

Empowering Women or Curbing Rights?

Increasing the minimum marriage age is not just tokenistic, but harmful.

Madhu Mehra writes:

The Prohibition of Child Marriage (Amendment) Bill, 2021 is flawed on many counts. Rather than provisioning welfare measures to support girls at risk of early marriage, the bill opts for raising the minimum marriage age for girls from 18 to 21 years, overriding family laws to enforce this. The raise in marriage age is presented as a solution for female malnutrition, early school dropout, declining workforce participation, and girls' empowerment. Not only do these claims fail to stand when tested against data, the use of child marriage and allied laws, as well as international standards, but the move portends harm.

Dispelling the correlation between malnutrition and marriage at 18 years, several scholars attribute poor health indicators of young mothers and their infants to poverty, not age. These are unlikely to change for women at 21 years, if they remain poor. Delaying marriage cannot compensate for poverty, gaps in food security, and public health services, all of which must be addressed independently.

Likewise, claims that marriage at 18 years results in women's "disadvantageous position in regard to higher education, vocational instruction, ..." are unfounded. The National Family Health Survey (NFHS)-4 lists poor quality and high cost of education as causes of early dropout of girls. Other causes include the burden of unpaid housework, lack of hygienic toilets and sanitary napkins, sexual harassment, and apprehensions of premarital sex. The right to education does not cover primary or secondary schooling in India—a gap—which, along with the reasons for early dropout of girls, must be addressed.

Child marriage is declining with a corresponding rise in the median age of marriage for girls. The percentage of women in the age group of 20–24 who married below the age of 18 dropped from 27% to 23% from the NFHS-4 (2015–16) to NFHS-5 (2019–21), respectively. This decline cannot be attributed to the law, which has existed since 1929, even as the practice continues. Although Karnataka declared child marriages void, the practice reportedly continues and spiked during the pandemic. The decline has occurred on account of an expanding aspirational middle class, their access to education, and higher standard of living and opportunities. Early marriage in India is a facet of early onset of adulthood in conditions of poverty.

Raising the minimum marriage age will be harmful and contrary to the best interests of girls and women. A series of three studies by Partners for Law in Development (PLD) shows that legal prosecutions against forced/arranged underage marriages are risk-laden for the girl and the social workers, who opt instead for negotiation with the families, often not always, successfully; their study of district and high court child marriage cases from 2008–17 corroborates this. Two-thirds of legal prosecutions are initiated by parents of girls against elopements, whereas one-third involve annulments or injunctions relating to arranged marriages. Forced marriages rarely, if ever, encounter courts, with girls lacking legal access.

The raise in marriage age will extend the period of such selective prosecutions while rendering young women under 21 years voiceless in their life decisions. In the last decade, the law has diverged between infantilising and criminalising adolescent sexuality. The Protection of Children from Sexual Offences (POCSO) Act, 2012 denies sexual consent until they are 18, including within non-coercive relationships between adolescent peers, exposing male partners to statutory rape charges that attract a minimum 10-year sentence and confinement of girls in shelter homes. In 2017, the Supreme Court extended the statutory rape charges to underage marital relations, irrespective of consent, and the 2021 draft Uttar Pradesh child marriage rules propose mandatory charges under POCSO for child marriage cases.

POCSO's wide ambit of criminalisation requires health providers to report underage patients seeking sexual and reproductive health services to the police. The resulting prosecutions of consenting minors not only obstruct timely justice delivery for sexual abuse cases, but also push girls towards unsafe services.

To gauge the extent of criminalisation, it is necessary to look beyond the weak implementation of the Prohibition of Child Marriage Act, as the bulk of prosecutions occur under the penal code for kidnapping for purposes of marriage. This will magnify for girls between 18 and 21 years, if the marriage age is raised.

India fails to meet the standards of the Convention on the Rights of the Child (CRC) in respect of adolescent sexuality. Aligning the best interests of adolescents with their developmental stage, evolving capacities, and their right to participate, and be heard in matters affecting their lives, the General Comment No 20 (CRC) emphasises on differentiating between the rights of adolescents from that of younger children, while calling for decriminalising adolescent sexuality and provisioning comprehensive sexual and reproductive health information and services.

The CRC prescribes minimum age thresholds to allow the adolescents' staggered entry into adult activities, with a corresponding obligation to develop capacities and provide support services. Accordingly, the minimum age of marriage must correspond to adulthood, as its purpose is only to set a bar below which marriages may be prosecuted. The current debate erroneously conflates the minimum age with the ideal age of marriage, when the latter is not for the state to decide. The right to marry, like the right to vote and enter into contract at 18, are shaped by individual circumstance and capacity. Girls and women should not be forced to marry early, or indeed compulsorily, at any age. This shift can come by making available welfare measures for girls from populations vulnerable to early marriage rather than through punitive laws that limit the rights of young women.

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