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INFORMATION ABOUT NAMIBIA'S LAW

Child marriage

Child marriage has been in the news recently. It is a worrying problem.

Child marriage tends to be associated with early and frequent pregnancy, which in turn is associated with higher rates of maternal and infant mortality. Child marriage also interferes with girls' right to development. Girls who marry young may drop out of school, and they may struggle to participate in economic, political and social activities. Child marriage may also increase the risk of domestic violence, because of power imbalances or social isolation.

The Child Care and Protection Act strictly forbids child marriage by making it a crime to give a child out in marriage or engagement if the child is below age 18, or does not consent to the marriage or engagement. This prohibition applies to civil, customary and religious marriages. This crime is punishable by a fine of up to N\$50 000 or imprisonment for up to ten years, or both. The difficulty is that not all of such crimes are reported.

Let us look at how the law has evolved on this point.

Civil marriages are governed by the **Marriage Act 25 of 1961**. At the time of Namibian independence, that law prohibited civil marriage by boys under age 18 or by girls under age 15, unless they had permission from an appropriate government official or a court. Since the age of majority was age 21 at that stage, children under age 21 also needed parental permission in order to marry.

This law was amended by the **Married Persons Equality Act 1 of 1996**. The amended statute set the minimum age for civil marriage at age 18 for both boys and girls, unless they had permission to marry younger from the Minister of Home Affairs or a court. Parental permission to marry was also still required for all children below the age of majority - which was at that stage still age 21.

The law was adjusted again by the **Child Care and Protection Act 3 of 2015**, which sets the minimum age for marriage at age 18 for both civil and customary marriage. The law has generally lowered the age of majority to 18, but persons under age 21 still need the consent of a parent or guardian in order to marry. The possibility of getting permission from the Minister of Home Affairs to marry below age 18 is still in place, but marriage is possible even with that authority only if there is also parental consent (or a ruling from the High Court dispensing with parental consent).

Now the law is about to change once again. The Ministry of Home Affairs will soon table a **new Marriage Bill** in Parliament. That Bill is expected to draw a line in the sand by making it a firm rule that no person under age 18 may enter into a civil marriage. No exceptions. This forthcoming law is also expected to amend the Child Care and Protection Act to apply that same rule to customary marriage, also with no exceptions. For any kind of marriage, the requirement of parental consent for all persons below age 21 will remain in place.

The removal of the “loophole” for marriage by children under age 18 will bring Namibia in line with the **African Charter on the Rights and Welfare of the Child**, which requires African states to enact legislation setting the minimum age of marriage at 18 years.

When the law refers to parental consent, what parent’s consent is required? That depends on the marital status of the parents.

If the parents are married, then both parents must consent. If the parents were never married, the parent who has guardianship of the child must consent. If the parents are divorced, the parent who has guardianship must consent unless the divorce order says something different. If the divorce order makes both parents equal guardians, then the consent of either of them would suffice – unless the divorce order contains a special requirement for consent to marriage.

What happens if a child marriage takes place despite the legal rules forbidding it?

At present, the marriage would be *void* if one or both parties are under age 18 and did not have government consent for the marriage. No court order is required to declare such a marriage void. In such cases, the marriage never really existed – even if the problem is discovered only after one of the parties to the marriage has died. However, either spouse, or anyone else with an interest in the marriage may, if they wish, can ask the High Court to make an order *confirming* that the marriage is void. Such a court order *places on record* the fact that the marriage never existed. This can prevent any doubt or confusion.

If one or both of the parties entered into the marriage in good faith, the Court has the power to make adjustments to prevent hardship or unfairness, such as making an order about how to separate the couple’s property. But the Court does not have the power to make a void marriage into a valid marriage.

A marriage is *voidable* (eligible for possible annulment by a court) if one or both parties are under age 21 and did not have the required consent of their parent or guardian for the marriage. In this case, either the underage party or that party’s parent or guardian could approach the High Court to ask that the marriage be declared void – but the Court will do this only if it would be in the best interests of the underage spouse or spouses. A request for an annulment must be made while both spouses are still alive.

If the spouses continue to live together for a substantial period of time without taking any action after the basis for annulment comes to light, the Court might conclude that they have accepted the situation. In this case, the Court might refuse to grant an annulment if there were no clear reasons for the delay (such as a lack of money to bring the case to Court). If the marriage is annulled, the consequences would be similar to those of a divorce.

There are special rules about children born of either a void or a voidable marriage. The key issue is protecting the best interests of the child, no matter what the situation. A court dealing with a void or a voidable marriage must consider the best interests of any child of the couple and make sure that the child is protected.

One positive bit of news is that child marriages in Namibia appear to be in decline.

The *2013 Demographic and Health Survey*, which is the latest such survey to be published in Namibia, considered the age of marriage – which it defined to include both civil and customary marriages.

This survey found that almost 2% of women who were between the ages of 20 and 49 at the time of the survey married at age 15 (this equals about 17 women out of the 1,906 women who were questioned). This was not illegal if the marriage took place before 1995, when the law allowed girls to marry from age 15. The survey found that another 8% of that age group married at age 18, which was and still is legal.

However, if one looks only at the marital status of younger women – those between the ages of 15 and 19 at the time of the survey, after the legal age for marriage had been raised to 18 for girls – only about 1% were married, separated or divorced and none were widowed. These figures suggest that child marriages are occurring less often in recent years.

Thus, the best figures we have indicate that fewer and fewer women are marrying before age 18.

In fact, Namibia has such a low rate of child marriage that it is reasonable to hope that we can eliminate this problem entirely and give young boys and girls a fair chance to develop and mature before they marry and start raising children of their own. Every child must have a chance to achieve his or her full potential.

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