Hmong 'Marriage by Capture' in the United States of America and *Ukuthwala* in South Africa: Unfolding Discussions

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Abstract

'Marriage by capture' among the Hmong people in the United States of America and *ukuthwala* in South Africa both take the form of the mock abduction of a young woman for the purpose of a customary marriage. The noteworthy point about these two customary marriage practices is that, although Hmong marriage by capture takes place in the context of a minority community in a liberal state, and *ukuthwala* occurs in a postcolonial state, courts in these jurisdictions convert these marriage practices to the common law offences of rape, assault, and abduction. This article reflects on the accused-centred approach in the case of *People v Moua*, in which the court invoked the cultural defence, and the victim-centred approach in *Jezile v S*, which severed cultural values from the rights of the woman. It questions whether the two communities in question, in their respective liberal and postcolonial settings, influence the attitudes of the courts in cases involving rape, assault, and abduction charges. The main argument proffered is that both approaches may encourage communities to continue marriage abduction practices without bringing them to the attention of investigative organs, with adverse human rights implications for the women and girls affected. The ultimate purpose of this conversation, therefore, is to show how the approaches of the courts to the recognition or non-recognition of these customary practices affect the rights of girls and women who encounter institutions of law that alienate people belonging to minority cultural groups, and often perpetuate injustice.

Keywords: *ukuthwala*; South Africa; United States of America; Hmong; marriage by capture; girls; abduction

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Introduction

This article discusses the similarities and differences between 'marriage by capture' among the Hmong people in the United States of America (USA) and *ukuthwala* in South Africa (SA). Hmong marriage by capture[1] and *ukuthwala*[2] both take the form of the mock abduction of a young woman for the purpose of a customary marriage. The interesting point emerging from a comparison of these two customary marriage practices is that, although Hmong marriage by capture occurs in a minority community in a liberal state, and *ukuthwala* occurs in a postcolonial setting, courts in both the USA and SA convert these customary marriage practices to the common law offences of rape, assault, and abduction.[3] The focus of this article, therefore, is to explore how the recognition and application of the customary practices of Hmong marriage by capture and *ukuthwala*, in their respective liberal and postcolonial settings, influence the decision of the courts in cases involving rape, assault, and abduction charges.[4] Without

1 See, generally, definitions of 'marriage by capture' by Deirdre Evans-Pritchard and Alison Renteln, 'The Interpretation and Distortion of Culture: A Hmong "Marriage by Culture" Case in Fresno, California' (1994) 4(1) Southern California Interdisciplinary LJ 8 at 1–48; Nilda Rimonte, 'A Question of Culture: Cultural Approval of Violence against Women in Pacific-Asian Community and the Cultural Defence' (1991) 43(6) Stanford LR 1311 at 1311–1326; and Jinghui Wang, 'Cultural Defense as a Shield for Violence' (2016) American University Journal of Gender, Social Policy and the Law (10 November 2016) <http://www.jgspl.org/cultural-defense-shield-violence/>.

2 See, generally, definitions of ukuthwala by, among others, Nyasha Karimakwenda, '"Today It Would be Called Rape": A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape' (2013) Acta Juridica 340 at 339–356, Lea Mwambene and Julia Sloth-Nielsen, 'Benign Accommodation? Ukuthwala, "Forced Marriage" and the South African Children's Act' (2011) 11 African Human Rights LJ 3 at 1–22; John Mbaku, 'International Law, African Customary Law, and the Protection of the Rights of Children' (2020) Michigan State Intl LR 535–690 at 609, Lucinda Vandervort, 'Marriage by Force: Contestation over Consent and Coercion in Africa' (2017) 29(1) Canadian Journal of Women and the Law 431–438 at 433; and Tom Bennett, *Customary Law in South Africa* (Juta 2004) 212.

3 See, for example, the SA case of *Jezile v S* 2015 (2) SACR 452 (WCC) and the US case of *People v Moua*, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985). Most scholars in SA are of the view that only the distorted forms of *ukuthwala* would lead to common law offences of rape, kidnapping, and assault; see, for example, Marcel van der Watt and Michelle Ovens, 'Contextualizing the Practice of Ukuthwala within South Africa' (2012) 13(2) Child Abuse Research in South Africa 12, Mwambene and Sloth-Nielsen (n 2), Lea Mwambene and Helen Kruuse, 'The Thin Edge of the Wedge: Ukuthwala, Alienation and Consent' (2017) SAJHR 25; Beatri Kruger and Hennie Oosthuizen, 'South Africa: Safe Haven for Human Traffickers Employing the Arsenal of Existing Law to Combat Human Trafficking' (2012) Potchefstroom Electronic LJ 282 at 286. See also earlier discussions by Felicity Kaganas and Christina Murry, 'Rape in Marriage: Conjugal Right or Criminal Wrong' (1983) Acta Juridica 125.

4 See also discussions by EK Soung, 'Bride Wealth and Its Implications for Hmong Women' (master's thesis, St. Catherine University and the University of St. Thomas St. Paul, Minnesota 2015) 10 <https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1527&context=msw_papers> accessed 19 September 2020, who observed that Hmong marriage by capture is in conflict with the laws in the USA, which constitutes an impediment to the practising of Hmong cultural traditions. In the context of *ukuthwala* in SA, Bennett (n 2) 212 has similarly observed that 'from a common-law perspective, *twala* could easily become kidnapping.' See also, generally, discussions by Karimakwenda (n 2) 339–356. Lea Mwambene and Helen Kruuse, 'Marital Rape and the Cultural

expressing any strong views on whether the approaches taken by the courts are good or bad, the differences in the outcomes invite two speculations. On the one hand, even though customary law has normative force as a legal system in the Constitution of the Republic of South Africa 1996, it continues to be interpreted through the lens of the common law. On the other hand, courts in the US legal system seem to recognise cultural pluralism within the context of a racially diverse society. The ultimate purpose of this conversation, however, is to show how the recognition or non-recognition of these customary practices affects the rights of women and girls as they encounter institutions of law that alienate people belonging to minority cultural groups and often perpetuate injustice.[5]

The article is divided into five main sections, including this introduction. While the focus is on highlighting the similarities and differences between the two marriage customs, the article suggests that the uniqueness of the communities in which the respective systems flourish might explain the differences in the outcomes of the court cases.[6] Therefore, the second section discusses the historical origins of the Hmong communities in the USA and of the communities that practice *ukuthwala* in SA. The characteristics of both Hmong marriage by capture and *ukuthwala* are thoroughly discussed in the literature.[7] It is therefore not necessary to explore those characteristics here. However, for purposes of this discussion, the third section of the article presents a brief summary of some of the major similarities and differences between the characteristics of Hmong marriage by capture and *ukuthwala*. The fourth section is an evaluation of the emerging discussions that have followed the decisions in the two court cases of *People v Moua* and *Jezile v S*.[8] In the last part, the conclusion, it is observed

Defence in South Africa' (2018) Stellenbosch LR 25 at 26 observed that 'a conviction and sentence on rape, assault and trafficking in the Jezile case occurred within an alleged *ukuthwala* arrangement.'

5 See, generally, discussions by Illumoka Adetoun Olabisi, 'Legal Imperialism and Democratization of Law: Towards an African Feminists Jurisprudence on the Development of Land Law and the Rights in Nigeria' (LLD Thesis, University of Columbia (Vancouver) 2013) 1.

6 For example, Y Yang, 'Bride Capture' in Jonathan Lee and Kathleen Nadeau (eds) *Encyclopedia of Asian American Folklore and Folklife* (Abc-Clio 2011) 422 at 421–423 has observed that courts generally favour husbands when wives take legal action against Hmong American men; see also the decision in *People v Moua*, which is accused-centred. In SA, generally, courts either recognise or invalidate customary rules that are in conflict with the Constitution and its Bill of Rights. See *Gumede v President of South Africa* 2009 3 SA 152 (CC) and general discussion by Julia Sloth Nielsen and Lea Mwambene, 'Talking the Talk and Walking the Walk: How Can the Development of African Customary Law be Understood? (2010) Law in Context: A Socio-legal Journal.

7 See, for example, discussions by Mwambene and Sloth-Nielsen (n 2) 3; Tom Bennett, 'The Cultural Defence and the Custom of *Twala* in South African Law' (2010) 10 University of Botswana LJ 3–26; Evans-Pritchard and Renteln (n 1); Soung (n 4) 9; Bennett (n 2) 212–213; Mwambene and Kruuse (n 3) 25.

8 Both these cases received extensive media coverage. In the context of *People v Moua*, Evans-Pritchard and Renteln (n 1) 1–48 have recorded, for example, David A Bell, 'The Triumph of Asian-Americans' New Republic (New York, July 15 and 22, 1985) 24–31, and Katherine Bishop, 'Asian Tradition at War with American Laws' *NY Times* (New York, 10 February 1988) A18. In the case of *S v Jezile* (n 3), the following reports appeared in the media: Nyasha Karimakwenda, 'Jezile *Ukuthwala* Judgment Signals Progress and Continuing Challenges' *Custom Contested* (Cape Town, 29 April 2015); Nyasha

that while these discussions explain both marriage customs, the setting—whether liberal or postcolonial—greatly affects a woman's enjoyment of her rights. Ultimately, both communities may end up practising these customs without bringing them to the attention of investigative organs, with adverse human rights implications for the women and girls affected by the practices. The proposal to policy makers, as a way forward to protect women's rights from violation, is a balance between *victim-centred* and *accused-centred* approaches.

Historical Origins

The first point of comparison between the practices of Hmong marriage by capture and *ukuthwala* is the historical origins of the communities that engage in these customary marriage practices, starting with Hmong communities. The Hmong people, now found in different parts of the USA, are historically an ethnic group from South East Asia.[9] They immigrated to the USA out of fear of Vietnamese retaliation for their involvement as guerrilla forces during the Vietnam War in the 1960s and 1970s.[10] During this war, the Hmong people in Laos[11] partnered with Americans to fight against South East Asian Communists. In 1975, Laos fell to the Communist group. Nearly all the Hmong people who settled in the USA are thus from Laos.[12]

Since the first settlement in 1975, there has been a steady increase in the Hmong population.[13] By 1988, approximately 97,000 Hmong people had established communities in places such as Providence (Rhode Island), Seattle (Washington), Minneapolis (Minnesota), Santa Ana (California), and the Central Valley of California.

Karimakwenda, 'Jezile Appeal Highlights Difficult Questions about Ukuthwala and Violence' *Custom Contested* (Cape Town, 28 November 2014); Jade Otto, 'Man Jailed for Marrying, Raping Girl' *Independent Online* (Cape Town, 14 February 2014) 14; Diana Mabasa, 'Ukuthwala: Is It All Culturally Relative?' De Rebus (Johannesburg, 23 July 2015); and Carmel Rickard, 'Girl 14, Married and Then Raped: Man Jailed after Customary Law Defence Failed' *Trading Places* (Smithfield, 23 March 2015).

9 Christine Wilson Owens, 'Hmong Cultural Profile' (ethnomed.org, 1 March 2007) <https://ethnomed.org/culture/hmong/hmong-cultural-profile> accessed 16 October 2018 records that according to Chinese sources, the Hmong originated in 2300 BCE in northern central Asia, in what is today Mongolia. Over centuries, people migrated south into Tibet and China. For thousands of years, the Hmong lived relatively independently while paying tribute to the Chinese government. However, under the oppression of the armies of the last dynasty in China, the Hmong rose up in rebellion. In the 1800s, faced with political persecution, depleted soil fertility, and increasing population pressure, some Hmong migrated into South East Asia. In South East Asia, they settled in the mountains of northern Burma, Thailand, Laos, and Vietnam.

10 See also Soung (n 4) 2.

11 According to Wilson Owens (n 9), Laos covers about 91,000 square miles, an area similar in size to the United Kingdom. It is a landlocked country that shares borders with Thailand to the west, Burma to the northwest, China to the north, Vietnam to the east, and Cambodia to the south.

12 The Hmong people are also found in Thailand, Vietnam, France, French Guiana, and China.

13 Paj Vang, 'A Phenomenological Study of Hmong Women's Experience with Forced Marriage in the Hmong Culture (LLM, California State University 2013) 1.

Population growth had increased by 97 per cent by 2000, with the total population reaching 186,310. According to the latest figures, recorded in 2010, the population totals 260,073, which amounts to an increase of 40 per cent.[14]

In SA, the practice of *ukuthwala*,[15] as it is called by the Xhosa and Zulu communities, originates from the Xhosa people but has been adopted by different ethnic groups, including the Sotho, Pedi, Tsonga, and Swati.[16] *Ukuthwala* generally enjoys popular support in the areas where it is practised.[17] It is, however, most prevalent in the Eastern Cape (among Xhosa communities) and KwaZulu-Natal provinces (among Zulu communities).[18] The Xhosas are part of the South African Nguni migration, which slowly moved south from the region around the Great Lakes, displacing the Khoisan hunter-gatherers of southern Africa.[19] Within the context of this discussion, it is important to note that Xhosa communities were well established by the time of the Dutch arrival in the mid-seventeenth century and occupied much of the eastern part of present-day SA.[20] The Zulu tribe, like the Xhosas, emanated from the Ngunis who inhabited the central and eastern parts of Africa and subsequently migrated to southern Africa.[21] Today, the Zulu tribe represents the largest part of the SA population, with about ten to eleven million people, and the majority reside in the province of KwaZulu-Natal.[22] The most significant events in the history of both the Xhosa and Zulu communities, relevant to the recognition or non-recognition of *ukuthwala* by the common law courts in SA, were the invasions by the Dutch in the mid-seventeenth

14 See, generally, Mark Pfeifer, John Sullivan, Kou Yang, and Wayne Yang, 'Hmong Population and Demographic Trends in the 2010 Census and 2010 American Community Survey' (2012) 13(2) Hmong Studies Journal 8 at 8–9. See also National Development, 2011b, as cited in Vang (n 13) 1.

15 It should be noted that other communities call it by different names. For example, the Basotho (Sothos) call it *Tjhobediso.*

16 See, generally, Jan Christoffel Bekker, Christa Rautenbach, and Nazeem Goolam, *Introduction to Legal Pluralism in South Africa* (2nd edn, LexisNexis 2006) 31. See Mwambene and Sloth-Nielsen (n 2) 1; Hlako Choma, '*Ukuthwala* Custom in South Africa: A Constitutional Test' (2011) 8 United States-China Law Review 874 at 876; Karimakwenda (n 2) 342; Bennett (n 7) 3 at 7.

17 See general discussions by Digby Koyana and Jan Bekker, 'The Indomitable *Ukuthwala* Custom' (2007) 40 De Jure 139 at 139–143; Velani Mtshali, 'Forced Child Marriage Practices under the Pretext of Customary Marriage in South Africa' (2014) 15 Child Abuse in South Africa 51. See also Jane Diala, 'The Child in a Child: Child Marriage and Lost Identity in Southern Africa' (2019) 35(1) Pravni vjesnik 53–73.

18 See recent observations by Diala (n 17) 53 and 58.

19 'Brief History of the Xhosa People' (xhosaculture.co.za, 16 October 2018) <xhosaculture.co.za/history> accessed 16 October 2018.

20 The Xhosas and the white settlers first encountered one another around Somerset East (in the Eastern Cape) in the eighteenth century. The Afrikaner *trekboere* (migrant farmers) migrating outwards from Cape Town came into conflict with the Xhosa around the Great Fish River region of what is today the Eastern Cape. 'Brief History of the Xhosa People' (n 19).

21 Buzzsouthafrica.com, '7 Surprising Truths you Never Took Serious About the Zulu Tribe' <http://www.emdonenilodge.com/7-surprising-truths-never-took-serious> accessed 19 September 2020.

22 According to the South Africa Population (2020) Worldometer, the current population of SA is 59,467,369.

century and by British troops in the 1800s. It is also important to recall that the area of Natal came under British rule in 1893.[23]

There are clear differences in the origins of the two communities in question: the Hmong people are a minority group that has been residing in the USA for a relatively short period of time, and the communities that practise *ukuthwala* in SA were the indigenous inhabitants before colonisation. However, as will be shown later, the length of the history of the SA communities that practise *ukuthwala* and of the Hmong communities in the USA do not affect the approaches that the courts, in their respective jurisdictions, take in relation to their cultural heritage. Therefore, more reasons for the distinction regarding the courts' approaches to the cultural heritage of the two communities have to be provided. In the interim, there are striking similarities between the characteristics of customary marriages in these two communities. Understanding the characteristics of customary marriage, which is the end result of Hmong marriage by capture and of *ukuthwala*, may arguably assist the courts to find the best possible approach when adjudicating over offences that result from these practices, and to better protect women's rights.

For example, in both systems a marriage signifies the coming together of two family groups, with an emphasis on uniting the families rather than the bride and the groom.[24] Mwambene and Kruuse's focus group discussion with the community where the Jezile case originated revealed that the *ukuthwala* negotiation process presents both parties, both the man's and the woman's families, with the opportunity to know the type of family that they are about to conclude a marriage with.[25] A customary marriage therefore does not grant individual rights to the two marrying parties.[26] Second, both systems are patrilineal, which means that a Hmong or a person from an SA community that practises *ukuthwala* belongs to the clan of his or her father. More importantly, at

23 'Zulu' (South Africa History Online) <https://www.sahistory.org.za/article/zulu> accessed 12 September 2020.

24 Vang (n 13) 9, Soung (n 4) 4. Johanna E Bond, 'Culture, Dissect, and the State: The example of Commonwealth Marriage Laws' (2014) 14 Yale Human Rights and Developments LJ 6. See also, generally, discussions by Bennett (n 2) 178–186, who raises conceptual problems within the context of customary marriages that are geared towards uniting two groups of families rather than making sure that the two individuals are happy in the marriage. See also Jan Bekker, *Seymour's Customary Law in Southern Africa* (Juta 1989); Trynie Boezaart, 'Building Bridges: African Customary Family Law and Children's Rights' (2013) *UPSpace* <https://doi.org/10.1504/IJPL.2013.056811> accessed 15 September 2020; and Paul Kyalo, 'A Reflection on the African Traditional Values of Marriage and Sexuality' (2012) 1 International Journal of Academic Research in Progressive Education and Development 211–219 at 213.

25 Lea Mwambene and Helen Kruuse, Field Research on Community Perspectives on *Ukuthwala* in Engcobo, Eastern Cape, September 2015 and April 2016. Transcribed notes from the field research are on file. They have also been discussed in Mwambene and Kruuse (n 3) 25, as well as in Mwambene and Kruuse (n 4) 25.

26 As such, the families' consent to a customary marriage is crucial. See, generally, Bennett (n 2) 199; Muna Ndulo, 'African Customary Law, Custom and Women's Rights' (2011) Indiana Journal of Global Legal Studies 88–89.

the conclusion of the marriage, a woman moves from her family into the family of her husband.[27] This may partly explain why a woman is taken to the village of the man's family after she has been abducted.

In addition, both communities maintain strict rules against intermarriage within the clan (clan exogamy).[28] In simple terms, clan exogamy means that a man with the clan name of Mwambene is prohibited from marrying a woman from another Mwambene clan. Furthermore, in both systems, lobolo (bride price) from the family of the groom is given to the bride's family as a requirement for the validation of a marriage.[29] Another striking similarity is that both systems recognise monogamous,[30] polygynous,[31] and levirate unions.[32] In all these forms of marriage, married women are under the legal guardianship of their husbands.[33] This position, linked to the fact that legal status is determined by gender and age, gives the control over the family and the responsibility of taking care of the family to the husband or eldest son, to the exclusion of women.[34] However, in both systems, it is generally observed that the interaction between state law and indigenous laws is changing the traditional marriage systems. In SA, for example, section 6 of the Recognition of Customary Marriages Act 120 of 1998, now provides that a husband and a wife in a customary marriage have equal legal capacity.[35] In addition, in both the USA and SA the marriageable age is now aligned to international standards.[36]

Characteristics of Hmong Marriage by Capture and *Ukuthwala*

The second point of comparison focuses on the nature and characteristics of Hmong marriage by capture and *ukuthwala*. Starting with the definition, both marriage by

27 Evans-Pritchard and Renteln (n 1). See also Vang (n 13) 9, Soung (n 4) 6, and Bennett (n 2) 212.

28 See, generally, Bennett (n 2) 207, and Soung (n 4) 7.

29 Bennett (n 2) 220–236, and Soung (n 4) 8.

30 A monogamous marriage is where a man is married to one woman.

31 A polygynous marriage is where a man is married to more than one woman. In SA, the Recognition of Customary Marriages Act recognises polygynous marriages under ss 2(3) and (4).

32 A levirate union is where a widow enters into a relationship with the deceased husband's brother or cousin for the purpose of producing children for the deceased husband.

33 Soung (n 4) 4. In SA, however, the Recognition of Customary Marriages Act, which now regulates all customary marriages, has changed these customary rules, granting equal legal status to a man and a woman in a customary marriage under s 6.

34 Thi Huong Nguyen, Pauline Oosterhoff, and Joanna White, 'Aspirations and Realities of Love, Marriage and Education among Hmong Women: Culture, Health and Sexuality', as cited by Soung (n 4) 6. In the SA context, see, for example, discussions by Karimakwenda (n 2) and Mbaku (n 2).

35 This provision is bolstered by s 9 of the Recognition of Customary Marriages Act, providing that s 17 of the Children's Act 38 of 2005, which regulates the majority age, also determines the legal status of people governed by customary laws.

36 In both Hmong communities and communities that practise *ukuthwala*, the marriageable age was traditionally at puberty. However, in line with international and constitutional standards, there has been great movement towards the prescribed majority age. For example, the Recognition of Customary Marriages Act, in s 3(1)(a), prescribes the marriageable age to be 18 years.

capture and *ukuthwala* refer to the abduction of a young woman for the purpose of a customary marriage.[37] The procedure to be followed is very similar in Hmong marriage by capture and *ukuthwala*. In the context of *ukuthwala*, this is described by Bekker and Koyana[38] as follows:

> The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day, towards sunset or at early dusk, and they will 'forcibly' take her to the young man's home. Sometimes the girl is 'caught' unawares, but in many instances, she is caught according to plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when in fact, it is hardly ever so.

From the above, it can be seen that *ukuthwala* is not in itself a customary marriage or an engagement. Therefore:

> Once the girl has been taken to the man's village, her guardian or his messenger will then follow up on the same day or the next day and possibly take her back if one or more cattle are not handed to him as an earnest promise for a future marriage. Consequently, if the guardian does not follow up to take her back, tacit consent to the marriage at customary law can be assumed.[39]

In order to further understand the suggestion that courts balance victim-centred and accused-centred approaches when dealing with common law offences linked to *ukuthwala*, it is important to mention that there are three types of *ukuthwala*. The first is *ukuthwala ukugcagca.*[40] In this instance, the girl is aware of the intended abduction; there is collusion between the parties. The literature informs us that this type of *ukuthwala* was used when couples were afraid of their families, who may have objected to the proposed marriage, or if the young man was not in a position to afford the lobolo.[41] From a constitutional and women's rights perspective, it is argued that this type of *ukuthwala* gives women the right to choose their husbands within the customary

37 *Ukuthwala* has also been described 'as an act of stealing a bride' in Ericka Curran and Elsje Bonthuys, 'Customary Law and Domestic Violence in Rural South African Communities' (2005) 21 SAJHR 607 at 607–635. See also Michelle Ovens and Marcel van der Watt, 'Contextualizing the Practice of *Ukuthwala* within South Africa' (2012) 13(2) Child Abuse Research in South Africa 12 at 11–26; Mwambene and Sloth-Nielsen (n 2) 7; Karimakwenda (n 2); Mbaku (n 2); Vandervort (n 2); and Bennett (n 2).

38 Koyana and Bekker (n 17) 139.

39 ibid 141. According to another discourse of *ukuthwala*, it may be the case that the woman cannot return home for fear of negative repercussions. Ovens and Van der Watt (n 37) 19 interviewed a woman who stated that she became a slave to her assailant for two years before he left her for another woman. She then turned to prostitution to acquire a means of survival, because she feared being disowned by her family.

40 Mkhuseli Jokani, 'A Criminal Response to the Harmful Practice of *Ukuthwala*' (no date, PowerPoint presentation) <sapsac.co.za › docs › 5. M Jokani.pptx> accessed 20 September 2020.

41 Karimakwenda (n 2) 344; Mwambene and Sloth-Nielsen (n 2). See also Papa Maithufi, 'The Requirements for the Validity and Proprietary Consequences of Monogamous and Polygamous Customary Marriages in South Africa: Some Observations' (2015) De Jure 265; Bennett (n 7) 3 at 8.

marriage rules. Mwambene and Sloth-Nielsen have thus argued for a 'benign' accommodation of this type of *ukuthwala*, but on condition that the requirement of consent of the bride is met, and that she colludes in or is aware of the mock abduction.[42] The second type of *ukuthwala*, termed *kobulawu*, is where both the woman's and the husband's families agree on the union, but the woman remains unaware of the agreement.[43] It has been observed that 'the first and second types seem to underpin the traditional practice where the family and community play an integral part in ensuring the well-being of the female'[44] and that both could therefore be accommodated.[45] The third type of *ukuthwala* is where neither the girl nor her family has prior knowledge of the impending *ukuthwala*.[46]

Coming back to the focus of this discussion, the above procedure in *ukuthwala* seems to be similar to the context of Hmong marriage by capture. For the latter, the procedure can be summarised as follows: once a woman has been abducted by a man, with the help of his friends, the man's family sends a message to the family of the woman, informing them of the incident.[47] However, the woman's family might insist that she be returned or they might agree to enter into marriage negotiations.[48] In addition, like in the different forms of *ukuthwala*, in Hmong marriage by capture a woman may be abducted with or without her prior knowledge. More important to note, however, is that although the captured woman has the choice to stay or leave after the abduction, she is usually forced to marry the abductor to save face and uphold her family's reputation.[49]

Another striking similarity between the two customs is that during the process of abduction, the woman is supposed to show resistance.[50] In other words, 'in order to preserve her virtue, the woman must pretend to be unwilling and yet she is a willing partner.'[51] The fact that in both contexts it is part of custom to show resistance is

42 Mwambene and Sloth-Nielsen (n 2) 7. See also Karimakwenda (n 2) 344.

43 See, for example, the cases of *Dyongo v Nani* 2 (NAC 114 (1911)) and *Zamana v Bilitane* 2 (NAC 114 (1911)), where the respective girls' family members suggested that the girls be *twala*'d as a preliminary to the marriage proposed by the suitor.

44 Philip Stevens, 'General Principles and Specific Offences' (2016) South African Journal of Criminal Justice 173 at 177.

45 Debbie Budlender, 'Women, Marriage and Land: Findings from a Three Site Survey' (2013) Acta Juridica 28–48 at 30.

46 Mwambene and Sloth-Nielsen (n 2) 6–7.

47 Soung (n 4) 9.

48 ibid.

49 Jennifer Ann Yang, 'Marriage by Capture in the Hmong Culture: The Legal Issue of Cultural Rights and Women's Rights' (2004) Law and Society Review at the University of California 39–52 at 42.

50 Thus in *Mkupeni v Nomungunya* 1936 (NAC (C & O) 77, Tabankulu said: 'It is true that in a real case of *Twala*, the girl does make a show of resistance, as to appear to go willingly would be regarded as a disgrace, but in such cases it is shown always that the resistance is not serious.' See Koyana and Bekker (n 17) and Bennett (n 2) generally.

51 Bekker, as cited in Koyana and Bekker (n 17) 139, as follows: 'The girl to appear unwilling and to preserve her maidenly dignity, will usually put up a strenuous but pretended resistance for more often than not, she is a willing party.'

challenging, particularly in offences of assault and abduction.[52] In the context of Hmong marriage by capture, Donovan and Garth state that the woman is supposed to protest, 'No, no, no, I am not ready to prove her virtue.'[53]

Despite the resistance and the violence accompanying both practices, there is often some willingness by the abducted. The show of willingness by an abducted woman is well captured in the following example by Koyana and Bekker:

> A Reverend was asked by his young brother to help him *twala* a girl. Very reluctantly, the Reverend agreed and went on with the brother to affect the *twala.* They started the odous [*sic*] task of forcing her along to their home. The Reverend soon realized that his brother was drunk so that he battled on largely alone pulling and pushing the girl who was sometimes crying. At a point, about 200 meters away from their home, the drunken brother collapsed and sat down. The Reverend also said that he also let go, as it was not for his sake that the *twala* was being done. The crying girl screamed 'don't stop, don't stop, we are almost there, carry on carry on' and the Reverend regained his confidence.[54]

Given the above similarities, it is clear that both Hmong marriage by abduction and *ukuthwala* seem to be different from the common law offence of abduction,[55] for the following two main reasons. First, whilst common law abduction is illegal, Hmong marriage by capture and *ukuthwala* are legal in the communities which practise them. Second, and more importantly, the purpose of abduction, namely to have intercourse, leads to a common law offence, while the aim of Hmong marriage by capture and *ukuthwala* is to negotiate a marriage.[56]

There are a number of characteristics that distinguish Hmong marriage by capture from *ukuthwala*. First, according to the Hmong tradition, the captured woman is held captive for three days.[57] After the three days, the man and his family arrange for a traditional Hmong go-between, called the *mej-koob*, to legitimise the marriage by arranging the bride price and performing a marriage ceremony.[58] Contrary to the Hmong custom, in *ukuthwala* there is no prescribed number of days that a woman is supposed to be held captive. In fact, it is expected of the family of the man to immediately report to the

52 See, generally, discussion on the violence linked to *ukuthwala* in Karimakwenda (n 2).

53 James Donovan and John Garth, 'Delimiting the Culture Defense' (2007) 26 Quinnipiac LR 120 at 109–146.

54 Koyana and Bekker (n 17) 140. See also Aubrey Manthwa, 'A Re-interpretation of the Families' Participation in Customary Law of Marriage' (2019) 82 THRHR 416. Donovan and Garth (n 53) 109–46.

55 Common law abduction has been described as 'the unlawful removal of a minor out of the control of his or her guardian with the intention of violating the guardian's *potestas* and of enabling somebody to marry her or have sexual intercourse with her' (*S v Killian* 1977 2 SA 31 (c)).

56 Koyana and Bekker (n 17) 142.

57 Soung (n 4).

58 For more on the Hmong culture, see Lisa Aronson Fontes, *Child Abuse and Culture: Working with Diverse Families* (Guilford Press 2005) 44.

woman's family that they are in custody of their daughter.[59] In *ukuthwala*, the intention is to compel her or her family to endorse marriage negotiations.[60] The family of the suitor is therefore required to report to the family of the girl/woman in order to start the marriage negotiations.[61]

Second, according to the Hmong tradition, it is expected that sexual intercourse, aimed at consummating the marriage, will take place during the three days that the woman is held in the custody of the man.[62] Sexual assault has therefore been observed to be part of the Hmong marriage-by-capture custom.[63] On the other hand, according to the *ukuthwala* custom, the abducted woman is supposed to be in the custody of the village matrons and not with the prospective husband until the marriage negotiations have been completed.[64] As a matter of fact, it is contrary to custom to seduce a girl before the conclusion of the marriage negotiations.[65] In other words, during this time, consensual sex with the young girl is forbidden.[66] Koyana and Bekker further explain that the girl or young woman is immediately placed in the midst and care of the womenfolk and is treated with 'utmost kindness and respect',[67] until such time as the marriage requirements are met.[68] As per custom, a man who seduces a girl during the *ukuthwala* process commits a delict and is required to pay a seduction beast.[69] This beast will be in addition to any number of lobolo cattle agreed upon for the eventual conclusion of the marriage.[70]

In both communities, however, the main reasons for the practice—of both marriage by capture amongst the Hmong and *ukuthwala*—are history and traditional culture. More importantly, the use of these practices is motivated by the need to force and start marriage negotiation processes.[71]

59 Mwambene and Kruuse (n 3) generally.
60 Mwambene and Sloth-Nielsen (n 2).
61 Koyana and Bekker (n 17).
62 Soung (n 4).
63 Soung (n 4) and Yang (n 6).
64 See the interviews in Ovens and Van der Watt (n 37) generally. See, generally, Mwambene and Sloth-Nielsen (n 2) and Koyana and Bekker (n 17) on the procedure that is followed once a young woman has been abducted.
65 Bekker (n 24) 98.
66 Bennett (n 7) 3 at 7.
67 Koyana and Bekker (n 17).
68 Mikateko Maluleke, 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 Potchefstroom Electronic LJ 11. See also s 3 of the RCMA.
69 Koyana and Bekker (n 17) 141.
70 Koyana and Bekker (n 17). See also F Mdumbe, 'International and Domestic Legal Frameworks Impacting on *Ukuthwala*' presented at the South African Law Reform Commission Roundtable discussions, 30 November 2009, where I was in attendance.
71 Soung (n 4) 4, and Mwambene and Sloth-Nielsen (n 2) 5.

Court Cases

The third comparison will be an examination of the court's jurisprudence on the offences of rape, assault, and abduction as a result of Hmong marriage by capture and *ukuthwala.* The focus will be on the cases *People v Moua* and *Jezile v S.* As pointed out, there are striking similarities between these two cases as regards the manner in which they were conducted, the defences raised, and the publicity they generated. More importantly, the outcomes of the two cases lead one to wonder that the cultural defence holds more water in a liberal setting than in a postcolonial context, for reasons beyond culture.

People v Moua

It is common knowledge that in 1985, a Hmong man, Moua, was tried for kidnapping and rape after abducting a woman on the Fresno College campus and consummating his marriage in his family home.[72] Moua claimed that he was performing the traditional Hmong practice of marriage by capture; thus his intent falls within the cultural norms.[73] Although the woman resisted, Moua argued that resistance was part of the tradition, as it was a means for her to communicate her virtue.[74] After negotiating a guilty plea to a charge of false imprisonment, he served 120 days in jail and paid a fine of USD1,000, of which USD900 went to the victim.[75] The court thus dismissed the rape and kidnapping claims.[76]

According to newspaper accounts, the following may shed some light on the court's reasoning. Judge Gomes of Fresno said: '[H]e would have difficulty excluding any cultural testimony or information that could help him understand the man's behaviour.'[77] In addition, the judge weighed up the cultural defence against the normal circumstances that surround rape. Consequently, the judge formed an opinion that Moua was not the normal kind of rapist driven by the intent to rape; instead, he was driven to obtain a spouse using the traditional practices of his culture.[78]

72 See, generally, Rimonte (n 1) 1311 at 1311–1326. See also accounts by Yang (n 49) 43, who summarised this case as follows: 'In *People v Moua*, Kong Moua kidnaps Seng Xiong and engages in sexual intercourse with Seng, believing he is following Hmong customary marriage practices. Seng Xiong rejects the marriage by capture tradition and files kidnapping and rape charges against Kong Moua. Kong spends ninety days in jail and pays the woman's family one thousand dollars as he pleads a lesser charge, in which the judge accepts the plea bargain and dismisses the rape and kidnapping charges.'

73 Rimonte (n 1) 1311.

74 Yang (n 49) 43.

75 Rimonte (n 1) 1311.

76 Yang (n 49) 422.

77 Rimonte (n 1) 1311.

78 Martin Golding, 'The Cultural Defense' (2002) 15(2) Ratio Juris 148 at 146–158.

Emerging Discussions

Following the decision in *Moua*, scholars have equated the cultural defence to a mistaken but reasonable belief with regard to the circumstances and facts of the case.[79] These perspectives have informed the emerging trends with regard to the use of the cultural defence. The literature interrogates the use of a cultural defence in instances where there is an honest but reasonable belief in the propriety of one's cultural heritage.[80] According to some scholars, a theoretical perspective questions the viability of this defence in cases that show criminal culpability and its effect on the weight that a would-be-accused attaches to the propriety belief in his or her culture.[81] This is an indication that the scholarly opinion on this issue is divided.[82] This position projects a possible alignment by scholars to promoting the holding in *Moua*.

Other proponents, such as Donovan and Garth, state that the court's application of the exclusionary rule should be based on the explanation that an accused offers to seek exoneration.[83] In this regard, the authors reiterate that the courts should readily allow an explanation from an accused where he seeks to be exonerated.[84] The exclusionary rule should not be based on the irrelevance or inadmissibility of the evidence, but rather on the basis of the explanation given and whether such defendants should be held liable or exonerated.[85] To this end, therefore, *Moua* has engaged scholarly arguments which ascribe to the duty by the courts to recognise one's culture in the context of wider human rights paradigms.[86] However, while such explanations may be used by the court, the courts are expected to develop a mode of admission of such evidence by subjecting it to a threshold that regulates the use of the cultural defence.[87]

Other conversations state that the court should allow an accused to rely on the cultural defence where there is another conventional rule that is recognised as part of criminal

79 ibid. Scholars generally observe that the defence of 'honest but reasonable belief' is based on the honest perception of the existence of given facts in light of the community that an individual is in, a belief which turns out to be mistaken according to the position of the law on the facts. Consider a hypothetical instance where an actor thinks he is doing X, yet, due to this mistake, he does Y. These facts effectively negate any recklessness or negligence on the part of the actor. See also Alison Renteln, 'Raising Cultural Defences' in James Connell and Rene Valladares, C*ultural Issues in Criminal Defenses* (Yonkers 2000), 7.1–7.43.

80 Renteln (n 79); Golding (n 78) 146 at 146–158.

81 Renteln (n 79) 7.1–7.43.

82 The lack of clarity is addressed by John Lyman, 'Cultural Defence: Viable Doctrine or Wishful Thinking?' (1986) Criminal Justice Journal 87–117 generally.

83 Donovan and Garth (n 53).

84 Alison Renteln, *The Cultural Defense* (Oxford 2004) 200; Donovan and Garth (n 53).

85 Renteln (n 84) 200; Donovan and Garth (n 53) 110.

86 This is premised on the fact that a person should have the opportunity to adduce evidence with regard to cultures that maintain social cohesion. Donovan and Garth (n 53) 110.

87 According to Renteln (n 84), the following three questions should be instructive in guiding the court's admission of evidence of cultural defence: first, whether the party is a member of the ethnic group; second, whether the group has a tradition such as the one alluded to by the party; and thirdly, whether the tradition influenced the way the party acted. See Renteln (n 84) 207.

law that can also be applied. Central to the *Moua* case is the position that the court was justified in taking greater heed of cultural diversity rather than criminal culpability. In this regard, Golding interrogates the context of cultural diversity in a criminal justice system, where there is a need for the courts to be cognisant of the different cultures that are found in American society as a result of immigration.[88] The question that arises is how the right to equality emanates from the instances where the courts posit the position that where it is possible, an accused may be exonerated or there may be a reduction in the charge.[89] It appears that other subtle issues, such as the right to equality, liberty, and a watered-down right not to incriminate oneself, do not take precedence over the holding. As such, *Moua* seems to have ignited perceptions that where a cultural defence is used, there ought to be another conventional defence that can be allowed in criminal law.

Some discussions indicate a thin wedge between the cultural defence and cultural racism. As such, there is need, in some cases, for cultural convergence that inhibits cultural sensitivity by courts in dealing with cases that involve a cultural defence.[90] It is argued that the *Moua* case involved an arena that requires that one be sensitive to cultural difference as a way of avoiding cultural racism.[91] While the glaring question is the extent to which the court seeks to uphold this defence as a tool that recognises the cultural heritage of an individual over the liberties of the woman, this is answered by the fact that the court still finds the accused to be responsible, but reduces the degree of culpability.

The foregoing discussion gives insight into the nature of the court's approach in *Moua*.[92] The court contextualises the position of the accused as a person who is reasonably following his culture in a society characterised by cultural diversity. The use of this accused-centred approach makes the court an open arena which embraces the reasons that informed the accused's actions.[93] Inevitably, this leads to the conclusion that the accused was not the 'normal kind of rapist', due to the lack of the intention to abduct and rape.[94]

88 Golding (n 78) 146 at 146–158.

89 It is submitted that this approach, following *Moua*, disregards the right to equality before the law due to limited protection of female victims. See Doriane Coleman, 'Individualising Justice through Multiculturalism: The Liberals' Dilemma' (1996) 96 Columbia LR 1093–1297 generally.

90 Cynthia Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defence' (2007) 49(911) Arizona LR 956 at 911–959.

91 ibid 955.

92 This discussion is important in situating the overall effect of the approach by the courts on the rights of women.

93 This position is seen in subsequent cases, which effectively diminish the culpability of the accused. See *People v Chen* No. 87-7774 (Sup. Ct. N.Y. County. Dec. 2, 1988) where the accused, as a Chinese, kills his wife on account of her adultery. The court finds that he was driven to violence due to traditional Chinese values about recklessness and loss of manhood. It sentenced him to second-degree manslaughter rather than first-degree murder.

94 Golding (n 78) 148.

In the interim, and with regard to the *Moua* case, these discussions on the cultural defence equate it to an honest but mistaken belief and point to the court's willingness to embrace an explanation toward a decision that exonerates the accused. Furthermore, they advocate the invocation of the cultural defence where there is another traditional defence under criminal law and the use of the cultural defence to avert cultural racism. It is yet to be seen how this approach affects the protection of the rights of a woman or a girl in her community.

Jezile v S

In order to understand the recognition or non-recognition of *ukuthwala* in *Jezile v S*, a brief legal history becomes relevant. Historically, courts in SA have long disregarded the defence of *ukuthwala* in common law cases of abduction,[95] assault,[96] and rape,[97] rejecting all three kinds of *ukuthwala* discussed above due to difficulties in ascertaining the issue of consent related to faked resistance, and the use of violence. However, as rightly pointed out by Maithufi, the post-constitutional decision of *Jezile v S* seems to bring to bear the fact that only the second and third types of *ukuthwala* could not withstand constitutional scrutiny.[98] Indeed, authors are of the view that if a customary marriage is preceded by *ukuthwala* where there is consent by the prospective spouses, the resultant marriage under the Recognition of Customary Marriages Act is valid, as the parties would have shown clearly that they intend to be married according to customary law.[99] This line of thinking seems to be supported by the relevant provisions in the Constitution, which safeguards the right to participate in the cultural life of one's preference.[100] At the same time, the right may not be exercised in a manner inconsistent with any provision of the Bill of Rights.[101] Therefore, in circumstances where *ukuthwala* is abused to force an unwilling girl or woman into marriage, such a marriage would be invalid.

Coming to the case of *Jezile v S*, the accused in this case, along with the complainant's uncle, arranged a customary marriage with the complainant, who was 14 years old.[102] This marriage was based on the practice of abducting girls under the *ukuthwala* custom

95 See, for example, *R v Njova* (1906) 20 EDC 71; *Ncedani v R* (1908) 22 EDC 243; *R v Sita* 1954 (4) SA 20 (E); *R v Mxhauli* 1992 SACR 704 (TK).

96 *R v Swartbooi and Others* 1916 EDL 170.

97 *R v Mane* 1948 (1) All SA 126 (E).

98 Maithufi (n 41) 264.

99 Maithufi (n 41). See also Mwambene and Sloth-Nielsen (n 2).

100 See, generally, ss 30 and 31 of the Constitution, which have been argued to add to the need to consider a cultural defence, in this case *ukuthwala*, in criminal charges. See, generally, Catherine Albertyn, 'Religion, Custom and Gender: Marital Law Reform in South Africa' (2013) 9 International Journal of Law in Context 386–410; Erin Goodsell, 'Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa' (2007) 21 Brigham Young University Journal of Public Law 109; and Bennett (n 7).

101 See ss 30, 31, and 211 of the Constitution. Kruger and Oosthuizen (n 3) 286.

102 *Jezile v S* (n 3) paras 5–7. Mwambene and Kruuse (n 3) 25 for a discussion of *ukuthwala* and the decision of *Jezile.*

in SA.[103] The complainant attempted to escape two times, and she suffered assaults and rape by the accused person.[104] Her third escape attempt was successful, and she then informed the police.[105] The matter first went to the magistrates' court, where the accused person was charged and convicted of rape, human trafficking, assault, and assault with intent to do grievous bodily harm; he was sentenced to 22 years imprisonment.[106] On appeal to the High Court, the appellant argued as follows. First, that he was in a customary marriage with the complainant at the time of the incidents and could therefore not have committed the offences he was convicted of.[107] Second, and more relevant to the focus of this discussion, the appellant bemoaned the fact that the trial court had misdirected itself by failing to assess the offences within the context of the customary practice of *ukuthwala*.[108] Lastly, and closely related to the second point, the appellant submitted that 'consent' within the practice of *ukuthwala* must be determined in accordance with customary law.[109]

Thus, what was before the High Court was an assessment of whether the cultural practice of *ukuthwala* could be advanced as a defence against the charges of human trafficking, rape, assault, and assault with the intent to do grievous bodily harm.[110] In examining evidence given by expert witnesses within the context of the facts leading to the commission of these crimes, the court found that the appellant had relied on the 'aberrant' form of *ukuthwala*.[111] In other words, the appellant's claims—that he believed that the complainant had consented to all the conduct associated with the customary marriage—were rejected by the court.[112] As such, the accused's convictions and sentences on both the trafficking and rape counts were maintained by the High Court on appeal.[113]

103 *Jezile v S* (n 3) paras 70–72. Koyana and Bekker (n 17) 139–143. Newman Wadesango and Owence Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) The Anthropologist 121–129; John Mubangizi, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions' (2012) 13(3) Journal of International Women's Studies 33–48; Chelete Monyane, 'Is *Ukuthwala* Another Form of "Forced Marriage"?' (2013) 44(3) South African Review of Sociology 64–82.

104 *S v Jezile* (n 3) paras 24–25.

105 ibid para 26.

106 ibid para 1.

107 ibid para 51.

108 ibid paras 42 and 52. See also Shannon Hoctor, 'Criminal Law' (2015) Annual Survey of South African Law 292, 296.

109 *S v Jezile* (n 3) para 52.

110 ibid paras 73–79. See also Stevens (n 44) 173.

111 *S v Jezile* (n 3) para 90.

112 ibid para 88.

113 ibid paras 96, 97, and 102. However, the convictions on the counts of assault with intent to cause grievous bodily harm, and common assault, were set aside in order to avoid double punishment of the appellant.

Emerging Discussions

Following *Jezile*, various discussions have emerged, but with a rather different rhetoric that points to what a woman or a girl who is married off is deprived of by the forced marriage. These discussions are punctuated by scholarly literature and empirical studies, which is a dual engagement that the discussions following the decisions in the *Moua* case do not present. Another point of difference with the *Moua* discussions is that the conversation following *Jezile* presents conflicting narratives with regard to the correct and the wrong *ukuthwala* traditions or customs.

An ethnographic study on *ukuthwala* within the context of *Jezile v S* presents confusion in understanding the custom in order to offer possible solutions to women adversely affected.[114] This confusion is identified in three discourses. First, the national legal discourse advocates the punishment of crimes committed in the execution of an illegal *ukuthwala* based on the need to protect the human rights of the victim.[115] Second, the narrative by Jezile recognises the interpretation of the traditional custom that implies consent on the part of the victim.[116] The diversity in this discourse lies in the victim's perspective on the lack of consent on her part, despite the narrative by the appellant and the victim's families that the payment of bride price is the overriding feature that triggers and legitimises the abduction and subsequent sexual relations.[117] The third discourse, a local narrative by other parties, engages human rights perspectives to demonise *ukuthwala*.[118] Within the context of this study, these discourses question the prevailing position and, more importantly, how violations of women's rights as a result of *ukuthwala* might be effectively addressed.

Following the varying discourses is an empirical study that interrogates the decision in *Jezile* and the perceptions of the community where Jezile hails from. The response to the foregoing discourses is evident in an empirical study by Mwambene and Kruuse,

114 Jaco Smit, 'Rights, Violence and the Marriage of Confusion: Re-emerging Bride Abduction in South Africa' (2017) 40(1) Anthropology Southern Africa 56–68.

115 For example, see the Prohibition of Forced Marriage and Child Marriage Bill, 2015. Smit (n 114) 60 alludes to the fact that this may be based on the legal pluralism that South Africa presents, by embracing the historical and colonial laws that are exemplified in the common and Roman Dutch law on the one hand, and customary law, which is inherited from various indigenous cultures of South Africa.

116 See, for example, field research findings by Mwambene and Kruuse (n 3). In Smit (n 114) 62, interviews held in Lusikisi village reveal that before South Africa's adoption of the Constitution in 1996, not all communities that practised *ukuthwala* perceived it to be criminal and destructive, despite the involvement of forceful sexual intercourse. This perception shows that the illegitimacy of an *ukuthwala* case depended on the perceptions of the actors involved. This explains why locals perceived the *ukuthwala* as a good way of forming families.

117 Smit (n 114) 62.

118 ibid 62–63. The interviews reveal that the local participants (like Jezile) do not allude to sexual violence. Rather, they speak about force in the form of sexual violence as possibly becoming a defining feature of *ukuthwala*. See similar perspectives in Makho Nkosi and Johan Wassermann, 'A History of the Practice of *Ukuthwala* in the Natal/KwaZulu-Natal Region up to 1994' (2014) 70 New Contree: A Journal of Historical and Human Sciences for Southern Africa 131–146.

which interrogates the decision in *Jezile* in juxtaposition with the perceptions of the community in Engcobo, where the incident occurred.[119] Central to the findings is the fact that the decision presents a parallel approach, as the community recognises the legitimacy of the *ukuthwala.* This depicts an alienation of the community's cultural heritage on the basis of a human rights and victim-centred approach by the court.[120] This would effectively dilute the protection of girls and women if the continued use of *ukuthwala*, as understood by the community, is not brought to the attention of investigative organs of the state.

In the finality of the discussions, an approach is identified that departs from the *Moua* case. *Jezile* takes on a victim-centred approach and makes the court a closed entity that severs cultural values from the rights of a woman in a postcolonial democratic society. As such, the decision returned by the Court does not reflect cultural perceptions, but rather the human rights perceptions of SA society. The danger of this approach lies in the fact that the Court's finding does not reflect the cultural perceptions of the families of both the victim and the accused.[121]

In the interim, and with regard to *Jezile v S*, this case therefore shows that SA takes a human rights approach which decries the violation of women's and girls' human rights, followed by conflicting narratives on the correct and incorrect kind of *ukuthwala* traditions or customs.[122] Furthermore, the practice of *ukuthwala* in SA leads to the creation of discourses that attempt to explain it; this is established by asking the community in which the incident occurred regarding the intentions behind the abduction of the girl for marriage. It is yet to be seen how these varying discussions impact on the protection of the rights of women affected by *ukuthwala* in SA.

Conclusion

This article intended to analyse the similarities and differences between Hmong marriage by capture and the customary practice of *ukuthwala* in SA. An examination of the courts' approaches in two famous cases shows that the accused-centred approach in

119 Mwambene and Kruuse (n 3) generally.

120 Mwambene and Kruuse (n 3).

121 An empirical study by Mwambene and Kruuse indicates that both families knew about the proposed marriage between the victim and the accused. As a result, the court decisions illuminate the danger in legislating or handing down decisions that do not reflect the cultural perceptions of the parties. See Mwambene and Kruuse (n 3) 25, and Mwambene and Kruuse (n 4) 25.

122 'The Status of Women in the South African Economy' (www.women.gov.za, 16 October 2018) <https://www.gov.za/sites/default/files/gcis_document/201508/statusofwomeninsaeconomy.pdf> accessed 9 September 2018 (15 April 2021). See also D Wilmot, 'The State of and Key Challenges Facing Girls' Education in a Transforming Society' (2016) Global Forum on Girls' Education: Creating a World of Possibilities, New York, 7–9 February 2016. UN Women, 'Women and Sustainable Development Goals' (unwomen.org, 2015) <https://sustainabledevelopment.un.org/content/documents/2322UN%20Women%20Analysis%20on%20Women%20and%20SDGs.pdf> accessed 10 September 2018.

the *Moua* case upholds culture while alienating the woman in the process. As such, the accused receives lighter sentences for the crimes committed. In contrast, the victim-centred approach in the *Jezile* case is based on the human rights implications of the violations that the girl child or woman may suffer. While the victim-centred approach is tough on the accused, it does not offer answers to the various discourses presented or consider the perceptions of the communities that practise these customs from a holistic perspective. In both approaches, communities may end up practising these customs without bringing them to the attention of investigative organs, with adverse human rights implications for the women and girls affected by the practices. In order to effectively protect women's rights from violations that may come with these customary marriage practices, it is proposed that courts find a balance between the victim-centred and accused-centred approaches.

References

Albertyn C, 'Religion, Custom and Gender: Marital Law Reform in South Africa' (2013) 9 International Journal of Law in Context <https://doi.org/10.1017/S1744552313000128>

Bekker JC, *Seymour's Customary Law in Southern Africa* (Juta 1989).

Bekker JC, Rautenbach C and Goolam N, *Introduction to Legal Pluralism in South Africa* (2nd edn, LexisNexis 2006).

Bell DA, 'The Triumph of Asian-Americans' New Republic (New York, July 15 and 22, 1985).

Bennett T, *Customary Law in South Africa* (Juta 2004).

Bennett T, 'The Cultural Defence and the Custom of *Twala* in South African Law' (2010) 10 University of Botswana Law Journal.

Bishop K, 'Asian Tradition at War with American Laws' *NY Times* (New York, 10 February 1988).

Boezaart T, 'Building Bridges: African Customary Family Law and Children's Rights' (2013) *UPSpace* <https://doi.org/10.1504/IJPL.2013.056811>

Bond JE, 'Culture, Dissect, and the State: The example of Commonwealth Marriage Laws' (2014) 14 Yale Human Rights and Developments.

'Brief History of the Xhosa People' (xhosaculture.co.za, 16 October 2018) <xhosaculture.co.za/history>

Budlender D, 'Women, Marriage and Land: Findings from a Three Site Survey' (2013) Acta Juridica.

Buzzsouthafrica.com '7 Surprising Truths you Never Took Serious About the Zulu Tribe' <http://www.emdonenilodge.com/7-surprising-truths-never-took-serious>.

Choma H, '*Ukuthwala* Custom in South Africa: A Constitutional Test' (2011) 8 United States-China Law Review.

Coleman D, 'Individualising Justice through Multiculturalism: The Liberals' Dilemma' (1996) 96 Columbia Law Review <https://doi.org/10.2307/1123402>

Curran E and Bonthuys E, 'Customary Law and Domestic Violence in Rural South African Communities' (2005) 21 South African Journal on Human Rights <https://doi.org/10.1080/19962126.2005.11865150>

Diala J, 'The Child in a Child: Child Marriage and Lost Identity in Southern Africa' (2019) 35(1) Pravni vjesnik <https://doi.org/10.25234/pv/5729>

Donovan J and Garth J, ‘Delimiting the Culture Defense’ (2007) 26 Quinnipiac Law Review.

Fontes LA, *Child Abuse and Culture: Working with Diverse Families* (Guilford Press 2005).

Golding M, ‘The Cultural Defense’ (2002) 15(2) Ratio Juris <https://doi.org/10.1111/1467-9337.00202>

Goodsell E, ‘Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa’ (2007) 21 Brigham Young University Journal of Public Law.

Hoctor S, ‘Criminal Law’ (2015) Annual Survey of South African Law.

Jokani M, ‘A Criminal Response to the Harmful Practice of *Ukuthwala*’ (no date, PowerPoint presentation) < sapsac.co.za › docs › 5. M Jokani.pptx >

Kaganas F and Murry C, ‘Rape in Marriage: Conjugal Right or Criminal Wrong’ (1983) Acta Juridica.

Karimakwenda N, ‘Jezile Appeal Highlights Difficult Questions about Ukuthwala and Violence’ *Custom Contested* (Cape Town, 28 November 2014).

Karimakwenda N, ‘Jezile *Ukuthwala* Judgment Signals Progress and Continuing Challenges’ *Custom Contested* (Cape Town, 29 April 2015).

Karimakwenda N, ‘“Today It Would be Called Rape”: A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape’ (2013) Acta Juridica.

Koyana D and Bekker J, ‘The Indomitable *Ukuthwala* Custom’ (2007) 40 De Jure.

Kruger HB and H Oosthuizen H, ‘South Africa: Safe Haven for Human Traffickers Employing the Arsenal of Existing Law to Combat Human Trafficking’ (2012) Potchefstroom Electronic Law Journal <https://doi.org/10.4314/pelj.v15i1.9>

Kyalo P, ‘A Reflection on the African Traditional Values of Marriage and Sexuality’ (2012) 1 International Journal of Academic Research in Progressive Education and Development.

Lee C, ‘Cultural Convergence: Interest Convergence Theory Meets the Cultural Defence’ (2007) 49(911) Arizona Law Review.

Lyman J, ‘Cultural Defence: Viable Doctrine or Wishful Thinking?’ (1986) Criminal Justice Journal.

Mabasa D, ‘Ukuthwala: Is it all Culturally Relative?’ De Rebus (Johannesburg, 23 July 2015).

Maithufi IP, 'The Requirements for the Validity and Proprietary Consequences of Monogamous and Polygamous Customary Marriages in South Africa: Some Observations' (2015) De Jure <https://doi.org/10.17159/2225-7160/2015/v48n2a1>

Maluleke M, 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 Potchefstroom Electronic Law Journal <https://doi.org/10.4314/pelj.v15i1.1>

Manthwa A, 'A Re-interpretation of the Families' Participation in Customary Law of Marriage' (2019) 82 Tydskrif vir Hedendaagse Romeins-Hollandse Reg.

Mbaku J, 'International Law, African Customary Law, and the Protection of the Rights of Children' (2020) Michigan State International Law Review.

Mdumbe F, 'International and Domestic Legal Frameworks Impacting on *Ukuthwala*' presented at the South African Law Reform Commission Roundtable discussions, 30 November 2009.

Monyane C, 'Is *Ukuthwala* Another Form of "Forced Marriage"?' (2013) 44(3) South African Review of Sociology <https://doi.org/10.1080/21528586.2013.817050>

Mtshali V, 'Forced Child Marriage Practices under the Pretext of Customary Marriage in South Africa' (2014) 15 Child Abuse in South Africa.

Mubangizi J, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions' (2012) 13(3) Journal of International Women's Studies.

Mwambene L and Sloth-Nielsen J, 'Benign Accommodation? *Ukuthwala*, "Forced Marriage" and the South African Children's Act' (2011) 11 African Human Rights Law Journal.

Mwambene L and Kruuse H, Field Research on community perspectives on *ukuthwala* in Engcobo, Eastern Cape (September 2015 and April 2016. Transcribed notes from the field research are on file).

Mwambene L and Kruuse H, 'Marital Rape and the Cultural Defence in South Africa (2018) Stellenbosch Law Review.

Mwambene L and Kruuse H, 'The Thin Edge of the Wedge: *Ukuthwala*, Alienation and Consent' (2017) South African Journal Human Rights <https://doi.org/10.1080/02587203.2017.1303902>

Ndulo M, 'African Customary Law, Custom and Women's Rights' (2011) Indiana Journal of Global Legal Studies <https://doi.org/10.2979/indjglolegstu.18.1.87>

Nkosi M and Wassermann J, 'A History of the Practice of *Ukuthwala* in the Natal/KwaZulu-Natal Region up to 1994' (2014) 70 New Contree: A Journal of Historical and Human Sciences for Southern Africa.

Olabisi IA, 'Legal Imperialism and Democratization of Law: Towards an African Feminists Jurisprudence on the Development of Land Law and the Rights in Nigeria' (LLD Thesis, University of Columbia (Vancouver) 2013).

Otto J, 'Man Jailed for Marrying, Raping Girl' *Independent Online* (Cape Town, 14 February 2014).

Ovens M and van der Watt M, 'Contextualizing the Practice of *Ukuthwala* within South Africa' (2012) 13(2) Child Abuse Research in South Africa.

Owens CW, 'Hmong Cultural Profile' (ethnomed.org, 1 March 2007) https://ethnomed.org/culture/hmong/hmong-cultural-profile.

Pfeifer M, Sullivan J, Yang K, and Yang W, 'Hmong Population and Demographic Trends in the 2010 Census and 2010 American Community Survey' (2012) 13(2) Hmong Studies Journal.

Pritchard DE and Renteln A, 'The Interpretation and Distortion of Culture: A Hmong "Marriage by Culture" Case in Fresno, California' (1994) 4(1) Southern California Interdisciplinary Law Journal.

Renteln A, 'Raising Cultural Defences' in James Connell and Rene Valladares, C*ultural Issues in Criminal Defenses* (Yonkers 2000).

Renteln A, *The Cultural Defense* (Oxford 2004).

Rickard C, 'Girl 14, Married and then Raped: Man Jailed after Customary Law Defence Failed' *Trading Places* (Smithfield, 23 March 2015).

Rimonte N, 'A Question of Culture: Cultural Approval of Violence against Women in Pacific-Asian Community and the Cultural Defence' (1991) 43(6) Stanford Law Review <https://doi.org/10.2307/1229041>

Sloth Nielsen J and Mwambene L, 'Talking the Talk and Walking the Walk: How Can the Development of African Customary Law be Understood? (2010) Law in Context: A Socio-legal Journal.

Smit J, 'Rights, Violence and the Marriage of Confusion: Re-emerging Bride Abduction in South Africa' (2017) 40(1) Anthropology Southern Africa <https://doi.org/10.1080/23323256.2016.1248987>

Soung EK, 'Bride Wealth and Its Implications for Homng Women' (LLM thesis, St. Catherine University and the University of St. Thomas St. Paul, Minnesota 2015) <https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1527&context=msw_papers>

Stevens P, 'General Principles and Specific Offences' (2016) South African Journal of Criminal Justice.

'The Status of Women in the South African Economy' (www.women.gov.za, 16 October 2018) <https://www.gov.za/sites/default/files/gcis_document/201508/statusofwomeninsaeconomy.pdf>

UN Women, 'Women and Sustainable Development Goals' (unwomen.org, 2015) <https://sustainabledevelopment.un.org/content/documents/2322UN%20Women%20Analysis%20on%20Women%20and%20SDGs.pdf> accessed 10 September 2018.

Van der Watt M and Ovens M, 'Contextualizing the Practice of *Ukuthwala* within South Africa' (2012) 13(2) Child Abuse Research in South Africa.

Vandervort L, 'Marriage by Force: Contestation over Consent and Coercion in Africa' (2017) 29(1) Canadian Journal of Women and the Law <https://doi.org/10.2139/ssrn.2959086>

Vang P, 'A Phenomenological Study of Hmong Women's Experience with Forced Marriage in the Hmong Culture (LLM, California State University 2013).

Wadesango N and Chabaya O, 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) The Anthropologist <https://doi.org/10.1080/09720073.2011.11891187>

Wang H, 'Cultural Defense as a Shield for Violence' (2016) American University Journal of Gender, Social Policy and the Law (10 November 2016) <http://www.jgspl.org/cultural-defense-shield-violence/>.

Wilmot D, 'The State of and Key Challenges Facing Girls' Education in a Transforming Society' (2016) Global Forum on Girls' Education: Creating a World of Possibilities, (New York, 7–9 February 2016).

Yang JA, 'Marriage by Capture in the Hmong Culture: The Legal Issue of Cultural Rights and Women's Rights' (2004) Law and Society Review at the University of California.

Yang Y, 'Bride Capture' in Jonathan Lee and Kathleen Nadeau (eds) *Encyclopedia of Asian American Folklore and Folklife* (Abc-Clio 2011).

'Zulu', (South Africa History Online) <https://www.sahistory.org.za/article/zulu> accessed 12 September 2020.

Cases

Dyongo v Nani 2 (NAC 114 (1911)).

Gumede v President of South Africa 2009 3 SA 152 (CC).

Jezile v S 2015 (2) SACR 452 (WCC).

Mkupeni v Nomungunya 1936 (NAC (C & O)) 77.

Ncedani v R (1908) 22 EDC 243.

People v Chen No. 87-7774 (Sup. Ct. N.Y. County. Dec. 2, 1988).

People v Moua, No. 315972-0 (Fresno Cnty. Super. Ct., Feb. 7, 1985).

R v Mane 1948 (1) All SA 126 (E).

R v Mxhauli 1992 SACR 704 (TK).

R v Njova (1906) 20EDC 71.

R v Sita 1954 (4) SA 20 (E).

R v Swartbooi and Others 1916 EDL 170.

S v Killian 1977 2 SA 31 (c).

Zamana v Bilitane 2 (NAC 114 (1911)).

Legislation

Prohibition of Forced Marriage and Child Marriage Bill, 2015.

Recognition of Customary Marriages Act 120 of 1998.