

Therapeutic Justice and Problem-Solving Courts: A Critical and Comparative Analysis

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Abstract

This article examines the global phenomenon of problem-solving courts, exploring their evolution, fundamental principles and impact on contemporary judicial systems. The transition of this innovative model from the criminal to the civil sphere is analyzed, highlighting its applications in different jurisdictions and areas of law. The study addresses the challenges faced in implementing these courts, including issues of legitimacy, effectiveness and adaptability to diverse legal and cultural contexts. Through a comparative perspective, the article evaluates the potential of problem-solving courts to reform traditional justice systems, promoting a more holistic approach focused on the effective resolution of complex social and legal conflicts.

Keywords

Problem-Solving Courts, Therapeutic Justice, Judicial Reform, Conflict Resolution, Comparative Law

1. Introduction: The Emergence and Evolution of Problem-Solving Courts

The traditional judicial system, with its primary focus on adjudicating disputes and applying sanctions, has been increasingly challenged to respond more effectively and holistically to the complex social and legal problems of contemporary society.

In this context, problem-solving courts have emerged as a significant innovation, proposing an approach that goes beyond the mere resolution of cases, seeking to address the underlying causes of conflicts and promote lasting changes in the lives of the individuals and communities involved.

The model had its genesis in the United States in the late 1980s, with the emergence of the first Drug Courts in Miami, Florida. These courts were conceived as

a response to the growing crack crisis and the recognition that mass incarceration of drug users was not producing the desired results in terms of crime reduction and rehabilitation (Hora, Schma, & Rosenthal, 1999). The initial success of these courts led to their rapid proliferation and the expansion of the model to other areas of criminal law and, subsequently, to the civil sphere.

The pioneering Drug Courts in the US employ several specific techniques, such as intensive monitoring (the use of frequent, random drug tests, combined with regular court appearances); a system of graduated sanctions (such as additional community service) and rewards (such as reduced court appearances); and multidisciplinary teams (collaboration between judges, prosecutors, defenders, treatment counselors and case managers to make collective decisions about participants' progress). Similar experiences can be found in drug treatment courts in Latin America, such as Chile, Mexico, Colombia, Argentina and Brazil.

As Winick points out, problem-solving courts are a practical manifestation of the theory of Therapeutic Justice, which proposes that the law can serve as a therapeutic agent and that legal institutions have the potential to promote the psychological and emotional well-being of individuals who meet the justice system. This perspective represents a paradigmatic shift in the way the role of the judiciary is conceived, moving from a neutral arbiter to an active agent in solving social problems (Winick, 2003).

The evolution of these courts was not limited to the United States. In fact, the problem-solving court movement quickly spread to other countries, including Canada, Australia, the United Kingdom and parts of continental Europe (Berman & Feinblatt, 2001). This global diffusion of the model has been accompanied by significant adaptations to meet the specificities of different legal systems and cultural contexts.

In Brazil, although the term problem-solving courts is not widely used, initiatives that share similar principles have been gaining ground. In this sense, Azevedo highlights the implementation of Restorative Justice programs and the creation of Special Courts as examples of approaches that seek a more effective and less adversarial resolution of conflicts (Azevedo, 2005).

As they expanded beyond the criminal sphere, new challenges and opportunities arose for the courts. Courts specializing in mental health, domestic violence, housing and family issues have begun to apply problem-solving principles to an increasingly wide range of civil matters. This expansion has raised important questions about the suitability of the model for different types of disputes and its potential to fundamentally transform the nature of civil adjudication.

In 2009, Nolan already recognized problem-solving courts as one of the most significant innovations in the judiciary in recent decades, an understanding that remains current (Nolan, 2009). Naturally, the innovation is not without controversy, raising questions about the appropriate role of the judge, the limits of judicial power and the tension between therapeutic goals and traditional principles of due process.

As they continue to evolve and adapt to new contexts, it is crucial to critically examine their theoretical foundations, assess their practical impact and consider their potential to shape the future of justice systems around the world.

2. Principles and Characteristics of Problem-Solving Courts

Problem-solving courts are distinguished from traditional courts not only by their organizational structure, but fundamentally by their philosophy and approach to the administration of justice.

One of the fundamental principles is the focus on resolving the underlying causes of legal problems, rather than simply adjudicating claims. As Winick notes, these courts seek to understand and address the psychosocial problems that are at the root of legal conflict (Winick, 2003). This approach reflects a broader understanding of the role of the judiciary in society, recognizing that many legal problems are symptoms of deeper issues that require multidisciplinary interventions.

Another fundamental principle is interdisciplinary collaboration. These courts often involve a team of professionals, such as social workers, psychologists and chemical dependency treatment specialists. This allows for a more holistic understanding of the individual and their needs, facilitating more effective and personalized interventions (Hora, Schma, & Rosenthal, 1999).

The active participation of the judge is another distinctive feature of problem-solving courts. In contrast to the more passive and neutral role of the judge in traditional courts, judges in these courts often take on a more interventionist and therapeutic role. Berman and Feinblatt describe this new judicial role as that of a “team approach”, working in collaboration with other professionals to motivate and support positive change in program participants (Berman & Feinblatt, 2001).

The emphasis on individual accountability and behavioral change is another central principle. Such judgments generally employ a system of gradual incentives and sanctions to encourage compliance with the program and promote long-term behavioral change. This seeks more sustainable results than traditional punitive approaches (Casey & Rottman, 2005).

Continuous monitoring and evaluation of results are essential characteristics of problem-solving courts. Unlike traditional courts, where the sentence is the act that, in theory, puts an end to the claim, here there is continuous supervision of the participants, often for prolonged periods, given the structural nature of the problems involved. Continuous judicial monitoring allows for rapid adjustments to treatment and interventions, increasing the chances of long-term success (Goldkamp, 2000).

Voluntariness is another important aspect, especially in the civil context. While some criminal courts may offer participation in treatment programs as an alternative to prison, civil courts generally operate based on the voluntary consent of the parties involved. This is an important characteristic to ensure the legitimacy of the courts.

Finally, problem-solving courts are characterized by their flexibility and ability

to adapt. Recognizing that there is no single solution to all problems, they usually adopt an experimental approach, testing new strategies and adapting their methods based on evidence and results. This willingness to innovate and learn from experience is fundamental to continued success in terms of efficiency (Nolan, 2009).

It can thus be seen that the principles and essential characteristics of these courts consist of a significant reorientation of the role and functioning of the Judiciary and of judges. With this, it is possible to offer an innovative approach to tackling complex social and legal problems.

3. Challenges of Problem-Solving Courts in the Civil Sphere

The expansion of problem-solving courts into the civil sphere represents a significant development in the judicial reform movement. While the principles remain similar to those of criminal courts, their application in the civil context presents unique challenges and promising opportunities to rethink the nature of civil adjudication.

One of the main challenges is the diverse and often complex nature of civil disputes (Tavares, 2020). While criminal problem-solving courts often deal with relatively homogeneous issues such as substance abuse or mental health, civil disputes cover a much wider range of problems. This diversity requires a more flexible and adaptable approach, capable of responding to the nuances of each type of case.

Another significant challenge is the balance between therapeutic goals and traditional principles of civil procedure, such as due process of law. After all, its more interventionist nature may conflict with traditional expectations about the role of the judge in civil proceedings. This potential conflict raises important questions, especially regarding the limits of judicial activism and the preservation of judicial impartiality.

The dynamic of voluntariness also takes on a different dimension in the civil context. In the criminal context, problem-solving courts often offer participation as an alternative to imprisonment. In the civil context, participation must generally be entirely voluntary, which can limit its scope and effectiveness, especially in cases where one of the parties may not be willing to participate in a more collaborative and intensive process.

Despite these challenges, they offer significant opportunities to improve the administration of justice. One of the main advantages is the ability to address the systemic problems that often underlie civil disputes, adopting a holistic and interdisciplinary approach capable of promoting more lasting and effective solutions.

Another potential benefit is improved access to justice. The more informal and collaborative approach can make the judicial process less intimidating and more accessible to litigants without legal representation. These courts have the potential to democratize access to justice by providing a forum where individuals can participate more directly in resolving their legal problems.

The expansion of problem-solving courts into the civil sphere also offers a unique opportunity for judicial experimentalism (Lordelo, 2024b). This experimentalism can manifest itself in various ways. For example, these courts can test different models of interdisciplinary collaboration, experiment with new ways of monitoring and evaluating results, or develop innovative approaches to resolving specific conflicts.

In addition, judicial experimentalism can contribute to a deeper understanding of the factors that contribute to the success or failure of judicial interventions. By adopting an experimental approach, these courts can generate valuable knowledge about best practices in resolving complex civil disputes, potentially informing broader reforms in the justice system.

This is the case with so-called structural litigation, such as the famous *Brown v. Board of Education of Topeka* (“Brown I”), a landmark 1954 U.S. Supreme Court case that ruled that racial segregation in public schools was unconstitutional. Due to the complexity of the case and the resistance of the states, the court subsequently noted the need to adopt experimental measures, delegating to local courts the adoption of prospective measures necessary to realize a plan of action.

Recent Brazilian academic research has paid special attention to structural processes, conceived as class actions in which the aim is to reorganize a bureaucratic structure, public or private, that causes, fosters or enables the occurrence of a violation by the way it operates, giving rise to a structural dispute through judicial action (Vitorelli, 2018). The country has become a laboratory for experiments of this nature, in which judicial measures are sought, such as the adoption of plans for environmental reparations, prison reforms, among others.

In short, the expansion of problem-solving courts into the civil sphere presents both significant challenges and opportunities. While issues of adaptability, voluntariness and balance with traditional principles of civil procedure remain important challenges, the potential to improve access to justice, address systemic problems and promote judicial experimentalism offers promising prospects for the future of civil procedural law.

4. Comparative Analysis: Implementation in Different Legal Systems

The implementation of problem-solving courts in different legal systems around the world offers a unique opportunity to examine how this innovative model adapts to diverse legal, cultural and social contexts.

In the United States, the birthplace of the movement, the model has expanded significantly since the creation of the first Drug Court in Miami in 1989. The proliferation of these courts in the US has been driven by a combination of factors, including the crisis in the prison system, frustration with traditional approaches to chronic social problems and support from judicial and legislative bodies (Hora, Schma, & Rosenthal, 1999). The US common law system, with its emphasis on judicial precedent and the discretion of judges, provided fertile ground for

experimentalist judicial innovation.

In the UK, the adoption of problem-solving is a reality (Bowen & Whitehead, 2013). Initiatives such as the Scottish Drug Courts and the Specialist Domestic Violence Courts in England and Wales show a growing interest in this model. Of particular note are the Family Drug and Alcohol Courts (FDACs), which focus on child welfare cases involving parental substance abuse. They use methods such as the non-adversarial approach, with the use of meetings without lawyers, where judges interact directly with parents to discuss progress (Bambrough, Shaw, & Kershaw, 2014).

In Australia, the experience has found particularly fertile ground. The country has been a leader in the implementation and innovation of problem-solving courts, particularly in areas such as indigenous courts and mental health courts (King, 2008). Koori Courts, focused on offenders from traditional communities, use culturally sensitive techniques, such as sentencing circles, in which stakeholders participate directly in the sentencing process, offering culturally appropriate advice (Marchetti & Daly, 2007). Informal language and cultural reconnection are also techniques used, with programs that reconnect offenders with their communities and cultural practices as part of the rehabilitation process (Borowski, 2011).

Similarly, in New Zealand, the Rangatahi Courts, which focus on young Maori offenders, employ traditional ceremonies, such as the use of *powhiri* (welcoming ceremonies) and *karakia* (prayers) to begin court proceedings. Rehabilitation plans based on *whānau* (family) are also used, so as to involve the young person's entire extended family (Taumaunu, 2014).

In the context of continental Europe, with its civil law systems, the implementation of problem-solving courts has faced unique challenges. The inquisitorial tradition and the more active role of the judge in many civil law systems can paradoxically facilitate certain aspects of problem-solving courts, while creating tensions in others (Freiberg, 2001). For example, in Germany, although they do not formally exist, many courts have adopted practices that reflect similar principles, particularly in cases involving young offenders.

In Brazil, although the term is not widely used, initiatives that share similar principles have been gaining ground, such as the Special Courts and Restorative Justice programs (Azevedo, 2005). The Brazilian legal system, which combines elements of civil law and common law, offers unique opportunities for adaptation and innovation in the context of problem-solving courts.

An example of this is Restorative Justice, which is emerging as an innovative and promising approach to resolving conflicts and promoting social peace. In a context of prison overcrowding, high rates of criminal recidivism and growing disbelief in the traditional justice system, it presents itself as an alternative that seeks not only to punish the offender, but also to repair the damage caused to crime victims and the community.

The growing acceptance and implementation of Restorative Justice in the country culminated in the publication of Resolution 225/2016 of the National Council

of Justice (CNJ), later updated by Resolution 300/2019. These resolutions establish guidelines for the implementation and dissemination of Restorative Justice within the Judiciary, representing a significant milestone for the institutionalization of these practices in Brazil.

To understand the proposal of Restorative Justice, it is essential to contrast it with the traditional model of retributive justice. Zehr makes the following distinctions (Zehr, 2008):

1) Focus: while retributive justice focuses on punishing the offender, restorative justice focuses on repairing the damage and restoring relationships.

2) Participation: retributive justice is conducted by professionals in the judicial system, with limited participation by the parties directly involved. Restorative justice, on the other hand, promotes the active involvement of the victim, the offender and the community.

3) Accountability: in the retributive approach, the offender is held responsible through punishment. In the restorative approach, the aim is for the offender to understand the impact of their actions and take responsibility for making amends.

4) Outcome: the main aim of retributive justice is to impose the penalty laid down by law. Restorative justice aims to repair the damage, reintegrate the offender and strengthen community ties.

A comparative analysis reveals several factors that influence successful implementation in different legal systems:

1) Flexibility of the legal system: systems that allow for greater judicial discretion and experimentation tend to facilitate the implementation of problem-solving courts.

2) Legal culture: the receptiveness of the legal community to innovative and therapeutic approaches is crucial to the success of these courts.

3) Resources and infrastructure: the availability of resources for support and treatment services is essential for the effectiveness of problem-solving courts.

4) Political and social context: political support and public perception of the need for alternative approaches significantly influence the adoption and success of these courts.

5) Legal traditions: the compatibility of the model with existing legal traditions affects its acceptance and implementation.

In fact, the successful implementation of problem-solving courts in different legal systems requires careful adaptation to local contexts, balancing the fundamental principles of the model with the specific legal and cultural realities of each jurisdiction (Wexler, 2014). Comparative analysis also reveals common challenges in different legal systems. These include issues of legitimacy and separation of powers, concerns about due process, difficulties in evaluating effectiveness and standardizing practices, and resistance from more traditional sectors of the legal community.

However, despite these challenges, the global diffusion of problem-solving courts demonstrates their potential to transcend legal and cultural barriers. As Nolan

notes, the model's adaptability to different legal contexts suggests that its fundamental principles respond to universal needs in contemporary justice systems (Nolan, 2009).

In conclusion, the implementation of problem-solving courts in different legal systems reveals both the versatility of the model and the importance of sensitive adaptations to the local context. This comparative analysis not only enriches our understanding of it as a global phenomenon, but also offers valuable lessons for future judicial reform initiatives in different jurisdictions.

5. The Future of Problem-Solving Courts: Perspectives and Critical Considerations

As the problem-solving court model continues to evolve and expand globally, it is crucial to critically examine its future potential, as well as the challenges and questions that remain unanswered.

One of the most promising prospects is their ability to catalyze a broader transformation in the justice system. In this sense, Berman and Feinblatt argue that they have the potential not only to solve individual problems, but also to inspire systemic changes in the way courts approach a variety of social and legal issues (Berman & Feinblatt, 2002). This view suggests that the principles and practices developed could eventually be incorporated into conventional courts, leading to a more holistic and solution-oriented approach throughout the judicial system.

Another promising prospect is its potential to promote greater integration between the justice system and other social services. This opens a model for more effective collaboration between the judiciary and a variety of community agencies and services. This integration could lead to more comprehensive and effective interventions to address complex social problems.

Its continued expansion into new areas of law also represents an important prospect. The model could be adapted to address an even wider range of cases, from environmental disputes to intellectual property conflicts. This expansion could lead to new forms of conflict resolution and the application of therapeutic principles in areas of law traditionally seen as adversarial (Tyler, 2008).

However, the future of problem-solving courts also faces significant challenges and important criticisms. A key concern is the risk that these courts could compromise fundamental principles of due process. As Hoffman points out, their collaborative and therapeutic nature has led to concerns about the procedural protections essential to a fair and impartial justice system (Hoffman, 2011). This concern is particularly acute in the context of criminal problem-solving courts, where the consequences of participation can be significant.

It is true that the principles of interdisciplinarity and judicial intervention differ in their application between the civil and criminal contexts. This is due, in particular, to the sanctioning nature of criminal proceedings, where a more robust concern for procedural guarantees is required. However, this does not inhibit the adoption of flexible techniques that allow for a more appropriate solution to cases.

In fact, international experience has shown that the field of criminal proceedings has perhaps been the most fertile for restorative experimentation.

Another important criticism concerns fairness and access to justice. The limited availability of problem-solving courts and the selectivity in their admission can create a two-track justice system, in which some individuals have access to more therapeutic and individualized approaches, while others remain subject to more punitive and adversarial processes. This potential disparity raises important questions about equality before the law and distributive justice.

Their long-term sustainability is also a critical consideration. Carey et al. note that their continued success depends on adequate funding, sustained political support and the availability of treatment resources and social services (Carey et al., 2006). In an environment of budget constraints and political change, maintaining and expanding these courts can face significant challenges.

Furthermore, the effectiveness of problem-solving courts remains a matter of debate. Although many studies have shown positive results, particularly in terms of reducing recidivism in drug courts, the evidence base for other types and for their long-term benefits is still limited. More rigorous research is needed to fully assess their impact in different contexts and for different types of legal and social problems.

An additional critical consideration is the risk that they may inadvertently expand the scope of the social control exercised by the justice system. As Nolan notes, by adopting a more interventionist and therapeutic approach, problem-solving courts can extend the reach of the judiciary into areas traditionally outside its jurisdiction (Nolan, 2003). This expansion of the role of judges raises important questions about the appropriate limits of judicial authority and the balance between therapeutic intervention and individual autonomy.

Despite these challenges and criticisms, the future of problem-solving courts looks promising, especially if they can effectively address the concerns raised. One potential direction for the future is the development of hybrid models that combine elements with more traditional court procedures. Another important prospect is the growing internationalization of the movement. The exchange of ideas and practices between jurisdictions has the potential to enrich and refine the problem-solving court model, adapting it to a variety of cultural and legal contexts (Goldberg, 2011). This international exchange can lead to significant innovations and the identification of universally applicable best practices.

The emergence of hybrid models is evidenced in several jurisdictions. In Canada, the Ottawa Drug Treatment Court has pioneered a “stepped” approach where cases begin with traditional court procedures for eligibility and rights advisement, then transition to problem-solving methods for treatment and monitoring. Similarly, Australia’s Neighbourhood Justice Centre in Victoria combines traditional court functions with problem-solving approaches, maintaining formal procedures for contested matters while employing therapeutic techniques for cases where parties agree to participate.

The United Kingdom has developed a particularly instructive hybrid model through its Integrated Domestic Abuse Court pilot program. In 2020, an expert analysis called the Harm Review examined how family courts handle domestic violence cases and other serious offenses. The study found that the adversarial process in these courts often intensified conflicts between parents, potentially causing new trauma to victims and their children. In response, the government committed to implementing an Integrated Domestic Abuse Courts (IDAC) pilot project, which would simultaneously analyze family and criminal matters to provide more consistent support to victims.

This court handles both criminal and civil matters related to domestic abuse, using traditional adversarial procedures for fact-finding and determination of guilt, while incorporating problem-solving approaches for sentencing, monitoring, and support services.

These hybrid models represent a promising evolution in court innovation, offering a framework that preserves essential legal protections while incorporating therapeutic approaches where most beneficial. Their success suggests that the future of judicial reform may lie not in wholesale adoption of problem-solving courts, but in thoughtful integration of their most effective elements into existing court structures.

The integration of technology also represents a promising direction. The use of digital tools for monitoring, communication and service delivery could significantly increase the efficiency of the courts. This could include the use of mobile apps for compliance monitoring, online platforms for education and support, and data analysis to evaluate and improve program outcomes (Lordelo, 2024a).

For jurisdictions considering implementing problem-solving courts, the comparative analysis suggests several essential policy considerations. The foundation should be comprehensive enabling legislation that clearly defines these courts' scope and authority, establishes participation criteria, protects due process rights, and ensures stable funding mechanisms. Implementation should follow a phased approach, starting with pilot programs in areas with strong stakeholder support and clear evaluation metrics, while developing standardized protocols that allow for local adaptation. Critical infrastructure development includes specialized training for judges and court staff, partnerships with treatment providers and social services, technological infrastructure for case management, and robust data collection systems.

6. Conclusion

In conclusion, the future of problem-solving courts is characterized by both exciting opportunities and significant challenges. As these courts continue to evolve and adapt, it will be crucial to maintain a careful balance between innovation and adherence to fundamental principles of justice and due process.

Among the various criticisms, those relating to judicial impartiality and procedural fairness in problem-solving courts certainly deserve special attention. A

possible way out of this problem would be to adopt experimentalist judicial methodologies that empower the parties more than the judges in the construction of negotiated solutions. The procedural choice itself could be delegated to the parties, who could choose between traditional or specialized litigation or even make the necessary adjustments through procedural conventions such as negotiated class certifications (Tavares, 2020).

As we move forward, ongoing critical evaluation, rigorous research and interdisciplinary dialog will be essential in shaping the future of this form of judicial experimentalism. If successful in navigating the challenges ahead, these courts have the potential not only to transform the administration of justice, but also to contribute significantly to addressing some of the most pressing social problems of our time. This is not just a matter of judicial innovation, but a reflection of our collective ability to reimagine the role of the justice system in contemporary society.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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