

UKUTHWALA

LET'S STOP STOLEN CHILDHOODS

WHERE TO GO FOR HELP?

Child Line Tel: 08000 555 555

South African Police Services (SAPS) Tel: 08600 1011

Department of Social Development Tel: 012 312 7014

Independent Complaints Directorate Tel: 012 399 0000

Commission on Gender Equality Tel: 011 403 7182

Human Rights Commission Tel: 011 484 8300

Public Protector* Tel: 0800 11 2040
(* To complain about State failure to protect girls)

WHAT ARE THE RIGHTS OF VICTIMS OF UKUTHWALA?

Child Care Act: Health care professionals, social workers, educators, and staff and managers of children's homes have a duty to report the ill treatment of children and young people in care.

Children's Act: The Children's Act provides that in all matters involving children, the best interest of the child are of paramount importance. It also stipulates the age of consent to marriage as 18 years.

Domestic Violence Act: A victim of *Ukuthwala* may apply for a protection order under the Domestic Violence Act against family members involved in her abduction.

Rights under Criminal Law: A girl or woman that has been subjected to *Ukuthwala* may lay a charge of abduction, kidnapping, rape and trafficking in persons.

Family law: A girl-child or woman that has been subjected to *Ukuthwala* has a right to have the marriage annulled and, where appropriate, claim maintenance.

Civil remedies: A girl-child or woman may also claim damages for all harmful consequences of the *Ukuthwala*. This may include pain and suffering, missed educational opportunities, and long-term medical needs.

Victim's Charter: The Victim's Charter holds law-enforcement officers to specific standards, including victim participation and accountability to the victim.

Social assistance: It is open to a victim of *Ukuthwala* to approach the South African Social Security Agency or any Department of Social Services for a social grant for their children.

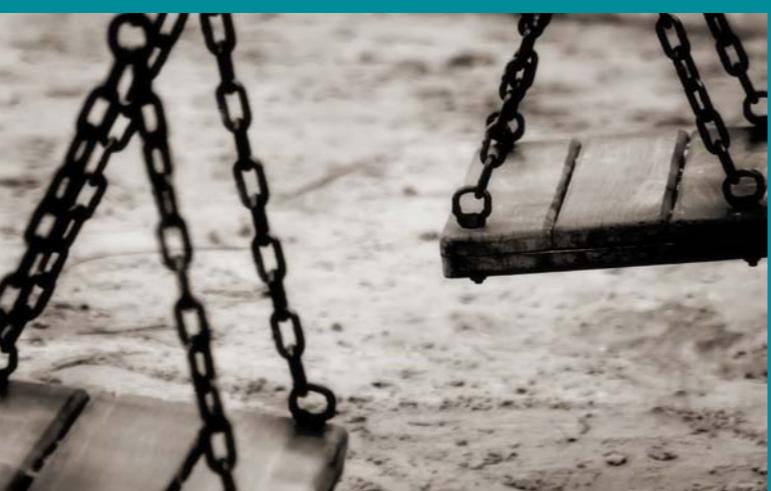
CAN CULTURE BE USED AS JUSTIFICATION FOR UKUTHWALA?

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 the 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.

Ukuthwala and the cruelty it inflicts on the girl-child by denying her of her right to be a child, among other things, are further inconsistent with the African value of *ubuntu*.

It must also be borne in mind that culture is dynamic and communities sometimes discard practices that were seen as benign in the past as they develop as a people.

In this day and age, the kidnapping and abduction of girl-children that have barely reached puberty cannot be reconciled with the ancient practice of



Ukuthwala, which was condoned by communities but subjected to delictual sanctions.

It's often said that some apparent victims of *Ukuthwala* feign crying when they are happy and have tacitly consented to their "kidnapping". As is the case with modern law on rape, the law requires consent, not a second-guessing of the girl's wishes. The Recognition of Customary Marriages Act also requires consent.

WHAT ARE THE RESPONSIBILITIES OF VARIOUS AGENCIES?

The Police: The Police must arrest every person accused of *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 below 12, the charge is rape and below 16, the charge is statutory rape regardless of alleged consent. Those that 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 abuses, including *Ukuthwala*. Abuse of teenagers with mental disabilities should be dealt with similarly.

School teachers: School teachers should report to the Police and social workers any reported or suspected child abuses, including *Ukuthwala*. Abuse of teenagers with mental disabilities should be dealt with similarly.

Prosecutors and courts: 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 the Department of Home Affairs 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 functionaries and others: Persons exercising public power have a duty to prevent child abuse within their sphere of control. This includes traditional leaders.

WHAT CAN THE COMMUNITY DO TO END UKUTHWALA?

To play a meaningful role in combating *Ukuthwala*, communities can:

- report violations and monitor law enforcement processes to end impunity
- provide life skills education for men to obtain suitors legally
- assist child orphans to ensure that they do not become prey to male predators and relatives seeking to shun responsibility or to cash in on *lobolo*.



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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. In ancient Africa, particularly among the Nguni, *Ukuthwala* was a condoned albeit abnormal path to marriage targeted at certain girls or women of marriageable age. But it did not involve raping or having consensual sex with the girl until marriage requirements had been concluded.

The act of *Ukuthwala*, however, was not with impunity; it incurred Delictual liability for the culprit, in the form of the payment of one or more herd of cattle to the father or legal guardian of the girl. Today *Ukuthwala*, particularly in the Eastern Cape, increasingly involves the kidnapping, rape and forced marriage of minor girls as young as twelve years, by grown men old enough to be their grandfathers.



WHAT IS THE IMPACT OF UKUTHWALA ON THE GIRL-CHILD?

Ukuthwala steals childhood. It causes an abrupt end to a girl's childhood and the carefree existence that all children are entitled to. Suddenly the little girl is a wife with a husband and in most instances, children and in-laws to serve or look after.

Health: Research conducted with young girls that have been victims of *Ukuthwala* and attendant rape, forced marriage and teenage pregnancy has revealed numerous health complications for the young girls. These range from HIV and other sexually transmitted infections to pregnancy related complications such as infant mortality, maternal mortality and fistula related diseases. These health complications are consistent with findings of United Nations (UN) Secretary General's Report on Violence Against Children (2006) and UN agencies such as the World Health Organization, UN Children's Fund and UN Development Fund for Women in countries that are plagued by forced and early marriages.

Human development: In virtually all child-marriage cases, the child is removed from school. Dropping out of school deprives the child education opportunities, including tertiary education and skills training. The social development of the child is also stunted as the early marriage and fast tracking into the adult world skips organic developmental phases.

Gender equality: Early marriage is a symptom of and exacerbates gender inequality. If it were not for gender inequality and child abuse, *Ukuthwala* would have no place in our society. The subordinate position of the girl or young woman is reinforced by the fact in most of the documented cases the girl-children have been forced to marry men old enough to be their fathers and/or grandfathers.

WHAT IS THE IMPACT OF UKUTHWALA ON THE COMMUNITY?

Development: A community's development depends on its people this includes the level of health, knowledge and education, skills and the resources controlled by those people. Since *Ukuthwala* undermines the girl-child's access to these opportunities. It indirectly undermines community

development. Girls and women who constitute more than 52% of the population are part of the critical human capital that families and communities rely on for their development. In rural areas women and girls' numbers are even higher and therefore more critical in rural development.

Cycle of poverty: There is a proven link between the lack of education, underdevelopment and poverty, *Ukuthwala* deprives girl-children opportunities to educate and develop. Furthermore, research indicates that the majority of the girls and young women that are victims of *Ukuthwala* are from poor families. Their lack of education and underdevelopment due to *Ukuthwala* deepen their poverty and perpetuate the cycle of poverty. In many instances the children born into poverty tend to be poor also. This contributes to the cycle of poverty in the communities, particularly rural communities, where *Ukuthwala* is rife.

WHAT ARE THE HUMAN RIGHTS IMPLICATIONS OF UKUTHWALA?

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

Ukuthwala as currently practised 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 the 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 the child. Forced and early marriage is, as demonstrated in the above, not in the best interests of the child. The acts of abduction, forced marriage, child marriage, rape and sometimes trafficking in persons involved in most instances of *Ukuthwala* also violate other international human rights obligations for South Africa.

As a signatory to the following international treaties, South Africa is required by international law to protect and prevent the kinds of harm to children that are inflicted through the practice of *Ukuthwala*:

- Convention on the Elimination of all forms of Discrimination Against Women, particularly Article 5 on Harmful Traditional Practices.
- African Charter on Human and Peoples Rights and Protocol on Women's Rights in Africa.
- Southern African Development Community (SADC) Protocol on Gender and Development.
- CRC.

THE CONSTITUTION

The Constitution of South Africa states: "A child's best interests are of paramount importance in every matter concerning the child (person below 18 years)." As already stated above, *Ukuthwala* cannot be in the best interests of 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 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 prohibition 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 the Equality Act, which include: gender based violence; and "any practice, including traditional customary or religious practice, 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..."

WHAT DOES THE LAW SAY ON UKUTHWALA?

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

Having sex with a child without her consent, following her kidnapping and abduction (*Ukuthwala*), constitutes rape in violation of the Criminal Law (Sexual Offences) Amendment Act, 2007 (Section 15). This Act, which is known as the Sexual Offences Amendment Act, 2007, prohibits sex with a person without their consent. Regarding a child, the age of consent is 16



meaning that sex with an under-16-year-old is statutory rape. Sex with a child that is 12 and below is rape as a child of that age is legally incapable of consent. The Act also prohibits other sexual activities with children (sections 16 and 17), including sexual grooming (Section 18).

Section 17 of the Sexual Offences Amendment Act, 2007 prohibits the sexual exploitation of children by parents and others. Parents or relatives and others who collude in or aid and abet the *Ukuthwala* of a girl-child commit the crime of sexual exploitation of children. These parents and relatives also face being charged with Trafficking in Persons under Section 71 of the Sexual Offences Act.

RECOGNITION OF CUSTOMARY MARRIAGES ACT, 1998 (ACT 120 OF 1998)

According to the Recognition of Customary Marriages Act, 1998, both the bride and the bridegroom must consent to marriage. The age of consent is 18 years of age. If one of the parties is under 18 years of age, 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. However, this is subject to the provisions of the Sexual Offences Amendment Act, 2007, which sets the age of consent to sex at 16.

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 Prevention and Combating of Trafficking in Persons Bill. The Bill prohibits the recruitment, sale, supply, procurement, transportation, transfer, harbouring, disposal or receipt of persons by means of the use of threat, force, intimidation or other forms of coercion; or by abusing vulnerability, for the purpose of exploitation.

TRANSKEI PENAL CODE

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