



**PUBLIC HEARINGS AND RESEARCH ON *UKUTHWALA*: VIEWS AND PERSPECTIVES
EMERGING FROM SOUTH AFRICAN COMMUNITIES**

Report compiled by the

**COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF
CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES**

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1 Glossary of Terms

Abduction – the wrongful, and usually forcible, carrying off/removing of a human being;

Arranged marriage – a practice where someone other than the couple to be married, decides who the partners should be;

Customary marriage – is concluded in accordance with customary law as defined in the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);

Elope – to run off secretly to be married, usually without the consent or knowledge of one's parents or guardian;

Ilobola – a Zulu word for a traditional Southern African custom whereby the bridegroom's family pays the bride's family for her hand in marriage. This could be in cash, in kind or in any other way as may be requested by the fiancée's family;

Polygamy – a marriage that includes more than two partners.

Intonjane - is a rite of passage for girl to welcome them into womanhood. During intonjane, a girl is secluded at her homestead, where she is taught womanhood values and norms, and prepared for marriage.

Umemulo - When Zulu women reach the age of 21, their parents arrange a coming of age ceremony for them. This ceremony, called 'umemulo' in isiZulu, is an indication that the girl is grown up and is ready to accept a boyfriend and get married.

Ukweshela - is usually when a man declares his attraction to a woman. The feeling is not always mutual. He will resort to all sorts of methods to get her attention. The main aim is to make the person connect with you.

Ukuqoma - Traditionally in the Zulu community once the girl confesses her love to a man ([ukuqoma](#)), she should give that person what is referred to as "[ucu](#)" (a strand of white beads). The item should be something that is usually worn by the woman for example a hat, headscarf or a necklace. In most cases it is the headscarf and is used to boast about the new lover, the man who is loved will then display the headscarf for everybody to see.

Funelani nganeno - when abakhongi (the marriage negotiators) are sent by the family of a boy, to the family of the 'bride to be' to tell them to funelani nganeno (to inform a girl's family that their girl is safe and is with his family).

Ho-Shobedisa – A Sesotho term equivalent to Isi Zulu/ IsiXhosa term for ukuthwala

Hotshabisa – A Sesotho sa Leboa term equivalent to Isi Zulu/ IsiXhosa term for ukuthwala



Section A

2 Foreword

The public hearings and research on the custom and the practice of *Ukuthwala* are an initiative and a response to the challenges and threats that are directed towards this practice. The truth is that some elements of gender-based violence that have been reported in recent years have, to a certain degree, been associated with *Ukuthwala*. This situation has not only reinforced the notion that this custom constitutes crime, but it has also resulted in negative perceptions about the practice. These perceptions have found expression in serious criticism, directed to those who are proponents of the practice including institutions such as ours. Notably, opponents of certain age-old practices regard these as archaic, and in the case of *Ukuthwala*, find this abusive and amounting to a criminal act and human rights violations. Although this may be true in some respects, the custom of *Ukuthwala*, as traditionally known, has never been a source or direct perpetrator of violence in any form. Consent, as emphasized later in the discussion, has always remained a hallmark in the said interpersonal relations of communities where this practice existed.

Furthermore, our history and contemporary society is not uncharacteristic of a dissonance between cultural practices and issues of human rights – despite the Constitutional provisions on cultural rights. Arguably, the custom of *Ukuthwala*, for some who have been closely following the debate, has been perceived as one of the classic examples that reflect a certain level of conflict between cultural and human rights provisions. This has resulted in a mind shift causing any debate, which centres on the concept and context of this practice, to examine it through the lenses of human rights violations. Apart from this phenomenon being addressed in the literature, communities echoed a somewhat similar view during the course of this enquiry. This in itself is a challenge in that it embeds insinuations of cultural erosion which could inevitably contribute to the undermining of fundamental traditions and practices.

The public hearings and research which have been conducted have revealed that the traditional practice of *Ukuthwala* served the community values well when the practice was accordingly embraced. Nevertheless, there are clear indications that *Ukuthwala* in its current form, as depicted in the present enquiry, has been intentionally and unintentionally misconstrued and abused. A reflection of this can be seen in the numerous cases of

abductions, rape and other forms of related violence on the pretext of *Ukuthwala*. On the basis of these observations we feel duty bound, as a people representing credible government agencies, not only to condemn forms of violence that are conducted under the guise of cultural practices, but also to propose recommendations that could translate into viable solutions.

3 Acknowledgements

The Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities (henceforth CRL Rights Commission) is indebted to all the communities and stake holders who participated in both the hearings and the research expedition on *Ukuthwala*. We are particularly grateful to the women and young girls who had the courage to share their experiences and sensitive narratives. For us, this has been very informative and insightful as we set out to craft the way forward.

We also wish to extend due acknowledgement for support and guidance received during the public hearings and research to the following institutions: Commission for Gender Equality officials; The Masimanyane Women's Support Centre, in East London, and their committed staff; the Palmerton Centre, in Lusikisiki and staff who assisted us; the Rural Women's Movement, in Kwazulu-Natal; the CRL Community Councils in the various locations such as Botshabelo and the Free State.

The following government structures are also acknowledged: UKhahlamba Municipality in Bergville; Provincial Departments of Social Development; South African Police Service who were helpful within the various provinces as well as the South African Law Reform Commission. Finally, special appreciation is accorded to the as well to the CRL Rights Commission. Last but not the least remains the Research and Policy Development Committee, the office of the CEO and the Chairpersons' office.

Section B

4. Key words, Concepts and Methods

Specific key words are conceptually critical to the phenomenon under investigation. For this reason, this report selectively employs a few key words and concepts which are essential to the work: These key words and concepts are culture and *Ukuthwala*.

Culture is the totality of human creation and expression in both tangible and intangible forms. The tangible forms include all material products of society created out of the genius of human beings. The intangibles consist of areas like language, beliefs, tastes, attitudes, rituals, religion, etc. which are also created by humans in order to facilitate their individual and collective existence. Culture and cultural products are constantly being changed and altered. They are handed over from generation to generation. Cultures are never static. They are dynamic realities which are in constant flux. Cultures diffuse and also absorb influences and traits from other cultures. It is cultures which distinguish us from the rest of the animal kingdom. Cultures make human beings in as many humans make cultures. In today's world, cultural rights, in other words, the right to live and practice one's culture, so long as it does not infringe on the rights of others, is acknowledged as a human right by the global community. This applies equally to individuals and groups. (CRL Rights Commission Report, 2010)

Ukuthwala as a traditional marriage custom among the amaXhosa and amaZulu has a long history in South Africa, and it was condoned as an alternative path to marriage (see Mwambene and Sloth-Nielsen 2011). While these two cultural groups appear to have been in the forefront of this practice from time immemorial, similar practices that resemble *Ukuthwala* have been recognizable in other South African cultures: amaNdebele, Basotho, amaSwati, vhaVenda and the Tsonga people (South African Law Reform Commission 2014). As far back as in the 1930s, Soga (in Kschula et. al., 2013) outlines the different forms of *Ukuthwala* when pointing out that *Ukuthwala* is applied to two forms of abduction, to genuine cases of abduction by force and also to fake cases of abduction. A common definition of *Ukuthwala* has been offered by most scholars who have demonstrated a keen interest in the debate (see Karimakhwenda 2013; Nkosi 2009; Rembe 2011) and have defined the practice as a process in which a young girl is abducted or waylaid through the use of force for purposes of marriage. Notably, most views that emerge from the recent literature point to the direction of the paraphrased definition, that is, the practice is carried out by force and as such it is unlawful.

Mtuzze, on the contrary, makes an interesting and convincing submission that relates to the translation of the concept of *Ukuthwala* into the English word, abduction: 'Unlawfulness is an essential element of abduction as evidenced by the definition, whereas *Ukuthwala* is traditionally lawful' (1993:50). This information transfer does create some difficult and misunderstanding when putting across African cultural issues, described in African languages, into English (*viz.*) Koyana and Bekker echo Mtuzze's view when suggesting that *Ukuthwala* was oftentimes consensual among concerned parties: '...the woman is in many instances a willing party to the *thwala* so that she can get her own empire as a married woman' (2007: 140). Clearly, apart from the meaning that rests in people not necessarily in innocent words (see Ralarala 2013 for a detailed account), and thus creating a misunderstanding on cultural world view of the African culture, the changing socio-economic milieu and colonial influences have further exacerbated the problem. Although this outline might be considered too brief to give credit to other critical issues related to the discussion of the definition, it is hoped that it does not only provide a glimpse in terms of the complexity of our cultural rights and their promotion and protection thereof, but it also relates to the conflicting views and controversy embedded in the debate. Suffice to say that our position resonates with the practice of *Ukuthwala*, as it has been outlined and explained by its proponents in the literature.

Methodology: In the course of collecting data and preparing this document, two phases of the work had to be undertaken by the Commission for the Promotion and Protection of the Rights of Culture, Religion and Linguistic Communities (CRL Rights Commission).

- (i) Public hearings in 4 provinces (Free State, Eastern Cape, Kwazulu- Natal and Limpopo) in the course of the, 2014.
- (ii) Research expeditions within the various provinces in specific locations.

Regarding phase one, the partners resolved to employ the Community Councils framework (i.e., mobilizing CRL Rights Commission structures and coordinating their voluntary participation through the various leaderships and central points) and the South African Human Rights Act 54 of 1994 in running the processes and procedures of the hearings.

The following steps were followed:



Research instruments were designed by a panel of Commissioners and officials, and these included questionnaires – meant to obtain the data from individuals and groups. Critical open ended questions included, but not limited to: What are your personal experiences of the practice of *Ukuthwala*? What do you understand about the practice? For purposes of comprehensibility as well as drawing active participation, some of the questions raised were posed in the language of the participants, as and when the need arises. As part of this exercise, relevant literature (obtained from primary sources, through desktop research, and various media) was reviewed, and expert opinions were solicited. Furthermore, an analysis of the legislation – as an enabling environment – was conducted in order to establish the gaps (if any) between cultural rights and human rights, with a view to educate society, and possibly address the negative perceptions that are associated with the practice.

In respect of phase two, the panel, constituted by officials from the respective institutions, conducted specific interviews with survivors of particularly girls and women who had been abducted. In addition, further consultations with various stakeholders and communities were carried out (Refer to Appendix C of this document) in order to enhance and augment the existing report. Pursuant to the provisions of the Act, a panel presided over the public hearings and the research activity, constituted by Commissioners, as designated by the collaborating institutions, lead the proceedings.

As a matter of research procedure, the proceedings were recorded and the collected data collected were used to collate and consolidate the document. It is also worthy of note that the process was designed to be informative, exhaustive and as inclusive as possible. The final report, as it stands, is informed by an analysis of the information obtained from these processes.

5. Introduction

To discuss the process of *Ukuthwala* and its role without unpacking the whole process that eventually leads to a traditional marriage is impossible. One needs to begin with the girl going through the rite of passage of *intonjane* or *umemulo*. This rite of passage is to declare that the girl is ready for courtship (*ukweshelwa*). The young men in the area would then begin the process of approaching the young maiden. This process of *ukweshela* would usually take a very long time, sometimes up to two years. This was because girls were taught that good maidens do not just declare their love to the young man without making them earn it. In most

cases the whole village would become aware of the fact that a particular young man is interested in a particular maiden. This process would usually entail the young man waiting at the banks of the river where the maidens would go to fetch water or on their way to collect wood. This long process of daily engaging the maiden and trying to convince her of his love was a critical part of the process towards eventually getting her as a wife.

The maiden, if she had any interest in the young man, would then accept his proposal for love (*ukuqoma*) at a time determined by her. The young man would then inform the rest of the village that *uqonyiwe* (he has succeeded in his quest to win her over as his bride-to-be). There would be joy and celebrations in the young man's home as he would have reached a particular stage in his life.

The next step would be for the couple to get married. Mbiti (1969:133) states that in African communities, marriage is an intricate and intertwined process with economic, social and religious aspects that often overlap and cannot be easily separated. The next step would be the process of *ukulobola* which entails the building of relationships between the maiden's family and the young man's family. This *ukulobola* process would entail the man asking his uncles to go to the maiden's family informing them of their wish to get married and thus begin the negotiations.

The critical part of these negotiations would be that on the very first day, the maiden's father and uncles would ask the man's family to identify the maiden for whom they have come to negotiate. The maiden would then be asked whether she knows these people. In actual fact, she would be asked to give her consent for them to continue with the negotiations, and to confirm she is in love with the man and wants to marry him. If the maiden denies any knowledge of the people, the *lobola* negotiations would end at this stage. However, if she declares knowing them she would be excused and the *lobola* negotiations would then leisurely continue over a period of time, sometimes for a few months, until the negotiators find each other. These negotiations are not necessarily just about settling for the number of cattle to be handed over, as culturally predetermined, but for the two families to begin to know each other and build a relationship.

After the finalisation of the *lobola* negotiations, the preparations for the wedding would begin between the two families and with the traditional leader in the village. The wedding would be a big feast for the whole village. The traditional presiding officer who leads the wedding would directly ask the woman whether she wants to marry the man. The woman would be expected to respond using whatever method is customarily used in that village. This would differ from a resounding “yes” to raising her hand holding a spear. This process of giving consent is very critical for the wedding procedure to continue and be finalised. If she does not give the necessary indication then the traditional leader would terminate the procedure.

This whole process from the rite of passage from girlhood to womanhood (*umemulo* or *intonjane*) through courtship to the final wedding day was designed to ensure that girls could never be proposed love to (*ukweshelwa*). Women would have ample time to make up their minds about the young man with whom they got involved and finally give consent to *lobola* negotiations and marriage. These procedures were there to ensure that women were not traded as commodities and were treated with dignity and respect throughout the whole process.

This process did not always flow as smoothly as outlined. Sometimes the young couple would find themselves in a difficult situation when it came to *lobola* negotiations. The families may have a long-standing feud and would not want to have any relationship with each other. In other situations the woman’s family might not want the marriage to continue without the culturally expected number of cattle being handed over. If the young man’s family could not come up with the required cattle, there would be a breakdown in the *lobola* negotiations. The breakdown in the process towards the marriage would create a problem for the couple and in these circumstances and others of a similar nature the *Ukuthwala* practice would apply.

The basic principle of *Ukuthwala* would involve a man and a woman agreeing to this as a result of the breakdown in *lobola* negotiations. The woman would then be taken by the man and his friends to the man’s home. On the way the woman would pretend to be reluctant to come along so as to maintain her dignity. The young men would carry her to his homestead. On arrival at his home the young men would immediately hand over the woman to other female members of his family. A delegation from the man’s family would immediately be sent to the woman’s family to inform them that she is in their homestead (*funelani nganeno*). The woman’s family would

then send a delegation to the man's homestead to check on the woman and to verify whether she wants to marry into that family. If the woman says that she does not want to marry the man then she would be taken home immediately and the family would have to pay a fine as stipulated by the traditional leader in the village. If the woman wants to marry into that family then the *lobola* negotiations would restart but the couple would have an edge as the parties would be more willing to find a negotiated solution to the problems. The wedding and the marriage would then follow the normal process.

6 The Mandate of the CRL Rights Commission

The CRL Rights Commission is one of the institutions established by the Constitution of the Republic of South Africa 1996, to strengthen Constitutional democracy in the Republic of South Africa and was given effect by CRL Rights Act no.19 of 2002. By this Act, the Commission is mandated to, *inter alia*:

1. promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
2. promote and develop peace, friendship, humanity, tolerance, national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
3. foster mutual respect among cultural, religious and linguistic communities;
4. Promote the right of communities to develop their historically diminished heritage.

7 Statement of the Problem

The abuse of children and women in the name of *Ukuthwala* is an unacceptable development which requires the intervention of government and civil society. According to the National Prosecuting Authority (NPA) the practice has taken an illegal tangent where some young girls, even as young as 12 years old are abducted and forcibly married to older men.

In addition, women and children (specifically the girls) are generally vulnerable to sexual and domestic violence and the resultant problems of maintenance after they fall pregnant. The fact that minor girls are forced into relationships with older men places enormous mental and physical stress on them. These circumstances may lead to emotional problems and the likelihood of maladjustment along with physical problems associated with early motherhood.

Conditions such as hypertension and depression are likely afflictions that girls in such a relationship will face. The fact that they are abducted at an early age when their bodies have not yet fully developed leaves them susceptible to cervical cancer and other complications associated with the reproductive system. They would also be vulnerable to sexually transmitted infections inclusive of HIV/AIDS. These aberrations must be curtailed to ensure that the custom reverts to the historical respected one for consummating customary marriage among adults.

8 Objectives of the public hearings and research

The CRL Rights Commission has compiled this report as one of its efforts to –

- provide a clear distinction between *Ukuthwala* and abduction
- stimulate debate on the matter;
- contribute towards the body of knowledge on *Ukuthwala*; and
- assist the country in finding viable solutions on how to chart a way forward in addressing the challenges around this matter.

Section B

9 The influence of colonisation in the concept and context of *Ukuthwala*

During colonialism, customary marriages were banned for they included first, *ilobola*, which the colonial masters equated to mean purchasing a person as in normal trading. Second, polygamy, which according to them was unimaginable; and third, *Ukuthwala*, which as one of the ways towards the formation of customary marriage; they understood to amount to the crime of “abduction”. Because of their strong belief in spousal consent, colonial authorities instituted court cases on behalf of unwilling brides, e.g. in the Transkei territories; forced marriages were abolished and the guardians or parents were charged in court if they allowed their children to be taken through *Ukuthwala*. In Natal and later KwaZulu-Natal, an officer of court had to attend all customary weddings to ascertain if the bride was willingly involved in the wedding. In other parts of the country where there were no laws against forced marriage the refusal by the bride was reason enough to declare the marriage null and void.

The fact that communities were barred from practising *Ukuthwala* lawfully could explain some of the distortions observed in recent times. In the social sciences it has been proven that restricting people from practising their customs through repressive laws is mostly counterproductive. What happens is that people will secretly go ahead and do as they know. This usually results in illegal and abusive tendencies, especially since everything is done in secret. Although there is no proof at this stage as to what led to some of the aberrations happening in the name of *Ukuthwala*, colonial-induced distortions may not be absolved from this.

Current observations in relation to the practice of Ukuthwala

Recently, the custom attracted a lot of negative media attention. Several cases of abductions, kidnappings of women and young girls in the name of *Ukuthwala* were reported. Most of these are in Lusikisiki, Eastern Cape. This custom became a subject of public debate in different forums, officially and unofficially. Many complaints have been reported. In the first and second quarter of 2009, the media reported that “more than 20 Eastern Cape girls were forced to drop out of school every month to follow the traditional custom of *Ukuthwala*. Girls as young as 12 years are forced to marry older men, in some cases with the consent of their parents or guardians.” An article entitled, “School girls forced to marry madalas” in the (Daily Sun 09 February 2011), on the negative findings of an investigation commissioned by the KwaZulu-Natal commissioner of police.

This investigation probed the 47 cases of allegations of school girls being abducted by older men in Bergville. Following the investigation 16 arrests were made and one suspect was convicted for abduction in the name of *Ukuthwala*. Television programmes such as the “Special Assignment” on SABC 3 and “3rd Degree” on E-TV featured episodes focussing specifically on cases of young girls/women abducted by older men in the name of *Ukuthwala* on numerous occasions. These and many other radio talk shows resulted in a huge public outcry against the practice, with some commentators calling for its total banishment.

Government, and a number of state and civic institutions, got involved in the debate, with government putting together several initiatives to try and normalise the situation. Commenting on the matter, the former Chairperson of the Congress of Traditional Leaders of South Africa (CONTRALESA), Chief Mwelo Nokonyana, was quoted as saying “*Ukuthwala* is an old custom that is now being wrongly practiced in several parts of the Eastern Transkei’.

Many scholars of tradition and culture commented and expressed shock about the fact that young girls are forced into marriage with older men. They argued that this is not the cultural practice as they understood it, but just simply child abuse. At the Roundtable Discussion of the South African Law Reform Commission (SALRC) on the Practice of *Ukuthwala* it was evident that *Ukuthwala*, like many other customary practices, has changed. In 2010, the Department of Justice and Constitutional Development visited the Eastern Cape in response to the reported cases of abduction and abuse of children in the name of *Ukuthwala*. At one of the meetings during the visit the Chairperson of the Eastern Cape Provincial House of Traditional Leaders, Inkosi Ngangomhlaba Matanzima, told the South African Press Association that it is criminal to expect a child of 12 or 13 years old to put up a family and give birth. During that visit the spokesperson for the Minister of Justice said that “they had travelled to the Eastern Cape to express their concern as a department over violations taking place involving young people, especially girls, in the area, under the guise of culture”. The Minister urged the NPA to prosecute all individuals or parents for specific or individual crimes which include kidnapping, abduction and statutory crimes. Early in 2011, the Commission for the Promotion and Protection of Rights of Cultural, Religious, and Linguistic Communities (CRL Rights Commission) held a meeting to discuss the problems relating to this practice. At the meeting it was clear that delegates were not satisfied with the events taking place in the name of

Ukuthwala, calling on traditional leaders and the Justice Department to deal with the challenges arising from the practice decisively. The Department of Social Development together with the OR Tambo District Municipality and other provincial and national departments for several years have been involved in the “Place of Safety” at Palmerton in the Eastern Cape. Palmerton is a shelter accommodating young girls who escaped their forced marriages in the name of *Ukuthwala*. Most of these girls came from the areas around Lusikisiki in the Eastern Cape.

At one of the National Council of Provinces’ (NCOP) sessions on 16 days of activism against the abuse of women and children, a member of Parliament, Honourable Masefako Dikgale, expressed her sadness at how the custom of *Ukuthwala* “has now degenerated into a practice where men sometimes force young girls and their families into marriage negotiations by making them participate in sexual acts, mostly against their will.”

10 The manifestation of the practice *Ukuthwala*

(a) When the girl is aware of the intended “abduction”. In this instance there is collusion between the affected parties, mainly the intended bride and bridegroom. Between themselves they plan the act without telling anyone and then *Ukuthwala* happens only as an act. This form of *Ukuthwala* could be equated to elopement. In this form of *Ukuthwala* the girl gives consent before the act takes place. Consent in this case is viewed as a significant matter as it will serve as a basis for marriage negotiations. The significance of consent or willingness to be waylaid is perfectly outlined in the following story entitled “*Ripping the veil off Ukuthwala*” written by Sthembiso Hlongwane, which was published in The City Press on January 24, 2009. The story is reported to have been related by one of the well-known academics in South Africa, Professor Sqhelo Koyana as follows:

He indicated that, a man asked his elder brother, to help him “*thwala*” (abduct for marriage) a local girl. As they were busy battling to carry the girl, the elder brother realised that his brother was drunk and he was battling alone. About 200 m from their home the drunken brother collapsed, so the elder brother threatened to let go of the girl. But the crying woman screamed: “Don’t stop, don’t stop, we are almost there,

carry on, and carry on". This illustration shows that girls know and consent to *Ukuthwala* in most cases.

- (b) When the families of the prospective husband and wife agree to the marriage. The girl is unaware of their plans in which case she might be forced to accept the marriage proposals.
- (c) When the practice is performed against the woman's will. There is no initial consent by anybody. The young man just decides to carry out the act of *Ukuthwala* on his own accord.

The first form (a) of *Ukuthwala*, as described above, is the most prevalent and seems to be the most desirable. According to most of the literature and commentaries, this is the original form of *Ukuthwala* as envisioned by custom.

10.1 Procedure of *Ukuthwala* in terms of the custom

- (a) Dependent on the form of *Ukuthwala* chosen by the proponents, the procedure or process for carrying out the act may entail certain activities. The intending bridegroom with his friends will waylay the intended bride in her neighbourhood, quite often late in the afternoon, late at night or early morning. Forcibly she will be taken to the young man's home, sometimes unaware of when it would happen, but still according to plan and with her consent. In either case the girl will show resistance to suggest to onlookers that she is held against her will, while in actual fact she is a willing participant. Evidently where *Ukuthwala* has occurred and not followed by marriage negotiations, a fine is payable to the girl's father in terms of the custom. This serves as punishment for embarrassing the girl's family and herself in the eyes of the community, as discovered by Koyana and Bekker in the case of *Sakanka vs. Totsholo* (1945 NAC C&O 11).
- (b) Once the girl has been taken to the man's place, her father will send a messenger to this man's household the same day or day after *Ukuthwala* has been carried out. If a cow was not offered by the man's family as an offer for marriage or if he does not approve of the marriage she is taken back to her home. Logically, within a day the

man's family must send a delegation to the girl's family to announce their intentions of marriage. They must do so before the girl's father can send his delegation.

- (c) If the girl is taken through *Ukuthwala* and the man's family fails to offer marriage, or the prospective husband is not accepted by the girl's family, a fine of one cow must be paid to the girl's family.

10.2 Value, essence or rationale of *Ukuthwala* in terms of the custom

- The main aim is to force the family of the girl to enter into marriage negotiations and give consent for the marriage to take place.
- Hasten matters if the woman is already pregnant.
- To persuade the woman of the seriousness of the intent to marry her.
- To avoid the payment of immediate *lobola* when the prospective groom's family cannot afford *ilobola* at that moment.
- Where it happens with the girl's prior knowledge, she is then expressing her right of consent.

The primary objective of the custom is for marriage purposes. *Ukuthwala* is the means to address the need to short-circuit the process of *ilobola* negotiations and an attempt to circumvent the possibility of one family disapproving the marriage arrangements. The two lovers who are in a relationship conceptualise the idea and agree on the day, time and place to meet for *Ukuthwala* to take place.

Once *Ukuthwala* has been carried out, it is common that on the following day, in the morning, a messenger is sent to inform the girl's family that their daughter is well and in the custody of the family of the intended groom.

The intention behind the practice of *Ukuthwala* is to provide means towards completion of a valid customary marriage. This opens a door for the two lovers, who are unable to accomplish their mutual intentions of getting married for reasons beyond their control, i.e. social, economic or otherwise, without the interference of third parties or factors which poses a threat. At a later stage the families get involved in completing the customary marriage process.

Section D

11 Legislative Environment

In the Republic of South Africa there is legislation that regulates marriage processes. South Africa is a signatory of a myriad of international legal tools with a bearing on a number of customary practices. This section will outline the provision of local and international legislative tools. This will allow us to understand where there are problems with respect to our customary practices and where we need to make the necessary interventions. Following our understanding of *Ukuthwala* and its impact on women and children as outlined above, it is imperative to dissect the different forms it assumes and assess these against what the law is saying or not saying about this custom.

11.1 International law

The basis of international law with respect to marriage rights is that forced marriage, including “abduction” for marriage and child marriage, is a form of “harmful traditional practice”. This is considered to be a form of violence against women and children, constituting gender-based discrimination and a violation of their human rights. The right of a woman to choose when, who and whether to marry is protected by a number of international human rights instruments, including those to which South Africa has either acceded or ratified. These conventions are the following:

- Article 16(2) of the Universal Declaration of Human Rights declares that, “Marriage shall be entered into only with the free and full consent of the intending spouses”.
- Article 1 of the Convention of the Consent to Marriages, Minimum Age for Marriage and the Registration of Marriages prohibits marriages that are “entered into without the full and free consent of both parties” and requires that such consent should be expressed by the prospective spouses in person. This Convention obliges States Parties to “take legislative action to specify a minimum age for marriage”. Furthermore, it states that, no marriage shall be legally entered into by any person under this age, except where a

competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses”.

- In 1954, the United Nations General Assembly adopted a resolution calling on all States to abolish customs and practices inconsistent with the Universal Declaration of Human Rights by ensuring a complete freedom in the choice of spouse, eliminating child marriages completely and the betrothal of young girls before the age of puberty and by establishing appropriate penalties where necessary.
- The International Covenant on Economic, Social and Cultural Rights (1966) states, in article 10(1), that, “Marriage must be entered into with the full and free consent of the intending spouses”. In its general comment no 14; the Committee on Economic, Social and Cultural Rights noted that States are under a specific legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage.
- Article 16(1) (a) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) is particularly relevant as it says “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular shall ensure, on the basis of equality of men and women... The same right freely to choose a spouse and to enter into a marriage only with their free and full consent”. Article 16(2) provides that “...the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify the minimum age for marriage...”
- The Committee on the Elimination of Discrimination against Women recommends that the States Parties take effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all forms of violence.
- The Convention on the Rights of the Child (1989) requires state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The Committee on the Rights of a Child urges

States Parties to develop and implement legislation aimed at changing the prevailing attitudes and address gender roles and stereotypes that contribute to harmful traditional practices, to protect adolescents from all harmful traditional practices, such as early marriage. States Parties are also urged to increase the minimum age for marriage with or without consent to 18 years, for both girls and boys.

- The international legal framework as outlined above has been augmented by regional legal frameworks. In the African Continent, the following instruments are particularly important:
 - The African Charter on the Rights and Welfare of the Child (1990) obliges all States Parties to, “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child”, as well as prohibit child marriage through legislation and take action to specify the minimum age of marriage to be 18 years.
 - The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2003) requires States Parties to take all legislative and other measures to eliminate all forms of harmful practices which negatively affect human rights of women. The Protocol also requires States Parties to enact appropriate national legislative measures to guarantee that no marriage takes place without consent of both parties and that the minimum age of marriage for women is 18 years.
 - The African Youth Charter (2006) also requires that “State Parties shall take all appropriate steps to eliminate harmful social and cultural practices that affect the welfare and dignity of youth”.

11.2 Domestic Legal Framework

11.2.1 The Constitution

The Constitution recognises that South Africa is not a homogenous society and guarantees to persons belonging to a cultural community the right to enjoy their culture and the right to

participate in the cultural life of their choice. However, both these rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Apart from few exceptions imposed by their young age, every child has the same rights as his or her adult counterpart. Some of these rights are:

- The right to equality; which must be read in conjunction with the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) which prohibits customary practices that impair the dignity of women and undermine the dignity and well-being of girls and sexual harassment.
- The right to human dignity.
- The right to freedom and security of the person, which includes the right to be free from all forms of violence.
- The right to education.
- The rights of children, which include “the right to be protected from maltreatment, neglect, abuse and degradation; not to be required or permitted to perform work or provide services that are inappropriate for a person of that child’s age; or place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development”. Furthermore, and most importantly, the Constitution enjoins everyone to take into account the child’s best interests in every matter involving a child. The Children’s Act elaborates what the principle of the “best interests of the child” entails, by providing, for example, that in matters concerning a child, the child’s age, maturity and stage of development, and the need to protect a child from any physical or psychological harm must be taken into account.
- The right to enjoy one’s culture has been thrown into competition with other rights and inevitably this has led to conflict. The Constitution gives no indication whether other rights supersede cultural rights; the fundamental rights are not ranked. The

SALRC has considered the interplay between individual rights and group rights in the Constitution, particularly regarding children, and concluded that:

“There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The Commission also accepts the importance of customary law and practices for a very large portion of our population. However, the Commission notes that customary law is recognised as a system of law provided it operates within the broad principles of the Constitution of 1996. Given the fact that the best interest of the child principle in section 28 is paramount and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of cultural or religious group”.

11.2.2 Law on customary marriages

In South Africa, customary marriages are regulated by national legislation and by laws promulgated by the authorities of the previous dispensation and those are: Transkei, Bophuthatswana, Ciskei, KwaZulu and Natal. The Children’s Act, to the extent that it deals with the marriages entered into by children, will also be considered. There are, however, serious gaps, particularly in national legislation, which could exacerbate the challenges around the practice of *Ukuthwala*.

(a) *The Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)*

In cognizance of the fact that, customarily, *Ukuthwala* is a precursor towards the formation of a customary marriage, it is important that all the steps necessary towards consummation of a valid customary marriage must be complied with, as set out in the Recognition of Customary Marriages Act. This Act states that the parties to a customary marriage must be above the age of 18, and that they must both consent to the proposed customary marriage.

Furthermore, this Act contains a number of provisions aimed at making it possible for people under the age of 18 years to conclude a valid customary marriage by approaching the Minister of Home Affairs. This Act also provides that if either of the prospective spouses is a “minor”, both his and her parents, or if he or she has no parents, his or her legal guardian must consent to the marriage. If, for whatever reason, the consent of the parents or legal guardian of a minor cannot be obtained, section 25 of the Marriage Act, 1961 (Act No. 25 of 1961) applies. It is important that the power of approval given to the parents, guardians and government officials must be exercised in the best interests of the child. Where a minor has entered into a marriage without consent as required by the Recognition of Customary Marriages Act, the parent, guardian or the minor can approach the court for the dissolution of the marriage. Such an application must be made before the minor reaches the age of 18 years and within six weeks of the date that the parent becomes aware of the existence of the marriage. Where such an application is made by the minor, it must be made before he/she turns 18 years or within three months thereafter. In addition to the requirement of consent, this Act also contains a number of safeguards aimed at ensuring that the parties involved in customary marriages comply with the essentials set out in the Act.

The Recognition of Customary Marriages Act requires customary marriages to be registered. In the case of a minor, the marriage officer may accept a birth certificate, identity document or sworn statement as proof of that person's age. If there is uncertainty about the age of a minor person, the registering officer may submit the matter to the magistrate's court, which must then establish the age of the person in question. Interestingly, the Act allows children under the age of 18 years to get married although under certain conditions. As we will see when we deal with the Children's Act, the marriageable age is in contention, especially within the context of custom where there was no numerical age adhered to. This is the reason why the Recognition of Custom Marriages Act determines 18 years of age as an age of marriage but at the same time allows for marriages below 18 years of age.

(b) *The Children's Act, 2005 (Act No. 38 of 2005)*

The provisions of the Recognition of Customary Marriages Act discussed above must be read in conjunction with the provisions of the Children's Act relating to marriages entered into by children. The Children's Act makes it clear that children, that is, persons below the age of 18 years, should not "be subjected to social, cultural and religious practices which are detrimental to their well-being". Subsequently, it provides that a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and that a child "above that minimum age may not be given out in marriage or engagement without his or her consent". Non-compliance with these provisions constitutes a criminal offence.

(c) *Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)*

The preamble to the Traditional Leadership and Governance Framework Act (Framework Act) states among other things that the State intends to "transform ... and restore the integrity and legitimacy of the institution of traditional leadership in line with" indigenous African law and practices but subject to the Constitution. Section 4(1a) of the said Act allows a traditional council to administer "the affairs of the traditional community in accordance with customs and tradition". Section 4(1b) states that traditional leaders and traditional councils may perform the functions conferred upon them by indigenous African law, customs and statutory law consistent with the Constitution. Section 20(1) (a) of the Framework Act provides among other things that a traditional leader may perform functions relating to arts and culture as delegated to him or her by the relevant organ of state or national or provincial government department.

(d) *The Codes of Zulu Law*

According to the SALRC, the KwaZulu Act on the Code of Zulu Law and Natal Code of Zulu Law (the Codes) are still in place in KwaZulu-Natal, regulating customary marriages. In terms of the Codes, the consent of the father or guardian of the intended wife is necessary if the wife is a minor. Furthermore, it is imperative that the intended wife, irrespective of her age, makes a public declaration during the wedding ceremony that she is getting married of her own free will and consent.

The official witness is expected to publicly ask the intended wife, at the wedding ceremony, whether it is of her free will and consent that she is about to enter into a customary marriage with the intended husband. Should the woman decline to announce her consent, or appear to be unwilling to proceed with the intended marriage, the proceedings are immediately stopped and, if necessary, the official witness will take the woman under his protection and report the matter to the Commissioner or Magistrate. Furthermore, the marriage may be annulled by the court because of the lack of consent.

Most importantly, the Codes make it a criminal offence for any family or any person to coerce or attempt to coerce any girl or woman to enter into a marriage against her will; to celebrate or permit the celebration of a customary marriage in the absence of an official witness; or to celebrate a marriage that the official witness has stopped. Any misconduct or breach of duty by the official witness is also a criminal offence.

(e) *Transkei Marriage Act, 1978 (Act No. 21 of 1978)*

The Transkei Marriage Act requires the consent of every party, who has attained the age of 21 years, or the consent of the father/guardian of the party, who has not attained this age, to a customary marriage for it to be a valid.

11.2.3 Overall assessment

The laws discussed above did not annihilate the practice of *Ukuthwala*; however, there are clear gaps. Glaring inconsistencies exist among the various pieces of legislation regarding minimum age of marriage.

- The Recognition of Customary Marriages Act allows marriages of people or children below the minimum age as required by the Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage. This affords parents or guardians the right to consent to marriages of their “minor” children. This Act does not state if the “minor” should give consent too. Effectively, girls who are married at a young age have no say in decisions concerning the choice of spouse and whether they wish to marry at all. Their parents or guardians usually decide for them. A child is not capable of

making an informed decision about marriage and may not fully understand the consequences of such a decision.

- The Children's Act effectively prohibits customary marriages of girls below the age of 12 years, but sanctions the marriages of girls above the age of 12 years but below the age of 18 years, provided that specific consent is given. This provision is problematic as it does not require the involvement of the official of the state as provided in the Codes, or that such a marriage should be allowed should it be in the interest of the girl.

11.2.4 Protection afforded by criminal law

The SALRC contends that, in addition to the offences referred to above, and depending on the circumstances of each case, and the age of the victim, those involved in the planning and execution of *Ukuthwala*, where the consent of the intended bride is lacking, could be prosecuted for offences. These are being an accomplice to rape; common law abduction, kidnapping, assault or rape; statutory rape; compelling or causing a person 18 years or older to witness a sexual offence or compelling or causing a person 18 years or older to witness a sexual act; sexual exploitation of a child; and conspiring and inducing another person to commit an offence. This list is by no means exhaustive.

In KwaZulu-Natal, a person could also be charged under the Codes with seducing or abducting an unmarried girl; enticing a female from the control or custody of her husband, father or guardian, or having or attempting to have illicit intercourse with her; or harbouring without just or reasonable cause, the wife, daughter or another person after a demand has been made for her return.

In the area formerly known as the Transkei, the Transkeian Penal Code of 1983 determines that people who coerce others into marriages against their will under the pretext of *Ukuthwala* could be charged with assault and kidnapping. The sexual offences created by this Code were repealed by the Justice Laws Rationalisation Act, 1996 (Act No. 18 of 1996).

Section E

12. Analysis and Discussion

12.1 Free State

During a focus group meeting in the Free State, someone shared a story of a girl forced to “consent” through torture: after a group of men abducted her without her agreement. She was held captive, a piece of fishing line was wound around her finger, and painfully tightened, until she was forced to “consent” to marriage. One chief said that if a girl refuses, “the boys will beat her”, a statement immediately contradicted by another chief present, who asserted that “beating children is not in our culture”. A gentle man, born in 1942, suggested that “if you do anything, you must do it out of respect”. He shared with the group that he “*shobedisa*’ed” his wife in 1962, when she was 15 years old, and he 20 and they happily lived together until 1994 when she died. This same group attested that at least one member in most families had been “*shobedisa*’ed”. They accept the practice, even when abusive, because it is widespread, because it is almost a norm. A woman chief even suggested that a girl “elicits” “*Ho-shobedisa*”, because she is aware that the boy desires her. She proclaimed that “abduction and rape are not part of “*Ho-shobedisa*”, the Sesotho way of getting married”, and that rather than intelligence or physical appearance, girls are more valued for their skills in “cooking, cleaning and ironing” clothes.

These examples are some of the least violent of abuses documented during provincial site visits, including with other groups in the Free State.

In the semi-rural area of Botshabelo in Free State, two focus groups were conducted. The first meeting was with community leaders and members, convened by a local mixed gender cultural group. This group divided into separate gender groups, each with its own facilitator. At the start, the women struggled to share their own or others’ stories of abusive *ho-shobedisa*, but readily acknowledged that it was widely practiced in the past, with fewer known cases of late. The men, on the other hand, in a completely separate space, readily discussed *Ho-shobedisa*, the variety of practices from the consensual to non-consensual and abusive, all of which they consider part of their culture and tradition. While the women who were left alone in the hall, initially chose to speak only of consensual *Ho-shobedisa*, one lady in the women’s group, recounted her painful experience of *Ho-shobedisa* in the form of a forced, arranged marriage when she was about 14 years old, to a young adult man she did not know or love. She spoke of how her family’s female elders counseled her for days to accept the status quo, especially since substantial *lobola* had already been paid by the groom’s family, leading her to eventually

accept her betrothal, albeit decidedly reluctantly. Unlike many others whose stories will shortly follow, her life is not one of overt suffering or abuse, but it is a life devoid of love or passion, as she says in her own words, silently wiping tears from her expressionless face.

Following this first cultural group, a senior social worker in the area arranged a meeting with a group of adult survivors of *Ho-shobedisa*. Supporting the testimony of the adult survivors in Botshabelo is Mme Karabo, 34 years old, who works with Childline in Bloemfontein. She recounted that her mother, along with her mother's three sisters, all suffered "*Ho-shobedisa*" as abuse and violence, rather than love.



Mme Karabo claims that *Ho-shobedisa* was widespread in the province in the recent past, was echoed by the six adult survivors in Botshabelo, who each recounted lives of inhumane violence and abuse. These women ranged in age from their thirties to their forties, with two elders 60 years old. The elder, Mme Maitumeleng, said that "some people told her that usually with *Ho-shobedisa* ; they had to sleep with the guy immediately". Yet others, she said, "don't let you sleep with the boy – they wait until you menstruate to ensure you're not pregnant [with another man's child]. Then only can you sleep with him." Like other women in different provinces, Mme

Maitumeleng shared that sometimes the young abducted *makoti* (bride) is paid up in cash, as inducement to consent. The abductor's family, especially female relatives, usually guard the abducted girl until she eventually acquiesces. Mme Makoena, also 60 years old, spoke of her *Ho-shobedisa* as a young girl, by a migrant mineworker, whom she did not love, who was competing for her affections with a local man that she did love. Mme Phumzi, born in 1966, was abducted by a migrant worker she did not know, and was viciously abused for 27 years until he left her for another woman, without maintenance for her four children.

Auxiliary social worker in Botshabelo, Nthabeleng Litabe, says that *abductions* happen more frequently to teenage girls who are vulnerable due to poverty, often orphaned or with only one parent (usually a mother). Abductions, she says, are done at, to, or from sites like rivers, where the girls go to fetch water for family use, or wood collection for fuel. "Some girls submit because there is food at the boy's house and none at her parent's home. Girls just have to accept it. Usually the old ladies say she won't get married again. If she runs away it is called "bad luck", says Litabe. People in Botshabelo speak of recent cases of *abductions* of girls by older men.

12.2 Eastern Cape

The Eastern Cape was significantly more explicit about *Ukuthwala*, especially the rural women leaders invited by Masimanyane Women's Support Centre to participate in one of two focus groups, facilitated by Thabisa Bobo, in East London. The Commission for Gender Equality's provincial coordinator, Mr. Nceba Mwrebo, attested to many actions in numerous areas of the Eastern Cape over four years, including powerful interventions in Lusikisiki by the former municipal mayor, Ms. Zoleka Capa, and a visit by Minister in the Presidency, Ms. MantoTshabala-Msimang, now deceased. He spoke of CGE's collaborations with United Nations Population Fund, South African Human Rights Commission and the Public Protector.

For the adult *Ukuthwala* survivors at the Masimanyane focus group, the CGE and others' limited interventions occurred at least one generation too late. During the first Masimanyane focus group, with nine service providers (counselors, social workers and public educators), project manager, Thabisa Bobo, asserted *abductions* as an "old problem": "Even if a woman was *abducted* 20 years ago, her trauma is still present. One woman said "I hated the process;

I've never been in love with my husband. The practice has changed quite a lot – I come from the Pedi area. The age gap has become too large between the man and the girl. The girls coming into [Masimanyane] offices, 14-16 years old, with older men - 40 years old or more, there are serious generational differences”.

This group spoke of the status of families, and that girls from high-status families will not be *abducted*, while girls from poor families and orphaned and vulnerable girls are more likely to be *abducted*. In the case of orphans in the care of an ageing grandmother, for example, the girl will be married off to an older man without her consent, due to concern for her “security”. Some grandmothers have been quoted as saying to the young girls, “I’m going to die; who’s going to look after you”.

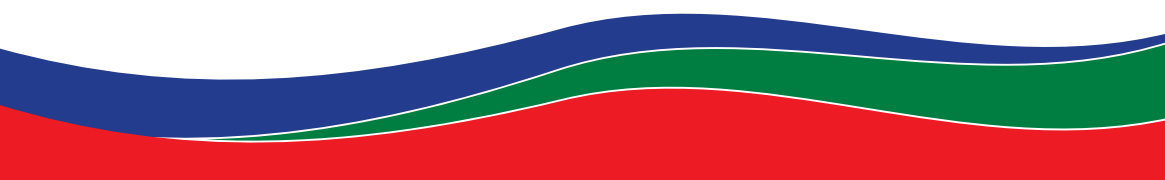
In the second Masimanyane focus group, with nine community leaders from five different rural women’s organizations, five are adult *abduction* survivors.

One survivor testified:

It’s very painful to be *thwala’ed*. I myself was *thwala’ed*. Even if you love your husband to be, or if you don’t love that person, it’s very painful to be *thwala’ed*, because they use scarves to strangle you. I was 15; he was 11 years older. I didn’t know him, never met him before. When I was strangled and dragged to that place, I didn’t even know which one of the abductors was to be my husband. I never loved him. I just endured the pain of being there and the fact that I couldn’t go back home. I knew I would never be a normal girl again. I would just be thrown away by my family, where I would be given a disgrace name, “*jose*”. Even the other girls won’t accept me – “she is a witch, don’t talk to her, she is poison”. I have to stay there and learn to love my in-laws. Even my sister-in-law will take my things and I can’t do anything.

The group explained further: “the question is about her sexuality, her virginity is questioned, and she is tainted. So she can’t return innocent to her father’s home, but has to stay with her husband and in-laws.”

A second survivor told a similar story of abduction, but shared even more brutal details:



At the new homestead I saw many men of different ages, but didn't know which of them will be my new husband. At last I found him. He was old and with only one eye. I was 15 years old, he was 34 years old. He showed he didn't love me and abused me. At night, when the time to sleep came, I would be with my husband in the rondavel. Outside the rondavel, men would wait to hear if I had sex with my husband. If they didn't hear, they would knock on the door, and the husband would let them in. If I haven't had sex with him they would beat me up and hold me while he rapes her. Then one of the other men would rape me to show my husband how to have sex with me. Thereafter, my husband would have sex with me. I endured the pain and even when I returned to my parents to share my experiences, they said I must stay there [with my husband] because in marriage you must endure.

A month after giving birth, she refused to have sexual intercourse with her husband, after which he beat her so badly, "he broke my leg and I was admitted in the hospital. Then he went to church; he was a churchgoer". Fearing for her life, she permanently fled from him soon after.

Another survivor was also abducted at age 15, when she was still in school, by a migrant worker 20 years older. She says "I didn't belong in my own family". She felt she was a burden to her family, because she was "another man's child". Her mother, whose first husband was deceased, could not support her because she had two younger children by a second husband. At the time she claims she was a "genius", and very good at school. She went directly from grade two to grade four, entirely skipping grade three. Skipping grades, completely due to intelligence and high performance at school, is most unusual. "But today", she notes wryly,

"On the way of being abducted you fall and they pull you around and when you arrive there you're a virgin and scared and the husband will do something that is new to you, he will press his knees on your thigh to get your consent. Then he starts to have sex with you forcefully. In the morning you have to dress in *makoti*(bridal) clothes and make teas and coffees, but I couldn't do it because my body was swollen and I had scratches and I couldn't return to school because I was scared other children would laugh at me and call me "jose".

During 2008, to protect girls and ensure their education, the former mayor of OR Tambo Municipality, Ms. Zoleka Capa, re-developed and refurbished a former missionary boarding school that had not been used for a long time and had fallen into disrepair. This, she turned

into the Palmerton Centre for orphaned and vulnerable children, and especially for child survivors of *abductions*. She personally strove to eradicate *the abduction and rape of girls*, resulting in her personally rescuing a substantial number of girls from areas surrounding Lusikisiki in the rural Eastern Cape. The centre is close to the Palmerton junior and senior schools, named after the missionary, Rev Palmerton, long departed.

The Acting Centre Manager, Nomapondo Ngotana, said that they accommodate on average between five and eight survivors of *abductions* a year: “it fluctuates – some come for a day or two; we run a home of safety. Some come for a week, or three days; some stay forever”. Their occupancy peaked during 2009 and 2010, at the height of Mayor Capa’s anti-abduction campaign. Since 2008, their programme has been run by the Department of Social Development. She suggests that the recent decrease in centre residents is due to their successful anti-abduction campaign, which encouraged families to accept the return of runaway abducted girls to their parental homes.

Due to the Centre’s work, their workers have been threatened by local male traditional and community leaders. Ngotana shares about some of the violence they face from local men: “in the community, when they see our van, sometimes they throw stones; they say we’re taking away their wives.” At one time Ngotana was held hostage by a local Chief and some men from the village, demanding that she release the runaway survivors to them, only gratefully to be rescued by the local police, who sent the men away.

At present there are three survivors of *abductions* at the Centre, two of whom are cousins. They are all from Hlabathi Location in Kwa Cele, one of the key sites of Capa’s earlier interventions. The other former residents have been returned to their parents by the Department of Social Development, or voluntarily returned home, where they either remained, or from where they migrated to other parts of the country.



Girl A, now 19 years old and in Grade 12, was abducted when she was 14. She wants to be a journalist or a teacher, and “likes to read newspapers, likes the news”. Her cousin, girl B, is 20 years old and in Grade 11, “likes to play” and also wants to be a journalist some day. Their friend, Girl C, is in Grade 10, 21 years old, and wants to be a journalist, or, with some hesitation, “a waitress”. They were each abducted during 2008 or 2009, then aged 14 or 15, and held in captivity, sexual and domestic slavery, for up to a year, before each escaped, either directly with the help of Mayor Capa, or boldly by fleeing to the local police station on their own, where they lay criminal charges and were later collected and brought to the Palmerton Centre by Mayor Capa.

Girl A aunt, elder sister of her father, arranged her abduction at the age of 15, by a man in his thirties, a stranger she did not know: “My aunt told me I must get married because she didn’t want someone who isn’t married – here we call them *idikazi*” [derogatory spinster, or “*jose*” in East London]. She says that on the first night at her abductor’s family home, “this husband was sleeping with me”, i.e. he raped her. Like many other girls, she was abducted over the holiday period, during December, in 2008, and escaped 12 months later, after hearing of Mayor Capa’s campaign, reporting her abduction to the police, and being brought to the centre by Capa. She

says that her parents “didn’t do anything about” her abduction, because they “got the *lobola*”, four cows. She speaks of her family as very angry. “I was really hurting, and at home they don’t want me, they say I must not come back”. Her stay at the Palmerton centre “was difficult” because her abductor demanded the return of the *lobola* he had paid her family, but her brother had used two of the original four cows to pay *lobola* to his fiancée’s family. When last girl A heard only one cow was still owed to her abductor’s family. She says her family learnt to forgive her, for running away and having to forfeit the *lobola*, and she forgave them eventually. Ironically, her aunt’s daughter, the same age as girl A, was also abducted, at approximately the same time, but she too escaped within a year.

Girl B was abducted at the age of 14, during the September school holidays. Her father’s relative, an older female cousin born during the 1970s, actively aided the abductors, despite her ceaseless crying and pleading. She stayed with the abductor, a migrant truck driver in his twenties, “but I told myself this is not my final place. I will eventually escape, but I had no option at the time”. She says her abductor was “not kind”, meaning he was cruel, and she stayed with him for seven months. Then she heard of Mayor Capa’s campaign, and was brought to the Palmerton Centre. While her family did not consent to her abduction, her abductor had started paying *lobola* at the time she fled his home. She says, “at first my family, it was not very easy, but eventually it was okay. I felt very bad. I felt my parents didn’t care about me”.

The Department of Social Development supports the family through the traumatic reunification process. In the words of the social worker: “When cases are reported, home visits are done. Reasons for the individual cases are explained and understood, and then reunification is done. Sometimes parents don’t feel sorry about what they did and we try to get them to see reason.”

The Lusikisiki Department of Social Development’s family reunification process could be considered controversial, since some service providers in the province suggest that, partially due to funding constraints, girls are encouraged to return to their families, rather than to stay at the centre until they complete school. This leads to girls dropping out of school in their family’s villages, teenage pregnancy, and exposing themselves to dangerous situations when they migrate to urban centers, even in other provinces.

It is quite unfortunate that when these young girls ran away from their abductors the procedures outlined in the Children's Act and the Regulations were not followed by the Social workers or the Child Care workers in the Centre or the community. The perpetrators should have been made to face the criminal justice system. The guardians or parents who had participated in the abductions and the payment of money for the girls should also have been made to face the criminal justice system.

12.3 KwaZulu-Natal

In Loskop, KwaZulu-Natal, ten adult survivors of *abductions* attended a focus group, convened by the Rural Women's Movement on behalf of the CRL Rights Commission. All of them still live with their abductors. Their respective abductions occurred in different areas at different times. They assert that in the Loskop area, abductions are rife. From their individual stories, it appears that typically girls aged 14 or 15 are abducted by men in their 20s. They are usually abducted going to or returning from school, or the river, or collecting wood.

Umama Fetti was aged 15, returning from school. She felt as though she was obliged to love her abductor:

"Because I didn't know who else would love me since I'd been in the wrong. I felt as though I did wrong because when I told my father what had happened, he said he couldn't help because I wasn't a virgin anymore, and I can't get anyone else to marry me. He went ahead and started negotiating *lobola* without my consent. If I wanted to stay home I had to be a virgin."

Regardless of her "virginity having been taken from" her, she still feels as if she had "done wrong". She feels as if she'd wronged her family in "losing" her "virginity".

Sizani Ngubane, Coordinator of the Rural Women's Movement, steps in to support Umama Fetti:

"uMama Fetti was abducted by three men, kicking and screaming [emphasized loudly]. No one in the community helped the Grade 8 child, when they took her to the mountain. They beat up the boy in order for him to perform what he's supposed to do [rape]. He

has no choice. She got into marriage in a very painful way. At the start it wasn't easy, but eventually it got better. She got used to it because she had to get used to it, because her father said now that she's not a virgin, she can't be at home, even though her mother wanted to have her return home."

Umama Nonku was aged 14, fetching water from the river, when she was abducted. Umama Nolwazi, was age 15; he 25. She was "coming back from collecting wood on the other side of the hill nearby. He forced her to sleep with him" [raped her], and she "fell pregnant immediately", and so "had no other option after that".

Umama Jabulisiwe was 15, returning from school, and asserts that she does not love her abductor.

The group attests to cases of girls abducted and kept in the forest or bush, instead of being taken to the abductor's family's home. This is to prevent the public, and especially the police, from hearing the girl's cries and rescuing her:

"They pin you to the floor, spread your legs in order for you to have sex [rape] with the abductor. Between three and 15 people accompany the abductor. The minute you get there you are raped. Once it's [the rape is] done, you have no choice; you can't return home. You're forced to be with him. Even the man is beaten up when the men try to show him how to sleep with the woman. In case he's a bit resistant, they beat him up to show him how to do the act. Sometimes another man will show the abductor how to rape the woman while the men hold her down, after which the abductor rapes her."

Umama Pilisiwe says: "I only wanted three kids and a beautiful house. I wanted to study to be a nurse and not to get married. After my parents died I had to get married, I don't know my biological mother."

Sizani Ngubane stresses that for local parents:

"Poverty is the contributing factor. We started in this area in July 2010 with 80 home based caregivers. 100% of the mothers were celebrating when their daughters had been abducted. We came here because we were invited by a community leader who was concerned. When we came here we didn't say, "we come for *Ukuthwala*", but we

conducted workshops for women and girls on women's human rights. It took us a whole month for the women to say it's actually happening. Out of 80 people, I could sense women didn't want to speak about it. I could see their body language. A woman would want to speak and another would shut her down. We just kept going until they were ready. Umama Fetti just got up, of 80 women and 2 men who are home based caregivers. She said, "it happened to me at 15". Another four women then also spoke up. We said, "why don't we take our struggle into the community". So they organized a workshop of 105 women. Because the five women had spoken up, we said, "Let's spread ourselves". We divided into five groups with at least one person in each breakaway group who had already spoken up. When the question came about whether the practice is happening in the community, those who had spoken up – it appeared **all 105 women had been abducted**. At this workshop, 75% of women said they couldn't stop it: "it happened to our grandmothers, our mothers, we can't stop it. It creates a space for young women to get married, instead of staying at home and doing nothing".

12.4 Limpopo

As with the focus group convened by the CRL Rights community council in Botshabelo, Free State the men in Polokwane felt more at ease in sharing their knowledge and experiences of forced marriages, often speaking in the third person, like the men in Botshabelo, Free State. In fact, at least two of the 26 men in Botshabelo were identified as apparent nonchalant perpetrators of *abductions* by their male facilitator. Interestingly, one of the facilitators of the men's group in Polokwane also identified two of the 40 men there as probable perpetrators: "Even though no one came out in the open, I suspected two of them were. They spoke so passionately and so detailed about the subject matter that I became convinced that they might have been."

The majority of women in the Polokwane meeting insisted that forms of *Ukuthwala* are not practiced in Limpopo. A few women - social workers and other community leaders - cited examples of arranged marriage, which some called *hotshabisa*: "a boy is taken to a hut where a girl has been kept [against her will]. They contrasted these arranged or forced marriages with abduction. On further exploration, they acknowledged that the girl often does not consent to sexual intercourse the first time or afterwards, which on even further probing, they readily

acknowledged as rape. They also acknowledged, after additional questioning, that the forced incarceration of the girl is not benign, and that it is indeed unlawful, and even a form of abduction, even if she is not carried off, as in the classical Nguni forms of *Ukuthwala*. One woman powerfully suggested that with *Ukuthwala* the girl kicks and screams loudly, publicly; yet with *tshabisa* or *thlakisa* or *tahisa*, the girl “kicks and screams from the inside, silently”. A social worker even mentioned the case of her client, a 19 year old girl, whose parents had no money to pay the traditional healer, and offered their daughter in lieu of payment instead.

Thus it is clear that abduction and forced marriage, especially of girls, but of women over the age of 18 years too, by men, strangers or known, occurs in each of the four provinces visited: Free State, Eastern Cape, KZN and Limpopo.

12.5 The Challenges faced in the 4 Provinces

It became clear that the two most affected provinces are the Eastern Cape and KwaZulu-Natal. The abductions are currently still prevalent in the Bergville and Loskop areas as was affirmed by participants and as an attempted abduction took place while the CRL Rights Commission was in the area. These abductions have become more vicious and extreme as the girls are taken to the mountains where they cannot run away. These abductions cannot be confused with *Ukuthwala* as all other cultural processes that lead to marriage are not followed.

Section F

13 Conclusion

The views and perspectives that have emerged from South African communities – through this research expedition - have not only opened windows for the readership to understand and appreciate our cultural milieu and cultural idiosyncrasies, but have also created a learning space for us to understand the criminal elements who oftentimes embroil in criminal activities under the guise of *ukuthwala*. Clearly, the majority of these views relate to violent incidents in which unwanted practices are masked in the name of our cultural practices. It is also understood that the consequences that are related to the pessimistic view of *ukuthwala* in particular – as a result of negative perceptions- have a direct bearing on the promotion and protection function of the Commission. Kaschula et. al (2013) writes:

Any observer of a culture and its norms from outside the culture will always be fraught, biased and emotionally charged, not least when the traditions or customs side in the direct opposition to the norms of the observer

While we embrace the existential realities, through this work, we are constantly reminded of the insurmountable task we are facing. However, as a Commission we are up the challenge to serve our communities. This report remains, as our humble contribution to communities, not only educational but informative in that has documented real time narratives that reflect the predicaments and challenges of our people in as far as the current violations of cultural and human rights. Notably, apart from being a utility that underpins our views and position as an institution, it carries potential to account and provide guidance in terms of charting the way forward, and possibly implement the proposed recommendations as well as considering future research as and when the need arises.

It is of great importance to highlight the fact that there have been very few prosecutions of a crime that is quite rife.. It is also clear that the people who abduct girls know that what they are doing is not *ukuthwala*. The majority, if not all, of these abductions do not lead to marriage. The process of *ilobola* is never what every African would tell you it should entail: the bringing together of two clans through a celebration of the relationship of the couple. The money, or cattle that changes hands is not and cannot be called *ilobola* as the most important and first step of consent is completely eliminated as both the abductor and the parents know that the girl would never agree to the continuation of the *lobola* negotiations.

14 Recommendations

- The Department of Social Development to implement the child protection measures as outlined in the Children's Act, with immediate effect.
- The Department of Justice and Correctional Services must immediately start prosecuting the cases of the perpetrators who have abducted girls in the past and those who are abducting them presently.
- The Houses of Traditional Leaders, both national and provincial, very loudly and without any reservation must condemn criminal violent actions and must expose those in their villages who have abducted girls in the past and those who are still abducting them currently.
- The Department of Social development must do research during the 2015/2016 financial year, to monitor the youngwomen and girls who have been reintegrated and reunified with their families
- An investigation must be conducted during the 2015/2016 financial year by the Department of Social Development as to why the system of child protection has failed these girls consistently over such a long period of time so that lessons are learnt and to ensure that this is prevented from happening in future.

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