Indian marriage laws and mental disorders: Is it necessary to amend the legal provisions?

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Marriage has been, since ancient times, one of the most important social institutions in all societies and it forms the basis of civilization and social structure. Marriage is said to be a contractual agreement that formalizes and stabilizes the social relationship which comprise the family.[4] The anthropological handbook “Notes and Queries (1951)” defined marriage as “a union between a man and a woman such that children born to the woman are the recognized legitimate offspring of both partners.”[5] Leach offered a list of 10 rights associated with marriage, with specific rights differing across cultures, which are:

- To establish a legal father of a woman’s children
- To establish a legal mother of a man’s children
- To give the husband a monopoly in the wife’s sexuality
- To give the wife a monopoly in the husband’s sexuality
- To give the husband partial or monopolistic rights to the wife’s domestic and other labor services
- To give the woman partial or monopolistic rights to the husband’s domestic and other labor services
- To give the husband partial or total control over property belonging or potentially accruing to the wife
- To give the wife partial or total control over property belonging or potentially accruing to the husband
- To establish a joint fund of property—a partnership—for the benefit of the children of the marriage
- To establish a socially significant “relationship of affinity” between the husband and the wife’s brother.[3]

In our country, marriage is regarded as an important and sacrosanct event in an individual’s life, and everyone is supposed to get married and have a family so that he can continue his progeny. Marriage is essential not only for begetting a son to discharge his debt to the ancestors but also for performance of other religious and spiritual duties. For every persons, who has a daughter, marrying off their life savings, take loans or dispose of their immovable properties to arrange substantial dowry to marry off their daughters.[5] Divorce is not generally acceptable in our society. After marriage, there is even a stronger social and moral compulsion to continue the relationship despite facing difficulties/problems in the marriage.[4]

**LEGISLATION**

Major mental disorders are listed both as preconditions of marriage and as grounds for divorce. Under Hindu Marriage Act, 1955, conditions in respect to mental disorders (Section 5(iii)), which must be met before the marriage is solemnized, are as follows:

- Neither party is incapable of giving a valid consent as a consequence of unsoundness of mind
- Even if capable of giving consent must not suffer from mental disorders of such a kind or to such an extent as to be unfit for marriage and the procreation of children
- Must not suffer from recurrent attacks of insanity.

It is pertinent to point out that the original provision was “neither party is an idiot or a lunatic,” which was changed to the present provision by Marriage Laws (Amendment) Act, 1976. “Recurrent attacks of epilepsy” was also a disqualification for marriage, which was removed by the Marriage Laws (Amendment) Act, 1999. Supreme Court observed that to brand the wife as unfit for marriage and procreation of children on account of the mental disorder, it needs to be established that the ailment suffered by her is of such a kind or such an extent that it is impossible for her to lead a normal married life (R. Lakshmi Narayan vs. Santhi, AIR 2001 SC 21 10).[6]

Marriages in contravention to the provision with respect to mental disorders come under voidable category. Voidable marriages (Section 12) are those which may be annulled by a decree of nullity on the given grounds but may continue to be legal until the time it is annulled by a competent court.

According to the Section 13 of the Act, divorce or judicial separation can be obtained if the person has been “incurably of unsound mind,” or has been suffering continuously or
intermittently from “mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.” The expression “mental disorder” means mental illness, arrested, or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression “psychopathic disorder” means a persistent disorder or disability of the mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment. In Sharda versus Dharmapaul (2003, 4 SCC 493), Supreme Court held that each case of schizophrenia has to be considered on its own merits. The medical evidence regarding the requisite degree of mental disorder is relevant though not conclusive. Supreme Court also observed that when there was sufficient evidence for the court to conclude that the slight mental disorder of the wife was not of such a kind and to such an extent that the husband could not reasonably be expected to live with her, divorce could not be granted (A.I.R., 1982 CAL 138). These judgments are significant because of the importance given to the effects and the impact rather that to the mere labeling of mental illness.

The Special Marriage Act, 1954, is meant for any person in India and Indian nationals abroad, irrespective of the faith that the individual may profess. A marriage solemnized in any other form can be registered under this Act. The Section 4(a) of the Act has provisions identical to the Section 5(iii) of Hindu Marriage Act as conditions for solemnizing marriage. Similarly, Section 27 lists identical provisions in respect to ground for divorce as in Section 13 of the Hindu Marriage Act.[7,8]

Under the Muslim Law, marriage is regarded as a contract. A Muslim who is of sound mind and has attained puberty is qualified to marry. In cases involving a person of unsound mind, if the guardian of the person concerned considers such marriage to be in the interest of society and is willing to take up all the monetary obligations of the marriage, such marriages can be performed. Divorce (Talaq) has to be for a reasonable cause and must be preceded by attempts for reconciliations by two arbiters. A woman can obtain a decree of divorce under “The Dissolution of Muslim Marriage Act, 1959”, if her husband has been insane for 2 years. Under Christian Law, marriage is voidable if either party is a lunatic or idiot. Christians can obtain divorce under Indian Divorce Act 1869 (as amended in 2001) on grounds of unsoundness of mind provided: (i) It must be incurable (ii) it must be present for at least 2 years immediately preceding the petition. Divorce is not admissible on ground of mental illness under the Parsi Marriage and Divorce Act, 1936. However, divorce can be obtained if the defendant, at the time of marriage was of unsound mind, provided the plaintiff was ignorant of the fact and the defendant has been of unsound mind for 2 years upward and immediately preceding the application.[9]

MARRIAGE, MENTAL DISORDERS, AND WOMEN

In Indian context, women suffer the most on account of mental disorders. When major disorders occur in young girls, parents are worried about her marriage. Lack of awareness and the widespread belief that marriage is a panacea for all evils prompt some parents to get their daughters married even when they are symptomatic.[3] However, when facts come out, a grave situation of mutual distrust, animosity, and hostility occurs. Women suffering from major mental disorders, whether developed before or after the marriage are often abandoned by their husbands and his family. As a result, lives of these women are shattered beyond repair and almost all these women now come to live with her parents, many of whom are already aged.[9] These women face immense hardships and are left to fend for themselves with few options open. They are ostracized on three counts, namely female status, having severe mental disorder, and the marital status of divorced/separated. Thus, the woman has to face the “triple tragedy.”[9] Divorced/separated women with major mental disorders become unwanted persons everywhere, and their plight becomes quite pitiable. Things are not so grave for male persons in Indian context. If a man with major mental disorder is married by concealing the fact, the woman in most of the cases has to reconcile with the situation and is burdened with taking care of her husband and sometimes has to be the breadwinner for the family. The stigma of being separated/divorced was more often more acutely felt by families and patients than the stigma of mental illness per se.[10]

WHY AMENDMENT IS NECESSARY

Time has considerably changed since the marriage laws were framed. Effective treatment of all types of mental disorders is now available. Therefore, it is felt that it is high time that all the phrases indicating mental disorder and reference to mental disorders should be removed from the Hindu Marriage Act and the Special Marriage Act. The reason for this is summarized as below:

- The first ground of disability to marry is the incapability to give valid consent in consequence of unsoundness of mind. If the valid consent is considered necessary in marriage, why single out only the unsoundness of mind. The incapability due to any reason must be considered a disability. The reference to “unsoundness of mind” is quite unnecessary as it stigmatizes the mental disorders. It must be pointed out that most persons with major mental disorders are able to give their consent except when they have acute symptoms. Moreover, in Hindu rituals of marriage, in most of the cases, consent is hardly taken from the girl at any stage of marriage. In such cases, it is actually the proxy
The second point is “mental disorders of such a kind or to such an extent as to be unfit for marriage.” It is quite a vague term and difficult to decide how the person with mental disorder is unfit for marriage. There are many physical illnesses also which are quite disabling and on account of these the person may be considered unfit for marriage. However, these are not listed under the condition of disability. Hence, why is there discrimination against mental disorders? Incurability of mental disorders is emphasized as a main factor of its inclusion in the list. However, with advancement in the field of psychiatry, it is now possible to treat almost all cases of mental disorders and almost all persons with mental disorders, except a tiny fraction, are able to lead normal life. Therefore, it is quite unreasonable and discriminatory to consider mental disorders as a disability to marriage.

The third point is unfitness to procreation of a child. Disorders of procreation of children are a complex subject which involves not only some psychological disorders but also many gynecological, genitourinary, endocriinal, and neurological disorders. When the contribution for this unfitness by mental disorders is only a fraction, why should only mental disorders be included as disability omitting many physical illnesses? It is worth mentioning that sterility is not a ground for divorce under Section 13 of the Hindu Marriage Act. Therefore, it is unreasonable to put restriction on inability of procreation of child only due to mental disorders.

Recurrent attacks of insanity is a ground for nullity of marriage. It must be mentioned that the word insanity is now not used medically, though still in vogue in legal parlance. Recurrent attacks assume remissions and relapses and lucid intervals. In the field of psychiatry, mood disorders are the most common variety of such recurrent nature. The extent of mood disorders ranges from mild spells of sadness to severe psychotic episodes. However, these disorders are potentially curable, and almost all patients of mood disorders are able to lead a normal life. The course of schizophrenia is also characterized by remission and relapse. However, the course and prognosis of schizophrenia have considerably improved, and most of them are able to live a normal life. Therefore, there is no sense of including these in condition of disability to marry. The inclusion of insanity under the list results in further stigmatization of mental disorders.

Previously, the reference was to recurrent attack of insanity and epilepsy. Epilepsy was removed from this list by an Act of Parliament in the year 1999. During the debate on the concerned Bill, it was pointed out that it is inhuman to equate epilepsy and insanity together as 80% of the cases of epilepsy are treatable. However, it is forgotten that even greater percentage of the cases of mental disorders are treatable, and patients are able to live a normal life with proper treatment. If it is considered inhuman to consider epilepsy as a disability in case of marriage, the same yardstick should also apply to mental disorders and it is highly unfortunate that “insanity” continues to be a disability to marry.

“Mental disorder” is a general term and includes many disorders ranging from minor anxiety disorders to major disorders such as schizophrenia. The course of prognosis of all is quite variable. Including the general term of mental disorder frequently causes problem to those suffering from minor disorders of anxiety or depression. If animosity develops between the parties, attempts are made to frame any type of psychiatric treatment as a ground for divorce. It causes hardship for the person having minor psychiatric ailments and seeking psychiatric treatment remains stigmatizing. Parents frequently shy away from consulting psychiatrists for their daughters with minor or major psychiatric disorders though the girl might be having a potentially curable psychiatric problem. A host of psychiatric disorders such as recurrent depression, dysthymia, conversion disorders, and obsessive compulsive disorders are frequently made the ground for divorce. The government as well as the society has a duty to take steps for reducing stigma attached to the mental disorders. Therefore, it is necessary to remove mental disorders from the list of disability to marry.

In the condition of divorce/judicial separation, there is mention of “incurably of unsound mind.” The first point is that most of the mental disorders are now curable. The second point is that anyone may also acquire a physical illness whether before or after the marriage, which may be incurable and the person so afflicted may be unable to live a normal conjugal life. However, no illness other than “incurably of unsound mind,” leprosy, and venereal diseases is listed under the ground for divorce/judicial separation. Thus, the provision is quite discriminatory for persons with mental disorders, and it denies them the right to remain married.

Other ground for divorce is the “person has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.” It is pertinent to note that the disability under Section 5 was “of such a kind or to such an extent.” However, here it is “of such a kind and to such an extent.” Therefore, should be understood that the ground for divorce should a severe mental disorder with a severe degree of disability. There may be host of reasons, other than mental disorders, due to which a person cannot be expected to reasonably live with the other person. Making only mental disorders as a...
ground for divorce is very unfortunate. It burdens the
person affected with mental disorders with unnecessary
stigma, and they are hesitant to seek psychiatric
treatment. Stigma of having mental disorders proves to
be a major hazard to them
• All persons with mental disorders have a right to marry
and live with dignity. Putting legal restriction on this
right is discriminatory. The real problem is negative
attitude of the society, and the stigma attached to
mental disorders. Many persons with mental illnesses
perform better than those without such disorders.
Marriage is one of the important support systems
for many persons with mental disorders and being
unmarried or getting divorced/separated denies them
this support. Siblings of persons with mental disorders
hardly support them
• The UN Convention on the Rights of Persons with
Disabilities (UNCRPD), 2006, has been signed and
ratified by India. The purpose of UNCRPD is to promote,
protect, and ensure the full and equal enjoyment
of all human rights and fundamental freedoms by all
persons with disabilities and to promote respect for
their inherent dignity.[11] Mental illness comes under
the categories of disability under the UNCRPD. Right
to marry may be regarded as a basic human right. Thus,
denying the persons with mental disorders the right to
marry is not in accordance to the UNCRPD.

CONCEALMENT OF FACT

The fact of mental illness, especially in cases of girls,
is frequently concealed at the time of marriage. This is
largely due to the fear that disclosure will not only lead
to rejection of the girl, but the canvassing of the fact
in the marriage market would be extremely detrimental
and would prevent her from getting a suitable match.[8]
Parties do not convey all the facts about the prospective bride,
or the groom and concealment of every fact about the
person is not considered fraud. It has been advocated that
an express provision should be made in the statute to the
effect that a past history of mental illness would be no bar
to marriage and failure to disclose such history or the fact
of treatment would not amount to suppression of material
fact.[11] However, in the author’s opinion, if all reference
to mental disorders is removed from the condition of disability
of marriage and from the grounds for divorce; such express
provision would hardly be required.

CONCLUSION

The basic reason of inclusion of mental disorders in the
conditions of disability to marry at the time of framing
the laws six decades back was the incurability. However
now, with remarkable advancements in the field of
psychiatry, most of the mental disorders are now curable,
and the persons so affected are able to lead a normal life.
Therefore, mental disorders should be removed from
the disability under the marriage laws. We should
aim to change the negative societal attitude toward
mental disorders which play important role in their
stigmatization. Mention of words like “recurrent attack
of insanity,” “inability to live normal life or procreation
of child” is derogatory and stigmatizing. It is necessary
to change all these. The law should perform a facilitative
role in the society, and it should not discourage persons
from seeking treatment of mental disorders. Marriage is
an important event in one’s life and in Indian context, it is
also a religiously sanctioned necessity. It is unreasonable
to deny this right to persons with mental disorders.

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