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FACULTY OF ECONOMICS, MANAGEMENT, ACCOUNTING AND PUBLIC
POLICY MANAGEMENT (FACE)

GRADUATE PROGRAM IN MANAGEMENT

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**The Institutionalization of Therapeutic Jurisprudence and
Restorative Justice in the US and Brazil**

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THE INSTITUTIONALIZATION OF THERAPEUTIC
JURISPRUDENCE AND RESTORATIVE JUSTICE IN THE US
AND BRAZIL

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I dedicate this work to my parents, my husband,
my brother, my sister, my advisor and all those
who inspired me on this journey. To God, for the
gift of life and for guiding me.

“If a tree falls in a forest and no one is around to hear it, does it make a sound?”

George Berkeley

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ABSTRACT

Three studies are incorporated in this doctoral thesis, which deals with the Institutionalization of Therapeutic Jurisprudence (TJ) and Restorative Justice (RJ) in the US and Brazil. The first study is a theoretical essay that describes the relationships between TJ and RJ and the concepts of change, innovation and entrepreneurship, from the perspective of Institutional Theory. The objective of the second study was to describe how institutionalized these movements (TJ and RJ) are in the US and the roles played by judges in this process. Finally, the third study discusses the perceptions of Brazilian judges about these new ways of dispensing justice from the insights of institutional change theory. Institutional theory was a common axis between the three studies, and it is a dominant theory in organizational studies and provides several explanations especially about changes such as those generated by TJ and RJ. The research used primary and secondary data. Primary data were collected through in-depth interviews with judges and key players in the Brazilian and US judicial systems and secondary data were obtained by means of documentary research in journals, internal documents and sites of courts. Data analysis was performed using content analysis. The theoretical study provided two propositions - *Proposition 1: Therapeutic Jurisprudence and Restorative Justice represent a divergent change and institutional innovation, as this approach alters traditional judicial activity and institutionalizes a new way of promoting justice, arguing that previous methods were ineffective as they failed to rehabilitate offenders. Proposition 2: Judges who apply Therapeutic Jurisprudence and Restorative Justice act as institutional entrepreneurs because they favor change in a conscious, open, motivated way, and mobilize institutional support alliances to overcome barriers.* The results of the research in the US show that American judges who apply Therapeutic Jurisprudence and Restorative Justice behave as institutional entrepreneurs and four roles played by them were identified: *promoter, author, convener and maintainer.* The results of the study in Brazil showed four dimensions - *beliefs, motivations, commitment and intergroup relations* - that characterize the roles played by Brazilian judges working with Therapeutic Jurisprudence and Restorative Justice. In each thesis article, studies are detailed and their results are stated.

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1. INTRODUCTION

The prison population in many countries has grown significantly since the beginning of the 21st century, with a 145% increase in the countries of South America, 14% in the US and more than 80% in Central American countries between 2000 and 2015 (Walmsley, 2015). This phenomenon has been driving changes in rules and law enforcement systems as a way to minimize the perverse effects of excessive incarceration of individuals. The results of these changes are beginning to emerge. With an estimated 1.51 million prisoners, the United States' prison population fell at the end of 2016 down 1% from the number of prisoners held in December 2015 (Carson, 2018).

The US criminal justice system recognized that incarceration by itself did not break the cycle of drug use and crime in the early 1990s (Hora, 2002). That country has pioneered the creation of a new way of dispensing justice that has the objective of achieving better results for victims, litigants, defendants and communities (Berman & Feinblatt, 2001). This innovative strategy is based on the central idea of reducing recidivism, improving public confidence in justice and preventing crime, not only arresting and prosecuting offenders (Wolf, 2007). There are several perspectives or movements included in this new perspective, including Therapeutic Jurisprudence (Winick, 2010) and Restorative Justice (Menkel-Meadow, 2007). These two perspectives are the main focus of this doctoral thesis.

The Therapeutic Jurisprudence (TJ) movement began in the late 1980s as an interdisciplinary approach in the field of mental health that criticized aspects of mental health law for producing anti-therapeutic consequences for people that the law was designed to help (Winick, 2002). Due to its interdisciplinary nature, therapeutic jurisprudence, although it began in mental health field, soon spread to other areas of legal analysis, and emerged as a mental health approach to law in general (Winick, 2002).

The reintegration of offenders into their communities, with or without additional punishment, and other efforts to provide healing and a variety of different practices, including excuses, restitution and acknowledgment of damages and injuries, is called Restorative Justice (Menkel-Meadow, 2007). Four Rs: repair, restore, reconcile, and reintegrate the offenders and victims with each other and their shared community make up the more idealized form of Restorative Justice (RJ). Restorative Justice raises deep philosophical, sociological, and empirical questions which involve, for example, who should have power, control and possession over crime (Menkel-Meadow, 2007).

It is argued in this doctoral thesis that the development of new ways to achieve justice, through approaches such as Therapeutic Jurisprudence and Restorative Justice, trying to solve judicial problems in a therapeutic and holistic way, is possible because it combines the concepts of institutional change, innovation and entrepreneurship. Despite the strong inertia of institutions (Battilana *et al.*, 2009), institutional change can happen when there is a break with institutionalized practices. This is recognized in studies using the institutional approach, which dominate the field of organizational studies (Greenwood *et al.*, 2008) and which traditionally focus on continuity (Garud *et al.*, 2007). In search of an adequate understanding of how systems of institutional meaning are interpreted in organizations, researchers generally adopt an internal perspective (Suddaby, 2010). The concepts of institutional change, innovation and entrepreneurship fit into this perspective.

Members of organizations and citizens around the world have demanded institutional change (Battilana *et al.*, 2009). On issues that affect society as a whole, as is the case of the prison crisis, this demand for change is more prominent. Studying Problem-Solving Courts (PSCs), a special kind of court that deals with new ways of judging such as Therapeutic Jurisprudence, Marlowe, Festinger and Lee (2004) focused on drug courts and sought to identify whether the judge is a "key component". They concluded that he was. The study by MacKenzie (2016), based on his own experience as a drug court judge, and data from other studies corroborates the idea that the judge is the central actor in the success of drug courts. In effect, the judge is the most important player in the performance of any court, and is the key actor responsible for judicial activity, which is the main purpose of the courts (Gomes & Guimaraes, 2013).

Judges who work within the guidelines of TJ and RJ play a special role. Unlike traditional judges they are more concerned with solving social problems than strictly applying the law. In this sense, the judge seeks to resolve, in an active and holistic manner, both the judicial case and the problem that produced it. In these ways, judges extend help to people in need, connecting them to community resources, motivating them through creative use of court authority to accept the necessary services and treatment, and monitoring their progress to ensure their success (Winick, 2002). The relationship between the work of these judges and institutional change, in this case the institutionalization of a new way of promoting justice, which may involve new organizational forms and new categories of action, is also considered. Institutional change results from human praxis brought about by contradictions that lead individuals to reflect on the limits of current institutional arrangements and inspire ideas for new arrangements (Seo & Creed, 2002).

Although Therapeutic Jurisprudence and Restorative Justice can be understood as a typical institutional change and innovation of great social importance, this approach has not yet been studied in depth. To fill in this theoretical gap, the broad objective of the research is to describe how Therapeutic Jurisprudence and Restorative Justice are institutionalized in Brazil and in the US. In this sense, the guiding question of the research as a whole is: How and to what extent are TJ and RJ being institutionalized as practices of justice in Brazil and in the US?

1.1 Description of the studies that compose the research

Three complementary studies were carried out to achieve the main research objective. The objectives of each of the studies are the specific objectives of the research. Table 1 shows the studies that compose the research and classifies them based on the following criteria: type of study, focus of analysis, main research question and expected results. Study I is theoretical and the others are empirical. Studies II and III used primary data about the perceptions of judges, data from the participant observation and also secondary data from documents.

Table 1 - Classification of studies that make up the research

Study	I	II	III
Type	Theoretical	Empirical	Empirical
Focus	Institutional Theory	Role of US judges	Role of Brazilian judges
Main research question	What are the relationships between TJ/RJ and the concepts of institutional change, innovation and entrepreneurship?	How are Therapeutic Jurisprudence and Restorative Justice institutionalized in the US and what are the roles played by judges in this process?	How is the institutional change over TJ and RJ in Brazil characterized and what are the roles played by Brazilian judges in this process?
Expected results	Agenda and research propositions	Describes how Therapeutic Jurisprudence and Restorative Justice are institutionalized in the US and the roles played by judges in this process.	Discusses the perceptions of Brazilian judges of these new ways of dispensing justice from the perspective of institutional change theory.

Source: prepared by the author

Understanding institutional entrepreneurship requires a rich, detailed and interpretive analysis that takes into account characteristics of the particular context in which it occurs (Garud et al., 2002). Therefore, in the present study, qualitative research is appropriate, since it is convenient when the following aspects, present in the study to be carried out, are important: “a) contextualization, b) lived description, c) dynamic (and possible causal) structuring of the socially constructed world of the members of the organization, and (d) the worldview of the people being studied” (Lee, 1999: 43).

For studies that seek a reflective understanding of the process of institutionalization, Machado-da-Silva et al. (2005) suggest that the most appropriate methodological designs use multiple methods, with an emphasis on qualitative research procedures, from a longitudinal and historical perspective, since this research design is the most appropriate to reveal the connections between structural references, domains of interpretation and action. Qualitative research was used in studies of institutional entrepreneurship such as the cases of Maguire et al (2004) and Garud et al (2002).

We followed the model suggested by Miles and Huberman (1994), which consists of the application of four steps: a) data collection; b) reduction of data; c) display of data; and d) conclusion and verification. In the last step, the researcher identifies dimensions and categories related to the phenomenon, regularities, patterns in the points of view of the people interviewed, explanations and flows of cause and effect. This interactive and cyclical process, which includes three types of analysis and the data collection activity itself, is illustrated in Figure 1.

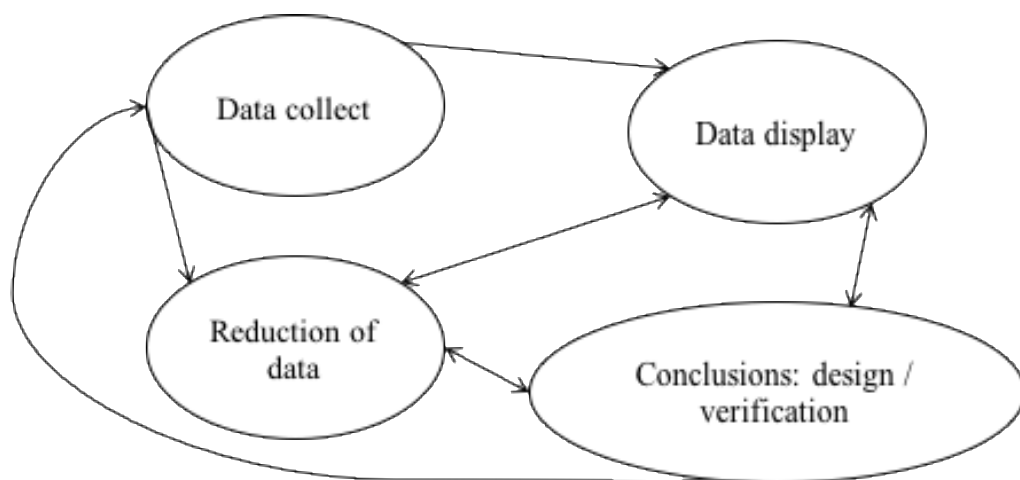


Figure 1 - Components of the data analysis: interactive model

Source: Adapted from Miles and Huberman (1994)

The data reduction step consists of the reduction and organization of the mass of data, for example, by coding, writing summaries, discarding irrelevant data from interview

transcripts, field notes, observations, etc. (Miles & Huberman, 1994). In the data display, Miles and Huberman (1994) suggest that to draw conclusions from the data, good data display in the form of tables, graphs, networks and other graphic formats is essential. Already in the stage of drawing conclusions and verification, the analysis should allow the development of conclusions about the study. These initial conclusions can then be verified, i.e. their validity examined by reference to existing field notes or additional data collection.

In the empirical studies of this doctoral thesis (Studies II and III), data were collected from multiple sources, such as secondary data and primary data. Secondary data were obtained by means of documentary research in journals, internal documents, sites of courts and the primary data through semi-structured interviews (see Appendix). Primary data were collected from interviews with judges and key players in the Brazilian and US judicial systems who work in Therapeutic Jurisprudence and Restorative Justice. At the outset, some judges were asked who they consider to be institutional entrepreneurs. From the second judge interviewed, to whom we asked the same question, in order to find other possible judges to be interviewed, a snowball process was conducted (Miles & Huberman, 1994). Collection of primary data in the US started at the end of 2017 and involved interviews with thirteen judges from several judicial areas and courts involved in Therapeutic Jurisprudence and Restorative Justice in the United States of America.

In the US these interviews were conducted at the end of 2017. Thirteen judges working with mental health, family, youth, restorative justice and drug programs were interviewed. The geographical representation of these judges includes the states of California, New York, Illinois and the District of Columbia. Walnut Creek, San Francisco and Chicago are examples of cities where judges were interviewed. In Brazil, 14 key-actors in the Brazilian justice system - a) eight judges from several judicial areas involved in Therapeutic Jurisprudence and Restorative Justice; b) a prosecutor with a strong presence in this movement; and c) five judges considered as traditionalists - were interviewed, but saturation was used as the criterion to define the number of interviewees. The Brazilian states in which key-actors were interviewed in 2018 were Bahia, Goias, Parana, Pernambuco, Rondonia and Sao Paulo.

1.2 Description of data analysis

The data analysis was conducted through the technique of content analysis, using NVivo software. Multiple sources of data may allow for "triangulation" (Jick, 1979). This is a detailed description of how data analysis was done from the empirical studies of the doctoral thesis. In

the examination of poorly understood phenomena and structured links between actors, qualitative research is quite adequate (Marshall & Rossman, 1995). As the object of this research fits this perspective, the qualitative method was used.

Each of the studies has specific objectives, but the general objective of explaining the process of institutionalization of Therapeutic Jurisprudence and Restorative Justice in Brazil and in the US unites all the studies. As recommended by Marshall & Rossman (1995), the construction of a logical argument was sought to demonstrate a focus by linking the specific research context to a larger set of theoretical issues and political concerns. In Study I, the essay in Section II of this doctoral thesis, two propositions of the research were stated:

Proposition 1: Therapeutic Jurisprudence and Restorative Justice represent a divergent change and institutional innovation, as this approach alters traditional judicial activity and institutionalizes a new way of promoting justice, arguing that previous methods were ineffective as they failed to rehabilitate offenders.

Proposition 2: Judges who apply Therapeutic Jurisprudence and Restorative Justice act as institutional entrepreneurs because they favor change in a conscious, open, motivated way, and mobilize institutional support alliances to overcome barriers.

From these propositions, supported by the literature and possible dimensions and variables to be explored the interview scripts were built. After the initial development, the script was analyzed by professors of the *Center of Studies in Law and Society* at the University of California, Berkeley. Table 2 presents the dimensions, themes, sources of the theory, and relating each of the questions in the interview script to these items.

The interviews were undertaken on the basis of a semi-structured script with questions related to the judges' work, rationalization strategies, justification and framing efforts, as a way to raise social support and mobilize allies, as well as to give meaning to their own actions, difficulties faced in the development of work and other aspects.

Table 2 - Dimensions and themes of the interviews

Dimensions	Themes	Sources	Interview script items
<i>Motivations</i>	<i>Decrease in recidivism and Personal Promotion</i> • <i>promoter</i>	Scott (2008); Black et al (2005); Schumpeter (1976); Gil-Garcia, Helbig and Ojo (2014); Sharif, (2010); Baxter et al. (2011)	1. What do you know about TJ or RJ? Please comment on your experience with TJ or RJ, undertaken through special courts, such as drug courts or whatever specific program that you are involved with. 2. Please comment the main differences between TJ and RJ or the difference between the court you work for and another type of PSC. 7. Do you feel that the TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) are a more effective method than the traditional methods used for handling cases involving drug offender? If so, why? If not, why not?
<i>Beliefs</i>	<i>Engagement and Resistance</i> • <i>convener</i>	Dimaggio & Powell (1991); Dacin et al. (2002); Tukiainen & Granqvist (2016); Scott (2008); Battilana et al., (2009); Lawrence & Phillips (2004).	2. Please comment the main differences between TJ and RJ or the difference between the court you work for and another type of PSC. 3. What were the main factors that push the beginning of the TJ and/or RJ movement (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) in your state (or local jurisdiction)? Do you feel these factors are still relevant? 4. How did you get involved with TJ/ RJ (undertaken through PSCs, such as drug courts or whatever specific program)? How did TJ / RJ become introduced in your court system? 6. What factors outside of the court process do you feel influenced the development of TJ/RJ/PS courts in your state? How widespread are these practices now? 8. What factors do you feel have been most significant in supporting the development of TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) in your state? What have been the most significant challenges in developing them? In sustaining them? What did you and other judges have to do to overcome them?
<i>Commitment</i>	<i>Rational involvement and Emotional involvement</i> • <i>author</i>	DiMaggio (1988); Maguire et al. (2004); Meyer (1982); Battilana (2006); Battilana et al. (2009); Dacin et al. (2002); Greenwood & Suddaby (2006); Garud et al. (2002).	9. In your opinion, which are the main reasons a judge would want to work with TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with)? Are there special characteristics you consider important for the judge that works with drug courts or PSC court approaches? Do you feel any judge, with adequate training, can serve as an effective drug court (or PSC court) judge?
<i>Intergroup relations</i>	<i>Umbrella and Compartmentalization</i> • <i>maintainer</i>	Battilana (2006); Battilana et al. (2009);	5. Do you feel the TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) are sufficiently established that it will be fairly easy to sustain them after you are no longer involved? (and reasons for whatever answer they give). 10. In your opinion, what is the role of the judge in the institutionalization of the drug court – e.g., ensuring that it continues as an essential component of the justice system.

Source: Author's own design (2019)

To assist in the organization, categorization and analysis of interview data, NVivo software was used. With NVivo, researchers can take advantage of the computer's ability to record, sort, match, and link to help answer their research questions from the data without losing access to the source data or contexts from which the data came (Bazeley & Jackson, 2013). Some of the features of the software are manage data, manage ideas, query data, visualize data and report from the data (Bazeley & Jackson, 2013). In this way it was possible to categorize interview data.

The collection of different types of data that focus on the same phenomenon can improve the accuracy of the judgments of organizational researchers and is called triangulation (Jick, 1979). The triangulation in the present research is between the interview data, the documentary data and the data of the observations made by the researcher in the courts. The triangulation of information was achieved by coding variables and ensuring that all aspects could be investigated in the three sources - interviews, observations and documents.

There is some literature that criticizes TJ and RJ in criminal justice. Edelman & Mia (1998) mention the institutionalization of a therapeutic paradigm of disputes and dispute resolution as one of the implications for how law matters in dispute resolution. The ideology of community is used in informal dispute resolution as a justification (Edelman & Mia, 1998). Therefore, Studies II and III considered the counterargument, and judges working in traditional courts were also interviewed in order to obtain the points of view of actors with different positions on the same phenomenon. Edelman (1974) discusses the use of the term "therapy" as suffix or qualifier in various fields. A second script of interviews was prepared for the judges who do not follow the line of TJ and RJ and who are denominated here as "traditional" ones. Judges from the courts described in this research as traditional, since they do not follow the line of TJ and RJ, were also interviewed, both in Brazil and the US

The data analysis was composed of 4 steps following the model of Maguire et al. (2004). First, the development of the narrative account (Eisenhardt & Bourgeois, 1988; Maguire et al., 2004) facilitate the understanding of the chronology of the emergence and the possible institutionalization of TJ and RJ. The assessment of the nature and degree of change in the field as a result of the new practices make up the second stage of data analysis. In the case of the present study, the questions asked of the judges at the end of the interview script provided useful data for this stage:

1. How long have you been serving as a drug court (or other kind of court) judge?
2. Are you the first judge to chair the program? Or had an earlier judge established it?

3. How long has the court you work in been operating in this new approach?

4. Did you have any training before taking on the assignment? Do you hear other criminal, or civil, or juvenile, or family matters?

The fourth step consisted of analyzing all interview responses, including the overall goal of the survey. The question arises of how to approach two countries in the same study. There are many institutional differences between Brazil and the US (Carvalho, 2004). In addition, Brazilian Law is a civil law jurisdiction (Coelho, 2015) while the United States follows the jurisdiction of common law (Prevot, 2016). However, an increasing reciprocal influence and contemporary interdependence between common law and civil law systems must be considered (Mirza, 2016). The differences may contribute to this study, since it makes possible the analysis, through the Institutional Theory, of different contexts. One of the most widely used forms to understand the Brazilian political reality has been to compare it with that of the United States. In most cases, differences between the two countries are identified immediately as a way to better unravel specifically Brazilian occurrences (Da Ros, 2012).

The similarities between the two countries also justify the approach used in the research. The category of drug-related crimes is probably the main cause of the exponential increase in incarceration rates in Brazil, with drug-related offenders constituting the largest number of prisoners (DEPEN, 2014). According to the statistics of the Federal Bureau of Prisons (2017) drug offenses account for 46.3% of inmates in the US. In both cases, the drug problem is perceived as the main problem in prisons.

1.3. Research relevance

The growth of the prison population puts an enormous financial burden on governments and threatens the social cohesion of societies (UNODC, 2013). The cases of rebellions that resulted in deaths in Brazil were reported by news media worldwide. Exactly one year after the case of Manaus, with horrifying scenes of decapitated bodies (Romero, 2017, Jan 2), prison riots in Brazil return to the news. Nine dead and 14 injured in central Brazil (Reis, 2018, Jan 2). Overcrowding is a pervasive phenomenon and one that continues year after year, but it is not inevitable. It must never be common. It requires a holistic and coordinated response from a wide range of authorities, including at the political level and in society in general (UNODC, 2013).

Problems like overcrowding affect the whole society. Everyone in society is affected in some way by the legal system in action, economically, socially or in their relationships (King,

2008). Therefore, proposals to solve these social problems such as TJ and RJ should be considered. Pargendler and Salama (2013) call attention to the use of consequentialist arguments increasingly in Brazil and the proliferation of studies that aim to investigate the effects of legal norms on economic and social reality, not like the traditional legal method, but more similar to other social science policies.

There are few studies about fields with different sets of expectations (McPherson and Sauder, 2013). TJ and RJ confront the repressive way of the traditional method of punishment. The deepening of these ideas from the perspective of the judges' opinion contributes to the discussion about the expectations of the social actors when discussing justice and the processes that shape it. Because it is an innovative field within the study of Law and Society, inquiries about the actors involved and their tactics are important for the structuring of the theme.

The legal development that ensures the well-being of all those involved without sacrificing other important values is part of the ideology of TJ and promoting the reparation of the victims and the community in a way that reintegrates the aggressor into the community is part of the ideology of RJ (Schopp, 1998). With a totally interdisciplinary character, TJ makes a connection with behavioral science fields such as cognitive psychology, psychiatry, clinical behavioral sciences, criminology, social work, nursing, neuropsychiatry and psychotherapy (Winick, 1997). Besides its theoretical contribution, this doctoral thesis examines a practical contribution to the justice system. The results of the research may also be useful for supporting improvements in public policies related to the administration of justice.

The relevance of the theme at the national and international level can be perceived through the path of scientific dissemination presented by the chapters of this thesis. A brief description of the events and journals in which the works were submitted and published deserve to be highlighted: The thesis project as a whole was presented and discussed at the *Center of Studies in Law and Society* at the University of California, Berkeley and also at *EGPA Symposium for Doctoral Students* which took place in 2017 in Milan, Italy. Chapter 2 was presented in 2017 at the EnAnpad conference and submitted to the journal *Theoretical Criminology* in January 2019. Chapter 3 was presented at the Annual Meeting on Law and Society, held in Toronto-CA in 2018 and was accepted for publication in January 2019 in *The International Journal of Offender Therapy and Comparative Criminology* (IJOTC). Finally, chapter 4 will be presented at the conference *Law and Society* in June 2019 in Washington-DC and was also submitted in February 2019 to the IJOTC.

2. THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE: AN ANALYSIS FROM THE PERSPECTIVE OF INSTITUTIONAL CHANGE, INNOVATION AND ENTREPRENEURSHIP¹

The prison population as well as the number of lawsuits has grown in different countries. Moreover, the simple incarceration of individuals does not necessarily mean a solution to the causes of crime, and normally supplementary actions are necessary for the resocialization of individuals involved in criminal actions. Changes and reforms have been made in the legal systems in general and in the judiciary in several countries, aiming to dispense justice quicker and more effectively. Studies point to the importance of new ways of delivering justice, through Therapeutic Jurisprudence and Restorative Justice, an innovative alternative of solving judicial problems in a therapeutic and holistic way. There are few scientific studies on this movement. This article describes relationships between Therapeutic Jurisprudence and Restorative Justice and the concepts of change, innovation and entrepreneurship, from the perspective of Institutional Theory. Supported by this discussion, propositions are stated to be tested in future studies.

Key Words: Institutional Change; Institutional Entrepreneurship; Institutional Innovation; Judges; Problem-solving courts; Restorative Justice; Therapeutic Jurisprudence.

Taking into account that law can be a healing agent, and not simply a formalistic endeavour, Therapeutic Jurisprudence (TJ) has emerged as a major rallying point for a comprehensive law movement that recognizes the importance of an interdisciplinary approach for more effective and realistic development, implementation, and evaluation of laws (Campbell, 2010). The use of the term “therapeutic” is explained by the fact that the seminal literature on therapeutic jurisprudence originated in the field of mental health law (Chase & Hora, 2009). As other areas of law have begun to employ the principles of therapeutic jurisprudence, the term "problem-solving courts" has come to be widely used to describe the main focus of this paradigm of justice (Chase & Hora, 2009). With a focus on exploring the role of the law in promoting therapeutic or antitherapeutic outcomes, therapeutic jurisprudence is an emerging field of law and social science research (Casey & Rottman, 2000).

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With similar transformation efforts, profound philosophical, sociological, and empirical questions are raised by the field of Restorative Justice (RJ) (Menkel-Meadow, 2007). Analyzing the particular case of child victims, Gal & Shidlo-Hizroni (2011) examine the idea of RJ as reflecting an approach to TJ. In the 1970s RJ began as a practice and social movement, as a form of response to what was considered an excessively severe criminal justice system that neither rehabilitated the offenders nor effectively dissuaded them from crime (Menkel-Meadow, 2007). The needs of people most directly affected by crime are a priority when it comes to a restorative perspective, where the state and its legal justice system also clearly have an interest as a stakeholder but are seen as further from direct impact (Umbreit et al., 2005). Menkel-Meadow (2007) highlights the fundamental concepts of Restorative Justice (RJ), including reintegration, reconciliation and orientation for the future of the wrongdoer.

Regulation of dispute resolution is strong in legal systems. There are professional lawyers and judges, the stages that must be followed are regimented, collection and presentation of the evidence are regulated, and the claims and decisions of judges must be justified legally and in writing (Shleifer, 2012). Criticisms are made of new proposals that alter this system of regulation.

Therapeutic Jurisprudence and Restorative Justice can be understood as a typical institutional change and innovation of great social importance. These approaches have not yet been studied in depth. No studies were found that analyzed the role of the judge as a main actor in the process of institutionalization of Therapeutic Jurisprudence and Restorative Justice. To fill this theoretical gap, this essay describes the relationship between the TJ and RJ phenomena and change, innovation and entrepreneurship, from the perspective of Institutional Theory. At the end, propositions are stated for analysis in future studies.

The literature review was carried out mainly from databases such as ABI/Inform Global, Emerald, JSTOR, PROQUEST, Sage, Scielo, ScienceDirect, Scopus (Elsevier), SpringerLink and Oxford. A supplementary search identified relevant references in the studies retrieved, such as articles in *The Academy of Management Journal*. This process applied the snowball technique (Miles & Huberman, 1994) to the references of the articles consulted, to reach the seminal authors and related research, and achieve saturation. The terms used in the search were: therapeutic jurisprudence, problem-solving courts, and restorative justice. The review showed that the term “problem-solving court” has not been used in studies of the Brazilian context.

This study makes a significant scientific contribution to a field of knowledge that lacks empirical studies, especially about judges' behavior (Gomes, Guimaraes & Souza, 2016), and

studies on the administration of justice. The study also has practical relevance because of its potential to provide support to policy makers, politicians and law enforcement agencies on the organization and functioning of the justice system.

2.1 Therapeutic Jurisprudence and Restorative Justice

Jurisdiction - "state power to do justice - to say the right" (Fuhrer, 1995, p.45) is an expression of state power. According to Bourdieu (1994), the state concentrates different kinds of capital: physical force or instruments of coercion (army, police), economic, cultural or informational capital, and symbolic capital. This author presents the concept of bureaucratic field to rethink the state as the agency that monopolizes the legitimate use not only of material violence (Max Weber's term), but also of symbolic violence. In establishing the rate of conversion among the different types of capital, the state shapes the space and social strategies. Social agents occupy unequal positions in the prison environment, and Bourdieu's concept can be applied to understand that punishment is an act of the state arising from struggles that occur in the legal field.

When the first legal systems were built in the middle ages, the act of judging was based on three pillars - establishing the truth of a crime, determining its perpetrator, and imposing a sanction. But, this scenario has changed and new questions have been raised that should be analyzed during the criminal trial of an individual (Foucault, 1977). The movement to reform prisons is nearly as old as prison itself. Since from the beginning of the nineteenth century, criminal incarceration has included both deprivation of liberty and the technical transformation of individuals (Foucault, 1977). Where is the origin of the crime? Instinct, unconscious, environment, heredity? How should we predict the evolution of this subject? In what way will the author most surely be corrected? These issues show that there was a change that added to the criminal court system a whole panoply of diagnoses, prognoses and norms, concerning the criminal individual (Foucault, 1977).

Contrary to what Foucault predicted, this change in the prison system has not taken place definitively and imprisonment persists. Nevertheless, transformations in the role of courts have been occurring, with emphasis, since the 1990s, on a wave of innovation that has gone through the judiciary in the United States, as well as in other countries, in different ways. Accustomed to resolving litigation, such as conflict between individuals in property matters or contracts, the courts faced several new types of problems, many of which are of social and

psychological nature. These cases require that the courts not only resolve contentious issues, but also seek to resolve a variety of human problems that are responsible for bringing the case to court (Winick, 2002).

By making decisions based on law and facts and considering contradictory evidence, judges have traditionally been neutral arbiters. However, many new types of cases do not involve factual disputes, but rather social and psychological problems (Winick, 2010). Consequently, the role of the judge has also changed. Rehabilitation of offenders through a team approach that places the judge in a leadership role is the explicit purpose of problem-solving courts (Winick, 2010). According to a survey by Marlowe et al. (2016), at least nine meta-analyses have concluded that adult drug courts significantly reduce criminal recidivism on average by approximately 8% to 14%.

Outside the US, several courts that act in this manner are still in the training stage, although some studies have already evaluated the outcome of such tribunals, such as the American University survey on behalf of the Organization of American States (OAS). Responses came from drug court officials in Belgium, Bermuda, Brazil, Canada, Chile, Ireland, Jamaica, Mexico, Norway and Suriname (Cooper et al., 2010). Most respondents in the study claimed that in their country's drug courts contribute more to crime reduction than traditional justice.

Wexler (1992) claims to have pioneered the use of the term Therapeutic Jurisprudence in a paper on law and therapy for an NIMH (National Institute of Mental Health) workshop held in 1987. "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent" (Winick, 1997, p.185). Considering that the law occurs in the context of human lives and interactions, TJ suggests that legal actors must be aware of how their actions, including how they apply the law, therapeutically influence those lives and how they are shaped by their context (Campbell, 2010). According to Hora, Schma & Rosenthal (1999), Wexler and Winick are co-founders of the Therapeutic Jurisprudence concept. Wexler and Winick (1991) characterized TJ as an interdisciplinary, empirical, and international orientation.

Therapeutic jurisprudence offers problem-solving courts a lot, including how judges should deal with offenders and how such courts should be structured and administered to maximize their therapeutic potential (Winick, 2010). The Conference of State Court Administrators (COSCA) recommends adopting a definition of problem-solving court based on six main characteristics, as stated in Table 1.

Table 1 - Essential Characteristics of a Problem-Solving Court

Core Characteristic	Description
Specialized Court Docket or Program	The court has a dedicated docket or program that functions in a non-adversarial manner.
Judicial Authority and Ongoing Supervision	The court provides ongoing judicial interactions with participants, predominantly through a court docket and related preparations.
Team Collaboration, Community Involvement and Information Sharing	The court fosters inter-disciplinary partnerships between the court and outside agencies and between members of the problem-solving court team.
Specialized Team Expertise	The members of the court team receive training that contributes to the successful implementation and operation of the problem-solving court.
Individualized Treatment and Responses to Risk and Needs	There is a coordinated strategy in place to respond to participants' compliance or non-compliance and individual needs.
Therapeutic, Rehabilitative	Evidence-based therapeutic treatment service(s) is offered to participants in an effort to rehabilitate the participant.

Source: adapted from Slayton (2015)

Problem-solving courts have enabled the entry of restorative and rehabilitation principles into the formal justice system, but the beginning of the Restorative Justice movement is older and dates back to the 1970s (Menkel-Meadow, 2007).

'What it is an alternative to' is how Restorative Justice is more commonly defined (Braithwaite, p.10, 2002). As important as the idea of restorative justice as a method of bringing together all stakeholders in a dialogue about the consequences of an injustice and what is to be done to put them right, is the idea of restorative justice as an alternative that has a very different value from punitive justice (Braithwaite, 2002), Table 2.

Table 2 - Foundational concepts of Restorative Justice

Foundational concepts
Personalized and direct participation in a process of speaking and listening of both a wrongdoer (offender) and a victim of an act of wrongdoing;
Narration of what an act of wrongdoing consisted of and the harm or injury it caused to those affected;
Explanation by the offender of what was done and why;
Acknowledgment and acceptance of fault for the wrong committed by the offender with recognition of the harm caused;
Opportunity for appreciation or understanding of why the wrong occurred (root causes) and, in some cases, forgiveness of the individual, without forgetfulness of the act;
Consideration of appropriate outcomes or restitution to those wronged by all participants, including victim, offender, family members, and/or larger community, often with expert facilitation;
Reintegration of the wrongdoer into the larger community, through apology, restitution, and/or support and social services provided
Reconciliation of wronged and wrongdoer, within a renewed commitment to shared social norms;
An orientation to the wrongdoer that treats the act separate from the person so that the person may be redeemed as the victim/community is repaired;
An orientation to the future, to the extent possible, to make right what was wrong and to rebuild new relationships and new communities.

Source: adapted from Menkel-Meadow, C. (2007)

This section reviewed the historical and conceptual origins of TJ and RJ and shows that they are ideas that are related. Schopp (1998) discuss the integration of TJ and RJ. Principles of restorative and therapeutic justice are related in domestic violence courts (Winick, 2010). Gal & Shidlo-Hizroni (2011) also identified this relationship between TJ and RJ in the case of child victims. Since its inception, TJ has been extended to many areas of national and international law, although much of the work of TJ relates to courts, its scope is much broader (King, 2008). Whereas TJ and RJ can be understood as institutional change and innovation of great social importance, the next section will provide a theoretical review of these two concepts and another related concept - Institutional Entrepreneurship.

2.2 Institutional Change, Innovation and Entrepreneurship

Since the beginnings of the institutional approach, which goes back to the work of Phillip Selznick in the late 1940s, and subsequent work (DiMaggio & Powell, 1983; DiMaggio & Powell, 1991; Meyer & Rowan, 1977; Scott, 2005, 2008), institutional theory identified the rise of the sociology of knowledge, described by Berger and Luckmann (1966), through social constructivism. These works with a sociological perspective consider that rational instrumental approaches are limited and attach importance to the relationship between organization and the environment, understood as cultural entities (DiMaggio & Powell, 1991). The works represent, therefore, a rupture with the rational model (DiMaggio, 1988). Moreover, this perspective accepts that institutions change over time.

Institutional change can come from the micro (interpersonal and sub-organizational) levels to the macro (societal and global) levels (Dacin et al., 2002). According to Dacin *et al.* (2002), it can also occur in relatively brief and concentrated periods or over time measured in decades or centuries. In addition, it can occur incrementally, so that observers and participants are rarely aware of any change, or abruptly, in moving episodes that exhibit major discontinuities with previous patterns (Dacin *et al.* 2002). The ways in which the agents of change produce new rules, beliefs, and practices and sustain them over time is a central question for studies on institutional change (Tukiainen & Granqvist, 2016). According to Scott (2008), the ways in which individuals and organizations innovate, act strategically and contribute to institutional change have already received attention from studies in the institutional approach.

Dacin et al. (2002) called for studies of institutional theory and institutional change and received more than 75 manuscripts for review. The authors sought to provide new insights into how institutions are created, transformed and extinguished, and how institutional processes

interact to affect institutional change. The richness and diversity of this growing field of research was demonstrated by the number of studies (Dacin et al., 2002). Transposing the concept of institutional change to Therapeutic Jurisprudence and Restorative Justice, a moment of crisis can be used to promote change (Wolf, 2008). The new form of courts emerged as a response to the prison crisis as a whole, including the revolving door problem (Wiener et al, 2010), where the same offenders returned to the courts. Solving this problem helps to resolve the problem of prison overcrowding (Wolf, 2008).

In shifting prevalent practices, resource engagements, and institutional order, Durand and Jourdan (2012) suggest alternative conformity as a powerful mechanism. The diverse external expectations and the environmental demands pressure, limit and support organizations (Durand and Jourdan, 2012). Justice organizations follow this same idea, for when discussing justice and the processes that shape it, the various expectations of society are often considered.

Gromet and Darley (2009) investigated the hypothesis that people's need for punishment does not preclude a desire for restorative sanctions that address the repairing of the harm to victims and communities caused by wrongdoing. The results showed people's view of satisfying multiple justice goals as an appropriate and fair response to error and according to the authors this allows a possible reconciliation between the "conflicting" objectives of restorative and retributive justice.

The change and innovation introduced by TJ and RJ can be characterized as divergent change, since changes that receive this denomination break with the established logic. In other words, divergent changes break the institutional *status quo* in a field of activity and transform existing institutions or create new ones (Battilana et al., 2009). Divergent changes break with institutions. The agents of change only qualify as institutional entrepreneurs when the changes introduced diverge from the institutional environment in which they are incorporated. Non-divergent changes align with institutions in the field (Battilana et al., 2009). The style and scope of drug courts transcend conventional political categories in many important ways (Nolan, 2002).

Innovation has been considered a cure for the sick state (Black et al, 2005), where the sickness is a low level of efficiency in the use of public resources. From this perspective, Schumpeter's (1976) maxim, that companies should innovate or die, can be applied to the public sector in general and to the justice system in particular. Gil-Garcia, Helbig and Ojo (2014) consider that the integration of information, technology and innovation into government activities is an essential element for a government to act in a more intelligent, that is innovative, way. Sharif (2010) characterizes successful innovation as a "collective achievement". The study

of innovation phenomena involves the delineation of "innovation systems" to capture this "collective" aspect for analysis (Sharif, 2010). Institutions (laws, regulations, rules, habits etc.), the political process, public research infrastructure (universities, research institutes, support from public sources etc.), financial institutions, and skills (the work force), are factors related to innovation that belong to such a collective "system" (Sharif, 2010).

For Black et al. (2005) regulatory innovations encompass changes in the performance of regulatory functions, institutional structures and organizational processes that push the regulatory regime. These authors also state that regulatory innovations consist of new solutions to old problems, or new solutions to new problems, but not old solutions to old problems. In the judiciary, Baxter et al. (2011) suggest that innovation, despite its increasing recurrence, is not systemic, and there is little innovation in frameworks for justice. These authors suggest that politicians and public managers have significant lessons to learn from the private sector approach to managing innovation and claim that successful innovation includes combinations of new processes, new services and new business models.

Justice innovation can be stimulated at a time of crisis, and today perhaps the greatest crisis in the criminal justice system is the overcrowding of prisons (Wolf, 2008). Courts, police, parole systems, prisons and restorative justice are the main themes addressed by the specific research on innovation in the field of criminal justice, which is generally descriptive in nature (Baxter et al, 2011).

The new courts that follow therapeutic jurisprudence have grown in a pattern that is characteristic of many successful innovations (Dorf & Fagan, 2003). This pattern is a new idea created or found by chance by an individual or group, and, once put into practice, seems to work. A small number of other actors embrace innovation and have similar experiences if there is a great demand for the innovation. This usually occurs because the innovation responds to a widely-perceived crisis or meets institutional needs and resolves the tensions within the organizations that adopt it. Innovation diffuses through the networks in which the first adopters interact. Eventually, after a period of adoption and systematic use, what was originally an innovation becomes an institutionalized routine or practice.

Dorf & Fagan (2003) attribute the origin of drug court diffusion to three institutional imperatives. According to the authors, these are the pressure created by the intensification of the war on drugs in the 1980s, the perception shared by legal elites that the breaking of drug cases led to a crisis in the courts characterized by an ineffective system of punishment and a revolving door that recycles offenders without reducing either drug use or crime, and the dissatisfaction of some judges with the imposition of draconian sentences in drug laws

promulgated during this same period. The structure and philosophy of drug courts offered a promise of reducing each of these three tensions (Dorf & Fagan, 2003). Even though the idea of drug courts departs fundamentally from the old system, many judges have no scruples about trying something new, claiming that previous methods were ineffective as they failed to rehabilitate offenders (Nolan, 2002). The potential for innovation and transformation which is seen in institutions is evidence that institutions are not fixed and determined, but are continually evolving (Lawrence & Phillips, 2004).

In view of the above considerations, we formulate Proposition 1.

Proposition 1: Therapeutic Jurisprudence and Restorative Justice represent a divergent change and institutional innovation, as this approach alters traditional judicial activity and institutionalizes a new way of promoting justice, arguing that previous methods were ineffective as they failed to rehabilitate offenders.

Changes and innovations, mainly institutional changes in the field of justice, are subject to exogenous and endogenous pressures. Initially, studies paid more attention to exogenous pressures (Meyer, 1982). Less attention was paid to the endogenous sources of change, which has been defined as institutional entrepreneurship (DiMaggio, 1988). Edelman et al. (1999) presented a proposal of endogeneity in which the law is considered endogenous when organizations are responding and building the law that regulates them.

Institutional entrepreneurship can be understood as a promising opportunity for endogenous institutional change (Battilana, 2006). Battilana et al. (2009) present a model of the institutional entrepreneurship process and a definition that "institutional entrepreneurs are agents of change, but not all agents of change are institutional entrepreneurs" (Battilana et al., 2009, p.68). For the authors, to be considered institutional entrepreneurs, the actors must fulfill two conditions: "(1) initiate divergent changes; and (2) actively participate in the implementation of these changes" (Battilana et al. 2009, p.68).

Considering institutional entrepreneurs as synonymous with leading elites, Eisenstadt (1980) suggests that this group is the most important link between cultural orientation and the symbolic articulation of the main institutional spheres, and also between them and the processes of change that have developed in historical societies. The development of institutional fields presupposes the importance of pre-existing practices, rules and understandings, but this does not mean that the process is simply determined by the existing institutional context. On the contrary, actors have the option to resort to multiple pre-existing institutional fields and ambiguous and contested macro-cultural discourses (Lawrence & Phillips, 2004). Broadly

speaking, the actors are not passive, but social agents who make choices in the interpretation of the presented meaning, perceive the meaning of the institutions and infuse their actions with meaning based on these perceptions (Dacin *et al.*, 2002).

As institutional theory suggests, actors in a field include individuals, groups, sub-units of organizations, organizations, firms and states (Kluttz & Fligstein, 2016). What causes some actors to stand out as individuals who engage in social action? The combination of a motivation to change associated with low immersion can result in the transformation of central actors into institutional entrepreneurs (Greenwood & Suddaby, 2006). Maguire *et al.* (2004) discussed the activities that constitute institutional entrepreneurship and how they vary in different contexts. These authors suggest that future research should compare and contrast institutional entrepreneurship in emerging and destabilized fields.

Maguire *et al.* (2004) sought to test the particular dynamics of institutional entrepreneurship in emerging fields and studied new practices of consultation and exchange of information between pharmaceutical companies and community HIV / AIDS organizations. Greenwood & Suddaby (2006) analyzed a change in a highly-institutionalized field, the introduction of a new organizational form - multidisciplinary practices that are combinations of several professions, typically accounting and consulting, and sometimes law - in the largest global accounting firms, the so-called "Big Five" (Arthur Andersen, Deloitte Touche Tohmatsu, Ernst & Young, KPMG, PricewaterhouseCoopers). In their research, Greenwood & Suddaby (2006) suggest that the causal dynamics of the observed changes were not immediately apparent and the motives of the actors were obscure (Elsbach & Kramer, 2003). Garud *et al.* (2002) provide a description of "institutional entrepreneurship" in Sun Microsystems, the company that was the primary sponsor of Java technology for the Internet. The complex mix of cooperative and competitive practices involved when companies create common standards for governing a technology was explored by the authors.

In the case of the judiciary, the motivation, and consequently the behavior, of the judges is influenced by the social role that the judges deem appropriate for themselves. Thus, for example, judges classified as social activists may also be motivated by career advancement and social recognition (Gomes, Guimaraes & Souza, 2016). When judges are feeling productive and positive, these attitudes are passed on to staff, litigants and lawyers (Chase & Hora, 2009). The theory that explains people's social roles - considering that people occupy social positions and have expectations for their own behavior and the behavior of other people - is called the "theory of roles" and addresses one of the most important characteristics of life - behavioral patterns or roles (Biddle 1986).

On the basis of observations collected in eight problem-solving courts (where the therapeutic jurisprudence is implemented), Wales *et al.* (2010) suggest that the role of the judge is significant in reducing recidivism. These authors suggest that the judge provides: (1) a high level of interpersonal treatment of participants that gives them dignity, respect and voice; (2) responsibility for both participants and service providers; and (3) transparency for decisions taken through an open negotiation process. In a study conducted by Porter *et al.* (2010) with criminal justice professionals from New York and Atlanta metropolitan areas, the interviewees repeatedly highlighted the role of the judge in promoting a problem-solving culture as an important feature.

Chase and Hora (2009) conducted a survey of 355 judges and examined differences in job satisfaction between judges assigned to problem-solving tribunals - such as drug treatment and family courts - and those in other, more traditional, family and criminal courts. In order to measure satisfaction, these authors used three scales: 1) utility, 2) attitude towards litigants, and 3) positive effects of adjudication. The judges who acted in Problem Solving Courts (PSC) scored higher on all three scales. The results showed that PSC drug court judges scored the highest level of satisfaction with the work they do (Chase & Hora, 2009). As the judge is considered the central actor in the efforts of the judicial model of problem solving to modify the behavior of the offender, so the magistrate was also seen as a specialized agent of change, and no longer as just an impartial arbitrator of the conflict or disinterested administrator of justice (Bozza, 2007). In the courts that follow this therapeutic line, the judge is the main behavior modifier (Marlowe, Festinger & Lee, 2004).

Battilana *et al.* (2009) presented the main activities in which institutional entrepreneurs engage in the implementation of divergent changes, including the articulation of a vision of change and the mobilization of allies to support the vision. The authors also point out that, as they initiate divergent changes, that is changes that break with existing institutions, institutional entrepreneurs face specific challenges arising from the institutional involvement of other actors and from possible political opposition. DiMaggio (1988) stated that for new institutions to emerge, institutional entrepreneurs must see in these institutions an opportunity to realize interests that they value highly. In addition, continuous transformations occurring in institutions are carried out by motivated actors (Lawrence & Phillips, 2004). Greenwood and Suddaby (2006) suggest that institutional entrepreneurship by central organizations comprises the interaction of consciousness, openness, and motivation.

In the case of TJ and RJ, judges act as leaders of interdisciplinary teams and combine the role of judicial officer and case manager to motivate participants to take advantage of the

available remediation services (Wiener et al., 2010). They are motivated actors who play a leadership role in the various phases of the innovation process. Innovation in justice faces intense barriers and effective leadership is essential in all phases of the innovation process (Baxter et al., 2011). Considering the concept of an institutional entrepreneur and the roles played by judges in TJ and RJ, it can be suggested that:

Proposition 2: Judges that apply Therapeutic Jurisprudence and Restorative Justice act as institutional entrepreneurs because they favor change in a conscious, open, motivated way, and mobilize institutional support alliances to overcome barriers.

2.3 Conclusion and recommendations

The present essay describes the relationship between Therapeutic Jurisprudence and Restorative Justice and the concepts of change, innovation and entrepreneurship, from the perspective of Institutional Theory. An analysis was made of studies of TJ, RJ, PSCs and the concepts of institutional change, innovation and entrepreneurship. Judges that apply TJ and RJ play a distinct role compared to traditional ones. Although there are TJ/RJ in many countries, no study was identified that examined that role through the lens of Institutional Theory. The aim of the present study is to fill this gap. The review also showed that the topic has not been explored and empirical studies in this area are needed to improve our understanding of TJ/RJ in the national context.

Two propositions have been suggested that relate TJ/RJ to the concepts of institutional change, innovation and entrepreneurship. TJ/RJ are an institutional innovation in the field of justice, in that it changes standards, values, norms and established rules. TJ/RJ themselves are configured as an institution. The creation and development of TJ/RJ includes a movement to de-institutionalize traditional judicial practices and replace them with new practices, habits and values. The first proposition deals with institutional change and innovation. The second proposition deals with the performance of TJ/RJ judges as institutional entrepreneurs. These propositions, after being empirically tested, can contribute on building knowledge about this phenomenon, from the point of view of Institutional Theory, and may also support the policy making process related to the administration of justice.

The propositions suggested in this essay are based on the assumption that institutions are not immutable, but are subject to change processes, providing a space for studies of justice that consider the active role of judges in creating, maintaining and changing the parameters that define the justice sector. Future studies could also provide empirical evidence on such issues.

In what ways might judges act to advance a new model for these professionals in courts that take a more therapeutic and holistic approach? How do distinct cultures contribute to the consolidation and institutionalization of this new model called Therapeutic Jurisprudence and Restorative Justice? How and why do TJ and RJ become more institutionalized in some cultures than in others?

In a study, Boen and Whitehead (2015) addressed mechanisms in problem-solving courts that generate better results and identified the importance of procedural fairness and especially the relationship between the offender and the judge. In the future, new studies could address these two mechanisms in depth. Regarding the relationship between the offender and the judge, we suggest research based on the theory of roles (Biddle 1986). This theory may contribute to a better understanding of judges' attitudes and behaviors and, to the extent that judges are central actors of justice, judges' understanding of the work they do may be helpful to understand the administration of justice.

Social trust was highlighted by Koene (2006) as an element of the institutional context that affects the process of institutional change and this trust is often determined by previous experience. The author suggests that the confidence of society reflects the confidence that the existing general institutional mechanisms are able to deal effectively with the challenges presented by the proposed innovations. In the case of the judiciary, there should be an analysis of the relationship between the social trust of the population in the justice system and the institutionalization of problem-solving courts. Koene (2006) also noted that entrepreneurs who promote innovation are not necessarily the innovators themselves. One possibility for future research is to consider, as proposed in Proposition 2, *that judges that apply Therapeutic Jurisprudence and Restorative Justice act as institutional entrepreneurs*, the differentiation between the judges who create the innovation and those who lead it, testing the influence of these actors on institutional change.

Khan, Munir and Wilmott (2007) sought to examine "the dark side of institutional entrepreneurship". Further studies are needed that address the negative side of TJ and RJ. One area for further study is the potential difficulty of creating TJ and RJ in relation to the so-called "Legal Security Theory" as suggested by Avila (2016). This author points out that the State needs to have normative and informational instruments to fulfill its duties of protection, but the more it manages these instruments, the more it will limit the exercise of individual freedom.

In general, more empirical studies on the subject are necessary to study and disseminate a better understanding of the phenomena. Research, preferably longitudinal research, that examines how the implementation of TJ and RJ affects the levels of crime in different countries

would be desirable. Given the factors that Chase and Hora (2009) have identified, there is a need for more investigation of litigant characteristics and resource allocation in TJ, drawing on evidence from various countries.

The propositions stated in this essay, when tested empirically, will contribute to the development of the theme and build knowledge about the administration of justice, as well as related improvements in policy making process. This article has the merit of focusing attention to a phenomenon that has been studied for more than two decades in the United States but not from the lens of institutional theory.

These propositions offer a useful starting point from which more theoretical and empirical research on TJ and RJ can be constructed. As Marlowe, Festinger and Lee (2004) suggest, using rigorous scientific methods, researchers and drug court professionals can work together to address issues of practical relevance to the field of drugs. The intent of this proposal is to generate a discussion that contributes to the theory and practice of TJ and RJ.

3. THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE IN THE US: THE PROCESS OF INSTITUTIONALIZATION AND THE ROLES OF JUDGES²

The legal systems and the judiciary in many countries have been changed and reformed, with the aim of dispensing justice quicker and more effectively. Some reforms have tried a less adversarial approach to resolving legal disputes, for example, Therapeutic Jurisprudence (TJ) and Restorative Justice (RJ). The objective of this article is to describe how institutionalized these movements are in the US and the roles played by judges in this process. The data collection involved document analysis, observation of court-hearings and interviews with 13 judges from several judicial areas involved in TJ and/or RJ judicial proceedings in the US. Data analysis was undertaken using content analysis and the software NVivo. The results provide evidence that: a) these movements are in a process of divergent change implementation; b) judges who engage with these approaches act as institutional entrepreneurs; and c) the judges interviewed can be classified into four roles that are complementary in the promotion of TJ / RJ: *promoter, author, convener and maintainer*.

Key Words: Institutional Change, Institutional Entrepreneurship, Institutional Innovation, Therapeutic Jurisprudence, Restorative Justice

² This chapter has been published in 2019 with the same title in *The International Journal of Offender Therapy and Comparative Criminology* and was presented at the Annual Meeting on Law and Society, held in Toronto-CA in 2018.

3.1 Introduction

Overcrowding in prisons produces precarious and often inhumane conditions in many countries and is an increasingly widespread problem (UNODC, 2013). Building more prisons with more space might not solve the problem. Since the early 1990s it has been recognized in the US that incarceration alone does not break the cycle of drug use and crime (Hora, 2002). With a focus on achieving better results for victims, litigants, defendants and communities, the US pioneered a new way of dispensing justice (Berman & Feinblatt, 2001), including Therapeutic Jurisprudence (Winick, 2010) and Restorative Justice (Menkel-Meadow, 2007).

Therapeutic Jurisprudence (TJ) began as an academic interdisciplinary approach in the field of mental health and provides the theoretical foundation for Problem Solving Courts (PSC) (Winick, 2002). Since its inception in 1987, TJ has been based on the principle that substantive rules, procedures and legal papers have therapeutic or anti-therapeutic effects (Hora, 2002).

Traditional notions such as deterrence, rehabilitation, incapacitation and crime prevention are analyzed and thought of differently by Restorative Justice (RJ) (Braithwaite, 1999). In an attempt to cure the hurts caused by an injustice, this approach gives the opportunity for discussion between all stakeholders involved to decide what should be done (Braithwaite, 2002). Seeking to understand the effect of legal practices on people, both the TJ and RJ are committed to an evidence-based framework, including the use of rigorous methods of social science (Braithwaite, 2002; Stobbs, 2015). A PSC is an organization (court) that uses the values and principles of TJ and/or RJ seeking to apply new ways of making justice.

When judges realized that traditional interventions of penitentiaries and supervised parole or probation did not stem the tide of drug use among criminals and drug-related crimes in America, they gave support to a grass roots movement that gave rise to Drug Courts (Hora et al, 1999). By introducing a problem-solving approach to a system accustomed to finding facts and punishing, adult drug courts were a significant innovation in the criminal justice system (Tanner-Smith et al. 2016).

The traditional role of judges in the adversarial US criminal justice system is to hear the evidence, provide a decision based on the facts presented and act as neutral arbitrators who are impartial (Portillo et al, 2013). The role of the judge was changed by Therapeutic Jurisprudence, from a neutral role to an important one in the rehabilitation of offenders (Hora & Stalcup, 2007).

The judge is no longer passive as he or she was traditionally (Portillo et al, 2013). Leader, communicator, educator, community collaborator, and institutional builder are the characteristics of the effective judge in a drug court (Marlowe & Meyer, 2011). In the US, the

judge participates in the legal process, the Legal Activity, having a voice in determining institutional norms and indicating which actors are relevant to determine a certain action (Hoffman, 1999).

This research describes how institutionalized Therapeutic Jurisprudence and Restorative Justice are in the US and the roles played by judges in this process. It is argued that the development of new ways to achieve justice, through these approaches trying to solve judicial problems in a therapeutic and holistic way, is possible because they combine the concepts of institutional change, innovation and entrepreneurship. Despite the strong inertia of institutions (Battilana *et al.*, 2009), institutional change can happen when there is a break with institutionalized practices. Explanations of institutional change have increasingly been the focus of neo-institutional theorists (Dacin *et al.*, 2002). In addition, the strong relationship between TJ and social science (Wexler & Winick, 2003b) makes the choice of institutional theory more appropriate. Although there is already a book focused on the role of the judge in TJ (Wexler and Winick, 2003), observation and interview of judges for social science research in the courts are rare. This research gap reinforces the relevance of this study.

3.2 Theoretical Background

With attention focused on social processes, institutional theory considers forces that are beyond the organizational boundary (DiMaggio & Powell, 1991; Scott, 2005). This perspective considers that rational instrumental approaches are limited and attach importance to the relationship between organization and the environment, understood as cultural entities (DiMaggio & Powell, 1991). It should be noted that this approach considers that institutions change over time. The role that organizations and / or individuals play in institutional change has been addressed by neo-institutional theorists since the late 1980s (Battilana, 2006).

In the 1990s, organizational change and adaptation were a central research issue because of the complexity of political, regulatory, and technological changes confronting most organizations (Greenwood & Hinings, 1996). It was during this same period that the US criminal justice system realized that imprisonment was not solving problems (Hora, 2002). A new way of dispensing justice emerged aiming to achieve better results for victims, litigants, defendants and communities (Berman & Feinblatt, 2001). The traditional adjudication process was changed by drug courts (Nolan, 2001).

In the processes of change at several organizational levels, disruptive events have been

central to explanations (Hoffman, 1999). Morril (2017) proposed a conceptual framework to analyze institutional change based on three stages: innovation, mobilization and structuring. The initial motive for beginning an institutional innovation is to correct a perceived institutional failure. This is followed by mobilization and the collective efforts of multiple, sometimes competing, critical masses, who frame alternative practices to secure legitimation and resources from key organizational players in existing organizational fields. Eventually, alternative practitioners are able to form a structured organizational field, claim professional jurisdiction, modify institutionalized ideologies and structuring occurs (Morril, 2017).

Until the appearance of Therapeutic Jurisprudence, the areas that involve emotional life and psychological well-being have not received much attention in the law field (Wexler, 2000). The humanization of the law and concern with the human, emotional and psychological side of the law and with the legal process is the intention of the TJ (Wexler, 2000). The legal theory of TJ resulted from an attempt to reconcile or accommodate this approach with traditional legal values such as due process (Osafo et al., 2017). Promoting the reparation of the victims and the community in a way that reintegrates the aggressor into the community is part of the ideology of Restorative Justice and the legal development that ensures the well-being of all those involved without sacrificing other important values is part of the ideology of TJ (Schopp, 1998).

In Daicoff's (2005) view, TJ and RJ are two of the main converging "vectors" of a movement that takes a comprehensive, integrated, humanistic, interdisciplinary, restorative and often therapeutic approach to law. Other examples of vectors of this movement cited by Daicoff (2005) are collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice and transformative mediation. Empathy with human survivors of legal conflicts can be considered the greatest methodological similarity between TJ and RJ (Braithwaite, 2002). Thus, it is considered in the present study that despite the differences between TJ and RJ both can be considered as strands of the same approach.

Unlike what happens in a normal criminal court, in a drug court the judge engages the clients directly, encourages them and asks personal questions in the treatment process. The traditional punitive strategies of law enforcement are marked by simple incarceration and formal social control. In the drug court the logic concentrates the cognitive attention of drug justice practitioners on the participants' obedience, respect for authority and adherence to rules and expectations (McPherson & Sauder, 2013). For offenders as well as affected family systems, judges and prosecutors may view their roles as therapeutically useful (Edwards & Hensley, 2001).

The role of the judge has changed and been extended in courts that apply TJ and RJ

approaches. The conventional role was neutral, a fact-finder, but became a problem-solver who uses the coercive power at their disposal, for example, to help address an offender's drug addiction (Feinblatt et al., 2000). Many scholars discuss problem-solving courts as judge-led initiatives (e.g., Miller & Johnson, 2009). Institutional entrepreneurs are crucial in the process of establishing new ways that instantiate new beliefs, norms, and values (Rao et al., 2000). The National Drug Court Institute (NDCI) has identified nine core competencies that describe the role of the drug court judge (Table 1).

Table 1 - Core competencies of drug court judges

Core Competency	Description
1	Participates fully as a drug court team member, committing him or herself to the program, mission and goals, and works as a full partner to ensure their success.
2	As part of the Drug Court team, in appropriate non-court settings (i.e., staffing), the judge advocates for effective incentives and sanctions for program compliance or lack thereof.
3	Is knowledgeable of addiction, alcoholism, and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner.
4	Is knowledgeable of gender, age, and cultural issues that may impact the offender's success.
5	Initiates the planning process by bringing together the necessary agencies and stakeholders to evaluate the current court processes and procedures and thereafter collaborates to coordinate innovative solutions.
6	Becomes a program advocate by utilizing his or her community leadership role to create interest in and develop support for the program.
7	Effectively leads the team to develop all the protocols and procedures of the program.
8	Is aware of the impact that substance abuse has on the court system, the lives of offenders, their families, and the community at large.
9	Contributes to the education of peers, colleagues, and judiciary about the efficacy of Drug Courts.

Source: National Drug Court Institute (adapted)

One should not confuse the creation of successful demonstration projects with the implementation of a new idea in a state or national system. Whatever the field - courts, health, education or social welfare - the process of institutionalization represents a unique set of challenges (Feinblatt, Berman and Foxx 2000). Identifying the measures needed to reduce prison populations is a first step. Ensuring that these measures are accepted and implemented is a step that depends on the conviction of all the major players in the criminal justice world (Lappi-Seppala, 2003). Therefore, we sought to understand the role of judges in this process.

Greenwood et al. (2002) proposed six Stages of Institutional Change: I - Precipitating Jolts; II – Deinstitutionalization; III – Preinstitutionalization; IV - Theorization; V – Diffusion; and VI – Reinstitutionalization. When events destabilize established practices, stage I occurs. Institutional entrepreneurship characterizes the stage of deinstitutionalization. One of the greatest challenges facing contemporary institutional theory is called the paradox of embedded agency and consists in the fact that the agency in institutional change is a point of controversy considering the tension between the notion of actors as strategic agents of change and the powerful influence of institutional forces on human agency (Battilana et al., 2009). The resolution of this paradox may be in the notion of institutional entrepreneurship as long as it accounts for actors' embedded agency (Battilana et al., 2009).

At the moment of change, institutional entrepreneurs can be strategic and opportunistic, taking advantage of uncertainty in the institutional order they seek to change, since change can arise suddenly and unpredictably, pushing institutional actors into periods of revolution (Hoffman, 1999). Notwithstanding institutional pressures are directed at stagnation, field characteristics and social position allow actors to engage as institutional entrepreneurs in implementing divergent changes involving the creation of a vision and the mobilization of allies (Battilana et al., 2009).

Since people have social positions and expectations of their own behavior and of other people, Role Theory explains and focuses on characteristic behavior patterns or roles (Biddle, 1986). This theory provides an intermediary between society and the individual that can explain why individual behavior implies characteristics that are constant (James, 1968). The different and predictable ways that humans behave, depending on their respective social identities and situation is one of the most important characteristics of social behavior that is analyzed by Role Theory (Biddle, 1986).

Actors deeply embedded in the field through reflexive deliberations can motivate changing established institutional arrangements, showing that they are not static (Delbridge & Edwards, 2013). The need to explore the relationship between context and action and to capture the legitimizing arguments informing such change are two ideas that are at the core of recent discussions of institutional change (Delbridge & Edwards, 2008). Patterns of content, rhetoric and dialogue among the constituents of the field allow us to have notions of the institutions they reflect (Hoffman, 1999).

The chronology of creation, implementation and changing of social norms and behaviors, i.e. institutions, such as TJ and RJ, can be a helpful tool to analyze their process of institutionalization. In 1989, through an administrative order issued by Chief Judge Gerald

Wetherington, the nation's first drug court was created (Hora, Schma & Rosenthal, 1999). The new movement took on major proportions, starting from the center of the city, and reaching suburban and rural communities, the Drug Treatment Courts grew (MacKenzie, 2016).

According to the “Timeline of Drug Courts and Other Problem-Solving Courts in the United States”, published by National Drug Court Institute, by 1990, spending on correction exceeded \$26 billion nationally. A year later, in 1991, there were five drug courts. In 1992, the first women’s drug court opened in Kalamazoo, Michigan. The first community court opened in 1993 in Brooklyn, New York. The National Association of Drug Court Professionals (NADCP) was founded in 1994 and in 1995 NADCP held the first national drug court training conference in Las Vegas, Nevada. Ten years after the creation of the first court, there were 472 drug courts in the US in 1999.

An example of documents disseminating the Therapeutic Jurisprudence and Restorative Justice approaches that have been published is "Development and implementation of mediation and restorative justice measures in criminal justice" United Nations (1999). In 2000, the Conference of Chief Justices / Conference of State Court Administrators passed a resolution in support of problem-solving courts (CCJ/COSCA). In 2003, the National Institute of Justice reported drug court recidivism rates were as low as 16.4% nationwide one year after graduation and there were 1,667 problem-solving courts in the US. In 2006, UNODC published “Handbook on Restorative Justice Programmes”. By 2007, 3,204 problem-solving courts existed and the National Center for Driving While Impaired (DWI) Courts (NCDC) was founded and UNODC launched “Handbook of Basic Principles and Promising Practices as Alternatives to Imprisonment”. In 2010, the Organization of American States (OAS) and the American University published “Establishing Drug Treatment Courts: Strategies, Experiences and Preliminary Outcomes”. In the same year, the Center for Court Innovation published “What Makes a Court Problem-Solving?”

In 2011, NDCI published a study called “The Drug Court Judicial Benchbook”. According to the Bureau of Justice Statistics’ (BJS) Census of Problem-Solving Courts (CPSC) there were 3,052 problem-solving courts distributed in all the states of the American territory in 2012. The five US states with the highest number of PSCs were California (208), New York (188), Florida (164), Texas (153) and Michigan (141). The states with the smallest numbers were North Dakota (10), South Dakota (10), Maine (9), Rhode Island (7) and Vermont (6).

States across the country have developed best practices, guidelines, recommendations or standards that are intended to guide courts seeking to implement a new problem-solving tribunal or existing courts to improve program outcomes for participants and the community.

Other states have developed certification checklists to demonstrate continued compliance or have established rules to govern the operations of the problem-solving courts (NCSC, 2015).

In 2013, the Red Hook Community Justice Center Evaluation was established in New York. In 2014, five projects about PSCs were completed. The following year, the states of Arizona, Illinois, Indiana, Oregon, Pennsylvania, Texas, Virginia, and Wisconsin completed projects related to PSCs. In 2015, COSCA published the study “Problem-Solving Courts in the 21st Century”. Colorado, Florida, Minnesota and Virginia completed projects in 2016. In 2017, studies were undertaken evaluating PSCs in the states of Colorado, Michigan, Minnesota, Nebraska, New Mexico, Utah and West Virginia, and ICJIA published “An Overview of Problem-Solving Courts and Implications for Practice”. In the same year, the National Center for State Courts (NCSC) and Center for Court Innovation published “Inspired by Peacemaking: Creating community-based restorative programs in state courts: An implementation guide”. In 2018, West Virginia developed statewide performance measures for West Virginia's Juvenile Drug Treatment Courts and conducted process and outcome evaluations of selected Juvenile Drug Courts.

This study used the theoretical concepts and the chronology described above in the process of exploring the opinions of judges applying Therapeutic Jurisprudence and Restorative Justice in the US, according to the research method described in the next section.

3.3 Data and Methods

Data were collected from multiple sources. Primary data were collected from semi-structured interviews with judges from the US who work in Therapeutic Jurisprudence and/or Restorative Justice and a judge who does not act in that field, in order to obtain the points of view of actors with different positions on the same phenomenon. The method of Participant Observation was also used, as it allowed the study of details and the sequence of events in an in-depth way. Secondary data were obtained by means of documentary research in journals, internal documents, and websites of several organizations in the field.

The 13 in-depth interviews were carried out between August and December 2017, with judges from the US working with mental health, family, youth, restorative justice, drug programs and one judge who was not working in that area. At the time of the interviews, the judges worked in counties located in four US states - California, New York, Illinois and the District of Columbia. The interviewed judges represent different generations in the Judiciary but share similar perspectives regarding the Therapeutic Jurisprudence and/or Restorative Justice. Some of the interviewees participated in the conceptualization of the first drug courts,

others have very recent experience, such as the case of a judge who has only six weeks working in this new perspective. Thus, each one spoke about the experience he or she had with TJ or RJ. Six of the 13 interviewees are female and seven are male. "Saturation point", when the answers add no new information, was reached in the tenth interview. Table 2 lists the 13 US judges interviewed, the nomenclatures they use most, and whether they practice TJ or RJ.

Table 2 - US judges interviewed

JUDGE	City	Gender	Nomenclature most used by the judge	TJ	RJ	Experience with TJ / RJ
(J1)	County of Alameda, CA	Female	Therapeutic jurisprudence; collaborative court	Yes	No	25 years
(J2)	Chicago, Il	Male	Rehabilitative Alternative Probation; problem-solving courtrooms	No	No	10 years
(J3)	Brooklyn, NY	Male	Problem-solving court; community courts	Yes	No	17 years
(J4)	Syracuse, NY	Male	Problem-solving courts; adult drug court	Yes	No	13 years
(J5)	San Francisco, CA	Male	Collaborative courts; behavioral health court	Yes	No	Two and a half years
(J6)	San Jose, CA	Male	Therapeutic justice; collaborative court; evidence-based practices	Yes	Very little contact with	10 years
(J7)	Washington DC	Female	Problem-solving courts; community courts	Yes	No	10 years
(J8)	County of Alameda, CA	Female	Collaborative courts	Yes	No	2 years
(J9)	Brooklyn, NY	Male	Problem-solving court; therapeutic court	Yes	No	20 years
(J10)	Walnut Creek, CA	Female	Therapeutic jurisprudence	Yes	No	30 years
(J11)	Chicago, Il	Female	RJ	No	Yes	Six weeks
(J12)	Albany, NY	Female	Problem-solving court	No	No	5 years
(J13)	San Jose, CA	Male	Traditional judge	No	No	No experience

Source: research data.

The theoretical concepts of institutional theory already presented steered the questions asked of the judges interviewed. Interviews were taped and transcribed and afterwards the data analysis was performed. The analysis of the verbal data collected consisted of the identification and systematization of similarities, regularities and constancy in the speech of the interviewed. To assist in the organization, categorization and analysis of interview data, NVivo software was used.

As a flexible and useful research tool, thematic analysis can provide a rich and detailed but complex account of data (Braun & Clarke, 2006). We used this tool to analyze interview data. Representing some level of standardized response or meaning within the data set, a theme captures something important about the data in relation to the research question (Braun & Clarke, 2006). Participant Observation, also used in this research, is an important method of data collection that can inform the development of the theory, providing understanding of participants' behaviors and contexts that influence their behaviors (Dahlke et al., 2015). Another technique that was used in this research is historical analysis (Hoffman, 1999; Leblebici et al., 1991; Maguire et al., 2004; Morril, 2017). In this sense, the next section starts with the main events related to TJ and RJ in the US. Afterwards, the data analysis of the interviews is presented.

3.4 The Process of Institutionalization of Therapeutic Jurisprudence and Restorative Justice in the US

From the data analysis of the present research, it was identified that all the judges interviewed, including the judge who does not apply TJ / RJ, showed a positive perspective on Therapeutic Jurisprudence and Restorative Justice. When asked about the beginning of the movement and the proposed change, the judges gave answers that Therapeutic Jurisprudence and Restorative Justice represent a divergent change and institutional innovation. The innovative character of the TJ / RJ can be identified in the judges' statements that show the need for something different: “We needed to think of something different so that we could try to keep people from continuing their time in the criminal justice system” (J4), “We need to do something different” (J3).

Some of the interviewees said that the perception of the need for something innovative started from society. “Society started to realize that they were treated poorly and left to wallow in the streets sometimes. And once that happened, again, I think the court system said that, you know, ‘We have to do better, as well.’” (J9) The perception that the previous judicial practice was not working was also reiterated: “people realizing that what we were doing before wasn’t really working or wasn’t having an effect.” (J4) The problem of addiction to harmful substances was pointed out: “It was someone looking at our community and realizing we were one of the top ten crack-infested communities in the United States and that we had to do something different.” (J3)

When asked about the main factors that pushed the beginning of the Therapeutic Jurisprudence / Restorative Justice movement, there was a consensus among the judges

interviewed. The frustration with what the judges call the "revolving-door" was stated by eight of the thirteen interviewees. Dissatisfaction is the main starting point for judges engaging in these movements, dissatisfaction with their jobs, with the tools at their disposal and with the "revolving door" that returns the same offenders to the courtrooms again and again. This problem is also discussed by Berman and Feinblatt (2002).

This metaphor used by the judges emphasizes one of the major problems facing criminal justice – recidivism - “it was revolving-door justice that created drug courts.” (J3) The following excerpts reiterate this point:

(...) judges want to get involved with these courts because of the frustration that you feel with the revolving door of justice (...) the frustration that you see from seeing the same people over and over and over again, and you're feeling like you're just not making any progress with these individuals. (J12)

“The traditional role of the court was somebody’s arrested on a drug charge – they go to trial – they’re convicted – you give them the maximum sentence. They go to jail. They get out. They’re still a drug addict. So, they commit crimes, so they can get drugs. (J9)

The feeling that the decisions made by them, the judges, do not really matter, that despite sentences of probation and detention defendants eventually are arrested again, is one of the biggest frustrations for the judges of the criminal courts, as also suggested by Berman and Feinblatt (2002). The excerpts from the interviews illustrate this feeling: “I think that we were seeing a high volume of low-level misdemeanor arrests. People making the same mistakes again and again and again.” (J7) This observation of seeing people making the same mistakes was quoted by some of the judges interviewed as a major discomfort felt by them: “Keep people from getting rearrested over and over again and just having the same problems.” (J4)

Despite the recognition that something innovative was needed to solve the "revolving-door" problem – “The drug addict would get out of jail and commit crimes all over again to feed his habit that was never treated in prison” (J9) and even if the judges were not satisfied “and usually that’s the judge who’s also frustrated with the way things are” (J10), it is not an easy task to make an institutional change. As Hargadon and Douglas (2001) argue, the collision of two social forces occurs when institutions meet innovations, the first focused on the stability of social systems and the second on change.

One of the judges spoke about the distribution of these innovative courts that apply Therapeutic Jurisprudence and Restorative Justice in the US:

Now we have drug treatment courts, mental health courts in every borough in the city, in most counties in the state, and they’ve spread around the country, as well. (J9)

Writing reports is one of the actions that US judges use to spread the idea around the world, the following passage illustrates this: “To institutionalize it, I have to make sure that we have protocols – that we have procedures in place that keep the public safe and keep the person going.” (J9) The following quote shows the interest coming from other parts of the world:

And in fact, I’ve had visitors from Australia, from the United Kingdom, from Scotland, from Canada, and other jurisdictions in the United States come to look at the mental health court to see what they can learn to establish these courts in their jurisdictions. (J9)

Well-structured guidelines are of the utmost importance in a process such as this in which judges step out of their conventional role and become active problem solvers (Feinblatt, Berman and Foxx, 2000). For the success and longevity of the programs, the development of standardized written policies and procedures is crucial, but often bureaucratic rules and procedures are barriers (Marlowe & Meyer, 2011). Therefore, we sought to understand how judges promote Therapeutic Jurisprudence and Restorative Justice in order to institutionalize these ideas in the US.

Berman (2000) reported that discussion among judges, attorneys, policy makers and scholars questioned the operation of traditional thinking and quoted one respondent as saying: “You know, I feel like I work for McJustice: we sure aren’t good for you, but we are fast.” The comparison made with the use of the term McJustice is somewhat surprising, but it does highlight the strong argument used by judges who believe in new approaches to deliver justice. Actors will need to leverage and convene support and acceptance of new institutional arrangements as the field is institutionalized (Dorado, 2005).

One point raised by some critics of Therapeutic Jurisprudence and Restorative Justice is the increased involvement on the part of the judges with the offenders that can reopen paths to possible unconscious bias in the processing and outcomes of cases. One interviewee highlighted this involvement: “Some of the clients in the low court think of me as a father type of figure.” (J5) One might ask whether the judge, after emotional involvement with the defendant, is able to judge him or her if Therapeutic Jurisprudence or Restorative Justice methods do not produce a solution.

3.5 The roles of US judges

All thirteen judges interviewed agreed that the judge's role in Therapeutic Jurisprudence and Restorative Justice is essential for the institutionalization of these new practices: “When I went into this, I didn’t think the role of the judge was that important. I’ve changed my mind.”

(J3) The interviewed judges had a clear opinion about their role in Therapeutic Jurisprudence / Restorative Justice: “One of the roles of a judge is as a convener”, (J11) “The judge takes a leadership role in the court.” (J9)

The role of *convener* indicates that the judge is an institutional entrepreneur who seeks to convince the other colleagues to adopt Therapeutic Jurisprudence and Restorative Justice. And even the traditional judge shares this opinion: “The role of the judges as a convener of a team, so the therapeutic court judge convenes folks.” (J13) The judge can be seen as an institutional entrepreneur because he favors change in a conscious, open, motivated way, as the following excerpt from one of the interviews shows: “(Therapeutic Jurisprudence / Restorative Justice) grew organically out of the interest of individual judges who were the strong advocates for them. Like, for example, Judge Brosnahan with the behavioral health court. That was her and it’s been her thing. No one else (...) and it runs based upon the way that she promotes that.” (J8) The role of convener is fully linked to NDCI Core Competency 6 - “Becomes a program advocate by utilizing his or her community leadership role to create interest in and develop support for the program”.

Being successful in institutionalizing new practices is not a requirement for an individual to be an institutional entrepreneur, and several organizational changes may be promoted by institutional entrepreneurs (Battilana, 2006). But judges act in this process of institutionalization of Therapeutic Jurisprudence / Restorative Justice as institutional entrepreneurs: “Only judges can probably convince other judges that something’s worthwhile”. (J5) This is consistent with Core Competency 9 - “Contributes to the education of peers, colleagues, and judiciary about the efficacy of Drug Courts”. And they lead the promotion of these new ideas: “These programs were promoted by individual judges who felt that the system was not successful and that people with various mental health needs and with drug addiction needs, needed to be treated differently because we see people constantly coming through.” (J8)

The *promoter* role represents this social influence of judges, of being able to convince peers and other actors. According to one of the interviewees, peer judges have the “power to encourage other judges” (J11) and one of the ways they can encourage colleagues is with testimonials like this: “It’s a very different way of judging. But I’ve found it the most satisfying part of my career.” (J10) “Judges do have a great ability to be persuasive with this.” (J8)

Another way of promoting mentioned by one of the interviewees is the influence that the judge has with the team: “The judge is key. If the judge is not on board, you don’t have a drug court program that works. If the judge doesn’t know how to motivate people, if the judge is bored or disgusted or unfriendly, impatient. It doesn’t work. It’s crucial.” (J10) The judge

can set the tone: “The judge sets the tone for how people are treated in the courtroom and throughout the court building.” (J3) The way the judge treats the offender in court, can spread a new attitude: “Treating people with respect has to come from the judge.” (J3)

The judges' arguments on this theme included statements highlighting the role of the judge in promoting the new perspective on dispensing justice. One of the judges interviewed was cited by other colleagues for writing an article that dealt with this subject. Thus, the role of the judge as *author* helps to promote new ideas, according to the comment below:

He basically crystallized my thinking about the necessity of being able to build in therapeutic aspects, even in an adversarial court. And trying to sentence people on evidence-based practices and trying to individualize sentences and look at those. So, from the criminal end I got a really good education from him. And then I read extensively his works. (J1)

From this point of view, the *author* role represents judges who are concerned with the documentation of practices and the dissemination of this knowledge. It is important to stress that intellectual production is an effective way to promote Therapeutic Jurisprudence and Restorative Justice.

The argument that it is an effective form was given emphatically by the judges interviewed: “That is why you’ve seen a spread of the courts. They work.” (J9) For some interviewees, it is already evident that this new form works and is effective: “We’re very effective at getting them to address those problems and also successfully graduate from our treatment court, where their charges get reduced substantially or dismissed.” (J4) Another judge said that, “It’s the only way to handle these cases. It’s extraordinarily effective. You’re able to cut down crime, cut down people recycling through the courts. You help them get their lives back on track.” (J3)

According to some interviewees, the concept of effectiveness means that: “They don’t want to go back to what they were doing because their life was upside down. So, I think these programs are very, very effective.” (J2) The judge considers the program effective, because it changes the life of the offender, to make him not want to return to the crime.

How to go beyond the first wave of judges who have adopted the principles and values of restorative and therapeutic justice, to engage the rest of the judiciary and overcome the barrier of resistance to the idea of tinkering with their traditional role are some of the challenges faced by this new approach (Berman and Feinblatt, 2002). A common point in the response of eight of the 13 interviewees, especially among the more experienced ones, is that the judge has to have partnerships. “Making these changes requires a lot of support and buy-in from other folks.” (J8)

Partnerships with professional organizations working in the criminal justice sector and with non-governmental organizations that are active in the field of crime and punishment can be a good tool for the State to disseminate and promote the use of alternatives to reduce imprisonment (UNODC, 2007). This point of view was stated by most of the interviews, as in the following: “The main support was the support from prosecution and police. If we hadn’t had that, we would not have been nearly as successful for drug courts.” (J10)

Another common point in the answers of six interviewees, including the traditional judge, is the importance of “not be centered on just one person” (J6), stressing the role of *maintainer* for the judge. For institutional change, cognitive, social and material support are essential resources (Dorado, 2005). From this point of view, the magistracy cannot hold all the knowledge, as the following quote shows: “I have to talk about what I call stewardship. I’m only here as a caretaker. So, if I leave, and it ends, I did nothing. So, what I’m hoping is I built something that I can step down. Another judge can step in. Take over. And it goes on.” (J9) The role of *maintainer* was also identified in other responses: “We have a role in terms of maintaining it that helps institutionalize it long-term.” (J8) “Everyone must know what the rules are.” (J13) This role relates to Core Competency 7 – “Effectively leads the team to develop all the protocols and procedures of the program” (NDCI).

Judges still have to mobilize institutional support alliances to overcome barriers: “One of the challenges that we face now is that we get our funding for what we do from other county agencies and from grants that we get with the federal government and the state and from other folks.” (J8) Core Competency 5 corroborates this - “Initiates the planning process by bringing together the necessary agencies and stakeholders to evaluate the current court processes and procedures and thereafter collaborates to coordinate innovative solutions” (NDCI).

Following the model of the process of institutional entrepreneurship proposed by Battilana et al. (2009), we structured a framework for the Therapeutic Jurisprudence and Restorative Justice phenomenon in the US, represented by Figure 1.

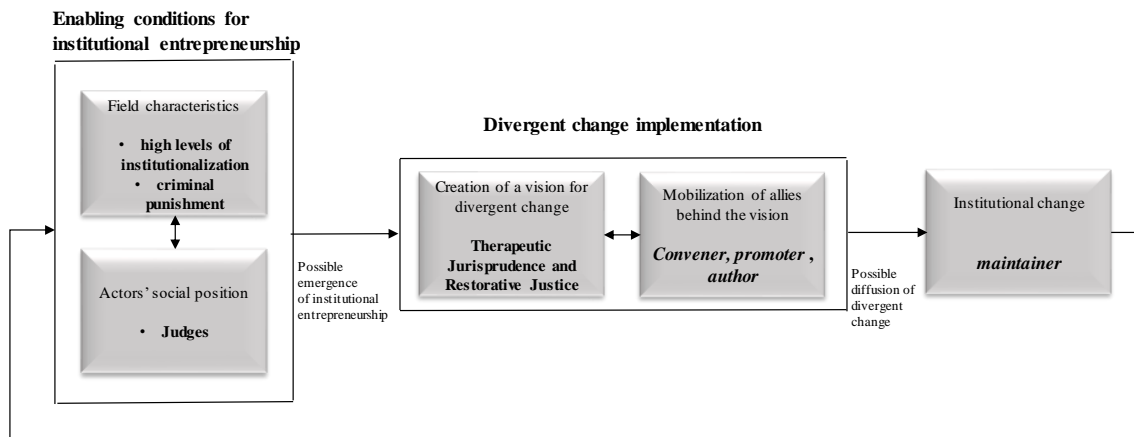


Figure 1 - Institutional Entrepreneurship Process for TJ and RJ in the US

Source: adapted from Battilana et al. (2009)

Battilana et al. (2009) have stated that key roles in enabling institutional entrepreneurship are field characteristics as well as actors' social position. The field-level manifestation of the logic of the state is represented by the logic of criminal punishment which is traditionally the standard behavior of judicial response to crimes, especially drug-related (McPherson & Sauder, 2013). The probability that organizations engage in institutional entrepreneurship can be influenced by actors' social position (Battilana et al., 2009). Battilana (2006) suggests that the probability of individuals having access to key resources that may be useful to conduct a divergent organizational change increases the higher the actor is in the organizational hierarchy. In terms of the framework in Figure 2, the case suggests that the social position occupied by the judges favors the divergent change, because the judges occupy higher hierarchical positions. It is possible to say that the roles of the judges identified in the present study are essential for *Divergent Change Implementation* specifically in the phase called *Mobilizing Allies*.

3.6 Discussion, Conclusions and Recommendations

This study offers several insights into institutional entrepreneurship in emerging Therapeutic Jurisprudence and Restorative Justice and extends current knowledge about the phenomenon in the US. The growth of the number of PSCs in the US gives evidence of the institutionalization of these new ways of dispensing justice. The distribution of problem-solving courts across the US shows that this new kind of justice has spread throughout the country. This theorization activity can be seen in the large number of reports published on Therapeutic Jurisprudence and Restorative Justice. Another feature is that the impetus for diffusion shifts

from simple imitation to a more normative basis, reflecting implicit or explicit theorization of structures.

Full institutionalization involves sedimentation. In this phase, the variability in the implementation decreases. This still has not occurred in Therapeutic Jurisprudence / Restorative Justice in the US. There are still several nomenclatures, and different practices. The full institutionalization of a structure will depend on the joint effects of relatively low resistance from opposing groups, continued cultural support and promotion by advocacy groups and positive correlation with desired outcomes. This promotion is already happening through the judges.

For the consolidation of a specific innovation, the social recognition of an anomaly may require some kind of collective mobilization (Lounsbury & Crumley, 2007). The idea of “revolving door” is probably the best way to explain the great frustration of the judges interviewed with the traditional model of justice, it was the recognition of an anomaly. This frustration aroused the desire for change in these judges, pushing Therapeutic Jurisprudence and Restorative Justice approaches in the US. These new ways of dispensing justice are conceptualized in this article as an institutional change.

The research data suggests that judges who apply TJ and RJ behave as institutional entrepreneurs. Presenting some degree of agency is not enough to qualify an individual as an institutional entrepreneur. What makes an individual an institutional entrepreneur is the fact of breaking with the rules and practices associated with the dominant institutional logic and developing alternative rules and practices (Battilana, 2006).

Based on the opinions of the judges interviewed, we identify four predominant roles played by judges who drive the process of institutionalization of TJ and RJ in the US: promoter, author, convener and maintainer. The judges involved in the creation of the first courts that acted in this new way showed themselves to be promoters of these new ideas and as the classification of the roles proposed demonstrates, some of them were authors of articles, studies, and reports that publicized their progress. Many of them have acted as conveners, and this view is shared even by the traditional judge interviewed. Last, but not least, the role of maintainer, of not letting knowledge and practice get lost, so the whole team must work together and the judge plays the key role, was also clear in the interviews.

It is important to emphasize that these roles are not mutually exclusive, but complementary. Some of the interviewed judges have characteristics of all roles, because they have written important articles in the field, they promote ideas and convince colleagues with enthusiasm and motivation, they want to keep the new format even when there is another judge

in place and build partnerships for the institutionalization of Therapeutic Jurisprudence / Restorative Justice.

The present study has one main limitation. As only one traditional judge was interviewed, the contrary view was limited, as this judge proved to be a supporter of Therapeutic Jurisprudence / Restorative Justice. In a future study we suggest an in-depth analysis of those who resist the new ideas. Although this is beyond the scope of our study, it would be useful for future research to measure resistance from traditional judges who oppose the application of innovative Therapeutic Jurisprudence / Restorative Justice approaches.

Similarly, it may also be useful to focus on the empirical application of institutional theory to test whether, in a few years, Therapeutic Jurisprudence and Restorative Justice have entered into the sedimentation process. One possible way would be to check the dimensions of theorization activity, variance in implementation and the rate of failure of structures.

The interest of researchers, judges, and policy makers from other countries to know more about how the US programs work in practice, and to know about the physical structure, was mentioned by most of the judges interviewed. In this sense, the findings may be useful in promoting such practices in other countries. Finally, it is emphasized that, as described in the introduction to this article, the problems related to prison systems are widespread across the world, and state-of-the-art innovations in justice deserve constant attention.

4. THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE IN BRAZIL³

The Brazilian prison population in 2017 had increased by more than 700% compared to the situation in the early 1990s. The ordinary response to prison overcrowding came through changes to the justice system, such as Therapeutic Jurisprudence and Restorative Justice. Although these new institutions are socially relevant, there are few studies about them in Brazil. This study seeks to discuss the perceptions of Brazilian judges of these new ways of dispensing justice from the perspective of institutional change theory. The data collection involved document analysis, court-hearing observations and interviews with 14 key-actors in the Brazilian justice system. The results show four dimensions - *beliefs, motivations, commitment and intergroup relations* - that characterize the roles played by Brazilian judges working with Therapeutic Jurisprudence and Restorative Justice. This movement can be classified as the modal type of institutional change called *layering* and *'radical' frame blending*.

³ This chapter has been submitted in 2019 with the same title in *The International Journal of Offender Therapy and Comparative Criminology* and will be presented at the Annual Meeting on Law and Society, to be held in Washington-DC in 2019.

4.1 Introduction

The criminal justice system in Brazil is going through a crisis of legitimacy that is greatly aggravated in the context of the expansion of criminalization and imprisonment. This scenario has pointed to the inability of the current punitive model to fulfill any socially useful function that justifies its exorbitant human and financial costs (CNJ, 2018). Common sense suggests that justice fundamentally inflicts retributive punishments on wrongdoers. Methods for solving a number of other damages caused by crime are neglected when the focus is entirely on punishment. In addition to the prison system being extremely expensive to maintain, believing that only prison can achieve justice raises several social problems (Gromet & Darley, 2009).

Both from the scientific academy, the state itself and the institutions of the justice system, an alternative attempt has arisen, aimed at the social control of behavior. Among the possible alternatives, a renewed interest in Therapeutic Jurisprudence (TJ) and Restorative Justice (RJ) can be seen in Brazil.

Therapeutic Jurisprudence focuses on ways of facilitating marginalized groups, and is a relational and interdisciplinary approach (Glover-Thomas, 2018). Law, psychology, psychiatry, criminology, criminal justice, public health and philosophy come together in an interdisciplinary way to form the basis for TJ (Birgden, 2004). Empirical research evaluating the application of TJ to the courts has been quite limited (Kaiser & Holtfreter, 2016). Olson *et al* (2001) showed that the threat of incarceration did not deter many of the more serious criminals involved in drug use, but they were receptive to substance abuse treatments. Focusing on the needs of the community makes these new courts valuable and should be the object of studies (Butts, 2001).

The Restorative Justice approach refers to reconciliation between the aggressor, the victim and the community to which both belong (Roberts & Stalans, 2004). In this case, the determination of damages caused by the infraction and what must be done to repair these damages is done jointly by all the actors affected by the offense (victim, aggressor and community) (Gromet & Darley, 2009). The restorative circle has the potential to reduce recidivism of imprisoned people (Walker and Davidson, 2018). The return to problem-oriented adjudication is held by Braithwaite (2002) to be the most solid point in common between TJ and RJ.

Prisons reflect the symptoms of a general system of policies and practices that support mass incarceration, what is needed is 'smart decarceration'; social innovation is needed at all

levels of the criminal justice system (Epperson and Pettus- Davis, 2017). Institutional studies have been concerned with exploring ways in which individuals and organizations innovate, act strategically and contribute to institutional change (Scott, 2008). However, there is little knowledge regarding the discursive tactics that actors use when they intend to mobilize and align other actors and groups in a field and build a common ground for institutional change (Werner & Cornelissen, 2014).

To fill in this gap, this study discusses the perceptions of Brazilian judges of Therapeutic Jurisprudence and Restorative Justice as new ways of dispensing justice in Brazil, from the perspective of institutional change theory. This understanding favors the theoretical and empirical development of TJ / RJ. As a field not yet much explored, this research is important for the administration of justice, as it allows public managers to understand how new practices work and improve them in the future.

4.2 Theoretical Background

In most industrialized and developing nations, restorative policies and programs were created and restorative justice emerged as a truly global phenomenon (Roberts & Stalans, 2004). The practice used in ancient societies, western and indigenous, in which offenders came face to face with the victims and their families to resolve disagreements and conflicts was restorative in nature (Walker *et al.*, 2018). The remote origin of these restorative ideas is attributed to these peoples. As a way of responding to the damages that the crime causes, restorative justice is a community-based approach in which individuals facing accusations speak to people they hurt and share stories and work for accountability, redress and rehabilitation (Fair and Just Prosecution, 2018).

Through different formats, restorative processes include extended family and friends of the offender and the victim and affected representatives or members of the community in an expanded circle where the nature of injustice and its consequences are discussed (Braithwaite, 2002). In the circle, the issues involve questions related to how stakeholders were harmed. Then there is a discussion about what needs to be done to heal the hurt. Lastly, it is likely that an agreement is signed to do a variety of things that the circle concludes are necessary to repair the damage (Braithwaite, 2002).

The way the law affects the psychological well-being of individuals who are in contact with it, is a concern of the legal theory called Therapeutic Jurisprudence (Birgden, 2015). Developed by David Wexler and Bruce Winick, TJ is a normative theory, which functions as a

framework for analyzing the role of law (Birgden, 2004). In minimizing negative side effects on welfare and promoting goals related to well-being, TJ suggests that behavioral science can be used to reform the law and legal processes (King, 2010). The law itself, and its rules, procedures and the roles of actors are considered by TJ as potential therapeutic agents (Birgden, 2004).

Winick and Wexler (2001) state some principles of TJ: ongoing judicial intervention, close monitoring of and immediate response to behavior, the integration of treatment services with judicial case processing, multidisciplinary involvement, and collaboration with community-based and government organizations. From these principles, the importance of the role of the judge in these programs becomes clear. The idea is that the risk of recidivism will be reduced through sanctions and incentives used by the problem-solving team that also monitors compliance with treatments, services, or other court mandates (Dollar et al., 2018). In this sense there is a broadening of the role of the legal system beyond fact-finding and imposition of sanctions; it must do more than simply punish, it must avoid future harm (Butts, 2001).

The redesign of institutions is regarded by Braithwaite (2002) as the ideal situation in which the justice of the people is better able to bubble up in the justice of the law. Thus, according to this author, RJ aims to transform the values of the legal system. In the same way, the adoption of the TJ approach entails undercutting the standard adversarial stance of the traditional judicial process and as a consequence there is a reformulation of the traditional court roles (Lucas & Hanrahan, 2016).

Valuable insights have been generated by institutional theory, especially into the processes of organizational environments (Oliver, 1991). We use the theory of institutional change as the background of this study. Mahoney and Thelen (2009) propose a model with four modal types of gradual institutional change: *displacement*, *layering*, *drift* and *conversion*. The definition of each type refers to the locus of institutional change, as shown in Table 1.

Table 1 - Types of Gradual Institutional Change

Dimensions	Displacement	Layering	Drift	Conversion
Removal of old rules	Yes	No	No	No
Neglect of old rules	-	No	Yes	No
Changed impact/enactment of old rules	-	No	Yes	Yes
Introduction of new rules	Yes	Yes	No	No

Source: adapted from Mahoney and Thelen (2009)

When removing existing rules and introducing new rules, the type of change is called Displacement. The modal type called Layering refers to the introduction of new rules on top of or alongside existing ones. The Drift type occurs when changes in the environment cause transformation of existing rules. Conversion is characterized by the change in the enactment of existing rules due to the strategic redistribution (Mahoney & Thelen, 2009). Werner and Cornelissen (2014) argue that by engaging in discursive processes of *frame shifting* or *frame blending*, actors articulate alternative or combined schematizations and manage to build common ground around the novel cognitive model and so change happens in existing institutions.

A contrast in words and thoughts that mark the difference between a novel framing and the previous institutionalized schema are characteristics of what Werner and Cornelissen (2014) calls the *frame shifting*. Another characteristic is the active questioning of existing institutionalized schemes by the actors who initiate the change and the mobilization of an alternative frame that restructures expectations and experiences and suggests different inferences (Werner & Cornelissen, 2014). The full integration of discourses and schemes that were previously disconnected characterizes the so-called "radical" frame blending (Werner & Cornelissen, 2014).

Through the example of two failures in hospital reform in the 1970s and 1990s and a successful case of institutional change in a hospital in the early 2000s, Kellog (2011) demonstrates that although in the 1970s the framework for change was advocated by internal physicians, the arguments only resonated and gained strength when macro discourse in the society had turned in that direction.

Therapeutic Jurisprudence and Restorative Justice, as new ways of dispensing justice, are an interesting object of analysis, and drug courts were the subject of analysis for the study on institutional logic authored by McPherson and Sauder (2013). Nevertheless, no study has yet considered the perceptions of judges about these new approaches from the point of view of institutional change. The present study, besides having a relevance in the Brazilian context, also stands out internationally.

4.3 Data and Methods

Primary data were collected using a combination of participant observation and interviews with 14 key-actors in the Brazilian justice system: a) eight judges from several judicial areas involved in Therapeutic Jurisprudence and Restorative Justice; b) a prosecutor

with a strong presence in this movement; and c) five judges considered as traditionalists. It is emphasized that the judges who accepted the invitation responded satisfactorily to the research, eager to express their opinions. However, many judges declined to take part. In Brazil there is still resistance on the part of some judges to expose their ideas, even in academic research. Despite the refusals, the number of interviews made was satisfactory for the achievement of the research objectives. In the eleventh interview, the saturation point was reached, when answers started to repeat and there was no new information.

The geographical representation of the judges includes the states of Bahia, Goiás, Paraná, Pernambuco, Rondônia and São Paulo, which means that at least one judge from each one of the 5 regions of Brazil was interviewed. Interviews were conducted in 2018. Those in the state of Goiás were conducted in person and those of the other states by videoconferencing. Supplementary phone and email contact were used to clarify points of interest. The data analysis was done using content analysis with the support of Nvivo software. Table 2 lists the interviewees, the state in which they work, gender, the approach they adopt in their work and the length of experience with TJ / RJ.

Table 2 - Brazilian Judges Interviewed

JUDGE	State	Gender	Approach	Experience with TJ / RJ
(J1)	Rondonia	male	TJ	Between 2016 and 2017
(J2)	Bahia	male	Systemic Law	Since 2006
(J3)	Rondonia	male	TJ/RJ	Since 2005
(J4)	Pernambuco	male	TJ	Since 2000
(J5)	Pernambuco	male	TJ	16 years
(J6)	Goiás	male	Traditional	No
(J7)	Parana	female	RJ	4 years
(J8)	Goiás	male	Traditional	No
(J9)	Goiás	male	Traditional	No
(J10)	Goiás	male	Traditional	No
(J11)	Goiás	female	Traditional	No
(J12)	Goiás	male	Traditional	No
(J13)	Goiás	female	Traditional	No
Prosecutor	State	Gender	Approach	Experience with TJ / RJ
(P14)	Sao Paulo	male	TJ	Since 2000

Source: Research Data (2018).

4.4 Development and implementation of TJ and RJ in Brazil

In 1999, there was a systematic shift in Brazil in the paradigm towards the adult drug abuser who committed a crime, because some Brazilian professionals had the opportunity to study the North American Drug Treatment Courts and learn about the operation of these new courts (Freitas & Silva, 2009). The present study based on interviews and documents suggests

that the inspiration for the launch of the “Therapeutic Justice Program” came from the American Drug Courts. The American judges who engage with TJ and/or RJ were considered to be institutional entrepreneurs and they seek to spread their idea around the world (Traguetto & Guimaraes, *in press*).

As stated in the excerpts from the interview below, some Brazilian judges were invited by the US Embassy to learn about the US program in Drug Treatment Courts and with that visit began the process of setting up and implementing in Brazil a similar program, named the “Therapeutic Justice Program”.

The court received the invitation of the American Embassy to meet this program of Drug Corps in the United States (...) to be established in Brazil as a good practice of American justice and I was assigned to know the program and see the possibility of implantation in Pernambuco [state]. (J4)

At the invitation of the US Embassy, in 2000 we went to the United States, we followed audiences, we saw how they worked, in short, we had an overview of the system that was being implemented. (J4)

The research by Cooper *et al.* (2010) shows that in other countries such as Bermuda, Chile, Ireland and Mexico there have also been international training meetings related to drug courts as well as operational programs visited. The United States encouraged and tried to facilitate the implementation of drug courts in Brazil, but as Judge (J4) said, the Brazilians adapted that approach because of differences in the judicial systems of the two countries:

The main US goal was to unleash the very high prison system. We brought this program to Brazil. We put together the people who made this visit, the magistrates, university teachers and founded the ‘Brazilian Therapeutic Justice Program’, which, in fact, as we have a different judicial system (...), we could not simply create drug courts as they were created in the United States. (J4)

The prosecutor interviewed reiterates this difference in legislation:

By our legislative characterization and the way of justice, the drug court system has not yet been implemented here, or there was a certain difficulty, especially in the point that the US Drug Court is based on the issue of abstinence and accurate testing program. (P14)

The document “Defining Drug Courts: The Key Components” prepared by US Department of Justice - Office of Justice Programs was translated into Portuguese aiming to spread this approach to dispensing justice. The following excerpt of the interviews reiterate this point:

It was the work of the American Consulate, who did this translation, because I have enough time on the road, I can tell you a little historically. ‘Therapeutic Justice’ in Brazil came from an initiative of Brazilians, but there was a management of (...) the

American system of drug courts, and these people came here and tried to somehow encourage us to adopt. (P14)

The State of Rio Grande do Sul is considered a pioneer in the practices of Therapeutic Jurisprudence, but it was the State of Pernambuco that inaugurated the first Therapeutic Justice Center, as it was called in Brazil, in 2001 (Fensterseifer & Welter, 2017). The excerpt from the speech of the judge of the state of Pernambuco who participated in the creation of this center, demonstrates this:

We spread it all over Brazil, immediately implanting in Pernambuco, which is the pioneer cell, and soon after the program took shape, was implanted in Rio de Janeiro, in São Paulo and we always made the training of these judges and their technical teams to work on programs that were approved by the State Judicial Branch. (J4)

In 2007 the Brazilian professionals of the Therapeutic Justice Program had contact with the team of the “International Network of Therapeutic Jurisprudence” and they realized that the concept called Therapeutic Jurisprudence was the theoretical basis for what they had already done in practice (Freitas & Silva, 2009). From December 1999 to July 2008, 78 events were held on the Therapeutic Justice Program, such as training seminars, congresses, courses, and workshops (Innovare, 2008).

In the Brazilian context, there were incentives to implement TJ and RJ coming from the United States, with many people engaged, but as stated by Judge 1, “It is not an institutional program, it is not the institutional policy of the Judiciary or the executive, or the legislative, it is touched by the agents who are in the unit.” (J1) As can be seen in the excerpts below, Interviewees J1 and P14 reported the current situation of TJ / RJ in Brazil:

The therapeutic justice in Brazil is being tested by initiatives of several professionals, it is being adapted to the standards of our legislation, our legal cultures, to the standards [of] each place. Maybe you will not find exactly a form repeated from one place to another. So, this institutionalization depends on this proliferation of ideas, it also depends on an organization of the entities that work with it. (...) Not only the judge has to do, who acts and participates in this process, the Public Prosecution, Order of the Lawyers of Brazil and Public Defense, and essentially the society. (P14)

There is a need for modification of the Criminal Code, which ends up modifying the Criminal Enforcement Law. Therefore, there is a need for a legislative change authorizing the courts or the Executive Branch to do so, which would be a form of punishment, from this legislative change, gives the courts time to adapt to it, making therapeutic and restorative justice an institutional program. (J1)

According to the booklet published by the Court of Justice of the State of Goiás in 2015, the proposal for the application of the Therapeutic Justice Program in that state can be applied in some procedural situations, such as: before or during the initiation of criminal proceedings; in the criminal transaction; after sentence and not linked to the criminal process; in all crimes,

even if the offender does not have the right to benefits for the filing or suspension of the process or sentence, provided that the measure proves adequate for its recovery and has adhered to the treatment.

With regard to Restorative Justice, the first Brazilian normative framework is Law no. 9.099 / 1995, that regulates the procedure for the conciliation and judgments of "crimes of lesser offensive potential" and makes possible the application, in its scope, of Restorative Justice through the institutes of the civil composition (CNJ, 2018). The speech of this judge shows that the theory of restorative justice has generated interest: "The court of childhood is very multidisciplinary, and many problems had no solution, because we only looked-for Law's path. So, with that anguish I went to look for something new. I found a book by Howard Zehr." (J7)

An example of a RJ project developed in Brazil, specifically in the state of Rondônia, is called "Acuda" - Cultural Association and Development of Distress and Egress. The project benefits about 100 re-educators. Each day of the week there is an activity. They do family therapy on Monday, on Tuesday yoga and Chinese cone, on Wednesday, ayurvedic massage and psychotherapy, on Thursday heike and biodance, on Friday ecumenical lectures and family encounter.

Resolution No. 125 which created the "National Judicial Policy for the proper handling of conflicts of interest" was published by the Brazilian National Council of Justice in 2010 (CNJ, 2018). Courses for judges were held. For example, "In the city of Ponta Grossa, the Court held a course of facilitators of peace-building cycles for judges in May 2014." (J7) Resolution No. 225 of the CNJ is the main normative document on the implementation of Restorative Justice in Brazil (CNJ, 2018).

4.5 The dimensions of the role of the judges in TJ and RJ in Brazil

It was unanimous among the 14 interviewees that the model referred to here as traditional is not generating satisfactory results, as shown by the following speech: "The traditional experience, it is undeniable that it did not generate the expected results, the mere repressive activity of mere law enforcement, it did not contribute to an effective overcoming of the issue." (J6) Even the traditional judge less familiar with TJ / RJ, reiterates: "We need an alternative to the conflicting justice that we have." (J10) So, the fact that TJ / RJ represents an attempt to change, an innovation, is seen as positive.

The analysis of the interviews allowed the grouping of the themes in four dimensions regarding to the role of judges in Therapeutic Jurisprudence and Restorative Justice in Brazil: *beliefs, motivations, commitment and intergroup relations*. The themes *Engagement* and

Resistance to change can be grouped into the **Beliefs** dimension, because they are related to whether or not the judge believes in these new ways of dispensing justice. The themes *Decrease in recidivism* and *Personal Promotion* relate to the dimension **Motivations**, representing the reason why the judge does this work. The themes *Rational involvement and Emotional involvement* are grouped in the dimension **Commitment** and show evidence of how the judge is involved in the conduct of the case. The themes *Umbrella* and *Compartmentalization* are part of the dimension **intergroup relations**, because they refer to how group work is done.

4.5.1 Beliefs

Resistance to change was cited as an aspect by both the judges who apply the TJ / RJ and the traditional judges. The speech below gives one reason for this resistance; people have built their careers based on the adversarial view, and they do not want to learn a new way.

Resistance of some people (...) who prefer the traditional solution, or people who do not want to look at the situation in a systemic way, have people who want conflict. This adversarial notion is still present, and for people who build (...) their reputation in work based on this adversarial view, it is natural that they resist. Because another way of dealing with conflicts arises where people are not experts, they are good at fighting, they are not good at agreement. (J2)

The traditional judge says that, “Most judges still do not believe in the program.” (J13) Judge J8 places himself in this group that resists: “The Judiciary, and in state of Goiás in particular, we have a very late vision, and we are late (...) We resist innovations.” (J8) And he continues: “The formation that we have (...) it is the old culture that does not awaken to modernism, to those instruments of composition that escape the old practice.” (J8) The judges are trained for and accustomed to punishment as one interviewee states: “It will be difficult to convince the judges trained in deciding that there is an alternative to criminal conflict other than punishment.” (J10)

The way some traditional judges see the drug addict can be portrayed by this section of speech: “The drug addict should not be a problem of justice, but of public health.” (J10) If, instead of trying to transfer responsibility to other institutions, treatment takes place, the results would be better. Drug addiction was recognized by the 193 state members of the United Nations as a “complex, multifactorial health disorder characterized by a chronic and relapsing nature with social causes and consequences that can be prevented and treated” (UNGASS 2016).

Prejudice was highlighted by one of the interviewees: “These practices are getting stronger, but there is still a lot of prejudice against them.” (J3) Another type of resistance, identified by one of the judges, related to the people being served by these programs:

The support network is committed to receiving the people who were in that program, but then began to reject some people for their own behavior, it is easier for you to reject someone than you embrace and try to solve. (...) They are people with crime problems, they are people who do not conform to the rules, but that is what I felt in the side effects, the initial barrier. (J1)

There are cultural reasons for resistance to Therapeutic Jurisprudence and Restorative Justice in Brazil, as stated by Judge J6. According to him the US Government encouraged the dictatorship in Brazil (1964-1985), so there is a resistance to what Americans try to implant in Brazil: "It is the same culture [the US culture] that stimulated the dictatorship in Brazil, is that come with these new institutes and such (...) So, we rejected it flat." (J6) US diplomacy ranked Brazil's president Goulart as pro-communist, thus US demonstrated that it supported the "military coup" in Brazil with actions against Goulart's government prior to the coup as diplomatic and financial pressure, threats of abandonment, support for opposition politicians and conspiracy with conspirators (Spektor, 2018).

Against the resistance, there are judges who participate in the programs of their own will and are true advocates of the cause. The *engagement* to apply TJ / RJ is placed by a judge as a consonant theme: "When the judge adopts [new approach of dispensing justice] because he wants, based on his own values, then we are dealing with another type of involvement, which comes from within him, the person, right? And that's why I think it's so strong." (J7) Another respondent calls himself an advocate: "As I was enthusiastic about the program, so I came to defend it." (J4)

In addition to having self-engagement, the ability to pass on to others their beliefs, desires and intentions is essential for the efficient pursuit of a goal, for an action of one's own will only contribute to the goal if it is followed by appropriate action by others (Shoemaker, 1988). The judge does not do his job alone. Apart from trying to engage his team, he also tries to convince his peers that the new methods work.

When the other person knows the real intent that someone is doing something, he or she will probably engage more appropriately (Shoemaker, 1988). We note throughout the interviews that many of the judges who apply TJ and / or RJ in Brazil regard it as a personal cause, as they believe they can change the Brazilian scenario regarding recidivism and overcrowding. The importance of this genuine engagement of the judge was also remembered by the Interviewee J11: "The judge, he is fundamental in this process, so much so that in places where restorative justice is very settled, as is the case of Rio Grande do Sul and São Paulo states, there is always a very strong presence of a judge." (J11)

4.5.2 Motivations

The *Personal Promotion* in many cases is the motivation by which the judge performs this type of work based on TJ and / or RJ. A strong personalization marks both the judges who are the protagonists who lead teams, who follow the programs for idealism and personal commitment (CNJ, 2018). On the other hand, programs such as TJ and RJ have to be a public policy to be institutionalized. As Judge J8 states, there is a feeling that these programs are “private property”:

Today these [programs] are hermetic, they are closed, they are proprietors, they are bookstores and there is the result that is not desirable. We must open to bring this interconnection of the programs (...) The judge treats as a project to call his own, and then he leads it as if it were his property and does not share, not provide information, and there is no result that could be more effective (...). Today (...) no program is working for this lack of interconnection, of not being something personalized to be something institutionalized. (J8)

Recidivism is seen as one factor that shows that the traditional method of dispensing justice needs to change: “It was no use to apply the penalty, to fulfill community service, or something of the kind, a restriction of rights, that he returned. The distressed, he returned, 3, 4 months later or during the course of pen execution he always returned.” (J1); “The penitentiary system is crowded and recurrence is 75%.” (J7)

The theme *Decrease in recidivism* refers to a judge’s motivation to apply TJ / RJ. The strengths of the new methods of justice include: “The great advantage is to recover the citizen without causing damage to his image, his family, his dignity, and cause the least possible problem to them.” (J4) In the case of Therapeutic Jurisprudence, focusing on the treatment of the person is taken as positive: “Therapeutic justice seeks much more. You work the recovery of the individual, a kind of treatment for deficiency that it presents, mainly in the psychological field.” (J3) Judge J7 argues that with this approach, the judge solves the social problem and not only the procedural problem:

A way for us to seek solutions that deal with what we call sociological litigation. [In] a judicial conflict, you have a procedural litigation, which aligns that process, but behind that there is a social problem, and this sociological line is often not reached by the result the judge gives to society, the judge stays on the surface, solves the process, but does not resolve the conflict. (J7)

The high number of people addicted to alcohol and drugs who need treatment was remarked by the prosecutor interviewed:

What pushed me and several colleagues who started working with this was the increasing demand for drug abuse and alcohol that comes to the justice system. (P14)

The same interviewee also said that the positive point is the reduction of cost:

Investing in this new idea causes a saving result because you release vacancies in the prison, the treatment is much cheaper than the prison and you reduce very intensively, very high, the percentage of recurrence. (P14)

Judge J8 adds: “Where these programs are implemented, restorative justice and therapeutic justice, where you observe these applications you have a highly favorable result and a new model of justice”. The prosecutor also made reference to effectiveness: “Quite effective for those here in Brazil who have less serious crimes.” (P14)

The traditional Judge (J9) draws attention to innovations that can improve the judicial service: “The Judiciary always has to be attentive to new things to everything that can come to contribute to good judicial performance, to reintegration people.” (J9) Even one of the traditional judges said there were no mistakes in something that sought consensus: “What error is there in a consensus? The consensual solution is that restorative justice restores relationships, it restores peace among the subjects involved.” (J10) Traditional judges do not act directly on TJ/RJ. However, as Judge J13 said, they could become aware of the success stories of other judges and this is a way of creating interest in this innovation.

There was one case that I saw happen here where the offender was monitored for therapeutic justice and totally changed his path, and today he is a microentrepreneur. And he reestablished relationships with his family, with work, with friends, now leads a totally normal life. (J13)

In the process of keeping substance abusers in treatment, employment may be an important factor according (Leukefeld et al., 2004). With employment and prospects for a better future, the drug user becomes stronger mentally and continues in treatment. The traditional judge drew attention to innovations that can improve the judicial service: “It avoids the slow, gradual, torturous process of unpredictable outcome, you give up that for those applications that are fast, effective, immediate, with positive results.” (J8)

4.5.3 Commitment

In recent decades, research has developed on affective influences on social judgment. Emotions and mood can influence decision-makers (Feigenson & Park, 2006). In the legal tradition, the ideal judge is dispassionate, but this goal is considered unobtainable by affective science (Maroney & Gross, 2013).

Emotional involvement is one theme relating to commitment. The interference of emotional involvement in the process was seen as negative by traditional Judge J6: “The judge must have the necessary balance so as not to lose the limits of the emotional, the affective that

interferes with the rational, the balance, the most appropriate action for the case.” (J6) According to Maroney and Gross (2013), eliminating emotion would not be a solution. The ideal is an emotionally well-regulated judge who can effectively manage their emotions. Another theme related to commitment is *Rational involvement*. Judge J6 pointed out that even in these new approaches (TJ and RJ), it is necessary for the judge to have a “critical distance”. A certain decisive distance between judge and offender is necessary in a situation of judgment or criticism (Corby, 2017).

Although the judge has a more comprehensive role, he must respect the function of each member of the team: “The judge cannot want to cross a psychologist who he is not, a psychoanalyst, a religious, whatever it is”. (J6) When each plays their role, rational involvement happens more easily.

4.5.4 Intergroup relations

Compartmentalization was stated by one of the interviewees as a recurring feature in Brazilian Therapeutic and Restorative Justice programs: “These court projects get very frayed, each one leads without other areas knowing.” (J8) The interviewee's recommendation is to “not be compartmentalized as it is today, but the areas communicating to who had information and valid experiences from one to the other.” (J8) The personalized intervention practiced by the judiciary in the development of the RJ programs has resulted in the accumulation of power in the hands of the few, and this threatens the very sustainability of the programs (CNJ, 2018).

Interviewee J8 suggested some actions to unify works that currently occur independently and without intercommunication. According to him: "Bringing this all to a large *umbrella* under a single coordination, areas communicating so that they have information and sharing valid experiences from one to the other... so the ideal would be to bring all this to a great umbrella under a coordination.” (J8) The term umbrella represents this unification of work teams in TJ and / or RJ, improved communication and learning sharing.

The speech of another judge showed that this possibility of interconnection has already been thought to be put into practice: “At the beginning of the administration of the presidency it was resolved that the therapeutic justice would be with the same professionals who would begin the structuring of restorative justice.” (J11)

4.6 Discussion, Conclusions and Recommendations

The introduction of amendments and modifications cannot be stopped by the defenders of the status quo who try to preserve the original rules and these small changes can accumulate, leading to a great change in the long term (Mahoney & Thelen, 2009). This portrays the process of institutional change in TJ / RJ in Brazil. Those who resist, try to preserve legislation without change, as summarized by the prosecutor: “It is not provided for by law, but it is not prohibited by law.” (P14)

Taking into account the research data and the four modal types of institutional change suggested by Mahoney and Thelen (2009) – *displacement, layering, drift, and conversion*, in Brazil Therapeutic Jurisprudence and Restorative Justice can be classified as *layering*. When institutional challengers cannot really change the original rules, they need to work within the existing system instead, adding new rules over or alongside the old ones. This process is called layering (Mahoney & Thelen, 2009). The following excerpt illustrates this characteristic of TJ/RJ in Brazil:

TJ/RJ are (...) complementary, I think one strengthens the other, I think only therapeutic and restorative, it would not serve. I think only the traditional one is not good anymore, so there are times and opportunities to use these alternative models and the traditional models too. So, I think one complements the other. (J3)

In this modal type *layering*, linking new institutions or rules to existing ones generates institutional change. Powerful players with veto power can protect older institutions, but they can not necessarily prevent the addition of new elements (Mahoney & Thelen, 2009).

As it is a work that does not yet have this institutionalization, it is more or less as a volunteer work, if you are not there together, always stimulating, changing some pieces, recomposing, there will come a time when this work will disintegrate and even end. (P14)

Casey and Rottman (2000) emphasize the flexible nature of the process of adopting the principles of therapeutic jurisprudence, which can occur throughout the system or by a judge in a court. Through the interviews and observations made in the courts visited, it is noted that in Brazil the application of TJ / RJ is flexible. The following testimonies highlight these points:

In Brazil, in terms of federal legislation, codes, we do not have an established system yet, but some management bodies, in the case of the Judiciary, such as the CNJ, the Supreme Court itself, there is a referral in this institutionalization of new conflict resolution systems. (J6)

There was the training of some judges and several officials so that they could begin to act both as restorative justice enforcers and also as trainers for courses in order to multiply this to other servers and also to other partners in other areas. (J11)

Werner and Cornelissen (2014) provide an analysis of institutional change at the micro level. Using their classification of frame shifting and frame blending, we suggest that although the American context fits with ‘radical’ frame shifting, the Brazilian context fits with ‘radical’ frame blending, as shown in Figure 1.

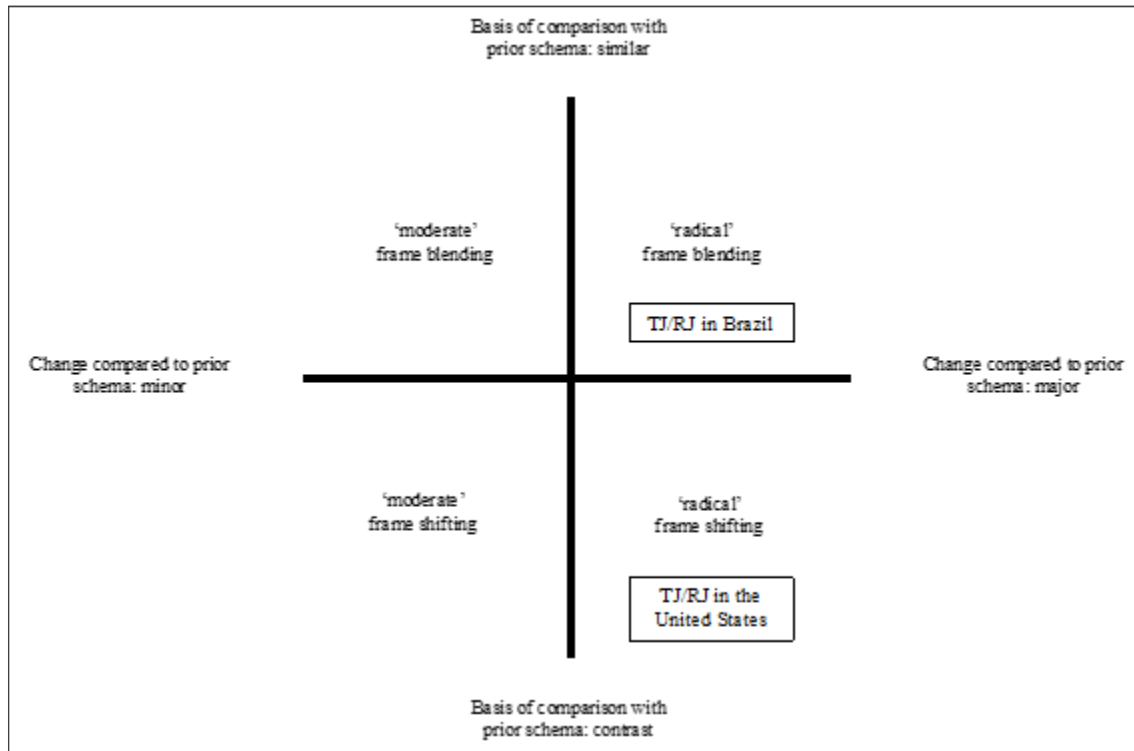


Figure 1 - Types of Frame Shifting and Frame Blending

Source: Adapted from Werner and Cornelissen (2014)

The American influence in the process of judicial translation of Restorative Justice in Brazil is evident. However, it is not, as at first sight, a mere reproduction, but a process of construction that develops through adaptation of the imported to the national (CNJ, 2018). ‘Radical’ frame shifting occurs with TJ / RJ in the USA. In this more radical form, the actors make use of an extensive vocabulary of keywords and phrases that present a complete disjunction with the previous schema (Werner & Cornelissen, 2014). Usually, neologisms and metaphors belong to this vocabulary, as is the case of the use of the expression “revolving door” in the United States.

The ability of individual actors to reformulate their circumstances and dispute changes, even when these actors are incorporated in their institutional contexts, is an outcome of these types of frames (Werner & Cornelissen, 2014). This phenomenon is called the paradox of

embedded agency (Battilana et al., 2009) and the embeddedness of Brazilian judges may be stronger.

The research shows four dimensions - *belief, motivations, commitment and intergroup relations* - that characterize the roles played by Brazilian judges working with Therapeutic Jurisprudence and Restorative Justice. In each dimension, there are aspects to be improved and positive points that can be identified in the interviews. The findings show that in Brazil, TJ and RJ can be classified as a mode of institutional change called *layering*. This means that new institutions and new rules have been linked to the existing ones and this combination generates institutional change. From a micro level of analysis, according to Werner and Cornelissen (2014) this type of institutional change is called '*radical*' *frame blending*, at the point where there is an integration of discourses and schemes that were previously disconnected.

The insights into institutional change help to explain how TJ and RJ can be institutionalized in Brazil as a whole. The findings may be useful in improving the management of the Brazilian judiciary. The classifications of the type of institutional change in Brazil is helpful, although the Brazilian change process does not occur in the same way as in the US. The change is happening according to the characteristics of the political context and the characteristics of the institutions themselves.

The four dimensions work as a tool to better understand the Brazilian scenario. In order for TJ and RJ to be a viable alternative to the recidivism cycle, legal scholars ought to explore this field of study. Given the many contexts and areas of science beyond legal studies to which TJ and RJ are relevant, the research possibilities are immense and fruitful. The interdisciplinary character of these new ways of dispensing justice creates a vast and important field for future exploratory research on the results and impact of these approaches in Brazil, which involve psychology, psychiatry, sociology and social sciences in general.

This study has limitations, one of which is the number of professionals sampled. Many judges who are important in this movement chose not to take part. Nevertheless, the quality and depth of the interviews that were made allowed findings that will increase understanding of TJ and RJ in the Brazilian context and also internationally. The lack of research on these themes in Brazil was also a limiting factor, but the present study opens the door to much research that can be done on the subject. In the future, other examinations of the dynamics of changes will be crucial because they will help us understand the future scenario of TJ and RJ in Brazil.

5. CONCLUSIONS AND RECOMMENDATIONS

The broad objective of the research was to study the process of institutionalization of Therapeutic Jurisprudence and Restorative Justice in Brazil and in the US. From the question - “How and to what extent are TJ and RJ being institutionalized as practices of justice in Brazil and in the US?” - three studies have been developed. The first was a theoretical study, the second and third were empirical.

The expected results of the first study were achieved, in which the main research question was: “What are the relationships between TJ/RJ and the concepts of institutional change, innovation and entrepreneurship?”. After reviewing the literature on TJ and RJ and the state of the art of Institutional Theory, Study I concluded with two propositions that describe the relationship between TJ and RJ and the concepts of institutional change, innovation and entrepreneurship:

Proposition 1: Therapeutic Jurisprudence and Restorative Justice represent a divergent change and institutional innovation, as this approach alters traditional judicial activity and institutionalizes a new way of promoting justice, arguing that previous methods were ineffective as they failed to rehabilitate offenders.

Proposition 2: Judges that apply Therapeutic Jurisprudence and Restorative Justice act as institutional entrepreneurs because they favor change in a conscious, open, motivated way, and mobilize institutional support alliances to overcome barriers.

The review of the literature was essential in the identification that in the Brazilian context there are few studies on this subject. This thesis contributes to fill this gap. In the final section of study I, a research agenda was suggested. Among the possible questions for future research was: “How and why do TJ and RJ become more institutionalized in some cultures than in others?”. Understanding the cultural differences that are reflected by the roles that characterize the US and Brazilian judges was a guiding force for the two empirical studies. Study II examined the question, “In what ways might judges act to advance a new model for these professionals in courts that take a more therapeutic and holistic approach?” with the US judges and showed how American judges act in promoting the principles and values of TJ and RJ.

It was suggested in Study I that research be done on the theory of roles (Biddle 1986), to understand the attitudes and behaviors of the judges. Considering that judges are central actors in the justice system, this understanding of the work judges do may be helpful in

understanding the administration of justice as a whole. Studies II and III followed this guideline and the results of both studies of the roles of judges will be useful in this regard.

The two propositions from the theoretical essay guided the building of the interview script (see Appendix) used in the field study, carried out next. The expected results of Study II were also achieved, in which the main research question was: “How are Therapeutic Jurisprudence and Restorative Justice institutionalized in the US and what are the roles played by judges in this process?”.

In the US study, 13 interviews were conducted between August and December 2017 with 12 American judges who work in Therapeutic Jurisprudence and/or Restorative Justice and one traditional judge. In the collection of primary data, participant observation was performed, with follow-up sessions of TJ and RJ. Documentary research in journals, internal documents, and websites of several organizations in the field were the source of secondary data for Study II.

The results identified four predominant roles played by judges who drive the process of institutionalization of Therapeutic Jurisprudence and Restorative Justice in the US: *promoter*, *author*, *convener* and *maintainer*. Official documents and annual reports were ways to promote the new norms that characterized the changed field for the other judges. It was found that these four roles are essential for judges to mobilize allies for the implementation of divergent institutional change.

The hierarchical position itself and the social influence that the judge has, enable for him or her to play the role of *promoter*, since both the team and peers listen to what he or she has to say and consider the opinion of the judge. Articles, studies, and reports were written by judges who worked in TJ and RJ, characterizing the role of *author*. Intellectual production also facilitates promotion. One role is interconnected to the other. Convincing other colleagues to adopt TJ and RJ is also part of the *convener* role. Sharing knowledge through promotion and writing of articles also enables this change to continue, which is part of the role of *maintainer*. This shows how much the roles are related to each other.

The model of the process of institutional entrepreneurship proposed by Battilana et al. (2009) was used to structure a framework for the Therapeutic Jurisprudence and Restorative Justice phenomenon in the US. Mobilizing allies behind the vision is a step associated with the roles of *promoter*, *author*, *convener*. The role of *maintainer* is associated with maintaining institutional change.

In Study II, Chapter 3 of this thesis, it was concluded that, as stated in Proposition 2 of Study I, the American judges who apply Therapeutic Jurisprudence and Restorative Justice

behave as institutional entrepreneurs. It was noted that the hierarchical positions of the judges favor divergent change.

The number of problem-solving courts in the US, which total more than 3200, and how they have spread and been distributed across the country gives evidence of the institutionalization of these new ways of dispensing justice, going from simple imitation to a more normative basis. Declining resistance from opposing groups, continued cultural support and promotion by advocacy groups and positive correlation with desired outcomes are factors that together represent the institutionalization of TJ and RJ.

The main research question of Study III was “How is the institutional change over TJ and RJ in Brazil characterized and what are the roles played by Brazilian judges in this process?”. To answer this question, 14 interviews with key-actors in the Brazilian justice system were conducted - a) eight judges from several judicial areas involved in Therapeutic Jurisprudence and Restorative Justice; b) a prosecutor with a strong presence in this movement; and c) five judges considered as traditionalists.

Results of Study III showed four dimensions - *beliefs, motivations, commitment and intergroup relations* - that characterize the roles played by Brazilian judges working with Therapeutic Jurisprudence and Restorative Justice. For each dimension, themes were highlighted. *Engagement* and *Resistance* represent the beliefs of the judges on these new approaches. *Decrease in recidivism* and *Personal Promotion* relate to the motivations. *Rational involvement* and *Emotional involvement* are about the way the judge commits himself/herself. *Umbrella* and *Compartmentalization* refer to the communication and relationships between different groups that perform similar work in TJ and RJ. These themes represent the culturally relevant (cross-cultural) issues as TJ and RJ as they apply to Brazil.

Some of the themes identified in Brazil, such as *Resistance*, are cultural barriers to the institutionalization of TJ and RJ that can take years to overcome. In this way, the institutional change in the Brazilian judicial system has been happening through a *layering* mode, linking new institutions or rules to existing ones. Based on testimonials from the interviews, it was noted that the US judges did not expect to face this resistance. When the Americans came to Brazil to encourage these new practices, they did not expect that to happen. However, there was resistance.

It happens in this way in Brazil, despite all the encouragement received from American judges. Through the interviews and documentary research, it was found that the American embassy invited key actors of the Brazilian judiciary to get to know the American programs *in*

loco. Booklets were translated into Portuguese by the embassy. Even so, the process of institutionalization in Brazil has been happening in layers.

The dissatisfaction of the US judges interviewed with the recidivism of the offenders, a fact they call “revolving door”, was the anomaly that favored innovation. This frustration also affected the Brazilian judges, who reported that they did not see any sense in the work when the offender returned to prison for the same reason as before. The desire for change caused some judges to lead this movement of change, conceptualized in this doctoral thesis as an institutional change.

To point some of the differences between the US and Brazil regarding the application of these programs, the interviews indicated that in the US the judge presents a degree of entrepreneurship, because regardless of whether they are elected or appointed, the judge has the responsibility to maintain the public safety of the municipality in which he or she works. What has been identified is that some Brazilian judges act on demand, not necessarily as institutional entrepreneurs. It was commented that the judges in Brazil are more inert; they only act if they are pushed. The way of achieving social pacification is through law enforcement.

Although this difference between the US and Brazilian judges was raised, it was defined by one of the Brazilian interviewees as a prejudice that the Brazilian judiciary is very rigid, very conservative, very traditional. The awards and incentives for innovations would be signs that the judiciary is more open to new proposals. It is expected that the scenario will be more open, because innovations contribute to the development of a nation as a whole.

It was noted that many Brazilian judges who were contacted refused to participate in the research because they were completely unaware of the subject and had never read about TJ and RJ in depth. The resistance identified in the present thesis that refers to the time of the dictatorship in Brazil can be seen as a cultural factor that interferes in this process. This also explains the characterization of institutional change in Brazil as a 'radical' frame blending, because as there is no total and rapid change, the solution found was the integration of discourses and schemes that were previously disconnected.

In addition to the limitations of the research that have been presented in the studies, it is important to list some others that were perceived during the course of the research. The opinion against TJ and RJ was limited in Study II, since only one traditional judge was interviewed. Many judges, especially Brazilian judges, chose not to participate, so the number of respondents was a general limitation of the research. In the US, the appointments were all scheduled in advance by email or by phone and there were few people who declined to take part.

The lack of literature that describes the Brazilian scenario was another limiting factor, as there are not many records of the programs that have already been implemented in Brazil. In addition, the website of the “Brazilian Association of Therapeutic Justice” has several pages that are not functioning, making it impossible to access documents that report detailed history. Although the lack of literature represents a considerable limitation, it also demonstrates that this is a field of study to be explored. In this sense, the following research agenda is suggested.

This thesis shows its originality in bringing to the field of administration of justice an object that has not yet been studied in Brazil. The testimonies of such important actors in the Brazilian and American judiciary and the availability and accessibility with which they answered the questions analyzed from the point of view of Institutional Theory make this thesis a valuable source for the Public Administration, Law, Administration of Justice, Sociology and several other fields of knowledge.

The confirmation that the propositions made about TJ and RJ are divergent changes made it possible to understand that this change can take place in different forms and types. Showing that, in Brazil, institutional change is occurring differently from the US contributes so that the actors who are acting in this movement, are not discouraged by the thought that it will never happen in Brazil, since the change did not happen in the way the Americans expected.

Broadly speaking, the predominance of theoretical research in the Brazilian legal field is well known. The present doctoral thesis makes an important scientific contribution, at a time when prison overcrowding has caused social problems all over the world, and particularly in Brazil where the rebellions of prisoners have been serious.

5.1 Research Agenda

In future studies of Therapeutic Jurisprudence and Restorative Justice, it would be worthwhile to analyze the views of those who resist the new ideas. Since the beginning of this research, it has been identified that there are many nomenclatures and different practices for the application of new therapeutic perspectives by the American judiciary. This problem was not solved by this study. Therefore, it is suggested that there should be new attempts to clarify and standardize these terms, as it would favor, strengthen and unify the movement. It would also be important to investigate whether, in coming years, there will be more changes in the American scenario of TJ and RJ.

Another point that needs to be explored in future studies is the relationship between TJ and RJ and the "Legal Security Theory" proposed by Avila (2016). A potential point to explore

is the possibility of using data coded from written judicial opinions in cases involving TJ and RJ for a quantitative analysis. For the selection of US cases the Westlaw database can be used and the methodology can follow the steps of the study of Edelman et al. (2011). In this research the authors tested “Legal endogeneity theory” in a random sample of 1,024 federal employment discrimination opinions (1965-99). The results showed that legal endogeneity increased over time. The same idea of testing the application of TJ and RJ over time can be used in a quantitative study. In Brazil, the database that could be used would be the electronic process software called PROJUDI (acronym for Digital Judicial Process in Portuguese).

Future research should also explore the role of each of the actors who are part of the justice system, that is, of work teams in TJ and/or RJ. How could they contribute to strengthening this change? Conducting studies in other countries that are trying to implement these practices is also a suggestion. An analysis of other countries in South America would provide good grounds for discussion. Another need for research is to examine the point of view of offenders who have experienced TJ and RJ.

In the US, the test to check if the offender is drug-free is repeated weekly. There are resources intended for this. In Brazil, these tests are not done. The real factors that influence this lack of resources for these innovatory projects in the judiciary should be researched in future in studies of public policy and the administration of the judiciary.

The US has already studied the improvements in recidivism rates after the application of TJ and RJ. In Brazil this field of analysis could be explored in the future. Studies dealing with the organizational management of these new courts would contribute and would be related to the role of *maintainer* of the judge and also related to the *intergroup relations* dimension. The studies of this doctoral thesis, although dealing with different countries, are correlated and interconnected in their results.

In general, the job of being a judge is something that demands a lot from whoever does it. When it comes to a new institution, a court resulting from an institutional change as is the case of TJ and RJ, this requirement is even greater, as it requires that the judge deal with factors such as the *Emotional Involvement* theme portrayed in the *Commitment* dimension of Chapter 4 of this thesis. The balance between empathy and authority and between impartiality and emotion can be studied by scholars.

The lack of research on these themes in Brazil was a limiting factor, but the present study opens the door to much research that can be done on the subject. Just as “Law and Society” is an interdisciplinary movement involving sociologists, political scientists, economists, anthropologists, psychologists, historians, legal scholars, TJ and RJ also have this

interdisciplinary character. Therefore, the strengthening in Brazil of this field of studies in Law and Society would contribute to TJ and RJ.

5.2 Recommendations for public policies of Administration of Justice

The conclusion that TJ and RJ could be a way to reduce problems related to the penitentiary system has not been analyzed in depth since it was not the focus of this doctoral thesis. However, researchers in the US are already focused on this analysis and it is to be hoped that this thesis may stimulate academic interest in Brazil as well. Public policies to reduce recidivism are necessary. In addition to the present doctoral thesis, future studies would be important for the judiciary in a number of ways, including identifying where best practices are to be followed and where to invest.

A point of discussion that was raised by the interviewees was that in Brazil it is more difficult to put an idea into practice when it comes to administration of the judiciary. Some of the respondents reported that investment in treatment is cheaper than funding prison structures. As in the US, a lot of thought has been given to investment and returns, and there has been heavy investment in a new model of courts called Problem-Solving Court. It is important that Brazilian public managers consider this pattern for the analysis of future investments.

The changes proposed by the proponents of TJ and RJ have significant implications for the functioning of the justice system as a whole. As shown in this thesis, the role of the judge changes, but the adaptations of the entire team structure to the new models of justice are considerable and therefore must be prepared, planned and studied. This is part of the function of the administration of justice.

What needs to be considered is whether all this is part of the priorities of the new public management that will govern both Brazil and the US in the coming years. The new Minister of Justice and Public Security of Brazil, Sergio Moro, has announced a package of anti-crime measures that includes the so-called "plea bargain", a legal instrument adopted in the United States (Correa, 2019, February 17). With this possibility, instead of the accused responding to legal proceedings, he or she can make an agreement with the Public Prosecutor's Office in which he or she pleads guilty to a lesser crime in exchange for advantages. Following this line, it is hoped to resolve criminal cases quickly in which there is a confession and, thus, to reduce the burden on the judiciary (Correa, 2019, February 17). The package as a whole proposes a hardening of criminal laws, which is contrary to the movement of TJ and RJ.

The fact that in 2019, Brazil has a new president-elect, Jair Bolsonaro, and the United States has elected Donald Trump, could also interfere with the continuity of initiatives like TJ and RJ, as both presidents have shown a tendency to increase the incarceration of offenders. A firm alignment with the United States of Donald Trump is Jair Bolsonaro's ambition for Brazil (Benites, 2018, November 26). For the coming years it will be necessary to study and understand how these innovations relate to TJ and RJ.

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APPENDIX

INTERVIEW SCRIPT (TJ AND RJ)

- Introduce yourself to the interviewee and inform that the research is a stage of the Doctoral Degree in Public Administration (UnB).
- State the objective: **describe how the different roles played by judges contribute to the process of institutionalization of Therapeutic Jurisprudence and Restorative Justice to the judiciary of the US and Brazil.**

Therapeutic Jurisprudence (TJ) has emerged as a major rallying point for a comprehensive law movement that recognizes the importance of an interdisciplinary approach for more effective and realistic development, implementation, and evaluation of laws (Campbell, 2010). The use of the term “therapeutic” is explained by the fact that the seminal literature on therapeutic jurisprudence originated in the field of mental health law (Chase & Hora, 2009). As other distinct areas of mental health law have begun to employ the principles of therapeutic jurisprudence, the term "problem-solving courts" has come to be widely used to describe the main focus of this paradigm of justice (Chase & Hora, 2009).

- ‘What it is an alternative to’ is how Restorative justice is more commonly defined (Braithwaite, 2002).
- Restorative Justice, according to Tony Marshall (1999 p. 5): “is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”

Table 1 - Most prominent types of problem-solving courts.

Type	Jurisdiction	Countries
Adult drug courts	Criminal	Australia, Canada, New Zealand, Norway, Scotland, USA, Norway, Scotland, USA
Juvenile drug courts	Criminal (youth)	USA
Family treatment courts	Family	England and Wales, USA
Mental health courts	Criminal	Australia, USA
Domestic violence courts	Criminal or multi-jurisdictional	Australia, New Zealand, USA
Community courts	Several - primarily criminal or multijurisdictional	Australia, Canada, USA

Source: Boen & Whitehead (2015).

- Inform that there are no right or wrong answers. What matters is the interviewee's perception.
 - Guarantee the anonymity of respondents: the answers will be analyzed in an aggregate way and ask permission to record the interview.
 - Inform that the interview will last approximately 30 minutes.
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1. What do you know about TJ or RJ? Please comment on your experience with TJ or RJ, undertaken through special courts, such as drug courts or whatever specific program that you are involved with.
2. Please comment the main differences amongst TJ and RJ or the difference between the court you work for and another type of PSC.
3. What were the main factors that push the beginning of the TJ and/or RJ movement (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) in your state (or local jurisdiction)? Do you feel these factors are still relevant?
4. How did you get involved with TJ/ RJ (undertaken through PSCs, such as drug courts or whatever specific program)? How did TJ / RJ become introduced in your court system?
E.g., perhaps judges wanted to be involved and volunteered for the assignment; or perhaps they were just assigned. What was the reaction?
5. Do you feel the TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) are sufficiently established that it will be fairly easy to sustain them after you are no longer involved? (and reasons for whatever answer they give).
6. What factors outside of the court process do you feel influenced the development of TJ/RJ/PS courts in your state? How widespread are these practices now?
7. Do you feel that the TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) is a more effective method than the traditional methods used for handling cases involving drug offender? If so, why? Why not?
8. What factors do you feel have been most significant in supporting the development of TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with) in your state? What have been the most significant

challenges in developing them? In sustaining them? What did you and other judges have to do to overcome them?

9. In your opinion, which are the main reasons a judge would want to work with TJ or RJ programs (undertaken through PSCs, such as drug courts or whatever specific program that you are involved with)? Are there special characteristics you consider important for the judge that works with drug courts or PSC court approaches? Do you feel any judge, with adequate training, can serve as an effective drug court (or PSC court) judge?
10. In your opinion, what is the role of the judge in the institutionalization of the drug court – e.g., ensuring that it continues as an essential component of the justice system.
11. Do you think that the application of TJ / RJ can present unwanted side effects? What would these effects be? Do you suggest a way to avoid them?
12. We are coming to the end and I would like to know if you have further comments about TJ and/or RJ that could help me to reach the objective of my research.

Now I would like to know some information about you just to allow me to analyze some tendencies on the answers of the interviewees and not to identify someone.

1. How long have you been serving as a drug court (or other kind of court) judge?
2. Are you the first judge to chair the program? Or had an earlier judge who established it?
3. How long the court you work to has been operating in this new approach?
4. Did you have any training before taking on the assignment? Do you hear other criminal, or civil, or juvenile, or family matters?

INTERVIEW SCRIPT - Traditional judges

1. What do you know about TJ or RJ?
2. In your opinion, what is the role of the judge in the institutionalization of TJ/RJ/ PSC?
3. Do you feel that the TJ or RJ programs are a more effective method than the traditional methods used for handling cases? If so, why? Why not?
4. Do you believe that this movement represents a new regulatory system?
5. In your opinion, how important is procedural formalism in the criminal justice system?
6. Do you think that the application of TJ / RJ can produce unwanted side effects? What would these effects be? Do you suggest a way to avoid them?
7. With this new model, do you believe that predictability can be reduced?
8. With the application of TJ / RJ, do you believe the risk of errors is increased?
9. We are coming to the end and I would like to know if you have further comments about TJ and/or RJ that could help me to reach the objective of my research.