

**HARMFUL PRACTICES INFRINGE THE  
RIGHTS  
OF WOMEN AND GIRLS**

**POLICY BRIEF**

**GAUTENG, KWAZULU-NATAL**

**&**

**MPUMALANGA**

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# HARMFUL PRACTISES INFRINGE THE RIGHTS OF WOMEN AND GIRLS

## Key facts

- Harmful practices are highly protected by those who still practices them without any consideration of the rights of women and girls.
- People are abducting young girls under the disguise of ukuthwala and often sexually exploit them, particularly in rural parts of the country.
- The high number of child brides in KwaZulu-Natal (KZN) is attributed to *ukuthwala*, which forces many girls to marry early.
- The Children's Act 38 of 2005 partially legalises virginity testing. Section 12 provides for testing to be performed on both male and female children over the age of sixteen with their informed consent.
- Experiences of women in polygamous marriages vary according to the socio-cultural context.[1] This includes higher mortality rates of men, satisfaction of sexual desires, and the need to have as many children as desired.[2]
- The girls who pass the test are publicly rewarded if they are "pure" or publicly shamed if they are not to be virgins, presumably on the basis that their hymen is no longer intact.
- KZN has the highest number of child brides, at above 25 000, followed by Gauteng with over 15 000 girls, from a population of three million nationally.

## BACKGROUND

### *Ukuthwala*

*Ukuthwala* has been practised for decades in South Africa. The practice involves the abduction of a girl or a young woman by a man and his accomplices with the intention to secure marriage negotiations. In its traditional form, *ukuthwala* is a collusive strategy used by willing lovers, with consent from the woman. But over the years, the practice has mutated. [3] Some families are now doing it as a means to force their children to agree to marriage. People are abducting young girls under the disguise of *Ukuthwala* and often sexually exploit them, particularly in rural parts of the country.

## Synopsis

Traditional cultural practices reflect values and beliefs of societies; however, some are harmful particularly, to women and girls. Research shows that, harmful cultural practices contribute to gender stereotypes that often fuel gender-based violence (GBV). In South Africa, there are three well known practices that are deemed harmful including virginity testing, bride kidnapping (*ukuthwala*) and polygamy. Despite the outlaw of harmful traditional practices, they still persist as they are embedded in societies, making it difficult to initiate strong advocacy. The government of South Africa should take appropriate measures to eliminate prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.

This policy brief first provides an overview of harmful practices in South Africa. It then analyses the legal system of South Africa pertaining the above-mentioned issues as well as advocacy initiatives that attempt to end such practices. The brief, highlights notable progress, gaps and key challenges experienced in responding to these issues. Finally, the brief proposes best practices, recommendations and solutions for ending harmful practices. This brief is part of the efforts to influence policy makers, role players and practitioners in order to develop broad strategies on the issues related to harmful practices.

[1] Thobejane TD. An exploration of polygamous marriages: a worldview. *Mediterranean J Soc Sci.* 2014;5(Suppl 7):1058–66.

[2] Hayase Y, Liaw K. Factors on polygamy in sub-Saharan Africa: findings based on the demographic and health surveys. *The Dev Ecos.* 1997; 3:293–327

[3] The Congress of Traditional Leaders in an interview with ENCA..

The incidents of *Ukuthwala* have been on the rise in recent years in KZN, rating the province second after Eastern Cape. Anecdotal evidence shows that Mpumalanga also has high cases of *Ukuthwala*. EMangwaneni is one of the well-known tribes with very high incidents of *Ukuthwala* in Bergville, KZN. [4]In their case, young girls are abducted and forced into marrying older men depriving them of their innocence, childhood and their learning opportunities, due to dropping out of school. Girls who are victims of *Ukuthwala* are exposed to health implications, and lack access to healthcare, and less conscious of sexually transmitted infections or sexually related implications. Most of them also fall into a trap of early pregnancies, and domestic violence. Although *ukuthwala* has been criminalised and has been incorporated into the Trafficking in Persons Act, some people still see it as a normal form of tradition and custom.

## Forced/early/child marriages

*Ukuthwala* is closely related to the practice of forced/early/child marriages. According to Statistics South Africa (2017) child marriage, involving girls aged between 12 and 17, is rife in South Africa. KZN has the highest number of child brides, at above 25 000, followed by Gauteng with over 15 000 girls from a population of three million nationally. About 122 girls between the ages of 12 and 17 have gone through divorce in KZN. [5]The high number of child brides in KZN is attributed to *ukuthwala* which forces many girls to marry early. Such child brides then become victims of domestic violence, premature and undesired pregnancies, and sexual health risks like exposure to sexually transmitted infections including HIV/AIDS. Some activists argue that in addition to social norms, the high rate of child marriages particularly in KZN is the result of poverty.[6]

## Virginity testing

Virginity testing gained momentum in the last two decades. Virginity testing is more practiced in Eastern Cape and KZN. Those who support the culture claim that it is a way to respond to the HIV/AIDS pandemic, sexually transmitted diseases, teenage pregnancy, and to identify children who are sexually abused. Virginity testing is the practice and process of inspecting the genitalia of girls and women to determine if they are sexually Chaste.

The Children's Act 38 of 2005 partially legalises virginity testing stating that testing can be performed on both male and female children over the age of sixteen with their informed consent. This practice is, however not in alignment with the law, since it targets only girls and mostly without their informed consent. While a girl's virginity is considered to bring honour to her family, it also comes with inherent risks, since, in African societies, the myth that sex with a virgin, can cure AIDS, is prevalent. The girls who pass the test are publicly rewarded if they are "pure" or publicly shamed if they are found to no longer be virgins, presumably on the basis that their hymen is no longer intact. This practice leads to leads to loss of dignity and unfair discrimination against girls.

[4] A Journal called The Impact of *Ukuthwala* on the Schooling and Livelihood of a Girl Child: A Case of the eMangwaneni Tribe in Bergville, KwaZulu-Natal. M.C Maphalala. 2017. <https://doi.org/10.1080/09766634.2016.11885711>

[5] Statistics South Africa: 2017

[6] Unisa-Africa Girl Development Programme.

Virginity testing is considered unlawful in international human rights law. According to the Cedaw committee, harmful practices such as virginity testing are often used to justify gender-based violence as a form of protection or control of women.

## Polygamy

Polygamy is the traditional practice of having more than one spouse. It is a common, and widespread, socially as well as culturally accepted phenomenon in South Africa. Research shows that the experiences of women in polygamous marriages vary according to the socio-cultural context.[7] This includes higher mortality rates of men, satisfaction of sexual desires, and the need to have as many children as desired.[8] Research shows that women in polygamous marriages mostly reside in financially vulnerable households with less money for basic needs. Education, employment, and place of residence are important determinants of being in polygamous marriages for women.

Polygamy is considered to have negative effects on women's reproductive health. These include lack of decision making on family planning, contraception use and childbearing. They are voiceless about their wellbeing. Moreover, women in polygamous marriages are at increased risk of acquiring sexually transmitted infections (STIs) including HIV and being subjected to intimate partner violence[9]. All these are attributed to gender-power dynamics in such relationships. Women in polygamous relationships tend to have less power, they are more likely to experience varying degrees of emotional, sexual and psychological abuse.

In June 2022, the Department of Home Affairs put forward a green paper on the legalisation of polyandry, in a bid to make the institution of marriage more inclusive. General public objections were about power and control as most people commented that African societies are not ready to face real equality.

## Less widespread harmful practices in South Africa

There are some harmful practices that are less widespread in South Africa including polyandry, dry sexual intercourse, sororate marriage practices (where a deceased wife is replaced by her young sister) and levirate marriage practices (where a man marries his deceased brother's widow). They also include harmful practices relating to childbirth, and dietary taboos during pregnancy and lactation. These practices predominantly affect women and degrade their human rights and societal status. Emerging harmful practices in the country, such as skin lightening/bleaching and vaginal tightening have negative impacts on women's health.

## Legal and policy framework

The constitution of South Africa supports cultural rights it states that all customary and cultural practices must promote women's rights to the full and equal benefit of the law. Section 30 of the constitution outlines an individual's right to culture and language, section 31 provides for the collective rights of cultural, religious and linguistic communities.

[7] Thobejane TD. An exploration of polygamous marriages: a worldview. *Mediterranean J Soc Sci*. 2014;5(Suppl 7):1058–66.

[8] Hayase Y, Liaw K. Factors on polygamy in sub-Saharan Africa: findings based on the demographic and health surveys. *The Dev Ecos*. 1997; 3:293–327.

[9] UNICEF

Section 185 further stimulates these rights through the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Cultural rights are also recognised by section 211(3), which provides for the application of customary law by South African courts.

Section 9 of the constitution provides for the right to equality and prohibits discrimination based on gender, sex, pregnancy, marital status, sexual orientation and culture, among others. Section 10 provides for the right to human dignity, and section 11 protects the right to life. Under section 12(1) everyone has the right to freedom and security of the person—including freedom from all forms of violence, and the right not to be treated in a cruel, inhuman and degrading way. Section 12(2) provides for the right to bodily and psychological integrity—including the right to make decisions concerning reproduction and the right to security in, and control over, one's body. Under section 15 the right to privacy is guaranteed.

The Promotion of Equality and Prevention of Unfair Discrimination Act 71, prohibits unfair discrimination against women, and places specific prohibition on GBV, female genital mutilation, and any system that prevents women from inheriting family property.

The Sexual Offences Amendment Act, 2007, prohibits having sex with a child without her consent, following her kidnapping and abduction (Ukuthwala), as it is regarded as rape, a violation of the Criminal Law. However, in this law, the proponents of ukuthwala are not criminalised.

The Customary Marriage Act is one of the laws that is seen as one of the vehicles through which the reform of customary law has taken place in South Africa since 1994. Under section 2 and three, the act recognises polygamous marriages. Payment of bride price (lobola) is one for the requirements of a valid customary marriage. These provisions of the Recognition of Customary Marriages Act are strongly linked to harmful cultural practices such as ukuthwala, early/child marriages, payment of lobola, and polygamy as they are currently practiced. In other words, because the law has not been reformed to mitigate against current understanding and practice, these practices are somehow legally supported.

The Children's Act 38 of 2005 partially legalises virginity testing. Section 12 provides for the testing to be performed on both male and female children over the age of sixteen with their informed consent.

In addition to the South African Constitution and related laws, there are international instruments to which South Africa is signatory of, and these also encourage countries to prohibit harmful practices impacting on the lives of women and girls. The Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), requires that parties to it "take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[10]

## Challenges and gaps

- Although KwaZulu Natal has the highest number of ukuthwala cases resulting in underage marriages, there are no task teams or special units designated to deal with it. The SAPS deal with ukuthwala through Family Violence, Child Protection and Sexual Offences units.
- The cases of *ukuthwala* are often unreported by many community members.

[10] Convention on the Elimination of All Forms of Discrimination against Women

- The results of the public consultation conducted in 2015 revealed that the practice of *ukuthwala* is deeply rooted in the communities and it becomes very difficult for the victims to report their own parents or family members to law enforcement agents[11].
- The harmful practice of virginity testing is a social, cultural and political issue, and its elimination will require a comprehensive societal response supported by the public health community and health professionals.
- The practice of polygamy continues to be criticised with proponents arguing that those who enter into polygamous marriages do so consensually. Hence there is little advocacy in this area.
- Poverty often led women to get into polygamous marriages.
- Low public awareness of the illegal nature of child marriage, and of the consequences of child marriage.
- Gaps in service delivery and ineffective response mechanisms.
- Lack of trust in authorities among rural and ethnic minorities communities.
- Parental resistance to sexuality education for their children

## ADVOCACY

International and local non-governmental organisations have been at the forefront in initiating campaigns to ban harmful practices in South Africa. With the rise of incidents of people kidnapping girls under the guise of *ukuthwala*, various government departments initiated campaigns to raise awareness on children's rights, women's rights and relevant laws. The campaigns, often, engage traditional leaders to end violence against women and girls. Also, the work with traditional leaders is part of efforts to eliminate harmful practices such as *ukuthwala* and child marriages. In South Africa, there are no campaigns on polygamous marriages.

However, the practice is highly criticised and considered to affect women the most.

## THE IMPACT OF COVID-19

When the strict lockdown measures started in March 2020, specific concerns were highlighted for COVID-19 and harmful practices. The strict lockdown measures disproportionately affected women and girls and possibly many fell trap of human trafficking, and child marriages. The Government of South Africa declared the Commission for Gender Equality and other women's rights organisations to be essential service providers during its lockdown to ensure they could help those experiencing GBV[12]. Several families in South Africa have been impacted financially due to the pandemic. Many of whom currently struggle to with provide for basic needs such as food, particularly in the rural areas. With such challenges, *ukuthwala*, getting into polygamous marriages and child marriages are on the rise.

[11] Mwambene, L., & Mgidlana, R. H. (2021). Should South Africa Criminalise *Ukuthwala* Leading to Forced Marriages and Child Marriages? *Potchefstroom Electronic Law Journal*, 24, 1–27. <https://doi.org/10.17159/1727-3781/2021/v24i0a9423>

[12] UN Women

# THE ROLE OF THE MEDIA

The media has an important role to play in fighting harmful practices, however these incidents do not regularly gain mainstream media's attention even though they are considered to fuel GBV. The cases of harmful practices are very sensitive, however a strategy to mitigate the risk of harmful practices may be responsible media reporting. Insensitive and unethical media reporting of GBV has direct ramifications on how the society understands the phenomenon; nevertheless, several violations in reporting have been observed.

## CONCLUSIONS AND RECOMMENDATIONS

Despite sophisticated laws and joint efforts by civil society, the government, and other role players, harmful practices are rife in South Africa. These harmful practices are considered to fuel gender-based violence. Culture is dynamic and it develops and changes over time. The alignment of laws is crucial to allow such developments move cultural practices towards the protection of women's rights.

The South African Constitution recognises the need to respect and develop customary law. But such customary law must be consistent with the provisions of the Constitution, including the rights enshrined in the Bill of Rights, such as the rights to privacy, equality and dignity. If customary law practices are not consistent with the Constitution, they are unlawful and should not be observed or legally entrenched in legislation.

Polygamy is a social phenomenon that has existed for millennia and continues to transform in South Africa and beyond. However, there is also less advocacy in this area. More awareness and education are needed to make an impact.

Harmful practices are still abounded in South Africa. This is partly because many women in the country are unaware of their basic human rights. It is this lack of awareness coupled with their socio-economic circumstances that ensures women's acceptance of the cultural and traditional practices, thereby perpetuating violation of their rights. This is exacerbated by their powerlessness centuries of subordination and discrimination. The Masiphephe Network recommends that:

### Engage traditional leadership

- As the primary custodians of culture, customs and tradition, working with traditional leaders in creating
- awareness about harmful practices and to ensure education so that people stop misrepresenting culture for self-centred gains.
- South Africa must act with due diligence to ensure that all women and girls are protected from harmful cultural practices.

### Legislative Reform and Education

- There is a need to develop and strengthen more policies and laws that protect women and girl children.
- There is a need for South Africa to revise the Children's Act with a view to prohibiting virginity testing.
- Legislation such as the Sexual Offences and Domestic Violence Act should not be hastily met with resistance but need to be understood and not cast aside on the basis of non-conformance with culture.
- There is a need for education and training programmes that will make people understand that laws are in place in the Constitution, and that certain behaviours are criminal.

### Strengthening Public Campaigns against Harmful Practices

- There is a need for strong campaigns in order for South Africans to step out of their own patriarchal comfort
- zone and accept that some cultural practices, which at a particular point in time might have been relevant and perhaps useful, are no longer so.
- Polygamy continues to be criticised, however there is less action taken to prevent women from getting into such acts.
- There is limited data polygamy and its effects in Gauteng, KZN and Mpumalanga. There is no recent national survey that has investigated polygamous relationships in the context of advancing human rights and dignity for all in South Africa.

## DISCLAIMER

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**Break the silence, call 0800 428 428 (GBV Command Centre) to report and get GBV support.**

### Contact Details

#### Masiphephe Network Strategic and Civil Society Implementing Partners

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<b>Gender Health and Justice Research Unit (GHJRU), University of Cape Town</b>	<b>Strategic research and policy partner across sites</b>	<b>021 406 6023</b>
<b>Agisanang Domestic Abuse Prevention and Training (ADAPT)</b>	<b>Gauteng City of Johannesburg Region E</b>	<b>011 786 6608</b>
<b>Sonke Gender Justice (Sonke) Gauteng</b>	<b>City of Johannesburg Region D</b>	<b>011 339 3589</b>
<b>Ethembeni Crisis Care Centre (ECCC)</b>	<b>eThekweni West, KwaZulu Natal</b>	<b>031 704 6860</b>
<b>Gugu Dlamini Foundation KwaZulu Natal</b>	<b>eThekweni INK Area</b>	<b>031 292 2852</b>
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## SOCIAL MEDIA PLATFORMS



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