

THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE IN BRAZIL

Authors: Jéssica Traguetto e Tomas de Aquino Guimaraes

ABSTRACT

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.

Keywords: Therapeutic Jurisprudence, Restorative Justice, Judges, Institutional Change, Brazil.

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.

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.

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)	Rondônia	male	TJ	Between 2016 and 2017
(J2)	Bahia	male	Systemic Law	Since 2006
(J3)	Rondônia	male	TJ/RJ	Since 2005
(J4)	Pernambuco	male	TJ	Since 2000
(J5)	Pernambuco	male	TJ	16 years
(J6)	Goiás	male	Traditional	No
(J7)	Paraná	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)	São Paulo	male	TJ	Since 2000

Source: Research Data (2018).

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).

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.

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)

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)

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.

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)

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.

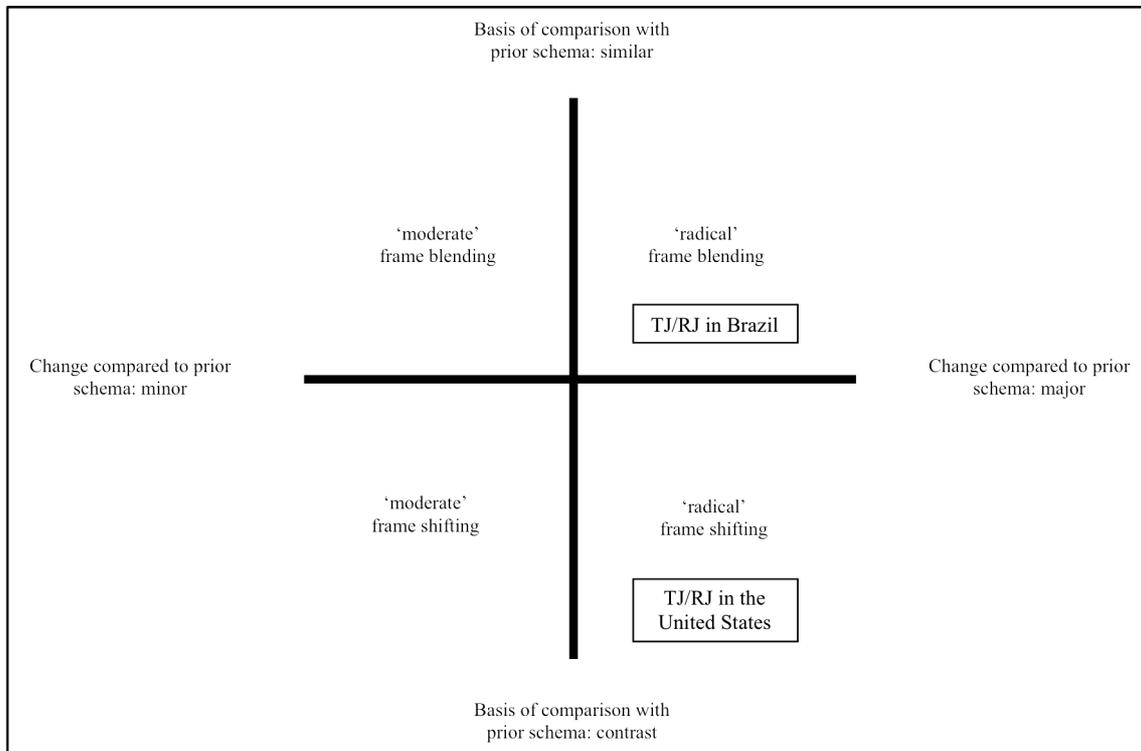


Figure 1 – Types of Frame Shifting and Frame Blending

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 show 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.

References

- Battilana, J., Leca, B., & Boxenbaum, E. (2009). How Actors Change Institutions: Towards a Theory of Institutional Entrepreneurship. *The Academy of Management Annals* 3(1), 65–107. doi: 10.1080/19416520903053598.
- Birgden, A. (2004) Therapeutic jurisprudence and responsivity: Finding the will and the way in offender rehabilitation, *Psychology, Crime & Law*, 10:3, 283-295, DOI: 10.1080/10683160410001662771.
- Birgden, A. (2015). Maximizing desistance: Adding therapeutic jurisprudence and human rights to the mix. *Criminal Justice and Behavior*, 42, 19-31. doi:10.1177/0093854814550024
- Braithwaite, J. (2002). Restorative Justice and Therapeutic Jurisprudence. *Criminal Law Bulletin*, 244-262.
- Butts, Jeffrey A. (2001). Introduction: Problem-Solving Courts. *Law & Policy*, Vol. 23, No. 2, April.

- Casey, P., & Rottman, D. B. (2000). Therapeutic jurisprudence in the courts. *Behavioral Sciences & the Law*, 18 (4), 445-457.
- Conselho Nacional de Justiça (CNJ). (2018). Relatório Analítico Propositivo - Justiça Pesquisa - Direitos e Garantias Fundamentais. “Pilotando A Justiça Restaurativa: O Papel Do Poder Judiciário”.
- Cooper, C. S., Franklin, B., & Mease, T. (2010). *Establishing Drug Treatment Courts: Strategies, Experiences and Preliminary Outcomes. Volume One: Overview and Survey Results*. Justice Programs Office, School of Public Affairs, American University.
- Corby, James. (2017). Critical Distance. *Journal for Cultural Research*, Vol.21 (4), p.293-294.
- Dollar, Cindy Brooks., Ray, Bradley., Hudson, Mary Kay & Hood, Brittany J. (2018). Examining changes in procedural justice and their influence on problem-solving court outcomes. *Behavioral Sciences & the Law*. 2018;36:32–45.
- Epperson, M. W., & Pettus- Davis, C. (2017). Smart Decarceration: Guiding Concepts for an Era of Criminal Justice Transformation. In M. W. Epperson, & C. Pettus- Davis (Ed.). *Smart Decarceration. Achieving Criminal Justice Transformation in the 21st Century*. Cambridge ; New York: Oxford University Press.
- Fair and Just Prosecution. (2018). “21 Principles for the 21st Century Prosecutor”. Brennan Center for Justice, Emily Bazelon, The Justice Collaborative. December 3.
- Feigenson, N., & Park, J. (2006). Emotions and Attributions of Legal Responsibility and Blame: A Research Review. *Law and Human Behavior*, 30 (2), 143–161.
- Fensterseifer, Daniel Pulcherio., Welter, Lisiane dos Santos. (2017). Cortes de Drogas no Brasil: a herança do Projeto de Frederico Westphalen/RS. *Revista da Faculdade de Direito da UFG*, v. 41, n.1, p. 87-103, jan. / jun.
- Freitas, Carmen Silvia Có., Silva, Ricardo de Oliveira. (2009). Therapeutic Jurisprudence Applied in Brazil: “Therapeutic Justice” (DTC) The Brazilian Program for Drug Users Offenders. National Center for DWI. Courts.
- Glover-Thomas, N. (2018): Therapeutic jurisprudence and mental health tribunals: changing patterns of demand and its impact, *Journal of Social Welfare and Family Law*, DOI: 10.1080/09649069.2019.1554798
- Gromet, D. M. & Darley, J. M. (2009). Punishment and beyond: Achieving Justice through the Satisfaction of Multiple Goals. *Law & Society Review*, Vol. 43, No. 1, pp. 1-38.
- Innovare, Prêmio. (2008). Justiça Terapêutica: um programa judicial de redução do dano Social (<https://premioinnovare.com.br/praticas/1/justica-terapeutica-um-programa-judicial-de-reducao-do-dano-social-2127>).
- Kaiser, K. A., & Holtfreter, K. (2016). *Criminal Justice and Behavior*, 2016, Vol. 43, No. 1, January 2016, 45–62. doi: 10.1177/0093854815609642
- Kellogg, K. C., (2011) Hot Lights and Cold Steel: Cultural and Political Toolkits for Practice Change in Surgery. *Organization Science*. 22(2):482-502. <http://dx.doi.org/10.1287/orsc.1100.0539>

- King, Michael S.. (2010) Should Problem Solving Courts be Solution-Focused Courts?. *Revista Juridica Universidad de Puerto Rico*, Forthcoming; Monash University Faculty of Law Legal Studies Research Paper No. 2010/15.
- Leukefeld, C., McDonald, H. S., Staton, M., & Mateyoke-Scriver, A. (2004). *Employment, employment-related problems, and drug use at drug court entry*. *Substance Use and Misuse*, 39, 2559-2579.
- Lima, Flávio Augusto. (2011). *Fontes de Justiça Terapêutica: em busca de um novo paradigma*. São Paulo: Scortecci.
- Lucas, P. A. & Hanrahan, K. J. (2016). No Soldier Left Behind: The Veterans Court Solution. *International Journal of Law and Psychiatry*. 45: 52–59.
- Mahoney, J., & Thelen, K. (2009). A theory of gradual institutional change. In *Explaining Institutional Change: Ambiguity, Agency, and Power* (pp. 1-37). *Cambridge University Press*. <https://doi.org/10.1017/CBO9780511806414.003>
- Maroney, T. A. & Gross, J. J. (2013). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. *Emotion Review*. Vol.6(2), pp.142-151.
- McPherson, C. M., Sauder, M. (2013). Logics in Action: Managing Institutional Complexity in a Drug Court. *Administrative Science Quarterly*. 58 (2)165–196.
- Oliver, C. (1991). Strategic responses to institutional processes. *Academy of Management Review*, 16: 145-179
- Olson, David E., Arthur J. Lurgio, & Stephanie Albertson. (2001). “Implementing the Key Components of Specialized Drug Treatment Courts: Practice and Policy Considerations,” *Law & Policy* 23 (2): 171–96.
- Roberts, Julian V. & Stalans, Lorena J. (2004) "Restorative Sentencing: Exploring the Views of the Public," 17 *Social Justice Research* 315-34.
- Shoemaker, Sydney. (1988). On Knowing One's Own Mind. *Philosophical Perspectives*, Vol. 2, Epistemology, pp. 183-209.
- Streeck, Wolfgang, & Kathleen Thelen. (2005). “Introduction: Institutional Change in Advanced Political Economies.” In *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen, 1–39. Oxford: Oxford University Press.
- Spektor, Matias. (2018). The United States and the 1964 Brazilian Military Coup. History of Brazil, History of Latin America and the Oceanic World, 1945–1991, *Diplomatic History Online Publication*.
- Traguetto, J. & Guimaraes, T. A. (in press). Therapeutic Jurisprudence and Restorative Justice in the US: The Process of Institutionalization and the Roles of Judges. *International Journal of Offender Therapy and Comparative Criminology*.
- United Nations General Assembly Special Session on the World Drug Problem (UNGASS). (2016). New York, 19-21, April. Available: <https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>

Walker, L. & Davidson, J., (2018). In Gavrielides, T., (Ed.) *The Routledge International Handbook of Restorative Justice*, New York, NY: Routledge.

Walker, L. Rodgers, Keyria & Mark Umbreit, (2018). What is Restorative About Teen Court?. *Internet Journal of Restorative Justice, Special Issue Restorative Justice and Complex Crimes*.

Werner, Mirjam D. & Cornelissen, Joep P.. (2014). Framing the Change: Switching and Blending Frames and their Role in Instigating Institutional Change. *Organization Studies*, vol. 35, 10: pp. 1449-1472.

Winick, B. J., & Wexler, D. B. (2001). Drug treatment court: Therapeutic jurisprudence applied. *Touro Law Review*, 18, 479-485.