

# A tradition corrupted

THE Justice Ministry is preparing to tackle the scourge of child marriages, especially the controversial practice of ukuthwala (when a man abducts a woman he wants to marry), after considering draft legislative recommendations made by the South African Law Reform Commission (SALRC) in the Prohibition of Forced Marriages and Child Marriages Bill. The draft bill seeks to ensure that marriages are entered into freely and without any form of coercion; prohibits child marriages and forced marriages; and provides for the prosecution of persons who commit offences provided for in the act and for appropriate penalties.

Justice and Correctional Services Minister Michael Masutha told The Sunday Independent that he was studying the commission's recommendations.

"Clearly, child marriages negate children's rights. Children are not ready for adult life. They must be at school, playing and left to enjoy their innocence, safe from harm or sexual abuse. Anything that robs them of their childhood is wrong," Masutha said. He said the work was still in its preparatory phase but urged children to refrain from sexual activity, and instead focus on achieving better results at school.

According to Otae Mkandawire, of UN Women in Pretoria, 6% of girls in South Africa are married before the age of 18 and 1% are married before the age of 15, according to statistics from the Unicef State of the World's Children 2017 report. Mkandawire said many countries have legislation that should protect children from early marriage, but laws alone are not enough, especially when such practices are deeply embedded in culture.

"Traditional and religious leaders need to realise that girls married as children do not fulfil their potential – missing out on education which leads to poverty and usually continues a cycle of generational poverty instead of improving her family's livelihood, health and economic prospects. Young married girls also face greater risk of violence in their relationship and health issues stemming from pregnancy and childbirth," she said.

The Unicef State of the World's Children 2017 report defines child marriage prevalence as the percentage of women 20–24 years old who were married or in union before they were 18 years old. In sub-Saharan Africa, 38% of girls were married before the age of 18 and 12% of girls in sub-Saharan Africa were married before the age of 15, according to the report.

After an extensive study undertaken between 2009 and 2016, the SA law commission has handed Masutha its recommendations, which conclude that child marriage is a serious human rights issue, with grave social problems, largely attributable to the

spate of attacks on young girls, mainly in certain rural areas, where perpetrators attempt to justify the custom of ukuthwala in South Africa. According to the commission, a distinction should be drawn between the known custom and the current practices, which are illegal distortions of the custom.

The discussion has also raised questions about ukuthwala itself as a custom and whether it passes constitutional muster. The SALRC has resolved not to debate the matter, preferring to assume the legitimacy of the genuine traditional types of ukuthwala as being a prelude to customary marriage. Customary marriage is protected by the Constitution and by the Recognition of Customary Marriages Act. However, fuelling the lengthy probe was the alarming media discovery of girls between the ages of 12 and 15 years being subjected to ukuthwala and forced to marry HIV-positive men. Almost 90 girls were hiding in Gauteng and KwaZulu-Natal in fear of becoming victims of the practice. But, the commission argues that there is no shortage of proposals and suggestions for a solution to the problem, ranging from stiffer sentences for offenders based on existing criminal law to strengthening the powers of traditional leaders to deal with the scourge.

There is significant support for strengthening the implementation of existing legislation and common law. Countering such arguments, according to the commission, are views that emphasise two considerations: that the current legislation and other relief are spread out too widely across the laws of South Africa to be readily accessible, and that a new statute would send a powerful symbolic message to perpetrators and ordinary South Africans alike. The SALRC, therefore, supports the enactment of new legislation because it would offer an opportunity to make an unequivocal statement against forced marriages, clarifying in the process the question of marriageable age. It would also consolidate the applicable principles in one instrument and send a powerful message in defence of women's rights.

As an additional approach, the commission said it might still be necessary to supplement the effectiveness of a new statute by amending various key enactments that already exist, such as the Recognition of Customary Marriages Act and the Children's Act. Such amendments would insert provisions to deal specifically with some of the effects of the current abuses of ukuthwala. Deirdre Byrne, head of the Institute for Gender Studies at Unisa, said there has been no change in the statistics announced by the Commission of Gender Equality that there are more than 91 000 girls in marriages or marriage-like relationships in South Africa.

Last year the gender body said marriages increase over the festive season because men receive bonuses and feel that it is time to take a wife.

"I am absolutely sure that this is true. Men tend to feel that they are entitled to have women to fulfil their sexual needs and to do domestic chores for them," she said. Byrne said Unisa had planned to set up a programme called the Unisa-Africa Girl Development Programme. Unfortunately, due to legal challenges, the programme was abandoned. Byrne said currently the law is silent on punishment of men

marrying girls who are under-age, although there has been one example in the Western Cape of a man, Mvumeleni Jezile, being sentenced to 22 years in jail for marrying a 14-year-old.

Asked what someone being forced to marry against her will must do, Byrne said she should alert the Commission on Gender Equality, Sonke Gender Justice, the police and any social workers in her community.

“I feel fairly sure that she would need to approach many bodies before any effective intervention would be undertaken. The problem with child marriages is the money that changes hands and, because of the money, it will take a concerted effort to stop this trend,” she added.

Steve Mahlangu, spokesperson for the Department of Justice and Constitutional Development, confirmed that the SALRC has investigated the distorted practice of ukuthwala and its impact on girl children. It published a discussion paper and revised discussion paper and held workshops throughout the country. The SALRC has compiled a report with a draft bill to address the issue. The report has been approved by the commission and sent to the minister for consideration.

Young married girls face greater risk of violence in their relationship and health issues

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