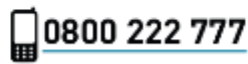


RESOURCE LINE



Dear Marina,

Hope you are all well & keeping warm this winter!

This month, our team has been focussed on learning more about Ukuthwala. We have had a few calls to the line on potential Ukuthwala cases & we are committed to gaining a better understanding of the distortion of the cultural practice, how best to approach it & working together to end injustices.

TODAY UKUTHWALA IS BEING PRACTICED IN DIFFERENT WAYS FROM THE ORIGINAL TRADITION, AS IT IS MARKED BY VIOLENCE AND RAPE.

WHAT IS UKUTHWALA?

Ukuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations.

HOW THE CUSTOM HAS BEEN DISTORTED:

The original custom requires consent between the two parties, the man and woman. It was described as a method instigated by two lovers to initiate the marriage negotiations by the respective families where there was some form of resistance to the marriage by the parents. The idea behind it was to overcome obstacles to the proposed marriage such as extreme parental authority. There would be no sexual intercourse taking place between the two until such time that the family of the girl has been approached and informed of their daughter's whereabouts. In this instance the marriage (lobola) negotiations would then begin and once this process has been completed then the two would be married together and live as a normal couple. One of the requirements was that the girl would have to be of a childbearing and marriageable age.

Nowadays Ukuthwala is being practised incorrectly, it involves kidnapping of underage girls, rape and forced marriage. There is no consent between the two, and often the girl does not even know the perpetrator. The men are often much older than the girls and girls are compelled to remain in this loveless marriage because the family benefits from the lobola paid by the male counterpart.

Culture as a way of life for a group of people, is given a place in our Constitution, but no culture is above the law. The Constitution is clear that cultural rights are protected subject to Constitution. Section 31 of the Constitution recognises cultural rights of communities and groups provided that such rights are not exercised in a manner inconsistent with any of the provisions of the Bill of Rights.

REMINDER ON THE RESPONSIBILITIES OF THE VARIOUS AGENCIES:

THE POLICE: The police must arrest every person accused with Ukuthwala. It's not for the police to determine whether culture and/or consent are defences in any particular case. Where sex has taken place with a child under the age of 12 years old, the charge is rape and below 16, the charge is statutory rape regardless of alleged consent. Those that have assisted should also be charged and where parents and/or relatives were involved for gain, they should be further charged with trafficking in persons for the purposes of sexual exploitation under the Sexual Offences Amendment Act, 2007.

SOCIAL WORKERS: Social workers should investigate and report to the police any reported or suspected child abusers, including Ukuthwala. Abuse of teenagers with mental disabilities should be dealt with similarly.

SCHOOL TEACHERS: School teachers should report to the police any reported or suspected child abuses, including Ukuthwala. Abuse of teenagers with mental disabilities should be dealt with similarly.

PROSECUTORS & COURT: All Ukuthwala cases involving children below 18 years of age should be prosecuted in accordance with the laws of the land. This includes abduction and kidnapping, child abuse, child procurement, rape and trafficking in persons.

DEPARTMENT OF HOME AFFAIRS: Officials of DHA should assist victims of Ukuthwala to secure the necessary documents regarding their status and that of their children to facilitate access to appropriate social services and justice.

PUBLIC FUNCTIONALITIES & OTHERS: Persons exercising public power have a duty to prevent child abuse within their sphere of control. This includes traditional leaders.

WHAT ARE THE HUMAN RIGHTS IMPLICATIONS OF UKUTHWALA?

CONVENTION ON THE RIGHTS OF THE CHILD AND OTHER HUMAN RIGHTS TREATIES:

Ukuthwala as currently practiced is in blatant violation of the rights of the child as articulated in the UN Convention on the Rights of the Child (CRC). South Africa is bound by CRC as it signed and ratified it without any reservations. The CRC states that every act or decision involving a child must be in the best interest of a child. Forced and early marriage is, as demonstrated above, not in the best interests of the child.

THE CONSTITUTION:

The Constitution of South Africa states: "A child's best interest are of paramount importance in every matter concerning the child. Ukuthwala specifically violates the right of a child to be cared for. This includes the right to be protected from maltreatment, neglect, abuse or degradation. It also includes not subjecting children to work or services that "place at risk the child's wellbeing, education, physical or mental health or spiritual or social development." Instead, little girls are turned into instant wives with all the burdens of wives in a gender unequal society exacerbated by age, rural poverty and the burden of the care attendant to HIV and AIDS.

PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 2000 (ACT 4 OF 2000):

By perpetuating the oppression of girls and young women, Ukuthwala violates the prohibitions of gender discrimination in the Equality Act. In addition, Ukuthwala and the rape and early marriage involved in Ukuthwala violate the provisions of Section 8 of Equality Act, which include: gender based violence; and “any practice, including traditional customary or religious, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well being of the girl-child.

HOW DOES THE LAW PROTECT VICTIMS OF UKUTHWALA?

- Criminal Law (Sexual offences and related matters) Amendment Act 32
- Recognition of Customary Marriage Act, age of consent for marriage is 18 years old.
- Prevention and Combating of Trafficking in Persons makes it punishable to conclude a forced marriage with another person.

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007:

RAPE: If a man has sex with a girl younger than 12 years of age, he commits rape because she is too young to consent. If the man has sex with a girl between 12 and 16 years old, he is guilty of statutory rape, whether or not she agreed to have sex. If he has sex with a girl over 16 years of age, without consent, he commits rape.

SEXUAL ASSAULT: Direct or indirect contact between genital organs, anus, woman's breasts or any part of the body used for purposes of penetration or sexual stimulation. Any man who sexually violates an abducted girl is guilty of sexual assault.

SEXUAL EXPLOITATION: When a person pays someone under the age of 18 years old for sexual services even if the sexual act has not been committed. The parents or caregiver of a child who participates in or allows Ukuthwala or does not report it when their child is abducted in terms of Ukuthwala to the police, may be charged with the crime of sexual exploitation. A parent therefore cannot accept lobola in exchange for the girl to be abducted.

RECOGNITION OF CUSTOMARY MARRIAGE ACT:

According to the Customary Marriage Act, 1998, both the bride and the bridegroom must consent to the marriage. The age of consent is 18 years. If one of the parties is 18 years old, parental consent is an additional requirement for a valid marriage. If this cannot be obtained, the permission of a Commissioner, a judge of The High Court or the Minister of Home Affairs must be sought.

PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL OF 2009:

Parents and relatives that hand over a child into forced marriage for financial or other gain can potentially be prosecuted under Section 4, read with Section 1 of the PACOTIP.

TRANSKEI PENAL CODE:

Ukuthwala of young girls was also prohibited in Transkei under the Transkei Penal Code. The Penal Code criminalized the abduction and kidnapping of children under 18 years of age.

The Nvumeleni Jezile v. The State case from 2015 was the Western Cape's first successfully prosecuted case of Ukuthwala in South Africa. Jezile was convicted of one count of assault, one count of simple assault, one count of Human Trafficking, and three counts of rape of a 14 year girl. [Click here to read report.](#)

All the information shared is available online at:

<http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html>

<http://www.derebus.org.za/ukuthwala-culturally-relative/>

<http://www.justice.gov.za/brochure/ukuthwala/2011ukuthwala.pdf>

http://www.justice.gov.za/brochure/ukuthwala/2015-Ukuthwala_leaflet-Eng.pdf

<http://www.tradingplaces2night.co.za/wp-content/uploads/2015/03/Jezile-v-State1.pdf>

We hope some of this information has been helpful to you as it has been to us while we are on this journey of learning more about what Ukuthwala really is. Have you come across cases of Ukuthwala? What are some of the challenges you are facing with Ukuthwala cases? We would really like to hear from you, so we could work on this together and collectively strategize how we can address this in our communities.

THANK YOU FOR EVERYTHING!

Sincerely,
The Resource Line Team

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