



# HARMFUL SOCIAL, CULTURAL OR RELIGIOUS PRACTICES

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## NOTE

In this publication, “Ministry” and “Minister” refer to the Ministry and Minister responsible for child protection, and “Guide” means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

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**T**he African Charter on the Rights and Welfare of Children requires States to take measures to eliminate harmful social and cultural practices affecting children. The Child Care and Protection Act puts this duty into action. One cultural practice of concern is child marriage. The Act sets the minimum age for customary marriage at 18, to match the minimum age for civil marriage which was already set at 18 – thus giving equal protection to children who live under customary law and those who do not. This brings Namibia in line with the African Charter on the Rights and Welfare of the Child which requires States to prohibit all marriages for children under age 18. Other harmful social, cultural or religious practices may be prohibited after consultation with interested parties, including traditional leaders.

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## 1. What are harmful social, cultural or religious practices?

The Child Care and Protection Act does not define “harmful social, cultural and religious practices”. Instead, it states: “A person may not subject a child to social, cultural and religious practices which are detrimental to his or her well-being.”

This is a broad description of harmful practices. The Act itself identifies **child marriage** as one harmful practice, and includes measures to prevent it. **Other specific harmful practices** may be identified by the Minister after consultation with interested parties, including traditional leaders, and prohibited by regulation. This could include **any form of sexual initiation**, which in the Minister’s opinion may be detrimental to the well-being of children.

◇ Child Care and Protection Act, section 226(1) and (4)

## 2. Constitutional and international framework

**Namibian Constitution:** The Namibian Constitution protects the right to practise any culture, language, tradition or religion, but only insofar as this does not impinge on the rights of others. It also preserves customary law, but only to the extent that it does not conflict with any of the provisions of the Constitution or statutory law. The Namibian Constitution limits marriage to persons of “full age”, and allows it only where it takes place with the full consent of the intending spouses.

◇ Namibian Constitution, Articles 14, 19 and 66

## Namibian Constitution

### Article 14: Family

- (1) Men and women **of full age**, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the **free and full consent of the intending spouses**.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

### Article 19: Culture

Every person shall be entitled to enjoy, practise, profess, maintain and promote **any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others** or the national interest.

### Article 66: Customary and Common Law

- (1) Both the **customary law** and the common law of Namibia in force on the date of Independence shall remain **valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law**.
- (2) Subject to the terms of this Constitution, any part of such common law or customary law **may be repealed or modified by Act of Parliament**, and the application thereof may be confined to particular parts of Namibia or to particular periods.

### Eliminating harmful social and cultural practices affecting children: Our collective responsibility

“ Harmful practices compromise the enjoyment of children’s rights. They hamper girls’ and boys’ development and education; they leave serious and irreversible health and psychological consequences and may even lead to disability and death, such as the maiming and killing of children with albinism for ritualistic purposes. Others are deeply rooted in gender-based discrimination, such as forced and early marriage.

[...] Despite increasing awareness of the impact of harmful practices on the enjoyment of children’s rights, the legal prohibition of these practices against children is not yet a reality in many countries around the world; and across regions, law enforcement remains weak and difficult. Still too often, there are inconsistencies in legal regulations; insufficient resources for implementation; lack of public awareness; as well as weak capacity among law enforcement officials, the judiciary, and traditional leaders and judges.

[...] [R]eal change can only happen when families, communities, traditional and religious leaders and children themselves take an active part in social change and implementation efforts.

Awareness-raising, public debates and social mobilization play an indispensable role in this process, helping to preserve practices that have a positive impact on children’s protection; and working towards the prevention and abandonment of those compromising their human rights. ”

◆ Statement of the UN Special Representative of the Secretary-General on Violence against Children, Day of the African Child 2013

**Convention on the Rights of the Child:** The Convention on the Rights of the Child addresses harmful traditional practices primarily in the context of the child’s right to health. Article 24(3) obligates States to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”. The Committee on the Rights of the Child has also emphasised links between sex discrimination and harmful traditional practices that affect girls disproportionately, such as female genital mutilation, honour killings, virginity testing and early or forced marriage (which can make girls more vulnerable to HIV infection), and has also expressed concern about male circumcision which takes place in unsafe medical conditions.

- ◆ Committee on the Rights of the Child, *General Comment No. 3* (2003), paragraph 11
- ◆ Committee on the Rights of the Child, *General Comment No. 4* (2003), paragraph 24
  - ◆ See, for example, Committee on the Rights of the Child, *Concluding Observations on Report of South Africa*, 2000, paragraph 33

**Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW):** Article 5(a) obligates States to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women” in order 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”.

In 2014, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child issued a Joint General Recommendation on harmful practices affecting women and children, primarily girls. It called attention in particular to female genital mutilation, child marriage, polygamy and so-called “honour crimes”. It also cited, amongst other practices, neglect of girls (linked to the preferential care and treatment of boys), extreme dietary restrictions, virginity testing, binding, scarring, branding/infliction of tribal marks, violent initiation rites, widowhood practices, accusations of witchcraft, infanticide, incest and body modifications carried out to enhance the beauty or marriageability of girls and women. The Joint General Recommendation also notes that effectively addressing harmful practices is amongst the core obligations of States under both CEDAW and the Convention on the Rights of the Child.

- ◆ Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, 2014

### **Obligation to protect against harmful practices**

“ ... the obligation to protect requires States parties to establish legal structures to ensure that harmful practices are promptly, impartially and independently investigated, that there is effective law enforcement and that effective remedies are provided to those who have been harmed by such practices. The Committees call upon States parties to explicitly prohibit by law and adequately sanction or criminalize harmful practices, in accordance with the gravity of the offence and harm caused, provide for means of prevention, protection, recovery, reintegration and redress for victims and combat impunity for harmful practices. ”

- ◆ Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, 2014, paragraph 14

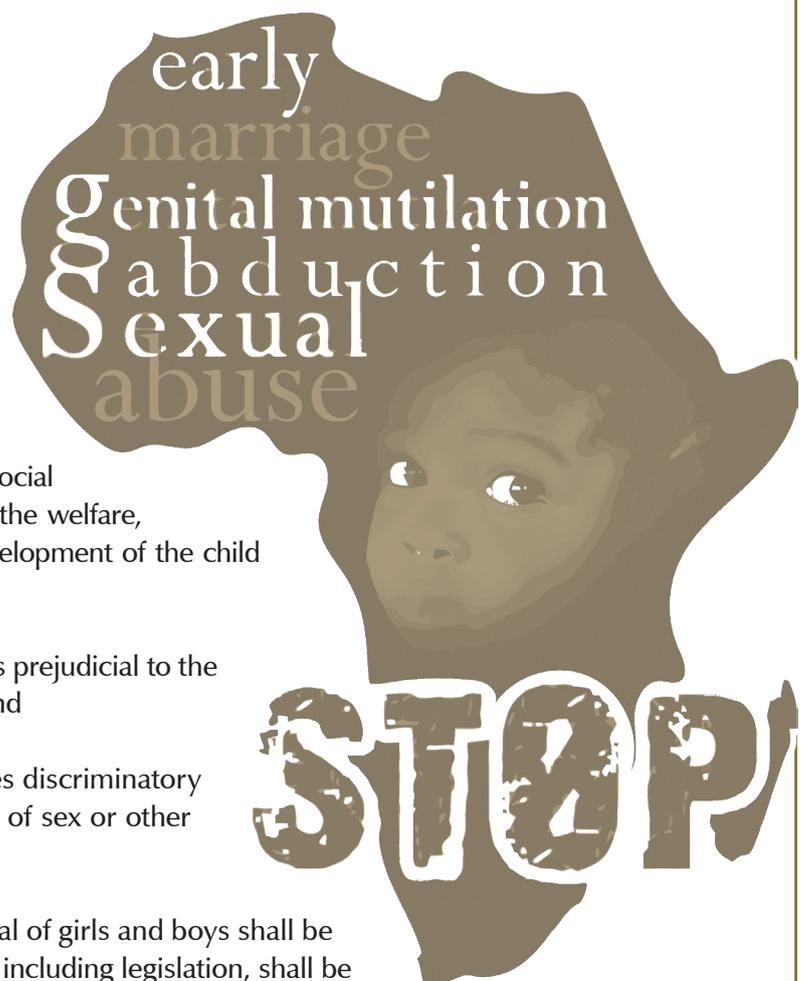
**African Charter on the Rights and Welfare of the Child:** Article 1(3) of this Charter obligates States to *discourage* any “custom, tradition, cultural or religious practice” that is inconsistent with the rights, duties and obligations contained in the Charter. Article 21 goes farther, obligating States to *eliminate* “harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child” – with particular attention to practices that are prejudicial to the health or life of the child, and practices that discriminate on the basis of sex or other status. Child marriage and betrothal are highlighted, and the Charter calls on States to set the minimum age of marriage at 18. The African Committee of Experts on the Rights and Welfare of the Child has pointed to the need to address the underlying factors that support harmful practices, such as poverty, gender discrimination and social exclusion. It has also stressed that “customs, traditions, cultural and religious practices should be kept under continuous review”, as they may become distorted over time so that practices which were once acceptable no longer function positively.

- ◆ African Committee of Experts on the Rights and Welfare of the Child, *General Comment No. 5*, 2018, sections 7.1-7.2
- ◆ African Committee of Experts on the Rights and Welfare of the Child, *General Comment on Article 31*, 2017, section 3.1

## African Charter on the Rights and Welfare of the Child

### Article 21: Protection against Harmful Social and Cultural Practices

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
  - (a) those customs and practices prejudicial to the health or life of the child; and
  - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.



**Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol):** Article 1 of the Protocol specifically addresses harmful practices that affect women and girls. Article 6 provides that the minimum age of marriage shall be 18 years. In 2017, the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child issued a Joint General Comment on Ending Child Marriage which notes the disproportionate impact of child marriages on girls, children with disabilities, migrant children, refugee children and children in child-headed households. This Joint General Comment emphasises the need to make sure that legislation prohibiting child marriage is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.

◆ Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, 2017

## **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

### **Article 5: Elimination of Harmful Practices**

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

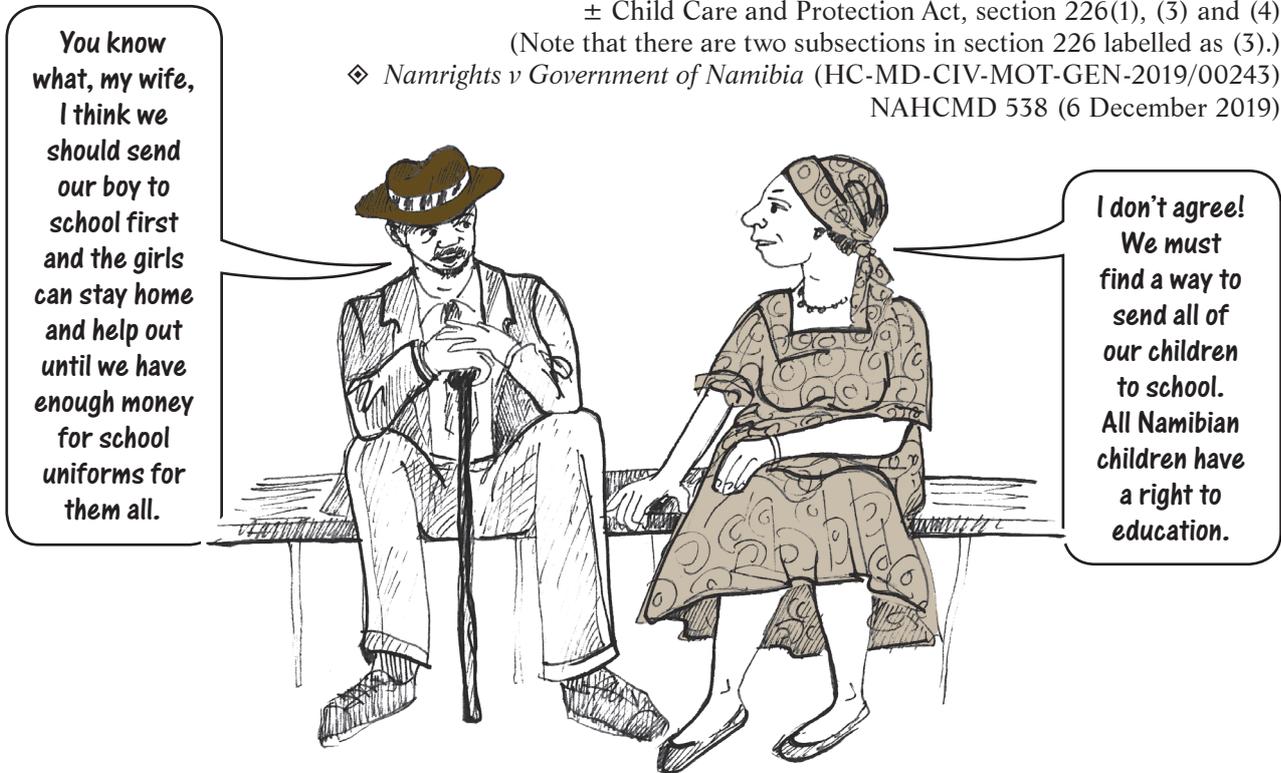
## **3. Prohibition of harmful social, cultural or religious practices**

The Child Care and Protection Act provides that a person who subjects a child to social, cultural and religious practices which are detrimental to the child's well-being commits a crime punishable by a fine of up to N\$50 000 or imprisonment for up to ten years, or both.

This provision may be difficult to enforce, because there are differing opinions on what social, cultural and religious practices are harmful to children. For example, as of 2019, there were different points of view in Namibia on whether the Owambo cultural practice of *olufuko* is harmful; one Namibian NGO asked the High Court to rule on this issue in 2019, but the case was dismissed on the grounds that the NGO did not have a direct interest in the matter. The Act provides for the future prohibition of specific practices, after public consultation.

± Child Care and Protection Act, section 226(1), (3) and (4)  
(Note that there are two subsections in section 226 labelled as (3).)

◇ *Namrights v Government of Namibia* (HC-MD-CIV-MOT-GEN-2019/00243)  
NAHCMD 538 (6 December 2019)



## 4. Child marriage

**Prohibition of child marriage:** One of the cultural practices of concern in some Namibian communities is **child marriage**. According to the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child: "Child marriage is correlated with early and frequent pregnancy, which in turn is associated with significantly higher rates of maternal morbidity, maternal mortality and infant mortality. Child marriage also curtails the right to development, as those who marry young are often forced to drop out of school or are precluded from participating in economic, political, social and other activities. Child marriage is also connected with increased exposure to the risk of domestic violence and because child marriage frequently results in social isolation, the protection needs of children and women in a child marriage often are not readily detected or met."

The Child Care and Protection Act 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. The 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.

◇ Child Care and Protection Act, sections 1 (definition of "marriage"), 226(2)-(3)  
(Note that there are two subsections in section 226 labelled as (3).)



## The wording of section 226(2)

**Child Care and Protection Act, section 226(2):** “A person may not give a child out in marriage or engagement if such child does not consent to the marriage or engagement or is below the minimum age for marriage contemplated in section 24 of the Marriage Act, 1963 (Act No. 25 of 1961).”

According to section 1 of the Child Care and Protection Act, marriage means “a marriage in terms of any law of Namibia and **includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia** and any marriage in terms of the law of any country, other than Namibia, where such a marriage is recognised as a marriage under the laws of Namibia”.

Section 226(2) of the Act does not refer specifically to age 18. It refers to “the minimum age for marriage contemplated in section 24 of the Marriage Act, 1963 (Act No. 25 of 1961)”. This cross-reference contains some confusion:

- ⦿ Firstly, it should refer to the Marriage Act, 1961 (not 1963).
- ⦿ Secondly, section 24 of the Marriage Act, 1961 does not set a minimum age for marriage, but rather requires parental consent for the marriage of a minor who is below age 21 and has not previously been married. *Section 26* of the Marriage Act, 1961, as amended by the Married Persons Equality Act 1 of 1996, sets the minimum age for marriage at 18 for both boys and girls.
- ⦿ Thirdly, the Marriage Act, 1961 applies only to civil marriages, but the fact that the provision in the Child Care and Protection Act applies to “harmful social, cultural and religious practices” – read together with the broad definition of “marriage” in the Child Care and Protection Act – clearly indicates that the minimum age of 18 was intended to apply to all types of marriage covered by the definition. This could cause confusion.

As of 2019, the Marriage Act 25 of 1961 was set to be replaced by a new Marriage Act, which may update and clarify section 226(2) of the Child Care and Protection Act.

◆ Child Care and Protection Act, sections 1 (definition of “marriage”), 226(2)

**Consent to marriage:** There are three layers of consent involved for a civil or customary marriage, depending on the age of the intending spouses:

- (1) **Own consent:** A marriage (or betrothal) between persons of any age may take place only with the full and free consent of both parties. Forcing a child into a marriage (or betrothal) against his or her will is a crime punishable by a fine of up to N\$50 000 or imprisonment for up to ten years, or both.
- (2) **Ministerial consent:** The consent of the Minister of Home Affairs and Immigration is required before any child (meaning a person under the age of 18) can marry.

As of 2019, a new Marriage Bill under consideration would close the door completely to civil marriage by persons under age 18. No Ministerial consent could enable a person under age 18 to enter a civil marriage. Law reform on customary marriage was also pending as of 2019, so the option of Ministerial authority to enter *any* kind of marriage in Namibia below the minimum age of 18 may fall away completely.

- (3) **Parental consent:** The consent of a parent or guardian is required before any person under age 21 can marry, unless that person has been previously married or emancipated by an order of court.

This rule was a compromise when the age of majority was lowered from 21 to 18 by the Child Care and Protection Act. Namibian lawmakers were of the opinion that persons below age 21 would continue to need guidance on the question of marriage even after the age of majority was lowered. So this rule is an exception to the full legal capacity of minors who are under age 21.

#### **Who must give parental consent?**

- ⊗ If the parents are **married**, then both parents must consent.
- ⊗ If the parents were **never married**, the parent who has guardianship 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.)

◇ Namibian Constitution, Article 14(2)

◇ Child Care and Protection Act,  
sections 1 (definition of “marriage”), 10(10), 101(1), 226(2)-(3)  
(Note that there are two subsections in section 226 labelled as (3).)

◇ Married Persons Equality Act 1 of 1996, section 14(2)

**Exceptions to the consent requirements:** There are two situations where the usual parental and/or State consent to marriage would not be required – but both of these would be rare in practice.

- (1) **Previous valid civil marriage:** A minor who is married in a civil marriage (with the required consents) automatically becomes a major. This majority status survives even if the marriage ends by divorce or death. So, if that person wants to marry again, he or she does not need State or parental permission for the second marriage – even if he or she is still under the relevant age of 18 or 21 at the time of the second marriage.
- (2) **Previous emancipation:** Under the Age of Majority Act (which is repealed by the Child Care and Protection Act), a minor who was at least 18 years old could apply for a court order declaring him or her to be a major. If a person was declared a major by such a court order while the Age of Majority Act was still in force, that person does not need parental consent to marry even if he or she is still under age 21 at the time of the marriage.

◇ Child Care and Protection Act, section 10(10)

◇ Marriage Act 25 of 1961, section 24(2)

**Overruling refusal to give consent:** A person who felt that a parent or the Minister was unreasonably withholding consent could approach the High Court to overrule the refusal to give consent.

◇ See Chapter 3 of this *Guide* on the age of majority for more information (section 6)

## 5. Other harmful social, cultural or religious practices

Child marriage is the only specific cultural practice prohibited by the Act. The Act authorises the Minister, after consultation with interested parties, including traditional leaders, to prohibit **other specific social, cultural or religious practices** which may be detrimental to the well-being of children – including but not limited to any form of sexual initiation.

A regulation which prohibits a specific social, cultural or religious practices may impose **criminal sanctions** of a fine of up to N\$10 000 or imprisonment for up to two years, or both.

◇ Child Care and Protection Act, section 226(4)-(5)

### Are these practices harmful?

*Open discussion on the positive and negative aspects of social, cultural and religious practices can be helpful in exploring what is detrimental to children and what is helpful to their development. Some social, cultural and religious practices could possibly be modified to eliminate harmful elements while preserving constructive features. People may disagree on what is harmful. The list here is intended to inspire debate. In line with the principle of child participation, children from various Namibian communities should take part in consultations about possibly harmful practices.*



- ⦿ Initiation rites?
- ⦿ Labial stretching to ready girls for marriage?
- ⦿ Isolation of girls during menstruation?
- ⦿ Sexual initiation of girls by male relatives?
- ⦿ Scarification?
- ⦿ Discrimination against children with albinism or disabilities?
- ⦿ Circumcision of male babies?
- ⦿ Beauty pageants for children?
- ⦿ Ear piercing of children?
- ⦿ Corporal punishment of children by their parents?
- ⦿ Forcing children to adopt their parents' religion?
- ⦿ Intolerance of some sexual orientations or gender identities?

## Criteria for determining harmful practices

*The Act does not set any criteria for determining if a specific social, cultural or religious practice is detrimental to a child's well-being. However, some criteria have been suggested by the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.*

**“15. Harmful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age,** in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that such practices cause to the victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children. There is also a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status. The practices are therefore reflected in the work of both Committees.

16. For the purposes of the present joint general recommendation/general comment, **practices should meet the following criteria to be regarded as harmful:**

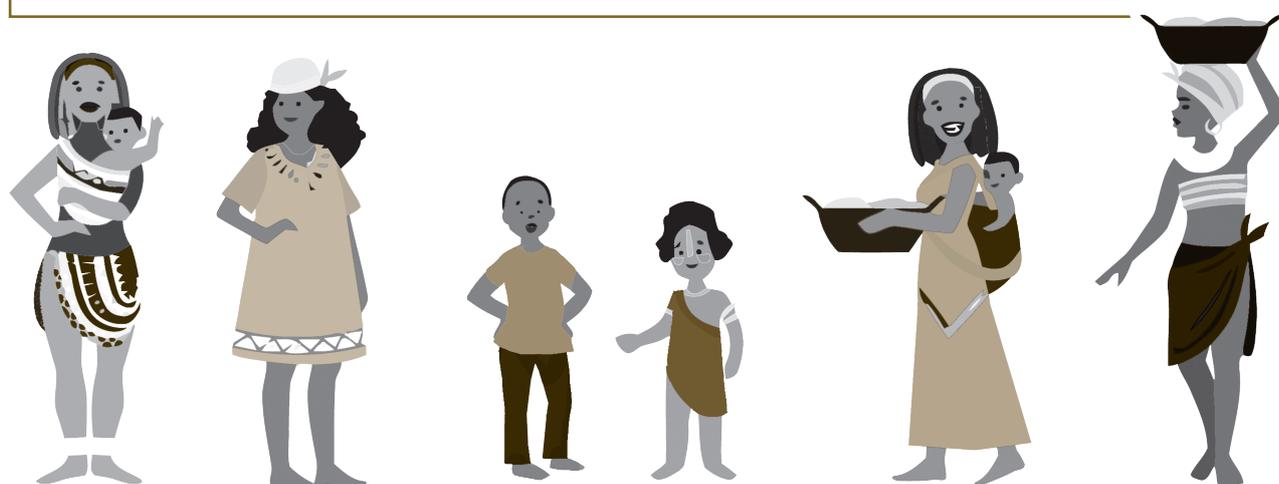
(a) They constitute a **denial of the dignity and/or integrity of the individual** and a **violation of the human rights and fundamental freedoms** enshrined in the two Conventions;

(b) They constitute **discrimination against women or children** and are harmful insofar as they result in **negative consequences for them as individuals or groups**, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;

(c) They are **traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children**, on the basis of sex, gender, age and other intersecting factors;

(d) They are **imposed on women and children by family members, community members or society at large**, regardless of whether the victim provides, or is able to provide, full, free and informed consent.”

◇ Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, paragraphs 15-16



## Implementing legislation to support the abandonment of harmful practices

“ Explicit legal prohibition provides a sound foundation to prevent and address harmful practices to protect those at risk and to fight impunity. But to be effective, legislation needs to be supported by an engaged and multidimensional process of national implementation that includes: information and awareness raising initiatives; available and accessible services; active institutions; and a wide process of social mobilization. With the involvement of community and religious leaders, parliamentarians, professional associations, academic institutions and grass-root organizations to influence and mobilize society for change, legislation can then gain traction as a genuine deterrent.

In this regard, the genuine involvement of communities where harmful practices are prevalent is crucial. Their engagement can help to avoid stigmatization and social exclusion. It can help communities to understand and address the social dynamics behind deeply entrenched traditions and acknowledge their detrimental impact on children’s rights and well-being. In turn, this process of social mobilization can result in communities’ empowerment to effectively promote the abandonment of such practices.

As experience in Africa and beyond as shown, when such a process of dialogue and engagement is pursued by motivating change from within, legislation is then envisaged as a fruit of true conviction, rather than the imposition of judgemental and external values.

[...] Law enactment to prohibit and address harmful practices is gaining momentum in countries across regions; at the same time, its implementation remains a challenge. When law enforcement is pursued in isolation from social engagement, without information and advocacy campaigns, and lacking support from adequate child protection measures, harmful practices run the risk of moving underground where they are hidden from the public domain, and make their prevention and children’s protection particularly difficult.

[...] Education is an empowerment tool that not only makes available knowledge and information, but also choices, and provides enlightenment as to what courses of action can be taken.

The role of education and awareness-raising on the harmful consequences of these practices cannot be over-emphasized; and it needs to start with children themselves. Children need to be educated and informed about their rights, to gain confidence and skills and become the first line of prevention of harmful practices. Human rights education is a critical contribution to this process and should be included as a core component of the formal and informal school curricula, helping to generate knowledge on international and regional standards on the rights of the child, preventing the marginalization and stigmatization of child victims, and empowering children to be part of this important process of social change. ”

◇ *Protecting children from harmful practices in plural legal systems with a special emphasis on Africa*, Office of the Special Representative of the Secretary-General on Violence against Children and Plan International, 2012, pages 19-20