



## The thin edge of the wedge: ukuthwala, alienation and consent

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### Abstract

Ukuthwala, a mock abduction of a girl for the purpose of a customary marriage, has been subject to debate at both local and national level. This debate culminated into a South African Law Reform Commission Report on the practice of ukuthwala. However, the case of *Jezile v S* brings theory into reality, putting in stark relief the issues that surround this custom in a constitutional democracy. The *Jezile* case highlights the disjuncture between communities' lived realities and the constitutional imperatives of the right to practice one's culture, as well as the rights to equality and dignity, specifically for women and the girl child in the context of ukuthwala. Based on field research conducted in September 2015 and April 2016 in Engcobo (where the ukuthwala was alleged to take place in *Jezile*), this article sets out the community's views in the aftermath of the case. Highlighting the alienation of the community from the law, and the complexities in understanding consent, the article posits that much more needs to be done from the 'bottom up' to ensure gender equality and protection of the girl child from harm.

### 1. Introduction

We are also not happy with how government treats us. As people living in the rural areas, government see us as nobody. Government looks down at us as not being important. If you could compare Nvumeleni's case with Oscar Pistorius's case, Pistorius killed someone and was sentenced to 5 years. Nvumeleni was practising his custom and he was sentenced to 22 years.<sup>1</sup>

*Ukuthwala*,<sup>2</sup> described as the practice of 'carrying off a girl for the purpose of entering into a customary marriage',<sup>3</sup> has been the subject of debate at both local and

<sup>1</sup> Jezile's family focus group discussions, 22 September 2015.

<sup>2</sup> A term used in isiXhosa and isiZulu, it is also known as ukweba umakoti in isiNdebele; tjabisa in sePedi; chobediso in seSotho; tlhaka or tlhakisa in xiTsonga; taha or tahisa in tshiVenda.

<sup>3</sup> See definitions of the practice in RH Kaschula et al. 'The Amaxhosa Ukuthwala Marriage Custom in Fact and Fiction: A Contemporary Critique' (2013) 33 South African Journal of African Languages 143; L Mwambene & J Sloth-Nielsen 'Benign Accommodation? Ukuthwala, "Forced Marriage" and the South African Children's Act' (2011) 11 African Human Rights Law Journal 1; N Karimakwenda 'Today it Would be Called Rape: A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape' 2013 Acta Juridica, 339; M van der Watt & M Ovens 'Contextualising the Practice of Ukuthwala within South Africa' (2012) 13 Child Abuse Research: A South African Journal 11; D Mabasa 'Ukuthwala: Is it All Culturally Relative?' (2015) 28 De Rebus 136; South African Law Reform Commission 'Revised Discussion Paper, Project 138: The Practice of Ukuthwala' (2015) viii; D S Koyana & J C Bekker 'The Indomitable Ukuthwala Custom' (2007) 40 De Jure 139; T W Bennett Customary Law in South Africa (2004); K Rice 'Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation About Gender, Rights and Generational Authority Among the Xhosa' (2014) 40 Journal of Southern African Studies 381; J C Bekker Seymour's Customary Law in Southern

national levels.<sup>4</sup> This debate culminated into a South African Law Reform Commission (SALRC) report which documents two years of discussion.<sup>5</sup> However, the case of *Jezile v The State*<sup>6</sup> brings theory into reality, putting in stark relief issues that surround this custom in a constitutional democracy. What the *Jezile* case does is to highlight the disjuncture between communities' lived realities, notions of justice, and the constitutional imperatives of equality, particularly on women and the girl child in the context of *ukuthwala*.

Using desktop and qualitative methods,<sup>7</sup> this article goes behind the reported facts of the case to understand the context in which these facts took place, the community's views and more importantly, how consent is deemed to take place in *ukuthwala* (namely consent to what, by whom and when)? By seeking out and highlighting the community's views, we do not condone customs related to *ukuthwala* without the woman's consent. However, we argue that the deeply held beliefs and views of the community must be seriously considered if attempts to address the challenges that come with *ukuthwala* are to succeed.

The rationale for such an argument is a genuine concern about how law, ideology and social practice interact. In particular, we thought it important to put a cultural practice into a much broader context of a community<sup>8</sup> that is trying to hold on to a cultural identity within a post-apartheid constitutional democracy. Specifically, following Trubek and Galanter's lead,<sup>9</sup> our research problematises the assumption made in a liberal legal model<sup>10</sup> that rules are enough to guide behaviour, and that a social practice can be successfully modified by a simple change of rules or a court judgment. Instead, our research adopts Chanock's 'bottom up' approach which, in part,

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Africa (1989). For literary representations of *ukuthwala*, see R H Kaschula 'Six Teaspoons of Sweetness' in South African PEN & J M Coetzee (eds) African Pens 2011: New Writing from Southern Africa (2011) 209; G Mlophe 'Nokulunga's Wedding' in G Mlophe Love Child (2002) 64.

<sup>4</sup> See, for example, discussions in Karimakwenda *ibid* 339; Van der Watt & Ovens *ibid*; Mabasa *ibid* 136; C Monyane 'Is Ukuthwala Another Form of "Forced Marriage"?' (2013) 44 South African Review of Sociology 64; Mwambene & Sloth-Nielsen *ibid* 1 and J Prinsloo & M Ovens 'Ukuthwala as an Aberrant Traditional Practice: The State versus Nvumeleni Jezile 2014 WCD' 2015 Acta Criminologica 169.

<sup>5</sup> SALRC *ukuthwala* report (note 3 above). See also earlier attempts to criminalise *ukuthwala* in the Kwazulu-Natal, Draft White Paper on *Ukuthwala* and related practices as observed in the SALRC *ukuthwala* report (note 3 above) 11.

<sup>6</sup> *Jezile v The State* [2015] 3 All SA 201 (WCC).

<sup>7</sup> We use desktop research, first, to frame the problem that has led to the study. Secondly, we use literature in the end of the analysis as a basis for comparing and contrasting findings of the qualitative study (J Creswell *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (4th edn, 2014)). Adopting the advantages of qualitative methods of study by D Norman & Y Lincoln *Handbook of Qualitative Research* (2nd edn, 2000), we also see that the method is used to describe existing phenomena and current situations in responding to local situations, conditions and needs of the participants. Also, ethics consent was obtained from the Humanities and Social Research Ethics Committee of the University of the Western Cape (ethics ref no: HS/16/3/6, reg no; 12/1/21) and the Faculty of Law Ethics Committee of Rhodes University (19/01/2015). We therefore adhere to concepts of the research ethics and informed consent. All participants in this study were informed of the purpose of the study, their informed consent was obtained, and anonymity guaranteed.

<sup>8</sup> For the purposes of this article, we adopt the definition of community as '[t]he people who are living in one particular area who are considered as a unit because of their common interest, social group or nationality'. See Cambridge English Dictionary ([www.dictionary.cambridge.org](http://www.dictionary.cambridge.org)).

<sup>9</sup> D Trubek & M Galanter 'Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062.

<sup>10</sup> See, for example, discussions on liberal legal models by R S Turner 'Neo-Liberal Constitutionalism: Ideology, Government and the Rule of Law' (2008) 1 *Journal of Politics and Law* 47.

seeks to improve empirical knowledge about legal reality.<sup>11</sup> This ‘bottom up’ approach is simply the idea, somewhat ironically, that focusing on the Constitution and rights guarantees may not be the best starting point to promote constitutionalism in this context.<sup>12</sup> Instead, Chanock recommends a reflexive process where communities’ social experiences are understood and taken into account sufficiently to encourage not only symbolic but also systemic change.<sup>13</sup> We think that understanding social practice is an essential starting point in the domain of customary law, and in particular, *ukuthwala*, since a failure to do so has arguably resulted in misunderstandings about key concepts,<sup>14</sup> and directing reform efforts in the wrong direction.

In this light, we start by describing the facts of the *Jezile* case with reference to both the reported judgment and the transcript of the Regional Magistrate’s Court hearing. Secondly, we highlight aspects of focus group discussions with the community, more particularly women, traditional leaders and the extended families in the area in which the *Jezile* matter originated. Thirdly, we consider the disjuncture and misinformation between the reported case and the community’s views. Finally, we reflect on whether current reform efforts will further enhance or undermine constitutional values. In view of the community’s beliefs around the values of *ukuthwala*, and their misconception that *Jezile* was convicted of *ukuthwala* rather than rape, the major question is whether the proposed reforms (discussed below) will further alienate the community from the justice system. We hypothesise that, without more, reform efforts may cement the community’s belief that the justice system is far removed from its reality, and is not representative of its needs.

## **2. Context (description of the community)**

Engcobo<sup>15</sup> is an area north of Mthatha in the Eastern Cape Province, forming part of the Chris Hani District Municipality. During apartheid, the area formed part of the former Bantustan of the Transkei. Today, the greater part of Engcobo consists of small rural villages (locally known as ‘lali’s’) on rocky and hilly terrain connected by dirt roads, and presided over by the authority of headman and traditional leaders. The villages surrounding Engcobo are generally small, impoverished areas, with outside

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<sup>11</sup> M Chanock ‘African Constitutionalism from the Bottom-up’ 4 <<http://www.customcontested.co.za/wp-content/uploads/2015/04/Chanock-PublicLecture-2015.pdf>>. See similar approaches by I Shivji ‘Contradictory Perspectives on Rights and Justice in the Context of Land Tenure Reform in Tanzania’ in A An-Na’im (ed) *Cultural Transformation and Human Rights in Africa* (2002).

<sup>12</sup> Chanock *ibid* 4–5.

<sup>13</sup> *Ibid*.

<sup>14</sup> For example, the often crude translation of lobolo into ‘bride price’, and – as discussed below – consent in the context of *ukuthwala*. See A E Laiou ‘Introduction’ in A E Laiou (ed) *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies* (1993) vii, in relation to issues of consent in sexual relations generally. Laiou comments: ‘[W]hat matters deeply in one society [regarding consent] does not matter in another, and resemblances are sometimes real and sometimes superficial’. She also says (at vii) that ‘[a]ll societies place limits on individual consent, and some value it less than others; many societies accept a certain degree of coercion as valid. What varies, and therefore historically significant, is the weight that each society places on individual consent, the limits it imposes upon it, and the validity it recognises to measures or acts of coercion’. For a critique of the Constitutional Court’s dealing of ‘consent’ in a de facto polygamous marriage, see H Kruuse & J Sloth-Nielsen ‘Sailing Between Scylla and Charybdis: Mayelane v Ngwenyama’ (2014) 17 PER/PELJ 1710.

<sup>15</sup> Derived from the isiXhosa term meaning ‘a green place next to a stream’.

pit latrines and approximately half the area connected to electricity.<sup>16</sup> The area claims the most youthful population, as well as the highest rates of poverty and unemployment in the Chris Hani District Municipality.<sup>17</sup> It is to this area that Nvumeleni Jezile returned from Phillippi, a township in Cape Town,<sup>18</sup> on or about December 2009 or January 2010 to find himself a wife according to the *ukuthwala* custom.

### 3. Facts of the *Jezile* case

It was common cause that Jezile returned from Phillippi to Engcobo with the intention to find and marry a virgin girl according to customary law.<sup>19</sup> In January 2010 in Engcobo, he noticed a girl (14 years old) from his neighbouring village and informed her family that he had the intention to marry her. The girl was informed by a gathering of various male members of the two families that she was to be married<sup>20</sup> and was taken to Jezile and his friends who, in the *ukuthwala* style,<sup>21</sup> took her to the village of Jezile's family. Following the successful traditional *lobolo* negotiations by Jezile's family and the girl's family, the girl became Jezile's customary wife.<sup>22</sup>

Whilst these processes were underway, the girl was apparently desperately unhappy and ran back to her family a few days later. She first spent a night in the forest close to her family home and thereafter, upon instructions from her mother, hid at another home.<sup>23</sup> The girl was later found and promptly returned to Jezile's family home by her own uncles. At Jezile's home, the girl was beaten by Jezile and his uncle for refusing to put on the *amadaki* clothing (traditional clothing for a new bride).<sup>24</sup> Soon after she was returned, the girl and Jezile left for Phillippi, Cape Town.<sup>25</sup>

Whilst in Phillippi, the girl refused to have sex with Jezile. Jezile proceed to forcibly rape her whilst she was protesting, and while his brother held her down.<sup>26</sup> At one incident of sex without her consent, the girl sustained an open wound as a result of the assault that Jezile made to subdue her.<sup>27</sup> A short while after these incidents occurred, the complainant managed to escape from Jezile's home to a nearby taxi rank. Two women assisted her to the nearest police station.<sup>28</sup>

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<sup>16</sup>Statistics South Africa 'Census 2011 Municipal Fact Sheet for Engcobo Local Municipality (EC137)' <http://www.localgovernment.co.za/locals/view/21/Engcobo-Local-Municipality#demographic>.

<sup>17</sup> See <<http://www.localgovernment.co.za/locals/view/21/Engcobo-Local-Municipality>>.

<sup>18</sup> Phillippi is one of the larger newer townships in Cape Town, South Africa. Approximately 191,000 people live in Phillippi according to the 2011 Census numbers. For more information, see <<https://census2011.adrianfrith.com/place/199033>>.

<sup>19</sup> Jezile (note 6 above) paras 5-6.

<sup>20</sup> Ibid para 7.

<sup>21</sup> While we note that the court questioned whether Jezile's conduct amounted to *ukuthwala* given that the trafficking and sexual assaults took place after the customary 'marriage' rather than before (Jezile note 6 above para 90), we recognise that Jezile relied on what he believed was the living form of *ukuthwala* in his community.

<sup>22</sup> Jezile (note 6 above) para 9.

<sup>23</sup> Ibid para 10.

<sup>24</sup> Regional Magistrate Court, Wynberg, Part 1 of 2, 27 (Appeal No: 7/14).

<sup>25</sup> Jezile (note 6 above) para 23.

<sup>26</sup> Ibid para 11. For similar experiences of women being held down for sex post-*ukuthwala*, see Karimakwenda (note 3 above) 339-356, 349.

<sup>27</sup> Jezile (note 6 above) paras 11 and 98.

<sup>28</sup> Ibid para 26.

Jezile was charged with the offences of three rape counts, human trafficking, assault with intent to cause grievous bodily harm, and common assault in the Wynberg Magistrates Court. What was in dispute before the court was:<sup>29</sup>

1. Whether the girl willingly travelled to Cape Town with Jezile and stayed with him willingly until she fled.
2. Whether she was trafficked to Cape Town for purposes of exploitation or abuse of a sexual nature,
3. Whether sexual intercourse took place, and if so, if this was with the girl's consent,
4. Whether the injury that she sustained to her leg was caused by Jezile.<sup>30</sup>

On 13 February 2014, the Regional Magistrate's Court found Jezile guilty of all the offences charged and sentenced him to twenty years imprisonment on the three rape counts, ten years imprisonment for human trafficking, six months' imprisonment on the assault with intent to cause grievous bodily harm and 30 days imprisonment on the count of common assault. The court ordered that eight years of the sentence for human trafficking, as well as the sentences imposed for the two assaults, could be served concurrently with the sentence imposed for the rapes. Effectively, he was given a total of 22 years imprisonment.<sup>31</sup>

On appeal, Jezile raised, as part of his defences, that he was in a customary marriage with the girl and it is an integral part of *ukuthwala* that the girl may not only be coerced, but will invariably pretend to object since it is required of her to at least do so.<sup>32</sup> In light of the cultural defence raised, the High Court invited several organisations and experts<sup>33</sup> on *ukuthwala* and customary law to assist as amici curiae.<sup>34</sup> These organisations included the National House of Traditional Leaders, the Women's Legal Centre trust, the Centre for Child Law, the Commission for Gender Equality, the Rural Women's Movement, among others.<sup>35</sup> The High Court concluded that Jezile's convictions on both counts of assault were set aside but confirmed the

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<sup>29</sup> Ibid para 12.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid para 2. In contrast, Van der Watt & Ovens (note 3 above) at 23 observed that in 2011, the Lusikisiki Regional Magistrate Court sentenced a man similarly convicted on the same charges as Jezile, to 16 years imprisonment but the sentence was suspended for five years on condition that he did not commit the same offence.

<sup>32</sup> Jezile (note 6 above) para 52.

<sup>33</sup> Prof RT Nhlapo, a renowned expert on customary law, and author of several publications on the topic, who chaired the advisory committee that assisted the SALC in the development of the Discussion Paper in Project 138.

<sup>34</sup> See generally T W Bennett 'The Cultural Defence and the Custom of Thwala in South African Law' (2010) 10 University of Botswana Law Journal 3. For international comment on cultural defences in general, see A Phillips 'When Culture Means Gender: Issues of Cultural Defence in the English Courts' (2003) 66 Modern Law Review 510; D Evans-Prichard & A Dundes Renteln 'The Interpretation and Distortion of Culture: A Hmong "marriage by capture" case in Fresno, California' (1994-1995) 4 California Interdisciplinary Law Journal 1; L Volpp 'Blaming Culture for Bad Behaviour' (2000) 12 Yale Journal of Law and the Humanities 89; P Fournier 'The Ghettoization of Difference in Canada: "Rape by Culture": And the Danger of a "Cultural Defence" in Criminal Law Trials' (2002) 29 Manitoba Law Journal 1; A Dundes Rente The Cultural Defense (2004).

<sup>35</sup> Also included were the Masimanyane Women's Support Centre, and the Commission for the Protection of Cultural, Religious and Linguistic Communities.

magistrate court decision with regard to the convictions and sentences for the offences of rape and human trafficking.<sup>36</sup>

#### **4. Community's views on *ukuthwala*, the outcome of the case and the law**

As pointed out, this research is based primarily on the local process and context issues of the *Jezile* case as seen through the lens of family and community. It is therefore important to stress the general themes that emerged from the focus groups which align with many of the issues that were raised in the *Jezile* case, specifically on *ukuthwala*, consent and the law. We seek to first highlight the community's views on *ukuthwala*. Thereafter, we consider the implications for consent more generally. We then conclude this part by discussing the community's perspectives on laws regulating consent and age requirements to a customary marriage.

##### **4.1. *Ukuthwala***

In discussion, it emerged that *ukuthwala* continues to be a respected custom in the Engcobo area, particularly in that it is seen as promoting community values relating to social cohesion and solidarity amongst its members. This finding is similar to the findings by Van der Watt and Ovens and the Gender Directorate in Lusikisiki, Eastern Cape.<sup>37</sup> These studies also reported strong cultural support for the practice of *ukuthwala* among chiefs and parents.<sup>38</sup> The community expressed the view that '*ukuthwala* is a practice that they will continue to exercise regardless of the prevailing criticisms from different sectors'. Complementing the reasons given in the Van der Watt and Ovens study for the continued support of the practice, the community in Engcobo saw *ukuthwala* as promoting the following community values: longevity in a customary marriage;<sup>39</sup> the prevention of children to be born out of wedlock; respect between child and parent in families; ties within the community – between one family and another; and the affirmation of a continued cultural practice.<sup>40</sup> Many of these values in *ukuthwala* are captured in the following sentiment expressed in one of the community focus group discussions:

If you can look now, with the old and the new generation, the difference between wives in the old generation who were *thwalaed* and new generation, those who were not married by *ukuthwala*, there is a big difference, the one who has been *thwalaed* stay in their marriages, their marriages are stable, their marriages lasts, because she's not just

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<sup>36</sup> *Jezile* (note 6 above) para 106.

<sup>37</sup> Van der Watt & Ovens (note 3 above) 11 and the SALRC *Ukuthwala* Report (note 3 above) 2, 14.

<sup>38</sup> *Ibid* (Van der Watt & Ovens) 16.

<sup>39</sup> This rationale appears to underpin Nhlapo's comments regarding the community sense of belonging and socioeconomic circumstances when he writes: 'In the context of a subsistence economy the very rules that appeared designed for the subjection of women often operated to ensure their security. The economic priorities underlying the pre-eminence of marriage and large families produced practices which worked in part to ensure that no woman was left without someone directly responsible for her maintenance'. See R T Nhlapo 'The African Family and Women's Rights: Friends or Foes?' 1991 *Acta Juridica* 135, 144.

<sup>40</sup> This view concurs with academic commentary on cultural practices and identity. For example, Stolz explains: 'Local customs and festivals are usually thought to be impressive and efficient demonstrations of indigenous identity. There is indeed something to be said in favour of their longevity, exactly because they are well-proven ways of gracing and making bearable the sombre cutting edges between life and death. A special birth rite, and initiation procedure, a wedding ceremony, a funeral, all placed at those incisive thresholds of life that beg for meaning, may reveal much about the particular world view of a community'. See Stolz quoted in J U Jacobs 'Young South Africans and Cultural (mal)Practice: Breaking the Silence in Recent Writing' (2013) 34 *Literator* 1, 2.

married to her husband, but she is married to the whole family, she respects not only her husband but the whole family, the one who is not thwalaed disrespects the family because she's married to her husband, she only focuses on her husband. That is why there are so many divorces now.<sup>41</sup>

While the community was aware of reported abuse of the *ukuthwala* practice, they saw more value in its retention and blamed the abuse of the practice on the general breakdown of values and 'problems' in the community, including the following:

- i. A lack of respect between children and parents ('Girls are cheeky now'<sup>42</sup>);
- ii. The abuse of alcohol and drugs by young men (leading to an abuse of the custom);
- iii. Extra-marital relationships by women in the community (leading to, in the community's view, a woman who has been thwalaed falsely accusing her new husband of rape because she wants to stay with her pre-existing 'boyfriend'<sup>43</sup>); and
- iv. Continued schooling after the thwala (leading the girl/woman to turn away from her marriage; linking to (i) above).<sup>44</sup>

#### **4.2. Outcome of the Jezile case**

In general, there is a clear sense of a community in mourning, at pain, angry, and more importantly, in disbelief at the outcome of this case.<sup>45</sup> All those who spoke in focus groups saw the case being squarely about an attack on their custom. Further, discussions with the community uncovered a variety of sentiments regarding the community's highly ambivalent relationship with the justice system that convicted their 'brother' and 'son' (namely, Jezile). The community indicated their discomfort and alienation from the legal processes that took place in the *Jezile* case, with general support for the notion that the local courts would have decided the matter differently, given that local magistrates would have allegedly understood the practice.<sup>46</sup> In the *Jezile* case, in particular, the community found the following issues alienating and challenging:

- i. The (geographical) distance to Cape Town (meaning that most of the family could not attend court proceedings).
- ii. The language spoken during the court process (meaning that neither Jezile nor the uncle (who was able to attend) fully understood the court proceedings. For example, the uncle was unable to tell the researchers whether he attended proceedings in the Magistrate's Court or in the High Court when the matter was appealed.)<sup>47</sup>
- iii. Their belief that Jezile's non-Xhosa legal representative did not understand the custom and, as such, could not properly represent him.

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<sup>41</sup> Women, chief and his delegates focus group discussions, September 2015.

<sup>42</sup> Women focus group discussions, September 2015.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Families of the complainant and Jezile focus group discussions, September 2015 and April 2016.

<sup>46</sup> Families of the complainant, Jezile, as well as the Chief and his delegates focus group discussions, September 2015 and April 2016.

<sup>47</sup> Jezile's family focus group discussions, April, 2016.

- iv. Their belief that the magistrate's lack of knowledge and lack of understanding of the *ukuthwala* custom in the court a quo led to their brother being wrongly convicted.
- v. Jurisdiction (why the matter was heard in a court in Cape Town when the *ukuthwala* proceedings occurred in Eastern Cape).<sup>48</sup>

The sense of alienation, of the breakdown of community life and of culture is evident in the following two comments by community members:

But we would like to say this affects us deeply, this hurt us, Nvumeleni is our child, our child who is in jail for a crime that we were also part of, because when he started his *lobola*, he came to us, we were part of the *lobola* negotiations from the beginning, why are you not arresting us? Why is he the only one serving a sentence in jail? He did not do this alone, he started this with his family, with his community, this is done regularly in this community, but now he is in jail alone.<sup>49</sup>

You know when you talk about criminalizing *ukuthwala*, that hurts me deeply, we have a problem here, there's a young man from our community who thwalaed a school girl, he's now in jail, after the process was done, families met together, *lobola* negotiations were done, after that the girl went to lay a charge, we see him on TV, . . . this guy did everything right, but now he's in jail'.<sup>50</sup>

In expanding on the community's views, we found the following themes evident as a result of the case.

#### **4.2.1. The idea of continuing consent/conjugal debt**

Both families could not understand how Jezile could be charged with raping his own wife.<sup>51</sup> In the eyes of the family, consent to the marriage amounted to consent to sexual intercourse.<sup>52</sup> The families' views seem to align with Karimakwenda's observation that under customary law 'sexual assault was not consistently considered to be immoral, especially if it served a socially recognised purpose - such as precipitating marriage'.<sup>53</sup> This view also aligns with research undertaken by Wood where she found that in practice, a woman's lack of consent did not mean that forced sex was considered to be rape, and was, in fact, 'part of the process'.<sup>54</sup>

In explaining why they thought the charge was unfounded in the context of the *Jezile* case, family members pointed out that the complainant had shared a bed with Jezile

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<sup>48</sup> Jezile's family focus group discussions, as well as the Chief and his delegates in September 2015 and April 2016

<sup>49</sup> Jezile's family focus group discussions, September 2015.

<sup>50</sup> Women focus group discussions, September 2015.

<sup>51</sup> For a comparative view of the history of spousal exemption for rape, see N Swartz, et al. 'Is a Husband Criminally Liable for Raping His Wife? A Comparative Analysis' (2015) 3 International Journal of Academic Research and Reflection 8.

<sup>52</sup> Families of the girl and Jezile focus group discussions, September 2015 and April 2016.

<sup>53</sup> Karimakwenda (note 3 above) 349.

<sup>54</sup> K Wood 'Contextualising Group Rape in Post-apartheid South Africa' (2005) 7 Culture, Health & Sexuality 303, 313.



for at least two weeks in Engcobo before moving to Cape Town.<sup>55</sup> The community felt that living together in this time denied the complainant the opportunity of alleging rape. Both families were generally uncomfortable with the thought of a husband asking his wife to have sex.<sup>56</sup> These observations can be illustrated from the following two excerpts:

In this case, she was thwalaed, there were *lobolo* negotiations, both families agreed, she came to stay with our family, for three months as a *makoti*. I wish the law could have mercy because I want to emphasise the part about rape, he did not rape her, he was following his custom. Her parents accepted the *lobolo* to show that they are agreeing with the marriage, she went home and her parents brought her back to our family.<sup>57</sup>

To add more, I would like to plead with the law to have mercy ... to look at the case differently, I suspect that maybe one of the family members of the girl who did not like the marriage got involved, fought this marriage in a different way and used this girl to lay a rape charge, but this is not rape, there is no rape in this case, you cannot stay with someone for over three months and later on claim that you were raped. I think someone in Cape Town got involved and convinced this girl to go and lay a rape charge.

Jezile's testimony during the trial generally confirms that he felt the same regarding marriage and sexual intercourse. When asked by the prosecutor: 'As your wife did it mean that she had to do as you told her? Was she a subordinate to you? Did she have to listen to you as being your wife?' Jezile's response was 'That is right, yes.'<sup>58</sup>

#### **4.2.2. Misinformation/lack of knowledge**

Almost two years after the appeal judgment against the conviction of rape, trafficking and assault was handed down, both families continue to hold mistaken beliefs on the case. These beliefs relate to the nature of the conviction. Jezile's family thought that he was convicted of following his custom, *ukuthwala*.<sup>59</sup> The complainant's family thought that he was convicted of assaulting the complainant as a result of a domestic argument.<sup>60</sup> It was, therefore, clear that both families lacked knowledge about

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<sup>55</sup> There was some debate about the time she spent in Engcobo before going to Cape Town. Neither the Magistrate's Court Transcript nor the Appeal Court judgment are clear on the matter.

<sup>56</sup> Families of the girl and Jezile focus group discussions, September 2015 and April 2016, respectively.

<sup>57</sup> Jezile's family focus group discussions, September 2015.

<sup>58</sup> Jezile (note 6 above) para 41. Also recorded in Regional Magistrate Court, Wynberg, Part 1 of 2, (Appeal No: 7/14), 66. In *S v Mvamvu* 2005 1 SACR 54 (SCA) 320 the Supreme Court of Appeal controversially took into account a similar view in determining a sentence on appeal. The court found that Mvamvu believed that he was still married to the complainant, and that (at para 16) 'it was clear from his evidence that at the time of the incidents [of rape] that the accused honestly (albeit entirely misguidedly) believed that he had some 'right' to conjugal benefits'. The court went on to say that '[h]is actions, though totally unacceptable in law, might well be (albeit to a limited extent) explicable given his background' and concluding by commenting that '[t]hese ingrained habits ... cannot be ignored when considering an appropriate sentence'. While most commentators have been critical of the SCA's view, it should be noted that the sentence in the court a quo in *S v Mvamvu* (five and three years for two rape convictions respectively) were replaced and the court imposed 10 years each for the two rape convictions, despite the court's apparent sympathy for the accused's beliefs.

<sup>59</sup> Jezile's family focus group discussions, September 2015 and April 2016.

<sup>60</sup> Girl's family focus group discussions, April 2016.

what offences Jezile was charged with, what he was convicted of, and why they deemed this fair/unfair.

This is clearly in sharp contrast to what was reported in the judgment as follows:

The Magistrate was however of the view that the matter was not about . . . ‘the practice of *ukuthwala* or forced arranged marriage 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.<sup>61</sup>

#### **4.2.3. Jurisdiction, language and legal representation**

In terms of jurisdiction, the community felt that the matter should have been heard in Engcobo and not in Cape Town, as that was a ‘white man’s court’.<sup>62</sup> Had the matter been heard locally, the community felt that the result would have been different. The community opined that the magistrates in Engcobo would understand the situation and not see it as an offence. This was expressed as follows:

And secondly it’s clear that the people who were presiding or involved during the court proceedings of this trial, that its people who are not familiar with *ukuthwala* or its their first time dealing with a case like this (*ukuthwala* case), the way this case has been publicised in TV, in papers, it’s all over the media like it’s something that is never heard of. Cases like this one are common in this area, but you don’t hear too much hype about them, because magistrates, prosecutors and defense attorneys who deal with these cases are familiar with and understands our customs, it’s not like it’s something new to them. It’s possible that his defence attorney had no idea of what *ukuthwala* is, it was something new to him, also in his eyes this was rape, it’s someone who does not understand our custom.<sup>63</sup>

This view is fortified by the community’s suggestion that another magistrate rehear the case in the following two ways:

Nvumeleni was following his custom, we would like to know if it’s possible that the case be re-opened and heard in Eastern Cape, to involve people who know about the custom, also we suspect that the magistrate presiding over the case did not understand our custom, we think that was a disadvantage for Nvumeleni or if the case cannot be heard in Eastern Cape, at least [the state should] change the presiding magistrate over the matter.<sup>64</sup>

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<sup>61</sup> Jezile (note 6 above) para 51.

<sup>62</sup> Jezile’s family focus group discussions, September 2015 and April 2016.

<sup>63</sup> The Chief and his delegates’ focus group discussions, September 2015. In the latter case, mention was made of the wound on her leg.

<sup>64</sup> Jezile’s family focus group discussions, September 2015 and April 2016.

Should they have taken people from here this case would have not turned out like this, who are these experts that they are talking about that gave evidence about our custom, because even us as Xhosa's we practice custom in a different way, in here we do things differently to Mpondos and Bhacas.<sup>65</sup>

Secondly, on the issue of legal representation, the Jezile family were concerned that a person who did not know or understand the custom of *ukuthwala* represented Jezile. In their view, this had a negative impact on the outcome of the case. This is illustrated by the following:

You see in this case, culture has played an important role. You cannot come from a different culture and represent someone whom his charge is based from his cultural practice which you do not understand at all. That is why there is so much difficulty in this case. A Xhosa custom cannot be represented by a coloured person. The judiciary system should look at these kinds of cases and let people who understand that particular custom preside over the case.<sup>66</sup>

Lastly, a relative who sat through the court *a quo* proceeding described that Jezile complained that he did not understand the proceedings because of language issues.<sup>67</sup> The community expressed similar sentiments, while also displaying a lack of understanding of court procedures, as follows:

I think . . . if the court would have made an effort and got family members of Nvumeleni who were involved in the beginning and ask about what really happened, to understand that people are different, for instance the immediate family of Nvumeleni is not well educated, and maybe his answers during cross questioning were not fruitful, because he's not familiar with legal terms of the courts. I think that was a disadvantage for him, also maybe his attorney that represented him during the trial was not a Xhosa speaking person, someone who does not understand our culture.<sup>68</sup>

#### **4.2.4. The state against culture**

In discussions in the focus groups and with family, a shared community view emerged that the community's custom and ways were not recognised nor protected by the state.<sup>69</sup> This is clear from the quote at the beginning of this article, and fortified by the views of family members. These family members further implied that, not only had their custom not been recognised, but that the state's position was 'confusing'<sup>70</sup> and that their socio-

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<sup>65</sup> The Chief and his delegates' focus group discussions, September 2015.

<sup>66</sup> Jezile's family focus group discussions, September 2015.

<sup>67</sup> Jezile's family focus group discussions, September 2015 and April 2016.

<sup>68</sup> The Chief and his delegates' focus group discussions, September 2015.

<sup>69</sup> Jezile's family focus group discussions, September 2015 and April 2016.

<sup>70</sup> 'Government is confusing us. We celebrate our heritage by marrying according to custom, we are criminals'. And, 'To add on that, we are told that this month September is heritage month. So what are we supposed to celebrate? Because we celebrate our custom, we get into trouble. We go to prison. We get life sentences. Losing your life. Your future. By practising your custom. Government preaches that we should preserve our customs. We should go back to where we came from. But that gets us into trouble. Please look at this. These

economic circumstances had been imperilled as a result of the state's stance against their practice:

What really pains us is that Nvumeleni was the breadwinner of this family. He is the first born of this family. They do not have a father. He was the big brother that they all looked up to. The provider for the family. The only one who was working. He thought he was doing the right thing by getting married, building his family home but that landed him in jail.<sup>71</sup>

Related to this aspect, is the community's view that the state failed to send out a clear message to the community as to sexual conduct of children. The community appeared to feel that the state condoned sexual activity by children for certain purposes but not for others. This is illustrated in the following:

What is your advice, here is the question: girls as young as twelve years claim grant money [ie. child support grants] for their children, which means government allows them to have children, meaning to engage in sexual activities, if they allow them to claim grant as young as they are, how come they don't allow them to get married before eighteen years?<sup>72</sup>

Apart from these sentiments, the community similarly viewed the outcome of the case as an attack on the community-orientated way of decision making which they clearly value as a social control mechanism and cohesion in the community. This is evident from the following two statements:

This hurt us. Nvumeleni is our child. Our child who is in jail for a crime that we were also part of because when he started his *lobolo* he came to us. We were part of the *lobolo* negotiations from the beginning. Why are you not arresting us? Why is he the only one serving a sentence in jail? . . . This is done regularly in this community but now he is in jail alone.<sup>73</sup>

I cannot sleep in the night. Someone's child is in prison because of concluding a marriage. If she did not want Jezile, she should have just left him instead of this.<sup>74</sup>

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laws are conflicting. It is confusing. They say practice this side but on the other hand they put you in jail. With Nvumeleni his whole life is gone. He was practising his custom but now his future is gone' (Jezile's family focus group discussions, September 2015). This view bears some similarity to J de Coninck's concept of 'bounded democracy' in which he explains that, apart from elections, further engagement with the state is restricted by ignorance, fear or other forms of exclusion. See J de Coninck 'Furthering an African Perspective on Social Justice: East Africa Social Justice Group' in J de Coninck, J Culp & V Taylor (eds) *African Perspectives on Social Justice* (2013) 3, 5.

<sup>71</sup> Jezile's family focus group discussions, September 2015 and April 2016

<sup>72</sup> Women focus group discussions, September 2015.

<sup>73</sup> Jezile's family focus group discussions, September 2015 and April 2016.

<sup>74</sup> Girl's family member, 28 April 2016. See also similar sentiments by Jezile (note 6 above) para 42 when he stated: 'what I wanted from that of my heart is to get a wife and then to use the protocol, to do the right thing, involve the elderly people so that I can get a wife that I can stay with, not all there to play to. And I wanted to follow that tradition and do the right things and follow my father's and forefathers, to do things according to our tradition'.

The collective conscious and collective responsibility of the community loom large.<sup>75</sup>

### **4.3. Community's perspectives and the Law**

The SALRC has reported on the various forms of *ukuthwala* which exist.<sup>76</sup> From these various forms, it is clear that the *Jezile* case dealt with the following possible scenarios: (1) that the families agreed on the (potential) marriage without the girl's knowledge or (2) the scenario that the girl would not have given consent, but the *ukuthwala* pressures her and her family into consenting. Two experts were led in the *Jezile* case, namely Professor de Villiers (in the court a quo) and Professor Nhlapo (in the appeal). Both sketched the requirements of *ukuthwala*. The court accepted Nhlapo's requirements as:

the woman must be of marriageable age, which in customary law is usually considered to be child-bearing age; consent of both parties to perform *ukuthwala*; parties arrange a mock abduction; woman would be abducted and placed in the custody of women folk to safeguard her person and reputation; sexual intercourse between parties is prohibited during this period; a family would then send an invitation to the woman's family of the mock abduction which would be a signal that the man's family wished to commence negotiations for their marriage; and that the woman's family consent is pivotal to a customary marriage.<sup>77</sup>

The traditional leadership in the community confirmed the above requirements as reflecting the community's practice as follows:

[L]et me explain how we understand the custom. When a young man is at the stage of taking a wife, he tells his parents that he wants to take a wife, the parents asks him whether he has someone that he wants to take as his wife, if the son says no, then he asks his parents to find him a wife. The family sends delegates (*intlola* - inspectors) to go and look for a girl who is going to be the wife, they go to the family of the girl as visitors who are just passing. Through the casual talk with the girl's family, they ask how many girls are in the family, and how old are they. During this visit they observe the family, what kind of family it is, whether parents instilled values and respect in bringing up their daughters. They also check things like livestock, farming to assess which of the things in the family is the potential wife interested in. If the *intlola* delegate is satisfied with the family that this family is a warm family that the girl is brought up in a respectful home they report back to the family of the son. *Onozakuzaku* delegates are then sent to the girl's family to ask her hand in marriage, the girl does not know anything about this. The discussion is between the two families (elders). The girl's family will make a plan to get the girl be thwalaed, they send the girl with other girls to accompany her to deliver a letter a

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<sup>75</sup> See van der Watt & Ovens (note 4 above) 15.

<sup>76</sup> The four possible scenarios identified are: 'the girl is aware of the plot and colludes with the lover; families agree on the (potential) marriage, with or without the girl's knowledge; the girl would not have given her consent, but *ukuthwala* pressures her and her family into consenting; and *ukuthwala* as a solution for men and women who have remained unmarried for a long time', SALRC (note 3 above) para 2.11.

<sup>77</sup> Note 6 above para 72.

*lali* [rural area] where the husband's family is, by then the son's family is aware that the girl would be sent on an errand, that gives them a chance to send delegate to thwala her. When they all meet at a certain spot, (a river maybe) then the girl is thwalaed, during the *ukuthwala* process the others will act as though they don't go along with the practice although they are aware that this is what is happening. The girl will then be surprised and start crying, that is why there is a saying that 'a wife joins her in-laws crying'. The girl that is being thwalaed is seen as being ready to be a wife, that she is ready to build a family. After the girl arrives at the groom's family, a delegate is sent to her family to tell them not to look for her as she has been thwalaed, even though they know her family knows that she was going to be thwalaed. The groom's family then does the formal processes such as dressing her as a new *makoti*, doing *utsiki* for her. This is all done with/after the agreement between the two families.<sup>78</sup>

Of particular interest is the first requirement that the woman must be of 'marriageable age'. Both the traditional leadership and the Jezile family believed that the complainant was at least sixteen years old. They believed she lied to get the protection of the law. In justifying their views that she could not have been fourteen years old, the leadership and the family pointed out that she was in grade seven at the time that she was *thwalaed*. Given that the general age of children entering school was ten years old in the area, they opined that she had to be older than sixteen years.

One family member noted that his daughter was fourteen years old and in grade two, while another spoke of his fourteen year old daughter being in grade three.<sup>79</sup> Notwithstanding their views of her age, the leadership and communities from both Jezile and the complainant's village found the actual age of the girl child to be irrelevant, choosing rather to consider the onset of puberty (the 'child-bearing age') as an indication of readiness to be married. In accordance with their practice, both families agreed that that sexual maturity governed the marriageable age of the child rather than the age in a birth certificate.<sup>80</sup> Given that the Jezile family knew she was in grade seven and looked sixteen, for them this was the determining factor, rather than her actual age.<sup>81</sup>

The other requirement is that consent of both parties is necessary to perform *ukuthwala*. Particularly important is Nhlapo's suggestion that the woman could be taken unaware of the decision and acquiesce in the process only after the fact.<sup>82</sup> Nhlapo also suggested that, if the woman does not agree, the process fails and her father could institute a civil action against the man's guardian.<sup>83</sup> In the *Jezile* matter, the community put emphasis on

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<sup>78</sup> The Chief and his delegates focus group discussions, September 2015.

<sup>79</sup> Jezile's family focus group discussions, September 2015.

<sup>80</sup> Jezile's family focus group discussions, September 2015 and April 2016. See also similar observations by Karimakwenda, (note 3 above) 342. In addition, consistent with Jezile's family view on the issue of age and consent, Karimakwenda also reported from her study that 'many African witnesses before the commission could not fathom the idea of a girl making a choice on her own. The witnesses stated that a girl must be obedient to her father so that she would then be obedient to her husband. See Karimakwenda (note 3 above) 347.

<sup>81</sup> See also Monyane (note 4 above) 68 where he quotes a traditional leader: [F]or a girl to be taken as a wife through *ukuthwala*, the process has nothing to do with age. Culture has no age. Age is something that we learn today because of [our] Westernisation'.

<sup>82</sup> Jezile's defence, Jezile (note 6 above) para 87.

<sup>83</sup> Jezile (note 6 above) para 72.2.

the fact that the complainant had stayed with Jezile for three months (or so they thought)<sup>84</sup> and that if consent was in issue, she would have been able to voice this much earlier by going back to her family (since it was walking distance – at least for the rural nature of the place). The community held the view that her escape from Jezile while she was still in the village was part of the process. This process required or expected that the woman should show ‘mock resistance’ and that the family would formally escort her back on the receipt of three bottles of wine/beer.<sup>85</sup>

The difficulty of the escape, for the law’s purpose, is of course to ascertain the true intention of the woman. Is she following custom (which would require her to feign running away for the process of *ukuthwala*) or was she truly running away (signalling her refusal to marry Jezile)? More importantly, running away obscures the ability for a court to determine when a woman actually does consent. The family members of Jezile thought it was the former instance, describing it thus:

Running away is a common thing that is done by new brides. But if the family is in agreement with her, her family then take her back to her marital home. What I would like to explain further is that all the things that have been explained that took place (viz. the exchange of brandy etc.) do not happen if there is no agreement or acceptance of the marriage between the two families. For instance, the *lobolo* negotiations do not take place meaning no payment for *lobolo* the bride’s family do not accept the bottles of brandy . . . Both families have to be in agreement before *lobolo* could take place.<sup>86</sup>

The family’s views are similar to what Jezile said in court that he was not unduly concerned when the complainant ran away in the Eastern Cape because:

This is a normal thing, always when a *makoti* is a newly-wed, normally she does do those things of running away and coming back, running away and they bring her back, but when the time goes on, she settles down and stays.<sup>87</sup>

Interestingly, both Nhlapo and Mahlangu (an expert from the House of Traditional Leaders who also gave an affidavit on appeal) held the view that the facts of the case did not amount to *ukuthwala* but a misapplied and aberrant form of the practice.<sup>88</sup> The experts gauged this to be the case through assessing the issue of the young age of the complainant, her lack of consent, and the fact that *lobola* was paid before the *ukuthwala* occurred. This did not differ with Jezile’s view that because requirements

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<sup>84</sup> Both the judgment and the community seem to lengthen or shorten this time without any objective clarity on the matter. While the community believed that the complainant stayed with the accused in Engcobo for three months, the judgment implies that the time was far shorter, but does not give a time line except to describe that ‘a few days into the marriage’ she ran away and was returned ‘two to three days later’ then the decision to go to Cape Town was made ‘shortly thereafter’. See Jezile (note 6 above) para 10.

<sup>85</sup> See also Jezile’s defence, Jezile *ibid* para 87.

<sup>86</sup> Jezile’s family focus group discussions, September 2015.

<sup>87</sup> Jezile (note 6 above) para 38.

<sup>88</sup> *Ibid* paras 76–77.

of *lobolo*, formal delivery of the girl by her family were met, he was in valid customary marriage with the girl, although it cast doubt on the ordering of acts.<sup>89</sup>

## 5. Complexities and way forward

### 5.1. Gap between communities' lived reality and law

In order to align *ukuthwala* with constitutional prescripts of equality and protection of human rights in general, several issues that unfolded in the *Jezile* case come to the fore. Perhaps the most troubling aspect of this case is, firstly, the gap between the communities' lived realities and law reform. What clearly emerges from the community discussions, and from the case itself, is a lack of knowledge of the law requiring explicit consent and the age of majority, being a requirement for a customary marriage according to the Recognition of Customary Marriages Act 120 of 1998.<sup>90</sup> This was expressed in the following: 'Do you hold a community to a law that they do not know?' and 'All the laws are far from the community.' Expressed both physically and metaphorically, their frustrations indicated a feeling that the law is far from the people:

But all these laws that you are telling us about are still very far and new to us. They all happen in the cities. In the rural areas we know nothing about these things that you are telling us about today.<sup>91</sup>

Now the problem is that this young man didn't know that the girl was underage, he took her because he loved her, when was this law about age passed?<sup>92</sup>

These expressions bear the characteristics of Ake's warning many years ago that democratisation without recourse to social experience would lead to the 'extreme alienation' of people who would feel a 'pervasive sense of helplessness amid a chaos of arbitrariness'.<sup>93</sup> The community's views that they felt alienated also comes through in the following observation:

You know where the problem is, is that when they are doing their public hearings, they do not come down to us, to the rural areas where this *ukuthwala* custom is being practiced, they just go to the towns or cities where people don't understand about this *ukuthwala* and get someone who read books to give inputs about our practice.<sup>94</sup>

This is an important observation in the light of the SALRC report on *ukuthwala*. The SALRC explicitly limited its approach to desktop research, engaging with stakeholders and legislative analysis due to what it called 'the obstacles to collecting data on the

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<sup>89</sup> Ibid para 86.

<sup>90</sup> See s 3 (1) (a) of the Recognition of Customary Marriages Act, which came into effect on 15 November 2000.

<sup>91</sup> Jezile's family focus group discussions, September 2015.

<sup>92</sup> Women focus group discussions, September 2015.

<sup>93</sup> C Ake Democracy and Development in Africa (1996) 178–80. See also Chanock (note 11 above) 5 and Shivji (note 11 above) 37.

<sup>94</sup> Jezile's family focus group discussions, September 2015 and April 2016.



prevalence of *ukuthwala*,<sup>95</sup> a position which left out the communities in which *ukuthwala* is practiced.<sup>96</sup>

The SALRC's recommendation in the form of a Prohibition of Forced Marriages and Child Marriages Bill, that will criminalise *ukuthwala* without the consent of the woman involved, is certainly in line with the constitutional values of equality, dignity and freedom.<sup>97</sup> However, looking at the methodology leading to the SALRC's recommended Bill, there is a concern that the lack of community involvement in formulating a response to the ills of *ukuthwala* will hinder any efforts to curb the practice.

In addition, the SALRC's recommendation does not address the socio-economic realities in which these communities find themselves. Specifically, the general poverty and youth of the area,<sup>98</sup> the age of school-going children,<sup>99</sup> given the distances they need to walk, and the infrastructure (large rivers without bridges). More importantly, it appears as if the SALRC did not consider the values that the community attributed to the practice, whether in fact or in belief. While the SALRC focused on the difficulty of collecting data on the 'prevalence' of *ukuthwala*, we contend that empirical research on experience rather than prevalence would have been better suited for the task. We believe focus on experience would have alerted the SALRC to the issues mentioned in this paper.<sup>100</sup>

As an example, a women's focus group agreed that their main reason for supporting the practice was to ensure that women in general (and their daughters in particular) would not have children out of wedlock.<sup>101</sup> In other words, they were afraid that the girl/woman may fall pregnant before being married, a slight in the community's eyes.<sup>102</sup> If the SALRC had understood that women, though affected by some of the challenges of *ukuthwala*, saw it as a means out of single parenting and underage pregnancy, then policy work on these 'goals' could have followed. In this context, recommendations as to contraception or campaigning for responsible sexual activity could be part of the solution.

Despite this criticism against the methodology of the SALRC, we do not argue that the Bill is redundant, rather that much more work needs to be done on the contextual factors

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<sup>95</sup> See SALRC Ukuthwala Report (note 3 above) 3.

<sup>96</sup> We acknowledge that traditional leaders were invited to contribute and attend the meetings of the SALRC, but contend that location and resource challenges would have prevented many from attending the meetings. Also, we believe that hearing women directly is important in understanding the continued practice, women being the subject of violation. We also acknowledge that the SALRC relied on civil organisations experiences (ibid 3) but raise a concern that such empirical data may have been collected for a different research question than the one before the SALRC.

<sup>97</sup> Attached as Annexure A to the SALRC Ukuthwala Report (note 3 above).

<sup>98</sup> This is acknowledged in the SALRC Ukuthwala Report ibid paras 3.6 and 6.9 with reference to 'poverty and financial strains'.

<sup>99</sup> See Monyane (note 4 above) at 66 where he refers to a lack of education as perpetuating 'the cycle of gender inequality'.

<sup>100</sup> The SALRC does make mention that the committee took into account an 'empirical survey' completed by the CRL Commission at para 3.9. However, it appears that this survey focused on organisations dealing with *ukuthwala* rather than dealing with the community directly.

<sup>101</sup> Women focus group discussions, September 2015.

<sup>102</sup> The women suggested that marriage after 18 was 'too late' saying 'that is why we thwala them'.

which impact the community.<sup>103</sup> If communities see *ukuthwala* as a means to achieve certain values, then it seems obvious that one could look at alternative ways that those values can still be achieved, as mentioned above.

In addition to the above suggestions and in the spirit of the bottom-up approach generally, we see the community's expression of a lack of knowledge as 'a democratic demand'<sup>104</sup> to participate meaningfully on rule-making and constitutionalism generally.<sup>105</sup> This demand can inform major recommendations on how to successfully implement new laws that are passed to address children and women's rights violations. In this vein, a community member articulates this demand directly:

[B]efore these laws are endorsed, they need to come to the traditional leaders, so that these laws could be discussed thoroughly, because we suspect that this law has been dealt/discussed by a white man, if I can say so. Or with people who don't have any knowledge or idea of what *ukuthwala* is. Maybe the cabinet can invite in a conference all the traditional leaders and discuss this issue thoroughly, maybe then they can come with something portable.<sup>106</sup>

If we do not take the community's experiences seriously and find alternatives to the values that the community wishes to promote, we suspect that the practice will go underground rather than be put to an end where consent is found wanting.

## **5.2. Law is not just a matter of law, it is also about justice**

Secondly, and more closely linked to the first point, is that law is not just a matter of law, it is also about justice.<sup>107</sup> As observed by Chanock, it is indeed to the 'content of these local reactions that we should look when thinking about [law reform] cultures and rights'.<sup>108</sup> As noted previously, perspectives of justice and rights embedded in law are inconsistent to the communities' lived realities. In the *Jezile* case it is clear that the communities felt alienated by the justice system, particularly in terms of the jurisdiction where the case was heard (being Cape Town), the state representative being non-Xhosa (a coloured lawyer) and a belief that the voice of the community was not heard through a witness to either the *lobolo* negotiations or the actual process of *ukuthwala*.<sup>109</sup> If we accept that perception is just as important as fact for purposes of law reform, we need

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<sup>103</sup> See for examples, factors such as economic strain, lack of education and poverty. See Karimakwenda (note 3 above) 355. While focusing on mandatory minimum sentencing in relation to rape in South Africa, Baehr makes the point that '[r]eaching young men with economic development programs, access to alcohol abuse and substance abuse treatment, education reform and media campaigns ... may prove to be more effective in reducing sexual violence in South Africa than mandatory minimums, or even a perfect justice system'. See K S Baehr 'Mandatory minimums making minimal difference: Ten years of sentencing sexual offenders in South Africa' (2008) 20 *Yale Journal of Law and Feminism* 213, 246.

<sup>104</sup> See A van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1; see also G Carbone 'Democratic Demands and Social Policies: The Politics of Health Reform in Ghana' (2011) 49 *The Journal of Modern African Studies* 381 for descriptions of these demands in practice.

<sup>105</sup> Chanock (n 11 above) 5.

<sup>106</sup> Chief and his delegates' focus group discussions, September 2015.

<sup>107</sup> M Constable 'Law as Claim to Justice: Legal Histories and Legal Speech Acts' (2011) 1 *UC IRVINE Law Review* 631.

<sup>108</sup> Chanock, as cited by F Banda 'This One is from the Ladies: Thank you Martin Chanock, Honorary African Feminist' (2010) 8 *Law in Context: A Socio-Legal Journal* 8, 11.

<sup>109</sup> Jezile's family focus group discussions, September 2015.

to ask the same question as posed by Shivji in the context of land reform in Tanzania: ‘Does the [suggested reform] embody the notions of justice, rights and fairness of the . . . people themselves or is it an expression of attempts to impose typical top-down bureaucratic approaches and notions of ‘administrative’ justice on the people?’<sup>110</sup>

### **5.3. Complexity of consent in ukuthwala**

Thirdly, this research uncovers the complexity of the issue of consent in the context of *ukuthwala*. In trying to understand consent and its meaning in custom and outside of it, the following views from the community are instructive:

I hear what you are saying but going back to the Jezile case. Let’s say that we agree on what you are saying about the provision [viz. the requirement of consent of the woman in the RCMA]. Now her parents had a discussion with her and she agrees to be *thwalaed*. Now later on, she changes her mind. Let’s assume this is what happened in this case. So in a case like that, who is to be blamed? Who is to be charged? At the beginning, she agrees to everything. Later on, she changes her mind. Who do we charge then?<sup>111</sup>

Closely related to the above sentiments, are the views by the Chief and his delegates in the following:

It’s common around here for a new *makoti* to go back home to visit her family, then her family brings her back, this is part of custom, what we call *ukuphindindlela*. To explain more about our custom, when a new *makoti* wants to do *ukuphindindlela*, she runs away/go back home; this is a way of asking for *ukuphindindlela*, because she knows that her family would give her gifts to bring to her in laws.<sup>112</sup>

Further complexities surrounding consent can be seen from the following:

[I]n the olden days they were not asked, but now it’s different, families are different, some families talk to their children and come to an agreement, some force their children to marriage. But in this case, as the husband’s delegate, if the bride’s family says yes you can take her, we are agreeing to the marriage, we don’t ask for details as to whether you have talked to your daughter or, whether she agreed or not. And also, yes the girl would not agree if she was not in a relationship with the man. But if the both families agreed to the marriage, we then go for that. The communication is between the girl and her family, not direct from the husband’s delegate and the girl.<sup>113</sup>

These comments all point to a local understanding of consent that is different to the accepted meaning of consent in the courts. While certain scholarship<sup>114</sup> and experts<sup>115</sup>

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<sup>110</sup> Shivji (note 11 above) 37.

<sup>111</sup> Jezile’s family focus group discussions, September 2015.

<sup>112</sup> The Chief and his delegates’ focus group discussions, September 2015.

<sup>113</sup> Women focus group discussions, September 2015.

<sup>114</sup> Mwambene & Sloth-Nielsen (note 3 above).

<sup>115</sup> See, for example, Nhlapo in the Jezile case (note 6 above).

have commented on the necessity of the girl's consent, other scholarship (and certainly this empirical research) implies that consent of the girl is not as important as the whole family's consent.

We posit this in considering a situation of what a family would do if the girl refused to marry upon request. Research<sup>116</sup> points to power dynamics between family and girl where a response of 'no' would in all likelihood result in a threat of, or actual, harm. Even if we had to dispel actual harm as a result of a negative response, the girl child is faced with disobeying her parents or elders, thereby spurning cultural affinity and community belonging. So, the elements of coercion and duress feature prominently in any contextual understanding of consent in *ukuthwala*.<sup>117</sup> The difficulties associated with consent are captured eloquently in the fictionalised short story account of a girl who is *ukuthwalaed*:

They sit aside . . . under a weary old oak tree . . . . A place for men. A place of words, fluttering softly down, disappearing into the dry, red, cracked earth, a place of secrets. It is my fate that is being negotiated and sealed, but I know nothing of it. *Though I can speak, I remain mute – one who does not speak, who is not spoken to.* It is a debate about me, by men, for men.<sup>118</sup>

## 6. Some implications for future research

Our study presents a number of possibilities for future research. While we acknowledge the implicit effects of the Constitution on *ukuthwala*, future research could examine the communities' views of what *ukuthwala* means in the light of the Constitution. We suspect that to understand the communities' views of *ukuthwala* under the Constitution, we need to appreciate how different socio-cultural practices contribute to enhancing or diminishing communities' value systems.<sup>119</sup> Comparative research across different community groupings may be necessary in identifying these views.

Second, future research could go further than we have been able to in exploring how different socio-groups view *ukuthwala*. We found some evidence of differences among groups, including, for example, a significant disparity between women and men respondents. We suspect there are particular reasons why women supported or did not support the practice that differs from men. For example, some of these women were also *thwalaed* before they got married. Second, as explained in part IV of this paper, women blamed the abuse of the practice on the general breakdown of the values in the community.<sup>120</sup> If any of the two hypotheses helps to explain the differences between women and men views, then it is an empirical question that can only be addressed through subsequent research.

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<sup>116</sup> Prinsloo & Ovens 178 (note 4 above); Karimakwenda (note 3 above) 347–9.

<sup>117</sup> See also similar discussions by Karimakwenda (note 3 above), and Rice (note 3 above) 2014.

<sup>118</sup> Kaschula (note 3 above) 209. Our emphasis.

<sup>119</sup> See our discussion of values above together with Van der Watt & Ovens (note 3 above) 11.

<sup>120</sup> Women focus group discussions, September 2015.

Thirdly, future research might benefit from examining *ukuthwala* through other methodological approaches. We believe our research has captured the communities' views in understanding the complexities of consent in the context of *ukuthwala* in the aftermath of the *Jezile* case. However, there are novel attempts to analyse how the communities react to specific issues of consent during the actual process of *ukuthwala*.

Lastly, the question arises as to whether the *Jezile* case will make a material difference to community practice. Here again, our findings suggest that the case has had a negative impact in addressing the effects of *ukuthwala* on women and children's rights. This is evidenced through the fact that community members view *ukuthwala* as a respected custom that must continue to be observed despite the *Jezile* case. Furthermore, both family members of *Jezile* and the complainant held more sympathy with *Jezile*'s incarceration than with the complainant's experience. We, however, suspect that the impact may be more than what we have been able to identify in this study.

## 7. Conclusions

The discussion with the community, on the customary practice of *ukuthwala* and the *Jezile* case, highlight several issues as we have mentioned, including contradictory perspectives on the notions of justice and the constitutional imperatives of equality, particularly on women and the girl child. Clearly, these contradictory views highlight that reform efforts will have limited success 'as long as we still suffer under the paradigms of liberal legalism where we think that changing rules is enough'.<sup>121</sup> The SALRC and courts' efforts (as shown in the *Jezile* case) to address the challenges that are associated with *ukuthwala* are laudable, but this research – we believe – shows that these efforts are not enough. Much more needs to be done in terms of understanding why practices, which appear archaic and patriarchal to outsiders, continue. We need to understand the legitimate cultural goals which the community wishes to achieve, and seek alternative means to achieve them. While public participation and engagement with the community will not necessarily resolve post-colonial tensions, it will allow communities to have their voice heard.<sup>122</sup> We also believe that it could potentially improve law reform efforts by bringing a dynamic to the law reform table. That dynamic, not often utilised, is the ability of customary law – through its people (not just traditional leaders) – to remake, remodel and reconstitute itself in the light of societal changes.<sup>123</sup>

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<sup>121</sup> Trubek & Galanter (note 9 above).

<sup>122</sup> Sen observes that '[o]pen-minded engagement in public reasoning is quite central to the pursuit of justice'. See A Sen *The Idea of Justice* (2009) 390. See also Baehr's discussion (note 103 above 216 and 244) that harsher sentencing and perfect criminal justice systems do not necessarily (and in fact in South Africa – at least in relation to harsher sentences) lead to a reduced incidence of rape.

<sup>123</sup> See, for example, Karikmakwenda (note 3 above 356) who urges that we should not see culture 'simply as an obstacle to change', instead (and quoting Merry) Karikmakwenda suggests that culture has capacity to 'innovate, appropriate, and create local practices'. See also S Hall 'Cultural Identity and Diaspora' in J Rutherford (ed) *Identity, Community, Culture, Difference* (1990) 222, 225, who argues that cultural identity is based on differences and discontinuities rather than on fixed essences, and that it is a 'matter of "becoming" as well as "being"'.

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The authors report no conflicts of interest. The authors alone are responsible for the content and writing of this article.

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