NOTES / AANTEKENINGE

THE PRACTICE OF "*UKUTHWALWA*", THE CONSTITUTION AND THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT

1 Introduction

The practice of "*ukuthwalwa*" has been described as a "mock abduction" or an "irregular proposal" aimed at achieving a customary law marriage (Bennett *Customary Law in South Africa* (2004) 212; *cf* Burchell *Principles of Criminal Law* 3ed (2005) 763 fn 10; see also Van Tromp *Xhosa Law of Persons: A Treatise on the Legal Principles of Family Relations among the AmaXhosa* (1947) 63ff; Whitfield *South African Native Law* 2ed (1948) 115-116; and Simons *African Women: Their Legal Status in South Africa* (1968) 117-119). It has been said that *ukuthwalwa* may be used for a number of purposes, such as: (a) to force the father to give his consent; (b) to avoid the expense of a wedding; (c) to hasten matters if the woman is pregnant; (d) to persuade the woman of the seriousness of the suitor's intent; and (e) to avoid payment of *lobolo* (Bennett 212; and *cf* Burchell 764 fn 19).

At common law the courts have stated that *ukuthwalwa* should not be used "as a cloak for forcing unwelcome attentions on a patently unwilling girl" (*Nkupeni v Numunguny* 1938 NAC (C&O) 77; and *cf* Burchell 763 fn 10), and have held that abduction by way of *ukuthwalwa* is unlawful (*R v Swartbooi* 1916 EDL 170; and *R v Sita* 1954 4 SA 20 (E), which refer to the custom as "twala"). However, it has been suggested that if there is a belief by the abductor that the custom of *ukuthwalwa* was lawful the abduction would lack fault (*cf* Burchell 764 fn 19), and that if the parents or guardians consented to the taking it would not be abduction, because abduction is a crime against parental authority (*R v Sita supra* 23; *cf* Burchell 762; Snyman *Criminal Law* 5ed (2008) 403; and Milton *South African Criminal Law and Procedure Vol II: Common Law Crimes* 3ed (1996) 553). Where the parents or guardians consent to the abduction the crime may amount to assault or rape (Burchell 764). Some of these potential *lacunae* in the law seem to have been addressed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter "the Sexual Offences Amendment Act").

There has recently been public outrage about the practice of *ukuthwalwa* in the Eastern Cape in which girls between the ages of 12 and 15 years of age were being abducted and forced into marriages against their consent.

(Address by Minister Manto Tshabalala-Msimang, Minister in the Presidency, during the Lusiksiki Imbizo on Girl Abduction, Forced and Early Marriages 24 March 2009 The Presidency http;//www.thepresidency.gov.za visited 2009-06-10; *Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3).

This aspect of *ukuthwalwa* is a breach of the common law (*R v Sita supra*) and the repealed section of the Sexual Offences Act (s 9 of the Sexual Offences Act 23 of 1957 (hereinafter "the Sexual Offences Act"). It is also completely contrary to the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa Act, 1996) and the Sexual Offences Amendment Act (Chapters 2 and 3 of the Sexual Offences Amendment Act). Part of the problem may be that some rural communities think that cultural practices trump constitutional rights, whereas according to the law the reverse applies.

2 Cultural rights and the Constitution

The Constitution provides that everyone has the right "to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights"(s 30). Likewise, persons belonging to a cultural community may not be denied the right to enjoy their culture, but such rights "may not be exercised in a manner inconsistent with any provision of the Bill of Rights" (s 31). Furthermore, customary law itself must be developed by the courts, tribunals or other forums to promote the spirit, purport and objects of the Bill of Rights (s 39(2)): The Constitution does not deny the rights or freedoms conferred by customary law where they are consistent with the Bill of Rights (s 39(3)). Therefore, if any of the practices of *ukuthwalwa* conflict with the Bill of Rights they will be regarded as unconstitutional and illegal. If they amount to sexual offences they will have to be reported to the police in terms of the Sexual Offences Amendment Act (s 54).

3 *Ukuthwalwa* and how it is being practised

Newspaper reports (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3), and the statements of Minister Manto Tshabalala-Msimang, Minister in the Presidency (see http;//www.thepresidency.gov.za accessed 2009-6-10), indicate that under the pretext of the *ukuthwalwa* custom young girls are being abducted – often with the connivance of their parents – and forced to leave school and enter into arranged "marriages" with much older men, some of whom are HIV positive who hope to be cured by having sex with a virgin. As a result many of the girls contract HIV and are impregnated at an early age. They are also being denied many of their other fundamental rights. The grossest violations of these rights consist of being detained against their will in guarded huts and forced to have sex with their "husbands", and being beaten and humiliated should they try to escape (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3).

According to the newspaper reports, even though some of the young girls had been taken to a shelter, no complaints had been made to the police (*Sunday Tribune* 31 May 2009 1). The chief in the region (a woman) is

reported to have gone further and said that the young girls who escaped were "embarrassing our village" and that she had only received one complaint that had been "resolved" (*Sunday Times* 31 May 3). This approach shows complete ignorance about the fundamental rights in the Bill of Rights and the duties imposed by the Sexual Offences Amendment Act.

4 *Ukuthwalwa* and the Bill of Rights

Nearly all of the most important rights and freedoms of young girls under the Bill of Rights are being systematically violated by some of the reported practices under the *ukuthwalwa* custom in the Eastern Cape (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3).

The right of young girls to equality before the law, equal protection and benefit of the law, and not to be unfairly discriminated against (s 9 of the Bill of Rights) is violated by those aspects of *ukuthwalwa* that discriminate against girls by not treating them in the same manner as young boys – for example, boys are not required to leave school prematurely and to enter into forced "marriages".

The right of young girls to their dignity and to have their dignity respected and protected (s 10 of the Bill of Rights) is violated when they girls are forced to submit to sexual acts with older men and are insulted or humiliated if they try to escape (*Sunday Times* 31 May 2009 3).

The right of young girls to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) to be free from all forms of violence; (c) not to be tortured in any way; and (d) not to be treated or punished in a cruel, inhuman or degrading way (s 12(1) of the Bill of Rights) is violated when they are kept in locked and guarded huts and forced to have unprotected sex with their "husbands" (*Sunday Tribune* 31 May 2009 1; *Sunday Times* 31 May 2009 3).

The right of young girls to bodily and psychological integrity which includes the right (a) to make decisions concerning reproduction, and (b) security and control over their bodies (s 12(2) of the Bill of Rights) is violated when they are forced against their will to have unprotected sex with, and be impregnated by, their "husbands" (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3).

The right of young girls not to be subjected to slavery, servitude or forced labour (s 13 of the Bill of Rights) is violated when they are forced at an early age, against their will, to become "wives" and to carry out the duties of wives according to custom.

The right of young girls to live in an environment that is not harmful to their health or well-being (s 24 of the Bill of Rights) is violated when they are forced to have regular unprotected sex with their HIV infected "husbands" (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3) in order to "cure" the husbands' HIV infection.

The right of young girls to basic education (s 29 of the Bill of Rights) is violated when they are forced to leave school at an early age in order to get

"married" and to "become a woman" (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3).

In addition to the general fundamental rights in the Bill of Rights there are particular Constitutional safeguards for children – persons under 18 years of age (s 28(3)). For instance, every child has the right to parental or family care (s 28(1)(b) of the Bill of Rights), and to be protected from maltreatment, neglect, abuse or degradation (s 28(1)(d) of the Bill of Rights), and the child's "best interests are of paramount importance in every matter concerning the child" (s 28(2) of the Bill of Rights). All of these rights are violated when the parents of the young girls connive with the "husbands" to allow the girls to be abducted and forced into "marriage" (*Sunday Tribune* 31 May 2009 1; and *Sunday Times* 31 May 2009 3).

5 *Ukuthwalwa* and the Sexual Offences Amendment Act

The Sexual Offences Amendment Act repeals the common-law offences of rape (see Burchell 705; Snyman 355; and Milton 439) and indecent assault (see Burchell 691; Snyman 371; and Milton 467) and replaces them with a new definition of rape (s 3) (repealed by s 68(2) of the Sexual Offences Amendment Act read with the Schedule to the Act). The Act also creates the new offences of sexual assault (s 5), and sexual exploitation of children (s 17(2)). In addition the Act repeals the duty in the Sexual Offences Act (s 9 of the Sexual Offences Act) on parents or guardians not to procure the defilement for their child or ward, (repealed by s 68(2) of the Sexual Offences Amendment Act read with the Schedule to the Act), with the new offence of furthering the sexual exploitation of a child (s 17(3)).

5 1 Rape and sexual assault

The Sexual Offences Amendment Act provides that a person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant is guilty of rape (s 3). "Sexual penetration" includes penetration by the genital organs of one person, or any other part of the body or an object, into the genital organs, anus or mouth of another person (s 1; and see Snyman 358).

A man who has consensual genital, oral or anal sex with a girl under 12 years of age commits rape because she is too young to consent (*cf* Snyman 393). If the man sexually penetrates a girl between the age of 12 and 16 years of age he is guilty of statutory rape – whether or not she consented (s 15). If he sexually penetrates a girl over the age of 16 years, without her consent, he commits rape (s 3).

A person who unlawfully and intentionally sexually violates a complainant, or who inspires a belief in a complainant that he or she will be sexually violated, without the consent of the complainant, is guilty of sexual assault (s 5). "Sexual violation" includes any act which causes direct or indirect contact between (a) the genital organs, anus or female breasts and any part of the body of another person or any object, or (b) the mouth of one person and the

genital organs, anus or female breasts, or the mouth of another person, or any other part of the body of another person that could be used in an act of sexual penetration or act of sexual arousal (s 1; and *cf* Snyman 372). Therefore, any man who sexually violates an abducted girl old enough to consent, without their consent, is guilty of sexual assault (s 5(1)).

Even if the "husbands" or parents or guardians were to contend that the girls abducted according to the *ukuthwalwa* custom had become "wives", in terms of the Sexual Offences Amendment Act it is not a valid defence to a charge of rape or sexual assault for an accused person to contend that a marital or other relationship exists or existed between the accused and the complainant (s 56(1)).

5 2 Sexual exploitation of children

The Sexual Offences Amendment Act provides that a person who unlawfully and intentionally engages the services of a child complainant, with or without the consent of the complainant, for financial or other reward, favour or compensation to the complainant or a third person, for the purpose of engaging in a sexual act with the complainant, irrespective of whether the sexual act is committed or not, or by committing a sexual act with the complainant, is guilty of sexual exploitation of a child (s 17). Although this section may be construed as outlawing prostitution (Snyman 383) and child prostitution (Snyman 396), it could be argued that men who abduct female children in terms of the *ukuthwalwa* custom and then pay the girls' parents or guardians *lobolo* for their "wives", will be guilty of sexual exploitation of a child because the parents or guardians would fall into the category of "a third person" who received financial or other reward for their children's services.

A person who intentionally allows or knowingly permits the commission of a sexual act by a third person with a child complainant, with or without the consent of the complainant, while being a primary care-giver, parent or guardian of the complainant, is guilty of the offence of furthering the sexual exploitation of a child (s 17(3)). Therefore, any care-giver, parent or guardian who intentionally allows their girl child to be kidnapped in terms of the *ukuthwalwa* custom can clearly be found guilty of furthering the sexual exploitation of a child. Previously such a parent or guardian could have been prosecuted under the Sexual Offences Act for procuring the defilement of his or her child or ward. The repealed section of the Act stated that a parent or guardian of a child under 18 years of age who "permits, procures or attempts to procure such child to have unlawful carnal intercourse, or to commit any immoral or indecent act, with any person other than the procurer … or [who] orders, permits, or in any way assists in bringing about, or receives any consideration for, the defilement [or] seduction … of such child, shall be guilty of an offence" (s 9 of the Sexual Offences Act; repealed by s 68(2) of the Sexual Offences Amendment Act read with the Schedule to the Act).

A person who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a child complainant, with or without the consent of the complainant, by a third person, is guilty of the offence of benefiting from the sexual exploitation of a child (s 17(4)). Once again this provision could be applied to parents or guardians who

intentionally allow their girl children to be abducted in terms of the *ukuthwalwa* custom in exchange for *lobolo.*

Although aimed primarily at prostitution the unrepealed provision in the Sexual Offences Act regarding the detention of females for the purposes of unlawful carnal intercourse could be applied to men or women who have detained young girls against their will in terms of the *ukuthwalwa* custom. The provision states that any person who takes or detains any female against her will "to or in or upon any house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not … shall be guilty of an offence" (s 12(1) of the Sexual Offences Act).

5 3 Aiding and abetting the commission of sexual offences

The Sexual Offences Amendment Act provides that any person who (a) attempts; (b) conspires with any other person; or (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit a sexual offence in terms of the Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable (s 55). This section could be applied to parents or guardians who conspire with the "husbands", or who aid, abet, induce, instigate, counsel or procure such "husbands" to abduct their children in terms of the *ukuthwalwa* custom. The section replaces the provision in the Sexual Offences Act (s11 of the Sexual Offences Act) regarding conspiracy to defile any female by false pretences or other fraudulent means (repealed by s 68(2) of the Sexual Offences Amendment Act read with the Schedule to the Act).

Persons engaging in *ukuthwalwa* practices amounting to human rights abuses prior to the relevant sections of the Sexual Offences Amendment Act coming into effect on 16 December 2007, would have to be charged with the common-law crimes of rape (see Burchell 705; Snyman 355; and Milton 439), indecent assault (see Burchell 691; Snyman 371; and Milton 467), kidnapping (see Burchell 758; Snyman 479; and Milton 539), and with statutory rape in terms of the Sexual Offences Act prior to its amendment (s 14(1) of the Sexual Offences Act). They could also be charged with the common-law crime of abduction (see Snyman 403; and Milton 554), but this would be problematical where the parents or guardians consent to the abduction because, as has been mentioned, the latter is a crime against parental authority (see *R v Sita supra* 23; and Burchell 764). The statutory crime of abduction in the Sexual Offences Act (s 11 of the Sexual Offences Act) has been repealed (by s 68(2) of the Sexual Offences Amendment Act read with the Schedule to the Act).

6 *Ukuthwalwa*: Is there a duty to report it as sexual abuse?

The Sexual Offences Amendment Act states that a person who has knowledge that a sexual offence has been committed against a child must

report such knowledge immediately to a police officer. A person who fails to report such knowledge is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment (s 54).

The duty to report applies to any person who knows about aspects of *ukuthwalwa* that amount to sexual offences against children – whether that person is a Cabinet Minister, a traditional leader , a public official, a police officer or anyone else. Newspaper reports suggested that no complaints about *ukuthwalwa* had been received by the police and that attempts had been made to settle the matter culturally (*Sunday Tribune* 31 May 2009 1). If true, this is completely contrary to the Bill of Rights (ss 30 and 31), the Sexual Offences Amendment Act (s 54) and public policy which is aimed at reducing crimes against women and children. Ministers, traditional leaders, public officials and others who have failed to report their knowledge about the gross human rights violations against the young girls to the police could be charged for such failure in terms of the Sexual Offences Amendment Act (s 54).

Other statutes also require certain people to report ill-treatment of children. Thus in terms of the Child Care Act (Act 74 of 1983; due to be replaced by s 110(3) of the Children's Amendment Act 41 of 2007 when it comes into force), every dentist, medical practitioner, nurse, social worker or teacher, or any person employed by or managing a children's home, place of care or shelter, who examines, attends or deals with any child in circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury which probably might have been deliberately caused, or suffers from a nutritional deficiency disease, must immediately notify the director-general of social development or a designated officer of such circumstances (s 42 of the Child Care Act). This would apply to child abuse arising from aspects of the *ukuthwalwa* custom. Likewise, the Prevention of Family Violence Act (Prevention of Family Violence Act 133 of 1993; due to be replaced by s 110(3) of the Children's Amendment Act No. 41 of 2007 when it comes into force), requires anyone who examines, treats, attends to, advises or instructs or cares for any child to report ill-treatment of them to the police, a commissioner of child welfare or a social worker (s 4 of the Prevention of Family Violence Act).

The Child Care and Prevention of Family Violence Acts apply until the much broader provisions of Children's Amendment Act (Children's Amendment Act 41 of 2007) come into force. In terms of section 110(3) of the Children's Amendment Act any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, *traditional health practitioner, traditional leader* or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report such conclusion in the prescribed form to a designated child protection organization, the provincial department of social development or a police official (author's italics; see generally,

McQuoid-Mason "The Children's Amendment Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act: Duty to Report Child Abuse and Sexual Offences against Children and Mentally Disabled Persons" 2008 *SA Med J* 929-931). The reference to traditional health practitioners and traditional leaders means that when the Children's Amendment Act comes into force there will be a specific duty on such persons to report aspects of the *ukuthwalwa* custom that constitute child abuse – no matter what their communities think – in addition to the duty imposed by the Sexual Offences Amendment Act.

7 Conclusion

Those aspects of the *ukuthwalwa* custom that undermine fundamental rights in the Bill of Rights are clearly unlawful in terms of the Constitution and the Sexual Offences Amendment Act. The custom in the Eastern Cape seems to be based on the wrongful premise that customary law practices supersede the provisions of the Constitution. If this is the case, there is an urgent need for widespread education of the local community about why the custom must either be abandoned entirely, or brought into line with the Constitution, so that the defence of ignorance of the law (*cf* Burchell 764 fn 19) cannot be raised.

While there are strong pressures on public officials, rural doctors, health-care professionals and others to respect cultural practices, where such practices undermine fundamental human rights in the Bill of Rights, and are contraventions of the Sexual Offences Amendment Act, there is a legal duty on them to report such practices to the police. A similar duty will be imposed, *inter alia*, on traditional health practitioners and traditional leaders by the Children's Amendment Act when it comes into effect. At present a failure to report ill-treatment of children in terms of the Sexual Offences Amendment Act, or the Child Care and Prevention of Family Violence Acts until they are repealed by the Children's Amendment Act, will be punishable as an offence. Such failure will also be punishable under the Children's Amendment Act once it comes into force.

David McQuoid-Mason
University of KwaZulu-Natal, Durban