

The Study on the Application And Implementation Of Therapeutic Jurisprudence In Family Laws With Respect To Divorce In India

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ABSTRACT

The concept of jurisprudence is deemed to be an interdisciplinary and indestructible field of study in law. This field of study has gained immense importance in the past few decades and has led to the development of various kinds of jurisprudence. Therapeutic jurisprudence is one such jurisprudence which talks about the Therapeutic treatment of defendants and the litigants. Family law in India is seen as a consolidated unit of several legislations with respect to religion and community. The country's progression and contemporary development have naturally conveyed that the divorce rate in India is increasing at an alarming rate and has become a burning issue. Though there has been lot of discussion on the in the increasing trend of divorce, the proper method to reduce the rate is still undiscovered. Several jurist and activists have suggested for dispute resolution instead of divorce which is possible if therapeutic jurisprudence is applied in the field of family law in India. This paper attempts to identify the benefits of therapeutic jurisprudence in the family laws and study the application of therapeutic jurisprudence in the family laws with respect to divorce India. By the basis of this research an attempt is made explain the effective mechanism for implementation of therapeutic jurisprudence in the process of divorce in India and effective steps for the implementation of therapeutic jurisprudence in the family laws of India with the help of primary and secondary sources of data.

Key words: *therapeutic jurisprudence, divorce, family law, dispute resolution*

Introduction

The concord within the nation could only be achieved only when each civilian of its motherland are bound to the obligations of the country. The citizens shall be obliged only if conscientiousness lies within their character, which would happen solitary through the means of a family. Therefore it could be illicitly found that the country's improvement and succession is highly contributed through the tranquility and order constituted by the family. Families have bequeathed colossal energy to the progression and growth of a nation. It is also lucid that family laws have felicitated this practice in a more lawful and precise way. Family laws refer to the legal premise of marriage, divorce, legal separation, child custody, welfare and support, alimony and so forth... It is imperative to regulate these practices because the nation is of a group of societies which consists of group of families. The personage right and duty within the family are cosseted by the aid of family laws and have occupied a very important position in the country's legislation and legal fram. Separate court of law is also established to protect the rights and freedoms of individuals within the family and provide remedial measures if any form of grievances occur in India. This principle talks about the morality through which defendants or offenders should be treated in the court. This jurisprudence believes that if offenders are treated in a positive way and if their rights are protected by the book then a positive well being of

the offenders would be developed and would make the court of law more approachable. This field of study treats law as a treatment to its citizens. This concept is multi disciplinary and rational in nature and has the capacity to connect and touch various forms of Law by itself. However this principle is subjected to various forms of criticisms, jurists have often implied that this principle might reduce and relax the penalty in the punishment and would make the convict enjoy more privileges. India being a democratic country bridle path the Justinian code and its family laws are noted by jurists all over the globe because it recognizes and legalizes various traditional family practices which are accepted by the society. This research paper attempts to study the application of therapeutic jurisprudence in the family laws of India.

Objectives

1. To study the application of therapeutic jurisprudence in the family laws with respect to divorce India.
2. To explain the effective mechanism for implementation of therapeutic jurisprudence in the process Of divorce in India.
3. To identify the benefits of therapeutic jurisprudence in the family laws.
4. To suggest effective steps for the implementation of therapeutic jurisprudence in the family laws of India.

Research methodology

The research is based on **secondary source of data**, which include:

1. Articles
2. Books
3. Journal
4. Research paper

and **primary source of data** include :

1. Legislations

a. Methods

1. Diagnostic Method
2. Descriptive method
3. Application method
4. Interpretation method

b. Types of Research

1. Applied Research
2. Application Research
3. Explorative Research
4. Implementation research

Review of Literature

1. **Barnick Ghosh(2010)** discusses about dispute reconciliation in the Hindu marriage Act and in the Special Marriage Act. This article talks about the practical and theoretical application of dispute resolution in the family courts. The author also discusses about the procedure to be followed in the process of dispute resolution and its presence in the civil procedure code. The study concludes that The family structure of India is extremely conservative and prefers not to take the disputes to unknown experts and/or mediators. It is recommended that in this context, greater awareness is generated about the usefulness of alternative dispute resolution mechanisms in the Indian society.
2. **Afred Alan (2006)** studies about the practice of therapeutic jurisprudence in family law. The author defines therapeutic jurisprudence as a social force that involves positive and negative impact on the basis of emotions. The study analyses family law in three broad disciplines and the author suggests effective methods for implementation of family law in the state.
3. **Penne Baker (1966)** attempts to analyse the use of Therapeutic treatment in admission of evidences and in testimony. The author states that if studies on the admission of evidences is done therapeutic then the victims would get an opportunity to share their emotions. He suggests that therapists must be used as cross examiners.

Limitations

Lack of data.

Hypothesis

H₀: There is a wide application of therapeutic jurisprudence in family laws with respect to divorce India.

H₁: There is a narrow application of therapeutic jurisprudence in family laws with respect to divorce in India.

Family Laws in India and the application of therapeutic jurisprudence having references to divorce

In India, family laws differ from community to community of the country. The majority of Hindu community practice and abide to the family laws of their community. This principle is same as that of the minorities such as the Muslims, Christians and the Parsis where the laws are based on the community practices which are in turn dependent on the customs and traditions followed in each community. The family laws in India are primarily based on the customs and traditions followed in the country. It is reasonably fascinating to note that there is another aspect of family law in India which talks about the marriage between two individuals belonging to different community and wishes to get married called The Special Marriage Act 1954. The inheritance and succession of property is governed by the succession act 1920. The Indian family laws do not differ from state to state but it differs from community to community. The primary function of Indian family laws is to recognize and legalize various cultural practices with respect to family on the basis of community.

It could be stated that the family laws of India is a consolidated unit of various legislations passed by the parliament with respect to religion and community. The Indian family laws discuss about the laws of marriage, divorce, succession, inheritance, women and children rights.

Before the 1950's India was the world's largest nation that practiced and allowed polygamy in the Hindu and Muslim community. The practice of polygamy was unlimited in the case of Hindus and was restricted to a number of four in the case of Muslims. Later in the year 1955 after the enactment of Hindu marriage Act 1955 the practice of polygamy was completely struck down. Therefore from this case it is evident that family laws in India have regulated the family practices on the basis of the righteousness and acceptance in the community. However it is unclear about the role and application of therapeutic jurisprudence in the Indian family laws.

The application of therapeutic jurisprudence in family laws could be identified and studied

through certain approaches and shall be studied on the basis of community and religion.

1. Dispute resolution: The Hindu marriage Act 1955 which was developed from the holy Vedas gives a great emphasis to reconciliation before divorce. Dispute resolution is the primary and the first step taken before divorce. However dispute resolution is not applicable in all case and the proper treatment of emotions are not carefully administered by advocates. The counseling process is also method of dispute resolution here an emphasis is given on feelings and personal emotions. In the case of The Special Marriage Act 1954 section 34(2) and 34(3) also talks about dispute reconciliation. In most cases dispute resolution is done more legally than on emotional and personal background. The family court has a duty to take efforts for dispute resolution under The Family Court Act 1984. However dispute resolution is not recognized under The Muslim Marriage Act 1939.

2. Opportunity: As per the Hindu Marriage Act 1955 and The Special Marriage Act 1954 opportunity for party to represent is given on a legal constraint but not on emotional constraint. Opportunity to understand emotions and heal emotions is not present in the Hindu Marriage Act and in The Special Marriage Act. However separate counseling is offered for the victims but not for the offenders.

3. Testify: Testimony is generally influenced by the advocates in the family courts and the testimony is taken into account only on a legal connotation and not on emotional and cognitive connotation.

4. Admission of evidence: evidences are generally evaluated on the basis of statutes and legislations that are present in that judicature but not on the basis of emotions and cognition. However in some cases after the examination of evidences if the judge feels that an individual is in need of counseling then the judge shall recommend for the same.

Approach to therapeutic jurisprudence	Application		
	Hindu Marriage Act 1955	Special marriage Act 1954	Muslim Marriage Act 1939
Dispute resolution	Dispute resolution is taken as the first step in any case under section 23(2) and 23(3) of Hindu marriage Act	Dispute resolution is taken as the first step in any case under section 34(2) and 34(3) of special marriage Act	dispute resolution is not recognized under The Muslim Marriage Act 1939.
	In some cases the advocates influence and prevent dispute resolution		
Opportunity	Opportunity for representation and explanation of facts is guaranteed only on a legal connotation but not on emotional and cognitive background.		—
Testimony	Testimony is taken into account only on a legal connotation and not on emotional and cognitive connotation.		
Admission of evidences	Evidences are generally evaluated on the basis of statutes and legislations that are present in that judicature but not on the basis of emotions and cognition but separate counseling are offered for the victims and offenders in some cases.		

** indicates exception

Table1. Application of therapeutic jurisprudence in family laws of India

Benefits of Therapeutic jurisprudence in family Law

The relevance of therapeutic jurisprudence and its benefits in family laws could be acknowledged and studied through certain approaches.

1. Dispute resolution: the universal environment and the itinerary of family courts are adversarial in nature, though they endorse the idea of decision making together. The practice of therapeutic jurisprudence is highly dynamic and standard. The idea of therapeutic jurisprudence

could be applied in the process of dispute resolution because both the parties would be able to share their feeling and worries more explicitly which would help the arbitrator to understand the rationale of misapprehension and the individuals will also be able to know what the opposing party feels. When this process is administrated then the victims could be healed and the offenders mistake could also be corrected which would help in the

process of dispute resolution. If therapist is used instead of a lawyer then problems shall be resolved on the basis of family and emotional concern.

2. **Opportunity:** if both offenders and the petitioners are given equal opportunity to present themselves before the court, it would more effortless to understand their emotions and the genuine cause of the dispute could be easily identified. If the court is able to identify the emotional trauma that the individual is facing then proper counseling could also be given to them and on that occasion the rationale is found treatment and solution is more easy.

3. **Testimony:** it is important to talk about the experiences, cognitions and emotions faced by the parties and analyse their behaviour. Traditionally most of the testimony is influenced by the advocates. If therapeutic system is followed then the litigants would have an opportunity to share their emotional traumas and are given platform to gain support and dignity. Giving testimony to a therapist also gives people a voice and an opportunity to be heard as a person. This would empower the fairness in the procedure of the judicial system and also would provide alimony to the victims and the defendant. Generally less educated individuals are often intimidated by intelligent and experienced cross examiners. In this case the real truth is often manipulated and hidden by the cross examiners which would result in infamy to the individuals. Therefore if therapeutic jurisprudence is used there wouldn't be any room for humiliation or manipulation.

4. **Admission of evidence:** generally not all evidences are given by oral testimony. Evidences are mostly given by the forms of affidavits in the court. When the facts of the case are presented in written form the real essences could not be understood and the individual trauma cannot be understood therefore if therapeutic jurisprudence is applied then judgments shall be logically given. The idea of partiality shall be avoided. If evidences are given orally given then discouragement and inferiority on the basis of gender shall be avoided.

Findings

1. Therapeutic jurisprudence is not applied in the Family laws of India.
2. The concept of therapeutic jurisprudence is practically followed as recommendatory method in the family courts of India.
3. There is a narrow application of therapeutic jurisprudence in family laws of India.
4. Therapeutic jurisprudence is applied only in the dispute resolution approach.
5. The first step before divorce in The Hindu Marriage Act and The Special Marriage Act is dispute resolution.
6. In most cases testimony and the evidences are manipulated and influenced by the advocates.

Mechanism for implementation of therapeutic jurisprudence in divorce of India

Indian family laws are a consolidated unit of various legislations on the foundation of religion with respect to marriage, succession and divorce. Hence an amalgamated and methodical cryptogram must be implemented for therapeutic jurisprudence. The concept of therapeutic jurisprudence should be enacted in the family court for effective protection of victims and offenders. Therefore this implementation shall be made procedural in the cases of divorce.

When a couple or an individual approaches an advocate seeking for divorce, then the advocate must give the impression of being into the facts of the cases on both emotional and legal perspective. Based on the facts the advocate must send the individual or the couple to the therapist who shall counsel as well as comprehend the rationale of divorce and a report shall be submitted. If the therapist feels that the individual is in need of emotional treatment then the same shall be conceded out. These reports shall be submitted before the family court judge. After examination of the reports, each party shall be made to represent themselves before the judge and the cross examination process shall be done by a therapist. Based on the cross examination the judge shall ask the couple to go for counseling for a specific period. In the process of counseling the therapist or the psychologist shall give treatment on emotional stress and stability. The therapist and the psychologist shall work out for dispute reconciliation. After the period of counseling the parties shall appear before the family court where the judge would explain about the reasons for reconciliation and if the parties accept for reconciliation then the case shall be closed. If not the judge would look into the case on legal connotation and would give divorce if the reason is valid. The judge shall also recommend for therapeutic treatment and counseling for the affected parties.

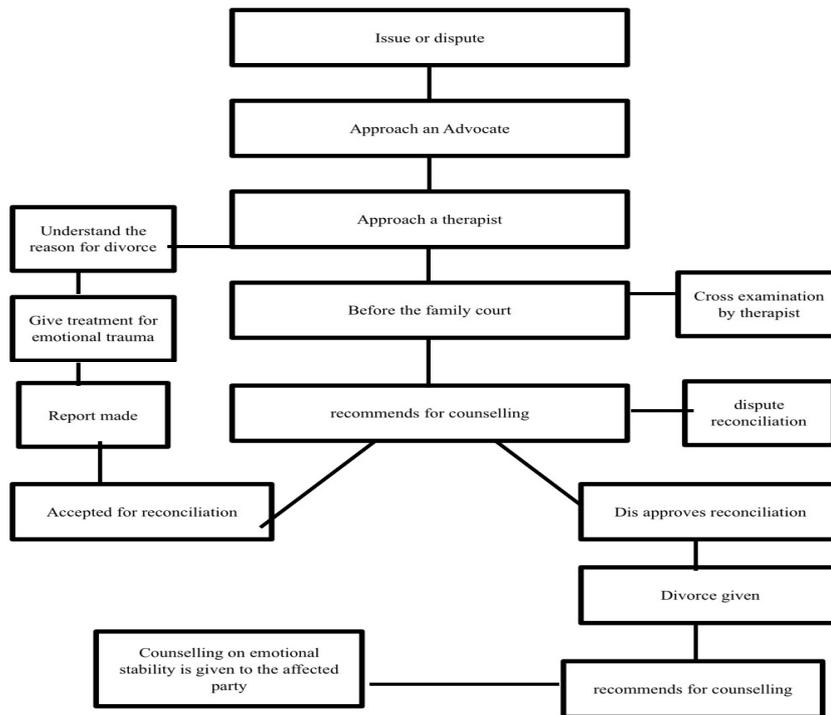


Figure1. procedural mechanism for divorce under therapeutic jurisprudence in India

Suggestions

1. A statutory body shall be established for the purpose of therapeutic treatment.
2. Amendments shall be made in the Hindu marriage Act and Special Marriage Act to implement the practice of therapeutic jurisprudence in family laws
3. A separate legislation shall be enacted for implementing the therapeutic treatment in dispute resolution.
4. The judges shall also look at the testimony on the basis of emotions and cognitions.
5. Awareness about the practice of therapeutic jurisprudence in family should be made for the lawyers.
6. Therapist shall be used for cross examination purposes.

Conclusion

From this study it could be understood that in India, family laws differ from community to community of the country. The majority of Hindu community practice and abide to the family laws as that of the minorities such as the Muslims, Christians and the Parsis where the laws are based on the community practices which are in turn dependent on the customs and traditions followed in each community. The family laws in India are primarily based on the customs and traditions followed in the country. It could be found from the research that Therapeutic jurisprudence is not applied in the Family laws of India. However the concept of therapeutic jurisprudence is practically followed as recommendatory method in the family courts of India. It is quite interesting to note that the first step before divorce in The Hindu Marriage Act and The Special Marriage Act is dispute resolution. It can be recommended that a statutory body shall be established for the purpose of therapeutic treatment and the judges shall also look at the testimony on the basis of emotions and cognitions.

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