

Benign accommodation? *Ukuthwala*, ‘forced marriage’ and the South African Children’s Act

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Summary

In this article, the authors evaluate the implications of the Children’s Act 38 of 2005 for ukuthwala. Ukuthwala is a practice whereby, as a preliminary procedure to a customary marriage, a young man forcibly takes a girl to his home. In recent times, the practice has taken on other dimensions, including very young girls being married to older men and charges of abduction being laid. Questions arise relating to the impact of constitutional principles upon this customary law and practice. It is suggested that, instead of adopting an a priori prohibitionist stance towards customs that seem to violate human rights norms, benign accommodation that promotes the positive aspects of culture should be sought. This approach leads to a conclusion that South African law should recognise those forms of ukuthwala where the requirement of the consent of the ‘bride’ is met. The implications of the prohibition on social and cultural practices detrimental to child well-being in the Children’s Act 38 of 2005 are framed in this context.

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1 Introduction

The practice of *ukuthwala* in South Africa has received negative publicity recently, with numerous complaints being recorded. In the first and second quarter of 2009, the media reported that ‘more than 20 Eastern Cape girls are forced to drop out of school every month to follow the traditional custom of *ukuthwala* (forced marriage)’.¹ Girls as young as 12 years are forced to marry older men, in some cases with the consent of their parents or guardians. Commenting on the matter, the Chairperson of the Congress of Traditional Leaders of South Africa (CONTRALESA), Chief Mwelo Nokonyana, said *ukuthwala* was ‘an old custom that was now being wrongly practised in several parts of the Eastern Transkei’.² Dr Nokuzola Mdende of the Camagwini Institute also stated that ‘abducting a girl of 12 or 13 is not the cultural practice we know. This is not *ukuthwala*, this is child abuse. At 12, the child is not ready to be a wife.’³ At the SA Law Reform Commission Roundtable Discussion on the Practice of *Ukuthwala*⁴ it was observed that *ukuthwala*, like many other customary institutions, has changed radically. The practice has now taken on other dimensions, including young girls being married forcibly to older men, relatives of the girl kidnapping and taking the girls themselves as wives, and abductions not being reported to the traditional authorities.⁵

These changed practices around *ukuthwala* potentially increase the risk of children’s rights violations. The aim of this article is to evaluate the implications of the Children’s Act 38 of 2005 (Act) for *ukuthwala*. In the second part of this article, we trace the history of *ukuthwala*, the traditional reasons for its use, and different forms of *ukuthwala*. We further discuss the procedure of *ukuthwala* and the legal position of the practice under customary law. In the third part, we contextualise debates around *ukuthwala* within the constitutional framework and against the backdrop of the international rights to culture and to equality. In the fourth part, we proceed by looking at the framework for the consideration of culture and custom in the Children’s Act 38 of 2005 before discussing the implications of the Act for *ukuthwala*. Concluding that *ukuthwala* is not equivalent to a ‘forced marriage’, the article

¹ *The Herald* 6 April 2009; *Sunday Times* 31 May 2009.

² *The Herald* (n 1 above). See, too, ‘The community of KwaCele, near Lusikisiki, has promised to end the practice of *ukuthwala*’ *Media 24.com* 24 March 2011.

³ *The Herald* (n 1 above).

⁴ This was convened on 30 November 2009 as part of its preliminary investigation to determine whether the proposal should be included in the Commission’s law reform programme and in an effort to gather information on the subject. Dr Mwambene attended this forum and short notes of the papers presented are on file.

⁵ D Ntsebeza ‘Background to the investigation of *ukuthwala*’ presented at the SA Law Reform Commission (n 4 above).

proposes that the positive attributes of the practice be recognised and advocates against blanket criminalisation.

2 *Ukuthwala*

2.1 What is *ukuthwala*?

In South Africa, the custom originated from the Xhosas.⁶ However, although the custom is predominantly practised among Xhosa-speaking tribes,⁷ the practice has expanded into different ethnic groups. For example, the Mpondo clan has adopted *ukuthwala* from Xhosa clans, such as the Mfengus.⁸ Young Sotho men, through contact with other tribes, have also adopted the practice which was otherwise foreign to them.⁹ *Ukuthwala* in South Africa enjoys popular support in the areas where it is still practised.¹⁰ According to a newspaper report, one chief (a woman) in the region where *ukuthwala* is practised said that the young girls who escape from the houses where they are detained whilst awaiting marriage were 'embarrassing our village'.¹¹

The word *ukuthwala* means 'to carry'.¹² It is a culturally-legitimated abduction of a woman whereby, preliminary to a customary marriage,¹³ a young man will forcibly take a girl to his home.¹⁴ Some authors have described *ukuthwala* as the act of 'stealing the bride'.¹⁵ *Ukuthwala* has also been described as a mock abduction or irregular proposal¹⁶ aimed at achieving a customary marriage.¹⁷ From these definitions, we see that *ukuthwala* is in itself not a customary marriage or an engagement.

⁶ M Ngcobo Presentation to the Portfolio Committee on the role of the Department of Social Development on *ukuthwala*, 15 September 2009 <http://www.pmg.org.za/files/docs/090915ukuthwala.ppt> (accessed 9 June 2010).

⁷ JC Bekker *et al* *Introduction to legal pluralism in South Africa* (2006) 31.

⁸ Ngcobo (n 6 above).

⁹ JC Bekker *Customary law in Southern Africa* (1989) 98.

¹⁰ The prevalence of the custom nowadays can be depicted from what DS Koyana & JC Bekker 'The indomitable *ukuthwala* custom' (2007) *De Jure* 139 note: 'From enquiries that we made and on the basis of our own observations we are assured that the *thwala* custom is still widely practised in Nguni communities.'

¹¹ This was a response to a report in *Sunday Times* 31 May 2009 3 that the current practice of *ukuthwala* also takes the form of detaining these girls against their will in guarded huts and forcing them to have sex with their 'husbands'. They allegedly get beaten and humiliated should they try to escape.

¹² DS Koyana *Customary law in a changing society* (1980) 1.

¹³ A customary marriage is a relationship which concerns not only the husband and wife, but also the family groups to which they belonged before the marriage. It is also defined as a marriage which is validly concluded by a *lobolo* agreement.

¹⁴ Koyana (n 12 above).

¹⁵ E Curran & E Bonthuys 'Customary law and domestic violence in rural South African communities' (2005) 21 *South African Journal on Human Rights* 607 615.

¹⁶ It should be noted that 'irregular' did not mean 'unlawful'.

¹⁷ TW Bennett *Customary law in South Africa* (2004) 212.

The main aim of *ukuthwala* is to force the girl's family to *enter into negotiations* for the conclusion of a customary marriage.¹⁸

The procedure for *ukuthwala* is as follows: The intending bridegroom, with the help of one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day.¹⁹ They will then 'forcibly' take her to the young man's home. Sometimes the girl is caught unawares, but in many instances she is caught according to a prior plan and agreement. In either case, the girl will put up a show of resistance to suggest to onlookers that it is against her will when, in fact, it is seldom so. As Bekker explains: 'The girl, to appear unwilling and to preserve her maidenly dignity, will usually put up strenuous but pretended resistance, for, more often than not, she is a willing party.'²⁰ Once the girl has been taken to the man's village, her guardian or his messenger will then follow up on the same day or the next day and possibly take her back if one or more cattle are not handed to him as an earnest promise for a future marriage.²¹ Consequently, if the guardian does not follow her up to take her back, tacit consent to the marriage at customary law can be assumed.

After the girl has been carried to the man's family hearth, negotiations for *lobolo* between the families of the bride and the groom would then follow. If the families cannot reach an agreement, the girl will return to her parental home, while the man's family will be liable for damages.²²

As noted, the main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage. It follows, therefore, that 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 is payable to the girl's guardian²³ who, with his daughter, is said to have been insulted by the *thwala* without a consequent offer of a marriage, or having been *thwala'd* by an undesirable suitor.²⁴

¹⁸ Bekker *et al* (n 7 above) 31 (our emphasis). It should, however, be observed that *ukuthwala* can be distinguished from the common law abduction. At common law, the crime of abduction has been described as the unlawful removal of a minor from the control of her guardian with the intention of violating the guardian's *potestas* and of enabling somebody to marry her or have sexual intercourse with her. On the other hand, *ukuthwala* is lawful in the society that designed it; there is no *ukuthwala* of males; and lastly, the purpose of *ukuthwala* is to negotiate a marriage, not conclude it, and sexual intercourse is customarily not the intention.

¹⁹ Bekker (n 9 above) 98; Koyana & Bekker (n 10 above) 139.

²⁰ Bekker (n 9 above) 98.

²¹ As above.

²² Curran & Bonthuys (n 15 above) 615.

²³ Mostly, among the *Pondo*, the *Fengu* and the *Bhaca*, and possibly other Cape communities.

²⁴ Bekker (n 9 above) 98.

It is important to note that during the process of *ukuthwala*, it is contrary to custom to seduce a girl.²⁵ By custom, the suitor, after forcibly taking the girl to his home village, is required to report the *thwala* to his family head. The family head thereupon gives the girl into the care of the women of his family home, and sends a report 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 and in addition to the *thwala* beast where no marriage has been proposed.²⁶ Other safeguards that were put in place for the protection of the *thwala* and the girl involved were that the parents of the girl were immediately notified after the *thwala* had occurred; if the *thwala* had not worked, a beast was supposed to be paid; and finally if a girl fell pregnant consequent upon her seduction, then further additional penalties were also supposed to be paid.²⁷

Numerous reasons exist for the practice of *ukuthwala*, some of which are arguably cogent and weighty. These include to force the father of the girl to give his consent;²⁸ 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. From these reasons, it is apparent that *uku-thwala* can serve important cultural purposes in those South African communities who live their lives according to cultural norms.

Where the *thwala* takes place with the foreknowledge and consent of the girl, she is exercising her right to participate and express a choice. (This will be addressed more fully in the conclusions.) However, equally, there is good reason to conclude that, in some cases, the girl or the unmarried woman is *thwala*'d without her consent. This provides the link to forced marriage, which then calls into play constitutional and human rights standards. In addition, in so far as the girl who is *thwala*'d may be aged below 18, issues related to child marriage and early marriage arise, which in turn calls for a consideration of some provisions of the Children's Act 38 of 2005.

²⁵ As above.

²⁶ Koyana & Bekker (n 10 above) 141.

²⁷ F Mdumbe 'International and domestic legal frameworks impacting on *ukuthwala*' presented at the SA Law Reform Commission Roundtable (n 4 above).

²⁸ It should be observed that before the Recognition of Customary Marriages Act 1998, consent of the girl's father was essential to the validity of the customary marriage. It is, moreover, argued that this requirement may still be necessary because sec 3(b) of the Recognition of Customary Marriages Act provides that 'the marriage must be negotiated ... in accordance with customary law'. Unless the last phrase is read as referring *only* to ceremonial aspects of customary law, and the payment of *lobola*, the requirement of parental consent (as at customary law) is also a requirement for a valid customary marriage under the Act. See further n 37 below.

2.2 Forms of *ukuthwala*

It is generally accepted that the traditional custom of *ukuthwala* is often carried out with the knowledge and consent of the girl or her guardian. This obviously suggests that *ukuthwala* is not necessarily effected against her will, or that of her guardian.²⁹ In the past, courts have held that *ukuthwala* should not be used as a cloak for forcing unwelcome attentions on a patently unwilling girl.³⁰ Courts have also held that abduction by way of *ukuthwala* is unlawful.³¹ On the other hand, courts have suggested that if there is a belief by the abductor that the custom is lawful and that the parents or guardians consented to the taking, it would not be abduction because abduction is a crime against parental authority.³²

We briefly look in this section at what we propose to be three forms of *ukuthwala*,³³ first, the practice that occurs where a girl is aware of the intended abduction and there is collusion between the parties,³⁴ that is, where the girl or woman being abducted conspires with her suitor. The 'force' used in the act of abduction is therefore for the sake of appearances only. For that reason, *ukuthwala* in this model could be suggested to be equivalent to elopement.³⁵ In this type of *ukuthwala*, the girl gives her consent.³⁶ The issue of consent is additionally important because, as observed earlier, *ukuthwala* is a preliminary procedure to a customary marriage and not a marriage in itself. The consent to *ukuthwala* presumably carries through the negotiations, to provide the basis for the validity of the (customary) marriage which is eventually concluded. If after the *ukuthwala* has taken place, the girl's parents refuse to give their consent, there cannot be a valid ensuing customary marriage.³⁷

²⁹ Curran & Bonthuys (n 15 above) 615.

³⁰ *Nkupeni v Numunguny* 1938 NAC (C&O) 77, as cited by Bennett (n 17 above) 213.

³¹ *R v Swartbooi* 1916 EDL 170; *R v Sita* 1954 4 SA 20 (E), as cited by D McQuoid-Mason 'The practice of *ukuthwala*: The Constitution and the Criminal Offences and Related Matters Act' (2009) 30 *Obiter* 716.

³² *R v Sita* (n 31 above). In the constitutional era, however, the common law crime of abduction might be unconstitutionally suspect, in that it focuses on a violation of parental authority and ignores the views and wishes of the child.

³³ Bekker *et al* (n 7 above) 31.

³⁴ LAWSA *Indigenous law* 32 (2009) para 89.

³⁵ As above.

³⁶ M Herbst & W Du Plessis 'Customary law v common law marriages: A hybrid approach in South Africa' (2008) 12 *Electronic Journal of Comparative Law* 6.

³⁷ The 1998 Recognition of Customary Marriages Act does not make provision for *ukuthwala*. It has, however, put beyond doubt the necessity for the consent of the bride to a customary marriage. In terms of sec 3(1) of the Recognition of Customary Marriages Act, the consent of both spouses is necessary for the validity of a customary marriage. (The consent of the guardian is discussed in n 28 above).

Second, *ukuthwala* also takes the form of where families would agree on the union, but the girl is unaware of such an agreement.³⁸ It has been observed that this type of *ukuthwala* often happened in cases where the girl might not otherwise agree to her parent's choice. It also happens in situations where a girl happens to be of high rank but, for various reasons, attracts no suitors.³⁹ After the girl has been *thwala'd* and both families' desire and consent to the union established, the girl is watched until she gets used to the idea of the marriage.⁴⁰ Consent, as understood in Western terms (that is, the consent of the bride and bridegroom only) might be more difficult to argue here.

The third version is where the custom occurs against the will of the bride. In this form of *ukuthwala*, there is no initial consent from either the girl or her parents or guardian. Under this form, a girl is taken to the family home of the young man by force. Emissaries are then sent to her family to open marriage negotiations. The family of the girl may refuse negotiations, in which case a beast is payable⁴¹ and the girl is taken back to her family. In addition, in its most abusive form, the forced abduction can expose the girl to rape by her 'husband' and to actual or threatened violence in order to keep her in the relationship.⁴² In this form of *ukuthwala*, we see that the bride is unwilling and therefore the intended marriage would, arguably, be a forced marriage. Other human rights violations are obvious, including the infringement of freedom and security of the person, violation of bodily integrity, dignity and various provisions which prohibit forms of slavery, to name a few.

As a general proposition, it can be concluded that some forms of *ukuthwala* do violate women's and children's rights. At the same time, there are also some legitimate cultural goals attendant on the practice and which arguably do not overstep the mark. The issue is how to address the objectionable forms of the practice of *ukuthwala*, for instance, through criminalisation or prohibition, without losing the culturally-beneficial aspects of the practice. On the one hand, there is the abiding interest in improving the position of women and children affected by traditional customary practices which can be harmful or detrimental, by proscribing them altogether. However, on the other hand, for many supporters of *ukuthwala*, the practice serves to promote legitimate cultural goals, at least one of which is to force the father of the girl to start marriage negotiations. For this group, criminalisation or prohibition would abrogate a cultural practice with considerable legitimacy, and impair the right to culture.

³⁸ Bekker *et al* (n 7 above) 31.

³⁹ Bennett (n 17 above) 212.

⁴⁰ K Woods 'Contextualising group rape in post-apartheid South Africa' (2005) 7 *Culture, Health and Sexuality* 303 313.

⁴¹ LAWSA (n 34 above) para 89; Bekker (n 9 above) 98.

⁴² Curran & Bonthuys (n 15 above) 616.

3 Contextualising *ukuthwala* within constitutional and international human rights paradigms

From the above discussion, several conclusions with constitutional implications can be drawn from the practice of *ukuthwala*. First, it is clear that only unmarried women and girls, and not unmarried men and boys, are subjected to the practice of *ukuthwala*. As a customary practice applicable only to girls, gender equality is called into play. Second, the discussion has also shown that with some forms of *ukuthwala*, girls are *thwala'd* without their consent. This violates their bodily integrity and freedom, security of the person, their right to make choices or, for children, their right to participate in decisions made about them. Third, the reported incidents of the current practice of *ukuthwala* show that the practice has taken the form of a 'forced marriage' and is no longer merely a preliminary process undertaken in the lead-up to a customary marriage. Fourth, we see that current trends related to *ukuthwala* may lead to 'child marriages'. Fifth, reports show that *ukuthwala* is proving to be a serious contributing factor leading to violence against women and children.

3.1 *Ukuthwala* and the right to equality

Both the South African Constitution, in section 9, as well as international human rights standards prohibit discrimination based on sex and recognise the equality of both sexes.⁴³ The significance of this principle where women's rights are concerned cannot be overemphasised. Indeed, as Cook points out, in the international sphere at more or less the same time as the South African Constitution was adopted:⁴⁴

The reasons for this general failure to enforce women's rights are complex and vary from country to country. They include lack of understanding of the systemic nature of the subordination of women, failure to recognise the need to characterise the subordination as a human rights violation, and lack of state practice to condemn discrimination against women.

To this end, she observes that the legal obligation to eliminate all forms of discrimination against women is a fundamental tenet of international human rights law.⁴⁵

In South Africa, the Constitutional Court has consistently affirmed the fact that the principle of equality and non-discrimination is recognised, and its value conceded even in the contest of competing claims

⁴³ Art 1 UN Charter; art 2 Universal Declaration; art 2 ICESCR; art 2(1) ICCPR; art 2 CEDAW; arts 2 & 3 African Charter.

⁴⁴ RJ Cook 'Women's international human rights law: The way forward' in RJ Cook (ed) *Human rights of women: National and international perspectives* (1994) 3.

⁴⁵ Cook (n 44 above). See, eg, art 18 of the African Charter; art 1 of CEDAW; and art 24(3) of CRC.

of the right to equality and the right to culture. In the *Bhe* case,⁴⁶ for example, Langa DCJ noted:

The rights to equality ... are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

At the point of entering into a marriage, several international human rights standards require that there should be equality of both spouses. For example, article 16(1) of the Universal Declaration of Human Rights, 1948 (Universal Declaration) provides that '[m]en and women of full age ... have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.' Article 16(2) of the Universal Declaration provides that '[m]arriage shall be entered into only with the free and full consent of the intending parties'. In addition to the Universal Declaration, article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964, provides that '[n]o marriage shall be legally entered into without the full and free consent of both parties'.

Furthermore, article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides:

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 a basis of equality of men and women:

- (a) the same right to enter into marriage;
- (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent.

CEDAW applies to girls under 18 years of age. Article 16(2) of CEDAW provides that the betrothal and marriage of a child shall have no legal effect and that all necessary action, including legislative action, shall be taken by states to specify a minimum age of marriage, and to make registration of marriage in an official registry compulsory. In addition, in 1994, a General Recommendation on Equality and Family Relations, the CEDAW Committee recommended that the minimum age for marriage for both boys and girls should be 18.⁴⁷

At the regional level, the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁴⁸ sets the framework to eliminate gender discriminatory practices. The African Children's Charter prohibits discrimination against children in any form and guarantees all children the right to enjoy the rights and freedoms recognised in the Children's Charter 'irrespective of the child's or his or her parents' or legal guardians' race, ethnic group, colour, sex ... birth or other status'.

⁴⁶ *Bhe & Others v Magistrate Khayelitsha (Commissioner for Gender Equality as Amicus Curiae)* 2005 1 BCLR 1 (CC); 2005 1 SA 580 (CC).

⁴⁷ General Recommendation 21 (13th session, 1994) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 20 August 2010).

⁴⁸ South Africa became a party to the African Children's Charter on 7 January 2000.

Member states to the African Children's Charter have the obligation to adopt legislative or other measures as may be necessary to give effect to the provisions of the African Children's Charter.⁴⁹

Further, the African Children's Charter defines a child as 'every human being below the age of 18 years'.⁵⁰ This definition highlights the significance of addressing discrimination in African societies in a number of ways.⁵¹ First, according to this definition, the African Children's Charter applies to every child under the age of 18 in ratifying countries, irrespective of sex. Secondly, the African Children's Charter unequivocally prohibits child marriages by boys and girls under the age of 18. To that end, Mezmur observes that the African Children's Charter provides greater protection than the Convention on the Rights of the Child (CRC), and avoids any discrepancy between the minimum age of marriage for boys and girls, which is consistently lower for girls in many countries.⁵²

Further protection of women and children affected by discriminatory cultural practices in Africa is provided under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁵³ The Women's Protocol provides that state parties shall enact appropriate national legislative measures to guarantee, *inter alia*, free and full consent of both parties to a marriage.⁵⁴ The Women's Protocol has also set the minimum age for girls and boys contemplating a marriage at 18.⁵⁵

From the above discussion, we see that the practice of *ukuthwala* has a strong potential to violate international human rights standards, especially where a forced marriage is the result of such practice. Equality norms make it clear that men and women are to have equal rights at the point of entry into marriage. Some forms of *ukuthwala* are clearly in violation of this right. Moreover, the right to free and full consent to a marriage, as recognised in international human rights standards,

⁴⁹ Art 1(1) African Children's Charter.

⁵⁰ Art 2 African Children's Charter.

⁵¹ This significance is appreciated when the definition of a child under the African Children's Charter is contrasted with the definition of a child provided by CRC. CRC defines a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'. Marriage would typically result in majority status being attained.

⁵² B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law* 20.

⁵³ The Protocol, which entered into force on 25 November 2005, is the first specialised gender-neutral instrument for the protection of women's rights in Africa. It was adopted by the Assembly of the Heads of State and Government of the African Union at its 2nd ordinary session, on 11th July 2003 in Maputo, Mozambique. It was promulgated out of concern by the AU that women in Africa continue to be victims of discrimination and harmful practices (see Preamble to the African Women's Protocol).

⁵⁴ Art 6(a) African Women's Protocol.

⁵⁵ Art 6(b) African Women's Protocol.

cannot be achieved when one of the parties involved is not sufficiently mature to make an informed decision. This position applies to cases of *ukuthwala* where, as reported, girls as young as 12 years are abducted. Furthermore, where consent is obtained through force, this is also a clear violation of the international standards that require that there should be free and full consent from both parties.⁵⁶

3.2 *Ukuthwala* and the right to culture

South Africa's Constitution expressly recognises the practice of one's culture, provided that persons exercising cultural rights may not do so in a manner that is inconsistent with any other provisions of the Bill of Rights.⁵⁷ Based on the constitutional recognition of the right to culture, proponents of *ukuthwala* would argue that everyone, including the state, is prohibited from interfering with their right to practise *ukuthwala*. As argued by Bennett:⁵⁸

The recognition of culturally-defined systems of law has become a constitutional right, vesting in groups and individuals, with the implication that the state has a duty to allow people to participate in the culture of their choice, including a duty to uphold the institutions on which that culture is based.

Devenish⁵⁹ has also argued that 'the right to practise one's culture allows members of communities to freely engage in the practice of their culture without intervention from the state or any other source'.

Sections 30 and 31 of the Constitution appear to be similar in wording to several international standards. An obvious example is article 27 of the Universal Declaration.⁶⁰ Other examples of the recognition of the right to culture in international law are article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 27 of the International Convention on Civil and Political Rights (ICCPR) and article 29 of CRC. At the regional level, the rights to culture were first declared in article 17 of the African Charter on Human and Peoples' Rights (African Charter).⁶¹

⁵⁶ L Mwambene 'The impact of the Bill of Rights on African customary family laws: A study of women's rights in Malawi with some reference to developments in South Africa' unpublished LLD thesis, University of the Western Cape, 2009 165.

⁵⁷ Secs 30 & 31 Constitution of the Republic of South Africa 1996.

⁵⁸ TW Bennett 'Conflict of laws' in Bekker *et al* (n 7 above) 18.

⁵⁹ G Devenish *A commentary on the South African Bill of Rights* (1999) 421.

⁶⁰ Art 27 of the Universal Declaration states: '(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The right to culture is also an integral part of other fundamental rights enunciated in the Universal Declaration, such as freedom of conscience, expression and religion.

⁶¹ South Africa ratified this treaty in July 1996.

From the above discussion, we see that both international human rights law and the South African Constitution recognise the right to culture. This notwithstanding, cultural rights are not regarded as providing a basis on which other protections may be abridged.⁶² Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.⁶³ Indeed, it is suggested that culture is protected so that it may enhance human rights development and, in turn, not lead to the derogation or diminishing of rights.⁶⁴

International treaty law exemplifies the approach that places the preservation of human rights as the most fundamental universal principle, even when human rights protection challenges cultural practices. Article 5 of CEDAW requires state parties to take all appropriate measures to⁶⁵

modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.

CRC also confronts the possibility of misuse of culture as a pretext to violate children's rights in so far as article 24(3) provides that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. Furthermore, CRC clearly places the focus on the child's best interests,⁶⁶ the child's evolving capacities,⁶⁷ the principle of non-discrimination⁶⁸ and respect for the child's evolving capacities,⁶⁹ all of which situate the focus of human rights on children and require placing children's best interests before those of potentially abusive cultural practices.

⁶² JR Levesque *Culture and family violence: Fostering change through human rights law* (2001) 95-96.

⁶³ R Cook 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women' in Cook (n 44 above) 228 234-235.

⁶⁴ J Sloth-Nielsen & B Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 330 335-336 observe that '[h]uman rights documents continually recognise that culture is an area that must be protected. However, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other. How to strike a necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.'

⁶⁵ See also art 2 of CEDAW, which requires '[s]tate parties ... by all appropriate means and without delay ... [to] undertake ... (f) ... appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

⁶⁶ Arts 3, 9, 20, 21 & 40 CRC.

⁶⁷ Arts 5, 12, 14 & 40 CRC.

⁶⁸ Art 2 & Preamble CRC.

⁶⁹ Arts 21, 28, 39, 40 & Preamble CRC.

Furthermore, at the regional level, the African Children's Charter is unequivocal with regard to the relationship between culture and children's rights. It explicitly asserts its supremacy over any custom, tradition, cultural or religious practice inconsistent with the rights and obligations guaranteed under it.⁷⁰ The African Women's Protocol also contains provisions relating to the elimination of harmful practices, including the prohibition, through legislative measures backed by sanctions, of all forms of harmful cultural practices.⁷¹ Harmful practices have been regarded as receiving 'the most' attention in the Women's Protocol.⁷²

Some scholars argue that, instead of abolishing customary laws that appear to be inimical to human rights, we should closely look at local cultures and see which aspects we can best retain to achieve the aspirations of human rights.⁷³ This approach would militate against the view that *ukuthwala* should be proscribed in its entirety.

Specifically addressing himself to this view, Ibhawoh states that⁷⁴

[i]t is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or reintegrated with national legislation to promote human rights. Such adaptation and integration must be done in a way that does not compromise the cultural integrity of peoples. In this way, the legal and policy provisions of national human rights can derive their legitimacy not only from the state authority, but also from the force of cultural traditions.

These insights may be important to the analysis of the implications of the Act for *ukuthwala* in South Africa. Thus, it may be necessary to distinguish between the practice of *ukuthwala* in forms which are inimical to human rights and may lead to human rights abuses, and those dimensions of the practice that advantage human rights, and promote the right to culture. In the light of the fact that the right to practise *ukuthwala* in South Africa continues to be asserted by people who are in opposition to change the custom, it may arguably be preferable to explore options which retain the positive features of the custom, rather

⁷⁰ Art 1(3) African Children's Charter.

⁷¹ Art 5 African Women's Protocol.

⁷² F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8 *African Human Rights Law Journal* 1 16.

⁷³ C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights', as cited by F Banda *Women, law and human rights: An African perspective* (2005) 256.

⁷⁴ B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838 839.

than advocating an abolitionist/prohibitionist stance which denies any value in the customary version of *ukuthwala*.⁷⁵

However, the idea of developing customary laws so that they are consistent with human rights comes into direct confrontation with debates about the protection of women and children against discrimination and their protection against violence. Whilst the development or adaptation of customary law is considered to be a viable approach to achieving international human rights aspirations because of the cultural legitimacy that it achieves,⁷⁶ feminist scholars and children's rights advocates alike might question whether this can be done at all without sacrificing the protection of women and children on the altar of custom.⁷⁷ In the case of *Christian Education of South Africa v Minister of Education*,⁷⁸ the Constitutional Court affirmed that the rights of members of communities that associate on the basis of language, culture and religion cannot be used to shield practices which offend the Bill of Rights.⁷⁹ In this case, it was instructive to note that, for the discussion related to the practice of *ukuthwala*, children's rights to protection from violence trumped claims based on religion. By analogy, it could be predicted that courts may not uphold the practice of *ukuthwala* if it has the mere potential of infringing other constitutional rights.

Fear of opening the door to trenchant violations of the physical security of South African women and children might blur and diminish arguments which advocate a more sensitive and nuanced treatment of the custom through which the positive aspects can be retained. We return to this in the conclusion.

⁷⁵ At the discussion forum convened by the SA Law Reform Commission (n 4 above), most people were of the view that there was nothing wrong with *ukuthwala* as it was originally practised and that, despite the recent distortions of the practice, the custom should not be outlawed.

⁷⁶ AA An-Na'im 'State responsibility under the international human rights law to change religious and customary laws' in Cook (n 44 above) 167 173-175 argues that, unless international human rights have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted, particularly at the domestic level, but also at the regional and international levels. Without such legitimacy, it will be nearly impossible to improve the status of women through the law or other agents of social change.

⁷⁷ E Grant 'Human rights, cultural diversity and customary law in South Africa' (2006) 50 *Journal of African Law* 2 reflects on the difficulties of legal pluralism in relation to the *Bhe* case: 'As the judgment shows, on one level, reconciling equality and culture is simply a matter of identifying those aspects of customary laws which offend the constitutional guarantee of equality, and striking them down. On the other level, it required the striking down of the male primogeniture rule in customary laws as incompatible with the right to gender equality. What to put in its place is a far more complicated matter. It is complicated not merely because of practical problems which preoccupied the majority of the court in *Bhe* case, but because of potentially contradictory demands of equality and the maintenance of legal dualism.'

⁷⁸ *Christian Education of South Africa v Minister of Education* 2000 4 SA 757 (SCA) 711 para 26.

⁷⁹ See also T Maseko 'The constitutionality of the state's intervention with the practice of male traditional circumcision in South Africa' (2008) *Obiter* 192.

4 Exploring the impact of the Children's Act 38 of 2005 on *ukuthwala*

4.1 Culture and religion in the Children's Act

The authors would assert that the Act is consciously sensitive to culture. A number of provisions support this claim, including both direct and indirect references to the importance of culture in child rearing and legal approaches thereto. For instance, the 'best interest of the child' principle outlined in section 7 requires consideration to be had, where relevant, to the child's 'intellectual, emotional, social and *cultural* development' (section 7(1)(h)), and mentions the need for children to maintain a connection with (*inter alia*) 'the extended family, *culture* and tradition' (section 7(1)(f)(ii)) as a consideration conducing to the child's best interests.⁸⁰

As far as placing the child in alternative care is concerned, there are various provisions emphasising the importance of culture. Foster care, for example, requires the placing of a child after consideration of a report of a designated social worker about 'the cultural, religious and linguistic background of the child' (section 186(1)(a)), and this cultural matching is reinforced further by the permissive provision to place a child from a different cultural, religious and linguistic background with foster parents whose characteristics are different to that of the child '*but only if ... there is an existing bond between that person and the child*' (section 186(2)(a)) or if no suitable person with a similar background can be found available to provide foster care to the child' (section 186(2)(b)). The Norms and Standards for Foster Care (Part 111(6)(g)) require foster care services, supervision and arrangements around such supervision to 'be sensitive to the religious, cultural and linguistic background of the child'.

In the assessment of the suitability of a prospective adoptive parent, the social workers effecting the assessment 'may take the cultural and community diversity of the adoptable child and the prospective adoptive parent into consideration' (section 231(3)), and the Regulations to the Act affirm that in an inter-country adoption process, the report on the would-be adoptive parents must include information on the applicant's ethnic, religious and cultural background (regulation 111(e)).

Additionally, culturally-appropriate values and principles surface periodically throughout the Act: The legislative provision (in section 16) for the responsibilities of children, as provided for article 31 of the African Children's Charter,⁸¹ is a case in point.

In addition to the positive way in which culture emerges as a general consideration in the Act, culture and social practice derived therefrom

⁸⁰ Our emphasis.

⁸¹ See J Sloth-Nielsen & B Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159.

form the basis of a dedicated section of the Act, namely, section 12 (titled 'social, cultural and religious practices'). The section regulates in detail two customary practices, namely, male circumcision (sections 12(8)-(10)) and virginity testing (sections 12(4)-(7)).⁸² Female genital mutilation is also prohibited (section 12(3)).

Ukuthwala, it is worth noting at the outset, is not mentioned by name as a customary practice in this section, a fact which might become relevant were the effects of the Act upon the practice to be considered. It might, for instance, be inferred that the legislature knew about the social practice as evidenced by prior writing⁸³ and research on the practice and, by choosing not to refer to *ukuthwala*, signalled that the custom did not require regulation. An *a priori* stance that the practice had no constitutional ramifications and did not necessitate legislative intervention could therefore be argued.

This does not mean that *ukuthwala* is in any way immune from future legal scrutiny. We suggest that, should the constitutional or legislative validity of the practice be put in issue, it is possible that the impact of the remainder of section 12's provisions upon *ukuthwala* as a customary practice might be called into question in so far as the practice has a bearing upon the girl child.

Additionally, it is important to place on record the strong value accorded to child participation throughout the Act. Section 10 of the Act is illustrative of this:⁸⁴

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

The fact that, in some instances, the practice of *ukuthwala* is an expression of the child's choice and constitutes an indirect expression of her views is relevant to the following discussion.

⁸² See secs 12(4), (5), (6) & (7) in respect of virginity testing, and secs 12(8), (9) & (10) in respect of male circumcision. Regulations 3-6 elaborate these provisions further. A detailed consideration is beyond the scope of this article. Suffice it to mention that the provisions on virginity testing were particularly contested during parliamentary hearings, and led to a compromise provision which sees prohibitions in place for the practice where the child to be subjected to the practice is below the age of 16 years, accompanied by the enactment of regulations prescribing how virginity testing is to be performed to comply with the Act where the child is over 16 years and furnishes her consent. One of the authors of this article was a member of the team which drafted the regulations submitted to the Department of Social Development outlining the further requirements for the practice to be conducted in conformity with the Act.

⁸³ See, eg, the prior work of Koyana & Bekker (n 10 above); Bennett (n 17 above).

⁸⁴ See also art 12 of CRC.

4.2 Section 12(1) and the overarching prohibition on detrimental cultural practices

Section 12(1) contains the overarching right of every child 'not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing'. This section, cast as a right of the child, is not hit by the offences created by section 305.⁸⁵ Hence, were *ukuthwala* to be characterised as a social practice which either in general or in a specific situation violated section 12(1) as a practice 'detrimental to the child's wellbeing', the remedy would not automatically lie in the penal sphere.⁸⁶ The potential for delictual damages remains for any infringement of rights under this section, though, as do other potential remedies for infringements such as injunctions, declaratory orders and interdicts, or preventive measures.

The debate about whether *ukuthwala* contravenes section 12(1) in any event (in the absence of any concrete sanction being attached) requires an assessment as to whether the practice is in fact a social and cultural practice which is detrimental to the child's wellbeing. Our answer to this must be context-dependent: The abduction and rape of a child without her consent fall undeniably to be outlawed as a harmful cultural practice, *albeit* that the sanctions of conventional criminal law might also be brought to bear. However, equally, we are convinced that not all forms of *ukuthwala* can be labelled as objectionable, harmful or detrimental, as outlined above in previous sections of this article. Any consideration of the implications of section 12 is speculative, as the determination as to whether the practice is detrimental will inevitably be related to the actual circumstances which are laid before the court for adjudication.

4.3 Section 12(2)(a) and early marriage

Section 12(2)(a) of the Children's Act is potentially of direct relevance to determining the legal status of *ukuthwala*. In fact, in ordinary parlance, this section would probably be described as the 'forced marriage' prohibition of the Act (as is required by the African Children's Charter, amongst other human rights documents).⁸⁷

The first part, 12(2)(a), prohibits the 'giving out' in either marriage or engagement 'of a child below the minimum age set by law for a valid marriage'. Several comments may arise here. 'Giving out' (seemingly an old-fashioned terminological rendering of the marriage pact between families) limits the usefulness of this article in accommodating some versions of *ukuthwala* in so far as the child 'victim' is concerned:

⁸⁵ Sec 305 is the overarching penalties clause of the Act.

⁸⁶ As far as contravening the Act is concerned, there may well be criminal sanctions derived from other common law or statutory offences, however.

⁸⁷ Art 21(2) of the African Children's Charter prohibiting both child marriage and betrothal.

a child who is *thwala'd*, as described above, is definitely not in any conventional sense of the word 'given', let alone 'given out'. In fact, a more suitable English rendition would be achieved by the substitution of 'given' with 'taken'!

A tentative conclusion is that this prohibition was not drafted to target *ukuthwala* as conventionally understood. It seems primarily to target *early marriage*, and the family-to-family negotiations that may precede it.

Second, there are obvious and intractable difficulties occasioned by the phrase 'of a child below the minimum age set by law for a valid marriage' in section 12(2)(a). Not the least of these problems relates to the variety of *minima* set by law for valid marriages under different legal regimes in South Africa.⁸⁸ Mention has been made of the minimum set for the recognition of a valid customary marriage — 18 years — in terms of the Recognition of Customary Marriages Act.⁸⁹ But is the minimum 'set by law' also a minimum under 'unwritten' customary law which has also been recognised as 'law' for some purposes?⁹⁰ Assuming a much lower age as the minimum under most customary systems — for instance around the age of puberty or shortly thereafter — this provision could potentially be of little practical effect in the protection of children against early marriage (an explicit requirement of the African Children's Charter as well as a number of other instruments relevant to South Africa).

However, such an interpretation would render the provision practically devoid of value, and would also raise questions about the value of the Recognition of Customary Marriages Act on setting a minimum age of 18 at all. Further, applying unwritten customary ages of marriage would run counter to the overall legislative intent that the Act applies to all children below the age of 18 years.⁹¹ It is suggested, therefore, that the 'law' setting a minimum age of marriage referred to in section 12(1)(a) must refer to statutory law.

This does not assist in resolving the additional problem that the Marriage Act of 1961 nevertheless continues to contain a lower minimum age of marriage than 18 years, descending to 15 years or even lower

⁸⁸ Which in turn raises the potentially (indirectly) discriminatory application of this provision, since questions might arise as to which children are protected by which set of laws setting a minimum age for marriage.

⁸⁹ Act 120 of 1998.

⁹⁰ See the discussion of South African 'law' as including customary law in LAWSA (n 34 above).

⁹¹ Sec 17 of the Act.

with ministerial consent,⁹² and moreover is one that discriminates between boys and girls as regards the statutory *minima set*.⁹³

As 'pure' civil law, this Act might not, it is submitted, be of any relevance to explicating the legal status of *ukuthwala* as a customary practice. Nevertheless, in establishing the benchmark criterion of 15 years for girls as the minimum age for marriage, it would be difficult to argue that, *in law*, any offensive practice regarding engagement, promise of marriage or marriage itself is restricted solely to persons above the age of 18 years, when the Marriage Act itself so plainly provides otherwise. It follows, therefore, that *ukuthwala* (when it is deployed consensually as a prelude to marriage in the case of girls below the age of 18 years) can hardly be regarded as being *contra bonos mores* when the legal marriage of girls of that age is permissible under the law of the land.⁹⁴

4.4 Section 12(2)(b) and forced marriage

Section 12(2)(b) of the Act prohibits that a child 'above that minimum age be given out in marriage or in engagement without her consent'. It remains for us to discuss whether section 12(2)(b) is useful as a shield against other forms of *ukuthwala* (forced seduction, for want of a better description) and, if so, how. Section 12(2)(b) can be distinguished from section 12(2)(a) in that it refers, first, only to persons *above* the minimum age of marriage (as already discussed, that is, 15 years of age for girls) and, secondly, to their being given out in marriage or engagement *without their consent*. This position accords more logically with the expectation of a prohibition on *forced marriage*, where the focus is also on absence of consent or upon duress.

Section 12(2)(b) apparently therefore includes *ukuthwala* within its ambit where the abduction is performed without consent. However, the *caveat* is whether *ukuthwala* can be brought within the legislative words 'marriage or engagement' — seduction is not mentioned, nor is it axiomatic that 'seduction with the view to an eventual marriage' bears an equivalent meaning — and, as important, whether the words 'given out' in section 12(2)(b) can be given a clear and precise meaning.

To be blunt, can the 'seducer' or abductor, in the way that *ukuthwala* has been described to take place, be subsumed under the prohibition

⁹² As low as 12 years for girls and 14 years for boys, linked to the presumed age of puberty.

⁹³ P Mahery & P Proudlock 'Legal ages in South African law' (2010) Children's Institute, University of Cape Town. Note that the Civil Unions Act 17 of 2006 sets a minimum age of 18 for the conclusion of a valid civil union.

⁹⁴ The argument that sec 12(2)(a) refers to the minimum age for marriage set in the Marriage Act is reinforced if regard is had to the provisions of sec 12(2)(b) which refers to protections for persons *above* the minimum age of marriage. Since the Act as a whole applies to persons below the age of 18 only, 'persons above the age of marriage' referred to in sec 12(2)(b) must mean some other age, that is, one below the age of 18 years.

on 'giving out' a child in marriage without her consent? This seems to strain the ordinary meaning of the words unduly, as the mischief targeted appears rather to be the act of *offering* the girl for marriage without her consent, and the wrongdoer likely to be a parent or family member, rather than the seducer or abductor. If this interpretation is correct, then *ukuthwala* does not fall foul of the section 12(2)(b) prohibition — it is simply inapplicable to the practice.

On the other hand, it is possible to conceive that the acts of a girl's parents, were they to be complicit in making arrangements with the abductor, without the girl's consent, would render their participation in *ukuthwala* conduct which falls foul of section 12(2)(b). In this regard, it is worth pointing out that section 12(2) is explicitly subject to the penal sanctions of the Act contained in section 305.

The question which then arises is whether section 305 read with section 12(2) renders *ukuthwala* subject to criminal sanction. The preliminary answer to this, based on the analysis above, is no (or not really).

On the wording of both sections 12(2)(a) and (b), the infringement of rights is committed by whoever 'give[s] the child out' in marriage or engagement. That is the first hurdle. The abductor's conduct cannot be brought within the plain meaning of these words. Second, the difficulties with the internal conflict of laws relating to the minimum age of marriage, and the requirement of a guardian's consent to validate a customary marriage⁹⁵ might prove a fatal defence to any prosecution. Which law, one might ask? And what of the *nulla poena sine lege* principle, which at minimum requires certainty as to the conduct to be deemed offensive?

Third, unless *ukuthwala* can be characterised as marriage — which it is not, it is a prelude to marriage negotiations — or engagement — which seems to be stretching a civil/canonical law concept way beyond its common meaning, it is not a practice which is covered by the prohibition at all. It is submitted that entry into marriage negotiations expected in customary law, and embodied in the practice of *ukuthwala*, is not the same as the concept of 'engagement' of civil law.⁹⁶

At first blush, section 12(2)(b) does seem to embody a forced marriage prohibition. But it is directed at only parents or guardians who furnish their consent in circumstances where that of the child is lacking, or where they apply duress. It may well be, therefore, that this conception of forced marriage is in need of better elaboration and, related

⁹⁵ Under customary law, the consent of the father was a *sine qua non*, regardless of the age of the girl. Tacit consent can be inferred from the circumstances. Should the father, eg, accept *lobolo* or allow the couple to live together as man and wife, consent can be inferred.

⁹⁶ Arranged marriages are not mentioned by name; there also the question of consent can be problematised when severe pressure is brought to bear on a would-be child bride, often over a period of time, and she ultimately does in fact furnish consent, but for fear of prejudicing family relationships.

more specifically to the South African cultural context, in the same way as has recently come to pass in the United Kingdom.⁹⁷

Two remaining points require consideration in the context of the Act before the discussion concludes with a consideration of *ukuthwala* as a customary practice with legal dimensions under current South African law.

The first question that may be posed is whether other provisions of the Act may be adduced to condemn or outlaw the practice. The answer to this is necessarily speculative, and rests largely on the approach to section 305(3) which criminalises parental child abuse, read with the various provisions which underscore the child protection system (including section 150 which defines a child in need of care and protection). Again, the abductor potentially is not liable under this approach, which focuses on the part played by parents and guardians.

Alternatively, recourse might be had to the offences contained in the Criminal Law (Sexual Offences) Amendment Act of 2007, or to common law renditions of kidnapping or abduction. When measured against the array of options for the assimilation, accommodation and development of customary law, these latter alternatives can only be considered blunt swords indeed by which to address the nuances of custom and tradition under a constitutional dispensation.

Finally, some consideration must be given to the option of civil liability. Assuming that it is correct that *ukuthwala* does not fall neatly under the provisions of section 12(2), an infringement of the child's rights to wellbeing contained in section 12(1) might conceivably lay the basis for such a claim against the abductor or seducer. This is reinforced by the conceptualisation of custom of *ukuthwala* as a delictual claim *in customary law itself*.⁹⁸

This might seem like an alarming proposition — along the lines of sanctioning the payment of damages for rape. It might, too, be regarded as perpetuating extreme gender inequality and offensive stereotypes which achieve no good in modern-day South Africa (characterised as one of the most violent societies in the world as far as gender-based violence and rape are concerned).

However, it does present the possibility of a more benign accommodation of this particular customary practice, in line with the desired objectives of current constitutional jurisprudence. As well, as demonstrated above, the Act itself is far from a model of clear condemnation of *ukuthwala* as a form of forced marriage.

⁹⁷ See the UK Forced Marriage (Civil Protection) Act 2007 and the Multi-Agency Practice Guidelines Handling Cases of Forced Marriage of June 2009 issued by the Forced Marriage Unit of the Ministry of Justice. See further H Patel & A Guha 'Forced marriage' (2010) 1 *Journal of Family Law and Practice* 41.

⁹⁸ LAWSA (n 34 above) para 138.

5 Conclusion

Forced marriage fails the constitutional compatibility test on any number of grounds, including freedom and security of the person (section 12), dignity rights (section 9), and the best interests of the child (section 28(2)). However, *ukuthwala* is not, in the plain sense of the word, 'forced marriage', although it could lead to this if the negotiations are concluded without the consent of the girl.

Further, though, we have argued that *ukuthwala* cannot be treated as a unitary phenomenon; variants of the practice must be distinguished. In attempting to rescue or divide positive attributes of *ukuthwala* which do not *prima facie* offend human rights, we suggest that current legal terminology, such as that used in the Act, is not sufficiently nuanced to describe and regulate it. An example relates to the inclusion of the words 'giving out' in sections 12(2)(a) and (b), which confines the application of this section unduly.

Sensitivity to various ways in which customary law can be accommodated would lead to a conclusion that South African law should recognise those forms of *ukuthwala* where the requirement of consent of the 'bride' is met, where she colludes in or is aware of the mock abduction. The legal relevance of her participation in these acceptable forms of *ukuthwala* should be acknowledged. Child participation and recognition of the evolving capacities of the child are a basic tenet of the Act, and recognising the role of the girl as an actor in her own interests via *ukuthwala*, thus promotes a fundamental principle of the Act. The benign accommodation approach promotes the positive aspects of culture, and moreover emphasises children's agency. (It is conceded, however, that the 'straight 18' position of the African Children's Charter in relation to child marriage does pose a significant barrier to advocating this position.)

It would further be required that the common law offence of abduction also be addressed. The fact that in the current form the offence focuses only on the violation of parental rights and ignores children's rights is problematic, but a full discussion lies beyond the scope of this article. At minimum, though, the common law could be developed to permit as lawful forms of mock abduction which are legal in customary law and in which consent to being 'carried away' features.

Last, where consent is absent and the abduction is consequently unlawful, we suggest that existing criminal offences are adequate to cover the practice. There is therefore no need for additional legislative intervention in the criminal law sphere.