POST-ADVERSARIAL AND POST-INQUISITORIAL JUSTICE: TRANSCEEDNG TRADITIONAL PENOLOGICAL PARADIGMS

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INTRODUCTION

Criminal justice systems are under constant strain. Rising case loads, crowded court dockets, growing prison populations and high recidivism rates have resulted in growing frustration with systems which have been criticized as being expensive, out of date, complex, unfair, slow and lacking regard to victims of crime and to the public generally (Law Reform Commission, Western Australia 1999:para 1.1). One consequence of these criticisms has been a search for different and innovative methods of dealing with crime and associated social problems (Freiberg 2001; Wexler 2004:86; Daicoff 2006).

In a number of common law countries, theories and practices of restorative justice and therapeutic jurisprudence have developed, creating more inclusive, optimistic and positive frameworks for justice systems and transforming the ways in which public and private dispute resolution systems are conceived of and operate. In these jurisdictions, the growth of interest in different modes of dispute resolution reflects a deep disenchantment with the traditional, confrontational techniques that are inherent in the common law adversarial system. Though therapeutic jurisprudence and restorative justice are the best-known of such theories, they are not the only ones to have been developed, articulated and practiced. Others, including appropriate dispute resolution, comprehensive law, creative problem solving, holistic law, problem-solving courts, managerial justice and multi-door courthouse theory have been influential in shaping public policy and legal education (Daicoff 2006: 1-2).

The purpose of this article is to build upon a developing body of work described as Non-Adversarial Justice (King et al 2009) that attempts to articulate an integrative framework for understanding these developments. This developing body of work suggests, in essence, that necessary changes or improvements to the adversarial system are not to be effected by adopting elements of the inquisitorial system through some form of convergence, but rather by adopting and developing some or all of the philosophical and practical innovations that have emerged in the common law world. It argues that many of these innovations could be considered by inquisitorial systems, albeit with due regard to the historical, political and cultural differences between the two systems (McKillop 2002:49). The broad conception of non-adversarial justice is still relatively new in Anglo-American jurisprudence and is probably even less known elsewhere.

1 Parts of this article are drawn from Freiberg 2007 and King et al 2009. My thanks are due to David Wexler, Julius Lang, Michael King, Jorn Dangreau and Tom Daems for comments on earlier drafts of this article and to Natalie Devitsakis for editorial assistance. Thanks also to Pascale Chifflet for sourcing French language materials and Normann Witzleb for assistance with German language materials.

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Because this article does not suggest the hybridization of adversarial and inquisitorial justice systems but their transformation, these new paradigms might be termed ‘post-adversarial’ and ‘post-inquisitorial’ respectively.

ADVERSARIALISM AND INQUISITORIALISM

The adversarial paradigm has been described as one in which (Australian Law Reform Commission 2000: para 1.117):

[T]he parties, and not the judge have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.

The system is based not only substantive and procedural law, but also on an associated legal culture and ethical base. The criminal trial is seen as a contest between the government and the accused in which the judge plays no part in the investigation and little in the conduct of the case itself or in its preliminaries. The autonomy of the parties is regarded as paramount and the system is said to be premised on conflict, party control, judicial impartiality and zealous advocacy. The interests of victims tend to be secondary.

Common law adversarialism is generally contrasted with Western European inquisitorialism, which is said to be characterized by an active role for the fact-finder, by decisions based on full judicial inquiry and by truth-seeking rather than proof-making. The main differences lie in the role of examining or investigating judges or magistrates, at least in relation to serious offences (McKillop 2002). European systems do not have jury trials in exactly the same form as common law systems, although lay persons sit on the bench in some cases and jury trials which are more akin to common law trials are exceptional and reserved for the most serious crimes.

Inquisitorial systems have not generally recognized guilty pleas and plea-bargaining is only a recent innovation in some jurisdictions. There is a traditional, but gradually shrinking, divide between jurisdictions that adhere to the principle of legality (e.g. Germany, Austria, Italy, Spain and Portugal), whereby the prosecutor is required by law to prosecute where there is sufficient evidence that a crime has been committed, and those that adhere to the principle of opportunity or expedience (e.g. France) which permits the prosecution to exercise a discretion as to whether or not to prosecute, or to apply to a court to terminate a prosecution if the defendant has made amends and there is no public interest in prosecution (Pelikan and Trenczek 2006:68; Casado 2007:2).

The adversarial process is adversarial in name only, if it is conceived as a process dominated by jury trials. In reality, the vast majority of criminal proceedings are determined in the lower courts. In Australia over 90% of cases are heard in the summary jurisdiction, that is, without a jury, and are resolved by a guilty plea, which significantly diminishes, but does not necessarily eliminate, all adversarial elements. (Freiberg 2007). But similarly, in France, over 96% of criminal cases are investigated without an investigating judge and over 99% of cases are heard in the lowest level courts, the tribunal correctionnel (before three judges) or the tribunal de police (before one judge) (McKillop 2002:55). In recent years, the membership of the

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3 I am acutely conscious that the descriptions below are gross generalisations that cannot possibly capture the differences between the legal systems and within them. My purpose is to capture their essential qualities rather than detail. Even the term ‘inquisitorial’ is problematic and one comparative law text eschews that adjective in favour of ‘non-adversarial’, but in a sense that does not accord with our suggested usage (Glendon et al 2007:198).
tribunal correctionnel has been reduced for the majority of cases from three to one, due to the pressure of business. In inquisitorial systems, though guilty pleas are generally not permitted, the reality is that in those cases where guilt is admitted, the formal proceedings are relatively brief, if not perfunctory (McKillop 2002:54). Conviction rates are very high. Increasingly, pre-, or non-court resolution of criminal cases is utilized in order to relieve pressure on the courts (Faget 2004). In both systems, justice is more managerial than adversarial or inquisitorial.

PRESSURES FOR CHANGE

Adversarialism

Adversarialism has long been subject to criticism. It has been described as being too confrontational because cases are presented to courts as disputes and trials are regarded as contests of opposing interests. The process is regarded as antagonistic and confrontational, with primacy being accorded to negating or destroying the opposition’s case rather than to settling the dispute (Strier 1994). Paradoxically, conflict is used to resolve conflict. Its focus on proof rather than truth (Moisidis 2008), and party control of proceedings has been criticized as elevating the interests of the parties over the need or desire to find the truth or to secure justice more broadly (Auld 2001:paras 76-128). Party control is also said to prolong the length of trials and increase their costs because insufficient regard is given to the cost of public resources such as court time and space (Stacy and Lavarch 1999:pp xi-xii).

The concentration upon the interests of the immediate parties to the dispute within a formal adversarial framework is said not to take into account the interests of other persons, who are not necessarily parties to the dispute such as victims.

Adversarialism, however, is not just an issue for the law. It is said to be reflected in a culture of argument and critique which limits creativity in the way that problems may be solved; in particular because it discourages apology, admissions of wrongdoing and the acceptance of responsibility (Wexler 1999:263; Tannen 1998). As King et al observe (2009:4-5):

The justice system is not the sole repository and advocate of adversarialism. Indeed, the justice system does not exist in isolation; to a considerable degree it reflects cultural attitudes and norms that exist in the wider community – including adversarialism. Adversarialism exists in the media, academia, business, politics, religion, sport and families. It is a part of what Tannen (1998) calls “the argument culture” where the taking of an aggressive, argumentative approach is seen to be important in addressing differences between people…

If the less satisfactory elements of the adversarial nature of dispute resolution are to be addressed, it requires not only reform of the justice system but also changes in the broader community (King 2008). The need for change has been recognised in the development of non-adversarial approaches to addressing disputes that do not end up in the justice system. Some non-adversarial approaches are used both within the justice system and the general community.

The non-adversarial justice paradigm represents both a reaction to some of the less desirable features of adversarialism and positive contributions from other professions, jurisdictions and disciplines to the task of dispute resolution and problem solving.
Traditional inquisitorial criminal justice responses to conflict have also been found wanting. Faget, writing of France, criticizes the system for exacerbating the antagonistic positions of the parties and for the technical and complex nature of the criminal justice system that prevents the parties from feeling engaged in the process (Faget 2004:3).

**Imprisonment rates, penal populism and the criminal process**

Other pressures for change have been more practical than ideological. In a number of the criminal justice systems in Europe and the common law world, imprisonment rates have risen steadily over the past three decades, often unrelated to increases in the crime rate and have put pressure on limited and inadequate prison systems and state budgets (Daems 2008). In 2008, the United States the imprisonment rate was around 756 per 100,000 of the population, in the United Kingdom, around 153 per 100,000 and in Australia, 129 per 100,000 (Walmsely 2009). Though imprisonment rates have been rising, European imprisonment rates are generally lower than Anglo-American rates: Spain has a relatively high imprisonment rate of 160 per 100,000, but west and middle-Europe (France 96; Germany 89; the Netherlands 100; Switzerland 76; Belgium 93; Austria 95) and the Scandinavian countries are considerably lower (Denmark 63; Finland 64, Sweden 74; Norway 69) (Walmsely 2009; Oberwittler and Hofer 2005).

One of the factors driving higher imprisonment rates has been the growth of populist punitiveness, or penal populism, which has been described as the process by which politicians tap into, and use for their own purposes, what they believe to be the public’s generally punitive stance (Bottoms 1995:40). This phenomenon is said to have intensified in the United States, the UK, New Zealand and Australia (Pratt 2007; cf Green 2009).

Although penal populism is not unknown in Europe, its prevalence and strength appears to be less than that in Anglo-American jurisdictions (Oberwittler and Hofer 2005:478; Nelken 2009:294; Green 2009). Green (2009:523) argues that punitiveness is linked to dominant value systems and cultural identities (see also Cavadino and Dignan 2006). Societies such as the USA and the UK, he argues, believe strongly in individual responsibility and deterrence so that the demand for punishment in such societies is higher because they seek individualistic means for achieving social goals rather than collective responses (Sutton 2004:171). These countries have majoritarian democracies that are more adversarial than those, for example, in Nordic consensus democracies. Green argues that Anglo-American multi-party democracies are likely to be more adversarial and competitive and I would argue that these values permeate the legal system generally and the criminal justice system in particular.

Using Norway as an example, Green argues that social democratic corporatist countries value more highly egalitarianism and conflict resolution through compromise. These cultural values are likely to affect their responses to crime and criminals. Further, the higher levels of state legitimacy in these countries have tempered the effects of penal populism and consequently the use of imprisonment (Green 2009:523).

If Green’s argument is correct, and it has some degree of persuasiveness, there are two paradoxical effects in relation to the prospects of engendering a ‘post-inquisitorial’ culture in Europe. The first is that there may be less pressure to develop
such a system because imprisonment rates are less of a problem and public demands for retribution and individual responsibility are not as great.

On the other hand, the existence of more social democratic, collectivist social and political cultures, and a greater faith in the role of government in responding to social problems, should mean that theories such as restorative justice and therapeutic jurisprudence should find more fertile ground for their development.

Pressures for change are evident in other parts of the criminal justice system as a result of increasing crime and imprisonment rates (Tonry 2006). The inquisitorial system has not been immune to criticism for lengthy court dockets, excessive delay and overcrowded prisons (Daems 2008; Nelken 2009:303). In 1989 the Italian court system moved from a purely inquisitorial to a mixed system partly because of extensive delays in getting cases to court—some lasting up to ten years (Glendon et al 2007:913; see also Nelken 2009:302). Congested court dockets and overflowing gaols resulted in the use of amnesties to relieve prison overcrowding and the development of ‘trial avoidance techniques’ such as agreed sentences and summary trials (Ma 2002:39). In January 2010 the Italian government declared a state of emergency in the prison system because of severe overcrowding.

Court delay is also endemic in many other jurisdictions. In order to deal with these problems, prosecutors have been given more power and discretion to divert cases. Prosecution-based sentencing is common (Ma 2002). In Germany, for example, half of all criminal cases are diverted from the courts (Oberwittler and Hofer 2005:474; Nelken 2009:304). Ma (2002:32) notes that in France congested calendars in the Assize Court, which deals with the most serious offences, has resulted in a form of plea-bargaining known as ‘correctionalization’ which results in the transfer of jurisdiction of cases to lower (and speedier) courts in the French curial hierarchy (McKillop 2002:51). This process is also evident in Belgium and for the same reasons. Though this process does not involve a direct bargain with the offender, it does involve the alteration of charges in the name of expediency. In Sweden and Finland, mediation has been used as a means of decreasing the pressure on the courts (Deisen 2006:136).

If non-adversarial ideas, particularly therapeutic jurisprudence and restorative justice, were a response to the failures of Anglo-American punitive adversarialism, the question is, how applicable might these ideas be to inquisitorial systems (Diesen 2006:156ff)? It is my contention that they are equally applicable because the ideas and values underpinning and driving these changes are neither jurisdiction-specific nor fundamentally inimical to the culture, jurisprudence or practices of the diverse legal systems that make up modern Europe.

In the following section, I outline the major features of non-adversarialism and explore how they might apply to inquisitorial systems.

ELEMENTS OF A NON-ADVERSARIAL JUSTICE SYSTEM

What is ‘non-adversarial justice’? Briefly described, non-adversarial justice is an approach to justice, both civil and criminal, that focuses on non-court dispute resolution but includes processes used by courts that may not involve judicial determination and court processes that involve judicial officers both pre- and post-determination of guilt or sentence in exercising more control over process. Its basic premises are prevention rather than post-conflict solutions, cooperation rather than conflict, and problem solving rather than dispute resolution. The aim is truth-finding,
rather than dispute determination, and it adopts a multidisciplinary rather than a legally focused approach.

Daicoff (2006) has suggested that non-adversarial approaches to the law have emerged for a number of reasons: a change from Enlightenment values of certainty, autonomy, individualism and personal rights to post-modern values of uncertainty, connectedness and group values, as well as the development of various jurisprudential theories (legal realism, feminism and critical legal studies). Personal and professional disillusionment with the conflict-based theories and practices of law has also led to the search for more effective, productive and satisfying means of resolving disputes and solving legal problems.

In Non-Adversarial Justice we identify a number of elements of a non-adversarial justice system, some of which are more applicable to the inquisitorial system than others (King et al 2009: Chapter 1). They are (1) the relationship between public and private interests; (2) the relationship between the court system and the broader justice system; (3) the difference between problem-solving and dispute resolution; (4) the importance of process as well as outcome; (5) the importance of partnership; (6) the role of judges; (7) the importance of inter-disciplinarity and (8) the need for a comprehensive approach.

(1) Public and private interests

Non-adversarialism does not seek to erode individual rights and freedoms, nor to replace the public court system: there will always be a role for courts, however constitutionally configured, in interpreting the law, scrutinising the behaviour of governments and public officials, and determining the rights and liberties of individuals, as between themselves and between themselves and the state. Non-adversarialism, particularly as it operates in relation to mediation and other forms of private dispute settlement, has been criticized on the basis that the private resolution of disputes, or the development of private dispute resolution systems, can reduce corporate and governmental accountability, create a multiplicity of standards or rules and exacerbate existing power imbalances between the rich and the poor (Cannon 2004). However, it remains the case that private dispute resolution systems, both adversarial and non-adversarial, work under, and in the shadow of, formal legal systems. Private systems cannot, and will not replace public systems of ordering. Rather, the issue is how much space each of them should occupy.

Courts under an inquisitorial system also play a central role in any justice system, possibly more so than in adversarial systems because of their active involvement from the early stages of investigation. Where the principle of legality applies, the courts assume an even greater role vis-à-vis prosecutors, who have minimal power to plea-bargain and prevent cases going to court. Where the principle of expediency applies, courts retain an important role in approving agreements with regard to the sanctions to be imposed (or agreed to) between the prosecution and defence.

(2) Justice systems, not court systems

Non-adversarial justice sees the justice system as more than the operation of courts. Though courts are an important forum for the resolution of disputes, they are not the only mechanism for so doing. It has been shown that many, if not most, disputes are settled prior to a formal court hearing. The growth of non-adversarialism can be discerned in both the formal and informal justice systems.

Diversion schemes
The term ‘diversion’ is frequently used to refer to schemes or programs by which disputes are resolved, or problems solved without direct judicial determination, either formally or informally. These programs aim primarily, to divert or remove offenders from the court system. Non-adversarial approaches to justice do not assume that courts are the only or best means by which disputes can be settled or problems solved. However, ‘diversion’ is also used to describe programs whereby a person is brought before a court, but is then re-directed (usually temporarily) into a program for some form of intervention, to be then returned to court for a decision about a final disposition. Diversion schemes and intervention programs are consistent with the non-or less-adversarial paradigm in that they shift the focus of dispute resolution away from the courts, may involve judicial monitoring or supervision of orders and may involve the co-ordination of a number of agencies in the management of an accused or offender (King et al 2009: Chapter 10; LRC WA 2009:19).

In Europe, jurisdictions that apply the principle of legality in theory require all cases to go to court. To the extent that diversion is a product of plea-bargaining, there are a number of structural differences between the adversarial and inquisitorial systems. Because the concept of a guilty plea is absent in the latter system, no bargains can be struck between the prosecution and defence: the prosecution has a different duty to the court and the judge is involved in the preliminaries of the case, at least in serious cases. And as noted, this legal structure is theoretically antithetical to prosecutorial discretion and to the idea of limiting the process to proof-making rather than truth-finding. On the other hand, the fact that the police, prosecutors and courts are involved from the very early stages should mean that, at least in theory, the inquisitorial system should be more conducive to court administered, or court supervised therapeutic intervention programs.

In Germany, the principle of legality does not allow for extensive discretion but under provisions of the Criminal Procedure Code introduced in 1999, a prosecutor has the power to defer a charge, or drop a charge in a misdemeanour case if (a) reparation or restitution is made; (b) a fine is paid favour of a charitable organization or the state or (c) if a serious attempt at Victim-Offender Mediation (VOM) is made and compensation or restitution is made (s 153a(1); Trenszek 2001:367; Ma 2002:35ff).

In Italy, the principle of legality requires the prosecution to take action. However, in some cases the prosecution may ask the judge to dismiss a case, refer it to the judge handling the preliminary investigation to continue the normal judicial process or refer the case to a social service or to a mediation centre (Mestitz 2008). Under the Criminal Procedure Code of 1989, a full trial may be avoided by a process of ‘agreed sentence’ whereby the prosecution and defence can enter into an agreement as to the appropriate sentence, without a trial, subject to judicial review (Ma 2002:39). There is no indication whether these agreed sentences include some form of rehabilitative intervention.

In jurisdictions that follow the expediency principle and where prosecutors are not obliged to file charges, cases can be processed in a number of ways, depending upon the seriousness of the crime. Under these systems, prosecutors wield extensive powers, much of it that is not subject to judicial supervision or monitoring. In France, for example, where the prosecutor has a wide discretion; Article 40-1 of the Code of Criminal Procedure offers three courses of action to the public Prosecutor (Procureur de la République): (1) initiation of a prosecution; (2) implementation of an alternative to prosecution or (3) closing the case without further action, if the circumstances of
the offence so warrant. A process referred to as ‘composition penale’, (conditional suspension of prosecution) introduced in 1999 permits the prosecution, before the beginning of formal proceedings, to offer the defendant the option of diverting the case from the court in exchange for an admission of guilt (Glendon et al 2007:944).

The majority of cases do not end in a criminal trial and it is estimated that some 50-80% of cases are disposed of under option (3) ‘no further action’ (Ma 2002:31).

Under option (2), there are some sixteen conditions of diversion (only some of which are rehabilitative) including the payment of a mediatory fine, restitution of goods, surrender of a vehicle, withdrawal of driving or hunting licences, undertaking of a training course within a health, social or professional structure, prohibitions on drawing cheques or using credit cards; prohibiting contact with victims or co-offenders or attending the scene of the offence, surrender of passport, reparations or undergoing of treatment pursuant to an ‘injonction thérapeutique’. If the conditions are fulfilled, the prosecution is withdrawn. There are about 50,000 conditional suspensions each year. Between 1994 and 2006 the number of cases dealt with under these general provisions increased from 68,879 to 468,085; having risen from 10.1% of cases that could be prosecuted to 38.1% of such cases (Ministère de la Justice 2008:107-109; Aubert 2009:12).

The process of victim-offender mediation as a diversionary measure is discussed further below. It appears to be a popular form of diversion and is primarily prosecution-driven (see restorative justice below; Pelikan and Trenczek 2006:82). However, diversion programs that involve mediation, reparation, payment of a relatively small fine should be distinguished from those that involve the accused person being encouraged to undertake rehabilitative programs which might relate to an accused’s drug and alcohol addiction, mental disorder, intellectual disability, ability to manage anger and the like (King et al 2009:171). It is in these areas that the concepts of therapeutic jurisprudence are most applicable and are discussed in more detail below.

(3) Problem solving, not dispute resolution

Non-adversarial justice attempts to move beyond the presenting legal issue to focus upon other dimensions of the problem that may have engendered a legal dispute. The development of problem-solving court courts in the United States, Canada, the UK, Australia, and elsewhere is evidence of the failure of social services and traditional court systems to cope with major social problems.

Neither adversarial nor inquisitorial systems lack in specialized courts be they juvenile courts, administrative courts, financial courts, commercial courts and others. However, specialized courts, which deal with relatively narrow classes of legal dispute, are not the same as problem-solving courts, which require, but are not limited to, specialization.

The concept of the ‘problem-oriented’ or ‘problem-solving’ court emerged in the United States in 1989 with the creation of the first drug court in Florida. Since its inception, there are now over 1,700 drug courts, 350 domestic violence courts, 90 mental health courts and hundreds of other similar courts in the United States (Farole et al 2008:1). There are also community courts, alcohol courts, homelessness courts, tribal courts, child welfare treatment courts, drive while intoxicated courts and others which adopt problem-oriented techniques Such courts also operate in the United Kingdom, Canada, Australia and elsewhere (King et al 2009: Chapter 9).
Berman and Feinblatt define a problem-solving court as one that seeks to use the authority of the courts ‘to address the underlying problems of individual litigants, the social problems of communities, and the structural and operational problems of a fractured justice system, and.’ (Berman and Feinblatt 2001:130-1).

Their major features are that they seek to improve case outcomes by reducing recidivism, improving health outcomes for offenders and where appropriate, improve relationships between offenders and victims. They seek to change the way that governments respond to social problems such as addiction or mental illness. They rely on the active use of judicial authority to change the behaviour of litigants and employ a collaborative approach, working with government and non-government agencies. They also seek to change the traditional roles of the parties involved in the adversarial process (Berman and Feinblatt 2001; Blagg 2008; King et al 2009: Chapter 9). More recently, King’s ‘solution focused’ approach has suggested that courts should not aim to solve underlying problems for defendants but to facilitate change through the court and community agencies engaging and working with defendants. The argument is that the latter better reflects research findings on how behavioural change happens. Under this conception of ‘problem-solving’, treatment augments, rather than takes precedence over, natural change processes of the individuals concerned (King 2009).

Therapeutic jurisprudence

Drug courts emerged as practical responses to real-world problems faced by judges. Contemporaneously with their establishment and evolution the concept of therapeutic jurisprudence was being developed by Professors David Wexler and Bruce Winick in the United States (Wexler 1999a). The concept commenced in mental health law, but has expanded to many other areas of law. It has been described as follows:

Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied (International Network on Therapeutic Justice Jurisprudence).

It has been regarded, and criticized as, part of a broader movement that has seen the creation of what has been termed a ‘therapy culture’ (Nolan 1998; Furedi 2004; Daems 2010).

Therapeutic jurisprudence is not simply a field of intellectual discourse - it has significant practical implications in the daily work of the judiciary, lawyers, legal educators, police, prosecutors, law makers, those involved in policy development and behavioural scientists involved in the work of the legal system. Therapeutic jurisprudence draws from the behavioural sciences by proposing ways in which the law in action may be reformed. Like the behavioural sciences, the law has an interest in the functioning of the human psyche and in behavioural change (King et al 2009:29; King 2009:24).

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4 [www.law.arizona.edu/depts/upr-intj/](http://www.law.arizona.edu/depts/upr-intj/)
Wexler suggests that there are four areas of inquiry and these apply to all legal systems including those where there is no direct court involvement: (1) the role of the law in producing psychological dysfunction; (2) therapeutic aspects of legal rules; (3) therapeutic aspects of legal procedures and (4) therapeutic aspects of judicial and legal roles (Wexler 1991:19; King et al 2009: Chapter 2; King and Guthrie 2008).

Although the concept of therapeutic jurisprudence was formulated in the United States, it has been readily adapted to legal systems around the world, including those of Australia, Canada and New Zealand. The concepts of therapeutic jurisprudence are not peculiarly applicable to adversarial systems, though it is in those systems that it has developed to date. They are of universal application. Approximately 1,500 articles, monographs, special editions of journals have been published over the past two decades on this topic but almost none in Europe (Ciapi 2000). Its influence in Europe is still in its early stages (Van Manen 2000-2001; Diesen 2006). However, because of a greater European skepticism towards therapy and public and private emotion, it may never flourish to the extent that it has in some Anglo-Saxon cultures.

In the field of criminal justice, therapeutic jurisprudence has been applied in areas such as criminal law and procedure, child witnesses, family and juvenile law, family violence, sentencing and offender rehabilitation, sex offending, restituation and compensation, plea bargaining, evidence, the legal profession, and more generally to theories of restorative justice, mediation, problem-solving courts, creative problem-solving and legal education (King et al 2009: 23; Daems 2010). It has taken a particular interest in the effect of the law and legal processes on the emotional wellbeing of judges, lawyers, offenders, victims and law students.

Therapeutic jurisprudence principles may fit even better with inquisitorial trial processes than they do with adversarial trials. French criminal procedure in the process of investigation and during the trial itself allows an examination of the background, personal circumstances and personality of the offender in order to obtain a holistic view of the person. This examination, known as personnalité, is not reserved for sentencing, as is the case in common law systems but is embedded in the whole process of investigation, determination and disposition (Lerner 2001 cited in Glendon et al 2007:207; McKillop 2002:58). In theory, the French trial has:

strong rehabilitation and dignitary goals. To achieve these ambitious ends of individualized justice, the French justice system seeks as much information as possible about the defendant; this relates to the ‘truth-seeking discussion’ model of a French trial…. The personnalité is, therefore, an affirmation that the person before the court, though accused of a grave crime, is a human being with a unique life story that deserves to be told and understood, not a faceless monster (Lerner 2001; cited in Glendon et al 2007:208).

Medical, psychiatric and psychological evidence is given by witnesses who are called by the court and not by the parties. King’s observation that

... there are basic principles associated with motivation and positive behavioural change that are based on empirical research that should inform all judging and advocacy practices in problem-solving courts. Among these basic principles, self-determination, the promotion of procedural justice values and

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practices based on health compliance principles… (King 2009:26)

would seem to apply equally to all courts that seek rehabilitative, therapeutic or correctional outcomes in their dispositional process.

Problem solving and diversion

Problem-solving in relation to diversionary, or quasi-compulsory treatment, programs for drug offenders have taken various forms in Europe, often depending upon the degree of discretion allowed to either the prosecution or the judge. The European Legal Database on Drugs provides a useful overview of the various schemes.

In many jurisdictions, at the pre-trial stage, a prosecution may be suspended or waived on condition of the accused undergoing treatment, with the discretion left to the prosecutor or the judge, depending on how far the case has advanced into the system. In France, for example, under Article 41.1 of the Code of Criminal Procedure, an offender may be invited to undertake, at his or her own expense, training in relation to drug awareness.

Judicial mandating of treatment as part of a sentence, sometimes to avoid imprisonment, has been available in Europe but these programs usually transfer power over the offender to the treatment authority rather than retaining the supervisory power in the court, as is the case with drug courts in common law jurisdictions. In France, for example, an ‘injonction thérapeutique’ may be ordered by the Prosecutor prior to, or instead of, initiating prosecution, where an offender is thought to have been under the influence of illicit substances and in need of treatment. This form of intervention may also be ordered at subsequent stages of the criminal process, including by the investigative judge or the judge in charge of detention matters, in the context of a ‘contrôle judiciaire’ over an offender in provisional release. Under this latter procedure, in relation to drug addicts, diversion for treatment may take place where the investigating judge decides that it is appropriate and there is the possibility of judicial supervision prior to trial under Article 138 of the Code of Criminal Procedure (UNODC 1999:28). Under this procedure, similar to bail, the judge may impose conditions upon the accused, including examination, treatment and care, even in a medical facility. In some circumstances, sentence can be postponed for the purpose of sending a person to a centre for compulsory treatment.

In other jurisdictions, general statutory provisions allowed for the settlement of cases, on conditions, such as in Germany, which allow prosecutors to terminate prosecutions on condition that the person undertake treatment.

Problem-solving courts in Europe

Problem-solving courts have not been adopted in Europe to anywhere near the same extent as they have in the common law jurisdictions mentioned above. There is one pilot drug court in Ghent, Belgium and two in Norway. The recently-created European Association of Drug Treatment Courts (EADTC) has brought together drug treatment professionals from Belgium, Spain, Bulgaria, the Netherlands, Sweden, Norway, UK and South American countries. However, the European literature on problem-solving courts in Europe is still sparse (Reker 2007; Reker and Mayr 2009).

There are various reasons for the lack of uptake of problem-solving approaches in Europe. First, the same pressures on the courts (and their disillusionment with

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http://eldd.emcdda.europa.eu/html.cfm/index5174EN.html#
traditional approaches to crime) may not apply to European courts. In the United States and Australia the relevant factors were: increasing frustration among the courts and the public with traditional approaches to case processing; rising court case loads; burgeoning prison populations; a breakdown in traditional social and community institutions which have supported individuals in the past; the difficulties faced by courts and correctional authorities in providing offenders with adequate or effective services and improved therapeutic interventions. Most importantly, it has been the realization that recidivism, where caused by underlying physical, psychological, social or economic circumstances, is better, and probably more economically, dealt with by effective social intervention than by harsher sentences (Berman 2000).

It may be that in Europe problems of drug addiction are not as great, or there are more medico-social approaches, such as have been adopted in Switzerland; or that other non-court approaches to the problem are more commonly used and more effective. Another reason may be that the evidence for the efficacy of quasi-compulsory treatment is still, at best, equivocal (Stevens 2004). Or it may be that the resistance to the idea of using the courts as agents of personal and social change, which was, and is still, evident in those common law jurisdictions that have introduced problem-oriented courts (e.g. Hoffman 2000; Nolan 2003 cf Nolan 2009) is greater in Europe.

There are many models under which problem-oriented courts operate: pre-sentence bail schemes, statutory pre-sentence schemes and sentence schemes using suspended or other forms of conditional sentencing options. There would appear to be no legal barriers to their adoption in inquisitorial jurisdictions.

In Belgium, the Ghent Drug Treatment Court,7 established in May 2008, operates on the basis of a diversion from normal prosecutorial process. The same judge, prosecutor and liaison officer supervise the accused person through the process. The Court’s preference was for a pre-sentence program because, in that jurisdiction, conditional suspended sentences are under the control of correctional rather than judicial authorities, and the court was of the view that judicial supervision provided a better form of supervision and greater motivation for the offender. If the offender successfully completes the pre-sentence program, the court can determine the charge and dismiss it without a sanction.

4) Process, not outcome

Over recent years there has been an increased emphasis on the importance of process in compliance and recognition of the importance of the expressive functions of law and the role of trust in criminal justice. Procedural (or natural) justice refers to the ways in which decisions are made and their fairness. Procedural justice is regarded as important not only as a means of ensuring that decisions are accurate, but also by attempting to ensure that participants feel that the dispute process has been fair and open (Lind and Tyler 1998); engendering more confidence in the operation of the justice system. Therapeutic jurisprudence regards the principles of procedural fairness in the work of all agencies involved in the criminal justice system as important, not only the courts. Perceptions of unfair or unequal treatment are a major contributor to dissatisfaction with the operation of a legal system (Burke and Leben 2007:3).

7 Am grateful to Judge Jorn Dangreau and his team for providing me with information about the operation of the court. The following information is sourced from unpublished material by Laurens van Puyenbroeck, June 2009 made available to the author.
Non-adversarial justice emphasizes the importance of the elements of voice (providing an environment where a person can present their case to an attentive tribunal), validation (the acknowledgment that the case has been heard and taken into account), and respect (the manner in which the judicial officer interacts with the person) (King 2003; see also Winick, 2003:1077) in the operation of the court system. Burke and Leben observe (2007:3):

Judges can alleviate much of the public dissatisfaction with the judicial branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them views it. While judges should definitely continue to pay attention to creating fair outcomes, they should also tailor their actions, language, and responses to the public’s expectations of procedural fairness. By doing so, these judges will establish themselves as legitimate authorities; substantial research suggests that increased compliance with court orders and decreased recidivism by criminal offenders will result.

These observations apply to all court systems whether they are adversarial or inquisitorial.

For victims generally, the inquisitorial system appears to take a more inclusive approach that may have the effect of lessening the pressures for fundamental reform. In many jurisdictions, victims play a more active role in the investigatory stage as well as in court. In addition, the process of giving evidence is less traumatic because it is not elicited through examination in chief and cross-examination but in a more narrative form that allows the victim to feel that their story has been properly heard. They may also make submissions on sentencing (King, nd). The victim is given voice, validation and respect in more, and better, ways than they are in the adversarial system. Victims in France and Belgium may apply for compensation by joining the criminal prosecution as a party (partie civile) (Daems 2008:157), but while this may be an efficient procedure, it may have the effect of re-traumatising the victim and prolonging or complicating the criminal trial (McKillop 2002:63-4).

Restorative justice

Restorative and therapeutic forms of justice have much in common, in particular their approaches to victims and offenders (Braithwaite 2002). It is in the area of restorative justice that there has been the most convergence between adversarial and inquisitorial systems and where European developments are most similar to those in the United States, Australia, the UK and elsewhere.

There are various forms of restorative justice, including group conferences, sentencing circles, healing circles, victim-offender reconciliation and mediation programs and others. There are a number of important non-adversarial elements to restorative justice processes. First, there is the element of party control, but in a non-court setting. The stress is on community, not courts. Second, there is the focus on addressing some of the factors that may have produced the conflict. Third, there is the emphasis on narrative and dialogue in a generally supportive setting. Fourth, there is the focus on the victim as victim, not the state as the surrogate victim of crime: restorative justice recognizes the emotional effect of crime on victims, offenders and community and seeks healing rather than attempting to channel emotions through some abstract entity such as the state (Daems 2010). Finally, dispositional outcomes,
whether they are restitution, compensation, apology, community work or other sanctions, are the product of a consensus decision, not the unilateral decision of a paternalistic, impartial arbiter.

Discussion about restorative justice programs in Europe commenced in the late 1960s, pre-dating even the United States. Victim-offender mediation programs commenced in the early 1980s in Norway and Finland (European Forum on Restorative Justice,\textsuperscript{8} and developed variously across the continent (Pelikan and Trenczek 2006:67). The European discourse was strongly influenced by Nils Christie’s 1977 work on ‘conflicts as property’ (Christie 1977; Pelikan and Trenczek 2006:65).

The most common form of restorative justice in Europe is victim-offender mediation (Pelikan and Trenczek 2006:64; Aertsen 2006:69; Coronas 2008:1). Victim-offender mediation can be described as a process in which the parties to a dispute arising from the commission by one of a crime against the other, “with the assistance of a neutral third party (the mediator), identify disputed issues, develop options, consider alternatives and endeavour to reach an agreement”. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted (National Alternative Dispute Resolution Advisory Council 1997\textsuperscript{9} see also Pelikan and Trenczek 2006:64).

Family group conferencing, which “involves a meeting facilitated by a youth justice coordinator attended by the victim (and supporter) or representative, the young person and family and a representative from the police” (King et al 2009:41) is not often used in Europe, though it has commenced on an experimental basis in the Netherlands, Sweden and Flanders, Belgium (Aertsen 2006:70; Blad 2006:102; Pelikan and Trenczek 2006).

Victim-offender mediation schemes have grown rapidly in Europe: Germany has some 400 services. Many operate in the juvenile jurisdiction and some are linked with victim services. Some are volunteer-based and some employ professional staff. The range of offences considered eligible for such schemes has increased from minor property offences, to encompass even violent crime.

In the beginning, victim-offender mediation schemes were primarily informal in that they depended upon the agreement of the parties and in many jurisdictions commenced in the juvenile jurisdiction (Aertsen 2006:69; Blad 2006:106). However, since the 1990s a number of jurisdictions have developed legislative bases for these practices (Germany, Norway, France, Austria and Belgium, France and Sweden). These schemes operate primarily pre-trial as part of a diversion scheme but are starting to be used post-sentence in some jurisdictions (Miers and Willemsens 2004; Pelikan and Trenczek 2006:68). Where it is used pre-trial, the successful conclusion of the mediation process will most often result in the dismissal of the charges.

There have been considerable challenges facing the development of restorative justice in Europe (Aertsen 2006:69; Coronas 2008:2; Casado 2007:2) including: the formalism of the inquisitorial model of justice, the principle of legality, the uncertain legal bases for restorative justice procedures, unclear jurisdictional boundaries in

\textsuperscript{8} www.euforumrj.org/
federalized systems, inadequate funding and the lack of collaboration between criminal justice and restorative justice practitioners.

Nonetheless, institutional support for restorative justice has concomitantly developed strongly over the past decade. In 2000, a non-government organization, the European Forum for Victim-Offender Mediation and Restorative Justice was formally established, now known as the European Forum for Restorative Justice. The Forum’s stated aims are to establish and develop victim-offender mediation and other restorative practices throughout Europe. It was intended to bring together persons and organizations around Europe involved in various programs but who were not formally linked in any way. At the time there were some 800 projects, many in the pilot stage.

Conferences on restorative justice have been held in

- 2002: *Restorative Justice and its Relation to the Criminal Justice System*;
- 2004: *Restorative Justice in Europe: Where are we Heading*;
- 2006: *Restorative Justice and Beyond – an Agenda for Europe*;
- 2008: *Building Restorative Justice in Europe: Cooperation between the Public, Policy Makers and Researchers*; and

From the late 1990s European Committee of Ministers and other organs of the European state began to play a more significant role in the development of restorative justice. In 1999 the Committee adopted Recommendation (99-19) that promoted victim-offender mediation. More influentially, in 2001 there was an EU Council Framework Decision on the Standing of Victims in Criminal Proceedings which placed legal obligations on parties to adopt mediation in criminal cases. It provided as follows:

*Article 10. Penal mediation in the course of criminal proceedings*

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.
2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

These provisions did not, however, prescribe the form or mediation to be adopted in any jurisdiction. VOM schemes are still in the process of development across Europe. In many jurisdictions the schemes’ relationship with the criminal justice system is clearly defined, although in others, such as Norway, Finland and Sweden, they tend to be more closely aligned with social welfare legislation (Pelikan and Trenczek 2006:84).

In France, the concept of restorative justice is still little known and written about (Pelikan and Trenczek 2006:70; Les Cahiers de la Justice 2006; Faget 2006), however, diversionary measures involving mediation between offenders and victims have been available since legislation was enacted in 1993. Diversionary mediation processes are focused in the office of the prosecutor, who are the gatekeepers of such
schemes and the programs are run by special agencies or individuals who must be accredited by the local prosecutor and the president of the tribunal (Pelikan and Trenczek 2006:70; Faget 2006). Penal mediation programs dealt with some 30,000 adult offenders in France each year, mostly in relation to minor offences (Pelikan and Trenczek 2006:71; Ministère de la Justice 2008).

In Germany, VOM schemes have been operating since 1984, primarily in relation to juvenile offenders but also in relation to adult offenders. Under provisions of the Criminal Procedure Code introduced in 1999 which create exceptions to the principle of mandatory prosecution (ss.153a – 155b) and the Criminal Code (s.54a) the prosecution may, with the consent of the court and the accused person, defer and finally refrain from formally charging a person in a misdemeanour case if, a serious attempt of VOM is made and the damage caused to the victims is made good. The law places an obligation upon prosecutors and judges to check, at every phase of the trial if VOM is attainable and there is also an obligation upon them to initiate such process, though the victim has the final say as to whether they wish to proceed down this path (Trenszek 2001). These provisions are used in fewer than 5% of all diverted cases, the preferred option being the imposition of a fine (Trenszek 2001:368).

If a trial takes place, and there has been both VOM and restitution to the victim by the offender, the court may mitigate the punishment or, in minor cases, dispense with punishment altogether (s.46a Criminal Procedure Code (Germany)).

Mediation services in Germany may be provided by the court, by social service organisations or by independent services (Trenszek 2001). Most cases are prosecution referred and most are community-based but state-funded.

Restorative justice in Europe faces many of the same challenges as it does in the common law jurisdictions. Despite its influence and popularity in academic circles, it is still of marginal importance in practice and deals with relatively few cases (Blad 2006: 107; Pelikan and Trenczek 2006:85). Amongst prosecutors, at least in France, there is a divergence of opinion about alternative procedures generally. Some see them as a means of extending formal social control where social controls have failed; some welcome them as a means of re-engaging the community by dealing with social conflict, especially relatively minor conflicts; others see them as tokenistic and ineffective unless they are properly resourced; while another group sees them as symbolic and only to be used when prosecution would never have been contemplated (Aubert 2009). These views are probably reflective of prosecutors’ attitudes elsewhere in Europe. Nonetheless, it could be argued that the prospects for the development of restorative justice are greater in some Europe jurisdictions than some adversarial jurisdictions particularly where the penal culture is relatively non-moralistic, where there are relatively low imprisonment rates (e.g. France, Germany, Belgium, Italy and Spain) and where there is a willingness to use intermediate sanctions (Tonry 2006:22).

There is still need for work in developing partnerships between the criminal justice system, policy makers and practitioners, to institutionalize funding arrangements and legal frameworks and improve standards for processes and practitioners (Report of Fifth Conference 2008; see also Miers and Willemsens 2004).

(5) Partners, not adversaries

Non-adversarialism is built on notions of cooperation rather than conflict. At the community level, courts and surrounding institutions such as Neighbourhood Justice
Centres (as exist in Red Hook, Brooklyn, Liverpool in the UK, and Melbourne, Australia), see themselves as working together with residents, police, businesses and a range of support agencies, both government and non-government. Government and community-run alternative or appropriate dispute resolution centres provide dispute resolution services for community conflicts, such as neighbourhood disputes. In the growing number of problem-oriented courts such as drug courts, justice processes are integrated with public and private drug treatment services, public agencies and community organizations.

One of the features of problem-oriented courts is the notion of a ‘team’, which is a group of legal, health, law enforcement and correctional professionals that works with the judicial officer on the pre-sentence or post-sentence disposition of the offender. Teams formulate treatment plans and services and recommend program conditions or changes to them. Teamwork in this context requires a range of disparate groups with often conflicting interests to work together, which has been difficult in the adversarial setting because ethical or professional values or practices have been antithetical to such behaviour. The Ghent Drug Treatment Court has found, as have courts elsewhere, that post-adversarial/inquisitorial approaches can bring clients into contact with treatment providers and fosters far better co-operation between the parties to the prosecution process, with the courts and with treatment agencies, not just in relation to the offender’s drug problems but with those relating to their health and social problems.

Further, for many problem-solving court programs, the concept of partnership extends to offenders participating in their programs. Rather than being dictated to by the court, the team endeavours to work with the offenders and values their input and role in decision-making that promotes their rehabilitation.

Though neighbourhood justice centres have not been established in the form that they have taken in the United States, the UK and Australia, in France and Belgium, similar, but more limited, institutions known as ‘Maisons de la justice et du droit’ (literally ‘Houses of Justice and Law’), have been established, for the purposes of resolving minor criminal disputes through mediation, providing information for citizens and assistance for victims of crime. Although they do not provide the full range of legal and support services that are provided in the other jurisdictions, these maisons may well provide the prototypes for the development of more fully formed post-inquisitorial justice centres (Aersten 2006:71).

(6) Active, not passive judges

Common law judges have traditionally been regarded as neutral or passive participants in legal conflicts and there are many constitutional and cultural constraints upon the role of the judge that may not as problematic in an inquisitorial system.

Developments in therapeutic jurisprudence have challenged the judicial role (Brookbanks 2003:463). Therapeutic judging is regarded as an important element in the rehabilitation of offenders for a number of reasons: the judge-defendant relationship can increase motivation; the courts can engage offenders in relapse-prevention planning and the development of problem-solving skills; the courts can manage risk, enhance offender compliance and build on the offender’s strengths (Wexler 2003-4:2). Though some of these tasks are undertaken by correctional officers post-sentence the theory of therapeutic jurisprudence holds that it is the
element of judicial authority that is key to an offender’s motivation to change their behaviour.

Therapeutic judging in a penal context requires a judge to maintain contact with, and supervision of, an offender post-sentence or while subject to a pre-sentence court program. Unlike traditional correctional services, problem-oriented courts do not transfer their supervisory responsibilities to probation or correctional services. Preferably, it will be the same judicial officer throughout the operation of the order.

As well as various forms of problem-solving courts, there are various forms of judicial supervision through therapeutic bail schemes and other pre-sentence orders that require judicial oversight.

In this respect, at least, the inquisitorial system would appear to be more amenable to changing judicial practices than the adversarial system. An inquisitorial court allows for more direct communication between the court (judges and/or lay assessors) and the accused and witnesses. Further, judges are generally in control of the presentation of evidence.

The extent of judicial involvement in pre-trial diversion programs is problematic. In common law jurisdictions, a judge or magistrate hearing bail applications or supervising intervention programs can maintain on-going contact with the offender through a process adjournments or continuances. Similarly, provisions in drug court and similar legislation provides for on-going judicial (c.f. correctional) supervision of sentences.

In many European jurisdictions, cases are usually dealt with by panels of judges, which may mitigate against the development of individual judge-offender relationships before and/or during sentence. In some jurisdictions, minor cases may be dealt with by a single judge and in Ghent there appears to be no problems in having a single judge supervise the offender. However, in most countries this is not the norm. In Italy, for example, large number of magistrates may be involved in reviewing a case (Nelken 2009:303). The idea of a charismatic judge leading a court, such as has occurred in Red Hook Brooklyn or in North Liverpool, England (which is viewed with suspicion, even in those jurisdictions) may be even less acceptable to European sensibilities and legal culture because of the different status and role that a judge has in those systems.

One possible model for judicial supervision of treatment can be found in Spain’s JVP (Juez De Vigilance Penitenciaria) laws that allow for conditional release at the end of the custodial component of a sentence. The JVP is similar to parole, in that there is provision for supervision, but it differs from some Anglo-American systems (where they still exist). The authority to release rests with a judge, not a parole board, and it is the JVP/judge that monitors the prisoner’s progress through various levels of classification throughout the sentence (Wexler 2003-4:3). However, unlike the drug courts, the supervising judge is not the same judge who imposed the original sentence.

(7) Inter-disciplinary development of law and legal processes

Increasingly, members of the judiciary and legal system are open to using practices from other fields as well. Therapeutic jurisprudence has provided a conduit through which principles and practices from the behavioural sciences have influenced court practice and legal practice.
Comprehensive or holistic approaches to justice (King et al 2009: Chapter 6) require an openness to disciplines other than law. Legal education under both legal systems has been criticized for its narrowness and solipsism. Anglo-American legal education has been criticized as focusing too greatly on the adversarial paradigm and on individual cases while European legal education has been regarded as too abstract and conceptual. American legal education is post-graduate and any inter-disciplinarity comes from the sequential development of ideas. Primarily, Australian legal education is undergraduate and combined courses such as arts and law, are common. Inter-disciplinarity tends to come more readily when the different disciplines are taught simultaneously, and there appears to be more skills training in such fields as mediation and negotiation, and more exposure to clinical practice than in European universities (King et al 2009: Chapter 16). The failure of Germany to provide sufficient exposure to ‘relevant neighbouring sciences’ has been identified as one of the limitations of its system of legal education (Glendon et al 2007:150).

(8) Comprehensiveness

A number of non-adversarial approaches such as therapeutic jurisprudence, restorative justice, appropriate dispute resolution, creative problem solving, holistic law, problem-solving courts and transformative mediation seek comprehensiveness either in the way they view people with legal problems, the legal problems themselves, the processes used by legal professionals or others in resolving legal problems or other forms of dispute. These approaches are also concerned with the skills needed by professionals in dispute resolution, the outcomes sought from dispute resolution processes or in a combination of some or all of these.

For example, the emotional dimension of the person with a legal problem, the legal professional and the processes used, have not often been seen to be important in traditional legal problem solving. Yet for therapeutic jurisprudence, restorative justice, creative problem solving, some forms of appropriate dispute resolution (such as transformative mediation) and holistic law, addressing the emotional dimension is seen to be vital to be able to resolve the legal problem comprehensively (see, for example, King:2008b).

Restorative justice uses processes that seek to facilitate parties expressing and resolving emotions surrounding the commission of a wrong that may have caused dysfunction in both victim and perpetrator.

A growing number of problem-solving courts also seek to take a comprehensive approach, addressing not only the underlying problem that brought a person before the court – such as substance abuse – but also addressing other underlying problems and viewing rehabilitation as the ability to lead a constructive, happy and law-abiding life in the community (King 2000, 2002; King and Ford, 2006).

CONCLUSION

The theories of therapeutic jurisprudence and restorative justice were, not so long ago, considered strange and objectionable to traditional legal practices. They ran counter to accepted notions of retributive justice, were seen to undermine the role of legal professionals and unduly elevate the role of the ‘helping’ professions (Trenszek 2001; Pelikan and Trenczek 2006:67). The broader idea of ‘non-adversarial justice’ is still in its infancy and encounters considerable skepticism. ‘Non-’ or ‘post-inquisitorialism’ is likely to suffer the same fate. Both legal systems have strong and long cultural traditions that permeate legal education and all branches of the profession. Policy
makers are more comfortable with known political paradigms and are nervous of system change. Punitive criminal justice is culturally and institutionally entrenched (Blad 2006:108).

However, this article has identified some of the changes that have occurred over the past few decades, some of which have brought non-adversarial elements to the adversarial system. In particular, the theories of therapeutic jurisprudence and restorative justice have ameliorated some of the more adverse features of fully fledged adversarialism and sought more positive, transformational outcomes for offenders, outcomes that have required the more active participation of both offenders and the courts (King 2009).

More broadly, the work on non-adversarial, and now possibly, non-inquisitorial justice, points to the need to understand how problems can be solved creatively (King et al 2009:74):

Creative problem solving is about expanding the repertoire of methods that legal professionals such as lawyers and judicial officers use to address legal problems. It invites them to think differently and more broadly about how they identify, understand and seek to address legal problems. It places their work in a wider social context, beyond the interests of an individual case or client, one involving a duty to promote social justice...

What are the advantages to a legal system of adopting some of these approaches? From the evidence that has emerged to date, it is likely that court systems will be more humanized and have lower workloads, victims and witnesses will be treated more sympathetically and have more confidence in the legal system, some of the underlying crimogenic factors will be addressed, offenders be empowered to change their lives, judges and legal professionals will have more job satisfaction and the role of other professions in responding to crime will be recognized.

On the other hand, it is necessary to recognize that these innovations and transformations should not result in a larger number of more coercive interventions, unnecessary net-widening and thinning, a diminution of individual autonomy and, particularly in Europe, an ‘over-judicialisation’ of minor offences that may previously not have come within the purview of the legal system (Aubert 2009).

European penology, like penology generally, needs to be constantly refreshed and re-invigorated by drawing ideas from many sources. This brief and incomplete survey of developments in some European jurisdictions indicates that the legal mechanisms for developing ‘post-inquisitorial justice’ are in place, can be developed from existing programs, or can be created consistently with local laws. While it is far to early to talk of major cultural and organizational transformations of criminal justice systems, the seeds have been sown and there is evidence of significant change in many jurisdictions. The immediate challenge is not to slavishly copy foreign programs for the sake of following the latest trends but to identify what values are important and need protecting or promoting, and which innovations, in any criminal justice system, are good and adaptable to the local justice system and penal culture. The ultimate challenge is to transform the punitive cultures within which these criminal justice systems operate (Blad 2006:107).
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