

Contextualizing the practice of *Ukuthwala* within South Africa

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The article explores the cultural practice of ukuthwala and illustrates how it has digressed from a traditional practice to a merely criminal act. It draws a distinction between the pure customary practice of ukuthwala and its current distorted form and further examines how the practice results in the sexual exploitation and abuse of children. The article draws on the primary authors' experience in the criminal investigation of child trafficking cases and two actual case studies are discussed to highlight how the traditional form of ukuthwala has been distorted and become a criminal act. The traditional themes of the ukuthwala practice are highlighted in both case studies and an attempt is made by the authors to explore whether there are possible common dynamics between ukuthwala and child trafficking. An African theory of the causes of crime is applied in an attempt to explore the multitude of variables which contribute to this complex phenomenon. Finally, the article underscores the psychosocial impact of ukuthwala on child victims and the wider ripple effect on society as a whole and addresses societies seeming reluctance to become involved or challenge the harmful form of this practice. Recommendations for policy and further research are suggested.

INTRODUCTION

South Africa's rich cultural diversity is acknowledged and considered in Sections 30 and 31 of the Constitution of 1996 with certain provisions postulating that customary law should be accommodated in South African law, providing that the specific rules or provisions are not in conflict with the Constitution. Wadesango, Rembe and Chabaya (2011:121) propose that culture is like a fabric which is woven together with numerous colours, with each colour representing aspects such as customs, practices and beliefs. The culmination of these 'colours' gives the individual within his/her community a sense of identity.

One of these darker shades of colour could very well be allocated to the customary practice of *ukuthwala* (see exposition of the construct below). The question may be asked whether African culture makes females more vulnerable to becoming victims of this crime when the act is perpetrated under the guise of a "traditional practice". In the past few years, the practice of *ukuthwala*, increasingly within the centre of media attention, has had a cascading effect on both public opinion and governmental intervention. These include interventions where multi-disciplinary meetings were held between local government, non-governmental organisations and traditional leaders on how to deal with this issue. The primary author was present at three meetings during 2009 at which the serious

nature of the problem was highlighted. These meetings further created a frame of reference for a better understanding of the dynamics of the problem and exposed the need for different avenues of intervention. One high level intervention was the unconditional condemnation of the practice by the police Minister Mr. Nathi Mthethwa (Ngcukana 2009:1). However, this outright sanctioning of the act is not a solution to the problems and may create further problems when individuals (protected by the Constitution) view the abolition of *ukuthwala* as an infringement of their Constitutional rights. It is thus critical to make a clear distinction between the "non harmful" cultural practice where role players consent and willingly participate and the illegal act of abduction and rape.

An operational deconstruction of *Ukuthwala*

It remains of paramount importance to distinguish between *ukuthwala* in its traditional form and the harmful and somewhat distorted practice currently taking place in South African society. Without a proper definition and sound research on the phenomenon a limited or incorrect understanding exists on what the situation is regarding *ukuthwala*. Efforts to prevent the illegal, harmful practice may be perceived by traditional leaders and communities as an intrusion into traditions and values.

Bekker (in Koyana & Bekker 2007:139) describes the practice of *ukuthwala* as a “more romantic” procedure that was sometimes resorted to when an obstacle to marriage, not necessarily imposed by the girl’s guardian, presented itself. According to Koyana and Bekker (2007:141) the genuine formation of a marriage as the essence of *ukuthwala* was evidenced by the fact that the suitor was not always present when the *thwala* took place, but left the work in the hands of those who acted in his interest. Koyana and Bekker (2007:139) give a brief illustration of a case to show how the procedure for *ukuthwala* traditionally took place. They describe the practice as an acceptable custom where onlookers would refrain from any interference, even in the event of ‘crocodile’ tears being shed by the girl who attempted to veil her tacit consent. The tacit consent of the girl being *thwalaed*, allowed for the preservation of the girl’s maiden dignity and was the fundamental reason for her apparent reluctance and her strenuous, but pretended resistance. For this reason the authors argue that the girl was generally a willing party to the *thwala*, and therefore the practice of *ukuthwala* was not necessarily synonymous with a forced marriage (Koyana & Bekker 2007:140).

Although an unusual path to marriage, the condoned practice of *ukuthwala* was targeted at girls or women who were of a marriageable age (Maluleke 2009:16). Herbst and Du Plessis (2008:6) state that customary law does not have a specific age requirement for marriage but that puberty and initiation ceremonies are viewed as prerequisites for accepting someone as an adult by the community. Puberty was therefore regarded as the minimum requirement for marriage as procreation was regarded as the ultimate goal of a marriage.

Furthermore it was contrary to customary law for the young man to have sexual intercourse with a girl that he had *thwalaed*. The girl would immediately be placed under the careful supervision of the womenfolk whilst the suitor was required to pay a number of *lobolo* cattle agreed upon. Where no marriage has been proposed after the *thwala* took place an additional *thwala* or *bopha* beast is payable (Koyana & Bekker 2007:141). The payment of one or more herd of cattle to the father or legal guardian of the girl is described by Maluleke (2009:16) as a delictual liability incurred by the culprit, making the act of *ukuthwala* not without impunity.

Mwambene and Sloth-Nielson (2011:6-7) distinguish between three forms of *ukuthwala*. The first form of *ukuthwala* is where the girl is cognisant of her abduction being planned by her suitor. The different parties are in cahoots with one another and the ‘force’ used basically serves as a veil for the girl’s implicit consent. Secondly, *ukuthwala* can occur where the families would agree on the anticipated marriage, but the girl is unaware of such an agreement. This type of *ukuthwala* might occur where the girl would possibly oppose her parent’s choice or where she attracts no suitors, despite the fact that the girl happens to be of high rank. Subsequent to the girl’s *thwala* and confirmation of both families’ consent to the anticipated marriage, the girl is watched until she gets used to the idea of marriage. With regards to this form of *ukuthwala*, Mwambene and Sloth-Nielson (2011:7) emphasise that “consent as understood in Western terms (that is, the consent of the bride and bridegroom only) might be more difficult to argue here”. The third form of *ukuthwala* as proposed by Mwambene and Sloth-Nielson (2011:7) occurs against the will of the girl. She is taken by force to the young man’s family home where after representatives are sent to the girl’s family to open marriage negotiations. The third form of *ukuthwala* can give way to crimes such as rape and intimidation as well as various human rights violations such as the infringement of the girl’s freedom and her security, and a violation of her dignity and bodily integrity.

The first two forms of *ukuthwala* as proposed by Mwambene and Sloth-Nielson (2011:6-7) and the ancient African practice of *ukuthwala* as described by Koyana and Bekker (2007:139-144) and Maluleke (2009:16) adhere to strong traditional themes where the involvement of the family and community ensure the monitoring of the well being of the women to a certain extent. However, both the present day practice of *ukuthwala* described by Maluleke (2009:16) and the third form of *ukuthwala* as proposed by Mwambene and Sloth-Nielson (2011:7) shift from a traditional to a form of abuse and violation of human rights. This distorted form of *ukuthwala* was observed by the primary author and is evident in the two case studies depicted in this article.

Ukuthwala as a social construct

Huisamen, Nosilela and Kaschula (2010:1) define the concept of *ukuthwala* as an age-old

Xhosa marriage custom which involves the 'legal abduction' of the bride-to-be. The custom entails the 'abduction' of the unsuspecting bride-to-be by the suitor's friends once the marriage has been negotiated between the two families. Of value to the understanding of the pure form of *Ukuthwala*, is their description of *ukuthwala* where the family, and most probably the community, is involved in an organized attempt to bring together a man and woman. A measure of consent is thus implied. This is part of the shared life experience of the traditional African person where social cohesion and social solidarity are part of the human psyche (Ovens 2010). This represents the spirit of uBuntu and a sense of shared responsibility. Against this background it is doubtful whether recent accounts of minor girls marrying older men and subsequent criminal charges being laid are truly forms of *ukuthwala*. According to Mwambene and Sloth-Nielson (2011:1) these cases may be indicative of the changing dynamics of this practice. However, the authors strongly oppose this view and believe that these are merely the acts of individuals who are involved with the abuse and exploitation of children. In its true form *ukuthwala* is an act, which is condoned by the parents of both parties and the parties themselves.

With reference to the abduction and rape of women and girls, the Commission for Gender Equality labels *ukuthwala* as an "unlawful practice disguised as a custom" (Commission for Gender Equality 2010:42). This view is strongly supported in this article. These accounts contribute to the customary practice of *ukuthwala* being weighed up against the provision of Section 39(3) of the Constitution (South Africa 1996) which states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law, as long as they are consistent with the Bill of Rights. The traditional form of *ukuthwala* adheres to the Bill of Rights where the act is consensual.

Research goal and objectives

Recent studies on the cultural practice of *ukuthwala* focused on among others the historical background of the practice within a legal context (Koyana & Bekker 2007); the violation of the practice of the rights of women and children (Ntlokwana 2009; Wadesango *et al.* 2011); legal comparative studies relating to customary law and common-law marriages (Herbst & Du Plessis 2008) and forced

marriages and the Children's Act (Mwambene & Sloth-Nielson 2011).

In the light of recent reports and concerns about the harmful accounts associated with *ukuthwala*, a need was identified for explorative research. In addition to a review of research reports, policy documents, newspaper and academic articles, the primary author's involvement in the criminal investigation of child trafficking over a 5 year period provided a frame of reference and a better understanding of the underlying dynamics of the phenomenon. Two case studies are discussed to clearly illustrate a traditional harmful account of *ukuthwala* and a more sinister modern-day account, the latter which illuminates the distorted nature of this practice. The research furthermore explores the opinions of those communities affected by the criminal dimension of *ukuthwala* and looks at the experiences of these children and impact of *ukuthwala* on these victims by reflecting on both literature and the primary author's interaction with victims. Furthermore the article explores the legal framework and responsibilities of responding agencies and proposes recommendations for first responders, procedures during the preliminary police investigation and considerations during the management of cases. The latter initiatives are based upon an understanding and acknowledgement of traditional, non harmful cultural practices and the consideration of the concept of *ubuntu* and restorative justice.

Theoretical explanations

According to Ovens and Prinsloo (2010:23) if too much emphasis is placed on the differences between people or when society is insensitive to them, people may be stigmatised because they are different. This creates a dilemma in the development of "theories of difference" on Africa. From a criminological perspective, both theoretically and practically, it is important to accept the variances between people of different cultures in the treatment of offenders, rather than using the differences to stigmatise or place them at a disadvantage. The criminological labeling theory serves as an operational example in this respect where people are labeled according to the interpretation of the researcher (Siegal 2003:17).

The criminologist must find a scientific midway whereby an objective and empathetic evaluation of another person's "otherness" is possible using assessment tools that make

provision for this “otherness” or uniqueness. This may be done by placing both victims and offenders within a framework which clearly provides and creates a setting for the characteristics of complexity, interconnectedness and mutual relationship. Thus any attempts by the authorities to enforce legislation prohibiting *ukuthwala* may be met with resistance and hostility where communities may sense that their way of life is being compromised and that their values and culture are being undermined. Education and cooperation remain paramount to deal with the practice. Winch (Hughes 1998:127) postulates that any two variables may either be called the same or different, only with reference to a set of criteria which lay down what is to be regarded as a relevant difference. Thus *ukuthwala* cannot be seen from a western or Eurocentric approach but must be studied in an African context understanding the variables of social cohesion, uBuntu and traditional communities and an understanding of the shared African experience.

“When the variables in question are purely physical the criteria will of course be those of the observer. But when one is dealing with intellectual or indeed, any kind of social aspects, that is not so. For their being intellectual or social in character depends entirely upon their belonging in a certain way to a system of ideas and modes of living” (Winch in Hughes 1998:127).

It is important to understand the foundation of *Ukuthwala* and to identify the spirit of uBuntu behind the practise. *Ukuthwala* in its traditional form played an important role in the traditional courting process. The community would intervene when the couple involved could not make progress with their relationship. In empathy with the plight of the perhaps shy or uncertain suitor, the community would take the initiative and “kidnap” the girl. At face value and especially when studying the harmful practise of the distorted *ukuthwala*, it is in contradiction to the social character of a traditional African society. However, the traditional form shows the caring and sense of social cohesion and solidarity which forms the basis of uBuntu.

If one studies the properties that emerge from the interconnectedness and complexity of relationships between parts relative to the collective consciousness within a traditional African context, one comes to terms with African thought processes. Muir (2000:23) states that the need for cybernetics and systems theory is based upon the following, “When we try to pick up anything by itself we find it is

attached to everything in the universe.” This interrelatedness is comparable with the wholeness of the African experience. Muir (2000) speculates that if the science, religion, philosophy and epistemology of western civilisation were “in better shape (more organic), we would not need cybernetics and systems theory as separate areas of inquiry. Rather they would be woven into the fabric of our knowledge as already are other prior mental tools such as, the flexibility of language... our tradition of education has a blind spot when it comes to complexity, interconnectedness and relationship”. This explanation of complexity, interconnectedness and relationship forms a basis for the understanding of the intrinsic value of *ukuthwala* in a collective decision making process regarding the wellbeing and suitability of an arranged “coupling”. The fact that the family and community were traditionally involved in the practice of *ukuthwala* is indicative of shared decision-making. This traditional principle ensures that the best interests of all role players were taken into account and that the “arrangement” was in the best interests of the future bride and groom and that the families and community supported the union.

Originally the traditional system had immense super power. This meant that the group was stronger than individual members, resulting in a strong social control mechanism. A break from tradition may have resulted in weaker social control mechanisms which in turn may have contributed to crime when the individual felt a lesser level of social cohesion and belonging. A breakdown in social control may make the individual more prone to committing crimes against society. In 1969, Mbiti foresaw this process of separation and alienation and maintained that “Modernisation has removed the African from the support group where stressors such as poverty leave the individual isolated and without support. This situation can be referred to as a void in which this lone figure stands” (Mbiti 1969:ix). If external pressure is placed upon traditional communities to abolish the practice it may impede social control mechanisms. It is better to empower traditional leaders, through education, to better monitor any *ukuthwala* practices taking place within their community and to report those that involve under age children.

Finally both researchers and criminal justice agencies need to look at the role of uBuntu in the *ukuthwala* practice. African ontology and epistemology are two aspects of the same

reality which manifest in the philosophy of *uBbuntu*. This term encompasses the idea of “being” in general. Traditional African religion does not focus on the individual but rather on the community to which the individual belongs. This illustrates the collective conscious and implies collective responsibility. The implication of the gradual withdrawal from tradition has led the modern African to become isolated. Modernisation has led to the destruction of the solid religious base of African culture which in turn, has led to people struggling with the conflict of losing their historical roots. Terblanche (Prinsloo 1998:77) describes this process as the disintegration of the regulating systems resulting in a state of dysfunction. The insensitive criminalising of *ukuthwala* in its traditional, non harmful form can only further exacerbate this process.

Nafukho (2006:409) avers that in traditional Africa, *uBbuntu* represents the rule of conduct and/or social ethic in the sense that it recognises the human being as a social being who needs to be with others. According to Nafukho (2006:409) *ubuntu* is based on three principles namely, spirituality, consensus building and dialogue. Bangura (Nafukho 2006:409) argues that traditional African culture has an unlimited capacity for the quest of consensus and reconciliation. He believes that:

African-style democracy operates in the form of lengthy discussions. Although the discussions value the hierarchy of importance among the contributors to the discussion, the speakers are normally provided with an equal chance to speak up until an agreement, consensus, or group cohesion is reached. The final agreement in the African dispute-building process was signified by *omulembe*, “peace”; *obulala*, “togetherness”; *umoja*, “oneness”; *amani*, “peace”; and *simunye*, “we are one” and “unity is strength”... Thus, the desire to agree within the context of *ubuntu* safeguards the rights and opinions of individuals and minorities to enforce group or team solidarity. The consensus tenet of *ubuntu* requires an authentic respect for individual rights and cultural values and an honest appreciation of differences among various African cultures and other cultures from within and outside of Africa.

Traditionally the practice of *ukuthwala* followed the philosophy and building process signified by *omulembe*, “peace”; *obulala*, “togetherness”; *umoja*, “oneness”; *amani*, “peace”; and *simunye*, “we are one” and “unity is strength”... Thus, the desire to agree within the context of *ubuntu* safeguards the rights and opinions of individuals and minorities to enforce group or team solidarity. *Ukuthwala* is a significant example hereof.

uBbuntu recognises the power intrinsic to the

capacity for dialogue in a given family, community, and society to talk with one another, stemming from the traditional African society to rely on dialogue to create “meaning of life” (Nafukho 2006:410). Correctly applied, *ukuthwala* allows for collective decision making and dialogue.

However, Bangura (Nafukho 2006:410) notes that “with its particularity, individuality and historicity, *uBbuntu* inspires us to expose ourselves to others, to encounter differences of their humanness in order to inform and enrich our own”. According to Bangura (Nafukho 2006:410), *uBbuntu* respects the beliefs and practices of others.

The *uBbuntu* concept of life is a process of realization through others; it simultaneously enriches the self-realization of others. It seeks to promote social networks, norms, and trust that should serve to increase individuals’ productivity in organizations and in society (Nafukho 2006:410, 411).

The changing dynamics of *ukuthwala*

In stark contrast to Koyana and Bekker (2007:139-144), the practice of *ukuthwala* is described by Maluleke (2009:16) as a form of abduction which involves the kidnapping of a girl or young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations. Similar to Maluleke (2009:16), the sentiment of a nexus between *ukuthwala* and the crime of abduction is shared by Herbst and Du Plessis (2008:6) who also elaborate on the element of consensus between the two parties. The authors concur with Koyana and Bekker (2007:140) who state that the girl was generally a willing party to the practice, but highlights the fact that the former Transkei and Kwazulu-Natal banned the practice as it was not always possible to ascertain whether the girl had indeed agreed to be abducted.

Referring to the contentious issue of *ukuthwala*, Ntlokwana (2009:3) states that a challenge in the South African Constitution lies in the contradiction that it raises between universal individual rights guaranteed in the Bill of Rights juxtaposed to the long cherished traditional practices which often violate the rights contained in the Bill of Rights.

During a visit to the Eastern Cape in June 2009, the government sent out its strongest message yet against the age old African custom of *ukuthwala*. The Minister of Police, Mr. Nathi Mthethwa condemned the African custom of *ukuthwala* as “just simple human trafficking”

and furthermore labeled those who sleep with the girls as rapists-urging the police to “do their job and arrest these people” (Ngcukana 2009:1). Mr. Nathi Mthethwa was accompanied by two national cabinet ministers all of whom labeled the practice of *ukuthwala* as human trafficking and calling for its immediate abolition (Ngcukana 2009:1). Instead of being a positive intervention this statement has met with the protest and disapproval of traditional communities who feel that their traditions are being challenged. Negotiations, traditional sensitivity and the identification of illegal practices can ensue in a process of negotiation to prevent cases of abuse while still allowing traditional communities to continue with the ‘non-harmful’ practise.

Community response

The following reports clearly indicate diverging responses from community members to government concerns about the practice of *ukuthwala*. Some communities in Lusikisiki, in the Eastern Cape maintain that *ukuthwala* is a practice that they will continue to exercise regardless of the prevailing criticism from the media, different segments of the community, government leaders, non-governmental organisations and even some traditional leaders (Oorlog voer teen kriminele element van ukuthwala-praktyk 2011:6). Email correspondence from an anonymous police investigator, familiar with the cases in Lusikisiki, similarly states that a strong cultural belief in the practice of *ukuthwala* amongst some chiefs and parents exists. They believe that they have the right to decide who may marry their children. This attitude only compounds efforts to address the problem and adversely affects cooperation between the police and the community which then complicates a subsequent investigation (Anonymous police investigator 2011).

It was reported that the community of KwaCele, near Lusikisiki, has changed their point of view regarding the practice of *ukuthwala* after intervention by the National Prosecuting Authority and other government representatives who engaged them in discussions regarding the criminal aspects which makes *ukuthwala* both harmful and illegal. The community was also informed about possible sentences which could be imposed on those individuals convicted of criminal acts flowing from the practice of *ukuthwala*. These discussions took place while court proceedings were being instituted against members of the

community implicated in the practice (Oorlog voer teen kriminele element van ukuthwala-praktyk 2011:6). In another report, the community of KwaCele has vowed to stop the practice of *ukuthwala*. However, this discontinuation of the practice by the community of KwaCele hinged upon the condition that the State would withdraw the charges against those that had been arrested for the practice. Fikile Magaya, the local ward councillor of KwaCele, is quoted as stating “We are glad that the prosecution has decided to come and enlighten us, and we now know that what we have been doing is wrong and illegal. We promise to stop it” (*Community to stop Ukuthwala* 2011). In this report regarding the occurrence of *ukuthwala* in KwaCele, near Lusikisiki, Luxolo Tyali, a spokesman of the National Prosecuting Authority, stated that there are currently more than 10 known cases of *ukuthwala* in the area (*Community to stop Ukuthwala* 2011).

However in order to understand the complexity of the practice and to ascertain the level of trauma and harm the victim endures it is necessary to look at specific case studies. Only by examining the lived experience of these young victims and their displacement from their families and all sense of security, can one truly understand the meaning of distorted *ukuthwala* and the harm it causes.

Methodology

The current article focuses on a work in progress and forms the initial phase in a longitudinal study which proposes to monitor the practice over a period of years. The primary researcher’s practical experience allows for a better understanding of the practice as the social context and interpersonal dynamics of *ukuthwala* cases are well understood. A thorough study of available literature contributed to the foundation of this research. Literature included amongst others academic articles, legal and government documents as well as a content analysis of newspaper articles covering the issue of *ukuthwala*. A qualitative and explorative study of two cases involving *ukuthwala* which were reported to the police and investigated by the primary author is illustrated. According to Yin (1994:13-14), a case study is a comprehensive research strategy which can include both single- and multiple-case studies. Case studies involve the systematic gathering of sufficient information about a particular person, social setting, event or group to permit the researcher to understand effectively how the subject operates or

functions (Berg 2004:251). The case study is not a methodological choice but a choice of what is to be studied (Stake 2000:435).

The researchers adhere to the concepts of research ethics and informed consent. Both police investigations used as case studies have been finalized. Pseudonyms were used when making reference to the victims and sensitive information which could possibly compromise their identity was omitted. Two participants interviewed were informed of the purpose of the study and their informed consent was obtained. Their anonymity was also guaranteed.

The researchers have undertaken to conduct a longitudinal study focusing on the changing dynamics of the phenomenon of *ukuthwala* within a rapidly developing society. The studies' strong epistemological basis will rely heavily on hermeneutics. According to Henning, Van Rensburg and Smit (2011:16) hermeneutics critically explores the conditions under which certain behaviours take place making it possible to interpret the meaning thereof. Hermeneutics will encompass aspects within the interpretative process. This includes verbal and nonverbal forms of communication as well as prior aspects that affect communication, such as presuppositions, pre-understandings, and the meaning of language used. This approach is so important for the understanding of the various subtle - to obvious nuances in traditional communities as well as divergent cultural practices often misunderstood by modern society. The research follows an interpretive paradigm and an interpretive philosophy. It does not only gather simple data (Henning *et al.* 2011:103) but provides an understanding of the meaning people give to reality and how their reality is shaped and influenced by their perceptions and interactions with others. African theory (Ovens & Prinsloo 2011) forms the framework for the interpretive process and encompasses all forms of communication and expression; written, verbal, artistic, geopolitical, physiological and sociological. The primary researcher's own experience as an investigator and close involvement with the case studies allows for a better ability to interpret and contextualize the phenomenon. His background as a police official dealing with and investigating child prostitution and trafficking over a five year period, his understanding of the criminal dynamics involving child victims and crime within a South African context allows for a critical understanding and interpretation of this form of exploitation of

children, not only within a South African context, but specifically within, often rural, and traditional communities. Thus the data derived from the study will contribute to the development of a better understanding of this uniquely African practice in order to deal with it appropriately.

The authors propose to explain the dynamics of *ukuthwala* from an African perspective and offer a criminological perspective on the distortion of the practice whereby it becomes a form of child abuse and possible trafficking. The researchers endeavor to identify aspects of *ukuthwala* that may warrant further exploration. Central to this study is an attempt to understand the experiential world of the victim. Finally the researchers propose possible remedies for policy, policing and courts and make recommendations for future research.

Case studies: Akhona* 15 years and Nombulelo* 13 years

Case study 1: Akhona 15 years*

Akhona* lived with her father and older sister in Bizana which is situated in the Eastern Cape. She was an ambitious grade 10 high school pupil who enjoyed school and socialising with her friends. During the 2009 Easter period the Bizana community engaged in the usual church activities and late night celebrations. One evening very late, Akhona* was woken by her sister who told her that she must get dressed for a late night worship service at church. She got dressed and went to the living room area where her father was in the company of an unknown male who was approximately 40 years of age. Akhona* found it odd to see her father not properly dressed for the church service and questioned him about it. Akhona's father informed her that he and Akhona's sister would meet up with her later while she accompanied his male friend to church. Akhona* obeyed her father and accompanied the unknown male to his vehicle and noticed another two male occupants inside. They travelled in the direction of the church but soon rerouted to the highway. Akhona* became worried and confused and immediately questioned the unknown male about the direction in which he was driving whilst trying to assist him with the directions back to church. The man became annoyed with Akhona* and told her to keep quiet. She persisted with protests against what was happening and requested to call her father. The man then informed Akhona* that he paid her father R 10 000-00 *lobola* and that she would

now be living with him. Akhona* was devastated and fell asleep during the lengthy journey.

Akhona* woke up the next morning when they arrived in a prominent coastal town, approximately 70 kilometers west of Port Elizabeth. She noticed that the two male occupants were no longer present in the vehicle. On their arrival at the man's house, Akhona* again began to cry and insisted on calling her father. The man subsequently allowed her to call her father whose response to the phone call was even more shocking. Without any explanation Akhona* was told by her father that she would be disowned by himself and the community should she even attempt to return home. Her father did not deny the version of events as communicated to her by the unknown male. The weeks that followed consisted of Akhona* doing housekeeping and cooking while her 'husband' went to work. On returning home he would demand sex from Akhona* and became aggressive when she complained. Akhona* was not confined to the house and was able to come and go as she pleased as long as she attended to her duties.

After a month Akhona* decided to report her experience to the police who referred the matter as a case of domestic violence to a local social worker. Neither a criminal case nor enquiry were opened by the police official who received Akhona's* initial complaint. After a consultation between Akhona* and the social worker, the case was identified as a 'textbook' case of child trafficking whereafter the social worker reported this to the police. The social worker reported that, due to the same traditional background of the police official who attended to Akhona's initial report, the case was not immediately identified as a criminal matter satisfying the elements of trafficking in persons. During the subsequent police investigation into the matter, neither Akhona* or her 'husband' could be found at the address and it appeared as if they moved away.

Discussion of case study 1

At the time of the current research, the whereabouts of Akhona* could as yet not be established. It can be argued that the outcome of the case would have been different should the police officer who received Akhona's* initial complaint have responded differently. The case study of Akhona* can be viewed as a tangible example of the argument put forth by Ntlokwana (2009:2) who states that violence

against woman and girl children is "most of the time done under the camouflage of custom and culture". In no way does it fit with the traditional practice of ukuthwala.

Case study 2: Nombulelo 13 years*

Nombulelo* lived with her mother and two sisters in an established Port Elizabeth community that consists largely of Xhosa speaking members with strong traditional belief systems and values. Nombulelo* was the youngest of her siblings and in the process of completing grade 7 at a local primary school. Her mother was the head of the household and therefore also the main breadwinner. Nombulelo's father left home while she was still very young.

During April 2000 Nombulelo* boarded a taxi after school as she was requested by her mother to pay the electricity account in the Port Elizabeth Central Business District area. Nombulelo* attended to business as requested by her mother and then decided to visit a clothing store in the main street before boarding a taxi back home. As Nombulelo* left the clothing store, she was approached by an adult Nigerian male who introduced himself as China*. He started a friendly conversation with Nombulelo* and asked about her family and place of residence. After he started making romantic advances towards Nombulelo* she decided to end the conversation and communicated the fact that she needed to return home. China* offered to take Nombulelo* home in his car but she declined. He then immediately gave her a cellphone as a 'gift' and insisted that she called her mother to inform her that she accepted an offer to be taken home by a 'friend'. Being persuaded by the generous offer Nombulelo* accepted and was taken home by China*.

On their arrival at Nombulelo's residence, China* introduced himself to her mother and eldest sister whereafter Nombulelo* went to her room to take off her school uniform and to attend to her homework. A lengthy conversation between China* and Nombulelo's mother followed before he left later that evening. Two days later on Nombulelo's 14th birthday, her mother and sister alluded to a 'surprise' that can be expected by her. Due to the poverty stricken family lifestyle and her past experience of birthday celebrations, Nombulelo* did not expect much of the hint offered by her mother and sister. However, she was shocked when China* arrived later the same day and brought

along groceries and ‘gifts’ for her mother and siblings. Nombulelo* was not impressed by China’s visit and ignored his presence whilst he engaged in conversation with her mother. Nombulelo later learned that China* was invited by her mother to attend her birthday party and he also funded the provisions for the celebration.

A few days after her 14th birthday, Nombulelo* returned home from school and followed her usual afternoon routine. She was busy in her room when she heard a vehicle stop outside her home and shortly thereafter heard a knock on the front door. Nombulelo* was called by her sister, who was with her mother, attending to a visitor at the front door. Nombulelo* left her room and found China* at the front door speaking to her mother. She noticed two bags on the floor next to her mother, who informed her that she would be leaving home to stay with China*. Nombulelo protested and could not believe what her mother had just communicated to her. When she noticed the inexpressive demeanor of her mother, sister and China*, she became hysterical and knew that something was very wrong. Nombulelo* was physically restrained by her mother and China* who forced her into China’s vehicle along with her luggage. She yelled at her mother asking questions such as ‘What about school?’ and ‘What about my friends?’ but her mother replied by telling her that she would soon be grown up and would be taken care of by China*.

Nombulelo* later reported to police that she became China’s “sex slave” for a period of two years before he left her for another woman. She then turned to prostitution as a means to survive as she “could not” return home for fear of being spurned or disowned by her family. She was subsequently recruited by Nigerian drug dealers who were acquaintances of China* and used as a ‘drug mule’ between major cities in South Africa.

Discussion of case study 2:

It is noteworthy that Nombulelo’s* case presents a distinct dynamic in terms of the perpetrator, namely China*, not being of Xhosa or other South African ethnic origin. China* being of Nigerian ethnicity could therefore raise a valid question as to whether the case of Nombulelo* qualifies as a case of *ukuthwala*. Mwambene and Sloth-Nielson (2011:3) states that the customary practice of *ukuthwala* has developed and been adopted by different ethnic

groups. They highlight the adoption of the practice by the Mpondo clan (from the Xhosa clans). Another example of the expansion of *ukuthwala* is that of young Sotho men who have adopted this unfamiliar practice through their contact with other tribes (Mwambene & Sloth-Nielson 2011:3). The 2011 Trafficking in Persons report released by the U.S. Department of State recognises the fact that Nigerian syndicates dominate the commercial sex trade within South Africa (U.S Department of State 2011:327). The authors will furthermore argue, based on investigative experience in child trafficking cases, that Nigerian crime syndicates are well aware of the so-called push and pull factors which contribute to the root causes of human trafficking in South Africa. The ‘push factors’ as proposed by UNESCO (2007:32) include amongst others the lack of legitimate and fulfilling employment opportunities in rural communities as well as traditional community attitudes and practices. The ease in controlling and manipulating vulnerable women is amongst those listed as ‘pull factors’. Some of the methods used by traffickers as referred to by UNESCO (2007:27) include the targeting of vulnerable communities where children are victims of vague contractual agreements between the traffickers and parents. The fate of Nombulelo* could very well be ascribed to a culmination of these aforementioned factors and shows that a definitive link is possible between *ukuthwala* and the later trafficking of these vulnerable victims.

Link between *ukuthwala* and trafficking

From both case studies it becomes clear that the distorted practice of *ukuthwala* may lead to trafficking. According to Ndukuya, (2006) modern child traffickers in South Africa can be divided into three categories: individuals who abduct a child for their own needs; impoverished communities that unwittingly send their children into bondage out of desperation, and child-trafficking syndicates that abduct children or acquire them to order.

The latest ‘*Ukuthwala*’ related case currently pending before the Wynberg regional court was recently reported on by Capazorio (2012) as follows:

The accused, Mvuleni Jezile, appeared on six charges, including trafficking in persons for the purpose of sexual exploitation, three counts of rape and two counts of assault. It is alleged that the accused kidnapped a 14 year old girl from the Eastern Cape, married her against her will and subsequently took her to the Western Cape where

she was raped and assaulted. The case is postponed while the accused is out on bail.

It is clear from the latter case that the distorted practice of *Ukuthwala* contributes to children being equated to commodities who are bought by the perpetrator to serve an egocentric purpose. Victims are subsequently reminded that they are paid for and therefore 'owned' by their new 'husband'. For the victim this results in a situation very similar to that of debt bondage. Debt bondage is a fundamental control mechanism used by traffickers to, amongst others; impose a state of submission onto their victims (U.S. Department of State 2008:18). It usually involves the creation of a financial debt for a diverse range of expenses incurred by the trafficker and for which the victim is held liable (Kruger 2010:153; U.S. Department of State 2007:26). It is also the experience of the primary author that the vulnerability of the victim drastically increases once the egocentric purpose for which she was acquired is achieved. Often the re-selling of the victim becomes a viable option to the perpetrator, upon which his role as a trafficker is established beyond reasonable doubt.

We may ask if *ukuthwala* can be linked in any way, if at all, to organised crime. Can this illegal act be defined as a form of organised crime? What is the link to trafficking, that is how many cases are eventually trafficked? This question can only be answered by specialized research to ascertain whether this link exists and this aspect needs to be further explored within the South African context.

Victim experiences, trauma and effects

Prince (2009:1) reported on some of the experiences communicated by victims after *The Sunday Times* spoke to dozens of young girls who became victims of *ukuthwala*. Some of these experiences are reported as follows:

"I screamed and told them to let me go, but they told me to shut up as my husband was waiting for me"

"I screamed until my voice went faint...my mother did not do a thing"

"It feels like I was sold like a slave and that my mother doesn't love me"

"Elders shoved us (her and the man) into a hut and told me how this man was now going to make me his wife...It was painful. I cried for days"

"I cried; this man could have been my father and he was so frail and sickly"

"I didn't want to marry a madala; I just wanted to go to school"

These victim experiences as reported by Prince (2009:1), the case studies of Akhona* and Nombulelo* and in particular Nombulelo's*

unequivocal statement to police that she became China's* "sex slave", not only invokes the daunting thought of modern-day child slavery, but makes it a reality in South Africa. Wadesango *et al.* (2011:121,123) describes *ukuthwala* as a form of marriage by abduction and amongst those traditional and cultural practices that violate the rights of women. Conclusions drawn by Wadesango *et al.* (2011:121) indicate that these practices have adverse physical and psychological effects on women and further compound the inferior status of women in society. One senses that in most cases of *ukuthwala* the parents, the family and even the community are aware and maybe even involved in the process, and nobody tries to intervene or stop it. Further research is necessary to explore why this is the case and why these children are betrayed by their own. Does society condoning this practice or turning a blind eye further perpetuate this illegal practice, and to what extent?

Maluleke (2009:16) distinguishes between the impact of *ukuthwala* on the girl child and the impact of *ukuthwala* on the community. The impact of this practice on the girl child includes health issues such as HIV, Sexually Transmitted Infections (STI's) and pregnancy related complications. Amongst the factors that adversely affect human development in the child are early school drop-out and marriage. *Ukuthwala* impacts upon the community by undermining multiple facets of a community's development and contributes to the cycle of poverty, particularly in rural communities.

During February 2010 the primary author assisted a 23 year old Xhosa victim of human trafficking during a covert police operation. During subsequent interviews with the victim, she disclosed that her ordeal started at the tender age of 14 years when she was 'sold' to an older male. She stated that her family was party to the transaction. They justified their own actions by arguing it to be an investment in her future. The victim mentioned that greed played a precipitating role in her family's decision to trade her off. The multi-layered physical, emotional and psychological consequences of this transaction had a lasting and adverse effect on the well being of the victim and she exhibited numerous psychological problems including suicidal tendencies and psychosis. She eventually saw prostitution as the only viable option after being discarded by the 'buyer'.

When children are sold or trafficked, both their socialisation and education are halted prematurely, leaving a permanent mark on the child. The effects of sexual abuse can be particularly devastating and include fear, depression, low self-esteem and self-worth, poor social skills, anger and hostility, an inability to trust and build meaningful relationships in later life, blurred roles and boundaries, appearing older (pseudo-maturity), sexualised behaviour, guilt, shame, feeling 'different' from others, isolation, substance abuse, self-harm (including suicide) and post traumatic stress disorder (Dottridge 2004:36).

Legislative framework and initiating the criminal justice process

The South African Law Reform Commission (2010:2) found that the problem of forced marriages and child marriages are aggravated by the lack of a dedicated or single piece of legislation which comprehensively addresses the problem. Such legislation should be clear on the responsibilities of first responders to these incidents including the police, social workers and members of society who come into contact with young women affected or threatened by such practices. The South African Law Reform Commission (2010:2) further lists a range of different charges that can be put to perpetrators of *ukuthwala* related crimes and states that using a "hotchpotch" of offences presents further challenges to the police and prosecuting authorities. The authors take notice of the sentiments put forth by the South African Law Reform Commission (2010:2) but raise the point that no instant solution to the problem exists. It is therefore proposed that available legislative tools be used as effectively as possible and that recommendations, included in the following discussion, are considered in a multi-disciplinary response to the distortion of *ukuthwala*.

The requirements for validity of customary marriages are stipulated in the Recognition of Customary Marriages Act 120 of 1998. In terms of Section 3 (1) (a) of the Act, the prospective spouses must both be above the age of 18 years and both must consent to marry each other under customary law. Section 3 (1) (b) of the Act stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law. In the event of either the prospective spouses being a minor, Section 3 (3) (a) of the Act stipulates that both parents, or if the minor has no parents, his or

her legal guardian must consent to the marriage. If the consent of the parent or legal guardian cannot be obtained, Section 3 (4) (a) provides that a Minister or any officer in the public service may authorise in writing thereto, and may grant written permission for a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question. Cognisance should however be taken of Section 15 of the Sexual Offences Amendment Act 32 of 2007 which criminalises sexual intercourse with a minor under the age of 16 years.

Section 12 (1) of the Children's Act 38 of 2005 affords children the right not to be subjected to social, cultural and religious practices which are detrimental to their well-being. Furthermore, the Children's Act unequivocally states that a child below the minimum age set by law for a marriage may not be given out in marriage or engagement, and should a person be above that minimum age, such giving out in marriage or engagement not to take place without his or her consent (2005: sec 12(2)). Any act in contravention of Section 12(2) is deemed an offence in terms of Section 305 (1) (a) of the same act. As a supplementation to the rights afforded to children in terms of the Constitution (South Africa 1996), all organs of the state in any sphere of government and all officials, employees and representatives of an organ of state are obligated to respect, protect and promote the rights afforded to children in terms of the Children's Act 38 of 2005 (2005:sec 8(2)). Amongst the legal instruments which could be used to prosecute those responsible for distorting the *ukuthwala* practice are:

- Common law crimes i.e. rape, kidnapping and abduction;
- Sexual Offences Amendment Act 32 of 2007 (South Africa 2007) i.e. Section 15 (statutory rape) and Section 17 (sexual exploitation of children); and
- Children's Act 38 of 2005 (South Africa, 2005) i.e. Section 284 (trafficking in children).

The South African Police Service are tasked by Section 205(3) of the Constitution to investigate crime and empowered by the Criminal Procedure Act 51 of 1977 (South Africa 1977) to take certain steps in order to solve crimes. The criminal justice process therefore takes effect when a crime is committed, with the

police as the first line of response, enabled and responsible to initiate this process (Joubert 2010:222). Referring to amongst others the Criminal Procedure Act 51 of 1977 and National Policy Guidelines, Conradie and Tanfa (2005:8) highlight that the role of the police in sexual abuse cases includes receiving criminal complaints, arresting the perpetrator, opposing bail, investigating the criminal complaint and gathering evidence, forwarding the case to the prosecution for a decision on whether to prosecute or not and keeping the victim informed of the progress in the case. In addition to Conradie and Tanfa (2005:8), SAPS National Instruction 22 of 1998, 'Sexual Offences: Support to victims and crucial aspects of the investigation' also confers responsibilities on police officials regarding the provision of victim assistance (section 3) and victim after care (section 11). The maintenance of an impartial and accountable police service is amongst the reasons for the issuing of National Instructions by the National Commissioner (South Africa 1995: section 25(1)).

The primary author was part of three meetings held in Bisho, in the Eastern Cape during June, August and September 2009 where a response to the occurrence of *ukuthwala* was discussed. Some of the deliberations centered on the question of whether these cases, mostly occurring in Lusikisiki, qualify as cases of child trafficking. Email correspondence from an anonymous police investigator familiar with the cases in Lusikisiki states that a subsequent decision was made that all cases relating to the practice of *ukuthwala* should be investigated by the SAPS' Family Violence, Child Protection and Sexual Offences Units (FCS) (Anonymous police investigator 2011). A task team has also been established that will be responsible for addressing the problem of *ukuthwala* in the Eastern Cape. The task team consists of prosecutors and members of the SAPS FCS Units who will be responsible for canvassing cases, ensuring cooperation between police and prosecutors, expeditious investigations and preparation of court documents to ensure the successful prosecution of *ukuthwala* related matters (Oorlog voer teen kriminele element van *ukuthwala*-praktyk 2011:6).

In response to the multilayered challenges presented by the distorted practice of *ukuthwala*, the authors propose a multidisciplinary attempt to achieve the objectives of criminal investigation as suggested by Stelfox (2009:2).

Stelfox (2009:2) begins with a reminder that previously the sole purpose of criminal investigation was to bring offenders to justice and to gather evidence to support prosecutions. He continues by arguing that the objectives of criminal investigation now include victim care, community reassurance, intelligence gathering, disruption of criminal networks and managing a wide range of crime risks. In an effort to achieve the objectives as stated by Stelfox (2009:2) the authors recommend that the prosecutors and police officials attached to the *ukuthwala* task team be supplemented with amongst others social workers, criminologists and community workers. Social workers and criminologists can assess the impact of the crime on victims and monitor their psychosocial progress. This information may be crucial for court preparation and holistic case management. Non-governmental organisations (NGO's) or faith-based organisations (FBO's) can be mobilised for the purpose of creating awareness while simultaneously acting as the 'eyes and ears' of the task team. The principle of case conferencing can be implemented where all the relevant role players will meet to discuss the progress of cases and problem solving activities.

With due consideration to the merits of each distorted *ukuthwala* case, the principles of restorative justice could be used effectively. A central theme in restorative justice is the recognition of the community as an alternative to criminal justice agencies and is a way of dealing with crime in a rational problem solving way (Batley 2005:123). Referring to the serious nature of crimes such as rape, Batley (2005:127) argues that the application of restorative justice principles and processes in such crimes do not invalidate its serious nature, nor does it suggest that the conduct of the perpetrator should be overlooked because he apologized. Such cases present excellent opportunities for victims to feel that they have been heard and for perpetrators to be confronted with the real and far reaching consequences of their actions. Considering the crimes associated with the distorted practice of *ukuthwala* and using restorative justice principles as a response mechanism, the authors agree with Batley (2005:129) who states that restorative justice is not an alternative to the current retributive system, but is something that can be applied within it. These recommendations could strengthen the criminal justice response to

dealing with those communities and individuals responsible for distorting the *ukuthwala* practice.

The first recorded conviction for an *ukuthwala* related case was recently reported on (Oorlog voer teen kriminele element van ukuthwala-praktyk 2011:6) as follows:

In April 2011 three men were sentenced to a total of 16 years imprisonment by the Lusikisiki Regional court after being convicted of the kidnapping of a 15 year old girl. The first accused, who was the suitor, was sentenced to 10 years imprisonment of which five years were suspended on condition that he does not commit the same offence. The remaining two accused were each sentenced to three years imprisonment because they assisted the first accused. Their sentences were suspended for five years on condition that they do not commit the same offence.

The National Prosecuting Authority (NPA) commented on the convictions by stating that a clear message is thereby sent out to communities still involved in the practice of *ukuthwala*. The NPA reiterated that *ukuthwala* is a serious and punishable offence (Oorlog voer teen kriminele element van ukuthwala-praktyk 2011:6). In view of the NPA's unequivocal classification of *ukuthwala* as a serious and punishable offence, the authors once again put forward the need for a clear distinction between the tradition of *ukuthwala* on the one hand, and the associated crimes branching out of the distorted practice on the other.

CONCLUSION

Considering the aforementioned legislation, the responsibility of the SAPS and the relevant incidents of *ukuthwala* being equated to human trafficking and rape, it is suffice to heed the warning by Jewkes and Abrahams (2002:1242) who argue that the criminal justice system and the police are not just the most visible sectors of the State, but their performance in response to complaints of rape is a yardstick against which the seriousness of the crime is measured. The changing dynamics of criminal investigation and the increased responsibility placed on responding agencies should be acknowledged. This should encourage a multidisciplinary response to the multifaceted challenges presented by the distorted practice of *ukuthwala*.

Referring to the contentious issue of *ukuthwala*, Ntlokwana (2009:3) states that a challenge in the South African Constitution lies in the contradiction that it raises between

universal individual rights guaranteed in the Bill of Rights in juxtaposition to the long cherished traditional practices which often violate the rights of these girls as contained in the Bill of Rights. Thus the customary practice of *ukuthwala* will remain a contentious issue and will increasingly be weighed up against the provision of Section 39(3) of the Constitution which states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law, as long as they are consistent with the Bill of Rights.

The authors quote Ovens and Prinsloo (2010): Fourie (2008:53) views ubuntuism as an intellectual quest to rediscover and re-establish idealised values of traditional African cultures and traditional African communities. "A person is a person through other persons" (Louw 1995). In African tradition this saying has a deeply religious meaning. The "person" that one will eventually become in a process "through other persons" is, ultimately, an ancestor. In this context ancestors include extended family and in African society an inextricable bond exists between man, his or her ancestors and whatever is regarded as the "Supreme Being". *Ubuntu* forms an integral part of African religion and indicates a deep respect and regard for religious beliefs and practices.

Thus best practice should lie in the development of intervention strategies on ground roots level beginning with the education and uplifting of communities and revival of *Ubuntu*. As illustrated within the article in many cases parents, family and the community were aware of the fact that the girl was a victim of *Ukuthwala*, yet they never intervened in any way. Rigorous discourse is required to identify the dynamics which silence families and the community and make them reluctant to intervene. Research may inform on best practice and this in turn will allow for negotiations between traditional leaders, non governmental organizations and the criminal justice system. Finally, the authors highlights the discourse on the topic of *Ukuthwala* that took place during the Judicial Service Commission's (JSC) interviews for the Eastern Cape High Court in October 2011. Commissioner Jonas Sibanyoni is reported as saying that a debate took place in Parliament as to whether the practice of *Ukuthwala* should be banned as a form of human trafficking. He said it was argued that the custom, as originally practiced is not what is happening today and that the custom should not be banned as "it's a culture, it's a tradition". One of the candidates, Attorney Duncan Dukada responded by arguing that the "genuine" *Ukuthwala* practice did not involve violence. As a one-time lecturer in

African customary law Attorney Duncan Dukada explained to the JSC what the proper customary practice of *Ukuthwala* entails. He concluded by stating that “what has been happening is really an illegal act, done under the pretext of custom” (Rabkin 2011).

The authors echo these sentiments on the practice of *Ukuthwala* as reported on by Rabkin (2011). All effort should be made to educate communities on the difference between

ukuthwala, the ancient romantic practice and the modern-day practice of child abuse, exploitation and slavery and to allay the fears of communities that their traditions are being infringed upon. Education and awareness should protect vulnerable members of society and empower communities to take a stand against criminals who act under the protection of “culture”.

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