

# *'Today it would be called rape': a historical and contextual examination of forced marriage and violence in the Eastern Cape\**

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The practice of *ukuthwala* has received considerable attention from the media, government, and civil society over the past few years. Reports assert that there has been a marked resurgence in the practice, in a distorted and destructive form, where older men target and violate vulnerable young girls, forcing them into marriage. Many of the coercive aspects of *ukuthwala* have been denounced as newly deviant and antithetical to the way marriage traditions were practiced in the past. This paper argues that these depictions of *ukuthwala* and traditional marriage are inaccurate. An examination of historical sources concerning Xhosa-speaking peoples in the Eastern Cape reveals the deeply rooted and longstanding linkages between marriage and violence. Although varying in prevalence over time, violence has been sanctioned by local understandings of consent and interpersonal relationships. The specific concepts that permit violence against girls and women have not only existed in conjunction with marriage, but also operate in various forms of abuse against females, such as group rape and child sexual abuse. Understanding the different manifestations of local conceptions of violence assists in explaining the embeddedness of gender-based violence today, as well as the immense challenges in eradicating it.

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## I INTRODUCTION

In recent years, the practice of *ukuthwala*<sup>1</sup> – the process of abducting a girl or woman for purposes of marriage – has come to be viewed as a form of gender-based violence or a harmful cultural practice. Since 2009, media and government have reported that *ukuthwala* has markedly resurged in an insidious form that is exploitative and violent. Particularly present in certain rural and impoverished areas of the Eastern Cape and KwaZulu-Natal, it is now used by older men to target and abuse vulnerable girls as young as 11 years of age.<sup>2</sup> It is reported that the girls are kidnapped by a group of their suitor's peers, raped, and then compelled into a marriage that resembles servitude and sexual slavery.<sup>3</sup> The men often do not consult the girl's family beforehand, but destitute families will frequently accept the forced marriage out of a desire to receive *lobolo* (bridewealth).<sup>4</sup> As a result of these disturbing manifestations, *ukuthwala* is now regularly equated with 'forced child marriage' or 'forced marriage'; and is seen as a tradition that is inherently violent and detrimental to girls and women.

The efforts made by government, media, and civil society to bring attention to the forced marriage of girls and to curtail the practice, are crucial. However, much of the discourse on *ukuthwala* is sensationalised, oversimplified and erroneous. Most reports, including a recent one by the Commission on Gender Equality, while acknowledging that the practice is, and has historically been, a 'patriarchal tool', also state that in the past the practice was benign.<sup>5</sup> The common narrative is that the girl was never abused or sexually violated as part of the *thwala* process; that she was

<sup>1</sup> *Ukuthwala* literally means 'to carry off'.

<sup>2</sup> S Chibba 'Quest to understand ukuthwala' *Masimanyane Women's Support Centre* 22 October 2012, available at <http://www.masimanyane.org.za/?q=content/quest-understand-ukuthwala>, accessed on 10 February 2013; L Mwambene and J Sloth-Nielsen 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' (2011) 11(1) *African Human Rights Law Journal* 1 at 5; N Ntlokwana 'Submissions to the SA Law Commission on ukuthwala' *Centre for Constitutional Rights* November 2009, available at [http://www.fwdeklerk.org/cause\\_data/images/2137/sub\\_09\\_11\\_26\\_Ukuthwala\\_Custom.pdf](http://www.fwdeklerk.org/cause_data/images/2137/sub_09_11_26_Ukuthwala_Custom.pdf), accessed on 20 October 2012 at 5; L Odendal 'Forcing the issue' *Mail and Guardian* 4 April 2011, available at <http://mg.co.za/printformat/single/2011-04-04-forcing-the-issue/>, accessed on 4 January 2013; M Malan 'Abduction a perversion of the past' *Mail and Guardian* 15 February 2011, available at <http://mg.co.za/article/2011-12-15-abduction-a-perversion-of-the-past>, accessed on 4 January 2012.

<sup>3</sup> Department of Justice and Constitutional Development *Publications: Ukuthwala*, available at <http://www.justice.gov.za/brochure/ukuthwala/ukuthwala.html>, accessed on 19 February 2013; C Makhaye 'Girls live in fear of being abducted and "married"' *The New Age* 11 April 2011, available at [http://www.thenewage.co.za/Detail.aspx?news\\_id=15106&cat\\_id=1010](http://www.thenewage.co.za/Detail.aspx?news_id=15106&cat_id=1010), accessed on 4 January 2012.

<sup>4</sup> Malan (n 2).

<sup>5</sup> Statement made by Amanda Gouws at the Women's Legal Centre's *Symposium on Harmful Cultural Practices* Cape Town, 16 November 2012.

treated well by her suitor and his family after being *thwala*-ed; and that the girl's free consent to marriage was always obtained.<sup>6</sup>

South African scholars have perpetuated this narrative in depicting an illusory version of *ukuthwala* and painting an idyllic picture of the past. Bekker and Koyana describe *ukuthwala* as 'a charming and romantic practice', a 'mock abduction' during which the girl is 'treated with utmost kindness,' and given 'inducements for her to wish to go ahead with the marriage'.<sup>7</sup> They go even further in asserting that the girl almost always feigned resistance and was willing to be *thwala*-ed in order to get her own 'empire' as a 'married woman'.<sup>8</sup> Jansen also writes of the old practice of *ukuthwala* as one in which no intercourse was allowed, and says that in modern times, a 'totally different content and colour is given to this recognised customary practice through the abuse thereof'.<sup>9</sup> In their article on forced child marriage, Mwambene and Sloth-Nielson comment that *ukuthwala* has 'changed radically' and is 'an old custom . . . being wrongly practised'.<sup>10</sup> The Law of South Africa (LAWSA) volume on indigenous law too asserts that the cooperation and consent of the girl was necessary, basing this on previous literature on *ukuthwala*.<sup>11</sup>

Essentially, the current practice of *ukuthwala* is treated as an aberration and distortion of tradition. In some respects this is true. On the whole, violence against women has increased, due in large part to the devastation and inequality caused by apartheid, economic stagnation, the legacy of the migrant labour system on family structures, and HIV/AIDS.<sup>12</sup> The extreme brutality associated with *ukuthwala* is part of this larger trajectory of intensifying gender violence. Yet, the aforementioned factors cannot adequately explain the brutal methods employed. They do not explain why men would so spontaneously and patently begin employing such punishing and cruel methods, and why families and communities would condone them. In light of the insufficient context given to the issue, as well as the misrepresentations, this paper will argue that many of the coercive aspects of *ukuthwala* and forced marriage that are denounced as newly deviant, are in fact not recent phenomena but are deeply rooted in cultural practices that have been performed for centuries. Historical evidence reveals that the practice of *ukuthwala*, and processes around marriage generally, were not as sensitive towards women as have been

<sup>6</sup> Odendal (n 2); Gouws (n 5); Mwambene and Sloth-Nielson (n 2) at 5.

<sup>7</sup> DS Koyana and JC Bekker 'The indomitable *ukuthwala* custom' (2007) 40(1) *De Jure* 139 at 141, 143.

<sup>8</sup> *Ibid* at 140.

<sup>9</sup> RM Jansen 'Customary family law' in C Rautenbach, JC Bekker and NMI Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2010) 45–73 at 48.

<sup>10</sup> Mwambene and Sloth-Nielson (n 2) at 5.

<sup>11</sup> NJJ Olivier, JC Bekker, NJJ Oliver (Jnr) and WH Olivier 'Indigenous law' *The Law of South Africa* 2 ed vol 2 (1995) para 89.

<sup>12</sup> Malan (n 2).

depicted, but regularly involved violence. In short, although not always considered ideal in theory, in practice, marriage and violence were intertwined. The force exercised with some forms of *ukuthwala* is a subpart of this much larger pattern. Women were recurrently brutally coerced into marriage, with or without *ukuthwala*, and once in those marriages, violence was employed to subdue unwilling wives, and to discipline wives for infractions.

While *ukuthwala* is the Xhosa and Zulu term for the custom of abduction for purposes of marriage, the practice also exists amongst other groups in South Africa, including the Sotho, Pedi, Tsonga and Swati.<sup>13</sup> It has different forms, not all of which are harmful to the woman, for example elopement. The practice is, in actuality, more common than is acknowledged and is found throughout Africa; Central, South and East Asia; and Eastern Europe. In South Africa, abduction for marriage is a pre-colonial practice.<sup>14</sup> Some of the earliest written evidence of *ukuthwala* and forced marriages can be found in court records, colonial commission testimony, and ethnographic studies from the early 1800s onwards. These evince the ever-present element of violence in marriage.

In the past, girls were not infrequently beaten and raped into submission, sometimes with the consent or at the instigation of their families. Families also used *ukuthwala* in order to profit from the bridewealth payment. In addition, very young girls were chosen, as in Xhosa culture girls are marriageable once they reach puberty and their breasts show. The severe methods, such as rape, used against women were justified by the legitimate end sought by the male – that of marriage. Even within the marriage, husbands were permitted to use violence to discipline their wives as long as they did not draw ‘excessive blood’ or inflict a ‘permanent injury.’<sup>15</sup> These facts directly weaken the assumption that processes leading up to marriage and marriage itself were as a rule consensual and benevolent in former times.

In order to reveal the longstanding presence of violence in marriage practices, this paper highlights the practice of *ukuthwala* and forced marriage as extreme examples. In the part that follows, I present an overview of *ukuthwala*, highlighting its variations and trajectories since the colonial era. The third part surveys evidence describing the presence of violence and coercion in traditional marriage practices from the 1800s through the mid-twentieth century. The fourth section presents localised understandings of consent amongst mainly rural Xhosa communities, and

<sup>13</sup> Women’s Legal Centre *Symposium on Harmful Cultural Practices* Cape Town, 16 November 2012.

<sup>14</sup> E Thornberry *Colonialism and Consent: Rape in South Africa’s Eastern Cape, 1847–1902* (PhD dissertation, Stanford University, 2011) at 258.

<sup>15</sup> J van Tromp *Xhosa Law of Persons: A Treatise on the Legal Principles of Family Relations among the Xhosa* (1947) at 105.

addresses how marriage sanctions behaviour that would otherwise be deemed anti-social and criminal. This serves to clarify how violence is condoned and persists despite interventions. Lastly, the enduring nature of this violence provides an explanation for the widespread violence that plagues women in this region today, as in the rest of South Africa. Therefore, in this final section of the paper I look at how the specific conceptions of consent and interpersonal relationships are also manifest in other forms of violence against women.

The nature and prevalence of violence and forced marriage has shifted over time and place – affected and influenced by external social, political and economic forces. The goal of this paper is not to indicate a 'primordial' inclination towards violence amongst black South Africans, as Delius and Glaser have cautioned against; or to argue that *ukuthwala* and traditional marriage are innately violent.<sup>16</sup> Rather, the goal is to complicate the narratives surrounding *ukuthwala* by providing a more nuanced and context-based account, to help explain the brutal patterns that are witnessed in *ukuthwala* abductions today. This paper seeks to convey how local communities understand violence; and how customary practices and beliefs have served as a vehicle for perpetuating violence. By stressing the existence of violence, I do not intend to suggest that it is ubiquitous or wholly condoned. Nevertheless, I argue that it has been used to such an extent that it has come to be regarded as an expected and normalised part of married life, even as many concerned individuals, communities, and groups continue to push against it.

## II AN OVERVIEW OF UKUTHWALA

There is no singular or homogenous Xhosa culture, as the Xhosa of today are a diverse population grouped together through the fictions created by colonialism and apartheid. As such, the patterns discussed here are not representative of all areas or groups. Furthermore, culture – people's traditions and ways of living that are 'justified by their roots in the past' – is never static.<sup>17</sup> As Engle Merry notes, it is crucial to look at culture as 'contested, historically produced, and continually defined and redefined in a variety of settings.'<sup>18</sup> Here, a distinction between custom, on the one hand, and norms, on the other, is crucial. Although both are integral parts of the larger framework of culture, they have different connotations, which are important for purposes of the arguments presented in this paper. While 'custom' refers to actual practices, 'norms' are representative of community ideals. In the following discussions of *ukuthwala* and

<sup>16</sup> P Delius and C Glaser 'Sexual socialisation in South Africa: a historical perspective' (2002) 61(1) *African Studies* 27 at 27; S Engle Merry *Human Rights and Gender Violence* (2005) at 11.

<sup>17</sup> Engle Merry (n 16) at 11.

<sup>18</sup> *Ibid* at 100.

marriage, violence is more reflective of a social custom as opposed to a norm. Although it was often utilised pragmatically, it was not widely viewed as an ideal tool. Many Xhosa people contested the use of violence in forcing a girl to marry. In the late nineteenth century, *ukuthwala* was viewed as a controversial practice – especially in cases where the man did not obtain permission from the girl's father.<sup>19</sup> For example, one Xhosa man testifying before the 1883 Commission on Native Laws and Customs stated that forced marriage was becoming recognised as an 'unnatural and unkind' process.<sup>20</sup> Further, many considered a love match as the ideal for a stable and enduring marriage.<sup>21</sup> Therefore, in theory, harsh practices were not absolutely condoned and have always been challenged even as they were deemed acceptable within customarily prescribed parameters. This presents a complex and ever changing picture of culture.

Before delving into a discussion of how violence has been used in the context of *ukuthwala* and marriage, it is first necessary to discuss the varying nature of *ukuthwala* and how it has been broadly practiced in the Eastern Cape. There are three types of *ukuthwala*. The first is *ukugcagca*, or elopement, where the man and woman decide to marry without obtaining their parents' consent beforehand. This is used when the couple are afraid their families may object, or because the young man cannot afford the *ikhazi* (the bridewealth payment in cattle) and would like to make an arrangement with the woman's family.<sup>22</sup> *Ukugcagca* became quite common by the mid-twentieth century and this is an example of how a form of *ukuthwala* gave women more flexibility and autonomy in allowing them to choose their marriage partners.<sup>23</sup> The harmful forms of *ukuthwala* refer to those where the girl's consent is not obtained. In one type, the marriage is preapproved by the man's and girl's families without the girl being informed.<sup>24</sup> In the past, this was mostly used by poor families to avoid marriage expenses, or because the families were afraid the girl would object.<sup>25</sup> The third kind of *ukuthwala*, which is the most potentially injurious, is where the girl is abducted without consent being obtained from either family, or only from the man's family.<sup>26</sup>

In the nineteenth century and into the early twentieth, *ukuthwala* was

<sup>19</sup> Thornberry (n 14) at 261.

<sup>20</sup> Cape of Good Hope Report and Proceedings with Appendices, of the Government Commission on Native Laws and Customs Cape of Good Hope (January 1883) at 258.

<sup>21</sup> Van Tromp (n 15) at 17.

<sup>22</sup> Ibid at 63–65.

<sup>23</sup> A Mager *Gender and the Making of a South African Bantustan: A Social History of the Ciskei, 1945–1959* (1999) at 75–76; M Wilson 'Xhosa marriage in historical perspective' in E Krige and J Comaroff (eds) *Essays on African Marriage in South Africa* (1981) 133 at 136–137.

<sup>24</sup> JC Bekker, C Rautenbach and NMI Goolam *Introduction to Legal Pluralism in South Africa* (2006) at 31.

<sup>25</sup> Mager (n 23) at 68.

<sup>26</sup> Mwambene and Sloth-Nielsen (n 2) at 8.

regarded as an irregular form of marriage, as it was only employed in extreme cases – such as where resources were limited or where consent of the families could not be obtained initially.<sup>27</sup> The full form of traditional marriage (*umshato*) involved extensive negotiations around *lobolo*, specific ceremonies and festivities. The turn of the century was a tumultuous period for all black South Africans. The population sustained shocks caused by colonial wars and conquest, the creation of the migrant labour system, and the rinderpest epidemic, which decimated the cattle population.<sup>28</sup> Consequently, the goal of marriage through regular means became elusive for many.<sup>29</sup> With such consistent and large-scale disruptions to economic and social structures, women 'were encouraged to elope, and men paid reduced bridewealth in drawn-out stages. Single mothers raised a generation of children 'not "born of cattle" but born of women'.<sup>30</sup>

Given these shifts and increasing economic deprivation, from the turn of the century onwards, informal marriages increased steadily amongst both Christian and non-Christian Xhosa populations.<sup>31</sup> In her survey of ethnographic studies in the Eastern Cape, and based on her own work in the Keiskammahok District in the Ciskei, Wilson found that by mid-century, in several areas, elopements and abductions had become 'the approved traditional form of marriage.'<sup>32</sup> Writing in the late 1960s, Simons reiterated this finding, stating: '[i]nformal marriages are now the rule rather than the exception . . . It is the standard method of initiating marriage negotiations in parts of the Ciskei and Transkei.'<sup>33</sup> Wilson concluded that very few marriages to which the brides adamantly objected took place. However, an inspection from another angle unveils a different landscape in which coercion and violence did play a visible role.

### III VIOLENCE IN THE PAST

It is not feasible to determine with accuracy the level of violence against women in South Africa over the past two centuries. However, broad patterns can be identified. Scholars have noted a discernible rise in gendered violence in the late nineteenth century, which sustained and strengthened over the next decades.<sup>34</sup> Subsequently, 'from at least the 1930s records suggest a marked upsurge in the levels of violence against

<sup>27</sup> Thornberry (n 14) at 260; Van Tromp (n 15) at 62.

<sup>28</sup> Thornberry (n 14) at 298; B Carton 'The forgotten compass of death: apocalypse then and now in the social history of South Africa' (2003) 37(1) *Journal of Social History* 199 at 203; Mager (n 23) at 75, 80.

<sup>29</sup> Ibid.

<sup>30</sup> Mager (n 23) at 75–76.

<sup>31</sup> Wilson (n 23) at 135.

<sup>32</sup> Ibid at 136–137.

<sup>33</sup> HJ Simons *African Women: Their Legal Status in South Africa* (1968) at 117.

<sup>34</sup> Mager (n 23) at 183–185; Delius and Glaser (n 16) at 28, 38–39.

young women in some rural communities.<sup>35</sup> By the mid-twentieth century, this 'stress on male power and authority over women, which had long been part of the processes of socialisation in the countryside, took on new and violent dimensions in a world turned upside down by conquest, colonisation, migrancy and industrialisation.'<sup>36</sup> Thus, an extreme form of masculinity proliferated, fostered by the same disruptive elements that had also caused an increase in informal marriages, and reinforced by men's increased sexual freedom and decreased deference to patriarchal systems, due to their fathers' inability to provide *ikhazi* for marriage.<sup>37</sup> Focusing on the former Border and Ciskei regions of the Eastern Cape, Mager contends that violent masculinity did not simply result from emasculation (that is, an expression of frustrations with external circumstances); nor did it stem from these communities being uncivilised, as some have claimed.<sup>38</sup> Rather, having power over women and enacting violence against women came to be a constitutive aspect of masculinity – men abused women because that is what being a man represented.<sup>39</sup> Men believed they were entitled to sexually abuse and assault women, and did so.<sup>40</sup>

Against this brief background of gender violence, I will now highlight historical evidence from the past two centuries that specifically concerns *ukuthwala* and forced marriage. The records of the colonial government are a good starting point. Of the many concerns that the Cape Colonial government held with regards to the customs of the 'natives', the status of women was a significant one. The colonisers detested the practices of bridewealth payment, forced marriage (through various means including *ukuthwala*) and polygamy. In the report of the 1883 Government Commission on Native Laws and Customs in the Cape of Good Hope, which emphasised groups in the Eastern Cape, the Commission concentrated many of the witness questions on the lack of consent in marriage. The Commission report states that as early as 1840, colonial treaties were modified to give refuge to Christian converts in 'Kafirland' who were seeking refuge after having refused to comply with practices such as 'forcible abduction or violation of females.'<sup>41</sup> The extent of these practices is uncertain, but what is clear is that *ukuthwala*, forced marriage, and violence against women were visible practices at the beginning of the nineteenth century.

<sup>35</sup> Delius and Glaser (n 16) at 39.

<sup>36</sup> Ibid.

<sup>37</sup> Mager (n 23) at 183.

<sup>38</sup> Ibid at 183–184.

<sup>39</sup> Ibid at 184.

<sup>40</sup> Ibid at 183.

<sup>41</sup> Cape of Good Hope (n 20) at 15 para 12.



Several witnesses before the Commission testified that girls had no say in the choice of marriage. Rather, it was a choice made by the girl's father and should she refuse, violence was used to compel her.<sup>42</sup> Many of the African witnesses (principally headmen and chiefs) could not fathom the idea of a girl making a choice on her own.<sup>43</sup> They stated that a girl must be made to be obedient to her father so that she would then also be obedient to her husband.<sup>44</sup> The Commission attempted to create mechanisms to ensure that the girl's consent was obtained before marriage, and suggested having a government witness at marriage ceremonies. In response, one witness before the Commission, a Reverend J.A. Chalmers stated, 'I would not, however, lay very great stress on the consent of the girl, because it may be given under compulsion . . . you could not reach the secret influences employed to obtain consent.'<sup>45</sup> This speaks to the problem of both latent and overt forms of coercion against women that served to keep them in subservient positions.

Testifying with regards to the Zulu population, the defeated King Cetshwayo's testimony also reveals the link between marriage and violence. He recounted that when four women had refused to marry men in his regiments he had ordered them to be killed.<sup>46</sup> He spoke further about the role of the man in making decisions regarding a girl's marriage, insisting that this had been the custom since time immemorial.<sup>47</sup>

Numerous women who ran away from marriages sought protection from colonial magistrates. For example, Hunter has documented this pattern in Pondoland following its annexation by the Cape in 1894.<sup>48</sup> Towards the end of the century, men increasingly *thwala*-ed women without their fathers' consent in order to pressure them to submit.<sup>49</sup> Court records from the 1800s show how coercive cases of *ukuthwala* were litigated under various civil and criminal remedies.<sup>50</sup> A court case from 1884 concerned a woman who had been forced into a marriage and was subsequently so distraught over it that she tried to commit suicide, and eventually succeeded in running away.<sup>51</sup> In parallel with the present, in the 1800s through the turn of the century, women were also beaten and raped as part of the *thwala* process.<sup>52</sup> In an 1876 *ukuthwala* case, a witness

<sup>42</sup> Ibid at 94 paras 1433–1457.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid at 145 para 2488.

<sup>46</sup> Ibid at 517–520.

<sup>47</sup> Ibid.

<sup>48</sup> M Hunter *Reaction to Conquest: Effects of Contact with Europeans on the Pondo of South Africa* (1936) at 189.

<sup>49</sup> Thornberry (n 14) at 258–259.

<sup>50</sup> See generally Thornberry (n 14).

<sup>51</sup> See *Muxeba v Tshaya Ngezito* CA 1/KWT H2/1/1/, 28 April 1884.

<sup>52</sup> Thornberry (n 14) at 265–668.

confirmed seeing four men beating the 19-year-old victim during the abduction process in order to force her into a marriage.<sup>53</sup> In a King William's Town case at the end of the century, the court heard the story of a woman named Nongwa, who was raped by her would-be husband after he *thwala*-ed her and was treated so cruelly by him that she fled.<sup>54</sup> In some cases, men escaped prosecution for rape by appealing to the 'custom' of carrying women away to marry them, therefore justifying their actions.<sup>55</sup>

In the early to mid-twentieth century, several legal and anthropological studies also record abuse against women in the context of *ukuthwala* and marriage. Especially in the cases of what Mayer terms an 'extreme form' of *ukuthwala* – where the parents arrange the marriage without the girl's consent – it was not uncommon for girls to try to run away.<sup>56</sup> Yet, as much as they tried to escape, the insubordinate wives were forcefully brought back and assaulted. The 1915 case of Nompetu is illustrative of this. The magistrate wrote:

Her evidence shows that she fled to West Pondoland and to every district in East Pondoland in her vain attempts to escape him . . . for three years she had no rest for the soles of her feet in her fruitless endeavours to escape a union which was in every way repulsive to her . . . again and again she was dragged back to the Defendant, once even at the end of a rope, and that she was on one occasion very severely beaten by her brother for refusing the bridegroom whom he and her father had provided for her.<sup>57</sup>

In other cases, women resorted to shocking methods to escape the oppression of their forced marriages. The 1946 case of Situwe Nqayi is particularly poignant and tragic. Using customary methods of protest, she had attempted to reject the marriage arranged by her father, but was forced to succumb through violence: 'Four men tied Situwe to the floor with cattle *riems*. So splayed and unable to move, she was easily raped by her "husband."<sup>58</sup> Although she repeatedly protested and declared 'I do not want to be the wife of this place', no one came to her aid.<sup>59</sup> One day, as her husband followed her to keep watch over her, in a final act of desperation and defiance, 'Situwe crept up behind him and sank an axe into his head.'<sup>60</sup>

<sup>53</sup> *R v Mhaya Kopisini, Wright, Montintili, and Manayo* CA SGG 1/1/118, 18 January 1876.

<sup>54</sup> *Patulweni v Klaas* 34 CA 1/KWT H2/1/5, 18 August 1890.

<sup>55</sup> For example, see *R v Pieter Soldaat and Nilangeni* CA SGG 1/1/706, 15 December 1903.

<sup>56</sup> P Mayer *Townsmen or Tribesmen: Conservatism and the Process of Urbanization in a South African City* (1961) at 239–240.

<sup>57</sup> Simons (n 33) at 103.

<sup>58</sup> Mager (n 23) at 103.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

Adding to the gravity of gender violence, communities often ostracised women who did leave their abusive husbands. One woman, named Yaliwe recounted how, in the 1940s, she had been *thwala*-ed by a man who beat her during the marriage and cut her off from the world.<sup>61</sup> After running away several times she eventually divorced him. The women in her area shunned her. They lectured that 'perseverance was important' and that they 'had experienced the same bad times.'<sup>62</sup> In their view, women had to 'suffer' in order to gain 'status' and earn 'respect'.<sup>63</sup> So pervasive was violence, that it was viewed as an accepted part of women's marriages, and those remaining in such relationships were deemed respectable by other women.

In an examination of court records from the mid-century, Mager found a distinct increase in the occurrence of violence against women by men and boys. She ascertained that by the 1940s and 50s 'men adopted the view that they were entitled to rape'.<sup>64</sup> For *ukuthwala* cases involving rape, some actors were successful in litigating in court under the civil law charges of abduction and seduction. For example, in the 1936 case of *Mkupeni v Nomungunya & Others*, the victim was abducted and raped by the defendant with the aid of two other men.<sup>65</sup> The court awarded her £25 in damages.<sup>66</sup> However, many parents were reluctant to sue under civil law or lay charges under criminal law, preferring instead to settle the case by demanding damages under customary law, or by arranging for their daughter to marry the perpetrator.<sup>67</sup> Customary law defined rape differently to colonial law (as shall be discussed in the next section) and thus, sexual assault was not consistently considered to be immoral, especially if it served a socially recognised purpose – such as precipitating marriage.

The framework of marriage made it harder for the gravity of sexual violence against women to be recognised. In her 2005 study of group rape in an Eastern Cape community, Wood spoke to elders about their recollection of forced sex during the *ukuthwala* process. One elder woman stated:

Some guys would hold you down for your husband-to-be. If a girl has strength, the men would turn out the light, holding your legs open for the guy

<sup>61</sup> Ibid at 179.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid at 183.

<sup>65</sup> Cited in Simons (n 33) at 117–118.

<sup>66</sup> Ibid at 118.

<sup>67</sup> Ibid at 118.

to sleep with you. Whatever you may try to do, they are holding you down. Even if you cry, old people wouldn't care, they knew what was going on.<sup>68</sup>

Wood notes that '[e]ven in cases where the girl had to be held down by other men for penetration to take place, most elders the author spoke to did not equate this with rape. Only one said "today it would be called rape".'<sup>69</sup> This last statement graphically encapsulates the key point of this paper: that in the past, as in the present, violence, including sexual violence, was not uncommonly an integral part of making a woman into a wife.

#### IV WHY VIOLENCE HAS PERSISTED: CONSENT AND THE CONTEXT OF MARRIAGE

In order to understand the persistence of the violence and coercion, which are strongly associated with the practice of *ukuthwala* today, it is vital to appreciate why these forces are exercised and condoned in certain circumstances. A survey of local Xhosa cultural perceptions of consent and marriage elucidates how violence is utilised and endorsed at a community level.

##### (1) *Consent*

With regards to marriage and the rights of the girl or woman, consent has traditionally been conceptualized by Xhosa custom in a very particular manner. As the headman and chiefs said before the 1883 Commission on Native Laws and Customs, the girl's wishes were in effect irrelevant. In theory, there were several proscribed means under Xhosa custom through which a girl could protest if she did not approve of her potential husband.<sup>70</sup> These included violating the *hlonipha* rules of female deference to male in-laws by shouting out the names of the males in the family; rubbing excrement on the face; or appealing to paternal uncles.<sup>71</sup> Such methods of protest were meant to protect women, and appear to have been more consistently honoured in the nineteenth century – but, based on the available historical sources, scholars have determined that from the twentieth century, increasingly, the woman's family, in-laws and headmen were impervious to her objections.<sup>72</sup> A woman's father or guardian consented on her behalf based on what he determined to be in her best interests. Van Tromp, a legal scholar who did ethnographic work amongst the Xhosa during the 1940s, confirms this perspective:

<sup>68</sup> K Wood 'Group rape in post-apartheid South Africa' (2005) 7(4) *Culture, Health & Sexuality* 303 at 313.

<sup>69</sup> *Ibid*; emphasis added.

<sup>70</sup> Van Tromp (n 15) at 17, 33.

<sup>71</sup> *Ibid* at 33.

<sup>72</sup> Delius and Glaser (n 16) at 38–39; Mager (n 23) at 102–103; Thornberry (n 14) at 58.

In the case of a daughter it is to a great extent her parents (family) that are responsible for her marriage to a man. She is as a rule not consulted, sometimes hardly knows anything about the marriage, but is expected to submit, which she, as a good and obedient girl, generally does; she is considered tacitly to consent to the marriage with a man of her parents' choice.<sup>73</sup>

Accordingly, in the traditional Xhosa sense, girls did not explicitly voice 'consent', and it was not uncommon for them to be beaten and threatened to force them to marry the man their father or family had agreed to.

There were other aspects of *ukuthwala* that further complicated issues of consent and rendered girls even more susceptible to harm. According to evidence of Xhosa custom from the nineteenth century until contemporary times, processes leading to marriage and marriage ceremonies are solemn occasions during which girls are not meant to show any emotions or elation.<sup>74</sup> Hence, even in circumstances where the girl agreed to elope, or approved of the man who had chosen her, during her abduction she pretended to object. As a result, the pressure on girls to feign resistance resulted in a 'deliberately constructed ambiguity, obscuring the feelings of the abducted bride.'<sup>75</sup> Utilizing this ambiguity, some scholars – such as the aforementioned Bekker and Koyana – have downplayed the extreme forms of *ukuthwala* by saying that resistance is almost always feigned and that girls want to be abducted.<sup>76</sup> Such characterisations are problematic because they perpetuate violent forms of *ukuthwala* and forced marriages, as men are able to argue that the woman consented by appealing to cultural justifications. Furthermore, this same ambiguity obscures the ability to determine when a woman actually *does* consent.

The vagueness surrounding marriage and consent caused Simons to criticise the vulnerable position of women in all informal forms of marriage, even elopements. In his 1968 book on the status of women in South Africa he wrote:

. . . abductions and elopements have their origin in forced marriages. A girl elopes with her lover because the guardian opposes their marriage. He may, in addition, wish her to marry a man whom she rejects. A man abducts an unwilling girl in order to force her to marry him, or to prevent her from marrying another. It is immaterial . . . whether she is taken with her own consent, or at her own suggestion or against her will, or whether she is decoyed or enticed away. An element of coercion is latent or active in the institution, which can only operate in a society where girls are not free to choose their husbands.<sup>77</sup>

<sup>73</sup> Van Tromp (n 15) at 33.

<sup>74</sup> Wilson (n 23) at 136; Thornberry (n 14) at 60–61; Van Tromp (n 15) at 54–57.

<sup>75</sup> Mager (n 23) at 177.

<sup>76</sup> Bekker and Koyana (n 7) at 139.

<sup>77</sup> Simons (n 33) at 117.

Simons' disapproving assessment is valuable for identifying and interrogating the forms of coercion that women were subject to, as well as the larger societal structures and pressures that function to restrain women's autonomy, both implicitly and explicitly.

(2) *Rape and the context of marriage*

To comprehend the prevalence of sexual violence in *ukuthwala* and forced marriages, it is essential to first set aside Anglo-American legal definitions of rape. Further, it is important to recognise that the definition of rape has not only changed throughout history, but that its definition is often locally specific.<sup>78</sup> Just as consent is a complex and nuanced matter with cultural variants, so too is the conception and definition of sexual violence. In simple terms, in Xhosa tradition, forcing a woman to have sexual intercourse is not categorically seen as an illegitimate act. Although recent reports of *ukuthwala* proclaim that girls were not raped in the past, in reality the relationship between abductions, marriage and sexual assault, is a longstanding one. This is not an idiosyncratic feature of Xhosa or other black South African cultures. Recall that marital rape was only criminalised in South Africa in 1993. The apartheid-era law sanctioning marital rape was inherited from colonial systems and shaped by ostensibly 'civilised' white men.

In terms of Xhosa custom, there are certain factors that are used to determine whether the act of sexually violating a woman is criminal or a sanctioned form of coercion. The factor of most relevance in assessing this question is whether the man sexually assaulted the woman with the intention of making her his wife. Wood explains what purposes sexual assault served for the man seeking to marry:

the act of penetration – violently enacted or not – was one crucial part of the process of turning a girl into a wife, and thus enabled her attainment of an adult status (assuming her prior virginity), and thus could not be equated with . . . rape, which had no decent intention. The act of sexual union marked the woman as belonging to that man: if the girl returned to her home after *ukuthwala*, the implication was that she was disgraced and 'damaged' by the man's sexual marking and 'owning' of her – a marking without substance.<sup>79</sup>

Hence, men utilised sex not only to force women to submit, but also because it is an irreversible act that marks the girl as wife and causes her to be disgraced should she refuse the marriage. Further, in cases where the father's permission to abduct his daughter was obtained beforehand, it was considered that he also 'tacitly' consented 'to carnal connection between

<sup>78</sup> Ibid at 34.

<sup>79</sup> Wood (n 68) at 313–314.

his daughter and the young man with the object of marriage', and therefore the man would not be found guilty of a crime.<sup>80</sup>

Ultimately, the legitimate objective of marriage justified the violent means used to attain marriage. Explaining this point, Van Tromp cautioned Europeans to not condemn the violent aspects of *ukuthwala*. Referring to sexual assault, he elaborated: 'the element of brute force employed at the initial stage of the proceedings does not forthwith determine and stigmatise the whole issue of these proceedings as a crime, as would be the case according to our own legal conceptions.'<sup>81</sup> He further explained that under Xhosa custom 'a series of connected acts is viewed as a whole and is judged retrospectively from the viewpoint of the objective sought and attained. Consequently a previous act in the sequence can be condoned and the whole issue be retrieved by the later act.'<sup>82</sup> In this case, the later act is marriage and the consent of the girl's family. Van Tromp's portrayal captures the essence of the intersection between marriage and sexual coercion. The link was so significant that even when men began to appear in court in the nineteenth century on charges of rape, they justified their actions by invoking the element of marriage. In their eyes, 'marriage excused sexual coercion, and sex could – these men hoped – make a marriage.'<sup>83</sup> In my view, the rapes that occur as part of the *ukuthwala* process in modern times are a continuation of this cultural repertoire.

## V THE PRESENT: THE INTERSECTION BETWEEN CULTURE AND OTHER FORMS OF VIOLENCE AGAINST WOMEN

The discussions in the preceding sections have argued that the occurrence of extreme forms of *ukuthwala* today can in part be explained by the fact that particular cultural notions of consent and marriage permit and condone such violence. The cultural justifications for this brutality are centuries old. The dynamics of consent and relationships also spill over into other settings of violence against women. In fact, it is most helpful to look at *ukuthwala* and forced marriages in conjunction with gender-based violence as a whole. In doing so, one sees the overarching context 'in which male collective coercion has long been deemed historically acceptable (as long as certain rules are followed.)'<sup>84</sup>

In terms of relationships, we have seen that the end goal of marriage has long justified the use of force. Studies done in the past two decades in the

<sup>80</sup> Van Tromp (n 15) at 69.

<sup>81</sup> Ibid at 71–72.

<sup>82</sup> Ibid at 72.

<sup>83</sup> Thornberry (n 14) at 256–257.

<sup>84</sup> Wood (n 68) at 313.

Eastern Cape (in rural, peri-urban and urban settings) and amongst Xhosa informants in Cape Town, detail the ways in which other types of interpersonal relationships also serve to validate violence in modern times. Many people consider only stranger rape or gang rape to be criminal acts.<sup>85</sup> If a girl or woman is raped by someone they know – a family member, a neighbour or someone from the area – then typically this will not be considered a criminal offense and may be ignored or settled internally, for example through payment of customary damages.<sup>86</sup> Consequently, in many cases, a girl who is sexually abused by her father, or someone close to her, will be left to suffer in silence or even blamed. Moreover, violence is so prevalent in marital relationships and pre-existing sexual relationships that it becomes normalised.<sup>87</sup> The legacy of violence against women has produced a palpable sense of resignation amongst many women, young and old. Recent studies of violence in the Eastern Cape show that many older women feel helpless in combating abuse in their daughter's relationships. There is a strong belief that it is in men's nature to sexually abuse, even when it comes to their own children, and so people tend not take action against it.<sup>88</sup> Women rationalise that, because they endured violence, so must their daughters.<sup>89</sup> Even with regard to *ukuthwala*, one woman lamented: 'even us we were abducted, we did not choose our husbands . . . so why should it be different now?'<sup>90</sup> As a result, violence becomes 'accepted generation after generation'.<sup>91</sup>

The ambiguity of consent is also at play in other forms of violence. To illustrate, in a study of 'streamlining', a form of collective rape amongst youth in the Eastern Cape, Wood found that 'young men claimed that women showed their consent through silence or failure to resist.'<sup>92</sup> This was further complicated by the fact that 'sexual consent was rarely voiced' by women, and so men use the absence of protest as an invitation to rape.<sup>93</sup> Overall, men took advantage of the obscurity around sexual consent in order to rationalise rape. Wood cited the ambiguity regarding

<sup>85</sup> Ibid.

<sup>86</sup> K Wood and R Jewkes "'Love is a dangerous thing": micro-dynamics of violence in sexual relationships of young people in Umtata' 1998 *Medical Research Council of South Africa* at 38; K Wood, F Maforah and R Jewkes 'Sex, violence and constructions of love among Xhosa adolescents: putting violence on the sexuality education agenda' 1996 *Medical Research Council of South Africa* at 6; A Clarfelt and L Meyers *The Impact of Gendered Economic Inequalities on Child Sexual Abuse Risk* (2012) Presented at Strategies to Overcome Poverty and Inequality: Towards Carnegie III, 3–7 September 2012, University of Cape Town, at 19.

<sup>87</sup> Wood and Jewkes (n 86) at 38; Wood, Maforah and Jewkes (n 86) at 7.

<sup>88</sup> Wood and Jewkes (n 86) at 38; Wood, Maforah and Jewkes (n 86) at 6; Clarfelt and Meyers (n 86) at 19.

<sup>89</sup> Wood and Jewkes (n 86) at 38.

<sup>90</sup> Clarfelt and Meyers (n 86) at 18.

<sup>91</sup> Wood and Jewkes (n 86) at 17.

<sup>92</sup> Wood (n 68) at 311.

<sup>93</sup> Ibid.



consent as one of the central justifications for why men argued that their actions did not constitute rape, and this argument 'reflected the often fine line in local sexual culture between "force", "persuasion" and "seduction", and the reputation-protecting "game" expected to be played by women – in particular saying "no" even if they were interested in a sexual relationship.'<sup>94</sup> A recurring theme evident in examinations of past and present manifestations of sexual violence is that men often abuse cultural prerogatives in order to continue – and get away with – abusing women. Further, women must constantly navigate the unbalanced rules of consent and respectability. As a result of the ambiguity surrounding women's inability to speak and to actually be heard, they are subjected to violence. Sadly, violence has become such a 'consistent feature' of young Xhosa women's 'sexual lives' that surveys suggest in most cases sex is initiated through deceit or coercion.<sup>95</sup>

## VI CONCLUSION

This paper has documented that many of the current views about violent practices in *ukuthwala* and traditional marriage are in fact misconceptions that mask the longevity of these practices, as well as the extent to which they are deeply embedded in contemporary sexual relationships. As long as the history of violence in marriage and interpersonal relationships is not fully appreciated and accurately depicted, interventions designed to alleviate the problem of abuse will only have superficial and short-term success as they will not address the root of the problem. Because cultural conceptions of violence sometimes contradict the norms set out in the laws of this country, prosecuting offenders and educating communities will have some effect, but will not completely shift the customary practices relating to violence that permeate the lives of many. Hence, the challenges in eradicating cruel forms of *ukuthwala* and violence against women as a whole cannot be underestimated. While the government and civil society must confront the structural factors that perpetuate violence, such as poor education, lack of access to healthcare, and economic strife, they should also be cognisant of the impact of culture.

By discussing perceptions of violence that exist in rural areas and also urban areas, this paper illustrates that culture is not some abstract entity that only exists 'out there' in the rural areas, amongst 'backwards' people.<sup>96</sup> It is everywhere, carried over from centuries old customs, and passed from generation to generation – albeit constantly shifting, transforming and being questioned. Further, the violence of *ukuthwala* and marriage is not just part of an insular and rural way of life; it is part of a

<sup>94</sup> Ibid.

<sup>95</sup> Wood, Maforah and Jewkes (n 86) at 4–5.

<sup>96</sup> Engle Merry (n 16) at 11.

national culture that permits and rationalises rape and violence against women. This is why the abusive forms of *ukuthwala* cannot be addressed in isolation.

While some may argue that culture is inherently and intractably patriarchal and detrimental to women, I would urge that we should not see culture 'simply as an obstacle to change', instead we should recognise 'its capacity to innovate, appropriate, and create local practices.'<sup>97</sup> Advocates for non-violence and women's rights have always existed alongside those who condone violence in the name of tradition. The task lies in shifting behaviour to reflect an ideology of gender equality. By first closely interrogating how violence is bred, shaped and fed by engrained cultural attitudes, it becomes possible to engage meaningfully with affected populations, and to articulate and create a different vision – a new model of tradition that respects and dignifies women.

<sup>97</sup> Engle Merry (n 16) at 228.