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## THERAPEUTIC JURISPRUDENCE AND PROBLEM-SOLVING COURTS

**Abstract:** There is temptation to talk of paradigms shifts in criminal justice. In recent years, therapeutic jurisprudence and problem-solving courts have been identified as ideas that have affected the conceptualization and operation of common-law system. Its basic premises about treatment instead of punishment remind on the assumptions of positivist school of criminology, a social movement developed in the continental Europe during the 1800s and early 1900s, meritorious for promotion of security measure as a special type of criminal sanction in civil law system. The ideas are the same, but approaches of two opposing systems are different. The purpose of this paper is to explore these different approaches, analyzing therapeutic jurisprudence, problem solving courts and security measures. Basic assumptions of therapeutic justice and development of this concept are analyzed in the first part of the research. Second part deals with problem solving courts, its emergence, reasons of establishment and procedure in front of them, while the last part is dedicated to medical security measures, their regulation in civil law systems and different approaches of regular and problem solving courts in dealing with the offenders that need medical treatment.

**Key words:** therapeutic jurisprudence, problem-solving courts, security measures.

### 1. THERAPEUTIC JURISPRUDENCE

In recent years, the word „therapeutic“ become cultural ethos and moral understanding of western culture.<sup>1</sup> There is more and more talk about psychotherapy, beauty therapy, retail therapy, and all others „therapies“ striving to improve the quality of the life. Everything what is „therapy“ and „therapeutic“ become popular in western political and cultural mindsets, lifestyles and everyday experience. In such circumstances, emergence of therapeutic jurisprudence (TJ) has not been surprising.

This concept has been developed in the United States in the late 1980s, as response to general concern over the protection of the personal rights of mental health patients.<sup>2</sup> Starting in the area of mental health law, TJ shortly after expanded

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1 J. Nolan Jr, F. Furedi /2002/: Drug control and the ascendancy of Britain's therapeutic Culture– in: J. Nolan Jr (Eds.), *Drug Courts in Theory and Practice*, New York: Aldine De Gruyter, pp. 215– 233.

2 The term „therapeutic jurisprudence“ was first used by Professor David Wexler in 1987 who is together with Bruce Winick, meritorious the most for development of this concept.

to the criminal law, family law, juvenile law, medical law, disability law and legal profession.

Therapeutic Jurisprudence focuses on the law's impact on emotional life and psychological well-being of individuals, analyzing the consequences that law, legal procedures and legal actors could have.

According to one definition, TJ is „the study of the effects of law and the legal system on the behavior, emotions, and mental health of people: a multidisciplinary examination of how law and mental health interact“.<sup>3</sup> In another view, TJ is „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.“<sup>4</sup>

Its main purpose is to humanize the law and put the focuses on human, emotional and psychological side of law and the legal process.

Traditional normative approach is criticized for being „formalistic“ and „mechanical“, focused only on the correct application of the legal norms, while the consequences of legal decision are not so relevant. Perceived like that, the law and legal system can only regulate social relations threatening with punishment for this one who do not respect the norms. In the lens of therapeutic jurisprudence, the law is not only „the regulator of social relations“ but the tool for their improvement. Therefore, this concept is primary focused on the consequences that legal norms and their enforcement have to the individuals, analyzing the role of law as a therapeutic agent. It suggests that society should utilize the theories, philosophies, and findings of various disciplines and fields of study to „help the development of the law.“<sup>5</sup> Fundamentally, therapeutic jurisprudence focuses on the „socio-psychological ways“<sup>6</sup> in which laws and legal processes affect individuals and society.

According to proponents of this concept, the court process and legal actors will invariably affect how individuals comply with court's decisions. There is belief, for example, that the way a judge behaves at a sentencing hearing can influence how an individual complies with conditions of probation. As stated by Wexler, „if a judge is not entirely clear in formulating a condition of probation, someone may not comply with the probationary terms because he or she never quite understood what it is that he or she was told to do or not to do. How a judge behaves at a hearing can affect whether someone complies.“<sup>7</sup> Individuals are more likely to accept their sentence, and there is a greater likelihood for treatment success, if they are given the feeling that the judge has taken seriously and carefully what they have to say and that they are treated fairly. Even though judge may strongly disapprove of individual's conduct, in the dialogue with offender he/she has to be supportive, empathetic, and

3 B. Garner (Ed.) /2009/: *Black's Law Dictionary*, 7th edition, West Group, St.Paul, Minn.

4 C. Slobogin /1995/: *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *Psychology, Public Policy & Law*, pp. 193–196.

5 B. J. Winick /1997/: *The Jurisprudence of Therapeutic Jurisprudence*, 3 *Psychology, Public Policy & Law*, pp. 184– 201.

6 D. B. Wexler /1996/: *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 *Revista De Derecho Puerto-riqueno*, pp. 273–277.

7 D.Wexler /2003/: *Therapeutic Jurisprudence: An Overview*, International Network on Therapeutic Jurisprudence. (Online) Available: <http://www.law.arizona.edu/depts/upr-intj/>

good listener. These are highly sensitive conversations and offenders will be less likely to recognize their problems and resolve to deal with them effectively if they perceive the judge to be cold, insensitive or judgmental...<sup>8</sup>

Psychological approach to the law has the priority over traditional, normative approach. Underlying principles of psychology are used to determine ways in which the law can enhance the well-being of individuals.<sup>9</sup> The focus of TJ is mostly on benefiting the life of the individual, rather than on moral obligations towards the others. Therapeutic model start to be an alternative to the punitive process, intending to humanize the law and focusing on its human, emotional and psychological side.

In common-law countries, theoretical concept of TJ found its practical application through launching of problem-solving courts, specialized for certain crimes or certain offenders.<sup>10</sup> The first such court, specialized for drug-addicted offenders, was established in Miami, Florida, in 1989. Since than, problem solving courts have expanded rapidly across the United States, and today there are more than 2,500 drug-treatment courts (DTC), community courts, domestic violence courts and mental health courts. Consequently, they started to be very popular alternative to classical criminal courts and procedure not only in the US, but also in England and Wales, Australia and Canada.

## 2. PROBLEM-SOLVING COURTS

Problem solving courts have developed in response to the realization that a „one size fits all“ approach to criminal justice does not work as was expected. The traditional criminal justice cannot effectively handle the complexity of certain human and social problems, what is proved by the high rate of recidivism. It become clear that imprisonment is not a solution for prevention of further criminal behavior of perpetrators who commit the crime because of drug-addiction, mental illness and similar causes.

Social and historical factors that contributed to the development of PSC are:

- a) Rising caseloads
- b) Rise in incarceration populations

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8 B. Winick /2003/: Therapeutic Jurisprudence and Problem Solving Courts, *Fordham Urban Law Journal* 3: 1055–1090, pp. 5–6.

9 For instance, some researches showed that if individuals suffering from health and social problems are treated with dignity and respect at court hearings, they will experience greater satisfaction and will be more willing to accept the outcomes of court proceedings. See: A. Birgden and T. Ward /2003/: Pragmatic Psychology Through A Therapeutic Jurisprudence Lens: Psycho-legal Soft Spots in the Criminal Justice System, *Psychology, Public Policy and Law* 9 (3/4), pp. 342.

10 „There is a clear symbiotic relationship between problem-solving courts [specifically drug courts] and therapeutic jurisprudence. Problem-solving courts are some kind of laboratories for therapeutic jurisprudence, considering that therapeutic jurisprudence is especially interested in *which* legal arrangements lead to successful therapeutic outcomes and *why*“. See: B. Winick and D. B. Wexler /2003/: „Therapeutic jurisprudence as an underlying framework“ – in: B. Winick and D. B. Wexler (Eds), *Judging in a Therapeutic Key: therapeutic jurisprudence and the courts*, Durham: Carolina Academic Press, pp. 105–6.

- c) Changes among the social and community institutions (including families and churches) that have traditionally addressed social and health problems
- d) The struggles of government (legislative and executive) in dealing with these problems
- e) Trends emphasizing accountability of public institutions and technological innovations
- f) Advances of therapeutic interventions
- g) Shifts in public policies and priorities—for example, the influence of the feminist movement has increased awareness about domestic violence;<sup>11</sup>

One particular reason for development drug-treatment court (DTC) movement was increasingly severe „war on drugs“ crime policies enacted in the 1980s in the United States. Such policy resulted in high recidivism rate and explosion of drug-related cases that flooded the courts.<sup>12</sup> „Zero tolerance“ policy of many U.S. jurisdictions meant that possession of even a relatively small quantity of drugs resulted in mandatory minimum sentences.<sup>13</sup> In New York State, for example, possession of half a gram of cocaine or 16 ounces of marijuana requires a minimum sentence of 1–3 years. The „Drug War“, resulted in a 56% increase in drug arrests between 1985 and 1991.<sup>14</sup> However, the practice showed that increased penalties and imprisonment as such, were not an effective solution, as they ignored the fact that addiction cannot be eliminated without effective treatment. „Putting more and more offenders on probation just perpetuates the problem. The same people are picked up again and again until they end up in the state penitentiary and take up space that should be used for violent offenders.“<sup>15</sup> It became obvious that incarceration alone cannot break the cycle of drugs and crime. Statistics showed that at least half of drug offenders sentenced to probation are rearrested within three years, again for the drug offence. Therefore, the needs of changing approach to drug addicted offenders became obvious, and the first special drug-treatment court was established in 1989. Since then drug courts have expanded rapidly across the United States. According to the National Association of Drug Court Professionals, there are currently 1,200 drug courts in the United States. These courts have enrolled more than 300,000 people in their drug treatment programs.<sup>16</sup> DTCs view drug offenders through a different lens than the traditional courts. Traditional criminal justice views drug abuse as a willful choice made by an offender capable of choosing between right and

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- 11 G.Berman and J.Feinblatt /2003/: „Problem-Solving Courts: A Brief Primer“– in: D.B. Wexler, and B.J. Winick (Eds.), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts.*, Carolina Academic Press: Durham, NC.
  - 12 Bureau of Justice Assistance, U.S. Department of Justice, Pub. No. NJC-144531.
  - 13 P. Bentley /2000/: *Canada's First Drug Treatment Court*, 31 C.R. (5th) 257, pp 271.
  - 14 Bureau of Justice Assistance, U.S. Dep't of Justice, Pub. No. NJC-144531.
  - 15 J. Schwartz and L. Schwartz /1998/: *The Drug Court: A New Strategy for Drug Use Prevention*, 25 *Obstetrics & Gynecology Clinics of North America*, 255.
  - 16 National Association of Drug Court Professionals, online: <<http://www.nadcp.org/whatis>>, last accessed February 04, 2004.

wrong. Therefore, the crime committed because of drug addiction is still a crime, and the offender is culpable for it. Contrary to that, DTCs treats drug abuse from a therapeutic, medical perspective, as a „bio-psychosocial disease.“<sup>17</sup> The Drug Courts were a new approach to dealing with offenders in an attempt to reduce drug related crime by *addressing its underlying causes*.

After good results of DTC, similar courts were founded for another crimes or perpetrators– community courts, domestic violence courts and mental health courts<sup>18</sup>.

Procedure before PSC differs from traditional criminal procedure, having in mind that it was designed not to adjudicate or punish offender, but to address underlying causes of criminal behavior. It is not possible to talk about unique procedure before PSC, bearing in mind that it is adjusted to particular type of crimes and offenders. Therefore, procedure before mental health courts differs from procedure before drug-treatment or domestic violence courts. But some of the main principles of Therapeutic Jurisprudence used in all PSC are:

- integration of treatment services with judicial case processing
- ongoing judicial intervention
- close monitoring of and immediate response to behavior
- multidisciplinary involvement
- collaboration with community-based and governmental organizations<sup>19</sup>

For the purpose of this paper in the following chapter is analyzed the procedure before the drug-treatment courts, as an illustrative example of the differences noted above.

### 3. DRUG-TREATMENT COURTS' (DTC) PROCEDURE

DTC procedure is short and informal, primarily designed not to punish offenders, but to cure their addictive behavior. After medical expertise, the prosecutor decides about pre-adjudication diversion into treatment, determining defendants appropriate for that. During the „screening process“ the prosecutor, together with defense council, checks the defendant's criminal history and personal characteristics. The defendants who have a criminal record of violent crimes, or pose a safety risk for the community, cannot be included into the program. Shortly after arrestment, the perpetrator is brought before the judge. Participation in DTC is voluntary. Defendant must agree to receive treatment, plead guilty and give up his constitu-

17 The term „bio-psychosocial“ indicates belief that „biological, psychological, and social factors are deeply woven into the development of addiction.“ See: Center for Substance Abuse Treatment, U.S. Dep't of Health and Human Services /1996/: Treatment Improvement Protocol Series No. 23, Treatment Drug Courts: Integrating Substance Abuse Treatment with Legal Case Processing 1.

18 The first mental health court in the U.S. opened in June 1997 in Broward County, Florida. More about PSC on: <http://www.ncjrs.gov/html/bja/monitor/welcome.html>

19 B. Winick /2003/: Therapeutic Jurisprudence and Problem Solving Courts, *Fordham Urban Law Journal* 3: 1055–1090.

tional right to trial. This initial hearing before the judge lasts only several minutes. In contrast to the traditional criminal procedure, the issue of guilt, in the context of therapeutic jurisprudence, is meaningless. Of greater importance is the therapeutically correct view that one recognizes and confesses one's addiction.<sup>20</sup> The focus is actually on the process of the treatment that starts after that.

The treatment could last five years, but in practice is usually finished after 18 months, and mostly depends on individual progress of the addicted person. Generally, the treatment involves three to four phases that include detoxification, stabilization, aftercare, and/or educational counseling. Detoxification means „drug-cleaning“ and elimination of psychological addiction. The offender is required to submit frequent, sometimes even daily, urine or blood samples. The results go directly to the DTC judge, either by reports from the treatment provider or on-the-spot testing. Treatment provider follows the progress and suggests transition to the next stage, but final decision is on the judge. Stabilization means individual and group psychological and medical counseling that usually last for a few months, but sometimes even more than one year, depending on individual progress of participant. The third and fourth stages (aftercare and educational counseling) are interconnected and based on training and preparing the client to the certain vocations or jobs and life on the freedom. During the whole procedure, the offender makes weekly or biweekly mandatory appearances before the judge and gives urine or blood samples to the control. If the defendant „breaks the deal“ by taking drugs, committing a new crime, or not showing before the judge, the prosecutor continues regular criminal procedure, that was hold in abeyance. Otherwise, upon completion of the treatment, the charges held in abeyance will be dismissed. The process is officially ended by the special hearing, so-called „graduation ceremony“, where the judge brings special decision, some kind of certificate about „successful completion of the program“.

Differences between classical and PSC criminal procedure are illustrated in the next table:

TRADITIONAL PROCESS	PSC PROCESS
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Case- oriented	People oriented
Right-based	Interests or needs based
Emphasis placed on adjudication	Emphasis placed on post-adjudication and alternate dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent-based	Planning-based
Few participants and stakeholders	Wide range of participants and stakeholders

20 The drug court demands a therapeutically revised form of confession: 'I am sick instead of I am guilty'. Guilt, in the context of therapeutic jurisprudence, is meaningless. See: J. Nolan Jr/2001/: *Reinventing Justice: the American drug court movement*, Princeton: Princeton University Press, pp 123–126.

Individualistic	Interdependent
Legalistic	Common-sensual
Formal	Informal
Efficient	Effective

Source: R. K. Warren, „Reengineering the Court Process“, Madison, WI

Therapeutic Jurisprudence and PSC transformed the roles of procedural actors. The people that enter DTC are no longer the accused or the defendant, but client or participant, who needs a help and therapy instead of punishment. A DTC requires a special collaborative effort among judges, prosecutors, defense attorneys and treatment providers. This team-based approach has resulted in the creation of new roles of traditional judicial players. The judge is viewed as the leader of the team. In traditional criminal procedure, the activities of judge are finished with adjudication and verdict. Therapeutic jurisprudence implies the judge as an active controller of the whole treatment procedure. He supervises the treatment through weekly meetings with the addicted person and medical staff. Instead of being only an independent and objective arbiter, he/she became „confessor, task master, cheerleader, and mentor.“ DTC required from the judges to develop new expertise, in order to understand the addiction and drug abuse behavior patterns. During the all treatment process, he/she plays an active role, monitoring compliance, rewarding progress and sanctioning misconducts. The prosecutor and defense attorney are not opposing parties, but members of the team with the same goal– healing of the defendant. The DTC prosecutor main role is to initially check which candidate is appropriate for the program. He/she has to ensure that the offender does not have a history of violence and will not pose a safety risk during the treatment program. During the screening process, defense counsel reviews the defendant’s criminal history with the prosecutor and evaluates whether or not the defendant meet treatment program requirements. Defense counsel ensures that the defendant understands the nature of his/her legal rights, the requirements of the program, and the possible legal consequences if fails to complete them. In DTC procedure treatment providers have much bigger role than in classical criminal procedure. They are mainly responsible for the treatment process itself and keep the court informed about the progress of each participant.<sup>21</sup>

#### 4. THERAPEUTIC JURISPRUDENCE IN CIVIL-LAW COUNTRIES

In the last year concept of TJ got growing popularity in common law countries. Despite the fact that this concept is not limited only to criminal law but on the other legal areas as well, its basic presumptions in the area of criminal justice significantly remind on the ideas of Italian positivist school of criminology, a social movement

21 More about that: Drug Courts Program Office, U.S. Dep’t of Justice, Defining Drug Courts /1997/: The Key Components 6., available at: <http://www.ncjrs.gov/html/bja/monitor/welcome.html>

developed in the continental Europe during the 1800s and early 1900s.<sup>22</sup> Even at that time, this school promoted a medical model (crime as sickness), advocated rehabilitation of offenders and idea that criminals should be treated, not punished. One of the merits of this movement was promotion of special type of criminal sanctions, so-called security measures, that exist in civil law countries for more than one century. In contrast to the punishment that is focused on deterrence and general prevention, the purpose of security measures is special prevention and rehabilitation<sup>23</sup>.

According to Serbian Criminal Code the purpose of security measures is to eliminate the causes that determine criminal behavior (art. 78). Medical measures are mandatory psychiatric treatment (in or out of a medical institution), mandatory drug-treatment and mandatory alcoholic-treatment. Mandatory psychiatric treatment in medical institution could be pronounced to the perpetrator who commits a crime in the state of mental incapacity or substantially impaired mental capacity if, according to the severity of the crime and mental disturbance, there is a serious danger of committing a more serious crime, and treatment in medical institution is necessary for elimination such danger. (Art. 81 CC). The public prosecutor submits to the court a motion for imposition of this measure. The judge decides about the measures after the trial, and independently decides about imposition of psychiatric treatment in or out of the medical institution, regardless of prosecutors' proposal. The measures is on indeterminate time, last as long as the need for treatment, but the court reviews *ex officio*, every nine months, whether the need for treatment in medical institution still exists. (Art. 505–510 CPC) Mandatory drug-treatment could be pronounced to an offender who committed a crime because of drug-addiction, and there is a serious danger that s/he might continue with criminal behavior due to this addiction. Drug-treatment is executed in a penitentiary institution or appropriate medical or other specialized institution and lasts as long as the need for treatment, but not longer than three years. (Art. 83 CC). Mandatory medical treatment of an alcoholic addicted is separate measure, regulated by the special article (Art. 84 of CC), on the same way like the treatment of drug addicted, except the fact that the treatment can not last longer than imprisonment, or in the case of another sentence, not longer than 2 years. (Art. 84 of CC).

Long-standing existence of the security measures in civil-law countries run to conclusion that concept of Therapeutic Jurisprudence (even without such name) is applied in continental Europe as well. However, while common-law world is very enthusiastic about TJ and PSC, in the Europe is some kind of disappointment in security measures and their results. Consequently, this raise the question of differences between American therapeutic justice and problem solving courts and European security measures.

First of all, concept of therapeutic justice is not limited to criminal law, it is only one of the areas of its application. Its focus is on the therapeutic consequences that law, legal actors and legal decisions could have on the individuals and society in general, not only to the condemned persons that need rehabilitation or correction.

22 More about this school: Đ. Ignjatović /2006/: *Kriminologija, sedmo izdanje*, Službeni glasnik, Beograd, str. 158–174.

23 More detailed in: Z. Stojanović /2005/: *Krivično pravo-opšti deo, XI izdanje*, Pravna knjiga, Beograd, str. 308–312.



In the area of criminal law, TJ found its practical application through problem solving courts specialized for certain crimes or certain offenders. As it was explained above, there are drug-treatment courts, mental-health courts, family violence courts etc., established with the purpose to implement different approach toward defendants who commit a crime because of drug addiction, mental illness etc. The purpose of security measures is the same – elimination of the causes that determine criminal behavior, through the treatment of the offenders. Civil law countries do not know special „problem-solving courts“ for imposition of such measures, but they are passed in a regular criminal procedure, by regular courts. The crucial difference is not the way of imposition of the measure (by the special court or in the regular criminal procedure), but the way of their implementation. In Serbian law, judicial job is finished by the pronouncement of the measure, and the treatment is in the hands of medical professionals. Therapeutic justice, contrary to that, promotes the idea of judicial activity during all treatment. He/she supervises the treatment, has periodical (weekly or biweekly) meetings with addicted person, has good cooperation with medical stuff and treatment providers that keep him/her informed about the progress of the patient. During the treatment process, he/she plays an active role, monitoring compliance, rewarding progress and sanctioning misconducts. In the focus of TJ and PSC procedure is not the judge's role to adjudicate the case, but his/her role to follow and control the treatment. For the judge, the case is not finished with adjudication, but with the successful completion of the treatment. In contrast to that, the court does not have such controlling role during the implementation of medical security measures. Truly, it has the duty to „punish“ non-compliance with the conditions of the measure, but the word is only about routine, formal control supervised not only by the same judge. In Serbian Law, for example, in certain circumstances (if the person does not follow the treatment, if the treatment does not show results, etc.) the court can transform security measures of the psychiatric, drug or alcoholic treatment at the liberty in the compulsory treatment in medical institution. The court also periodically, ex officio controls the measure of psychiatric treatment in medical institution passed on indeterminate time, in order to check if the need for treatment still exists. However, these decisions passed during the treatment are not brought by the same judge who determine the security measure, but by the judicial council from the art. 24 par. 6 of CPC.

In both systems the treatment is, with exception of mental incapacity, conditioned by the guilt. Security measure of the mandatory drug-treatment for example, could be passed after the trial (main hearing), as additional sanction to the punishment to the offender who was found guilty in regular criminal procedure. Procedure before DTC excludes trial, but implies defendants' guilty plea. Such plea does not result in a punishment, but in a treatment adjusted to every individual defendant. During the treatment, the charge is hold in abeyance. If the defendant „breaks the deal“ by taking drugs, committing a new crime, or not showing before the judge, the prosecutor proceed with regular criminal procedure that continues with sentencing hearing before the judge. As defendant plead guilty earlier (it was condition for the drug-treatment), there is no need for trial, and the task of the judge is just to pass the sentence. In this „procedural“ sense, drug-treatment procedure in the US

has more similarities with conditional disposal of criminal prosecution (art. 236 of Serbian CPC), than with security measure.

Security measures are type of criminal sanctions, determined by the verdict, mostly in addition to the punishment, in regular criminal procedure. Thus, failure in the treatment cannot result in more severe punishment, but only in treatment's modification (transformation of the treatment at the liberty to the treatment in medical institution). Except of the psychiatric treatment in medical institution that is not time-limited, the other measures can not last more than three (psychiatric treatment at the liberty or drug treatment) or two years (alcoholic treatment), regardless on the results of treatment. In any case, the other pronounced punishment (imprisonment, fine, etc...) will also be executed in addition to the treatment. In PSCs, practical results of the treatment have much higher importance, bearing in mind that duration of the treatment and punishment depends on them. The treatment can not last more than 5 years but its concrete duration and the movement from one stage to another, depends on the individual progress of each participant, what judge decide in every single case. If the treatment gave results, the case is finished; otherwise, it's proceeding with the sentencing.

In the end, concept of Therapeutic Jurisprudence resulted in establishment of special, problem solving courts, specialized for certain offenders. Security measures are passed by the regular court, as result of regular criminal procedure.

## CONCLUSION

The concept of therapeutic jurisprudence has been developed in the late 1980s, promoting an idea of therapeutic consequences that law should have on individuals and society. It found its practical application through establishment of Problem-solving courts, specialized to certain crimes or offenders. They originated in the United States, with the establishment of the Florida Drug Court in 1989. Since then, many other problem-solving courts, including drug courts, mental health courts and family violence courts, have been flourished throughout common-law countries. Basic conceptual premise of these courts is that traditional criminal procedure cannot effectively handle the complexity of creation human and social problems, if fail to deal with fundamental cases almost guarantees re-offending. Hence, the aim of these courts is to address the „underlying cause“ of the offending behavior, by fashioning sentences that involve linking offenders to various services, such as drug treatment or mental health services. Other problem-solving courts include collaboration with social services, assessment of offenders' needs by caseworkers, a less adversarial courtroom and increased interaction between judges and offenders. In addition to these 'altruistic' reasons like 'improving the wellbeing of individuals', PSC had more pragmatic background – they enabled more effective procedure, faster and cheaper disposition of the case based on guilty-plea and good alternative for the problem of rising caseload and overcrowded prisons. However, good practical results of such approach raised common-law enthusiasm about therapeutic jurisprudence and problem solving courts.

Security measures, regulated in the Criminal Codes of the European countries for a century, are based on the same foundation– to eliminate the causes that determine criminal behavior, but such long-standing implementation only provoked skepticism in their results. It is not surprising that same concepts and ideas could have different consequences depending on their practical application. Common-law approach of therapeutic justice and problem-solving courts is based on constant cooperation between judge, prosecutor, defense council and treatment providers and constant and regular judicial– control over the defendant’s treatment and progress. Instead of focusing on the process of adjudication and punishment, the focus is on the procedure of treatment. The question is if such active role of the judge during the treatment is appropriate for judicial function. The opponents would say that the role of judges is not to cure, but to arbitrate, adjudicate and punish. On the other hand, the criminal law has protective function; its purpose is to protect society and its values from the acts that threaten and harms public safety and welfare, while criminal procedure is designed to enforce such protection. This logically raises the question if passing the verdict and the sentence by the judge is enough to provide such protection. In contrast to the regular procedure where judge’s decision only states the break of legal norm having the passive reflection to the future, problem-solving courts’ decisions are orientated *pro futuro*, aiming not to punish but to correct and prevent future breaking of the norms. While the regular criminal procedure looks backward, trying to conclude „what was happened“ problem solving procedure looks forward, trying to prevent future criminal behavior by the common efforts of the all procedural actors–the judge, the prosecutor, the defense counsel and treatment providers. Formal separation of the duty among procedural actors is less importunate than common aspiration toward the same aim– protection of the society and its basic values thorough reduction of criminal behavior.

## REFERENCES

- Garner B. (Ed.) /2009/: *Black’s Law Dictionary*, 7th edition, West Group, St.Paul, Minn
- Ignjatović Đ./2006/: *Kriminologija, sedmo izdanje*, Službeni glasnik, Beograd
- Nolan J. Jr /2001/: *Reinventing Justice: the American drug court movement*, Princeton: Princeton University Press
- Nolan J. Jr., Furedi F. /2002/: Drug control and the ascendancy of Britain’s therapeutic Culture– in: Nolan J. Jr (Eds.), *Drug Courts in Theory and Practice*, New York: Aldine De Gruyter
- Slobogin C./1995/: Therapeutic Jurisprudence: Five Dilemmas to Ponder, *1 Psychology, Public Policy & Law*
- Stojanović Z./2005/: *Krivično pravo–opšti deo, XI izdanje*, Pravna knjiga, Beograd
- Wexler D. B./1996/: Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence, *35 Revista De Derecho Puerto-riqueno*
- Wexler D. B./2003/: *Therapeutic Jurisprudence: An Overview*, International Network on Therapeutic Jurisprudence
- Winick B. J./1997/: The Jurisprudence of Therapeutic Jurisprudence, *3 Psychology, Public Policy & Law*

Winick B. J./2003/: Therapeutic Jurisprudence and Problem Solving Courts, *Fordham Urban Law Journal* 3

Center for Substance Abuse Treatment, U.S. Dep't of Health and Human Services /1996/: Treatment Improvement Protocol Series No. 23, Treatment Drug Courts: Integrating Substance Abuse Treatment with Legal Case Processing 1

<http://www.ncjrs.gov/html/bja/monitor/welcome.html>

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## TERAPEUTSKA JURISPRUDENCIJA I SPECIJALIZACIJA SUDOVA

### REZIME

Koncept terapeutske jurisprudencije razvijen je u SAD krajem osamdesetih godina prošlog veka u cilju ispitivanja emotivnih i psiholoških posledica koje primena pravnih normi ostavlja na pojedince i društvo u celini. Pristalice ovog koncepta kritikuju klasičan normativni pristup zbog preteranog formalizma i insistiranja jedino na pravilnom tumačenju i primeni pravnih normi, insistirajući na sociološko-psihološkom tumačenju prema kome pravo ne treba da bude samo „regulator društvenih odnosa“ već i sredstvo za njihovo popravljnje. Prvi deo rada bavi se analizom ovog koncepta. Ideje terapeutske jurisprudencije našle su svoju praktičnu primenu kroz osnivanje posebnih sudova, specijalizovanih za određene učinioce ili određena krivična dela, tzv. sudovi za rešavanje problema (*problem-solving courts*). Prvi takav sud, specijalizovan za učinioce krivičnih dela usled zavisnosti od korišćenja opojnih droga, osnovan je na Floridi 1989 godine, a kasnije su slični sudovi osnovani i za nasilje u porodici, osobe sa mentalnim poremećajima i za lakša krivična dela. Imajući u vidu stopu recidivizma, ustanovljeno je da klasičan krivični postupak i izvršenje kazne ne daju zadovoljavajuće rezultate kod pojedinih izvršilaca, te im se pokušalo pristupiti na drugačiji „terapeutski“ način, koji akcenat stavlja na lečenje i iskorenjivanje uzroka koji dovode do kriminalnog ponašanja. Pored ovih „altruističkih“ motiva, u pozadini osnivanja ovih sudova nalaze se i pragmatični razlozi – sve veći broj krivičnih predmeta kao i prebukiranost američkih zatvora počeli su da dovode u pitanje efikasnost pravosuđa, te se osnivanje posebnih sudova i lečenje umesto kažnjavanja pokazalo kao dobra alternativa. Postupak pred ovim sudovima kao i uloga krivičnoprocesnih subjekata inspirisani su idejama terapeutske jurisprudencije i u velikoj meri se razlikuju od klasičnog krivičnog postupka. Kao ilustrativan primer u radu je analiziran postupak pred sudom za učinioce krivičnih dela izvršenih usled zavisnosti od upotrebe opojnih droga. Nakon lišenja slobode i medicinskog veštačenja tužilac inicijalno procenjuje koji su učinioци „pogodni“ za uključivanje u program, na osnovu izvoda iz kaznene evidencije i ličnih karakteristika okrivljenog. Ova faza traje svega nekoliko dana a zatim se zakazuje saslušanje pred sudijom.

Samo „sudeње“ traje svega nekoliko minuta, okrivljeni priznaje krivicu te nema potrebe za saslušanjem svedoka i izvođenjem drugih dokaza. Sudija ne izriče sankciju već u saradnji sa lekarima određuje odgovarajući tretman za učinioca, koji se ne naziva okrivljeni, već „klijent“, „pacijent“ ili „učesnik u programu“. Akcenat je naime na postupku lečenja koji sledi nakon toga a u koji je, pored medicinskog osoblja aktivno uključen i sud. Okrivljeni je dužan da se svakodnevno testira na opojne droge, analize se šalju sudiji koji prati tok lečenja i periodično se sastaje sa okrivljenim kako bi pratio njegov napredak. Ova mera se izriče na neodređeno vreme, može trajati najduže pet godina, a konkretno trajanje zavisi od potreba i progressa svakog pojedinačnog pacijenta-okrivljenog. Ako se lečenje pokaže uspešnim postupak je završen, dok u suprotnom sledi izricanje kazne na osnovu priznanja krivice koje je okrivljeni dao kao preduslov uključivanja u program.

Ideje terapeutske jurisprudencije popularne poslednjih par decenija u državama anglosaksonskog pravnog područja, u velikoj meri podsećaju na ideje italijanske pozitivne škole, razvijane u kontinentalnom pravu krajem devetnaestog veka, koja je isticala biološke i psihološke uzroke kriminalnog ponašanja, insistirajući na njihovom lečenju. Decenijsko postojanje mera bezbednosti u državama kontinentalne Evrope navodi na zaključak da su ovde neke ideje terapeutske jurisprudencije zaživele mnogo ranije, čak i bez tog naziva. Ciljevi mera bezbednosti su specijalno preventivni i resocijalizacioni, okrenuti lečenju i popravljanju. Međutim, dok je anglosaksonski svet prilično entuzijastičan idejama terapeutske jurisprudencije i zadovoljan rezultatima specijalizovanih sudova, dugogodišnja primena mera bezbednosti medicinskog karaktera u našem pravu dovela je do izvesnog skepticizma u njihove mogućnosti, te se po logici stvari nameće pitanje u čemu je problem. Poslednji deo rada bavi se ovim pitanjima.

**Ključne reči:** terapeutska jurisprudencija, specijalizovani sudovi, mere bezbednosti medicinskog karaktera.