Physical violence: crime or cultural protégé?

1 Introduction

South Africa has a dark history with regards to the violation of human rights. Sloth-Nielsen "Child Justice" in Boezaart (ed) *Child Law in South Africa* (2017) 682 states that racialised justice was at the order of the day. Almost 30 years since the dawn of democracy, not enough has changed and the country is currently plagued by a scourge of gender-based violence. The devastating impact of sexual violence on victims is well documented. In *Maila v The State* [2023] ZASCA 3 the court stated that "sexual violence victims often experience a profound sense of shame, stigma and violation". As recent as 5 April 2022, the Constitutional Court condemned "the horrific reality that this country has for far too long been, and continues to be, plagued by a scourge of gender-based violence to a degree that few countries in the world can compare" (*AK v Minister of Police* 2022 (11) BCLR 1307 (CC) 1312. See also *Maila v The State* 11 and *Khambule v S* [2023] ZAKZPHC 35.) In *Petersen v The State* [2023] ZASCA 26, a 9-year-old child was violently and brutally raped. After raping her, the appellant had cut the child's throat with a piece of glass. She had, however, already died as result of asphyxiation due to strangulation by the appellant. The second and third counts of rape and murder were committed while he was out on bail for the first offence. In *Tshabalala v S*; *Ntuli v S* 2020 (5) SA 1 (CC) 17 the same Court held that "[h]ardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation". Mkhize and Vilakazi "Rethinking gender and conduits of control: A feminist review" 2021 *SAJHR* 1 state that "the war on women, their bodies and their right to self-determination persists, irrespective of the Constitution" and that many of South Africa's contemporary social institutions, including culture, normalise forms of gendered violence and the exploitation of women's lives and bodies through cultural practices like *ukuthwala*. For far too long has physical violence, and gender- based violence in particular, escaped the full might of the penal machinery under the cloak of culture.

Much has been written in the past on the cultural tradition of *ukuthwala* from a feminist, child law and human rights perspective (Reddy and Mkhize "Gendered and Feminist Inequalities: A Review and Framing Notes" 2020 *Agenda* 1; Maluleke "Culture, Tradition, Custom, Law and Gender Inequality" 2012 *PELJ* 1; Nhlapo "Customary Law in Post-apartheid South Africa: Constitutional Confrontations in Culture, Gender and 'Living Law'" 2017 *SAJHR* 1; Ntuli "Conflict between Traditional Cultural Practices for Women and South African Government Laws" 2019

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Gender and Behaviour 1; Makhubele *et al* "Religious Beliefs and Practices Contributing Towards Child Abuse and Neglect: The Case of Johanne Masowe Yechishanu Apostolic sect, Harare, Zimbabwe" 2016 *Child Abuse Research in South Africa* 37; Mwambene and Sloth-Nielsen "Benign Accommodation? *Ukuthwala*, 'Forced Marriage' and the South African Children's Act" 2011 *AHRLJ* 1; Jacobs "Young South Africans and Cultural (Mal)practice: Breaking the Silence" 2013 *Journal of Literacy Criticism, Comparative Linguistic and Literary Studies* 1; Rickard "A Matter of Justice" 2021 *Legalbriefs*; Mabasa "*Ukuthwala*: Is it all culturally relative?" 2015 Aug *De Rebus* 136; Mwambene and Mqidlana "Should South Africa Criminalise *Ukuthwala* Leading to Forced Marriages and Child Marriages? 2021 *PELJ* 53; Mwambene "Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi" 2018 *AHRLJ* 527; Olaborede and Lumina "The Normative Complementarity of the African Children's Charter and the African Women's Protocol in the Context of Efforts to Combat Child Marriage" 2017 *Speculum Juris* 41; Karimakwenda "Today it Would be Called Rape: A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape" 2013 *Acta Juridae* 339; Wood "Group Rape in the Post-apartheid South Africa" 2005 *Culture, Health & Sexuality* 303.) The incorrect practice of *ukuthwala* as part of the current scourge of gender-based violence has not enjoyed the same measure of exposure from criminal law scholars recently. Reported case law on *ukuthwala* is equally dearth. The cases of *S v Jezile* 2016 2 SA 62 (WCC), *S v Osabiya* (CC47/2019) [2021] ZAGPPHC 716 (21 October 2021) and *Mbhamali v S* [2022] 1 All SA 488 (KZD) (12 October 2021) are the only criminal cases recently reported (compare Dukada "Some Thoughts on the '*Ukuthwala'* Customs vis-à-vis the Common–law Crime of Abduction: The Case of *Ncedani* 1908 22 EDC 243 and *Sita* 1954 4 SA 20 (E) revisited" 1984 *De Rebus* 359).

In this contribution the authors provide a critical analysis of the South African courts' response to *ukuthwala* as a criminal defence.

2 Gender-based violence in South Africa

There is a lot of literature available on gender-based violence. Gender-based violence has been defined as a broader umbrella term referring to any harmful acts directed at individuals based on their gender (Tol, Wietse *et al* "Mental Health and Psychosocial Support Interventions for Survivors of Sexual and Gender-based Violence During Armed Conflict: A Systematic Review" *World Psychiatry* 2013 179). The United Nations High Commissioner for Refugees (also known as the UN Refugee Agency or UNHRC) states that gender-based violence is rooted in gender inequality, the abuse of power and harmful norms (available at https://www.unhcr.org/what-we-do/protect-human-rights/protection/gender-based-violence last accessed 2023-04-21). The European Institute of Gender Equality states that gender-based violence is a phenomenon deeply rooted in gender inequality and continues to be one of the most

notable human rights violations within all societies (https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence last accessed 2023-04-21). The Institute likewise confirms that gender-based violence is violence directed against a person because of their gender.

Gender-based violence can manifest in different forms. According to the UNHRC, gender-based violence can include sexual, physical, mental and economic harm that is inflicted in public or in a private setting. It also includes threats of violence, coercion and manipulation. Gender-based violence can manifest as intimate partner violence, sexual violence, child marriage, female genital mutilation and so-called honor crimes. South Africa is in dire need of effective solutions for gender-based violence. In an attempt to eradicate the social evil of gender-based violence, the South African legislature amended a raft of laws in January 2022. These amendments include the Criminal and Related Matters Amendment Act 32 of 2007, the Criminal and Related Matters Amendment Act 12 of 2021, the Domestic Violence Amendment Act 14 of 2021 and the Criminal Law (Forensics Procedures) Amendment Act 6 of 2010. These amendments are all aimed at strengthening efforts to address gender-based violence. Despite these judicial advances and apparent political will, gender- based violence is still rampant in South Africa (Scholtz "South African Needs to Step Up Against Gender-based Violence" 2022 *Human Rights Watch* available at https://www.hrw.org/news/2022/11/01/south-africa-needs-step-fight-against-gender-based-violence (accessed 2023-04-21).

Gender-based violence is a matter of serious concern in South Africa. It is one of the most pressing issues affecting South Africa today. While gender-based violence is a worldwide phenomenon, South Africa is labelled as the "rape capital of the world". (Human Rights Watch Report 2010 available at https://www.hrw.org/world-report/2010/country-chapters/south-africa accessed 2023-04-21); Oparinde, Kunle, and Matsha. "Powerful Discourse: Gender-based Violence and Counter-Discourses in South Africa" 2021 *Cogent Arts & Humanities* 1.) This is based on the high rates of rape committed in the country. Research indicates that South Africa has one of the world's highest rates of gender-based violence which manifests as femicide, rape and intimate partner violence (Matzopoulos *et al* "Utility of Crime Surveys for Sustainable Development Goals Monitoring and Violence Prevention Using a Public Health Approach" 2019 *SAMJl* 382–386).

The Minister of Police, Mr Bheki Cele, has recently presented the quarterly crime statistics of crimes reported to the South African Police Service (SAPS) from 1 July to 30 September 2022. The Minister reported a double-digit increase (over the 3 month period compared to the same period last year) for murder, attempted murder and assault with intent to cause grievous bodily harm (GBH) against women. Statistics show that more than 13 000 women were victims of assault with intent to cause grievous bodily harm between July and September 2022. More than 10 000 rapes complaints were recorded in the same period (News24

Crime Stats "High levels of women abuse and murders are worrying" (23 November 2022) available at https://www.news24.com/news24/southafrica/news/crime-stats-high-levels-of-women-abuse-and-murders-are-worrying-police-minister-bheki-cele-20221123 (accessed 2023-04-21). It is undeniable that gender-based violence adversely effects victims, leaving them with psychological trauma and physical consequences that need to be addressed. In this manner, gender-based violence burdens not only law enforcement agencies but also medical services and the entire South African economy. It is therefore imperative that measures are taken to curb these horrendous acts that engulf this country.

3 *Ukuthwala* as customary practice

The practice of abduction and forced marriage is commonly referred to as *ukuthwala*. The tradition originated from Xhosa culture where families make marriage preparations for their female children without the necessary consent from their children (Ngcobo–Mbere "Victims Empowerment Programme *Ukuthwala* Departmental briefing" (14 September 2009) available at https://pmg.org.za/committee-meeting/10809/) (accessed 2023-04-21). The *ukuthwala* practice creates gender-based violence. As a customary practice *ukuthwala* amounts to a very abusive, discomforting, unfair and unacceptable treatment of young girls and women in our society (Shaka "The Scourge of Gender- based Violence on Women Plaguing South Africa" 2022 *Eureka: Social and Humanities* 96-100). The author unequivocally and unapologetically calls for the review of the practices. According to the United Nations Human Rights Office of the High Commission "Not a single girl should be forced to many" (12 October 2012) available at https://www.ohchr.org/en/stories/2012/10/not-single-girl-should-be-forced-marry-un-experts (accessed 2023-04-21), an estimated 10 million girls globally under the age of 18, and many of them as young as 8 years old, are forced to "marry" men who may be three of four times their age each year.

Although not the most recent decision on the practice of *ukuthwala,* the court in *S v Jezile* 2016 2 SA 62 (WCC) provided the most thorough analysis of the appropriate traditional practice of *ukuthwala* as opposed to the misapplied, perverted form of *ukuthwala* where young females are abducted, raped and sexually assaulted. The court in *Jezile* was immaculately assisted by the expert evidence of Professor Ronald Thandabantu Nhlapo, an expert in customary law. Valuable evidence on the cultural practice of *ukuthwala* was also rendered by various *amici curiae*, including the National House of Traditional Leaders, the Woman's Legal Centre Trust and the Centre for Child Law.

The appellant in the case of *Jezile* appealed against convictions of human trafficking, rape, assault with the intent to cause grievous bodily harm and common assault to which he was sentenced to an effective 22 years imprisonment. The facts leading to these convictions were that the accused had left his residence in Phillippi near Cape Town for his home in rural Easter Cape in order to find a young girl there to marry. He

identified the complainant, then 14 years old and a complete stranger to him, as his chosen wife and requested his family to engage in *lobola* negotiations with the complainant's family (para 7). After conclusion of these negotiations the complainant was informed that she was to marry the appellant and was, despite her resistance, forcefully taken to his home in a nearby village, introduced to him and clad in *makoti* attire. The appellant paid R8 000 to the complainant's family as *lobola*. Shortly hereafter the complainant escaped from her marital home but was promptly returned to the appellant by her male family members (para 10). Without having been consulted or informed of the appellant's plans, the complainant was forced by her male family members to leave their Eastern Cape village and accompany the appellant back to Phillippi near Cape Town where sexual intercourse between the appellant and complainant took place on various occasions. Shortly hereafter the complainant managed to escape again and reported the events to the police (para 11).

The crux of the appellant's appeal against his convictions was that the trial court had erred in not evaluating the matter within the context of the traditional practice of *ukuthwala*. The appellant submitted that "consent" in *ukuthwala* must be considered against the backdrop of the rightful place which customary law enjoys in our constitutional dispensation (para 52). Inherent in the practice of *ukuthwala*, so the submission went, is not only the fact that the bride may be coerced, but also that she is expected to object to the marriage and sexual intercourse. Being mindful of the fact that *ukuthwala* has received public attention and has been regarded as "an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape" (para 56) the court engaged the expert evidence of Professor Ronald Thandabantu Nhlapo on the practice of *ukuthwala,* as stated above. Particularly insightful was Professor Nhlapo's evidence that customary law posits both regular and irregular methods of initiating a customary marriage. The regular method entails a proposal by the bridegroom's family to the intended bride's family which, if accepted, is followed by negotiations regarding the payment of *lobola* by the bridegroom's family to the bride's family. Where circumstances do not allow for this regular method, customary law permits certain irregular methods to circumvent obstacles barring marriage negotiations. *Ukuthwala* is one such irregular method (para 72). According to Professor Nhlapo, the essential features of *ukuthwala* are the following:

- The girl must be of child-bearing age which is, in customary law, considered to be the marriageable age;
- Consent or condonation of both the intended bridegroom and the intended bride is required;
- Integral to the practice of *ukuthwala* is an arranged mock abduction of the woman at dusk. For the sake of modesty the woman would purport to resist while she would, in fact, have agreed to this arrangement beforehand;

- The woman is then smuggled into the bridegroom's homestead and safeguarded by the women folk and the intended bridegroom's father would be informed of the presence of the intended bride;
- Of particular importance is that sexual intercourse is strictly prohibited at this time and, should it occur, is punishable by the payment of a fine or "*bopha*" to the intended bride's father;
- Lastly, the intended bridegroom's family would then extend an invitation to the bride's family, informing them of her presence at their homestead and that the bridegroom's family wishes to start marriage negotiations. If her family accepts the proposal, she would return to her home and regular *lobola* negotiations would start. Should the intended bride's family reject the proposal, she has to return to her home and damages must be paid to her father for the unsuccessful *ukuthwala*. This part of the practice supports the fundamental tenant of customary law that no marriage is possible without the consent of the intended bride's parents (para 73).

From the accepted evidence it is clear that *ukuthwala* is nothing more than a gateway to marriage negotiations; an "innocuous, romantic and charming age-old custom", as described by the National House of Traditional Leaders (para 74). Circumstances where this method of instigating marriage negotiations would be employed by consenting partners are where a woman wishes to marry a man of her choice rather than concluding an arranged marriage, where the woman's family is not in favour of her marrying the man of her choice or where time is of the essence because the woman is pregnant and the parties want to conclude the marriage as a matter of urgency (para 73).

4 The legal framework

Having stated what the correct practice of *ukuthwala* entails, the validity of *ukuthwala* as a criminal defence would logically be determined by the particular facts of each case but also by the legal framework governing an *ukuthwala* incident. In particular, the substantive minimum requirements for a valid customary marriage prescribed by the Recognition of Customary Marriages Act 120 of 1998 will necessarily apply to the validity of *ukuthwala* (para 82).

In developing a sound argument that child trafficking, and any form of child abuse or exploitation for sexual purposes, is not to be tolerated in the South African constitutional dispensation, the legal framework governing an *ukuthwala* incident was stated by Yekiso J (Saldanha J and Cloete J concurring) in *Jezile* (para 57 – 69).

4 1 The Constitution of the Republic of South Africa, 1996

As the highest law of the land, the Constitution logically is the cornerstone of any legal framework governing potential criminal conduct. In this regard, section 211(3) of the Constitution provides that "the courts must apply customary law when that law is applicable, subject

to the Constitution and any legislation that specifically deals with customary law."

Section 28(3) of the Constitution defines a child as a person under the age of 18 years. While section 28(1)(d) stipulates that every child has the right to be protected from maltreatment, neglect, abuse or degradation, section 28(2) states that a child's best interests are of paramount importance in every matter concerning the child (para 59).

Also relevant in the context of *ukuthwala* as a criminal defence is section 39 of the Constitution, which speaks to the interpretation of the Bill of Rights. Section 39 stipulates as follows:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

4 2 The Children's Act 38 of 2005

The Children's Act contains various sections that are part of the legal framework governing an *ukuthwala* incident. Section 1 of the Act defines "trafficking" in relation to a child in broad terms as including:

> (a) The … transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –
> (i) by any means, including the use of threat, force or other forms of coercion, abduction … abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or
> (ii) due to a position of vulnerability, for the purpose of exploitation…

Section 12 (1) of the Children's Act is particularly relevant in the context of *ukuthwala* and stipulates that every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being. Section 284(1) of the Act prohibits child trafficking while section 284(2) provides that it is no defence to a charge of contravening s 284(1) that the child or a person having control over that child consented to the intended exploitation. This is an important stipulation in light of the fact that *ukuthwala* is often sanctioned by the victim's (male) family members as the recipients of the *lobolo*. Section 305(1)(s) of the Children's Act contains the criminal provision which makes a contravention of s 284(1) a crime (Snyman *Criminal Law* (2020) 34). Section 305(8) of the Children's Act contains the criminal sanction

and provides that any person convicted of an offence in terms of s 305(1)(s) is, in addition to a sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment (par 62).

4 3 The Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007

Act 32 of 2007 defines the crimes that are committed against victims of *ukuthwala*. Section 3 defines the crime of rape as "any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape" (Burchell *Principles of Criminal Law* (2016) 610; Snyman (2020) 307; *Maila v The State* 41). Consent obtained by force, a threat of force or intimidation is not valid consent. Mere submission does therefore not equate to valid consent to sexual penetration (Burchell (2016) 619). Pursuant to section 5 of the Prevention of Family Violence Act 133 of 1993 in which marital rape was first regarded as a crime, section 56(1) of Act 32 of 2007 stipulates that it is not a valid defence to rape to rely on the existence of a "marital or other relationship". The appellant in *Jezele* raised as one of his defences and grounds of appeal to the charges of rape that he was in a customary marriage with the complainant at the time of the rape incidents (para 51). Yekiso J, however, referred to the reasoning of the court *a quo* that the matter was not about

> …the practice of *ukuthwala* or forced arranged marriages and its place if any, in our Constitutional Democracy. Rather, this case is about whether the state proved that the accused committed the offences he is charged with and if so whether he acted with the knowledge of wrongfulness and the required intent. To this extent only, reference to the so-called marriage will be made from time to time.

Section 5 defines the crime of sexual assault as "a person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault". Sexual violation refers to non-consensual sexual contact (Burchell (2016) 602; Snyman (2020) 320). A marital or other relationship is also not a defence to a charge of sexual assault (Burchell (2016) 618).

The court in *Jezele* regarded section 56(8) of the Act as the only possible defence to criminal liability in respect of cultural practices (para 63). Section 56(8) provides for a specific defence in the context of a legitimate cultural practice and stipulates that a person may not be convicted of a crime in terms of sections 9 or 22 if that person commits such an act in compliance with and in the interests of a legitimate cultural practice. Sections 9 and 22 are almost identically worded. Section 9 criminalises the conduct of a person who unlawfully and intentionally exposes or displays his or her genital organs, anus or breasts (in the case of a female) to another person, who is 18 years or older, without that person's consent. Section 22 contains a similar provision with regards to

a complainant who is younger than 18 years (Burchell (2016) 634; Snyman (2020) 331).

The court is *Jezile* also had to consider the transitional provisions pertaining to trafficking in persons for sexual purposes as contained in sections 70 to 72 of the Act 32 of 2007. At the time of judgement, the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 had not come into force yet. These provisions thus formed part of the legal framework governing *ukuthwala* at the time pending the adoption of national legislation in compliance with the Protocols referred to therein (para 63). These Protocols include the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the United Nations Convention on the Rights of the Child of 1989. South Africa ratified the 1989 United Nations Convention on the Rights of the Child on 16 June 1995 (Mezmur The United Nations Conventions on the Rights of the Child in Boezaart (ed) *Child Law in South Africa* (2017) 404). The United Nations Convention on the Rights of the Child came into force on 2 September 1990 and is underpinned by three principles: the right of children not to be discriminated against; their right to participate in decisions affecting their lives and to be heard; and the "best interest" concept (Shäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 90). This concept means that the best interests of the child shall be of paramount importance in all actions concerning him or her. This Convention is the most widely ratified human rights instrument in the world and theoretically provides the minimum standard of respect that member states must guarantee to the child (Mezur (2017) 404; Heaton & Kruger *South African Family Law* (2015) 296; Mahery The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law in Boezaart (ed) *Child law in South Africa* (2009) 309; Currie & De Waal *The Bill of Rights Handbook* (2013) 601). As a member state, South Africa has a duty to combat and ultimately eradicate abuse and violence against women and children (para 63).

Section 70(2)(b) of Act 32 of 2007 defined the offence of trafficking in similar terms to that contained in section 1 of the Children's Act quoted above. Section 70(2)(b)(6) included trafficking by means of "the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked" (para 63). The evidence in the case of *Jezile* revealed how the 14-year-old complainant, whose father was deceased, had "pleaded with her uncle never to force her into a customary marriage" (para 15). Whilst being forcibly restrained by being held by her arms *en route* to her "marriage" by her uncle and the appellant's family member, the complainant cried and pleaded but was instructed by her uncle to stop. According to the evidence she was then handed over to the appellant and two of his family members who they met along the way. She was similarly restrained by them for the remainder of the journey to the appellant's village which was a considerable distance away (para 16).

Section 71(1) of Act 32 of 2007 contained a criminal norm and makes the trafficking of any person without their consent an offence. Sections 71(3) and (4) stipulated that consent will only be valid if it was voluntary or uncoerced and explicitly excludes a person submitting to an act as a result of being trafficked. The evidence in *Jezile* clearly indicates that the complainant was instructed to marry the appellant and that her resistance to this instruction was ignored (paras 8 to 10). She therefore has never consented to being trafficked. Lastly, section 56A(2) of the Act relates to sentencing. The section provides that the court imposing sentence shall consider as an aggravating factor that the person committed the offence with the intention to gain financially or receive any favour, benefit, reward, compensation or any other advantage or had indeed gained financially or received any favour, benefit, reward, compensation or any other advantage from the commission of such offence. In *Jezile* the appellant's conduct was exclusively motivated by his decision to obtain a young female virgin for a wife (para 5). The appellant had noticed the complainant, then 14 years old and at the start of Grade 7 in school, and decided that she would make a suitable wife (para 6).

4 4 Prevention and Combatting of Trafficking in Persons Act 7 of 2013

The Prevention and Combatting of Trafficking in Persons Act 7 of 2013 was assented to on 28 July 2013 and came into force on 9 August 2015 (Kruger "Combating Child Trafficking in the Children's Act and the Prevention and Combatting of Trafficking in Persons Act" in Boezaart (ed) *Child law in South Africa* (2017) 251; Burchell (2016) 86; Snyman (2020) 25). The Act was passed in compliance with South Africa's international obligations and repeals the transitional provisions relating to human trafficking in sections 70 to 72 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act considered by the court in *Jezile*.

Section 4 provides a lengthy definition for the crime of trafficking in persons:

> Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of –
>
> (a) a threat of harm;
> (b) the threat or use of force or other forms of coercion;
> (c) the abuse of vulnerability;
> (d) fraud;
> (e) deception;
> (f) abduction;
> (g) kidnapping;
> (h) the abuse of power;
> (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or

(j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

Section 4(2)(b) makes it an offence for a person to conclude a forced marriage with another person for the purpose of exploitation of the other person (para 64) while section 11(1)(a) stipulates that consent of the other person is no defence. While a "forced marriage" is defined as "a marriage concluded without the consent of each of the parties to the marriage" the word "marriage" itself is not defined (para 64). The evidence in *Jezile* revealed that the young complainant did not consent to the marriage with the appellant but that she pleaded with her uncle never to force her into a customary marriage (para 15). The criminal sanction appears in section 13. A person who is convicted of the crimes created in sections 4(1) and (2) is, subject to section 51 of the Criminal Law Amendment Act 105 of 1997, liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.

Section 14 obliges a court that impose a sentence on a person convicted of any offence under the Act to take the following aggravating factors, in addition to any other factors, into account: whether the victim was held captive for any period; whether the victim suffered abuse and the extent thereof; the physical and psychological effects the abuse had on the victim; and whether the victim was a child (compare *Maila* 28 where it was stated that "sexual violence victims often experience a profound sense of shame, stigma and violation"; *AK v Minister of Police* 149 where it was stated that "burgeoning gender-based violence cases continue to clutter court rolls at an alarming rate; Secondary victimisation is as commonplace as suicidal tendencies amongst victims"; United Nations Office on Drugs and Crime *Handbook for the Judiciary on Effective Justice Responses to Gender-based Violence against Women and Girls* 25; Du Toit *The Philosophical Investigation of Rape*: *The Making and Unmaking of the Feminine Self* (2009) 85; Allan "Die psigiese gevolge van verkragting" 1993 *SACJ* 186; Artz and Combrink "A Wall of Words: Redefining the Offence of Rape in South African Law" 2003 *Acta Juridica* 72). The evidence in *Jezile* disclosed that the complainant was referred to a social worker because she was obviously traumatised (para 32). Dr Narula testified that she had examined the complainant and that the complainant appeared traumatised, fearful and tearful, still wearing her *amadaki* dress (para 31). During examination Dr Narula noted a huge gaping wound on the lower thigh that had become septic, as well as two healing abrasions on the complainant's left forearm and a hematoma on her toe. On gynecological examination she found a healing tear of the hymen, scarring of the posterior fourchette, redness at the hymen and bilateral vestibular redness of the vagina, as well as vaginal discharge. The court found her findings to be compatible with the history given as

recent forceful vaginal penetration by a penis or object. The complainant had also tried to escape from the appellant twice before being brought to Cape Town. On neither of these occasions had she willingly returned to the appellant (para 46).

4 5 The Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act 120 of 1998 came into commencement on 15 November 2000 and recognises a valid customary marriage as a marriage for all purposes (in section 2). The Act forms an important part of the legal framework governing an *ukuthwala* incident. Two of the main purposes of the Act are to make provision for the recognition of customary marriages and to specify the requirements for a valid customary marriage. The requirements for a valid customary marriage are listed in section 3 of the Act as follows: (a) the prospective spouses must both be over the age of 18 years; (b) the prospective spouses must both consent to be married to each other under customary law; and (c) the marriage must be negotiated and entered into, or celebrated, in accordance with customary law (para 66; Pienaar "African Customary Wives in South Africa: Is there Spousal Equality After the Commencement of the Recognition of Customary Marriages Act?" 2003 *Stellenbosch Law Review* 256; Horn & Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *Journal for Juridical Science* 54; Kerr "The Constitution and Customary law" 2009 *SALJ* 39; *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) 10). Of particular relevance to an incident of *ukuthwala* is section 3(3)(a) which stipulates that if either of the prospective spouses is a minor (as the complainant indeed was in *Jezile*), both his or her parents, or if he or she does not have parents, his or her legal guardian, must consent to the marriage. Section 3(4)(a) confers on the Minister the power to grant permission to a person under the age of 18 years to enter into a customary marriage if the Minister considers such marriage to be desirable and in the interests of the parties in question, where either prospective spouse is below the age of 18 years (para 66). This does not relieve the parties to the proposed marriage of their obligations to comply with all other requirements for a valid customary marriage prescribed by law, in particular that both prospective spouses must consent to be married to each other to be under customary law. From the accepted evidence it was clear that the complainant in *Jezile* never consented to be married to the appellant. The magistrate in the court *a quo* found her testimony to be:

> both honest and reliable… …there was no evidence to suggest that the complainant had willingly left her home without her mother's knowledge or consent to be married to a complete stranger twice her age… the mother's views and wishes would in any event have been disregarded by the complainant's male relatives. This was borne out by the mother's futile attempt to protect the complainant. The mother's evidence corroborated that of the complainant about the latter's attitude towards the 'marriage', and her

> escape from the appellant within days of it taking place… … it was inconceivable that the complainant would willingly have subjected herself to the "marriage". It was even the appellant's evidence that the complainant was unhappy and ill at ease after her arrival at the "marital home" (para 45).

4 6 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2008

The Promotion of Equality and Prevention of Unfair Discrimination Act aims to give effect to section 9 of the Constitution and to promote equality and eliminate unfair discrimination. Section 8 of the Act states that no person may unfairly discriminate against any person on the ground of gender, including gender-based violence, female genital mutilation, the system of preventing women from inheriting family property and any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child (para 67). Section 8 is particularly significant in the context of *ukuthwala* in the manner it occurred in *Jezile*.

4 7 International conventions and protocols

South Africa has signed and ratified the Universal Declaration of Human Rights. Article 7 of the Declaration states that all are equal before the law and are entitled without any discrimination to equal protection of the law. Of great significance in the legal framework governing an *ukuthwala* incident is article 16(2) which provides that men and women are entitled to equal rights as to marriage, during marriage and at its dissolution and that marriage shall be entered into only with the free and full consent of the intending spouses (para 68; Freeman "Why it Remains Important to Take Children's Rights Seriously" 2007 *The International Journal of Children's Rights* 5).

South Africa also signed the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 29 January 1993 and ratified it on 15 December 1995. The Convention requires member states to take all appropriate measures to implement legislation to suppress all forms of trafficking in women (article 5); to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure, on the basis of equality of men and women, the same right to enter into marriage with free and full consent (article 16(1)) and to modify the social and cultural patterns of conduct of men and women, in order to eliminate prejudices and discriminatory customary and other practices (article 26) (par 68)).

The United Nations Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children (the Palermo Protocol) was adopted in the year 2000. This Protocol supplement the United Nations Convention against Transnational Organised Crime (the Trafficking Protocol) which compels member states to make trafficking in persons a criminal offence (par 68; Kruger (2017) 251).

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa entered into force and obliges member states, of which South Africa is one, to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Member states must enact and effectively implement appropriate legislative or regulatory measures to curb and prohibit all forms of discrimination and harmful practices which endanger the health and general well-being of women (par 68).

As stated above, South Africa ratified the Convention on the Rights of the Child on 16 June 1995. The Convention entered into force on 2 September 1990 (Mezmur (2017) 404; Lopatka "The Convention on the Rights of the Child: Universal Dilemmas" (1999) *Whittier Law Review* 83; Doek "The UN Convention on the Rights of the Child: Some Observations in the Monitoring and Social Context of its Implementation" 2003 *University of Florida Journal of Law and Public Policy* 125). Article 24(3) of the Convention states that member states shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. Articles 34 and 35 oblige state parties to protect children against all forms of exploitation, including trafficking (par 68).

The African Charter on the Rights and Welfare of the Child (ACRWC) came into force on 29 November 1999 (Sloth-Nielsen "The African Charter on the Rights and Welfare of the Child" in in Boezaart (ed) *Child law in South Africa* (2017) 426. Child marriage or betrothal is prohibited (in article 21(2) of the Charter.) Article 27 prohibits sexual exploitation and the inducement, coercion or encouragement of a child to engage in any sexual activity, while article 29 obliges member states to take all appropriate measures to prevent the abduction, sale or trafficking of children for any purpose, in any form, and by any person including parents or legal guardians of a child (para 68; Chirwa "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" 2002 *The International Journal of Children's Rights* 157; Duroja "The Potential of the Expert Committee of the African Children's Charter in Advancing Adolescent Sexual Health and rRghts in Africa" 2013 *CILSA* 385).

Yekiso J in *Jezile* also referred to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography as part of the legal framework governing an incident of *ukuthwala* (para 68). The sale of children is defined in article 2 of the Protocol as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."

The final piece of the legal framework governing an *ukuthwala* incident which Yekiso J made mention of is the Addis Ababa Declaration on Ending Child Marriage in Africa of 11 April 2014. This Declaration was prepared by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) under the auspices of the African Union (para 68).

5 Conclusion

Having been enlightened on the pivotal requirements for a valid *ukutwhala*, the court in *Jezile* correctly concluded that *ukutwhala* was not properly performed on the facts before the court (para 75). First and foremost, the complainant was a mere 14 years old at the time of the abduction. Section 3(1)(a)(i) of the Recognition of Customary Marriages Act 120 of 1998 clearly states that both prospective spouses must be above the age of 18 years to conclude a valid customary marriage. Secondly, the girl's lack of consent to be married to the appellant, to live with him and to have sexual intercourse with him is fatal to the existence of a valid *ukuthwala*. Thirdly, the fact that *lobola* was paid even before the alleged *ukuthwala* occurred is a clear indication that the facts do not support a valid *ukuthwala*. On the contrary, the facts speak of a perverse and aberrant misapplication of the custom and a "most severe and impermissible violation of women and children's most basic rights to dignity, equality, life, freedom, security of the person and freedom from slavery" (para 78). It is in this light that the defences raised by the appellant had to be considered.

The essence of the appellants defence at his trial was that the complainant had, in fact, consented to her removal from her homestead and to the sexual intercourse with him and that her two attempts to escape was in accordance with the expected show of resistance in order to protect her modesty. On appeal this argument was outright rejected by the court as a "cynical attempt" by the appellant to claim that he believed that the complainant had twice attempted to escape out of sheer modesty (para 88).

There is no customary law principle that could ever justify the appellant's marriage to the complainant, abducting her from the Eastern Cape or having sexual intercourse with the complainant against her will (para 91). Moreover, the appellant's reliance on *ukuthwala* was flawed from the onset since the crimes with which he was charged occurred after the traditional *ukuthwala* allegedly occurred.

As pointed out by the court in *Jezile* (para 70), the South African Law Commission was requested in 2009 by the Gender Directorate in the Department of Justice and Constitutional Development to prioritize an investigation into the practice of *ukuthwala*. A Discussion Paper, in Project 138, titled "The Practice of Ukuthwala" was accordingly issued in 2014. This law reform process is, however, still pending.

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