

## An Analysis of Government Reforms to Personal Laws

**\*Sudhakar Rolan**

### **Abstract**

A bill proposing to increase the age of marriage for women, and ensuring harmony in the age limit across religions, was introduced in Lok Sabha this week and then referred to a Parliamentary Standing Committee. Both aspects of the proposed amendment to the Prohibition of Child Marriage Act, 2006 have raised a debate on female autonomy and the application of personal laws in marriage.

The amendment proposes three changes. First, the law proposes to increase the minimum age of marriage for a woman. By amending the definition of a "child" in Section 2(a) to mean "a male of a female who has not completed twenty-one years of age", the Bill makes the minimum age of marriage same for both men and women. Currently, it is 18 years for women and 21 for men.

Second, it also increases the window for a "child" to file a petition to declare a child marriage void. Under the law, child marriages, although illegal, are not void but "voidable." A child marriage can be declared null and void by a court when either party to the marriage files a petition under Article 3(4) of the 2006 Prohibition of Child Marriage Act. A "void" marriage, as opposed to a divorce, in legal terms, would be as if the marriage had never taken place in the first place.

"The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority," Section 3(4) currently reads, allowing a woman to file for declaration of the child marriage as void before she turns 20 and for the man before he turns 23. After that, the marriage would be deemed valid and the couple can file for divorce.

The Bill proposes to extend this window for both the woman and the man to five years after attaining majority. Since the age of majority is 18 for both, this would mean that either the man or the woman can file a petition to declare the child marriage void before they turn 23, or until two years after reaching the new minimum age of marriage.

The third, crucial change proposed is the introduction of a "notwithstanding" clause.

This essentially clears the decks for equal application of the Prohibition of Child Marriage Act across religions, notwithstanding any customs.

The key argument in favour of raising the age is in correlation to health and social indices such as infant mortality, maternal mortality, and nutrition levels among mothers and children. However, since

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the age of majority is 18, increasing the age of marriage is viewed as a paternalistic approach by the state in personal matters of an individual.

Additionally, the application of the child marriage law across faiths sets the stage for a debate on the limits of personal law.

In Lok Sabha, ET Mohammed Basheer of the Indian Union Muslim League said the Bill was unconstitutional and was violative of Article 25 of the Constitution, which guarantees the freedom of conscience and free profession, practice and propagation of religion.

Another criticism is that increasing the minimum age of marriage will further push many marriages to the brink of illegality and marginalise vulnerable sections. Since the existing Act does not make child marriage automatically illegal, the increase in minimum age might not really benefit women. It could bring those who aid the marriage of a woman over the age of 18 under the ambit of a law that sanctions imprisonment of up to two years.

The 2006 law is considered a special legislation with a stated objective to prevent child marriages. While special legislation is applied over general law, experts have often pointed out that the Prohibition of Child Marriage Act suffers from a lacuna since it does not explicitly say that the law would trump general law.

Since Muslim law recognises "attaining puberty", which is legally assumed at 15 years, as the minimum age of marriage, it raises questions as to whether the child marriage law can apply to Muslims.

The Statement of Objects and Reasons in the Bill states: "In order to address the issues of women in a holistic manner; as a measure for empowerment of women, gender equality, in creasing the female labour force participation, make them self-reliant and to enable them to

take decisions themselves, the Bill, inter alia, proposes to (i) amend the Prohibition of Child Marriage Act, 2006, to reinforce its application overriding all other existing laws, including any custom, usage or practice govern ing the parties in relation to marriage...."

High Courts have differed in their interpretation of the law. The Karnataka High Court, in a decision in the case of Seema Begaum D/O Khasimsab vs State Of Karnataka (2013), said that "no Indian citizen on the ground of his belonging to a particular religion, can claim immunity from the application of the P.C.M".

In February this year, the Punjab and Haryana High Court granted protection to a Muslim couple (a 17-year-old girl married to a 36-year-old man), holding that theirs was a legal marriage under personal law. The HC examined provisions of the Prohibition of Child Marriage Act but held that since the special law does not override personal laws, Muslim law will prevail.

There are several instances of personal law being replaced with secular law that applies to all religions equally.

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For example, in *Shabana Bano v Imran Khan* (2009), the Supreme Court held that a divorced Muslim woman is entitled to claim the maintenance from her husband under Section 125 of the Criminal Procedure Code even after the expiry of iddat (mourning) period, as long as she does not remarry. Under Muslim law, the award of the maintenance is provided only during the iddat period.

In 1996, the Supreme Court agreed with a Kerala High Court view that even though the Ecclesiastical Court can grant a divorce or nullify a Christian marriage, the Church cannot solemnise a second marriage of a party till the marriage is dissolved by a court.

In *Shayara Bano v Union of India* (2017), the Supreme Court declared the practice of instant triple talaq as unconstitutional although it is provided for under Muslim law.

In a 1960 case, the Supreme Court held that the Transfer of Property Act, 1882 would apply over Muslim law on transfer of property.

The recent move to raise the legal age of marriage for women from 18 years to 21 have maintained that a legal age of marriage has proved to be of little use in curbing child marriages. It is true that the NFHS 5 (2019-2021) found that 23% of girls in the 20-24 years age group were married before they had turned 18, a marginal decrease from the NFHS 4's (2015-16) 27%. That the law set the legal age of marriage at 18 years for women as far back as 1978 would make it seem like having such legislation has been of little use. However, the NFHS 3 had found that 47% of the girls in the 20-24 age group had gotten married before they turned 18-thus, the NFHS-5 finding represents a sharp decline in prevalence of child marriages from merely a decade and a half ago. The National Crime Records Bureau reports 785 'child marriages in 2020, arguably a far smaller number than the true prevalence in a year in which the problem is widely acknowledged to have worsened because of the pandemic's impact on household incomes, girls' education and earning potential, among other factors. It, however, demonstrates that marriage-age legislation has helped, even if marginally, raise societal consciousness. Indeed, a helpline supported by the women and child development ministry received as many as 5,200 calls over child marriage that year.

That said, the government would do well to focus on the substance of some of the scepticism the move has met. Improvement in education and health along with falling poverty are strongly correlated with women exercising autonomy on marrying later. The government may have the best intentions when it says raising the marriage age will benefit women's health, through lower fertility rates, better nutrition, etc; but, these are more a function of the income-group a woman belongs to, her educational attainment, and her autonomy in seeking paid work than higher marriage age. Indeed, if higher marriage age were a better indicator of health, we would have seen lower incidence of anaemia among Indian women as their age of marriage went up; but this isn't so, as Mary E John points out in *The Indian Express*.

The government also needs to keep in mind the old adage about good intentions paving the path to hell when it formulates policies to criminalise participation in marriage under the age of 21 years. The decline in child marriage has been chiefly urban-led-the NFHS 5 found 14% of women urban areas in the 20-24 age group got married before 18 versus 27% in rural areas; the corresponding

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NFHS 4 figures are 23 and 26.8%. This means criminalisation of participation in marriage under 21- other than that of the contracting party (bride or the groom) -would affect the poor more, where health and education of women in any case take a backseat because of low incomes. The government will certainly have to navigate a tricky legislative terrain to ensure the law doesn't exacerbate problems for the poor, but this must be done in the interest of justice.

Another area where intervention can strongly support the vision behind raising the minimum age of marriage for women is raising the labour force participation rate among women, which has been declining. Retreat from paid work means women could get forced into unpaid care work, that too through early marriage. The mean age of marriage for women in India in 2018 was 22.3 years, as Ministry of Statistics and Programme Implementation data published last year shows. So, there is already a voluntary march, most likely led by women themselves, against early marriage. Against this backdrop, the government must get its messaging right on raising the age of marriage.

The move to raise the minimum marriage of women to 21 is aimed towards the empowerment of women, generation, making them self-reliant and "to enable them to take decisions themselves", the government said in the 'Statement of Objects and Reasons' of the bill introduced in Parliament. Union women and child development minister Smriti Irani introduced the Prohibition of Child Marriage (Amendment) Bill in the Lok Sabha and agreed to send it to a standing committee. The government's decision to raise the legal age of marriage for women from 18 to 21 is well intentioned. The Cabinet cleared the move after a task force set up to examine matters of "motherhood, maternal mortality rate and improvement of nutrition" suggested that a change in the minimum age of marriage would help "empower women". But meeting that goal will require much more. It will mean addressing a complex social challenge made of poverty, devalued status of women in society, suspicion of women's sexual choices and lack of girls' access to education and income opportunities. The sharpest dip in the percentage of girls marrying before they turn 18 was seen in the decade between the NFHS-3 (2005-6) and NFHS-4 surveys (2015-16), when it came down from 47.4 per cent to 26.8 per cent, coinciding with an expansion in education opportunities across the board. It has shown a slight improvement in the NFHS-5 survey (2019-21). Nearly a quarter of Indian girls (23 per cent) continue to be married before they turn 18, despite existing legal barriers. Several estimates suggest that over half of Indian women get married before the age of 21; in the poorest communities, that number is much higher. Raising the age of marriage would, therefore, criminalize a large number of marriages, with a disproportionate effect on the most underprivileged groups. There is a clear link between education and delayed marriage. Data shows that women with 12 or more years of schooling marry much later than other women. Think of a 15-year-old girl from an underserved community in rural India. The chances of her staying in school, and going on to study further, go up only if there are more high schools and colleges near her home, if she can access a reliable transport service or stay in hostels; and, finally, if education opens up paths to livelihoods and incomes. Forbidding marriage to 18-year-olds, adults in the eyes of law, could have a special bearing on young people's sexual lives. The policing of young women's sexual choices by natal families is only likely to grow.

While legal reform is essential, care must be taken to ensure that it does not fall into a policy

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approach that sees women as passive recipients or conceives of their well-being only in terms of marriage and motherhood. The soaring aspirations of women in India often run into harsh, limiting realities. They need governments to commit to expanding their opportunities far more urgently than for them to decide when they can marry.

Conclusion: In a necessary move, the Union government has referred the controversial Prohibition of Child Marriage (Amendment) Bill, 2021, to a Standing Committee of Parliament. However, while doing so, the BJP-led NDA claimed that progressive decisions of the government were being stalled. The Bill, if passed, will effectively raise the age at which women can marry from 18 to 21, on par with men. The reason for this endeavour is ostensibly to prevent child marriage and reduce teenage pregnancies. However, there are valid reasons as to why this piece of legislation is unlikely to make any difference to the prevalence of child marriage (a practice that cuts across regions and religions and has increased over the course of the pandemic).

First, the Bill says it will reduce teen pregnancies, ensuring the health and safety of young mothers. However, 18 is effectively the age of consent to sex, with the Protection of Children from Sexual Offences Act defining a child as a person under that age. Does the government believe that the only people in the nation having consensual sex and getting pregnant are married couples? Second, an 18-year-old can drive, vote, drink and consent to sex. Why does a person able to make decisions for the country have to wait three more years to get married? Third, has legislation on marriageable age eradicated child marriages? Of course not. According to the National Family Health Survey-4 (2015-16), about a fourth of women (26.8%) aged 20-24 were married before they turned 18. This fell only marginally to 23.3% in the NFHS-5 (2019-21) despite the 2006 legislation raising a woman's age for marriage to 18.

Yet, in states such as TN, the NFHS-5 showed only 12.8% of women married before they turned 18 while in Kerala, arguably India's most developed state, the figure was just 6.3%. Experts point out that addressing poverty and ensuring education for the girl child are the factors that will actually reduce child marriage and ensure better maternal health. Yet, in the absence of meaningful investments to facilitate these improvements, legislation will only serve to criminalise the families of girls and leave them more vulnerable.

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