

## THE CONCEPT OF THERAPEUTICAL JURISPRUDENCE AND WELL-BEING\*

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*Social capital refers to the patterns and qualities of relationships in a community operating from a variety of different sources, including social well-being. The potential for social capital to make a positive contribution to well-being as an outcome of criminal justice is among the priorities of social concern as it is related to capabilities of criminal justice to affect an infrastructure of security around human relationships that are guaranteed by institutions of justice. Constraints related to implementation of traditional criminal justice continually instigate search for more adequate legitimate response to criminal behavior.*

*Therapeutic jurisprudence is a new approach based on the view that the practice of law involves resolution of conflicts between people, and that a legal practitioner, in order to fulfill his or her tasks, must fully understand the social and psychological consequences to the parties concerned entailed by these conflicts as reflected in legal proceedings they are involved with. This article seeks to address some of the therapeutic consequences that law, legal actors and legal decisions could have on both subjective and collective well-being.*

*KEY WORDS: well-being / criminal justice / therapeutic jurisprudence / courts / social change*

### 1. INTRODUCTORY REMARKS

The progress of societies can be seen as a guided process of social change by which each individual can meet the conditions of life to live well. The fight against crime is among the main priorities constituencies in modern democracies believe their governments should have. Criminal justice as it is integrated in a wider crime prevention agenda, stands for addressing security as the major human concern and in that way it contributes to the general sense of well-being. A trial represents a manifestation of power and authority but,

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today, social reaction to crime also calls for apology and forgiveness what is in stark contrast to the traditional legal approach to criminal and civil legal problems, which usually focuses on attributing blame to another and asking a neutral third party decision-maker to assign fault and responsibility to that other (Daicoff, 2011: 15). In the context of well-being, it is becoming increasingly important to examine what judges are actually doing in deciding cases, not merely what they say they are doing. This conforms with a legal realism as a positive (descriptive) theory of adjudication and is opposite of legal formalism that has been the central theory of judging in countries that belong to the legal tradition of civil law whose most prevalent feature is that its core principles are codified into a referable system which serves as the primary source of law.<sup>1</sup>

Realists believe that there is more to adjudication than the mechanical application of known legal principles to uncontroversial fact-finding as legal formalism believes. The central target of legal realism, as an anti-formalist theory, is legal formalism: the classical view that judges don't make law, but mechanically apply it by logically deducing uniquely correct legal conclusions from a set of clear, consistent, and comprehensive legal rules. Pragmatists are not interested in legal tradition at all and are convinced that it would be possible to go beyond tradition in the name of a positive change for society. The result of examination of the nature of judicial process by Benjamin Cordozo was conclusion that "the final cause of law is welfare of society" (Cordozo, 1921: 66). This pragmatic concept that sees the law as the servant of human needs stands in sharp contrast to Aristotelian influential theory of corrective justice as a mean to restore a preexisting equilibrium of rights (Posner, 1990: 1567). Another proponent of the American legal realism, Pauline Tesler articulated the needed balance as the ultimate task of jurisprudence founded on reasoning that includes humanity, reason, and justice (Tesler, 2001: 213).<sup>2</sup> She is advocating for "rights plus" to what she is attributing the meaning of reaching beyond bare legal rights to incorporate the parties' needs, desires, goals, mental status, wellbeing, relationships, and future functioning into the resolution of the legal problem. As opposed to the American realist movement that is concerned with the courts and decisions, the Scandinavian form of legal realism, as the other influential corresponding legal school of thought, is concerned with the legal system as a whole rather than the narrow area of interest of the courts.<sup>3</sup> However, regardless of substantial heterogeneity among legal realists, it is to be noted that, while believing in a rule of law, they pointed to the role of idiosyncrasy in law, hence, they sought to make it more efficient and, at the same time, more certain also by introduction clinical legal education (Tumonis, Šavelskis, Žalytė, 2013).<sup>4</sup>

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<sup>1</sup> In contrast with civil law system stands legal tradition of the common law whose intellectual framework comes from judge-made decisional law which gives precedential authority to prior court decisions on the principle that it is unfair to treat similar facts differently on different occasions.

<sup>2</sup> Jurisprudence is about the science, study and theory of law.

<sup>3</sup> Legal Realism is generally associated with a movement that arose in 1920s and 1930s in the United States of America (USA), re-emerging again later in different forms and influencing legal scholarship and practice. It should be distinguished from its Scandinavian counterpart since Scandinavian realists wanted to explain scientifically how the law changes human behavior. However, both schools of jurisprudence are devoted to empirical research and the use of such knowledge to solve the problems of modern society (Spaak, 2009: 33–83).

<sup>4</sup> Clinical legal education is the study of law and lawyering in context.

## 2. FRAMING THERAPEUTIC JUSTICE

All ideas previously outlined in the introductory part of this article, introduced a type of common sense approach to the problem of legal matters as measured by their impact on human well-being in terms of emotions, psychological functioning, and relationships involved in legal matters, while still resolving the particular legal matter. As a result, different approaches appeared as tools of jurisprudence such as problem solving courts, restorative justice, collaborative law etc. A new orientation in legal philosophy with relevance to legal practice also brought up therapeutic jurisprudence. The concept of therapeutic jurisprudence has been endorsed quickly in different areas, both geographically and in terms of legal practice, starting with enforcing social laws in a humane way but further adding goals to include family law, criminal law, correctional treatment, contract law, etc.

Christian Diesen is explaining therapeutic jurisprudence as an approach based on the view that practice of law involves resolution of conflicts between people, and that in order to fulfill his or her tasks a legal practitioner must fully understand the social and psychological consequences entailed by these conflicts to the parties concerned (Diesen, 2007: 132). Bruce Winick and David Wexler, who are the two authors associated with the creation of the paradigm "therapeutic justice", define the concept as a study of the role of law as a "therapeutic agent" (Winick, Wexler, 1996). Christopher Slobogin defines therapeutic justice as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects" (Slobogin, 1995: 767). For some Scandinavian authors, therapeutic jurisprudence is a part of a wider concept called proactive law that seeks a new approach to legal issues in businesses and societies. Instead of perceiving law as a constraint that companies and people in general need to comply with, proactive law considers law as an instrument that can create success and foster sustainable relationships, which, in the end, carries the potential to increase value for companies, individuals, and societies in general (Haapio, 2006: 21).

Traditional jurisprudence does not have a long-term prevention effect in specific cases that involve the complex socio-psychological or mental issues. Problems remain unresolved and the outcome of the process according the traditional model of court procedure is being treated merely as a "symptom" while the needs of victim are ignored (Halder, 2015: 106). Therapeutic jurisprudence is a movement that is about using science and medicine (including psychology and psychotherapy) as tools to approach victimization, offending, and addressing the harms done by individuals that ultimately will prove better than incarceration, punishment, and "shaming" in the sense of abusing offenders. James Zion builds his argumentation on adequacy of therapeutic justice to be used in the area of criminal justice by examining different facets of its implementation such as who is the "victim" of a crime, is it the state or people who get hurt, do we punish the action rather than the actor, do we punish the actor or perpetrator of violence, and if so, what is the effect of the punishment, do we address (by using healing terminology) the symptoms of violent crime, namely violent acts, by the incapacitation of those who have hurt by incarcerating them, or do we try to discover the etiology of violence as an illness and attempt to address its causes (Zion, 2015: 572).

Therapeutically jurisprudence is interdisciplinary approach that within legal system framework focuses mental health and psychological well-being of all participants in the

process — judges, prosecutors, barristers, experts, and other participants in the process who in the procedure become "therapeutic actors" (Diesen, 2007). The role of law is understood via its "therapeutic effects", and is based on use of theoretical and empirical results of social sciences by legal professionals, with the aim of improving implementation of justice (Wexler, Winick, 1996). However, determination of law as an instrumental concept of conflict resolution that is also concerned with psychological and social factor does not mean that the court decisions are not the results of the traditional court procedure. Attributing additional function to the judges is not undermining significance of legal norms and their implementation in a fair trial that involves elements such as burden of proof or financial compensation.

### 3. PROBLEM-SOLVING COURTS AND THERAPEUTICAL JUSTICE

As traditional criminal procedure is viewed as being impotent to effectively handle the complexity of individual and social problems, failure to deal with what fundamentally causes crime increases probability of re-offending. In the area of criminal law, therapeutic jurisprudence is founded in its practical application through problem-solving courts specialized for certain crimes or certain offenders (Bajović, 2010: 265). Problem-solving courts aim at addressing the "underlying cause" of the normative transgression, as they can tailor sentencing to incorporate various services for the offender that are essentially therapeutic (e.g. drug treatment, counseling or support services for mental health) and impact subjective well-being of the offender more substantively in comparison to the security measures of the continental legal tradition that also aim at eliminating the causes considered to be root of criminal behavior.

Development of therapeutical jurisprudence in the USA is primarily determined by the legal tradition of common law and creation of new legal norms that enabled setting of new judiciary structures in reaction to specific offences and offenders, such as drug-addicts or those with mental health issues, so as to promote their therapy (Hora, Schema, Rosenthal, 1999). These judiciary structures have been labled as *problem-solving courts* according to the approach that is governing their work that is focused on prevention rather than retribution.

The basis of *problem-solving courts* functioning is rooted in the practice and experimental approach to specific crime perpetrators, namely, the drug-addicts. Traditional criminal justice views abuse of psychoactive substances as an act of free will, and, therefore, considers the offender capable of directing his or her actions in the way that will conform with legally allowed. However, that also is the basis for constituting the guilt for the crime committed. Specific judiciary structures — *drug courts* that decide on implementation of therapy for drug-addicts are trying to influence crime committed as a result of drug abuse and look at the act of crime within a therapeutical, medical perspective of a 'bio-psycho-social illness'. Therapeutical jurisprudence and *problem-solving courts* look at the law as an instrument of help to people, especially the individuals with different psychological and emotional problems such as drug-addiction, family violence, abuse and neglect of children, juvenile delinquency, mental health related issues and other. In time, the practice previously described gained significance and spread to other types of cases (Cooper, 2000). Other forms of *problem-solving courts* have been formed ranging from courts dealing with family violence (*family violence courts*) to the courts that combine court supervision over the mental health treatment and community support as a model of

prevention of acts punishable by the law (*mental healths courts*). The core idea of this approach is reshaping and changing of law with the aim of reaching two goals, namely, to minimize anti-therapeutic effects of court proceedings and increase of therapeutical agency when it conforms to other legal goals (Winick, 1996).

The creation of all mentioned judiciary structures stems from acknowledgment that traditional criminal justice in specific cases involves complex social and psychological or mental issues and does not have an adequate, long-term effect in confronting behavior sanctioned by the law. Problems remain unresolved and the outcome of traditional court proceeding only touches upon symptoms as they lay exposed on the surface. These problems result in repeated crime what demands repeated court intervention that again has no means and capabilities to deal with it in a sustainable way. Active and holistic court approach constitutes assistance to the individuals with problems as well as benefiting the community by decreasing the individual suffering and by increasing the quality of life within a community.

New court practice involves synergy of interdisciplinary approach to problem-solving with the leading role of a judge (Winick, Wexler, 2003). The judge and the courtroom become a setting for a "therapeutical drama", and the judge performs the role of a leading actor and coordinates the roles of others who participate in the process. Inclusion of social and educative approach together with adequately informed activities form foundation for undergoing cooperation of a judge with individuals that have a specific problem that brought them before the court. Such an approach provides motivation to accept therapeutical treatment with judiciary supervision.

#### 4. THERAPEUTICAL JURISPRUDENCE AND RESTORATIVE JUSTICE: SIMILARITIES AND DIFFERENCES

Comprehensive approach in court proceedings demands a contextual justice, rather than consistent justice, therefore, serious engagement in problem-solving is needed in relation to specificities of special cases as well as optimal normative "treatment" of injustices that these specificities typically hide, what is, of course, quite complicated to enforce (Braithwaite, 2002). The question "what is a just punishment" should be swapped for the question "what is right solution to the problem", since "the right punishment" in the context of retributive approach is almost always a bad solution to the problem that is a cause of crime.

As opposed to standard court proceedings that allow alternative conflict resolution only in within coordinates of a very narrowly set area, and is not concerned with looking for a sustainable solution, therapeutic jurisprudence is a concept that is similarly to the concept of restorative justice interested in needs of victim of crime.<sup>5</sup> John Braithwaite explains that both restorative justice and therapeutic jurisprudence are based on the structure of proof that includes strict methodologies of social sciences while searching to understand effects that legal practice has on people (Braithwaite, 2002).

Central premise of restorative justice has been constructed in communitarian theoretical tradition as key actors in restorative process are the victim and perpetrator

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<sup>5</sup> Both restorative justice and therapeutic jurisprudence are approaches of criminal justice reaction to crime that are based on psychology and other behavioral sciences as well as results of research in social sciences.

of crime, but also the community itself (Bulatović, 2015: 138). That is why, when it is plausible, the restorative process should include all actors by simultaneously providing assistance and support to the victim and perpetrator of crime, because it is a way to engage the community in the process. Restorative justice promotes reintegration of offenders in the community by confirming their value as human beings with redefining them as equally valuable citizens, as opposed to public humiliation and condemnation (Harris, Walgrave, Braithwaite, 2004).

Therapeutical jurisprudence, as opposed to restorative justice, insists on positive effects of law to restorative process that ends with "healing" of disturbed relationship. This approach is targeting identification of therapeutic and non-therapeutic consequences of legal norms and their implementation, as well as their influence in the sense of increasing therapeutic and diminishing non-therapeutic consequences (Wexler, Winick, according to Halder, 2015: 106). The tools of therapeutic jurisprudence are secured by behavioral sciences, but it is necessary also to search for the key values in order to be able to reshape the legal norms and procedures in a way that will advance psychological functioning and subjective feeling of well-being of all actors involved in the process (Halder, 2015: 106).

Restorative justice and therapeutic jurisprudence are two isolated vectors within a more comprehensive legal concept that includes several elements such as preventive law, procedural justice, facilitative and transformative mediation, creative problem solving and specialized judiciary structures (Daicoff, 2005). Both approaches value active participation in problem solving (King, 2008). However, while restorative justice criticizes criminal justice system for taking over decision on issue of guilt from victims and offenders and emphasizes the need to return the process to their rightful owners, therapeutical jurisprudence is focused on advancement of court proceedings and introduction of therapeutical concepts such as self-determination (Winick, 1992).

Restorative and therapeutical processes in court proceedings highlight the value of justice by empowering the participants to promote their individual psychological and social restoration (King, 2008). In cooperation with different institutions and the community, the process of decision-making in problem-solving is undergoing involvement of individuals and institutions respectively. In this way, therapeutic jurisprudence activates motivation and other internal human resources that are necessary for successful integration in the society, as proponents of this approach are firmly convinced that by forcing and with paternalistic approach it is possible only to provoke negative effects that are not compatible with psychological resilience.<sup>6</sup>

Different positioning of the central spot in the process of redesigning judiciary is, arguably, the most distinguished feature of restorative justice as opposed to therapeutic jurisprudence. While restorative justice calls for a wider institutional and social context in problem-solving, therapeutical jurisprudence emphasizes the role of actors in the process and their empowerment as key requirements for sustainable solution to a problem. This is why for therapeutic jurisprudence is important to understand basic principles of psychology and human behavior, while for restorative justice it is crucial to understand how social structures and their inequalities function. These two stands are not mutually

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<sup>6</sup> Capability to deal with problems and manage stress is labeled as resilience, i.e. psychological resistance. The core of resilience is faith that we are capable of dealing with challenges we face as well as to endure in that effort. Additionally, resilience can be understood as capacity to successfully recover after stressful events in life or to overcome losses, and it can be developed in different ways, so it is important to grasp that legal processes also affect our resilience.

exclusive but rather point towards prevailing ideas on enhancing criminal justice so as to be able to deal with issues beyond formal procedure.

## 5. WELL-BEING AND THERAPEUTICAL JURISPRUDENCE

Central concept of therapeutic jurisprudence is based on influence on well-being exercised by the law and court proceedings. Concepts of well-being and therapeutic jurisprudence are connected along the lines of capabilities of the legal system to contribute to the well-being as a basic social value. Well-being is related to the legal procedures in terms of its adequacy and correctness. Framed in this way, the outcome of court proceedings is less dependent on the very outcome, and more on its righteousness. Adequacy and righteousness are reflected in the goal set to achieve full and complete insight in the case on the basis of presentations by legal professionals that participate in proceedings and by offenders own presentation of the case. It has been confirmed in numerous occasions that adequacy and righteousness of court proceedings has positive effect on the sense of ownership of the outcome, even if it is unfavorable (Tyler, 1996 after King, Ford, 2006).

Well-being is integral part of a multitude of court proceedings, including a major part of criminal procedure related cases what points towards psychological dysfunction being a circumstance of relevance for committing a crime. Victims and perpetrators of crime psychological problems are related to the causes and consequences of crime. In many cases, resolving a dysfunctionality is a precondition for resolving a legal problem or prevention for repeated act of crime (King, Ford, 2006).<sup>7</sup> Therapeutic jurisprudence introduces adequately designed processes and promotes transformative improvement of offenders by dealing with their own basic well-being related problem, what contributes to resolving the legal problem. Therefore, well-being as the ultimate drive of human behavior is of paramount importance for every participant and whole legal system.

To identify relevant well-being aspect of court proceedings, a rigid definition is needed (King, Ford, 2006). In that sense, therapeutic jurisprudence can be defined as "use of social science in establishing criteria for promotion of psychological and physical well-being via legal norms and practice" (Slobogin, 1995: 767). Narrow focus of the court proceeding presupposes looking for specific indicators of well-being such as certain aspects of court proceedings that support examination of social dysfunctions of a person that participate in the proceeding, substance abuse, anger management, depression etc. A wider approach to therapeutic jurisprudence is rather interested in examining how norms and procedures influence well-being, including emotional well-being, as a supportive agent to full personal integrity, than it is in presence or absence of dysfunctions (King, 2008). Different approaches are not mutually exclusive, because presence of dysfunction is actually an indicator of illness. The answer to what it means to be mentally integrated person is sought in the sphere of specific physical and psychological status, achievement of certain level of welfare or combination of the two. The most important elements for achievement of well-being are related to motivation status, self-actualization as actualization of own potential and talents as well as fulfillment of life purpose, and self-acceptance (Maslow after King,

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<sup>7</sup> For example, if offender does not resolve problem of drug addiction, he or she will continue to be in an elevated risk to committ a crime. A disturbed relationship between life partners can have a detrimental effect on their children emotional condition, hece, their well-being.

Ford, 2006: 16). For a complete overview of elements of well-being, the effects produced by institutions and the society as a whole should be added as they can be either encouraging for self-actualization or be an obstacle to it, and primarily, it is referred to in the spheres of education, working environment, judiciary, and health. Only effective individual development can enable expression of full human capabilities.

## CONCLUSIONARY REMARKS

A growing awareness of society's global interdependence and interconnectivity, as well as an awareness of the need for sustainable, non-destructive forms of living and working, have placed a new emphasis on collaboration and cooperation (Daicoff, 2011: 15). Jurisprudence includes principles behind law that make the law. The impact of the judicial system has great importance in society, but the reach and quality of this influence varies. Jurisprudence has social, economic and relational effects that affect all people, especially individuals who appear as parties in the criminal litigation though the effects of proceedings and decisions stretch over the victims of crime and their families, survivors, witnesses and court officials. The tendency to develop a jurisprudence that will treat the law and its implementation as a way of achieving benefit for all stakeholders forms a part of the new legal theories and approaches that become more appealing to a growing body of practitioners.

Therapeutic jurisprudence is in search for the most successful methods to prevent violence incapacitation, deterrence, or repression (with all their frightening civil liberties implications), with a view of getting at the root causes of crime and act on that through successful intervention and prevention tactics. Such understanding of judicial activity includes promotion of the idea of a therapeutic treatment closely supervised by a judge that cooperates with everyone involved in the therapeutical process and is duly informed about its progress. The main challenge in legal interpretation remains to be that of finding a suitable balance between the demands of certainty and those of flexibility so as to optimize the outcomes of a judicial process that plays an important role in calculations of costs of crime that are crucial for assessing the optimal investment into crime prevention what is one facet of well-being.

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## KONCEPT TERAPEUTSKE JURISPRUDENCIJE I DOBROBIT

*Socijalni kapital se odnosi na obrasce ponašanja i kvalitete odnosa unutar zajednice nezavisno od njihovog različitog porekla, a obuhvata i dobrobit kao fundamentalnu vrednost ljudskih aktivnosti. Potencijal socijalnog kapitala da doprinese ostvarenju dobrobiti kao finalnog ishoda krivičnog pravnog reagovanja je u vrhu prioriteta koji se postavljaju kao cilj krivičnog pravosuđa od kog se očekuje da neposredno utiče na bezbednost kao široko definisanog koncepta međuljudskih odnosa koje garantuju institucije za sprovođenje zakona. Tradicionalni pristup krivičnog pravosuđa se suočava sa određenim ograničenjima što upućuje na traganje za adekvatnijim odgovorom na ponašanja koja su sankcionisana krivičnim zakonom.*

*Terapeutska jurisprudencija je nov pristup u sudskoj praksi usmerenoj na rešavanje konflikata među ljudima, koji traga za načinima da profesionalcima u pravosuđu omogući da razumeju socijalne i psihološke posledice koje za učesnike ima učestvovanja u postupku. Cilj ovog rada je da ukaže na određene "terapeutske posledice" u odnosu na dobrobit pojedinca i zajednice u celini, koje mogu izazvati norme, učesnici u sudskom postupku i sudske odluke.*

**KLJUČNE REČI:** *terapeutska jurisprudencija / krivičnopravni proces / krivično delo / izvršilac krivičnog dela / dobrobit.*