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[90] Para 23 of CEDAW/C/GC/31-CRC/C/GC/18 (2014).

Regional provisions also imply that no young people should enter into marriage before the full age. Article 8(2)(b) of the SADC Gender Protocol and article 8(2) of the African Youth Charter[91] require legislation on marriage to ensure that every marriage takes place with the free and full consent of both parties. These provisions can also be used to ensure women and girl children's capacity to make informed and uncoerced decisions when choosing their life partners.

The ACHPR and ACERWC recognise that older children may have the capacity to make decisions about their lives and may have the capacity to consent to sex, medical treatment and other acts.[92] However, despite such evolving capacities, the language of the Maputo Protocol clearly stipulates that children under the age of 18 are incapable of giving full and free consent to a marriage. The outright prohibition in the ACRWC implies this as well.

Furthermore, the ACHPR and ACERWC state that a child's inability to consent to marriage cannot be supplemented with parental or any other consent given on behalf of a child, as the requirement of 'full' requires total consent on the part of the person consenting.[93] The ACHPR and ACERWC demand that marriage officers must verify the fact of consent.[94] Arguably, the position of the ACERWC is blurry. The stance taken here is contradictory to article 21(2) of the ACRWC position where no consent requirement is stated, and accordingly does not protect children from child marriages.

To enforce the prohibition against child marriage, the ACHPR and ACERWC state that the absence of consent from the prospective spouse must clearly be established as a legal ground for the annulment of a presumed marriage.[95] In addition to this, penalties and sanctions should be imposed where marriages are performed without the necessary checks to ensure that the age and consent requirements are met.[96]

[91] South Africa ratified the African Youth Charter on 28 May 2009.

[92] Page 5 of ACHPR/ACERWC/GC (2018).

[93] Paras 6 and 22 of the ACHPR/ACERWC/GC (2018).

[94] Para 23 of ACHPR/ACERWC/GC (2018).

[95] Para 23 of ACHPR/ACERWC/GC (2018).

[96] Para 29 of ACHPR/ACERWC/GC (2018).

Although consenting to a marriage and entering into it with full, free and informed consent is a human right, I support Askari's argument that the articles on consent to marriage do not protect children for two reasons. According to Askari, first, fulfilling the requirement of free and full consent means that child marriages continue and secondly, the reality that young girls can be coerced into marriage is ignored.[97]

Debates concerning whether to align the other minimum ages, such as the minimum age for sexual consent, with the legal minimum age of marriage continue. In 2007, the Commission on the Status of Women adopted a resolution on forced marriage of the girl child. The resolution urges States Parties to enact and strictly enforce laws concerning the minimum legal age of consent.[98] Petroni et al make persuasive arguments that the legal ages of marriage and sexual consent need not be aligned for the reasons below.[99]

According to Petroni et al, marriage is a potentially life-long contract with important legal obligations and responsibilities. In many societies divorce is frowned upon, and married children might not be allowed to procure legal services to help them navigate a divorce.[100] A UNICEF report also highlights that the consequences of child marriage include domestic violence, child trafficking, increased prevalence of early pregnancy and its associated complications and reduced educational attainment.[101] Petroni et al argue that other negative effects which can also be linked to child marriage include

[97] Askari L, 'The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Marriages' (1998) 5 *ILSA Journal of International Comparative Law* 136.

[98] See for example Clearing Confusion Around the Age of Consent available at https://www.herald.co.zw/clearing-the-confusion-around-the-age-of-consent/ (accessed 9 February 2020); Botswana bill to raise age of sexual consent to 18 to combat defilement available at https://www.africanews.com/2018/03/27/botswana-bill-to-raise-age-of-sexual-consent-to-18-to-combat-defilement// (accessed 9 February 2020); Juvenile Committee calls for review on sex age to consent available at https://www.businessghana.com/site/news/general/154044/Juvenile-Committee-calls-for-review-on-sex-age-toconsent (accessed 9 February 2020).

[99] Petroni S, Das M & Swayer M 'Protection versus Rights: Age of Marriage versus Age of Sexual Consent (2018) 3 *Lancet Child Adolescent Health* 274-280.

[100] Petroni et al (2018: 5).

[101] UNICEF 'Child Marriage and the Law' (2007) Legislative Reform Initiative Paper Series available https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf (accessed 15 May 2019) 33-35.

restricted decision-making capacity, increased prevalence of depression and poor economic opportunities.[102]

By contrast, the authors argue that sexuality is an intrinsic aspect of being human, including for children and adolescents. According to the authors, those who care about adolescent health should ensure that adolescents are able to express their sexuality in ways that are informed, safe, healthy, and consensual. This requires accessible, youth-friendly sexual health-information and services to help adolescents mitigate potential risks, such as early pregnancy and exposure to sexually transmitted infections.[103]

Petroni et al persuasively conclude that laws which raise the age of sexual consent can be detrimental and may often be used to curb adolescents' agency. In addition, such laws can also result in stigmatisation and/or criminalisation of individuals who have sex before marriage, and increase barriers to accessing sexual and reproductive health.[104]

From the above, the requirement of consent is an imperative requirement to prevent forced marriages. It is clearly stated that such consent must be full, free and informed. The implication therefore is that consent obtained by force, threats or manipulations is unlawful.

2.2.3 Registration of Births and Marriages

States have an obligation to ensure that compulsory marriage registration is used as a mechanism to prevent child marriage. The Marriage Convention provides in article 3 that all marriages shall be registered in an appropriate official register by a competent authority. The CEDAW also provides in article 16(2), that necessary action, including legislation, shall be taken to make the registration of marriages in an official registry compulsory, whether contracted civilly or according to custom or religious law.

Similarly, article 6(d) of the Maputo Protocol and article 21(2) of the ACRWC make registration of marriages compulsory. Sloth-Nielsen and Kachika point out that a

[102] Petroni et al (2018: 5).

[103] Petroni et al (2018: 5).

[104] Petroni et al (2018: 5).

marriage registration system should include certain key information concerning the marriage, including its occurrence, dissolution, its form, and the age of both parties to the marriage.[105] This type of documenting is arguably important in case of legal problems that may ensue which are related to the marriage.

Another way to regulate child marriages is through an effective birth registration system. Article 6 of the ACRWC and 7 of the CRC require children's registration immediately after birth. According to Sloth-Nielsen and Kachika, these provisions bring into relevance to the question of child marriage as age can only be proven and registration of child marriage refused if there is some certainty about the person's date of birth.[106] Indeed, Hanmer and Elefante have recognised the importance of using identification to enforce marriage laws. They highlight that civil registration systems provide undisputable evidence about the age of the intending spouses and are thus crucial for implementing child marriage laws.[107]

In General Comment No. 2, the ACERWC, observed that a lack of decentralised, effective, well managed and affordable civil registration systems are to blame, for children who become vulnerable to early marriage.[108] The ACERWC therefore expects States Parties which do not have civil registration laws to adopt them, those whose civil registration laws are not implemented must implement them, and those whose laws are deficient or outdated must align them to the required standards through law reform.[109]

Linking birth registration to harmful practices, the ACERWC refers to the role played by birth registration in combating early marriage. Child marriages are less likely to occur and easier to prevent, when effective birth registration systems are in place.[110]

---

[105] Sloth-Nielsen J & Kachika T, 'Applicable International and Regional Law and Policy: Child, Early and Forced Marriage' submitted to Plan+ 18 Programme (2015) 8.

[106] Sloth-Nielsen J & Kachika T (2015: 7).

[107] Hanmer L & Elefante M 'The Role of Identification in Ending Child Marriage: Identification for Development' (2016) World Bank 15.

[108] Para 3 of the ACERWC General Comment no. 2 on article 6: 'Right to Birth Registration, Name and Nationality' (2014), hereafter ACERWC/GC/02 (2014).

[109] Para 11 of the ACERWC/GC/02 (2014).

[110] Para 18 of the ACERWC/GC/02 (2014).

According to the ACERWC, a universal well-functioning birth registration system increases the visibility of the most disadvantaged children and enhances their protection against harmful practices. On the other hand, a malfunctioning birth registration system makes it difficult to prosecute perpetrators of harmful practices committed against children because it makes it less likely that laws prohibiting such practices will be implemented effectively.[111]

Both the ACERWC and the CRC Committee have already pointed out through their concluding observations to South Africa that there are some gaps in its birth registration practice, partly reflected in some provisions of the Births and Deaths Registration Act and its Regulations which hinder the registration of births of children in South Africa including non-citizens.[112] The ACERWC for example, specifically recommended that South Africa creates a more accessible mechanism for fathers, including unmarried fathers, to register their children's births.[113]

The ACHPR and ACERWC recommend that in the absence of official documentation, marriage officers may rely on school or hospital records, to verify the date of birth and age of a child. In addition to this, community knowledge and interviews can also be resorted to. Ultimately, sole reliance on statements of parents or legal guardians is not considered a reliable verification procedure. In the event of a dispute or inconclusive evidence, the presumption should be that the person is under the age of 18.[114]

[111] Para 30 of the ACERWC/GC/02 (2014).

[112] Paras 31 & 32 of the CRC/C/ZAF/CO/2 (2016) and paras 13-15 of the Concluding Observations and Recommendations of the ACERWC to RSA on its First Period Report on the Implementation of the ACRWC March 2019, hereafter ACERWC/CO/RSA (2019).

[113] Para 14 of the ACERWC/CO/RSA (2019).

[114] Para 26 of the ACHPR/ACERWC/GC (2018).

2.3 International and Regional Jurisprudence on Forced Marriage and Child Marriage

2.3.1 Joint General Recommendation/General Comment no. 31 of the Committee on the Elimination of Discrimination against Women and no. 18 of the Committee on the Rights of the Child on Harmful Practices (2014)

On November 2014, the CEDAW and CRC Committees published a Joint General Recommendation/Comment. This marked the first time that two treaty monitoring bodies collaborated to interpret provisions related to harmful practices under the CEDAW and CRC, this being a problem that mutually affects women and children.

The Committees note that harmful practices are deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles. Moreover, it is pointed out that harmful practices also highlight the gender dimension of violence and indicate that sex and gender perceptions and prejudices, power imbalances, inequality and discrimination perpetuate the widespread existence of practices that often involve violence or coercion.[115]

The aim of the Joint General Recommendation/Comment is to clarify the obligations of States Parties to the CEDAW and CRC by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the Conventions to eliminate harmful practices.[116] These obligations are discussed below.

The CEDAW and CRC contain specific references to the elimination of harmful practices. Articles 2 and 3 of CEDAW urge States Parties to adopt and implement effective legislation which address the obstacles, barriers and resistance to the elimination of discrimination that give rise to harmful practices and violence against women. The nature of this obligation is immediate and States Parties must pursue policies that are relevant, appropriate and have the potential to eradicate violence against women.[117]

---

[115] Para 6 of CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[116] Para 2 of CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[117] Para 31 of the CEDAW/C/GC/31-CRC/C/GC/18 (2014). For a discussion on 'immediate obligations' see General Comment No. 3 of the ICESCR (1990).

Article 4(1), read with articles 5(a) and 16(2), of CEDAW empowers States Parties to adopt temporary measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of inferiority or the superiority of either sexes or on stereotyped roles for men and women and to ensure that the betrothal and the marriage of a child will have no legal effect.

The CRC, on the other hand, enjoins States Parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.[118] Tobin points out that the inclusion of the verb 'shall' imposes a mandatory and immediate obligation to take such measures. In the same vein, he highlights that this obligation does not require that States immediately abolish such practices, but instead they should carry out this obligation progressively. Moreover, he explains that the article does not require the abolition of traditional practices, customs and rituals in their entirety, but only those aspects of a traditional practice which are prejudicial to the health of a child.[119]

Article 19 of the CRC provides for the right of the child to be protected from all forms of violence including physical, sexual or psychological violence. States Parties are required in terms of article 37(a) to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment. In General Comment No. 13, the CRC Committee proposed that measures to end violence must be extended in order to effectively put an end to practices which jeopardize children's development.[120]

The CRC also applies the four general principles to the issue of harmful practices, namely non-discrimination, the best interests of the child, the right to life, survival and development and the right to be heard.[121] Kaime points out that these general

[118] Art 24 of the CRC.

[119] Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does it Mean and Require of States?' (2009) 9 *Human Rights Law Review* pages 375-376.

[120] General Comment No. 13 on the Right of the Child to Freedom from all Forms of Violence (2011) para 2.

[121] Arts 2, 3(1), 6 and 12 of the CRC, respectively.

principles may be useful guidelines to States Parties in addressing harmful cultural practices that violate girls' rights[122] including *ukuthwala*.

The Committees propose a holistic strategy to effectively prevent and eliminate harmful practices, which includes legal and social measures that are combined with political commitment and accountability at all levels. Such a holistic strategy must be mainstreamed and coordinated both vertically and horizontally and integrated into national efforts to prevent and address all forms of harmful practices. This strategy must also be adequately resourced financially, [123] and with an independent monitoring mechanism to track progress. [124]

The Joint General Recommendation/Comment declares that States Parties to both Conventions have a due diligence obligation to prevent acts that impair the recognition, enjoyment or exercise of rights by women and children.[125] Sloth-Nielsen and Kachika explain that in this context, 'due diligence' should be understood as an obligation for States Parties to prevent infringements of rights, to investigate and punish those responsible for violations, including private actors, and to provide access to redress for violations.[126]

The authors propose that States Parties take multi-pronged approaches to combat child marriage as a form of violence against girls and a violation of their human rights non-negotiable. This approach has to target all the harmful implications of child marriage, including those that are spelt out in the general recommendation/comment as illustrative examples.

Harmful implications of child marriage include early pregnancies; maternal morbidity and mortality; infant mortality; limited decision-making power by girls; higher rates of school dropout; domestic violence; limited enjoyment of the right to freedom of

[122] Kaime T 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections' (2005) 2 *African Human Rights Law Journal* 232.

[123] Para 34 of the CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[124] Para 35 of the CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[125] Para 11 of CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[126] Sloth-Nielsen J & Kachika T (2015: 15).

movement; girls' lack of personal and economic autonomy; girls' attempts to flee or commit self-immolation or suicide to avoid or escape the marriage.[127]

2.3.2 Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage

The Joint General Comment by the ACHPR and ACERWC is based on article 6(b) of the Maputo Protocol and article 21(2) of the ACRWC. The aim of the Joint General Comment is to elaborate on the nature of States Parties obligations that arise from the Articles, both which prohibit child marriage.

The Joint General Comment describes legislative, institutional and other measures, informed by the normative framework of the ACRWC and Maputo Protocol,[128] that should be taken by States Parties to give effect to the prohibition of child marriage and to protect the rights of those at risk of or affected by child marriage.[129]

a) Legislative measures

The ACHPR and ACERWC urge States Parties to adopt legislative measures, including amending, repealing or supplementing legislation as appropriate, to ensure that the betrothal and all forms of marriages of boys and girls under the age of 18 are prohibited, without exception, and pursuant to the obligations set out in article 6(b) of the Maputo Protocol and article 21(2) of the ACRWC.

States Parties are required to ensure that legislative measures also prohibit practices of abduction and kidnapping for purposes of marriage.[130] This is particularly important in practices such as *ukuthwala* where girls are abducted. Furthermore, States Parties with plural legal systems must take care to ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.[131]

---

[127] Para 22 of CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[128] Arts 21(1), 21(2), 2, 1(3) of the ACRWC and Arts 6(a-b), 1(b) and 26 of the Maputo Protocol.

[129] Para 2 of the ACHPR/ACERWC/GC (2018).

[130] Para 18 of the ACHPR/ACERWC/GC (2018).

[131] Para 19 of the ACHPR/ACERWC/GC (2018).

The ACHPR and ACERWC recommend that where constitutional reforms are undertaken, non-derogable clauses that entrench equality within marriage and specify a constitutional minimum age of 18 years for marriage are contemplated. Limitations, exemptions and derogations from these clauses, whether based on tradition, religion or any other ground, should not be permissible.[132] Some Southern African States that have adopted the legislative measure approach include for example eSwatini and Malawi.

In 2012, eSwatini introduced the Children's Protection and Welfare Act which provides that persons under the age of 18 have the right to refuse to be compelled to participate in any custom or traditional practice which is likely to negatively affect them, including child marriage.[133] The legislation provides penalties, up to 20 years imprisonment, for parents and guardians who collude with adult men to orchestrate child marriages.[134] In its Concluding Observations, the ACERWC raised its concern that burden is placed upon the child to refuse harmful practices and that for reasons related to a child's fear of parents or caregivers or lack of understanding about the implications of undergoing a harmful practice, a child may not be able to refuse such practices. Accordingly, it was proposed that eSwatini itself maintains that responsibility.[135]

In Malawi, the Marriage, Divorce and Family Relations Act was adopted in 2015 and it specifies the minimum age for marriage as 18 for both boys and girls.[136] Similarly, the Child Care, Protection and Justice Act of 2010 (Child Care Act) prohibits anyone from subjecting children to social or customary practices which are detrimental to their health and development.[137] In terms of section 81 of the Child Care Act, forcing the betrothals or marriages of children is prohibited. In a further effort to eradicate child marriages, the Parliament voted to remove a constitutional provision allowing children

[132] Para 24 of the ACHPR/ACERWC/GC (2018).

[133] Children's Protection and Welfare Act 6 of 2012 Part III number 15.

[134] Children's Protection and Welfare Act 6 of 2012 Part III number 19.

[135] Para 14 of the Concluding Observations & Recommendations by the ACERWC on the Initial Report of the Republic Kingdom of eSwatini on the Status of the Implementation of the ACRWC July 2019.

[136] s14 of the Marriage, Divorce and Family Relations Act of 2015.

[137] s80 of the Child Care, Protection and Justice Act of 2010.

to marry at the age of 15 with parental consent.[138] Given that Girls Not Brides has reported Malawi to be one of the countries with the highest number of child marriages in the world, this is certainly a progressive effort.[139] Moreover, the Constitution is the supreme law of the country.[140] By implication, any legislation which is inconsistent with its provisions is unlawful.

Diala and Diala criticise the 'invasion' by States Parties through legislation. The authors opine that these invasions reflect the assumption that law is a magic charm that can bring about behavioural changes, when people can in fact resist invasion from external norms. The authors persuasively argue that, using legislation as a sole means of combating child marriage is inadequate.[141] A further reading of the Joint General Comment indicates that the ACHPR and ACERWC have certainly considered this point and thus further measures to combat child marriages are proposed. These are discussed below.

b) Institutional measures

For States Parties to be able to identify and prevent child marriages, protect children from the risk of child marriage and reduce the impacts of child marriage, including for those already married,[142] the ACHPR and ACERWC propose the following measures:

i. implementing verification procedures for birth registration, age verification and marriage registration;
ii. enforcing laws, penalties and sanctions;
iii. implementing strategies to promote education, particularly education for girl children;
iv. ensuring access to comprehensive sexual and reproductive health services;
v. promoting access to justice;
vi. providing redress and support for those children already married;

[138] Mwambene L 'Legal Responses to Child Marriage in Southern Africa' (2018) 18 *African Human Rights Law Journal* 544.

[139] Malawi available at https://www.girlsnotbrides.org/child-marriage/malawi/ (accessed 9 June 2020).

[140] Mwambene L (2018: 544).

[141] Diala J & Diala A 'Child Marriage, Bridewealth and Legal Pluralism in Africa' (2017) 4 *Journal of Comparative Law in Africa* 92.

[142] Para 25 of the ACHPR/ACERWC/GC (2018).

vii. conducting training and capacity building workshops for relevant government officials;
viii. establishing credible and effective data collection mechanisms; and
ix. allocating sufficient budgetary and other resources towards ending child marriage.

States Parties can implement these measures through their governmental departments. In South Africa, these measures can be implemented through *inter alia*, the Department of Home Affairs, the Department of Justice and Correctional Services, the Department of Basic Education, the Department of Health, the Department of Social Development and the Department of Planning, Monitoring and Evaluation.

c) Other measures

Child marriage exists within economic contexts marked by poverty. Some parents believe that marrying their daughters off at an early age relieves them of financial responsibility.[143] The ACHPR and ACERWC urge States Parties to adopt measures to reduce poverty. According to the World Bank, South Africa can do this by addressing inequality of opportunity among people residing in rural areas and equalising opportunities, such as education, among children.[144]

The ACHPR and ACERWC further mention that States Parties should address other harmful practices that contribute to the prevalence and impact of forced marriages and child marriages, which are often sustained in the name of tradition or religion to subordinate women and girls. Recognising the links between these marriages and gender inequality, States Parties are also encouraged to promote the participation of parents, particularly fathers, religious leaders and community leaders in ending them.[145]

The Joint General Comment enjoins States Parties to formulate and apply targeted measures to prevent forced marriages and child marriages among children at higher risk, namely children affected by conflict, children with disabilities, children in child

[143] UNICEF 'Early Marriage: Child Spouses' (2001: 6).

[144] World Bank 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers Constraints and Opportunities' (2018).

[145] Para 53 of the ACHPR/ACERWC/GC (2018).

headed households and children affected by homelessness.[146] This supports the pledge that 'no one will be left behind' in implementing the SDG Agenda 2030.[147]

States Parties are obliged to provide reparation to the victims in the forms of restitution and rehabilitation.[148] Restitution should be aimed at returning victims to the position they were in before the marriage and may include restoration of status and re-enrolment in schools. Restoring the child marriage survivor's status is arguably necessary to ensure that the child is not deprived of protections afforded by the CRC and ACRWC. Rehabilitation should be aimed at restoring the child's independence, physical, mental, cultural and full reintegration into society. Reintegration is critically important especially where perpetrators have faced criminal penalties or punishment.

Finally, States Parties are encouraged to support civil society initiatives and partnerships that promote the wellbeing and protection of children, particularly those invested in empowering communities and girls at risk of these marriages. This can be done by dialogue and collaboration between all stakeholders, and particularly traditional, community and religious leaders.[149]

2.4 Case Law

Mudzuru & 2 Others v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others,[150] is a Zimbabwean Constitutional Court case which outlawed child marriages. The constitutional challenge was brought by two Zimbabwean women, aged 19 and 18 years respectively, who had been subjected to early marriage. They sought to have child marriage under both civil and customary law declared in violation of various sections of the Zimbabwean Constitution.[151] The cause of action appeared from the judgment as follows:

---

[146] Para 54 of the ACHPR/ACERWC/GC (2018).

[147] Preamble of the UN General Assembly Resolution 70/1 Transforming our world: 2030 for Sustainable Development (2015), hereafter 2030 Agenda for Sustainable Development A/RES/70/1.

[148] Para 59 of the ACHPR/ACERWC/GC (2018).

[149] Para 62 of the ACHPR/ACERWC/GC (2018).

[150] *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others*, Judgment No. CCZ 12/2015. (*Mudzuru v Minister of Justice*)

[151] *Mudzuru v Minister of Justice* page 1.

> ‘The applicants alleged that the fundamental rights of a girl child to equal treatment before the law and not to be subjected to any form of marriage enshrined in s 81(1) was read with s 78(1) of the Constitution have been, are being and are likely to be infringed if an order declaring s 22(1) of the Marriage Act and any other law authorising child marriage unconstitutional was not granted by the Court’.[152]

Section 78, titled ‘Marriage Rights’, states that persons who have attained the age of 18 years have a right to found a family and that no person may be compelled to enter into marriage against their will.[153] Section 81(1) provides rights for children including the right to equality, the right to be heard, the right to family or parental care or to appropriate care when removed from the family environment, the right to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse and the right to education, health care services, nutrition and shelter.[154]

Contrary to the Zimbabwean Constitution, the Marriage Act of Zimbabwe[155] prohibited the marriage of a boy under the age of 18 years of age and a girl under 16 years of age in section 22(1), except with the written permission of the Minister of Justice if he or she found such a marriage to be desirable. This permitted child marriages and established a different marriage age for boys and girls. The Customary Marriages Act[156] set no minimum age for a customary marriage, thus, according to received wisdom, the minimum age for marriage is the attainment of puberty.

The applicants relied on the CRC[157] and ACRWC[158] in support of the argument that allowing children under the age of 18 years to be married off entails subjecting them to maltreatment, neglect and abuse which is proscribed in section 81(1)(e) of the Constitution.[159] As a result, the Constitutional Court, in terms of section 46(1)(c), was obligated to consider these instruments since Zimbabwe is a signatory. In addition, the

---

[152] *Mudzuru v Minister of Justice* page 8.

[153] s78 of the Zimbabwean Constitution.

[154] s81 of the Zimbabwean Constitution.

[155] Chap 5:11 of the Marriage Act of Zimbabwe.

[156] Chap 5:07 of the Customary Marriages Act.

[157] Ratified by Zimbabwe in 1990.

[158] Ratified by Zimbabwe in 1995.

[159] *Mudzuru v Minister of Justice* page 2.

Zimbabwean Constitution enjoins courts to interpret legislation in a manner consistent with international customary law applicable in Zimbabwe[160] or any international convention, treaty or agreement that is binding on Zimbabwe.[161] The *Mudzuru v Minister of Justice* judgment thus presents an example of how the courts can make effective use of international law and treaties in their reasoning.

The court held that, by ratifying the CRC and ACRWC, Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child enshrined in the relevant conventions to ensure that they are enjoyed in practice.[162] The court held that sections 78(1) and 81 of the Zimbabwean Constitution must be interpreted progressively.[163]

In this regard, the court held that the meaning of section 78(1) could not be ascertained without having regard to the context of the obligations undertaken by Zimbabwe under international conventions and treaties on matters of marriage and family relations at the time of the enactment of the Constitution in May 2013.[164] The court held further that regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood.[165]

The court noted that the UDHR, CEDAW, Marriage Convention and CRC do not specify a minimum age for marriage,[166] and therefore narrowed its focus to article 21 of the ACRWC. The court held that in clear and unambiguous language, article 21 imposes on Zimbabwe, an obligation to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and

[160] s326(2) of the Zimbabwean Constitution.

[161] s327(6) of the Zimbabwean Constitution.

[162] *Mudzuru v Minister of Justice* page 27.

[163] *Mudzuru v Minister of Justice* page 27.

[164] Sloth-Nielsen J & Hove K '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*: A review' (2015) 15 *African Human Rights Law Journal* 562.

[165] Sloth-Nielsen J & Hove K (2015: 562).

[166] *Mudzuru v Minister of Justice* page 28.

development of the child.[167] According to the court, Zimbabwe had an obligation to abolish child marriage.[168]

Article 21(2) of the ACRWC was found to have a direct effect on the validity of the impugned provisions of the Marriage Act. The court referred to concluding observations on Zimbabwe by the ICESCR Committee (1995) and the ICCPR Committee (1998) as well as General Recommendation 21 of CEDAW (1994), to highlight that Zimbabwe was always reminded of its duty to ensure that section 22(1) of the Marriage Act was consistent with international standards.[169]

The court held that section 78(1) was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under article 21(2) of the ACRWC to specify by legislation 18 years as the minimum age for marriage and abolish child marriage.[170] With regard to the effect of section 78(1) on section 22(1) of the Marriage Act and child marriage, the court stated that the former provision (read with s81(1) of the Constitution) sets forth the principle of equality in dignity and rights for girls and boys, effectively prohibiting discriminatory and unequal treatment on the ground of sex or gender. Moreover, consistent with article 21(2) of the ACRWC, section 78(1) abolishes all types of child marriage and brooks no exception or dispensation as to age based on special circumstances of the child.[171]

Based on an analysis of the consequences of child marriage, and relying on treaty law and foreign case law in its interpretation of the applicable constitutional sections, the Constitutional Court concluded that section 22(1) of the Marriage Act was inconsistent with the provisions of the constitution and therefore invalid.[172] From the date of the judgment, a marriage of persons under the age of 18 was illegal.[173]

Subsequent to the *Mudzuru* judgment, a legal challenge to the Tanzania Law of Marriage Act was brought in the High Court of Tanzania, in the case of *Rebeca Gyumi*

[167] *Mudzuru v Minister of Justice* page 36.

[168] *Mudzuru v Minister of Justice* page 36.

[169] *Mudzuru v Minister of Justice* pages 37-38.

[170] *Mudzuru v Minister of Justice* page 42.

[171] *Mudzuru v Minister of Justice* page 49.

[172] *Mudzuru v Minister of Justice* page 50

[173] *Mudzuru v Minister of Justice* page 55.

v Attorney-General.[174] The law permitted girls to marry at the age of 15 with parental consent and at the age of 14 with judicial consent.[175] The petitioner sought orders that sections 13 and 17 of the Tanzanian Law of Marriage Act be declared unconstitutional. In addition, the petitioner sought a declaration that 18 years would be the minimum age for marriage until the legislature amended the law.[176]

The petitioner challenged the constitutionality of the provisions on four grounds,[177] namely:

(a) sections 13 and 17 of the Law of Marriage Act which provide different ages of marriage for boys and girls as well as parental consent contravene the right to equality as provided for under the Constitution of the United Republic of Tanzania of 1977 as amended;
(b) section13(1)(2) of the Law of Marriage Act which permits females to get married at the age of 14 years, whilst males marry at the age of 18 years, is discriminatory and thus contravenes the Constitution;
(c) section 17 of the Law of Marriage Act which allows a child of 15 years of age to get married with the consent of the parent(s)/guardian/court infringes on the rights to equality and dignity provided for under the Constitution; and
(d) section 13(2) of the Law of Marriage Act which requires leave of the court for the marriage of the person at the age of 14 years, arbitrarily infringes on children's right to education provided for in the Constitution.

The petitioner invited the court to look at international and regional instruments, to which Tanzania is a signatory, that support the fight against discrimination. In this regard, the petitioner cited the UDHR, article 26 of the ICCPR, article 2 of CEDAW, article 1(2) of the CRC, article 3 of the ACRWC[178] and article 2 of the Maputo Protocol.[179] The petitioner used the above provisions to argue that Tanzania had an obligation to adopt legislation to eliminate discrimination.

[174] *Rebeca Z. Gyumi v The Attorney General Miscellaneous Civil Cause No. 5 of 2016.*

[175] s17 & s13(1) of the Tanzanian Marriage Act.

[176] *Rebeca Z. Gyumi v The Attorney General* page 2.

[177] *Rebeca Z. Gyumi v The Attorney General* pages 2-4.

[178] Tanzania ratified the ACRWC on 16 March 2003.

[179] *Rebeca Z. Gyumi v The Attorney General* page 8.

The court accepted the invitation and made brief reference to the provisions of the Maputo Protocol and ACRWC. In the case of differential treatment, the court agreed with the petitioner that the right to equality is denied. It was held that, according to article 6 of the Maputo Protocol, States Parties are encouraged to guarantee equal treatment of men and women and ensure that both are considered as equal partners in marriage.

The court further stated that the article also stipulates that States Parties should enact appropriate measures that ensure that marriage does not occur without the free will and full consent of both parties and that the minimum age for marriage is 18. In this regard, the court agreed with the petitioner that Tanzania having ratified the said regional instrument, ought to take appropriate legislative measures to ensure that the rights enshrined in the Tanzanian Constitution are realised by all.[180]

Furthermore, the court rejected the respondent's argument that the impugned provisions should be spared on account of values embedded in customary law and rules of Islamic law. For its position on this issue, the court referred to article 21 of the ACRWC.[181] The court also noted that 13 years ago, Tanzania had ratified the ACRWC and was therefore not persuaded by the respondent's view that customary practices that impact children adversely still intend well for those children.

In reaching its verdict, the court examined the *Mudzuru* judgment and was persuaded by the Zimbabwean court's observations and conclusions.[182] Accordingly, the High Court confirmed the constitutional invalidity. The government of Tanzania, however, noted an appeal against the whole judgment in the Court of Appeal of Tanzania.[183]

With regard to international and regional law, certain clauses in international and regional treaties of which Tanzania is a member were briefly reviewed by the Court of Appeal. The court cited article 16 of the UDHR with emphasis on 'men and women of full age' and 'the free and full consent'.[184] The court went on further to state that articles 1 of the CRC and 2 of the ACRWC define a child to mean every human being below

[180] Rebeca Z. Gyumi v The Attorney General page 20.

[181] Rebeca Z. *Gyumi v The Attorney General* page 21.

[182] Rebeca Z. *Gyumi v The Attorney General* page 22.

[183] *The Attorney General v Rebeca Z. Gyumi* Civil Appeal No. 204 of 2017, Judgment (2019).

[184] *The Attorney General v Rebeca Z. Gyumi,* page 29-30.

the age of 18 years, unless under the applicable law to the child, majority is attained earlier.[185] An oversight by the court is that article 2 of the ACRWC defines a child as a person under the age of 18 without any exceptions. Lastly, the court merely cited the article 6 of the Maputo Protocol with emphasis on subsections (a) and (b), and without an in-depth analysis. [186]

The court concluded that it was clear in international and regional law that only men and women of 'full age' had the right to marry. Any person who had not attained the age of 18, therefore, lacked the capacity to enjoy this right. It was also concluded that persons who enter into marriage must 'pass the test of free and full consent'.[187] This 'test' was, however, not explained. Ultimately, the appeal was dismissed. According to Msuya, the court's position was that all legislative developments should reflect worldwide public outcry about ensuring that the welfare and protection of the girl child is enhanced and the dignity and integrity of women is safeguarded.[188]

2.5 Conclusion

International and regional frameworks oppose forced marriages and child marriages but do not address the problem as its own category.[189] Instead, various international and regional treaties contain clauses which may be used to challenge these marriages in States Parties. In addition to this, Committees and Commissions monitoring the implementation of these instruments have also drawn up general recommendations and comments, generally or specifically attempting to resolve the issue.

It is left to States Parties to take legislative or other appropriate measures to achieve the desired aims. Unfortunately, this overlooks the vulnerable positions that children may still find themselves in when States Parties ignore calls to act. Furthermore, loopholes created by parental/judicial consent and customary or religious laws,

---

[185] *The Attorney General v Rebeca Z. Gyumi,* page 30-31.

[186] *The Attorney General v Rebeca Z. Gyumi,* page 30-31.

[187] *The Attorney General v Rebeca Z. Gyumi* page 31.

[188] Msuya N 'The analysis of child marriage and third-party consent in the case of *Rebeca Z. Gyumi v Attorney* General Miscellaneous Civil Case no 5 of 2016 Tanzania High Court at Dar es Salaam' (2019) 14 *De Jure* 297.

[189] Robles MJ 'Child Marriage and the Failure of International Law: a Comparison of American, Indian, and Canadian Domestic Policies' (2018) 18 *International and Comparative Law Review* (2018) 110.

prevent the prohibition of forced marriages and child marriages by some of these international and regional treaties. Forced marriages and child marriages therefore fall into what Robles calls 'a sanctions limbo'.[190]

According to Robles, the international treaties and agreements set forth to combat child marriage to some or other extent may be useless.[191] Unless a specific instrument is designed to meet the needs of potential and actual child spouses, one which outlines enforcement, minimum age, annulment steps and all of the factors previously mentioned in this chapter, child marriage will remain a worldwide issue.

With the prevalence of forced marriages and child marriages, particularly in the African region, perhaps it can be argued that a protocol prohibiting these marriages is necessary. Take for instance the CRC Optional Protocol on the Involvement of Children in Armed Conflict[192] and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,[193] which have both been ratified by over one hundred states, even by the United States of America which has not ratified the CRC.[194] These protocols indicate a commitment to achieve active participation in international actions to address the violations of children's rights covered in the two Protocols.[195] Likewise, a regional or international legislation dedicated specifically to the issue will show States Parties' commitments (or non-commitments) to eradicating forced marriages and child marriages completely.

---

[190] Robles MJ (2018: 114).

[191] Robles MJ (2018: 114).

[192] To date the OPAC has 130 signatories. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last accessed on 4 June 2020).

[193] To date the OPSC has 121 signatories. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (last accessed on 4 June 2020).

[194] The USA ratified both the OPAC & OPSC on 23 December 2002. However, the USA is the only country which has not ratified the CRC.

[195] Doek J 'What Does the Children's Convention Require' (2006) 20 *Emory International Law Review* 208.

CHAPTER THREE: THE SOUTH AFRICAN LEGAL FRAMEWORK AND DEVELOPMENTS IN ADDRESSING THE MALPRACTICES SURROUNDING *UKUTHWALA*

3.1 Introduction

As discussed in chapter 2, South Africa is a party to several international and regional human rights instruments that can be used to protect girls from child marriages and which impose specific obligations to be met. In complying with the requirement of enacting legislation as a first step towards the implementation of international standards on the protection of children's rights in general,[196] and child marriages in particular, South Africa has a Constitution that has a Bill of Rights with specific provisions on children's rights.[197]

In addition, several customary, criminal and civil legislations have been put in place that can also be used to address harmful cultural practices and child marriages. These include the Children's Act 38 of 2005. This chapter focuses mainly on the South African legal framework and developments in addressing the malpractices surrounding *ukuthwala*.

By examining relevant legislation, this chapter will briefly discuss the available criminal sanctions in place which are used to tackle *ukuthwala* leading to forced marriages and child marriages. Case law and how it has contributed to the development of customary law and its implementation will also be discussed. Most importantly, the chapter presents an analysis and critique of the Prohibition Bill.

3.2 South African Legislative Measures

3.2.1 Pre-constitutional jurisprudence on *ukuthwala*

Dating as far back as 1906, Western courts have been suspicious of *ukuthwala* since Colonial times. *Ukuthwala* gave rise to various common law crimes including abduction, assault and rape. Consequently, courts decided on these criminal matters

[196] Arts 24(3), 16, 2(1)(b) & 5, 20 and 21 of the CRC, CEDAW, Maputo Protocol, African Youth Charter and SADC Gender Protocol, respectively.

[197] s28 of the Constitution.

related to *ukuthwala*. Although these judgments were handed down long before the adoption of the Constitution and may have been motivated by the prejudices that existed against customs of African communities, aspects thereof are still relevant and may be of value.

Some decided pre-constitutional cases, which dealt with the common-law crime of abduction were *R v Njova*[198]*, Ncedani and Others v Rex*[199] *R v Sita*[200] and *S v Mxhamli.*[201] In the case of *R v Njova* a girl older than 14 but under the age of 21 was abducted, against her will and that of her parents, for the purpose of marriage or carnal connection. An issue that the Court had to deal with was whether or not the facts alleged in the indictment constituted a crime by the law of the native territories.

In terms of section 169 of the Native Territories Penal Code (Penal Code), only the kidnapping of children under 14 years of age was a crime. Section 269 provided that crimes and offences that were not more particularly specified, which were punishable in the Cape Colony, were punishable in the native territories. The court held that the removal by a native man of a native girl between the ages of 14 and 21 for the purposes of marriage or sexual intercourse constituted the crime of abduction.[202]

Two years following the *R v Njova* judgment, the case of *Ncedani v Rex* was heard. The *Ncedani v R* case concerned an appeal where 3 accused had been charged, convicted and sentenced for the crime of abduction. They had abducted an unmarried girl under the age of 21 years, against her will and that of her legal guardian, for purposes of marriage. The first and second accused pleaded guilty and the third accused pleaded not guilty. The magistrate found all 3 guilty.

On appeal, they argued that the girl was not removed from her guardian's control for the purpose of marrying either of the accused or for the purposes of satisfying their lust, and if this objection was not sustained, the facts of this case did not constitute a crime by law in force in the native territories. The court rejected this argument and relied on *R v Njova* that the law of the Cape Colony was applicable. In addition, the

---

[198] *Rex v Njova (1906) 20 EDC 71.*

[199] *Ncedani and Others v Rex (1908) 22 EDC 243.*

[200] *Rex v Sita* 1954 (4) SA 20 (E).

[201] *S v Mxhamli* 1992 (2) SACR 704 (TK).

[202] *Rex v Njova* page 72.

court held that the Penal Code provides that everyone who aids or abets any person in the actual commission of an offence is guilty of a crime. It was concluded that the forceful removal of a minor girl without her or her guardian's consent constituted the crime of abduction.[203]

In *R v Sita*, the case concerned an appeal of a decision made by a magistrate who had ruled that in the Transkei the abduction of a girl between the ages of 14 and 21 years was not a crime at all since it had not been specifically declared a crime under the Penal Code.[204] The appeal court however relied on *R v Njova* and *Ncedani v R*, as a *stare decisis*. The judge stated that a custom cannot override common law and therefore the consent of a parent or guardian was necessary.[205] The appeal succeeded and the verdict of the magistrate was set aside.

Finally, in *S v Mxhamli* the appellant was convicted in the magistrate's court for abduction and received a sentence of 4 months imprisonment. He and two companions had forcibly removed a girl from her grandmother's homestead to the appellant's mother's homestead, where he raped her on two occasions. It was also common cause that he had not previously paid court to the girl.

The girl claimed that she had been assaulted and threatened and forced to submit to sexual intercourse. The appellant admitted that she had been crying and had been distressed, but asserted that she had agreed to having sexual intercourse. The appellant further asserted that he had taken the girl intending to marry her, and for the purposes of this appeal this could be accepted.[206]

The appellant challenged the appropriateness of his sentence on the basis that he was practising *ukuthwala*. It was submitted that according to the custom a man who wished to marry a girl was entitled to forcibly abduct a girl irrespective of whether there had been prior overtures to the girl or her guardian with a view to marriage. The court dismissed the appeal because the conduct of the appellant was not sanctioned by custom. The court stated as follows:

---

[203] *Ncedani and Others v Rex* page 245.

[204] *R v Sita* page 22.

[205] *R v Sita* page 23.

[206] *S v Mxhamli* page 705.

> ‘In the first place, it is a practice open to a “suitor” - i.e. someone who has, at the very least, made his desire to marry a girl known to her (or her guardian), and it is common cause that the appellant had not had any prior relationship with the girl he abducted; in no sense could he qualify as her suitor. In the second place, even if [the] appellant is given the benefit of the doubt as to whether the girl consented to intercourse, at best for the appellant he seduced her’.[207]

The court’s contention, however, was that if the custom were followed in the correct manner then this would have been a mitigating factor in a sentence for abduction. Where, on the other hand, an abductor claiming to act under the custom does not observe the parameters of the custom, his offence is not mitigated in the least.

The above cases clearly indicate that the unlawful removal of a minor child from the custody of her parent or guardian, for the purpose of marriage or sexual intercourse constituted a crime. However, in terms of *ukuthwala* such removal was and still is considered a precursor to a customary marriage. In spite of this, one would still be found guilty of having committed the crime of abduction unless the custom was recognised by law. In all but Sita’s case, the courts failed to recognise the existence of the customary law and in most cases refused to consider it because it was in direct conflict with the common law.[208]

The second crime for which the man and/or his accomplices could be prosecuted was assault. In *Rex v Swartbooi and Others*[209] the accused and eleven others were charged with common assault for attacking and beating the complainant, and others, when they forcefully removed her from her home. On appeal, the appellants relied on *ukuthwala* as a defence for their actions.[210] The court stated that it would not recognise the custom as a defence to a charge of assault which may be committed upon a girl who is desired for the *thwala*, or upon any of her friends and relations who wished to

[207] *S v Mxhamli* page 706

[208] Oosthuizen T & Ngema NM (2010: 92).

[209] *Rex v Swartbooi & Others* 1916 EDL 170.

[210] *Rex v Swartbooi* page 171.

resist efforts made by the bridegroom or any member of his party.[211] The appeal was dismissed.

Finally, where a man had sexual intercourse with a girl without permission, he could be prosecuted for the crime of rape. In *Rex v Mane*[212] the accused was charged with the crime of rape and the facts were reported as follows.[213] The girl's guardian, while her father was away, gave permission to the accused's brother to *thwala* her for the purpose of marrying the accused, without her knowing.

On suspicion that she would be married off, she informed the members of the accused's kraal that she did not want to be married at all and tried to escape several times without any success. During this time, the accused had sexual intercourse with her on two occasions without her consent. When she finally escaped, she immediately went to make a report to the police.

The court found that the complainant never gave consent to the *thwala* and was not the accused's wife. The court relied on the evidence of a headman that in the custom of *thwala* it is an essential element that the bride should be a consenting party. The accused was found guilty of rape.[214]

Two aspects from the case law remain relevant. First, courts would not accept the defence of *ukuthwala* for the crimes of abduction, common assault and rape, for reasons, *inter alia*, of the lack of consent from the girls or their guardians. Secondly, the courts seemed concerned by the violence and force that was used in order to facilitate *ukuthwala* and thus refused to condone such.

3.2.2 Constitutional protection

The advent of the 1996 Constitution brought about considerable changes in South African law for women and children living in customary settings. The Constitution provides for the protection and advancement of women and children's rights by affirming the democratic values of human dignity, equality and freedom and security

[211] *Rex v Swartbooi* page 172.

[212] *Rex v Mane* 1948 (1) All SA 126 (E).

[213] *Rex v Mane* pages 127-129.

[214] *Rex v Mane* page 130.

of the person.[215] The inclusion of these provisions is one of the effective approaches that can enhance the legal measures to curb against the violation of women's and children's rights by the continued practice of the distorted version of *ukuthwala*.

a) Equality

Section 9(1) of the Constitution guarantees the right to equality and subsection (3) unequivocally prohibits discrimination on the basis of gender. According to Ngcukaitobi, the right to equality and non-discrimination essentially means that special measures may be taken to ensure the protection or advancement of people who have been disadvantaged by discrimination in the past.[216] In this context, the Constitutional Court in the case of *Bhe v Magistrate Khayelitsha*, where the principle of male primogeniture was held to be unconstitutional because of discrimination against women, Langa DCJ noted that the right to equality is one of the most valuable rights in an open and democratic state and that it assumes special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include gender.[217]

Accordingly, section 9(1) and (3) of the Constitution protects women and girls from harmful cultural practices such as forced marriages and child marriages, because when interpreting customary laws, courts have an obligation to promote the spirit, purport and objects of the Bill of Rights which include the promotion of equality and non-discrimination.[218]

b) Freedom and security of a person

The Constitution protects the right to freedom and security of a person, a right that may be threatened by the practice of *ukuthwala*. In terms of section 12(1), the right to freedom and security of a person encompasses the right:

(a) not to be deprived of freedom arbitrarily or without just cause;

---

[215] s10, S9 and S12 of the Constitution, respectively.

[216] Ngcukaitobi T 'Equality' in Currie I and De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2018) 211.

[217] *Bhe v Magistrate of Khayelitsha* para 72.

[218] s39(2) of the Constitution.

(b) …
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.

According to Rautenbach and Matthee's analysis, first, in terms of subsection (a), a girl who is forced into *ukuthwala* is almost certainly deprived of the right to freedom and security of her person, especially if she was compelled against her will. Secondly, subsections (c) and (d) proscribe all forms of violence and torture. In extreme instances *ukuthwala* results in assault and/or rape. Thirdly, *ukuthwala* can infringe the right in subsection (e) when a girl is subjected to violence, humiliation and unpleasant living conditions and treatment while in the custody of her captor.[219]

In a situation where *ukuthwala* leads to the commission of rape, this constitutes a breach of section 12(2). In terms of the subsection it is provided that:

Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;
(b) to security in and control over their body; …

Section 12(2) expressly outlines the right to security of the person so as to include protection of physical integrity, and extends it to the protection of psychological integrity.[220] This is in line with the Maputo Protocol and ACRWC which condemn practices that compromise the physical and mental well-being of women and girls.[221] Currie and De Waal explain that 'security in' and 'control' over one's body are not synonymous; the former denotes the protection of bodily integrity against intrusions by the State and others, and the latter denotes the protection of what could be called bodily autonomy or self-determination against interference.[222]

[219] Rautenbach C & Matthee J (2010: 136).

[220] Currie I & De Waal J 'Freedom and Security of the Person' in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2018) 286.

[221] Art 5(2) of the ACRWC & preamble of the Maputo Protocol.

[222] Currie I & De Waal J (2018: 287).

(c) Best interests principle in customary law

Another key provision which is violated by harmful cultural practices is section 28 of the Constitution. Section 28(1)(d) provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation. More importantly, section 28(2) states that a child's best interests are of paramount importance in every matter concerning the child. Skelton points out that as much as section 28(2) is a self-standing right, it also strengthens other rights.[223]

Furthermore, the section has been given context by the Constitutional Court. In *S v M* the Constitutional Court remarked that section 28(2) requires that statutes must be interpreted and the common law (and customary law) developed in a way which favours protecting and advancing the interests of children; and courts must function in a manner which at all times shows due respect for children's rights.[224] Sachs J went further to state that:

> 'Every child has his or her dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents…Foundational to the enjoyment of the rights to childhood is the promotion of the rights as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.'[225]

Bennett notes that the position of children under customary law is determined by the status of their parents, and an individual is protected through his or her family.[226] The Constitutional Court therefore has enhanced the protection for children living under customary settings by making it clear that their best interests are of paramount importance in any matter that concerns them.[227]

---

[223] Skelton A 'Children' in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2019) 599.

[224] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 15.

[225] *S v M* paras 18-19.

[226] Bennett TW 'Customary Law in South Africa' (2004: 295).

[227] See also Ngidi R 'Upholding Best Interests of the Child in South African Customary Law' 228 in Boezaart T (ed) *Child Law in South Africa* (2009) & Ozah K & Hansungule Z 'Upholding the Best Interests of the Child in South African Customary Law' in Boezaart T '*Child Law in South Africa*' 2 ed

(d) Right to culture

The Constitution also provides for and protects the right to culture.[228] Sections 30 and 31 give every person the right to participate in a culture of their choice. Section 15(3) allows legislation recognising marriages concluded under any tradition, or system of religious, personal or family law. However, these provisions explicitly include a qualification stipulating that no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.[229]

This recognition could be interpreted as protecting practices such as *ukuthwala* and other customary practices which have the impact of undermining other constitutional rights of women and girl children. Indeed, Rautenbach and Matthee argue that an overview of these constitutional provisions to culture seems to suggest that a person who commits a culturally motivated crime can argue that he or she was only exercising his or her constitutional rights.[230]

However, where conflict arises between the right to culture and a young woman or girl's right to enjoy other freedoms afforded by the Constitution, the solution can be found in the internal limitation clauses in sections 15, 30 and 31 of the Constitution, as pointed out earlier. Another important clause is section 36(1) of the Constitution which provides for the limitation of rights.[231] In addition, section 39(1) can be used to compel

(2018) where they discuss other cases where the children's best interests was applied for children living in customary settings.

[228] s15(3), s30 and s31 of the Constitution.

[229] s30, s31(2) and s15(3) of the Constitution.

[230] Rautenbach C & Matthee J (2010: 135).

[231] s36 of the Constitution provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

courts to consider international and foreign law which protects women and girl children from forced marriages and child marriages. Furthermore, section 211(3) of the Constitution provides that courts must apply customary law when applicable, subject only to the Constitution and any legislation that specifically deals with customary law.

Importantly, as previously mentioned earlier, courts are empowered by section 39(2) to develop common or customary law to promote the spirit, purport and objects of the Bill of Rights and thus in *Carmichele v Minister of Safety and Security* the Constitutional Court developed the common law to protect women from violence.[232] In *Bhe v Magistrate Khayelitsha*, the court ruled that the *Carmichele* case applies equally to the development of indigenous law.[233]

The cumulative effect of these constitutional provisions is that although the right to culture is protected, and thus protects customary practices such as *ukuthwala*, it will not prevail where it does not pass constitutional muster.

3.2.3 Criminal Protection

Perpetrators and accomplices of the distorted versions of *ukuthwala* may be prosecuted for offences in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Acts of 2007 and 2015, respectively ("Sexual Offences Act of 2007" and "Sexual Offences Act of 2015").

a) Sexual Assault

Section 5(1) of the Sexual Offences Act of 2007 provides that a person who unlawfully and intentionally sexually violates a person without his or her consent is guilty of the crime of sexual assault.[234] Furthermore, a person who unlawfully and intentionally

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[232] *Carmichele v Minister of Safety and Security* 2002 1 SACR 79 (CC) paras 37-40.

[233] *Bhe v Magistrate Khayelitsha* para 215.

[234] s5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act).

inspires the belief in a person that the he or she will be sexually violated, is guilty of the offence of sexual assault.[235]

The elements of the crime of sexual assault are: *(a)* an act of sexual violation of another person; *(b)* without the consent of the latter person: *(c)* unlawfulness; and *(d)* intention.[236] The purpose of this crime is to criminalise sexual acts which fall short of actual penetration of the victim.[237] *Ukuthwala* therefore fulfils these requirements where the suitor sexually assaults the young woman or girl, or inspires a belief that she will be sexually assaulted.

b) Rape

Section 3 of the Sexual Offences Act of 2007 provides that any person who unlawfully and intentionally commits an act of sexual penetration with another person without the latter's consent is guilty of the offence of rape. The elements of the crime of rape are: *(a)* sexual penetration of another person; *(b)* without the consent of the latter person; *(c)* unlawfulness; and *(d)* intention.

For purposes of this section, consent means a voluntary or uncoerced agreement.[238] Section 1(3) contains a provision dealing with the interpretation of the words 'voluntary or uncoerced'. It provides the unlimited circumstances in respect of which a person does not voluntarily agree or without coercion agree to an act of sexual penetration or an act of sexual violation such as:

(a) Where the victim submits or is subjected to a sexual act as a result of the use of force, intimidation or a threat of harm;
(b) Where there is an abuse of power or authority by the accused;
(c) Where the sexual act is committed under false pretences or by fraudulent means or where the complainant is incapable in law of appreciating the nature of the sexual act.[239]

[235] s5(2), Sexual Offences Act of 2007.

[236] Snyman CR (ed) *Criminal Law* 6 ed (2015) 360.

[237] Snyman CR (ed) *Criminal Law* 6 ed (2015) 360.

[238] s1(2) of the Sexual Offences Act of 2007.

[239] s1(3) of the Sexual Offences Act of 2007.

In the context of *ukuthwala*, there are certain factors that are used to determine whether the act of sexually violating a woman is a criminal or a sanctioned form of coercion. The factor of most relevance in assessing this question is whether the man sexually violated the woman with the intention of making her his wife. Karimakwenda found that sexual penetration was one crucial part of the processes of turning a girl into a wife and thus could not be equated with rape, which had no decent intention.

The act of sexual union marked the woman as belonging to that man: if the girl returned to her home after *ukuthwala*, the implication was that she was disgraced and 'damaged' by the man's sexual marking and 'owning' of her- a marking without substance.[240] Hence, men utilised sex not only to force women to submit, but also because it is an irreversible act that marks the girl as wife and causes her to be disgraced should she refuse the marriage.[241]

Further, in cases where the father's permission to abduct his daughter was obtained beforehand, it was considered that he also 'tacitly' consented to carnal connection between his daughter and the young man with the object of marriage, and therefore the man would not be found guilty of a crime.[242] Ultimately, the legitimate objective of marriage justified the violent means used to attain marriage.[243]

Jokani argues that a man who forces himself on the young woman or girl is liable to be charged with rape because he has intercourse with her without her consent. Where a girl is said to have given consent, such consent cannot be said to be voluntary because it has been given by force, intimidation, threats and abuse of power or authority. The abuse of power or authority in the context of *ukuthwala* occurs, for example, when a father threatens to expel the girl if she refuses *ukuthwala*.[244]

Where a girl child is *thwalad* and a man proceeds to have sexual intercourse with her he may be charged with statutory rape in terms of section 15(1) of the Sexual Offences Act of 2015. In terms of this section, a person who commits an act of sexual

[240] Karimakwenda N (2013: 352).

[241] Karimakwenda N (2013: 352).

[242] Karimakwenda N (2013: 352).

[243] Karimakwenda N (2013: 353).

[244] Jokani M et al 'A Criminal Law Response to the Harmful Practices of *Ukuthwala*' (2018) 39 *Obiter* 758.

penetration with a child who is 12 years of age or older but under the age of 16 years is, despite the consent of such child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.[245] Section 16 of the Sexual Offences Act of 2015 similarly provides for the crime of statutory assault as above.

Lastly, section 1 of the Sexual Offences Act of 2015 defines a child as a person under the age of 18. However, in for purposes of statutory rape and assault, a child is defined as a person who is 12 years or older but under the age of 16 years.[246] For children below the age of 12, section 57(1) of the Sexual Offences Act of 2007 provides that these children are incapable of consenting to sexual acts.

c) Trafficking

Trafficking in persons, especially women and children, for purposes of exploitation is covered in the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (Trafficking Act). Trafficking in persons means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[247]

The Trafficking Act defines forced marriage as a marriage concluded without the consent of each of the parties to the marriage.[248] In terms of section 4(2)(b), any person who concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner is guilty of an offence.[249] Therefore, in *ukuthwala* where a victim is forced into marriage and taken from one place to another against her will, this can be equated to trafficking in persons. Parents, relatives and others who hand over a

[245] s15 of the Sexual Offences Act of 2015.

[246] s1 of the Sexual Offences Act of 2015.

[247] Art 3(a) UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime.

[248] Definitions section of the Trafficking Act.

[249] s4(2)(b) of the Trafficking Act.

child into a forced marriage for financial or any other type of gain can be prosecuted under section 4(2)(b) read with section 1 of the Trafficking Act.

d) Kidnapping

Another crime for which the man and/or his accomplices can be prosecuted for is kidnapping. Kidnapping consists of unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such a person is a child, the custodians of their control over the child.[250] The elements of the crime of kidnapping are the following: *(a)* the deprivation of *(b)* a person's freedom of movement (or the parental control in the case of a child) which takes place *(c)* unlawfully and *(d)* intentionally.[251]

Ukuthwala infringes the protected legal interest of freedom of movement in the case of kidnapping. Snyman however, points out that kidnapping in South Africa can also be committed in cases where a person consented to his or her own removal.[252] This means that in terms of the form of *ukuthwala* where the girl colludes with the man, the abductor can be charged with kidnapping even when the minor girl consents to her own removal.

3.2.4 Civil Protection

a) Recognition of Customary Marriages Act 120 of 1998

The RCMA was enacted to recognise customary marriages and to specify requirements for a valid customary marriage.[253] It confers full recognition on customary marriages; it regulates, *inter alia*, the requirements to conclude a valid customary marriage, registration and dissolution of customary marriages.[254] Customary marriages are defined as marriages concluded in accordance with customary law.[255]

In terms of section 3(1)(a) of the RCMA, prospective spouses must both be above the age of 18 years and must both consent to be married to each other under customary law. Section 3(1) is imperative in that it lists the requirements for the conclusion of a

[250] Snyman CR (2015: 471).

[251] Snyman CR (2015: 471).

[252] Snyman CR (2018: 481).

[253] Preamble of the RCMA.

[254] s2, s3, s4, s7 & s8 of the RCMA, respectively.

[255] Definitions section of the RCMA.

valid customary marriage. Given the clear language of the RCMA, *ukuthwala* that will lead to a marriage of a person below the age of 18 years falls foul of the RCMA and thus cannot be considered to be a valid customary marriage.

Section 3(1)(b) provides that a customary marriage must be negotiated and entered to or celebrated in accordance with customary law. This implies that negotiations preceding the celebration of a marriage are regarded as requirements for its validity.[256] Maithufi and Bekker pointed out that such negotiations take place between families of the prospective spouses and may even commence when the prospective spouses or one of them is still a minor.[257] According to the authors, it would appear that betrothals or engagements are regarded as valid by the RCMA provided that the prospective spouses give their consent when they reach the required age. Furthermore, it would also appear that an engagement preceded by *ukuthwala* is sanctioned provided that the parties' consent are of the required age.[258]

The RCMA further provides in section 3(3)(a) that if either of the prospective spouses is a minor, both parents or legal guardians must consent to the marriage. In addition to this, section 3(4)(a) empowers a Minister, or any officer in the public service authorised in writing thereto by him or her, to grant written permission to a person under the age of 18 years to enter into a customary marriage if they consider such marriage to be desirable and in the interests of the parties concerned. Where the Minister's permission was not obtained, the Minister may still declare the marriage to be valid in terms of section 3(3)(c).

As I stated in chapter 2, leaving the issue to States ignores the vulnerabilities which children may find themselves in. Section 3 arguably does not send a message against forced marriages or child marriages, and instead approves them. By sanctioning parental consent as well as the consent of the Minister, on behalf of children under the age of 18, the legislature failed to consider article 21(2) of the ACRWC position that no marriage of a child below the age of 18 should be permitted. Moreover, the RCMA

[256] Maithufi IP & Bekker JC 'The Recognition of the Customary Marriages Act of 1998 and its impact on family law in South Africa' (2002) 35 *Comparative and International Law Journal of Southern Africa* page 185.

[257] Maithufi IP & Bekker JC (2002: 185).

[258] Maithufi IP & Bekker JC (2002: 186).

was enacted in 1998 and it came into force on 15 November 2000, and this was all after 10 October 1997 when South African signed the ACRWC.[259]

Section 3(5) of the RCMA provides that section 24A of the Marriages Act of 1961 applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be. Section 24A provides that a marriage between persons of whom one is or both are minors shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare whose consent is by law required for entering into such a marriage, did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application for the dissolution of the marriage is made by (a) a parent or guardian of the minor or (b) the minor before he attains majority or within three months thereafter. [260]

It is interesting to note that section 3 was one of the only two provisions in the SALRC Discussion Paper which had an 'alternative draft clause'.[261] The original clause provided that the minimum ages of marriage were 18 for boys and 15 for girls. The alternative draft clause however established the minimum age for a customary marriage to be 18. Furthermore, the draft Bill had a section titled 'the customary marriages of minors'.[262] The discrepancies in proposed minimum ages for marriage indicate that the discussions surrounding child marriages were controversial.

The RCMA has been influential in the development of customary law for the advancement of women and children's rights in other respects.[263] However in the case of child marriages, it can be argued that the RCMA provides no protection at all for children who grow up in customary settings.

---

[259] Ratifications Table available at https://www.acerwc.africa/ratifications-table/ (accessed 20 May 2019). South Africa ratified the ACRWC on 7 January 2000.

[260] s34 of the Matrimonial Property Act No. 88 of 1984.

[261] SALRC Discussion Paper 74 *Customary Marriages* Project 90 The Harmonisation of the Common Law and the Indigenous Law August (1997) 143.

[262] SALRC Discussion Paper 74 *Customary Marriages* Project 90 The Harmonisation of the Common Law and the Indigenous Law August (1997) s6 of the Bill at 144.

[263] *Bhe v Magistrate of Khayelitsha*; *Mayelane v Ngwenyama; Gumede v President of the Republic of South Africa*.

b) Children's Act 38 of 2005

Section 12 of the Children's Act provides for the regulation of social, cultural and religious practices that pertain to children. Section 12(1) states that no child may be subjected to social, cultural and religious practices which are detrimental to his or her well-being. The customary practices the section regulates in detail include female genital mutilation, virginity testing and male circumcision.[264] Insofar as child marriage is concerned, section 12(2) provides that a child:

(a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and
(b) above the minimum age may not be given out in marriage without his or her consent.

The first part of this provision discourages marriages of children below the minimum age set by law for a valid marriage. For civil marriages, section 26(1) of the Marriage Act 25 of 1961 provides a minimum age of 18 for boys and 15 for girls, as well as the Minister's consent where children are below these ages.[265] As discussed previously, the RCMA sets the minimum age of marriage to 18 years. For civil unions, in terms of section 1 of the Civil Union Act 17 of 2006, the prescribed minimum age is 18, with no exceptions.[266] It can be argued that section 12(2)(a) inadequately protects children from child marriage because the minimum ages for marriage in South African laws are inconsistent.

The second part of this provision echoes the international, regional and sub-regional instruments which emphasise the importance of consent.[267] In addition to this, subsection (b) can be read with section 10 of the Children's Act which provides for child participation by children who have sufficiently developed and matured to be able

[264] s12(3), s12(4-7) & s12(8-10) of the Children's Act.

[265] s26(1) of the Marriage Act 25 of 1961. It is worth pointing out that the SALRC has argued that the age discrepancies serve no rational purpose and amount to unfair discrimination on the ground of sex. See Para 2.30 of the SALRC Discussion Paper 133 (Project 25) *Statutory Law Revision: Legislation Administered by the Department of Home Affairs* (2015).

[266] s1 of the Civil Union Act 17 of 2006.

[267] See sub-paragraph 2.2.2 of this thesis.

to express their views. They may do so in all matters concerning children and their views must be given due weight and consideration.

It can be argued that section 12(2)(b) however ignores that the capability of consenting is not equivalent to understanding and appreciating the consequences of marriage. Since it has been stated that children are incapable of consenting to sexual acts, it can also be argued that children are incapable of consenting to marriages.[268]

Section 305(1)(a) of the Children's Act makes it an offence to commit an act in contravention of section 12(2). Parents or guardians who give out their children in marriage and who are convicted in terms of section 305(1)(a) more than once, may be liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.[269] In spite of these provisions, however, children are still subjected to harmful practices including forced marriages and child marriages. This brings into question the effectiveness of the Chidren's Act in combating child marriages.

The Children's Act certainly has shortcomings in addressing *ukuthwala* and the violation of children's rights. Mwambene and Sloth-Nielsen have observed that the Children's Act is, insofar as harmful cultural practices are concerned, preventative as opposed to prohibitive. Nonetheless, the authors propose an amendment of the section to include child marriages as a result of *ukuthwala* as a harmful cultural practice.[270] I do not support this proposition as it isolates *ukuthwala* and does not identify cultural practices by other groups which may be similar to *ukuthwala*.

In summary, insofar as *ukuthwala* violates other constitutionally entrenched rights, then section 12(1) of the Children's Act is also breached. Furthermore, in terms of section 12(2), forced marriages and child marriages are generally prevented. Where such marriages do take place, with compliance with all relevant prescripts, the concerned child must also give his or her consent.

[268] See sub-paragraph 3.2.4 of this thesis.

[269] s305(7) of the Children's Act.

[270] Mwambene & Sloth-Nielsen (2011: 17).

3.2.5 Prohibition of Forced and Child Marriages Bill: Overview & Critical Analysis

The basic premise of the Prohibition Bill is to make child and forced marriages an offence; thus, protecting both women and children subjected to *ukuthwala* leading to these marriages. The law seeks to prevent forced and child marriages by making certain actions punishable and by calling for the prosecution of persons who commit such actions.[271] The Prohibition Bill introduces an expanded crime of forced marriage, prohibits child marriages and criminalises forced marriages.[272] It would be applicable to all citizens of the country. The purpose of this section therefore is to provide an overview and analysis of the Prohibition Bill.

a) Overview of the Prohibition Bill

Section 1 of the Probition Bill is a definitions section. The Economic and Social Affairs Division for the Advancement of Women (DAW/DESA)[273] proposes that a law must provide clear definitions of forced marriage and child marriage; and any definition of forced marriage must be broad enough to encompass the whole array of practices related to this issue.[274] Accordingly, section 1 of the Prohibition Bill proposes the following definitions for both forced marriages and child marriages:

> 'A child marriage is defined as a marriage relationship or cognate union where one or both of the parties are children, and the marriage was without the consent and free will of one or both of the parties.'
>
> 'A forced marriage refers to a marriage relationship or cognate union entered into without the consent and free will of one of the parties and includes those marriage relationships or cognate unions purporting to be contracted in pursuit of such practices such as *ukuthwala*, *shobediso*, *tjhobediso*, *kutlhaka*, *thlakisa*, *tahisa*, *kutaha* and *tshabisa*, *ukweba umakoti* or any similar practice.'

[271] s3(3) of the Prohibition Bill.

[272] Preamble of the Prohibition Bill.

[273] Economic & Social Affairs Division for the Advancement of Women 'Supplement to the Handbook for Legislation on Violence Against Women: Harmful Practices Against Women' (2011), hereafter Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011).

[274] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 23.

From these definitions, an important element is the lack of free and full consent. As discussed in chapter 2, it has long been established under international law that marriage must be entered into with the free and full consent of both parties.[275] This provision may be significant for the protection of persons over the age of 18, however I still maintain the argument in chapter 2 that fulfilment of this requirement does not protect children.

Furthermore, DAW/DESA provides that the goal of legislation on violence against women and children should be to prevent violence against these groups, to ensure investigation, prosecution and punishment of perpetrators, and to provide protection and support for complainants or survivors of violence.[276] Accordingly, section 2 of the Prohibition Bill provides that the objects of the Act are to ensure that marriages are entered into freely and without any form of coercion; to prohibit child marriages and forced marriages and to provide for the prosecution of persons who commit offences provided for in the Act and for appropriate penalties.[277]

Importantly, the Prohibition Bill makes it an offence to force a person into marriage in the following manner:

> '3(1) A person commits the offence of forced marriage if he or she-
>
> (a) uses violence, threats or any other form of coercion for the purposes of causing another person to enter into a marriage, and
> (b) believes or ought to believe that the conduct may cause the other person to enter into the marriage without free and full consent.
>
> (2) In relation to any person who by reason of mental capacity or any such reason lacks capacity to consent to a marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing that person to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form of coercion).
>
> (3) Any person who-

[275] Arts 16(2), 1, 10(1), 23(3) 16(1)(b), 6(a), 8(2)(b) & 8(2) of the UDHR, Marriage Convention, ICESCR, ICCPR, CEDAW, Maputo Protocol, SADC Gender Protocol and African Youth Charter, respectively.

[276] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 57.

[277] s2 of the Prohibition Bill.

(a) attempts;

(b) conspires with any other person; or

(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit an offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.' [278]

According to DAW/DESA, the creation of a broad offence on forced marriage is important as it allows the full range of such marriages to be punishable under the law.[279] The coercion of a person to enter into marriage against her will is prohibited in section 3(1) of the Prohibition Bill. In addition, several persons are heavily involved in forced marriages and the betrothal and marriage of children,[280] therefore the Prohibition Bill in section 3(3) explicitly addresses the criminal responsibility of those involved in the arrangement of a forced marriage.

The Prohibition Bill makes child marriages an offence in section 4 as follows:

> "A person commits a child marriage offence if he or she enters into a marriage or cognate union with a child, unless he or she complies with the provisions of the RCMA, Marriage Act and Children's Act."[281]

This means that persons, including parents, guardians or family members who convene a child marriage are liable for prosecution. The section fails to protect children because compliance with the provisions of the RCMA, Marriage Act and Children's Act means that child marriages can still occur.[282]

Besides criminalising forced marriages and child marriages, section 5 of Prohibition Bill also finds the accused guilty in the event that the evidence on the charge of forced

[278] s3 of the Prohibition Bill.

[279] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) page 24.

[280] *Rex v Swartbooi & Others* 1916 EDL 170.

[281] s4 of the Prohibition Bill.

[282] See para 3.2.4 of this thesis.

marriage or child marriage does not prove the offence, but proves instead the offences of abduction, kidnapping, assault, trafficking or any other criminal act.[283]

According to section 6 of the Prohibition Bill, a person found guilty of the offences referred to in sections 3, 4 and 5, may be liable on conviction to imprisonment for a period in line with the punishment prescribed for the offences of assault, abduction, kidnapping, rape and human trafficking or a fine or both such imprisonment or fine.

Finally, section 7 of the Prohibition Bill provides for the issuance of forced protection orders.[284] Section 1 defines this as an order issued by the court to prohibit a person from committing or aiding to commit the offence of forced marriage or child marriage, or if such purported marriage has taken place, an order issued by the court compelling the respondent(s) to terminate such marriage and to allow the victim to return to his or her place of residence before such purported marriage took place.[285]

The forced protection order may be issued against more than one person. In terms of section 7(b)(*ii-iii*), the terms of the order may, in particular, relate to respondents who are, or may become involved in other respects as well as, or instead of, respondents who force or attempt to force, or may force or attempt to force, a person into marriage; and other persons who are, or may become, involved in other respects as well as respondents of any kind.

b) Critical Analysis of the Prohibition Bill

It is however noted that the Prohibition Bill is by no means perfect. The provisions are more geared towards the perpetrator and they do not necessarily ensure the safety of the victim. The Prohibition Bill provides no details about the protection, support and assistance for survivors and information relating to service providers.[286]

The Prohibition Bill does not mandate the appointment of specialised protection officers who have undergone dedicated training in relation to forced marriages and child marriages and are tasked with developing an individual safety plan for each survivor: ensuring that the survivor has access to legal aid; maintaining a list of service

[283] s5 of the Prohibition Bill.

[284] s7 of the Prohibition Bill.

[285] s1 of the Prohibition Bill.

[286] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 12.

providers to whom they can refer the survivor; preparing an incident report which is to be submitted to a magistrate; taking the survivor to a shelter, as well as to be medically examined and/or treated if it is so required.[287] Comparatively, chapter 5 of the Trafficking in Persons Act entrenches a victim-centred approach and promotes better service delivery to respond to the needs of victims.

The Trafficking Act prioritises the welfare of victims during investigations and prosecutions by referring victims only to organisations accredited to receive adult victims of trafficking, which provide the following: access to and provision of adequate healthcare, counselling programmes and reintegration measures, and a plan to address the immediate and reasonable future needs of that victim.[288] Similarly, section 191(2)(f) of the Children's Act provides that a child and youth care centre must offer a therapeutic programme designed for the reception and temporary safe care of trafficked children.[289]

The Prohibition Bill does not require the development of protocols for various sectors setting out guidance on risk assessment, reporting, service provision and follow up in cases of suspected or actual forced marriages and child marriages.[290] Unlike the Prohibition Bill, section 110 of the Children's Act, provides obligations on various sectors for reporting of abused or neglected children or children in need of care and protection.[291]

As described by Hendriks, this section compels certain professional sectors to report any child abuse or neglect that is suspected on reasonable grounds to a designated child protection organisation, the provincial Department of Social Development or a police official. If the reporting is done in good faith and substantiated to the relevant authorities, the professionals responsible will not be held liable to civil claims as a result of their reporting. The Children's Act further stipulates that the Department of

[287] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 28.

[288] See s24, s25 and s28 of the Trafficking in Persons Act.

[289] s191(2)(f) of the Children's Act.

[290] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 29.

[291] s110 of the Children's Act.

Social Development must assess and further manage the situation in the best interests of the child.[292]

The Bill does not provide for the consequence of a forced marriage and a child marriage. There is no provision indicating the voidability or annulment of the marriage. For example, a court may declare a civil marriage null and void if the formal and material requirements are not complied with.[293] The grounds for voidability for example include, minority, material mistake, duress and undue influence.[294] Similarly, putative marriages where one or both parties enter into a civil marriage while being unaware that there is a defect which renders the marriage void, may also be set aside.[295]

The Prohibition Bill does not propose amendments to laws to prevent harmful practices related to forced marriages and child marriages.[296] Instead, the Prohibition Bill demands compliance with legislation such as the RCMA, Marriage Act and Children's Act, which allow child marriages. Proposals to rectify this issue are provided in chapter 5 of this thesis.

Importantly, DAW/DESA provides that legislation preventing a harmful practices must seek and acknowledge that communities have an integral role to play in the abandonment of forced marriages and child marriages, and call for government support for community-based abandonment initiatives that are targeted at changing behaviour and attitudes, and the training of traditional leaders about modern policies protecting women and children.[297] Nowhere in the Prohibition Bill is a Traditional House Leader or Minister mentioned.[298]

The Prohibition Bill neither provides for reporting procedures for complainants, arrests, nor does it designate officers to assist complaints. For example, section 2 of the

---

[292] Hendriks ML 'Mandatory reporting of child abuse in South Africa: Legislation explored' (2014) 104 *South African Medical Journal* 551.

[293] Heaton J & Kruger H (eds) 'Chapter 4: Void, Voidable and Putative Civil Marriages' in South African Family Law 4th ed (2015) 33.

[294] Heaton J & Kruger H (2015: 34-36).

[295] Heaton J & Kruger H (2015: 38).

[296] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 31.

[297] Supplement DAW/DESA Handbook for Legislation on Violence against Women (2011) 33.

[298] Contrast this with provisions where a Minister or a commissioner of child welfare is required to furnish his consent for child marriages. See s25 of the Marriage Act and s3(4)(a) of the RCMA.

Domestic Violence Act is titled 'duty to assist and inform complainant of rights'.[299] In terms of this section, a South African Police Service member has an obligation to attend to a complainant who has reported domestic violence by (a) assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment, (b) providing information in the language of the complainant and (c) explaining to the complainant his or her right to lodge a complaint. Section 3 also allows for arrest without a warrant.

Finally, the competent verdicts and penalties are already provided for in other legislation including the Criminal Law (Sexual Offences and Related Matters) Amendments Acts of 2007 and 2015, and the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

3.3 Conclusion

The SALRC finding that the South African legal framework does not adequately address forced marriages and child marriages is correct. However, neither does the Prohibition Bill. I have provided a critical analysis of the Prohibition Bill to explain this. Without, especially, clear guidance on how to handle cases, a stand-alone Prohibition Bill remains unnecessary. This does not however mean that the criminalisation of forced marriages and child marriages should fall through the cracks. In the next section I therefore discuss the advantages and disadvantages of criminalising forced and child marriages as a result of *ukuthwala*.

[299] Domestic Violence Act 116 of 1998.

CHAPTER FOUR: THE ADVANTAGES AND DISADVANTAGES OF CRIMINALISING FORCED MARRIAGES AND CHILD MARRIAGES RESULTING FROM *UKUTHWALA*

4.1 **Introduction**

The previous chapters set out the legal frameworks for the investigation whether South Africa should criminalise *ukuthwala* leading to forced marriages and child marriages. The present chapter will present the opinions and experiences of the community where the *S v Jezile* case originated. It is within the rural local towns and villages of the Eastern Cape and KwaZulu Natal provinces where *ukuthwala* manifests itself.

The field research[300] was conducted in Engcobo in 2015 and 2016, an area north of Mthatha which falls within the Chris Hani District Municipality of the Eastern Cape Province.[301] Whilst all the participants saw the malpractices surrounding *ukuthwala* as unacceptable and offensive to their culture, little support was expressed for criminalising it because the community maintained that the processes of *ukuthwala* are different from criminal acts. The evidence indicates that a community-led change is favoured to address the current malpractices surrounding *ukuthwala*.

The chapter is structured as follows. First, I highlight the community's views on *ukuthwala*. Thereafter, I provide a brief discussion on the theoretical perspectives on harmful cultural practices generally. This is followed by the main purpose of this thesis which is a discussion of the advantages and disadvantages of criminalising *ukuthwala* leading to forced marriages and child marriages. The final section contains the conclusion.

[300] Ethics consent was obtained from the Humanities and Social Research Ethics Committee of the University of the Western Cape (ethics ref no: HS/16/3/6, reg no: 12/1/21). I adhere to concepts of the research ethics and informed consent. All participants in this study were informed of the purpose of the study, their informed consent was obtained, and anonymity guaranteed.

[301] Engcobo Local Municipality (EC137) available at https://municipalities.co.za/overview/1021/engcobo-local-municipality.

4.2 Community Perspectives on *Ukuthwala*

4.2.1 The process of *ukuthwala*: marriageable age and consent

It emerged from the discussions that marriageable age is not something which the participants really concerned themselves about. Some participants were convinced that there is a need to prevent marriages of underage children.[302] However, other participants asserted that the onus falls on the parents of the girl to disapprove of *ukuthwala* on the basis that the girl is too young to wed; and that they do not concern themselves with such. One participant from the complainant's family emphasised that girls are not *thwalaed* before they reach puberty or without prior discussions with their families.[303]

During a discussion, when enquiring about the process of *ukuthwala* and whether the consent of the girl is sought, participants explained that this depends on the families. They elaborated that families are different and thus they do things differently. Participants in the group discussion with the convict's family insisted that, provided that the girl's family gives approval, they do not make further enquiries as to whether consultation with their daughter occurred and whether she agreed or not.[304]

Furthermore, the role of parental consent seemed to be important, with participants explaining that their parents and the prospective spouse's parents provided their consent and further that they, as children, remained in their marriages in order to respect their parents' wishes. It was explained that a decision to *thwala* starts with the prospective male spouse initiating the idea by informing his family that he has selected a young woman or girl as a potential bride, and this is followed by a consultation with the young woman or girl's family.[305]

The research indicates that male relatives, particularly 'uncles', dominate the decision-making process leaving women and girls with not much choice but to accept the

[302] Group interview with women 2015.

[303] Interview with the complainant's family 2016.

[304] Interview with Jezile's family 2015.

[305] Interview with Chief and his delegate 2015.

proposal in order not to 'disobey' their parents, but instead to 'respect their wishes' even if they know nothing about the prospective spouse.[306]

4.2.2 Criminal offences surrounding *ukuthwala*

There was a murmur that the violent aspects of the custom did not exist before and that this was contrary to how *ukuthwala* was being practiced in the past. This is despite the fact that historical evidence reveals a longstanding linkage between *ukuthwala* and criminal acts.[307] It was the version of the participants that a girl is and was never abused or sexually violated during the *thwala* process.

For example, because they assumed that consent to marriage amounts to consent to sexual intercourse, both families did not understand how Jezile could be charged with raping his own wife.[308] In trying to justify why they felt that the allegation was unfounded, family members pointed out that the complainant had shared a bed with Jezile for at least two weeks in Engcobo prior moving to Cape Town.[309] Furthermore, they explained that she spent ample time with Jezile in Engcobo yet she failed to go and lay a charge.[310]

As explained by Mwambene and Kruuse, the community felt that living together denied the complainant the opportunity of alleging rape. Both families were generally uncomfortable with the thought of a husband asking his wife to have sex.[311] The community did not think of the act as being criminal and destructive, even if it did involve having sexual intercourse with a girl who had not given her consent to such an interaction. They saw *ukuthwala* as a way of making and preserving families.

The women opined that the human rights regarding reproductivity negatively impacted on girl children. They criticised the legislation which allows children to have an abortion at the age of twelve.[312] This is similar to Smit's findings that when he consulted men

---

[306] Interview with the complainant's family 2016 and interview with women 2015.

[307] Oosthuizen & Ngema (2010: 88-94).

[308] Interview with Jezile's family 2015 and complainant's family 2016.

[309] Interview with Jezile's family 2015 and complainant's family 2016. See Mwambene & Kruuse (2017:8-9).

[310] Interview with chief and his delegate 2015.

[311] Mwambene & Kruuse (2017: 9). Interview with Jezile's family 2015 and complainant's family 2016.

[312] Group interview with women 2015.

and women on their customs which they felt were negatively affected by human rights, both genders raised the legislation on abortion, corporal punishment, *ukuthwala* and certain forms of ritual cattle slaughter.[313] They defended *ukuthwala* by stating that where underage girls are *thwalaed*, this should be seen as a measure of avoiding unwanted teenage pregnancies; and preventing children from being born out of wedlock.[314]

The participants felt that an activity that used to form part of their everyday life suddenly became demonised in the media. The community expressed their discontent in the ways the media broadcast the case of Jezile.[315] They felt it was inappropriate and did a disservice to their community because it attached a specific identity to the problem and made them appear to be criminal. Participants expressed the opinion that the criminalisation would not eradicate the problem, but instead would stigmatise the community.[316]

4.2.3 Government and courts against culture:

Government neglect and the promotion of individual rights have exacerbated the extent of local resentment. The participants felt as though the government had shown that it was disinterested in them as individuals, and as a cultural group. A participant said:

> 'We celebrate our custom, we get into trouble, we go to prison, we get life sentences, losing your life, your future, by practising our customs…[yet] government preaches that we should preserve our customs…but that gets us into trouble…these laws are conflicting and it is confusing [us]…'.[317]

[313] Smit WJ *The Violent Re-Emergence of Abduction Marriage in Modern South Africa: Ukuthwala as a Diagnostic Event for Changing Marriage Practices and the Power of Discourse* (Published LLD thesis, Raboud University Nijmegan, 2017) 111.

[314] Interview with Jezile's family 2016.

[315] Interview with Jezile's family 2015 and 2016.

[316] Interview with Jezile's family 2015

[317] Interview with Jezile's family 2015.

The participants concerned were upset because, according to them, human rights and 'white man's' courts make *ukuthwala* and other practices illegal in the absence of the necessary consultation on the ground level. One of the participants proposed that:

> 'Maybe before these laws are endorsed, they need to come to the traditional leaders, so that these laws can be discussed thoroughly…'.[318]

The way in which the government treated the situation made the community very defensive. Similarly to other research, our research shows that the government and the human rights discourses appeared as evidence of outside interference, which was directed towards disrupting local customary practices.[319] During an interview, some participants had the following to say:

> 'Well if this case was heard in Engcobo, he would not have been charged and sentenced, because here, people presiding over cases like this one understand this custom, whereas in Cape Town they understand it differently as rape'.[320]

4.3 Theoretical Perspectives on the Criminalisation of Harmful Practices Generally

Harmful cultural practices have not been defined precisely, but they seem to include practices that are likely to negatively affect the child's life, health, social welfare, dignity, physical or psychological development', such as circumcision and other genital mutilations, virginity testing, child betrothals and child marriages.[321] Theoretical perspectives on cultural relativism seem to suggest that culture is vilified as something from which women and girl children should be liberated.[322] On the other hand, feminist literature takes as its premise the protection of individual women and girl children's

[318] Interview with Jezile's family 2015.

[319] Diala J & Diala (2017: 92) & Smit WJ (2017: 111).

[320] Interview with Jezile family 2015.

[321] Himonga C (2008: 84).

[322] Vaezy L (ed) *A Woman's Right to Culture: Toward Gendered Cultural Rights* (2015).

rights against harmful cultural practices,[323] and universalists believe human rights are universal and thus belong to everyone wherever they reside.[324]

4.3.1 Feminists condemnation of harmful cultural practices

Many theories have been advanced by feminists who condemn harmful cultural practices. Three of many arguments are discussed in this section. First, proponents of feminism argue that the development and continuation of harmful practices is closely tied to patriarchy and to the structures that support it.[325] Patriarchy is defined as a social system characterised by male domination over women.[326] Diop et al found that such a system promotes male privilege, focuses on male-centred benefits, and is structurally male-dominant.[327] It is argued that, for example, these patriarchal systems tend to exert control over women's sexuality and marriageability.[328]

Secondly, proponents of feminism argue that harmful practices reinforce inequality and discriminate against women. Mubangizi states that harmful cultural practices are generally rooted in a culture of discrimination against women, and as violations of human rights they function as instruments for socialising women into prescribed gender roles.[329] Niles found that cultures define a woman's role as primarily that of housewife, and many women are expected to fulfil this role as early as twelve years of age.[330]

---

[323] Maluleke MJ (2012: 11).

[324] Reichert E 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) 22 *Journal of Comparative Social Welfare* 24.

[325] Diop M, Stewart P & Herr K 'A Black African Feminist Theory to Examine Female Genital Mutilation (FGM) Within African Immigrant Families in the United States' (2017) Theory Construction and Research Methodology Workshop, National Council on Family Relations at 13.

[326] McCann C & Kim S (eds) *Feminist Theory Reader: Local and Global Perspectives* (2003) 211.

[327] Diop M et al (2017: 13).

[328] Glover J et al 'Persistence and Resistance of Harmful Traditional (HTPs) Perpetuated against Girls in Africa and Asia' (2018) 19 *Journal of International Women's Studies* 58-59.

[329] Mubangizi J 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions' (2012) 13 *Journal of International Women's Studies* 34.

[330] Niles F 'Parental Attitudes Towards Female Education in Northern Nigeria' (1989) 129 *Journal of Social Psychology* 14.

It is argued that practices such as female genital mutilation and virginity testing are performed on female subjects, in order to enhance males' sexual enjoyment and control women's sexuality, and this reinforces discrimination against women and girl children.[331] Kheswa and Hoho strongly condemn *ukuthwala* and argue that societies should not justify a practice that condones constitutionally unacceptable behaviour of men because the majority of girls in these forced marriages experience low self-esteem, PTSD, unprepared motherhood and develop neurotic personalities.[332]

Thirdly, harmful cultural practices are perceived as an effort to control women's sexuality as well as their reproductive capacity. Mubangizi recognises cultural practices as an impediment to women and girl children's rights to sexual and reproductive rights.[333] He argues that in spite of legislative and judicial attempts to minimise the clash between cultural practices and sexual and reproductive rights, the violation and abuse of such rights still abounds.

4.3.2 Cultural relativism

According to Donnelly, cultural relativism is a doctrine that some variations are exempt from legitimate criticism by outsiders, a doctrine that is strongly supported by notions of communal autonomy and self-determination.[334] The basic thrust of cultural relativism is that each culture has the liberty to practice what is native and relevant to that society without the imperialist imposition from another culture that holds a different set of beliefs and or norms.[335] This questions the legitimacy of the theory of human rights, which aims to establish principles for judging the conduct of all cultures.

---

[331] Mubangizi J 'An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa' (2015) 16 *Journal of International Women's Studies* 313-314.

[332] Kheswa J & Hoho V '*Ukuthwala*: The Sexual-Cultural Practice with Negative Effects on the Personality of Adolescent Females in Africa' (2014) 5 *Mediterranean Journal of Social Sciences* 2808-2813.

[333] Mubangizi (2015: 159). See also Danial S 'Cultural Relativism vs Universalism: Female Genital Mutilation, Pragmatic Remedies', (2013) 2 *Prandium: The Journal of Historical Studies* page 3.

[334] Donnelly J 'Cultural Relativisim and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400.

[335] Danial S (2013: 2).

Cultural relativists describe universalism of human rights as an attempt to impose Western ideologies on Africans, which promotes individual autonomy above the group and fails to accommodate cultural diversity.[336] In general, relativists agree with defenders of human rights that all cultures value human dignity, but argue that non-Western societies do not use an individual rights approach to protect that dignity.[337] According to Brennan, in some non-Western societies the dignity of the individual is preserved through his or her membership in the community, while in others it is preserved through fulfilment of prescribed duties.[338]

Brennan has observed that cultural relativists view human rights instruments as unnecessary where societies have adequate internal systems to protect their own members and, in fact, judging cultural practices against international norms is inappropriate because it imposes external values on those cultures.[339] Nhlapo argues that human rights arguments are often used to condemn African institutions and practices when the real motive behind the hostility is a fundamental unwillingness by the dominant culture to co-exist with other cultures it considers inferior.[340]

Furthermore, cultural relativists stress that it is incorrect to always review cultural practices from a negative point of view. Instead, cultural practices have specific advantages. For example, studies on virginity testing show that supporters of the practice consider it as a way of preserving moral values of communities[341]; a right of

---

[336] Bennett TW 'The Compatibility of African Customary Law and Human Rights' (1991) 18 *Acta Juridica* 21.

[337] Bennett TW (1991: 21).

[338] Brennan K 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 *Law & Inequality: A Journal of Theory and Practice* 371.

[339] Brennan K (1989: 371).

[340] Nhlapo T 'The African Customary Law of Marriage and the Rights Conundrum' (2012) A Reading for the Course: LLM (Human Rights and Democratisation in Africa) 20, *Faculty of Law, University of Pretoria* 2.

[341] May E 'Virginity Testing: Towards Outlawing the Cultural Practice that Violates our Daughters (2003, Unpublished thesis) 7-11. See also, Mahery 'Virginity Testing and the Children's Bill, Discussion Paper, 11 October 2005, Children's Institute, University of Cape Town, available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Law_reform/Children_Act_guides/Research_and_Submissions/virginity_testing_10_oct_2005.pdf (accessed 25 March 2020) & Mwambene and Kruuse (2017: 6).

passage from being a girl to becoming a responsible wife;[342] a manner to prevent the spread of HIV/AIDS and an opportunity to detect sexual child abuse.[343]

Nyamu-Musembi's view is that instead of abolishing customs, we should examine local cultures attentively and see which aspects we can best use to achieve the aspirations of human rights.[344] Similarly, Idang argues that although some cultural practices have negative elements which must be abandoned, the positive aspects of customs ought to be practiced and passed onto future generations.[345] He makes a compelling argument that culture is not stagnant but rather an adaptive system with values that play a significant role in giving society its uniqueness. Therefore, the negative and harmful traditional practices that dehumanise people should be discarded immediately.[346]

According to Nhlapo, not all challenges to traditional practices are illegitimate. All practices must now be tested against the Constitution. It is the purpose of instituting the test that is important. One can see either a genuine attempt to make multiculturism work (a process requiring genuine tolerance of difference), or an implacable resistance to living with any cultural variation that is unfamiliar to the dominant value-system.[347] He argues that Western scholars should be tolerant, respectful and prepared to interact better to understand cultures.[348] Verkuyten et al argue that tolerance forms a barrier against discrimination, hostility, conflict and is a critical condition for citizenship

[342] Bunting A 'Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue' (2005) 14 *Social and Legal Studies* 28.

[343] Le Roux L *Harmful Traditional Practices, (Male Circumcision and Virginity Testing of Girls) and the Legal Rights of Children* (Unpublished LLM thesis, University of the Western Cape, 2006) 13.

[344] Nyami-Musembi C 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights in A An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* 126.

[345] Idang G 'African Cultures and Values' (2015) 16 *Phronimon* 98.

[346] Idang G (2015: 110).

[347] Nhlapo T (2012: 14).

[348] Nhlapo T (2012: 15-16).

and democracy. Tolerance is about the weighing of reasons to object to certain out-group beliefs and practices with reasons to nevertheless accept them.[349]

4.3.3 Universalism (Human Rights)[350]

Universalism holds that each human being possesses inalienable rights regardless of religion, gender or age.[351] This position is reinforced by the international community during the Vienna Programme of Action where it was agreed that all human rights are universal, interdependent, interrelated and indivisible.[352] The concept of "harmful traditional practices" originated in the United Nations circles where resolutions were adopted by the General Assembly calling on all States to abolish harmful customs, laws and practices by eliminating child marriages and the betrothal of young girls before the age of puberty, and establishing appropriate penalties where necessary.[353] The concept started to gain more currency following CEDAW and the founding of the CEDAW Committee. Several general recommendations made by the CEDAW Committee have identified culture, among others, as being an impediment to the enjoyment of women's rights.[354]

Other scholars have argued that the demand for cultural preservation disproportionally hampers women's struggle for the full enjoyment of human rights.[355] Asomah's contention is that cultural preservation should be assessed solely on the basis of its usefulness, not on the grounds of preservation of cultural identity and traditions when, in fact, doing so would result in the erosion of the dignity, liberty and security of

---

[349] Verkuyten M, Kumar Y & Adelman L, 'Intergroup Toleration and Its Implications for Culturally Diverse Societies' (2019) 13 *Social Issues and Policy Review* 28.

[350] Universalism as used in this context is specifically human-rights related.

[351] The concept of 'human rights' refers us to a body of international law, consisting of the UDHR, the ICCPR, the ICESCR, and a host of special multilateral treaties sponsored by the United Nations.

[352] Para 5 of the Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[353] In 1958 and 1961, the UN Economic and Social Council invited WHO to study customs subjecting girls to ritual operations, making FGM gain the most attention.

[354] Banda F (ed) *Women, Law and Human Rights: An African Perspective* (2005) 249.

[355] Asomah J 'Cultural Rights versus Human Rights: A Critical Analysis of the Trokosi Practice in Ghana and the Role of Civil Society' (2015) 15 *African Human Rights Law Journal* 133.

others.[356] The implication is that cultural practices should not prevail over individual human rights.

4.3.4 Reconciliation of Universalism and Cultural Relativism

Some authors have proposed guidelines to help identify and resolve conflicts between local cultural, religious and legal norms and universal principles of human rights. An-Na'im suggests an approach which prioritises internal cultural discourse and cross-cultural dialogue.[357] He opines there may be room for changing a cultural position from within, through internal discourse about the fundamental values of the culture and the rationale for these values.[358] However, in Durojaye's view it remains uncertain how this balance can be successfully achieved particularly in an environment like Africa with entrenched patriarchal traditions where women's voices are suppressed.[359]

On the issue of whether prohibition through legislation alone is appropriate, Van Bueren argues that to implement children's rights in one culture is not simply a matter of translation but attention has to be paid to the functions they perform in different traditions. According to her, children's rights have a better prospect for implementation if they reflect local cultural beliefs.[360] Mwambene and Kruuse also argue that a bottom-up approach would enable more effective responses to the specific challenges of a particular community. Hence, local needs and issues must be considered as the point of departure for action.[361]

Reichert suggests the following: (i) examining the history of cultural practices, (ii) examining the power brokers who determine the cultural norm and (iii) analysing the

---

[356] Asomah J (2015: 134).

[357] An-Na'im A 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992).

[358] An-Na'im A (1992: 4).

[359] Durojaye E 'The Human Rights Implications of Virginity Testing in South Africa' (2016) 16 *International Journal of Discrimination and the Law* 235.

[360] Van Bueren G 'Children's rights: balancing traditional values and cultural plurality" in Douglas G. & Sebba L(eds) *Children's Rights and Traditional Values* (1998) 17.

[361] Mwambene L & Kruuse H (2017: 3).

cultural practice within a contemporary human rights standard.[362] Similarly to Durojaye's analysis of virginity testing, if these guidelines are applied to *ukuthwala* it becomes apparent that the practice may likely interfere with recognised and acceptable human rights principles and standards.

Applying the first guideline, as previously explained in this chapter, *ukuthwala* is a long-standing practice which is carried out to open up marriage negotiations. As explained by the chief in the Jezile community prior to the group discussion with women, after the man has initiated the process by informing his parents that he wishes to marry, *intlola* (inspectors) visit the girl's family and observe the kind of people they are i.e. whether 'the girl is brought up in a respectful home'. Thereafter *onozakuzaku* (husband's family delegate) are sent to propose *ukuthwala*.[363] The implication is that the practice is not aimed at abducting girls randomly.

With regard to the second guideline, similarly to other cultural practices which I have observed, the decision-making process in *ukuthwala* is male dominated. *Onozakuzaku* and *intlola* constitute uncles, headmen and other male relatives. Msuya as well as Durojaye both point out that women have limited influence over the decision-making processes that shape their communities and their own lives.[364]

Applying the third guideline, Durojaye argues that if a cultural practice seems to be manifestly inconsistent with human rights principles and standards, then it does not deserve to be retained. [365] This is similar to arguments made by Kheswa and Hoho as well as Maluleke that *ukuthwala* raises human rights challenges and infringes the constitutional rights of women and girl children and therefore it should not prevail over these rights.[366] However, based on the observations during the field research in

[362] Reichert E (2006: 31).

[363] Group interview with women 2015.

[364] Msuya N Harmful Cultural and Traditional Practices: A Roadblock in the Implementation of the Convention on the Elimination of Discrimination against Women and the Maputo Protocol on Women's Rights in Tanzania (Unpublished PhD, University of KwaZulu-Natal, 2017) 31. Durojaye E (2016: 236).

[365] Durojaye E (2016: 236).

[366] Kheswa J & Hoho V (2014: 2811) & Maluleke (2012: 18).

Engcobo, focusing on the distortions surrounding the *ukuthwala* would be more effective in protecting other human rights. In this regard, the chief stated as follows:

> 'As a community that practices our custom, our tradition, we believe in our custom. This custom was practiced by our forefathers so therefore we cannot say that we are going to discontinue practising it. If there are things that are not done correctly, in this custom of *ukuthwala*, we are willing to change. We can practice the custom but in a different way as how our parents used to, but we are not going to stop practicing our customs. Our lives are based on our customs.'[367]

4.4 Advantages and Disadvantages of Criminalising Forced Marriages and Child Marriages

Criminalisation of forced marriages and child marriages is a controversial topic on which a wide range of strongly held views exist. By analysing competing arguments both for and against the criminalisation of forced marriages and child marriages, this section draws upon the arguments from the field research conducted in Engcobo as well as research results of other researchers.

4.4.1 Arguments against criminalisation

Research on the criminalisation of forced marriages and child marriages outlines persuasive arguments against criminalisation. One of the arguments is that a specific criminal offence of forced marriages and child marriages, if effectively enforced, might discourage victims, especially child victims, from coming forward and seeking assistance for the fear that their parents or extended family members might be prosecuted.[368]

The study conducted in Engcobo revealed the danger of complainants being ostracised by their family and the community at large. During the consultations one participant indicated that the complainant in the Jezile case was the first one to bring

[367] Interview with chief and his delegate 2015.

[368] Proudman CR 'The Criminalisation of Forced Marriage' (2012) 42 *Family Law* 2.

them problems.[369] This was reiterated during a family discussion that the complainant had brought 'shame' to the family and that the family 'sympathised with Jezile'.[370]

In addition, a criminal law does not guarantee conviction. There is a presumption that a person is innocent until proven guilty.[371] Moreover, an accused may raise the defence that he was exercising his constitutional rights or the defence that he was deceived as to the age of the girl by either the girl or a person in whose charge she was in.[372] The latter defence was dealt with in *Mohale v S*. In the trial court, the complainant testified repeatedly that she had informed the accused that she was thirteen years old, however the accused disputed that she stated this.[373] Following the complainant's version, the magistrate rejected the appellant's version followed by a conviction.[374]

On appeal to the conviction, Mohale raised the defence that he was misled about the complainant's age, however the State argued that this defence was not open to him because he testified that he had never asked the complainant about her age.[375] The court held that there was evidence to support the finding that Mohale was indeed misled as to the real age of the complainant.[376]

First, it was held that there was undisputed evidence by the complainant namely, (i) she met Mohale at a tavern, a place where, in the court's opinion, a 13-year-old would unlikely hangout; (ii) the complainant and Mohale met only at the tavern and (iii) the complainant's statement that she slept with Mohale and had sexual intercourse at her brother's home (assuming that the brother was older since he owned a home).

Secondly, the J88 medical form provided evidence which proved that she was at an advanced stage where she looked like a full-grown girl than her real age. Moreover,

[369] Discussions with the Jezile family 2016.

[370] Discussions with the complainant's family 2016.

[371] s35(3)(h) of the Constitution.

[372] s56 of the Sexual Offences Act.

[373] *Mohale v S* 2019 (2) SACR 666 (GP) para 9.

[374] *Mohale v S* para 10.

[375] *Mohale v S* para 25.

[376] *Mohale v S* para 26.

the medical report supported the complainant's admission that Mohale may have been misled as to her real age because of her physical appearance.

Thirdly, it was recorded that she had gone to her brother's house with Mohale and had no urgency in leaving to avoid being caught. The court held that a 13 year old would not likely allow a situation where an older brother discovers that she is involved in a relationship at that age, much less, a relationship with a 29 year old.

The court concluded that none of the above evidence was taken into account by the trial court in reaching its findings.[377] It was held that the trial court was faced with two mutually destructive versions, one of the complainant and that of Mohale. The court refused to reject Mohale's version as not being reasonably true and upheld the appeal. The conviction and sentence were set aside.[378]

Research suggests that the introduction of a new criminal offence could cause duplication with the criminal offences that already exist and cover the criminal aspects of forced marriage for example, kidnapping, imprisonment, child abduction, assault and rape.[379] This is true, as seen in *S v Jezile*. Proudman points out that despite the current array of criminal offences they do not provide for victims of forced marriage who experience emotional and psychological force.[380]

She also suggests that criminalisation may not send out a strong public message to perpetrators that forced marriage and child marriage are legally unacceptable.[381] Although it is hoped that criminalisation of forced marriages and child marriages as a result of *ukuthwala* would deter families from breaking the law due to the fear of prosecution, the research in Engcobo showed that the contrary may be true. In fact, the participants suggested that they should all have been prosecuted because they participated in the proceedings of the complainant's *ukuthwala.* [382]

[377] *Mohale v S* para 27.

[378] *Mohale v S* para 28 and 30.

[379] See chapter 3 of this thesis.

[380] Proudman (2012: 2)

[381] Proudman (2012: 2).

[382] Discussions with Jezile family 2016.

4.4.2 Arguments for criminalisation

Research also shows compelling arguments for the criminalisation of forced marriages and child marriages. The obvious main argument for criminalisation, and as dealt with extensively in chapter 3 of this thesis, is that the distortions surrounding the practice of *ukuthwala* are an unjustifiable violation of fundamental human rights, particularly the rights of women and girl children.[383]

It is also argued that, in the longer term, criminalisation will challenge community understandings of forced marriages and child marriages, as there is currently a fundamental problem in how legitimate consent and force are understood across cultures.[384] The research in Engcobo showed that participants are willing to change aspects of *ukuthwala* which are wrong, however they will not abandon their custom.[385]

The law at present is unable to challenge community perceptions that emotionally coerced marriages are unacceptable. Existing legislations do not provide for all of the aspects of forced marriage and child marriage including the control, persuasion, pressure, manipulation and threats that many forced marriage victims experience over time.[386] According to Proudman, a criminal offence may be necessary to encompass the wide spectrum of coercive behaviour that may be exerted over a long period of time rather than as a one-off violent attack.[387] She argues that this will also provide justice for victims who do not have access to existing criminal law remedies due to a prioritisation of physical and sexual violence.

4.5 Conclusion

In conclusion, this chapter has presented the community perspectives as well as the theoretical perspectives on *ukuthwala*. In addition, the advantages and disadvantages of criminalising *ukuthwala* were discussed. One of the major findings is that a preventative rather than a punitive response is favoured.

---

[383] Centre for Constitutional Rights 'Submissions to the SA Law Commission on *Ukuthwala* Custom' paras 12-17.

[384] Proudman (2012: 3).

[385] Interview with chief and his delegate 2015 and interview with Jezile's family 2015.

[386] Proudman (2012: 3).

[387] Proudman (2012: 4).

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study examined the criminalisation of *ukuthwala* leading to forced marriages and child marriages. It has established that these practices violate fundamental human rights, particularly the rights of women and girl children, under international, regional and national laws.

As seen in chapter 2, international and regional frameworks oppose forced marriages and child marriages. Various international and regional legal instruments contain clauses which may be used to challenge these marriages in States Parties. In addition to this, Committees and Commissions monitoring the implementation of these instruments have also drawn up general recommendations and comments, generally or specifically attempting to resolve the issue. Legal obligations are imposed on States Parties to take legislative or other appropriate measures to ensure that the rights of women and girl children are protected from *ukuthwala*-related abuses. Unfortunately, loopholes created by parental/judicial consent and customary or religious laws, prevent the prohibition of forced marriages and child marriages by some of these international and regional treaties.

As seen in chapter 3, the South African legal framework does not adequately address forced marriages and child marriages. In fulfilling its international and national obligations, the SALRC drafted the Prohibition of Forced Marriages and Child Marriages Bill. After close scrutiny of the Prohibition Bill it can be concluded that, although regulation of *ukuthwala* is necessary, a stand-alone legislation is not necessary. This does not however mean that the criminalisation of forced marriages and child marriages should fall through the cracks.

Chapter 4 of this thesis presented the findings in the field research conducted in Engcobo. Furthermore, theoretical perspectives on harmful cultural practices were discussed generally. Lastly, the advantages and disadvantages of criminalising *ukuthwala* were discussed. One of the major findings is that a preventative rather than a punitive response is favoured.

5.2 Recommendations

Some legislative amendments (removals and additions) in other legislations are necessary to ensure a consistent and comprehensive legal framework that will protect women from distortions surrounding *ukuthwala* and ensure that no child is subjected to marriage.

Section 12 of the Children's Act, which pertains to social, cultural and religious practices which are detrimental to the well-being of children, should be amended to include a prohibition of child marriages and the betrothal of children, with no exceptions such as consent. In addition, the definition of a child marriage should be inserted in the Children's Act. Similarly, the definition of a forced marriage should be inserted in the Domestic Violence Act.

The provisions of the Marriage Act and the Recognition of Customary Marriages Act which allow parental and/or ministerial consent should be removed. The parental and ministerial consent permitted by these legislation opens room for parents or guardians to circumvent the law.

The Domestic Violence Act and Children's Act should be amended to include the Forced Marriage Protection Order (FMPO) proposed in the Prohibition Bill. As mentioned in the Prohibition Bill, the procedure and process for the attainment of the FMPO is the same as the procedure set out in the Domestic Violence Act. With regards to the Children's Act, the FMPO should be inserted in the Act to send a strong message that child marriages are unacceptable.

Furthermore, the implementation strategies that are solely based on legal protection focused on justiciability may founder and fail to address the critical need for raising the protection of women and girl children. It is therefore crucial to identify complementary processes that aid in the implementation of women and children's rights.

In this regard, dialogue may be necessary. This measure is supported by the CRC Committee, ACHPR and ACERWC, who have asserted that law reform must be accompanied by awareness-raising, guidance and training.[388] In terms of the Kigali

[388] Paras 56 & 79 CEDAW/C/GC/31-CRC/C/GC/18 (2014) & para 52 of the ACHPR/ACERWC/GC (2018).

Declaration, States pledged 'to encourage dialogue with men and boys to prevent and eliminate child, early and forced marriage'.[389] It is also supported by my research where participants criticised being held accountable to legislation they were not aware of.[390]

As stated by Imoh, any dialogue on harmful cultural practices in a community needs to start from the community's own starting point in order to contextualise the custom. It should then proceed by encouraging the community to discuss educational, health and development issues and work towards reaching a consensus on the human rights of women and girl children and the responsibilities of other community members such as, for example, the clan, chief and church.[391] The best results will be achieved through informed dialogue between men, women and children.

Word count: 28485 (chapters only)

[389] Kigali Declaration (2015) declaration and commitment no.10.

[390] Field Research: 'Community Perspectives on *Ukuthwala*' in Engcobo, 2016.

[391] Imoh A 'Tackling the Physical Punishment of Children in Resource Poor Contexts' (2016) 24 *International Journal of Children's Rights* 469-487.

BIBLIOGRAPHY

Case Law (South Africa)

Bhe and Others v Khayelitsha Magistrate 2005 (1) BCLR 1 (CC).

Carmichele v Minister of Safety and Security 2002 1 SACR 79 (CC)

Gumede v President of Republic of South Africa and others 2009 (3) SA 152 (CC).

Mayelane v Ngwenyama 2013 (8) BCLR 918 (CC).

Mohale v S 2019 (2) SACR 666 (GP).

Ncedani and Others v Rex 1908 (22) EDC 243.

R v Njova 1906 (20) EDC 71.

Rex v Swartbooi and Others 1916 EDL 170.

Rex v Mane 1948 (1) All SA 126 (E).

Rex v Sita 1954 (4) SA 20 (E).

S v Jezile 2015 (2) SACR 452 (WCC).

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).

S v Mxhamli 1992 (2) SACR 704 (TK).

Case law (other countries)

Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others (Const. Application No. 79/14) [2015] ZWCC 12.

Rebeca Z. Gyumi v The Attorney General Miscellaneous Civil Cause No. 5 of 2016.

The Attorney General v Rebeca Z. Gyumi Civil Appeal No. 204 of 2017, Judgment (2019).

International Legislation and Declarations

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979.

Convention on Consent to Marriage, Minimum age for Marriage and Registration of Marriages, 1962.

Convention on the Rights of Child (CRC), 1989.

International Covenant on Civil and Political Right, 1966.

International Covenant on Economic, Social and Cultural Rights, 1966.

International Labour Organisation Convention on the Worst Forms of Child Labour, 1999, No. 182.

Universal Declaration of Human Rights, 1948.

UNCRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2002.

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000.

Vienna Declaration and Programme of Action, 1993.

International General Comments, General Observations and Concluding Observations

CCPR General Comment No. 28 on Equality of Rights between Men and Women (2000).

CRC Committee Concluding Observations on the Second Periodic Report of South Africa (2016).

General Comment No. 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003).

General Comment 13 on the Right of the Child to Freedom from all Forms of Violence (2011).

General Comment 14 on the Right of the Child to Have His or Her Best interests Taken as a Primary Consideration (art. 3. para 1) (2013).

General Comment 17 on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31) (2013).

General Recommendation 21 on Equality in Marriage and Family Relations (1994).

Joint general recommendation/general comment no. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Cultural Practices (2014).

UN General Assembly Resolution 70/1 Transforming our world: 2030 for Sustainable Development (2015).

Regional Legislation and Declarations

African Charter on the Rights and Welfare of Children,1990.

African Charter on Human and Peoples' Rights, 1981.

African Youth Charter, 2006.

Kigali Declaration, 2015.

Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003. (Maputo Protocol)

SADC Protocol on Gender and Development, 2008.

SADC Declaration on Gender Development, 1997.

Regional General Comments and Concluding Observations

Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage, 2018.

Concluding Recommendations by the ACERWC on the RSA Initial Report of Implementation of the ACRWC (2015).

Concluding Observations and Recommendations of the ACERWC to RSA on its First Period Report on the Implementation of the ACRWC March 2019.

Concluding Observations & Recommendations by the ACERWC on the Initial Report of the Republic Kingdom of eSwatini on the Status of the Implementation of the ACRWC July 2019.

South African Legislation

Constitution of the Republic of South Africa, 1996.

Children's Act 38 of 2005.

Civil Unions Act 17 of 2006.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015.

Domestic Violence Act 116 of 1998.

Marriages Act 25 of 1961.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Prevention and Prohibition of Trafficking in Persons Act 7 of 2013.

Recognition of Customary Marriages Act 120 of 1998.

South African Law Reform Commission Revised Discussion Paper/Project 138: The Practice of *Ukuthwala*: The Prohibition of Forced Marriages and Child Marriages Bill.

Legislation (other countries)

Zimbabwean Constitution of 2013.

eSwatini Children's Protection and Welfare Act 6 of 2012.

Malawi Marriage, Divorce and Family Relations Act of 2015.

Malawi Child Care, Protection and Justice Act of 2010.

Books

Banda F *Women, Law and Human Rights: An African Perspective* (2005) Oxford – Portland Oregon: Hart Publishing.

Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) Cape Town: Juta & Co.

Currie I and De Waal J *The Bill of Rights Handbook* 6 ed (2013) Cape Town: Juta & Co.

Gose M *The African Charter on the Rights and Welfare of the Child* (2002) University of Cape Town: Community Law Centre.

Himonga C, Nhlapo T, Maithufi I and Mofokeng L *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape Town: Oxford University Press.

Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009) University of Pretoria: Pretoria University Law Press.

McCann C and Kim S (eds) *Feminist Theory Reader: Local and Global Perspectives* (2003) New York and London: Routledge.

Mofokeng L *'Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law'* (2009) Pretoria: Van Schaik Publishers.

Snyman CR *Criminal Law* 6 ed (2014) Durban: LexisNexis.

Vaezy L *A Woman's Right to Culture: Toward Gendered Cultural Rights* (2015) Louisiana: Quid Pro Books.

Chapters in Books

An-Na'im A 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992) Philadelphia: University of Pennsylvania Press.

Ehlers L and Frank C 'Child Participation in Africa' in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) England: Ashgate.

Heaton J and Kruger H (eds), 'Chapter 4: Void, Voidable and Putative Civil Marriages' in *South African Family Law* 4 ed (2015) South Africa (Durban, Johannesburg & Cape Town): LexisNexis.

Himonga C 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in J Sloth-Nielsen Children's Rights in *Africa: A Legal Perspective* (2008) England: Ashgate.

Ngcukaitobi T 'Equality' in Currie I and De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2018) Cape Town: Juta & Co.

Ngidi R 'Upholding the Best Interests of the Child in South African Customary Law' in Boezaart T '*Child Law in South Africa*' (2009) Cape Town: Juta & Co.

Nyami-Musembi C 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights in A AN Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) London: Zed Press.

Ozah K and Hansungule Z 'Upholding the Best Interests of the Child in South African Customary Law' in Boezaart T '*Child Law in South Africa*' 2 ed (2018) Cape Town: Juta & Co.

Skelton A 'Children' in Currie I and De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2016) Cape Town: Juta & Co.

Van Bueren G 'Children's rights: balancing traditional values and cultural plurality' in Douglas G. and Sebba L(eds) *Children's Rights and Traditional Values* (1998) Ashgate: Aldershot.

Journal Articles

Alewo A and Olong M ‘Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women’s Rights in Nigeria’ (2012) 1 *International Law Research* 134-143.

Arthur M et al ‘Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities’ (2018) 39 *Journal of Women, Politics & Policy* 51-74.

Asomah J ‘Cultural Rights versus Human Rights: A Critical Analysis of the Trokosi Practice in Ghana and the Role of Civil Society’ (2015) 15 *African Human Rights Law Journal* 129-149.

Askari L ‘The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Marriages’ (1998) 5 *ILSA Journal of International Comparative Law* 123-138.

Bennett TW ‘The Cultural Defence and the Custom of *Thwala* in South African Law’ (2010) 10 *University of Botswana Law Journal* 3-26.

Bennett TW ‘The Compatibility of African Customary Law and Human Rights’ (1991) 18 *Acta Juridica* 18-35.

Brennan K ‘The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study’ (1989) 7 *Law & Inequality: A Journal of Theory and Practice* 367-398.

Bunting A ‘Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue’ (2005) 14 *Social and Legal Studies* 17-38.

Danial S ‘Cultural Relativism vs Universalism: Female Genital Mutilation, Pragmatic Remedies’ (2013) 2 *Prandium: The Journal of Historical Studies* 1-10.

Diala J & Diala A ‘Child Marriage, Bridewealth and Legal Pluralism in Africa’ (2017) 4 *Journal of Comparative Law in Africa* 77-104.

Doek J ‘What Does the Children’s Convention Require’ (2006) 20 *Emory International Law Review* 199-208.

Donnelly J ‘Cultural Relativism and Universal Human Rights’ (1984) 6 *Human Rights Quarterly* 400-419.

Durojaye E ‘The Human Rights Implications of Virginity Testing in South Africa’ (2016) 16 *International Journal of Discrimination and the Law* 228-246.

Glover J, Liebling H, Goodman S and Barrett H ‘Persistence and Resistance of Harmful Traditional (HTPs) Perpetuated against Girls in Africa and Asia’ (2018) 19 *Journal of International Women’s Studies* 58-59.

Himonga C ‘Implementing the Rights of the Child in African Legal System: The Mthembu Journey in Search of Justice’ (2002) 9 *International Journal of Children’s Rights* 89-122.

Jokani M, Knoetze E and Erasmus D al ‘A Criminal Law Response to the Harmful Practices of *Ukuthwala*’ (2018) 39 *Obiter* 747-767.

Kheswa J & Hoho V ‘*Ukuthwala*: The Sexual-Cultural Practice with Negative Effects on the Personality of Adolescent Females in Africa’ (2014) 5 *Mediterranean Journal of Social Sciences* 2808-2813.

Hendriks ML ‘Mandatory reporting of child abuse in South Africa: Legislation explored’ (2014) 104 *South African Medical Journal* 550-552.

Idang G ‘African Cultures and Values’ (2015) 16 *Phronimon* 97-111.

Imoh A ‘Tackling the Physical Punishment of Children in Resource Poor Contexts’ (2016) 24 *International Journal of Children’s Rights* 469-487.

Kaime T ‘The Convention on the Rights of the Child and the Cultural Legitimacy of Children’s Rights in Africa: Some Reflections’ (2005) 2 *African Human Rights Law Journal* 221-238.

Karimakwenda N ‘Today it would be called rape: A historical and contextual examination of forced marriage and violence in the Eastern Cape’ (2013) 2013 *Acta Juridica: Marriage, Land and Custom* 339-356.

Kalra G and Bhugra D ‘Sexual Violence against Women: Understanding Cross-Cultural Intersections’ (2013) 55 *Indian Journal of Psychiatry* 244-249.

Koyana DS and Bekker JC ‘The Indomitable *Ukuthwala* Custom’ (2007) 40 *De Jure* 139-144.

Maithufi IP and Bekker JC ‘The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa’ (2002) 35 *Comparative and International Law Journal of Southern Africa* 184-185.

Mabasa D ‘*Ukuthwala*: Is it all culturally relative?’ (2015) *De Rebus* 28-30.

Maluleke MJ ‘Culture, Tradition, Custom, Law and Gender Equality’ (2012) 15 *Potchefstroom Electronic Law Journal* 1-22.

Mubangizi J ‘A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions’ (2012) 13 *Journal of International Women’s Studies* 33-48.

Mubangizi J ‘An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa’ (2015) 16 *Journal of International Women’s Studies* 158-173.

Msuya N ‘The analysis of child marriage and third-party consent in the case of *Rebeca Z. Gyumi v Attorney* General Miscellaneous Civil Case no 5 of 2016 Tanzania High Court at Dar es Salaam’ (2019) 14 *De Jure* 295-315.

Mwambene L and Sloth-Nielsen J ‘Benign accommodation? *Ukuthwala*, ‘forced marriage’ and the South African Children’s Act’ (2011) 11 *African Human Rights Law Journal* 1-22.

Mwambene L and Kruuse H ‘The Thin Edge of the Wedge: *Ukuthwala*, Alienation and Consent’ (2017) 33 *South African Journal of Human Rights* 1-21.

Mwambene L ‘Legal Responses to Child Marriage in Southern Africa’ (2018) 18 *African Human Rights Law Journal* 527-550.

Mtshali V ‘Forced child marriage practices under the pretext of customary marriage in South Africa’ (2014) 15 *Child Abuse in South Africa* 51-61.

Nhlapo T ‘The African Customary Law Marriage and the Rights Conundrum’ 15 May 2012, A Reading for the Course: LLM (Human Rights and Democratisation in Africa) 20, *Faculty of Law, University of Pretoria* 1-24.

Niles F ‘Parental Attitudes Towards Female Education in Northern Nigeria’ (1989) 129 *Journal of Social Psychology* 13-20.

Oosthuizen T & Ngema NS ‘*Ukuthwala*: Structured for Relevance’ (2010) 2 *Speculum Juris* 84-102.

Petroni S, Das M & Swayer M ‘Protection versus Rights: Age of Marriage versus Age of Sexual Consent (2019) 3 *Lancet Child Adolescent Health* 274-280.

Proudman CR ‘The Criminalisation of Forced Marriage’ (2012) 42 *Family Law* 460-465.

Rautenbach C and Matthee J, ‘Common Law Crimes and Indigenous Customs: Dealing with the Issues in South African Law’ (2010) 61 *Journal of Legal Pluralism* 109-144.

Reichert E ‘Human Rights: An Examination of Universalism and Cultural Relativism’ (2006) 22 *Journal of Comparative Social Welfare* 23–36.

Rice K ‘*Ukuthwala* in Rural South Africa: Abduction Marriages as a Site of Negotiation about Gender, Rights and Generational Authority among the Xhosa’ (2014) 40 *Journal of Southern African Studies* 381-399.

Robles MJ ‘Child Marriage and the Failure of International Law: a Comparison of American, Indian, and Canadian Domestic Policies’ (2018) 18 *International and Comparative Law Review* 105–125.

Sloth-Nielsen J & Hove K ‘*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*: A review’ (2015) 15 *African Human Rights Law Journal* 554-568.

Tobin J 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does it Mean and Require of States?' (2009) 9 *Human Rights Law Review* 373-396.

Verkuyten M, Kumar Y & Adelman L 'Intergroup Toleration and Its Implications for Culturally Diverse Societies' (2019) 13 *Social Issues and Policy Review* 5-35.

Wadesango N, Rembe S & Chabaya O 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13 *Anthropologist* 121-129.

Internet Sources

About UNICEF available at http://www.unicef.org/about/ (accessed 6 April 2019).

About Girls Not Brides available at http://www.girlsnotbrides.org/about-girls-not-brides/ (accessed 6 April 2019).

Botswana bill to raise age of sexual consent to 18 to combat defilement available at https://www.africanews.com/2018/03/27/botswana-bill-to-raise-age-of-sexual-consent-to-18-to-combat-defilement// (accessed 9 February 2020).

Child Marriage Atlas available at https://www.girlsnotbrides.org/where-does-it-happen/atlas/#/ (accessed 15 May 2019).

Clearing Confusion Around the Age of Consent available at https://www.herald.co.zw/clearing-the-confusion-around-the-age-of-consent/ (accessed 9 February 2020).

De Waal M 'Limpopo child bride: Sold into marriage, kept there by the system' (2013) available at http://www.dailymaverick.co.za/article/2013-02-01-limpopo-child-bride-sold-into-marriage-kept-there-by-the-system/#.VxdeN_I97IU (accessed 6 April 2019).

Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children available at http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf (accessed 9 May 2019).

Current Status+ Progress: Child Marriage is a Violation of Human Rights, but is all too common available at http://data.unicef.org/child-protection/child-marriage.html (accessed 15 May 2019).

Ending Child Marriage: Progress and Prospects (2013) available at https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf (accessed 6 April 2019).

Juvenile Committee calls for review on sex age to consent available at https://www.businessghana.com/site/news/general/154044/Juvenile-Committee-calls-for-review-on-sex-age-toconsent (accessed 9 February 2020).

Mahery 'Virginity Testing and the Children's Bill, Discussion Paper, 11 October 2005, Children's Institute, University of Cape Town, available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Law_reform/Children_Act_guides/Research_and_Submissions/virginity_testing_10_oct_2005.pdf (accessed 25 March 2020).

Malawi available at https://www.girlsnotbrides.org/child-marriage/malawi/ (accessed 9 June 2020).

Odala V 'How Important is Minimum Age of Marriage Legislation to End Child Marriage in Africa' (2013) available at https://www.girlsnotbrides.org/how-important-is-minimum-age-of-marriage-legislation-to-end-child-marriage-in-africa/ (accessed 16 March 2020).

Ratifications Table: African Charter on Human and Peoples' Rights available at http://www.achpr.org/instruments/achpr/ratification/ (accessed 20 May 2019).

UNICEF, 'Access the Data' available, https://data.unicef.org/topic/child-protection/child-marriage/ (accessed 15 May 2020).

UNICEF 'Child Marriage and the Law' (2007) Legislative Reform Initiative Paper Series available https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf (accessed 15 May 2019).

What is *ukuthwala*? available at http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html (accessed 15 May 2020).

South African Reports and Discussion Papers:

South African Human Rights Commission (SALRC) Discussion Paper 132 (Project 138) *The Practice of ukuthwala* (May 2014).

SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (October 2015).

SALRC Discussion Paper 74 *Customary Marriages* Project 90 The Harmonisation of the Common Law and the Indigenous Law August 1997.

SALRC Issue Paper 35 (Project 144) *Single Marriage Statute* (2019).

Ukuthwala in KwaZulu-Natal: An investigation into State Prevention and Response-Commission for Gender Equality (2012) Commission for Gender Equality.

SALRC Discussion Paper 133 (Project 25) *Statutory Law Revision: Legislation Administered by the Department of Home Affairs* (2015).

Unpublished theses:

Le Roux L *Harmful Traditional Practices, (Male Circumcision and Virginity Testing of Girls) and the Legal Rights of Children* (Unpublished LLM thesis, University of the Western Cape 2006).

Mafhala VR *Child Marriage Practice: A Cultural Gross Violation of Human Rights of Girls in a Free South Africa* (Unpublished LLM thesis, University of Pretoria 2016).

Matthee JL *One Person's Culture is Another Person's Crime: A Cultural Defence in South African Law* (Unpublished LLD thesis North West University 2014).

May E *Virginity Testing: Towards Outlawing the Cultural Practice that Violates our Daughters* (Unpublished LLM thesis, University of the Western Cape 2003).

Msuya N *Harmful Cultural and Traditional Practices: A Roadblock in the Implementation of the Convention on the Elimination of Discrimination against Women and the Maputo Protocol on Women's Rights in Tanzania* (Unpublished PhD, University of KwaZulu-Natal, 2017).

Ramnath P *Are traditional African practices relating to child marriages in the face of HIV/AIDS in violation to the South African legal framework?* (Unpublished LLM thesis, University of the Western Cape 2015).

Smit WJ *The Violent Re-Emergence of Abduction Marriage in Modern South Africa: Ukuthwala as a Diagnostic Event for Changing Marriage Practices and the Power of Discourse* (Published LLD thesis, Raboud University Nijmegan, 2017).

Other documents

Centre for Constitutional Rights 'Submissions to the SA Law Commission on *Ukuthwala* Custom'.

Diop M, Stewart P & Herr K 'A Black African Feminist Theory to Examine Female Genital Mutilation (FGM) Within African Immigrant Families in the United States' (2017) Theory Construction and Research Methodology Workshop, National Council on Family Relations.

Hanmer L & Elefante M 'The Role of Identification in Ending Child Marriage: Identification for Development' (2016) World Bank.

UNICEF 'Early Marriage: Child Spouses' (2001) Innocenti Digest No. 7.

Sloth-Nielsen J & Kachika T, 'Applicable International and Regional Law and Policy: Child, Early and Forced Marriage' submitted to Plan+ 18 Programme (2015).

Economic & Social Affairs Division for the Advancement of Women 'Handbook for Legislation on Violence Against Women' (2009).

Economic & Social Affairs Division for the Advancement of Women 'Supplement to the Handbook for Legislation on Violence Against Women: "Harmful Practices" Against Women' (2011).

World Bank ‘Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers Constraints and Opportunities’ (2018).