Ukuthwala: Structured for Relevance

T Oosthuizen*
Lecturer, Department of Public Law, University of Zululand

NM Ngema**
Lecturer, Department of Private Law, University of Zululand

1 INTRODUCTION

South Africa is a diverse community with different cultures; each of which has its own customs, beliefs and values. Within diverse communities, one group usually regards its values, beliefs and laws superior to those of others. Historically, indigenous customary law was regarded as primitive rules for uncivilised savages.[1] The emphasis on social equilibrium and the idea of *ubuntu* were consequently disregarded and replaced with ideas from the western civilisation.[2]

With the colonisation of Africa by the western world, European public and criminal law was imposed on all new colonies without exception and private indigenous law was recognised as long as it was not in conflict with the European sense of morality or justice.[3] The Cape Colony and Natal followed an approach of indirect rule which meant that "native" chiefs were appointed as agents of government to rule the indigenous population under the supervision and control of a colonial administrator.[4] In this system, customary law was used as an administrative tool to deal with black people. In time, indigenous customary law was codified in order to simplify its application.

The application of African custom law was subjected to European values and notions of morality which were used to purge customary law of perceived undesirable attributes.[5] This resulted in the juridical rejection of certain customary traditions which did not compare favourably with European values and notions of morality.[6]

---

* BA, BProc, LLM (UNISA).
** LLB, (UNIZUL) LLM (UNISA).

1 Pieterse "'It's a black thing': upholding culture and customary law in a society founded on non-racialism" 2001 *SAJHR* 364 366.
2 Johnson, Pete and Du Plessis *Jurisprudence: A South African Perspective* (2001) 209.
3 Pieterse 2001 *SAJHR* 369.
4 Pieterse 2001 *SAJHR* 370.
5 Sanders *The Internal Conflict of Laws in South Africa* (1990) 2.
6 Pieterse 2001 SAJHR 374; Thomas and Tladi "Legal pluralism or a new repugnancy clause" 1999 *CILSA* 354–363; Koyana "The indomitable repugnancy clause" 2002 *Obiter* 98–115; Taiwo "Repugnancy clause and its impact on customary law: comparing the South African and Nigerian position – some lessons for Nigeria 2009 *Journal of Juridical Science* 92.

Most of these traditions were concerned with personal freedom, sexual immoralities or injustices.[7]

The colonisation of Africa by European countries embedded law[8] in a positivist fashion.[9] Legal norms were imposed by the state upon its subjects and regarded as an indispensable ingredient of organised society.[10] This was done regardless of the multicultural nature of the society.

South Africa remains a multicultural society. Irrespective of any contempt that some members of society may have for customary law, it remains the law which is adhered to in many areas by many people.[11] Indigenous law is constitutionally recognised as part of the South African legal system and is seen "as standing alongside the Roman-Dutch common law".[12] In line with the Constitution,[13] indigenous law must be retained and developed by the courts.[14]

Pieterse calls for a different approach to customary law and its integration and harmonisation with common law:

> "one which would not only address the most glaring issues of racial inequality relating to legal dualism, but could also assist in the development of a legal system which reflects the culture of the majority of South African population while remaining true to the constitutional vision of a unified nation".[15]

The purpose of this article is to describe the custom of *ukuthwala* as a form of customary marriage in its historical context. Historically, *ukuthwala* has been held to constitute either of the common law crimes of abduction, kidnapping, assault and rape. We explore the conflict between this custom and the common law by way of critical analysis of the interpretation of the custom by the criminal courts. Currently there is a call for the abolition of the custom because it infringes on the rights of, and contributes to the violence against women and girl children. We concede that there are certain aspects of *ukuthwala* which challenge the underlying principles and values of the Constitution and we agree that these aspects of the custom should be abolished, but there are portions which do not undermine the values of the Constitution and these parts should be considered, developed and kept as part of indigenous law.

2 A historical overview of *ukuthwala*

According to Bennett,[16] customary marriages have five distinguishing features, one of which is that the "union was achieved gradually over time, not immediately

---

7 Bennett *Customary Law in South Africa* (2004) 68.
8 Johnson *et al Jurisprudence: a South African Perspective* (2001) 75 and 210.
9 According to Johnson 131 legal positivism is seen as a scientific, rational approach to the law with a separation of law and morality.
10 Sanders 2.
11 Sanders 2.
12 Section 39 (2) provides that in interpreting any law and applying and developing common law and Customary law, the courts must have due regard for the spirit, purport (purpose) and objects of the Bill of Rights. this is clear that customary law, like common law, is subject to the Bill of Rights.
13 The Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").
14 Section 211(3) of the Constitution reads: " The courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law."
15 Pieterse 2001 *SAJHR* 365.
16 Bennett 188.

with the performance of a particular ceremony".[17] Different tribes and cultures had different customary ceremonies in relation to marriage. In 1947, Tromp stated in his treatise on the Xhosa law of persons that:

> "marriage and the formation of a family unit is the essence of Xhosa social life; it is the basis of the social structure of the amaXhosa. Every marriageable man and woman is expected to marry and to procreate. It is considered to be a disgrace not to be married; unmarried people are laughed at and looked upon with disapproval."[18]

Another feature of the customary marriage is family involvement.[19] Family life, as an important part of customary culture, makes the marriage between individuals a concern of the entire family groups. Both family groups participate not only in the matter of choice of marriage partners, but also in the preceding negotiations, the agreement, the transfer of marriage goods and the ceremonies.[20] In marriage negotiations, the girl is normally expected to submit to the wishes of her father and family and marry the man chosen by her parents.[21] Marriage can only take place once the girl has reached the age of puberty.[22]

There are different ways of contracting a marriage and most marriages are pre-negotiated with a number of standardised customs and ceremonies linked to it.[23] In contrast to these forms of regular marriages, there are also a number of irregular ways of contracting a legally binding marriage. Most of these forms of marriage have no or very few customs and ceremonies attached to them and are commonly referred to as *ukuthwala*. This irregular form of marriage is:

> "a custom whereby, preliminary to a customary marriage, a young man will forcibly take the girl to his home. He, accompanied by one or two friends, will waylay her when she goes to the river to fetch water, or to the forest to get a head load of firewood."[24]

Even though the girl is aware that the abduction will result in a marriage, she usually puts up some resistance, and the degree of resistance differs.[25] The resistance is normally feigned, as explained by Bekker when he states that "the girl, to appear unwilling and to preserve her maidenly dignity, will usually put up a strenuous but pretended resistance for, more often than not, she is a willing party".[26]

Later that day or the following day, the suitor or his people will send a delegation to the girl's family home, reporting that the girl is safe, that she was taken for the purpose of marriage and that the families should proceed with marriage

---

17 *Ibid*.
18 Van Tromp *Xhosa Law of Persons* (1947) 28.
19 Bennett 188.
20 Van Tromp 33; Myburgh *Papers on Indigenous Law in Southern Africa* (1985) 2–9.
21 Van Tromp 33. She was, however, not without any remedy if she did not wish to marry the man of her family's choice and could either appeal to her parental uncles or clearly show her discontent at the *umzi*.
22 Van Tromp 35. Bennett 203 also states that the persons normally were considered marriageable only after their initiation; Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 105–122.
23 Van Tromp 62.
24 Koyana *Customary Law in a Changing Society* (1980) 1.
25 Koyana 1.
26 Bekker 98; Koyana and Bekker "The indomitable u*kuthwala* custom" 2007 *De Jure* 139.

negotiations and the payment of *lobolo*.[27] Immediately a responsive association is established between the two families and the girl's status is instantly raised to that of a young wife.[28]

It appears that in some communities practicing the *ukuthwala* custom, the girl is *thwalaed* to the homestead of the future husband after the completion of *lobolo* negotiations.[29]

The custom of *ukuthwala* is divided into three forms,[30] namely:

(1) where the girl is aware of the *ukuthwala* that will take place, in other words, that is where there is conspiracy between the girl and her suitor;
(2) where there is an agreement between the family of the girl and the family of the groom and the girl is unaware of such an agreement; and
(3) where neither the girl nor her family has prior knowledge of the *ukuthwala*.

2 1 *Ukuthwala* by mutual consent (*ukugcagca*)[31]

In this form of *ukuthwala* the girl consents to the intended carrying away and the intended marriage, but her parents and family did not consent and were normally unaware of it until after the *twala.* This marriage is based on mutual love and the parties would resort to *ukuthwala* because they feared that their families would not agree to their marriage, or the man was not in a position to give an *ikhazi*, in which instance he had a way of marrying his loved one but could wait to arrange and pay the *lobolo*.[32]

2 2 *Ukuthwala kobulawu*

In the second form of *ukutwala* the parents of the girl consent to the marriage. The parents of both parties have negotiated and agreed on the *thwala* which may take place forcibly or with the girl's co-operation. The girl is not previously consulted in respect of the marriage or the planning of the *thwala*.[33] There are a few reasons why this form of *ukuthwala* is used. First, the families may fear that the girl will refuse to marry the man and that an appeal to her uncles may succeed, the man may fear another suitor may take the girl before he can finalise negotiations with her parents or it may be for financial reasons.[34]

Once the girl has been *thwalaed,* her father would normally send a member of the family to inform her that the *thwala* was with his consent and that she should not refuse the man. If the girl refuses the man and the marriage, she needs to shout out her refusal, which is enough and she will be returned to her family. It is also accepted that the man may, if the girl continues to refuse him, have sexual intercourse with her to establish a connection, or bond in an attempt to persuade her to consent to the marriage. This sexual intercourse is done with the consent of the girl's father and is not seen as rape.[35]

---

27 Koyana 1.
28 Koyana and Bekker 2007 *De Jure* 141.
29 Olivier *et al Indigenous Law* (1998) 20.
30 Bekker *et al Introduction to Legal Pluralism in South Africa* 2ed (2006) 31.
31 According to Van Tromp 64 this form of *ukuthwala* is seen as elopement (*ukugcagca*).
32 Van Tromp 66.
33 Van Tromp 67.
34 Van Tromp 68.
35 Van Tromp 69.

2 3 *Ukuthwala* without any consent

Here there is no consent and the girl is usually taken to the man's *umzi* with brutal male force. He would have to pay a penalty beast before he could begin with any negotiations with her family and the female may resist the marriage. If the man had sexual intercourse with the girl before he received the consent of her parents, it is seen as rape and he is heavily punished.[36]

In all forms of *ukuthwala* the girl should, after being *thwalaed* immediately be placed with the women of the suitor's family where she is treated in a kind and respectful manner. The suitor does not have sexual relations with the girl after she was *thwalaed* and if he seduces her, he must pay a seduction beast as penalty. If the girl is *thwalaed* and no marriage offer is made the man will be fined a *thwala* or *bopha* beast for the insult caused to the girl and her family.[37]

In all three forms, the marriage will only be considered complete and valid once

(1) the man, and his family, the girl and her family, all consented to the marriage;

(2) there is an agreement between the parties as to the *ikhazi*;

(3) the transfer or handing over of the bride is complete; and

(4) the girl is put through the *ukutyis' amasi* ceremony where a goat is slaughtered and a piece of its roasted meat given to her with a few sips of milk from the goat's milk-sack, introducing her into the family of the man.[38]

3 THE CONFLICT BETWEEN *UKUTHWALA* AND COMMON LAW

Sir Theophilus Shepstone remarked in 1883 that:

> "it is impossible, I think, to govern people satisfactorily without knowing their customs and modes of thought; magistrates who do not possess or soon acquire a knowledge of these, are dangerous persons to be entrusted with the charge of native populations".[39]

When *ukuthwala* is viewed through the European sense of morality and justice, it can be seen as constituting either of a number of common law crimes such as abduction, kidnapping, assault and even rape.

3 1 *Ukuthwala* and abduction

Snyman defines abduction as:

> "[a] person, either male or female, commits abduction if he or she unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor".[40]

---

36 Van Tromp 72.
37 Koyana and Bekker 2007 *De Jure* 141.
38 Van Tromp 69–70.
39 Van Tromp 1.
40 Snyman *Criminal Law* 5ed (2008) 403.

Abduction is a common law crime with its origin embedded in the constitutions of Justinian, which penalised the removal or *raptus*, with or without violence, of a woman from the control of her guardian for the purpose of marrying her or to have sexual intercourse with her. Germanic law also acknowledged the guardian's parental right and pecuniary interest in the women under his control.[41] Roman-Dutch law also included abduction as an act which infringed on the guardian's rights, but some authors only viewed it as a crime if the abduction was without the consent of the minor. If the abduction was consensual for the purpose of marriage, the guardian would only have a civil claim against the abductor.[42]

In South African law, the crime of abduction is committed against the parent or guardian, and not against the minor child. Force is not a requirement for the crime, and the minor's consent is no justification for the abduction.[43] The removal must be either permanent or for a prolonged period of time. A temporary removal for the purpose of having sexual intercourse is not abduction. The intention to have sexual intercourse with the minor or to marry her must be present at the time of the removal.[44]

Abduction was neither defined as a crime, nor declared as one by the Native Penal Code,[45] which applied in the "native territories" (known as the Transkeian territories) which were annexed to the Cape Colony by the British authorities in 1879. Section 169 of the Code only prohibited the kidnapping of children under the age of fourteen years.

According to Van Tromp:

> "[t]he term *ukuthwala*, literally meaning "to carry away", has always been translated and taken to mean "abduction". This is a most unfortunate translation for, though it is literally correct, the English term "abduction" invariably implies the commission of a crime, which implication is not contained in the Xhosa term *Uthukwala.* The Xhosa term implies a marriage by carrying the girl away, which implication is again lacking in the English term abduction."[46]

In 1906 the Eastern Division of the Cape High Court[47] was asked to rule on the question of whether or not the abduction of a female, older then fourteen but younger than twenty-one, for the purpose of marriage or carnal connection, would constitute a crime in light of the limitation of s 169 to children below the age of fourteen years. Relying on s 269 of the Native Penal Code, which stated that any act which, if committed in the colony, constituted a crime would also constitute a crime in the "native territories", the court held that such conduct indeed constituted the crime of abduction in the "native territories" and was punishable as such. The accused, who was unrepresented at the time, pleaded guilty to the crime of abduction for removing a girl, older than fourteen but younger then twenty-one years, from the possession of her parents without their consent, for the purpose of having carnal connection.

---

41 Milton *South African Criminal Law and Procedure: Volume II Common Law Crimes* 2ed (1992) 572.
42 Milton 573.
43 Snyman 404.
44 Snyman 405; *S v Sashi* 1976 2 SA (N) 446.
45 Act 24 of 1886.
46 Van Tromp 64.
47 *Rex v Njova* 1906 EDC 71.

In *Ncendani v Rex*,[48] three accused appealed their conviction and sentence for abduction. The three men took a girl, under the age of twenty-one but older than fourteen years, with force and without consent from the custody of her lawful guardian, for the purpose of marriage to another male. Their defence was first, that neither of the accused had the intention to either have sexual relations with the girl or to marry her, secondly they relied on the fact that "this case does not constitute a crime by the law in force in the native territories, inasmuch as section 169 of the Penal Code refers only to the stealing or abduction of children under the age of fourteen years".[49] The court rejected the first defence in light of s 77 of the Code, which provides for the conviction of anyone who aided and abetted another to commit a crime. The court found that the three accused deliberately took the girl with the intention that another man should have carnal relations with her. Secondly, also relying on s 269 of the Code, the court found that the facts indeed did a crime, namely common-law abduction. The judge stated that:

> "[t]he abduction of an unmarried girl under the age of twenty-one for the purposes of marriage or carnal knowledge has long been held to be a crime in this colony (*The Queen v. Schut* 1 A.C. 37, and *The Queen v. Matali and Buchenroerder*, 6 C.T.R. 175), and I am of the opinion that the enactment of sec 169 of the Code was not intended to deal with the crime of abduction, as known to the law of this colony. It must not be forgotten that the Penal Code in force in the Transkei is applicable to both Europeans and natives; consequently the argument used by the appellant's counsel, to the effect that, the native custom of *thwala* having long been recognised in the territories, the legislature deliberately intended to legalise the carrying off of unmarried girls for the purposes of marriage, appears to me to be of little weight. I cannot for one moment assume that the legislature intended to limit the crime to offences specified in sec 169. If this were so, it would enable a native to abduct an European girl between the ages of sixteen and twenty-one or an European to abduct a native girl of the same age, in each case for the above-mentioned purposes, and escape the ordinary consequences of their actions."[50]

This judgment clearly reflects the imposition of European values and notions of morality on an African custom which was found to be repugnant merely because it did not fit with those values and notions. The custom, and its application and value to the indigenous community were not considered at all.

In *R v Sita*[51] the question of whether the custom of *ukuthwala* can be pleaded as a defence on a charge of abduction came before the high court. In this case the state appealed against the acquittal of the accused on a charge of abduction, where the magistrate found that the custom of *ukuthwala* was a defence against the charge. In this instance the magistrate considered the custom of *ukuthwala*, and in relying on s 169 of the Code as not specifically declaring abduction a crime where the girl is between the ages of fourteen and twenty-one years of age, found that *ukuthwala* did not constitute abduction. On appeal, the high court, relying on s 269 declared that abduction was a crime applicable to "natives" and that s 169 was not for the purpose of abducting a girl for the purposes of marriage or sexual intercourse but was in fact applicable to all children, boys and girls,

48 1908 EDC 243.
49 *Ncendani* 244.
50 *Ncendani* 245.
51 1954 4 SA 20 (E).

younger then fourteen, for any purpose. The judge stated: "I am at a loss, however, to see how a custom can, in a criminal case, override clear common law whether that custom be a legal or an illegal one."[52] The appeal succeeded and the matter was referred back to the magistrate's court.

In *S v Mxhamli*[53] the appellant was convicted in the magistrate's court of abduction and received a sentence of four months' imprisonment. He was found guilty of the fact that he and two companions removed a 16-year-old girl, whom he had not previously courted from her grandmother's home to the home of the applicant's mother with the intention that the applicant would marry the girl. The appellant seduced the girl during the night. On appeal against his sentence he contended that he was merely practising the custom of *ukuthwala* and that the prison sentence was therefore inappropriate.[54] The court dismissed the appeal on two grounds namely, first that the applicant was not a "suitor" to the girl and that the custom was only available to "suitors" and secondly, that the sexual intercourse with the girl was contrary to the custom.[55] The court did, however, concede that if the custom were followed in the correct manner then it would be a mitigating factor in a sentence for abduction. In close analysis of the custom of *ukuthwala*, it is apparent that the court's argument was inaccurate. According to Whitfield, "[c]ourtship as it exists with Europeans is almost unknown" and "[s]weet-hearting is much practised by the Natives but it is seldom that the love affair leads to matrimony".[56] Seduction of the young woman, although undesirable, was not unfamiliar to the custom of *ukuthwala* and it was customary in many tribes to pay a *bopa* or seduction beast.[57] The seduction did not render the *thwala* invalid.

In *Busiswe Nobulumko Feni v Ntombekhaya Mguudlwa*[58] the court acknowledged the validity of the custom of *ukuthwala* as constituting a valid customary marriage.[59]

The conflict between the common law crime of abduction and *ukuthwala* is clear. In terms of the common law if one removes a minor from the control of her guardian for the purpose of marriage or to have sexual intercourse with her, one commits a crime. In terms of the custom of *ukuthwala*, if one removes a girl from the control of her guardian for the purpose of marriage one enters into a valid and binding customary marriage. Yet it appears as if a person who practices the custom of *ukuthwala* will be guilty of abduction. However, if the custom is recognised by law as a valid and existing custom then there is no reason why the unlawful conduct required for the crime of abduction cannot be justified. Furthermore, as explained by Dukada,[60] if the person who practises *ukuthwala* is unaware of the unlawfulness of his conduct in terms of the

52 *Sita* 23E–F.
53 1992 2 SACR 704 (Tk).
54 *Mxhamli* 705.
55 *Mxhamli* 706.
56 Whitfield *South African Native Law* (1929) 79.
57 Whitfield 80.
58 2004 JDR 0330 (Tk).
59 *Feni v Mguudlwa* 8.
60 Dukada "Some thoughts on the 'ukuthwala' custom vis-à-vis the common law crime of abduction" 1984 *De Rebus* 359.

common law, he does not have the required knowledge of unlawfulness as required for a conviction of abduction. In all but *Sita's* case the courts failed to recognise the existence of the customary law and in most cases refused to consider it because it was in direct conflict with the common law.

3 2 *Ukuthwala* and kidnapping

Kidnapping is defined as the unlawful and intentional depriving of a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child.[61] This is a crime against the person's freedom of movement and can be committed against adult males and females and against children. When a child is kidnapped, it is not just the child who is deprived of freedom of movement but also the child's guardian who is deprived of control over the child. It follows that, should a child consent to be removed from his or her guardian's control, kidnapping is still committed as the guardian is still deprived of control of the child.[62] The main difference between kidnapping and abduction is that in abduction the removal from the guardian's control is normally with the intention of someone marrying the minor or having sexual intercourse with her. In the case of kidnapping the reason for the removal is immaterial.[63]

As with abduction, the conduct of *ukuthwala* can be equated with the conduct required for kidnapping. In all three forms of *ukuthwala* the conduct is to "carry away" and is normally done literally.[64] Such conduct is kidnapping except in the instance where the girl consents prior to the *ukuthwala* and she is a major. In such instance there would be no intention of depriving the young woman of her freedom as is required for kidnapping, and the guardian would no longer control her and could therefore not be deprived of control over his child.

If a girl is *thwalaed* without her knowledge and consent, but with the consent of her guardian as in the second form of *ukuthwala*, or as in the last instance without her or her family's consent, she is taken by the groom and his assistants, who will "lay hands on her"[65] and forcibly take her to his home. If she puts up resistance, which she normally does, "she is sometimes overwhelmed by brutal force".[66] She is normally locked up and closely guarded. Should she refuse to accept the man as her husband, she may shout out loud so that the people could hear that she objects and then she must be released.[67] If she is not released, the continued deprivation of her freedom will constitute kidnapping. If she consents, and a marriage follows, the conduct with which she was taken may constitute kidnapping but is not viewed as such by the *amaXhosa*.[68]

3 3 *Ukuthwala* and rape

The Criminal Law (Sexual Offences and Related Matters) Amendment Act[69] consolidated the common law crime of rape as well as a number of different

61 Snyman 479.
62 *Ibid.*
63 Snyman 480.
64 Van Tromp 64.
65 Van Tromp 68.
66 *Ibid.*
67 Van Tromp 69.
68 Van Tromp 73.
69 Act 32 of 2007 (hereafter referred to as "the Act").

sexual offences.[70] Section 3 of the Act defines rape as the unlawful and intentional commission of an act of sexual penetration of any person without his or her consent. Sexual penetration is defined[71] and includes any act that causes sexual penetration. Consent is also defined[72]and must be voluntary or an uncoerced agreement.

Chapter 3 of the Act contains sections that deal with sexual offences against children. Our law has always acknowledged and criminalised consensual sexual intercourse with a child under the age of 16 years and this crime was commonly known as statutory rape.[73] Statutory rape is now defined in s 15 of the Act as the commission of an act of sexual penetration with a child, despite the child's consent to such act. A "child" is defined as "a person 12 years or older but under the age of 16 years".[74] If the child is under the age of 12, he or she is deemed unable to give valid consent.[75] Therefore, a person who commits any act of sexual penetration with a child under the age of 12 years will be guilty of rape.

The Native Penal Code contained both rape and statutory rape as crimes, with the only difference being that statutory rape in terms of the Code was only committed if the act was against a child under the age of 12 years.

During the *ukuthwala* process the seduction or deflowering of the girl is undesirable[76] but not always absent. The man who seduced a girl he *thwalaed* has to pay a seduction beast to her family as penalty for such seduction. The seduction is viewed differently in each of the three forms of *ukuthwala*.

If the girl has consented to her *thwala* without her parents' knowledge, a penalty for seduction had to be paid to her family. If she consented to the seduction and was over 12 years of age her suitor would not have been liable for rape. Today, if she were over the age of 12 but under the age of 16 he would be committing statutory rape.

If the girl was unaware of the *thwala* but her parents consented, sexual intercourse with the girl to persuade her to consent to the marriage was not uncommon.[77] Van Tromp[78] states that:

> "[i]t is not unusual for him to have sexual intercourse, *udibane ngegazi*, because once he succeeded in having connection the girl will usually no longer refuse him. Under this form of *ukuthwala* it is understood that the father of the girl tacitly consents to carnal connection between his daughter and the young man with the object of marriage, and of trying to induce the girl to submit. The young man is therefore not guilty of *ukudlwengula* (rape). By having sexual intercourse the young man forms a bond, *intambo*, between himself and his bride."

Today, the young man will be liable for rape should he have sexual intercourse without her consent, regardless of the guardian's consent. Furthermore, if a girl consents, but such consent was as a result of force, intimidation, threat or an

---

70 Common-law crimes such as indecent assault, incest, bestiality, intercourse with a corps and statutory define crimes contained in the Sexual Offences Act 23 of 1957.
71 Section 1(1) of Act 32 of 2007.
72 Sections 1(2) and 1(3) of Act 32 of 2007.
73 Section 14 of the Sexual Offences Act 23 of 1957.
74 Section 1(1) of Act 32 of 2007.
75 Section 1(3)(d) of Act 32 of 2007.
76 *S v Mxhamli* 706; Koyana and Bekker 141; Bekker 89.
77 Van Tromp 69.
78 *Ibid.*

abuse of power or authority, such consent will be deemed to be invalid consent.[79] According to the new statutory definition of rape, the agents or friends normally employed by the young man to *thwala* the girl, may also be liable for rape should the young man have unconsensual sexual intercourse with the girl.

3 4 *Ukuthwala* and assault

"Assault consists in any unlawful and intentional act or omission

(a) which results in another person's bodily integrity being directly or indirectly impaired, or
(b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place."[80]

Section 155 of the Native Penal Code defined assault as:

> "the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose."

The conduct that will cause an impairment of another's bodily integrity can take different forms, with the most common being the application of force to his or her body. The conduct must be accompanied with the required intention to impair another's bodily integrity.[81]

The very nature of *ukuthwala* is comparable to assault. The "carrying away" of the girl will always include some force being applied to her body. Whether the *ukuthwala* amounts to a criminal assault will depend on the circumstances of each case. There is no doubt that, especially in the instances where the girl does not consent, the conduct of taking her amounts to an assault against her. A trait of the custom was and still is for the girl to resist the taking and "[i]f she hits, shouts and tries to get loose, she is sometimes overwhelmed by brute force".[82] Even though the conduct is clearly one of assault, it is condoned in the spirit of the custom. In this regards Van Tromp[83] states:

> "[t]his kind of *ukuthwala* is not uncommon among the *amaXhosa*, and it is of great importance to draw attention here to the peculiar feature of Xhosa legal conceptions that the element of brute force employed at the initial stage of the proceedings does not forthwith determine and stigmatise the whole issue of these proceedings as a crime, as would be the case according to our legal conceptions. In Xhosa Law, a series of connected acts is viewed as a whole and is judged retrospectively from the viewpoint of the object sought and attained. Consequently a previous act in the sequence can be condoned and the whole issue be retrieved by a later act."

The effect of this would be that the girl's later consent to marriage would condone the brute force and assault used in taking her. In reality the courts did not view the custom through the eyes of the *amaXhosa,* nor did they apply the Xhosa law to interpret the conduct of the young man who was normally convicted of assault.[84]

---

79 Section 1(3) of Act 32 of 2007.
80 Snyman 455.
81 Snyman 456.
82 Van Tromp 68.
83 Van Tromp 72.
84 *Rex v Swartbooi* 1906 EDC 170.

4 THE CONFLICT BETWEEN THE CONSTITUTION AND *UKUTHWALA*

4 1 The right to human dignity

The right to human dignity is well established in international law as is evident from the various ratifications of instruments protecting this right.[85] Section 1 of the Constitution stipulates that the Constitution is founded on the values of human dignity, equality and advancement of human rights and freedoms.[86] The value of human dignity is also affirmed by s 7.[87]

Human dignity is one of the core constitutional rights that ought to be respected and protected. The protection of human dignity appears in the wording of the limitation clause,[88] which provides that when limiting any right in the Bill of Rights, that limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 10[89] provides that "everyone has inherent dignity and the right to have their dignity respected". The wording of the latter section is clear; it does not exclude women and children from enjoying the right. Therefore, "respect and protection for the inherent dignity of the girl children and women requires recognising that they have freedom to make choices on when and who they marry".[90] The Constitutional Court is clear on this. It confirmed that the Constitution protects the right of persons to choose whom they marry and to raise a family.[91] In *Dawood v Minister of Home Affairs*[92] the court held that:

> "[t]he decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of an individual to achieve personal fulfillment in an aspect of life that is of crucial significance…it is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity."

The second form of *ukuthwala* custom where there is an agreement between the family of the girl and the family of the groom where the girl is unaware is a clear violation of the right to human dignity. This form of *ukuthwala* deprives a girl of her right to choose when and who to marry and it violates the right to dignity.

The third form of *ukuthwala* where neither the girl nor her family has prior knowledge of *ukuthwala* is a clear violation of the right to human dignity.

4 2 Right to equality

The right to equality has been described as the overriding human rights principle that is the "obvious starting point in operationalising human rights".[93] The right

---

85 Article 1 of the Universal Declaration of Human Rights; art 26 of the European Social Charter; art 5 of the African Charter on Human and Peoples Rights.

86 Section 1 of the Constitution of the Republic of South Africa, 1996.

87 Section 7 of the Constitution.

88 Section 36 of the Constitution.

89 Section 10 of the Constitution.

90 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" http://www.fwdklerk.org.za/cause_data/images/2137/sub_09_11_26_Ukuthwala_Custom.pdf (accessed 10-04-2010) 9.

91 In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 28.

92 Para 28.

93 Tomasevski "Indicators" in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* 2ed (2001) 533.

to non-discrimination is protected in various formulations, in instruments such as the Charter of the United Nations;[94] the Universal Declaration to Human Rights;[95] the International Covenant on Civil and Political Rights;[96] the International Covenant on Economic, Social and Cultural Rights;[97] the Convention on the Rights of the Child;[98] the International Convention on the Protection of the Rights of Migrant Workers;[99] the African Charter on Human and Peoples Rights;[100] the American Convention on Human Rights[101] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[102]

Some international instruments are designed or aimed at addressing specific prohibited grounds of discrimination, such as the International Convention on the Elimination of all Forms of Discrimination Against Woman and the International Convention on the Elimination of all Forms of Racial Discrimination.

The principle of non-discrimination prohibits both direct and indirect forms of discrimination. Thus, any discrimination the "purpose" or "effect" of which is to nullify or impair the equal enjoyment of rights is prohibited in terms of non-discrimination provisions.

The new South African legal order has at its core, a commitment to substantive equality and it embraces constitutional democracy based on equality. The following provisions cumulatively seek to realise a vision of a society that is based on equality. The preamble to the Constitution recognises that one of the functions of the Constitution is to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law and s 1 identifies human dignity, the achievement of equality and the advancement of human rights and freedoms as some of the basic values upon which the Republic of South Africa is founded. Section 9 protects the right to equality before the law, guarantees that the law will both protect people and benefit them equally and prohibit unfair discrimination.

The limitation clause only allows a right in the Bill of Rights to be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[103] Courts, tribunals and forums are directed, when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[104]

The question thus arises whether *ukuthwala* violates the right to equality of girls? It violates the right to equality if it unfairly discriminates against girls. The Constitutional Court concluded that discrimination in South Africa means "treating people differently in a way which impairs their fundamental dignity as

94 Articles 1(3), 13(1)(b), 55(c) and 76.
95 Articles 2 and 7.
96 Articles 2, 3 and 26.
97 Articles 2(1), (2) and 3.
98 Article 2.
99 Article 7.
100 Articles 2, 3, 18 and 28.
101 Articles 1(1) and 24.
102 Article 14.
103 Section 36 of the Constitution.
104 Section 39 of the Constitution.

human beings".[105] The *ukuthwala* custom constitutes a differentiation on a specified prohibited ground of discrimination (ie. discrimination based on sex and gender). If there is differentiation on one or more of the seventeenth grounds specified in s 9(3), then discrimination is established.[106] Section 9(5) provides that once discrimination on one of the specified grounds is established then it is presumed to be unfair.

In *Harksen's* case,[107] the court provided some guidelines on what constitutes unfair discrimination. The impact on the complainant is the determining factor regarding unfairness. The court held that the following factors must be taken into account in making this determination:

(a) the position of the complainant in the society and whether they have suffered from past patterns of discrimination;

(b) the nature of the provision or power and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal and an attendant consequence of that was an infringement of the applicant's rights; and

(c) the context to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

It has been argued that the second and the third form of *ukuthwala* violates the right to human dignity in terms of international law and our municipal law, and that the right to human dignity is one of the core values of the Constitution.[108] The key value upon which the entire provision revolves is that of dignity. As O' Regan J[109] put it:

> "Human dignity therefore informs constitutional adjudications and interpretations at a range of levels. It is a value that informs the interpretation of many, possible all, other rights. The court has acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman and degrading way, and the right to life."

In order for the *ukuthwala* custom to pass constitutional muster, it must be proved that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The second and third forms of *ukuthwala* fail to pass constitutional muster as they violate the right to dignity and equality and therefore ought to be declared unconstitutional.

4 3 Freedom and security of the person

The right to freedom and security is found in various instruments such as the International Covenant on Civil and Political Rights;[110] the European Convention for the Protection of Human Rights and Fundamental Freedoms;[111] the American Convention on Human Rights;[112] and the African Charter on Human and

105 *Prinsloo v Van Der Linde* 1997 3 SA 1012 (CC) para 31.
106 *Harksen v Lane NO* 1997 11 BCLR 1489 (CC) para 46
107 Paras 50–51.
108 See 4 1 above.
109 *Dawood* para 35.
110 Article 7.
111 Article 3.
112 Article 5.

Peoples Rights.[113] This right is also protected by the South African Constitution[114] and this right "includes the right to be free from all forms of violence either public or private sources".[115] Violence against an individual constitutes a grave invasion of personal security. Section 12(1)(c) imposes both a negative duty and a positive duty upon the state in protecting individuals. The state has a duty to avoid violence and a duty to discourage private individuals from invading the right to personal security.[116] The second and the third forms of *ukuthwala* violate the right to freedom and security of the person and it is not justifiable in terms of the limitation clause.

5 THE EFFECT OF THE CONFLICT BETWEEN LAW AND CUSTOM

Due to the early misinterpretation of *ukuthwala*, our courts have continuously and indiscriminately applied the European common law, leading to the branding of *ukuthwala* as a crime and its treatment as such.[117] *Ukuthwala* that ends in a marriage was never intended to be a crime, but was always a customary way of concluding a lawful marriage albeit in an irregular manner.[118] The reference to a barbarous custom was often made in court. In *Swartbooi,*[119] the judge stated:

> "I have pointed out on other occasions, this court will not recognise the barbarous custom of *thwalaing* as a defence to a charge of assault which may be committed upon a girl whom it is desired to *thwala*."

These unfortunate views of the custom remain. Where the custom is still practised today, it is being blamed for forced child marriages,[120] the high incidence of HIV[121] and the cause of violence against woman and children. Recently the minister responsible for children and persons with disabilities declared that the custom is to be viewed as illegal and immoral by all government departments.[122]

The truth is that *ukuthwala* was merely an irregular way of forming a marriage. Marriage by negotiation was common and girls were often married off to older men when they reached puberty[123] without the use of *ukuthwala*.

---

113 Articles 5 and 6.
114 Section 12.
115 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 9.
116 Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 258–259.
117 Van Tromp 72.
118 *Ibid*.
119 1906 EDC 170.
120 Victim Empowerment Programme, *ukuthwala*: Departmental briefing "*Ukuthwala* Briefing by DSD" http://www.pmg.org.za/report/20090915-victim-empowerment-programme (accessed 21-09-2009).
121 SABC "Mothlanthe condemns *ukuthwala* practice" http//sabcnews.com/portal/sites/SABCNews (accessed 21-09-2009).
122 SABC "*Ukuthwala* marriage custom declared illegal: Minister" http://sabcnews.com/portal/sites/SABCnews (accessed 21-9-2009).
123 Van Tromp 28.

Statistical evidence shows clearly that the custom of *ukuthwala* is gaining popularity among the followers of customary law. As far back as 1990, Bekker[124] stated that:

> "[t]he marriages by *ukuthwala* which have been increasing from the 1920's have increased even further during the past few decades…[*u*]*kuthwala* marriages increased from 14.6% of all marriages in the 1920's to 18.3 % in the 1930's and reached 30.3% in the 1940's…it can be seen that these marriages have increased further and constitute 55.9% of all marriages since 1950."

More recent news reports indicate that up to 20 young girls are forced to leave school per month to follow the custom of *ukuthwala*.[125]

Even though the custom has gained popularity among the followers of customary law, there are those critical of the custom and who agitate for its abolition. Ntlokwana, in his submissions to the South African Law Reform Commission on the *ukuthwala* custom[126] points out that the custom is currently distorted and relied upon when a girl as young as 12 years is forced into a marriage with a much older man, often one with a HIV-positive status, and that this is not *ukuthwala* as it is traditionally known. The author states that, "*thwala* was traditionally intended for people of the same age group who, in normal course of events, would have been expected to marry each other. Old men were never engaged in *thwala*. *Ukuthwala* was never meant to apply to minors."[127] The fact that a man who abducts a minor child for sexual gratification and enslavement, or a parent who sells his minor child to an older man for sexual enslavement, erroneously calls this conduct a marriage by way of *ukuthwala* does not change the underlying principles of the custom and does not justify the criminal conduct of such man or parent. There can be no *ukuthwala* if it does not fully comply with the requirements of the custom.

The fact that customary law is constitutionally recognised[128] as part of the South African legal order. The fact that it is not a subservient system as in the past means that its continued existence is desirable. This does not mean that customary law will remain static.[129] Customary law needs to be developed so that it will be in line with the Constitution.

6 DEVELOPMENT OF *UKUTHWALA*

Section 39 of the Constitution provides that:

> "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.

---

124 Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 190.

125 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 5.

126 *Ibid*.

127 *Ibid*. Although this seems to be the unsupported view of the author, we agree with it and support for this view can be found in the work of Van Tromp.

128 Section 211 of the Constitution, gives a clear and unambiguous recognition to customary law. Recognition is also expressed indirectly in various other provisions of the Constitution such as section; s 8(1) and s 39(2).

129 Church and Church "The constitutional imperative and harmonisation in a multicultural society: a South African perspective on the development of indigenous law" 2008 *Fundamina* 6.

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

The courts' obligation in terms of the above section is emphasised in the case of *Carmichele v Minister of Safety and Security*[130] where the Constitutional Court stressed that:

> "[t]he obligation of courts to develop common law in the context of the section 39 objectives is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately."

The *Carmichele* case "applies equally to the development of indigenous law. Where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation".[131] The development of indigenous law is important because "once a rule is struck down, that is the end of that particular rule, yet there may be many people who observe the rule".[132] The *ukuthwala* custom has gained popularity and there are people still practising it today.[133]

Section 3(1) of the Recognition of Customary Marriages Act[134] provides that the consent of both prospective spouses of a customary marriage is necessary for the validity of a marriage. The requirement of consent is essential to prevent the conclusion of a forced marriage. The Act also provides that both prospective spouses must be 18 years or older and that the marriage has to be negotiated and entered into or celebrated in accordance with customary law.

A valid customary marriage, including one concluded by way of *ukuthwala*, requires the consent of both parties and their families, the agreement between the parties as to the *ikhazi*, the transfer or handing over of the bride and the *ukutyis' amasi* ceremony.[135] It follows that if the girl who was *thwalaed* does not consent to the marriage, there cannot be a marriage, and if she is kept at the house of the man who *twhalaed* her, he will be guilty of kidnapping. Should he have non-consensual intercourse with her, he will also be guilty of rape. If force was used against her in the process of taking her, he will be guilty of assault. Where the custom is applied in a *bona fide* manner to accelerate the negotiation of a marriage, and even to enter into a customary marriage before the *lobola* is paid in full, there is no reason why it cannot be recognised as a valid customary marriage. Where the custom was applied in a *mala fide* manner there cannot be a valid customary marriage and the conduct against the woman will, apart from being criminal in nature, constitute a gross infringement of her human rights just as any other criminal conduct of such nature would.

---

130 2001 4 SA 938 (CC) para 39.
131 *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of RSA* 2005 1 BCLR 1 (CC) para 215.
132 *Bhe* para 215.
133 Bennett 190; Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 5.
134 Act 120 of 1998.
135 Van Tromp 69–70.

The fact that many people, especially younger people, still follow the custom creates a need for the development of the true customary usage rather than its abolition. Furthermore, the exploitation of the custom for justification of criminal conduct indicates the need for proper education and the implementation of programmes in respect of the correct application of customary laws from a young age, especially in rural areas where abuse of the custom is common. A girl who is educated on her human rights from an early age would be able to escape what she might otherwise have been perceived as her traditional fate.

We acknowledge gender-based violence in Africa and agree with Ntlokwana[136] that South Africa has an international duty to respect and protect the rights of all woman and children. We also agree with his submission that, despite the constitutionally guaranteed rights, customary law continues to affect the personal life and rights of woman and children. This, however, should rather lead to further research into the general application of customary law rather than striking down one custom, which, in itself will not change gender-based violence and abuse of rights.

7 CONCLUSION

Ukuthwala is a custom developed in Xhosa law for use by the amaXhosa people. Due to the irregular means used in the custom, measured against the morality and value system of a foreign entity such as the European laws, it was criticised, criminalised and branded as barbarous. This stigma stayed with the custom which is still widely practised today. As a result, there has been strong criticism of it and calls have been made for its abolition.

It is our submission that there is a need to return this custom and to subject to it major development. We cannot fault the first form of *ukuthwala* which can be equated with western elopement. Keeping in mind that we are dealing with customary law where customs such as *lobola* are still widely practised, acknowledged and enforced, an outright abolition of *ukuthwala* will remove a legal and binding way for two people to enter into a customary marriage without the strict and expensive customary rituals associated with a customary marriage.

The second form of *ukuthwala* may still be relevant, but only if it does not have a direct impact on the human rights of the girl. Should she consent to the marriage at the time of, or just after the *thwala,* there can be no real harm in the initial conduct leading to the *thwala*. If the conduct involved in the process of *thwala* was reasonably necessary and did not include extreme violence or rape, it should be justified in light of the custom and the subsequent marriage should be acknowledged in terms of the Recognition of Customary Marriages Act.

Due to its violence and consequent impact on the human rights of women, the third form of *ukuthwala* must be abolished and the community should be educated in this respect. No conduct of such extreme and unreasonable violence against women and children should be tolerated and disguised under the guise of custom. In these instances, normal criminal law principles must apply and be enforced.

---

136 Ntlokwana "Submissions to the SA Law Commission on Ukuthwala Custom" 7.

In a recent article in the *Mail and Guardian*[137] the following comments were made:

> "[t]he second example illustrates an instance where society should not tolerate a cultural practice that can never be rendered constitutionally compliant. It involves the *ukuthwala* ('abduction') practice, which involves abducting girls as young as 12 and forcing them to marry men who are old enough to be their grandfathers. This practice is unconstitutional and unlawful, and no amount of development will permit it to pass constitutional muster. It violates the rights and dignity, the right to education and the right to freedom and security of the person, and it is not in the best interest of the child."

It is our submission that the above statement was made based on these misconceptions created by our courts, combined with a total lack of knowledge of the history, purpose and development of the custom. Clearly there is a need and duty to research and establish the true nature of the indigenous customs, to educate the people regarding the true nature of such customs, to evaluate, and if necessary, to acknowledge and develop the customs to be relevant in our constitutionally modern society. In the case of *ukuthwala* it is our submission that it is a custom, albeit not without its problems, that at the very least, deserves to be considered before it is banned and abolished outright.

137 Ntlokwana "Bound by the Bill of Rights" (15-01-2010) *Mail and Guardian* 25.