

Therapeutic Jurisprudence: Relevance and Prospect in Bangladesh

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Abstract:

Therapeutic Jurisprudence is a comparatively new concept of jurisprudence. It concentrates on emotional and psychological wellbeing of human being. It speaks about the fusion of psychology and law and suggests the need to tune the law to the need of the subjects it affects. The applicability of Therapeutic Jurisprudence is now extended to legal rules, legal procedures, and the roles of legal actors and the behavior of judges, lawyers, and of therapists acting in a legal context. This paper focuses on those legal concerns in Bangladesh where by introducing Therapeutic Jurisprudence many problems can be solved without changing the entire system radically and it will help to regain the faith of the people in our legal system.

Introduction:

The philosophy of law, otherwise known as jurisprudence in its modern sense, means the study of the general or fundamental elements of a particular legal system.¹The domain of jurisprudence has now become wider than earlier, as the characterization of law has been customized with pluralistic views from different perspectives. There is no single magic tool which is sufficient to address the subject in an inclusive way. Therefore, Austin's definition of law as command of sovereign has climbed into new dimensions fostering the need of modern people. A school of jurists demands that law should be conceived of as harmonizing the conditions under which human race accomplishes its destiny by realizing the highest good of which he is capable². Believing in the perception that law and legal proceedings can be calming and

supportive for individuals' wellbeing, the concept of therapeutic jurisprudence has evolved. Therapeutic jurisprudence is a new perception in this area; it was first described by Professor David Wexler³ and refined subsequently by him and Professor Bruce Winick⁴. This describes jurisprudence as the study, the extent to which a legal rule or practice promotes the psychological and physical wellbeing of the people it affects.⁵

Definition of Therapeutic Jurisprudence:

Jurisprudence is connected with man's external conduct but could be benefited from psychological research. Therapeutic jurisprudence (here after mentioned as TJ) is connected with emotional and psychological periphery of human beings, which professes to humanize law and considers it as one of the healing arts. Professor Wexler defined TJ as:

The study of the role of the law as a therapeutic agent is an interdisciplinary enterprise designed to bring insights from the clinical behavioral sciences into the development of the law. The therapeutic jurisprudence perspective suggests that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers, judges, and often therapists) constitute social forces that like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences, rather than ignore them, and that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and justice values.⁶

Professor Wexler asserts that TJ is the study of therapeutic and antitherapeutic consequences of law.⁷ Not every time law provides the same consequences as it was intended for. Examples are not rare where law creates more harm than lawlessness. TJ by considering law as therapy makes the fusion of two different

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principles law and psychology as complementary to each other. It tries to modify the depressive observation of common people about law. It supports that respect for law can make the enforcement of law more effective than deterrence of law. If the object of law is to realise the highest good for human race, then it needs to be comprehensible and tuned according to the need of the people. TJ is meant to use the law in a different or creative way to be tuned with the need of the people. TJ is an interdisciplinary approach to law. It may enrich the practice of law through the integration of interdisciplinary, non-adversarial, non-traditional and psychologically-beneficial legal expresses.

Professor Wexler urges that TJ does not of itself suggest that therapeutic goal should trump other ones⁸ nor even propose to change the whole system of law by introducing a new system. It can be applied even under the existing legal system by changing the approach towards law by making it more supportive. It infers that law and its supporting elements can be more humanizing in considering the need of the people. Primarily the theory was acknowledged in the mental health law but now it has expanded its scope to other areas such as family laws, criminal laws, juvenile laws, and other legal spectrum. Understanding its promising significance TJ has taken off internationally in countries like Australia, Canada, Israel and Pakistan.⁹

According to Professor Wexler, the whole context of law and the applicability of TJ can be divided into the following categories: (1) legal rules, (2) legal procedures, such as hearings and trials and (3) the roles of legal actors and the behavior of judges, lawyers, and of therapists acting in a legal context. Much of what legal actors do has an impact on the psychological well-being or emotional life of people affected by the law.¹⁰

Therapeutic Jurisprudence in Legal Rules:

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Law is only effective when it is properly acknowledged and enforced. In order to make law actionable the same need to be desirable and acceptable to the people. Most of the time a statute makes the law on paper ones. That is why thousands of law can be found in the archive for exhibition with hardly any accomplishment. Because of the repugnancy and ambiguity many provisions of law become futile. For example in UK *The Children and the Young Offenders Act 1933* permits the juvenile court in the trial of children and adolescent juveniles to allow to return home on being discharged, fined or on undertaking of attendance at the attendance center. Doubts have always been expressed about the justification of fine in cases of juvenile since it is the parents and not the delinquent child who are penalized under the mode of punishment.¹¹

Again, Professor Wexler views that sometimes law may produce antitherapeutic consequence to the victim. There are some special laws which are purported to protect the interest of vulnerable persons but it may have unintended consequences of harming those persons.¹² The best example has been shown by Kay Kavanagh where he explains the “Don’t ask, Don’t Tell” policy in the military service regarding homosexuality. The policy is intended to integrate homosexuals into the military and also to protect them from long belief that “homosexuality is incompatible with military service.”¹³ The author reinforced that the policy does more harm than good for homosexual members of the military, because required nondisclosure of sexual orientation may leave them feeling socially isolated and marginalized.¹⁴ Therefore sometimes the law which is made for helping the vulnerable people makes them even more vulnerable. This is the antitherapeutic consequence of law. TJ purports to find out those antitherapeutic consequences of law, encourage people to think and study to spot the ways that can lessen those impacts.

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Even some laws are made by undermining the need of minority groups. In case of guardianship most of the legal systems are concerned of minors and disable persons. In between these two types of persons, however, there can be another type of persons who is mildly cognitive impaired¹⁵ but particularly capable of assuming an active role in decisions about their person and property. A legal system that disenfranchises this group will not produce optimal outcomes and may have the unintended consequences of promoting disengagement among wards.¹⁶

TJ seeks to locate all these areas of distress and encourages ingenious solutions by harmonizing psychological and physical well being of the people it affects.

Therapeutic Jurisprudence in Legal Procedure:

The principles of TJ arise from the respect for the individual. It recommends the whole legal system to be supportive with trends following the demand of the people it influences. TJ in correspondence with other initiatives and methods can mitigate stress and trauma associated with the legal process. Especially it can best be used in restorative justice, drug treatment courts, collaborative divorce and victim mediation and others.¹⁷ The best example can be regarding child custody disputes. If we monitor the adversary process it will become clear that it is not only traumatic for the child but also detrimental to the relationship with his/her parents. Therefore, TJ counsels for collaborative divorce¹⁸ to provide best environment and protection for the child as well as the parties. TJ can equally be applied in Drug court and Juvenile Court. One comprehensive study concluded that drug courts reduce drug use and recidivism rates, and lessen the direct and indirect costs of dealing with drug-related crimes.¹⁹ Drug courts' success can be attributed to long-term offender engagement, as well as a therapeutic methodology that attempts to treat the underlying problem. Again in most of the countries, the trial of juvenile offenders is conducted in a special court presided over by a special

magistrate, usually a lady.²⁰ The practice of employing lady special magistrates to deal with the cases of juvenile offenders has gained favour for psychological reasons. It is believed that children have less fear for women than for men. Moreover women are temperamentally more suited to understand the problems of children and can win easily the confidence of juvenile delinquents by virtue of their tenderly attributes.²¹

TJ can also be applied in criminal cases especially in domestic violence cases. Teaching the former offender empathy for his victim helps combat his distorted thinking about his crime and its effects on the victim, motivating him to resist the temptation to repeat the crime.²²

Therapeutic Jurisprudence and Judges, Lawyers and Law Schools:

In modern legal system, it is the Judge who is the guardian of the court and responsible to uphold justice. Sometimes judges consider this more convenient to simply go with the evidence presented in front of them without verifying the evidence. They are very much record oriented. When the judge admits guilty pleas, there is a requirement that the court finds that plea is voluntary and there is a factual basis for that plea.²³ It might happen that the statement or confession was made forcefully or without understanding the consequences or mistakenly. So it is the duty of a judge to reveal the facts without being deluded by others. There should be basic differences while dealing with juveniles and adult offenders. While dealing with juveniles the judges should remember that young offenders could not be tried but corrected and they should not be punished but reformed. Therefore, more empathetic approach needs to be taken.

Lawyers have an important role in the healing process. Prof. Wexler demands that lawyers are better respected if they show care for their clients, just as doctors are respected for their manner.

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While handling the case it is very important for the lawyer to make his client confident about him and ensure that he is handling their case with utmost care and importance. While rendering advice, a lawyer should refer not only to the concerned law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

“Law school teaches about rules, arguments and logic – but not the impact of the law on the emotional life or well-being of people,” says Wexler, “That has been an underappreciated aspect of the law – a dimension of the law that has been ignored.” But, through research, he found that we could look at the law as a dynamic social force with consequences and behavioral impacts.²⁴ Law students begin their study with high ambition of becoming social reformer, but by the end of their first year they start tumbling from their goal. Meanwhile, the law student become more motivated by externals—grades, appearances, money—and less by intrinsic values such as personal growth and contribution to the community. Krieger says- “not that making money and being respected is inherently bad”. The point, he emphasizes, is one that psychological research backs up: People whose primary motivation is money tend to be unhappy, while people who are motivated by goals such as helping others or making a difference tend to be happy.²⁵ In Krieger and Sheldon's study, many who started law schools in hopes of serving the public had given up their dream for money and prestige. TJ is addressing those issues by seeking to make people's experience with the legal system supportive and healing rather than traumatic and stressful, as it often is.²⁶

Importance of TJ in Bangladesh:

In Bangladesh, the entire legal system has become a maze where problems rotate without any hope for quick remedy, and 'justice' has become unreachable for the poor. A study shows that a total of

ten million (96, 83, 305) cases are now pending in different courts of the country and under existing procedure hundred years will be required for their disposal. The breakup of this backlog is: 4,946 cases in the Appellate Division of the Supreme Court; 1, 27, 244 cases in the High Court Division, 3,44,518 civil cases and 95,689 criminal cases in the Session Judges courts and 2,96,862 cases with Magistrate courts and 99,004 cases with Metropolitan Magistrate courts.²⁷ The situation becomes even worse because of the lengthy, rigid judicial process. It is a well know principle of equity that justice delayed justice denied. Therefore, people are loosing hope to get justice from the existing costly legal system. They consider it better to be the silent victim rather to be crashed down in the name of justice. In this present context, in order to bring the people's faith back, therapeutic connotation can do big help as the notion of TJ is basically to moderate law and practice for the best treatment of the people it affects. Some of the therapeutic aspects which have worked successfully in some countries can easily be introduced in Bangladesh without altering its existing legal system; at the same time it will shift a large sum of burden from the court. Some features of TJ which can be easily introduced in Bangladesh are discussed below under the following headings.

Collaborative Divorce- Collaborative Divorce is a process of bringing together family lawyers, mental health professionals, and financial advisors to help couples reach divorce settlements without going to court. It removes the adversarial element embedded in many divorce proceedings, and replaces it with an approach that consists of mutual respect and problem solving. In a collaborative divorce, the parties strive to reach a fair settlement through a series of meetings (sometimes called joint sessions) between the two parties and their lawyers and sometimes other neutral experts. The primary focus of the four-way meetings or joint sessions is to identify the priorities, goals, needs and interests

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of the parties, and help them progress towards and create a settlement that is consistent with their priorities, goals, needs, and interests. The parties make their own decisions based on their own standards. It is quicker, cheaper and less painful than a typical divorce. Best of all, the collaborative approach helps all the family members come through the divorce with the least amount of trauma and distress. Because the parents are not fighting, the children adjust better. The collaborative law movement has spread rapidly to most of the United States, Europe, Canada and Australia. In the United States, at least three states have statutes on collaborative divorce (California, North Carolina, and Texas).²⁸ In Bangladesh we can easily introduce collaborative divorce as a means to avoid the stressful court procedure for divorce.

Mediation- Mediation is a form of [alternative dispute resolution](#) (ADR), and also refers to appropriate dispute resolution, and aims to assist two (or more) disputants in reaching an [agreement](#). This is a process whereby the [parties](#) themselves resolve their disputes rather than accept something imposed by a third party. It is a non-adversarial approach to conflict resolution. The role of the mediator is to facilitate communication between the parties, assist them in focusing on the real issues of the dispute, and generate options that meet the interests or needs of all relevant parties in an effort to resolve the conflict.²⁹ The disputes may involve [states](#), organizations, communities, [individuals](#) or other representatives with a vested interest in the outcome. In Bangladesh this mediation can be applied in a variety of disputes, such as commercial, legal, diplomatic, workplace, community and family matters.

Juvenile Courts and Drug Courts- Juvenile and Drug courts are developed under the premise that combining rehabilitative and treatment goals with the traditional goals of retribution and deterrence can reduce subsequent abuse and lower recidivism rates

amongst offenders. In order to effectuate this goal, TJ places new duties on judges, requiring them to assume a more active role in the proceedings. The philosophy behind drug courts can encourage long-term solutions to problems of drug abuse and addiction in Bangladesh. Some research findings demonstrate the effectiveness of drug courts and the value of implementing a TJ model.³⁰ Within the judicial process any volunteer former offenders or juveniles who have completed their probation period can be brought to share their feelings with the fresh offenders. This will help them in their quick recovery and encourage them to find a better way of living.

Criminal Justice- Punishment can be broadly defined as an authority's infliction of a penalty on an offender, an offender being someone who has broken a rule or has caused someone else to break a rule, whether negligently or intentionally.³¹ According to the therapeutic concept the implied model of punishment is essentially a utilitarian one, tempered some basic principles of retributive justice, or what philosophers have labeled as "teleological retributivism".³² That is to say, the law should promote punishment regimes which minimize suffering to offenders while still effectively protecting the interests of society and ensuring the preservation of an offender's basic civil and legal rights. The treatment programs described above are one important (but not the only) way of achieving these goals.³³ In a particular case of sex offenders, writers on therapeutic jurisprudence have strongly advocated for improvement in legal procedures to facilitate rehabilitation and treatment. Professor Wexler has suggested that judges should not accept a plea such as *nolo contendere* ("no contest") without questioning the basis for such a plea, otherwise the judicial officer concerned could well be implicitly colluding with an offender's denial ("I didn't really do it, but they told me it would be easier for me this way").³⁴ In case of prisoners, in practice the way they are kept in the prison it

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hardly makes an impact on their psychology and behavior rather deviate them towards crime. The whole process makes them aggrieved towards the State and their grievance is satisfied by taking revenge to its people.³⁵ Therapeutic approach advocates for such imprisonment which is designed to improve them as men, and to restore them to social life with full self-respect. Again, under the therapeutic process, the offender can make realize the consequence of his conduct upon the victim and make him repentant for such. Teaching former offender empathy for his victim helps combat his distorted thinking about his crime and its effect on the victim, motivating him to resist the temptation to repeat his crime.³⁶ In Bangladesh, following the example of some developed legal systems special programs can be initiated for creating awareness among the mass.

Law Clinic: Breaking the traditional system in legal education the concept of 'law clinic' can be introduced at University level (University of Dhaka has already started the program for the graduate students). This will help to develop within the student a deep sense of social responsibility; and it will essentially transcend the boundaries of class-rooms, put the students in touch with the practical situation and enable them to locate themselves within or, in contrast, without some community.

Conclusion:

The purpose of jurisprudence is to identify the social issues, regulate rules and implement those among the subjects. In this post modern time, one legal system can be said to be successful where its subjects are well adjusted and respond accordingly. As discussed above no one single principle is enough to regulate the whole legal arena, therefore some innovation as well as improvisation needs to be applied in the legal spectrum. This specially applies in Bangladesh where the whole system still blindly follows the old decaying rules introduced by the British Rules in the nineteenth century without further adjustment with

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social needs. These backdated laws and its implementation procedures need to be modified according to the needs of the people and with the changing circumstances. TJ invites to search for such scopes for humanizing law as well as for reducing the anti-therapeutic consequences of existing laws. Finding the efficacy of therapeutic techniques, opponents of TJ have argued that human beings are not putty that can be remoulded at will by benevolent intentions.³⁷ TJ acknowledges that the healing roots of the legal system and professions can be in tension with our highly developed adversarial system. Considering this, David Wexler has pointed out, the adversarial nature of our system has legitimate and crucial value for critical thinking.³⁸ However, the legal system suffers from a culture of adversarial representation and relationships, in which argument rises to the level of a privileged status.³⁹ This can obscure many important social values which the legal system need not and should not ignore such as social harmony and ethic of care. TJ is receiving attention precisely because it requires that we recognize such values and balance them with others. Days are not probably far away when judges, lawyers, justice system officers and all others directly or indirectly associated with litigations would welcome TJ to get its lasting benefits.

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² Mahajan V.D (1998), *Jurisprudence & Legal Theory*, Eastern Book Company, Lucknow, p.51.

³ David Wexler is a Professor of Law and Professor of Psychology at the University of Arizona. He is also a Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico. The Network maintains a website, which includes a comprehensive therapeutic jurisprudence bibliography, at <http://www.law.arizona.edu/upr.intj>.

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⁴ Winick, a professor at the University of Miami's School of Law, is one of the nation's leading mental health law scholars. With David Wexler, he is the cofounder of "therapeutic jurisprudence".

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⁷ Wexler. David, (2000), *Therapeutic Jurisprudence: An overview*, 17 T.M. Colley L. Rev. p.125.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ Paranjape. N. V. (1999) *Criminology and Penology*. 10th Edition. Central Law Publications. Allahabad, p.360.

¹² Patricia McManus C. (2006), *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, Seton Hall Law Review, Val-XXXVI, p.594.

¹³ Kavanagh Kay, (1999), *Don't Ask, Don't Tell: The Deception Required, Disclosure Denied*, 1 Psychol. Pub. Pol'Y & L. p. 144.

¹⁴ See *id.*, pp 142-143.

¹⁵ Mild cognitive impairment is a developmental disability that involves low intelligence test scores and difficulty adapting to the demands of living. Generally these persons can learn academic skills up to certain level and many may have the skills necessary to meaningful contribution and participate in important decisions about themselves and their lives.

¹⁶ Patricia 2006, supra note 12, p.595.

¹⁷ Wexler 2000, supra note 7.

¹⁸ The term Collaborative Divorce has explained in afterwards.

¹⁹ Belenko Steven. (2001), *Research on Drug Courts: A Critical Review 2001 Update*, The National Center on Addiction and Substance Abuse at Columbia University, at<<http://www.casacolumbia.org/absolutenm/articlefiles/researchondrug.pdf>>

²⁰ See Paranjape, supra note 11, p.372.

²¹ See *id.*, p.375.

²² See Wexler, supra note 6, p.236.

²³ Wexler 2000, See supra note 7

²⁴ Bahls Jane Easter. (2002), *Humanizing Law School, Student Lawyers*, Vol-31, No3. p. 215.

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²⁵ See *id.*

²⁶ See *id.*

²⁷ Yussouf M. M. (2003), *Administration of Judicial System in Bangladesh*,
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²⁸ Wikipedia, http://en.wikipedia.org/wiki/Collaborative_divorce_Internet

²⁹ Honeyman, Christopher and Nita Yawanarajah. "Mediation." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: September 2003
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³⁴ See *id.*

³⁵ Swift Morrison I. (1911), *Humanizing the Prisons*, *The Atlantic Monthly*,
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³⁷ Siddique Ahmad. (1997), *Criminology Problems & Perspectives*, 4th Edition.
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³⁸ Schma William, Therapeutic Jurisprudence,
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³⁹ See *id.*