Towards Responsive Law

Towards just institutional approaches to conflict prevention and resolution
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Towards Responsive Law

Arno Akkermans, Berber Laarman, Esther van Voorst, Arnt Mein
Amsterdam Centre for Comprehensive Law
Towards Responsive Law

• Many jurisdictions in the world see innovative initiatives, taking place in all areas of law, within various sectors of society, and provided with various names and labels

• Most of these initiatives are ‘bottom-up’. Front line legal professionals who are striving to make their work more effective and societally valuable

• These innovative developments have long been the subject of scholarly attention, but a truly overarching scientific discourse, and with it a generally used overarching conceptual framework to describe and interpret these developments, seems to be lacking so far
Towards Responsive Law

- Important schools of thought are for instance Restorative Justice, People Centered Justice and Therapeutic Jurisprudence

- Attempts at an overarching approach are Non-Adversarial Justice and Comprehensive Law

- We believe Nonet and Selznick’s 2001 concept of ‘Responsive Law’ has the most potential for an overarching conceptual framework
Historical development of the relationship between law and society according to Nonet and Selznick (2001)
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- We believe we are indeed witnessing a gradual transition from autonomous law to responsive law

- This transition takes many forms – we will give some illustrations

- The wood and the trees: if this perspective is new to you, it takes an overarching view to ‘see it’

- One example is the innovations of recent decades in the way people are trying to resolve conflicts
<table>
<thead>
<tr>
<th>From traditional</th>
<th>To innovation</th>
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<tbody>
<tr>
<td>1. Juridification</td>
<td>Dejuridification</td>
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<tr>
<td>2. Procedure oriented</td>
<td>Solution oriented</td>
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<td>3. Adversarial procedures (parties do battle in a</td>
<td>Consensual procedures (parties contribute to the solution)</td>
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<td>legal arena)</td>
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<td>4. Legal decision making (cutting legal knots,</td>
<td>More comprehensive ‘problem solving’ (addressing underlying interests,</td>
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<td>addressing the legal dimension)</td>
<td>problems and causes)</td>
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<td>5. Limited perception of needs and interests of</td>
<td>Broad perception of needs and interests of parties (including emotions,</td>
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<td>parties (mainly: pecuniary needs and interests)</td>
<td>non-pecuniary needs and interests)</td>
</tr>
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<td>6. Decision taken by third party</td>
<td>Solution (partly) reached by parties themselves</td>
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<td>7. Decision taker is procedurally passive</td>
<td>Decision taker is procedurally active</td>
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<td>8. System perspective dominant</td>
<td>User perspective is prioritised</td>
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<td>9. Several formally different procedures, with</td>
<td>Centralised access point, ‘one counter’, triage</td>
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<tr>
<td>different access points and ‘counters’</td>
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- The transition towards responsive law takes many forms
- It relates to the demands being placed on the legal system in terms of the extent to which it succeeds in meeting the needs and expectations of its ‘users’
- It is no longer considered sufficient when an outcome is legally correct, or a decision was taken lawfully
- The perspective taken is the extent to which a procedure and its outcome truly meet the needs and expectations of those who seek recourse to the legal system

*People-centred justice resolves people’s legal problems and ensures that when they do occur, solutions are tailored to what people need in order to move forward with their lives. That is the true measure of an effective justice system.*

*READ MORE IN OUR POLICY BRIEF DELIVERING PEOPLE-CENTRED JUSTICE, RIGOROUSLY*
Examples in this panel

- Arno Akkermans: new perspectives in tort law
- Berber Laarman: Addressing Harm in Healthcare: a Responsive Approach
- Esther van Voorst: School absenteeism and community justice in Amsterdam
- Arnt Mein: Legal professionals in transition
Towards Responsive Law: New perspectives in Tort Law
Traditional perspective: autonomous law

Perpetrator → Victim

Needs in focus
- Monetary compensation
New perspective: responsive law. What are the justice needs of those involved?

Perpetrator

Victim

Needs in focus
- Monetary compensation
- Relational needs

- Establishment of facts
- Acknowledgement of wrong and its consequences
- Acceptance of responsibility
- Non-pecuniary redress: apology, preventive measures, etc.
- Support in recovery
New perspective: responsive law. What are the justice needs of those involved?

Perpetrator

Needs in focus
- Relational needs

Victim

Needs in focus
- Monetary compensation
- Relational needs
New perspective: responsive law. Sensitive to context
New perspective: responsive law. Priority to consensual solutions

Akin to Restorative Justice ‘conference’:

sharing responsibility for solution

Perpetrator
Victim
Professionals
Professionals
Adversarial procedure is diametrically opposed to justice needs and perceptions

Emotional redress for suffering a wrong

- Affirmation: acknowledgment of responsibility for wrongdoing and its consequences

- Affect: expression of remorse and sympathy for the victim

- Action: compensation and prevention

Adversarial procedure is diametrically opposed to justice needs and perceptions

Characteristics of claims resolution:

• V must take initiative, supply info, A more powerful, V suffers the burden of proof
• A appears to be able to allow himself a passive attitude
  => carries across implicit message that not WD/A but V is responsible for solving problem of damage caused
• WD doesn’t pay compensation himself, generally no direct communication between WD and V, WD often not even aware of consequences for V
  => V experiences that WD does not take responsibility
• Out of court resolution – no decision by judge
  => no authoritative proclamation of moral responsibility of WD for accident
• Also no symbolic acknowledgement of moral responsibility of WD by A
• ‘Taboo trade-off’: impairment cannot really be compensated by money
Making claims resolution more responsive to justice needs and perceptions

- Acknowledgement of wrong and taking of responsibility
- The symbolic message implicit to proactive claims resolution, and to sharing responsibility for solutions
- Addressing relational needs
- Promoting personal contact between the responsible party and the victim
- Prioritizing actual recovery
- Prioritizing consensual solutions
- Promoting procedural justice