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Sentencing drug addiction A comparative approach in Common & Continental legal systems

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Abstract

In many cases, when a drug addict is charged with a criminal offence, the criminality is a function, directly or indirectly, of the addiction. Yet, traditional sentencing in both common law and continental jurisdictions focuses on the criminality, even if the addiction is given some mitigating role. More recently, we have seen in many common law systems the development of Drug Treatment Courts which take a therapeutic approach that focuses on the addictions and its treatment. In continental systems, the trial judge plays a dominant role that includes both the duty to investigate and to find the substantial truth of the offence. In this paper, I consider whether the role of the continental judge can be modified into a "therapeutic" judge in a Drug Treatment Court.

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What is Drug Treatment Court (DTC)

Drug treatment courts emerged in 1989 as a distinctly different way of dealing with drug user offenders and represented a response to the growing numbers of drug-involved offenders in U.S. jails and prisons. Canada established DTC in Toronto in 1998

Drug Treatment Court (DTC) is based upon a model of “therapeutic jurisprudence” that relies upon a partnership between the courts and treatment to pair treatment services with judicial supervision for repeat non-violent offenders who’s criminal activity is driven by a drug addiction.

DTCs recognize that addiction is a relapsing disease and attempt to moderate inflexible accountability rules. Drug treatment courts are not all the same BUT they share a number of common characteristics.

Drug treatment court offenders:

- appear more frequently in front of judges
- are required to enter into an intensive treatment program
- undergo frequent, random urinalysis, undergo sanctions for failure to comply with program requirements
- are encouraged to become drug-free, develop vocational and other skills to promote re-entry into the community.

Drug treatment courts operate as a bridge between criminal justice and health services in the community for the drug user offender. Generally, the concept implies “working together” to meet a common goal.

How DTC Works?

ARREST & ADMISSION

Arrest - Application –Crown Screening – Treatment Assessment

ADMISSION

Guilty Plea – Admission – DTC Release Conditions[e.g. the finding of guilt is confirmed and the plea is locked in after they have finished the 30 day assessment phase, Ottawa DTC]

TREATMENT & SUPERVISION [assessment-stabilization-intensive treatment-relapse prevention or maintenance]

- Daily Treatment (30 hrs /week) – Weekly Court appearances
- Twice weekly urine testing – Employment/education readiness

Program duration: approximately 12 months

EXIT

- Graduation : Non – custodial sentence (probation)
or
- Removal : Regular sentencing (custody)

Types of charges at time of admission

1. Trafficking
2. Administration of Justice
3. Property
4. Drug possession
5. Possession for purposes of trafficking
6. Burglary
7. Fraud
8. Theft
9. Robbery

The DTC Applicant (The Ottawa DTC)

1. All clients have long standing addictions and are consuming their drug of choice (crack or opiates) on a daily basis.
2. Most have histories of nonviolent, addiction related crime and pose a substantial risk of reoffending.
3. Most struggle with concurrent mental health disorders (diagnosed and undiagnosed).
4. Their physical health is generally poor and basic needs such as stable housing are unmet and pose a significant barrier to treatment for many.

Judicial Discretion at Sentencing via DTC

Since the project is focused on Canadian Drug treatment courts, both observation of Ottawa DTC pre-trial meetings and hearings and studying of the operation of DTC in Canada show that:

- When the convict applies to participate in DTC his acceptance is not mandatory.
- Especially for serious offences, the Federal and Provincial Crown evaluate along with the DTC team, the cause of the particular crime. The Crown has discretion to accept or reject participation. The pre-trial meetings are collegial and the DTC Judge [or defence counsel if present] can try to encourage acceptance.
- After the applicant is accepted if there are problems or non-compliance the DTC Judge decides how to respond which can include a sanction, temporary revocation of release or rejection from the program.
- BUT Judicial power at DTCs is focused on rehabilitation and structured by the therapeutic model of criminal justice.

DTC GRADUATION CRITERIA

For every dollar spent on addiction treatment and prevention today, at least \$5.60 will be saved in future associated costs. Report of the Provincial Auditor for Ontario, 1999

- Have suitable and stable housing
- Be either working, going to school, or volunteering in the community
- Not have accrued any new charges or convictions
- Have been in substantive compliance with rules of program
- Have been abstinent from all drugs and alcohol, as verified by urine drug testing, for not less than 180 days (level I) or 90 days (level II)

Graduation Rates in Ottawa DTC:

2013-2014: 60%
2010-2011: 20-30%
2011-2012: 30-45%
2012-2013:45-55%

Even if participants do not graduate from the program, many of them have reduced their drug use and learned skills to cope with and manage their addiction and criminal thinking behaviours.

Changing Roles

THE LAW REFLECTS THE POLITICAL VALUES OF ITS TIME

The DTCs interfere with the adversarial system. The roles of the parties change. Looking at the Canadian model:

The Prosecutor does not prove guilt but does the screening for eligibility. When the applicant is found eligible his role becomes encouraging completion.

The Judge participates actively. He is encouraging towards therapy and respects every positive step made by the offender. He understands and appreciates the hard work an addict needs to do in order to change his criminal life and his addiction routine.

Defense counsel works towards the completion of the treatment.

The **treatment case manager** plays an active role in the procedure.

The **DTC client** has a Voice

In the past the above changes regarding the roles of the prosecutor the judge and the defense counsel were criticized as “scandalous”.

But

Although the DTC model looked like it would “move” the system to something new and obscure, it did not.

To the contrary, the common law system did not lose its characteristics. Criminal procedure and the traditional trial remain the same (regarding the parties’ roles).

The continental system roles

The **judge** participates actively in the trial. He investigates the truth of the case and is free to evaluate the adduced evidence upon the *l' intime* conviction principle (free evaluation of evidence)

The **prosecution** has no burden of proof. The prosecutor may propose an acquittal during trial with no binding effect on the court. He may interrogate the accused and the witnesses

The **defence counsel** works for the defendant

The **defendant** can be interrogated by the judge and the prosecutor (but not by the defence counsel) and always speaks last.

This comparison of roles indicates that it might be easier for the continental system to adopt the DTC model than it was for the common law.

The Continental Judge as a Therapeutic Judge

Questions regarding judicial attitude and stereotypes – Continental system

Can the continental judge perform a therapeutic role ?

The tradition of the continental system is hierarchical. The judge is the authoritative leading figure in the trial.

Will this judge “accept” the role of communicating with an addict and engage in discussions towards therapy with empathy? Can he reward the addict when he does well with his treatment?

Questions regarding legislation – Continental system

Is there any prohibition in the criminal procedure code that precludes the judge from monitoring the therapy of an addict on a regular basis?

Are there domestic laws that permit or encourage therapy?

Are there laws that provide for a judge alone trial in drug cases?

The pilot project discussion & drug policy

Although DTCs have proved their effectiveness both in recidivism and cost, there still is criticism. It is important to say that DTCs differ among themselves. When we look at evaluations, we have to think carefully how, when and where the research has been conducted. (e.g. US model differs from the Canadian ones)

Treating drug dependence through health care and not through punishment is one of the basic concerns in most European countries. Alternative sentences to incarceration have been implemented in most of these countries.

European research shows that only Belgium operates a DTC but the model is not the same as in common law countries. The Portuguese criminal justice system provides another style of therapeutic intervention.

In other countries e.g. in Greece, for serious drug cases therapy is usually one of the terms and conditions of release but only if the accused asks for it and the judicial authorities accept it.

Research and trial practice show that when the treatment order is not monitored on a weekly basis, as in DTCs, there is less progress and the completion rates fall almost to half.

Volunteer Judge and Prosecutor

The true expansion of sentencing objectives to the rehabilitation of the offender

All research supports the finding that **the most important characteristic of DTC success is the role of the Judge.**

The operation of a pilot drug treatment court in continental countries will permit an evaluation which will disclose the need for possible procedural amendments, as well as weak points.

The judge and the prosecutor should be volunteers. Research shows that **volunteers perform better in the DTC model.**

Continental judges and prosecutors are tasked to find the substantial truth in each case. When this truth is linked to underlying drug addiction, the next step should be treatment of the addiction which will rehabilitate the offender and reduce the risk of recidivism.

The monitoring of treatment will provide evidence of the offender's rehabilitation which is one of the goals of sentencing and the criminal process. And, thus, does not conflict with the judge's role.

The positive results of DTC effectiveness in other legal cultures suggest that the continental system needs to abandon traditional authoritarian obstacles and treat the root of drug-related criminality.

DTC Participants say:

“I felt the **recognition** of people I have been running from my entire life. People I’ve—for a lack of a better term—greatly disliked, for example, legal officials and the law. The fact of being **recognized by them** for ... just showing up meant a lot, because I spent most of my life not showing up.” [Graduate]

“Going to the court twice a week I again was establishing a routine. Every Tuesday every Thursday, you know. You get that routine after a while and **it helps you stabilize**, you know. **Some kind of regular routine is very important when you are getting off hard drugs. If you got too much time on your hands, you are in danger.**” [Non-completer]

“They are **small rewards, but they are nice rewards**. They’re thoughtful, and when you actually see someone receive one, it’s like a boost. It actually does, it makes one want to have one themselves. And yeah, **they’re small rewards, but in actuality, they’re huge**—in what they actually do.” [Graduate]

R. v. McDonald, 2015 ABCA 108 [para.39]

“It would be naive to assume that an offender's motivation for entering a drug treatment program were not, in part, a wish to avoid incarceration.

In fact, that is the very carrot used to encourage offenders to enter drug treatment programs and make a genuine effort at change.”

By incurring the cost of a DTC, government and society may realize some potential benefits:

- 1. Avoided or delayed incarceration costs.** If DTC graduates do not re-offend, incarceration costs are avoided. If they do re-offend, the costs are not avoided, but are shifted into the future.
- 2. Reduced dependence on social services and increased positive economic contribution.** Graduates who resume productive careers or become employed contribute to the economy, pay taxes, and reduce their reliance on social assistance or other social services as well as post-treatment reduction in health care costs.
- 3. Quality of life.** By addressing their addictions and criminal behaviour, general benefits occur to graduates and their families in terms of quality of life .
- 4. Economic benefits from reduced crime.** To the extent that recidivism is reduced, there is also a corresponding reduction to the costs of crime (including incarceration and victim costs) for society as a whole.

Common Criticisms

1. The DTC distorts the role of the judge: Is it true?
2. There are better drug strategies than a DTC (e.g. more community treatment; harm reduction) : is this an either/or choice ?
3. A better response would be lower sentences for drug addicted offenders: does this preclude the revolving door phenomenon?
4. What about drug treatment in prison? (not monitored like DTC, no separate therapeutic wings)
5. The DTC model is coercive

R. v. McDonald, 2015 ABCA 108 [para36]

The core premise of a drug treatment court, including the Drug Court here, is that offenders can be aided through its processes and that by tackling the cause of crime -- the addiction itself -- society too will benefit.

The principal tool of a drug treatment court is to break the offender's pattern of anti-social and self-harming behaviour.

Total success is ideal.

The Drug Treatment Court

is the **State's sentencing response**

when prevention, community sanctions or incarceration, drug treatment and/or harm reduction **have failed** to stop the operation of the revolving door phenomenon [drug-crime-prison-drug-crime]

For drug addicted offenders

the DTC is the epitome of Criminal Justice goals



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