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REVIEW ARTICLE

## Legislative provisions related to marriage and divorce of persons with mental health problems: a global review

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### ABSTRACT

Realization of right to marry by a person is an exercise of personal liberty, even if concepts of marriage and expectations from such commitment vary across cultures and societies. Once married, if an individual develops mental illness the legal system often starts to discriminate against the individual. There is no doubt that every individual's right to marry or remain married is regulated by their country's family codes, civil codes, marriage laws, or divorce laws. Historically mental health condition of a spouse or intending spouse has been of interest to lawmakers in a number of ways from facilitating divorce to helping the individual with mental illness. There is no doubt that there are deeply ingrained stereotypes that persons with mental health problems lack capacity to consent and, therefore, cannot enter into a marital contract of their own free will. These assumptions lead to discrimination both in practice and in law. Furthermore, the probability of mental illness being genetically transmitted and passed on to offspring adds yet another dimension of discrimination. Thus, the system may also raise questions about the ability of persons with mental health problems to care, nurture, and support a family and children. Internationally, rights to marry, the right to remain married, and dissolution of marriage have been enshrined in several human rights instruments. Domestic laws were studied in 193 countries to explore whether laws affected the rights of people with mental illness with respect to marriage; it was found that 37% of countries explicitly prohibit marriage by persons with mental health problems. In 11% (21 countries) the presence of mental health problems can render a marriage void or can be considered grounds for nullity of marriage. Thus, in many countries basic human rights related to marriage are being flouted.

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### Introduction

Marriage is one of the oldest institutions and in many cultures there is almost universal expectation that individuals will get married in order to procreate and bring the family up together as a unit. Depending upon whether the individuals are from ego-centric societies or socio-centric societies or from sex-positive or sex-negative societies their own expectations from marriage will differ from those of the society. Marriage of people with mental illness or those developing mental illness once married has specific connotations. Another variable in the role of the marriage

is related to gender. In many cultures women will be expected to marry according to gender roles and gender role expectations. Combined with mental illness this may create double jeopardy against women with mental illness and discriminate against them further.

Marriage provides a wider continuum for social attachment (Ross, 1995) and fosters emotional and physical well-being of the partners (Ross, Mirowsky, & Goldsteen, 1990; Simon, 2002). Marriage improves economic well-being of families, especially women (Lerman, 2002), and gives equal access to wider financial security benefits (Tebbe & Widiss, 2010).

'Married' status is associated with greater longevity, whereas unmarried, divorced, or widowed people, especially men, have higher mortality rates (Hu & Goldman, 1990). Divorced or separated persons have higher risk of suicide (Kposowa, 2000). Disruption in marital status of parents negatively affects overall psychological well-being and academic performance of children (Amato, 2001; Sun & Li, 2002).

Realization of the right to marry by a person is an exercise of personal liberty. Every individual's right to marry or remain married is regulated by his or her country's family codes, civil codes, marriage laws, or divorce laws. However, social expectations also play a role. For example, in some countries parents want to get their children with mental illness married off to ensure there is a care-giver after the parents are no more, and there is the assumption that marriage can cure mental illness. Historically, the mental health condition of a spouse or intending spouse has been of interest to lawmakers. Laws of many countries have considered conditions of unsound mind or insanity as lawful grounds for either not permitting marriage or annulling or dissolving nuptial ties (Ali, 2013; Hasson, 2009; McCurdy, 1943; Pathare, Nardodkar, Shields, Bunders, & Sagade, 2015; Reddy, 1995). In many countries, marriages of 'idiots' or 'lunatics' have been recognized as unlawful (Matloff, 2009; Nambi, 2005). This approach is based on stereotypes that persons with mental health problems lack the capacity to consent and, therefore, cannot enter into a marital contract of their own free will. Other possible reasons for prohibiting marriage of persons with mental health problems include concerns about inheritability of mental illness in the off-spring of such a marital union and questions about the ability of persons with mental health problems to care for, nurture, and support a family and children.

Internationally, rights to marry, right to remain married, and dissolution of marriage have been enshrined in several human rights instruments. These include Article 16 of the Universal Declaration of Human Rights (UN General Assembly, 1948) and Article 10 of the International Covenant on Economic, Social and Cultural Rights (UN General Assembly, 1966) (ICESCR). For persons with mental disabilities, provisions of Art. 23.1(a) of the United Nations Convention on the Rights of Persons with Disabilities (UN General Assembly, 2007) (CRPD) explicitly state that the State Parties (countries) shall ensure 'The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the

intending spouses is recognized'. State Parties (countries) are also required to take 'effective and appropriate measures to eliminate discrimination against persons with disabilities' in relation to protection of right to marry and found a family. In the context of Art. 4 (b) of CRPD, these effective and appropriate measures include legislative measures 'including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. Taken together, these obligations require Member States to bring their marriage regulating laws in line with the principles of CRPD, so that persons with mental health problems or disabilities can marry on the basis of free and full consent of the intending spouses.

We reviewed marriage and divorce laws of United Nations Member States to examine how national laws regulated marital issues for persons with mental health problems and to examine adherence of national laws with international human rights obligations.

### Aims

To marry, remain married, and protection against dissolution of marriage on the basis of mental health problems are integral in exercise of 'right to marry', as described in Article 23.1(a) of CRPD. The aim of this study was to find out whether national laws curtailed rights of persons with mental health problems to marry and remain married.

### Objectives

The objectives of the study were to evaluate provisions of laws to examine if presence of mental health problems rendered persons being considered unfit for marriage, or rendered marriage as void or voidable, or rendered marriage as dissolvable.

### Methodology

We obtained copies of Family Codes, Civil Codes, Marriage and Divorce Laws, of 193 UN Member States from various databases including LandWise (<http://landwise.resourceequity.org/>), NATLEX of International Labour Organization (<http://www.ilo.org/dyn/natlex>), and World Intellectual Property Organization (<http://www.wipo.int/portal/en/index.html>). For federal countries, we analysed laws of most populous state as a representative state of that country. When pertinent legislation was not found, we extended our search to non-codified sources like academic papers, books, university reports, and government's reports. For non-English versions of laws,

we used available authoritative translations. In other cases, we used Google Translate to translate key terms and pertinent provisions of the laws. We identified provisions of marriage, divorce, capacity, and mental health conditions, and other family relations using the following keywords: *mental, unsound, mind, insane, sane, mad, cognitive, intelligence, infirm, imbecile, dementia, demented, full reason, deficient, derangement, disturbed, defect, capacity, incapable, ability, disability, disorder, disease, illness, disturbance, handicap, health, fitness, sickness, capacity, lunatic, family, impediments, requirements, curable*, etc.

For marriage and annulment provisions, we searched key words or a combination of key words including: *marry, at the time of marriage, void, voidable, divorce*.

For systematic comparisons of laws, we used World Bank Classification of income status of the countries, and Member States' ratification status of ICESCR and CRPD as mentioned in the United Nations Treaty Collection.

## Results

Our search revealed that the right to marry and remain in the marriage was codified in a diverse set of laws including civil marriage and divorce laws; civil codes, civil and commercial code; transitional civil codes, family code, code of persons and family, family and guardianship codes; birth, deaths and marriage registration laws; personal laws, laws regulating contraction and dissolution of marriage, personal status laws, domestic/family relations laws, ordinances, and in some countries, in a women's charter of rights.

### Section A: analysis of provisions of laws covering void and voidable marriages

We found that laws in only 30% (58 countries) do not impose any restrictions on the eligibility of persons with mental health problems to enter into marriage (See Table 1). In 37% (71 countries) laws explicitly prohibit marriage by persons with mental health problems. In 11% (21 countries) the presence of mental health problems can render a marriage void or can be considered grounds for nullity of marriage. In 6% (11 countries) persons with mental health problems are allowed to marry subject to approval from others. Of these 11 countries, four countries allow marriage with permission from the appropriate Court or Family Council, in four countries persons with mental health conditions may marry subject to consent from a parent, guardian, or custodian, and in two countries

**Table 1.** Overall status of 193 countries on right to marry and persons with mental illness.

Overall frequencies	(n = 193)
No restriction on marriage by persons with mental health problems	58 (30%)
Persons with mental health problems barred from getting married	71 (37%)
Persons with mental health problems allowed to get married on certain conditions	11 (6%)
Mental health problem rendering marriage void/being a ground for nullity (see Table 2)	21 (11%)
Marriages governed by Sharia	12 (6%)
Law not found	18 (9%)
Not clear	2 (1%)

**Table 2.** Conditions permitting marriage of persons with mental health problems.

Overall frequencies (n = 11 countries)	n
Marriage allowed if the person has capacity to understand	1 (9%)
Marriage allowed subject to Courts/family council's permission	4 (36%)
Marriage allowed subject to Parent's/guardian's/custodian's consent	4 (36%)
Marriage allowed subject to Doctor's/institution's opinion	2 (18%)

marriage is only permitted subject to approval from an expert or an institution (see Table 2).

### Economic status of the countries and right to marry

There are no significant differences between countries based on their economic status. Our review revealed no restriction on right to marriage of persons with mental health problems in 10 countries (33%) from the lower income group and 18 countries (31%) from the high income group. Similarly, laws of nearly 30% (n = 9) of countries from the low income group, 42% (n = 22) from the higher-middle income group, and 36% (n = 21) from the high income group prohibited persons with mental health problem from marriage (See Table 3).

We also found that laws frequently use non-scientific, derogatory, and archaic terminology to describe persons with mental health problems. Such terms include: no sufficient use of reason, unable to reason, unsoundness of mind, dementia, demented, insanity, not being sane, mental illness/disorder/disease/disability/handicap, temporary or permanent mental disorder, disturbance of mental activity, mentally disturbed, mental disturbance, mental defect, mentally unfit, incapable of judging, imbecility, deficient mental health, absence of sound mind, diminished in intelligence, demented, not gone mad, mad man, psychologically incapacitated, mental derangement, mentally deranged, and infirmity of mind.

Despite binding obligations under international treaties, 40% (n = 63) of countries that have ratified the ICESCR and 41% (n = 64) of countries that have

**Table 3.** Income level of the countries (World Bank classification) and right to marry for persons with mental illness.

Conditions	Low income ( <i>n</i> = 30)	Lower middle income ( <i>n</i> = 50)	Upper middle income ( <i>n</i> = 53)	Higher income ( <i>n</i> = 59)
No restriction on marriage by persons with mental health problems	10 (33%)	13 (26%)	16 (30%)	18 (31%)
Persons with mental health problems barred from marriage/marriage not recognized by law	9 (30%)	19 (38%)	22 (42%)	21 (36%)
Persons with mental health problems allowed to marry on certain conditions	1 (3%)	2 (4%)	3 (6%)	5 (8%)
Mental health problem rendering marriage void/being a ground for nullity	3 (10%)	7 (14%)	4 (8%)	7 (12%)
Marriages governed by Sharia Law not found	0 (0%)	5 (10%)	3 (6%)	4 (7%)
Unclear	7 (23%)	3 (6%)	4 (8%)	4 (7%)
		1 (2%)	1 (2%)	

**Table 4.** Ratification status by country and right to marry for persons with mental illness.

Conditions	Ratified ICESCR ( <i>n</i> = 157)	Ratified CRPD ( <i>n</i> = 157)
No restriction on marriage by persons with mental health problems	45 (29%)	44 (28%)
Persons with mental health problems barred from marriage/marriage not recognized by law	63 (40%)	64 (41%)
Persons with mental health problems allowed to marry on certain conditions	10 (6%)	10 (6%)
Mental health problem rendering marriage void/being a ground for nullity	16 (10%)	19 (12%)
Marriages governed by Sharia Law not found	9 (6%)	12 (8%)
Unclear	12 (8%)	6 (4%)
	2 (1%)	2 (1%)

**Table 5.** Overall status of 193 countries on mental illness as a ground for divorce.

Overall frequencies ( <i>n</i> = 193 countries)	<i>n</i>
Mental illness is a ground for divorce	23 (12%)
Mental illness not a ground for divorce	121 (63%)
Mental illness of 3–5 years of illness/incurability as a ground for divorce	8 (4%)
Marriages governed by Sharia Law not found	11 (6%)
	30 (16%)

ratified the CRPD prohibit marriage by persons with mental health problems (See Table 4).

### Section B: analysis of provisions of laws covering dissolution of marriages

We found in 63% (*n* = 121) of countries that laws offer some protection to persons with mental health problems by not listing mental health problems as a lawful ground for divorce. Twelve per cent (*n* = 23) of country laws allow mental illness (of any severity or duration) in a spouse as a ground for divorce, while, in 4% (*n* = 8) of countries, long duration (3–5 years) and/or ‘incurability’ of mental illness was allowed as grounds for divorce (See Table 5).

Low middle income countries were most likely to allow divorce on the grounds of mental illness (24% as compared to 6–10% in other income groups) (See Table 6).

Eleven per cent (*n* = 17) and 12% (*n* = 19) of countries that have ratified the ICESCR and CRPD,

respectively, allowed mental illness of a spouse as a valid ground for divorce. Another 4% of countries that have ratified the ICESCR and CRPD allowed divorce on the grounds of long duration of mental illness or incurability of mental illness (See Table 7).

## Discussion

We believe this is the first study to present a comprehensive review of laws of all UN Member countries regulating marriage and divorce of persons with mental health problems. Findings of the study give a global perspective on provisions of marriage, annulment, and divorce of persons with mental health problems. Our findings highlight the important issue that discrimination against people with mental illness is rife in many countries. The likelihood of getting divorce on grounds of mental illness is another major problem. This may be used in domestic disputes to find an easy solution, thus isolating and discriminating further against individuals with mental illness.

### Discriminatory marriage laws foster stigma of mental illness and prevent social integration

In many societies from Africa and Asia, married couples are treated with dignity and respect; whereas annulment or dissolution of marriage carries profound stigma (Arugu, 2014; Dommaraju & Jones, 2011). Society holds ‘disapproving and devaluing attitudes’ towards those who are divorced because of

**Table 6.** Income status: mental illness as a ground for divorce.

Conditions	Low income (n = 30)	Lower middle income (n = 50)	Upper middle income (n = 53)	Higher income (n = 59)
Mental illness is a ground for divorce	2 (7%)	12 (24%)	3 (6%)	6 (10%)
Mental illness not a ground for divorce	19 (63%)	25 (50%)	34 (64%)	42 (71%)
Mental illness of 3–5 years of illness/incurability as a ground for divorce	0 (0%)	2 (4%)	5 (9%)	1 (2%)
Marriages governed by Sharia Law not found	1 (3%) 8 (27%)	4 (8%) 7 (14%)	2 (4%) 9 (17%)	4 (7%) 6 (10%)

**Table 7.** Ratification status and mental illness as grounds for divorce.

Conditions	Ratified ICESCR (n = 157)	Ratified CRPD (n = 157)
Mental illness is a ground for divorce	17 (11%)	19 (12%)
Mental illness not a ground for divorce	102 (65%)	102 (65%)
Mental illness of 3–5 years of illness/incurability as a ground for divorce	7 (4%)	7 (4%)
Marriages governed by Sharia	8 (5%)	11 (7%)
Law not found	23 (15%)	8 (5%)

mental illness (Lauber & Rössler, 2007). Marriage laws further consolidate the stigma of divorce due to mental illness. In such cases, a Court order is a confirmation that concerned person's mental illness is incurable and it is unreasonable to expect another person to stay with the person with mental health problems. Furthermore, such orders are likely to reduce future chances of remarriage of the person with mental health problems.

There is some evidence that women and their family members are more likely to be ridiculed by society if nuptial ties are broken due to the woman's mental illness. In India, Thara, Kamath, and Kumar (2003a) found that women and family members experience extreme stigma and higher distress levels due to divorce because of mental illness than due to mental illness alone. These women and their children often lose access to financial and social securities that come along with the marriage (Thara, Kamath, & Kumar, 2003b). Family members who take care of these female patients find it burdening and exhausting. In such cases, if symptoms of mental illness are acute and there is little psychiatric help available, their families may even be forced to relocate. These families often express their burn-out saying 'Her death will be our only relief' (Thara et al., 2003a). One may argue that lack of social structures, including mental health-care within the community, and dearth of academic and economic empowerment policies of women with mental illness also contribute to social exclusion as much as legal provisions of divorce on the basis of mental illness. Marriage laws, however, institutionalize the stigma of mental health problems and lead to downstream violation of multiple human rights, particularly for women with mental health problems.

### *Provisions of marriage laws differentially impact men and women*

Although provisions in the law regulating annulment or divorce on the basis of mental health problems are gender-neutral in most countries, in practice these provisions have differential negative effects for women, as shown in studies from some countries. Pathare et al. (2015) have shown that over a 20 years' period, in 85% of cases it was husbands who sought divorce on the grounds of mental illness. Surprisingly, in 14% of the cases, relief was granted ex-parte, meaning the woman was neither present nor represented in these cases in Court. The poor financial status of women, lack of emotional and practical support for women from their natal families and stigma associated with divorce means few, if any, women are likely to go to Court asking for a dissolution of marriage on grounds of their husbands' mental health problems. In the case of uncodified personal laws, Mashhour (2005) argues that the patriarchal nature of many countries, and not religion, has led to 'deterioration of women's rights'. Divorce is one area where masculinity has dominated over the years (Shahidian, 2002, p. 56). Patriarchal nature of the society and institutionalization of persons with mental health problems pose most common risks for misuse of annulment and divorce laws.

### *Presumptions of annulment or divorce provisions appear to be based on stereotypes rather than any concrete evidence of the inability to perform matrimonial duties*

Use of non-standardized terms to describe mental health conditions typically denotes stereotypes

associated with status approach. While decision-making capacity is task-specific, ill-defined terms such as 'unable to reason' and 'unsound mind' are likely to be equated with mental health condition. For example, the Supreme Court in India has interpreted 'unsound mind' to mean 'mental illness' (Hari Singh Gond vs State of MP, 2008), although there is no specific definition of 'unsound mind' in any Indian legislation. In this regard, the Committee on the Rights of Persons with Disabilities (2014) has expressly stated in General Comment No. 1 that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'. Moreover, use of terms like 'madman', 'demented', or 'deranged' perpetuate stigma of mental illness. Thus, laws which invalidate consent of persons with mental health problems by provisions of void or voidable marriage need to be amended and brought in line with CRPD. Laws in some require an expert such as a psychiatrist to decide whether a person with mental health problems can perform and fulfil duties in a marriage. Lack of procedural protections is likely to lead to misuse of these provisions against women (Pathare et al., 2015).

It is evident from the results of this study that law makers and policy-makers in many countries urgently need to remove legal barriers to marriage of persons with mental health problems to ensure that non-discrimination as enshrined in ICESCR and CRPD is supported in national legislation.

### **Unobstructed right to marry and supported decision-making**

An often asked question is how legislation can provide procedural support to persons with mental health problems when they have to make major life decisions. The supported-decision-making model as promoted in the CRPD provides a way to ensure that assistance is provided to persons with mental health problems to enable them to realize their rights based on their will and preferences including the decision to enter into marriage.

Over the past decades, the world has gradually moved away from the notion of disallowing or invalidating marriage or allowing divorce on the grounds of a health problem of a particular spouse; for example, epilepsy, leprosy, and HIV/AIDS. It is time we adopt a similar principle for mental illness so that mental health problems by themselves cannot be considered as legitimate cause to either prevent marriage or enable divorce. Further research in this area may explore and address legal barriers in accessing maintenance as a remedial measure in the cases involving

mental illness as a ground for annulment or dissolution of marriage.

### **Limitations**

We did not review subsidiary legislation such as rules and regulations, disability and women empowerment policies or national programmes, or case law framed under the family codes, and marriage laws in this study. Such subsidiary legislation, programme, or case law may contain important provisions pertaining to rights of persons with mental disabilities and may have been missed in this study. We also did not look for or examine draft bills because a final version of legislation that would be approved may differ from the current bill. We were unable to find laws pertaining to marriage in 10% of countries and legal provisions for divorce in 16% of countries. We do not, however, feel that this missing data significantly impacts our findings. Sharia law is uncodified and is interpreted variously in different countries. Hence we were unable to analyse provisions of Sharia law. Variations in the definition of mental illness and equation with mental disability, mental disorder, and insanity, as well as various other terms may have a further emphasis on the legal aspects of marriage.

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