

# Forced child marriage practiced under the pretext of customary marriage in South Africa

Velani Mtshali

Department of Criminology and Security Science, School of Criminal Justice, University of South Africa  
E-mail: [mtshavz@unisa.ac.za](mailto:mtshavz@unisa.ac.za)

In South Africa forced child marriage is practised by the Zulu and the Bapedi. In Zulu it is called “*ukuganisela*” and in Sepedi it is called “*go thiba difate*”. These concepts appear to be culturally acceptable because in customary marriages the family groups of the prospective parties (to their marriage) give consent to their daughters’ marriages to men without necessarily informing them. The two terms will be treated under one word “*ukuganisela*” - the Zulu practice of forced child marriage.

The aim of this article is to explore the concept of forced child marriage because the Recognition of Customary Marriages Act 120 of 1998 does not give enough protection to girl children who cannot give consent if their parents act on their behalf. Forced child marriage is discussed in terms of its nature, the extent to which it is practiced, its incidence, consequences and current measures in place for its prevention in the South African context. The conclusion is that “*ukuganisela*” is a form of forced marriage that robs girls of their human rights, including education. It further violates specifications of the following South African legal instruments: the Constitution, Bill of Rights, Children’s Act of 2005 and the Recognition of Customary Marriages Act 120 of 1998 in 2000. The implications are that empirical research should be done and more campaigns should be launched to educate the public about girl children dropping out of school due to being forced by their parents to get married before they have developed into full adults.

## INTRODUCTION

Forced child marriage is a complex practice that has existed for centuries. It is rooted in gender inequality, tradition and poverty. In many cases parents arrange these marriages and young girls have no choice. Poor families marry off young daughters to reduce the number of children they need to feed, clothe and educate. In some cultures, a major incentive is the price that prospective husbands will pay for the young girls as their brides (Unicef 2013:1).

Mohammed Al-Suhari, director of the Islamic studies at the university of Umm Al-Qura and a member of the National Society for Human Rights (NSHR) states that forced child marriage is not part of religion and that this norm has become a phenomenon in some conservative societies which do not want to give any value to the opinions of the would be husband or wife. In the same report it is stated by Al-Ghamdi that some parents forced their daughters into marriages for financial reasons (Saudi Gazette report 2014:1).

According to Letsika (2005:77) Section 34(1) of the Laws of Lerotoli, in Lesotho, no person may be forced to marry against their will. Section 3(1) makes it a criminal offence to abduct a girl. A person found guilty of such an offence is liable to be imprisoned or fined.

In South Africa both the Sotho-and Nguni-speaking people practise a form of forced child marriage. In Sepedi, which is part of the broader Sotho-speaking culture, it is called “*go thiba*

*difate*” while in Zulu, which is part of a broader culture of Nguni-speaking culture it is called “*ukuganisela*.” (Mokwana 2009:74; Mtshali 2010: 121) This article discusses forced child marriage using the term “*ukuganisela*” as a concept that will apply throughout the text.

The purpose of discussing the concept of “*ukuganisela*” is to explore the practice as a violation of human rights both internationally (United Nations), according to Article 2 of the 1948 Universal Declaration of Human Rights and the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage as well as locally (South Africa) as enshrined in Section 28(2) of the Bill of Rights, Recognition of Customary Marriage Act no. 120 of 1998 as well as Section 1(1) (a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The article will contribute to existing knowledge in that it will draw the attention of criminologists, victimologists’, social workers and related disciplines to the fact that, just like *ukuthwala* which was exposed as a violation of the rights of girl children, “*ukuganisela*” is a form of forced child marriage. *Ukuthwala* is better understood as an elopement. It takes the form of a mock abduction, whereby a suitor and his friends remove the girl from her parents’ control and carry her off to her suitor’s homestead. She might be caught unawares or she might be part of the plot. Sexual intercourse was not contemplated until the girl’s status had been

duly fixed (Mwambene and Sloth-Nielsen 2011: 6-8).

The argument of this article is that while “*ukuganisela*” is a form of forced child marriage and a violation of the girls’ rights, it is treated lightly by the courts. For instance, in one case involving forced child marriage, the Magistrates Court in KwaMaphumulo in KwaZulu-Natal ordered the family of a 13 years old girl to return all the lobolo received by her father from the prospective husband who is 41 years old. No further action was recommended against the parents of the 13 year old girl (Shangase 2013: 3).

“*Ukuganisela*” as a subculture of forced child marriage will be viewed from the following contexts:

- The nature of forced child marriage.
- The extent of forced child marriage.
- The incidence of forced child marriage.
- Consequences of forced child marriage.
- Prevention of forced child marriage.

Before discussing “*ukuganisela*” in the context outlined above it is important to define key concepts.

### Definition of key concepts

#### **Child**

Section 1(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as Act 32 of 2007), defines a child as a person under the age of 18 years, while section 1(1)(b), with reference to sections 15 and 16 (the sections dealing with statutory rape and statutory sexual assault), defines a child as a person of 12 years and older, but under the age of 16.

For the purpose of this article, a child is defined as a girl who is over 12 and under 18 and therefore is not capable of giving consent such as an act of consensual sex.

#### **Consent**

Section 1(1)(a) of Act 32 of 2007 defines consent as a voluntary or uncoerced agreement. According to this Act, children younger than 16 years are not capable of giving consent. Accordingly, for the purposes of this article, consent means voluntary agreement by a girl who is older than 12 years but younger than 18 years and who is therefore incapable of giving such consent.

#### **Customary marriage**

Customary marriage is defined in section 1 of the Constitution of South Africa as a marriage

concluded in terms of customary law. Customary law refers to the customs and usages traditionally observed among the indigenous peoples of South Africa, or the activities which form part of the culture of those people. One of the customs traditionally observed is the preferential marriage among the Sotho- and Swazi-speaking people. This is a reference to cross-cousin marriage (Mtshali 2010:121).

#### ***Ukuganisela***

*Ukuganisela* is a Zulu term denoting a form of forced marriage whereby a girl’s parents open negotiations with a boy’s parents. This was a custom practised mainly by the parents of girls who were of high standing, such as women of the royal family, and sometimes it was done without her knowledge and against her will (Krige 1950:125; Shangase 2013).

#### ***Ilobolo or lobolo***

*Ilobolo* or *lobolo* is defined in the Recognition of Customary Marriages Act 120 of 1998 as property in cash or in cattle gifted by the bridegroom (or his family) to the bride's family in exchange for her hand in marriage. Traditionally, these gifts consisted of livestock in the form of cattle, sheep, horses or goats, and they may also be given by the family of the groom to the family of the bride in the form of money, furniture, motor vehicles and even houses, depending on the wealth of the families involved (Jansen 2010:56).

Among the Bapedi in South Africa, a similar custom exists whereby a “betrothal”, also called *go thiba difate*, is arranged during infancy whereby daughters from the house of a *kgosi* (king) are destined to marry into another *kgosi*'s (king's) tribe or nation (Krige 1950:125; Mkwana 2009:74).

### HISTORICAL BACKGROUND

According to Vorster and De Beer (1996:153) one of the **Zulu's** most important cultural characteristics is that they are a patrilineal clan. Dlamini (1983:384) stated that the Zulu customary marriage involves the prospective husband and wife and their respective families. While the partners acquire certain rights and obligations against each other, it is their families who are responsible for the fulfilment of these rights and duties. The responsibilities of the families of the married couple include the conclusion of the marriage, its continued existence and its dissolution. The bride’s family is represented by her guardian while the bridegroom is represented

by his father or the father's heir.

During the subsistence of the marriage the woman looks to her father-in-law for protection against her husband and the husband does not take action against his wife but against her guardian, which can be the father of the wife. The reasons put forward for the two family groups are the following:

- The collective approval by the family group of the intended spouse was motivated by the fact that this was an agreement whose consequences would affect the whole family home and its inmates
- Representation by family heads was done because the prospective partners were not accorded the customary capacity to conclude a marriage
- In customary law majority (age of maturity) was an exclusive preserve for men. It was the man's conclusion of a marriage and his assumption of the status of a family head that enabled him to attain the majority status (Dlamini 1983:385; Becker 2010:93).

### Forced child marriages

In forced marriages parents decide on a spouse for a child with no input from the child himself or herself (The Algeimer 2012:1-2). According to Krige (1950:124-125) there are three forms of marriage negotiations, namely, **ukucela**, **ukuganisela** and **ukubaleka**.

**Ukucela** is said to be the most common and most usual form of marriage negotiation. In this case the boy's people open negotiations and formally ask the hand of the girl. **Ukuganisela** is a marriage arrangement whereby the girl's parents open negotiations with the boy's parents. This was a custom practised mainly by the girl's parents who were of high standing such as women of the royal family and sometimes it was done without her knowledge and against her will (Krige 1950:124). In the case of the girl's parents acting without her knowledge the girl did not even know the man (Krige 1950:124).

Women of the royal family were often married by way of **ukuganisela**. The parents would select some important man whom they considered suitable as a match for their daughter. For example in 1930 such a marriage took place between a daughter of Uziwedu ka Mpande (prince and son of King Mpande) and Ntshidi ka Zimema, an important head of one of the then Zululand districts (Krige 1950:124).

In the case where the girl's parents selected a husband for her against her will her father might

order her to go and present herself at her future husband's kraal or she might be forcibly taken to the husband and coerced her to stay with him in his home (Krige 1950:125).

Under the custom of **ukuganisela**, some girls are turned into child brides at a tender age, at times the parents of these girls know about these marriages but prefer to overlook the situation and accept **lobola** from the groom. This practice is defined as a traditional custom and legitimately acceptable in some communities, for example, in the Eastern Cape (Lutya 2012:16).

Customary marriage is as defined in Section 1 of the Constitution Act no. 108 of 1996 a marriage concluded in terms of customary law. Customary law in turn refers to the customs and usages traditionally observed among the indigenous peoples of South Africa or activities which form part of the culture of those people. One of the customs traditionally observed is the preferential marriage among the Sotho- and Swazi-speaking people. In preferential marriage "cousins" (batswala) are allowed to enter into a legally binding marriage. The meaning of the word "cousins" is restricted to any child of a brother's sister and vice versa (Letsika 2005:78; Mtshali 2010:121).

Another dimension to customary marriages is that the parents of the prospective parties to a marriage play a significant role and "**ukuganisela**" is one form of marriage that this article focuses on. Furthermore, struggles have been waged against the violation of women and children's rights and that includes customary marriages in which parties to the marriage are not directly involved. On the basis of this there has been an international campaign on violence against women and children.

South Africa has one of the most progressive Constitutions in the world guaranteeing children and women rights enshrined in the United Nations Convention. The United Nations Charter of 1945 re-confirmed the fundamental human rights and fundamental freedoms without discrimination based on gender or sex. The pursuit of equal rights for women through the international law has been a slow process. Article 2 of the 1948 Universal Declaration of Human Rights was the first initiative to give a voice to the principle of all before the law. However, the Declaration was not binding. It provided an equal protection clause, namely, Article 2 (a) which states that men and women of full age have the right to marry and start a family. They are entitled to equal rights as to

marriage, during marriage and at its dissolution. This implies that marriage is for adults and not for children. (De Silva-Alwis 2008:2). The Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) was established and adopted by the United Nations General Assembly in 1979. CEDAW was described as the bill of rights for women because it spelt out the areas in which women were discriminated against and it committed countries to amend their laws and construct national gender policies. It provided the prohibition of child marriage in Article 16 (De Silva-Alwis 2008:2). CEDAW was further strengthened by the Beijing Platform for Action. The Beijing Platform for Action gave a detailed template for women empowerment and it is described as a service of inspiration in women's rights (De Silva-Alwis 2008:2).

In the Convention on the Rights of the Child (CRC) the definition of a child is described as every human being below the age of eighteen (18) years, unless under the law applicable to the child, the age of majority is attained earlier. For this reason States are prohibited from giving validity to a marriage between persons who have not attained their majority (De Silva-Alwis 2008:2-3)

Based on the definition of human rights stated above, the UN Convention on the Rights of the Child was adopted by the United Nations in 1989. Important human rights relating to the child are: Equality and Non-Discrimination, best interests of the child and the right to survival, development, protection and education (Patnaik & Tripathy 2005:7-8).

In terms of equality and non-discrimination the onus is on the State to ensure that the rights set out in the convention to each child within their jurisdictions are enjoyed without discrimination (Patnaik & Tripathy 2005:8). Related to the child, Article 3 of the Convention states that in "all actions concerning children... the best interests of the child shall be a primary consideration". The principle provides a basis for evaluating the laws and practices of States with respect to the protection of the child. In pursuit of the best interests of children, parents and governments are held responsible for the protection of children's health, education, development and overall well-being to their best abilities (Patnaik and Tripathy 2005:8).

### **Education and development of children**

The United Nations Office of the High Commissioner for Human Rights (OHCHR) on the Convention on the Rights of the Child starts

off by stating that rights of all children and young people under the age of eighteen years are protected. The following articles 24, 28 and 29 will apply in the context of the study on ukuganisela (UN 1990:1).

Article 24 states that all children have a right to good health and good quality health care. All children should have clean water, nutritious food and a clean environment so that they can stay healthy. Article 28 further stipulates that all children have the right to education.

Article 29 states the various functions of education on the child including:

- a) That education should teach children to live responsibly and peacefully in a free society
- b) That education should teach children to respect their parents, their own and other cultures
- c) That education should teach children to respect their natural environment
- d) That the purpose of education is to develop every child's personality and talents and mental and physical abilities

Consequently, every child has the right to education on the basis of equal opportunity. Early marriage therefore disrupts the girl's schooling opportunities guaranteed by Convention to Eliminate All Forms of Discrimination Against Women and Convention on the Rights of the Child and the employment rights of girls are violated by early marriage. Lack of information can be linked to lack of education also on sexual and reproductive health issues, which may be due (or lead) to early pregnancies (De Silva-Alwis 2008:3). The CRC contains a provision calling for the abolishment of traditional practices which may endanger the health of children, like giving consent on their behalf to be married to a man older than themselves. Article 12 of the CRC states that a girl child has the right to express her views freely in all matters affecting her (the girl child) in accordance with her age and maturity (De Silva-Alwis 2008:4).

At the Fourth International Conference on Women held in Beijing in 1995, strategies for the empowerment of women were spelt out by calling for gender equality at international, national, local and individual levels. It recognised that the action to protect and promote the rights of women had to start with the girl child (Patnaik & Tripathy 2005:8).

The Beijing Platform for Action was followed by the United Nations Entity for Gender Equality and the Empowerment of Women. This body,

also called UN Women, was launched in 2011. It raised funding of \$1.2 billion for 2011-2013. The UN Women works for the elimination of discrimination against women and girls, the empowerment of women and for the achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action and peace and security (UN 2013:1).

The UN Entity for Gender Equality and the Empowerment of Women has grown as a counterweight to entrenched cultural presumptions that women should occupy the domestic environment of child-rearing while men own property, pursue vocations and make decisions. However, many developing countries such as Saudi Arabia where women are not allowed to drive cars or engage in athletic sports are busy amending colonial-era laws which reflect the values of that period (UN 2013:1).

Circumstances of extreme poverty or conflict unquestionably fan the flames of violence against women. For example forced child marriages flourish in regions where hardship weakens the natural bonds of family life, already eroded by traditional attitudes towards women (UN Entities, UN Entities, UN Entities Scope of Work 2013:1).

## **FORCED CHILD MARRIAGE**

This section will include the nature, extent, causes, incidence, consequences and prevention of forced child marriage.

### **The nature of forced child marriage**

Forced child marriage is a complex practice that has existed for centuries. It is rooted in gender inequality, tradition and poverty. In many cases parents arrange these marriages and young girls have no choice. Poor families marry off young daughters to reduce the number of children they need to feed, clothe and educate. In some cultures, a major incentive is the price that prospective husbands will pay for the young girls as their brides.

As stated above, the United Nations has classified forced child marriages as a serious violation of human rights; forced child marriage is not part of religion and that this norm has become a phenomenon in some conservative societies which do not want to give any value to the opinions of the would be husband or wife. In some regions, for example in Lesotho, no person may be forced to marry against his or her will (Letsika 2005:77).

### **The extent of forced child marriage**

The ten (10) countries with the highest rates of child marriage are the following: Niger (75%), Chad and Central African Republic (68%), Bangladesh (66%), Guinea (63%) Mozambique (56%), Mali (55%), Burkina Faso and South Sudan (52%) and Malawi (50%) (World Health Organisation 2013).

The Christian community in Pakistan is estimated to be over 2 million. According to a report by the Movement for Solidarity and Peace in Pakistan (MSP), an estimated 1 000 (one thousand) Christian and Hindu women are forced to convert and marry Muslim men in Pakistan every year. Furthermore, 700 of the cases involve Christian and 300 Hindu women. The numbers of forced marriages may be greater because some cases are never reported or are not processed through the legal system (Iqbal 2014: 1).

In Yemen some fifty two percent (52%) of the girls are reported to be married to older men before the age of eighteen (18) years while fourteen percent (14%) of Yemeni girls are married to older men before they reach the age of fifteen (15). Girls who refuse to marry older men are forced to do so by their families (Eurasia Review 2014:1).

According to the WHO (2013) the United Nations Children's Fund (UNICEF) estimates that some 50 000 girl children die in low-and middle-class countries; still births and new-born deaths are fifty percent (50%) higher among mothers under twenty (20) years than in women who get pregnant in their twenties; and in poor countries most young girls, regardless of age, are forced to demonstrate their fertility once they are married.

In South Africa aspects of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) contaminate marriage statistics (Budlender, Chobokoane & Simelane 2004:3).

Firstly, the most recent publication by Statistics South Africa (2002) reports on marriages registered in 1999. The RCMA only came into effect in November 2000. The data therefore excludes customary marriages. Secondly, the Act allows couples married under customary law to contract a civil marriage under the Marriage Act of 1961-this allows double counting in the registration of statistics. Thirdly, the regulations make the registration of a customary marriage a relatively cumbersome procedure because of the requirement that a couple must fill in many forms. This has the potential to discourage the

illiterate and semi-literate to register. Fourthly, the couple must have identity documents—a requirement which is not always easily fulfilled because couples younger than 18 years who marry may not qualify to obtain an identity document.

Despite the facts above, evidence worldwide indicates that there are a growing number of forced child marriages (Loaiza & Wong 2012: 10).

### **INCIDENCE OF FORCED CHILD MARRIAGE**

Naidu (2012:153) states that in India there is a gross under-reporting of crimes against children. Reasons put forward include the following:

- parents, caregivers and the police give children less attention;
- children and many people remain silent when violence is committed by other family members or by powerful members of the community or society;
- the lack of consistent marriage registration makes early and forced marriage difficult to track; and
- the persistent social and legal acceptance of some forms of violence against children often leaves such violence unnoticed and unreported.

For example, in Pakistan, the MSP's investigations found that cases of forced child marriage followed a particular pattern. Firstly, girls between the ages of 12 and 25 are abducted. Secondly they are converted to Islam. Thirdly they are married to Muslim men or a third party (Saudi Gazette report 2014:1; Iqbal 2014:1).

Once a girl has been married off the victim's family files a First Information Report (FIR) to report the abduction or rape. The abductor, on behalf of the victim girl, files a counter FIR, in which he accuses the family of the victim of harassing the wilfully converted and married girl to Islam and for conspiring to convert the girl back to Christianity (Saudi Gazette report 2014:1; Iqbal 2014:1).

The perpetrator then presents evidence before a court of law to the effect that the girl wilfully consented to the marriage and that she wilfully converted to Islam after which the girl is asked to testify. Upon the victim girl stating that she had wilfully converted and consented to marriage the court settles the case without relief to the family of the victim (Saudi Gazette report 2014:1). In most cases the MSP reports that the girl remains in the custody of the perpetrator while judicial proceedings are conducted.

In the north-east of Nigeria, a mass kidnapping of more than two hundred (200) school girls by the Boko Haram terrorist group took place. About fifty (50) of the kidnapped girls managed to escape from their captors but some two hundred and twenty (220) still remained missing. The girls' ages ranged between sixteen (16) and eighteen (18) (Associated Press 2014:2). The parents of the kidnapped school girls are reported to have said that the girls were being sold to Boko Haram militants for 2, 000 naira (\$12). They were forced to marry their Islamic extremist abductors (Associated Press 2014:1).

In South Africa there is a cultural practice called *ukuthwala*. *Ukuthwala* is not a customary marriage in its original form. It is a method of forcing the girl's family to enter into marriage negotiations. The man and the girl have agreed to marry before *ukuthwala* takes place. According to Joan Broster, (Soucie 2011:2-3) author of *Child marriage: ukuthwala in South Africa-gender across borders*, who had spent about seventeen years living among a community that practised *ukuthwala*, even unsuspecting girls who had not consented to *ukuthwala* were not opposed to its purpose. However, contemporary forms of *ukuthwala* involve girls, reported to be as young as nine or ten years old being married to men, sometimes, five times older than them. They are beaten or raped if they refuse. This is done to prevent parents from having the girl returned or to report the matter to the police (Soucie 2011:2-3).

Cases of *ukuganisela* in South Africa and Zimbabwe are also reported in the media. It was reported that the Magistrates Court in Kwa-Maphumulo in KwaZulu-Natal ordered the family of a 13 years old girl to return all the lobolo received by her father from the prospective husband who was 41 years old. The prospective husband was an evangelist of the well-known Nazareth Baptist Church (also known as *ibandla lakwa Shembe*) (Shangase 2013:3). It was not the first time that the *Ilanga* newspaper reported on such a matter, and previously it reported on a case where, the office of the Commission for Gender Equality prevented another marriage between an old man and a girl of 14 years of age from taking place (“... kakukhona okukuqala ILANGA libika ngodaba lokuganiswa kwezingane ezincane kule ndawo,” meaning that the *Ilanga* newspaper was not reporting for the first time about such incidents in the same area about young girls who did not have any knowledge of the man to whom

they were getting married to.

In Limpopo a thirteen year-old girl was married off to a fifty seven (57) year old traditional healer. The girl was in Grade Six at the time she became a child bride. Her mother was a single parent with five children. The girl suffered from epilepsy and “ancestral problems” (De Waal 2013:1). She was taken to the Sangoma (traditional healer) for treatment. When the mother of the girl could not afford the bills for the treatment of her daughter the Sangoma negotiated a deal to settle the bill. Firstly, he said it would be to the girl’s advantage to be close to him while she received treatment. Secondly, he proposed that the girl’s parent would receive R5 000 towards her daughter’s lobolo, to which she consented (De Waal 2013:1). The police arrested the Sangoma but could not charge him because the girl’s mother had given her consent to the marriage as stipulated by the customary marriage (De Waal 2013:1).

Another report from Zimbabwe was that an elderly couple reportedly married off their 15 year old granddaughter for a bag of mealie meal and R500 (Madhuku 2014:1).

### **CAUSES OF FORCED CHILD MARRIAGE**

Botha (2009:1) states that poverty is seen as the main cause for people to marry at a young age and the following factors are listed as other contributors to child marriage:

- Protecting the girl child’s sexuality.
- Gender discrimination.
- Inadequate implementation of the law.
- Domestic violence.
- Trafficking in women and children.
- Health costs.
- Education.

Risks related to early marriage according to Botha (2009:1) include young girls who marry before the age of eighteen (18) years have a greater risk of becoming victims of intimate partner violence than those who marry at an older age, especially where the age between the parties is great. Child marriage marks an abrupt and often violent introduction to sexual relations. Social pressures within the community can lead families to marry off their girl children. In some cultures the belief exists that marrying girls before they reach puberty will bring blessings on families. Some societies believe that early marriage will protect young girls from sexual attacks and violence. Some see it as a way of

ensuring that their daughter will not become pregnant out of wedlock. Too many families marry their young daughters because early marriage is the only option.

### **CONSEQUENCES OF FORCED CHILD MARRIAGE**

According to the United Nations (UN) complications from pregnancy and childbirth are the leading causes of death for girls aged between fifteen (15) to nineteen (19) years in developing countries. Of the sixteen (16) million adolescent girls who give birth every year about 90% are already married (WHO 2013). According to De Silva-Alwis (2008:3) some of the consequences of forced child marriages are that they harm the girl child’s health, especially her reproductive health. These harms often culminate in maternal mortality.

Dr Sameera Al-Ghamdi, a psychological consultant stated that the adverse psychological consequences of forced child marriage are many and may include depression and suicide (Saudi Gazette report 2014:1).

In Yemen one of the consequences of forced child marriages are said to be girls dropping out of school (Eurasia Review 2014:1). This supported by the World Health Organisation (2013) that considers one of the consequences of a violation of the rights of girls is that child marriage effectively ends their education. Other consequences following the dropping out of school are that any opportunities to gain vocational and life skills are blocked and that girls become pregnant too early and become mothers before they are psychologically ready for motherhood.

In 2009, UNICEF reported to the South African Parliamentary Monitoring Group that the number of women forced to marry under the age of eighteen (18) years was eight percent (8%). UNICEF noted that South Africa had been late to submit its second and third periodic reports as required by the UN convention on the Rights of the Child (Botha 2009:1). This may mean that the government does not take this matter seriously.

### **PREVENTION OF FORCED CHILD MARRIAGE**

Articles 34-36 of the CRC state that a child has the right to protection from abduction, sale or trafficking, from all forms of sexual exploitation and sexual abuse and from all forms of exploitation prejudicial to any aspect of the

child's welfare. Article 19 protects the child from all forms of physical or mental violence, injury or abuse, maltreatment, or exploitation, including sexual abuse, while in the care parents, guardians or any other person (De Silva-Alwis 2008:5).

According to the United Nations Population Fund (UNFPA) projections estimate that between 2011 and 2020 child marriage will increase annually to 140 million (Botha 2009:1). Therefore, it is imperative that urgent steps should be taken to control or combat child marriage.

The Saudi legal system has measures to control forced child marriages. Under the Saudi legal system any woman who is forced by her legal guardian to marry a man against her will can approach a court and have the marriage revoked and that the role of the guardian is merely to give advice. Marriage official Mohammed Al-Otaibi states that before an official writes a marriage contract the woman should be consulted. Women should be asked if they have clearly consented to the marriage. If the answer is to the contrary the marriage contract should not be documented (Saudi Gazette report 2014:1). Mohammed Al-Suhari, advocates for an awareness campaign in society about forced child marriage by Imams (religious men who lead prayers in a Mosque) (Hornby 2010:749; Saudi Gazette report 2014:1).

In developing a Rights Framework to Combat Child Marriage the rights to education and employment, should be included among others. For example, in Malawi, one of the poorest countries in the world, half of young girls are married before they reach eighteen (18) years. The country is working towards stopping the practice by allowing the young girls to be educated by providing free universal access to primary education. Becoming educated citizens allows women to contribute meaningfully to the development of their country. Furthermore the government supports and enforces legislation to increase the minimum age for marriage to eighteen (18) years. Other indicators for government support are the provision of equal access to quality primary and secondary education for both girls and boys; the mobilising of young boys and girls, and parents and leaders to change practices that discriminate against girls and to create social, economic and civic opportunities for girls and young women (Botha 2009:1).

In South Africa, the above principles are evident in the implementation of the Constitution, Bill of Rights, Children's Act 2005,

Recognition of Customary Marriages Act 120 of 1998 among others. But a gap exists in Section 3(3)(a) of the Recognition of Customary Marriages Act 120 of 1998 (as amended up to and including two Government Notices, No. R.1390 and R. 1391, printed in Government Gazette 31 735 dated 24 December 2008). This section requires that where the prospective spouse is a minor (under 18 years) both her parents or if she has no parents her legal guardian has the power to give consent on behalf of the girl child to the marriage. The Recognition of Customary Marriages Act, is not clear on preferential marriages between cousins as practised by the Northern Sotho-speaking and the Swazi-speaking people in South Africa (Mtshali 2010:121).

### **CONTRAVENTION OF THE CONSTITUTION, BILL OF RIGHTS , CHILDREN'S ACT 2005 AND RECOGNITION OF CUSTOMARY MARRIAGES ACT**

After forced child marriage ("*ukuganisela*") has been viewed from its nature, extent, incidence, causes, consequences and prevention the results show that its practice in South Africa seems to violate the following legal specifications; namely the Constitution, the Bill of Rights, the Children's Act and the Recognition of Customary Marriages Act.

#### **The Constitution**

Section 7 of the Constitution of the Republic of South Africa Act no.108 of 1996, protects the child through the Bill of Rights. It describes the Bill of Rights as the cornerstone of democracy in South Africa which enshrines the rights of all people, including children, in South Africa and affirms the democratic values of human dignity, equality and freedom (Dutschke 2006:44).

#### **Bill of Rights (legal subjectivity)**

Section 28(1) of the Bill of Rights states (Dutschke 2006:45) that every child has the right:

- To family care or parental care or to appropriate alternative care when removed from the family environment.
- To basic nutrition, shelter, basic healthcare and social services.
- To be protected from maltreatment, neglect, abuse or degradation.

Section 28 (1) (d) of the Constitution of the Republic of South Africa Act no.108 of 1996, states that all children have the right to be protected from abuse. Section 28 (1) (c) states



that every child has the right to receive social worker services (Dutsche 2006:45).

### Children's Act 2005

The Children's Act 2005 (Act no. 38 of 2005) specifies certain strategies for child protection. It states that designated child protection services should carry out investigations and assessments in cases of suspected abuse, neglect or abandonment of children (Section 106 (4) (c)). Therefore where the girls' parents selected a husband for her against her will her rights to dignity, equality and freedom are severely violated.

### The Recognition of Customary Marriages Act (RCMA)

With regard to "ukuganisela" this cultural practice is in conflict with the Recognition of Customary Marriages Act 120 of 1998 requirements that (a) the prospective spouses (i) must both be above the age of 18 years and (ii) must both give consent to each other under customary law and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law. In the case where the girl's parents selected a husband for her against her will her father might order her to go and present herself to her future husband's kraal or she might be forcibly taken to the husband and shut up with him. This amounts to a violation of the girl's right to dignity and privacy.

The Recognition of Customary Marriages Act (RCMA) No. 120 of 1998 came into operation on 15 November 2000. It gives full legal recognition to customary marriages. According to Section 1 of the Act, a "customary marriage" is defined as marriage concluded in accordance with customary law. Customary law in turn is defined as the customs and usages traditionally observed among the indigenous peoples of South Africa and which form part of the culture of those peoples. This among others implies that where certain cultural groups are practising incest in contravention of the Sexual Offences Act 32 of 2007, section 12(1), they may proceed unhindered with the customary marriage (GhostDigest 2008:1). This may also apply to the case where the Sotho-speaking people practise preferential marriages. In such marriages, cross-cousin marriages are encouraged.

### Customary marriages entered into after the commencement of the Act (15 November 2000)

Section 2(2) of the Recognition of Customary Marriage Act of 1998 states that a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

Section 3 (1) states that in order for a customary marriage entered into after the commencement of the Act to be valid it must comply with the following:

The prospective spouses (i) must both be above the age of 18 years and (ii) must both give consent to each other under customary law and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The above requirements clearly indicate that the practice of "ukuganisela" (forced child marriage) is in contravention of the RCMA as where a 13 year old girl was married to an old man of 41 years.

### CONCLUSIONS AND RECOMMENDATIONS

The goal of this article was to explore "ukuganisela" (forced child marriage) as a cultural practice among certain groups in South Africa and various other countries. **Ukuganisela** is one of the cultural practices which seems to stand in stark contrast to the Constitution, Bill of Rights (legal subjectivity of the child), Recognition of Customary Marriages Act (RCMA) 120 of 1998, Children's Act 2005, the Criminal Law (Sexual Offences and Related matters) Act 32 of 2007. Since Ukuganisela violates the rights of girls under the age of 18 who do not give consent to marriage with an older man, it can be considered legally as a form of forced marriage, even according to legislation about customary marriages.

Although the South African Bill of Rights and other legislation intend to give women equal rights and prevent their exploitation and violence against women, there are still insufficient measures in place to protect young girls from forced marriage. It is recommended that since this is such a controversial issue, further in-depth research needs to be conducted on this issue.

---

### REFERENCES

The Algeimer. 2012. *Study on arranged marriages reveals that Orthodox Jews may have it right*. Available from: <http://www.algeimer.com/2012/07/06/study-on-arranged-marriages-reveals-that-orthodox-jews-may-have-it-right/> (Accessed 24 October 2014).

- Associated Press. 2014. *Girls recently kidnapped in Nigeria forced to marry extremists, reports say*. Available from: <http://www.foxnews.com/world/2014/04/30/reports-abducted-girls-forced-to-marry-niger...> (Accessed 2 May 2014).
- Bekker, JC. 2010. Customary law of contract. In *Introduction to Legal Pluralism*, edited by C Rautenbach, JC Bekker and NMI. Cape Town: LexisNexis.
- Bill of Rights Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996. Available from: <http://www.justice.gov.za/legislation/constitution/bill-of-rights-.html> (Accessed on 28 October 2014).
- Botha, Y. 2009. *Forced marriages: briefing by UNICEF*. South Africa: Parliamentary Monitoring Group.
- Budlender, D, Chobokoane, N & Simelane, S. 2004. Marriage patterns in South Africa: methodological and substantive issues. *South African Journal of Demography*, 9(1):1-26.
- Constitution of the Republic of South Africa Act No. 108 of 1996. Available from: <http://www.justice.gov.za/legislation/constitution/constitution.htm> (Accessed on 28 October 2014).
- Department of Justice, South Africa. 2007. Criminal Law (Sexual Offences and Related Matter) Amendment Act No.32 of 2007. Government Gazette 510 (30599). Pretoria: Government Printers.
- De Silva-Alwis, R. 2008. *Child marriage and the law*. New York: United Nations Children's Fund (UNICEF).
- De Waal, M. 2013. *Limpopo child bride: sold into marriage, kept there by the system*. Available from: <http://www.dailymaverick.co.za/article/2013-02-01-limpopo-child-bride-sold-into-marria...> (Accessed 3 July 2014).
- Dlamini, CRM. 1983. The transformation of customary marriage in Zulu law. *XVI CILSA*:383-392.
- Dutschke, M. 2006. Children's right to social services in South Africa. *Endangered Species Research Review*, 7 (1):6-8, April.
- Eurasia Review. 2014. Call to end child marriage. Available from: <http://www.eurasiareview.com/27042014-call-yemen-end-child-marriage/> (Accessed 2 May 2014).
- GhostDigest. 2008. *Customary Marriages Act-1*. Available from: <http://www.ghstdigest.coza/articles/customary-marriages-act-1/53442> (Accessed 18 February 2013).
- Hornby, AS. 2010. Oxford Advanced Learners' Dictionary. Oxford, New York: Oxford University Press.
- Iqbal, A. 2014. *1, 000 Minority girls forced in marriage every year in Pakistan: report*. Available from: <http://www.dawn.com/news/1098452> (Accessed 24 October 2014).
- Jansen, R-M. 2010. Customary family law. In *Introduction to Legal Pluralism*, edited by C Rautenbach, JC Bekker and NMI. Cape Town: LexisNexis.
- Krige, EJ. 1950. *The social system of the Zulus*. Pietermaritzburg: Shuter and Shooter.
- Letsika, Q. 2005. The place of Sesotho customary law marriage within the modern Lesotho legal system. *University of Botswana Law Journal*, December:73-100.
- Loaiza, E & Wong, S. 2012. *Marrying too young: end child marriage-UNFPA*. New York: United Nations Population Fund.
- Lutya, TM. 2012. Human trafficking of young women and girls for sexual exploitation in South Africa. In *Child Abuse and Neglect-a multidimensional approach*, edited by Alexander Muela. Intech.
- Madhuku, T. 2014. *Poverty scourge fuels child marriages*. DailyNews Live.
- Mokwana, ML. 2009. *The melting pot in Ga-Matlala Maserumule with reference to the Bapedi culture, language and dialects*. Pretoria:Unisa.
- Mtshali, VZ. 2010. Exploring incest in preferential marriage among the Northern Sotho- and Swazi-speaking people in South Africa. *Acta Criminologica: CRIMSA Conference: Special Edition*, 2:114-127.
- Mwambene, L & Sloth-Nielsen, J. 2011. Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act. *Journal of Family Law and Practice*, 2.1, Spring:5-16.
- Naidu, YG. 2012. *Child rights, law and development-emerging challenges*. New Delhi: Serials Publications.

- Patnaik, AK & Tripathy, SN. 2005. Human rights and girl child. In *Girl child and human rights*, edited by Debadutta Chaudhury and SN Tripathy. New Delhi, India: Anmol Publications.
- Recognition of Customary Marriages Act 120 of 1998. (As amended up to and including two Government Notices, No. R.1390 and R. 1391, printed in Government Gazette 31 735 dated 24 December 2008). Cape Town: Government Printers (Government gazette no. 19539).
- Saudi Gazette Report. 2014. *Forced marriages against Islam: scholars*. Available from: <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=201404302...> (Accessed 2 May 2014).
- Shangase, T. 2013. Uhlanziswe ilobolo. *Ilanga*, January:03-05.
- Soucie, N. 2011. *Child marriage: ukuthwala in South Africa*. Available from: <http://www.genderacrossborders.com/2011/10/28/child-marriage-ukuthwala-in-south-afri...> (Accessed 9 July 2014).
- Statistics South Africa 2002. Available from: <http://www.statsa.gov.za/publications/SASStatistics/SASStatistics2002.pdf>.
- Unicef. (United Nations Children's Fund). 2013. *Child marriages: 39, 000 Every day*. Available from: [http://www.unicef.org/media\\_68114.html](http://www.unicef.org/media_68114.html) (Accessed 24 October 2014).
- UN. (Office of the High Commissioner for Human Rights). 1990. *Convention on the rights of the child*. Available from: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed 1 September 2014).
- UN. (Office of the Secretary-General's Envoy on Youth). 2013. *UN Women: The United Nations entity for gender equality and the empowerment of women*. Available from: <http://www.un.org/youthenvoy/un-agencies/un-women-the-united-nations-entity-for-gend...> (Accessed 9 July 2014).
- UN. 2014. Universal Declaration of Human Rights United Nations. Available from: <http://www.jus.uio.no/lm/en/html/un.universal.declaration.of.human.rights.1948/c02.html> (Accessed 28 October 2014).
- Vorster, LP & De Beer, FC. 1996. *General introduction to ethnology*. Clubview, Pretoria: Hand Consultants.
- World Health Organisation. 2013. (Joint press release by UNFPA, UNICEF, WHO, UN WOMEN, the United Nations Foundation, World Vision, Girls Not Brides, Every Woman Every Child, World YWCA and The Partnership for Maternal, Newborn and Child Health). *Child marriages: 39 000 Every Day - More than 140 million girls will marry between 2011 and 2020*. Available from: <http://www.unwomen.org/en/news/stories/20...> (Accessed 24 October 2014).