Viewing the Dublin Drug Treatment Court through the lens of Therapeutic Jurisprudence

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Abstract

Over the last 25 years Problem Solving Courts have developed internationally to provide a response to entrenched criminal justice related issues including addiction and mental health problems. These Courts operate in adherence with the concept of Therapeutic Jurisprudence, which recognises the Court and its officials as therapeutic agents, who work collaboratively to achieve the best possible outcomes for those appearing before the Court. In an Irish context, Problem Solving Courts have been in operation since 2001 when the Dublin Drug Treatment Court (DDTC)was established. This, however, remains the only Problem Solving Court in operation within the Irish criminal justice system. This paper considers the wide ranging international literature on Drug Courts before casting a critical eye over the DDTC, from its inception to the present day. It considers the workings of the court against the theoretical backdrop of Therapeutic Jurisprudence (TJ). This paper argues that while there seems to be a lack of overt engagement with TJ principles on the part of the Irish judiciary involved in the DDTC, many principles of the DDTC actually adhere to TJ principles. It builds on the works of Butler and Loughran et al which has already provided an excellent grounding for any future studies on the DDTC.

Introduction

In many ways, the current Irish Minister for Justice has hit a crossroads with Problem Solving Courts in Ireland, and recent noise has suggested that the Dublin Drug Treatment Court (DDTC) might be shut down after coming under scrutiny from policymakers and governments.[1] In light of this, and given the limited successes garnered by models within the neighbouring jurisdiction of England and Wales, we feel that casting a critical eye over the evidence-base and models themselves is necessary for underpinning any potential empirical analysis of the DDTC. While the authors seek to help improve the operation of the DDTC it should be noted that that given its low prosperity, this requires a balanced and holistic critique of the Irish model, rooted in an international perspective beforehand. Our analysis will be framed from a TJ standpoint as this may provide fresh insight into the some of the achievements and possibilities of the DDTC, which will hopefully act as a springboard towards further empirical study.

The purpose of this paper is to provide a critical literature review of the international drug court movement before discussing the Irish attempts at the same and it considers the international literature on problem solving courts, drug courts and TJ. It considers the operation of the DDTC through examination of a series of reviews of the court. This paper builds on the work of Butler[2], whose analysis of the transfer of a US drug court model into the Irish criminal justice system identified differences in the following areas: the concept of TJ being improperly utilised by the Judiciary; a harm reduction approach; an education

[1] C. Gallagher, Drug treatment court: A failed experiment imported from the US? *Irish Times*, 24 June 2019. <https://www.irishtimes.com/news/ireland/irish-news/drug-treatment-court-a-failed-experiment-imported-from-the-us-1.393492 > [accessed 10 July 2019].
[2] S. Butler, The symbolic politics of the Dublin Drug Court: The complexities of policy transfer. *Drugs: Education, Prevention and Policy* 20 (1) pp. 5-14.

programme for users; and clients typically being socially marginalised heroin users. This paper examines each of these assertions through the lens of TJ and builds on the suggestion by Loughran et al[3] that while there is no formalised process of TJ in the DDTC, the operation and mechanisms of the court may be 'doing' TJ without knowing it.

Problem solving courts and Therapeutic Jurisprudence

Problem solving justice offers somewhat of an elastic concept, but canons that come within its purview include: enhanced information sharing, community engagement, collaboration, individualised justice, accountability and outcomes.[4] These values are most commonly articulated within the practical operation of problem solving courts, which were pioneered in the late 1980s in the United States. A wide range of international literature details the genesis, growth, successes and failures, as well as the various client issues that these courts tackle.[5]

Problem solving courts have emerged as 'a response to entrenched needs such as drug addiction and mental illness, which drive reoffending.'[6] They provide an interface between

[3] H. Loughran, M. Hohman, F. Carolan and D. Bloomfield, Practice Note: The Irish Drug Treatment Court. *Alcoholism Treatment Quarterly* 33 pp.82-92.

[4] J. Donoghue, *Transforming criminal justice?: Problem-solving and court specialization,* Routledge, 2014; D. B. Wexler, Wine and bottles: A metaphor and a methodology for mainstreaming TJ. *Arizona Legal Studies Discussion Paper* 15 (05) < https://ssrn.com/abstract=2553868 > [accessed 10 July 2019].

[5] P. Bowen and S. Whitehead, *Problem-solving courts: An evidence review*. Centre for Justice Innovation, 2016; Family Drug and Alcohol Court, *The Principles of Problem Solving Courts* < http://fdac.org.uk/wp-content/uploads/2015/10/Paper-on-problem-solving-principles-for-web-6-October-2015.pdf > [accessed 12 January 2019]; J. Ward, *Are Problem Solving Courts the way forward for justice? What is Justice? Working papers 2/2014*. Howard League for Penal Reform, 2014; S. Ryan and D. Whelan, Diversion of Offenders with Mental Disorders: Mental Health Courts. *Web Journal of Current Legal Issues* 1, pp. 1-18. <https://cora.ucc.ie/bitstream/handle/10468/618/SR_DiversionPV2012.pdf?sequence=1andisAllowed=y > [accessed 23 January 2019]; G. McIvor, Drug Courts: Lessons from the UK and Beyond, in: A. Hucklesby and E. Wincup (eds.) *Drug Interventions in Criminal Justice.* Open University Press, 2010; H. Steadman, S. Davidson, and C. Brown, Law and Psychiatry: Mental Health Courts: Their Promise and Unanswered Questions. *Psychiatric Services* 52(4) pp.457–458 < https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.52.4.457> [accessed 22 January 2019].

[6] See Bowen and Whitehead, supra note 5, p.3.

human and social issues, and the law and criminal justice, by developing therapeutic spaces to foster rehabilitative outcomes amongst individuals with complex needs. Whilst they present in many guises, the most common forms of problem solving courts are: Drug Courts, Family Drug and Alcohol Courts, Mental Health Courts, Veteran Courts, and Community Courts.[7] Each model is distinguished by targeting a certain group, allowing the court to cater for particular needs of particular people, particular forms of crime, and they provide for the individual requirements of specific victims and offenders or particular communities. By applying problem solving justice, other hallmarks of the court model include: collaborative supervision and intervention between various agencies to allow for a rounded response to the complexities facing those who appear before the court, a procedurally fair environment, accountability through judicial monitoring, and a focus on both therapeutic and recidivist outcomes.[8] As such, whilst certainly no new practice, problem solving courts provide a cutting edge approach to a court of law's jurisprudence.

Problem solving courts operate in adherence with the concept TJ. This is concerned with the human, emotional, and psychological ramifications of the law and legal processes, and on those that encounter its institutions. TJ is premised on the notion that socially just, emotionally intelligent, and compassionate responses should dominate the theory, conceptualisation, and practice of the law.[9] It promotes an interdisciplinary approach for understanding legal issues through psychological analysis, and 'calls for researchers, mental

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[7] P.M. Casey and D.B. Rottman, Problem-solving courts: models and trends. *Justice System Journal*, 26, pp. 35–56; A. Freiberg, Problem-oriented courts: Innovative solutions to intractable problems. *Journal of Judicial Administration*, 11 (8) pp. 8-27; M. Perlin, The judge, he cast his robe aside: Mental health courts, dignity and due process. *Mental Health Law and Policy Journal* 3 (1) pp.1–29.

[8] See Bowen and Whitehead, supra note 5. See Ward, supra note 5.

[9] D.B. Rottman and P.M. Casey, Therapeutic jurisprudence and the emergence of problem-solving courts. *National Institute of Justice Journal*, pp.12-19, in: Steadman, Davidson and Brown supra note 5.

health workers, attorneys, and judges to apply techniques drawn from psychology and social work to motivate offenders and patients to accept rehabilitation and treatment and to pursue it successfully'.[10] Through these principles it advocates a 'problem solving, proactive and result orientated posture that is responsive to the current emotional and social problems of legal consumers'.[11]

Judicial monitoring is considered to be one of the most the most lauded elements of problem solving courts.[12] It involves bringing offenders back to court for regular reviews and discussion of their progress (or failures) before a dedicated judge, whereon benches increase motivation and compliance through therapeutic styles of engagement aligned with TJ principles. Judicial officers become therapeutic agents, and their role should be considered as 'motivating rather than intimidating...emphasising the standing and authority of the judge or magistrate, rather than the judge or magistrates power to impose sanctions.'[13] Having a dedicated judge, rather than one who is moving through a circuit is vital and as judges become familiar with offenders and their life circumstances, they form therapeutic relationships, which enable them to monitor process and engage in a therapeutic style of practice. A focus on outcomes involves operating sanction and reward systems within the court environment, whilst constant monitoring and reflection on these allows for determining what works and what does not for each offender, which bears fruit to rehabilitative outcomes.

[10] R. Wiener, B. Winick, L. George and A. Castro, A testable theory of Problem Solving Courts: Avoiding past empirical and legal failures. *International Journal of Law and Psychiatry* 33 (4) pp. 201-206.

[11] A. Lurigio and S. Snowden, Putting Therapeutic Jurisprudence into Practice: the Growth, Operation and Effectiveness of Mental Health Courts. *Justice System Journal*, 30, p.196, in: Ryan and Whelan, supra note 5, p. 3.

[12] See Ward, supra note 5.

[13] M. King and J. Wager, Therapeutic jurisprudence and problem solving case management. *Journal of Judicial Administration* 15, pp. 28-36, in: G. McIvor, Beyond supervision: Judicial involvement in offender management, in: F. McNeill, P. Raynor and C. Trotter (eds.) *Offender Supervision: New directions in theory, research and practice*, pp. 215-238, Willan, Oxon, 2010, p. 218.

As such, TJ principles allow the courts to become holistic and engage in shaping new services to ensure successes.[14] A therapeutic interactional style, fostered during court conversation, linchpins the judicial role, and is often contextualised by the doctrine of procedural fairness. Within this, courts harvest fairer and more transparent justice by 'treat[ing] the defendant with dignity and respect and accord the defendant a sense of voice and validation.'[15] This encourages compliance with judicial decisions through accountability, minimises harmful consequences of offending and victimisation, and enhances restorative legal goals and outcomes. This perception of increased legitimacy 'promotes normative as opposed to constraint-based or instrumental compliance'.[16]

Drug Courts

The first drug court was established in Florida in the 1980's[17] during a crack cocaine epidemic that oversaw drug arrests increase by 134% during the period 1980-89.[18] The drug court model was designed 'to bring drug treatment more fully into the criminal justice system, treating offenders with a history of drug abuse for their addiction, whilst simultaneously ensuring supervision and sanctions when needed from the courts.'[19] That

[14] See Bowen and Whitehead, supra note 5.

[15] See Ryan and Whelan, supra note 5, p. 4.

[16] A. Bottoms, Compliance in Community Penalties in A. Bottoms, L. Gelsthorpe and S. Rex (eds.) *Community Penalties: Change and Challenges*, 2001, in: McIvor, supra note 13, p. 226.

[17] See Ward, supra note 5.

[18] Ibid.

[19] R. King and J. Pasquarella, *Drug Courts: A Review of the Evidence. The Sentencing Project*, 2009, p. 1.

there are now over three thousand Drug Courts in the United States alone speaks its own truth in terms reputation, and models have since been established across jurisdictions worldwide.[20]

Drug courts, while varying between jurisdictions, tend to operate with ten key components in mind. There are: the integration of alcohol and other drug treatment services with justice system case processing; using a non-adversarial approach to allows prosecution and defence to promote public safety while protecting participants' due process rights; early identification of eligible participants and prompt placement in the drug court program; providing access to a range of alcohol, drug, and other related treatment and rehabilitation services; monitoring abstinence through frequent alcohol and drug testing; a coordinated strategy governing the court's responses to participants' compliance; ongoing judicial interaction with each participant; monitoring and evaluation to measure the achievement of program goals and gauge effectiveness; continuing interdisciplinary education to promote effective drug court planning, implementation, and operations; forging partnerships among drug courts, public agencies, and community-based organizations to generate local support and enhance drug court program effectiveness.[21]

The component matrix offers a measure for assessing and implementing drug courts, with research suggesting that presence of all components induces laudable success.[22] These

[20] National Institute of Justice. Drug Courts <https://www.nij.gov/topics/courts/drugcourts/Pages/welcome.aspx> [accessed 5 July 2017].

[21] National Association of Drug Court Professionals, *Defining drug courts: The key components*, U.S. Department of Justice, Washington D.C., 1997.

[22] P. Hora, Courting new solutions using problem-solving justice: Key components, guiding principles, strategies, responses, models, approaches, blueprints and tool kits. *Chapman Journal of Criminal Justice* 2 (1) pp. 7-52; M. Hiller, S. Belenko, F. Taxman, D. Young, M. Perdoni and C. Saum., Measuring Drug Court Structure and Operations: Key Components and Beyond. *Criminal Justice and Behaviour* 37(9), pp. 933–950; D. Marlowe, Research update on adult drug courts <https://www.nadcp.org/wpcontent/uploads/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf >[accessed 10 July 2019].

components thus provide a mechanism for helping to assemble, evaluate and understand Drug courts on rudimentary level:

> *Each of these hypothesised key components has been studied by researchers or evaluators to determine whether it is, in fact, necessary for effective results. Results have confirmed that fidelity to the full drug court model is necessary for optimum outcomes.*[23]

Drug courts typically operate as one of two programmes: deferred prosecution programmes and post-adjudication programmes. There is a clear distinction between these two models:

> *In a deferred prosecution or diversion setting, defendants who meet certain eligibility requirements are diverted into the drug court system prior to pleading to a charge. Defendants are not required to plead guilty and those who complete the Drug Court program are not prosecuted further. Failure to complete the program, however, results in prosecution. Alternatively, in the post-adjudication model, defendants must plead guilty to their charges but their sentences are deferred or suspended while they participate in the drug court program. Successful completion of the program results in a waived sentence and sometimes an expungement of the offense. In cases where individuals, however, fail to meet the requirements of the drug court (such as a habitual recurrence of drug use), they will be returned to the criminal court to face sentencing on the guilty plea.*[24]

Both of these formats pose ethical problems. They offer vulnerable offenders an opportunity to reform that is dependent on them admitting to their offending, but success is not guaranteed. This critique is relevant in light of the downfall of the English and Welsh drug

[23] See Marlowe, supra note 22, p. 3.

[24] See King and Pasquarella, supra note 19, p.3.

court pilots.[25] Their infliction on poorly thought-out conceptual terms does not chime well with moral reasoning; offenders were offered an opportunity to break free from a life of crime and complex and entrenched life histories, but chances could have only ever been minimal due to tokenistic attempts the at the drug court models. These ethical issues are exacerbated by widespread concerns over how drug courts are evaluated, which could mean that they are less successful than originally meets the eye. Studies are typically small in scale and vary in terms of quality, comprehensiveness, use of comparison groups, and the definition of key variables, such as recidivism.[26] As such it is therefore useful to maintain a critical eye when considering the evidence-base on drug courts as this evidence is, at best, inconsistent. For example, over three-quarters of US drug courts (78%) reduced criminal activity, with leading models showing reductions between 35% to 40%.[27] In a review of Adult, Juvenile and Family drug courts, the Centre for Justice Innovation found that for Adult drug courts, despite having a higher cost than traditional court processes, the higher costs were paid back through reductions in crime and prison time. The report cited evidence from an Australia which showed that drug courts in Victoria handed down 6,125 days of imprisonment over the two year period of evaluation, compared with 10,617 days for the control cohort. This equated to a saving of AUS $ 1.2 million in reduced imprisonment costs. It also cited a Scottish study which found that there were positive outcomes for offenders given Drug Treatment and Testing Orders in drug courts, where 47% of court orders were completed, compared to 35% in other courts. Family Drug Courts were found to be positive

[25] **A. Kawalek, *Reframing the British Problem-Solving Courts* 2020 (forthcoming).** See National Association of Drug Court Professionals, supra note 21.

[26] S. Belenko, *Research on Drug Courts: A Critical Review: 2001 Update.* National Center on Addiction and Substance Abuse at Columbia University, 2001.

[27] C. Lowenkamp, A. Holsinger and E. Latessa, Are drug courts effective? A meta-analytic review. *Journal of Community Corrections*, Fall 2005, pp. 5–28 <https://www.researchgate.net/profile/Christopher_Lowenkamp/publication/288951455_Are_drug_courts_effective_A_meta-analytic_review/links/56e9484208ae693eaf278ffe/Are-drug-courts-effective-A-meta-analytic-review.pdf > [accessed 10 July 2019].

and the review cited an evaluation from a London programme which found that parents going through the Family Drug Courts were more likely to be abstinent from drugs and alcohol and be reunited with their children at the end of proceedings, compared to those who went through mainstream care proceedings.[28] Despite such positive outcomes, other studies from Australia[29], Canada[30] and Scotland[31] have reported only modest impacts on recidivism as a success indicator. An Australian study of the New South Wales Drug Court found that despite showing a reduction in recidivism, the inability to conduct a randomised trial evaluation meant that the authors could not be sure that the drug court program was more effective than conventional sanctions at reducing recidivism among offenders whose crime was drug-related.[32] A Scottish study[33] found that in two drug courts in Glasgow and Fife, 70% of offenders had been reconvicted within one year and 82% within two years. Reconviction rates were almost identical in Fife and Glasgow. The reconviction rate did, however, vary according to the outcome of the Court order: 12-month and two-year reconviction rates were significantly lower among those who completed their orders or whose orders were discharged early and higher among offenders whose orders were breached or revoked. Furthermore, most of the evaluations of drug courts are undertaken using 'quasi-

[28] See Bowen and Whitehead, supra note 5

[29] D. Weatherburn, C. Jones, L. Snowball and J. Hua, The NSW Drug Court: A re-evaluation of its effectiveness. *Contemporary Issues in Crime and Justice* 121. <https://www.bocsar.nsw.gov.au/Documents/CJB/cjb121.pdf > [accessed 28 January 2019].

[30] B. Fischer, 'Doing Good with a Vengeance': A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America. *Criminal Justice* 3 (3) pp. 227-248.

[31] Scottish Government Community Justice Services, *Review of the drug courts in Glasgow and Fife Sheriff Courts,* Scottish Government, , 2010.

[32] See Weatherburn et al, supra note 29.

[33] See Scottish Government Community Justice Services, supra note 31

experimental designs with poorly constructed comparison groups.'[34] Researchers carrying out a systematic literature review claimed that most studies (81%) fell into the rejected category of evaluation quality.[35] Elsewhere, a meta-analysis measuring the effectiveness of drug courts[36] found that the analysis body of literature on drug courts was 'methodologically weak with few randomized evaluations of each type of drug court and only a modest number of rigorous quasi-experimental evaluations.'[37] The study found that of 92 evaluations of adult drug court selected for meta-analysis, only 3% were randomized experiments, 22% were rigorous quasi-experiments and 25% were classified as relatively rigorous. Programmes are often hailed as a success based on a pilot schemes evaluation, and they are then widely implemented before their effectiveness has been properly examined. They often become part of the system and expand their roles while lacking evidence of effectiveness, and often in ways that preclude evaluation. A Scottish study[38] for example, found that that most juveniles naturally age out of drug use and the overall benefits of drug courts were limited, and such courts may result in net-widening for those who will simply grow out of such behaviour. Related to problems with assessment is the assertion that drug courts "cherry pick" their clients, as 'most drug courts have restrictive eligibility criteria that routinely exclude high risk

[34] W. Hall and J. Lucke, Legally coerced treatment for drug using offenders: ethical and policy issues. *Crime and Justice Bulletins* 144 pp. 1-12, p. 4.

[35] L. Gutierrez and G. Bourgon, *Drug Treatment Courts: A Quantitative Review of Study and Treatment Quality 2009-04*. Public Safety Canada < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2009-04-dtc/index-en.aspx> [accessed 10 July 2019].

[36] O. Mitchell, D.B. Wilson, A. Eggers and D. MacKenzie, Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts. *Journal of Criminal Justice* 40 (12) pp. 60-71.

[37] Ibid p. 63

[38] See Scottish Government Community Justice Services, supra note 31

offenders, many of whom are likely to end up behind bars.'[39] Consequently, drug courts can report high rates of success because they purposefully target people most likely to complete treatment programs. Such successes are often widely reported, and the policy is implemented before its effectiveness has been properly examined. Research has found that that a common factor which negatively affected drug court evaluations was 'the comparability of the comparison group to the group receiving drug court treatment.'[40] Comparison groups, they found, often allowed for historical factors and selection bias to threaten the validity of the evaluation as they were often composed of people who refused or were declined admission to a drug court programme. As such, the findings of such reports must often be tempered due to a lack of scientific rigor.[41]

Whilst these statistics potentially pose problems, they are, perhaps, asking the wrong questions and are paying attention to less important issues at hand. They have been criticised for overemphasising primary outputs.[42] For key players in TJ, outcome delivery, and bottom line questions about reductions in re-offending and cost savings, are of secondary importance, as they 'bypass… the critical issue... do such courts provide additional dignity to the criminal justice process or do they detract from it? Until we re-focus our sights on this issue, much of the discourse on this topic remains wholly irrelevant'.[43] As such, perhaps attention is better

[39] E. Sevigny, H. Pollack and P. Reuter, Can Drug Courts Help to Reduce Prison and Jail Populations? *The Annals of the American Academy of Political and Social Science, Reconsidering the Urban Disadvantaged: The Role of Systems, Institutions, and Organizations* 647 pp. 190-212, p. 193.

[40] See Mitchell et al, supra note 36.

[41] See Casey and Rottman, supra note 7.

[42] C. Wittouck, A. Dekkers, B. De Ruyver, W. Vanderplasschen and F.V. Laenen, The Impact of Drug Treatment Courts on Recovery: A Systematic Review, The Scientific World Journal Volume 2013, Article ID 493679 pp. 1-12. < https://www.hindawi.com/journals/tswj/2013/493679/> [accessed 10 July 2019].

[43] See Perlin, supra note 7.

focused on challenging and optimising not only our understanding of what the law is but on how the models reconceptualise penal theory, justice and punishment towards a therapeutic ideal. Arguably, drug courts' broader cultural and political implications are more symbolic than granular reoffending data, and it is perhaps for these reasons that they continue to enjoy support among policymakers and politicians in many countries.[44]

The Dublin Drug Treatment Court (DDTC)

The DDTC, established on a pilot basis in 2001, was designed 'to provide a scheme for rehabilitation, under the auspices and control of the court, of persons who are convicted of, or who have pleaded guilty to, drugs offences, relating to possession for own use or for supply to others on a minor scale, and crimes triable in the District Court which are related to the drug misuse of the offender.'[45] The Drug Court Planning Committee estimated that the court would take 100 referrals a year. The Court operates a post-adjudication model and is made unique to the international models by running on a system based on points and phases. Participants gain points through compliance with set conditions and lose them when they fail to comply. These points lead to progression through a three-phase system: Phase 1, Phase 2 and Phase 3.[46] If a participant fails Phase 1 then they will be returned to the criminal courts for sentencing. If they progress to and complete Phase 2, this will result in the DDTC recommending that their sentence is suspended, while successful completion of Phase 3 will result in any charges they faced being struck out completely. 2017 was hailed as 'the best

[44] See Hall and Lucke, supra note 34.

[45] Drug Court Planning Committee, *The First Report of the Drug Court Planning Committee*: *Pilot Project*. Stationary Office, Dublin, 1999.

[46] Courts Service of Ireland, *The Drug Treatment Court Programme; a guide to the induction and bronze phases for participants* Courts Service of Ireland, Dublin, 2011; Courts Service of Ireland, *The Drug Treatment Court Programme; a guide to the silver phase for participants*. Courts Service of Ireland, Dublin, 2011. Courts Service of Ireland, *The Drug Treatment Court Programme; a guide to the gold phase for participants.* Courts Service of Ireland, Dublin, 2011.

year ever'[47] for the Court with 108 new referrals from the District Court to the programme. 10 participants completed Phase 3 during the year, the highest number in any one year since the programme commenced in 2001. This indicates that they have completed all stages of the programme, are not using any non-prescribed drugs and are either working or enrolled on a course. At the end of 2017, there were 26 participants on Phase 1, 11 on Phase 2 and 12 on Phase 3.[48]

Despite this, critical analyses of the DDTC reveal that it has failed to 'attract and retain a number of clients throughout its first 10 years in operation'[49] and several studies have highlighted the low numbers of participants who engage with the DDTC. A study conducted in the early days of the Court's operation[50] highlighted the low participant number relative to that estimated by the Planning Committee. It was noted that for the period of the review (2001-02) there were only 61 referrals to the DDTC. Despite (or perhaps due to) such low numbers, it was recommended that the pilot scheme have its catchment areas extended. A 2005[51] study examined the reasons for the low number of persons processed by the Court. These included the fact that offenders can only be referred to the Court at the post-conviction stage. Moreover, eligibility excluded offenders under 18 and whose offences involve

[47] Courts Service of Ireland, *Courts Service News Issue 4*. Courts Service of Ireland, 2017 p. 9. <http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/2E00E06A444204D7802581F6005BBE34/$FILE/Courts%20Service%20News%20Vol%2019%20Issue%204.pdf.> [accessed 28 January 2019].

[48] Courts Service, *Annual Report.* Courts Service of Ireland, Dublin, 2017. <http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/8000F0BA4F127EE7802582CD00338311/$FILE/Courts%20Service%20Annual%20Report%202017.pdf> [accessed 12 January 2019].

[49] See Butler, supra note 2, p.6.

[50] M. Farrell, *Final Evaluation of the Pilot Drug Court*, Farrell Grant Sparkes Consulting / Irish Courts Service, Dublin, 2002.

[51] J. McCormack, *Report - Drug Treatment Court*. Department of Justice, Equality and Law Reform, Dublin,2005.

violence. However, these eligibility criteria are typical for a traditional drug court,[52] which generally do not suffer from lack of clientele but are rather subject to cherry-picking critiques. Thus, a more likely explanation for low numbers in Ireland is lack of awareness among judges and other legal professionals of the DDTC option. This is not a new phenomenon for problem-solving courts, as recent research highlighted the anonymity of Manchester Review Court, a problem-solving court in England, which appears to have been operating on local terms, and without awareness of policymakers at national level.[53] Problem-solving justice at Manchester was further undermined by nationally-placed central agencies competing for space within the same justice system. One leading example is the Payments by Results model which the probation services were subject to the under Transforming Justice agenda in 2013. Under this payment structure, probation officers' hesitancy to breach due to fearing no result circumscribed court attendance efforts.[54] Not only did this issue significantly lower participation for the judicial monitoring of offenders, it also disempowered magistrates and their ability to augment problem solving justice more broadly.[55] Whilst the cause is not necessarily the same as in Dublin, low clientele appear to be underpinned by a similar lack of awareness that isolates the practices within a catch-22 cycle. Butler highlights that the very nature of the post-adjudication model might be related to the relatively small numbers engaging with the court, whereby offenders actually make the rational choice to 'take their chance with a custodial sentence rather than embark upon an onerous and lengthy therapeutic programme.'[56] It should be noted that there were 11,000

[52] See Perlin, supra note 7.

[53]See Kawałek, supra note 25.

[54] Ibid.

[55] Ibid.

[56] See Butler, supra note 2.

drug seizures in Irish prisons over a 7 year period, between 2010 and July 2017[57] and offenders who are taking their chances with imprisonment could simply be doing so in the knowledge that they will be able to get more drugs while in prison.

It was thought that the DDTC might cease operation in 2009 due to the small number of participants engaging. It was at this point, when giving evidence to the Public Accounts Committee, that the then Secretary General of the Department of Justice stated that he was not 'convinced any longer that it is the way to go. Frankly, it was started with the best intentions but I don't think its production level justifies extending the model.'[58] In terms of completion and attrition rates, perhaps most damningly, the report by Comptroller and Auditor General found that just '17% of programme participants (22 individuals) completed the full programme to the satisfaction of the Court.'[59] This completion rate was considered to be low by international standards, in which the Comptroller and Auditor General cited research from 16 drug Courts in the US which demonstrated completion rates that ranged from 27% to 66% comparatively. The Comptroller and Auditor General recommended that the effectiveness of the DDTC needs to be re-evaluated, and this should compare the cost and effectiveness of the Court with orders made by other courts that include treatment of those sentenced to community-based orders. A 2010 study [60] found that for the period 2001 – 09 there were 200 participants deemed to be suitable for admission to the DDTC. Of this there

[57] M. Fagan, 11,000 drug seizures in Irish prisons in seven years. *Irish Times* 9 October 2017 < https://www.irishtimes.com/news/crime-and-law/11-000-drug-seizures-in-irish-prisons-in-seven-years-1.322641 > [accessed 14 January 2019].

[58] S. McCarthaigh, Drug court may be axed by end of year. *Irish Examiner* 18 September 2009 < https://www.irishexaminer.com/ireland/icrime/drug-court-may-be-axed-by-end-of-year-101199.html > [accessed 28 January 2019].

[59] Comptroller and Auditor General, *Drug Addiction Treatment and Rehabilitation*. Department of Community, Rural and Gaeltacht Affairs, Dublin, 2009.p. 13

[60] Department of Justice, Equality and Law Reform, *Review of the Drug Treatment Court.* Department of Justice, Equality and Law Reform, Dublin, 2010.

were 131 terminations and only 29 completions, amounting to a mere 14%. On the issue of recidivism, it was found that of the 29 participants who completed / graduated, 16 did not re-offend. This represented a 62% success rate. However, the Department of Justice stressed that despite such a significant reduction in recidivism, the small sample size made it difficult to draw definitive conclusions, which links to quality concerns for DDTC evaluations discussed earlier in this paper. However, notwithstanding the small sample size, it was found that the Court was 'having a positive effect on offenders participating in the programme in terms of lower rates of recidivism and improved quality of life for the participant, their families and the wider community.'[61]As such, the evidence for outcomes is mixed in the Dublin example, and depends somewhat upon the indicator of success that is measured and considered. From a TJ perspective, it is perhaps worth considering what emotional benefits can be gained from participating in the programme compared to regular routes through the criminal justice system, and how this has, perhaps, changed practitioners' and politicians' understandings of what the law and justice "is" and "means".

Seven years after the Department of Justice study, a new National Drug and Alcohol Strategy was launched[62] and has recommended that another evaluation of DDTC be undertaken. Researchers have not yet grasped the nettle and responded to this gap; as such, we seek to address the call for more research in later empirical analysis. Stronger successes displayed by the international models highlights that this evaluation must include a thorough examination of drug courts worldwide, including jurisdictions with high success and failure rates, and reasons for this. Recent findings from the Manchester Review Court only serve to highlight

[61] Ibid p. 19.

[62] Department of Health, *Reducing Harm, Supporting Recovery: A health-led response to drug and alcohol use in Ireland 2017-2025*. Department of Health, Dublin, 2017 <https://health.gov.ie/wp-content/uploads/2017/07/Reducing-Harm-Supporting-Recovery-2017-2025.pdf> [accessed 12 June 2019].

the importance of an international perspective for engaging success testament to a fidelity model and outlook.

Butler's[63] critique of DDTC considers the complexities associated with policy transfer, in this case, the introduction of US style courts to Ireland. Such critiques consider whether uprooting a model from another jurisdiction, interwoven into an entirely different criminal justice system, can be achieved. Certainly, in the case of England and Wales this resulted in many missing key components, including those that pillar drug court sustainability. To this end, evaluation should be carried out with the international Ten Key Components in mind to shed light on areas of non-adherence and inefficacy. This type of analysis appears never to have been done before in Ireland and could lead to similar conclusions to those for the England and Wales models.

Butler[64] has noted that due to the failure of the court to attract and retain a number of clients throughout its first 10 years in operation, it is difficult to ascertain why any politician would justify its maintenance or expansion. Such failures make it appear odd that the court continues, not only to exist, but to enjoy continued political support from all political parties in Ireland. This reaffirms previous research,[65] which found that drug courts enjoy considerable support among policymakers in many developed countries. A Consultant Psychiatrist interviewed by Butler stated that he believed that the reason the Court continued to enjoy political support was down to political window dressing, while a senior civil servant interviewed by Butler stated that continued political support may be a result of it being

[63] See Butler, supra note 2.

[64] Ibid.

[65] See Hall and Lucke, supra note 34.

'attractive politically always to promote alternatives to custody.'[66] Whilst the original intention of the DDTC was to implement a US style drug court, several differences reportedly emerged in its implementation, including: the concept of TJ being improperly utilised in the Judiciary; a harm reduction approach; an education programme for users; and clients typically being socially marginalised heroin users.[67] We now attempt to analyse these issues through the lens of TJ.

Viewing the Dublin Drug Treatment Court through the lens of Therapeutic Jurisprudence

It has been argued that the concept TJ is not present in the DDTC judiciary, 'as it had not been explicitly articulated in Ireland.'[68] This is largely due to attitudes of those who work in the court, especially judges, who do not consider themselves to be therapists, but rather view their role as one offering practical support and advice. However, acting as "court therapist" provides only a very limited view of what TJ "is" and serves only to confirm our speculations that practitioners lack grassroots understandings of the conceptual underpinnings of their practice. It has, however, been claimed that the provision of such support at Dublin is 'in many ways Therapeutic Jurisprudence'[69] and it is worth noting that the qualifications required by probation officers in Ireland, whereby they must have a master's degree in social work, provides a strong ethical and value position which is closely aligned rehabilitation. This very much adheres to a TJ approach. In the courtroom, TJ is perhaps best contextualised as basic decency within courtroom interactions whereby judiciaries assume an ethic of care, empathic sentiments, and a holistic approach to justice. One Irish drug court Judge interviewed by

[66] See Butler, supra note 2, pp .11-12

[67] See Butler supra note 2.

[68] Ibid p. 9.

[69] See Loughran et al, supra note 3, p. 88

Butler noted that there was 'an immediate interaction, a personal interaction between the judge and the individual, a sort of relationship if you like…You get to know them, you become familiar with them, you get to know their face, their history'.[70] Such interactions between the judge and those appearing before the DDTC are vital, and the forging of what this judge called a 'relationship' could in a sense be seen as engaging in TJ as it may provide the person appearing before the judge a sense of voice and validation as discussed earlier in this paper. This may also play a vital role when the profile of a typical participant in the DDTC is considered. Whilst US drug courts have been accused of engaging in 'theatrics'[71] which do not play well in an Irish setting – '[In America there were] 'young men standing with their fathers, a husband, a wife, and the spectrum is so different to what we have…you get people who are employed, you get people who are educated, who are interested, who are motivated.'[72] This must be contrasted against a typical participant in the DDTC who was described as someone coming from an area 'where there's second generation, even third generation, drug abuse, where the socio-economic background is as low as you could get and where within dysfunctional families children lack stimulation – such as developing hobbies, such as reading, such as any of those things that go towards making life better.'[73] Clients typically come from communities which have been long associated with crime, heroin, unemployment, poverty and little community support.[74] They are perceived as trusting few people, having experienced little respect from society as well as begin marginalized, angry

[70] See Butler, supra note 2, p. 9.

[71] See Farrell, supra note 50, p. 96.

[72] See Butler, supra note 2, p. 11.

[73] Ibid.

[74] See Butler, supra note 2. See Comptroller and Auditor General, supra note 59.

and fearful.[75] Essentially they may be lacking in the necessary social capital to engage with the court and its programmes to the same degree as those in US drug courts.

The forming of relationships as described by the Drug Court Judge, suggests that the DDTC is perhaps "doing" TJ without knowing it. Loughran et al have noted that while the particular judge in Butler's study did not see themselves as practicing TJ, this may have been due to there already being 'a bit of this approach among all of the judiciary towards drug users'.[76] As TJ continues its mission of mainstreaming, these styles might be better compared to "bedside manner" that one would suppose from a medical practitioner, which now holds as expectation rather than substantial effort or change in energetic tone. As such, TJ already appears to be running through the DDTC, to a certain extent.

The DDTC implements a harm reduction approach, wherein clients are not expected to engage in abstinence from drug-use immediately but, rather are required to reduce their drug use over time, as per the three phases.[77] Although, arguably, the international models operate a "needs" or "strengths" - based approach, rather than one that is established upon risk,[78] the Dublin court is nevertheless embracing the incremental approach advocated by desistance and recovery pioneers,[79] and as posited by the National Association of Drug Court

[75] J. O'Sullivan, *An Examination of the Practitioners' Role in Promoting Compliance with Participants in the Irish Drug Treatment Court.* Dublin Institute of Technology, 2012.

[76] See Loughran et al, supra note 3, p. 88.

[77] Ibid.

[78] S. Maruna and T. LeBel, Strengths-based restorative approaches to re-entry: The evolution of creative restitution, reintegration and destigmitization in: N. Ronel and D. Segev (eds.) *Routledge frontiers of criminal justice: Positive criminology.* Routledge, New York, 2015 pp. 65-84.

[79] S. Maruna *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*, American Psychological Association, Washington D.C., 2001.

Professionals under Component 6.[80] As such, this is an inherently strengths and needs based perspective, and thus perhaps offers another example of the court and practitioners "doing" TJ without their knowing it.

Having noted that offenders in the US in general are 'typically very embittered toward the educational process'[81] an education programme was built into the DDTC programme. One of the most prominent features of the profile of Drug Court participants is early school leaving and over half of those appearing before the Court state that primary level is their highest level of educational attainment.[82] Types of education and training undertaken as part the DDTC programme include literacy, peer support, health and fitness, and traditional Irish Junior Certificate subjects,[83] and while its impact is difficult to quantify, 'comparing the low educational attainment of the majority of participants when first entering the Programme, with the classes attended during the Programme is a way of showing that the majority of clients will have significantly improved their level of education.'[84] One would hope that by doing so it will increase employment and training opportunities open to them at later stages of the programme, and potentially, post-completion. This is a further example of TJ as the court is attempting to engage with participants through a problem solving, proactive and result orientated posture to advance long term change. This is an important discussion as there are strong links between a lack of employment and low completion rates of drug court

[80] See National Association of Drug Court Professionals, supra note 21. As stated earlier in this paper, Phases 1 and 2 are when clients are expected to reduce their drug use and when they move to Phase 3 they are expected to withdraw from the drug use completely.

[81] See Loughran et al, supra note 3, p. 87.

[82] See Farrell, supra note 50.

[83] These include English; Irish; Mathematics; Science; History and; Geography.

[84] See Farrell, supra note 50, p.49.

programmes in Ireland[85] and internationally.[86] In terms of employment, the majority of participants are unemployed when entering drug court programmes, and but research suggest that access to employment is an important aspect of a successful recovery process.[87] Social capital and strong family ties can be motivating factor when it comes to engaging with Drug Court programmes and promoting rehabilitation and research shows that those with strong social ties are more likely to be retained in treatment and are less likely to relapse.[88]

Conclusion

This paper has examined a wide range of international and Irish literature on the subject of Drug Courts. Overall what is evidence is that there is a lack of consistency in the research. This is often due to studies being methodologically weak. In the context of the DDTC it is clear that having been in operation for almost two decades, the numbers who have gone through the DDTC process and who have successfully completed its programme simply suggest that while well intentioned, the DDTC has been a failure. Butlers suggests that this is due to the difficulties associated with policy transfer, and it is hard not to agree to a certain extent, that a US drug court model simply will not work in the Irish criminal justice system without 'radical changes in judicial philosophy and practice, as well as in relationships between criminal justice and healthcare system'.[89] This judicial philosophy refers to the

[85] C.M. Comiskey, P. Kelly, Y. Leckey, L. McCulloch, B. O'Duill, R.D. Stapleton and E. White, *The ROSIE Study: Drug Treatment Outcomes in Ireland*. National Advisory Committee on Drugs, Dublin, 2009.

[86] B. Smith, Completion rates: An analysis of factors related to drug court program completion, *Cogent Social Sciences*, 3, 1304500; J. Gallagher, E. Wahler, E. Lefebvre, T. Paiano, J. Carlton and J. Miller, Improving Graduation Rates in Drug Court Through Employment and Schooling Opportunities and Medication-Assisted Treatment (MAT) *Journal of Social Service Research* 44 (3) pp. 343-349.

[87] G. Cox and M. Lawless, *From residential drug treatment to employment*. Merchants Quay, Dublin, 2000.

[88] A. McLellan, T. Hagan, M. Levine, F. Gould, K. Meyers, M. Bencivengo and J. Durell, Supplemental social services improve outcomes in public addiction treatment. *Addiction* 93(10) pp. 129-1499; B. Havassy and S. Hall, Social support and relapse: Commonalities among alcoholics, opiate users and cigarette smokers. *Addiction Behaviour* 16(5) pp. 235-246.

[89] See Butler, supra note 2 p. 13.

development of TJ in an Irish context. The analysis undertaken in this paper suggests that such a development might not be so difficult to achieve in a Irish contexts, as TJ principle certainly seem to running through aspects of the DDTC, even if this is unbeknownst to the judiciary. If the DDTC continues operating it would perhaps be beneficial to provide training and guidance to the Irish judiciary on the theory and development of TJ. Furthermore, if the DDTC continues operating there should be debate as to whether it should be included in a wider programme of court reforms. It was recently stated that:

"*The Minister for Justice and Equality is examining options as a way forward for the operation of the Drug Treatment Court. The matter will be progressed alongside wider justice reforms that are also under consideration, such as the proposal to establish a Community Court. An independent review of the Drug Treatment Court could inform the Minister's deliberations, and the initiative should continue to be supported in the meantime*."[90]

It therefore seems pertinent to recommend that a comprehensive study and review of the DDTC is undertaken as this could determine whether it has a future operating on its own, whether it should be incorporated into a wider community court structure, which could also incorporate TJ as well as restorative justice[91], or whether indeed it should be abolished. This study would have to consider issues such as recidivism, financial costs, the numbers graduating through the DDTC and the numbers who are now drug free. It should also be carried out with the international Ten Key Components of drug courts in mind to shed light on areas of non-adherence and inefficacy.

[90] See Department of Health, supra note 62, p. 56.

[91] Gavin, P. and Sabbagh, M. Developing community courts with restorative justice in Ireland. *British Journal of Community Justice* 15(2) pp. 1-22.

Whilst our critical analysis has shined new light on the DDTC operating Therapeutic Jurisprudence, further empirical analyses that formally address this is necessary and are our next steps. What the existing research for Ireland has demonstrated, and in light of the English and Welsh drug court research, the extent to which the Dublin model operates with fidelity to the international standard is also worth consideration. It seems clear that all therapeutic approaches taking place this side of the globe lack formal understanding of their international origins, and this has led to somewhat of a chequered history. The lack of anchor from international principles has perhaps undervalued the models, leading to poor publicity, increasingly low participants, alongside failure and/or disinterest for further roll-out.