



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

**COUNTRY REPORT: THE
PROTECTION OF
CHILDREN AGAINST
CHILD MARRIAGES IN
SOUTH AFRICA**

**37th SADC-PF Plenary
Assembly**

INTRODUCTION

The 36th Plenary Assembly of the Southern African Development Community-Parliamentary Forum (SADC-PF), held in Victoria Falls, Zimbabwe, in October and November 2014 resolved that all SADC National Parliaments prepare country reports on the constitutional and legislative provisions in their countries regarding the protection of children against child marriages for the 37th Plenary Assembly. These reports will be considered by the Standing Committee on Human and Social Development and Special Programmes (HSDSP) to understand the existing situation in the region and chart the way forward. This Report therefore presents an overview of the prevalence of child marriages in the Republic of South Africa.

1. SYNOPSIS: CHILD MARRIAGES IN SOUTH AFRICA

- Child marriages cover **marriage of those under the age of 18**. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) Committee prescribed the minimum age of marriage to be 18 years.
- It affects boys and girls, although the tradition has a **disproportionately negative impact on the girl child**.
- Although the practice begun as a means to protect unwelcome sexual advances and to gain economic security, it often means **for the girl a life of certain sexual and economic servitude** (United Nations Children's Fund (UNICEF), 2008).

In South Africa, incidences of *ukuthwala* – a traditional practice that is nowadays abused to be a form of forced child marriage – has resurfaced in recent years.¹

The South African Department of Justice and Constitutional Development (renamed the Department of Justice and Correctional Service since 2014) (2010) define *ukuthwala* as 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. Sometimes, the girl is caught unawares, but in many instances she is “kidnapped” according to plan and agreement. In either case, she would put up a show of resistance to suggest to onlookers that she is taken against her will, when that is actually not the case (South African Law Reform Commission (SALRC), 2014).

It is important to note that the purpose of *ukuthwala* is “to force the girl's family to *enter into negotiations* for the conclusion of a customary marriage”.² If a man abducts a girl but fails to offer marriage, or if he does offer marriage but is deemed by the girl's guardian to be unacceptable as a suitor, a fine of one beast (*thwala* beast) is payable to the girl's guardian.³

¹ South African Law Reform Commission (2014)

² Mwambene & Sloth-Nielsen (2011)

³ Mwambene & Sloth-Nielsen (2011)

It is also important to note that the conventional process of *ukuthwala* does not entail the seduction of the girl. As soon as a girl has been *thwala'd* (i.e. "abducted"), the suitor is required to report the *thwala* to his family head. The girl is then left in the care of the women in the suitor's family's home and a report is sent to the girl's guardian. A man who seduces a *thwala'd* girl is required to pay a seduction beast, in addition to the number of lobolo cattle agreed upon. If no marriage is proposed after the abduction and the girl was seduced, the seduction beast is paid in addition to the *thwala* beast (see previous paragraph).⁴

Ukuthwala has been practiced for the following reasons:

- To force the father of the girl to give his consent;
- To avoid the expense of the wedding;
- To hasten matters if the woman is pregnant;
- To persuade the woman of the seriousness of the suitor's intent; and
- To avoid the need to pay an immediate lobolo where the suitor and his or her family were unable to afford the bride wealth.⁵

Despite its traditional purposes, the practice of *ukuthwala* has increasingly been abused, particularly in the province of the Eastern Cape, to increasingly involve the kidnapping, rape and forced marriage of minor girls as young as twelve years by grown men old enough to be their grandfathers.⁶ The issue of *ukuthwala* is currently being considered by the South African Government, particularly after the Department of Justice and Correctional Services' Gender Directorate requested the South African Law Reform Commission (SALRC)⁷ to investigate the practice in 2009. This request emanated from news coverage by the South African Broadcasting Commission (SABC) and eTV that included reports on the prevalence of forced marriage and sale of young girls into marriage with older men. The news coverage revealed the following:

- Girls between the ages of 12 to 15 years are subjected to *ukuthwala*;
- These girls are at times forced to marry men who are HIV positive;
- The practice of *ukuthwala* is defended as being a traditional cultural practice that allows a man to abduct a woman whom he wishes to marry, even if he has not proposed love; and
- These abductions often happen when girls are on their way to school or are fetching water or wood.⁸

⁴ Mwambene & Sloth-Nielsen (2011)

⁵ Mwambene & Sloth-Nielsen (2011)

⁶ Department of Justice and Constitutional Development (2010)

⁷ The SALRC was established by the South African Law Reform Commission Act (No. 19 of 1973). The Commission is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis. Amongst others, it does research with reference to all branches of the law of South Africa in order to make recommendations for the development, improvement, modernization or reform thereof, including (a) the repeal of obsolete or unnecessary provisions; (b) the removal of anomalies; (c) bringing about uniformity in the law in force in various parts of South Africa (Department of Justice and Constitutional Development, 2009).

⁸ South African Law Reform Commission (2014)

The SALRC (2014), in its subsequent investigative discussion paper published in 2014 entitled *The Practice of Ukuthwala*, found that there is no accurate statistical data regarding the prevalence of *ukuthwala* in South Africa. According to the SALRC (2014), the practice remains elusive and the perpetrators manage to remain anonymous. The SALRC (2014) also found that the KwaZulu-Natal and the Eastern Cape provinces were hit the hardest, and that that *ukuthwala* frequently occurs during the times when men, mainly workers in the big cities of South Africa, visit their rural homes during major holidays such as the festive season, Easter long weekends and school holidays. Most cases coincide with violence.⁹

1.1 Rationale behind resurgence of *ukuthwala*

The following reasons have been identified behind the resurgence of *ukuthwala*:

- **Poverty** – May parents or guardians that are suffering economically often orchestrate an abduction as they are tempted by the lobola offered by the prospective husband.
- **Cure for HIV** – There is a belief that having sexual intercourse with a virgin cures HIV/AIDS infection.
- **Gender stereotypes** – Some men regard women as subordinate to men.¹⁰

1.2 Impact of *ukuthwala*

The impact of *ukuthwala* is vast, especially since it causes an abrupt end to a girl's childhood.

- **Health** – Victims of *ukuthwala* are often exposed to rape and teenage pregnancy, which in turn has serious health implications like HIV, other sexually transmitted diseases and pregnancy related complications such as infant mortality and maternal mortality.
- **Human development** – Since the girls are removed from school, they are deprived of education opportunities. The social development of these girls are also stunted as they skip crucial development phases.
- **Gender equality** – Early marriage is a symptom of and exacerbates gender inequality. In most of the documented cases, young girls are forced to marry men old enough to be their fathers or grandfathers.
- **Cycle of poverty** – *Ukuthwala* deprives girls from education and development opportunities, and most victims of *ukuthwala* come from poor families. These girls' lack of education and underdevelopment due to *ukuthwala* deepen their poverty and perpetuate the cycle of poverty as, in many instances, their children born into poverty tend to be poor as well.
- **Development** – The development of the broader community suffers when girl children's development is undermined, especially in areas where women and girls constitute the majority of the population.¹¹

⁹ South African Law Reform Commission (2014)

¹⁰ South African Law Reform Commission (2014)

¹¹ Department of Justice and Constitutional Development (2010)

2. LEGISLATIVE FRAMEWORK

South Africa has the following legislative framework related to child marriages:

2.1 International Obligations

South Africa is party to the following international instruments, which compels the country to by international law to protect and prevent children from the harmful effects associated with the practice of *ukuthwala*:

- The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962);
- International Covenant on Civil and Political Rights (1966);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979);
- African Charter on Human and Peoples Rights (1981);
- United Nations Convention on the Rights of the Child (1989);
- The African Charter on the Rights and Welfare of the Child (1990);
- Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003);
- The African Youth Charter (2006); and the
- The SADC Protocol on Gender and Development (2008).

2.2 National Legislation

The South African Department of Justice and Constitutional Development (2010) highlights the following national legislation in Table 1 as relevant to marriages and the protection of women and girls in South Africa. Table 1 also contains issues for consideration for some of the legislation, as noted by the SALRC and others in their investigations of *ukuthwala*.

Table 1: Legislation pertaining to marriages and the protection of women and girls in South Africa

KEY PROVISIONS	
ACT	ACT
<p>The Constitution of the Republic of South Africa (1996)</p>	<p>Amongst others, the South African Constitution in Section 28 states that “a child’s best interests are of paramount importance in every matter concerning the child”.¹² It further provides for all children to be protected from maltreatment and abuse.</p> <p>Issue for consideration: The Bill of Rights in Chapter 2 of South Africa’s Constitution plays an important role in determining whether conduct is contrary to public policy or unjust and unlawful. Section 31 of the Constitution guarantees the right to enjoy and practice one’s culture, but these rights may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights which, amongst other, include (a) the right to equality; (b) the right to human dignity; (c) the right to freedom and security of the person; as well as (d) the right to education. The conflicting issue that thereby arises is whether the right to practice one’s culture supersedes the rights of children. In 2002, the SALRC considered this matter during the review of the Child Care Act (No. 74 of 1983) and found that “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 [a] cultural or religious group”.¹³</p> <p>The Act seeks to promote the principles of equality, fairness, social progress, justice, human dignity and freedom. It outlaws, inter alia, discrimination based on race, gender and disability.</p>
<p>Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000)</p>	<p>This Act prohibits sex with a person without their consent. For children, the age of consent is 16, hence sex with a child under the age of 16 is statutory rape (See Sections 15 to 16). Section 17 of the Act prohibits the sexual exploitation of children by parents and others. Parents, relatives or others who collude in or aid and abet the <i>ukuthwala</i> of a girl-child therefore commit the crime of sexual exploitation of children. These parents and others can also face being charged with trafficking in persons under Section 71 of the Act.</p>
<p>Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32 of 2007)</p>	<p>This Act states that both the bride and bridegroom must consent to marriage, and the age of consent is 18 years of age. If one</p>
<p>Recognition of</p>	<p></p>

¹² See Section 28 of the Constitution.

¹³ South African Law Reform Commission (2014)

<p>Customary Marriages Act (No. 120 of 1998)</p>	<p>of the parties is under the age of 18, the child, his or her parents, as well as the Minister of Home Affairs or an officer in the public service authorised by the Minister to give permission for the marriage may permit the marriage.</p> <p>Issue for consideration: Although the Act provides for the age of consent to marriage to be 18 years of age, it does not refer to the minimum age for marriage. The same applies to the Marriage Act (No. 25 of 1961).¹⁴ However, according to the common law, the consent required for girls under 18 applies to girls aged 12 to 17. For boys, consent is required for boys aged 14 to 17¹⁵. This therefore implies that with consent, girls can get married at a younger age than boys.</p>
<p>Children's Act (No. 38 of 2005)</p>	<p>The Children's Act contains the following important provisions:</p> <ul style="list-style-type: none"> • A child is anyone below the age of 18. • In all matters affecting the child, the child's best interests and his or her involvement in decision-making are of paramount importance (Sections 9 and 10). • Children should not be subjected to social, cultural and religious practices which are detrimental to their wellbeing (Section 12(1)) (It is worth noting that non-compliance with this provision does not attract criminal liability¹⁶). • Children below the minimum age set by law for a valid marriage (12 for girls and 14 for boys)¹⁷, may not be given out in marriage or engagement (Section 12(2)(a)). • A child above the minimum age may not be given out in marriage or engagement without his or her consent (Section 12(2)(b)). Violation of this prohibition constitutes a criminal offence punishable by a fine or 10 years' imprisonment, or both, in the case of a first offender; and 20 years' imprisonment in the case of the second offender (Section 305(1)(a), (6) and (7)). • The Act, in Section 1(1), provides for forced marriage in its definition of "exploitation" and also prohibits the trafficking of children by anybody or any institution, including parents (See Section 284 and 287). • Frontline officials who come into contact with a child who is a victim of trafficking must report the matter to a social worker for investigation (Section 288). <p>Issue for consideration: The SALRC (2014) is of the view that the lack of specificity in the Children's Act has created a loophole for the abuse of the practice of <i>ukuthwala</i>. Section 12 of the Act, titled "Social, Cultural and Religious Practices" clearly regulates the following customary practices, namely male circumcision (Sections 12(8)-(10)), virginity testing (Sections 12(4)-(7)) and female genital mutilation (Section 12(3)), but does not mention the practice of <i>ukuthwala</i>. Mwabene and Sloth-Nielsen (2011) argue that this omission has not been omitted due to Parliament's lack of awareness or research of the practice, but instead that the practice in its traditional form had no constitutional ramifications that required any legislative intervention.</p>

¹⁴ South African Law Reform Commission (2014)

¹⁵ Mahery & Proudlock (2011); South African Law Reform Commission (2014)

¹⁶ South African Law Reform Commission (2014)

¹⁷ Mahery & Proudlock (2011)

	<p>Mwabene and Sloth-Nielson (2011) are also of the view that Section 12(2)(a) of the Act, which states that “children below the minimum age set by law for a valid marriage, may not be given out in marriage or engagement”, does not adequately address the traditional <i>ukuthwala</i> practice as, a child who is <i>thwala’d</i>, is not “given” or “given out”, but “taken” instead. In the view of these authors, this provision addresses early marriage and the family-to-family negotiations that may precede it, but not the kidnapping or abduction associated with <i>ukuthwala</i>.</p> <p>The SALRC (2014) and Mwabene and Sloth-Nielson (2011) agree that the Act also does not specify the minimum age of marriage in the above provision. The Children’s Institute (2011) states that in terms of common law, a child cannot get married below the age of puberty (12 years of age for girls and 14 years for boys). The fact that the minimum age for marriage is not determined in statutory law (i.e. in written law passed by Parliament), leaves the provision open to interpretation, especially in terms of “unwritten” customary law.¹⁸</p>
<p>Prevention and Combating of Trafficking in Persons Act (No. of 2013)</p>	<p>This Act, in Section 4(b), states that any person who concludes a forced marriage with another person within or across the borders of South Africa, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.</p>
<p>KwaZulu Act on the Code of Zulu Law (No. 16 of 1985)</p>	<p>In KwaZulu-Natal, the KwaZulu Act on the Code of Zulu Law (No. 16 of 1985) and the Natal Code of Zulu Law (Proclamation R151 1987) (henceforth, the Codes) are still in force and therefore continue to regulate customary and cognate unions.¹⁹ The Codes require the indentured wife, irrespective of her age, to publicly declare during the wedding ceremony that she is getting married out of her own free will and consent (See Section 38(1)). The Codes also state that, should the woman declare her dissent or appear unwilling to proceed with the intended marriage, the official must stop the proceedings immediately. It is a criminal offence for any person to coerce any girls or women to enter into a marriage or cognate union against her will. The Codes require all customary marriages to be registered, although failure to register a customary marriage does not affect its validity (See Section 45).</p>

It is worth noting that South Africa’s public spending since 1994 have vastly improved the welfare of many children. In addition, the South African Government prioritises the well-being of children throughout its National Development Plan (NDP) 2030, recognising that the advancement of children’s rights is critical to the country’s development. However, despite South Africa’s progressive legislation and

¹⁸ Mwabene & Sloth-Nielson (2011)

¹⁹ South African Law Reform Commission (2014)

budgetary commitment to child protection, the implementation of this legislation remains a challenge – thereby hindering the realisation of an effective child protection system.²⁰ The contributing factors to this challenge include the following: child protection laws were developed separately and therefore do not speak to each other or contradict one another (for instance, variation in reporting requirements for each Act, or the lack of standardised definitions of child abuse), and there is little clarity about how the numerous child protection-related policies, strategies and programmes which are spread across government departments articulate with one another. While the Department of Social

²⁰ UNICEF South Africa (2013)

Development (DSD) is the lead department for the child protection system, others – such as the departments of Health, Basic Education, and Justice and Correctional Services – also provide services to children and families which directly influence their protection. The quality of co-ordination and co-operation between the child protection and other systems is therefore central for effectiveness.²¹

3. THE WAY FORWARD

Following the publication of the SALRC (2014) investigative discussion paper on *The Practice of Ukuthwala*, comments on the paper was invited until 31 October 2014. After the closing date, the SALRC conducted workshops on the discussion paper in the 9 provinces to engage with communities on the matter, the last consultation being held in January 2015. After engaging with all of the inputs received, the SALRC will determine whether a Bill or Amendment Bill to legislate the practice of *ukuthwala* will be drafted. All the inputs received will be submitted in a report to the Minister of Justice and Correctional Services.²² Should any legislative proposal be drafted, the Department of Justice and Correctional Services will submit this to Parliament for consideration and passing.

In *The Practice of Ukuthwala* discussion paper, the SALRC proposed the enactment of new legislation for the following reasons:

- It would offer an opportunity to make an unequivocal statement against forced marriages;
- It would consolidate the applicable principles in one instrument; and
- It would send a powerful symbolic signal in defence of women's rights.

In its assessment, the SALRC has found that, “although the current law addresses a number of the abhorrent aspects of contemporary abuses of *ukuthwala*, it appears that these laws do not address such abuses satisfactorily”. The SALRC therefore recommends that a criminal law should be created that would:

- Define the concepts of “forced marriage”, “child marriage”, and *ukuthwala* in all its manifestations;
- Criminalise the conduct of forcing someone into a marriage without his or her free and full consent;
- Criminalise the conduct of people who aid and abet the contracting such marriages;
- Criminalise the conduct of perpetrators even if the marriage did not take place; and
- Contain an aggravated offence (i.e. serious offences that are specifically defined in the legislative proposal developed) for conduct in relation to a person under the age of 18 years.

²¹ Chames & Lomofsky (2014)

²² Modiba (2015)

To strengthen any new legislative proposals, the SALRC also recommended amending some of the various key Acts that already exists, including the Recognition of Customary Marriages Act and the Children's Act. These amendments would insert provisions that specifically addresses some of the effects of the current abuses of *ukuthwala*.²³

Finally, the SALRC also proposed non-legislative measures in addition to the above, including education, training, and awareness-raising campaigns with all sectors of society.²⁴

4. RESPONSES BY THE SOUTH AFRICAN PARLIAMENT

Thus far, the South African Parliament has undertaken numerous initiatives in engaging with the practice of *ukuthwala*, as well as the challenges of violence against women and children. Various committees of the National Assembly (NA) and the National Council of Provinces (NCOP), including the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women, the Portfolio Committee on Cooperative Governance and Traditional Affairs (NA), the Portfolio Committee on Justice and Correctional Services (NA), the Women in The Presidency Committee (NA), the Select Committee on Women, Children and Persons with Disabilities (NCOP), the Select Committee on Education (NCOP) and the Select Committee on Social Services (NCOP) have engaged with these issues over the past 20 years. During the course of the Fourth Parliament, the Multi-Party Women's Caucus also sought to address the issue of *ukuthwala*. To date however, no legislation on the matter has been passed by Parliament.

As the legislative authority of South Africa, Parliament will have a very important role to play subsequent to the Department of Justice and Correctional Services' envisioned submission of legislative proposals to Parliament of enactment. Amongst others, this would entail rigorous engagement with the existing as well as newly proposed legislative provisions, whilst providing a platform for all interested parties and sectors of society to raise their views and concerns around the issue of *ukuthwala* – as per Parliament's constitutional mandate of providing a platform for the public consideration of issues. At this stage however, the South African Parliament is unable to report on when the submission of any legislative proposals on *ukuthwala* will transpire.

The South African National Gender Machinery (NGM) comprised of the Department of Women in the Presidency, the Portfolio Committee on Women in Parliament, the Commission on Gender Equality (an independent statutory body) and civil society organisations, all have a critical role to play in monitoring *ukuthwala* and Government's attempts to both address and put preventative measures in place.

²³ South African Law Reform Commission (2014)

²⁴ South African Law Reform Commission (2014)

Bibliography

Department of Justice and Constitutional Development, 2009. *South African Law Reform Commission: Objects, Constitution and Functioning*, s.l.: s.n.

Department of Justice and Constitutional Development, 2010. *Ukuthwala: Let's Stop Stolen Childhoods*. s.l.: Gender Directorate.

Mahery, P. & Proudlock, P., 2011. *Legal guide to age thresholds for children and young people*. [Online] Available at: <http://www.ci.org.za/depts/ci/pubs/pdf/resources/guides/Ages%20Guide%20April%202011%20e-version.pdf> [Accessed 09 01 2015].

Modiba, M., 2015. *Project 138: The Practice of Ukuthwala*, s.l.: s.n.

Mwambene, L. & Sloth-Nielsen, J., 2011. Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act. *African Human Rights Law Journal*, Volume 11.

Republic of South Africa, 1985. *KwaZulu Act on the Code of Zulu Law*. s.l.:s.n.

Republic of South Africa, 1996. *The Constitution of the Republic of South Africa*. Pretoria: Government Printer.

Republic of South Africa, 1998. *Recognition of Customary Marriages Act (No. 120 of 1998)*. Pretoria: Government Printer.

Republic of South Africa, 2005. *Children's Act (No. 38 of 2005)*. Pretoria: Government Printer.

Republic of South Africa, 2007. *Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32 of 2007)*. Pretoria: Government Printer.

Republic of South Africa, 2013. *Prevention and Combating of Trafficking in Persons Act*. Pretoria: Government Printer.

South African Law Reform Commission, 2014. *Project 138: The Practice of Ukuthwala. Discussion Paper 132*. s.l.:South African Law Reform Commission.

