

Child marriages in South Africa: An Assessment of How the Custom of *Ukuthwala* Aligns with the Proposed Single Marriage Bill

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Abstract: In line with international standards, the Civil Union Act precludes minors from entering into a marriage. On the other hand, the Marriage Act and the Recognition of Customary Marriages Act do make provisions that subject to consent being obtained, a minor may enter into a customary or civil marriage. The proposed Single Marriage Bill sets out to unify the various marriage laws into a single legal framework. In so doing the Bill ensures that all forms of marriage comply with constitutional rights and traditional practices, like *ukuthwala*. The practice of cultural practices has to however be conducted in a manner that respects the rights and dignity of all individuals involved, aligning with constitutional protections and international human rights standards.

Recent statistics revealed that some child marriages continue to persist in South Africa despite the current legislative majors that forbid and or restrict child marriages. Given this, the article seeks to explore whether the provisions of the proposed Single Marriage Bill, require that a person must be 18 years of age and give their full and free consent to enter into a marriage, may be enough to deter child marriages. In answering the question, the impact of cultural epistemologies behind the custom of *ukuthwala*, which may be perpetuating child marriages will be evaluated. For this purpose, documentary analysis as well as the analysis of historical and contemporary narratives, media reports, and cultural texts related to *ukuthwala* will be adopted. Utilising a human rights perspective to evaluate how *ukuthwala* aligns with international and national human rights standards, focusing on issues such as consent, child protection, and gender equality will form the theoretical basis for the research.

From the research conducted, it is evident that historically *ukuthwala*, which involves the abduction of a young woman by a man and his friends as a precursor to marriage negotiations was a consensual practice, but in contemporary times, it has often been associated with forced and underage marriages, raising significant legal and human rights concerns. This paper cautions that the negative forms of *ukuthwala* that exclude the consent of the bride are a clear violation of human rights and are likely to perpetuate child marriages. It also cautions against the exceptions in the current legislative framework and commends the proposed Single Marriage Bill for not leaving any room for exceptions.

Keywords: Child marriages, Single Marriage Bill, *ukuthwala* custom,

Introduction

The concept of child marriage is often used interchangeably with forced marriage and early marriage. For the purpose of this article, child marriage should be understood as a marriage whereby one of the parties to the marriage is below the age of 18 years of age at the time of the solemnisation of the marriage. A forced marriage on the other hand cannot always equated to a child marriage as an adult female may be forced into a marriage of her own volition. For example, a widow who is a major in terms of the law may be forced to marry one of the brothers of her deceased husband through the custom of *ukungena*. It is however worth noting that the original purpose of *ukungena* is not to force anyone into marriage against her will consequently if a widow is forced into such a marriage it amounts to the abuse of the practice.

An early marriage refers to a situation where one of the parties to the marriage has not yet attained the minimum marriageable age of 18 years at the time of the conclusion of the marriage but will be conferred the majority status through the process of emancipation when he or she is finally married in terms of the law (Budoo and Ramnauth, 2018 at 16). Be that as it may, in the context of South African legal order the issue of child marriages caught public attention in 2009 when the media reported alarming statistics of child marriages in the country that camouflaged as a cultural practice of *ukuthwala* which has raised questions about the meaning of *ukuthwala*, and its connotations in Zulu customs (Ngema and Matadi, 2024 forthcoming). For the purposes of this study, *ukuthwala* however refers to an irregular way of initiating marriage negotiations under customary law. The regular way of initiating a customary marriage begins by courtship whereby a man courts a woman to be in love with him. If he finally succeeds in developing a romantic relationship with a woman, then there are numerous cultural practices that must be adhered to, inter alia such as the sending of emissaries to the bride's family for the purpose of initiating marriage negotiations, the payment of *lobolo* and so forth. It is beyond any doubt that there are many standardised ceremonies that are linked to customary marriage, and this is aptly captured in one of the requirements of a customary marriage. Section 3 of the Recognition of Customary Marriages Act 120 of 1998 provides that "a marriage must be negotiated, entered into or celebrated in accordance with customary law." The wording of the above section was crafted wisely with the intention of accommodating many standardised cultural practices that must be followed during negotiations and during the celebration of a marriage. In addition to the normal or regular way of initiating a customary marriage, there are also irregular ways that do not follow the standardised cultural practices (Van Tromp 1947, 68).

The South African legal framework has adopted an international trend of countries that placed the minimum age of marriage at 18 years. In March 2022 there was a glimpse of hope when parliament promulgated the White Paper on Marriages in South Africa. It recognised the fact that the current legislative framework deprives Muslims, Rastafarians, and LGBTQA+ persons of solemnising legally recognised marriages. The White paper intended to create a policy foundation for the regulation of marriages for all persons who reside in the Republic of South Africa. It also recommends policy and strategic interventions in the issue of child marriages and consent to marriage. The problem is that the current legislative framework is conflicting, and some statutes provide for a marriageable age of 18 without an exception while other legislations provide for an exception to the minimum marriageable age thereby permitting marriages of persons below the age of 18 if there was parental consent. In this paper it is argued that the latter mentioned exception is more likely to defeat the purpose of setting the minimum marriageable age and will perpetuate child marriages. The paper is therefore divided into three parts. The first section discusses the criticism of an exception to the minimum marriageable age of 18 years and juxtapose it with the doctrine of the best interest of the child. This section seeks to make the point that there is nothing convincing that makes exception to the minimum age of marriage to be reasonable and that this conflicts with the doctrine of the best interest of the child. The second section of this paper evaluates the regulation of child marriages under the proposed Single Marriage Statute. In particular this section evaluates whether the custom of *ukuthwala* aligns with the aforesaid proposed Bill, or not. The third part of the paper seeks to explore the true factors that foster the continuation of child marriages in South Africa and propose the way forward. This section includes a discussion on the criticisms of an exception to the minimum age of 18 versus the doctrine of the best interest of the child.

Criticism of An Exception to the Minimum Marriageable Age of 18 Years

It is trite law that South African marriages are currently regulated by different pieces of legislation such as the Marriage Act 25 of 1961, Customary Marriages Act 120 of 1998, and Civil Union Act 17 of 2006. The Civil Union Act prescribes marriageable age as 18 years and thereby forbid any person to marry in terms of the said legislation while below the age of 18. However, the first two statutes provide for an exception that permits a person to marry even if he or she has not yet attained the age of 18 years if there is parental consent to such marriage. A person that is below the age of 18 years is also allowed to marry if there is a consent from the legal guardian, the minister of home affairs or the high court that is regarded as the upper guardian of all minors. The latter mentioned exception to the minimum marriageable age of 18 is however not free from problems. This is because it fails to provide any guidelines that ought to be followed by the designated minister when granting such exception. There is no minimum age stipulated where it would be clear that no child must marry below that age. It would be clearer if, for example, the legislature will make it categorically clear that no person may marry below the age of 12 or 14 to dispel any legal uncertainties. Whenever there are no clear guidelines, a designated cabinet minister is expected to use his or her discretion to decide whether to grant or refuse a marriage of a person that is below the age of 18 years. Common sense dictates that the issue of granting an exception to the minimum marriageable age is more subjective in nature and is likely to be abused or used

to the disadvantage of children. The reasons that are advocated in support of marrying off children that are below the age of 18 years are therefore outweighed by the problems that are created by child marriages.

One reason contributing to the spread of child marriages is the influence of religious beliefs and cultural customs. Muslims generally permit the marrying of a person at a young age as the Quran stipulates that girls can be married off upon attaining puberty. The majority of the Islamic schools of thought (*madhhab*) such as *Hanafi*, *maliki*, *shafii* and *hambali* consider wet dreams for men or virginal lubrication for women and the appearance of pubic hair to be signs of puberty (Hoko Harii 2020, 512). In a situation where there is no clear physical sign of puberty, most Islamic jurists agree that the minimum age for attaining puberty is fifteen years for both boys and girls (Hoko Harii 2020, 512). It is a trite fact that when a person reaches puberty, he or she begin to develop sexual desires and end up actively doing something to satisfy these sexual desires (Arnab and Siraj 2020, 23). As far as the sacred texts of main religions forbid pre-marital and extra-marital sexual intercourse, Muslims and Hindus are likely to be more conservative in enforcing pre-marital chastity (Adamczyk and Hayes 2012, 726). It has therefore not come as a surprise that Muslims perceives early marriage as a form of protection against pre-marital sexual intercourse. Likewise Islamic tradition perceives any form of pre-marital sexual intercourse as a performance of illicit sexual intercourse between an unmarried male or a female is regarded as *zina* and is punishable with one hundred lashes (Mir-Hosseini and Hamzic 2010, 11-17). As a result of this many Muslims often perceive it as their sacred duty to marry off their children before reaching puberty or immediately after puberty.

Regulation of Child Marriages under the Proposed Single Marriage Statute

According to the proposed Single Marriage Statute, the requirements for marriages are divided into two, namely, those regulating monogamous marriages and those regulating polygamous marriages. Section 5 of the Bill provides that all monogamous marriages that are solemnised after its commencement must be concluded by individuals who are above the age of 18 years. It is also one of the prerequisites that the prospective spouses must provide their consent to the marriage. The prospective spouses must not be *non-compos mentis* but be of sound mind during the time of the conclusion of the marriage. Unlike the Marriage Act and the Recognition of Customary Marriages Act that provided for an exception to the minimum marriageable age of 18 under some circumstances, the latter mentioned provisions of the proposed statute does not give any room for exceptions. This is a commendable legal development that would serve as a form of deterrence amongst those cultural and religious groups that continue to tolerate child marriages. Section 11 (1) of the Bill further permits the marriage officer to solemnise the marriage in any part of the county and at any time according to the traditions or religions of the prospective spouses. According to the provisions of section 11 (3) a marriage officer has a duty to ascertain that the prospective spouses have produced their identity documents as expected in terms of section 4 of the Bill. The birth certificate or identity document is the acceptable proof that can be produced before the marriage officer to ensure that there is no spouse that is under the minimum marriageable age of 18. Section 11 (5) of the Bill also forbids the marriage officer from formalising a marriage that conflicts with the requirements of a valid marriage as contemplated in sections 5 and 6 thereof. Moreover, the marriage officer has a duty to investigate whether the prospective spouses agree to the intended marriage. He must also ensure that there are no lawful impediments to the formalisation of the intended marriage. The marriage officer must likewise ensure that people who are related according to the prohibited degree of consanguinity are not allowed to tie a wedding knot. For the first time in the South African history, a legislation is proposed to prohibit child marriage in its entirety. This is so because there was no legislation that criminalised an act of knowingly participating in child marriage. Section 17 (1) of the Bill provides that any person who knowingly enter a marriage with a child is guilty of an offence that would not exceed 5-year imprisonment. Now section 17 (2) of the proposed law makes it a criminal offence for a marriage officer to solemnise a marriage that contravenes the provisions of the proposed law.

There is further no room for marriage officers to “buy time” by delaying the registration of marriage until a child is of age as the proposed law mandates them to register the marriage within a period of 14 days after its conclusion. Any failure to do so amounts to a criminal offence. The reading of the proposed Single Marriage Statute shows a renewed interest and seriousness on the part of policy makers, and it ushers a determination to end child marriages by every means possible. Section 5 (2) of the Bill also provides that “for a marriage entered into in accordance with custom or religion to be valid, it must, in addition to the requirements referred to in subsection 1 of the Bill, be negotiated and entered into or celebrated in accordance with the respective custom or religion.” The latter provision is crafted in a similar manner as section 3 of the Recognition of Customary Marriages. This was crafted by the legislature with an aim of accommodating numerous cultural practices and rituals that precedes marriage without mentioning them in particular. The custom of *ukuthwala* aligns well with the proposed Single Marriage Bill which seek to outroot child marriages as *Ukuthwala* was not meant to be practiced by children but by couples who are mature enough to discern

between what is good or bad for them. It was practiced by two consenting adults who intended to solve their social problems such as:

- To fast-track marriage negotiations where timing is an issue;
- When a woman is faced with a dilemma of having met a man, she truly loves more than the current lover in her life;
- To speed up marriage negotiations in response to peer pressure;
- To force the hand of parents if the suitor is too poor to afford *lobolo*;
- To circumvent the parental opposition to the match.

This shows the beauty and usefulness of the custom when it is practiced by two consenting adults who are in love with each other, but life offers a bitter leaf to them and social hinderances to their union. However, this does not mean that the custom is free from being abused. *Ukuthwala* that does not involve the consent of one of the parties is not in line with the law nor is it valid if it involves children (Ngema, 2010).

It is therefore evident that the custom of *ukuthwala* itself does not necessarily perpetuate child marriages, but more the abuse of the custom. The following section of the paper evaluates factors that drives child marriages.

Factors that Drive the Continuation of Child Marriages in South Africa

a) Poverty

It is beyond comprehension why a parent or guardian would send off his or her child to marry while such a child is not mature enough for marriage. Common sense dictates that only greed and poverty can push a parent to nurse such an abomination in the first place. There are few opportunities and assets are scarce amongst the poor communities, and this makes girls to be perceived as economic burdens by their families (Msuya, 2020, 51). Girls are normally raised with the hope that they would get married one day and start a new life in their husband's family and investing on them is viewed as a waste of resources, thereby being considered less valuable than their male counterparts. Girls from poor households are therefore more prone to be married off before attaining eighteen years than those from richer households (Naveed and Butt, 2020, 168-169). After all there is a financial incentive for a family that is living in abject poverty to arrange an early marriage for their underage daughter to reduce harsh economic conditions in which they find themselves (Msuya, 2020, 51). Common sense dictates that when one of the girls in the family is married off, her family would benefit from the gifts that might be given by the in laws. Moreover, the family of the girl that is married off early would no longer have the responsibility to feed, educate, or clothe such a daughter (Msuya, 2020, 51).

b) Lack of education

Absence of education leads to unawareness and poor understanding of children's rights and the available avenues for claiming their rights. If both parents and their children are illiterate it makes it difficult for them to enjoy their legally protected rights. Broad awareness campaigns are essential to enlighten the public about children's rights. Awareness campaigns can be conducted via radio, television, print media or internet and through stage plays to inform the public about the rights of children. It is also essential to ensure that such awareness campaigns effectively include and influence the less privileged and illiterate segments of the population. It is undeniable that education is closely related to culture because it is a way through which culture is transferred from one generation to the other (Dlamini 1994, 581). Likewise, education is significant because it improves the human mind to think critically about issues. "Even a mind that has been indoctrinated with a particular ideology is capable of eventually discovering the falsity of that ideology and rejecting it" (Dlamini 1994, 581). Often parents are not willing to invest in their daughters' education because of a belief that one day they would leave their fathers' house to get married and any investment on their education is generally considered as a waste of resources. Child marriage also diminishes the girl's prospects for education after the consummation of marriage because of domestic burdens such as house chores, lack of mobility, childbearing and social norms that make marriage and education incompatible (Naveed and Butt 2015,167). Early marriage likewise hinders girls from developing to their full potential, limits girl's development of skills, resources, knowledge and eventually limiting her negotiating power with her husband or in-laws (Nasrullah, 2015, 29-33). Moreover, early marriage exposes girls to a possibility of domestic violence and abuse (Nasrullah, 2015, 29-33).

Conclusion

This paper argued against the exception to the minimum marriageable age of 18 years that is provided for in some legislations such as the Marriage Act and the Recognition of Customary Marriages Act. Such an exception permits a minor that is below the age of 18 to conclude a valid marriage if there is a consent from the parent, guardian, or any

designated officer. This defeats the very purpose of setting the minimum age for marriage. South Africa can learn from the mistakes made by the Republic of Bangladesh that kept the similar exception. Bangladesh enacted the Child Restraint Act in 1929 with an aim of combating against the scourge of child marriages but such legislation never yielded any positive results for more than a century now. It was estimated that child marriages are at 52 % in the year 2017 (Arnab and Siraj 2020, 23). This exception to the minimum age for marriage is dangerous in a society that subscribes to the normative system that tolerates child marriages because this makes such marriages to continue unabated. It is unfathomable to imagine a situation that would be so urgent to justify giving a child away in marriage before attaining an 18th birthday. Child marriage is more prevalent amongst the poor segments of our society, and it perpetuates the cycle of poverty. It affects the education opportunities for the girl child and expose her to more health risks. The lawmakers understood very well that a child that is below the age of 16 is not yet matured enough to take some decisions. They made it a criminal offence of statutory rape to anyone who decide to have carnal knowledge of a person that is below the age of 16 regardless of the presence of consent. So, it baffles us as to what warrant such a decision to marry a child that is not ripe for marriage. This paper argued that an exception to the minimum age of 18 is contrary to the doctrine of the best interest of the child. As already argued earlier, the custom of *ukuthwala* can be easily associated with the spread of child marriages because of some reports in the news media that portrays the plight of young girls who are forced into child marriages under the guise of custom. It has been argued that the custom in question was not practiced by children but by lovers who are ripe for marriage. The custom of *ukuthwala* does not go against any current or proposed legislation that is aimed at forbidding child marriages. The paper exposed the major factors that feeds to the continuation of child marriages such as abject poverty combined with greed, and lack of education.

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