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THE CONUNDRUM OF RAISING LEGAL AGE OF MARRIAGE

AUTHORED BY - RAJA RANJAN

Abstract:

The paper investigates the impact of The Prohibition of Child Marriage (Amendment) Bill, 2021 that aims to increase the minimum age of marriage of females to 21 years arguing that such measures are neither necessary nor sufficient to fight the menace of child marriage. First it will trace the debate surrounding age of marriage from colonial period. Then it will elaborate on the provisions of the proposed bill. The paper will also examine the rationale of government for such proposal and will examine the recommendations of Jaya Jaitly Committee that was formed to look into the correlation between the age of marriage with issues of women's development. The paper further goes to look the underlying issues with the current proposal and how this bill can prove to be detrimental for women's interest. Also it will delve into the question of what happens to those who have been marriage between age of 18-21 years as there will exist a boundary question on the legality of such marriages. This paper concludes with the areas that need to be looked into by government rather than dealing this socio-economic issue through legal lens

I. Tracing The Contours Of Legal Age Of Marriage In Modern India

In the late nineteenth and early twentieth centuries, defining the age of consent and the legal minimum age of marriage became a central point of conflict between colonial ideology and the nationalist movement¹. This tension shaped the nationalist movement's construction of an ideal Indian womanhood². The landmark case of *Dadaji Bhikaji v Rukhmabai*³ (1884), where 22-year-old Rukhmabai refused to consummate her marriage arranged when she was 11, became a catalyst for change. This resulted in The Age of Consent Act of 1891, which increased the minimum age of a 'consenting' bride from 10 to 12 years, regardless of marital status and violations were punishable as rape.

¹ Sonalde desai, 'Gender Scripts And Age At Marriage In India, [2010] 47(3) Demography 672

² Ibid

³ *Dadaji Bhikaji vs. Rukhmabai* (21.09.1885 - BOMHC) :MANU/MH/0047/1885

However, the Act did not directly address the legal age of marriage. Thereafter Joshi Committee was formed to provide recommendations on both the legal age of consent and marriage for men and women in British India. This led to enactment of the Child Marriage Restraint Act of 1929, commonly referred to as the Sarda Act, which established the minimum marriageable age for girls at 14 years and for boys at 18 years. In 1978, these ages were revised to 18 for girls and 21 for boys. The Prohibition of Child Marriage Act (PCMA) of 2006, while maintaining these age limits, replaced the CMRA of 1929 and focused on preventative measures. This minimum age is going to witness a change with passing of The Prohibition of Child Marriage (Amendment) Bill, 2021

II. Context And Committee Report

The Ministry of Women and Child Development constituted a task group⁴ in June 2020 headed by Jaya Jaitly along and secretaries of several other ministries to investigate the (i) health, medical well-being, and nutritional status of mother and child, during pregnancy, birth and thereafter, (ii) key parameters such as Infant Mortality Rate (IMR), Maternal Mortality Rate (MMR), Total Fertility Rate (TFR), (iii) any other relevant points pertaining to health and nutrition in this context.

Following were the recommendations of the committee.⁵

1. Following feedback from young adults in 16 colleges nationwide, the committee recommends raising the marriage age to 21 years. Committee members stress that input was gathered from young people of diverse backgrounds, including various faiths and both rural and urban areas.
2. The committee has urged the government to explore ways to enhance girls' access to education, including transportation to schools and colleges in remote areas. They also advocate for skills training and entrepreneurship programs, along with the introduction of sex education in schools.
3. The committee emphasizes that these initiatives should take priority, as the effectiveness of the law would be limited until they are implemented and women are empowered.
4. The group suggests launching a comprehensive public awareness campaign regarding

⁴ <https://pib.gov.in/PressReleasePage.aspx?PRID=1629832>

⁵ Sakshi Singh, 'PROHIBITION OF CHILD MARRIAGE :AN ANALYTICAL STUDY' [2022] 1(3) Indian Journal of Contemporary Legal and Social Issues 5

the increased marriage age, along with fostering societal acceptance of the new regulation. Which they suggest would be far more effective than employing coercive measures..

5. It should also be noted that the report of the task force is not available in public domain

III. The Prohibition of Child Marriage (Amendment) Bill, 2021

After taking into account the recommendations of the Task Force and other aspects, the Ministry of Women and Child Development has introduced 'The Prohibition of Child Marriage (Amendment) Bill, 2021' in the Parliament on 21.12.2021 for raising the minimum age of marriage of women to 21 years to make it at par with that of men(Annual report)

Key amendments introduced of the Bill

1. The Bill amends the Prohibition of Child Marriage Act, 2006 to increase the minimum age of marriage of females to 21 years
2. The Bill will override existing marriage and personal laws, or any other custom or usage or practice in relation to marriage, under any other law.
3. Section 3 of PCMA 2006⁶ specifies a time limit of two years from attaining as the period during which a party that was a minor at the time of marriage can file a petition to seek an annulment of a voidable marriage. The Bill seeks to raise this time limit to five years
4. In relation to marriageable age, the Bill intends to make the amendments effective after two years from the date of the President's assent, so as to provide sufficient opportunity to make effective other provisions immediately.

The Bill would amend:

1. The Indian Christian Marriage Act, 1972.
2. The Parsi Marriage and Divorce Act, 1936.
3. The Muslim Personal Law (Shariat) Application Act, 1937.
4. The Special Marriage Act, 1954.
5. The Hindu Marriage Act, 1955.
6. The Foreign Marriage Act, 1956.

The aforesaid Bill has been referred to the Parliamentary Standing Committee on Education, Women, Children, Youth and Sports (EWCY&S).

⁶ The Prohibition of Child Marriage Act 2006, s 3(1)

IV. Rationale Behind The Bill

According to the statement of objects and reasons (SOR) of the Bill, increasing the age of marriage will help in achieving various goals including improvement of maternal and infant mortality rates (IMR and MMR), nutrition levels, sex ratio at birth (SRB), female labour force participation, and gender equality, and will lead to empowerment of women⁷. A Lancet journal study highlights that offspring born to adolescent mothers face a heightened risk of malnutrition⁸. Adolescent pregnancy contributes to child under-nutrition due to factors such as inadequate maternal nutrition, limited education, reduced access to healthcare services, suboptimal complementary feeding practices, and challenging living conditions⁹.

Praising this move, a report prepared by the State Bank of India suggests that by increasing the legal age of marriage for women, the percentage of females enrolled for graduation will increase by 5-7%¹⁰. In a consultation paper of reform in family law in 2008¹¹, the Law Commission argued that having different legal standards “contributes to the stereotype that wives must be younger than their husbands”. This bill seeks to eradicate such stereotypes and bring in gender neutrality. This bill can tackle additional gender disparities, including girls being withdrawn from education for marriage, health hazards associated with early pregnancies such as maternal and neonatal mortality, and the significant challenge of girls being ill-prepared to raise children when they themselves are not fully physically and mentally developed.

In the case of *Ashwini Kumar Upadhyay vs. Union of India*¹², a writ petition was filed under Article 226 of the Indian Constitution challenging the differing ages of consent for marriage. The petition argued that this distinction is rooted in patriarchal stereotypes, perpetuating both de jure and de facto inequality against women's dignity and contrary to global trends. It was also contended that this clear discrimination violates fundamental rights to gender equality and dignity as enshrined in Articles 14, 15, and 21 of the Indian Constitution. In the case of *Joseph Shine vs Union of India*¹³, the Supreme Court, in its decision to decriminalize adultery,

⁷ PRS India, <https://prsindia.org/billtrack/the-prohibition-of-child-marriage-amendment-bill-2021>

⁸ P.H. Nguyen, ‘Social, Biological, and Programmatic Factors Linking Adolescent Pregnancy and Early Childhood Undernutrition (2019) 3 The Lancet Child and Adolescent Health 463–473.

⁹ Ibid

¹⁰ Ecowrap, ‘Increasing the Legal Age of Women Marriage: A Dominant Strategy For Societal Good, Financially Empowering Women’ State Bank of India 3 (22 October 2020)

¹¹ Government of India, Law Commission of India, “Proposal to amend the prohibition of Child Marriage Act, 2006 and other allied laws, Report no. 205, February 2008

¹² *Ashwini Kumar Upadhyay vs. Union of India Writ Petition (C) No. of 2019*

¹³ *Joseph Shine v. Union of India, Writ Petition (C) No. 194 of 2018*

emphasized that any law perpetuating gender stereotypes and treating women differently undermines their dignity. Furthermore, the unequal age of marriage has negative implications for girls, as under the Prohibition of Child Marriage Act, both boys and girls are given a two-year period to repudiate their underage marriages. However, girls may face challenges in seeking annulment of their marriages at the age of 20 compared to boys at 23, due to a lack of necessary guidance¹⁴.

V. The Uneasiness With The Bill

Section 3 of The Majority Act, 1875¹⁵ defines Major as any person who have attained age of eighteen. Raising minimum will affect the rights and responsibilities of people. Many international organizations, including UNICEF, define a minor as anyone under 18, and thus classify any marriage below this age as child marriage¹⁶. This proposed law change contradicts this widely accepted definition. Additionally, Indian laws such as the Juvenile Justice Act, various labor laws, and the POSCO Act¹⁷, all define a child as being under 18. Furthermore, the Supreme Court, in the Independent Thought case¹⁸, and the CEDAW Committee¹⁹ also endorse 18 as the appropriate age of marriage. It's illogical that the law deems individuals mature enough at 18 to vote, enter contracts, start businesses, manage finances, and drive, yet not mature enough to make the significant decision of marriage.

The proposed bill restricts the freedom to marry. The Supreme Court in the KS Puttaswamy²⁰ judgment, recognized the right to privacy as a fundamental right, including the right to choose a life partner and decide on family planning. The proposed reform could potentially delay the ability of girls from strict, regressive, and patriarchal households to marry a man of their choice until they reach the age of 21. During this additional waiting period, families and society might exploit the situation to further intimidate and exert control over these young women. It would also lead to an increase in the parental backlash against young adults who choose to marry against their parents' wishes and would also result in a criminalization of consensual sexual activity. Scholars like Flavia Agnes²¹ criticize the bill, arguing that it reinforces patriarchal

¹⁴ The Prohibition of Child Marriage Act 2006, s 3(3)

¹⁵ THE MAJORITY ACT, ACT NO. 9 OF 1875

¹⁶ Megan Arthur "Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities." *Journal of women, politics & policy* vol. 39,1 51-74. 22 Nov. 2017,

¹⁷ Protection of Children from Sexual Harassment Act, 2012. Sec 2(d(a))

¹⁸ Independent Thought vs. Union of India (2017) 10 SCC 800

¹⁹ An international treaty adopted in 1979 by the United Nations

²⁰ K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors., MANU/SC/0911/2017

²¹ V.Bhalla, "'Increasing the marital age of women to 21 is counter-productive', says pioneer of the women's

control by allowing paternal and state power to work together, potentially leading to increased violence against women who exercise their autonomy in choosing to marry, ex: Hadiya case. In 2018, the Supreme Court, while reading down Section 377 of the Indian Penal Code, 1860, ruled that consensual sex between consenting adults is a fundamental right under Articles 14, 15, 19 and 21 of the Constitution²². If this Bill were passed, it would be legal to have sexual relations but illegal to marry for those between the ages of 18 and 21 years. Additionally, this bill faced criticism on procedural grounds as the 31-member parliamentary panel assigned to examine it included only one woman member. This raised significant concerns, as having just one woman on the panel was deemed highly questionable for a bill that assess issues affecting women.

In rural areas, the circumstances are especially challenging, where girls are viewed as a financial burden and the preference for having a son remains prevalent²³. Mary E. John, who submitted a memorandum to the task force, believes that simply increasing the legal age of marriage for women does not automatically result in improved opportunities and decision-making abilities²⁴. Merely raising the age limit doesn't lead to significant improvements if the necessary support infrastructure for women is lacking. It can create confusion for example recent news where in Hyderabad, Muslim families are hurrying to marry off their daughters upon learning about a forthcoming law aimed at raising the minimum marriage age for girls to 21 years. The situation became so intense that families lined up to conduct these marriages before the law takes effect²⁵.

Is it a case of reasonable restriction

In the case of *Shakti Vahini v. Union of India*²⁶, it was held by Supreme court that choosing partners consensually is an expression of choice protected under Articles 19 and 21 of the Constitution. Similarly, in *Shafin Jahan v. Ashokan*²⁷, the Supreme Court ruled that the Right to Life under Article 21 includes the right to marry, and this right cannot be restricted unless

movement, Flavia Agnes”, January 27, 2022, as accessed from <https://theleaflet.in/incr>

²² Joseph Shine v. Union of India, Writ Petition (C) No. 194 of 2018

²³ Aparna Mitra, ‘Son Preference in India: Implications for Gender Development’ (2014) 48(4) Journal of Economic Issues 1021

²⁴ MEMORANDUM-TASK-FORCE-ON-AGE-OF-MARRIAGE-FROM-CIVIL-SOCIETY-ORGS-AND-REPS-June-25-2020.pdf (pldindia.org)

²⁵ <https://www.thestatesman.com/india/unprecedented-rush-marriages-among-muslims-hyderabad-1503036667.html>

²⁶ *Shakti Vahini v Union of India and others*(2018) 7 SCC 192

²⁷ *Shafin Jahan vs Ashokan and Others*AIR 2018 SC 1933

such restriction is imposed by a law that is substantively and procedurally just and reasonable.. The Bill imposes a limitation on the right to marry before the age of 21. The key issue is whether this limitation for individuals aged 18 to 21 meets the criteria for reasonable restrictions established by courts. Generally, any restriction on fundamental rights by law must satisfy three conditions: there must be a public purpose, the restriction must be connected to that purpose, and there should be no less intrusive means available to achieve the same purpose²⁸. Members of opposition party have held this bill. Giving reference to landmark judgment of Narasu Appa Mali, opposition party leaders have termed this bill as “*unwanted, unconstitutional and an attack on personal laws*”²⁹.

The boundary question of legality

Child and women's rights advocates, along with population and family planning experts, oppose raising the marriage age for women. They believe it would push many into illegal marriages. The India Child Protection Forum also objects, arguing it would criminalize young couples, particularly those marrying against their parents' wishes. A lot more marriages will be considered underage marriages, it will create creating a situation where it will criminalize a lot more families for getting their daughters married at a young age, especially people from poor and marginalized communities. This law could be used as a tool by those in power within a village to unfairly target and oppress marginalized groups, specifically children from Dalit and Adivasi families³⁰. The advisory group that submitted its report to task force stated that if age of marriage be raised to 21 years, no less than 56% of the women (in the 20-24 year age group of NFHS IV) who married below this age – and their families – would be turned into criminals overnight³¹. Moreover, this proportion is as high as 75% amongst the poorest twenty percent of the population³². The cases of female foeticide might increase because the parents would be more burdened by girl children if marriageable age increases.

VI. Need Of A Holistic Approach

According to official data from 2019, the average age at which women marry is 22.1 years. This age has gradually risen over time, reflecting a voluntary trend. The increase is largely

²⁸ K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors., MANU/SC/0911/2017

²⁹ State of Bombay v. Narasu Appa Mali [AIR (1952) Bom 84]

³⁰ V.Bhalla, “‘Increasing the marital age of women to 21 is counter-productive’, says pioneer of the women’s movement, Flavia Agnes”, January 27, 2022, as accessed from <https://theleaflet.in/incr>

³¹ MEMORANDUM-TASK-FORCE-ON-AGE-OF-MARRIAGE-FROM-CIVIL-SOCIETY-ORGS-AND-REPS-June-25-2020.pdf (pldindia.org)

³² Ibid

attributed to improvements in women's educational levels³³. Consequently, addressing the issues targeted by the proposed amendment may be more effectively achieved by enhancing girls' education, running education awareness programs in communities with low female education rates, and educating young students of both genders about the importance of financial independence and the risks of teenage pregnancy.

In 2020, UNICEF recommended setting the minimum marriage age at 18 for both males and females, based on the rationale that individuals are emotionally, physically, and mentally mature enough to marry at that age. Additionally, the United Nations Convention on the Rights of the Child supported this recommendation, arguing that the marriage age should align with the age of majority³⁴. Furthermore, in 2018, the Law Commission of India endorsed this recommended age, noting the lack of scientific evidence for different marriage ages and emphasizing that reaching the age of majority grants citizens the right to vote, suggesting that the legal marriage age should also be 18. It's imperative to tackle the root causes contributing to India's status as the country with the largest number of child brides globally, accounting for approximately one third of the total³⁵. These include family poverty, societal insecurity, denial of inheritance rights for females, reluctance to educate girls, adherence to societal customs and traditions, and the perpetuation of patriarchal systems.

Despite the existing Act, the government's National Family Health Survey-4 (2015-16)³⁶, estimated that about one in four young women in the country have been married before 18 years of age. The existing PCMA Act lacks effective social mechanisms and sufficient legal remedies. Simply increasing the age of marriage does not address these significant issues and is unlikely to yield the desired outcomes. Despite calls from activists and scholars to declare child marriages void, they remain voidable at the discretion of the underage party, contributing to ongoing challenges with compliance³⁷. Furthermore, the PCMA fails to penalize officers for neglecting their duties, resulting in a lack of accountability and hindrance to social justice for children. The government should implement measures to mandate marriage registration across all states, enabling the collection of precise data regarding early marriages. Although child

³³ Bandita Sahoo, '18 v 21: AN ANALYSIS OF MARRIAGEABLE AGE IN INDIA' [2022] 2(3) Journal of Legal Research and Juridical Sciences 7

³⁴ Ibid

³⁵ Shireen J. Jejeebhoy, Ending Child Marriage in India, Drivers and Strategies (New Delhi, UNICEF) <<https://www.unicef.org/india/media/2556/file/Drivers-strategies-for-ending-childmarriage.pdf>>

³⁶ http://rchiips.org/nfhs/factsheet_nfhs-4.shtml

³⁷ Flavia Agnes, 'Controversy over Age of Consent' (2013) 48(29) Economic and Political Weekly 10,

marriage is deeply ingrained within socio-economic structures, solutions are often sought within legal frameworks. Contemporary efforts must be situated within ongoing structural changes in economic, cultural, and social frameworks³⁸. Thus instead of increasing legal age of marriage age, there is need to improve socio-economic indicators and efforts have to be made that existing laws are implemented effectively so that women can apply their agency freely and achieve equality, liberty and dignity in true sense of terms.

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