

Chapter 7

Extra Marital Affairs, Breach of Trust in Marriage, and Therapeutic Jurisprudence: A Critical Analysis From the Perspectives of Ancient Hindu Codes, Customs, and Contemporary Laws

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ABSTRACT

Therapeutic jurisprudence (TJ) emphasizes the law's healing touch to cure the socio-legal evils that may hamper the wellbeing of people at large. The chapter deals with extramarital affairs, breach of trust in marriages, and the role of TJ in restitution of justice for spouses, especially female spouses who may be pushed to trauma, extreme depression, frustration, and anger due to extramarital affairs by unfaithful husbands with special reference to India. In ancient Hindu Codes and customary laws, extramarital affairs by husbands did not find specific mention as offensive behavior in marriage. This has led the contemporary laws to not acknowledge extramarital affairs as offences in marriage. But in the ancient times, women in India had rights to seek restitution of justice from family elders and community elders. This alternative dispute resolution mechanism provided much needed healing touch. The chapter researches on the hidden role of TJ in the ancient and contemporary laws in India dealing with victimization of women by way of extramarital affairs by husbands.

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INTRODUCTION

In 1980's Bruce Winnick and David Wexler evolved the concept of Therapeutic jurisprudence (TJ) specially to signify the therapeutic aspects of law for restitution of justice (Wexler D, 2000). Research of Winnick and Wexler showed that law and its applicability to specific cases have deep impacts on the litigants, victims, and common individuals as a whole. At the beginning, TJ played a significant role in promoting the therapeutic aspects of mental health laws. But slowly TJ researchers started looking into other areas of law including criminal laws, family laws, laws related to cyber space, workplaces related laws etc. This research could bring significant impacts on contemporary legal proceedings and judicial cognitive mindsets that would help litigants and especially victims of crimes. (Perlin, 2016). In India, the concept of TJ had its long history through the ancient scripts and customary laws. This may best be understood from the ancient understanding of victim's rights and duties of the king for restoration of justice, acknowledgement of rights of the accused, compensatory jurisprudence etc., where the focus of the ancient legal texts known as Manusmriti, Artha Shashtra, Danda Neeti etc, was on wellbeing of the people and justified satisfaction of the litigants, victims etc. (Umashankar.P, 2022).

Some of these are reflected in the modern Indian judicial understandings like the landmark decision of Justice Krishna Iyer in the 1977 case of Mohammed Ghiyasuddin vs State of Andhra Pradesh (Halder,2015), where Justice Iyer emphasised on rights of the accused and convicted prisoners to undergo a therapeutic correctional administration system. In the contemporary world, TJ is being applied to resolve matrimonial disputes in many jurisdictions (Freeman, 2008). The principle is also being applied for resolving child custody issues. TJ in my understanding has worked wonderfully worldwide to provide a therapeutic touch to many litigants in family dispute matters.

Marriage has been considered as the strongest unit in a society from primitive period. Traditionally it has been understood that mutual trust plays a significant role in strengthening the bond between two heterosexual individuals who will eventually go ahead for procreation.

Marriage in India, especially in Hinduism is considered to be a sacred institution where not only the bride and bridegroom unite for conjugal life on the basis of mutual trust and devotion to each other, but the respective families of the parties to the marriage also get connected as relatives. (Mitra, S.K. and Fischer, A., 2002).

Customary laws flowing from ancient scripts like the Vedas. Artha Shashtra, Smritis including Manu Smriti etc, governing marriages, succession, adoption etc, have indicated that in a marriage “*dampati*” or legally wedded heterogeneous couple

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