TRANSFORMING LEGAL PROCESSES IN COURT AND BEYOND

Editors:
Professor Greg Reinhardt and Dr Andrew Cannon AM

A Collection of Refereed Papers from the 3rd International Conference on Therapeutic Jurisprudence, presented by the Australian Institute of Judicial Administration in Perth, Western Australia on 7-9 June 2006
3rd International Conference on Therapeutic Jurisprudence

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The Australasian Institute of Judicial Administration Incorporated (“AIJA”) is an incorporated association affiliated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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FOREWORD

In June 2006, the AIJA was pleased to host the 3rd International Conference on Therapeutic Jurisprudence. The conference followed the success of the first two conferences (held at the University of Southampton in Winchester, England, in July 1998 and hosted by the University of Cincinnati in the United States in May 2001).

The quality and range of papers and presentations on therapeutic jurisprudence over the three days of the conference involving speakers from Australia, USA, Canada, New Zealand, Scotland, Pakistan, South Africa and Vanuatu and including judges, magistrates, lawyers, academics, justice system professionals, students and professionals from service and treatment agencies, inspired the AIJA to consider the publication of a selection of papers from the conference.

An editorial board consisting of the keynote speakers at the conference, Professors Bruce Winick and David Wexler, together with Dr Andrew Cannon AM, Dr Michael King and myself, was established to select and edit papers for publication in an AIJA monograph. The selection process was not easy and in the interest of keeping the monograph within manageable limits, hard choices needed to be made regarding inclusion of papers. Those papers not included in the monograph, where permission has been given, will be found on the AIJA website.

I hope that the monograph will add to learning in the area of therapeutic jurisprudence. It is the intention of the AIJA to devote a web page to current issues in therapeutic jurisprudence.

On behalf of the AIJA, I thank all who have submitted papers and the members of the editorial committee.

Greg Reinhardt
April 2007
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(in order of appearance of their papers)

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COUNTRY AND HEALING: AN INDIGENOUS PERSPECTIVE ON THERAPEUTIC JURISPRUDENCE

Ambelin Kwaymullina*

The stories of Australia’s Indigenous nations tell that the creation of this continent was no freak geological event, no accidental collision of rock and fire. This country was made. Land, water and sky were all formed in the Dreaming by the creative beings, the Ancestors, who gave life shape, and gave life law. Aboriginal peoples have told the stories of the Dreaming for a very long time, stories which are all too often dismissed as mythology. But these stories are no superstitions. They tell us, not just how the world was made, but what the world is. They are history, science, philosophy, and metaphysics. The Western world is increasingly recognising the value of Indigenous understandings – scientists look to Indigenous plant knowledge to develop new medications; ecologists study Indigenous land management practices, physicists examine the parallels between Indigenous worldviews and quantum physics; doctors and psychologists listen to what Indigenous peoples have to say about healing. And now there is the doctrine of therapeutic jurisprudence, a theory recognising that legal processes affect the well-being of everyone involved. But this new concept – like so many of the Western world’s emerging understandings – is, to Indigenous peoples, very old indeed. So what do the stories of Aboriginal people tell about the nature of this world, and the place of the law?

1. Aboriginal Law in Country

Imagine a pattern. This pattern is stable, but not fixed. Think of it in as many dimensions as you like – but it has more than three. The pattern has many threads of many colours, and every thread is connected to, and therefore has a relationship with, all of the others. The individual threads are every shape of life. Some – like those recognised to be human, kangaroo, paperbark tree – are known to western science as “alive”; others, like rock, would be called ‘non-living’. But rock is there, just the same. Human is there, too, though it is neither the most nor the least important thread – it is one among many, equal with the others. The pattern made by the whole is in each thread, and all the threads together make the whole. Stand close to the pattern and you can focus on a single thread; stand a little further back and you can see how that thread connects to others; stand further back still and you can see it all – and it is only once you see it all that you can recognise the pattern of the whole in every individual thread. The whole is more than its parts, and the whole is in all its parts. This pattern is life, creation, spirit, and it exists in country.†

When the English came, they claimed the continent under the doctrine of *terra nullius* – the idea that, because Aboriginal systems were thought to be primitive, this land was empty of law. But law was everywhere. The

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* Indigenous lawyer, from the Bailgu and Njamal peoples of the Pilbara region of Western Australia.
Ancestors formed the pattern of creation, and they taught the ways of sustaining the pattern, the law, to all life. The continent now called Australia is made up of a multitude of Aboriginal countries, each with its own Law. Common to all these systems is the idea that law sustains and maintains well-being, and not just the well-being of people, but of all life. This world was created in balance, and it is the law which maintains that balance, which tells Indigenous peoples how to live in the world, so that there is always a world to live in. Ultimately, Law is the ways of living in country that sustain country.

Aboriginal law is often spoken of as being holistic. Indigenous systems recognise the place of each part in sustaining the whole, and the presence of the whole in every part. The pattern of creation is carried within all life, and is writ large in country – and whatever happens to that pattern, happens to people. When Aboriginal peoples are hurt, country is hurt, and when country is hurt, we are hurt. So Aboriginal law recognises that order between people is itself a reflection of the order of the world, and if that balance is not kept, if the relationships between all life are not sustained, then there will eventually be no order anywhere.

Indigenous law recognises the inter-connectedness and the inter-dependency of process and result. A wrong process can never lead to a right result. The process must itself sustain and renew the pattern of creation – for if it does not, the result that emerges at the end will be something that is less than creation, less than life, less than humanity. The process creates the result.

Indigenous law is about relationships. The Aboriginal kinship system recognises the connections, not just between humans, but between humans and all other life. Everyone has a place in this system, and by knowing this place, people know their rights and their responsibilities – to provide another with food, to care for a specific story or site, to punish a wrongdoer. And the rights and responsibilities that one person has with regard to another depend on their respective places in the system. It is not the right or responsibility that defines the relationship, it is the relationship that defines the right or responsibility. And because these relationships exist between all life, a transgression affects all life. Trespassing on a site associated with a specific animal damages the relationship between the trespasser and the person who has the responsibility of caring for that site, but it also damages the relationship between humans and the animal the site is associated with, and between humans and country. So when there has been a breach of law, the aim of Indigenous law is not simply to punish, but to restore the affected relationships, and in turn to restore the pattern of creation, to keep the balance of the world.

2. Western Law and Terra Nullius

When strangers came to this country, they brought with them another law under the banner of the Latin legal phrase, terra nullius. At the heart of terra nullius is the notion that the dispossession of another is both authorised, and justified, where that other is thought to be inferior to the Western self. But all the justifications that were used to find this inferiority rested upon a single belief: that the culture of the Western world represented all that is civilised in
the world. So the right of Western law to exist in Indigenous country, the authority and legitimacy of that law, derives from a notion that is inherently anti-therapeutic, inherently harmful to Indigenous peoples. *Terra nullius* is an idea which itself grew out of some assumptions which are fundamental to the traditional Western legal system – assumptions which are not only very different from Indigenous understanding of the world, but also run counter to the idea of therapeutic jurisprudence.

The first assumption that *terra nullius* rests on is that the land is not alive. If the living nature of country had been understood, then *terra nullius* would never have existed – for it would also have been understood that ownership of country was a responsibility to be given, not a right to be taken. But the Western legal system did not perceive the web of connections that is country. It operated by breaking things down into parts, and dealing in parts, rather than looking to sustain the whole. The Western legal system is not holistic – and in many ways, therapeutic jurisprudence is a response to this lack of holism, to the artificial divisions between disciplines such as law, medicine, psychology, and the failure to look beyond narrow legal issues to underlying problems and causes.

The second concept embodied by *terra nullius* is to focus on the result, rather than the process. Under the doctrine of *terra nullius*, the possession of land is not a process that leads to a just result, but a result that justifies any process, or lack of process. Traditional western law tends to be very results focussed – on determining who is wrong and who is right, who wins and who loses, and by doing so according to very black and white, positivist notions of what law is. Therapeutic jurisprudence recognises that these legal processes, adversarial processes, can be harmful. And from an Indigenous perspective, processes which have as their end result a simple, narrow determination of who wins and loses, rather than a focus on repairing damaged relationships and sustaining the whole, must always be harmful to those involved in them.

Finally, *terra nullius* is not about making or sustaining relationships. *Terra nullius* failed to recognise the connections between all life, and to a large extent, Western legal systems still fail to recognise the importance of these relationships. Through the lens of therapeutic jurisprudence, Western legal processes are beginning to examine not just symptoms but causes – to look, for instance, at the connection between a crime and an underlying substance addition. But there are other connections which must be made. Aboriginal peoples now deal with the legacy of laws imported by *terra nullius*, laws that took the people away from country, that locked them in prisons and missions and government institutions, and that made very difficult the practice of Aboriginal culture. And the Western legal system must deal with its own legacy of being the means through which enormous damage was inflicted upon the connections between Aboriginal families, and Aboriginal peoples and country. It has been said that by the time someone ends up before a court, society has failed them many times. By the time an Indigenous person ends up before a court, they have been failed for generations – and not just failed, but actively oppressed.

Indigenous peoples continue to suffer the effects of the laws and the thinking of *terra nullius*. We suffer the effects of the Stolen Generations, a history in which
thousands of children were taken away, and we all had something stolen from us. We suffer the effects of ongoing discrimination and discriminatory practices, and we struggle to fulfil our responsibilities to care for our country when we cannot control what happens to country. We suffer the multi-generational trauma that is the legacy of being Indigenous in a colonial nation-state. And this is not to say that people should not take responsibility for causing harm, because of course they should, and Indigenous systems acknowledge the need for this. But the Western world, and the Western legal system, must also take responsibility for the harm that was and is done to peoples and country, for its own connections to Indigenous pain. It must also be understood that those who break a law still continue to be part of the web of relationships that connect us all – so to treat them in a way which further damages or destroys those connections, is not only to act in an inhumane way but to create inhumanity in others. And as a society, we will all, sooner or later, have to deal with the consequences of doing that.

3. Therapeutic Jurisprudence in Country

If there are to be legal processes that enhance, rather than damage well-being, then those processes must themselves sustain, recreate, and renew the pattern that is creation. The complexity of issues faced by Indigenous peoples require holistic solutions. The Western world now has specialist tribunals, such as drug courts, because it is acknowledged that it is not so much the individual act of wrongdoing, but the underlying problem of substance addition that requires attention. But what happens when that substance addition is itself a symptom of a much bigger problem, a multi-generational trauma problem? A treatment programme that only addresses the addition is of very limited utility, and in fact removing the means by which someone has been anaesthetizing their pain can have tragic results. Where is the treatment programme for colonialism, for dispossession? For having your children stolen, for being abused in State or Church run institutions, and not just as events experienced by one or two or ten individuals but by generations of your race, because of your race?

All around the world, Indigenous peoples, alone and in partnerships with others, are developing initiatives to address these issues. But the focus of these initiatives is never just an individual transgression of the law, or even an underlying substance addiction. It is about cultural revival. It is about working through art, and through dance, and storytelling, through getting out to country and through knowing the country. And it is work that is massively under-resourced.

There are great opportunities for learning and the exchange of ideas between therapeutic jurisprudence and Indigenous peoples. But there must also be caution, for Western world’s way of learning from Indigenous peoples has often been just another dispossession. It is a learning that has led to the bones of Aboriginal peoples being locked away in museums; to artefacts and sacred objects being exhibited in display cases rather than being returned to be part of a living culture; to environmental knowledge being taken to the degree that Indigenous peoples now speak of eco or bio-colonialism; and to Indigenous art and stories being stolen as part of the phenomenon we call cultural appropriation. And to add insult to injury, the voices of the strangers have been privileged over those of Indigenous peoples, so that what others say about us is given greater value than what we say about
ourselves. So if there are to be partnerships between therapeutic jurisprudence and Indigenous peoples, those partnerships must be equal ones. It must be asked, is this process for involving Indigenous peoples a process that empowers Indigenous peoples? Does it respect Indigenous culture and cultural protocols? Does it give Indigenous peoples control of their own knowledge and the power to protect that knowledge? For it is not possible to learn from Indigenous peoples, to understand Indigenous culture, without respecting and valuing the peoples and the culture. Any process that disempowers and dispossesses, no matter how lofty the aim, is an anti-therapeutic one that can never lead to a therapeutic result.

Perhaps the most important thing that all those interested in the practice of therapeutic jurisprudence can do is to recognise the significance of country. To understand that in order for a process to be therapeutic one it must be holistic; it must repair and renew connections; and it must recognise that for Indigenous peoples, land is not just where we live, it is who we are. And recognising the broader web of connections within which we all exist is also to recognise a larger responsibility – a responsibility to value the stories of creation and suffering that are part of country; a responsibility for the Western legal system to acknowledge its place in causing that suffering; and for us all to find a way not just of living together in country, but of healing together in it.

4. Healing in Country

The story that follows is one that came to me in a dream, and it is about a man who lived sometime, somewhere, in the Western world:

The Story of the Old Man and the Mountain

There was once an old man who lived at the base of a great mountain. This old man had very keen eyesight – he could spot storm clouds coming when they were no more than a smudge on the horizon, and see the dust kicked up by approaching enemies when it was just a faint swirl in the wind. But one day a young man came to the village who could see even further and more clearly than the old man could. Soon everyone began asking the young man to keep watch for them, and the old man was forgotten.

The old man had never told anyone, but he believed it was the mountain that had given him his amazing sight. So one night before he went to bed, he looked up out his window at the mountain, and pleaded with it to allow him to see further and more clearly than anyone else in the world. When he woke the next morning, a strange thing had happened. When he looked at the mountain, he could indeed see very far and very clearly – so far, that he could count the snowflakes on the mountain’s peak. But when he looked at anything else, his vision grew blurry and dim. The old man was very puzzled by this, and he decided to climb the mountain, thinking that if he reached the very top, he might find an answer.

The old man hadn’t climbed very far when he heard a man’s voice calling for help. Turning his head in the direction of the sound, he
saw someone lying on the mountain, but the figure was so blurry to him that he couldn’t tell who it was. “Old man!” called the other man. “I have fallen and hurt my ankle. I’m so happy to see you, I was worried I’d be stuck here for days. Could you help me?” Now, the old man was much too proud to admit he didn’t know who was speaking to him, so he pretended he knew, and helped him. But when they reached the bottom of the mountain and the villagers came running, calling out the name of the man he had helped, the old man realized he had aided the young man who was taking his place. He grew so angry that, even though the mountain was the only thing he could see clearly, he turned his face away from it, and refused to look upon it again.

A few nights later a woman from a neighbouring village came to see the old man. She showed him two jewels and said, “These jewels have been left to me and my sister. Now, I know that while one of these jewels is perfect, the other has a flaw. I am an important and wealthy woman, while my sister is poor and has no position at all. She has no use for a perfect jewel. Please tell me which jewel is flawed so I can give it to my sister, and keep the other for myself.” The old man could not bring himself to tell the woman that he could no longer see as he once did, so he made a show of looking at the jewels, and then he picked one out and said – “This is the perfect jewel. Keep this one, and give the other to your sister.” But a few weeks later, the woman came back. She shouted at the old man in front of the whole village – “Old man! Because of you I have given my sister the perfect jewel, and I have a flawed one! You are nothing but a fraud! You can’t see anything!” And the old man was so shamed by this that he decided to pack up his things, and leave the village forever.

The old man travelled for many days and many nights. Eventually he passed by the neighbouring village where the woman with the jewels lived, and as he walked by, he heard her voice, calling out to him. “Old man!” she said. “I was just coming to see you! Please, let me say I’m sorry. My sister has sold her jewel, and now that I see how much easier life is for her and her children, I realize how selfish I was. Truly, you saw what I did not, and did the right thing by giving me the flawed jewel.” The old man thanked her and walked on, deep in thought about what she had said. He was so busy thinking that he didn’t pay attention to where he was going, and wandered into an enemy village. He was hungry and thirsty, so he drew water from their well, and sat down under a tree to eat his food.

The people of the village were amazed to see their enemy drinking their water and sitting under their tree. They sent for the Chief, who went to the old man and demanded to know what he was doing there. Thinking he was among friends, the old man was shocked by the Chief’s rudeness. “What do you mean by speaking to me like this?” the old man said. “Why is it you will not let me,
you neighbour, have a little of your water and your shade? Come, sit and share my meal with me.” The Chief didn’t know how to respond to this strange behaviour, and he thought perhaps the old man was a little crazy, so he did as he asked. He and the old man sat under the tree all afternoon, and talked of many things – of crops, and poetry, and how the young were always in too much of a hurry. At the end of it the Chief clapped the old man on the back and said, “Old man, for years your village and mine have been enemies. But I can see that we are not so different as I thought. I had heard that there was one in your village who saw further and more clearly than any other, and now I know that this indeed true. Go back to your village, and tell them I wish to make peace.” The old man, realizing he was in the village of his enemy, became very frightened, and he jumped to his feet and hurried away before the Chief could change his mind.

The old man decided that he had better go home before he got into any more trouble. But on the way back, he thought of the young man, and the woman with her jewels, and the enemy Chief. And when he reached his village, he flung himself on the ground before the mountain, and said – “Mountain, forgive me! At last I understand! You gave me exactly what I asked for.”

In the years to come, the old man became renowned for his wisdom, and people travelled for miles just to seek his advice. And whenever anyone came to him for help, the old man would tell them the story of himself and the mountain, and say – “For many years I saw further and more clearly than anyone else in this village. But it was only when the mountain took away my sight, that I learned what it was to have vision.”

If we are all to live in a therapeutic world, then we must cooperate, rather than compete; we must value the person above the possession; we must look to things that unite us, rather than those that divide us; and we must recognise that it is the earth which is the source of all wisdom. Therapeutic jurisprudence has been called a perspective, a lens – I think it can be a vision.
DOMESTIC VIOLENCE ADJUDICATION IN SOUTH AFRICA:
A VIEW ON THERAPEUTIC JURISPRUDENCE AND HUMAN
RIGHTS PROTECTION OF THE FEMALE VICTIM

Ingrid Sinclair and Anél Du Plessis

ABSTRACT

Research shows that violence against woman is not being dealt with effectively
by the justice system in South Africa. The increase in domestic violence may
therefore demand novel approaches to strengthen, amongst others, the human rights
protection of female plaintiffs. This paper aims to provide a critical overview of the
meaning of therapeutic jurisprudence in the South African context and the human
rights framework for the protection of female plaintiffs in cases of domestic
violence. Another aim of the paper is to examine current trends and practices in
some magistrates’ courts that administer domestic violence cases. In order to
achieve these objectives, this study provides an exposition of the meaning of
therapeutic jurisprudence in South Africa and the views of stakeholders involved in
the functioning of magistrates’ courts on related aspects. The corpus of human
rights in terms of the Bill of Rights of the Constitution of South Africa, 1996 as it
applies to the female plaintiff in adjudication procedures is also critically discussed.
The authors conclude this paper with recommendations for an improved, holistic
approach to domestic violence cases in the magistrates’ courts of South Africa,
taking cognisance of the human rights protection of the female plaintiff and the
notion of therapeutic jurisprudence.

1. Introduction

Domestic violence in South Africa has been described as endemic, widespread
and common and has been well researched and documented. The aim of this study
is not to repeat these findings but rather to reiterate the fact that violence against
women “is still the most pervasive understated, yet least recognised human rights
abuse in South Africa.” Domestic violence is a socio-legal problem that affects its
victim, but often also families, communities and broader society. Increasingly,
victims of domestic violence turned to the justice system for relief, and the plaintiffs

1 For the purpose of this article, ‘domestic violence’ is defined as physical; sexual, emotional, verbal
and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property;
entry into the complainant’s residence without consent, where the parties do not share the same
residence; or any other controlling or abusive behaviour towards a complainant where such conduct
harms, or may cause imminent harm to, the safety, health or well-being of the complainant. This is
the definition afforded in section 1 of the Domestic Violence Act 116 of 1998. Domestic violence
against women often occurs as a result of power-imbalanced relationships. See Feldhusen B ‘The
2 Artz L. The Weather Watchers: Gender, Violence and Social Control in South Africa. (Institute of
Criminology, University of Cape Town: South Africa) 2001
3 Although women, children and men may all be victims of domestic violence, only the position of the
adult female victim is addressed in this article.
in these cases are almost always women. However, research shows that violence against women is not being dealt with effectively by the justice system in South Africa. Domestic violence is not addressed in a holistic or similar manner in different jurisdictions and members of the judiciary (specifically in magistrates’ courts) are not always adequately trained to deal with those facets unique to domestic violence cases. An exceptional workload also impedes the ability of magistrates to pay special attention to the needs of victims of domestic violence. The increase in domestic violence cases in courts may therefore demand novel approaches to, amongst other concerns, the protection of the human rights of female plaintiffs. These rights are entrenched in the Constitution of South Africa, 1996 (hereafter the Constitution) and include, inter alia, the rights to human dignity, privacy, access to information and access to courts.

Some of the aspects of litigation (whether it be the complaint, the process, or the outcome) are expected to assist victims along the path to recovery from domestic violence. Courts may be important agents in the process of emotional recovery of the victims of domestic violence. In recent years there has been growing interest

6 Many plaintiffs have, for example, therapeutic expectations when a court is approached to settle a case of domestic violence. See also Feldhusen B ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’ 1993 Ottawa Law Review 25 (2) 212. See, for comments on the fragmented handling of court cases in South Africa, Van Zyl Smit D in Fattah A and Parmentier (eds) Victim Policies and Criminal Justice on the Road to Restorative Justice A Collection of Essays in Honour of Tony Peters (Leuven University Press 2001) 236.
7 In this regard it should be noted that the main purpose of the criminal justice system is to promote the public interest by controlling criminal conduct and that the needs and position of the victim are not, understandably, prioritised. However, some of the shortcomings of the criminal system can be addressed by the civil system since the civil system is premised on the equality of the plaintiff and defendant and allows for closer involvement with the plaintiff. See also Feldhusen B ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’ 1993 Ottawa Law Review 25 (2) 214.
8 Section 10 of the Constitution.
9 Section 14 of the Constitution.
10 Section 32 of the Constitution.
11 Section 34 of the Constitution. See for a discussion of these and other related rights, paragraph 3 below.
12 This is particularly true for victims coming from poor families that live under very constrained socio-economic circumstances, without the necessary resources that could allow for access to psychological treatment or support. It is interesting to note that research conducted by Feldhusen has shown that most plaintiffs expect that civil litigation may assist in their psychological recovery. Feldhusen B ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’ 1993 Ottawa Law Review 25 (2) 203.
in, and global discourse on, the application of therapeutic jurisprudence and lawyering\textsuperscript{13}. Consequently, the South African judiciary may be faced with the challenge not only to protect and fulfil the related basic human rights of plaintiffs, but also to comprehend and implement the notion of therapeutic jurisprudence.

This paper explores the ways in which therapeutic jurisprudence and the framework of constitutional rights of specifically female victims could contribute to improve the way in which magistrates’ courts approach and address cases of domestic violence. Subsequent paragraphs provide a critical overview of the meaning of therapeutic jurisprudence in the South African context and the constitutional framework for the protection of the rights of female plaintiffs in cases of domestic violence. Current trends and practices in domestic violence adjudication in some South African magistrates’ courts as well as the view and perceptions of magistrates and judicial officers are reflected on and recommendations are made based of these reflections.

2. Methodology

The data referred to in this exploratory and critical paper had been collected by means of both quantitative and qualitative methods (desktop research, observation of court processes, survey questionnaire, field notes and interviews), but for this article we rely only on data generated by the survey questionnaire. A questionnaire was distributed at a magistrates’ court in the Johannesburg district and at a conference on sentencing practices attended by legal practitioners in the North West Province. The participants included magistrates and other judicial officers that work at the magistrates’ court in Johannesburg and several magistrates’ courts in the North-West and the Limpopo Provinces\textsuperscript{14}. A population of 20 participants completed the questionnaire survey. The biographical information of this study is contained in Annexure A to this paper. The data was analysed using content analysis by identifying common themes that were collated and comparatively analysed.

3. Therapeutic jurisprudence in domestic violence cases

3.1 Introductory remarks

Therapeutic jurisprudence is related to the notion of restorative justice as far as it focuses on the law’s impact on emotional life and on psychological and social well-being. One of the core values of restorative justice that is also key to a therapeutic approach to justice is the balancing of offender needs, victim needs and the needs of

\textsuperscript{13} See Winick BJ Therapeutic Jurisprudence Defined http://www.brucewinick.com/TherapeuticJurisprudence.htm (Date of use: 11 August 2005).

\textsuperscript{14} Note that the response size for the questionnaire prevents it from being representative of the views of all magistrates and judicial officials in South Africa. To supplement the small sample group, additional personal interviews with magistrates as well as court observations took place. A further limitation may be that only magistrates’ and judicial officers’ views are reflected and not the view of other court personnel such as clerks.
Women worldwide experience domestic violence litigation to be time consuming and confusing; they feel that justice agents do not understand them and they experience a greater need for information and for victim advocates who are familiar with the concerns common to domestic violence. Most women who come to the court for assistance in domestic violence cases in South Africa are usually poor black women who speak a vernacular language and find the formal court processes, which are conducted mostly in English, overwhelming and alienating. Victims approach courts in the hope that their emotional needs will be met. It is the contention of this paper that therapeutic jurisprudence is a useful approach for the improved handling of domestic violence cases by magistrates’ courts in South Africa.

3.2 Therapeutic jurisprudence: a South African view

For the purpose of this paper, therapeutic jurisprudence is defined to mean:

a study of the role of the law as therapeutic agent. It looks at the law as a social force that may produce therapeutic or anti-therapeutic consequences through substantive rules, legal procedures or the behaviour of legal actors such as lawyers and judges. The task of therapeutic jurisprudence as an interdisciplinary approach to legal scholarship is perceived to be to identify and examine the relationships between legal arrangements and therapeutic outcomes.

The notions of therapeutic jurisprudence and restorative justice are still relatively unexplored in South African jurisprudence and legal writing. A lot may still be said about these approaches to justice and their application and place in South African law as well as in the practices of the judiciary. As is the case with restorative justice, therapeutic jurisprudence should encourage a shift towards less formal responses to crime and the infringement of rights that emphasise the role of citizens, community groups and other institutions of civil society. Therapeutic jurisprudence links with the idea that the justice needs of communities in South Africa cannot necessarily be

15 See Strang H Repair or Revenge Victims and Restorative Justice (Clarendon Press London 2002) 43-44. Strang also argues that restorative justice should be viewed as a new lens through which to perceive crime, taking into account its moral, social, economic, and political contexts.


18 Restorative justice provides an alternative approach to criminal justice systems around the world, while therapeutic jurisprudence is an alternative approach that may apply to both the criminal and civil justice systems but that has more healing potential in civil proceedings because of the close involvement of the victim. See, on restorative justice for example, Strang H Repair or Revenge Victims and Restorative Justice (Clarendon Press Oxford 2002) and Wright M Justice for Victims and Offenders A Restorative Response to Crime (Open University Press Philadelphia 1991).
met merely by punishment or by treatment of offenders. Instead, an integrated approach is required for achieving the variety of needs of sanctioning, offender accountability and reintegation, safety and victim restoration.

A justice system premised on the rule of law implies an ethic of justice under the applicable laws. The justice system in South Africa should facilitate active participation by victims, offenders and their communities as part of the move towards an ethic of care alongside the ethic of justice. Spader argues that the law, in the thousands of cases of domestic violence before magistrates’ courts, should be applied and enforced in a supportive manner for an ethic of justice to meet an ethic of care.

3.3 The notion of ‘therapeutic jurisprudence’ and the rights of women

South Africa is regarded as a deeply patriarchal society in which women have been subordinated in public and private life. Women are often subjected to violence and abuse, have less access to education and economic opportunities than men, and are more likely to be poor and dependent upon men to meet their basic human needs. Many women live under conditions of poverty, exhaustion and violence with little financial independence and access to property and other basic resources.

As indicated above, therapeutic jurisprudence, inter alia, ‘investigates the law as a social force that may produce therapeutic or anti-therapeutic consequences’ through different procedures and role-players in the bigger context of law and law enforcement. The rights of women in the Constitution, international human rights instruments and national laws in South Africa may provide the legal framework for therapeutic jurisprudence in especially those instances before courts where women are victims in vulnerable and exposed positions. In this paper it is argued that effective respect for, and protection and fulfilment of, the human rights of women in cases of domestic violence (as discussed in Section 4) inevitably requires a therapeutic jurisprudence approach.

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19 See also Spader DJ ‘The Morality of Justice and the Morality of Care: Are there Distinct Moral Orientations for Males and Females?’ 2002 Criminal Justice Review 27 (1) 75.
23 According to research by Statistics SA in 2000, 2.1% of women in South Africa report sexual abuse. On the other hand, it is estimated that as few as one out of 20 incidences of rape are reported. Gender violence in South Africa exists across race and class but, as argued by Cheadle, Davis and Haysom, poor women tend to be more vulnerable for reasons such as a lack of secure housing and reliance on public transport that are not always safe. See in this regard Cheadle MH, Davis DM and Haysom NRL South African Constitutional Law: The Bill of Rights (Butterworths Durban 2002) 54.
24 See Section 3.2.
3.4 The notion of ‘therapeutic jurisprudence’ and domestic violence cases in magistrates’ courts

A therapeutic jurisprudence approach to domestic violence may not only advance the impact of magistrates’ courts on the life of victims but may also contribute to improved protection of the rights of women as entrenched in the Constitution. Therapeutic jurisprudence in this sense views the role of the magistrates’ courts and magistrates as therapeutic agents. In most instances in South Africa (especially in traditional, rural and remote areas), the local magistrate court is approached by the victim of domestic violence only when involvement of the court seems to be the last remaining option\(^25\). When the victim of domestic violence finally approaches a magistrates’ court, it is often expected that the court will solve not only the problem of violence in the family, but also most of the other problems that occur in the family. These include, for example, financial problems and problems with child discipline. It is not argued in this paper that magistrates’ courts should become counselling centres, with a psychological approach rather than a legal approach to domestic violence. It is, however, argued that in applying the law, magistrates’ courts (often the only accessible courts in the rural areas of South Africa) should consider and address cases of domestic violence in the social context of the victim and with the therapeutic potential of the court’s intervention in mind. Principles of therapeutic jurisprudence that include ‘the integration of treatment services with judicial case processing, ongoing judicial intervention – as well as many other strategies, such as how to help an offender develop problem-solving skills, etc. close monitoring of and immediate response to behaviour, multi-disciplinary involvement, and collaboration with community-based and government organizations\(^26\) could assist in addressing the problem of domestic violence.

3.5 Concluding remarks

The meaning, role and place of therapeutic jurisprudence in South African and specifically in magistrates’ courts are still wide-open for interpretation, analysis and further research. Therapeutic jurisprudence is a feasible and important option in the reconsideration of the ways in which the justice system of South Africa currently addresses the almost unmanageable and destructive consequences of domestic violence. A therapeutic jurisprudence approach may ultimately strengthen victims’ perceptions of respect by the criminal justice system for their human dignity, privacy, life and freedom, and to this extent may also augment the human rights protection of women in South Africa.

\(^{25}\) In traditional African families domestic violence is often regarded as an issue that should be dealt with in the community and by community leaders.

4. The human rights framework for the protection of the rights of women in South Africa

4.1 Introductory remarks

In order to show how the framework of constitutional rights of specifically female victims could contribute to improve the way in which magistrates’ courts approach and materialise civil cases of domestic violence in South Africa, an understanding of the most pertinent and related human rights is required. Subsequent paragraphs briefly, albeit critically, reflect on the rights in the Constitution that are regarded as being of particular importance. Since international human rights law also plays an important role in the bigger context of human rights protection in South Africa, mention is also made of the applicable international human rights instruments.

4.2 The Constitution of the Republic of South Africa, 1996

The domestic human rights framework of South Africa encompasses an array of provisions to protect the rights of individuals, including women.27 There is no explicit reference to the rights of women; however, a number of rights may be applied in an argument for improved human rights protection and therapeutic jurisprudence practices in cases of domestic violence against women.

4.2.1 The right to equality (section 9)

Section 9 of the Constitution states, inter alia, that everyone is equal before the law and has the right to equal protection of the law and that the state may not discriminate directly or indirectly against anyone on one or more grounds, including amongst others, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation and culture.29 In South Africa, a difference is made between formal and substantial equality. It is argued that with regard to the position of women in cases of domestic violence as addressed by magistrates’ courts substantive equality may be at stake. Substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.30 At the heart of substantive equality is the idea that individuals should be put in a position to participate fully in society and to develop to their full potential.31 Although usually associated with issues such as equal job opportunities

27 For an introduction to the Constitution and the Bill of Rights contained in chapter 2 as well as the principles of the new constitutional order in South Africa, see Currie I and De Waal J The Bill of Rights Handbook 5th ed (Juta Cape Town 2005) 1–22.

28 Section 9(1).

29 Section 9(3). For an exposition of the historical and social context of the right to equality in South Africa, see Currie I and De Waal J The Bill of Rights Handbook 5th ed (Juta Cape Town 2005) 231.

30 Currie I and De Waal J The Bill of Rights Handbook 5th ed (Juta Cape Town 2005) 233. Formal equality on the other hand simply requires that all persons are equal bearers of rights and it does not, for example, take into account social and economic disparities.

31 A substantial approach to equality permits and requires positive measures, tailored for the needs of particular individuals and groups, to address inequality and remedy disadvantage, thus creating the conditions for full and equal participation in society. Cheadle MH, Davis DM and Haysom NRL South African Constitutional Law: The Bill of Rights (Butterworths Durban 2002) 57, 76.
and equal access to schools, substantive equality may also be applied in cases where
the judicial system is operating as such to be more protective of plaintiffs than of
victims in the court scenario, especially where the victim is an abused female person
and the victim the alleged abuser.

It is also important to note that the right to equality may also be interpreted to
provide for equality of rights. To this end the South African courts have developed
the concept of ‘equality of arms’, which includes the idea of ‘equality of rights’. This
in essence means that in a court situation both parties should be placed in an
equal position to each other. It also links with the idea that the right to a fair trial
should be applied consistently as far as both parties are concerned. Substantive
equality envisages, amongst other things, a society in which all people enjoy a level
of psychological, physical and material well being that enables everyone to
participate fully in that society. In research on therapeutic jurisprudence it also
became evident that litigants (both the accused and the plaintiff) want to perceive the
proceedings as unbiased.

4.2.2 The right to human dignity (section 10)

Human dignity, although not easy to define in clear terms, suffices as a core value
established by the Constitution. According to section 10 of the Constitution,
‘everyone has inherent dignity and the right to have their dignity respected and
protected’. In the broadest sense, the concept of dignity means to be treated with
respect whether in a public or private sense. Human dignity may be viewed as the
source of a person’s innate rights to freedom and to physical integrity and that from
these rights several other rights flow. The constitutional protection of the right to

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32 Section 35 (3)of the Constitution.
33 This idea has been applied in South African in both criminal and civil cases. See Cheadle MH, Davis
DM and Haysom NRL, South African Constitutional Law: The Bill of Rights (Butterworths Durban
2002) 71-72.
34 Cheadle MH, Davis DM and Haysom NRL, South African Constitutional Law: The Bill of Rights
(Butterworths Durban 2002) 77.
35 Feldthusen B 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' 1993 Ottawa Law
Review 25 (2) 217.
36 The Constitutional Court itself remarked that dignity is a difficult concept to define and capture in
clear terms. See National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12)
BCLR 1517 (CC) para 28.
37 The right to equality has been addressed by the Constitutional Court repeatedly in cases such as
National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC),
President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) and Prinsloo v Van der Linde
1997 (3) SA 1012 (CC).
38 See the discussion of Haysom N in Cheadle MH, Davis DM and Haysom NRL, South African
Constitutional Law: The Bill of Rights (Butterworths Durban 2002) 131 on respect for a level of
autonomy of the individual, respect for a subject’s sense of his or her worth in society and respect for
the right to have equal worth and value in society.
39 Currie I and De Waal J, The Bill of Rights Handbook 5th ed (Juta Cape Town 2005) 273. See also
Cheadle MH, Davis DM and Haysom NRL, South African Constitutional Law: The Bill of Rights
(Butterworths Durban 2002) 123.
dignity ‘requires us to acknowledge the value and worth of all individual as members of society’[^40], which arguably includes the value and worth of women in society.

Also, human dignity is not only a justiciable and enforceable right that must be respected and protected but it is also a value that should inform the interpretation of possibly all other fundamental rights[^41]. Dignity relates to the fact that an individual has the right to be protected from conditions or treatment that offends the subject’s sense of his or her worth in society. Domestic violence, essentially abusive, degrading and demeaning, constitutes this type of offensive treatment. Dignity as a core value should also guide courts in defining the purpose and reach of the other rights entrenched in the Constitution[^42]. It is agreed that violations of one’s dignity may take many forms and, if specific state interventions are required, there is a ‘plausible foundation for a mandamus on the state to take steps to protect persons from violations of their dignity by third parties’[^43]. In the context of therapeutic jurisprudence, litigants in cases of domestic violence have indicated that they prefer a court process that protects their dignity and in which they can participate, in which their voices are heard, and over which they have some form of control. They seem to value this even when it is expected to have little influence on the outcome[^44].

### 4.2.3 The right to life (section 11)

The Constitution states that everyone has the right to life[^45]. The right to life arguably requires of the state to take a leading role in establishing and ensuring respect for human life and dignity in South Africa[^46]. The right to life can be interpreted positively or negatively. When interpreted positively, it means that the state has a duty to protect the lives of its citizens. It is important to note that the right to life includes more than the right to physical existence. The possibility exists for the right to life to impose a duty on the state to create conditions that will enable all persons to enjoy a human existence[^47]. It may also be argued that the right to life,

[^45]: Section 11. The right to life is textually unqualified and may only be limited in terms of the section 36 limitation clause. In South Africa, this right is often linked to controversial social issues such as the death penalty, abortion and euthanasia.
[^46]: Currie I and De Waal J The Bill of Rights Handbook 5th ed (Juta Cape Town 2005) 281. In the groundbreaking case of S v Mmakwe 1995 (3) SA 391 (C) it was held by Constitutional Court that the rights to life and dignity are the most important of all human rights and the source of all other personal rights in the Bill of Rights.
[^47]: S v Mmakwe 1995 (3) SA 391 (C) para 353.
where other constitutional rights and the Bill of Rights fail to do so, may be employed to ensure a minimum quality of life. Since domestic violence to a large extent impacts on the quality of life of women, the right to life may accordingly not be as remote as may be expected.

### 4.2.4 The right to freedom and security of the person (section 12)

Bodily security is put in jeopardy by violence. For this reason section 12 of the Constitution may be regarded as of particular importance. Section 12(1) states, *inter alia*, that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private source and not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2) states that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.

Sections 12(1)(c) and 12(2)(b) are particularly important since these may be read to include that everyone (including women and children) has the constitutional right to be free from all forms of violence, including domestic violence and accompanying private abuse, as well as the right to bodily and psychological integrity, which includes the right to security in and control over the body. Often the results of domestic violence are more psychologically than physically destructive for women. Section 12(1)(c) requires of the state to protect individuals, both negatively by refraining from the former invasions itself and positively by restraining or discouraging private individuals from such invasions. In *S v Baloyi* 2000 (2) SA 425 (CC) it was held that the state is obliged to protect the right of everyone to be free from private or domestic violence. Positive duties are imposed on the state to protect individuals against violations of their physical integrity by others. In the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) it was decided that, in some instances, there is a positive component to the Bill of Rights which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection. Of further particular importance is the court’s remark that ‘... Constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.’

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49 It is argued in this article that section 12(2)(b) makes room for therapeutic jurisprudence in cases of domestic violence since it provides not only for bodily integrity but also psychological integrity.

50 *S v Baloyi* 2000 (2) SA 425 (CC) para 11.

51 Section 12(1)(c).

52 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44. See also Currie I and De Waal I *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005) 304.

53 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 para 57.
4.2.5 The right to privacy (section 14)

Section 14 of the Constitution states that everyone has the right to privacy. This right includes the right not to have their person or home searched\(^ {54}\) and the right not to have their privacy of communication infringed\(^ {55} \). It may be argued that the principal value served by privacy is human dignity and that in the adjudication of domestic violence cases the protection and safeguard of the autonomous identity of the victim may require positive action by a magistrate and other judicial officers\(^ {56} \). Evidently the collection, use, and disclosure of private information (especially as part of the collection and consideration of evidence and testimony) should be conducted in a way that does not further infringe the right to dignity of the female victim.

Judge Langa states that privacy is a right ‘which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings’\(^ {57} \). To this extent, the right to privacy becomes part of the human rights framework that allows for a therapeutic approach to domestic violence adjudication. It may be unavoidable in cases of domestic violence for the right to privacy of the female victim and her family to be justifiably limited in terms of section 36 of the Constitution.\(^ {58} \) However, and this is recommended in this paper, the right to privacy may and should serve to limit the extent to which and manner in which investigating officers and magistrate courts approach the intrusion of the private life of plaintiffs in domestic violence cases.

4.2.6 The right to access to information (section 32)

Section 32 states that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights\(^ {59} \). It is therefore argued that female victims in domestic violence cases have the right to obtain information from another person (such as an accused or his family) in order to effect the fulfilment of other constitutional rights such as the right to psychological integrity\(^ {60} \).

\(^{54}\) Section 14(a).
\(^{55}\) Section 14(d).
\(^{57}\) Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC) para 18.
\(^{58}\) See the short discussion of the section 36 limitation clause below.
\(^{59}\) Sections 32(1)(a) and (b). Note that Promotion of Access to Information Act 2 of 2000 has been promulgated in terms of the Constitution with the aim to effect section 32.
\(^{60}\) This may, however, require a balancing act by the court as far as the right to privacy of the accused and the right to information of the plaintiff are concerned.
4.2.7 The right of access to courts (section 34)

In terms of section 34 of the Constitution ‘everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’ (emphasis authors’ own)\(^{61}\). Any person is accordingly entitled to a hearing in court that is open and public and fair\(^{62}\). It is perhaps not correct to argue that it is unfair towards a victim of domestic violence not to have a trial that incorporates the therapeutic approach to justice and jurisprudence. However, the provision for another independent and impartial tribunal or forum, where this seems to be appropriate, could be employed in favour of the establishment of, for example, special domestic violence courts or, in the alternative, an independent specialist forum. It is argued that the high prevalence of domestic violence in South Africa and its known impact on individuals, families and societies make it appropriate for special domestic violence courts or another specialist forum in the existing magistrates’ court constituency to be established. The right of access to courts could in this way be employed to establish a forum not only conducive to the protection of other human rights (of both the plaintiff and accused) but also to the effective realisation of a judicial forum that contributes to a therapeutic approach to domestic violence jurisprudence\(^{63}\).

4.2.8 The limitation clause (section 36)

An exposition of some of the rights should arguably also make mention of the limitation clause contained in section 36\(^{64}\). This clause states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including, amongst others, the nature of the right and the relation between the restriction and its purpose. The reasons for limiting any constitutional right should be particularly strong since the Constitution permits the limitation of rights by law but requires the limitation to be justifiable\(^{65}\). According to Currie and

\(^{61}\) See also Cheadle MH, Davis DM and Haysom NRL South African Constitutional Law: The Bill of Rights (Butterworths Durban 2002) 618.

\(^{62}\) Most countries’ bills of rights in some way or another accommodate the conflict between entrenched rights and social interests by means of an interpretation clause. See Cheadle MH, Davis DM and Haysom NRL South African Constitutional Law: The Bill of Rights (Butterworths Durban 2002) 694.

\(^{63}\) This links with the idea that a limitation clause gives rise to two stages of analytical enquiry, the first being to determine whether the right in question is indeed infringed and the second to establish whether the infringement can be justified as a reasonable limitation of the right. See Cheadle MH, Davis DM and Haysom NRL South African Constitutional Law: The Bill of Rights (Butterworths Durban 2002) 696.
De Waal, this means that ‘the limitation must serve a purpose that most people would regard as compellingly important’. In limiting the rights of an accused to protect the rights of the female victim in domestic violence cases (and vice versa), the justifiability of the limitation may be particularly important together with the nature of the right that is limited and the purpose of such limitation. When viewed from the lens of therapeutic jurisprudence, it may be justifiable to limit an accused person’s right to information in order to protect the rights of a victim to dignity and privacy.

4.2.9 Enforcement of rights (section 38)

Section 38 of the Constitution provides for the right of a number of people to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. The court may grant appropriate relief, including a declaration of rights.

4.2.10 The interpretation clause (section 39)

In adjudicating cases before magistrates’ courts, it is required to interpret legislation and, increasingly, also to interpret the rights protected in the Constitution. This is also the case in adjudicating cases of domestic violence. Section 39 of the Constitution states that:

39 (1) When interpreting the Bill of Rights, a court, tribunal or forum –
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law, and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum, must promote the spirit, purport and objects of the Bill of Rights.

As far as a female victim relies on some of her constitutional rights in a case of domestic violence before a magistrates’ court, it is important that a magistrates’ court considers the core values that underpin society. Furthermore, when interpreting legislation such as the *Domestic Violence Act* 116 of 1998, a

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67 Section 32.
68 Sections 10 and 14.
69 The people include, amongst others, anyone acting in their own interest and anyone acting on behalf of another person who cannot act in their own name. See sections 38(a) and (b) of the Constitution.
It has been stated that the Constitution (by means of section 39) expresses the need to ensure that the values of the international human rights regime percolate through the South African legal system. The reference to international law in section 39 may be interpreted to allow recourse to treaties whether South Africa is a party to them or not. Dugard states that the Constitution ‘reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, particularly in the field of human rights’. South African judges and magistrates are therefore required to draw on the entire field of international human rights treaties. These include international human rights instruments aimed at the protection of the rights of women.

4.2.11 Courts and the administration of justice (Chapter 8)

In respect of state actors, the Bill of Rights directly applies to the non-lawmaking conduct of the judiciary, for example the conduct of trials. In order to view and understand the justice system in South Africa it is important to take heed of chapter 8 of the Constitution, which deals with the courts and the administration of justice. Section 165 states that the judicial authority of the Republic is vested in the courts and that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

It is furthermore stated that ‘organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts’. ‘Magistrates’ courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a

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70 See also Cheadle MH, Davis DM and Haysom NRL. *South African Constitutional Law: The Bill of Rights* (Butterworths Durban 2002) 746.


74 Section 165(1). According to section 166 the courts are the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; the magistrates’ courts; and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either High Courts or the magistrates’ courts. Note that in terms of section 239 of the Constitution, a court or judicial officer is specifically excluded from the definition of an ‘organ of state’ but that this does not mean that the Bill of Rights does not apply to them. See also Currie I and De Waal J. *The Bill of Rights Handbook 5th ed* (Juta Cape Town 2005) 47.

75 Section 165(2). As far as civil cases of domestic violence in magistrates’ courts are concerned, the *Civil Proceedings Evidence Act 25 of 1965* applies.

76 Section 165(4).
status lower than a High Court may not enquire into, or rule on the constitutionality of any legislation or any conduct of the President.\(^77\)

As far as court procedures are concerned, the Constitution is quite brief since it only states that all courts function in terms of national legislation and that their rules and procedures must be provided for in terms of national legislation.\(^78\) These legislative instruments should, however, be in conformance with the Constitution to be valid. Chapter 8 furthermore provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution (emphasis authors’ own). Such a matter could arguably also include the establishment of structures and procedures for the inclusion and incorporation of therapeutic jurisprudence approaches in adjudication in general, and in cases of domestic violence in magistrates’ courts in particular.\(^79\)

4.2.12 Institutions supporting democracy and the protection of constitutional rights (Chapter 9)

Apart from the protected constitutional rights discussed above, the Constitution also provides for state institutions that should support constitutional democracy in South Africa. Six state institutions are provided for. Three of these institutions have a direct bearing on protecting the rights of women in South Africa, and they are the Human Rights Commission, the Public Protector, and the Commission for Gender Equality.\(^80\)

4.2.13 Other national legislation

This article aims to investigate and comment on the constitutional framework for the protection of the female plaintiff in cases of domestic violence in the context of therapeutic jurisprudence. Yet, for an improved understanding of the discussion in this article, it may be important to refer briefly to the existing legislative framework on domestic violence in South Africa. The legislative framework consists of, inter alia, the Domestic Violence Act 116 of 1998, the Civil Proceedings Evidence Act 25 of 1965, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

4.2.13.1 The Domestic Violence Act 116 of 1998

The Domestic Violence Act provides for the issuing of protection orders with regard to domestic violence; and for matters connected with it. In its preamble, it is stated that domestic violence is a serious social evil; that there is a high incidence of

\(^{77}\) Section 170.

\(^{78}\) Section 171.

\(^{79}\) Section 180. These institutions are not discussed in this paper.

\(^{80}\) The other institutions comprise of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. See section 181(1). All of these institutions are independent, and subject only to the Constitution, and they must be impartial and must exercise their powers and perform their functions ‘without fear, favour or prejudice’. See section 181(2).
domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective. Regard is furthermore given to the Constitution and the international obligations of South Africa with regard to the protection of the rights of women, and the purpose of the Domestic Violence Act is to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide. Section 11 is the only section that makes reference to the actual proceedings in courts and no provision is made for special domestic violence courts or special divisions in magistrates’ courts to deal with domestic violence cases. It is, however, important to note that section 19 states that the Minister of Justice may make regulations regarding, amongst other matters, any matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of the Act.

4.2.13.2 The Civil Proceedings Evidence Act 25 of 1965

The aim of the Civil Proceedings Evidence Act 25 of 1965, as amended, is to state the law of evidence in regard to civil proceedings in South Africa. As far as could be established, this Act does not make any provision for proceedings in civil cases of domestic violence and, to this extent, the procedure and rules of evidence are exactly the same as in ordinary civil proceedings and therefore not necessarily conducive to the integration with the principles of therapeutic jurisprudence.

4.2.13.3 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The objectives of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 are to give effect to the letter and spirit of the Constitution, in particular the equal enjoyment of all rights and freedoms by every person and the promotion of equality. The guiding principles contained in the Act refer to corrective and restorative measures, but no explicit reference is made to therapeutic measures in the context of equality. Section 8 states that no person may unfairly discriminate against any person on the ground of gender, including gender-based violence, while section 11 states that no person may subject any person to harassment. Section 16 determines that, for the purpose of the Act, every magistrates’ court is also an equality court for its area of jurisdiction. It is also provided for that the state must develop awareness of fundamental rights in order to promote and achieve equality. Of interest is the Schedule to the Act, which provides an illustrative list of unfair practices in certain sectors but not one of the

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81 See the preamble to the Domestic Violence Act 116 of 1998.
82 Section 2.
83 Section 25.
listed practices makes reference to the possibility of unfair practices in, for example, the procedures of courts.\(^\text{84}\)

### 4.3 The international and regional framework

The rights of women are firmly embedded in existing regional and international human rights instruments. The Constitution of South Africa provides for the consideration of international and foreign law in the interpretation of rights.\(^\text{85}\) Some of the regional and international provisions that may relate, albeit in a broad sense, to the protection of the female plaintiff and her family in cases of domestic violence in the context of therapeutic jurisprudence are contained in the *Charter of the United Nations*, 1945; the *Universal Declaration of Human Rights*, 1948; the *International Covenant on Civil and Political Rights*, 1976; the *International Covenant on Social, Economic and Cultural Rights*, 1976; the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979; and the *African Charter on Human and Peoples’ Rights*, 1981.\(^\text{86}\) A discussion of these international human rights instruments is outside the scope of this paper.

### 5. Domestic violence, the magistrates’ courts, and women in South Africa: facts and faces

#### 5.1 Introductory remarks

From the above it is evident that several human rights exist that should be taken into account in domestic violence cases and in strengthening the position of female victims of domestic violence in South Africa. It has been argued that the taking into account of these rights in domestic violence adjudication in magistrates’ courts may contribute to the psychological well being of female victims. It may, however, be important to determine whether the current structure of, and state of affairs in, the magistrates’ courts of South Africa is such as allows for the protection of human rights and the integration of therapeutic principles in the procedures of domestic violence cases.

To put the following discussion in context, the judiciary is managed by the national Department of Justice and Constitutional Development but magistrates’ courts have autonomy over the ways that they manage cases. Some magistrates’ courts have a special division, called the ‘family court’, which addresses, amongst other family matters, cases of domestic violence. Family courts were established during 1998 and 1999 in four provinces in South Africa so that all family-related legal matters such as divorce, child maintenance, child abuse and domestic violence...
could be dealt under one roof\(^87\). These courts are often inaccessible to the female victims of domestic violence in remote and poor rural areas. The following section provides an exposition of data on the current experience of some magistrates’ courts as far as domestic violence cases are concerned. This analysis reveals that magistrates’ courts are faced with numerous challenges as far as the human rights protection of female victims of domestic violence is concerned. Only the key findings of the study are discussed\(^88\).

5.2 Court management, functioning and training of magistrates’

The study examined how domestic violence cases are managed by the courts. This sub-section deals with; the types of courts that deal with domestic violence, how they are managed, the viability of domestic violence courts and the training of magistrates. From these findings it appears that there is no uniform and comprehensive implementation strategy and that there is a lack of coordination within the justice system of strategies and programmes to deal with the issue of domestic violence. There were divergent opinions by participants about the types of court where domestic violence cases were dealt with, whether specific courts only dealt with domestic violence issues, and whether specific magistrates were assigned to deal with domestic violence only. Some of the participants indicated that their magistrates’ court jurisdiction had family courts that dealt with domestic violence cases while others indicated that domestic violence cases were dealt with by the ordinary civilian section for protection orders, or by the criminal section once there was a breach of the protection order. Seven participants indicated that their magisterial districts have family courts while official documents from the Department of Justice and Constitutional Development on the contrary indicate the establishment of only five family court pilot projects\(^89\). The findings of this research either indicate that magistrates might have misunderstood a question on whether their areas had family courts or that there is a lack of information about the objectives and meaning of family courts.

In response to a question about which courts should deal with domestic violence cases, an interesting finding was that most magistrates preferred that domestic violence cases be rather dealt with in a criminal court. Reasons why they preferred that these cases be dealt with in criminal courts were that the informal manner in which cases are dealt with in the magistrates’ chambers might be interpreted by court users as suggesting that domestic violence was not a serious matter. Criminal trials, however, focus on punishment and do not consider therapeutic responses as alternatives where offenders are kept accountable but victims feel satisfied with the justice process. Criminal trials are seen as cases between the state (represented by the public prosecutor) and the accused, who has a constitutional right to legal


\(^{88}\) For the short explanation of the methods of data collection, see Section 1 above.

\(^{89}\) Mills ibid
representation⁹⁰. The effect of this process is that the victim’s role in the case is limited to being a state witness and the victim’s needs are usually ignored during the criminal proceedings. Many victims are not satisfied with the outcomes of these formal legal processes. Parenzee affirms that the adversarial processes in the criminal justice are not always the best ways of dealing with problems of domestic violence since domestic violence deals with ‘human relations, power dynamics, gender inequalities, and [is] only tangentially about legal resolution’⁹¹. Domestic violence courts where victims’ voices are heard and their safety is guaranteed could be a bridge between having an informal process and ensuring that offenders are kept accountable for their actions.

The above findings, where most participants felt that domestic violence is best dealt with in criminal cases, are contrary to findings where the majority of the participants, in response to a question dealing with the viability of specialised domestic violence court, indicated the benefits of establishing these courts in South Africa. The motivation forwarded for the feasibility of these courts in South Africa, such as: specialist dedicated magistrates, the expedition of cases, high quality prosecution of domestic violence offences and the court processes focuses on victims, are the same motivations that are presented by the literature⁹² for the establishment of specialist domestic violence courts. These views about the establishment of domestic violence courts were similar to findings that magistrates expressed in a research study conducted by Artz⁹³. She however cautions that research about the effective functioning of domestic violence courts in Western countries shows that the same ‘procedural’ and ‘infrastructural’ problems are experienced by these courts.

Questions on the description of type of training received on the social context of domestic violence and whether training on domestic violence should be separate and different yielded the following: the participants indicated that there was not a standardised training programme that was developed specifically to deal with understanding the social context of domestic violence. The training was also fragmented and differed in terms of its length and depth of understanding the social context of domestic violence and it was also delivered by different role players. Although the magistrates received fragmented training on the social context of domestic violence, most of them reported that training on dealing with the complexities of domestic should be separate and different. Participants have emphasised that specialised training on how to deal with complexities of domestic violence should be intensive and take account of the diverse social and political dynamics of the South African society.

⁹⁰ Sec 35(3) (g) of the Constitution of the Republic of South Africa Act 108 of 1996
5.3 Court capacity, facilities and processing of domestic violence cases

The study also explored whether the courts had the necessary capacity to deal with domestic violence cases, how these cases were processed and what the effect of the processing had on victims of domestic violence. The findings indicated that there were many structural problems in the administration of the justice system’s response to domestic violence. The responses also pointed out that while there is an increase in the administrative duties of courts, there is a critical shortage of administrative staff such as clerks and interpreters dedicated to deal with the domestic violence caseloads. These staff members lack the necessary training, administrative support as well as physical resources to deliver an effective service to victims of domestic violence. The understaffing of courts compromises the services that women receive from the court. Vetten94 affirms that the Department of Justice is aware of these staff shortages. She notes that from 1996 to 2000 the Department lost 2,796 employees, which has had an adverse effect on service delivery. She argues that the Department has not allocated adequate resources to accommodate the increasing demands made by the implementation of the Domestic Violence Act on courts. Paranzae et al. argue that ‘not only does this lack of resources set people up for failure, but it creates an environment which becomes hostile to work in, due to unmet expectations both on the part of law enforcement agents and helpless complainants, feelings of disempowerment, and feelings of being implicated in a system that is not performing’95:

The findings related to the effective management of courts and suggestions on how to improve this management indicated that in instances where these cases were poorly managed by the court system this was because the courts lacked resources. Proof that the current processes are not addressing the needs of victims is reflected in the responses that these processes do not provide the relief victims hope for. The processes also do not address the underlying problems of domestic violence. Matters to address other issues that arise as a result of domestic violence, such as maintenance and children, are dealt in a fragmented manner. Participants expressed the concern that there is no objective monitoring of the compliance to orders given by the court, especially where children are concerned. Participants suggested that a multi-disciplinary approach in dealing with the problem will address domestic violence in a holistic manner. Currently the courts refer only the victim to counselling services but some participants stated that offender rehabilitation services should form part of the sentencing procedures.

In addition to all the above shortcomings at the court, special mention needs to be made of the police perceptions and attitudes that still need to change. The research indicates that the police are still providing minimalist and inadequate responses to the problem of domestic violence. This lack of attitude change of the police indicates that, while it is necessary to have progressive legislation to address certain


problems, the accompanying strategies to effect attitudinal change should be simultaneously introduced.

Most women who come to the court lack English literacy skills: they have an African vernacular as their first language or are illiterate and desperately need assistance when filling in complex forms, which are only available in English and Afrikaans. Artz\textsuperscript{96} explains that ‘ideally’ clerks should spend at least a half an hour to assist victims to fill in forms and give them sufficient information on the court processes, but because of the reasons mentioned above it is not always possible for clerks to fulfil these duties. At some courts Non-governmental Organisation (NGO) involvement assists with this function, which could take some away some of the heavy loads that have been brought about by the Domestic Violence Act. But most courts do not have NGO assistance.

Courts have not been designed to facilitate the comfort and safety of victims. There are no private waiting and consulting rooms for victims where their cases can be dealt with in privacy and confidentially and where there are facilities to nurse and change their babies. Women are faced with many obstructions when they eventually seek help from the court. Mills\textsuperscript{97} claims that this lack of understanding of the complexities of abuse in the justice system goes beyond reason since research on domestic violence has reported the difficulties that women go through to finally admit their abuse and then ask for help. This lack of understanding of the complexities of abuse by the court staff has the effect of invalidating their experience of abuse and the effects that it has on victims. All the foregoing factors make the access to justice for women unattainable. This ineffective functioning of the court system goes against the expressed vision of the Justice Department described in the Justice Vision 2000 document, which aims: ‘to provide equal access to justice to all regardless of race, gender, ethnic or social origin, culture and economic status. Also to ensure fast effective and cheap justice processes that are sensitive to the needs and is understandable to everyone.’\textsuperscript{98} When victims of domestic violence are treated unfairly by the justice system, their constitutional rights, amongst others, to human dignity, to privacy, to access the courts and information, as discussed in Section 3, are being infringed.

In order for strategies and practices to be relevant and responsive to changing circumstances and conditions, they should emerge from processes of ongoing reflection, evaluation and adaptation. These interventions should also take account of the women that they are designed and intended for. This paper suggests that the establishing of domestic violence courts through the use of a therapeutic approach could be considered as a measure to deal with most of the shortcomings experienced at present by the courts.

\textsuperscript{96} Artz ibid
\textsuperscript{97} Mills ibid.
\textsuperscript{98} Department of Justice and Constitutional Development, Justice 2000- Executive summary.
Most of the findings relating to the effective processing of domestic violence by the court were based on subjective observations of user satisfaction, public awareness of the Act, efficient clerical staff, dealing with long queues, and no repeat offenders. Vetten\textsuperscript{99} confirms these last findings when reporting that there are no \textit{scientific} (my emphasis) measures in place to evaluate whether the criminal justice system is effective in implementing the Domestic Violence Act.

5.4 The feasibility of special domestic violence courts and participant suggestions on the effective management of domestic violence

Domestic violence courts are described as courts that are specially convened to remove domestic violence cases from mainstream day-to-day court processes by identifying them and classifying them or streamlining them for improved legal processes and expedition of cases. Their objectives are to improve victims’ experience of the legal system and to use the courts’ powers to direct offenders into treatment\textsuperscript{100}. A case for the feasibility of domestic violence courts has been found in different sections of the findings. Participants indicated that these courts will lead to specialisation and increased expertise of legal officers dealing with domestic violence. The issue of domestic violence will be taken more seriously and particular attention will be paid to this phenomenon and the impact that it has on family life. It will fast track cases and lead to the speedy delivering of protection orders. It will also be victim focused. The literature highlights the elements that are mentioned such as specialist court officers, victim focus, and availability of services to victims and offenders and fast tracking of cases\textsuperscript{101}.

The usefulness of offender intervention programmes (which are non-existent at most courts) in helping to address the problem of offenders re-offending emerged several times within the research. The literature, however, suggests that the effectiveness of offender programmes is still debateable, especially around ‘methodological issues, court mandated versus voluntary participation and what constitutes effectiveness’.\textsuperscript{102} Some participants suggested that a multi-disciplinary approach to deal with different facets of abuse will help to deal effectively with the problem. The literature recognises that ‘the rationale behind the establishment of specialist domestic violence courts recognises that problems due to domestic violence are multiple and complex and that the responsibility for addressing the issue involves services and intervention by multiple agencies to provide a fast range of culturally appropriate services to victims and their children, not merely an appropriate criminal justice process’.\textsuperscript{103}

One of the participants made a recommendation on how special courts could be implemented differently in smaller towns by having a travelling court. The

\textsuperscript{99} Vetten \textit{ibid}
\textsuperscript{100} Specialist Domestic/ Family Violence Courts within the Australian context \textit{ibid}
\textsuperscript{101} Specialist Domestic/ Family Violence Courts within the Australian context \textit{ibid}
\textsuperscript{102} Specialist Domestic/ Family Violence Courts within the Australian context \textit{ibid}
\textsuperscript{103} Specialist Domestic/ Family Violence Courts within the Australian context \textit{ibid}
suggestion is in line with existing models of domestic violence courts, since there is no standard model. The model is dependent on a range of factors such as: the availability of suitable and accessible services for victims and perpetrators, a high-level interagency collaboration and co-operation between these services and between the services and the court to ensure that options are made available for victims and offenders.¹⁰⁴

There were also concerns expressed about why these courts might not be feasible, such as staff shortages, the strenuous workload and that the processes might lead to ‘officer’ burnout. These issues might cause further delays in the swift processing of domestic violence cases.

5.5 Concluding remarks

The data collected may certainly be used to draw many more conclusions on the current ways and needs of magistrates’ courts in South Africa as far as domestic violence is concerned. For the purpose of this paper it suffices to say that apart from the high prevalence of domestic violence in South Africa, the other challenges that face magistrates’ courts (such as the lack of an integrated and co-operative approach and the lack of resources) are of such a nature that they hamper the effective fulfilment of some of the rights of the female victim in the context of therapeutic jurisprudence. In the light of the previous discussion of human rights, it seems that women’s human rights are not always regarded by the justice system, and in particular the magistrates’ courts, in South Africa.

6. Recommendations

Magistrates’ courts in South Africa can arguably deal more effectively with domestic violence when the framework of human rights of the female victim and the key attributes of a therapeutic approach to justice are taken into account. The current structure, operation and needs of most magistrates’ courts in South Africa (as supported by the discussion of the data in Section 5 above) may, however, require a novel approach to domestic violence.

The following aspects are put forward for the attention of, and consideration by, the Department of Justice and Constitutional Development in South Africa but also magistrates and other judicial officers involved in cases of domestic violence:

- The South African government is challenged to strengthen the protected rights of women in the country in terms of the Constitution and other national legislation but also in terms of international and regional human rights instruments. These include amongst other rights, the rights to dignity, privacy and life;

- In the democratic dispensation of South Africa, the rising caseload in magistrates’ courts and the increased frustration of both the public and affected parties with the deficiencies in the standard approach to the

¹⁰⁴ Specialist Domestic/ Family Violence Courts within the Australian context ibid
processing and outcomes of domestic violence cases are matters of concern that should be taken seriously;

- Magistrates’ courts should reconsider its role as a problem-solving court in all cases of a socio-economic nature especially cases of domestic violence. The idea of problem-solving courts has developed in response to the realisation that a ‘one size fits all’ – approach only works in some contexts;  

- In order to strengthen the human rights protection of the female victim and to support national legislation for the prevention and protection of the victims of domestic violence, the notion of therapeutic jurisprudence should be investigated and incorporated in magistrates’ training and in magistrates’ court practices. Therapeutic jurisprudence should be viewed as strongly related to the potential of the law to contribute to the healing of people. Increased emphasis should be placed on the human impact of domestic violence as well as the enhancement of the quality of justice experienced by both victims and offenders in cases of domestic violence;

- In order to strengthen the human rights of the female victim and to effectively employ a therapeutic jurisprudence approach to domestic violence, magistrates’ courts should address and approach domestic violence across South Africa in a uniform, co-ordinated and holistic fashion. Judicial case processing should, for example, be partnered with treatment providers and community groups to provide follow-up support and support for victims and offenders to reduce recidivism. Collaborative working relationships should be established with legal practitioners, social workers, community and traditional leaders and Non-governmental Organisations (NGOs). A therapeutic jurisprudence approach endorsed by all of these parties may enhance the female victim of domestic violence’s willingness to access the justice system, to minimise the system’s anti-therapeutic effects and to maximize the therapeutic impact that it may have;

- In South Africa, a ‘victims rights’ approach should be married with and supplemented by a ‘victims care’ approach. A vocabulary should be developed for therapeutic jurisprudence in the civil proceedings before magistrates’ courts whilst magistrates’ courts should aim to create a non-adversarial atmosphere. Rules of evidence, procedure and court room etiquette should be more relaxed;

- It should be noted that domestic violence courts and the underlying approach of therapeutic jurisprudence to, amongst other socio-legal problems, such as domestic violence, have had revolutionary effects on the workings of justice systems in the United States, Canada and elsewhere in the world;  

105 Bakht N Problem Solving Courts as Agents of Change www.restorativejustice.org/articlesb/articles (Date of use 7April 2006).

106 Bakht N Problem Solving Courts as Agents of Change www.restorativejustice.org/articlesb/articles (Date of use 7April 2006).
The high prevalence of cases of domestic violence in South Africa and the load on magistrates’ courts require either special domestic violence courts in each magistrates’ court in the country or a special unit in the existing magistrates’ court set-up, which will allow specially trained magistrates and court officials, together with trained therapeutic experts such as social workers and psychologists, to address domestic violence in a holistic fashion.

7. Conclusion

The state, especially the judiciary (whether in terms of law or in a moral sense), is expected to address domestic violence in a way that will ensure the best possible outcome for not only the victim, but also the family members involved. The magistrates’ courts in South Africa are in many instances (especially in traditional African families) the last resort of the female victim of domestic violence. This leaves magistrates and judicial officers with a responsibility to address these cases with the key human rights of affected women and the possible healing impact of the court’s decision in mind. A therapeutic approach to justice does not require of courts to become extended medical or psychological centers. Rather it requires a revisiting of the healing impact of the law in practice and the positive changes that can be brought about in the lives of affected people. The impact of this approach in domestic violence cases before the magistrates’ courts of South Africa may not be underestimated. Physically and emotionally abused women constitute a very vulnerable population in South Africa. Adopting strategies that empower these women would be in the best interest of us all.
Annexure A

Biographical Information

A population of 20 participants completed the questionnaire survey in the pilot study and their particulars are recorded in the table below. Seventeen of the participants in the sample were magistrates and the other three respondents indicated that they were a social worker, an attorney and an advocate at the high court. From the 17 participants who were magistrates, 14 were at a district court and the other four presided over a regional court.

Table 1: Biographical information

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RECONNECTION TO COMMUNITY AS A SENTENCING TOOL

Magistrate Annette Hennessy

Murri Court is an Indigenous sentencing Court developed by Magistrates in Queensland in an effort to address the over-representation of Indigenous people in the criminal justice system and in particular, in prisons. This paper examines the practices which have been successfully utilised in the Rockhampton Murri Court and will highlight the broader advantages of the indigenous community engaging in the criminal justice system. The path to a true reduction in the rate of recidivism for indigenous offenders living in an urban setting may lie in the ability of the indigenous community to reconnect the offender with traditional indigenous values and communal responsibilities.

In honouring some central tenets of local traditional ways and through publicly acknowledging respect for the wisdom and authority of Elders of the indigenous community, the Murri Court endeavours to provide a process for the indigenous community to be integrally and practically involved in the criminal justice system. The process places offenders into the supportive but demanding arms of the indigenous community with an emphasis on rehabilitation and healing for the community. Elders and members of indigenous Community Justice Groups participate in Murri Court and are primarily the providers of holistic information on indigenous offenders and the impact of the offending on the community for the assistance of the sentencing Magistrate.

Community based orders imposed in Murri Court are intensively focused toward the end result of rehabilitation of the offender under the watchful eye, and with the support, of indigenous community leaders and through the use of indigenous service providers. Treatment of offenders for issues behind the offending behaviour including domestic and family violence, alcohol and substance abuse, mental health conditions and psychological problems assist offenders to rectify the underlying causes leading them to offending. In the process of healing that hopefully takes place, offenders are surrounded by concerned members of their community who become part of their lives and re-establish and strengthen community ties with the offender.

The resultant reduction in recidivism honours the dedication and dignified patience of the Aboriginal, Torres Strait Islander and Australian South Sea Islander community members in awaiting inclusion in the criminal justice system, for their chance to play an essential role in healing their own people and strengthening the community.

Dislocation and Offending

“The high rate of incarceration of Aboriginal and Torres Strait Islander people, the levels of alcohol consumption and related violence are a source of distress and dislocation to people both on
communities and in urban and regional settings.”

This statement made in 1995 is now so uncontroversial that the premise has become commonplace. But how often are these issues looked at from the aspect of rebuilding the disintegration of communities, even if the rebuilding is attacked one person at a time? Everyone wants to belong, to be valued and appreciated and supported. Once those feelings are lost and individuals become disenfranchised, community disintegration occurs incrementally. The forcible removal of people from their community by any means, including incarceration, inevitably impacts on the fabric of the community.

Public and personal safety must be paramount considerations of the criminal justice system. However, we should not lose the opportunity to appropriately redress the disenfranchisement of individuals for the good of the whole community in the long term whilst protecting personal and community security in the short term. It is essential to bring offenders to the point of taking responsibility for their actions from which they can attend to their own rehabilitation and redress their wrongs to the community. The most important people in effectively achieving this end have been historically locked out of the process used to deal with indigenous offenders. Those people are, of course, the members of the indigenous community to which offenders belong.

Murri Court first commenced in the Queensland Magistrates Court in Brisbane on 21st August 2002 under the leadership of Diane Fingleton, then Chief Magistrate, and Brian Hine, Deputy Chief Magistrate following investigation of other Indigenous Court initiatives around the country, particularly Nunga Court in South Australia. The initiatives grew from continuing concern that many years on from the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, indigenous people were grossly over-represented in the criminal justice system. In 2001, Aboriginal and Torres Strait Islander people were 3.2% of the Queensland population, but they made up 23.1% of the prison population and 8.4% of people in the community corrections system.

The Murri Court concept has been applied in centres other than Brisbane, including Rockhampton, Mt Isa, Townsville and Caboolture, and has been adapted to fit local communities and their needs. This paper will deal with the practices developed in Rockhampton. Murri Court models have varied in order to be responsive to the needs and views of the local indigenous community.

With the assistance of the provisions of the Penalties and Sentences Act, Magistrates, through the initiative of Murri Court, are attempting to address the issue of over-representation by providing for indigenous communities to have significant

2 Queensland Government Queensland Aboriginal and Torres Strait Islander Justice Agreement 2001 page 7 (Department of Justice and Attorney General)
3 Section 9(2) Penalties and Sentences Act 1995 (Qld)
input into the sentencing process through respected persons – Elders and Community Justice Groups. Through working within the frame of reference of the people using the Court and establishing the social context of the offending, the Court process can become more meaningful and understandable to the participants. The aim is for this involvement to lead to the imposition of more successful and culturally appropriate bail and sentencing orders with a view to long term rehabilitation and reduction in recidivism. The perhaps initially unforeseen, but arguably the most significant, benefit has been the reconnection of offenders with their communities. The harmony which can result from the reduction in recidivism in the community assists in building the community fabric.

The Importance of Communication

Murri Court focuses on open communication flowing in all directions to improve the information which is provided to the Court but also accepting and receiving the wisdom and experience of the Elders and the contextual information from the community through the Community Justice Group. It is also an opportunity for the provision of continual education and information about the Court process, sentencing and bail principles and the criminal justice system generally to the participants in Court and through them to the community at large. The victim has a voice and the insight and acceptance of responsibility of the offender is sought in the process in order to frame effective orders. Openness and conversation are encouraged in all participants in order to ensure that the message people are imparting and not just their words are heard.

“I know you and you know me”

“[A] key factor in healing for Aboriginal people is the role of connection. Connection can mean the process of dealing with problems with the assistance of others and not by oneself …. The extended family, friends, and members of the community [are] seen as natural support for Aboriginal people and as illustrating the importance of belonging. Similarly it was seen as desirable for many Aboriginal people to be connected to and belong with nature and spirituality and ultimately to be part of [a community].”

This statement was made in a healing context but is equally prescient in relation to the aims of the process of Murri Court.

When we meet someone, we try to make a connection or a link with them. We probe for points of intersection in our respective lives, things we may have in common – where we are from, who we are related to or acquainted with, where we went to school or worked. It is often said “it’s a small world” and that can be very true. We can usually place most people that we meet into a context which, whilst it may not be six degrees of separation, at least makes us feel comfortable. This is a human trait, perhaps derived from some ancient survival instinct, which has certainly become a social norm in many cultures.

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And so, when an Elder of an Indigenous community can say to a defendant, “I know you and you know me”, a connection with the defendant is re-forged or reinforced and general trust held in the Elder, by virtue of their respected position in the community, becomes personal. The connection also invokes thoughts of those people that the Elder and defendant have in common and indirectly brings their views to the issue at hand - the wayward behaviour of the defendant. Often, when addressing offenders, the Elders speak of the “old people” (ancestors) and what they would have done or seen done to an offender in the “old days”. This always strikes a chord with offenders – even the toughest.

Allowing the criminal justice system to be flexible and open enough to be a means of reconnecting a defendant with their law-abiding community in an atmosphere of mutual respect and hope for the future, may be one of the most important advancements in the system in many years.

Offenders are told by members of their community, “we will walk beside you”, “we will face this journey [to rehabilitation] with you” which lets the offender know that they are worthy of the support of their Elders, that their families are considered important to preserve and that they have a responsibility to those around them to behave in a certain way. The combination of the pressure of knowing that the community is paying attention to on-going behaviour and the encompassing support for rehabilitative and growing efforts on the defendant’s part cannot be underestimated in their potency.

**Operation of Murri Court, Rockhampton**

One of the main objects of the Murri Court is to divert indigenous offenders from imprisonment orders when other appropriate penalties may be used in an effort to address the over-representation of indigenous offenders in the prison system. The Court is also seeking to address the rate of indigenous offenders failing to appear, which can often lead to prison terms, and a decrease in the failure rate of community based orders.

In re-designing the usual Court process, one aim was to ensure that there was significant improvement in offenders’ understanding of the proceedings and his/her obligations under any resulting orders. A more precise understanding of what happened in Court and the conditions of the orders, will of course assist offenders in progressing with a positive outlook through the orders (if feel they have been dealt with fairly) and more successfully (if they know what they need to do), leading to a decrease in breaches of orders with a consequent decrease in the likelihood of terms of imprisonment on re-sentencing.

**Eligibility**

Eligibility for Murri Court arises from offences falling within the jurisdiction of the Queensland Magistrates Court, usually where the offender is of Aboriginal, Torres Strait Island or Australian South Sea Islands descent and where the offender indicates a plea of guilty to the charge/s. The offender may elect to be referred to the sittings or consent to the Magistrate’s referral. One of the major triggers for referral to Murri Court is the existence of substantial difficulties of the offender
which can be addressed through intervention and treatment in order to move toward long term abstinence from re-offending. This requires significant effort and dedication on the part of the offender and it is essential that he/she is prepared to submit to the process and subsequent orders.

The mechanics of the process

Murri Court is held at a dedicated time (isolated from the main list) on a regular basis. Separate time is allocated in order to allow the Court to dedicate more time than is traditionally available in the eternally busy Magistrates Court list. In some centres, the Magistrate does not robe and sits at the same level as the rest of the participants in the Court. In Rockhampton, during consultation with the Indigenous community it became clear that there was a preference for the Magistrate to robe and sit on the Bench – the reasoning was to ensure that the offenders realised that the process was a Court process with the appropriate authority and seriousness.

Indigenous community involvement in the Murri Court process comes primarily from the Community Justice Groups and Elders or Respected Persons. Community Justice Groups are partially funded by the State Government and have legislative based standing to make submissions to Courts on bail and sentencing matters. Members are taken from the local community (usually by way of nomination or invitation) and undergo training to varying degrees. The Fitzroy Basin Elders Committee is a volunteer organisation of Elders whose elderly but eternally dynamic members are involved in many community projects and initiatives. In the main, most of the work of these important organisations is voluntary work and the importance of the contribution of these members of the community should be appreciated, lauded and most of all - supported.

The Community Corrections Office, a limb of Department of Corrective Services, contributes to the operation of the Court significantly, not only in the preparation of presentence reports but more significantly in the supervision of community based orders. The positive interaction between the Justice Group and Department of Corrections, and the dedication of additional time by both organisations to Murri Court is integral to the success of the process. The co-operation of these organisations with the criminal justice system through the Magistrates Court represents a holistic approach to a historically difficult problem in a practical and positive way.
At the time of referral to Murri Court, presentence reports are sought by the Court from the Community Corrections Office and the Community Justice Group. The Community Justice Group is provided with a summary of the Police allegations and the criminal history of the offender by the Police. Written reports are prepared by both organisations following interviews with the offender and his/her family and following liaison regarding the availability of appropriate programs. On some occasions, offenders are referred to services prior to sentencing or may attend of their own volition.

Reports address the offender’s background, personal situation, the offender’s attitude to the offending, availability of programs in the community and their appropriateness for use in sentencing orders. Where the offender is from another community, the Justice Group liaises with the Justice Group from the offender’s community in relation to the report. The Elders and/or Community Justice Group may decline to assist an offender for appropriate reasons including conflict of interest, or threatening behaviour of an offender for example.

Murri Court Day

On the day of the Court appearance, the Elders, Community Justice Group and Community Corrections Officers meet with the offender and family (if appropriate). The Elders in particular usually speak quite frankly about the offending behaviour and the offender’s personal circumstances. The ethos of the interactions between the Elders, Community Justice Group and offender is predominantly to strongly condemn the offending behaviour and to inform the offender of the effect on the community of the offending behaviour whilst encouraging the offender to take up the support of the Indigenous community organisations in order to rehabilitate themselves and make redress to the community for their behaviour.
The sentencing hearing itself proceeds much as usual, with submissions from Police (including victim impact information if available), Community Corrections, Justice Group, offender’s legal representatives, and the offender and/or their family.

A representative of the Elders’ organisation sits on the Bench with the Magistrate. The Elder addresses the offender in the public setting as to the community concerns, the responsibilities of the offender regarding reparation and rehabilitation. This is a very powerful part of the proceedings and there is usually 4-6 other Elders who attend Court and sit in proximity to the offender. There is a discernible atmosphere of seriousness when the Elders are present. The Elders are very direct and they make it quite clear to the offenders that they must honour their responsibilities to the community after Court for community support to be available to them.

After consideration of all of the material presented and submissions made, the sentencing decision is taken by the Magistrate alone.

Orders imposed in Murri Court

The full range of sentencing options are available to Murri Court. The most successful Orders have proved to be Probation Orders and Intensive Correction Orders, which typically include conditions requiring attendance on the Community Justice Group and/or Elders, attendance at counselling and/or programs to address specific issues (for example domestic and family violence, alcohol or drug abuse), attendance at Indigenous Mens’ Groups or other support groups, and Community Corrections courses or programs. The extent of compliance required represents what might be considered to be significant punishment and deterrence whilst offering rehabilitation opportunities. An integrated approach is taken to the offender’s rehabilitation with a real and sustained effort (within the terms of the orders of the Court) to address the difficulties faced by the defendant as far as is possible.

The Success of Community involvement

An essential aspect of the power of the Murri Court process on a spiritual or emotional level is the intensity of the natural authority and wisdom of the Elders. The atmosphere in the Courtroom is striking. There is a distinct feeling of condemnation of the offending but support for the offender’s potential emanating from the Elders and the Justice Group members.

Often similar emotions are expressed by the offender’s family members. Declaring private concerns and fears for and about the offender in front of those assembled in Court, in a public way, can be very cathartic for the family members (who are often victims of the offending themselves). Orders often need to take intimate family considerations into account in order to tailor orders which are designed not only to punish but also to assist the offender to address his/her difficulties with appropriate supports.

The Court, through this process, acknowledges one of the basic tenets of traditional indigenous law and community values, that is, the authority of and respect for the Elders of the community. Whilst other customary actions such as
banishments from the community or various areas and places, apologies and reparation are taken into account, it is the involvement of the Elders which makes the process so worthwhile. Their wisdom and knowledge are a constant inspiration. The pride of the Elders in the attempts to assist the community they are making through the Court is noticeable. The acknowledgment in a public forum of the Elders’ authority and wisdom and their role as moral guardians of the community by the Court honours traditional respect for the role of the Elders.

**Benefits for the Community**

There have been beneficial spin-offs from the collaboration of organisations in the local community with Murri Court. There is substantial support for the Murri Court process from many indigenous community service providers and their involvement is integral to the operation of the Court’s orders.

A number of community organisations have dove-tailed programs or created new programs and/or services in response to needs identified by the Murri Court process and its participants. The cross-referrals between services have also increased according to anecdotal reports.

The Elders and members of the Community Justice Group report a feeling of inclusion in the criminal justice system and an improvement in the nature of the interactions with and attitudes of staff in the Court House and associated organisations. This shows that real reconciliation can flow from creating an atmosphere which brings all people together from which they can appreciate points of similarity through working with a common purpose.

The combination and more efficient use of community services will tend to create stronger community organisations and a more integrated approach to the resolution of community and individual problems. The benefit of the increase in the feeling of “community” amongst organisations and their participants is central to regeneration of the internal support structures in the indigenous community.

**Results**

A preliminary analysis of the data from Murri Court in Rockhampton has shown that 8.5% of offenders had no criminal history, 31.0% of offenders had minor history (street and traffic offences) and 60.5% of offenders had history for major offences (indictable and/or violence). Consequently, 91.5% of offenders came to the process with some previous criminal history.

In recent times, the offenders have increasingly been drawn from a high-end offending group – those who are facing a term of imprisonment due to the seriousness of the offending behaviour or as a result of their criminal history. As a consequence, re-offending rates have fluctuated over time, but the results continue to be encouraging.

Examination of the circumstances of the 71 defendants who have appeared before the Murri Court shows that 31% have not re-offended, and of the 69% who did re-offend, over 60% of them committed offences of a more minor nature than the
subject offence. Although over two-thirds of defendants did re-offend, this should be placed in the context of the offending profile of the defendants prior to participating in the Murri Court process. That is to say that despite only 8.5% of offenders having no criminal history prior to Murri Court, 31% did not re-offend after participating in Murri Court, more than a three-fold increase in lawfulness.

An analysis of the nature of the re-offending showed that 67.7% committed minor offences and 32.3% of offenders committed indictable and/or violent offences, despite 60.5% of offenders having previous convictions in this category. This could be seen to represent a significant reduction in serious offending. 72% of the re-offending behaviour occurred 9 or more months after the date of appearance at Murri Court, perhaps confirming that the intensive nature of the intervention is the most effective period of the offenders’ involvement.

Over the period that Murri Court has operated in Rockhampton, community based orders, such as Probation and Intensive Correction Orders have been considered important, in large part because offenders respond to the opportunity for effective rehabilitation, but it can also be seen that those orders are more effective than imprisonment in diverting offenders from serious offending.

Community Based orders are more effective in reducing recidivism for indictable and violent offending. Probation orders diverted 71.8% of offenders on those orders from major re-offending. Intensive Correction Orders (terms of imprisonment served in the community under supervision and with an element of community service) diverted 100% and Imprisonment diverted only 41.6%. The highest rate of re-offending for indictable and violent offending was seen in those offenders sentenced to imprisonment.

The dual benefits of reductions in serious offending and the opportunity for rehabilitation should be attractive to all aspects of the community.

Reconnection is not an abstract idea

There have been some very real improvements in the lives of offenders and objective signs of their reconnection with or ‘reintegration’ into the community.

One man who appeared before the Court for a disqualified driving matter where he was facing a mandatory term of imprisonment under the legislation due to his traffic history had a wife and young family of three sons. He had a significant problem with alcohol. He was placed on an Intensive Correction Order, a term of imprisonment to be serviced in the community with community service and supervision components. He successfully completed the ICO. He has been working with the Elders and other community organisations as a volunteer in the meantime. He is “off the grog” and his family is flourishing. His oldest son has been earmarked as a dance student of significant talent by an interstate theatre company. This lad has also been the school captain in his senior year. He has reported that he was “going nowhere” before his father sought help.

A woman who appeared before the Court at a time when she was in a very violent relationship and coped with her situation by drinking (and consequently getting into
trouble) has since left the relationship and built a new life. The support offered to her through Murri Court may well have assisted her in this regard. She has gone on to become an office bearer of a Committee related to her daughter’s schooling. The pride with which she reports this fact and her obvious delight in participating in the community in this way is testament to the turn around she has achieved in her life and the positive impact she can have on her children as a result.

**Conclusion**

The power of the opportunity to heal members of their community, bring wayward persons back into the fold, improve community safety and be involved in the process in a collaborative and productive way has been an empowering experience for the indigenous community and members of the criminal justice system alike. Working towards the common goal of appropriately reducing rates of incarceration for indigenous people and the reconnection of those offenders with their community and the communal healing that has resulted have produced other, unexpected benefits and provided hope for the future.
INTERNATIONAL CRIMINAL JUSTICE AND THE PROMISE OF THERAPEUTIC JURISPRUDENCE

Dejo Olowu*

Abstract
Over the cause of more than half a century of post-World War II experience of prosecuting perpetrators of war crimes, crimes against humanity, and other gross human rights violations, one philosophical challenge that has engaged the minds of jurists and stakeholders is how to put an end to the culture of impunity. Increasingly, however, the methodologies employed towards realizing this onerous goal have encountered problematic contours through ossified rules and legalistic orthodoxies. This essay evaluates the frameworks of some existing institutional mechanisms for international criminal adjudication and accentuates the normative, procedural and structural inadequacies of their approaches to post-conflict peace, rehabilitation, and reconciliation. Extrapolating from learned experiences, this essay canvasses the need for the integration of behavioral inquiry into current international criminal adjudicatory processes. Acknowledging the negligible appreciation of the innovative concept of therapeutic jurisprudence in contemporary international criminal justice discourses, this essay identifies pragmatic trajectories for relevance and synergy.

I. INTRODUCTION
Since the new school of socio-legal enquiry known as therapeutic jurisprudence emerged in the late 1980s,¹ it has recorded remarkable inroads into the legal dimensions of mental health and medical practice, family and matrimonial causes, personal injury, diverse aspects of criminal justice (in the municipal context), particularly as it relates to child offenders, drug offenders, sex offenders, the treatment of victims, sentencing of repeat offenders, and so on.² The

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interdisciplinary scholarly engagement with these numerous fields has thus been tremendous and far-reaching. However, therapeutic jurisprudence is yet to garner substantial theoretical and practical application in the areas of international criminal law, international criminal procedure, and international criminal adjudication.

Despite the thematic extensions of therapeutic jurisprudence inquiry, scholarly appreciation of the concept in the realm of international law is yet to assume any level of significance, and consequently, discourses on its application in theory or practice remain negligible. While Cooper sought to apply the idea of therapeutic jurisprudence in his analysis of the concept of the collective right to self-determination, Toro was more concerned about the significance of therapeutic jurisprudence in the normativization of relations among some American states, and in her seminal essay, Nicola Henry limited her consideration of the “therapeutic approach” to its relevance for sexual offences in international armed conflict situations. Apart from these works, the International Network on Therapeutic Jurisprudence has not identified any other scholarly initiative of topical relevance to international law.

While each of these mentioned efforts were groundbreaking in their respective rights, none of them captures the holistic inquiry of this essay into the significance of therapeutic jurisprudence for international criminal justice. In sum, international criminal justice still lags far behind in assimilating the benefits of the growing phenomenon of therapeutic jurisprudence. Why is this so? What seemingly inherent factors in the discipline of law present legal scholars and international criminal lawyers and jurists with the difficulty of a paradigm shift that would engage the strategic importance of therapeutic jurisprudence for international criminal justice?


3 See Alan Tomkins & David Carson, International Perspectives on Therapeutic Jurisprudence – Part II (2000) 18 BEHAV. SCI. & L. 411, 411 (observing that “Therapeutic Jurisprudence is flourishing”). See also Wexler, TJ and Legal Education, supra note 1, at 179 (noting the expansion of scholarly efforts in the field of therapeutic jurisprudence); Susan Daicoff, Law as a Healing Profession: The “Comprehensive Law Movement” (2006) 6(1) PEPP. DISP. RESOL. L. J. 1, 11 (remarking that therapeutic jurisprudence has received recognition in “more than 581 articles and eighteen books” since 1990).


7 For the regularly updated compilation of bibliography on therapeutic jurisprudence from around the world, see TJ Bibliography, at http://www.law.arizona.edu/depts/upr-intj/ (last visited 04 May 2006).
Within the context of contemporary global challenges, is there a framework within which the basic tenets of therapeutic jurisprudence can be integrated into the dynamics of international criminal adjudication? This essay attempts to address this cannonade of questions in tandem and proffers some modest intellectual insight into possible synergy between therapeutic jurisprudence and the ends of international criminal justice.

In analytical detail, this essay argues that the contemporary normative, structural and institutional frameworks for international criminal justice have become patently stereotypical and unproductive, and advocates a re-orientation of those who administer the machinery of international criminal justice.

In its thematic outlook, Part I introduces the scope and parameters of this essay while Part II broadly discusses the foundations of international criminal law vis-à-vis the notion of justice as understood within the context of this branch of law. Part III of the essay highlights the conceptual, normative, procedural and institutional frameworks of contemporary international criminal adjudication and evaluates the impact of these means and methods on the ultimate goal of problem-solving justice, indicating the necessity for fresh and innovative understanding of international criminal justice. Following the robust critique in this segment, Part IV explores the emergent idea of therapeutic jurisprudence, its philosophical foundations, its tenets and methodological approaches, and assesses the possible role of the concept in the practice and administration of international criminal law and justice. Extrapolating from some current theoretical and practical dilemmas in international criminal justice discourses, Part V makes an attempt at identifying the trajectories for the viable integration of the therapeutic jurisprudence concept into current understanding and practice of international criminal law and justice and reflects on the efficiency that a synergy between therapeutic jurisprudence and international criminal justice could generate. Part VI draws conclusions and inferences from the article’s pragmatic approach.

II. INTERNATIONAL CRIMINAL LAW AND THE CONCEPT OF JUSTICE

It will be safe to posit that international criminal law did not emerge as a distinct branch of public international law until after the Second World War of 1939-1945 (WWII). Of course, references are usually made to the hazy transnational criminal processes that followed the invasion of Armenia by Turkey in 1945 and Wilhelm II of Hohenzollern (the German Kaiser)’s antics calculated at securing a victory over the Allied Nations during the First World War 1914-1918 (WWI). However, it was the International Military Tribunal for the Trial of German Major War Criminals (the Nuremberg Trials) and the International Military Tribunal for

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the Far East (the Tokyo Trials) that followed the WWII that marked the humble beginnings of international criminal law.¹⁰

Even though the incidence of the Cold War, coupled with philosophical debates about the sovereignty of states, and the general reluctance among states towards cooperation in the area of international prosecutions had slowed down the development of international criminal law as a perceptibly distinct body of law,¹¹ the demise of the Cold War had re-energized the “startling growth of efforts to establish a worldwide criminal process capable of punishing heinous crimes ranging from genocide to grave breaches of the Geneva Conventions.”¹² Sufficient to say that since the 1990s, the international community, particularly under the aegis of the United Nations (UN), had evidenced a commitment to agenda-setting in the establishment of diverse normative frameworks and institutional mechanisms to deal with heinous crimes and to punish their perpetrators.¹³ The realm of international law is replete with remarkable icons of this commitment.

In the aftermath of the Balkan conflicts of the early 1990s, the UN Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY) pursuant to the Statute of the ICTY,¹⁴ to investigate and prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹⁵ Similarly, following the Rwandan genocide, the UN, through its Security Council, had adopted the Statute of the International Criminal Court for Rwanda which set up the International Criminal Court for Rwanda (ICTR)¹⁶ to prosecute crimes stemming from the atrocities of April to July 1994.¹⁷

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¹⁵ Ibid., at , para. 2. For scholarly discussions on this court, see Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal (1994) 34 VAND. J. INT’L L. 276; McGoldrick, Criminal Trials, supra note 8, at 22-35.

Apart from the two *ad hoc* international criminal tribunals mentioned above, the UN has inspired, sponsored or supported the establishment of various hybrid criminal tribunals around the world. The Sierra Leone Special Court was jointly established by the Sierra Leonean Government and the UN to prosecute those responsible for crimes against humanity, war crimes, and other serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. A similar approach was also adopted in responding to the variety of crimes committed from May 1998 to June 1999 in the course of the armed conflict between Kosovo separatists and the forces of the Federal Republic of Yugoslavia with the establishment of special panels within the Kosovo legal system composed of a mix of international and national judges and prosecutors.19

Courts have also been established in East Timor with the assistance of the United Nations Transitional Administration in East Timor (UNTAET)20 having two Special Panels for Serious Crimes with exclusive jurisdiction over “serious criminal offenses,” namely genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture committed between January 1 and October 25, 1999, when armed pro-Indonesian militias ransacked East Timor after people in the region voted for independence from Indonesia.21 A similar experience replayed in Cambodia where an agreement between the Government of Cambodia and the UN established “Extraordinary (Legal) Chambers” in the Cambodian judicial system to prosecute Khmer Rouge leaders and others most responsible for serious violations of Cambodian penal law, international humanitarian law and custom (including genocide), and international conventions recognized by Cambodia committed within


the period April 17, 1975 to January 6, 1979 when the Khmer Rouge massacred approximately 1.7 million Cambodians.\textsuperscript{22}

In a bolder attempt at consolidating international criminal law, the international community adopted the Rome Statute of the International Criminal Court,\textsuperscript{23} setting up a ‘permanent’ International Criminal Court (ICC) with jurisdiction over “the most serious crimes of concern to the international community as a whole.”\textsuperscript{24} Under article 5(1) of the Rome Statute, these crimes are genocide, crimes against humanity, war crimes, and the crime of aggression.\textsuperscript{25}

With the enthusiasm that welcomed the idea of the ICC in the 1990s and the energetic pace with which the treaty forming the Court was adopted in 1998 and brought into force in 2002, there was no longer any doubt that the world of the twenty-first century was no longer going tolerate the most egregious violations of international law. The establishment and proliferation of normative international criminal standards and institutional mechanisms thus mark a new age for international criminal law and justice, simultaneously signaling the need for critical engagement with the direction in which international criminal law is advancing its justice component.

It is significant to mention that in its pursuit of justice, the machinery and processes of international criminal law are not radically divergent from those applicable in adversarial municipal criminal processes – the procedure for bringing anyone to justice involves the existence of a formal complaint; investigation; indictment; evidence of witness(es); cross-examination of witnesses; consideration of testimonies, law and evidence; verdict; sentence; and the possibility of appeal –

\textsuperscript{24} Rome Statute, ibid., Preamble, para. 4. For a comprehensive assemblage of scholarly essays on diverse aspects of the ICC, see ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Flavia Lattanzi & William A. Schabas eds., 1999).
\textsuperscript{25} For a scholarly analysis of the definition and substance of each of these crimes, see LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 105-181 (1997) [hereinafter SUNGA, THE EMERGING SYSTEM]; Herman von Hebel & Darryl Robinson, Crimes within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 107-108 (Roy S. Lee ed., 1999); Bert Swart, Internationalized Courts and Substantive Criminal Law, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 291, 298-301 (Cesare P. R. Romano et al. eds., 2004). It is worthy to note that under art. 123 of the Rome Statute, it is possible to amend the Statute to include one or more international crimes that do not amount to crimes against peace and security of mankind. 
basically those procedures characterizing the Anglo-American and Civil Law legal traditions.  

Apart from merely codifying and consolidating the normative premises of international criminal law, however, it is safe to posit that the value-construct that underpins the decades of state-led and civil society-inspired efforts at criminalizing the most serious international atrocities has been the concern to end the culture of impunity that had characterized many of those crimes which nations of the modern world have found abhorrent. To a certain degree, this is the central pivot of the notion of justice in the context of contemporary international criminal law.

While there have been volumes of works on what should be the standards of international criminal law, as I have shown in this part, what remains largely undefined and unsettled is what the essence or aim of international criminal justice should be. In his seminal essay examining the eradication of impunity as the essence of international criminal law, Akhavan had argued that:

Despite the adoption of numerous international instruments affirming human rights and humanitarian standards, international relations in the modern age have perpetuated a culture of virtually complete immunity. Idi Amin, Mengistu Haile Mariam, Pol Pot, and a litany of other tyrants have never been held accountable for their deeds. Notwithstanding the plethora of pious resolutions, solemn declarations, and legally binding treaties, the international community has accepted international crimes committed culture of impunity cannot be underestimated. The failure to uphold elementary international norms has created a political climate in

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which extermination, deportation, and wanton destruction lie within the range of options available to rulers—not only as conscious decisions, but as a subliminal conception of viable conduct. Impunity erodes the inhibitions and restraints against such behavior, permitting an amoral account of raison d’état. Reversing this entrenched culture of impunity is a gradual and incremental process. By instilling such unconscious inhibitions in the international community over time, and gradually but definitively transforming the rules for the exercise of power, a new reality of habitual lawfulness may take root and develop. 29

The deterministic imperative of international criminal law to deter future occurrences of grave criminal acts through punishment—in the name of ending impunity—has gained considerable currency among other writers. 30

But can a system of international criminal law that seeks to merely serve the end of deterrence and punishment (essentially retributive justice) meet the demands of sustainable international peace and security—the core foundation of modern international cooperation and organization? Can retribution simpliciter win the peace, establish post-conflict harmony, achieve social integration and rehabilitation, or promote reconciliation and healing in the short or long term? This is one dilemma that has for long been neglected in critical scholarly discourses, and even where and when it is engaged, such engagements are usually within the narrow confines of the discipline of law. The ensuing segment queries the current understanding of international criminal justice and the application of its processes to the ends of post-conflict peace, rehabilitation and reconciliation.

III. INTERNATIONAL CRIMINAL JUSTICE: LIMITATIONS OF PURPOSE, PRACTICE AND PROCESSES

Among international lawyers, there is hardly any dispute as regards the propensity of international criminal justice to help in building and sustaining international peace and security. This reasoning provided a conceptual basis for the establishment of the two ad hoc international criminal tribunals. 31 Further, McGoldrick asserts that the recently established ICC can assume a significant role as “an instrument for

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maintaining international peace and security by the pursuit of justice.” However, the extent to which international criminal justice, by its paradigmatic theory (of deterrence by punishment) and metanormative processes has achieved the purpose of international peace and security remains to be seen. This perhaps explains why, more than a decade after the establishment of both the ICTY and the ICTR pursuant to the powers of the UN Security Council to deal with threats to peace or breach of peace in the two affected regions, and despite the possibility of more arrests of the masterminds of the atrocities perpetrated in the Balkan and Great Lakes regions in the 1990s, it still remains foolhardy to suggest that the former Yugoslavia and Rwanda have attained the status of post-conflict states with the renewed ethno-political tension in and around the Balkans, and the spillage of génocidaires-inspired armed conflicts into the Democratic Republic of the Congo, Burundi and Uganda. Apart from the pursuit of accused and suspected perpetrators of atrocities, these situational conflicts upon which international criminal adjudication has been brought to bear have not achieved the ultimate goals of peace and reconciliation.

But beyond the foregoing dismal commentary to the cause of international criminal justice lies the perennial cynicism that has dogged the development and very establishment of its legal basis, structures, mechanisms, administration and procedures over the course of the decades following the Nuremberg and Tokyo Trials. From the post-WWII Nuremberg and Tokyo Trials to the ICTY and the ICTR, the legality and legitimacy of these institutions of international criminal justice have elicited quite considerable debate and criticism. Although the Nuremberg Trials have been credited with producing landmark decisions that have shaped and defined the outlook of international law in general, and international criminal law and international human rights law in particular, their most

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32 McGoldrick, Legal and Political Significance, supra note 26, at 471.
33 Lamenting the failure of international criminal justice to serve the purpose of deterrence, Bassiouni had said: “It is paradoxical indeed that in spite of the commitment expressed in the motto “never again,” which was adopted by the world community after the atrocities of World War II, enormous tragedies have occurred repeatedly since that war and are still occurring today.” See M. Cherif Bassiouni, The Future of International Criminal Justice (1999) 11 PACE INT’L L. REV. 309, 312 [hereinafter The Future].
35 See generally Eugenia Zorbas, Reconciliation in Post-Genocide Rwanda (2004) 1(1) AFR. J. LEG. STUD. 29, 32 (analyzing how ongoing conflicts around the Great Lakes region of Africa have negatively impacted reconciliatory efforts in post-genocide Rwanda).
formidable criticism has been that the trials essentially pursued the end of justice for the victorious allied powers.38 The trials have also been condemned as being selective and highly politicized.39 In Drumbl’s extensive criticism, the trials were lopsided in that:

Many suspects avoided prosecution. The involvement of non-German nationals in the atrocities was deliberately overlooked. Moreover, the initial focus of the proceedings was not on the atrocities perpetrated against European Jewry, but on the crime of waging an aggressive war. In fact, Nuremberg began not as an affirmation of the law of atrocity but rather as a condemnation of Nazi warmongering and militarism. Subsequent apprehensions by the Soviet Union, however, regarding the criminalization of waging an aggressive war - let us not forget the Soviet invasions of Poland and Finland - prompted a political settlement that gave birth to a new offense, crimes against humanity, into which the deliberate persecution and murder of Jews and gypsies could be folded. In the end, the indictment formally issued by the Tribunal on October 19, 1945 included four charges: a common conspiracy to wage aggressive war, crimes against peace, war crimes, and crimes against humanity…United States prosecutors increasingly turned to atrocity evidence to sustain the momentum of the trials while reassuring the Soviet Union. History has recorded Nuremberg to be much more about the law of atrocity than it actually was.40

Indeed, so deterministic was the outlook and purpose of the ‘justice’ designed by the Nuremberg and Tokyo Trials that the hallowed maxim *nullum crimem sine lege* was summarily dispensed with as a mere rule of justice than regarded as a fundamental requirement of criminal justice.41 There was also no possibility of appeal in the trials.42

With respect to the ICTY and the ICTR, there have been robust arguments and debates that the powers of the UN Security Council under Chapter VII of the UN

38 *See* ANTONIO CASSESE, INTERNATIONAL LAW 454 (2nd ed., 2005), for a description of the Nuremberg and Tokyo Trials as “victors’ justice.” *See also* Overy, supra note 10, at 25-26 (observing that “even while the horrors of the Nazi camp system were being revealed in court, the Soviet authorities were setting up concentration camps in the Soviet zone of occupation, like the isolation camp at Muhlberg on the Elbe, where, out of 122,000 prisoners who were sent without trial to the camp, over 43,000 were killed or died”).


41 *See* McGoldrick, *Criminal Trials, supra* note 8, at 16.

Charter did not envisage the establishment of any criminal tribunal as part of permissible measures for maintaining international peace and security.\textsuperscript{43}

Beyond the question of legality and legitimacy, the guarantees of procedural fairness and expectation of fair trial have been of concern to commentators and analysts of international criminal justice. While Cassese questions the adoption of the adversarial model of adjudication in international criminal courts and tribunals,\textsuperscript{44} Sunga’s concern had been with the liberal rules of evidence that give undue protection to victims and witnesses such that may shield them from rigorous cross-examination.\textsuperscript{45} And while Miller decries the role of politics in the international criminal justice process,\textsuperscript{46} Gray indicates that these rules are likely to be sustained under the ICC.\textsuperscript{47} And yet to others, it is the mode of selecting and retaining counsel and judges for international criminal courts and tribunals that is perceived as more problematic.\textsuperscript{48}

However, while I do not wish to overstretch these criticisms, I contend that a more serious limitation to the role and significance of international criminal justice lies in its near total marginalization of the psychological conditions, sociological realities and historical situations of indicted or convicted perpetrators of grave international crimes in scholarly discourses or in the formulation of normative and institutional frameworks for the administration of justice under international criminal law. I contend that whatever ideological persuasion might be prevalent in today’s international legal circles, international criminal justice must not ignore the


\textsuperscript{44} CASSESE, INTERNATIONAL LAW, supra note 38, at 462.


\textsuperscript{47} Kevin R. Gray, Evidence Before the ICC, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 287, 308 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

pursuit of post-conflict peace, rehabilitation and reconciliation. Thus far, these goals are not on the front burner of international criminal justice process.

This identifiable shortfall in international criminal justice processes lies in the weakness or inability of international criminal law to conceive the goal of justice beyond punishment that has become its metanormative essence. Since the Nuremberg Trials, the pattern that has evolved in relation to the most heinous crimes – genocide, war crimes, crimes against humanity, including their inchoate modes – is one that runs wholly on the pivot of prosecution; and deterrence through punishment. The idea behind this approach is in tandem with that preached by Hannah Arendt in the mid-20th century which criminalizes mass atrocities and projects them as subjects of concern for all humanity and which must, therefore, by all means engage international institutional mechanisms that would secure justice through the apprehension, prosecution and punishment of offenders. Later day proponents of this model of justice thus view the most heinous crimes as morally evil, consciously or unconsciously creating a sense of ‘global morality’, and cast perpetrators of these grave crimes as “enemies of all humankind” who must be punished. Although the notion of individual responsibility has become such a tremendous subject of adulation for international criminal law and for its purveyors, this dominant philosophical idea has produced a halting stroke for inquiry into the nexus between the principle of criminality, on the one hand, and anthropological or sociological phenomena, on the other. This perhaps explains why Clapham submitted that the current international criminal justice “attributing conduct to single actors fail to capture the complexity of the phenomena ....” In violent conflict situations (such as those witnessed in Rwanda and the Balkans

49 For intellectual allusions and linkages to this point, see Nehal Bhuta, Review Essay: How Shall We Punish The Perpetrators? Human Rights, Alien Wrongs and the March of International Criminal Law (2003) 27(1) MELB. U. L. REV. 255, 256; John M. Czarnetzky & Ronald J. Rychlak, An Empire of Law?: Legalism and the International Criminal Court (2003) 79 NOTRE DAME L. REV. 55, 62. See also Bringing War Criminals to Justice, supra note 28, ibid., where the PILPG had argued that “Given the scale of the atrocities in the former Yugoslavia, if the international community is perceived to have granted a de facto amnesty for the major perpetrators, it will send a signal to other rogue regimes throughout the world that they have nothing to lose by engaging in such criminal acts.”

50 See generally HANNAH ARENDT, THE HUMAN CONDITION 241 (1958) (labeling these categories of atrocities as “radical evil”). See also HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 269 (1963) (contending that since the German holocaust was essentially a crime against humanity, an international adjudicatory body was required to mete out justice to its perpetrators).

51 See Overy, supra note 10, at 22, 28. See also Bassiouni, The Future, supra note 33, at 315 (claiming that the efficacy of international criminal justice will depend on the punishment of perpetrators”).


where the massacre of people of other ethnic group(s) had become a sort of learned civil religion,\textsuperscript{54} to what extent can the individual responsibility paradigm of current understanding of international criminal justice offer ‘justice’ that heals troubled communities? What about the affective and emotive elements in egregious international crimes? What factors make it possible for ordinarily peaceable folks – skilled professionals, clergymen and women, nurses, journalists, pastoralists, civil servants and others – to become agents of mass annihilation or other grave crimes in the name of conflict? Can the mere peril of criminal sanction extricate rooted mania of collective resentment and obsession? My point here is that there should be more to international criminal justice than mere stigmatization and punishment. Those who administer it and formulate its norms and structures must also realize this. After all, all those mass atrocities that ever shocked the conscience of human beings since the 1930s did not just happen as spur-of-the-moment events but as results of ideological notions systematically inculcated in ordinary folks and citizens over the course of time.\textsuperscript{55} Reisman recognized this realism when he noted that:

\begin{quote}
In liberal societies, the criminal law model presupposes some moral choice or moral freedom on the part of the putative criminal. In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.\textsuperscript{56}
\end{quote}

I contend that for international criminal justice, as it is presently conceived and constituted, to assume realistic quintessence, the scope of its administration and legal frameworks must assume broader dimensions. While I do not denounce the dominant theory of individual criminal responsibility, it is my argument that international criminal justice process should embrace and consider the notions of collectivity, representative criminality and shared guilt, group accountability, collective rehabilitation, among other sociological realities.

\textsuperscript{54} See generally PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 6 (1998) (describing the mental state of Rwandan Hutus as one in which “the government, and an astounding number of its subjects, imagined that by exterminating the Tutsi people they could make the world a better place”); Zach Dubinsky, The Lessons of Genocide (2005) 2(1) ESSEX HUM. RTS. REV. 112, 117 (noting that before, prior to and during the Rwandan genocide, Hutus had always seen Tutsis as “cockroaches” in the literal translation of the word “Tutsi”); Akhavan, Beyond Impunity, supra note 29, at 11 (alluding to the ethnic revulsion of Hutus towards Tutsis in Rwanda which the former felt must be exterminated by all means). See also ROBERT D. KAPLAN, THE COMING ANARCHY 45 (2000) (observing how atrocious acts could be shared norms in which “people find liberation in violence”).

\textsuperscript{55} See Drumbl, supra note 40, at 1317-1319.

\textsuperscript{56} W. Michael Reisman, Legal Responses to Genocide and Other Massive Violations of Human Rights (1996) 59 LAW & CONTEMP. PROBS. 75, 77.
Another significant discount for contemporary international criminal justice is its overwhelming, if not exclusive, disposition to victim-centered justice; an attitude that seems to have taken central stage even in scholarly and institutional responses to incidents of mass atrocities in international law.\(^57\) What happens to the participation of stigmatized offenders in international criminal trials apart from standing in the dock? What about the perspective of understanding their individual and collective capacities and roles in cause-and-effect fashion? What about utilizing the process of international criminal justice to gain some insight into ongoing perceptions and realities in the emotive communities/societies from which indicted persons are drawn?

Since international criminal law is a normative system that evolved from within the human society and is one that seeks its legitimacy from same,\(^58\) I submit that the end of international criminal justice should be attuned to serving holistic purposes. While punishment may serve the positivistic ideal of retributive justice,\(^59\) the heuristic in my argument is for an evolutionary international criminal justice process that would serve not only the ends of retribution, but simultaneously the goals of sustainable peace, rehabilitation and reconciliation. Beyond deterrence through punishment and stigmatization, international criminal justice should respond to the challenges of rehabilitating not only individual perpetrators of outlawed acts but also of collective/group actors and their affective communities. While the latter task appears Herculean, it holds the promise of addressing issues that retributive justice might aggravate, making reconciliation and peace difficult if not impossible. For now, international criminal justice predicated on its legalistic and singular disciplinary parameters is ill-equipped to fulfill this task. The implication of this pointer is to identify and to critically engage innovative and multidisciplinary approaches that could enhance its theoretical and practical capacity for curative justice – one that can heal the individual culprit and his/her society – rather than portray international criminal justice as a platform exclusively for retribution and punishment.

It is in this context and against this background that I now examine the significance and relevance of the innovative concept of therapeutic jurisprudence.

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\(^{57}\) See generally Henry, supra note 6, at 237 (endorsing the growing intellectual concerns for restorative justice to victims of international human rights violations); Emily Haslam, Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315, 317-320 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004) (contending that the increased participatory roles for victims will strengthen the goal of international criminal justice). For an assemblage of UN initiatives promoting justice for victims of crimes and extensive discussion of same, see ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM: FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION ch. 7 (1994).


\(^{59}\) For a scholarly discussion on punishment as an underpinning idea in international criminal justice, see SUNGA, THE EMERGING SYSTEM, supra note 25, at 324-328. See also Henry, supra note 6, at 232-234 (analyzing the relevance of the Rawlsian approach to justice in the criminal context).
IV. THERAPEUTIC JURISPRUDENCE: PREMISE, PRECEPTS AND PROSPECTS

Unlike many other legal concepts whose historical origins are embroiled in controversy, the idea of therapeutic jurisprudence owes its foundation and development to the creativity of two eminent realists – David Wexler and Bruce Winick – a fact that explains why ascribing a definition to this concept has not been problematic. By the succinct and consensual definition individually and jointly given to the concept by these two, “therapeutic jurisprudence” is “the study of the role of the law as a therapeutic agent.” Expatiating on this concise definition, Winick states:

It is an interdisciplinary enterprise designed to produce scholarship that is particularly useful for law reform. Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law. Therapeutic jurisprudence builds on the insight 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 and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence calls for the study of these consequences with the tools of the social sciences to identify them and to ascertain whether the law’s antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.\(^61\)

The foregoing elaboration of the premise of therapeutic jurisprudence offers an insight into why and how the broad spectra of the concept’s influence continue to grow. Rather than formulating rigid normative or theoretical propositions, therapeutic jurisprudence merely seeks to open new vistas into how the norms, personnel and institutions of law could influence social behavior and phenomena.\(^62\) It does not seek to dismiss other views and approaches but rather to factor the injection and integration of all conceptual persuasions towards the ultimate enhancement of the worth of the law.\(^63\)

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\(^61\) Winick, The Jurisprudence, ibid.

\(^62\) LAW IN THERAPEUTIC KEY, supra note 60, ibid.

Even though the concept of therapeutic jurisprudence was originally conceived within the context of mental health law and had for long been confined to that field, the ripples of its applicability have penetrated diverse fields and disciplines whose methodologies and ethos implicate the law. Today, apart from being properly located in the realist school of sociological jurisprudence, its relevance in appellate matters has also been identified. At the heart of therapeutic jurisprudence lies the goal of using the entire paraphernalia of law and adjudication for transformative justice. As Malcolm observes, “[t]herapeutic jurisprudence involves all facets of the court system.”

In essence, whereas the prescriptive character of law and legal systems defines the human being as an object of law, therapeutic jurisprudence defines law as an object for the human being. For instance, rather than cast an offender in the stereotyped perceptions of ‘wrong doer’ leading to stigmatization as criminal law would, therapeutic jurisprudence seeks ways of modifying the impact of the conflict by offering deeper investigation into the behavioral causes and phenomena that gave birth to the perceived ‘wrong’.

In projecting its effect, the end of justice that therapeutic jurisprudence envisages and promotes is that which analyzes the roles of, and offers benefits to, the victim/aggrieved/complainant, the judge/jury/court, the society, and the defendant/the accused, simultaneously. How then does therapeutic jurisprudence tackle these multifaceted ambitions? Apart from its complex and systematic precepts on problem-solving and resolution-centered approach to justice, what component does therapeutic jurisprudence exhibit for practical application to real life situations? David Carson offers an insight in his following submission:

Therapeutic jurisprudence (TJ) is...essentially, about law reform, where ‘law’ is interpreted widely. Thus we could say that all TJ concerns law reform, but far from all law reform involves TJ. Therapeutic jurisprudence is concerned with outcomes, with effects. It seeks laws that have productive therapeutic effects,

64 See David B. Wexler, Therapeutic Jurisprudence and the Criminal Courts, in LAW IN THERAPEUTIC KEY, supra note 60, ibid.; Winick, The Jurisprudence, supra note 60, at 201; Hall, supra note 2, at 466, 467.
65 See supra note 2 and accompanying text.
66 Winick, The Jurisprudence, supra note 60, at 206.
68 Malcolm, supra note 2, at 13.
70 See generally McGuire, supra note 2, at 112-113 (describing how the acts, demeanors and interactions of lawyers, judges and offenders can deliver “therapeutic impacts”). See also Carrie J. Petrucci, Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence (2002) 38 CRIM. L. BULL. 263-295.
71 See Wexler, Reflections on the Scope, supra note 60, at 224.
although it does not profess that such effects are necessarily better than others. It is also involved with processes, if those have anti-therapeutic effects. The TJ motivation appears to have more to do with effectiveness than with efficiency, although the latter might directly or indirectly permit more therapeutic outcomes.\(^2\)

Although Carson’s discourse relates to criminal legal process within the context of municipal law, it does not fail to hold some sobering implications for criminal legal process in the international legal arena. Does international criminal law concern itself more with effectiveness than with efficiency? Is there a way that international criminal law acts as an antitherapeutic agent – through its normative, lawyering or adjudicatory components? Beyond its emphasis on providing sanctions against a priori violations of its commands, how does international law and justice project itself to resolve lingering social conflicts after abrupt cessation of hostilities? Are there any plausible ways of reconceptualizing international criminal justice such that its outcomes could generate therapeutic effects?

All that I had explored in the Parts preceding this segment express an overarching message: that the corpus of international criminal law and the current thinking of international criminal justice emanating from it are yet to fulfill their therapeutic potentials – the potentials of rehabilitation, of reconciliation, and of winning the peace in post-conflict societies. The implications are not simply for the reform of international criminal law, but also of the theory and practice of international criminal justice. Such normative and attitudinal reform may not be found in the lawyerly arena alone. This is where other fields of intellectual inquiry find their entry point in international criminal law.

The conscientious works of an inventive lawyer, McGuire, for instance, facilitates tremendous insight into how much therapeutic effects appropriate communication and interactions within and among the structural and institutional webs of criminal law can have on victims, defendants, judges, the courts, trial attorneys and defense lawyers alike.\(^3\)

While I concede that McGuire’s surveys and learned experiences are limited to municipal realities, the possibility of extending the lessons learnt to the international criminal legal arena is not forlorn. One will like to investigate, for instance, what the apparatuses of psychology, sociology, anthropology, and economics portend for the challenge of rehabilitation and reconciliation in post-genocide Rwanda or post-ethnic cleansing Balkans. Or can the ossified deterrence-through-punishment


singular approach of international criminal justice avail in these problematic contexts?

Even though it is tempting to isolate grave international crimes and treat them as the acts of free individual human agents, the innovative field of therapeutic inquiry will help us understand and factor otherwise latent social, economic, cultural, psychological and political forces that spur such atrocities with a view to resolving their consequences and pains through the ‘healing’ instrumentality of law, after all, therapeutic jurisprudence affords the opportunity to understand collective realities often veiled by our stereotype notion of individual criminal responsibility. As Winick rightly postulated, “Any consequence that is arguably therapeutic and in at least some sense related to psychological functioning would seem to be within the broad contours of therapeutic jurisprudence.” Why then should international criminal law and justice not appropriate the mechanisms and benefits of therapeutic jurisprudence?

The task before all stakeholders in international criminal law and justice would be to ensure that where there are defects in the normative framework of the law, we must reform such; where there are identifiable antitherapeutic consequences flowing from legalistic rendition of the law, we must learn new attitudes; where rigid approaches have failed to yield curative dividends, we must change, but by all means, we must make international criminal law serve the end of justice for all to who it is beholden.

V. THERAPEUTIC JURISPRUDENCE AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

Even though international criminal law sometimes institutionally employ the language of peace and reconciliation in defining its objectives, the application of its precepts and the methodology of such application are often incongruous with the achievement of those stated goals. The problem identified in this essay is the shortfall in the conceptual and practical capacity of international criminal law and its key actors to achieve the goals of peace and reconciliation. The implication of this observation is the evaluation of the diverse structures and mechanisms of international criminal law in terms of their appropriateness to produce therapeutic advantages, namely, of peace, rehabilitation and reconciliation, in specific situations of grave atrocities.

74 See generally Christopher Slobogin, Therapeutic Jurisprudence: Five Dilemmas to Ponder, in LAW IN THERAPEUTIC KEY, supra note 60, at 763 (defining therapeutic jurisprudence as “the use of social science to study the extent to which a legal rule of practice promotes the psychological well-being of the people it affects.”).

75 Winick, The Jurisprudence, supra note 60, at 194.

76 For example, the ICTY states its objectives as “to bring to justice persons allegedly responsible for serious violations of international humanitarian law; to render justice to the victims; to deter further crimes; to contribute to the restoration of peace by holding accountable persons responsible for serious violations of international humanitarian law.” See ICTY at a Glance, at http://www.un.org/icty/glance-e/index.htm (last visited 04 May 2006).
With the dust generated by the gory experiences of Rwanda and the Balkans yet to fully settle, in light of the ongoing investigations and findings of genocide and other massive atrocities in the West Papua,\(^7\) and against the background of allegations and findings of ongoing gross violations of international humanitarian law and international criminal law in the Darfur region of Sudan,\(^8\) it becomes compelling for international criminal law to modify its approaches to justice. Therapeutic jurisprudence holds that promise of transforming international criminal justice into a problem-solving process.\(^9\)

In the face of the well-founded criticisms against the politicization of international criminal law and justice,\(^10\) there is no gainsaying the fact that the future credibility and utility of international criminal justice will depend on the ability of its role actors to divorce its processes from political coloration. By its apolitical stance, therapeutic jurisprudence affords such a leeway.\(^11\) The adversarial system that has become dominant in international criminal justice even makes it more compelling for rigorous exploration into the deducible palliatives of therapeutic jurisprudence.

And while contemporary international criminal justice pays little or no attention to making itself responsive to the needs of rehabilitation of perpetrators and masterminds of mass atrocities or the reconciliation of the embittered, polarized and suspicious societies from which the much stigmatized culprits emerge, a re-orientation of all role actors in the field of international criminal law and justice along the path of therapeutic jurisprudence will serve higher goals of justice than one that contents itself with the punishment of offenders. In this regard, I contemplate the adoption of normative and institutional processes that would make international criminal justice involve all stakeholders in identifying and taking sincere steps to heal lingering individual and collective psychological damage; that would transform inbuilt ethno-conscious perceptions into positive mechanisms for responding to the objective of reconciliation among conflicting interest groups. A synergy between the centripetal processes of international criminal justice and methods of therapeutic jurisprudence will lead to the crystallization of a functional international criminal justice system.

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\(9\) See, Malcolm, supra note 2, at 11-12.

\(10\) For a robust critique of the method of selecting judges of the \textit{ad hoc} international criminal tribunals and the performance of some of the sitting judges that renders the outcomes of trials susceptible to accusations of bias, see Koechler, supra note 48, \textit{ibid}.

\(11\) See generally Carson, supra note 72, at 126 (describing the “apolitical” virtues of therapeutic jurisprudence).
Without doubt, the successful transition of international criminal justice from one that simply stigmatizes atrocious acts and stereotypes its responses to one that analyzest, understands and pursues the healing of their consequences will depend largely on a number of factors: the formulation of innovative legal standards for the administration of therapeutic justice; the adaptability of existing normative frameworks; the extent to which therapeutic skills are applied in the prosecution of serious international crimes; the stage at which therapeutic technique is applied; and the willingness of its principal actors to embrace change. While there will of course be some measure of initial resistance or cynicism, the challenge will be more about how to formulate its legal base, define its scope and structure its implementation.

Since the institutions of international criminal law and justice are not merely those inanimate physical buildings and objects that carry their insignias, it is the human figures and hands that operate them that must become the subjects of any transformative approach to international criminal justice. How will these human operators of the norms and institutions of international criminal justice change their attitudes and patterns if they do not know of any alternative model? In view of the fact that change in juridical reasoning must commence from within, I contend that in conceptualizing a viable international criminal justice ethos through the therapeutic jurisprudence paradigm, the starting point will be in transforming the very curricula of legal education.

Departing from the orientation of many international criminal law academics towards casting the aims of international criminal justice within the confined archetypes of deterrence, the punishment of offenders, and justice for victims, legal education, particularly in the area of public international law or international criminal law, as the case may be, must begin to epitomize the holistic approach to justice, of the therapeutic jurisprudence paradigm. While ‘Therapeutic Jurisprudence’ may not necessarily be constituted as a distinct law course, it deserves to be appropriately integrated into all core law subjects that might implicate the law student’s professional life in the immediate future. The glowing words of Professor David Wexler are apposite in this regard:

It is time for a change and, fortunately, change now seems to be in the air. By legitimizing and encouraging TJ and comprehensive lawyering, we may better serve the public, enrich the professional lives of many lawyers, and attract to the profession competent and caring persons and problem solvers who currently dismiss law as a professional prospect.

Beyond enriching the curricula of conventional legal education, however, the continual training and retraining of juridical personnel – defense lawyers,

82 See generally Carson, supra note 72, at 126 (noting that some critics will query this approach as “judicial activism and argue that the judges are going beyond their proper remit; that justice is a process not a product”).
83 Professor Wexler had advocated that “Therapeutic Jurisprudence should be a course in its own right.” See Wexler, TJ and Legal Education, supra note 1, at 187.
84 Wexler, TJ and Legal Education, supra note 1, at 189.
prosecuting attorneys, investigators, judges, court officials, prison workers, police personnel – in the basic tenets and skills of therapeutic jurisprudence, in collaboration with social workers, psychologists or psychiatrists, sociologists and other professionals, will go a long way in the appreciation and application of user-friendly therapeutic jurisprudence techniques in international criminal adjudication and post-conflict or post-trial peace and reconciliation efforts.

In addition to the foregoing, the successful integration of therapeutic jurisprudence into international criminal justice system must be research-driven. There will be the need for legal researchers to explore viable practical responses to the challenging factors that I had earlier identified. In similar vein, legal research must be directed at the normativization of therapeutic methods in international criminal law corpus; and at the learned experiences of therapeutic justice in municipal courts for comparative lessons. Research must also examine the form which therapeutic interventions should take in post-conflict situations and the expected outcomes; the stage at which therapeutic processes are applied in post-conflict reconciliation efforts, and whether these processes should constitute integral component of the criminal process or serve as post-trial alternatives, or both. Legal researchers should also address the question of the degree to which victims, lawyers, judges, accused persons, and affective communities would participate in the healing process. Whatever the case may be, all the latitude of interdisciplinary inquiry must be brought on board.

VI. CONCLUSION

More than half a century after the Nuremberg and Tokyo Trials, it is now beyond polemics that international criminal law has assumed an autonomous and distinct class of its own among numerous other fields of international law. However, the extent to which international criminal law holds its norms, institutions, means and methods as vehicles of effective institutional implementation remains to be seen. In an age when the norms and institutions of international criminal law are becoming increasingly integrated, it is only appropriate that those normative and institutional structures fulfill their ultimate goals and purpose, namely, effective justice, peace and reconciliation. As I have demonstrated in this essay, the praxis and value-constructs of international criminal law and justice are not presently adequate to achieve these objectives in situations of grave and massive violations.

In responding to the challenges identified, I have attempted to interject current thinking on international criminal justice with the trajectory of therapeutic jurisprudence. My vision is for a transformative system of international criminal law that will not perpetuate its predisposition to deterrence and ending the culture of impunity through ossified methodologies or legal orthodoxies. I conceive of an international criminal justice system that does not simply process human beings but one that gives a voice to all stakeholders in the criminal justice system, whether they are victims, indicted or convicted persons, judges or courts, witnesses, attorneys, affected communities or other participants.

85 See supra text on p. 27.
While this essay does not overlook the path of normative and institutional reforms, it has emphasized the trajectory of ‘bottom-up’ pedagogical re-orientation. This is a reflection of my acknowledgment that the future of international criminal justice will be determined by the quality of the specialization and the skills of its upcoming purveyors, proponents and role actors.

Far from being an *ex cathedra* pronouncement on all the dynamics that should inform the integration of therapeutic jurisprudence into international criminal justice process, this essay is simply a modest contribution to the intellectual inquiry required for a sustained culture of critique and reflection in the discipline of law. This essay would therefore have achieved its aim if it stimulates further scholarly discussions in this direction.
THERAPEUTIC JURISPRUDENCE: PROVIDING SOME ANSWERS TO THE NEUTRALITY DILEMMA IN COURT-CONNECTED MEDIATION

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Abstract:

Neutrality as an attribute of the practice of mediation has been criticised in the mediation literature. Key theorists maintain that mediator neutrality is a myth that hides the reality of the impact of the mediator on both the content and the process of mediation. Internationally, new models of mediation have been articulated that are therapeutic in nature, highly value relationships and include a multidiscipline approach to understanding conflict and emotion. These new models reject the concept of the neutral mediator. However, courts and governments rely upon neutrality as a “legitimising framework” for the wide adoption of mediation as an alternative to litigation. In this paper we discuss the paradigm of therapeutic jurisprudence and its links with new models of mediation, such as the transformative and narrative models. We postulate that the discourse of therapeutic jurisprudence can convince courts and governments to adopt models of mediation that eschew the attribute of neutrality.

Introduction

The use of the alternative dispute resolution process (ADR) of mediation is common in courts and tribunals in Australia. The third party facilitation of disputes is routinely used as an adjunct to litigation either prior to the instigation of proceedings or as part of the case management of actions.1 In fact, the largest growth in the use of mediation has not come from public demand, but from the institutional adoption by courts and tribunals of this process.2 In recent years government backed mediation schemes, or similar third party dispute resolution processes, has seen consistent and widespread growth.3 One of the tenets of mediation has traditionally been the notion of the neutral third party. The neutrality of the mediator is part of the “legitimising framework” that places mediators alongside decision makers in courts and tribunals. Theorists have critiqued the notion of the neutral mediator arguing that the mediator affects the story of the

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3 For instance the overhaul of industrial relations includes the promotion of dispute resolution processes Part VIIA Workplace Relations Amendment (Work Choices) Act 2005 (Cth) and similarly the significant reform initiatives in Family Law further promote dispute resolution processes, see Family Law Amendment (Shared Responsibility Act) 2006 (Cth).
mediation in a number of ways, most notably through facilitating the settlement of the dispute by privileging issues that lead to the ‘solving of the problem’. In this way mediators influence both the content and the process of the mediation and move the parties towards resolution. However, in the course of pursuing the answer to the problem of the mediation mediators may silence some parties concerns, particularly in regard to relationship and emotional issues, and may be unreflective regarding their own assumptions in relation to the parties.\(^4\)

Not all models of mediation rely upon the rhetoric of neutrality. Internationally, new models of mediation have been articulated that are therapeutic in nature, highly value relationships and include a multidiscipline approach to understanding conflict and emotion. The most influential of these models are the narrative\(^5\) and transformative\(^6\) models and support for these approaches is evident in the United States and New Zealand. In Australia these two new models have not been widely practised\(^7\) and the dominant models of practice, the facilitative and evaluative approaches, particularly where practised in the court-connected context, tend to mimic court processes in their pursuit of settlement. In particular, the evaluative model gives the role of the third party an advisory capacity reminiscent of the expertise and decision-making role of a judge, Magistrate or tribunal member. Although, in this model the mediator does not give a binding decision to the parties, the mediator advises the parties of their likely success in court. This introduces a powerful incentive for parties to settle and reflects a degree of mediator influence that has caused scholarly and industry comment.\(^8\)

In this paper\(^9\) we argue that the discourse of therapeutic jurisprudence can provide an alternative “legitimising framework” for the practice of mediation. The philosophy of therapeutic jurisprudence has grown in influence,\(^10\) particularly in the last decade, and articulates a concern that the law be assessed under a normative framework that values the therapeutic impact of the law and legal actors.\(^11\) Drawing


\(^9\) In a previous paper we have argued more generally for the benefits of therapeutic jurisprudence in addressing the dilemma of neutrality in mediation practice see Douglas K and Field R, “Looking for Answers to the Mediation Neutrality Dilemma in Therapeutic Jurisprudence,” Paper presented to the 8th National Mediation Conference, Hobart, May 2006.

\(^10\) For a discussion of a range of initiatives in this area see Winick B and Wexler D, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (Carolina Academic Press, Durham, 2003).

upon the work of the social sciences this approach considers the law’s impact upon
the emotional and psychological welfare of those who come in contact with our
justice system. As indicated many litigants are directed to mediation through the
case management of courts and tribunals and though there have been seemingly high
levels of satisfaction from participants, disquiet has been expressed regarding the
trend towards an evaluative model of mediation. In our view the evaluative model
provides the opportunity for the mediator to hide behind the mantel of neutrality
whilst in effect pursuing a determinative role. We posit that this approach has anti-
therapeutic outcomes for parties in that this model does not meet the emotional needs
of participants and lacks procedural justice. We argue that courts and government
need to adopt the philosophy of therapeutic jurisprudence to stem the tide of the use
of this model and we call for more research into the benefits of different models of
mediation.

To pursue our aim we will first discuss the dilemma of neutrality in mediation, we
will then explore the discourse of therapeutic jurisprudence, we next canvass in
detail models of mediation including the narrative and transformative models and
lastly we consider the need for research that evaluates court-connected mediation
models not merely around satisfaction rates, but whether there has been
improvements to participants emotional and psychological well-being.

The Neutrality Dilemma

We have already asserted that, currently, neutrality remains an important concept
in mediation, and particularly in problem-solving, court-ordered models of
mediation. Certainly, most traditional definitions of mediation include a statement to
the effect that “the mediator is a neutral intervener in the parties’ dispute”. There is
clear ideology in the retention of neutrality rhetoric for mediation. Cobb, for example, has noted the connection with a moral commitment to concepts such as

\[12\] Winick and Wexler, n 10 at 7.
\[13\] Research shows that mediation has largely high satisfaction rates amongst parties, however we
need to query the expectations of participants of the process when assessing satisfaction rates, see
Boule, n 7 at 581.
\[14\] See for example Welsh N, “The Thinning Vision of Self-Determination in Court-Connected
Mediation: The Inevitable Price of Institutionalization?” (2001) 6 Harvard Negotiation Law
Review 1.
\[15\] Boulle, n 7 at 18. See also Folberg J and A Taylor A, Mediation: A Comprehensive Guide to
Resolving Conflict Without Litigation, (Jossey-Bass, San Francisco,1984) at 7-8; Moore CW, The
Mediation Process, (Jossey-Bass, San Francisco 3rd ed., 2003). This is reflected, for example, in
Laflin ME, “Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for
Lawyer-Mediators” (2000) 14(1) Notre Dame Journal of Law, Ethics and Public Policy 479,
Negotiation Law Review 71. However, of note is the fact that Sir Laurence Street’s three
fundamental principles of mediation do not include a reference to neutrality on the part of the
mediator: Street L, “The Language of Alternative Dispute Resolution” (1992) 3 Australian Dispute
Resolution Journal 144 at 146.
\[16\] See for example Coben JR, “Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator
Values Beyond Self-Determination and Neutrality” 5 Cardozo Journal of Conflict Resolution 65.
equality, participation, voice, and personal responsibility.\textsuperscript{17} Ideals of fairness, even-handedness and appropriate process are implied in the language of “neutrality”. And although in reality it is an elusive concept,\textsuperscript{18} and, in mediation in particular, one that is manifestly under-defined,\textsuperscript{19} it is little wonder that governments, who want to see themselves as providing good, moral and democratic dispute resolution processes, continue to see the notion of neutrality as central and key to informal appendages to litigation. Nevertheless, relatively rigorous debate continues in the field of dispute resolution about the general meaning of the term.\textsuperscript{20}

Court-ordered mediation is predominantly focussed on problem-solving facilitative mediation models; but with an increasing emphasis on evaluative approaches by mediators.\textsuperscript{21} Problem-solving models of mediation are also more broadly dominant in Australia.\textsuperscript{22} Such models arguably allow for superficial assertions to be made of third party (mediator) neutrality, because the mediator’s focus is on reaching a solution; and because they emphasise, consistent with liberal legal ideology, the importance of the individual, and focus on finding an end result, or outcome, to the problem that brings the parties to the mediation table. Such

\begin{itemize}
  \item \textsuperscript{17} Cobb says that “moral values are so pervasive within our democratic culture that we do not notice them as moral commitments; we do not notice them as a frame containing moral discussions that is itself a moral framework.”: Cobb S, “Dialogue and the Practice of Law and Spiritual Values: Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice” (2001) 28 Fordham Urban Law Journal 1017 at 1019.
  \item \textsuperscript{18} As MacKay comments: “It is easy enough to say that the mediator should be a neutral facilitator, but what does that mean?”: McKay RB, “Ethical Considerations in Alternative Dispute Resolution” (1989) 45 Arbitration Journal 15 at 21. Indeed it has even been said of mediators that they have a “very limited vocabulary to explain how neutrality functions.”: Rifkin J, Millen J and Cobb S, “Toward a New Discourse for Mediation: A Critique of Neutrality” (1991) 9(2) Mediation Quarterly 151 at 152.
  \item \textsuperscript{21} For example, the influential body, the National Alternative Dispute Resolution Advisory Council (NADRAC), often assumes in its literature a problem-solving orientation: National Alternative Dispute Resolution Advisory Council, The Development of Standards for ADR: Report (Canberra, 2001).
  \item \textsuperscript{22} Boulle, n 7, at 46 and Della Noce DJ, Baruch Bush RA and Folger JP, “Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy” (2002) 3 Pepperdine Dispute Resolution Law Journal 39 at 49: “The problem-solving model, while seldom going by that precise name, and seldom acknowledging or exposing its ideological roots, is the dominant model in the mediation field.” We prefer the term settlement based mediation. There are some positive attributes in relation to problem-solving, that arguably should be retained, but the focus of the mediation should not be upon settlement, a driving force to achieve a solution to the problem.
\end{itemize}
models tend also to assume that the parties are “autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self interests.”\textsuperscript{23} Further, it is an assumption in relation to these models that the mediator’s expertise is focussed predominantly on process only, not on the content of the dispute, and that their facilitation role aims mainly to assist parties to their own mutually agreed outcome.\textsuperscript{24}

Clearly, neutrality becomes plausible if the rhetoric is that the mediator’s focus in problem-solving mediation is on process only, as opposed to the content or outcome of the dispute. Equally, clearly, neutrality can also be argued as necessary in the context of problem-solving mediation in that it can be seen as playing an “important legitimising function”.\textsuperscript{25} The problem-solving nature of court-ordered mediation is comparable to the problem-solving nature of litigation; and notions of mediator neutrality arguably make problem-solving models of mediation credible,\textsuperscript{26} because there is an overt connection with the language and ideology of judicial impartiality.\textsuperscript{27} This is an aspect of court-ordered mediation that possibly draws potential parties to the mediation process; that is, because of neutrality’s promise of fairness and its offer of protection against biased or unfair practice. Such protections connect problem-solving mediation with the authority and legitimacy of formal legal adjudication processes.\textsuperscript{28}

There are, however, many issues arising from the neutrality claim in problem-solving mediation. Some of these issues derive from the falsity of neutrality (discussed further below); but others arise as a result of the morally driven belief in the truth of neutrality, referred to above. For example, the ostensibly neutral stance of the mediator in outcome and results-oriented problem-solving models is problematic from the perspective of achieving sustainable conflict resolution, because it can result in insufficient time or attention being devoted to emotional issues in disputes.\textsuperscript{29} Certainly, a neutral mediator who controls process only is unable to involve themself extensively in the detail of the parties’ emotions and relationships. It follows that in problem-solving approaches to mediation, and particularly, for example, in court-connected mediation contexts, and in legal

\begin{flushleft}
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{26} Mayer B “The Dynamics of Power in Mediation and Negotiation” (1987) 16 Mediation Quarterly 75 at 83.
\textsuperscript{27} Boulle, n 7 at 18-19.
\textsuperscript{28} Ibid.
\textsuperscript{29} Bush and Folger, n 6 at 239-247. See also Alexander N, “Mediation on Trial: Ten Verdicts On Court-Related ADR” (2004) 22 Law in Context 8 at 17; the exception may be in the Family Law jurisdiction.
\end{flushleft}
mediation contexts where the “shadow of the law” is very strong, relationship dimensions of conflict can be subordinated.

There are a number of additional reasons why neutrality can be said to be a false or misleading concept in the context of problem-solving mediation. For example, although the aspirational aims of neutrality are convincing, “pure neutrality is very difficult to achieve and sustain.” This is partly because mediation involves experiential imperatives, as mediators work “to assist clients who are struggling not only with interpersonal conflicts, but also intra-personal issues.” Sometimes, as a result, departure from conceptual notions of neutrality is required. It is almost inevitable, at least to some extent, that a mediator’s own emotional reaction to the parties and the dispute will influence their actions and decisions in mediation. The mediator’s “own knowledge, experiences, and values” are also influential. Whether the mediator is aware of it or not, they cannot avoid a certain element of transference and counter-transference between themselves and the parties.

Neutrality can also be considered a flawed concept in mediation because the reality of mediation practice is that mediators are truly powerful. Therefore, any “notion that mediators are passive participants in a process shaped by forces they have not deployed” is simply manifestly inaccurate. The work of Greatbatch and Dingwall, for example, has clearly shown that mediator values and judgments can, and often do, enter the mediation process and influence mediation outcomes. Particularly in relation to problem solving models, such as those used in court-ordered mediations, we know that some mediators will prioritise the reaching of a

32 Taylor, n 19 at 215.
33 Taylor asks: ‘The question for practitioners is whether articles like those of Rifkin, Millen and Cobb (1991), which propose a theoretical basis for understanding neutrality, are so conceptual as to be of limited value to the practitioner.’ Taylor, n 19 at 218. As Astor has put it: “Whilst practitioners make decisions every day about neutrality, it does not seem that those decisions are very much informed or assisted by the current research and theorising about neutrality.”: Astor H, “Rethinking Neutrality: A Theory to Inform Practice- Part 1,” (2000) 11 Australasian Dispute Resolution Journal 73 at 77.
35 Ibid.
settlement. Any settlement. Settlement-oriented mediators use what Greatbatch and Dingwall refer to as “selective facilitation” to push negotiations towards achieving an outcome. In such circumstances, the mediator is clearly not neutral. Rather, they have an important impact on both the content and outcome of the mediation. They cannot be said to be merely a process expert.  

In support of these assertions, Astor and Chinkin warn that “it is not sufficient simply to claim mediator neutrality (as) mediators have considerable power in mediation and there is evidence that they do not always exercise it in a way which is entirely neutral as to content and outcome.” And according to Silbey, “mediators exercise power by manipulating the immediate situation of mediation, and the interactions and communication between the parties, in order to control and shape the outcomes.” We also know, for example, that mediator power can be exercised in a gendered fashion. For example, the Report on the Evaluation of the Family Court of Australia Mediation Service acknowledged, significantly, that women were much “more likely to report that mediators pressured them into agreement or tried to impose their viewpoints on them.”

Neutralty can also be considered “unreal” in the context of problem-solving mediation because it contradicts and interferes with what many mediators consider to be their ethical duty to ensure just outcomes. It has been said, for example, that neutrality is a lesser value in the mediation process than the commitment to ensuring “fairness, or win-win settlements.” This is the basis on which some mediators, consciously, non-neutrally and actively intervene for the benefit of a weaker party or absent third parties, such as children. McCormick, for example, has asserted that “a mediator committed to representation of all the interests cannot be preoccupied with neutrality.”

Theoretically, at least, a further complication arises in the distinction that is sometimes drawn between neutrality and impartiality. This distinction aims to

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38 Boulle points to a growing realization amongst mediators of this issue and the concomitant realisation that neutrality is an aspiration rather than a reality, see Boulle, n 7 at 35.
39 Astor and Chinkin n 20 at 102. Professor Wade has said that “virtually every step taken by a mediator involves the exercise of power.”: Wade, n 37 at 54. The research of Greatbatch and Dingwall asserts that mediators are clearly not neutral in their mediation practice; see n 37 at 74. Silbey, n 36.
40 Bordow S and Gibson J Evaluation of the Family Court Mediation Service (Family Court of Australia Research and Evaluation Unit 1994) at 112.
41 Bernard et al, n 31.
42 Astor considers that this has “the regrettable consequence that what many mediators would regard as ethical behaviour involves loss of neutrality”: see Astor H, “Rethinking Neutrality: A Theory to Inform Practice – Part II” (2000) Australasian Dispute Resolution Journal 145 at 147.
44 “In the case of mediation, each concept (of neutrality and impartiality) has a different significance. Impartiality must be regarded as a core requirement in mediation, in the sense that its absence would fundamentally undermine the nature of the process. It is inconceivable that the parties could waive the requirement that the mediator act fairly. Neutrality, however, is a less absolute requirement and could be waived without prejudicing the integrity of the mediation process, for

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address the neutrality dilemma in mediation by acknowledging that whilst a mediator may not always be neutral, they should always manage to be impartial.\textsuperscript{46} That is, certain mediator uses of power in mediation (for example interventions, actions or evaluations) can be seen as legitimate even though they might be said to strictly contradict the notion of neutrality. Their legitimacy is based on the fact that such conduct still can be said to fall within the concept of impartiality.\textsuperscript{47} Such semantic distinctions, we think, are not necessarily meaningful or practically relevant for mediators or parties in terms of how they experience the reality of the mediation room. Many people, for example, consider neutrality and impartiality to be synonymous. We don’t consider the distinction to be particularly useful, then, in any real sense; at least not without detailed explanation being provided to the parties.

Our support of approaches to mediation that reject notions of neutrality is based on the issues with neutrality in problem-solving mediation articulated here. We support concepts of mediation that move beyond the current preoccupation with false assertions of neutrality, and that move towards a principle of providing parties with a clear and accurate sense of what the mediation process can and cannot provide for them.\textsuperscript{48} As neutrality cannot realistically be achieved we argue that the better approach is to move to models of mediation that can be supported in other ways. We believe that the theory of therapeutic jurisprudence offers a potential way forward for removing the perceived need for neutrality to be a “legitimizing” concept for mediation. We next outline this theory and then relate it to the practice of new models of mediation.

\textbf{Therapeutic Jurisprudence}

Therapeutic jurisprudence\textsuperscript{49} is a recent philosophy\textsuperscript{50} that promotes a different approach to courts, tribunals and associated services in our legal and justice system. Stemming from the work of United States academics, Winick and Wexler, in the mental health field therapeutic jurisprudence is an attempt to chart the impact on the emotional life and psychological well-being of those affected by decisions of our justice system.\textsuperscript{51} The aim is to draw upon the work of the social sciences in charting the therapeutic or anti-therapeutic effect of decisions by courts and more widely, justice agencies. This philosophy has been linked with other initiatives in the law,
such as movements in preventative and collaborative law, and has been identified as an influential vector of the comprehensive law movement. All of these approaches to the law attempt to move away from our adversarial system and look to innovative ways to solve the problems that present to our legal and justice system. The success of therapeutic jurisprudence is in its promotion of diverse initiatives, such as problem-solving courts and correctional programs. It is also advocated as a paradigm to temper the litigious culture of lawyers and promote practice that assists in the furtherance of a client’s overall well being.

It is an interdisciplinary approach, and acknowledges the various disciplines involved in justice including, social workers and psychologists. Although in Australia this approach has been mainly taken up in the criminal justice system, therapeutic jurisprudence has also been used as a theoretical framework in a variety of areas including civil law, medical issues such as anorexia and neighborhood


54 See for a discussion of a range of initiatives Winick and Wexler n 10 at 25.


58 The philosophy is supportive of interdisciplinary practice between various professions such as the law and social work Hartley C and Petrucci C, “Justice, Ethics and Interdisciplinary Teaching and Practice: Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and the Law” (2004) 14 Washington University Journal of Law and Policy 133. This is an appealing aspect to the philosophy as mediation also draws upon a wide range of professional backgrounds such as social work, psychology as well as law.


disputes. The mediation movement’s focus upon alternatives to litigation, which reduce stress and cost, has resonance with the aims of therapeutic jurisprudence, “It also studies the effects of conciliation and mediation processes as means of reaching settlement and avoiding the anti-therapeutic effects of protracted litigation and adversarial trials.” Some writers limit the kind of models of mediation that can be categorized as therapeutic to the transformative and narrative models.

Therapeutic jurisprudence has been accused of being paternalistic and might be said to extend the social control of the state due to the more active role of the court in supervising the lives of those who come before it. However, in the context of mediation, we see value in this philosophy in promoting models of practice that eschew neutrality, deal with emotion and provide a greater degree of procedural justice. There are clear links between therapeutic jurisprudence and new models of mediation. Mediation is known for its therapeutic effect when incorporating storytelling, an attribute of both narrative and transformative models.

Models of Mediation

Unlike litigation there are many definitions of alternative dispute resolution processes (ADR) including mediation. Definitions range from the simple to the extensive and in an effort to provide a benchmark for practice the National Alternative Dispute Resolution Council (NADRAC), has provided two descriptions of mediation, but acknowledges that different agencies will have differing

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66 King, n 58 at 50.
70 Paquin and Harvey, n 67.
71 Ibid.
73 “Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or outcome of its resolution, but may advise on or determine the process
definitions according to their needs. NADRAC does not include the attribute of neutrality however many courts and tribunals still do. For instance, the Federal Court of Australia describes the mediator in the court-connected process as neutral and in addition advises that the mediator may suggest possible solutions.

Boulle, when commenting upon the difficulties of establishing a definition of mediation points to the use of models as a way of showing the range of practice of this approach to dispute resolution. There are a number of models identified by Boulle, including the facilitative model which he states is the model extensively used in “training, writing and practice in community, neighborhood and family disputes” and the evaluative model which he states is much in evidence in “court-connected, commercial and industry-based mediation.”

As indicated earlier in this paper these two models are examples of problem-solving models where settlement of a dispute is the main aim of the process. However, these dominant approaches do not provide the range of dispute resolution methods to deal with the differing kinds and contexts of conflict in our society. An alternative approach to problem-solving models is the narrative and transformative models where the aim is not to focus upon solutions, but to prioritize exploring emotion and relationship issues between the disputants, although solutions to the problems brought to the mediation table are often found.

In this discussion we first wish to highlight the differences between the two problem-solving models of mediation and in the process of this discussion argue that evaluative mediation has anti-therapeutic outcomes.

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74 NADRAC indicates that these two descriptions are not intended to be prescriptive; see ibid.
76 These are the settlement, facilitative transformative and evaluative models. He also refers to the narrative model by does not include this models as one of the four major paradigms of mediation see Boulle, n 7 at 43-47. In this paper we discuss all of the models identified by Boulle, save the settlement model, which we regard as close to the evaluative model.
77 Ibid at 43.
78 Mediators have been criticised for their “how to” approach to mediation, avoiding theory in favor of a focus upon skills that lead to settlement, see Della Noce et al, n 22 at 45.
80 Bush and Folger, n 6 at 239-247.
(i) **Problem-Solving Models of Mediation**

In the early days of the present wave of mediation practice, there was little distinction between the models of mediation that were being practiced. This was the case even though there were significant differences in approaches taken by mediators. Riskin,\(^{81}\) in an influential analysis of models, pointed to the use of two main models of mediation, the facilitative and evaluative models. He posited that mediation could be explained as a grid showing movement between an approach where the mediator sought to gain agreement through delving behind party’s positions and discovering needs and interests, to an approach where the mediator advised party’s of likely court outcomes and evaluated their dispute. Riskin aimed to provide a grid to assist parties and their lawyers, to understand and make choices about mediation models.\(^{82}\) The articulation of the grid led to debate in the mediation industry concerning whether the evaluative model, or at least one part of the grid, could even be categorized as mediation and the negative repercussions of promotion of this type of practice.\(^{83}\) More recently, Riskin has responded to a range of criticism regarding this model and renamed the approaches “elicitive” and “directive”. As indicated, these kinds of models could be described as problem-solving models as the aim of the process is primarily to bring about a solution to the problem that brings the parties to the mediation.\(^{84}\) Evaluative mediation has grown significantly in court-connected mediation in Australia and the United States,\(^{85}\) particularly due to the apparent preference of lawyers for this approach. Boulle, when considering the extent of mediator interventions in disputes notes that:

…in commercial, court connected, personal injury and tribunal-based mediations, mediators tend to be “highly interventionist” in terms of informing, advising expressing opinions and making recommendations to the parties, highlighting their potential difficulties on the facts and law, and predicting what might eventuate if the matter proceeded to a court or tribunal. In these settings mediators tend to be experienced lawyers, ex-judges, court registrars or other experts and the parties are often legally advised.\(^{86}\)

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\(^{81}\) There have been a number of publications discussing the Riskin grid, see for example Riskin L, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 Harvard Negotiation Law Review 7


\(^{84}\) Some writings regarding therapeutic jurisprudence include the facilitative model, see for example Wexler, n 62 100. The adoption of the therapeutic jurisprudence framework may allow facilitative mediation to develop an approach to practice that does not rely upon neutrality and focuses more attention upon emotion rather than settlement, however we do not discuss this issue in detail in this paper.

\(^{85}\) Welsh n 14.

\(^{86}\) Boulle, n 7 at 40.
Importantly, mediators may move through a range of models when mediating. That is, they may begin with an elicitive, facilitative approach and later introduce an evaluation of the merits of parties respective cases, becoming directive.\textsuperscript{87} Even in the transformative approach, where authors Bush and Folger emphasise that models should not be combined,\textsuperscript{88} mediators do sometimes move between models.\textsuperscript{89}

Where mediators take up that part of Riskin’s grid where they evaluate disputes and fail to consider parties emotional and relationship needs we argue that this model is anti-therapeutic. This is because the positive psychological effects of dealing with emotions and relationships are curtailed in evaluative mediation. There is a focus upon outcomes and the “soft” issues of emotions and relationship are not addressed or are given marginal attention. Jones and Bodtker\textsuperscript{90} have identified the lack of reflection by many mediators of the place of emotion in conflict. They have pointed to the need for all mediators, whatever model of mediation is practiced, to address emotion as they argue that “emotion is the foundation for all conflict”.\textsuperscript{91} If mediators do not reflect upon the impact of emotion there can be negative effects for disputants and for the mediator (as the mediator’s emotional responses affect his/her practice).\textsuperscript{92} The evaluative model potentially will be anti-therapeutic as this approach focuses on solutions to problems and may merely provide simplistic venting of emotional concerns.\textsuperscript{93}

The rise of the evaluative approach is at odds too with one of the core ideas of mediation, self-determination. Parties are said to determine their own outcomes when undergoing mediation as there is no third party empowered to decide the dispute. Welsh argues that as the evaluative model has become more popular in court-connected mediation the ideal of self-determination has diminished:

However, as mediation has been institutionalized in the courts and as evaluation has become an acknowledged and accepted part of the mediator’s function the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role.\textsuperscript{94}

\textsuperscript{87} Ibid at 43.
\textsuperscript{88} Bush and Folger n 6 at 45.
\textsuperscript{89} See Martin M, “How Transformative Is Volunteer Mediation? A Qualitative Study of the Claims of Volunteer Mediators in a Community Justice Program” (2000) 18 Mediation Quarterly 33. In this article the author describes research which demonstrates that mediators with the best intentions to practice transformative mediation would move, on occasion, from the transformative approach to a problem solving approach. The more experienced the mediator the more likely the mediator was to adhere to the goal of transformative mediation.
\textsuperscript{91} Ibid at 219.
\textsuperscript{92} Ibid at 239.
\textsuperscript{94} Welsh, n 14 at 4.
Significantly, the evaluative model tends to place less emphasis upon the parties articulating their concerns and more of a focus upon the rights of disputants. The mediator provides an evaluation of the parties’ rights and may, in some instances, pressure the parties to settle the dispute. However, during the process the mediator will maintain the myth of neutrality, protesting that he/she has no decision-making capability. In a mediation this may mean that after a short hearing of opening statements, sometimes delivered by the legal representatives, the participants may be ushered into different rooms and the mediator will deliver offers by moving back and forth between the rooms. This approach to mediation arguably affects the psychological outcome for the parties as parties lose true self-determination.

In this context the psychology of procedural justice is an important issue to consider. Research has shown that litigants highly value a sense of being involved in a fair process. Being able to tell the story of the conflict and being treated with respect was more important than winning in court. Tyler’s recent research led him to state:

People’s evaluations of the fairness of judicial hearings are affected by the opportunities which those procedures provide for people to participate, by the degree to which people judge that they are treated with dignity and respect, and by judgments about the trustworthiness of authorities. Each of these three factors has more influence on judgments of procedural justice than do either evaluations of neutrality or evaluations of the favorableness of the outcome of the hearing.

Procedural justice has long been recognized as an attribute of mediation, but differing models provide differing experiences of procedural justice. We argue that the narrative and transformative models better meet parties’ need for procedural justice. They do so through the professional practice of the mediator allowing parties the opportunity to be heard by the authority figure of the mediator. These new models value the stories brought to the process by the parties and listen without rushing to settlement. Tyler identifies the wish by parties to experience procedural justice...

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97 Winick and Wexler describe this concept as follows: “The literature on the psychology of procedural justice, based on empirical work in a variety of litigation and arbitration contexts, shows that if people are treated with dignity and respect at hearings, given a sense of “voice,” the ability to tell their story, and “validation,” the feeling that what they have said has been taken seriously by the judge or hearing officer, they will experience greater satisfaction and comply more willingly with the ultimate outcome of the proceedings, even if adverse to them”, see Winick and Wexler, n 10 at 129.
99 Note that Boulle identifies procedural justice as an attribute of facilitative mediation, see Boulle, n 7 at 44.
justice as more important than the issue of neutrality. Some may argue that parties still need to feel the process of mediation is fair and by abandoning the rhetoric of neutrality there is a risk that parties may feel the process is lacking. However, we maintain that if the mediator conducts the process in an *even handed* way, giving equal time and attention to the parties, the experience of fairness will be assured without relying on the attribute of neutrality.

We will now discuss narrative and transformative mediation in more detail and show how they better deal with emotion and relationships and issues of procedural justice.

**(ii) Narrative Mediation**

Narrative mediation is a relatively new model of mediation that has its origins in narrative therapy and is predicated on a storytelling approach to conflict. Based upon post-modern and social constructivist perspectives conflict is not constructed as the product of colliding individual needs, as postulated in problem solving models, but as “…the inevitable product of the operation of power in the modern world”. The mediator is not seen as the neutral facilitator of the process of the mediation, or as an evaluator of the merits of a dispute, but as a co-author in the re-storying of the conflict that brought the parties to the mediation table. The authors of this model reject the liberal ideology that supports notions of neutrality observing when considering dominant models of practice that:

> The ultimate model for the mediator is that of the scientist-practitioner, the detached neutral observer applying the knowledge generated within modernist scientific tradition, in which the concept of problems solving is well entrenched.

Instead, this approach looks beyond the facts and interests that are the subject of problem-solving mediations and deconstructs “the cultural and historical processes by which these facts and interests came to be.” The mediator is given the authority to be a co-author of the re-storying of the conflict from his role in the

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100 For example, in the narrative model the mediator is careful not to be seen as excessively warm towards one party and will not make off putting remarks to any party; see Winslade and Monk, n 5 at 137–40.


102 This model has much in common with Cobb’s mediation as storytelling approach see Cobb S, “Empowerment and Mediation: A Narrative Perspective”(1993) 9 Negotiation Journal 245 . New models of mediation practice may be described as “second generation practice”, see Cobb, n 17. The storytelling model has not been considered in this paper, but we include it in our more general paper Douglas and Field, n 9.

103 Winslade and Monk, n 5 at 41.

104 Ibid at 34.

105 Ibid at 38.

106 The mediator needs to reflective regarding the authority to co-author and the power he or she wields in the process. This requires reflexive practice, see ibid at 121.
mediation process and he utilizes a number of innovative interventions to achieve the aim of arriving at a new, more harmonious view of the conflict. Through techniques such as mapping the history of the dispute, curious questioning and externalising the problem, mediators seek to shake loose stories of mutual blame. The written word is used to assist in the development of a new story, which may address the concern/s that brought the parties to the process.107

(iii) Transformative Mediation

The transformative model of mediation offers an alternative to litigation and the mirroring of the litigious process by problem-solving models, such as evaluative mediation.108 The mediator in the transformative model is not considered a neutral third party, but instead acknowledges the impact of mediator interventions upon the mediation story with the normative aim of achieving moral growth.109 Unlike litigation mediation provides the opportunity to achieve unique outcomes, such as the transforming of the parties conflict. The aim is to achieve the twin objectives of empowerment and recognition contributing to moral growth. Parties can achieve empowerment through deciding for themselves how to address the conflict they are experiencing. Mediator interventions encourage parties to see the conflict from the other party’s point of view, achieving a degree of empathy, called recognition. Achieving moral growth is the priority in conflict transformation, but solutions to problems can be found in addition to this normative aim. In this respect, achieving the transformation of conflict, mediation cannot be compared to any other dispute resolution option110 and its transformative dimensions can benefit the specific dispute being mediated as well as the community more generally as participants become more adept at dealing with conflict.111 Thus the moral growth of participants affects the disputing parties and the wider community.112

Like narrative mediation this approach relies upon postmodern and social constructionist literature as part of its philosophical basis, but also draws upon the fields of communication, cognitive psychology and social psychology.113 Drawing in particular from psychology Bush and Folger analyse conflict as causing an individual a “kind of crisis”. When parties experience the conflict that leads to mediation they will often feel a sense of disempowerment and displacement. Importantly, conflict of this kind affects an individual’s sense of self and relationships with others. Parties react with a sense of weakness; becoming self-absorbed and self-centred. Bush and Folger describe this process as a negative spiral of conflict which the transformative model can reverse. Mediators intervene in the

107 Ibid at 37-47.
108 Bush and Folger, n 6 at 37.
109 See Della Noce et al, n 22 at 57.
110 Bush and Folger, n 6 at 60.
111 Ibid at 37.
112 Ibid at 78.
113 Della Noce et al, n 22 at 48
conflict with the normative aim of transforming the conflict through empowerment and recognition shifts.\textsuperscript{114}

Clearly, both the narrative and transformative model articulate an approach to emotional issues and relationships that problem-solving models do not. The opportunity to tell the story of the conflict in these two models, listened to in an evenhanded manner by the mediator, arguably provides superior opportunities to experience procedural justice than in the problem-solving models. We therefore believe that these new models, with their rejection of neutrality, are the approach that courts and policy makers should increasingly adopt in court-connected mediation programs.

**Conclusion: The Need For Research Based Upon a Therapeutic Jurisprudence Framework**

At present research shows mediation has generally high satisfaction rates from parties.\textsuperscript{115} However, satisfaction may be affected by the expectations that parties bring to the process. Boulle argues that:

> Some of the views expressed by mediating parties, for example that mediation ‘met my expectation’ have limited value without knowledge of the respondents’ prior expectations and understandings and more specificity on which individual needs were met in the process.\textsuperscript{116}

Research into mediation often does not break down the model used\textsuperscript{117} and as such provides limited information to courts and policy makers as to the competing benefits of various models. It is only when we are able to test the effectiveness of models of mediation that we will be able to make informed choices regarding the appropriateness of the use of a model in a particular setting. Therefore, we require evaluations of models that are based upon indicators other than satisfaction rates. In our view evaluations should include assessments of the improvements to participants’ emotional and psychological well-being after experiencing a particular model of mediation.

In this paper we have attempted to provide an alternative to the use of neutrality as a “legitimizing” framework for the practice of mediation in court-connected matters. We have canvassed new models of mediation that do not rely upon the rhetoric of mediation in the way that problem-solving models do. There is a resonance between therapeutic jurisprudence and the practice of narrative and transformative mediation that can traced to the emphasis that these models place upon the emotional and relationship dimensions of conflict and the resultant arguably positive therapeutic outcomes for parties who experience these models. Evaluative mediation, we have

\begin{itemize}
\item \textsuperscript{114} Ibid at 45-53.
\item \textsuperscript{115} Mack, n 2 at 29.
\item \textsuperscript{116} Boulle, n 7 at 578-9.
\item \textsuperscript{117} Ibid at 579.
\end{itemize}
posed, has anti-therapeutic outcomes due to the sidelining of emotional concerns and the lack of procedural justice associated with this approach. In order to test our assertions we believe that these models need to be researched in the court-connected context. In this way policy makers\textsuperscript{118} and courts can engage with the benefits of these kinds of models. The approach of the research however, needs to be grounded in the philosophy of therapeutic jurisprudence. Any evaluation must include the normative outcomes valued by this movement.

\textsuperscript{118} Evaluations of justice initiatives are now common place in Australia, see for example Department of Justice, Quality Assurance Framework (Courts and Programs Development Unit, March 2006).
Summary: This article will discuss the legal landscape for TJ in Pakistan with special reference to juvenile and probation laws and the role of defense lawyer. Pakistan has a number of laws for juvenile justice and the present law, i.e., the Juvenile Justice System Ordinance, 2000 has incorporated TJ provisions in it. The probation law coupled with the JJSO 2000 has TJ potential for administration of juvenile justice at criminal side. Now, prime responsibility shifts on the defense lawyer as to how (s)he guides the juvenile court to administer JJSO in a way to explore its healing capacity. As a first study of its kind in Pakistan in wake of non-availability of TJ literature, this paper will focus on legal provisions that are TJ oriented or that can be administered in TJ fashion.

Key words and acronyms: Juvenile (a person under the age of 18 years that includes a child and youthful offender); PLJ (Pakistan Law Journal); PLD (All Pakistan Legal Decisions); SCMR (Supreme Court Monthly Review); PCrLJ (Pakistan Criminal Law Journal)

I. INTRODUCTION

Therapeutic Jurisprudence (TJ) is to see the law in context of its healing impact on litigants. The literature of TJ suggests that the scope of TJ is multi-dimensional and
inter-disciplinary\textsuperscript{6}. It has great scope in juvenile law as juveniles deserve special attention by all the actors of judicial system when said juveniles are accused of some offence under penal or criminal laws.\textsuperscript{7} The reason is to protect the child rights in such a way where the purpose of criminal law is also met along side a desired positive psychological impact on the personality of the juvenile.\textsuperscript{8} It is so because when juvenile is out of judicial process, he or she should be considering that the judicial system helped in removing his or her problem that caused his or her involvement in criminal activity.\textsuperscript{9} Present juvenile law specifically provides that the provisions of Ordinance shall be in addition to and not in derogation of any other law for the time being in force.\textsuperscript{10} This conforms to general understanding that a law cannot be allowed to affect the public policy.\textsuperscript{11}

In a country like Pakistan that has a legal system based on traditional British mindset\textsuperscript{12}, but with necessary amendments and impact of its Islamic character\textsuperscript{13}, the

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\item \textsuperscript{7} “Rehabilitation in society” of juveniles is the key word for most of the legislation around the world relating to juvenile justice system. Preamble of JJSO also includes these words to show the intention of the legislature.
\item \textsuperscript{8} It is so because proponents of therapeutic jurisprudence do not “suggest that therapeutic considerations should trump other considerations.” Wexler and Winick (eds.), \textit{Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence}, 1996, p. xvii.
\item \textsuperscript{10} See sec. 14 of the JJSO 2000.
\item \textsuperscript{12} From 1857 to 1947, subcontinent (consisting of the then mainland un-partitioned India) was ruled by the British. It was partitioned through the Indian Independence Act of 1947 and Pakistan came into being. During these 90 years, subcontinent was run under the British laws which were sometimes tailor-made to suit the local needs and customs. Even after partition, both countries have same laws but with amendments and modifications to suit the needs of their people. Of course, new laws were and are enacted after independence as and when need arise. Mostly, the British style of legislation is followed. See generally, Khan, Hamid. \textit{Constitutional and Political History of Pakistan}, Karachi: Oxford University Press, 2001.
\item \textsuperscript{13} The Constitution of Pakistan, 1973 provides in its Preamble that “principles of democracy, freedom, equality, tolerance, and social justice, as enunciated by Islam, shall be fully observed”. Article 1 of this
enforcement of rights of juveniles need to be understood and publicized for international community. Pakistan has a number of laws that deal with juveniles.\textsuperscript{14} The latest enactment is the Juvenile Justice System Ordinance, 2000 [hereinafter JJSO 2000] which fortunately incorporates in it the TJ principles, especially, when it says that if a child is committed for an offence, said child may be released on probation for good conduct and the court can place such child under the care of a guardian executing a bond for good behavior and well-being of the child\textsuperscript{15} This law further provides that said juvenile will be produced before the Court periodically so that the Court may see the progress of probation.\textsuperscript{16}

This law introduces therapeutic jurisprudence in Pakistan. It is interesting and surprising to note that that the terms “well-being”, “bond for good behavior” and “Court-controlled probation” used in this law are key words for TJ community and courts around the world wherever TJ is practiced.\textsuperscript{15} Hence, a great responsibility shifts on the shoulders of judges, lawyers, psychologists and other actors of judicial and legal system to understand properly the concepts of TJ and how it can suitably be implemented in

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Constitution provides the name of country as "Islamic Republic of Pakistan"; while Article 2 provides that “Islam shall be the State Religion of Pakistan.” In wake of this, it has become incumbent upon the courts of this country to follow the Islamic interpretation of every provision whenever challenged. See generally, Mahmood Khan Achakzai v. Federation of Pakistan, PLD 1997 SC 426. The foundation of this thinking was laid down, as early as 1965, by the Chief Justice A. R. Cornelius when he wrote: “[Fundamental Rights] are not to be understood, expounded and applied in any other light than that of the dictates of Islam, that is to say of the ethical values which are enshrined in the Scripture of Islam.” Justice A. R. Cornelius, “Need to Expound Law According to True Philosophy of Pakistan” in PLD 1965 Journal 48. It will be interesting to note that Chief Justice Cornelius was first non-Muslim Chief Justice of High Court but was ardent supporter of the legal philosophy and realism that Constitution of Pakistan enshrined Islamic way of life which can only be achieved if interpretation of Constitution is made in light of Quran and Sunnah.

\textsuperscript{14} Sections 82 and 83 of Pakistan Penal Code (PPC), 1860; sections 29-B, 401 and 514-B of the Code of Criminal Procedure (CrPC), 1898; the Reformatory Schools Act, 1897; the Punjab Borstal Act 1926; the Good Conduct Prisoners Probational Release Act, 1926; the Punjab Children Ordinance, 1983; the Punjab Youthful Offenders Ordinance, 1983; the Sindh Childrens Act, 1955; the Sindh Borstal Schools Act, 1955; Lahore High Court Rules and Orders, vol.III, Chapter 22; the Probation of Offenders Ordinance 1960; the Juvenile Justice System Ordinance 2000.

\textsuperscript{15} Sec.11 of the Juvenile Justice System Ordinance, 2000.

\textsuperscript{16} In traditional probation order, the probationer is under control and observation of the probation department while the judge disassociates herself after passing probation order. However, this approach is one interpretation of probation law of 1960. If more research is done and the probation law is seen through TJ lens, there are obvious provisions that can help lawyers and judges to apply probation law in more therapeutic fashion and in accordance with established TJ techniques. For example, to make the probation court-controlled, sub-section (2) of section 5 of the Probation of Offenders Ordinance 1960 expressly provides that ‘additional conditions’ may be imposed for probationers’ well-being etc. By interpreting this clause through TJ lens, a lawyer can argue that as an additional condition, the probation order may be passed by the judge to bring the accused before the court after every, say three months so that judge can look into the progress of probation contract.

\textsuperscript{17} For example, the concept of behavioral contract.
Pakistan. For this reason, law of probation needs to be read together with the JJSO 2000 so that alternative sentencing regime can effectively be established for rehabilitation and well-being programs. I would like to limit my study spanning over these preceding five years so that readers can know as to how the regime of TJ is taking off in wake of many hurdles described by Munir:

“In a developing country like Pakistan, to have a judicial behavior compatible with these applied ideas is not an easy task. The problems in Pakistan are complex regarding the application of the TJ approach in courtroom environment. They are, inter alia, illiteracy, lack of research and writing and empirical analysis of implications of judicial decisions, overworked, underpaid, and under-trained police, a language barrier between the legal system and the litigants (official court language is English, but the people speak local languages), poverty, incapacity to engage a lawyer, heavy backlog of cases in courts giving no time to judge for a TJ dialogue with the accused, non-training of police officers, lawyers, probation officers and judges regarding these sensitive matters, resulting in a lack of interest on part of judges to change their behavior toward the TJ approach specifically provided in juvenile law.”

It will also help to understand as how the bar is responding and how the judges understand TJ while administering juvenile law. It is further made clear that as in Pakistan we have no parallel research and writing regimes that are well-established in developed countries, therefore, this study is based heavily on case-law and legislation.

II. THE LEGAL LANDSCAPE

The juvenile delinquency was recognized in this country as early as 1860 when the Pakistan Penal Code (hereinafter as PPC) was enacted in the subcontinent. Sections 82 and 83 of PPC are relevant. S. 82 provides that “nothing is an offence which is done by a child under seven years of age” while s. 83 provides that “nothing is an offence which is

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18 The Probation of Offenders Ordinance, 1960.
19 Munir, Muhammad Amir. “TJ Elements in Juvenile Justice System of Pakistan: Problems for a Juvenile Court to Act Therapeutically” available online at www.law.arizona.edu/depts/upr-intj/intj-article.html. Visited on 16 April 2006,
20 However, my father Justice Dr. Munir Ahmad Mughal (former Judge of the Lahore High Court) and brother Muhammad Amir Munir (Civil Judge-cum-Judicial Magistrate) have published few articles on TJ in Pakistani law journals. They are working on more TJ oriented research and writing to be published soon. Prof Wexler is mentor and guide for them.
21 Though not so relevant to this study, but its original title was the Indian Penal Code, 1860 (Act No. XLV of 1860). It was enacted by the British rulers of Indian sub-continent. After partition of Indian subcontinent and creation of Pakistan in 1947, the words “Indian” and “India” were replaced with the word “Pakistan”.

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done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and the consequences of his conduct on that occasion.” These provisions provide a defense to a child to avoid criminal liability. Hence, a person below seven years of age cannot be committed for any offence, but a person between the ages of seven and twelve can only take this defense if it is proved that said child has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion. In former case, only fact of age is to be proved; while in later case, a factual inquiry of psychological and mental state of affair of child is required to be brought on record to establish that child is entitled to the defense under these provisions. However, it is to be noted that these were only provisions where child will either be relieved of criminal liability or may entail some punishment if his mental state of affair brings his matter under s.83. There is no sentencing guide regarding the juvenile in PPC.

The sentencing principles provided in the PPC only deal with the quantum and fractions of sentences. There is no mention and requirement regarding any therapeutic consideration for sentencing juveniles. It is, however, held by the Lahore High Court that “matter of sentencing of a young offender always received a careful and generally sympathetic consideration by the courts keeping in view special features of particular cases.” This means that we have to see if there exists any other enactment that particularly deals with juveniles.

The Code of Criminal Procedure 1898 (hereinafter CrPC) provides that the case of a person under age of fifteen years may be tried by a district magistrate or any other magistrate especially empowered under the provisions of the Reformatory Schools Act 1897. Hence, prior to creation of special juvenile courts under JJSO 2000, this provision was used to establish courts that can hear exclusive juvenile cases.

Another very important provision in CrPC needs mention here so that we can know the potential of use of law in a therapeutic way. This is s. 401 of CrPC that deals with the power of the government to suspend or remit sentences passed by the courts. The role of the judge has been made very important under this provision because whenever government is asked through an application to suspend or remit sentence of any convicit,

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22 See ss. 53 to 75 of PPC.

23 Farooq Ahmad v. Federation of Pakistan, PLJ 2005 Lah 1. See also “Instructions to the Criminal Courts”, Rules and Orders of the Lahore High Court Lahore, 1996, vol. III, Chapter 19-A, which provides that “the measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, the character of the offender, his age, antecedents and other extenuating or aggravating circumstances, such as sudden temptation, previous convictions, and so forth, which have all to be carefully weighed by the Court in passing the sentence.” (p. 131 of LHC R&Os).

24 This Code provides the procedural law to be followed by all the criminal courts to ensure fair trial.

25 See s.29-B of CrPC, as amended by the Law Reforms Ordinance 1972.
the government has to refer the matter to the presiding judge who convicted the accused for his opinion as to whether the application should be granted or refused. The judge is made bound to state his reasons for the opinion he will form.26 “Instructions to the Criminal Courts” given in the Lahore High Court Rules and Orders (hereinafter LHC R&Os) further explains this provision in the following words:27

> It happens sometimes that a sentence which a Judge or Magistrate can pass under the law is unsuitable28 in view of all the circumstances of the case. In such case, all that can be done is to make a recommendation to the Provincial Government to take action under ss. 401 and 402 of the CrPC.

I found in these provisions a great potential for implementation of therapeutic jurisprudence techniques for juvenile delinquents as it involves both the government and the court for decision about the future treatment of convict.29 The readers should note that until a full-fledged TJ oriented juvenile court is not established through the process of law,30 such types of enabling provisions can greatly help to implement TJ strategy where only the action is required by the legal actors using the TJ lens.31

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26 See s.401 (2) of CrPC. It reads:

> Whenever an application is made to the Provincial Government for the suspension or remission of a sentence, the Provincial Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reason for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.


28 These are enabling words where the judge herself can initiate a reference to be sent to provincial government for suspension, remission or commutation of sentence of an accused just convicted by the court due to unsuitable circumstances to the accused if he or she is sent to jail. The provincial government can impose conditions while suspending or commuting the sentence. Hence, it can be interpreted that to send to jail a juvenile is ‘unsuitable’ for him or her and hence suspension or remission of sentence can be recommended by the court itself.

29 For example, in probation law of 1960, post trial follow-up is entrusted to the Probation Officer. However, it is very well established internationally that the present TJ culture is court- or judge-controlled, of course with due assistance of probation officer and other legal actors. The probation releases in America also results in re-arrests of accused involved in other crimes that establishes that only probation system is not reliable to control the repetition. Therefore, the paradigm shift took place to bring the court as a ‘team’ leader in TJ related court activities. See generally, Hora et. al. “Therapeutic Jurisprudence and Drug Court Movement” 74 Notre Dame L. Rev. 439; David B. Wexler, “Robes and Rehabilitation: How Judges Can Help Offenders ‘Make Good’”, 38 Court Review 18 (Spring 2001).

30 Munir, Muhammad Amir. “Proposal for Establishment of a Drug Treatment Court in Pakistan”, 2005. [This proposal was prepared to be submitted to the Law and Justice Commission of Pakistan (LJCP) under its Access to Justice Development Fund in its window ‘Fund for Legal and Judicial Research’ by Muhammad Amir Munir, Civil Judge 1st Class/Judicial Magistrate s.30, Gujrat. However, due to
The Probation of Offenders Ordinance 1960 (hereinafter Probation Ordinance 1960) has also TJ potential of its application to juvenile delinquency cases. I would like to mention that this law has TJ compatible provisions where the probation can be judge-controlled as compared to traditional probation-officer controlled. Seeing this law through ‘TJ lens’, it is found that s.5(2) of this law provides that while making probation order, the court may also direct that the bond\(^{32}\) shall contain such conditions as in opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions\(^{33}\) with respect to any other matter which the court consider necessary for preventing a repetition of the same offence, or commission of other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.\(^{34}\) Probation law is general in terms and can be applied on any type of offender, if his or her rehabilitation is possible. It is with the lawyers how they ask relief from the court regarding the use of these therapeutic provisions already available in our laws.

Finally, I turn towards the JJSO 2000. I take it as an opportunity to share with all the international TJ community, may it be the judges or the lawyers or other legal actors, that Pakistan has sufficiently incorporated TJ provisions in this latest legislation. It is another matter that the legal community has yet to be educated as to how this law is to be implemented in its letter and spirit, which is nothing else but the application of therapeutic jurisprudence principles. As discussed above, this law provides that every person below age of 18 years will be deemed as ‘child’ and that except in special circumstances,\(^{35}\) a child arrested below the age of 15 years will be granted bail by the court and if child was above 15 years of age, he may be granted bail keeping in view administrative restrictions, permission was not granted by the Lahore High Court to submit this proposal to the LJCP. Copy of this ‘Proposal’ is available with the author.\(^{31}\)

31 Ibid.

32 Using TJ lens, compare ‘bond’ with ‘behavioral contract’.

33 These are the words that can be interpreted, using TJ lens, whereupon the court can pass an order that probationer will be brought before the court quarterly or as it may deem fit so that the progress of probation contract can be looked into by the court itself. Definitely, it will further create a check on the performance of the Probation Officers and hence will generate a therapeutic impact. A juvenile court judge informed that in Pakistan, it is common understanding that accused avoid confessing their guilt to serve probation period. Instead, they prefer to be sentenced to jail for a lesser term. Another judge was of the view that this area needs further research and analysis and that the credibility of probation department needs improvement. [Author’s interview with a panel of juvenile court judges. Details are available with the author.]

34 Consider this provision that enables the probation officer as that of the judge to guide the juvenile offender for improving his future life. Here, the ‘team’ of decision makers can decide what the juvenile has to do for a good life ahead including efforts for providing him job, psychological and mental health treatment, etc.

35 For example, where the offence charged entails capital punishment. See s.10 of JJSO 2000.
Section 11 of JJSO 2000 is most important and relevant for our present discussion. It provides that a juvenile may be released on probation for good conduct by the court on execution of a bond by a guardian or a suitable person so that well-being of the child may be ensured. This very provision made it mandatory that a juvenile released on probation will be produced before court periodically so that the probation will remain judge-controlled. It is also provided that if the judge considers that further probation is unnecessary, the court can end the probation. This very law provides that a juvenile will not be handcuffed, fettered, awarded punishment of death or ordered to labour during the time spent in borstal.

From above discussion, it is clear that Pakistan has already stepped into the regime of therapeutic jurisprudence in particular field of juvenile law; and the legal landscape is already there for an effective therapeutic jurisprudence strategy to be adopted by the judicial policy makers and the bars. It may include effective in-service training courses for judges and probation officers and members of the bars of trial courts. Law schools also need to be included in this training program so that they can consider some short courses on therapeutic jurisprudence taught at the school for prospective lawyers and judges. Therefore, Pakistan should be considered as a member of international TJ Club. Definitely, it needs academic backbone and research and writing on this humane side of the law. Next part of the paper will discuss how the courts of this country have interpreted various provisions of above mentioned legal provisions and how the bar has argued juvenile delinquency matters before the courts.

III. ROLE OF THE COURTS AND THE BAR

I have discussed a number of laws that have TJ potential for there administration. However, after promulgation of JJSO 2000, it is important to note that whenever a child is accused of an offence, it will be JJSO 2000 through which benefit will be extended to the delinquent juvenile. The reason is that the age of juvenile mentioned in JJSO 2000 is 18 years. In other laws referred to above, readers should have noted that the age bracket defined for a child is somewhere twelve, somewhere fifteen and somewhere seven. The JJSO 2000 is not to derogate other laws, but being latest enactment and having extended definition of ‘child’ (with maximum number of years, i.e., eighteen), it will be

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36 Hence, if court found that offence is not heinous, bail will be granted. See Proviso to s.10(7), JJSO 2000.
38 S. 12, JJSO 2000.
39 For further discussion on this topic, see Part IV of this Paper.
40 S. 14 of JJSO 2000 reads: The Provisions of this Ordinance shall be in addition to and not in derogation of any other law for the time being in force.
the prime law through which courts will treat juveniles in their courtrooms. It is further important to note that no provision of JJSO 2000 derogates from other laws that deal with juveniles. Therefore, the TJ elements of JJSO 2000 will automatically come into the field to provide healing impact of this law to delinquent juveniles.\textsuperscript{41} We will now discuss individual cases reported in last five years about interpretation and meanings of various provisions of JJSO 2000 read with other laws dealing with juveniles.

The first controversies that were generated after promulgation of JJSO 2000 were to get the cases of juveniles transferred to the juvenile courts. What will happen once the case is transferred to juvenile court remained a matter for further debate as far the therapeutic jurisprudence is concerned. For example, in a murder case, the point for determination of age\textsuperscript{42} of the accused came before the trial court so that his trial may be conducted by a juvenile court constituted under JJSO 2000 and not by an ordinary criminal court. After inquiry, the trial court concluded that the age of the accused is 23 years in accordance with report of medical board and reliance cannot be placed solely on birth certificate establishing the age of accused as less than 18 years. The arguments that were raised before the Lahore High Court were that the birth certificate, and not the report of medical board, is relevant to solve the controversy of age of the accused. These arguments were not impressive and the Lahore High Court held that “the age could only be determined after obtaining the medical report from the Board”\textsuperscript{43} and that the “possibility of difference of one year on both the sides cannot be ruled out as laid down in 1975 PCrLJ 936.”\textsuperscript{44} A contradictory view was taken by another Judge of the same High Court in \textit{Mehboob Ahmad v. The State}\textsuperscript{45} wherein it was held that the “medical opinion cannot override the evidence of birth certificate.”\textsuperscript{46} This conflict of opinion arose for the reasons that s. 7 of the JJSO 2000 did not prescribe any particular document or mode of determining the age of the accused. However, the language of this provision is general and it leaves to the court to consider various factors including the medical report to reach at a definite age of accused. The formula of age determination and resulting benefit of being juvenile was not extended to those who committed offence prior to the promulgation of JJSO 2000.\textsuperscript{47} To settle this controversy, the Supreme Court of Pakistan had declined to concede to arguments of defense counsel, in \textit{Muhammad

\textsuperscript{41} Author’s interview with Muhammad Amir Munir, Judge, Juvenile Court, Gujrat, dated 24 April 2006.
\textsuperscript{42} S. 7 of JJSO 2000 reads: If a question arises as to whether a person before it is child for the purposes of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child.
\textsuperscript{43} \textit{Hasan Zafar v. The State,} 2001 PCrLJ 1939, at p.1943.
\textsuperscript{44} \textit{Hasan Zafar v. The State,} 2001 PCrLJ 1939, at p.1944.
\textsuperscript{45} 2002 PCrLJ 2034.
\textsuperscript{46} Ibid, at p. 2036.
\textsuperscript{47} \textit{Ijaz Hussain v. The State,} 2002 SCMR 1455, at p. 1459.
Zakir v. The State,\textsuperscript{48} that the trial court had placed explicit reliance on the ossification test report and has totally ignored the documents, i.e., birth certificate and school leaving certificate.\textsuperscript{49} In another case Muhammad Akram v. Muhammad Haleem,\textsuperscript{50} the Supreme Court had accepted an appeal against an order of high court wherein the order of trial court regarding the determination of age of accused without ossification test was upheld.\textsuperscript{51} The dictum of above discussion is that the documentary proof coupled with ossification test have to be given due weight to reach at correct age of the accused and none of them alone is sufficient to determine the age of accused whenever the same is in controversy. Now, once it is determined that an accused is less than 18 years of age and his or her case transferred to a juvenile court, the role of lawyers and judges begins to apply the law in therapeutic fashion. But is this happening here in Pakistan? The answer is not an easy one as many practitioners are using TJ techniques but without knowing that whatever they are doing is TJ as is understood in TJ oriented countries.\textsuperscript{52}

A constitutional petition\textsuperscript{53} was filed by Zia Ahmad Awan, an advocate and human rights activist, in Hon’ble Sindh High Court in the year 1993 which was finally decided in the year 2001. The petitioner filed this writ petition quite before the enactment of JJSO 2000 under the principles of public interest litigation. He argued that section 10 of the Sindh Children Act prohibits joint trial of a child with an adult but such joint trials are being conducted. He further submitted that under section 68 of this Act, no youthful offender can be sentenced to death or imprisonment and under section 69, the expressions “convicted” and “sentenced” are not to be used in relation to children but these provisions are being violated. He further pointed out that there are no separate arrangements for juvenile offenders for taking them to Court and back to the remand home and they are, sometimes, taken in the same vehicle along with adult hardened criminals. He further pointed out lack of provision for medical facilities for the children involved in offences and non-existence of certified schools as required under the Sindh Children Act. He also pointed out that often juvenile offenders are produced before Court in handcuffs. Apart from these arguments, following relief was claimed:\textsuperscript{54}

a. To declare that various sentences awarded to the juvenile in contravention of the provisions of the Sindh Children Act, 1955 are illegal \textit{ab initio} void and \textit{coram non-judice};

\textsuperscript{48} 2004 SCMR 121.
\textsuperscript{49} Ibid. However, the Supreme Court did not provide detailed reasons for its decision.
\textsuperscript{50} 2004 SCMR 218.
\textsuperscript{51} Ibid, p. 220.
\textsuperscript{52} Interview with juvenile court judge Muhammad Amir Munir conducted on 24 April 2006.
b. to establish juvenile courts in the areas notified under the Sindh Children Act, 1955 as required under section 9 of the said Act;

c. to declare that no court competent to try a juvenile under section 8 of the Sindh Children Act shall try any juvenile along with an adult in contravention of section 10 of the Sindh Children Act, 1955;

d. to direct the authorities not to bring the juvenile to the court with hardened and desperate criminals and in handcuffs or fetters;

e. to declare that there should be proper 'certified schools' for juvenile offenders with all the arrangements and facilities as provided under Sindh Children Act, 1955;

f. to declare that there should be a separate juvenile court for each district of Karachi and other parts of Sindh;

g. to declare that there should be a separate vehicle for these boys to take them to the court for trial and back;

h. to declare that there should be medical facilities for these juvenile offenders and other training facilities as provided under the Act;

i. to declare that the trial of these young offenders be conducted without any delay and they should not be allowed to rot in Remand Home for months without trial;

j. to order any other/further/better/additional relief or relieves/facilities in 'remand home' this Honorable Court deems fit and proper in the circumstances of the facts of case and for betterment of the juvenile offenders.

These fine therapeutic arguments and comprehension were alleged in the year 1993 under the already existing laws of province of Sindh. No reference was given by the petitioner about the international practice or accepted norms of TJ at that moment of time. However, the Sindh High Court took almost eight years to decide this writ. This delay itself tells us that even in the presence of many laws having TJ potential, the higher courts were not impressed to order immediately any violation alleged regarding application of such laws according to their intent and purpose. Before this writ petition was decided, the JJSO 2000 was promulgated. Thereafter, when the writ was decided, learned judges observed that due weight be given to new legislation by the provincial government. The Court observed:55

It would be advisable for the Government of Sindh to promulgate a consolidated law on the subject, incorporating substantial provisions of the Federal Juvenile Justice System Ordinance, 2000. It is

responsibility of the Provincial Government to ensure that the provisions of the law are complied with by the agencies and concerned officials.

However, it is not clear why the Court considered it necessary to advise the government to enact still another law when already a number of laws dealing with juveniles were in force but the only question alleged was their enforcement in accordance with letter and spirit of these laws. This petition was allowed with further direction to the government that within a period of six months, government will establish all those institutions required by law and to provide facilities required by law. I am unable, at this time, to collect any relevant information whether the government acted accordingly or still the situation is at standstill.

From this particular example, we can say that our lawyers were even aware of juvenile rights and claimed from the court to enforce them, although without giving reference to TJ techniques. It can further be concluded that the public interest litigation movement\textsuperscript{56} that took place in this country in early 90s was getting momentum and hence an important issue was kept pending till rise of new century. It can be attributed to 'non-lawyering',\textsuperscript{57} as compared to 'bad lawyering'.\textsuperscript{58} But for international TJ community, I will quote a few examples of 'bad lawyering' that resulted in non-conversion of death sentence into that of life imprisonment\textsuperscript{59} of convicts that were lately alleged to be juveniles.

The JJSO 2000 was promulgated in the year 2000 and it was held by the Supreme Court that a convict juvenile cannot be extended benefit of section 12\textsuperscript{60} of JJSO 2000 if the decision was announced prior to promulgation of this law.\textsuperscript{61} This is also principle of

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\textsuperscript{56} See, e.g., Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 416; Darshan Masih case, PLD 1990 SC 513.

\textsuperscript{57} The reason this petition took eight years for Court to decide and even it seems that the Court decided the petition to remove it from its roster to end the backlog of cases.


\textsuperscript{59} Section 12 of JJSO 2000 provides that no order of death shall be passed against a juvenile convict.

\textsuperscript{60} Section 12 of JJSO 2000 provides that no juvenile will be sentenced to death or handcuffed or fettered or given any corporal punishment or ordered to labour during custody.

\textsuperscript{61} See, e.g., Ijaz Hussain v. The State, 2002 SCMR 1455. In this case, juvenile was convicted to death sentence on charges of murder. First Appeal against conviction was dismissed by the Lahore High Court. When the matter was pending before the Supreme Court, JJSO 2000 was promulgated. Plea was raised that the convict should be extended benefit of being juvenile of 15/16 years in accordance with new law. However, the Supreme Court rejected this plea on the grounds that the trial was conducted prior to promulgation of JJSO 2000 and hence benefit of section 12 JJSO 2000 cannot be extended to the
interpretation that unless it is not provided expressly in the law that it is to operate retrospectively, no retrospective effect can be given to such legislation. However, when the courts interpreted that no retrospective effect can be given to section 12 of JJSO 2000, the President of Pakistan issued a Notification (hereinafter Notification) in exercise of power as conferred upon him under Article 45 of the Constitution of Pakistan, 1973 whereby it was made clear that “those who have been convicted on or before 17-12-2001 are entitled for the above said special remission”. This step taken by the President of Pakistan has provided a TJ lens for interpretation of JJSO 2000. To get relief under this new development, a number of juveniles filed review petitions before the Supreme Court to seek conversion of their sentences from death to life imprisonment. In Rehmatullah v. Home Secretary, Punjab, Lahore, plea of juvenility was taken keeping in view the President’s Notification and prayer was made to the Court for conversion of death sentence to life imprisonment. The Supreme Court refused the plea on the grounds that “the question of age was never agitated before the learned trial court, appellate court as well as this Court. It is too late to raise such a plea now…”. The element of ‘bad lawyering’ is itself pointed out by the Supreme Court that trial and appellate lawyers never raised question of age determination. Had the age controversy raised and resolved at the trial or first appeal, the juvenile may have asked treatment under the Punjab Youthful Offenders Ordinance, 1983, which provides, inter alia, that no death sentence or transportation can be imposed on a person who has not attained the age of fifteen years. Same proposition came before the Supreme Court in another case, Muhammad Jamil v. The State, and the Court rejected the plea of juvenility for the same reasons that such plea was taken lately. Therefore, it can be safely concluded that heavy responsibility shifts on the shoulders of the lawyers to raise each and every plea at relevant time so that if any law provides therapeutic treatment, same can be administered properly keeping in view the circumstances of each case.

63 President’s Notification dated 13-12-2003.
64 It reads: “45. President’s Power to Grant Pardon, etc. — The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any Court, tribunal or other authority.”
65 2004 SCMR 1861.
66 2004 SCMR 1861, at pp.1863-64.
67 See section 45 of the Punjab Youthful Offenders Ordinance, 1983. It is, however, to be noted that under definition clause of this Ordinance, section 2(u), a person who is charged with the offence of attempted murder cannot claim himself as a youthful offender to seek any benefit of this law.
68 2004 SCMR 1871.
On the other side of this debate, on the constitutional touchstone, the positive therapeutic impact was generated by the Courts under their suo motu jurisdiction. There are number of cases that were taken up by the High Courts under their power to take suo motu action. I will quote few. In February 1991, a news item was published that some 1900 juvenile prisoners were held in various jails of Punjab in conditions which were ‘grossly unsatisfactory’. The Chief Justice ordered the release of 155 juvenile prisoners and held that the children under the age of 14 years could not be arrested under vagrancy laws. In another case of a juvenile under the age of 7 years, the Lahore High Court took suo motu notice of his arrest and detention in Borstal jail because under section 82 of PPC, no one under the age of 7 years can be attributed an offence. The latest in the row is suo motu notice taken by the Chief Justice of Pakistan regarding three juveniles that were arrested in a theft case in Sindh province and were put up in fetters and handcuffs. When the footage was shown on a TV channel, the Chief Justice directed the District & Sessions Judge of district Hyderabad to get immediate release of juveniles.

Therefore, sometimes it was ‘lawyering’ and sometimes ‘judicial activism’ that kept on protecting juvenile rights in the context of ‘humanism in the law’. But one thing must be understood that ‘humanism in the law’ was always there in Pakistani juvenile laws except that said ‘humanism’ was not practiced by the law practitioners at

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69 Article 25 of the Constitution of Pakistan, 1973, in its sub-section (3) provides: “Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.” Therefore, this sub-section (3) operates as an exception to the fundamental right of equality of citizens as enshrined in Art. 25.


73 Criminal Miscellaneous H No. 288/1989/BWP, Bahawalpur Bench of the Lahore High Court.


75 For example, when proper assistance is provided to the juvenile delinquent by a counsel, either engaged by the juvenile or appointed by the juvenile court.

76 For example, when the court itself take notice of any violation of juvenile law.

all times. However, the above study suggests that occasional use of humanism was always there and so far it has not reshaped itself as a ‘Comprehensive Law Movement’.

From the above discussion and perusal of law reports of preceding five years, it is found that since the promulgation of JJSO 2000, no case has been reported under section 11, which provides therapeutic treatment of juvenile in court and afterwards. The only heated debate, which still continues, is on the age determination of the accused regarding murder cases. How the law is argued before the juvenile courts is not available through any scholarly writings. It is also pertinent to mention here that judges of trial courts seldom write research articles and hence their experience of trial of juveniles is not available for academic discussion. However, the website of TJ published a *Guest Column* written by Civil Judge Muhammad Amir Munir regarding his experience of dealing with juveniles in his court. It would be very interesting for this international audience to note the approach adopted by him to apply the JJSO 2000 in TJ fashion. He wrote:

‘Let us take an example how the TJ was applied by a judge and problems were solved keeping in view the welfare/well-being of a child:

"A child, with no previous criminal record, was charged with an offence. The Probation Officer was directed to prepare a report about the child, having his history and physical and psychological characters. He prepared a report about child’s character from his own sources, including interview of neighbors, school teachers, meeting with his friends, etc. An open dialogue by the judge in the language of the accused, as simple as possible and without legal phraseology, was made regarding factors which led the accused to commit the crime. He was asked if he is ready to reform himself on his own conditions. His father also was made to attend the proceedings. With his father’s surety bond that he will keep an eye on the future conduct of the child, the child admitted his guilt and resultantly, as agreed, the probation order was passed. He is made to appear after every three months to tell his story for up to a year. His father became happy and child gave

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79 Munir, Muhammad Amir. “A Judge May Write” in PLJ 2005 Magazine 239. In this article, the author, who himself is a trial court judge, analyzed the present situation of research and writing among the judges in Pakistan. He concluded that institutional support and amendment in code of conduct for judges, in line with the world best practices, regarding encouragement of writing by the judges is need of time.

assurance that he will keep on studying and will not indulge in any criminal activity in the future. The judge passed oral comments: “Wish you best of luck!” The child will come again before the Court after three months to tell how his probation period is going. The probation officer will also report about the child’s conduct during this period. If satisfactory, the child may be relieved from remaining period so that he can enjoy his more responsible life with full liberty with a therapeutic effect generated by the way he was treated in the courtroom.”

This was an example of a case I dealt with in my court room while I was holding a juvenile court.

Even in this example, the role of lawyers is missing. Perhaps, it may be due to inability of the juvenile or his guardian to engage a lawyer. On the other hand, the lawyers have not themselves written any research papers or articles in law journals expressing their own experience of conducting trials of juveniles. This area itself needs much consideration for lawyers’ community and the bar organizations so that positive research and writing can be encouraged on an important area of law practice. There is a great scope to apply the JJSO 2000 and the Probation of Offenders Ordinance 1960 to juvenile cases for generating therapeutic impact of law in minds of users of juvenile justice system provided lawyers and judges are trained in therapeutic jurisprudence.

I would like to discuss a little about the TJ potential of section 401 of CrPC. The JJSO 2000 provides therapeutic treatment of juveniles under trial and hence what can be done for those juveniles who are already convicted and sentenced! Section 401 of CrPC can be used effectively and a lawyer can present an application before the government that a convicted juvenile be released on signing a behavioral contact with the government for his future conduct. In this process, the trial judge will have to write his or her opinion as a mandate of law. Hence, even for those juveniles who were convicted and are under custody can be given therapeutic treatment by an effective well-being plan produced before the government with active involvement of juvenile’s parents and some community non-governmental organization. The judge has an important role to be played along side other legal actors like probation officer and the counsel for the juvenile. Judge can also engage any psychologist or psychiatrist to reach at a conclusion as to whether sentence of the accused is to be suspended and if so on what terms and conditions. Of course, the active involvement of the juvenile will have to be ensured so that while signing the behavioral contract, compliance with its terms can be maximized. Involvement of parents of minor will also help in keeping the minor to fulfill his or her words. I see a great role of lawyers and judges and other legal actors that they can play in establishing a TJ regime by use of this enabling provision of criminal procedure code which is as old as 1898. However, I am unable to find a single judgment or decision of courts/government under this provision of procedural law where a juvenile is released for his or her well-being. It is right time for Pakistani lawyers to study the TJ and its techniques so that these provisions of law which have become almost dead-letter-law may be revived and reactivated to enforce present day’s TJ regime for betterment and
well-being of the accused. A great healing impact is available deep inside these provisions and the humanism hidden in them needs to be explored in accordance with the above discussion. It will prove a fantastic court-government interaction duly assisted by the lawyers to provide a healing impact to the convicted juvenile. Definitely, population of jails will lessen due to effective use of this provision along side a responsible and observed behavior of prospective beneficiary / juvenile.

Before concluding this part of my paper, it is pertinent to mention an important judgment of the Lahore High Court, Lahore cited as Farooq Ahmad v. Federation of Pakistan,\(^81\) that has held the JJSO 2000 as ultra vires to the Constitution and accepted norms of criminal justice in this country. This judgment has analyzed the JJSO 2000 thoroughly and a bench of three learned judges concluded that the “High Court cannot blindly or blindfoldedly allow JJSO 2000 to destroy the moral and legal fiber of criminal justice system.”\(^82\) Regarding the separate trial of juveniles in a case where adult accused are also involved, it was held that the “JJSO 2000 ensured duplicity of effort by prosecution and contained an inherent risk of conflicting judgments having rendered by a juvenile court and ordinary court.”\(^83\) The Court further went on to hold that the “Ordinance contemplate a lenient and liberal approach towards bail for such accused persons and after their conviction section 11 of the said Ordinance provides for their release on probation. We have found a lot of substance in the argument of the learned counsel for the petitioner that such immunity from the sentence of death, lenience in the matter of bail after arrest and prospects of release on probation after conviction provided for in the impugned Ordinance contain incentive for and have tendency of not only encouraging persons below the age of eighteen years to commit heinous crimes.”\(^84\) The Court concluded the Order in terms that “the JJSO 2000 is hereby struck off the statute book on account of its being unreasonable, unconstitutional and impracticable.”\(^85\)

This judgment was challenged in the Supreme Court of Pakistan which has suspended the operation of judgment till final disposal of appeal. An academic critical analysis of this judgment has been made by Dr. Faqir Hussain, Secretary Law and Justice Commission of Pakistan. His thorough article has suggested that the “Court was unable to get adequate legal assistance”\(^86\) on such an important issue. He has recommended that

\(^81\) PLJ 2005 Lah. 1. [Mr. Justice Asif Saeed Khan Khosa wrote the leading judgment. Other members of the bench were Mr. Justice Khawaja Muhammad Sharif and Mr. Justice Mian Muhammad Najum-uz-Zaman.]
\(^82\) PLJ 2005 Lah. 1, at p.39.
\(^83\) PLJ 2005 Lah. 1, at p.17.
\(^84\) PLJ 2005 Lah. 1, at p.28.
\(^85\) PLJ 2005 Lah. 1, at p. 44.
\(^86\) Hussain, Dr. Faqir. "Review of the Lahore High Court Judgment in the Case of Farooq Ahmad v. Federation of Pakistan in Writ Petition No.20654 of 2002 reported as PLD 2005 Lah. 15" in PLD 2005 Journal 58.
review should be filed before the Supreme Court of Pakistan to save the JJSO 2000. Review is now pending, as discussed above.

The brief analysis of the above judgment is mentioned here to inform to the international community that the courts in Pakistan are yet to be properly sensitized and educated about the global trends of juvenile delinquency. No other academic article has been written and published in two famous law journals by any other lawyer or law professor to analyze this judgment or to confront the discussion raised by Dr. Faqir Hussain. It may be due to the reason that matter has gone sub-judice before the august Supreme Court of Pakistan. The JJSO 2000 is in operation and its TJ potential needs orientation among lawyers, judges, and law professors for an effective national strategy adopted by them to implement it in letter and spirit. The above discussed judgment of the Lahore High Court will definitely be an eye opener for further amendments in the law, if there is a real need to do so.

IV. TJ AND LEGAL EDUCATION IN PAKISTAN

On academic front, we do not find any course in law school curricula that teaches us TJ or even where studies are made about juveniles and their rights. None of law schools in Pakistan have special juvenile delinquency study centers. The juvenile law’s TJ potential has yet to be explored by a vibrant legal education system. I have studied law school curricula prescribed by the Bar Council and found that no course has been prescribed to study the humanism in the law. However, I have been informed by Syed Ali Imran, Principal of Gujrat Law College (GLC), Gujrat that efforts are underway to establish a TJ Society at GLC under guidance of Civil Judge Muhammad Amir Munir and Prof David B. Wexler. As a pioneer step, an introductory lecture on therapeutic jurisprudence was delivered by Civil Judge Muhammad Amir Munir to law students and law faculty at GLC on 4 May 2006. Therefore, GLC has become a pioneer institution in Pakistan to introduce TJ concepts to its students and faculty. It is hoped that if efforts to establish TJ Society remained successful, the GLC may become a beacon light for others to learn TJ and its practical applications in courtroom and beyond. My brother Muhammad Amir Munir has also informed me that he has had discussions with the head of department of law and policy at LUMS, a well-reputed and important educational

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87 Pakistan Law Journal (PLJ) and Pakistan Legal Decisions (PLD). These two law reporters are widely read and subscribed by all those who are in the field of law, e.g., advocates, judges, law colleges, legal research centers or law professors.


institution of Pakistan, on the topic of introduction of therapeutic jurisprudence in its curriculum. However, only GLC has initiated steps to go ahead in this direction.

It will be interesting to mention that my father Justice Dr. Munir Ahmad Mughal has translated in Urdu the online article of Prof Wexler titled ‘Therapeutic Jurisprudence: An Overview’. This Urdu version of Prof Wexler’s article has been published in Pakistan Law Journal. It will soon be available online at the website of TJ. He is also translating Susan Goldberg’s “Judging for 21st Century” into Urdu. Further, my brother Muhammad Amir Munir, who himself is civil judge and is pioneer practitioner of TJ in his courtroom, has written a number of articles and research papers on various topics in context of therapeutic jurisprudence. His articles are both in English and Urdu languages. His essay “TJ Elements in Juvenile Justice System of Pakistan” has been accepted and published as Guest Column online at the website of TJ. He is writing on therapeutic jurisprudence under able guidance of Prof. Wexler. He is writing on therapeutic jurisprudence under able guidance of Prof Wexler. Judge Michael King is also one of his mentors. I myself indulged in study of therapeutic jurisprudence on encouragement by my father and brother. Rest of it goes to Prof Wexler, who provided guidance to me at each and every step of my learning of TJ.

The international community of TJ will also be happy to note that in a pioneer effort to introduce TJ in my own institution, i.e., International Islamic University, I am working to establish a linkage program between IIU and University of Arizona, USA duly supported by both the institutions. This two months project will be funded by the Higher Education Commission of Pakistan under its Linkage Development Program. Prof Wexler will be providing academic assistance during my stay at University of Arizona. Prospectively, I will be leaving for University of Arizona in 2007.

V. CAPACITY BUILDING MEASURES

So far, there are three individuals in Pakistan who are working on TJ under guidance of Prof Wexler. These are myself, my brother and my father. At Institutional level, GLC has taken pioneer step to have its own TJ Society, while International Islamic University will be having a linkage program developed with University of Arizona, in near future. The most important difficulty in study of TJ in a country like Pakistan is non-availability of TJ literature. I will emphasize on TJ books and important articles published around the globe. The only available material in Pakistan is few articles written by my brother and father, while they both used literature either from the internet or the ones provided by Prof Wexler. My brother Muhammad Amir Munir is highly grateful to three

important TJ personalities. One is Prof Wexler, without whose able and continuous guidance and support it was not possible for him to become pioneer writer and practitioner of TJ in Pakistan. Second is Hon. Judge Michael King of Perth Drug Court, W. Australia, who also supported him and provided him materials and also extended him invitation to attend this conference. Third person is Hon Justice Peggy Hora of Alameda Superior Court, who has sent through post her wonderful article “TJ and the Drug Treatment Court Movement” jointly written with Judge Schma and Rosenthal. He is also thankful to Prof Susan Daicoff for sending her article “Law as a Healing Profession”. Anyhow, these are still individual efforts. There is a dire need to have basic literature of TJ in libraries of courtrooms, bars, law schools and social science departments of universities and colleges.

I would like to suggest to the TJ community that efforts should be made to provide TJ literature to one to two targeted countries that have interest in TJ but lack resources in acquiring TJ literature. Otherwise, TJ movement in countries like Pakistan will be further delayed to take off. As a suggestion, I can say that some complimentary TJ literature, including basic texts, may be forwarded to those institutions who are making efforts to initiate TJ Society in Pakistan. Hence, Gujrat Law College and International Islamic University may be declared as Depository Libraries for TJ literature in Pakistan. This way, the TJ movement will get a great boost.

I would also recommend to the organizers of TJ Conferences to consider, for some appropriate time, to have its future conference in Pakistan. I can convey to the organizers of this Conference about the willingness of my host institution, i.e., International Islamic University, Islamabad about a prospective TJ Conference in Pakistan. All this will be available to provide capacity building measures to those who are interested in TJ and its practice.

IV. CONCLUSION

From the above discussion, certain conclusions can be drawn about the TJ and its prospects in Pakistan. It is found from the survey of legal landscape in Pakistan that Pakistan has already a number of laws that have humane approach in them and the JJSO 2000 has provided a perfect TJ approach of administration of juvenile justice system. Of course hurdles are there as mentioned by Judge, Amir Munir: 93

In a developing country like Pakistan, to have a judicial behavior compatible with these applied ideas is not an easy task. The problems in Pakistan are complex regarding the application of the TJ approach in courtroom environment. They are, inter alia, illiteracy, lack of research and writing and empirical analysis of implications of judicial

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decisions, overworked, underpaid, and under-trained police, a language barrier between the legal system and the litigants (official court language is English, but the people speak local languages), poverty, incapacity to engage a lawyer, heavy backlog of cases in courts giving no time to judge for a TJ dialogue with the accused, non-training of police officers, lawyers, probation officers and judges regarding these sensitive matters, resulting in a lack of interest on part of judges to change their behavior toward the TJ approach specifically provided in juvenile law. To engage external actors for a reformatory collective decision-making becomes a great task when you consider financial and other resources at your stake. Post trial follow-up by the judge needs time. There is also a giant gap between the academic and practical side of various social and behavioral sciences that deal with the study of judicial system.

The study of case law also suggests that the practice of humanism in law is yet at a rudimentary stage and lawyers and judges need effective understanding of TJ concepts as are understood in those countries where TJ is practiced since long and is established as an independent field of study. Law professors in Pakistan also need orientation of those laws that have TJ potential and how they can be administered in an accepted judicial and legal method. Any misunderstandings about this new approach that may develop in the minds of legal fraternity need to be addressed properly. Otherwise, the system itself will repel TJ from full integration. Its example is the judgment of Farooq Ahmad discussed above.

It is also need of the time that the efforts of individuals and institutions may be collaborated by formation of a national TJ Working Group that can provide guidance and future policy steps to all those who are interested in TJ studies. It will help in further strengthening the efforts towards a full TJ regime, at least in juvenile delinquency cases. Last but not least, Pakistan has a great potential for TJ study and TJ application and it can provide a leading role model for other developing countries where the problems of society are same.

I would like to say that application of this new and interesting jurisprudence (TJ) will bring a dynamic change in the behaviours of judicial actors like judges, lawyers, appellants, defendants, police etc. and definitely it will play a vital role in making of better images of Pakistani Judicial System and the Judicial Actors, nationally and internationally. Those who knock the door of a court or are brought to the court will return back to their homes with a pleasant mood, after getting justice and change in their behaviours towards crimes.

From various writings and research papers on TJ in Pakistan, it is found that the lack of TJ literature is a great hurdle in further development of TJ concepts in Pakistan. I would like to invite to TJ community to address this issue by providing some relevant
material to those institutions who are in the wake of initiating TJ activity in their curricula.

I thank you all of you for patience hearing and hope that you have learned a lot from my understanding of TJ and its prospects in Pakistani juvenile law.
THE DRUG COURT: ‘A POLICE PERSPECTIVE’
Sergeant Julia Foster

ABSTRACT
The principal role of prosecuting in the Perth Drug Court falls to a police prosecutor. Historically the placing of offenders before the court has been one of the prime mandates of police. With the changing focus of policing and the demands of the community, a police prosecutor now works collaboratively with team members and participants towards the wellbeing and rehabilitation of participants. The paper highlights the experiences and challenges that the prosecutor faces in the Drug Court. It demonstrates how the ‘enforcement’ outlook of the police prosecutor guides her actions while meeting the challenge of incorporating the therapeutic jurisprudence perspective as a member of the court team.

EXPERIENCES AND CHALLENGES
In June 2003, after prosecuting for four years in the mainstream Magistrates Court of Western Australia, I was assigned the duty of prosecuting in the Perth Drug Court. This entry into a treatment focussed court and the field of therapeutic jurisprudence (TJ) stood in contrast to the normal adversarial system where I had worked previously.

Although the prime mandate of police is to ‘Protect and Serve’, the investigation of crime and the apprehension of criminals are an intrinsic part of the police officer’s function. This culminates in the charging of the accused and placing them before the court.

In Western Australia it is principally sworn police officers who prosecute criminal charges in the Magistrates Court. These prosecutors come from an agency that has preferred the charges, however, as prosecutors they also act as officers of the court and have ethical obligations to the court. Given this split function, very strict ethical protocols and guidelines have been set by the Commissioner of Police and the Director of Public Prosecutions (State DPP) to ensure a quality service to the courts.

Adversarial prosecuting is quite an ‘isolationist’ form of advocacy. The parties appearing at the bar table have little interaction with each other aside from the swapping of further information, or the police disclosure of evidence to the accused or their counsel, according to statute. Indeed, professional duty often precludes the sharing of information beyond statutory obligations to disclose.

Short parley in regards to positions of bail and other issues related to the accused are quite limited in content. Ultimately the court proceedings in police prosecutions require the police to put their case to the court, defence counsel (or the accused, if unrepresented) to present the defence case and then the magistrate hands down a decision.

This isolationist style of advocacy and court procedure clearly does not apply in a treatment focussed court such as the Drug Court. Interaction between members of
the Drug Court team is highly collaborative, including the magistrate and uniquely, the accused. If the adversarial process can be called isolationist, then the working principles of the Drug Court are the extreme opposite.

Under the normal adversarial system, police prosecutors receive comprehensive and continual ‘in house’ training that changes and evolves over time to reflect legislative reforms. In contrast, no formal training or education had been set in place when I assumed the role of prosecutor in the Drug Court.

Entry to the Drug Court is a challenging and confronting step for a police prosecutor to take. The collaborative and information sharing nature of the Drug Court challenges the historical roles of all parties working within its realm. Past perceptions of the roles and functions of each team member have been recognised, discussed and altered to meet the treatment focus of the Court. Even the terminology traditionally used in the adversarial process has had to be broken down and redeveloped. An example of this major change is the person is no longer addressed in court as the ‘accused’ but is referred to by name or as the ‘participant’. The change in focus is a major challenge for a police officer as the participants have been apprehended and charged by police officers and viewed as offenders.

**BALANCE**

Balance between the team and the Court in my view is an important component of the Drug Court. The case management of a participant must ensure the treatment needs of the participant are met. However, the court team must also ensure that other justice system values are met, including compliance with the law and conditions of bail.

Drug Court team dynamics are also important. Each team member must be respected and their values considered. The therapeutic court involves the promotion of voice, validation and respect. This applies not only to participants in the court but also to the team members. If this does not occur, then the careful, overall balance of the court can be upset and the focus and value of the court diminished.

The Perth Drug Court is comprised of the magistrate, the police prosecutor, the Court Assessment and Treatment Services (CATS) officers and a Legal Aid duty lawyer. The magistrate will always have responsibility for the court’s overall function, control and decisions. CATS are responsible for the day to day case management of the participants, identifying the treatment needs and programs for each individual. A Legal Aid duty lawyer appears for the participant; ensuring they receive legal advice and that their rights are not infringed.

It is the role of the police prosecutor to ensure participants comply with court orders and that the safety of the team, the participant and the community are not overlooked. A part of this role is the vetting of applicants to the Drug Court. The Drug Court prosecutor conducts comprehensive checks of police records to assist the Court to determine the suitability of a participant for a court program. In many cases, the applicant may be facing more charges than those before the Drug Court.
Police are therefore responsible for searching to discover if there are any other charges within the court system. This is particularly important as the applicant may have charges already within the court system at different stages of judicial process that may preclude their entry to the Drug Court.

An example of this is Western Australia’s ‘third strike legislation’. Where a person, who has been convicted twice (on separate occasions) of burglary on a dwelling, and with the second charge not being prior in time to the first, a subsequent conviction of the same charge is deemed to be a third strike. A magistrate or judge then has no alternative other than to imprison the accused for a period of not less than twelve months. There are other situations which may preclude an applicant such as, the person’s conviction record both from this state and any other state or country.

The checking process has come under greater scrutiny as a result of an amendment to the Sentencing Act 1995 (WA) introducing the presentence order (PSO). For an offender to be placed on a PSO the court must find the charges are serious enough to warrant an immediate term of imprisonment. A PSO is comparable to a Drug Treatment Order used by drug courts in other states of Australia. The significant difference is that a PSO can be used in relation to cases where there is no illicit drug problem. As a result, more applicants on indictable charges have sought to be placed in Drug Court pending their appearance in the District or Supreme Courts.

This change has necessitated very close vetting of Drug Court applications by both the police prosecutor and the State DPP. The State DPP has conduct of serious charges that required committal to the District and Supreme Courts.

This information gathering is necessary as it is important the best available and latest information relating to an applicant or court participant be provided by the prosecutor.

It is in this atmosphere the team needs to collaborate closely to assess the suitability of an applicant coming to the Drug Court. The interests of the various Drug Court team members are relevant to determining suitability and, indeed, to all Drug Court processes. Police have a twofold interest in the success of the Drug Court. These are to ensure justice is seen to be done and to ensure the Drug Court process is followed to promote decreased recidivism by enabling participants to address their drug habit and thereby remove the cause of their offending.

At first glance, CATS and the Legal Aid duty lawyer appear to have one interest, that of the applicant or participant. However, it could also be argued that they have a commitment to the integrity of the Drug Court and their own processes, meaning that they would not advance one client’s interests at the expense of these processes, particularly given the possible adverse impact upon other clients. It is here that all the team members challenge and overcome historical perceptions and actively listen to each member. Where we once were at odds or practising ‘isolationist mode’ in the usual adversarial setting of a courtroom, this certainly is not the case for the Drug Court.
Role boundaries within team environs must be clearly established and honoured. This is one particular precept the team must be aware of and vigilant about. In any event, each individual within the team needs to be committed to the therapeutic processes of the court to make an effective and cohesive team, program and court setting.

In recognising the therapeutic processes and the people working in the Drug Court my initial entry as prosecutor to the Drug Court was interesting to say the least. As previously discussed, in house training for the role of police prosecutor is undertaken and continues throughout the year. However, this was not the case for the Drug Court. The only information I had to draw on was the personal information, views and opinions of past prosecutors working within the Drug Court and a copy of the draft Drug Court Manual.

After two weeks of isolationist participation and pondering the therapeutic jurisprudence based process and team balance, I quickly recognised the court had become entirely treatment focussed. Court sittings were not commencing on time and were continually interrupted with the late or non-appearance of participants. After observing the team and the participants I saw that the court was sitting in broken sessions to meet the treatment needs and appointments of participants.

I advised each member of the Drug Court team this was not acceptable and that the reporting of a participant to the court in a timely manner was important and not to be overlooked. Further, I determined some officers were not entirely aware of the actions the police prosecutor could take and the sanctions the court could impose in the case of a participant’s tardiness or failure to attend court. As a result, I began to warn participants as they attended court. I also requested the magistrate provide bail warnings to the person once in court and, that any further infractions on late attendance to court could have punitive consequences.

Although the then Drug Court magistrate upheld these submissions I was aware that the warnings were not seen to be treatment focussed and may be damaging. However, the warnings continued for a two-week period until we had managed to catch up with most or all of the participants attending court.

My actions caused a certain amount of resistance within the Drug Court, however, when participants began to arrive on time, rather than being arrested and taken into custody by me, the Court started on time. There were fewer interruptions and with the timely appearance both CATS and counsel were able to take instructions and address any queries that were likely to arise in court.

As a result a certain amount of empowerment returned to the team. Team members began to realise that with my support on compliance issues their directions to participants carried more weight. With this empowerment came more effective communication between the prosecutor and other team members. The police prosecutor was acknowledged to be a valued member of the court team. This is an example of how input from the prosecutor is sought and most importantly, valued by other team members in the Drug Court.
POLICING BOUNDARIES

Since commencing work in the Drug Court it has been necessary to set boundaries with other team members about the role of the police prosecutor within the Drug Court. This is what I call the ‘can do/can’t do domain’. As a police officer and an officer of the court there are certain things I am lawfully bound to do and similarly, things I can not do. This requires me from time to time to make a clear stand on certain issues. For example, if a participant re-offends whilst on a treatment program, regardless of how well they are doing, it is my role to make a submission that punitive action be taken.

My perception is that it is difficult for the other team members to appreciate the enforcement role of the prosecutor, given they are expending enormous amounts of time and energy on case management. However, I believe I have been able to effectively educate members on the dual responsibility I carry within the court.

The prosecutor’s role in enforcement is important, for if the participant is re-offending then the court’s treatment process is redundant either because the participant’s treatment needs are not being met or the participant is not committed to the program. If this is the case, the prosecution will submit to the court that the community must be protected from the participant and that the participant needs to be remanded in custody, or terminated from Drug Court and sentenced.

The Drug Court team has also established procedures governing how the court is to deal with new offences in relation to participants, particularly where those charges arose some years previously and have only come to court as a result of back capture DNA evidence. If the charges are historical in that they occurred prior to the participant coming to the court, are not too serious subject to preclusion clauses of the Drug Court Manual or are subject to a mandatory penalty, then I may submit to the court that the charges be joined with matters already before the Court.

There are times however, where the police prosecutor has no other alternative than to take the adverse course. An example of this is where arrest warrants or warrants of commitment have issued. Occasionally these warrants will issue for participants and I am compelled to execute the warrants even if it means that a participant may be required to return to custody for a period of time (e.g. cut out time for unpaid fines.)

Consistency in the enforcement of court standards has brought about certainty. With clear boundaries and sanctions set in place the team has been able to work on the premise “with actions come consequences”. This is an important motto we all work with as it provides responsibility and validation to the participant.

It is my belief that the clarification of the prosecutor’s role has contributed to open discussion in Drug Court case management meetings concerning each participant and their successes, problems and failures. I also believe that a healthy, respectful and questioning environment exists, allowing the team to work in a positive direction.

WANTS, WISHES, REALITY AND ENFORCEMENT
Drug Court offers the promise of recovery from addiction, healing of relationships and reintegration into the community. It does so using a comprehensive approach involving close monitoring by the court, CATS and police, collaborative case management, therapeutic jurisprudence based processes and the use of sanctions. Drug Court applicants are required to attend an information session so the applicant has a clear understanding of the Court’s expectations of them should they wish to continue with a Drug Court program. After completing the session each applicant is given a form to sign declaring they have understood the conditions of entry to the court and that they will abide by those conditions.

The reality is that often an applicant does not have a true understanding of how a Drug Court program intrudes into a participant’s personal life. The other factor is that although there is a certain amount of voluntary participation, the simple fact is it will be an enforced participation. Punitive sanctions will be taken against participants if they fail to abide by the conditions and treatment ordered by the Court.

The Drug Court makes presentence orders or adjourns sentencing under the Sentencing Act 1995 (WA) and places the participant on bail with conditions. But the Act does not confer powers on police to act on a failure to attend urinalysis or any other facet of the person’s treatment program. This is arguably, in part, a legislative oversight. As a result, bail conditions are set to run in tandem with a presentence order so that failure to comply with a lawful direction of one of the team members enables the prosecutor or frontline police officers to act. CATS and the Legal Aid duty lawyer are faced with this fact when team reviews are carried out on each applicant or participant.

It is my role to question why failures to meet lawful directions are not reported to me. A participant’s failure to comply with a condition of bail gives me the ability to arrest and return the participant to custody. To arrest and deprive any person of their liberty is a serious matter, however, it is expected that the prosecutor will enforce these powers.

**ETHICAL ISSUES AND THE SHARING OF INFORMATION**

The Drug Court team faces challenges on a daily basis in relation to the level of information disclosed to other team members. There is often a gap between what team members wish to share and what they can share with the team. Each team member is bound by his or her agency’s guidelines and protocols (as well as statutory provisions) regarding how much information he or she can share. However, without an appropriate level of shared information the therapeutic process cannot work.

CATS in the day to day management of the participants gathers substantial information concerning the comings and goings of the people they are managing. I am sure, however, that certain information is discussed as to how, when and who has supplied that person with an illicit substance – for example when a dirty urinalysis or self report of use is given to the case officer. The issue then is: do they pass this information along to the rest of the team? In doing so, if the police prosecutor becomes aware of intelligence in regards to ‘dealing’ is she then bound to
act upon that information and supply it to internal police intelligence holdings for action? If she was so bound, the communication lines between participant and the CATS officer would be ineffective.

Where I have received intelligence that a participant has been caught breaking curfew or an incident has occurred drawing police attention, I will endeavour to speak to the participant, counsel and their officer about it. In my role as prosecutor to the Drug Court, however, I do not carry out investigative work that may result in the laying of new charges other than breaches of bail set by our court. This would be counter-productive to the therapeutic process and compromise my position in the team. I believe the open and ethical stance I take in regards to Drug Court has made a strong impression both on the court, the team and surprisingly, the participants.

However, in my view, a certain amount of intelligence must be shared by the team. This allows each team member to provide a certain snapshot of information they may have. As a result a more intimate and true picture of the participant’s circumstances is put before the court. At times information will be provided to the prosecutor in regards to a participant’s personal conflicts. Often there will be outside influences disrupting the treatment process of the participant. Requests for the prosecutor to take adverse action against the ‘outside’ influence must be denied.

As the Drug Court prosecutor I have more direct contact with the accused, or participant, than in a conventional adversarial setting. For example, in one instance, a participant was arrested and charged with driving whilst legally disentitled. He advised me of what had occurred and why. The reason given was plausible and as a result I advised him I would not oppose the new charge coming to the Drug Court. Because the charge was not similar to any of the charges for which he was with the court initially I indicated to the court that no opposition would be given for the charge to be dealt with and finalised without breaching his treatment order.

**DRUG COURT RESULTS AND ISSUES**

With more serious offenders making application for inclusion in the Drug Court, the attention of other courts, the police, and the community at large on the Drug Court has increased. I am often asked ‘is Drug Court successful?’ My only reply at this point is ‘I do not know’. In my opinion, the Drug Court needs to exist for a while longer before an exhaustive study can be carried out.¹

In my view, generally speaking, the trend is that the closer the participant is to the age of thirty (30) the better our intervention process appears to be. It is my belief that younger people enjoy the sensation given by taking drugs and the social culture they are moving in at the time. Although they do not like the dependence they have on the drug, they are not ‘self-aware’ of their mortal vulnerability.

¹ Since this paper was presented the Department of the Attorney General has completed a review of the Perth Drug Court. It found that Drug Court participants had a recidivism rate 17% lower compared to prison and 10.4% lower as compared to community based orders. The review can be downloaded from the Perth Drug Court webpage via www.justice.wa.gov.au.
In my experience, those participants closer to thirty years of age, are more self-aware of their mortality and have usually lost just about all there is to lose. The respect, love and trust of their families, their partners, their children, friends and any financial assets are generally gone. Their health may be in decline, their self-respect non-existent. It is at this point they have identified that all they have left to lose is their life. In my opinion it is these people we battle for and against the most. To see (in most cases) the daily effort of clawing their way back into society and redeeming self-respect and worth is the reason I continue to work in the Drug Court.

To assist and work with another human being and return them, if not completely cured of their addiction but to a level of sustainable viability within the community, is most satisfying. To see the mending of bridges with family, friends and a respected and worthwhile part of the community is rewarding.

We have had our failures. Therapeutic jurisprudence does not have all the answers and a therapeutic approach is not perfect, in my view, but without active intervention experience has already educated us that simply imprisoning and turning our backs does not work. The abuse of illicit and prescribed substances in our community is of serious concern to all of us. Without proactive intervention then ultimately it threatens to cripple the society we live in.

**INCORPORATING THERAPEUTIC JURISPRUDENCE AS A MEMBER**

As a police officer and a prosecutor in the Drug Court the major challenge of incorporating therapeutic jurisprudence is overcoming police culture and ideology. No longer are we only the enforcers of the law but valued team members in a collaborative multi-agency team.

However, bringing street credibility to the process is powerfully useful. It should be remembered that historically the police has been the only agency available to deal with antisocial and criminal behaviour, twenty four hours a day, seven days a week. Knowing when to be tough and unforgiving in the light of a participant’s actions because they have used or, knowing when to step back and let the treatment focus continue comes from years spent policing on the street.

The point at which our participants successfully complete the treatment program and pass on to a community based sentence rather than imprisonment is rewarding. The time, effort and energy the court, team and participant have expended are great.

As a police officer and as a prosecutor there is nothing greater you could ask for than a simple thank you from someone you have been able to assist. But to be sought out by someone who has completed the program and thanked personally has its own reward.

Negotiation, interpersonal skills and leadership play a big role in my function as prosecutor. There are so many directions the court could take in the treatment program of a participant and their sentencing. Although we are a collaborative team we are also a group of individuals with singular and opinionated ideals. For me it would be easy to hide behind the ‘isolationist’ role and the police uniform. At the
end of the day, if each of us took these steps then we would never get past the application stage of a person wanting to come to the Drug Court.

It is important the prosecutor makes their expectations of the participant’s commitment to the program very clear at the application stage. The applicant should have no doubt as to the stance of the prosecution and the compliance work we will do. Through the whole process, from application to completion of program, each participant clearly understands what the prosecution will require of them.

The other side of this stance, however, is the recognition of the intimate and exhaustive intrusion we make into the participant’s life whilst they are with the Drug Court. With this in mind I try and make myself available to participants and their partners or family should they wish to talk with me. I will sit down with participants outside the court and talk with them. I show interest in what they have to say and how they are doing. When a participant completes the program successfully I will stand and acknowledge the effort and struggles that person has made. I believe this is important both to the participant completing the program and to the others who may be sitting in the back of the court who may be beginning in their order.

This rapport building is most important as police obviously are not held in high esteem by these people. Sometimes the simple act of recognising a small win they have had and verbalising that to the person is something they have never experienced or expected from a police officer.

Continued training and information sessions have begun with other government and non-government agencies. Succession planning within the prosecution division has begun with officers being trained and educated in the Drug Court. Standard operating procedures and a lesson plan have been formalised with prosecutors being briefed by me in regards to what is occurring in the Drug Court.

There is also the unique relationship between the prosecutor and the magistrate that I would like to mention. I have had the opportunity of working with three magistrates since taking up duties in the Drug Court. This relationship developed in the course of team reviews and meetings is unique. It is important that the prosecutor does not bring informality back to the court setting and does not exhibit any personal working relationship ties in this regard.

Accordingly, the prosecutor is aware the magistrate will also remain impartial to any working ties and will hear the submissions and the knowledge gleaned by that officer dispassionately. There are times when each of us will request a ‘leap of faith’ from each other and careful deliberation be given. This is the combined power that makes the therapeutic jurisprudence based experience what it is.

Specialty courts such as the Drug Court are the way of the future. The ‘lock ‘em up and throw away the key’ attitude in many aspects is the tome of doom. Active and positive intervention, validation and self-worth provided through the TJ process must continue if we are to move forward into a healthy and law abiding future.
My very special thanks to:

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THE PEACEMAKING VIRTUES OF GOOD LAWYERS IN THE ADVERSARIAL PROCESS

Robin Tapper

INTRODUCTION

It is reported that in his work as a lawyer Abraham Lincoln concluded a conference with a client with these words:

“Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try you hand at making six hundred dollars some other way.”

None of those I have interviewed for this paper may have gone as far as he has, but Lincoln’s words illustrate that there is little new in what I am here exploring. Still, there is a need to keep reviewing the way in which lawyers are working, and might better be working, in the adversarial process. In his bird’s eye view of the legal process through the notion of ‘law jobs’ the American realist thinker Karl Llewellyn added to the first four more specific tasks a fifth ‘law job’, which he labeled ‘juristic method’:

“With the emergence of the perceptibly “legal”, as a body of ways, people and ideology, there emerges at once the problem raised by any institution and its staff: the problem of keeping the institution and its staff in hand and on their jobs. Institutional ways and ideology tend to grow hard, wooden, tend to crystallize upon their own premises, tend to be patterned in further operation on their own past rather than on their living function; or they tend to be turned to service of their staff rather than of the people. … I shall call it the problem of ‘juristic method’, that of the ‘ways’ of handling “legal” tools to law-job ends, and of the on-going upkeep and improvement of both ways and tools.”

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3 Ibid, passim. The first four ‘law jobs’ are: the disposition of Trouble cases; preventive channeling and the reorientation of conduct and expectations so as to avoid trouble; the allocation of authority and the arrangement of procedure which legitimize action as being authoritative; and the net organization of the group or society as a whole so as to provide direction and incentive.
This paper is aimed at being part of this ‘juristic method’, but I have not found ‘woodenness’ in the people I have interviewed in its preparation. I asked a small group of legal practitioners about the virtues of a good lawyer in the adversarial legal process. In the next section I set out much of the text of those conversations.

I began by sending an email to some friends and acquaintances in the law and included a brief paper about my interests in the area, links to the web site of this conference, and three questions as a starting point in the discussion. I spoke to eight people, of whom three were judges, three solicitors and two barristers. They had experience in various areas of law but were not chosen as representative of the profession as a whole; a major gap is that no respondent was a criminal lawyer. I gave the option of meeting, talking on the telephone, or responding by email. Each responded, either by email or by making a time for a meeting with me. The conversations were not for attribution, and I did not make an audio record of them. This was a deliberate choice, to engage in reflection rather than research. I made notes at the time and fuller notes afterwards, with respondents offered the chance to review the notes.

THE RESPONSES

My starting questions were:

1. What are the most important qualities of a good lawyer in the adversarial process?
2. What is the good of the adversarial legal process to which those qualities contribute?
3. Does a good lawyer in the adversarial legal process promote the healing of conflict and, if so, in what ways?

I did not define ‘the adversarial legal process’, but the paradigm of the trial and preparation for it is the context of the questions and the discussion. What follows is taken from my notes, arranged more or less under those three questions – with some overlap between them – and with an additional section of general comments. I do not distinguish one respondent from another. I have edited some responses to remove the possibility of identification of the respondent. The point is to raise questions for reflection.

1. Qualities of a good lawyer in the adversarial process

“The starting point is that a good lawyer must be competent. What does this mean? Competence is more obvious when it is not there, and what it consists of is more obvious when it is not there. Knowledge of the facts and the law are necessary. In Western Australia the legal profession is ‘fused’ and all practitioners are admitted as both barristers and solicitors. The solicitors to whom I refer practise mainly as solicitors, and the barristers are among those who have elected to practise as members of the private bar.
includes the ability to learn from your own mistakes; some lawyers show no signs of ever learning from their mistakes.”

“The good lawyer has to know the client’s case. Knowing the client’s case comes from listening to the client. This is a female quality, the ability to listen to the client’s case. The male quality that is needed is objectivity. I am not talking about men and women, but about male and female qualities. Men can have female qualities and be able to listen and women can have male qualities and be objective. The point is that a good lawyer needs both.”

“A good lawyer who has the skills of actively listening and who treats people with respect can help people to feel more satisfied with the process: a lawyer who uses the adversarial process to clarify issues rather than to gain an advantage against the other side; who uses the process as a way of looking for possible outcomes, for options for resolving the matter.”

“Competence includes a sense of balance. Necessary qualities are objectivity and judgement. This means the ability to stand back from the case, to be a check on the client’s interests, to consider precedents and tactics. The quality of judgment is often as much about what to leave out as what to include.”

“A part of the craft of lawyers is the ability to recognise what is important and, even harder, what is not important in a case.”

“Given the assumption that a "good lawyer" has a sufficient intellect to apply his or her craft, judgment is critical. A good lawyer can always sense when he or she has "lost" the court or is, simply, not engaging the attention of the court or, more lethally, getting the court offside. Similarly, an intelligent lawyer always knows when to give up a losing argument. Most of all, from a commercial perspective, there has to be an acute sense of when a commercial solution has been reached; it is pointless plugging on with obscure points of law, to the greater glory of the proponent of those points, while the winner secures no commercial advantage to the client. Regrettably, one sometimes sees unnecessary embroidery undertaken which ultimately secures no benefit to the client.”

“There are not only qualities of professional judgment but also of humanity. What happens when the lawyer’s professional duty is in conflict with their human nature? Sometimes human nature and strategy might go together - for example, when deciding whether to cross-examine a child in a sexual abuse case: it is not good tactics to demolish a child witness – strategy and humanity may go together there.”

“A basic and perhaps the most important quality of a good lawyer is to do with trust. The judge must be able to trust the lawyer to be honest. The fairness of process is basic, and the ability to trust is basic to the fairness of process. Some lawyers take so partisan a
stance for their clients that you can’t trust them to be fair in terms of the process. Trust is a part of peacekeeping. Parties lose trust if the process is unfair. If a lawyer is not competent, and the judge has to raise an issue with that lawyer, the party is not going to be able to see the process as fair to them.”

“The lawyer must be a person of honesty and integrity. This is the basis of the duty lawyers have to the court. The adversarial system is not a game of deception. Honesty is not just about the facts but also about the law, about not misrepresenting the law in argument.”

“The ability to be persuasive is a fundamental quality. This requires self-confidence and being able to convey points, to frame arguments, in a way that is fitting for the occasion. This also requires determination. In the adversarial process there are many people prepared to derail you. You have to stick to your guns. The judge may take a preconceived view. The other side might raise irrelevant issues. The lawyer needs not to be too easily deterred by other people, or shy away from conflict him or herself, and this requires determination.”

“The communication skills needed by lawyers more and more are written skills, because courts are asking now for more and more submissions to be in writing rather than orally. These are skills of succinct persuasion. Not obscuring the message is a difficult skill.”

“The lawyer must also be diligent. Even if all the other qualities are there, a lawyer who is lazy is not a good lawyer in the adversarial process. The adversarial system is a neutral system in the sense that the parties invent it, shake it, and pursue their causes in it. It is hard work to get on top of the facts and the law, to drive the case, to move others, to move the court. Sometimes it is necessary to move the case even against the laziness or lack of understanding of the client. To find facts, to marshal witnesses, all this takes energy and determination. Disinterested clients, employees of corporate clients, their hearts may not be in it. It can be hard not just to work hard but also to motivate yourself and your side.”

“What competence means may be different from the point of view of a judge on the one hand and on the other from the point of view of a lawyer acting for one party or another. A judge would see competence as getting to the point, dealing with the issues, but a party defending a matter might see a lawyer as good who avoids the issues and keeps the court from getting to the point, delaying the matter. The judge might say, ‘that lawyer is good, he gets to the point’ but there might be a value in delay to one party.”

“It may be in the immediate interests of a client to take a matter slowly and to waste time, but it is not in the interests of the adversarial system, of the system of justice, as a whole. There may
be a difference between society’s point of view and that of the individual, but abuse of the system to gain an advantage may not be in the longer-term interests of the client either.”

“The lawyer who thinks they are a hero can make it worse for the client.”

2. **What is the adversarial process good for?**

“The adversarial system might be something like Schumpeter’s theory of government; that out of conflict between competing ideas at their strongest truth will prevail. The adversarial system is based on the idea that in a healthy environment the best view will prevail. But it depends on the healthy environment and that the best opposing views are put forward well. If the necessary qualities are present in the lawyers for each side, there can be a vigorous and healthy debate. If the lawyers don’t have those qualities, or the qualities are only on one side, it is not a healthy system.”

“The adversarial system should focus on the real issues. It is not a roving investigation by the judge; the issues are those defined by the parties. The parties, through their lawyers, are able to define the issues because they have the qualities set out in answer to the first question. By definition this needs a mature approach, where matters that cannot be proved are admitted – now more and more there are costs penalties for issues that are not admitted when they were not reasonably pursued.”

“The outcome of a healthy process is a good decision, which can be called ‘truth’ or ‘justice’. Where all the facts are presented and the options are clearly presented, in a helpful way, this gives the decision maker the chance of getting the decision right – the first condition is fulfilled.”

“Public confidence in the administration of justice should be at the individual litigant level, with some degree of satisfaction. The best case was delivered. The party is not left thinking “I wasn’t heard”. To be heard in a fair process gives the best chance of a sense of satisfaction, whether or not the party was successful.”

“A good adversarial process leaves the parties being satisfied, regardless of the outcome, that the process was fair, fair to them. This means that they were heard and acknowledged and dealt with fairly. The result is not the issue.”

“It is important to keep in the mind the point of the adversarial system. This is not always well understood, for example by police and social workers. Sometimes a police officer who has been in court will make some comment about how it can be that lawyers can represent a murderer. They don’t seem to see that the system needs every party to have the chance of representation for the system to achieve its purpose.”
“A client who is represented can feel cheated by the system when it limits what they can say in court. A client will sometimes say something like: ‘When do I get to throw the dirt?’”

“Are there any cases where the adversarial process is appropriate? Yes, but the process should be changed to acknowledge feelings, and not to damage people more than is absolutely necessary.”

3. **Promoting the healing of conflict in the adversarial process**

“The adversarial process begins with the first interview with the client. There needs to be from the start guidance to the client about what achievable outcomes might be. This includes being positive with the client, encouraging the client to see themselves as the decision-makers. This is hard when clients often come seeing themselves as victims of a situation. Some clients don’t want to make their own decisions. From the start the lawyer should be reality testing the client’s position, bringing some objective reality into the picture, introducing the other party’s perspective.”

“The adversarial system is about keeping the peace. It may be that we make scapegoats to keep the peace. But with therapeutic jurisprudence there is the danger of throwing the baby out with the bath water. The aim of the system is to keep the peace. This means locking up peace-breakers if necessary. Legal history shows the development of the system as a way of keeping the peace. It shows that a crucial factor is the independence of the judiciary – for instance, a judge could find against the Premier but could not be sacked or persecuted for that. This is crucial to fair process. Open courts are another crucial factor in the peacemaking role of the adversarial process.”

“To be a ‘peacemaker’ the lawyer has to avoid getting into the ring with the client. Wisdom and experience make a difference, makes it more possible to help the client to see what is really important for them. Ask what their real interests are; clients have often not before asked that question for themselves. Clear thinking is needed, because the adversarial process will not meet all the issues.”

“Any commercial lawyer up and down St George’s Terrace could tell you endless stories of clients coming into his or her office hot under the collar and ready to dismember an opponent and seeking the urgent issue of legal proceedings; when the client has calmed down and the realities of the legal landscape are revealed, it is extraordinary how often the belligerent becomes pacific. I think that the courts simply have no idea of how much time and trouble are saved by mature counsel offered by experienced commercial practitioners.”

“I ask clients, “What would your bank manager advise you as to whether or not to settle this?” I ask them to take a commercial view of the matter. There is no point winning for the sake of
winning. If the lawyer gives people all the information up front people know what they are aiming for and what it will cost, so that it can be a commercial decision.”

“The adversarial process is stressful for all. It is not an end in itself. There has to be a good reason for going through the process. Information about the process gives people the options. The lawyer has the professional duty to look after the interests of the clients. It is in the interests of the client to be diverted to all alternatives, the adversarial process must be the last resort. The adversarial system is a process in which weaknesses are exposed, often painfully exposed. It is often not pleasant. The need is to kick goals, to wear down the opponent. No one wants the pain.”

“There is room in some jurisdictions for a judge to seek to avoid a hearing even when the parties are in court, by standing the matter down for a short time to let them have a final chance to negotiate. The parties are there on opposite sides of the court. I say to them that I accept that they have tried to sort the matter out, but that I will stand the matter down for 15 minutes to see if they and their lawyers are able to discuss whether they can settle it. Then I leave. Sometimes I get a message after 5 minutes that there is no possibility of settlement and the hearing goes on. Other times I get a message that they need more time, and I allow it.”

“There are many ways of sorting out disputes outside the structure of the court process, such as mediation etc. Informal negotiations. You get to know lawyers you can have a reasonable discussion with. What lawyers? I would describe them as ‘Those with a firm hand but a ready ear’. Some lawyers have no interest in finding a solution. It is all about their side. They are not prepared to give up anything. Negotiations presuppose that you are willing to consider buying a solution.”

“The lawyer who negotiates well needs to have knowledge and confidence.”

“If you can trust the other lawyer you can talk to them about the chances of settling the case. The lawyer cannot be trusted when they are so gung ho that they are not willing to consider that the matter could be settled, will not explore the possibility.”

“A good judge can make a difference in satisfaction with the process, and the parties can go away satisfied whether they are successful or not. What is a good judge? A good judge is one who listens, actively listens, and who treats people with respect.”

4. Other comments about the adversarial process

“You have to have a rigorous process in which people are not unnecessarily damaged. The process should not just recognise the need for fair process and the issues of substance, but also have room to recognise the feelings of the parties.”
“Lawyers have feelings about it too. I had the experience of spending 3 years committed to a very difficult commercial case, with the client demanding a high level of commitment. Then the management of the client company changed and they did not want to go on with the case any more. It was now just a commercial decision for them and they instructed me to settle the case, to pay the other side the money they wanted, just get the matter over with. After that, as a lawyer, you get disillusioned; you don’t feel like committing yourself to a case in that way again.”

“If you value your work, your skills, something of yourself goes into your work for clients. It is their case and their choice but it includes something of yourself, the lawyer. It can be difficult emotionally at times.”

“Lawyers who are driven by money and ego who come to mediation in the same framework tend to act as if mediation is litigation. I see lawyers like that scoring points over the other party as if in litigation and looking with gloating glances to the client, making eye contact with the client, making sure the client sees them.”

“Lawyers who think of themselves as heroes can make it worse for the client. For example one lawyer, who had made a number of points that he seemed to be proud of even though not one of them had been successful, made a comment that showed he thought that he had been brilliant. But not one of his submissions had succeeded. There is a lawyer who on at least one occasion that I know of made his client’s case worse by saying too much, apparently because of his own ego and his wish to appear brilliant in the eyes of the client.”

“My disillusionment with the adversarial system came when I was working on a land rights case. There were a series of cross-examinations by lawyers representing agencies and companies of an old aboriginal woman – she was giving answers with her head down, answering yes if the inflection of the question seemed to imply a ‘yes’ and no when the inflection of the question implies a ‘no’. At that time that was the only way the law allowed, but it was not right for the purpose.”

“The adversarial process is getting harder for lawyers. It was once possible to be handballed a matter by a client and say ‘see you in court’. That is not possible any more. Also clients have changed and become more demanding.”

“A lot of lawyers use aggression as a tactic generally to try to undermine the other party and their lawyers: letters just on the edge of being offensive; a flood of faxes making demands with impossible time limits; all running up the costs of their own party as well as the other party. Do I think this is what a good lawyer does? I don’t do it, because you have to consider the proportionality of costs to what the client is aiming to achieve. I
don’t know if the client gets a better outcome than they would without those tactics. But it makes legal practice difficult.”

“The time limits imposed by the adversarial process, by courts and other parties, don’t allow time to be proactive, to reflect on what is being achieved. You are caught up in the process. And yet I get satisfaction in my work when I can be proactive.”

“The trial process encourages parties to avoid making their own decisions. There are also clients who are impossible to deal with. Some clients are so sure of their own rightness and that they will be vindicated by the judge that they persist with the adversarial process up to trial against all advice. Sometimes they persist because they have had bad advice.”

“From the start the process can require immediate action from lawyers in family law as a matter of the necessary tactics to protect the client. In proceedings about children the status quo is so important a factor that immediate court action might be needed for the client to be on the right side of the argument. In property proceedings there might be the need to take money out of bank accounts, to put a caveat on property. The other party can see these as aggressive tactics and sometimes they are. Protection of a client can be aggressive.”

“At the macro level, yes it is possible that the adversarial process may be therapeutic. But realistically, can there be healing in such a contentious and pressurized environment? Perhaps it may have the effect of making people who have been a party to a trial very determined never to go through that again.”

“The trial itself is artificial and arbitrary, the trial process is anathema to a good outcome. The process is stressful, accusatory, undermining of people, and inflammatory of conflict. The outcome may possibly put an end to a dispute and that is the only good about it, and often the dispute doesn’t come to an end. There may be a benefit to society in the adversarial process but the trial does not lead to a better outcome.”

“The adversarial process is a war with rules, as distinct from a war with no rules.”

“It is hard to get over how awful the trial process is.”

**REFLECTION**

Even these few brief conversations, which were not deliberately representative of lawyers and judges, include many of the tensions in ideas about the adversarial process: e.g. the process can be awful and arbitrary, and the process may provide a fair process for healthy and vigorous debate; lawyers are to have a mind for the fairness of process and the credibility of the system as a whole, and they may be good lawyers if they delay and obstruct the other party for the sake of their own client; the quality of objectivity is essential for a lawyer, and lawyers must at least to
some extent be partisan in relation to the client’s case. None of these tensions is new. In this section, though, I attend to the third conversation-starting question: Does a good lawyer in the adversarial legal process promote the healing of conflict and, if so, in what ways?

A purpose of this question is to frame the adversarial process positively rather than negatively. A main point here is that lawyers do not create adversarialism; as May discusses it is supported by the political mythology of American culture – and, perhaps to a lesser extent, Australian. It is in May’s view the negative derivation of professional authority that is the foundation of extreme adversarialism in law, and of the lawyer as the client’s agent alone, unaccountable in all other respects. This can have a further effect:

“The negative derivation of professional authority can lead clients, eventually, to resent the professional. The professional wields great but precarious authority and prestige. Physicians and lawyers can arouse great anger. …

The interim passivity of the client in the contractual model forces resentment of the professional. The client/patient tends to act at two points – in hiring and firing the professional. [He discusses the resentment of the patient for the doctor.]

The client in legal proceedings falls into a somewhat more complicated passivity. The lawyer does not impose adversarialism on a wholly passive client. Most clients come to lawyers under the steam of their own wants and fears. … The mechanism itself seems to accommodate only the play of force pitted against counterforce. Everyone, client as well as professional, feels driven into an adversarial mode.”

In recommending that the emphasis in the legal process be deliberately moved from the negative to the positive aim, May draws a parallel with doctors who are being called to focus less on the negative aim of fighting death and disease and more to the enhancing of health in partnership with patients. Similarly, lawyers owe their clients not just courtroom tactics but counseling and moral advice about conflict, and the use of the skills of negotiation not just as courtroom tactics by other means. However, as with medicine, this change can run the risk of paternalism (or maternalism) through overbearing authority figures. May writes:

“Professionals who would direct others to positive goals would

6 For example, an interesting early attempt at professional conduct rules for lawyers is quoted in Geoffrey Robertson’s The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold (Chatto & Windus, London: 2005) pp.78ff. See also generally the discussion in “Adversarialism in America and the Professions: The Law”, Chapter 2 in May, op cit, pp.53-88.
7 May writes of the value of and need for the move from an emphasis on the negative to the positive in his chapter on “Adversarialism in America and the Professions: the Law”, op cit, particularly in and from the section, beginning at p.61, headed “The Political Myth As It Shapes the Professional Transaction”, and I draw on his discussion, and depart from it, in what follows.
8 Op cit, p.53.
fall prey to paternalism in a pluralistic society unless we accept teaching and persuasion as essential ingredients. ... Teaching helps to heal the patient, to ‘make whole’ the distressed and distracted subject. Other professions must also teach. ...Lawyers offer technical services in drawing up contracts and litigating in the courtroom, but through counseling they must also teach their clients. Lawyers must teach if they would uphold justice and not merely burrow for holes in contracts...”

This theme is a part of the conversations in the previous section, but there can there be seen a tension. May considers the “reshaping of the professional character and virtue” of lawyers. One aspect of this is seen in the crucial area of the extent to which a lawyer is to be a partisan for the client, and in this context May notes a general move in professional conduct rules from ‘zeal’ for clients to ‘diligence’ for clients, and notes the need for a deepening of practical wisdom in lawyers; it is in this context that the example of Abraham Lincoln, above, can be seen.

To me May’s reflections are extremely helpful and point in the right direction but do not go far enough. I follow May by taking, as a positive example of adversarial behaviour, that shown in the prophetic tradition of the Judeo-Christian heritage. In the best of that tradition the prophet speaks – and lives - for truth against falsehood, for justice against oppressive power, and for faithfulness against betrayal. For Christians Jesus is the full embodiment of that tradition, in his dying for the sake of unmasking – with love, as a gift - the violence in those who were executing him in the name of God. An example from our time of a lawyer who exemplifies that tradition – although perhaps formed more by his African tradition – is Nelson Mandela. This can be seen in many instances but particularly on his arrival as a prisoner at Robben Island when he and his companions would not cooperate with orders aimed at cowing them, culminating with Mandela responding to a bullying officer: “I am ready to serve five years but I am not prepared to be bullied. You must act within the law.”

In taking on unpopular causes the prophet shares the pain of those suffering and, crucially, does so for the sake of the healing and renewal of the whole community, including those against whom the prophet speaks. The prophet does not join in perpetuating lies, persecution and faithlessness by retaliating against those evils, but aims to heal them by unmasking them, sometimes by symbolic acts as well as words. To be able to be in the midst of conflict while not being caught up in the

10 Ibid, pp.67-69
11 Ibid, pp.75ff.
fascination of it\textsuperscript{14} is no easy feat, and that it is painful can be seen in the conversations in the previous section. This is an aspect of what, in my work within the Christian tradition, I term ‘the gifts of enemies’.

While the day-to-day tasks of a lawyer (especially a lawyer not engaged in criminal law) may seem far from the ‘prophetic’, there is a link. What is usually called the ‘objectivity’ required of lawyers is not only an intellectual task – although it is that, and that is not simple – but also it is about having a certain character in the emotional life of conflicts. For a lawyer to have a good professional character includes the practising of wise ways of dealing with the emotions that usually go along with situations of conflict – emotions in clients and in lawyers. In my experience this is not often a focus of legal education and professional development. However, the conversations reported here should encourage more emphasis on the character of lawyers. The classical traditions at the root of Western culture offer resources on which to draw for the development of character.\textsuperscript{15} A recovery of the stories of the Western tradition – including a reframing of adversarial conflict in terms of the gifts of enemies – as well as drawing on the resources of other traditions, can provide a context for reflection on the virtues of good lawyers.

The deeper the understanding of the purposes of the adversarial process, and the deeper the education of and support for lawyers working within it, the more that process may function as the last resort in conflict resolution. There might also be a chance even in the adversarial process of a healing of the emotions and desires that perpetuate conflict. My hope is that a good adversarial process might even lead parties to the process into a deeper practical wisdom, equipping them better to respond to future conflicts in a less adversarial way.

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\textsuperscript{14} James Alison calls this freedom ‘being indifferent’ – in On Being Liked (Darton, Longman & Todd, London: 2003); I think of it as ‘not being the other side of the Velcro’.

THERAPEUTIC JURISPRUDENCE IN THE MAGISTRATES COURT: SOME ISSUES OF PRACTICE AND PRINCIPLE

Dr Andrew Cannon

The developing practice of therapeutic jurisprudence in specialist programs in Magistrates Courts changes the function and role of the Magistrate and of court staff. These changes involve some challenges to traditional limits on court practice and the dividing lines between the court and other agencies. This short paper examines some of the changes in practice and the issues in principle that arise, and the need for training and evaluation to deal with those. It is essential to involve community resources so that supports for the defendant remain in place once the court programs are completed. This leads to a discussion of the need for specialist courts to adopt a more holistic approach in dealing with defendants and to ensure they are also therapeutic in relation to victims by including restorative justice principles in the therapeutic approach.

Practice and principle in running the court

Open court v confidentiality

One of the foundations of a court is that it conducts its work in public. This is for multifaceted reasons some of which were captured by Jeremy Bentham:2.

“In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place, can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.”

However, the work of specialist courts is managing people and this involves much information of opinion and fact about the person and their performance. The practice in many specialist courts, such as the Drug Court, is to have files and reports given to the magistrate before court and often to conference with prosecution, defence counsel and the drug court managers in the absence of the defendant with a view to arriving at a common position before the defendant is

1 Deputy Chief Magistrate and Senior Mining Warden for South Australia, Adjunct Professor of Law Westfälische Wilhelms-Universität, Münster, Germany, Adjunct Associate Professor Flinders University School of Law.

brought into court. This approach was described (but not endorsed) by Judge Peggy Hora as the: “don’t fight in front of the kids” approach.

I am opposed philosophically to this approach. The court is stage managing its process in front of the defendant. It is a show performance. The real decision is made behind closed doors and in the absence of the key person affected. Decisions are made that profoundly affect the defendant, including decisions to put them in custody to dry them out. It is patronising and offensive to all concepts of natural justice to do this in the absence of the person affected. The presence of the defendant’s counsel in the secret conferencing gives some protection to the court’s integrity of process, but only at the cost of a hopeless compromise to defence counsel. Can they agree that a time in prison to dry out is appropriate for their client?

Armed with this simple view I worked without conferencing in the drug court and with experienced counsel it worked well. However when a new counsel with an adversary bent came on the scene the process became argumentative and this distracted from the process. I persevered without conferencing but my successor reintroduced it, and the court worked more smoothly with private conferencing. I have since sat in the court and conferenced under that method. I satisfied my principle issues by relating to the defendant what happened in any private conferences. I remain unhappy with that approach. There are no guarantees of openness of process here for the defendant. The main problem it is addressing is to remove the adversarial role and there may be better ways to do this whilst maintaining transparency of process. After all, much of the idea of Therapeutic Jurisprudence is underpinned by the importance of fairness and respectful engagement, which is scarcely compatible with conferencing results in the absence of the defendant.

A related issue is the information in reports. I had a teenage boy who had some strange behaviour patterns and we referred him for psychological assessment. The psychologist’s report suggested that there were strong indications of a dysfunctional relationship with his father including a real likelihood of sexual abuse, although it was repressed. What to do with this information? The advice from his case worker, an experienced worker whose views I value, were that to confront this issue at this point, whether it be true or not, would put so much pressure on the defendant it would be likely to make the drug rehabilitation more problematic. What to do? There was no factual basis nor complaint about any conduct. It was a speculative inference drawn from observed conduct. I took the report off the file and ignored it. Was this right? Should I have requested further investigations, or reported it to the police, or let the boy know? Maybe this was a cause of his behaviour and it needed to be dealt with before he could manage his behaviour. Maybe the case worker was right that it were best left alone at this time. Maybe it was all untrue? What if there was more concrete information to indicate that such an allegation was true? Here are some knotty conundrums indeed.

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3 Plenary 2: The synergy between therapeutic jurisprudence and drug treatment courts: national and international perspectives.
This raises the subsidiary issue of what access should be allowed to the case notes and related reports, and material on the court file. We run our Drug Court as a pre-sentencing process and material placed before the court during sentencing procedures can only be released with permission of the court. This would justify our practice not to permit general access to case files. We have not yet had requests for permission to access the files. When it occurs it will raise complex policy issues. Access for research into the workings of the court under an undertaking not to identify any participants would be permissible. Access to a divorcing spouse to obtain information for the divorce proceedings would not. Where the line lies between such examples is yet to be thought out.

**The role of counsel**

I have mentioned the role of defence counsel and my view that they are compromised by conferencing in the absence of their client, especially when they agree to a result such as a remand in custody to dry their client out. Prosecution counsel have an equally difficult role in deciding how tolerant to be of the inevitable failures by defendants and an attitude to suspended sentences for matters that would normally demand prison time to be served. As the processes move further from the open court, passive bench norm, the integrity of court processes are largely preserved by pushing the problems from the court onto counsel. We should not countenance conferencing about a defendant in the absence of the defendant and their counsel (although I am aware of a colleague who used to do this), but it is acceptable with the defence counsel present but in the absence of his or her client.

A practical example of the changing role of counsel is the extent that we permit court staff to be questioned. Assertions of fact and opinion by court staff are the basis of decision making by magistrates to give praise and punitive sanctions, including gaol for drying out. How much opportunity should be given to defence counsel to question these? Court staff are trusted by the court to manage defendants, and as officers of the court should be afforded respect in that role. Against that, all of us make mistakes and are likely to fall into bad habits if we cannot be reviewed or held accountable. Too much questioning compromises the case worker’s relationship with the defendant, in a sense their client, especially if it occurs in front of the defendant. This touches on the need for a problem solving focus rather than finding a result by the dialectic of conflict. My view is that no questioning should be allowed unless a genuine basis to query an assertion of fact or opinion is raised, otherwise the job of case workers in dealing with often extremely difficult and manipulative clients is made impossible.

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4 S. 51(2)(c) of the *Magistrates Court Act* 1991 (SA).
Rigour v enthusiasm

The ideal of Therapeutic Jurisprudence is to encourage self determination by the defendant rather than using the traditional court paternalistic coercive model (we decide what is right and impose sanctions to enforce our view of what is right). In the Drug Court model in Australia a degree of paternalistic coercion is used. Defendants do volunteer, but they are only selected if they face an immediate term of imprisonment, and the threat is that it will be imposed if they do not comply with the program. If they graduate in the South Australian model the imprisonment is suspended. In some States the imprisonment is imposed but suspended for as long as they are successful in the drug court program. This coercion is a core feature of Drug Court and first and last and in the middle of the Drug Court program we must have rigour as well as encouragement. We must provide certainty, consistency and fairness. Those who work in drug courts will know that it is a constant game between the court and the defendants to outwit each other. The defendants talk to each other, know the strengths and weaknesses of the court staff and the magistrate and are often trying to beat the system. One example from our program makes the point. It is the case the staff have dubbed the “Golden rain”. We do spot urine tests on defendants when they attend court. We had a problem in a public lift of what was assumed to be water leaking from the roof. Investigations revealed that what in fact had occurred was a condom full of clean urine, which had been hidden in a roof panel in the lift, had rolled against a light which melted it, hence the golden rain!

In the early days of our program we sometimes turned a blind eye to the use of Indian Hemp, on the basis that some substitution may have helped the defendants get off the harder drugs. We now screen for it and award demerit points if it is used. It is an illegal drug and case workers found that affected defendants could not properly participate in counselling sessions. We penalise Indian Hemp use less severely than use of drugs such as amphetamines and opium derivatives.

We do think our program is deficient in the rewards we offer. There is the carrot of a suspended sentence, and the important judicial encouragement, but we should provide more rewards along the way, such as participation in recreational activities and providing more employment opportunities.

The role of the Magistrate

Therapeutic jurisprudence has been practiced by many magistrates for many decades but without a label. Calling it TJ recognises and legitimises an attitude to judging that is desirable. It is a respectful and proactive engagement with people involved in the court process to pay attention to their needs, rather than a neutral but mechanical and unsatisfying closing of files. It is a more exposed judicial role compared to the relatively mute and remote figure who only pronounces at the end and then in detached language. It is obviously desirable for the same magistrate to

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conduct a special list for some time to provide consistency and to develop a rapport with the defendants. However, I am concerned that specialist courts should not be personality specific. Inherent in a more engaged judicial role is an element of revealed personality but the processes need to be generic enough to permit the handover of a list to others. We ensure this occurs by sharing specialist lists between two magistrates, with a third working in the list occasionally. This provides flexibility for other lists, back up in the event of leave or illness and lessens the risk of burnout. For list sharing to occur it is essential that each magistrate maintains careful, accessible notes on each defendant so that a successor can pick up the threads and discuss their personal issues. Central to the process is the treatment of defendants as individuals, and not just as another defendant. This raises the next topic of training and education.

Training and education

There is a view that some people have the therapeutic touch and some do not. I prefer the contrary view that it can often be taught. We have a well developed mediation scheme for civil litigants. We had a registrar who wanted to do mediation but showed no skills at all. However, after completing a mediation course and so mediating to build up experience, this same registrar is now one of our most respected and experienced mediators. This confirms my view that therapeutic jurisprudence is an attitude and process that can be taught and "mainstreamed".

That means we need the accoutrements of a developed discipline: process manuals, training programs and the like, for magistrates, court staff and lawyers. We are in the business of achieving psychological changes so that basic training in this field should be an essential part of training for all specialist courts. There needs to be clear, short, policy statements with which participants agree to comply.

Court staff need to work with other departments, community organisations, manage budgets, and co-ordinate complicated special list needs, introducing them to a whole new range of skills that need to be defined and taught.

Evaluation and resources

Specialist courts should be subject to regular, independent research. This is essential for honest performance evaluation and even more important to maintain and augment budgets. Feeling good about our work will not convince Treasury departments of anything. How much additional cost do we spend on each defendant, and how much prison time and community cost by reducing recidivism does that expense save. Given the cost of keeping a prisoner in a high security prison, I believe an honest appraisal of TJ will prove it to be cost effective. Only that will ensure it is adequately resourced.

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8 Cannon, “An Evaluation of the Mediation Trial in the Adelaide Civil Registry” (August 1997) 7 JJA 1 p.50

9 Cooke, J, Innovation and transformation within the Australian courts: A court administrators perspective”, (Feb 2006) 15 JHA 174 at p.176.
What is clear is that it is essential to reintegrate people into the community and private providers have an important role in this. There is an interesting article in *Fortune* magazine, which identified that homeless people cost the community more for medical emergencies, assaults, damage and disorderly crimes than it would cost to provide them with rental accommodation. In New York they put the annual cost at US$50,000 and as high as US$150,000 in San Diego. They are linking private enterprise and local government in partnerships to address the problem. If we are to prevent relapse into criminal activity, specialist court programs must engage the private sector and local government sector to provide support for defendants that will continue past the delivery of public sector programs. This has been recognised in Aboriginal courts, which specifically involve their communities in the sentencing process. I think that we need to learn from that model to engage community resources in therapeutic programs, perhaps through the local government sector and relevant community groups. Private sector employers might be engaged to provide one of the most useful assistance to rehabilitation, paid employment.

**Future developments**

*Providing a more holistic approach*

In the future specialist courts may increase in number or be incorporated into mainstream sentencing processes. For now I think the individual special courts need to grow together. There is a clear inter relationship between drug abuse, mental health conditions, life skills gambling and budgeting needs. Our programs tend to target a particular problem such as drug addiction, mental health problems, or family violence in isolation. Specialist programs need to be more holistic in their approach, so that we tailor our programs to the often multiple needs of the defendant. Rather than having a coercive drug court program, a voluntary drug counselling program, a mental health court program, specialist family violence lists and other specialist programs working in isolation from each other, with their own admission rules and differing approaches, we should assess defendants for their needs and tailor programs for them. I suggest the primary division of programs should be whether they are intensive and coercive, such as present drug court programs, or rendering assistance on a voluntary basis. The basis of this division is whether the defendant faces an immediate term of imprisonment. To enter a program on this basis the defendant will need to plead guilty, and then a program based on the present drug court procedures can designed with therapy for other relevant problems such as gambling, family violence, mental health as well as drug rehabilitation. These programs will require special lists and a degree of continuity of the judicial officers running them, because they have a high degree of judicial oversight. If the defendant does not face a term of immediate imprisonment voluntary programs can be provided. These are more readily mainstreamed as the

12 CARDS in South Australia, MERIT in NSW.
programs are voluntary and the judicial oversight is less frequent. Greater use of non government community resources in program delivery will ensure continuing support when court programs finish.

**TJ, victims and family violence**

Chief Justice Wayne Martin said at the conference\(^{13}\) that the name Therapeutic Jurisprudence has been important to capture an idea, but it might be a disservice to the idea of a more useful approach by implying, as he has heard it described: “A lot of warm and fuzzy talk about being kind to crims.” Therapeutic Jurisprudence does tend to be defendant focussed. If it is to be credible it needs to have regard to the harm their conduct is causing to others and to ensure the process offers something for them. Most obvious here are the victims of the crimes that have brought the defendant to attention, but their dysfunctional lifestyles often cause harm to others such as family violence.

If a defendant is to be truly healed, s/he needs to extend his or her consciousness beyond the selfish and develop an awareness of, and concern for, the needs of other people affected by his or her conduct. This needs to be genuine and beyond mere regret. I note the important analysis by Deborah Slocum\(^ {14}\) of the difference between regret and sorry. Regret is an “I” experience. “I am sorry. I wish I hadn’t done it.” “I am sorry I hurt you and I wish I did not face imprisonment.” In contrast to be sorry is to enter the experience of the victim. To empathise with her experience. Many defendants enter coercive TJ programs such as drug court as an alternative to immediate imprisonment and that is a primary motivation. If we are to be truly therapeutic we need to ensure they move from the regret that they face imprisonment, to sorrow for the harm their lifestyles have caused to those around them. This is the obvious link between TJ and Restorative Justice (RJ).

The South Australian Magistrates court ran an adult restorative justice pilot to provide victim offender mediation as part of the sentencing process. We tried it with a drug court defendant who was in the second phase of the program. It had so great an effect on the defendant that he relapsed into drug use to manage the personal shock. Although this outcome was not what we intended, it tells me that the process was effective and should be used, with appropriate management in place to deal with the impact it may have.

We are alert to the dangers of coercive programs not exacerbating family violence problems. Intensive bail conditions may place an abusive male under stress due to withdrawals with a victim who is then placed under court imposed pressure to tolerate the defendant’s presence and ongoing violence. We make sure that there is an assessment of this risk in all bail reports to try to avoid this wrong. We also need to relate family violence programs to drug and mental health programs in a more

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\(^{13}\) Conference dinner speech.

\(^{14}\) Session 3B: Slocum, D and Allan, A, “The relationship between apology, sorrriness and forgiving: the findings of a qualitative and quantitative study.”
general way so that drug and mental health issues that are contributing to family violence are treated rather than being ignored.

**TJ and the relationship to corrections supervision**

A core issue for Therapeutic Jurisprudence is its relationship with community based and parole correctional programs. Both are different aspects of rehabilitation of criminal tendencies. A principled basis of division of these responsibilities needs to be developed. TJ uses the special authority of the court to enhance the effectiveness of programs. However, implicit in the actual service delivery is the potential for “patch wars” over resources and more constructively the need to ensure an integration and collaboration between services delivered under court programs and those by correctional departments and community organisations. A logical development of court involvement in rehabilitation might be a greater judicial involvement in the supervision of bonds and probation, and the return of criminals who re-offend to the sentencing judge or magistrate. This emphasises a key difference in a therapeutic approach, a concern for the ongoing progress of defendant. Some judicial officers will not agree with that approach.

Richard Refshauge from the floor of the conference made the point that the traditional separation of powers discourse is not a useful rhetoric for TJ programs. The relationship is more complex when the judiciary become involved in the management of defendants before sentence, and even more so in supervising bonds after sentence. The discourse of TJ in Australia has not come to terms with the soft dividing line between the judicial and the executive process implicit in TJ. Without TJ the court imposes imprisonment, or a bond, and takes no interest in the conduct and treatment of the defendant unless a breach of bond offence occurs. Once courts move into supervising treatment this division is no longer workable. They are involved in an area that is traditionally a function of the executive. Once courts intrude on traditional functions of the executive they must accept some compromises in the traditional notions of their independence. At the simplest level they cannot demand resources that are not available. They are familiar enough with that. But there are more serious issues of principle in this area that still need to be defined and worked through.

**TJ and culturally specific programs**

We run Nunga courts in South Australia, Koori courts in Victoria, Murri courts in Queensland, Yandeyarra Circle Court in Western Australia and other Aboriginal courts in other States and Territories of Australia. In South Australia we have not

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15 DDP for the Australian Capital Territory.

16 Session 10B: Birgden, A, Poulter, S, Popovic, H: “Therapeutic Jurisprudence in action in the Victorian Magistrates Court, principles, policies and practice.”

17 Justice Terry Sheahan AO, President of the Workers Compensation Commission NSW, commented from the perspective of having been both an Attorney-General and a Judge that once the judiciary intrude into the traditional work of the executive they must accept this compromise.
yet been successful in delivering specialist court programs within those frameworks. To be a long term valid model the Nunga court needs to encourage victims to participate, and provide treatment programs for the complex problems of Aboriginal defendants. The model then developed might also have application for other community groups, not just defined by race but also by local interactions. It is only by relating specialist programs to the community that they will work in the long term.

Conclusion

The changing practices in therapeutic programs in courts raise some profound issues of principle. These need to be identified and discussed so that the programs do not run into unintended difficulties. Careful education and independent evaluation is essential to provide the intellectual discipline and skills to mainstream the therapeutic approach, and independent evaluation is needed to ensure that the effect of changes is well understood. For these new approaches to work it will be necessary to involve the victims of crime through restorative justice and the community in the new court approaches. These changes need to be understood and they must involve the communities in which the court works to be accepted and effective.
DISCIPLINARY INVESTIGATIONS AND HEARINGS: A THERAPEUTIC JURISPRUDENCE PERSPECTIVE

Ian Freckelton

Introduction

The role of bodies regulating the conduct of professionals is

- to protect the public by conducting investigations and making orders that prevent unfit or dangerous practitioners from practising in a way that puts the community at risk;
- to maintain appropriate professional standards; and
- to give confidence to the public that there is adherence to high standards of professionalism.\(^2\)

Regulation can be conceptualised as a process that facilitates professionalism and protects the public against its absence.\(^3\)

There can be a complex balance for regulators to achieve in investigations and adjudications upon inappropriate professional conduct between dealing with individual instances of such conduct and addressing root causes of adverse outcomes and inappropriate provision of services. With an increasing awareness amongst the health professions, especially medicine, of the reality of multi-factorial causes for adverse outcomes, this can require an analysis of up-to-dateness and sufficiency of skillsets and competencies. Such an approach is a fundamental shift in approach for regulators as it entails going beyond individual notifications and scrutinising patterns and phenomena which might impact upon professionals’ ongoing safety to practise. Other challenging components of contemporary regulation are the introduction of an element of alternative dispute resolution and new modes of conducting hearings involving practitioners assessed as having the potential for reclamation.

These paradigm shifts within modern regulation are analysed in this paper with a view to assessing the potential contribution of therapeutic jurisprudence approaches to maximising public health outcomes from investigations and hearings and minimising collateral harm caused by regulatory processes and procedures for practitioners and notifiers alike. This paper relates aspects of therapeutic jurisprudence research in a practical way to the investigative, arbitral and mentoring roles of contemporary regulatory authorities dealing with notifications against health

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practitioners. It particularly draws upon initiatives being implemented by the Medical Practitioners Board and Psychologists Registration Board in Victoria, Australia.

**Perceptions of Regulation**

Both practitioners and notifiers in regulatory processes often experience them as painful and intimidating, if not terrifying, and investigators and tribunal panels as persecutory, dismissive, and overly legalistic. They experience themselves as powerless, and too often derive little lasting benefit from their interactions with regulators.

Such outcomes, both personally and professionally, are unsatisfactory for health professions which should be particularly attuned to differentials in power between the professional and the recipient of health services. It has been argued that bodies investigating and making decisions about allegations against health professionals have a responsibility that transcends the obligation of adherence to principles of natural justice and procedural fairness and extends to modeling appropriate professional interactions. Part of this consists in avoiding unnecessary infliction of harm to clients and patients.

The nexus between the benefits of therapeutic engagement and the statutory frameworks is recognized by the approaches of therapeutic jurisprudence. As Wexler has stated, “Therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent. It focuses on the law's impact on emotional life and on psychological well-being." Put alternatively, involvement in a legal process can act in a way akin to a clinical intervention, which in turn can have positive repercussions for individuals as well as for community safety – the principal statutory objective of regulators.

Therapeutic jurisprudence offers a lens through which it is possible to analyse the content of the law, the interpretation of the law and legal processes in a more sophisticated and sensitive way. In particular, it gives specific recognition to the health repercussions of each aspect of the operation of the law in practice. It highlights the potential for investigations taking place in the shadow of the law and

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4 This article refocuses, updates and draws upon some material in I Freckelton and J Flynn, “Paths Toward Reclamation and the Regulation of Medical Practitioners” (2004) 12 Journal of Law and Medicine 91 and I Freckelton and D List, “The Transformation of Regulation of Psychologists by Therapeutic Jurisprudence” (2004) 11(2) Psychiatry, Psychology and Law 296. The intellectual contribution of my co-authors in both articles is gratefully acknowledged.


for legal hearings in both courts and tribunals to have counter-therapeutic as well as pro-therapeutic outcomes. Over the last one and a half decades, therapeutic jurisprudence has generated fresh perspectives on many components of the law for more attuned awareness of the mental health consequences of different practice options within the content and application of the law. It offers the possibility for the law to draw creatively for both its processes and its outcomes from the insights of the mental health professions. This should be so in the context of the disciplinary processes of bodies regulating health professionals.

Notifiers

An approach to regulation of professionals that is informed by some of the values and sensitivities of therapeutic jurisprudence has much to commend it from the perspective of those who lodge notifications with health practitioners’ regulatory authorities. Those who file formal aggrievements about the conduct of health practitioners by and large do so in the awareness that they are in a significantly disempowered position vis-à-vis the professional. They tend to be fearful that they will not be believed when they are challenging a tertiary educated, respected member of the community. They are frequently emotionally vulnerable and sometimes have psychiatric or intellectual disabilities. For instance, in one case before the Victorian Psychologists Registration Board the “victim” of a health practitioner’s behaviour had recently been assessed by him as having a 60% psychiatric impairment under the 2nd edition of the American Medical Guides to Permanent Impairment. In another, the person to whom the health practitioner had made sexual overtures on the Internet and then by telephone had attempted suicide in the previous fortnight and was immediately afterwards admitted to hospital. Moreover, the very dynamic of sexual interaction between a health practitioner and his or her client generally renders the client emotionally vulnerable when revealing what has happened between them and the professional. This psychological reality brings its own challenges for regulatory bodies, and those conducting investigations on their behalf, in terms of the need to be able to gauge, preferably early, the

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9 Re Paul Fagan [1999] PRBD (Vic)
reliability of what is being alleged, as well as to take into account the maelstrom of emotions probably being experienced by the notifier/victim\(^\text{12}\).

In order for the allegations to be effectively assessed in terms of their reliability, notifiers need sensitive handling by investigators and then by disciplinary tribunals hearing allegations. This is a relatively new recognition – all too often investigative and disciplinary procedures have adopted the traditional model of the criminal law, where police have been the arms length investigators and prosecutors have had little interaction with even their principal witnesses\(^\text{13}\). Provision of support services in the criminal law for “victims” is of comparatively recent origin and continues in many places to be given by volunteers with much good will but minimal training.

Acknowledgment of the potential for secondary and tertiary traumatisation of notifiers and of the stressful nature of making what can be serial intimate disclosures should have a number of ramifications for health investigators and tribunals. Notifiers should not be rushed or pressured by investigators. They should be encouraged to reveal what they wish to say as they become ready, albeit with the assistance of focusing by investigators. From a therapeutic perspective, what notifiers often need from the whole investigative and hearing experience is empowerment and validation, rather than having their story taken from them and refashioned into someone else’s narrative for the purposes of witness statements and witness box evidence.

It is important to recognise that the motives of notifiers can be mixed. At one level they may want to reveal damaging information about a health professional so as to protect other potential victims – a major reason for notifications to regulators. At another they may be diffident about doing so because of the harm that they know their disclosures are likely to cause – to the professional, and those associated with the professional\(^\text{14}\). This means that hesitation in revealing “the full story”, gaps in memory, conflicts in detail and even retractions of accounts need to be viewed in context.

Second, it may be necessary for the notifier to be provided with professional support from an early stage in the investigation so as to ensure that they do not unduly suffer or even decompensate during the time that they are making their disclosures. It is at this early stage that they may be especially uncertain of the ramifications of what they are doing and may also be subjected to harassment or pressure from the professional. Utilisation of health practitioners or psychiatrists familiar with health tribunal processes has much to commend it, given the specialised character of the environment into which the notifier is entering.

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\(^{12}\) On occasions, it is not the participant in an intimate relationship with the health practitioner who is the notifier. For instance, the “victim” in *Re Paul Fagan* [1999] PRBD (Vic) later married the health practitioner and expressed the view that the relationship had always been equal and appropriate. Likewise, the suicidal victim in *Re Kieran Morrow* [2004] PRBD (Vic) 4 was not the notifier. On rare occasions, the notifier is a third party with an ideological concern about an event: see *Royal Women’s Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85.


Thirdly, awareness of the toll that the often lengthy process of investigation can take upon notifiers is also important. Generally, the delays and their ramifications will not be a factor of which the notifier will be apprised when embarking on registering a formal notification in relation to a health practitioner. The reality of the process of initially reducing a grievance to writing, of responding to the account proffered by the practitioner and then of working with investigators and lawyers to produce a formal statement can be draining. In particular, this is so where the notification relates to a personal relationship formed with the practitioner or to sensitive issues traversed in the course of the provision of treatment or therapy. Then the wait for the hearing which can involve many delays which are inexplicable to the notifier – generally as a result of logistical demands, such as the queue of matters before the tribunal, the need to deal with pre-hearing issues and the challenge of assembling witnesses and panel members at the required time – can be very taxing. Then there is the wait for the tribunal’s formal decision.

The result can be a notifier who has moved on significantly from the time when they lodged their notification and whose mental state and attitude toward the health practitioner has changed. These are matters to which investigators and tribunal members alike need to be sensitive and to incorporate into their evaluation of the allegations of notifiers.

In practical terms there are a number of additional strategies which the Victorian Medical Practitioners Board and Psychologists Registration Board have implemented to translate these issues into pragmatic implementations of therapeutic jurisprudence.

The first of these is the maximisation of transparency at each step, so that the notifier is not only aware of the protocols, but has, as much as is practical, the information available to and comprising the thinking of the Board. This means that the notifier is normally provided in a timely manner with any written responses and additional documentation to the notification by the health practitioner.

The second is the Board’s response to a closed notification. Where previously a notifier received a brief “no further action” letter, they are now provided with a summary of the allegations and response, additional information attained at interview, and the Board’s thinking which has led it to decide to close the file. This is a labour-intensive exercise, but assists the notifier to feel heard and understood, especially if the disposition is, in their terms, unsatisfactory. When the Board is provided with a recommendation by its Investigative Officer, it is also accompanied by draft responses to the notifier and the health practitioner that explain the reasoning behind the Board’s decision.

Finally, notifiers to the both Boards are now offered paid sessions with a health practitioner during the course of a hearing, or its immediate aftermath, if they consider that they are suffering substantial distress as a result of their notification being brought to hearing.
Practitioners

For a health practitioner, too, the lodging of a notification can be a highly traumatic experience. For most professionals their work and their standing amongst colleagues is a very substantial part of their life. The notion that a client, patient, or even another colleague is so aggrieved as to pursue allegations which have the potential to lead to professional disgrace and even removal from the right to practice is terrifying. This can lead to many responses. Some practitioners go into denial and fail to provide full accounts, which might be exculpating, to investigators\(^\text{15}\). Some Become abusive and hostile to investigators, even becoming bush lawyers and taking every technical point that they can find in the course of the investigation to suggest that they are the victim of a conspiracy or a crusade. Some attempt to pressure the notifier or persons associated with the notifier to withdraw or water down their allegations. Some panic and engage in problematic behaviour such as attempting to rewrite records or augmenting or destroying their clinical notes\(^\text{16}\). Some have abandoned practice without good cause. Others have even committed suicide. One even murdered a complainant\(^\text{17}\)

While clearly enough some of the behaviour described above can constitute “consciousness of guilt” and properly be interpreted as indicative of conduct engaged in by a practitioner aware of having transgressed ethical norms, care needs to be taken in jumping too readily to conclusions. Often health practitioners can be enveloped by a sense of shame and respond in imprudent ways which have nothing or little to do with whether they are guilty of the allegations made against them. They may feel culpable simply because a client is so angry as to have made allegations against them. This can lead to self-destructive responses, such as lies or even an inability to continue practice.

In an informal hearing on which the author sat, the health practitioner felt desperately guilty about her conduct in altering a clinical record after a client committed suicide. However, she had done so openly and without an attempt to be deceptive. When told that her behaviour was understandable in its context and that she had made a mistake but had not engaged in unprofessional conduct\(^\text{18}\), she expostulated that that could not be right – she was guilty! The attempt by the hearing panel thereafter was toward her letting go of her guilt and forgiving herself sufficiently to trust herself to resume practice.

There is a need for investigators and tribunal members alike to be very careful in the inferences they draw from the conduct of the practitioners subsequent to a notification. It is important too for practitioners to be encouraged to avail themselves of therapeutic assistance if they are finding the experience of an investigation or a hearing unduly stressful. In my view it is an ethical obligation of regulatory


\(^{18}\) See the distinction applied by Morris J in Vissenga v Medical Practitioners Board [2004] VCAT 1044.
authorities to make available, in an active sense, professional assistance for health practitioners complained against as well as those who claim to be victims of practitioners’ misconduct. Health practitioners’ registration boards are uniquely well-placed to recognise and respond to the needs of persons under stress.

**Hearings**

The principal object of a hearing by a health tribunal is to ascertain whether on the balance of probabilities it is proved that the practitioner has engaged in one form or another of unprofessional conduct. The fact-finding aspect of the hearing, therefore, is pre-eminent. As Wexler and Winick put it: “Therapeutic jurisprudence does not suggest that therapeutic considerations should trump other considerations.” This is significant because a corollary is that other objectives pursued by a hearing (such as maximising the therapeutic outcomes for all concerned) are subsidiary.

While the outcomes of hearings are crucial for practitioners whose livelihood and reputation can be irretrievably damaged by adverse decisions, hearing results can also be viewed as vital by notifiers. For many the decision to register a notification and then to give evidence against a health practitioner can be a profoundly confronting experience. It is extremely important that notifiers be enabled to leave a hearing with the perception not just that they have been able to tell their story but that they have been listened to, taken seriously and treated fairly and respectfully; any other perception is likely to be significantly counter-therapeutic. This can mean, for instance, that latitude should be extended to health practitioner and notifier alike to ventilate to a degree that would not normally be permitted or appropriate in a court proceeding – the very experience of being heard can be healing.

Many personal and health matters are traversed at hearings. This can be embarrassing and distressing for practitioners, notifiers and witnesses alike. There is a significant potential for damaging and compounding trauma because of the intrusiveness and the sense of violation occasioned by public exposure of private matters – for some people this can be unendurable. In addition, public revelation of health status and personal issues can have unpredictably deleterious consequences.

This issue is not straightforward in relation to health practitioners’ hearings. Sometimes health practitioners’ mental health (e.g. manic episodes, depression or being subject to unusual stressors) can go some distance toward explaining why they behaved as they did. Thus it needs to be the subject of significant evidence. Sometimes a background of poor psychiatric health, characterized by a propensity to

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20 For a discussion of the healing aspects of narratives, see JB Mitchell, “Narrative and Client-centered Representation. What is a True Believer to Do When His Two Favorite Theories Collide?” (1999) 6 *Clinical Law Review* 85; see further K Diesfeld and I Freckelton, “Introduction” in Diesfeld and Freckelton, op cit, n 3 above.

confabulate or make false allegations, can be highly relevant to assessment of a notifier’s reliability as an historian.

Sometimes too the most potent aspect of a hearing in terms of reducing the likelihood of recidivism on the part of the health practitioner can be the deterrence of a health practitioner (in law, “specific deterrence”) by the public shaming and exposure. This issue can be relevant to the deterrence of other practitioners also (in law, “general deterrence”).

The question is one of balance, eschewing public canvassing of private health matters save to the extent that it is necessary to achieve the fundamental objective of hearings – protecting the public and acting fairly toward the health practitioner and notifier.

**Decisions**

The most lasting and formal outcome of a health tribunal hearing is the decision, both its bottom line and the reasoning expressed to reach that bottom line. In a number of jurisdictions, including in New South Wales since 1999 in relation to medical practitioners, and in recent years in Victoria, in relation to psychologists, medical practitioners, dentists and Chinese medical practitioners most decisions in formal hearings (as against informal hearings conducted into less serious matters) are published on the internet via the tribunal’s website. This has a number of controversial consequences. The decision is available long-term for viewing by peers as well as by interested members of the public. It is a very strong element of general deterrence by reason of its accessibility.

In addition, the “permanency” of a decision enables a regulator to engage in a form of ethical outreach to the professions. Such communication has the potential to be prophylactic in that it can give guidance to practitioners about forms of conduct which should be regarded as unacceptable. In addition, it has the potential to facilitate ethical awareness by the encouragement of debate and discussion about the decisions of the Board.

Other aspects of a decision are vital. Firstly, the decision of a regulatory authority dealing with a health practitioner constitutes what has been termed a clinical opportunity - a chance for a breakthrough in terms of a practitioner’s insight into the nature of their impropriety, what has brought it about and its effects upon others. If

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24 http://www.psychreg.vic.gov.au


28 Of course, it is not a guarantee. There are times – for instance, in dealing with practitioners in complete denial or who are insightless or psychopathic – where this is not a realistic aspiration.
the practitioner is reclaimable, namely if they have not committed a transgression at
the extreme end of the spectrum, and assuming they are not a psychopath29 or
seriously mentally ill, the decision constitutes a vital opportunity for attitude-change
as a result of mentoring. It is a chance for respected colleagues of health practitioners to inform them about how the profession views what they have done
and how it has come to pass that they have breached important norms of the
profession, whether those be in terms of written components of a code of ethics or
practice, or the unwritten rules of the profession.

An example of where the Psychologists Registration Board of Victoria attempted
this was in relation to a health practitioner who had breached a number of boundary
issues in relation to a psychologically vulnerable client whom he too assertively
pushed into group psychotherapy. The practitioner had had good intentions but had
been oblivious to many of the messages which his conduct had communicated to the
client. The task for the Board was to assist the health practitioner to be more
sensitive to such matters, as well as to give guidance to other practitioners who
might find themselves in similar situations. Thus, a prophylactic potential lay both in
respect of the individual health practitioner and the psychological community more
generally30.

A number of members of Medical and Psychologists Boards in Victoria have
adopted the practice of communicating decisions orally, with the practitioner
standing, and enabling the practitioner on occasions to respond and interact with the
panel during the process of decision delivery. This, of course, is at variance with the
more formal mode generally adopted by the courts. It is not done in such a way as to
demean or humiliate the practitioner but so as to communicate effectively with the
practitioner without the mediation of their lawyers.

Such an initiative provides a chance for denunciation of conduct, reflection on
what has caused the infraction and encouragement of the practitioner to take steps to
minimise the potential for repetition of transgressions. On occasions, the delivery of
such reasons can be an emotional experience with the health practitioner for the first
time coming to terms in a meaningful sense with what they have done. Most of all,
such a procedure is an opportunity on many occasions for the practitioner to
commence the journey back toward reflective and ethical practice. Accordingly, part
of the delivery of findings and determinations (penalties) concentrates on mentoring
– in a practical sense communicating to the practitioner the base upon which they
can build the remainder of their career, what they can do to avoid repetition of
unethical behaviour and the steps they should take to improve the quality of their
practice.

Such steps are repeated in the written version of the decision which enables
reinforcement of the oral presentation of what has been said to the practitioner. From
the practitioner’s perspective, the written decision should enable him or her to

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29 See eg the view of the panel in Re Hall [2003] PRBD (Vic) 5
http://www.psychreg.vic.gov.au/pdf/decision_20030505.pdf; and the worries expressed by the panel
understand fully why it is that the tribunal has reached its decision and communicate clearly what shortcomings the practitioner has engaged in, if any, as well as what needs to be done to resume safe and ethical practice.

There are times when a health practitioner is not found at a hearing to have engaged in unprofessional conduct. There can be two reasons for such a decision – that the health practitioner is regarded by the tribunal as innocent or that the evidence has not been regarded as sufficient to legitimize an adverse finding. It is important that the actual position of the tribunal be made clear so that all who read the decision can appreciate the reasoning process of the tribunal.

A well written decision can enable a health practitioner to assert rightfully that the allegations against him or her have been found to have no merit. This is a fundamental issue of fairness but also part of the process of enabling a wronged health practitioner to rehabilitate his or her reputation and to recover so far as possible from the stigma of the allegations.

The second function of the decision is the communication to the general community and especially to other practitioners of where ethical lines should be drawn. It is a chance to alert members of the wider community to what they can legitimately expect from the profession and to reassure them that health practitioners who breach the norms of the profession will receive condign consequences. The decision is a means by which other practitioners can be given guidance as to ethical values and as to how they should behave if they confront ethical and practice dilemmas of the kind met by the practitioner in question.

A decision, of course, is important also for the notifier and sometimes for those associated with the notifier. It can constitute a vindication of their stance about something as serious as a boundary violation. It can also be a chance for healing and for closure. Sometimes, especially at a hearing at which a notifier has played a key role, and if they are in attendance when the findings and penalties are imposed, it can be constructive for the notifier to be spoken to personally by the panel. This can provide an opportunity for acknowledgment of a notifier’s courage in making

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31 See Wiki v Atlantis Relocations (NSW) Pty Limited [2004] NSWCA 174 at [58]; In Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 which was followed in Moylan v The Nutrasweet Co [2000] NSWCA 337, Henry LJ said (at 381–382) in regard to the general duty to give reasons for his or her decision (particularly in relation to expert evidence): “The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know … whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.”

32 See eg Re RD [2004] PRBD (Vic) 6: http:


34 This can especially be the case in cases involving alleged sexual relationships between health practitioners and clients: see eg Re Hall [2003] PRBD (Vic) 5; http://www.psychreg.vic.gov.au/pdf/decision_20030505.pdf
the personal sacrifice on behalf of the community to make personal disclosures in order to lessen the likelihood of the health practitioner behaving similarly, to another client’s detriment, in the future. This has the potential to be healing.

**Decision Making Traps**

Tribunal members can be tempted by three types of errors in incorporating the principles of therapeutic jurisprudence into disciplinary hearings.

The first of these is an over-emphasis upon the clinical intervention. This can take the form of focusing upon the health practitioner’s functioning, and disregarding the need for the rigour required of statutory decision-making bodies. Panel members can be tempted to empathise unduly with the health practitioner in their findings by responding to the stresses of practice and overly to contextualise the professional behaviour that has given rise to the notification. Such errors can detract from the confidence of the community in the fairness and arms-length aspect of decision-making. It can also limit the genuine awareness of the health practitioner of the seriousness of misconduct, thereby being fundamentally counter-therapeutic in outcome. One of the elements leading to this type of error is lack of familiarity with the legal frameworks underpinning hearings, and the culture of the law.

The second type of error, by contrast, is an inclination to critique the quality of a health practitioner’s clinical work with excessive censoriousness, using hindsight knowledge. This can manifest by an inclination to make adverse findings about the quality of the health practitioner’s clinical work – outside the terms of the notice of hearing which contains the formal allegations which the health practitioner is required to answer.

A third form of error is to become overly legalistic in the conduct of either formal or informal hearings out of a fear of being appealed. Panel members with limited forensic experience often approach the legal aspect of hearings as strangers in an accustomed land, anxious about stepping off the certain path into a legal quagmire.

**Professional Standards Panel Hearings**

Matters not considered likely to require suspension or cancellation of a health practitioner’s registration are generally dealt with by “professional standards panel hearings” or “informal hearings”. Generally, these take place without the health practitioner being legally represented, without the presence of the public, in the absence of the formal trappings that characterise formal hearings, and without an official decision being posted on the net. This means that, although, such hearings still involve the important decision as to whether the health practitioner has engaged in unprofessional conduct, and the opprobrium that accompanies such a decision, the panel can focus on facilitating the acquisition of insight by the health practitioner and the provision to the practitioner. The panel is freed from most of what can be the

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35 This measure was employed by the author in a hearing involving a sexual relationship between a health practitioner and his client. The fact that this was done, in light of the fact that the notifier committed suicide a short time later, means that at least it can be said about the Board that it behaved in as sensitive a way toward the notifier as could have been orchestrated in difficult and ultimately tragic circumstances.
confining constraints of the more legalistic formal hearing process and focus upon the potential for changes in attitude and practice.

Such a focus is a creative and constructive exercise. It is an opportunity for the creation of rapport with a health practitioner who has made a significant error and to provide assistance to diminish the likelihood of repetition of insensitivity, poor professional practice or ethical unawareness.

A range of steps need to be taken to maximise the therapeutic potential for such hearings. They take time – not just an hour or so. Also professional standards panel hearings are interpersonally demanding, often requiring breaks for health practitioners and panel members alike. They require quite different skills from those exercised in more formal hearings. The decision has to be right in terms of evaluation of the available information but, by reason of the absence of legal representatives, the process is much more panel-driven. This means that panel members need to be able to elicit information in a way which is demonstrably fair and not pre-judged. Then, if an adverse finding is made about the health practitioner having engaged in unprofessional conduct, a combination of avuncular mentoring and extension of empathy needs to engage the health practitioner to a point where they are brought to understand where they have transgressed, why they have and what they can do to avoid such misdemeanours in the future.

In one sense, it is the informal hearing that most encapsulates the potential of therapeutic jurisprudence for health practitioners’ boards, by maximising the therapeutic interplay with a legal framework.

A serious impediment to the perception of fairness and evenhandedness in hearings by the Medical Practitioners and Psychologists Registration Boards in Victoria has been the conduct of what until 1 July 2007 are termed “informal hearings” without both the notifier and the medical practitioner being present at the same time. When the procedure is to hear first from the notifier, then the practitioner, and then to provide a summary decision on the day to the practitioner, there is a risk of communicating to the notifier that the practitioner is in a preferred position, that the notifier is a second class participant. In addition, the task of the fact-finding panel is made the more difficult with the absence of the notifier when the practitioner gives his or her evidence.

A pilot of conducting hearings in the presence of both the notifier and the practitioner is being undertaken at the Medical Practitioners Board. A fact-finding advantage has already been identified by reason of the capacity to hear from both participants in the hearing as issues in dispute need to be clarified. While the hearing needs to be carefully managed so as to not to cause the notifier (and occasionally the practitioner) counter-therapeutic further traumatisation, the presence of both participants can impose inhibitions on unreasonable behaviours. In addition, there is the potential of the acquisition of better informed appreciation of the other’s perspective by both the practitioner and the notifier; this can have advantages in terms of sensitising the practitioner to the consequences of his or her inappropriate conduct. Finally, the more substantial involvement of the notifier is likely to be less alienating and to engender greater confidence in the fact-finding neutrality and rigour of the process.
Such a procedure for professional standards panel hearings is more demanding for tribunal members and requires high level skills in communication and hearing management. However, as an innovation directed to better perception so evenhandedness and notifier participation, it deserves careful analysis.

**Post-hearing Issues**

The period after a formal hearing can be an emotional roller-coaster for health practitioners and notifiers alike.

From the perspective of notifiers, there can be the stressful build-up to the receipt of the decision and then relief or frustration. Then the focus of the hearing is over and, regardless of the result, there can be a degree of let-down and even depression. In relation to notifiers who have alleged a serious boundary violation, this can be a difficult time. They may well feel a maelstrom of emotions – anger, love, guilt and many others. The coincidence of these emotions is part of the healing process but it can be deleterious and even dangerous. It is important that some notifiers be contacted post-hearing and offered professional support. This can focus, for instance, on why it is that an adverse decision was not made, perhaps because of the lack of sufficiently compelling evidence. It can focus too on working through the post-hearing feelings of emptiness, confusion, guilt or distress that a notifier may have. This might even be regarded as a therapeutic obligation of a health practitioners’ regulator.

From the perspective of health practitioners, the period post-hearing can be difficult too. If a decision has gone in their favour, there generally are not too many adverse consequences. If a decision has been adverse, however, there are the sequelae of the shaming and exposure experience. These can be devastating and have the potential to induce potentially lethal depression. Likewise, if the health practitioner has been suspended or deregistered, there can be the practical challenges of closing down a practice and effecting therapeutic closure with clients. This can be difficult and personally demanding for the health practitioner.

In both instances assistance from a suitable professional may well be salutary – in the health interests of the health practitioner and of his or her clients so that termination of therapy is effected without undue trauma and so that referral is accomplished constructively and appropriately.

**Other Aspects of Regulation**

An under-recognised aspect of the work of regulatory bodies is the provision of guidance to practitioners. Such documentation can provide useful particulars for statements of claim as it identifies what is expected of practitioners by their governing body. Examples of such documents are:

- the Medical Board of South Australia’s “Good Medical Practice: Duties of a Doctor Registered by the Medical Board of South Australia”[^36],

the Medical Council of Tasmania’s “Policy on Disposal of Medical Records”\[37]\;
the Victorian Board’s Medico-Legal Guidelines\[38]\;
the NSW Board’s “Medical Certificates Policy”\[39]\;
the ACT Medical Board’s “Standards Statement: Medical Practitioners and Sexual Misconduct”\[40]\; and
the Western Australian Medical Board’s “Telemedicine Policy”\[41].

Another important trend of contemporary regulation is the move by regulators toward streaming investigations toward performance and health issues, by contrast with the traditional preoccupation with whether the practitioner has engaged in a form of inappropriate conduct. The core characteristic of “the performance pathway” is that it is directed toward ascertaining whether the practitioner lacks skill and knowledge – put another way, whether there is a competency deficit\[42]. This does not require a finding as to whether a practitioner has engaged in unacceptable conduct on a particular instance. Like the “health pathway” which focuses upon whether the practitioner suffers from a physical, psychological or psychiatric condition which may be impairing his or her ability to practise, it attempts to address an ongoing deficiency which creates the potential for the practitioner to cause harm on multiple occasions on the future. Its focus is generally collaborative – to assist the practitioner to recognise the problem and to take the steps necessary to remediate it.

However, there are difficult implementation issues for “performance pathways”. Notifiers concerned to have a decision on whether they have been the victim of unprofessional conduct, unsatisfactory professional conduct or professional misconduct may be frustrated by the absence of such a decision and the solicitous concentration on the skills and knowledge of the practitioner who has harmed them. The performance pathway can appear a soft option, although it is seldom so experienced by practitioners the subject of a demanding peer assessment of their competencies.

Like the health pathway, a road previously trodden by regulators, the performance pathway is likely to constitute an increasingly important focus of regulators’ investigations, liberating them from the need to make formal findings about specific allegations of inappropriate conduct and enabling concentration on the factors that have given rise to adverse outcomes. While its move away from adversarial

\[42\] See A Reid, “To Discipline or Not to Discipline? Managing Poorly Performing Doctors” (2006) 23(2) *Law in Context* 91.
decision-making has attractions from a therapeutic jurisprudence perspective, it may take time to develop processes of peer assessment that are effective across disciplines and that satisfy community demands. Likewise the introduction of some elements of alternative dispute resolution to regulators\textsuperscript{43}, enabling them to resolve aggrievements to the satisfaction of regulators, practitioners and notifiers will demand changes in perspective and expectation from all parties.

Conclusions

This article has sought to address a number of the contemporary issues that accompany the investigation and hearing process of health practitioners’ registration bodies. It has utilised some of the insights provided by the therapeutic jurisprudence lens. A challenge for regulatory authorities dealing with allegations of impropriety by health practitioners is to combine fact-finding accuracy and fairness with outcomes that are as pro-therapeutic as can be orchestrated – from the perspective of health practitioners, witnesses, members of the community and even investigators and panel members\textsuperscript{44}. Health practitioners’ registration bodies are particularly well-suited to such a synthesis of objectives. However, achieving such objectives may require lateral thinking and abandonment of traditional and adversarial procedures, modeled on those of the courts. An example of a constructive innovation may be the holding of professional standards panel hearings in the presence of notifiers as well as practitioners.

The increasing awareness of health, performance and systemic causes of adverse outcomes has the potential to move regulatory bodies away from the traditional focus on whether practitioners engaged in inappropriate conduct on specific occasions. Therapeutic jurisprudence perspectives would generally welcome such a focus on root causes, rather than particular adverse outcomes. Likewise, the potential for collaborative attempts to bring practitioners back to practice when health and competency deficits are adequately addressed has much to commend it from a broader perspective of drawing upon skills when they are unlikely to be applied counter-therapeutically in the future. However, such changes to health practitioner regulation constitute fundamental paradigm shifts and will require the acquisition of new skills and perspectives within regulatory bodies, as well as sensitive communication to notifiers and the general community. The experience of problem-solving courts may provide useful models for the implementation of such changes within the health regulatory environment.

\textsuperscript{43} See eg Health Professions Registration Act 2005 (Vic), s59(1)(b)-(c).

“The Synergy Between Therapeutic Jurisprudence and Drug Treatment Courts”

Hon Peggy Fulton Hora

Therapeutic jurisprudence (TJ to its adherents) has been called “…[T]he most prolific vector [of the Comprehensive Law Movement], at least in academic and judicial circles. It has rapidly spread to all areas of the law and has been enthusiastically adopted by American judges in the form of ‘problem-solving’ courts.”

The task of TJ is to identify and ultimately examine empirically relationships between legal arrangements and therapeutic outcomes. It has a law reform agenda geared to minimize antitherapeutic consequences and facilitate achievement of therapeutic ones. TJ theory insures people re helped in ways that obey, complement, and further the goals of the law and is designed to ensure the law does things to help people. TJ proposes to see the law as a healing profession.

The Comprehensive Law Movement, as it is termed by Prof. Susan Daicoff, seeks to maximize emotional, psychological and relational wellbeing of those involved with legal matters. Its focus is beyond strict legal rights, responsibilities, duties and obligations.

Using a TJ lens, the court system can be viewed as an interdisciplinary, problem-solving, community institution.

TJ asks the question: “Can we enhance the likelihood of desired outcomes and compliance with judicial orders by applying what we know about behavior to the way we do business in court?” And TJ’s other question is: “Can we reduce the anti-therapeutic consequences and enhance the therapeutic ones without subordinating due process and other justice values?”

Problem-solving courts, as drug treatment and other outcome-focused, collaborative courts have come to be known, focus on the underlying chronic behaviors of criminal defendants and other court users and recognize that the public is looking to the courts to address complex social issues. They began in the U.S. in 1989 in direct response to jail overcrowding, courts becoming plea bargaining mills.

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3 Id.
4 Id.
5 Daicoff, supra.
6 Barach, Alvan, M.D. as quoted by Bill Moyers in Healing and the Mind (1993)
and the fact that people with addictions, mental illness and status offenders were clogging the courts with high recidivism rates. It was discovered that three areas particularly lent themselves to a problem-solving, collaborative approach – domestic violence, mental health disorders and substance abuse. Each area offers an opportunity for changed behavior through treatment, intervention or therapy and each lend themselves to conditions imposed by a judge. Each allows the court to address the underlying issues that brought the person to court.

The Center for Court Innovation\(^8\) has developed “Six Shared Principles that Distinguish Problem-Solving Courts from the Conventional Approach to Case Processing and Case Outcomes in State Courts.”

1. Case Outcomes: P-S courts seek to achieve tangible outcomes for victims, offenders and society including reduced recidivism, reduced stays in foster care for children under the court’s protection, increased sobriety for substance users and healthier communities.

2. Judicial Monitoring: P-S courts rely on judicial authority to solve problems and change behavior of litigants. Judges stay involved with each case throughout the post-adjudication process. Frequent progress reports are expected from collaborating entities.

3. Informed Decision-Making: P-S courts improve the quality and quantity of information available in the courtroom. Judges can respond quickly and effectively to performance and hold court users and partner agencies to a high level of accountability.

4. Collaboration: P-S courts employ a collaborative approach and rely on government and non-profit partners to achieve their goals.

5. Non-Traditional Roles: Some P-S courts, such as drug treatment courts, alter the dynamics of the adversarial process and employ a team approach to the participants’ treatment and recovery. The team works together to craft incentives and sanctions for participants. The judicial role may include being a convener or broker between participating entities.

6. System Change: P-S courts promote reform outside of the courthouse and work more visibly with the executive and legislative branches. Outside agencies may be encouraged to adopt new staffing patterns such as attending court sessions and improve case management practices because of reporting expectations.

Problem-solving courts further require a new role for the judge who is expected to be more proactive. TJ judges believe they can and should play a role in the problem-solving process and they believe that outcomes – not just case processing – matter.\(^9\) Collaborative courts recognize the therapeutic potential of the court’s coercive powers and find “judicial leverage” to be an appropriate tool.

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\(^8\) See: http://www.problem-solvingcourts.org/ps_char.html last visited 26 June 2006

\(^9\) Adapted from Judge Judith S. Kaye, Chief Judge, New York
There are many types of problem-solving courts. At least 18 countries have courts using problem-solving approaches and TJ techniques\(^\text{10}\) and as of December, 2004, there were 2,558 problem-solving courts in the United States alone.\(^\text{11}\) They consist of:

- 811 adult drug treatment courts
- 357 juvenile drug treatment courts
- 153 family treatment courts
- 176 driving-while-impaired (DWI) courts
- 68 re-entry drug courts
- 16 other re-entry courts
- 23 community courts
- 111 mental health courts
- 393 teen/peer courts
- 141 domestic violence courts
- 1 campus drug treatment court
- 937 other problem-solving courts
- 54 tribal healing-to-wellness courts
- 1 urban Native American DWI court

California has a Community Justice Project dedicated to building restorative justice principles in the community. Its goals are to enhance awareness and understanding of community justice practices and principles; facilitate information sharing between existing community justice programs and start-up programs; and, to facilitate the development of local practices consistent with community justice principles.\(^\text{12}\)

The Conference of Chief Justices (CCJ) is a body made up of the top administrative judge in each state’s court of highest jurisdiction. The Conference of State Court Administrators (COSCA) has a membership of the top administrative employee of the court of each state. In August of 2000\(^\text{13}\) the CCJ and COSCA voted unanimously to support problem-solving courts and further agreed to develop best practices. It also recognized the need for collaboration and interdisciplinary training. This commitment was reaffirmed in 2004 and in 2006 it voted

\(^{10}\) Australia, Canada, Scotland, England, Ireland, New Zealand, Brazil, Israel, Tobago, Chile, Jamaica, Cayman Islands, Trinidad, Barbados, Bermuda, Macedonia, Norway and Italy


\(^{12}\) See: http://www.courtinfo.ca.gov/programs/ccjp last visited 26 June 2006

\(^{13}\) See: http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf
unanimously again to support the Judges’ Criminal Justice/Mental Health Leadership Initiative (JLI)\textsuperscript{14} which grew out of working in mental health courts.\textsuperscript{15} These actions by the top leadership of the courts gives legitimacy to problem-solving courts in the United States and allows judges who are interested in working therapeutically to do so without fear of reprisal.

CCJ/COSCA agreed to:

- Encourage the broad integration over the next decade of the principles and methods employed in the problem-solving courts.
- Support national and local education and training on the principles and methods.
- Advocate for the resources necessary to advance and apply the principles and methods.

COSCA said, “The human and political success of therapeutic justice programs is too great to ignore.”

In support of the JLI resolution, CCJ committed to join the organization and urged state supreme court justices to “take a leadership role to address the impact of mental illness on the court system through a collaborative effort involving stakeholders from all three branches of government.”\textsuperscript{16}

The synergy between TJ and problem-solving courts is best displayed by a review of the operating principles of such courts. Defining Drug Courts: The Key Components\textsuperscript{17}, Essential Elements of a Mental Health Court\textsuperscript{18}, and the United Nations’ Twelve Principles for Court-Directed Treatment and Rehabilitation Programs\textsuperscript{19} all envision a collaborative, treatment-oriented alternative to traditional case processing using TJ principles.

The National Center for State Courts issues a trends report periodically and in 2005 stated that judicial educators need to teach problem-solving methods and TJ to more judges; encouraged law schools to refocus their efforts and take a more

\textsuperscript{14} JLI is coordinated by the Council of State Governments Criminal Justice/Mental Health Consensus Project (See: http://consensusproject.org/) and the GAINS/TAPA Center for Jail Diversion (See: http://gainscenter.samhsa.gov/html/)
\textsuperscript{15} See: http://ccj.ncsc.dni.us/CriminalAdultResolutions/resol11JudicialCriminalJusticeMentalHealthInitiative.html
\textsuperscript{16} Id.
\textsuperscript{17} See: http://www.nadcp.org/whatis/ last visited 26 June 2006
\textsuperscript{18} See: http://consensusproject.org/mhcep/essential.elements last visited 26 June 2006
problem-solving approach; and, predicted bar exams incorporating TJ as they have family law, tribal law and ADR.\textsuperscript{20}

Twenty years ago when TJ was a mere twinkle in the eyes of Prof. David Wexler and Prof. Bruce Winick and the judges who started the first drug treatment courts were starting to feel their frustration with the recycling of the same alcohol and drug users throughout the system, none of us would have ever believed things would have developed to the extent they have, not in our wildest dreams.

\textsuperscript{20} See: http://www.ncsconline.org/WC/Publications/KJS_CtFutu_Trends05.pdf
MIRRORING THE STAGES OF CHANGE IN THE
ESTABLISHMENT OF PROBLEM SOLVING COURTS

Michael S King and Lynton Piggott

The Transtheoretical Stages of Change Model suggests stages through which intentional behavioural change occurs, describing what is done at each stage, the processes that generate and support the change and markers of change. As the name suggests, its framework allows for the integration of different theories of change into one model. It emerged in the context of a study of the behaviour of smokers but has been extended to cover all types of addictive behaviour, including licit and illicit drug and eating disorders. It addresses the mechanics through which an addition occurs as well as the mechanics of recovery from addiction. The model has also been extended to the behaviour of organisations.

Addiction is a significant concern for the justice system. The vast majority of serious offenders coming before a judge or magistrate in criminal cases have a substance abuse problem that is associated with their offending behaviour. With growing recognition that past processes have not been adequate to deal with the problem of offenders’ substance abuse problems, the justice system has turned to new approaches, such as problem solving court processes. It is now accepted that problem solving courts have therapeutic jurisprudence as their underlying philosophy.

The problem solving court approach in Western Australia began with the Family Violence Court in Joondalup. The Perth Drug Court was established in 2000. Another problem solving court approach based on therapeutic jurisprudence is the Geraldton Alternative Sentencing Regime, which commenced in August 2001. It addresses both addiction and family violence as well as other offending related problems.

In this paper we use the Transtheoretical Stages of Change model, a model that is commonly relied on by professionals in the treatment of addictions and in processes such as drug courts, to study the development of the Perth Drug Court and the Geraldton Alternative Sentencing Regime and the response of the Western Australian justice system to therapeutic jurisprudence in courts and in particular to problem solving courts. As both authors are directly involved in the operation of the Perth Drug Court we consider it appropriate that a model we use to study our Drug Court participants can also be used to study ourselves and the organisation in which we work.

Many studies of change in organisations are retrospective, observing that something has worked and seeking to explain how it happened within the context of particular theories. Others are empirical studies of whether a model can explain organisational change. Our paper is not so much a study of how organisational change has succeeded on a macro level but how the development of two projects applying therapeutic jurisprudence and their relationship with the larger organisations can be understood in the light of the stages of change model. It is not an empirical study. Rather it is based on our experiences of working within the justice system and in particular within courts and on our observation of organisational responses to the changes brought about by the use of therapeutic jurisprudence in these projects. Our paper must therefore be considered subject to that caveat.

**The Transtheoretical Stages of Change Model**

**Stages of Change and the Individual**

Before considering the stages of change, it is important to consider the state that is sought to be changed. DiClemente observes that

> By definition, the end-state of an addiction is a well-established way of behaving that is consistent, stable and resistant to change. Change requires dissolution of this established pattern and involves a shake-up of or perturbation of the status quo for some period of time until a new pattern can be established that replaces the old.\(^3\)

The stages of change model describes the process of moving from the well-established pattern of behaviour to one that is entirely new. It describes what is happening before the process begins, what is required to activate it in terms of inner attitude and commitment, what action is involved in carrying out the change and how the change is to be sustained.

Janice Prochaska summarises the model as follows:

The TTM is stage-oriented rather than action-oriented. It is facilitative rather than imposed. The TTM integrates the when, why, and how of change. The stage dimension indicates when particular types of changes can occur, for example, thinking, preparing, acting and sustaining. The pros and cons reflect why particular changes should occur. The change processes guide how change can progress from one stage to the next.\(^4\)

The first stage is one of precontemplation. Here the person is content with his or her situation. There is no recognition that there is a problem and therefore no consideration of a need to change. The process of change has not even begun.

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3 DiClemente, n 1, p 25.
Commonly a person moves out of this stage due to life experience such as a crisis – for example, illness, relationship breakdown, or appearing in court for a criminal offence – which provides the impetus for the person to question their situation and to contemplate behavioural change. Here the person considers the intellectual reasons for and against change and the associated emotions. The stability of the precontemplative state has been disrupted and the person is in a state of flux. This is the stage of contemplation.

If the person makes a positive commitment to change they move into the preparation stage. The goal for this stage is to develop strategies and to formulate a plan for implementing behavioural change. With the commencement of the implementation of the plan, an individual moves into the action stage. Being able to sustain the new pattern of behaviour over time is a goal for the action stage. It involves performance of the plan, revision of the plan if needed and being able to overcome personal and other challenges that impact upon the ability to perform the plan. The next stage – maintenance – requires incorporating the new pattern of behaviour into the person’s lifestyle. It involves being able to sustain the pattern in varying social circumstances and avoiding a relapse. Once the new pattern of behaviour is maintained without effort, the process of change has ended and a new status quo has been established.

Each stage has tasks and goals that support progress through each of the succeeding stages of change. However, the model does not suggest that there is necessarily a smooth, linear transition from precontemplation through to maintenance during the change process. For example, a person could move through to the action stage and then go back to the precontemplation or contemplation stages, or a person could move from precontemplation to contemplation, conclude there is no problem or need to change and return to the precontemplation stage. A person may be stuck in one stage – such as contemplation – for months or years.

The Transtheoretical Model of Change suggests there are processes – internal or externally directed in nature – that take an individual from one stage to another. The internal processes are modes of thinking and emotional responses while the externally directed process are concerned with the individual’s attitude, response to and behavioural interaction with the environment.

The model also identifies particular indicators of change: decisional balance (the weighing of reasons for and against change) and self-efficacy (the person’s confidence in carrying out a particular behaviour). Temptation is the flip side of self-efficacy: the strength of the desire to engage in the behaviour sought to be changed.

The Transtheoretical Model of Change also seeks to consider change in the context of the life of the individual, acknowledging that there are different domains of life in which a person functions and which intersect with the stages and processes

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5 DiClemente n 1, 32-36.
6 DiClemente n 1, 36-39.
of change. It identifies five main areas: current life situation, beliefs and attitudes, interpersonal relationships, social systems and enduring personal characteristics.

**The Transtheoretical Model and Organisational Change**

Prochaska, Prochaska and Levesque note that the organisational change field is fragmented and lacking empirical validation. They refer to Micklethwait and Wooldridge’s depiction of this field as the “domain of witchdoctors”. They propose that the Transtheoretical Model of Change can be applied to change in organisations, noting its ability to integrate diverse approaches to behavioural change and the empirical evidence in relation to its use in promoting behavioural change in individuals.

In seeking to introduce change in an organisation, Prochaska, Prochaska and Levesque suggest that managers can assess the stage at which employees are in relation to change – such as whether they are precontemplative or contemplative. They noted research finding a link between the balance of reasons for and against change – decisional balance – and stages of change. Strategies can then be used to promote readiness to change, that is, to promote employees’ appreciation that there are more significant reasons for than against change. So rather than forcing change on an organisation which could promote resistance amongst employees and thereby frustrate the change process, Prochaska, Prochaska and Levesque suggest that the processes of change could be used to promote greater commitment to change.

The processes of change as they apply to organisations are:

1. Consciousness Raising: Becoming more aware of a problem and potential solutions;
2. Dramatic Relief: Emotional arousal such as fear about failures to change and inspiration for successful change;
3. Self-Reevaluation: Appreciating that the change is important to one’s identity, happiness and success;
4. Self-Liberation: Believing that a change can succeed and making a firm commitment to the change;
5. Environmental Reevaluation: Appreciating that the change will have a positive impact on the social and work environment;
6. Reinforcement Management: Finding intrinsic and extrinsic rewards for new ways of working;
7. Counter-Conditioning: Substituting new behaviours and cognitions for the old ways of working;

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7 DiClement n 1, 39-43.
9 Prochaska et al n 8, 248.
8. Helping Relationships: Seeking and using social support to facilitate change;

9. Stimulus Control: Restructuring the environment to elicit new behaviours and inhibit old habits; and

10. Social Liberation: Empowering individuals by providing more choices and resources.¹⁰

Janice Prochaska’s study also noted the important role of teams in promoting organisational change.¹¹

Her study of the application of the model to the movement of family service agencies to time-limited therapy found support for the stages of change, decisional balance and processes of change. Further research is needed to see whether the model can be applied to a broader range of organisations.

The Transtheoretical Model and Problem Solving Programs in Western Australia

The Perth Drug Court

The links and relationships between substance misuse and criminal offending are subject of longstanding discussions. Various initiatives across the criminal justice system and the treatment sector resulted in a range of intervention strategies to address substance misuse relative to offending behaviours. Those initiatives, most notably since the 1970s, were typically developed under the mantle of “diversion strategies”. Those strategies were characteristically developed and implemented with a perception that they sat outside core operational business of the respective organisations and systems, generally targeting individuals and their specific offending behaviours rather than general characteristics of offending behaviour.

In Western Australia, an initiative called the Court Diversion Service (CDS) ¹² was arguably such an initiative. Whilst the importance and contributions of CDS and similar type initiatives were significant, it is suggested that they were inevitably limited in the impact they may have been able to fulfil in part due to the systemic typecasting of these initiatives as being outside the realm of core business. CDS was staffed by three officers, inclusive of administrative support. Organisational considerations of the Service were more notably concerned with whether to maintain existing funding (salaries and location costs) rather than alternative considerations as to the potential expansion of the initiative. The relatively lengthy existence of CDS (relative to similar initiatives outside of Western Australia) was, it is suggested, more consequent of the continuous lobbying of CDS staff and associated but disparate networks than organisational commitment. Within the framework of the current paper, it is suggested that the organisational considerations of the CDS and

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¹⁰ Prochaska et al, n 8, 250-251.
¹¹ Prochaska, n 4.
¹² CDS was established in 1989 and remained operational until December 2000 when the Service was incorporated into the Court Assessment & Treatment Service (CATS) within the Perth Drug Courts.
the perceived relevance of such diversion initiatives was unambiguously pre-
contemplative.

The advent of the world-wide “heroin epidemic” throughout the latter years of the 1990s resulted in a range of escalated whole of government responses. Nationally, this was reflected in the National Illicit Drug Strategy (NIDS) that arose out of the Council of Australian Governments (COAG) agreement established in April 1999.\(^{13}\) Within Western Australia, the comprehensive strategy at the time was reflected within the policy document Together Against Drugs: WA Strategy Against Drug Abuse, Action Plan 1999-2001. The development and implementation of the pilot Perth drug courts was established within the context of that strategy. The various policy discussions and various other organisational discussions were a demonstrable measure of a stage of change that was clearly of a “contemplative” nature.

The development of the pilot Perth drug courts was overseen by a steering committee that was originally comprised of representatives from the then Western Australian Ministry of Justice\(^ {14}\) and the WA Drug Abuse Strategy Office (WADASO).\(^ {15}\) The steering committee was subsequently expanded to include representation from a range of identified stakeholders. As New South Wales had the only operating drug court in Australia at the time\(^ {16}\), this effectively provided a working model to observe for other jurisdictions within Australia considering the establishment of a drug court or drug courts. Initial considerations for a pilot drug court in Western Australia included visits to the Parramatta Drug Court by various legislators, judicial officers, senior officers in the then Ministry of Justice and various other interested persons. Feedback from those visits and participation in various related forums reflected a continuing and growing enthusiasm for the establishment of drug courts within Western Australia. The writers suggest that in stages of change context, the processes at that time reflected the “preparation” period in establishing drug courts in Western Australia.

The planning and preparation that was undertaken for the establishment of the Perth drug courts included reviewing similar problem-solving courts within Australia and internationally. Ultimately, the model chosen for the Perth pilot was based on the pre-existing CDS model. The pilot drug courts were established in the Perth Magistrates Court (Central Law Courts, Perth) and the Perth Children’s Court, Perth. The two courts were established as separate courts. The pilot was intended to enable access to judicial case management within a drug court for all criminal jurisdictions, irrespective of age, severity of offending or severity of substance misuse and associated problems.

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\(^{13}\) The COAG agreement of April 1999 was notable for agreements relating to the development of comprehensive strategies to address the issues relating to supply and demand of illicit substances across all States and Territories, with various initiatives intended to be developed within the terms of Commonwealth and State partnerships.

\(^{14}\) The Western Australian Ministry of Justice was subsequently renamed the “Department of Justice”. It has recently been restructured to separate the functions across two separate departments, the Department of the Attorney-General and the Department of Corrective Services.

\(^{15}\) The office of WADASO was subsequently devolved and the functions of that office were incorporated within the current Drug & Alcohol Office.

\(^{16}\) The Parramatta Drug Court (New South Wales) commenced operation as a pilot in February 1999.
Whilst it is tempting to mark the progress of the establishment of the Perth drug courts to the commencement of the pilot in December 2000 as having progressed irreversibly to an action phase within the terms of stages of change, various issues inevitably arose that reflected a need to revisit preparatory requirements. This process has been and continues to be the experience of drug courts and similar problem solving courts, nationally and internationally. It was expected that operational requirements would inevitably arise, particularly in the pilot phase, which would demand organisational attention. As might be expected, the pilot status of the drug courts provided an ensured degree of organisational attention and focus during the life of the pilot. As would be expected, the pilot status of the Perth drug courts ensured the retention of the cross-organisational steering and management groups established during the developmental phase of the drug courts. As a pilot initiative, the drug courts were subject of evaluation, which was completed and tabled in May 2003. The Perth drug courts remain operational as originally established.

Although the Perth drug courts were established in the Perth Magistrates Court and the Perth Children’s Court, the predominant focus has been on the adult jurisdiction in the Central Law Courts. The “adult” drug court has since inception operated with dedicated drug court staff inclusive of a judicial officer, a Police Service prosecutor, lawyers from the Western Australian Legal Aid Commission and community corrections officers (CATS). Dedicated operational court staff have been devolved into mainstream court services since the conclusion of the pilot phase.

In the Children’s Court Drug Court, the Court has a single dedicated drug court team member, a juvenile justice officer (CATS). Other team members attend to their drug court roles additional to other core business roles. Although it would seem reasonable to expect a level of angst about the necessary limitations this places on the case processing capacity of the Children’s Court Drug Court, in the context of this paper that circumstance may have served the Children’s Court Drug Court well. Given the obvious limitations on that court, the necessity to develop co-management strategies with existing services was apparent from the inception of the court. This serves to place an emphasis more on enhancing existing processes and less demand on the organisation to attend to alternative strategies to promote change. Notwithstanding the resource limitations within the Children’s Court Drug, the court is able to draw as required on the protocols and agreements established within the broader drug court establishment process. Finally in relation to the Children’s Court Drug Court experience, it has been commented by a number of experienced practitioners across various disciplines that the principles of therapeutic jurisprudence were from the outset more discernibly enshrined in the practice of the juvenile jurisdiction: those principles and practices would therefore be expected to be more commensurate with drug court ideals than the practice and principles of the adult jurisdictions.

In the adult jurisdiction, the operation of the Perth Drug Court has been consistently challenged in seeking to establish, refine and at time revamp practices that contribute to the expectations of the ideals articulated in the establishment of that court. The drug court team is a committed and dedicated team that contributes unflaggingly to that process. The constant attention required to be given to operational practice that is less congruous to mainstream practice in the adult
jurisdiction than it is in the juvenile jurisdiction is necessarily reliant on the commitment of individuals and teams within the broader drug court team. If it is accepted that progression within the stages of change necessitate constant attention being paid to the issues and goals established in the earlier stages of change, the consequence of not attending to those requirements may serve to undermine the overall processes.

Since the conclusion of the pilot phase and the subsequent evaluation of the Perth drug courts, there has been a growing organisational expectation that the practice of the Perth drug courts will be absorbed within core organisational operational business, typically cited as a process of “mainstreaming”. The organisational advantages of this are obvious and as an ideal, perhaps reasonable. Similarly, in an ideal world, it would be desirable if practice development could assume an exchange of best practice strategies between specialist courts and mainstream services. It is suggested that the experience of the Perth Drug Court in the adult jurisdiction has demonstrated that the organisational expectations that the court would progress within an “action” phase of change and ultimately beyond that were arguably premature.

Whilst participation in the Perth Drug Court has been beneficial for many participants, the experience of Perth Drug Court team members in facilitating and supporting that experience has been that many of the barriers experienced in the earlier part of the court’s operation still remain. It could be suggested that this may be reflective of an organisational need to revisit previous goals and strategies for the drug court in order to progress. This process is not necessarily an adverse reflection but is perhaps a demonstration of the organisation considering change processes in much the same manner that we expect of our Drug Court participants.

**Therapeutic Jurisprudence in Geraldton**¹⁷

Geraldton is a regional centre some 420 kilometres north of Perth. It is the centre of the western rock lobster industry, a tourist destination and has significant agricultural operations. It is the regional government centre for the Midwest region. Like other regional centres it has a courthouse with a resident magistrate who exercises adult and juvenile criminal jurisdiction as well as civil, family, child welfare and coronial jurisdiction.

Each regional court has a significant degree of autonomy in determining its own processes within the legislative framework laid down by Parliament and the constraints of the common law. In Western Australia, there has been a history of individual magistrates and their courts introducing practices and procedures to better serve the people of their area, practice and procedures that may not be used elsewhere. For example, Magistrate Terry Syddall had Aboriginal Elders sit with him on the bench in Broome Court in the 1970s and Magistrate Steve Wilson established an Aboriginal Court at Wiluna when he was Carnarvon Magistrate.

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¹⁷ King MS, “Innovation in Court Practice: Using Therapeutic Jurisprudence In a Multi-Jurisdictional Regional Magistrates Court” (2004) 7 CIL 86.
Prior to 2001, there were no dedicated problem solving or other dedicated therapeutic jurisprudence based programs run through the Geraldton court, nor was there any evidence of any plans to do so. Essentially the court, the then Ministry of Justice and the local stakeholders were in a state of precontemplation in relation to such a proposal.

In about March 2001, the then Geraldton magistrate met with the clerk and assistant clerk of courts at Geraldton to raise the possibility of running a drug court style program in Geraldton based on the principles of therapeutic jurisprudence. It was agreed to put the proposal to stakeholders and a meeting was scheduled for April 2001. Stakeholders included the local legal profession, police, Community Justice Services and treatment agencies. At the meeting magistrate raised the idea and described its possible application and then asked for the different agencies involved for their views as to the viability of the project. There was general agreement in support of the proposal and a steering committee comprising the magistrate, the clerk and assistant clerk of courts and representatives from the stakeholder agencies was formed to implement it.

The steering committee formed two working groups, one to work on court procedure and the other to work on the treatment aspects of the proposal. The work of both groups was presented to the steering committee where it was approved. The magistrate then drafted a court practice direction based on that work.

The initial meeting was essentially a matter of consciousness raising and providing inspiration for change. Also, by involving the agencies right from the start the court was also seeking to solicit their support in promoting change. At the same time, the court promoted their empowerment and decision making in relation to processes in which they were to be involved. This approach parallels the process of empowerment and self-determination used in therapeutic jurisprudence based court programs where courts promote involvement by the parties in decision making that promotes the resolution of legal problems and the problems that underlie them. The agreement to proceed and the formation of the steering committee was evidence of the agencies’ and court’s belief that they could facilitate change in processes. Their method was the establishment of teams to implement the project.

These same processes were followed in relation to the use of the stress reduction and self-development technique Transcendental Meditation® (TM) by participants in the project including consciousness raising and seeking social support. At a meeting the magistrate proposed the technique be used by participants to address the problem of stress and substance abuse. He referred to research linking stress and substance abuse and to US research finding the TM technique promotes reduced substance abuse and recidivism.18 While the proposal was met with some degree of scepticism, it was agreed that the proposal be tried. In December 2001, the initial group of participants learned the technique. After observing significant positive attitudinal and behavioural change in difficult, long-term and entrenched offenders, the local manager of Community Justice Services worked to secure funding to allow the use

of the TM technique to continue. It continued to provide significant benefits for participants.\textsuperscript{19}

The Chief Justice and Chief Magistrate supported the Geraldton Alternative Sentencing Regime. However, it received mixed support from within the ministry/department. The Geraldton court staff worked with the magistrate in relation to the project and the local manager of Community Justice Services was supportive. However, at that stage arguably the department as a whole was in a contemplative state in relation to therapeutic jurisprudence, having far more arguments against its implementation than in favour. Therapeutic jurisprudence was seen to exist in three isolated projects – the Joondalup Family Violence Court, the Perth Drug Court and the Children’s Court Drug Court – but therapeutic jurisprudence was not a guiding philosophy of the department. Essentially the department’s attitude was that it was the Geraldton magistrate’s project rather than a departmental project or a collaborative project between local agencies and the court.

The Geraldton Alternative Sentencing Regime commenced in August 2001. The court and its stakeholders had moved from precontemplation to action in a matter of months. It took several months for the project to take hold in the court. The first person admitted to the intensive court supervision regime track of Geraldton Alternative Sentencing Regime was not admitted into the project for some weeks after it officially commenced. But within 6 months of commencement, there was a regular Monday court list established to deal with Geraldton Alternative Sentencing Regime cases. As far as the Geraldton court was concerned the process of change in terms of the establishment of the project was complete.

The Geraldton Alternative Sentencing Regime continues to operate today. The work of the steering committee has continued with fine-tuning of the project taking place from time to time. Its operation has required the magistrate, court staff, lawyers, community corrections officers, treatment agencies and police to work collaboratively in ways that had not been done previously in Geraldton or in many other places in Australia. It has also required them to work for several years with little support from government in Perth and in the initial stages in the context of a hostile response by Perth departmental management.

Although the Geraldton Alternative Sentencing Regime was registered as a departmental project in 2004, it has continued to struggle to gain resources and recognition. The department did fund an independent evaluation of the project that supported its efficacy in promoting offender rehabilitation and its healing impact upon Aboriginal participants and recommended that the Transcendental Meditation program be further evaluated in the justice system.\textsuperscript{20} Although the court secured funding for additional staff time, no other support has been forthcoming.


Although the Geraldton Alternative Sentencing Regime has received recognition nationally and internationally as well as in reports of the Gordon Inquiry and the Law Reform Commission of Western Australia, it is rarely mentioned in any official material on diversion or rehabilitation programs and until recently was not mentioned on the website of the relevant department.\(^\text{21}\)

The Geraldton Alternative Sentencing Regime stands in contrast to Geraldton’s Family Care Program in terms of governmental support and recognition. The Family Care Program promotes judicial case management of care and protection applications where a team works with parents to resolve underlying issues and reunite the family.\(^\text{22}\) The same processes were used in relation to its establishment as for the Geraldton Alternative Sentencing Regime: the magistrate and clerk of courts working together and the court bringing together principal stakeholders: the Department for Community Development and Aboriginal Legal Service and engaging in consciousness raising, inspiring change, involving the agencies in the change process and seeking their support. Again, there was support for the project and the court worked together with the agencies in relation to the establishment of the project. It was launched in 2004 by the Minister for Community Development and the President of the Children’s Court.

**Conclusion**

The current paper cites the experiences of the establishment and management of the drug courts in Perth and the Geraldton Alternative Sentencing Regime within a framework of the Transtheoretical Stages of Change Model. Although the two initiatives operate independently of each other, similarities in the experiences of the two courts relative to the organisational environment can be identified. It is suggested that the Stages of Change model is a useful framework to apply in considering the process of establishing, developing and maintaining specialist courts such as those considered in this paper. It is suggested that the same framework could be effectively applied in the development of all therapeutic jurisprudence initiatives.

The Stages of Change framework is readily adopted in the engagement and management of participating clients and is a recognised and invaluable tool in seeking to actively engage those participants in a process that effectively demands a commitment to implementing lifestyle changes. The experiences of the drug courts in Perth and the Geraldton Alternative Sentencing Regime demonstrate the parallel organisational processes that are equally demanding but nonetheless essential for the courts to be provided with optimum opportunities to demonstrate their effectiveness.

The paper is confined to a reflective analysis by the authors of the drug courts at Perth and the Geraldton Alternative Sentencing Regime. The study is intended to be considered as an experiential analysis only.


Most significantly, it is suggested that the utilisation of the framework of the Stages of Change can be effectively employed by managing and supporting organisations in planning and implementing any initiatives that may be considered in the spectrum of therapeutic jurisprudential opportunities. Western Australia has been recognisably innovative and supportive in establishing therapeutic jurisprudence initiatives and that support will assist the continued practice development achievable within therapeutic jurisprudence. Perhaps the risk associated with not employing a framework such as that suggested by the authors is that such initiatives are exposed to the increased possibilities of becoming isolated from the broader organisational considerations which in turn potentially reduces the benefits of those initiatives, not least of all to those managing and supporting organisations.
AUSTRALIAN MAGISTRATES, THERAPEUTIC JURISPRUDENCE AND SOCIAL CHANGE

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Abstract

Therapeutic jurisprudence (TJ) is an orientation to decision-making that is attracting interest amongst some judicial officers and courts. A TJ approach emphasises the quality of the interaction between judicial officers and the individuals who appear before them, which is enhanced by direct engagement, empathy and communication. Drawing on a national survey of Australian magistrates, this paper shows that many magistrates are concerned to make a difference to the operation of the courts and those who use them. Magistrates identify many of the qualities and values associated with a TJ approach as important aspects of their work or as the characteristics of a good magistrate, regardless of whether they explicitly or consciously adopt a TJ orientation. There is also some evidence that the capacity to interact positively with citizens is a source of job satisfaction for some magistrates. However, the limited capacity in their current position to contribute to change in the court system is a source of dissatisfaction for many magistrates.

Therapeutic jurisprudence (TJ) is an orientation to decision-making that is attracting interest amongst judicial officers, especially those in the lower courts, both in Australia and overseas. A TJ approach focuses on the quality of the interaction between judicial officers and the individuals who appear before them, with an emphasis on direct engagement, empathy and communication. The core idea is that legal processes have the potential for positive impact on the physical and psychological well being of participants, perhaps ultimately contributing to progressive social change.

This paper examines the TJ implications in individual magistrates’ orientation to their work in two ways. First, drawing on a national survey of Australian
the paper shows that many magistrates are concerned to make a difference to the operation of the courts and those who use them. Second, there is some evidence that the capacity to interact positively with citizens is a source of job satisfaction for some magistrates.

The research suggests that some of the qualities associated with a TJ approach are prevalent among Australian magistrates. At the same time, few magistrates spontaneously use TJ language and some magistrates would actively resist the labelling of their approach as therapeutic jurisprudence. However, when the actual orientations to their everyday work are investigated in depth, magistrates identify many of the qualities and values associated with a TJ approach as important aspects of their work or as the characteristics of a good magistrate, regardless of whether there is an explicit adoption of a TJ orientation.

The paper first provides an overview of the concept of therapeutic jurisprudence and its potential links with social change. It then considers Australian magistrates’ orientation to social change and therapeutic jurisprudence, drawing in particular on findings from the National Survey of Australian Magistrates that show value to society and desire to improve the court system were important reasons for some magistrates when they considered a move to the magistracy. Overall, magistrates are satisfied with importance to society of their work but there is dissatisfaction with scope for improving the court system. The central conclusion is that some of the qualities associated with a TJ approach are implicit in many Australian magistrates’ orientations to their work, even though they might not explicitly adopt therapeutic jurisprudence terminology.

Therapeutic jurisprudence and social change

Proponents of therapeutic jurisprudence emphasise its qualitative differences from traditional adjudication. A more active judicial officer is central to the implementation of therapeutic jurisprudence, distinct from the conventional view of the judicial officer as a passive adjudicator (King 2003; King 2006; King and Aty 2006; King and Ford 2006; King and Wager 2005; McMahon and Wexler 2002; Wexler 2000). Popovic suggests: “the therapeutic jurisprudence approach requires judicial officers who are prepared to modify their judicial style and to embark on a new form of “court-craft”. .. [T]he qualities required for judicial officers adopting a therapeutic jurisprudence approach are different from those required of more traditional judges” (2002: 128). Judicial officers adopting a TJ approach will be more interested in the welfare of litigants, actively interact with and listen to

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1 Magistrates courts in Australia are first instance courts of general jurisdiction. Each Australian state and territory has a Magistrates or Local Court, which hears summary criminal and civil matters. In most jurisdictions, the court is called the Magistrates Court, except in New South Wales where it is the Local Court. Magistrates sit without juries in criminal and civil cases, and decide all questions of law and fact. Magistrates in most jurisdictions can impose sentences of two or three years’ imprisonment for one offence and up to five years for multiple offences. The value of civil cases now heard by magistrates ranges from $20 000 to $100 000. The Federal Magistrates Court is not included in this research. At the time this research began the Federal Magistrates Court was very new and not fully constituted. It has a substantially different jurisdiction from the state and territory courts, with a different relation to the superior courts and faces constitutional constraints not applicable to the state and territory courts.
participants, engage in direct dialogue and be less formal and impersonal than their more traditional counterparts. From this stance, all judicial officers have the opportunity to adopt a TJ approach (Goldberg 2005: 8). “Every judicial officer is able to minimise negative effects and to promote positive effects on participant well-being through the nature of the interaction that takes place between the bench and the party involved” (King 2003: 172). According to the Canadian National Judicial Institute:

Therapeutic jurisprudence asks all judges to recognize that they can be important agents of change, and to acknowledge that their words, actions, and demeanour will invariably have an impact on the people who come before them in the courtroom. (Goldberg 2005: 4)

Alongside this concern with process and the potential positive effects of the judicial/citizen interaction, a TJ approach can also involve the courts or judicial officers working more closely with human services personnel to address various social and personal problems, including drug-abuse and addictions, homelessness, unemployment, and lack of work-related and parenting skills. This demonstrates the judicial officer’s interest in and engagement with the antecedent causes of crime or the behaviour that resulted in a person’s court appearance. It also indicates the willingness to seek input from social services personnel or other experts to aid the decision making process, thus suggesting a team approach, one of the qualities associated with therapeutic jurisprudence judicial officers (Popovic 2006). In the criminal courts a judicial officer can attempt to gain insight into the underlying social or psychological causes of the criminal behaviour, enable assessment of the needs of defendants, and facilitate access to various services for these individuals. A judicial officer oriented to TJ is cognisant of these issues and social problems and seeks the advice and input of social services professionals where appropriate.

The philosophy of therapeutic jurisprudence also underpins, or has influenced, the development of the problem-oriented or specialist courts within many lower (and some higher) courts worldwide. Problem-oriented courts typically espouse a combination of treatment/therapeutic and punishment objectives (Indermaur and Roberts 2003; Lawrence and Freeman 2002; Makkai 2002). The therapeutic ethos can offer a more individualised (deemed as humane/human) remedy or intervention, for example requiring participation in various education or training programs (Nolan 1998). Such an intervention, combined with judicial supervision, aims to assist a defendant to deal with an addiction or other health problem, encourage self-esteem and counter some of the consequences of disadvantage or discrimination (Burns and Peyrot 2003). Problem-oriented courts and therapeutic jurisprudence more generally, espouse a commitment to social agency that emphasises assistance, guidance and treatment that contrasts with the conventional judicial emphases on detachment and neutrality (Emerson 1969: 3).

The interest in TJ as a qualitatively different framework for judging, and the development of problem-oriented courts, has emerged in a context of considerable
social, economic and legal change in Australian society. These changes include reductions in publicly-funded welfare, decline in full-time permanent employment, falling real wages, emergence of the ‘working poor’, increases in the number of post-separation and blended families, deinstitutionalization of mental hospitals, the ageing of the Australian population and declining fertility. Social problems such as unemployment, drug addiction, welfare dependency, homelessness, mental illness and suicide have worsened as result of these broad social changes.

A recent investigation of three impoverished Australian suburbs describes these problems as a ‘depressingly familiar’ route to poverty (Peel 2003: 8). Residents themselves defined the ‘persistent insecurity’ of poverty as ‘always being behind, always being unable to afford things everyone else takes for granted, and always putting up with run-down housing and poor health ... Other people’s mishaps – too many bills coming at once, getting ill, losing a part-time job, having a child with asthma, a broken appliance – were their catastrophes’ (Peel 2003: 8). Each of the suburbs Peel investigated, and many like them, has a magistrates court nearby and many of the people with similar life circumstances appear every day in the suburban and city magistrates courts across Australia.

Magistrates’ orientation to social change and therapeutic jurisprudence

A judicial stance that emphasises interest in and engagement with individuals, open communication, positive input, consideration of the needs and welfare of people and problem solving ‘can transform social relations to some degree’ (Sewell 1992: 20). Such a stance potentially brings about positive social change, which might be local, personal and incremental, and perhaps enduring (Roach Anleu and Mack, forthcoming).

The criminal offending or debt which may precipitate appearance in a magistrates court might be only one aspect of social and economic deprivation, and some of the psychological or personal difficulties that users of the magistrates court experience have their roots in social problems. Every day, people end up the magistrates court in part as a consequence of inadequacies or limitations of other social support systems, e.g. welfare, education, employment and/or mental health. One commentator states: ‘Magistrates’ courts have probably been quicker than the higher courts to adapt to economic, political and social change’ (Freiberg 2001: 8). This observation suggests that magistrates courts may be more attuned to the effects of economic, political and social changes compared with the higher courts that do not deal with the same volume and diversity of cases and participants.

Magistrates and their courts have many opportunities to have a positive impact on the lives and situations of many people. Annually, they deal with ninety per cent, sometimes more, of all criminal and civil lodgements (SCRGSP 2005: 6.16, Table 6.4). Magistrates have responsibility for other types of cases, which might include domestic or apprehended violence restraining orders, coronial inquiries, mining,
occupational licensing, liquor licensing, children (criminal, care/protection and adoptions), and/or diversionary courts. Magistrates courts are concentrated in city centres and suburbs, with locations in regional and remote areas of Australia.

One component of a national socio-legal research project is the National Survey of Australian Magistrates. In 2002 a mail-back survey was sent to 434 magistrates throughout Australia in November 2002 and responses were received into January 2003; 210 surveys were returned, giving a national response rate of 48 percent. By and large, the sample of magistrates who responded to the survey is representative of the population of Australian magistrates in terms of jurisdiction (state/territory), gender, time on the bench, age and geographic location (Roach Anleu and Mack 2003: 2-3). The survey canvassed such topics as magistrates’ reasons for becoming a magistrate and satisfaction with their current position. Responses to the open-ended questions also provide information on magistrates’ orientation to their work.

The National Survey of Australian Magistrates reveals several aspects of the nature and content of magistrates’ desire to make a difference to the operation of the courts and the everyday people who use them. The survey investigates the extent to which value to society and desire to improve the court system were important to magistrates in their decisions to become a magistrate. It also examines the extent to which magistrates are satisfied with the importance to society and the scope for improving the court system.

**Reasons for becoming a magistrate: Value to society and desire to improve the court system**

Some who consider becoming a magistrate might be motivated, at least partly, by having an opportunity to make a difference to many individuals, to put something back into the community and have wider value to people and society. For example, one magistrate interviewed by the Law Institute Journal regarding his appointment commented: ‘It’s the frontline court that deals with the huge majority of cases and, as such, has to be – and is – most directly receptive to the needs of the community’ (Law Institute Journal 2000a: 27). The article elaborates that ‘the belief that he could make a difference’ prompted this magistrate to accept the position. Another magistrate observed: ‘If you [the magistrate] can make a small contribution to having a more just society, then you’re doing something worthwhile for your community’ (Law Institute Journal 2000a: 27; also see 2000b).

Three in five (61%) of the survey respondents report that value to society was an important or very important factor in their decision to become a magistrate. For almost one in four (23%) value to society was a somewhat important consideration, while fewer than one in five (16%) indicate that value to society was not very important or was unimportant in their decision to become a magistrate.
While these findings show that value to society was an important factor for a majority of magistrates in deciding to become a magistrate, there are differences, in particular with respect to age\textsuperscript{3}, gender and time on the bench\textsuperscript{4} among magistrates. Proportionately more of the younger magistrates, women and those who have been on the bench for less than 17 years indicate that value to society was very important in the decision to become a magistrate. The strongest differences exist within the age and gender categories. Approximately one-third of the youngest magistrates report that value to society was very important in their decision to become a magistrate contrasting most markedly with the older magistrates, one-fifth of whom report that this factor was a very important consideration for them. Twice the proportion of women as men indicates value to society as very important (40% of the women, compared with 20% of the men).

The survey also asks about the importance of a desire to improve the court system in the decision to become a magistrate. This factor conveys a more proactive approach to the role of magistrate and a motivation or interest in bringing about institutional change. Two in five (42\%) of the magistrates who responded to the National Survey of Australian Magistrates indicate that a desire to improve the court system was very important or important in the decision to become a magistrate but was not very important or was unimportant for almost the same proportion (37\%). For one-fifth of respondents (23\%), a desire to improve the court system was somewhat important in their decision to become a magistrate.

In their decision to become a magistrate, proportionately more younger, female and recently appointed magistrates identify desire to improve the court system as an important (including very important) consideration. Gender appears to be a significant influence: seven in ten of the women (70\%), compared with just over three in ten of the men (34\%), assess desire to improve the court system as either important or very important. Older magistrates are much less likely than the youngest magistrates to regard a desire to improve the court system as very important in their choice to become a magistrate. Proportionately fewer of the longest serving magistrates assess the desire to improve the court system as very important in their decision to become a magistrate, compared with recent appointees. The different orientations among magistrates indicated by these findings might indicate different personal goals, or they may reflect varying perceptions or expectations about the appropriate role and/or capacity of magistrates to facilitate positive change.

\textsuperscript{3} We classified age into three groups:
* Youngest magistrates = 37-50 years
* Mid-50s = 51-57, and
* Older magistrates = 58+ years.

\textsuperscript{4} Time on the bench is classified into four groups:
* Recent appointees = <5 years on the bench
* Experienced magistrates = 6-12 years
* Well-established magistrates = 13-16 years, and
* Longest serving magistrates = 17+ years on the bench.
Responses to the survey also provide insight into magistrates’ satisfaction with their current position in relation to the importance to society of their work and their scope for improving the court system (Roach Anleu and Mack 2003).

**Current satisfaction with importance to society and scope for improving the court system**

Overall, more magistrates are satisfied (including very satisfied) with the importance to society of their work than with their scope for improving the court system. A substantial majority (67%) of magistrates is satisfied with the importance to society of their work. Very few (less than 6%) are dissatisfied or very dissatisfied with the importance to society of their work and about one-quarter (27%) is neutral: neither satisfied nor dissatisfied. A slightly higher proportion of women is dissatisfied or neutral regarding this aspect of their work compared with men. As time on the bench and age increase, so does the proportion expressing satisfaction with the value to society of their work.

It is not possible to gauge whether these differences between older and younger magistrates or longer serving and more recently appointed magistrates derive from intrinsic differences, or whether experience on the bench over time shapes these levels of satisfaction. The attitudes of younger and more recently appointed magistrates might become more similar to their older and longer-appointed counterparts with the passage of time, or the different attitudes might persist through aging and greater time on the bench, suggesting distinct cohorts of magistrates.

In the survey several magistrates elaborated on orientation to their work and their level of job satisfaction. Many emphasised the satisfaction they derive from the opportunity to interact directly with a diversity of people. They view the interactive process as an important dimension of problem solving which increases the intrinsic value of their work, especially in the courtroom.

One older, female magistrate who has been on the bench for 17 or more years discusses her engagement with people before the court, describes her interest in their circumstances and evinces a strong desire to have a positive impact:

> I cannot think of any occupation, at least one involving legal training, that provides such exposure to so diverse a cross-section of people, their problems, stories, views and attitudes – endlessly fascinating and a real feeling that one is doing some useful problem-solving on a daily basis.

This magistrate does not use TJ language but expresses the attributes usually associated with a TJ approach (Goldberg 2005: 5; Popovic 2002: 129). She emphasises her interest in people and their backgrounds; her interest goes beyond the facts, criminal charges or legal claims involved in a particular case. Her fascination with ‘stories, views and attitudes’ indicates a strong people-orientation, an openness to listen to different viewpoints and in information not filtered by legal practitioners. Her use of the word ‘exposure’ implies an interest in a range of issues not just applying the law and deciding on contested facts. ‘Exposure’ also implies a
non-hierarchical approach to interaction and even hints at a level of vulnerability not encased completely by legal formality and procedure. This magistrate points to the proactive role of the judicial officer and the high level of satisfaction attached to ‘useful problem solving’. That it occurs on a ‘daily basis’ refers to the large number of people that the magistrate is able assist.

Another of the longest serving magistrates (17+ years on the bench) in his mid-50s also identifies the interaction with people and their diverse backgrounds as a strong source of job satisfaction:

I enjoy people and the magistracy has given me great scope to work in a professional capacity with people of all types and from a variety of backgrounds. I can work effectively by myself and I have enjoyed the solo responsibilities of the courtroom.

Similarly, a recently appointed (5 or fewer years on the bench) female magistrate in the youngest group of magistrates (37-50 years) reflects on the diversity of people in the courts and compares her experiences as a magistrate with other legal jobs:

It’s early days for me. At the moment it is a very enjoyable position. At the moment, what I like about it is that, compared to other “senior” legal jobs it lets you have “a life”. It’s nothing like the stress of working up trials or dealing face to face with very difficult clients or witnesses. Ideally, I should have done this job 10 years ago when I had my first child – it is simply a more child-friendly job than most. It is intellectually challenging but not as difficult as the bar. It is the diversity of not only the law but the people who appear that makes it an interesting position.

This magistrate suggests that being on the bench provides some social and emotional distance from participants who are experiencing a range of emotions, compared with being a legal practitioner. She highlights the capacity to be people-oriented, especially as there is not the pressure of preparing for trial as an advocate or the need to deal with possible strains in the professional-client relationship.

Each of these three quotes above from different magistrates emphasises that their capacity or orientation to interact with the individuals who appear in court, to take account of their diverse circumstances and solve problems (which might extend beyond the legal problem) occurs within their formal role as a magistrate. This suggests that their identity as judicial officers is not diminished or compromised by a more TJ or people-oriented approach to their legal professional positions.

At the same time, there are limits to this problem solving or people-orientation. Indeed one (mid 50s, male, experienced) magistrate cautions:

There can, for some magistrates, be a tension in not over-reading their role – to try to be social worker, reformer and popular with everyone – but in so doing miss doing what only they can do and that is actually make a decision about something.
Other magistrates also mentioned making decisions that can positively impact on the lives of the variety of ordinary people that come through the magistrates/local courts as a source of job satisfaction. Several magistrates point out that the significance of magistrates and their courts’ interaction with a large number of ordinary people is not sufficiently recognised or appreciated by governments and public figures. A male, mid-50s magistrate in the longest-serving group observes:

It is an odd situation in Australia. Much of the focus by government, law research, courts of appeal, journals, academics, etc, is devoted to the judges. The judges receive invitations to important events. The politicians tend to emphasise them and in their own minds view the magistrates as doing the ‘less important’ cases. And yet, around Australia, it is the magistrates who are mainly making the decisions in cases, large and small, about the citizens of Australia. It is the magistrates who are the face of justice in courtrooms ranging from huge suburban complexes to small county courthouses. It is a mistake to concentrate on a small group of elite judiciary (whose work is also important) and ignore or fail to acknowledge the central role played in public legal administration in this nation by the magistracy (emphasis added).

This comment suggests that some might perceive magistrates courts as doing less important matters, because perhaps they are legally or factually less complex or serious compared with matters in the higher courts. However, for the many people across the social structure who appear in magistrates courts, magistrates are the face of justice, imparting a human or living quality to their courts. As the quote above suggests, for many people magistrates are the embodiment of justice, and therefore impact on perceptions of the entire justice system as an institution.

However, some magistrates experience frustration regarding the limited opportunities to make a difference or to reform the court system in some way or to improve the experiences of those who appear in the magistrates courts. In the survey, magistrates express considerable dissatisfaction with the scope for improving the court system. Indeed, more magistrates are dissatisfied than satisfied with the scope for improving the court system. Only about one fourth (27 %) are satisfied or very satisfied with the scope for improving the court system, compared with more than one-third (36%), who are dissatisfied or very dissatisfied. A similar percentage (37%) is neutral.

Magistrates’ satisfaction with scope for improving the court system varies by age and time on the bench, but not by gender. The group of magistrates expressing the most dissatisfaction is the most recent appointees: half of these magistrates (49%) report dissatisfaction with scope for improving the court system. In contrast, only one-quarter (26%) of experienced magistrates (on the bench for 6-12 years) express dissatisfaction with scope for improving the court system. Indeed, those magistrates for whom a desire to improve the court system was important or very important in their decision to become a magistrate express the greatest dissatisfaction with the scope for improving the court system in their current position. As age increases, dissatisfaction with scope for improving the court system decreases, with
magistrates more likely to be neutral on this point. The youngest magistrates (under 50) are most likely to be dissatisfied and/or very dissatisfied.

These findings might suggest distinct cohorts within the magistracy, that is younger, more recent appointees espouse different views and conceptions of their role and expectations when compared with their older, longer serving counterparts. Alternatively, the effect of time on the bench and aging may cause the younger, more recently appointed magistrates to become more similar in views to older, longer serving magistrates over time.

In responses to the open-ended questions, some magistrates express frustration at what they perceive to be structural constraints on their capacity to effectively interact with people before the court, including the limited time available to engage with their often complex problems and needs. One experienced (6-12 years on the bench) female magistrate comments:

It is the most exciting, rewarding and fulfilling role when the right time is available to manage cases. I usually just take that time where necessary. The administration/lack of [a] modern view of work is frustrating and makes more work and stress for all levels of court staff. I look forward to going to work each day. I thoroughly enjoy the work and results of extra work on DV [domestic violence], etc. but the time required needs to be allocated internally.

A recent appointee describes the working conditions and lack of institutional support as frustrating and negative dimensions of the job, which she contrasts with the satisfying human dimensions of the work of a magistrate:

I find the human interest aspects combined with the application of the law immensely satisfying – however, the administration of the court process and cases and education and training and lack of support is a frustrating and negative aspect of the job. Experiences vary enormously from court to court.

An older, long-serving (17+ years on the bench) male magistrate describes a different challenge and comments that, from the standpoint of the court administrative structure, decisions or outcomes trump active listening, thereby impinging on the capacity to adopt a more TJ process:

In general the position has enabled me to serve the community in a manner that gives ongoing satisfaction. However, the structure being imposed is meaning that decisions, as opposed to listening to the defendants and clients, is [sic] paramount.

This magistrate identifies a clear tension between a more active (TJ-like) engagement indicated by ‘listening’ and the core judicial task of making decisions. Describing the court administrative structure as ‘being imposed’ implies a lack of legitimacy in these structures. Contrasting ‘decisions’ with ‘listening’ also
reinforces a tension between a (TJ) judicial process and bureaucratic performance measures. Decisions, as outcomes, are more easily quantified than is ‘listening’, a more qualitative and people-oriented dimension of the court process. However, satisfaction with the justice system and the extent to which people assess a procedure as fair (ultimately shaping the perceived legitimacy of institutions) can be more affected by their experience of the process than by the substantive outcome (Tyler 1990). A belief that they had an opportunity to present their arguments, to be listened to and have their views considered by the authorities increases individuals’ willingness to voluntarily accept imposed decisions.

Conclusion

Younger, more recently appointed and female magistrates (overlapping, but distinct categories) appear to have a stronger orientation to change and reform. When deciding to become a magistrate, higher proportions of these magistrates indicate that a desire to improve the court system and value to society were important considerations. Altruism and an interest in making a difference appear to have had more impact on their career decisions compared with older male magistrates appointed some time ago.

This research suggests that some of the qualities associated with a TJ approach are prevalent among Australian magistrates. In particular, the orientation to change, the desire to listen to the stories of those who appear in the magistrates courts and the interest in the human dimensions of their work indicate that many magistrates adopt a less traditional view of their judicial role than that presupposed by the conventional image of judicial decision-making. At the same time, few magistrates spontaneously use TJ language, though they report high levels of satisfaction flowing from their interaction with diverse people and appreciate their capacity to solve problems rather than simply applying the law to the facts. When the actual orientations to their everyday work are investigated in more depth, many of the qualities and values associated with TJ orientation – communication, listening, direct engagement, problem-solving – are identified as important aspects of magistrates work and the characterisation of a good magistrate.
BIBLIOGRAPHY


MAINSTREAMING THERAPEUTIC JURISPRUDENCE IN VICTORIA: FEELIN' GROOVY?

Jelena Popovic

“The assignment of business within a court, although from one point of view administrative, bears so directly upon decision-making that it is essential that it be within judicial control. The same is true of certain other aspects of the conduct of a court's business, such as fixing times and places for sitting. In practice, however, some of those matters are so closely tied up with the provision of resources by the executive that co-operation with the public or civil service is necessary.

This brings me to the question of the provision and application of funds. Most courts are not self-funding. Nor should they be. The concept of "user-pays" has only limited relevance to access to justice. When a court resolves a dispute between two private litigants, it does so in the interests of the entire community, and in the exercise of governmental power. Courts are not merely publicly funded dispute resolution facilities. It is difficult to know who might be regarded as the users of the services of a criminal court. Most courts cannot be fully independent financially. They must obtain their resources from the other branches of government. Yet the arrangements made concerning those resources may affect the capacity of courts to fulfil their responsibilities; and they may also affect both the reality and the appearance of the freedom of courts from executive interference. Constitutions operate at the level of convention as well as law, and considerations of propriety, as well as enforceable obligation, come into play.” 1

INTRODUCTION

From the outset, the author wishes to make it plain that the views expressed in this paper are her own and in no way purport to be made for or an behalf of the Magistrates’ Court of Victoria or any other magistrate for Victoria.

The author is concerned that the views expressed in this paper may be perceived to be critical of individuals employed by government. Any such perception is entirely unintended.

The rational for this paper is to engender thought and discussion in an effort to improve the range of services currently offered by the Victorian Magistrates’ Court and to enable the court to continue being responsive to the needs of the community.

it serves. In order for these aims to be achieved, the relationship between magistrates, court administrators, departmental officers and government policy makers needs to be analysed. Analysis should also serve to enhance the relationship.

The tension between courts and the executive is not a new one, nor has it been a previously unidentified issue. Sir Anthony Mason, Chief Justice of the High court wrote in 1988 about the intrusion of the executive into the judicial realm. His Honour concluded that ‘administration of the court system in which judges do not have any influential voice puts judicial independence at hazard.”

The use of the word “mainstreaming” in the title of this paper refers to the application of Therapeutic Jurisprudence principles by way of legislative powers and governmental policy. Therapeutic Jurisprudence has already been ‘mainstreamed’ in the Magistrates’ Court of Victoria in the sense of being broadly applied throughout the Court rather than being limited to specialist courts.

There has been a slow but noticeable change of perception by judicial officers of their role over the preceding 3 years, with ensuing acceptance and practice of the principles of therapeutic jurisprudence. In Victoria, the support of government has had an impact in facilitating change. The world-wide experience has been that the impetus for therapeutic jurisprudence approaches in courts has directly emanated from the judiciary. This paper will canvas both the benefits and possible difficulties which may arise between courts and government where a governmental policy of therapeutic jurisprudence is implemented.

The author wrote in 2002 entitled Judicial Officers, Complimenting Conventional Law and Changing the Culture of the Judiciary in which the following comment was made:

“In the early stages of the introduction of (court–based) services there was reluctance by the Victorian Magistrates’ court to seek legislative reform or legislative provision for the programs. This reluctance was based on fears that the bureaucracy would ‘hijack’ ‘the programs and that the Victorian Magistrates’ Court would lose its ability to own the programs. The concern was that the programs would become diluted, lost in red tape or bureaucratised. However, there has since been a change of thinking: legislative reform is seen as empowering and legitimating. Judicial officers appear to prefer to make orders where they are specifically


3 That is, there is a difference in approach in Victoria from that written about by Byrne, Farole, Puffett and Rempel in “Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts” 2005 Vol 26 No 1 The Justice System Journal, due to Therapeutic Jurisprudence in Victoria commencing in the mainstream and progressing to specialist courts and lists rather than the other way around.
empowered to make them….This preference is likely to see programs consonant with therapeutic jurisprudence gain further legitimacy as they receive statutory underpinnings.4

Some four years after making this statement, much has changed in the Magistrates’ Court of Victoria. Therapeutic Jurisprudence is the way business is done. It has almost universal acceptance by the magistrates, and the programs are being increasingly utilised in the higher jurisdictions. Although there was an initial delay in magistrates embracing the available programs, they are now in such high demand that the demand far outweighs the supply. The magistrates have become quite discerning of the programs and reliant on their practical benefits in informing them about how to deal with the cases coming before them. The imprimatur of government policy and legislation has been instrumental in bringing about the change in thinking. However, the concerns expressed in 2002 about loss of independence have proven to be real.

THERAPEUTIC JURISPRUDENCE IN VICTORIA – THE HISTORY

The early writings in relation to Therapeutic Jurisprudence note that the greatest impetus towards Therapeutic Jurisprudence approaches emerged from judges who were becoming increasingly frustrated with the ‘revolving-door’ nature of their work.5 That is, the same offenders were returning to the criminal justice system time and time again after completing the punishments imposed on them. They were continuing to commit crimes and be a burden on the community. The reasons behind their offending were unchanged.

One judge has summarised the role of judges in origins of Therapeutic Jurisprudence thus:

“Every generation has had judges who believed there had to be a better way to dispense justice……..”offenders” kept coming back on revocation or new charges taking more and more court time and services. Thus judges began to look at the social sciences and to direct court officers to use the expertise of of mental health, medical and other professionals. These judges wanted solutions that would make an impact on the causes of behaviour so they could do more than just punish the act…the relevance of Therapeutic Jurisprudence became apparent when judges started asking if the conditions or programs (they imposed on a therapeutic basis to change behaviour) required made any difference. Judges were becoming “problem solvers.”6

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It is a truism that many of the early examples of Therapeutic Jurisprudence were personality driven, that is, that they were initiated by charismatic judges and magistrates who brought their personalities into the programs. It has proven to be difficult to 'succession plan’ in terms of replacing those judges have burnt out, retired or moved on.

As previously mentioned, in order to ensure the longevity of worthwhile therapeutic programs, it is necessary to get more judicial officers interested in them and to apply the principles, and clearly this factor is one of the benefits of enacting legislation and having the Government’s imprimatur.

Victoria’s history in regard to the early moves towards Therapeutic Jurisprudence mirrors the experience of the American Courts. Individual Magistrates, most notably Deputy Chief Brian Barrow and later the then Chief Magistrates Michael Adams and the author, saw the need for specialist advice to assist magistrates with offenders coming before the court whose needs were not being met by services outside the court system. The first specialist service, the forensic mental health nurse, came to the court in 1993, followed by Juvenile Justice in 1995, the Disability Officer in 1998, the CREDIT program in 1999 and so on. The Bail Support program was instigated by Corrections Victoria in approximately 2001 but was ‘assigned’ to the Magistrates’ court which has ownership of the Program. Funding was obtained via the Indigenous Issues Unit of the Department of Justice for the employment of an Aboriginal Justice Officer to assist the court in 2002.

The court is the envy of every other in terms of the services it can provide and its holistic ethos in problem solving. However, the services are a hodge-podge in the sense that they are 'owned' and 'funded' via a variety of means which makes them difficult to administer. The term 'Therapeutic Jurisprudence’ was not known to the magistrates who sought to get the programs started: therefore, not only were the

7 The full range and description of Court Support Services can be located on the Magistrate’s Court of Victoria’s website at www.magistratescourt.vic.gov.au.

8 The table below describes who is responsible for the program and how it is funded:

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<th>Program</th>
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<td>Juvenile Justice</td>
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<td>DHS</td>
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<td>Disability Officer</td>
<td>Magistrates’ Court of Victoria</td>
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<td>CREDIT/Bail Support</td>
<td>Magistrates’ Court of Victoria</td>
<td>Program administration is DoJ funded direct to Magistrates’ Court of Victoria, Treatment funded by DHS as part of Tough on Drugs, National Drugs Strategy</td>
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<td>CREDIT</td>
<td>Magistrates’ Court of Victoria</td>
<td>Program administration is DoJ funded direct to Magistrates’ Court of Victoria, Treatment funded by DHS as part of Tough on Drugs, National Drugs Strategy</td>
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<td>Bail support</td>
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<td>Rural drug treatment</td>
<td>DHS</td>
<td>DHS- Treatment funded by DHS as part of Tough on Drugs, National Drug Strategy</td>
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<tr>
<td>Aboriginal Liaison Officer</td>
<td>Magistrates’ Court of Victoria</td>
<td>Indigenous Issues Unit DoJ, direct to Magistrates’ Court of Victoria</td>
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programs an administrative hodge-podge, they lacked a jurisprudential or theoretical basis.

The pioneering Victorian magistrates came upon the work of Winick and Wexler in the early 2000’s and were delighted that our innovative approach was part of not only a wider movement but also of judicial scholarship in America.

Some time after the implementation of some of the programs, the thinking of Government was that the programs needed to come under a theoretical rubric and be more easily administrated. There also needed to be an easier way of providing recurrent funding to ensure the continuation of the programs. It was in this context that the Court’s

Support Services became one of the items in the Attorney-General’s Justice Statement.

In May 2004, the Attorney-General for Victoria, Rob Hulls, launched his vision for the provision of justice in State of Victoria for the next 10 years.  

The Justice Statement aimed to address:

- "Initiatives to modernise the justice system and ensure it remains flexible and responsive to change"
- "Strong measures to safeguard the rights of those who are most vulnerable".

The Court Services division of the Department of Justice was allocated the task of converting the Attorney-General’s vision into a reality.

A Discussion paper was prepared by the Department of Justice entitled: "Policy Framework to Consolidate and Extend Problem Solving Approaches in the Victoria Courts"

The conclusion to the introduction on page 4 of the document states:

“In Victoria, a number of problem solving courts and initiatives have been introduced to respond to people with specific needs including the Drug Court and a range of diversionary and support services in mainstream courts. Evidence of their effectiveness is only just emerging.

The Department of Justice has tasked Court Services to develop a policy framework to consolidate and extend problem solving courts and approaches in the court system. In developing the framework, evidence available from evaluations of and learnings

from pilot programs in Victoria and elsewhere need to be incorporated to ensure that best practice models are employed. As problem solving approaches require appropriate support services, decisions to consolidate or extend them must be based on evidence of success including reduced offending behaviour. The need for careful evaluation has driven the decision to use pilot programs in Victoria, all of which have evaluation components.”

In relation to problem solving approaches, the Justice statement has this to say:

"The problem-solving court is the most common model that has been developed to address defendants with specific needs. Problem-solving courts have evolved in response to particular issues faced by the courts, such as repeat offending caused by drug dependency or mental illness.

Their key characteristics are that:

- They seek to address the causative factors associated with the offending behaviour and thereby reduce recidivism.
- They make active use of judicial authority to change the behaviour of litigants. Judicial officers usually remain engaged in the case to monitor progress and compliance with orders, and dispense sanctions and rewards for breaches and achievements.
- They adopt a collaborative approach, drawing on the skills and resources of different agencies to address the problem.
- The dynamics of the courtroom are changed from the traditional, adversarial process of assertion and denial to the sharing of information and plans to address the defendant’s behaviour. For this reason, these courts are often only accessible to those who are willing to plead guilty. Judicial officers in problem solving courts engage in dialogue with the offender and other members of the interdisciplinary court team. The offender is part of the interaction rather than an observer speaking through their lawyer.”

Arising from the Justice Statement, a successful bid was made to the Victorian Parliament, in the form of a bid to the Economic Review Committee of the Department of Treasury and Finance, for a budgetary allocation to expand the problem solving programs offered by the Magistrates’ Court of Victoria. The

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10 Above n at page 60.
resultant program is known as ‘CISP’ (Court Integrated Services Program), and is the topic of one of the other speakers in this session, Samantha Poulter.

**DOCTRINE OF THE SEPARATION OF POWERS and the INDEPENDENCE OF THE JUDICIARY**

In Australia, the Doctrine of the Separation of Powers has been defined as follows:

“The doctrine that the three arms of Government (executive, legislative and judicial) are separate and that their respective functions and powers are mutually exclusive.” 11

The tensions between the concepts of the independence of the judiciary and the need for administrative intervention have been described thus:

“The modern insistence upon satisfactory accountability of all governmental institutions, which needs to be reconciled with principles of independence, has to be accepted and addressed. A great deal of public money is invested in courts, and the community is entitled to demand that they be administered efficiently and effectively. The public are entitled to expect that individual judges will do their work efficiently, as well as fairly, will manage cases with due regard to considerations of economy, and will deliver judgments reasonably promptly. If judges themselves do not take the lead in developing appropriate techniques of accountability in relation to questions such as this, others will, and those others might not share our understanding of, or respect for, principles of independence.” 12

and

“These processes affect the efficiency of courts, and often involve the application of substantial resources. The public, and the other branches of government, want to be satisfied that the courts are using the funds made available to them wisely. Demands for a suitable level of accountability for the way in which courts apply public money are natural and inevitable. The task of devising appropriate forms of accountability consistent with the requirements of independence is a challenge for modern government, including the judiciary.” 13

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11 Butterworths Australian Legal Dictionary at page 1067.
12 Gleeson, the Hon Murray, The Role of the Judiciary in a Modern Democracy, paper delivered at the Judicial Conference of Australia, Sydney, 8 November 1997.
The Chief Justice of the High Court, Murray Gleeson, has recently delivered a paper entitled “The Right to an Independent Judiciary”14 in which the fundamental importance of judicial independence and the separation of powers, together with some of the threats to those notions, are clearly and forcefully enunciated. The author recommends that any reader interested in the issues raised in this paper read that document and does not intend to reiterate the contents.

The bottom line is that the tension remains in that the Magistrates’ Court wishes, in accordance with the Principle of the Separation of Powers and Judicial Independence, to:

- Maintain its independence from Government and the Executive
- Respond to the needs it sees in the community and the justice system with appropriate programs
- That the programs are easily and quickly accessible
- Be funded appropriately to adequately fund the programs;

But in accordance with its duties, the Executive must:

- Implement Government policy
- Be accountable to Treasury
- Work within budgetary parameters.

It is arguable that the tension between Government, the Executive and the Court is trickier in the context of Therapeutic Jurisprudence by virtue of the historical context of the initiatives having been created, implemented and led by committed judicial officers who have a sense of ownership of the programs. There could be a sense that the executive does not understand court culture and has no interest in understanding it or working within it. Additionally, there could be a sense that if the executive take over the programs, the practicality and immediacy of the programs will be lost to bureaucratic processes.

Additionally, it is the judicial officers who

- Have the daily experience of seeing persons coming before us requiring services and programs
- We are the ones who have to make the sentencing decisions
- We are the ones who have to have confidence in the services and programs as we are the ones who are reliant on them to assist us in our decision making.

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Traditionally, and in line with the principle of the separation of powers, judicial officers have been reticent to have any involvement in policy issues and this has been left entirely to government. Therapeutic Jurisprudence has altered the role of judges and magistrates in this regard. As the architects of problem-solving approaches, judges and magistrates have taken the policy initiative. It may be that this change of roles is confusing to both judicial officers and government alike. In Australia, there has been little analysis of what the effect of the change might be.

When is it permissible for judges and magistrates to seize policy initiative? In doing so, do they impinge on the principle of the separation of powers?

His Honour Thomas J\textsuperscript{15} does not specifically canvas the issue of judicial officers being directly involved in innovations to do with court practices or policy. His Honour comments as follows:

"It is often necessary for judges to make comments and representations to improve the administration of their own courts or the legal system….It is also acceptable that judges may speak out against proposed legislation that will affect their own court. This frequently involves differences of view between government and the court, each having different perceptions as to how the way in which problems should be attacked. It seems to be an acceptable form of self defence that judges may oppose legislation that they think will have a deleterious impact upon their court…..Judges are in a special position to inform the legislators and the public of the benefits or dangers of such legislation or government initiatives. Sometimes judges are in a uniquely advantageous position"\textsuperscript{16}

Thus, it could be argued that it is within the role of judicial officers to be involved in the development and implementation of programs which not only impact on our courts but which have the direct intention of improving the quality of our decisions.

**POSITIVES OF MAINSTREAMING**

There is a clear need for the Executive to assist the Court in the development and maintenance of programs. It is desirable that a jurisprudential and administrative framework be built around the programs. Courts are not traditionally adept at obtaining funding for programs nor should it be the role of courts to find funding. The Court must benefit from the expertise and experience of the executive to obtain funding and ensure that it is available on a recurring basis. The Executive is much more skilled at arranging appropriate evaluation of programs, which is necessary to establish the efficacy of the programs and to ensure ongoing funding.


\textsuperscript{16} Above n.13.
The Executive is better staffed to look at policy and implementation than the Courts, who have previously been engaged in these activities additionally to their pre-existing and on-going workload. There are now many more people to share the work around and hopefully, who have the time to do it better than it was undertaken in the past.

Court staff and magistrates generally do not have a background in Government and are not familiar with the way government and the budgetary process work. With the involvement of the executive, the staff who are assigned to the courts Services Unit understand and have expertise in government processes.

Finally, a ‘whole of government’ approach is more easily achieved if facilitated by the Executive.

**DRAWBACKS OF MAINSTREAMING**

From this magistrate’s perspective, there are also many drawbacks to mainstreaming:

- Loss of ownership of programs and loss of control by the court of how the programs work.
- The Magistrates Court has lost its ability to be creative, as all new initiatives have been taken over by Government or the Executive. The Court is no longer able to set up the programs that our considered necessary or beneficial by the magistrates and the Court in general. The only new programs and initiatives which are now able to be implemented are those that are part of Government policy. The main example of this is that the Court has considered for some time now that the greatest imperative is the need for a specialist mental impairment list or program, similar to those which have now been implemented in South Australia, Western Australia and Queensland. The Court has been able to set up programs which are cost neutral and have not required assistance from the executive such as the Sex Worker List. This list relies entirely on the good will of outside agencies and is a small program which only operates for one afternoon a month.

- There has been little if any, of the ethical issues around the partnerships which are formed with outside agencies or other government agencies.
- The court has become one of many ‘stakeholders’ in the process of devising and implementing programs. The Court, as a stakeholder, is ’consulted’. Consultation can take many forms and does not guarantee the court a voice. It does not necessarily mean that we are listened to or have a greater influence in the decision making than any other ‘stakeholder’.

- The independence of the Courts from Government gives the Court the ability to be critical of other government departments. This is often quite useful as the court is able to advocate for services without being constrained by inter-departmental niceties. The Department of Justice must be more circumspect than the court in terms of taking any action which might upset other Government Departments.
• The Court is concerned that there will be a dilution of the practicality and immediacy of the services which we have in the past brokered for the defendants.

• The Court, quite correctly, does not have a role in the appointment of personnel. One issue which arises is that staff are appointed without any background in courts. These staff members become involved in decision making about the courts which they know very little about.

• There is a sense that all these factors taken together have ultimately resulted in a less respectful treatment of the Court and magistrates and have also resulted in a sense of frustration.

The Executive needs to be mindful that these ‘drawbacks’ may impact on the magistrates’ confidence in the programs they are responsible for. If the magistrates do not have confidence or the programs do not appear to function in a way which benefits the court, they will not be utilised. There are examples of programs initiated by Corrections Victoria where the magistrates were ‘consulted’ prior to implementation. Concerns were voiced about the efficacy of the orders but the concerns were largely ignored. These programs have never had the confidence of the magistrates and have rarely been used, for example, Home Detention Orders17 and Combined Custody and Community Orders18. Government, the Executive and the Court will suffer embarrassment if there is a low take up the programs: the programs will be at risk of being curtailed or removed, and there will be a great deal of difficulty convincing Treasury in future of the needs for programs.

BEST PRACTICE

An example of best practice in Victoria is the establishment, success and expansion of the Koori Court. It would be worthwhile to examine in some detail why this initiative and the collaboration of Government, the Executive and the Magistrates’ Court has been so successful. Without having had the opportunity of conducting an thorough assessment, the author posits her uninformed guess: the Magistrates, the Court’s administrative arm, the Government and the Executive all had a basic concept of how the Koori Court could work, all strongly desired it, and worked towards it cooperatively. Further, deference was paid to the judicial officer, who led the initiative, Magistrate Kate Auty, whose input, based on considerable knowledge, expertise and long established links with the Koori community, was not only respected but largely followed. Additionally, the Koori Court had a foundation built from the recommendations of the Royal Commission into Aboriginal Deaths in Custody19 and of the Victorian Aboriginal Justice Agreement.

17 Sentencing Act (Vic) 1991 s.18ZT.
18 Sentencing Act (Vic) 1991 s.18Q.
CONCLUSION

A tension exists between the bureaucracy and the Judiciary; there has been and continues to be a (uneasy) partnership forming between the two arms of Government for what is perceived to be a common good, but these two arms of Government operate very differently and distinctly.

Could it be that part of the tension is that the courts are keen to innovate and work towards more tangible and beneficial outcomes for individuals, but are not prepared to be told how to change, and conversely, does government or bureaucracy see the move towards Therapeutic Jurisprudence as means by which to change courts?

One potential solution is to have an institution such as a Centre for Courts Innovation, similar to the Center for Court Innovation in New York. The function of the Center for Court Innovation are described as “the independent research and development arm, creating demonstration projects that test new ideas.”

It would be useful to clearly set out the roles and responsibilities of people at the outset of any new project so every-one involved knows where they stand in relation to each of the other participants.

The discussion about ‘why’, (that is, why it is necessary or being implemented) should be had well before a new project commences.

There ought to be more sensitivity about respective roles and also the history of the development of the various programs.

And importantly, all must be clear about who the ‘client’ is.