UKUTHWALA AS AN ABERRANT TRADITIONAL PRACTICE: THE STATE VERSUS NVUMELENI JEZILE 2014 WCD

Johan Prinsloo and Michelle Ovens

ABSTRACT

'Ukuthwala' is a complex and controversial custom that is lately scrutinised by various sectors of society. While the custom is frequently practiced and defended by those doing so, the eventual conviction of Mr Nvumeleni Jezile for human trafficking and rape by the Western Division of the High Court, provides a clear customary and legal framework within which the custom of 'ukuthwala' should be evaluated. It has become apparent that the custom is regularly conducted in an aberrant form, associated with violence, child trafficking, rape and other criminal behaviour under the guise of 'ukuthwala'. Based on the facts of this case, the court determined that sufficient legal authority exists "that child trafficking and any form of child abuse or exploitation for sexual purposes, is not to be tolerated in our constitutional dispensation".

Keywords: *'Ukuthwala', cultural defense, legal principles, international conventions, traditional customs, victims.*

INTRODUCTION AND ORIENTATION TO THE RESEARCH PROBLEM

The practice known as *ukuthwala* has received substantial attention in recent years and receives considerable political, academic and public debate. Contemporary practices are seen to be an abuse of traditional custom and a disguise to force young women and girls into forced marriages and even being trafficked or sold into marriages with older men (South African Law Reform Commission (SALRC), 2014: 1). Also see Monyane (2013) in this regard.

The practice reportedly occurs mainly in the Eastern Cape Province and KwaZulu-Natal. Monyane (2013: 68), reports that although *ukuthwala*, is usually associated with Xhosa culture, it is also popular among the Mpondo, Mfengu, as well as the Sotho cultures. In the Sotho culture, the Custom is referred to as *chobediso*. It came to light that in the rural areas of the Eastern Cape Province and KwaZulu-Natal, young girls between the ages of 12 and 15 years are exposed to *ukuthwala,* when they walk to school or when fetching water or wood as part of their household chores. Young girls may be forced to enter into marriages with men who are HIV positive and there is a general fear amongst girls in the area of falling victim to *ukuthwala.* Consequently, some girls go into hiding in Gauteng and KwaZulu-Natal to avoid these forced marriages (SALRC, 2014: 1).

The following examples of news article headings, each of which tells a harrowing tale, illustrate the issue in question (*cf.* Louw, 2014a; Malan, 2011; Mlandu, 2014; Mngoma, 2015a; Ndlovu, 2011; SAPA, 2012; SAPA, 2015; RDM News Wire, 2015; *Ukuthwala* in KZN, [sa]; Van Onselen, 2014; Villette, 2014a; Villette, 2014b).

- ANCWL slams '*ukuthwala'*.
- Abduction a perversion of the past.
- Bid to crack down on forced marriages.
- Child bride horror.
- Daughter sold for sheep: parents on bail.
- Girls live in fear of being abducted and married.

1. Research Professor. Department of Criminology and Security Science, School of Criminal Justice, College of Law, University of South Africa. E-mail: Prinsjh@unisa.ac.za
2. Professor. Department of Corrections Management, School of Criminal Justice, College of Law, University of South Africa. E-mail: Ovensm@unisa.ac.za

- Government welcomes court rulings.
- Lack of prosecution fuels *ukuthwala.*
- Traditional practices may be harmful: Xingwana.
- South Africa needs to do more to eliminate child marriages.
- *Ukuthwala* branded as a harmful cult.
- *Ukuthwala* in KZN: 14-year old girl branded to marry 27-year-old man.
- *Ukuthwala* is "unconstitutional".

It was reported in parliament that as many as 255 *ukuthwala* cases were reported for the 2012-2013 period. Of these, 45.5 percent of the abductions occurred in the Eastern Cape and 54.5 percent in KwaZulu-Natal (Louw, 2014). Monyane (2013: 65), reported that in 2009, more than 20 young girls were forced into *ukuthwala* and subsequently had to terminate their school careers. However, legal sanctioning of the practice of *ukuthwala* also creates problems when men, who are protected by the Constitution, take the stance that the abolition of *ukuthwala* is an infringement upon their Constitutional rights. Nhlapo (2015: 1-2), summarises the existing tension in this regard as follows:

> "The debate is not new and usually emerges in two distinct clusters of emphasis. The first cluster encompasses all those skirmishes that underlie the belief by many South Africans that the country is too westernised and that the space for cultural expression is rapidly diminishing…The second cluster shows itself in more overtly political hostilities. These include the charge that African cultural institutions, whether they be traditional leadership or virginity testing, are under siege in the current social and political dispensation from a Constitution hell-bent on obliterating all traces of African identity".

In *S v Nvumeleni Jezile 2014 WCD*, Mr Jezile based his defense on charges of human trafficking, rape and assault as an outcome of the cultural custom of *'ukuthwala'* and that he was in a customary marriage with the victim. South Africa's cultural diversity is undeniably acknowledged and reflected in Sections 30 and 31 of the Constitution of the Republic of South Africa of 1996, with various provisions advancing that customary law should be accommodated within South African law. The Constitutional Court in *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC), resolved that customary law should be recognised as the practices of the people who live according to it and that it be adapted to their changing needs and circumstances within the parameters of the Constitution and any legislation specifically related to customary law.

In matters dealing with customary law, courts should deliberate on past practices of the community, whilst balancing the necessity for flexibility and the imperative to expedite development against the value of legal certainty and respect for vested rights, as well as the vulnerability of parties affected by the law (*cf. Shilubana and Others v Nwamitwa*, 2009).

THE FACTS OF THE CASE AGAINST JEZILE

It arose from the judgment of the court (*cf. S v Nvumeleni Jezile 2014*) that Mr Jezile (28 years) went to his home village in the Eastern Cape for the purpose of marriage. The young woman had to be less than 18 years of age, ideally 16 years old and still a virgin, in accordance with his custom. When he saw the 14-year-old victim, a grade 7 learner at the time, he "decided that she would make a suitable wife". The victim lived with her maternal grandmother and her mother who worked in a neighbouring town, could only visit her at the end of each month. Her father was deceased.

Mr Jezile, accompanied by two family members, approached the male family members of the victim in lieu of traditional *lobola* negotiations, which were concluded within a single day. The next day the victim was "called to a gathering of various male members of the two families", where she was informed by an unknown person that she was to be married.

Despite her opposition and pleas she was physically restrained, introduced to Mr Jezile and informed that he was to be her husband.

She was then dressed in *amadaki* or *makoti* (traditional clothing of a new bride) and forced to follow numerous traditional ceremonies and to attend to household duties. The victim attempted to escape several times but "*was found and promptly returned …by her own male family members…".* Later on in court, Mr Jezile testified that he was not concerned about the victim's desire to escape and rationalised that it was 'normal' behaviour associated with *ukuthwala. "This is a normal thing, always when a makoti is a newlywed, normally she does do those things of running away and coming back, running away and they bring her back, but when the time goes on, she settles down and stays…*

Mr Jezile then took his 'new bride' back to his place of residence in Philippi in the Western Cape. The new environment was completely foreign to her. The victim was subjected to sexual intercourse against her will on various occasions. When the victim tried to resist him, Mr Jezile struck her with the aluminium handle of a mop, which broke and made an open wound on her leg, after which he assaulted her with his belt. Shortly thereafter the victim was able to escape and ran to the local police station.

The female police official who assisted the victim observed that she was traumatised and limping. The medical doctor who examined her found her to appear "traumatised, fearful and tearful" and noted a large injury on her lower thigh that had become infected. Two healing abrasions were noted on the victim's left forearm and a haematoma on her toe. A gynaecological examination established the presence of a healing tear of the hymen, scarring of the posterior fourchette (fold of skin that forms the posterior margin of the external opening of the vagina), redness of the hymen and bilateral vestibular redness of the vagina, and vaginal discharge. The findings supported the victim's account of her recent forceful vaginal penetration by a penis or object. Dr Narula's testimony showed that the complainant had been a virgin prior to sustaining the 'gynaecological injuries'. In his defense, Mr Jezile depended on the belief that his actions:

> "…relied on this practice as constituting the living customary law that eschewed the requirements of consent and the prescript of age as determined in the RCMA. Counsel for the appellant submitted that the appellant had effectively entered into what he termed a 'putative customary union'… as an aberrant form of *ukuthwala* (as) constituting the *'traditional'* customs of his community" (*cf. S v Jezile 2014 WCD*).

There is a strong conviction that the practice of *ukuthwala* is a traditional cultural practice. Advocates thereof are defending the practise, and make claims that tradition sanctions the abduction of a woman by a man who wishes to marry her (SALRC, 2014: 1). An expert in customary law testified on Mr Jezile's behalf and maintained that in the past, young women and girls could actually be forced into these 'marriages' (*cf. S v Jezile 2014 WCD*).

As a point of departure, it is critical to distinguish clearly between the 'non-harmful' cultural practice where role players both consent and willingly participate in the aberrant form of *ukuthwala* and the common law and statutory offences associated with it.

A customary deconstruction of *ukuthwala*

It remains of overriding importance to differentiate between *ukuthwala* in its traditional form and the harmful and 'irregular' practice taking place within South African society. Sans proper definition and sound research on the occurrence, a limited or distorted understanding persists on the true nature of *ukuthwala* (see Van der Watt & Ovens, 2012).

Prof Thandabantu Nhlapo, "a renowned expert on customary law", assisted the court to come to a proper understanding on *ukuthwala* (*cf. S v Jezile 2014 WCD*). Professor Nhlapo explained to the court that *ukuthwala* provides for 'irregular' means of concluding a

customary marriage, which "if the precepts of the custom were correctly followed, would eventually lead to the conclusion of a valid marriage under customary law".
Nhlapo explained that:

> "[T]he regular method for the conclusion of a customary marriage entails a proposal of marriage by the intended bridegroom's family, which is extended to the family of the intended bride, and, if accepted, negotiations with regard to the payment of *lobola* by the betrothed man's family to the betrothed woman's commence. Once the negotiations are concluded and the *lobola* fixed, a series of what he termed *'highly ritualized ceremonies'*, which vary amongst different traditional communities, occur, and which formalise the relationship" (*cf. S v Jezile 2014 WCD*).
>
> He explained that there are instances:
>
> "…where circumstances do not readily permit for the regular method of pursuing a customary marriage. In such circumstances customary law allows for a number of *'irregular means'* for circumventing obstacles with a view to commencing marriage negotiations" (*cf. S v Jezile 2014 WCD*).
>
> *Ukuthwala* is one such means, of which both the traditional and essential features are:

- The woman must be of marriageable age, which in customary law is usually considered to be child-bearing age;
- The consent of both parties is essential in *ukuthwala*. He notes that there are instances where a woman was unaware and her consent in the process only occurs after the fact. If, however, she does not agree to the process, her father may institute a civil action against the man's guardian;
- Part of the process, was the arrangement of a mock abduction of the woman at dusk. Even though she had agreed to the arrangement the woman would still be required to resist for the sake of modesty;
- The woman would be smuggled into the man's homestead and the women of the family would be responsible for defending both her person and reputation. The man's father would then be informed of the woman's presence within his homestead and be told that his son wished to marry;
- Sexual intercourse is strictly prohibited during this period. If it does occur, willingly or by coercion, it is punishable and requires the payment of a fine or *'bopha'* (a herd of cattle) to the girl's father; and
- A letter was sent to the woman's homestead by his family, in accordance with the custom, either on the day of the mock abduction or on the following morning, to notify her family that she was with them. This would be a gesture that the man's family wished to embark upon marriage negotiations.

Nhlapo (*cf. S v Jezile supra*), informed the court that "a pivotal tenant of customary law", requires the consent of the woman's parents. If the woman's family rejects the proposal she has to be returned with "payment of damages" as a result of an unsuccessful *ukuthwala*. Should the proposal be accepted, she returns home for regular *lobola* negotiations to be initiated.

> *Ukuthwala* is not a marriage in itself, but, properly understood, is the method instigated by willing lovers to initiate marriage negotiations by their respective families (Nhlapo in S V Jezile 2014 WCD).

In clarifying the custom, Nhlapo (*cf. S V Jezile 2014 WCD*), explains that certain circumstances may exist under which *ukuthwala* could occur:

- In cases where the woman objects to an arranged marriage and chooses to marry someone of her own choice;
- When the woman's family object to her marrying the man of her choice;
- Where the man was unable to afford and secure a marriage by means of the payment of *lobola*; and
- Where time was of the utmost importance, such as when she was pregnant (*cf. S V Jezile 2014 WCD*).

According to Nhlapo:

> *ukuthwala* has to be seen as a self-directed form of betrothal by a man and woman to each other, subject to parental approval, and is a collusive strategy of the couple to counter the influence of extreme parental authority and to give effect to the will of young lovers (*cf. S V Jezile 2014 WCD*).

Bekker (cited in Koyana & Bekker, 2007: 139), refers to the practice of *ukuthwala* as a "more romantic procedure that was sometimes resorted to when an obstacle to marriage existed". However, from a legal point of view, *ukuthwala* presents a labyrinth of legal principles that needs to adhere to and which renders the custom to be a highly complex and controversial phenomenon.

LEGAL PRINCIPLES IMPACTING UPON THE CUSTOM OF *UKUTHWALA*

The following synthesis of legal principles provides a broad framework of the relevant constitutional and legislative provisions to be considered in the evaluation of the custom of *ukuthwala* in its aberrant form (*cf. S v Jezile 2014 WCD*).

The Constitution of the Republic of South Africa, 1996

> **Section 211(3) –** courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
>
> **Section 28(1)(d)** stipulates that every child has the right to be protected from maltreatment, neglect, abuse or degradation; and section 28(2) that a child's best interests are of paramount importance in every matter concerning the child. A child is defined in section 28(3) as a person under the age of 18 years.

Also see Monyane (2013: 67), according to which section 28 comprises of a 'mini-charter' of children's rights which should be read with the United Nations Convention on the rights of the Child (1990), as well as the African Charter on the rights and Welfare of the Child (1990), listed below.

> **Section 39** deals with the interpretation of the Bill of Rights, and provides that:
>
> 39(1) When interpreting the Bill of Rights, a court, tribunal or forum
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The question which arises here is does the customary practice of *ukuthwala* meet the requirements contained in section 39 of the Constitution?

Apart from the abovementioned sections of the Constitution, Monyane (2013: 67), adds section 7(2) to the argument, according to which the state is obligated to respect, protect, promote and fulfil the rights enclosed in the Bill of Rights (i.e., chapter 2 of the Constitution of South Africa, 1996). Sections 9, 10, 12 and 14 confirm the right of every person in South Africa to equality, dignity, freedom, security and privacy (Monyane, 2013: 67).

The Children's Act, 38 of 2005

Section 1 of the Children's Act 38 of 2005 defines *'trafficking'* in relation to a child as including:

> *(a)* The … transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –
>
> (i) by any means, including the use of threat, force or other form of coercion, abduction…abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or
>
> (ii) due to a position of vulnerability, …for the purpose of exploitation…'

Section 12(1) stipulates that every child has the right not to be subjected to social, cultural and religious practices that are detrimental to his or her well-being;

Section 284(1) prohibits child trafficking;

Section 284(2) provides that it is no defence to a charge of contravening section 284(1) that the child or a person having control over that child consented to the intended exploitation;

Section 305(1)(s) makes the contravention of section 284(1) an offence; and

Section 305(8) provides that any person convicted of an offence in terms of section 305(1)(s) is, in addition to a sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.

Furthermore, section 12(2)(a) of the Children's Act prohibits marriage or engagement of a child below the age of 18 years (Monyane, 2013: 74). Monyane (2013: 74) underscores that according to section 12(2)(b) of the Child Justice Act, a woman older than 18 years may "not be given out in marriage or engagement without her consent".

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
The following sections are relevant:

Section 3, which defines the offence of rape;

Section 56(1) stipulates that it is not a valid defence for rape to rely on the existence of a 'marital or other relationship';

Section 56(8), which appears to be the only limitation in relation to criminal liability in respect of cultural practices in the Act, and provides that a person may not be convicted of an offence in terms of section 9 or

section 22 dealing with exposing bodily parts, if that person commits such an act 'in compliance with and in the interests of a legitimate cultural practice';

Part 6 (subsections 70-72) contains the transitional provisions pertaining to trafficking in persons for sexual purposes, pending the adoption of legislation in compliance with the Protocols referred to therein. These include the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the UN Convention on the Rights of the Child, 1989 (CRC). South Africa, as a member state, is obliged to combat and ultimately eradicate abuse and violence against women and children;

Section 70(2)(b) defines the offence of trafficking in similar terms to that contained in the Children's Act. Section 70(2)(b)(6) includes trafficking by means of 'the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked…';

Section 71(1) makes the trafficking of any person without their consent an offence;

Sections 71(3) and (4) stipulate that consent can only be 'voluntary or uncoerced' as defined therein, and excludes a person submitting to an act as a result of being trafficked; and

Section 56A(2) provides that the court imposing sentence 'shall consider as an aggravating factor' that the person: (a) committed the offence with the intention to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

Sections 15 and 16 of the Act render sexual relations with a girl under the age of 16 years to be statutory rape, and below the age of 13 as rape due to her legal incapacity to consent to sex.

The Prevention and Combating of Trafficking in Persons Act 7 of 2013

The following provisions are of relevance to the extent that they indicate the legislature's attitude towards trafficking in compliance with South Africa's international obligations.

Section 4(2) creates as a separate offence, a person concluding a forced marriage for the purpose of the exploitation of a child or other person.

Section 11(1)(a) stipulates that consent of the other person is no defence.

Section 13 imposes hefty penalties including life imprisonment (subject to s 51 of Act 105 of 1997).

Section 14 lists the '*aggravating factors'* that a court must consider in sentencing (in addition to any other factors) and include:
(a) whether the victim was held captive for any period;
(b) whether the victim suffered abuse and the extent thereof;
(c) the physical and psychological effects the abuse had on the victim; and (d) whether the victim was a child.

'Forced marriage' is defined as *'a marriage concluded without the consent of each of the parties to the marriage'*, but *'marriage'* itself is not defined.

The Recognition of Customary Marriages Act 120 of 1998 (RCMA)

This Act was enacted in order to recognise customary marriages in accordance with South Africa's constitutional obligation, and contains mandatory requirements for a valid customary marriage.

Section 3(1) lists these three requirements, namely that:

(a) the prospective spouses must both be over the age of 18 years;
(b) must both consent to be married to each other under customary law; and
(c) the marriage must be negotiated and entered into, or celebrated, in accordance with customary law.

Section 3(3)(a) stipulates that if either of the prospective spouses is a minor, both his or her parents, or if he or she does not have parents, his or her legal guardian, must consent to the marriage.

Section 3(4)(a) confers on the Minister the power to grant permission to a person under the age of 18 years to enter into a customary marriage if he or she considers such marriage to be desirable and in the interests of the parties in question, where either prospective spouse is below the age of 18 years. However, this does not relieve the parties to the proposed marriage of their obligations to comply with all other requirements prescribed by law.

Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits unfair discrimination against any person on the ground of gender, including:

(a) gender-based violence; and
(b) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including undermining the dignity and wellbeing of female children.

Apart from the abovementioned legal principles which provide a broad framework of the relevant constitutional and legislative provisions, the following significant interactional conventions and endorsed protocols are to be considered in the evaluation of the custom of *ukuthwala* in its aberrant form(*cf. S v Jezile 2014 WCD*).

INTERNATIONAL CONVENTIONS AND PROTOCOLS RATIFIED BY SOUTH AFRICA

The Universal Declaration of Human Rights

This Convention includes a clause that marriages hall be entered into only with the free and full consent of the intending spouses.

Monyane (2013: 71), emphasises that men and women of legal age have the right to marry "and are entitled to equal rights during marriage and its dissolution". She also underscores similar provisions contained in the Convention on consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964.

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

This Convention requires of member state signatories to take all appropriate measures to:

(a) modify the social and cultural patterns of conduct of men and women, in order to eliminate prejudices and discriminatory customary and other practices (art 26);
(b) implement legislation to suppress all forms of trafficking in women (art 5);

(c) eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure, on the basis of equality of men

> and women, the same right to enter into marriage with free and full consent (art 16(1)).

However, CEDAW applies especially to minor girls. Article 16(2) stipulates that "engagement and marriage of a child shall have no effect…" (Monyane, 2013: 71).

The UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children

This Convention supplements the UN Convention against Transnational Organised Crime (Trafficking Protocol) which compels member states to make trafficking in persons a criminal offence.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

This protocol has the same effect as CEDAW above, and sets the minimum age for marriage at 18 years, and furthermore provides for the elimination of harmful cultural practices or possible harmful cultural practices (see Monyane, 2013: 72-73).

The UN Convention on the Rights of the Child, 1989 (CRC)

This Convention stipulates that member states:

> (a) shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children (art 24(3)); and
>
> (b) shall protect children against all forms of exploitation, including trafficking (arts 34 and 35).

The African Charter on the Rights and Welfare of the Child (ACRWC)

This Charter states the terms of which:

> (a) child marriage or betrothal is prohibited (art 21(2)); and
>
> (b) sexual exploitation and the inducement, coercion or encouragement of a child to engage in any sexual activity is likewise prohibited (art 27). Member states must take all appropriate measures to prevent the abduction, sale or trafficking of children for any purpose, in any form, and by any person including parents or legal guardians of a child (art 29).

The Charter frames the objectives of the elimination of gender inequality and discriminatory practices and more specifically, any discrimination "against children in any form. It guarantees all children the right to enjoy the rights and freedoms recognized in the Children's Charter." Furthermore, the Charter explicitly prohibits marriages by children under the age of 18 years (*cf.* Monyane, 2013: 71). Furthermore, the Charter "asserts its supremacy over customs, traditions, cultural and religious practices that are inconsistent with the rights and obligations guaranteed under it" (Monyane, 2013: 73).

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

Article 2 thereof defines the sale of children as follows:

> (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration….

The Addis Ababa Declaration on Ending Child Marriage in Africa of 11 April 2014

This Declaration was developed by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) under the support of the African Union.

However, all these legal and international aids are of little help to the victims of *ukuthwala*, who suffer from the trauma of their ordeals (see also Monyane, 2013: 65-66).

PARTRICAL HEGEMONY AND TRAUMA DUE TO *UKUTHWALA*

Monyane (2013: 72), reiterates the existence of a legal anomaly. "One of the fundamental challenges of the South African Constitution is that it faces contradictions between universal individual rights guaranteed in the Bill of Rights on the one hand, and long cherished traditional practises on the other. *Ukuthwala*, is an example of such a practise, which often violates the rights contained in the Bill of Rights".

In their submissions before the court, various bodies including the Commission for Gender Equality, the Rural Women's Movement, Masimanyane Women's Support Centre and the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities, who acted as *amici curiae* (*cf.* Jezile, 2014, WCD 79) all expressed the collective view that both "forms" of *ukuthwala*, (the traditional and aberrant), "feed on the patriarchal nature of customary law".

In this respect, the *amici* referred to the observations of Langa in the matter of *Bhe and others v Magistrate, Khayelitsha and Others*, 2005 (1) SA 580 CC, in which he described customary law as: "a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors…"

According to the court the *amici: "*contended that there were echoes of such patriarchy even in the relatively benign form of *ukuthwala* described by Nhlapo" (*cf.* A customary deconstruction of *ukuthwala* above).

According to the Shadow Report, entitled "Criminal Justice: Violence against Women in South Africa" submitted by the International Development Agency in Beijing in 2010:

> Patriarchal thinking and practices are still rife. Violence against women intersects with other forms of oppression and discrimination that manifests in the political, economic, social, and cultural and gender inequities associated with patriarchal power relations that subordinate women (Monyane, 2013: 66).

However, fundamentalists defend the practice as culturally sound and Mthembu, who founded *Indoni* (see http://www.indoni.org/vision.html), an organisation that promotes African culture, sees nothing wrong with the practice and has come out in support of the practice (Louw, 2014c); "*Ukuthwala* must not be abolished, but modernised". According to her, there is nothing wrong with *ukuthwala*, as long as the woman agrees to the arrangement and the girl or woman consents to the marriage and is allowed to continue with school after the marriage. It is difficult to imagine, however, that a man, who engages in the traditional culture of *ukuthwala* in whichever form it may be, and based on expectations of domestic duties and services, will allow his wife to attend school and related extra-mural activities and studies. It is also difficult to comprehend how a 'child' younger than 18 years and still at school can be assumed to be ready for the responsibilities of married life. But then age, as well as statutory laws regulating the age of marriage, seem to be irrelevant from a traditional point of view, and according to a traditional chief: "[F]or a girl to be taken as a wife through *ukuthwala*, the process has nothing to do with age. Culture has no age. Age is something we learn today because of [our] Westernisation" (Monyane, 2013: 68).

Monyane (2013: 70), argues that young under-aged girls "continue to be forcibly married before the legal age…", in violation of their rights of freedom and autonomy, leaving them at a disadvantage, socially isolated with insufficient education, skills and employment opportunities, and therefore vulnerable to poverty.

Furthermore, it was confirmed in Jezile *supra,* that *ukuthwala* occurs regularly in the rural regions of the Eastern Cape and KwaZulu-Natal where victims are physically constrained, threatened with physical harm and assaulted when they resist. Furthermore, it is

confirmed by Karimakwenda (2014) that violence as an element of *ukuthwala* is condoned in some traditional communities, basically as a result of historical examples where it was tolerated and subsequently became ingrained as an acceptable part of the custom. According to (Karimakwenda (2014: 1), "[R]esearch has shown that, amongst some segments of Xhosa-speaking groups, brutality has long been utilized as a part of *ukuthwala* abductions".

The victim in the Jezile case was still "visibly traumatised when testifying almost two years after the events" (*cf. S v Jezile 2014 WCD 27-29*) and during her ordeal her mother found her in an: "hysterical state, crying uncontrollably…She herself was too scared of the men to interfere, but noting the child's distress, begged her not to take her own life."

Groups such as the Commission for Gender Equality, the Rural Women's Movement and the Masimanyane Women's Support Centre, who acted as *amici* to the court (*cf. S v Jezile 2014 WCD 78*) attested to the fact that:

> "…the appellant's conduct [Jezile] was not only an aberrant form of *ukuthwala*, but also indicative of a widespread practice in the many communities in which they worked. In their accounts of the practice, young girls are often forced into unions with their abductors, in many instances, with the complicity of their families, who are paid the *"lobola"* upfront. Girl children are often abducted, raped and beaten in an effort to force them into submission as young brides".

In the court's opinion:

> "…these *amici* very appropriately described this practice as a most severe and impermissible violation of women and children's most basic rights to dignity, equality, life, freedom, security of person and freedom from slavery. They noted though that while they and many other organisations condemned such conduct, the practice of the aberrant form of *ukuthwala* relies on a degree of participation and acceptance in parts of very many communities. They described the practice as no more than sexual slavery under the guise of a customary practice" (*cf. S v Jezile 2014 WCD78*).

Wood (2005: 314), relates that in practice, a woman's lack of consent does not mean that forced sex is considered to be rape.

> "More commonly, the man had the permission of the girl's [male] family to abduct her, without her prior knowledge, in cases where the girl might not otherwise agree …Forced sex seems to generally take place as part of the process".

An elder woman, who had also been married through *ukuthwala,* explained that:

> "Some guys would hold you down for your husband-to-be. If a girl has strength, the men would turn out the light, holding your legs open for the guy to sleep with you. Whatever you may try to do, they are holding you down. Even if you cry, old people wouldn't care, they knew what was going on" (Wood, 2005: 314).

Notwithstanding the cultural and customary defence raised by patriarchs who practice *ukuthwala,* especially those who believe that they have the right to practise it in an aberrant form, persons such as Nosakhele Stumo, aged 50, and Fetti Mswane, aged 45, can attest to their ordeals and lasting trauma even after all these years. Both were *twalad* when they were 14 and 15 years old respectively (Louw, 2014b: 11-12).

It also emerged that although some parents do not condone the custom, they are scared to protect their daughters from the practice "in fear of community disapproval" (Monyane, 2013: 68).

Nosakhele Stumo (see TimesLive, 2014), who is pleading for the abolishment of the practise, relates her ordeal as follows:

> "My mother's family did not have enough money to send me to school and decided to marry me off to a man I didn't know, let alone love. I was forced to cook, clean, and wash myself after the same person repeatedly forced himself on me. *Ukuthwala* caused me pain. I am still in pain".

Nicole and Mwambene (Monyane, 2013: 66), both of whom can be considered as authorities on the practice of *ukuthwala,* have concluded that it is outdated and exposes women and children to sexual and domestic violence and infringes children's rights, as was proven in the Jezile case. According to Monyane (2013: 66), there is "compelling evidence suggesting that the majority of the victims are young girls aged 10 to 14 years…" depriving them of an "education and perpetuates the cycle of gender inequality". Gasa (cited in Jacobs, 2013: 5) describes *ukuthwala* as "neither a sacred rite nor a custom, but one of the dark corners of traditional culture…"

CONCLUSION

In the words of the presiding judges of the High Court in *Jezile 2014 WCD: "*there is accordingly an abundance of clear authority to the effect that child trafficking, and any form of child abuse or exploitation for sexual purposes, is not to be tolerated in our constitutional dispensation".

An extensive synthesis of legal principles, as well as international conventions and protocols, that were ratified by the South African government (*cf. S v Jezile 2014 WCD*), has been provided as a broad interactive framework in which the 'custom' of *ukuthwala* in its aberrant form needs to be evaluated. From this it emerged that in its aberrant form, *ukuthwala*, as a so-called custom, is inherently criminal and inhuman. Even in its customary form as a 'non-harmful' cultural practice, it is uncertain to which extent it can be reconciled with the promotion of the values that underpin a democratic and open society founded on human dignity, equality and freedom, particularly within the framework of traditional patriarchy. Section 39 (2) of the Constitution of the Republic of South Africa, 1996, stipulates that when "developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." In contemporary post-apartheid South Africa, the Bill of Rights guarantees every one's rights and the need for any *'irregular means'* to overcome obstacles standing in the way of the marriage of any couple who meet the legislative prerequisites, subsequently become unnecessary. Even in its voluntary form, the custom of *ukuthwala* falls short of the provisions of section 39 of the Bill of Rights, contained within Chapter 2 of the Constitution of the Republic of South Africa, 1996. As already indicated, a myriad of existing criminal, statutory and common law acts and principles were still inadequate and unable to protect the many victims of *ukuthwala.* It should no longer be tolerated as an excuse to commit very serious crimes against women and children.

LIST OF REFERENCES

Jacobs, J.U. 2013. Young South Africans and cultural (mal) practice: Breaking the silence in recent writing. *Literator*, 34(1): 1-12. Available at http://dx.doi.org/10.4102/lt.v34i1.33 (accessed on: 6 October 2015).

Karimakwenda, B. 2014. Jezile appeal highlights difficult questions about Ukuthwala and violence. *Custom contested.* Centre for Law and Society, Faculty of Law, University of Cape Town. Available at http://www.customcontested.co.za/jezile-appeal-highlights-difficult-questions-ukuthwala-violence/ (accessed on: 7 October 2015).

Koyana, D.S. & Bekker, J.C. 2007. The indomitable Ukuthwala custom. *De Jure,* 1: 139-144.

Louw, P. 2014a. Child bride horror. *The Times*. 4 August.

Louw, P. 2014b. Culture or crime? *The Times*. 4 August.

Louw, P. 2014c. '*Ukuthwala* is a custom, not a crime'. *The Times*, 5 December. Available at http://www.timeslive.co.za/thetimes/2014/12/05/ukuthwala-a-custom-not-a-crime (accessed on: 15 October 2015).

Malan, M. 2011. Abduction is a perversion of the past. *Mail & Guardian*. 15 December.

Mlandu, L. 2014. Ukuthwala is "unconstitutional". *Eye Witness News (EWN).* 19 February. Available at http://ewn.co.za/2014/02/19/ukuthwala-is-unconstitutional (accessed on: 30 September 2015).

Mngoma, N. 2015a. Lack of prosecution fuels *ukuthwala.*

Mngoma, N. 2015b. Daughter sold for sheep: Parents on bail. *Daily News*, 10 July. Available at http://www.iol.co.za/news/crime-courts/daughter-sold-for-sheep-parents-on-bail-1.1883737#.ViUfIU0w-1s (accessed on: 11 July 2015).

Monyane, C. 2013. Is Ukuthwala Another form of 'Forced Marriage'? S*outh African Review of Sociology*, 44(3): 64-82.

Ndlovu, Z. 2011. Girls live in fear of being abducted and married. Available at http://www.mediamonitoringafrica.org/index.php/resources/entry/the_new_age_raises_the_alarm_on_abduction_and_rape_under_the_guise_of_ukuth/ (accessed on: 6 October 2015).

Nhlapo, T. 2015. Unease reigns as culture and the constitution collide in South Africa. *The Conversation*, 18 May. Available at: https://theconversation.com/unease-reigns-as-culture-and-the-constitution-collide-in-south-africa-41795 (accessed on: 7 October 2015).

RDM News Wire. 2015. SA Needs to do more to eliminate child marriages. *TimesLive*, 29 June. Available at: http://www.timeslive.co.za/local/2015/06/29/'SA-needs-to-do-more-to-eliminate-child-marriages' (accessed on: 3 October 2015).

SAPA. 2012. Traditional practices may be harmful. *IOLNews*, 1 August. Available at http://www.iol.co.za/news/politics/traditional-practices-may-be-harmful-xingwana-1.1354282#.ViUgaU0w-1s (accessed on: 22 July 2015).

SAPA. 2015. Government welcomes court rulings. *IOLNews*, 26 March. Available at http://www.iol.co.za/news/crime-courts/government-welcomes-court-rulings-1.1837538#.ViUiJE0w-1s (accessed on: 22 July 2015).

South African Law Reform Commission (SALRC). 2014. Media statement. Project 138: The practice of *ukuthwala.*

South African Law Reform Commission (SALRC). 2015. Newsletter. Discussion paper on *ukuthwala.*

South African Law Reports. 2008. *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC). Juta: Durban.

South African Legal Information Institute (SAFLII). 2015. *S v Nvumeleni Jezile 2014 WCD.*

TimesLive. 2014. Ukuthwala. *YouTube*, 3 August. Available at: https://www.youtube.com/watch?v=V6yEjAzpW9s (accessed on: 3 October 2015).

Ukuthwala in KZN: 14-year old girl branded to marry 27-year-old man. Available at http://www.mzansiforum.co.za/threads/ukuthwala-in-kzn-14-year-old-girl-forced-to-marry-27-year-old-man.217/ (accessed on: 10 October 2015.

Van der Watt, M. & Ovens, M. 2012 Contextualizing the practice of *Ukuthwala* within South Africa. *Child Abuse Research in South Africa*, 13(1): 11-26.

Van Onselen, G. 2014. Bid to crack down on forced marriages. *The Sunday Times.* 19 October.

Villette, F. 2014a. ANCWL slams "ukuthwala". *Cape Times*, 18 December. Available at http://www.iol.co.za/news/south-africa/western-cape/ancwl-slams-ukuthwala-1.1796707#.ViUcik0w-1s (accessed on: 22 July 2015).

Villette, F. 2014b. Ukuthwala branded as a harmful cult. *Pretoria News.* 18 December.

Wood, K. 2005. Contextualizing group rape in post-apartheid South Africa. *Culture, Health & Sexuality*, 7(4): 303-317.