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Should Judges Be Empathic? The Place of Judges' Empathy in Therapeutic Jurisprudence²

1. Introduction

We have recently witnessed the popularization of empathy in the public domain. While there are numerous fields where empathy is a key point of interest as such, this article will focus on empathy in the context of law. However, narrowing it down to this discipline does not solve the problem of undetermined nature of empathy nor its many definitions.³

If one considers the beginnings of the concept of empathy, the link between empathy and law may be indistinct. However, numerous links between empathy and law are present in Western literature, especially American literature. This topic is frequently addressed in the context of empathy in legal practice. Discussions in the literature focus on both the positive and the adverse consequences of applying empathy in the legal profession. One of the challenges related to the deliberations on empathy in law is the mere understanding of empathy as a term that later becomes the subject of debates in the contexts of justice, legal systems, lawyers' education, or legal professions. In the literature, readers frequently find arguments against the use of empathy in law. For example, it has been claimed that empathy may distort a judge's impartiality or raise excessive emotions. However, there is also an extensive literature in which the authors, who are advocates of empathy in legal practice, perceive empathy as a specific opportunity to improve the functioning of the judiciary and its effects. Such a view of empathy in law, where it is presented as an element in a judge's work and demonstrates a certain vision of law, shares said vision of law with one of the legal philosophies known as the therapeutic jurisprudence (hereinafter: 'TJ').⁴ Since it acknowledges another human being and the objectives that may be pursued by properly

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² This article is a deliverable of the research project 'Empathy as a Challenge. Example of Polish Judges' (Grant number 2019/33/B/HS5/01664) financed by the National Science Centre, Poland and carried out at the Faculty of Law and Administration of the Jagiellonian University in Krakow.

³ See more about history on concept of empathy: S. Lanzoni, *Empathy: a History*, New Haven–London 2018.

⁴ The notion of therapeutic jurisprudence has been introduced to Polish readers, see: A. Zienkiewicz, *Holizm prawniczy z perspektywy Comprehensive Law Movement. Studium teoretycznoprawne* [Eng. *The Legal Holism From the Perspective of Comprehensive Law Movement. A Theory of Law Approach*], Warszawa 2018, and *Therapeutic Jurisprudence*, in: M. Andruszkiewicz, A. Brezcko, S. Oliwniak (eds.), *Filozoficzne i teoretyczne zagadnienia demokratycznego państwa prawa* [Eng. *Philosophical and Theoretical Issues of the Democratic State of Law*], Białystok 2015, pp. 174–179; B. Kmieciak, *Terapeutyczne działanie prawa* [Eng. *Therapeutic Function of Law*], "Forum Prawnicze" 2012/2, pp. 64–81; M. Najda, *Zarządzanie emocjami na sali rozpraw a terapeutyczne cele postępowania* [Eng. *Management of Emotions in a Courtroom and Therapeutic Goals of Judicial Proceedings*], "Dziecko Krzywdzone. Teoria, Badania, Praktyka" 2021/20, pp. 159–178.

channelling the actions of subjects operating within the judiciary, TJ pays attention to soft skills, communication and empathy, which can contribute to the therapeutic and anti-therapeutic consequences caused to the subjects it comes into contact with in the legal system. However, it is important to note that TJ is a part of a wider movement which is a comprehensive law movement (hereinafter: 'CLM'), which seeks to resolve legal matters in the optimal way for the individuals and focus on terms of personal functioning, interpersonal relationships, wellbeing, and morale. The CLM recognizes that litigation is one of the least optimal methods for resolving a conflict, and often views it as the last resort due to its focus on resolving legal matters in a way that leaves the parties in a generally better, or at least not worse, condition than they were at the outset. The CLM looks for creative, win/win solutions for individuals.⁵ It has at least nine converging 'vectors' which are: collaborative law, creative problem solving, holistic justice, preventive law, problem-solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.⁶ Thus far, no one has written a text that focuses on the reconstruction of the understanding of empathy and the role of empathy in the work of judges in TJ. The first goal of this paper is to reconstruct the concept of empathy in TJ. Secondly, this paper aims at evaluating and systematizing TJ postulates as regards the application of empathy in the judiciary by legal actors/therapeutic agents, and to approach these from a critical perspective.

In the first part of the article, the TJ and its understanding of empathy are presented based on a critical analysis of the relevant literature. The underlying assumptions of therapeutic justice have been analysed in texts by David B Wexler and Bruce J. Winick, the main representatives of TJ. The second part of the article presents the vision of the role of empathy in the practice of judges and other staff of the judiciary. In the last section of the article, the author refers to the reception of empathy in TJ and the postulates related to empathy in the judiciary.

2. What is therapeutic jurisprudence?⁷

TJ derives from psychology and mental health law. It dates back to the 1980s and was initiated by Wexler. Winick first met Wexler in 1975 in Miami, when he was given an office next to Winick's. The researchers established a professional relationship and struck up a friendship that survived decades and functioned as a 'mutual catalyst' and 'soundboard' for TJ ideas.⁸ Not only has this cooperation influenced the popularization of the idea, but it has also impacted its development as it resulted in numerous joint and individual publications on TJ.

Wexler considers TJ as a 'study of the role of the law as a therapeutic agent' which focuses on impact of law on emotional life and psychological well-being of people.⁹

⁵ S. Daicoff, *The Comprehensive Law Movement An Emerging Approach to Legal Problems*, "Stockholm Institute for Scandinavian Law" 2006/49, pp. 111–112, <https://scandinavianlaw.se/pdf/49-7.pdf>, accessed on: 25 September 2022.

⁶ S. Daicoff, *The Comprehensive Law...*, pp. 113–114.

⁷ In my paper I am focusing on Winick's and Wexler's work as I am trying to reconstruct the concept of empathy in the TJ from their perspective. More information about TJ, including research on TJ, developing concepts, the role of compassion and introducing TJ into practice, see: D.C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, "Miami Law Review" 2021/79, pp. 660–750.

⁸ C. Backhouse, *An Introduction to David Wexler, the Person Behind Therapeutic Jurisprudence*, "The International Journal of Therapeutic Jurisprudence" 2016/1, p. 11.

⁹ D.B. Wexler, *Therapeutic Jurisprudence: An Overview*, "Thomas M. Cooley Law Review" 2000/17, p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=256658&fbclid=IwAR3azw8Inq66up3rFwNQGBp5g0DX1_NRtIsPyIFTQI-hcP1L-uZLms7uUBEQ, accessed on: 29 January 2022.

He also believes that TJ led to humanization of law, as it took into account the 'human, emotional, psychological side of law and the legal process'.¹⁰ Moreover, Wexler understands TJ as a perspective that allows one to perceive the law as a trigger of specific behaviours and consequences in society.¹¹ He coined the phrase '[t]he law as therapeutic agent' and suggested that TJ focuses on the impact of law on the psychological well-being of those who are in contact with the law.¹² This approach to TJ is associated with additional actions taken during a court trial that aim to influence the defendant. Wexler noted that it is possible to evoke both a positive and a negative attitude of the defendant towards the judiciary, while in contact with it. For this reason, Wexler argues, the consequences of law and its application to the case fall within the sphere of therapeutic and anti-therapeutic consequences. TJ aims at a more conscious and therapeutic implementation and application of law, provided that other values, such as justice and court procedures, can be fully followed.¹³ Wexler suggests that the key to evoking a positive influence on the defendant lies in noticing the defendant's additional personal characteristics. According to him, a skilful diagnosis of personal problems that cause runins with the law may be helpful in the defendant's resocialization.¹⁴ Wexler especially emphasizes the role played by legal actors, i.e., professional groups such as lawyers, attorneys, public prosecutors, or even court staff or police officers. He also believes that these persons influence those involved from the onset of their contacts with the judiciary to the finalization of court proceedings.¹⁵ The researcher emphasizes that TJ as a theory does not elevate therapeutic goals above other goals that are typical of the judiciary's impact on the defendant, and it does not support coercion or paternalism.¹⁶

Winick considered TJ as a simple idea that stimulates research on the therapeutic dimension of law using tools typically applied by behavioural sciences.¹⁷ He also stated that such an approach helps to determine whether legal solutions can be structured to minimize anti-therapeutic effects and maximize the potential of therapeutic effects, such as healing or resocialization.¹⁸ TJ provides for examination of not only legal provisions but also legal practices and the methods in which legal subjects (such as judges, lawyers, and police officers) play their roles. Winick argued that they, as therapeutic agents, can have a therapeutic effect on individuals who are in contact with the judiciary.¹⁹ Additionally, Winick paid attention to the emotional sphere of those affected by the law by considering the situation of victims who, as he believed, are exceptionally sensitive to the treatment by the legal system.²⁰ The researcher also noted that an approach that complies with the TJ offers us insight into the (positive or negative) influence of contacts with the law and the judiciary on citizens in the context of their psychological well-being.²¹ It should be emphasized that in TJ, the role of the judge is

¹⁰ D.B. Wexler, *Therapeutic...*, p. 1.

¹¹ D.B. Wexler, *Therapeutic...*, p. 1.

¹² D.B. Wexler, *Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development*, "Arizona Legal Studies Discussion Paper" 2010/7, p. 95, <https://ssrn.com/abstract=1628804>, accessed on: 16 October 2021.

¹³ D.B. Wexler, *Therapeutic Jurisprudence...*, p. 1.

¹⁴ D.B. Wexler, *Therapeutic Jurisprudence...*, p. 3.

¹⁵ D.B. Wexler, *Therapeutic Jurisprudence...*, p. 3.

¹⁶ D.B. Wexler, *Therapeutic Jurisprudence...*, p. 1.

¹⁷ B.J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, "Nova Law Review" 2009/33, p. 536.

¹⁸ B.J. Winick, *Foreword...*, p. 536.

¹⁹ B.J. Winick, *Foreword...*, p. 536.

²⁰ B.J. Winick, *Foreword...*, p. 540.

²¹ B.J. Winick, *Foreword...*, p. 540.

not only to administer justice or to resolve a dispute, but also to help the defendant in their resocialization or healing so that they do not have any run-ins with the law again, which was not possible in the 'traditional' model of the judiciary.

The ideas of TJ mentioned above have also been implemented in legal practice. Consequently, TJ may be considered a certain 'philosophical foundation' of the revolution that resulted in the emergence, in the early 1990s, of special courts known as the problem-solving courts (hereinafter: 'PSC').²² These courts specialize, for example, in dealing with offenders who are addicted (drug treatment courts), mentally ill (mental health courts) or have committed domestic violence (domestic violence courts). Furthermore, various models of hybrid courts can also be distinguished among PSC. The main objective of these courts is the perpetrator's social rehabilitation.²³ The change involving the establishment of PSC occurred because the correlation between certain prohibited acts and personal problems of perpetrators had been noted. The personal problems that led to problems with the law included, for example, alcohol or drug addiction, domestic violence, untreated mental illnesses, or reoffending.²⁴

PSC became part of the judiciary in common law countries such as Canada or Australia. With the introduction of this type of court, a new role of a judge has developed, different from the traditional function of an arbiter, as described by Winick: 'The traditional role of the courts has been to adjudicate disputed issues of fact in civil and criminal cases. Traditionally, judges were neutral arbiters considering conflicting evidence and rendering a decision based on the law and the facts'.²⁵

As a result of the practical application of TJ and the implementation of Winick and Wexler's postulates, the judge gained a new role, in addition to the traditional role described above. Thus, the judge acts as an active 'therapist' with a conscious influence on the defendant and on other persons who are in contact with the judiciary. These changes have consequences because, in PSC, judges require that perpetrators of prohibited acts perform specific actions that force them to confront their basic psychological and social problems.²⁶ As judges act upon state authority, they have greater opportunities than representatives of other authorities to act in the interest of the community. This results from the fact that they can impose penalties on defendants for their actions and keep them responsible for their own correction. In this model of courts, judges act as team leaders and cooperate with social aid authorities to address the broader problems faced by criminals.²⁷

The importance of the changes mentioned above can be illustrated by comparing the problem-solving approach to a traditional²⁸ (within the meaning of common law) model of courts mentioned in the literature:

- (1) **Objectives of proceedings:** Traditionally, it is the resolution of a dispute. In the problem-solving approach, it is a solution to an underlying problem that causes run-ins with the law;²⁹

²² B.J. Winick, *Problem Solving Courts: Therapeutic Jurisprudence in Practice*, in: R.L. Wiener, E.M. Brank (eds.), *Problem Solving Courts: Social Science and Legal Perspectives*, New York–Heidelberg–Dordrecht–London 2013, p. 219.

²³ B.J. Winick, *Foreword...*, p. 536.

²⁴ B.J. Winick, *Problem...*, p. 211.

²⁵ B.J. Winick, *Problem...*, p. 211.

²⁶ R.L. Wiener, L. Georges, *Social Psychology and Problem-Solving Courts: Judicial Roles and Decision Making*, in: R.L. Wiener, E.M. Brank (eds.), *Problem...*, p. 4.

²⁷ R.L. Wiener, L. Georges, *Social...*, p. 4.

²⁸ For detailed comparison of traditional courts and PSC, see: A. Zienkiewicz, *Holizm...*, pp. 384–391.

²⁹ S. Goldberg, *Problem-Solving in Canada's Courtrooms A Guide to Therapeutic Justice*, Ottawa 2011, p. 4.

- (2) **Trial outcome:** In the traditional approach, emphasis is laid on the legal outcome. In PSC, the therapeutic outcome is emphasized;³⁰
- (3) **Case-orientation or claim orientation:** Traditional courts usually look 'backwards'. In PSC, actions are oriented towards people and their future;³¹
- (4) **Role of the judge:** In the traditional approach, attention is paid to the similarity of a judge and their conduct to an arbiter. However, in PSC, judges are guides that look through 'therapeutic lenses'.³²

The four differences mentioned above do not constitute an exhaustive list of all the differences between the traditional approach and the problem-solving approach. They have been picked because of their importance in the context of TJ.³³

3. The role of empathy in the work of judges – TJ postulates

Empathy, which plays a vital role in interpersonal relations and the communication process, can be used to influence people. Empathy in TJ was defined by Winick as the ability to experience someone else's feelings and look at the world through that person's eyes.³⁴ Winick referred to the definition by Gerald A. Gladstein, who claims that empathy comprises both cognitive and affective elements.³⁵ Winick described empathy in the context of the ability to properly interview the parties and understand the other person's feelings and perspective without judgment, criticism, or blame.³⁶ Winick's understanding of empathy has two components. The first one is an emotional component manifested in the experience of someone else's feelings. The second component is a cognitive one and it involves adopting someone else's perspective by 'looking at the world through their eyes'.³⁷ The aforementioned definition indicates a multi-faceted view of empathy by one of the main representatives of TJ, understood in psychological literature as a complex emotional and cognitive phenomenon or a cognitive and emotional phenomenon, depending on the relevance of individual elements.³⁸

The literature on medical sciences and psychology emphasizes that an ability to empathize with the mental states of others is a major determinant of individual and social functioning in the group. This ability is especially important in interpersonal relations – interactions between a mother and a child, a teacher and a student, a doctor or a nurse and a patient, and a therapist and their patient.³⁹ Ewa Wilczek-Rużyczka argues

³⁰ S. Goldberg, *Problem-Solving...*, p. 4.

³¹ S. Goldberg, *Problem-Solving...*, p. 4.

³² S. Goldberg, *Problem-Solving...*, p. 4.

³³ What should also be mentioned are the Guiding Values for judges working in PSC which are based on TJ point of view. These guiding values are tool for judges to fairly and constructively generate solutions to problems. See: A. Zienkiewicz, *Holizm...*, pp. 344–345.

³⁴ B.J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, "Fordham Urban Law Journal" 2013/30, p. 1069.

³⁵ B.J. Winick, *Therapeutic...*, p. 1069.

³⁶ B.J. Winick, *Therapeutic...*, p. 1080.

³⁷ In the discussion about empathy in TJ, some researchers postulate the concept of compassion rather than empathy. Anthony Hopkins and Lorana Bartels argue that in the context of TJ, compassion is broader than empathy. See: A. Hopkins, L. Bartels, *Paying Attention to the Person: Compassion, Equality, and Therapeutic Jurisprudence*, in: N. Stobbs, L. Bartels, M. Vols (eds.), *The Methodology and Practice of Therapeutic Jurisprudence*, Durham 2019, pp. 117–119.

³⁸ See: E. Wilczek-Rużyczka, *Empatia u pracowników medycznych* [Eng. *Empathy in Healthcare Professionals*], Warszawa 2017, p. 19.

³⁹ E. Wilczek-Rużyczka, *Wypalenie zawodowe a empatia u lekarzy i pielęgniarów* [Eng. *Professional Burnout and Empathy Among Physicians and Nurses*], Kraków 2008, p. 75.

that the awareness of emotional states of both the parties (of a person who understands and of a person who is understood) can be the key to understanding another human being.⁴⁰ The similarity between the relationships of a therapist and their patient may also relate to the role of judges in TJ. The description of a vision of a judge's role as a therapeutic agent who has an influence on the defendant in TJ resembles the relationship between a patient and a therapist in their office. In both cases, the therapist/therapeutic agent acts consciously, being oriented towards another person, equipped with the appropriate tools of influence, and building an individual relationship with the patient/defendant. The relationship is established to provide grounds for individual work to help solve individual problems that in TJ will be defined by the occurrence of behaviours contrary to the law.

This approach can be observed in problem-solving courts where the idea of TJ has been implemented. The awareness of the judges' influence on people in contact with the judiciary is especially promoted. Examples of this idea are presented in the literature and can also be found in papers by both Winick and Wexler. One can observe that in their understanding of TJ, empathy can be found:

- (1) in judges,
- (2) as something generated by judges in others.

Empathy in TJ (categories)	Postulates of empathy
1) Empathy in judges	<p>1a) The behaviour that judges should demonstrate in their work as an 'intellectual response to the individual, communicating that she understands the individual's predicament, and an emotional response, communicating that she shares the individual's feelings';⁴¹</p> <p>1b) judges must be sensitive to the psychological mechanisms of transference and countertransference. Transference is an individual's inclination to project on the current relationship the emotions originally experienced in previous relationships with other people, usually parents and siblings. Thus, according to Winick, the judge and the staff who have an influence on the defendant should act in such a way as to give them the sense of empathy, approval, cordiality, and eagerness to allow the defendant to express themselves;⁴²</p> <p>1c) when having an influence on individuals whose criminal acts are related to addictions, judges should understand how empathy is expressed, how denial mechanisms are recognized and addressed, and how the principles of behavioural psychology and motivation theory are applied.⁴³ Winick and Wexler suggest that judges should understand the psychology of procedural justice, which assumes that people appearing at court feel greater satisfaction and are more eager to abide by court orders when they are given voice, validation, dignity, and respect;⁴⁴</p> <p>1d) judges should know how to organize court practices and function in court in a way that maximizes their therapeutic potential.⁴⁵</p>

⁴⁰ E. Wilczek-Rużyczka, *Wypalenie...*, p. 76.

⁴¹ B.J. Winick, *Therapeutic...*, p. 1069.

⁴² B.J. Winick, *Therapeutic...*, p. 1069.

⁴³ B.J. Winick, D.B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, "Touro Law Review" 2015/18, p. 482.

⁴⁴ B.J. Winick, D.B. Wexler, *Drug...*, p. 482.

⁴⁵ B.J. Winick, D.B. Wexler, *Drug...*, p. 482.

<p>2) Empathy as something generated by judges in others</p>	<p>2a) Winick recommends that judges use motivational interviewing conducted personally. It comprises five stages and is rooted in psychology. It was developed to motivate people to cope with their addictions.⁴⁶ The technique of the five basic principles of motivational interviewing requires that an interviewer should proceed in a non-confrontational manner and show empathy.⁴⁷ The interviewing judge should avoid arguing with the interviewee as this may produce an effect contrary to expectations and trigger a defensive reaction.⁴⁸ When faced with resistance, the interviewer should try to roll with resistance rather than confront the interviewee.⁴⁹ Such a situation requires listening with empathy and giving feedback by providing new information in such a way that the individual retains control and can make their own decisions and propose solutions to their problems.⁵⁰ The last principle relates to the interviewer supporting the interviewee's sense of effectiveness. The reason for such an approach is that individuals do not attempt to change unless they sense that a goal may be achieved, barriers may be overcome, roadblocks on the path to success can be removed, and change can occur;^{51,52}</p> <p>2b) TJ observes not only defendants but also another group of subjects to whom the appropriate actions to prevent or minimize 'adverse consequences' should be addressed. This group includes victims who participate in the trial and are in contact with the judiciary. The need for appropriate treatment of victims in the trial by the judge and other staff of the judiciary requires education to increase the psychological understanding in therapeutic agents and their ability to approach victims/injured parties with empathy and sensitivity;⁵³</p> <p>2c) this ability to search for solutions and self-awareness is also represented in another type of influence on the defendant, as identified by Winick. It was addressed to juveniles in the early stage of their life and relied on the development of empathy through education based on the role-play of the prosecutor, defence attorney, or jury member.⁵⁴ The application of such training that develops empathy in juvenile delinquents can help them understand the perspectives of others (victims or society) and look at their conduct from a different angle.⁵⁵ With this type of empathy training, they have an opportunity to develop better behaviour patterns and, as a result, it can prevent future problems with the law.</p>
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It should also be mentioned, that according to Winick's research, empathy of other legal actors is also shown. As Winick noted:

⁴⁶ B.J. Winick, *Therapeutic...*, p. 1080.

⁴⁷ B.J. Winick, *Therapeutic...*, p. 1080.

⁴⁸ B.J. Winick, *Therapeutic...*, p. 1081.

⁴⁹ B.J. Winick, *Therapeutic...*, p. 1081.

⁵⁰ B.J. Winick, *Therapeutic...*, p. 1081.

⁵¹ In the context of the abovementioned method, the relationship between the motivational interviewer (in this case the judge) and the defendant should be founded on the defendant seeking their own solutions to their problems and gaining a deeper insight to make it easier to understand the situation. If legal actors, who are also referred to as therapeutic agents in TJ, adopt this attitude, they can achieve the positive goals of causing the legal consequences assumed in TJ. Apart from soft skills, another important tool of judges is empathy, which is consciously used during motivational interviewing. In this method, the judge is not presented as a person who will solve the problems faced by the defendant. Instead, the judge acts as a guide to help the defendant find acceptable solutions that would be reinforced and not constitute a specific penalty or an imposed solution.

⁵² B.J. Winick, *Therapeutic...*, p. 1081.

⁵³ B.J. Winick, *Foreword...*, p. 541.

⁵⁴ B.J. Winick, *Therapeutic...*, p. 1059.

⁵⁵ B.J. Winick, *Therapeutic...*, p. 1059.

public prosecutors should talk to the victim, give them an opportunity to speak first, and listen to their opinion and hear what the victim wants to say. Additionally, when contacting the victim, the public prosecutor as a therapeutic agent should show empathy while treating the victim with dignity and respect.⁵⁶

Winick also emphasizes that in those professions where the relationship is different from the relationship between a public prosecutor or a judge and a defendant – namely, a lawyer and their client – require a high level of psychological skills, including an objective evaluation of the situation, active listening, caring about the client's comfort, using empathy-based communication, and understanding the psychology of persuasion.⁵⁷

What should be pointed out is that Winick's postulates regarding public prosecutors or lawyers can also refer to judges and other staff of the judiciary, in accordance with the assumptions of TJ that the therapeutic effect is to take place within the entire system in which legal agents act. TJ considers various types of relationships and subjects subordinate to courts. TJ papers on the profession of a judge or professions of other legal actors of the administration of justice and performance of their 'roles' postulate that various individualized approaches are required. Considering that the influence is to be exerted upon the victim or the defendant, a proper use of interpersonal skills and the competence of legal actors requires a specific thought process.

This process is about recognizing the needs and appropriately adapting actions to an individual to observe a maximized therapeutic effect. With reference to the defendant, the influence aims to help them solve their problems so that they not only understand what they are penalized for, but also are able to regain a sense of dignity and be intent on real changes in their life that will be instrumental in preventing reoffending. In this case, the judge's role is to be a type of guide specialized in the category of matters they are supposed to deal with; the guide who has special expertise and skills that should help them achieve therapeutic goals.

A certain metaphor comes to mind in the context of summarizing postulates regarding the role of empathy in the work of judges in TJ. Stina Bergman Blix argues that theatre actors and court lawyers work with narratives.⁵⁸ A plot of a play, like a crime, revolves around a story, intentions, and events.⁵⁹ Bergman Blix makes a connection between the work of actors on a theatre stage and the work of judges in the courtroom by commencing with the perspective-taking process and ending with the experience of empathy. Contrary to the imagined theatre framework, narrations in court cases are real, and for the judges who attune to the people in court, the 'reality framework' may result in a painful experience.⁶⁰ This metaphor can be applied to judges who practice in problem-solving courts where the ideas of TJ are pursued. In TJ, judges are viewed as actors on a stage with roles to play. However, contrary to Bergman Blix's example, their acting is more like a performance in which their recipient is involved and, thus, becomes

⁵⁶ B.J. Winick, *Foreword*..., p. 542.

⁵⁷ M. Perlin, A. Lynch, 'Mr. Bad Example': *Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities*, "Wyoming Law Review" 2016/16, p. 321, <https://scholarship.law.uwyo.edu/wlr/vol16/iss2/3>, accessed on: 16 October 2021.

⁵⁸ Some research studies on empathy in lawyers' work were conducted by Stina Bergman Blix in cooperation with Åsa Wettergren, see: A. Wettergren, *Empathy and objectivity in the legal procedure: the Case of Swedish Prosecutors*, "Journal of Scandinavian Studies in Criminology and Crime Prevention" 2016/17, pp. 19–35.

⁵⁹ S. Bergman Blix, *Different Roads to Empathy: Stage Actors and Judges as Polar Cases*, "Emotions and Society" 2019/1, p. 165.

⁶⁰ S. Bergman Blix, *Different*..., p. 171.

an active participant of the entire play. This implies specific changes in the cognitive and behavioural spheres of the recipient. Such a change would be caused by a therapeutic approach of the judge who plays the role of a 'therapist' or 'coach' in the performance and, thus, helps the trial participant undergo their transformation.

4. Empathy in court practice under TJ

Considering the aforementioned postulates of Winick and Wexler regarding TJ and empathy in judges' work, certain tendencies have been noted.⁶¹ Both researchers argue in their papers that empathy is a tool of influence that can be used by a legal agent (judge). Empathy can be shown unconsciously or consciously, and it can also be developed (as a competence) and trained. However, empathy is not the only element recommended by authors in the pursuance of objectives formulated as part of TJ ideas.

Based on the analysis of the cited papers by Wexler and Winick, the following categories of the application of empathy by legal actors (therapeutic agents) can be distinguished:⁶²

- (1) **Subjective (external) category** – it refers to a person (victim/defendant/suspect /juvenile delinquent/reoffender/witness) and focuses on such an application of empathy that would be adapted to a specific situation of an individual. This, in particular, refers to the judge's specific response to the situation of a subject to 'reach' someone in a better way and to respond to their needs. The judge can address a victim or a witness differently, considering their position in the trial or traumatic experience. The way in which a judge addresses a re-offending defendant will differ from the way the judge approaches a juvenile delinquent, as the subjects have different needs and are in different positions and at different stages in the trial or in different stages of mental development.
- (2) **Subjective (internal) category** – it refers to the development and training of empathy by legal actors (judges/lawyers/ prosecutors/employees of courts/police officers and others) so that they could apply the subjective external category more consciously. This also concerns conscious management of the empathy process, which would help them avoid manipulations or situations where they could be accused of being biased. Such development is also associated with weighing and understanding the motives, situations, and problems of individuals who remain under judge's power. This is also associated with learning new skills that would improve the therapeutic process, such as empathic listening, as well as noticing the needs of subjects and responding to them (adapting resources) in a proper, individualized, and flexible manner. Empathy would enable taking the perspective of subjects involved in the trial and understanding their situation. This is the key element of a decision-making process that must be carried out as

⁶¹ There are many works on judicial empathy that also contain empirical research on judicial empathy and how it can influence judge's decisions. See: R. Delgado, J. Stefancic, *Do Judges Cry? An Essay On Empathy And Fellow-Feeling*, "Case Western Reserve Law Review" 2019/70, pp. 23–51; N.E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, "Akron Law Review" 2014/47, pp. 693–751; A.N. Glynn, M. Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, "American Journal of Political Science" 2015/59, pp. 37–54; T.M. Haegerich, B.L. Bottoms, *Empathy and Jurors' Decisions in Patricide Trials Involving Child Sexual Assault Allegations*, "Law and Human Behavior" 2000/24, pp. 421–448; A. Zariski, *Sympathy and Empathy in Therapeutic Jurisprudence from a Psychoanalytic Perspective: From Freud to Posner and Beyond*, "International Journal of Therapeutic Jurisprudence" 2016/1, p. 291–312.

⁶² These categories were created by author in context of subject (therapeutic agents) work and using/developing empathy by therapeutic agents in the texts of Wexler and Winick.

a result of the performed actions, since life experiences of different subjects may be unfamiliar to therapeutic agents, given their own positions and backgrounds.

- (3) **External developmental category** – this category may be divided into two sub-groups. The first sub-group concerns training and development of empathy in individuals that need it, for example, defendants. As a result, these subjects could be offered an opportunity to better develop their skill/competence to understand the world, other people, situations, or themselves, which could help them avoid future run-ins with the law. This applies, for instance, to an example of training for juvenile delinquents presented by Winick. In this training, a theatre-like show is played in the courtroom. Juveniles are given a chance to ‘feel’ the situation of each party to the proceedings (judge/public prosecutor/defendant/victim and others) to allow them to understand different points of view of a given illegal incident and to note the influence of their behaviour and acts on those present in the courtroom. This form of training could be a very good element of education not only for defendants, but also in youth detention centres (as part of early work with juveniles) or even during legal education at university or as part of legal training for trainee lawyers – legal actors – and other subjects associated with the judiciary, for example, police officers. The second sub-group concerns working with defendants to eliminate/restrict the source of a personal problem that gives rise to current/emerging behaviours causing conflicts with the law. This concerns, in particular, cases of addiction, violence, or other factors that can be addressed by building relationships, trust, and showing new paths or providing motivation.

5. Challenges of TJ

However, this vision of the judiciary and the categories described above entail certain questions that should be asked to continue the scientific analyses of the practical application of TJ, for example, in countries that are not governed by the common law system:

- (1) Should the examination of the level of empathy and the obligatory training of empathy as a competence of legal actors be the decisive requirements in judges’ work to ensure fair trial in case TJ is implemented in courts? Is it possible to conduct an effective and developmental mandatory training?
- (2) What if judges acting as therapeutic agents are not inclined to work on improving their empathy? Empathy is a personal trait. Every person has developed a different level of empathy and some people even have deficits of it. Therefore, one should consider the influence of a judge’s refusal to train empathy, the possible lack or deficit of empathy, or the unevenly developed ‘mature’ empathy of judges on trials and the administration of justice.
- (3) If some judges in problem-solving courts cannot look through therapeutic lenses at participants of the proceedings in an equally skilful way, will it threaten their impartiality and equality?
- (4) Should judges use empathy as a tool? Is the conscious process of empathy management more just than the ‘traditional’ court trial where judges are believed to be impartial, stone-faced arbiters who use the law as a tool to administer justice?⁶³

⁶³ The concept of empathy in judicial work was also developed in the concept of ‘responsive judge’. As one can perceive judges in problem solving courts as responsive judges, the concept of empathy TJ and responsive judging is extremely interesting. See: T. Sourdin, A. Zariski, *What Is Responsive Judging?*, in: T. Sourdin, A. Zariski (eds.), *The Responsive Judge. International Perspectives*, “Ius Gentium: Comparative Perspectives on Law and Justice” 2018/ 67, pp. 1–38.

- (5) Is it possible to translate the TJ developed in the common law culture into legal cultures governed by civil law? Does drawing on experience of already functioning problem-solving courts give us hope of an effective reception of a new court form in the Polish justice system or in other countries, for example, by attempting to incorporate TJ postulates into the work of penitentiary court judges?

Legal actors who play the major role as therapeutic agents view participants of proceedings through therapeutic lenses in an individual manner. They do not deprive them of their subjectivity but focus on listening to them and communicating with them properly. As a result of this approach, among other reasons, the TJ is categorized as belonging to a broader concept of the psychology of persuasion.⁶⁴ The literature distinguishes between various perspectives of relations and behaviours of legal actors in comparison to individual subjects with the simultaneous assumption of an undisturbed impartiality in the trial. Such an approach based on individualization and on a specific relationship between the judge and the subject subordinated to them can prevent depersonalization. The judge has specific tools of influence to use consciously, all while focusing on a person who needs understanding and to be shown a way rather than to simply cover individual cases on dockets allocated to the judge, which could happen in the case of excessive duties imposed oftentimes on judges. These assumptions are reflected in categories that systematize the postulates of Winick and Wexler, which have been elaborated upon for this article, and the questions raised in items 1 to 5.

The questions raised suggest that the topic should be examined further, and research should be conducted (especially in practical aspects) in the places where the postulates of TJ are implemented. These postulates present the vision of the law that brings consolation. Even though the solutions are to be used in addition to a traditional trial rather than instead of it, one should still consider the challenges associated with their implementation and new problems that may emerge and are unforeseeable at this stage.

6. Conclusion

TJ is an idea developed in the common law system, which is slowly reaching countries with a civil law system. The focus on another person in TJ and the use of therapeutic lenses, associated with the objectives meant to be pursued by the judicial system, determine a specific vision of the law. In TJ, empathy is a professional tool and competence that can be used by the staff of the judiciary (therapeutic agents). It should be noted that in this context of viewing the judge's role, empathy is an inseparable element of deliberate actions, making it a professional competence that judges can develop in themselves and in the subjects subordinate to them. Even though in his early works Wexler had not used the word 'empathy' directly, the vision of the TJ he had described incorporates empathy as an element of the competence of therapeutic agents. Empathy in TJ was later named and reconstructed by Winick in his works, and at a later stage of deliberations on TJ, it was an element that was addressed and developed by both researchers in their joint papers.

As interpreted by both main representatives of TJ, empathy is understood not only emotionally, in other words, it is based not only on an automatic emotional reaction of

⁶⁴ M. Perlin, A. Lynch, *'Mr. Bad Example'...*, p. 321.

a subject to their interlocutor's status or situation. It is a broader element of a judges' personal resources that they consciously manage in their work. The judge should know how to apply it to a specific situation and while in contact with others so that it could become a specific work tool. Thanks to this competence that judges can develop, empathy can allow them to conduct themselves appropriately to the position of the people they deal with by choosing appropriate tools such as empathic listening or appropriate communication (verbal and non-verbal). This may later have an impact on more effective pursuance of the objectives and assumptions of TJ, and on the performance of work and influence on people who are in contact with the judiciary.

Further academic analyses and empirical research regarding empathy and the work of judges in problem-solving courts could focus on the therapeutic alliance.⁶⁵ In his classical definition of therapeutic alliance, Lester Luborsky presents a two-factor conceptualization of the stages of therapy. At the first stage, usually in the early phase of treatment, the therapist ensures that the patient perceives them as warm, sincere, supportive, helpful, and understanding. The second stage is related to a working bond based on reliance on the agreed therapeutic goals.⁶⁶ The vision of the application of empathy in judges' work and the similarity between the relationship of therapists with patients and judges with defendants/victims implies that therapeutic alliance may appear in the work of judges and other therapeutic agents who pursue the assumptions of TJ.

Should Judges Be Empathic? The Place of Judges' Empathy in Therapeutic Jurisprudence

Abstract: Therapeutic jurisprudence (TJ) has had an influence on the judiciary and legal practice given the emergence of special courts, the so-called problem-solving courts. As understood by David B. Wexler, TJ is an approach that combines experience from many scientific fields, constituting an interdisciplinary field of research that focuses on the therapeutic and anti-therapeutic consequences of laws, legal procedures, and the roles and behaviours of legal actors such as lawyers and judges. The role that they play during a trial is particularly emphasized in this theory in the context of causing both positive and negative consequences for those participating in the trial.

The first purpose of this paper is to reconstruct the understanding of empathy and its role in the therapeutic jurisprudence, and to show how the concept of empathy is understood in the context of a judge's work, particularly in relation to main TJ authors, David B. Wexler and Bruce J. Winick.

Keywords: judicial empathy, therapeutic jurisprudence, judges, empathy

⁶⁵ According to APA Psychology Dictionary, Therapeutic Alliance is understood as 'a cooperative working relationship between client and therapist, considered by many to be an essential aspect of successful therapy. Derived from the concept of the psychoanalytic working alliance, the therapeutic alliance comprises bonds, goals, and tasks. Bonds are constituted by the core conditions of therapy, the client's attitude toward the therapist, and the therapist's style of relating to the client; goals are the mutually negotiated, understood, agreed upon, and regularly reviewed aims of the therapy; and tasks are the activities carried out by both client and therapist', <https://dictionary.apa.org/therapeutic-alliance>, accessed on: 16 November 2021.

⁶⁶ J. DeGeorge, *Empathy and the Therapeutic Alliance: Their Relationship to Each Other and to Outcome in Cognitive-Behavioural Therapy for Generalized Anxiety Disorder*, "Masters Theses 1911 – February 2014" 2008, p. 179, <https://scholarworks.umass.edu/theses/179/>, accessed on: 16 November 2021.

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