

# Inherited Capital and Acquired Capital The Socio-political Dynamics of Producing Legal Elites

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The aim of this paper is to present the results of research on the structures of social, political and academic capital that are able to demonstrate and explain the existence of power structures of the Brazilian juridical field, especially with regard to the administration of the State judicial system. With this objective in mind, the research analyzed the personal, professional and academic trajectories of members of the institutional, associative and academic elites linked to the administration of the State judicial system. Questioning the thesis that the social diversification of legal professions would necessarily produce ideological and political changes in the Brazilian judicial system, my main hypothesis is that the existence of a political subfield of the administration of the judicial system may be a factor in the resistance to reforms, indicating the control of this political dimension of the Brazilian State by elites with characteristics much less diverse than those of their professional bases.

Keywords: Judicial system; Juridical field; Legal elites; Legal professions; Judicial reforms.

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## Introduction

The power of the elites in the administration of the State judicial system is the power of their capital and of structures that allow the production, reproduction, circulation and the exercise of this power. It is therefore power derived from and accumulated in individuals' trajectories and in the structures that made these trajectories possible. By analyzing the life trajectories of members of the legal elites (high courts justices, professional leaders, law specialists) and processes of structuring and differentiation of the Brazilian juridical field (related to the evolution of the academic field of Law, to the bureaucratization and professionalization of the social division of juridical work), we can identify certain structures of symbolic capital, produced and accumulated throughout

these processes and which have enabled those who hold such capital to obtain a high position in the hierarchies of the juridical field. Furthermore, the integrated analysis of these structural processes and biographies confirm the existence of a political field of the administration of the State judicial system, a subfield of the juridical field defined by the action of institutions formally superior to the juridical field, but also of individuals who possess structures of capital that distinguish them from other jurists who move around this field, and who gravitate towards the apparatus of the administration of the judicial system, disputing its management and control.

The aim of this article is to present the results of research<sup>1</sup> on the structures of social, political and academic capital that are able to demonstrate and explain the existence of power structures of the Brazilian juridical field,<sup>2</sup> especially with regard to the administration of the State judicial system. With this objective in mind, the research analyzed the personal, professional and academic trajectories of members of the institutional, associative and academic elites linked to the administration of the State judicial system.

Questioning the thesis that the social diversification of legal professions would necessarily produce ideological and political changes in the Brazilian judicial system, my hypothesis is that the existence of a political subfield of the administration of the judicial system may be a factor in the resistance to reforms, indicating the control of this political dimension of the Brazilian State by elites with characteristics much less diverse than those of their professional bases.

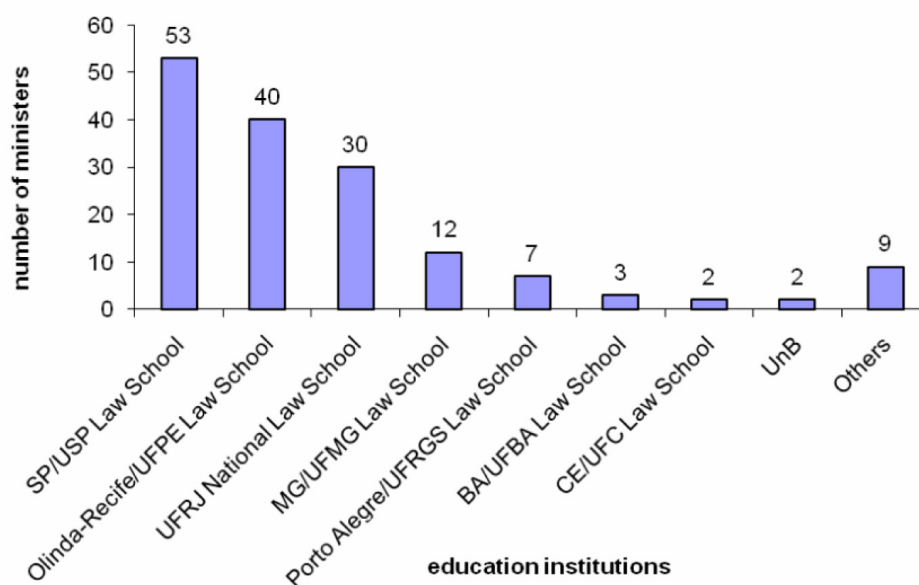
### **Inherited Capital and Acquired Capital**

We could identify “who’s who” or “who’s in charge” of the administration of the State judicial system just from the list of presidents of law courts and professional organizations, associate leaders, specialists and notables in general, as listed in the organizational charts of these institutions and organizations, or as they are honored in speeches, tributes and specialized publications that contribute to the social construction of a sense of nobility of the members of these elites.<sup>3</sup> However, for a more consistent and profound sociological and political analysis, we have to understand the origin of these elites’ power and the dynamics of the relationships of domination and of recognition that have allowed these individuals to climb up the hierarchy of the administration of the State judicial system.

The data collected in my research confirms the importance of certain symbolic capitals and the combination of them in determining positions in the juridical field and its elite groups. More specifically, it seems that members of different groups of elites of the administration of the State judicial system share certain common symbolic capitals, which explains the peer recognition that legitimizes their positions of power.

The most obvious of these capitals seems to be the symbolic capital of possessing a higher education title; a degree from an elite Law school.<sup>4</sup> By analyzing CVs and biographies of members of different groups and hierarchies of the judicial elites, it was possible to identify a group of elite higher education institutions – those founded during the Empire, the first schools of the Republic and Catholic denominational schools, followed by a scattering of public state and federal courses, and private secular schools that emerged before the explosion of Law courses in the 1990s –, whose graduates have a privileged access to the political field of the State judicial system (Graph 1).

**Graph 1** Number of ministers of the Supreme Federal Court by education institution of origin (Brazil, 1889 to 2008)<sup>5</sup>



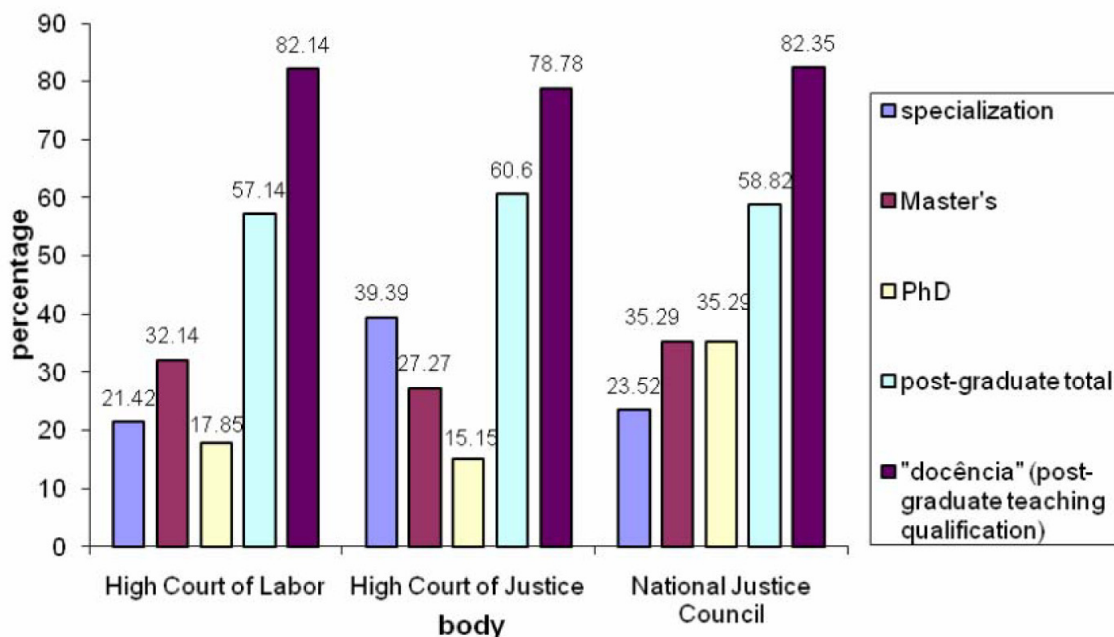
Sources: Consultor Jurídico (2008); Federal Supreme Court (2009).

This does not mean that all of the graduates of these courses become leaders of the administration of the State judicial system and that they may not, by chance, come to hold lower positions in the field, along with graduates of less prestigious universities. The conversion of this capital into an upward trajectory in the juridical field and in the political field of law seems to be associated with specific political advantages or with the accumulation of social capital and networks of relationships inherited from and built up by their family, or both of these. As in the case of the associate leader of the bench interviewed for this research (and of a large number of the members of the legal elites from an ascending middle class based on family investments in education),<sup>6</sup> the absence of family social capital was compensated by a degree from an elite university and by the political teachings of the student movement, as well as political capital accumulated by assuming administrative

functions in the government and as political advisors. In the case of the justices of the High Court of Justice (STJ) who are the sons of ex-ministers of the Federal High Court (STF),<sup>7</sup> it was their family's capital and networks of relationships that allowed them to activate the capital conferred by their degree and to maintain dominant positions in the field. In any case, it seems that, of all the symbolic capitals identified and analyzed in this thesis, the capital gained from a degree from an elite Law school is the most widely shared by the legal elites – be they institutional or corporative leaders, law specialists or ministers of Justice, occupying national posts or prominent positions in local judicial systems.<sup>8</sup>

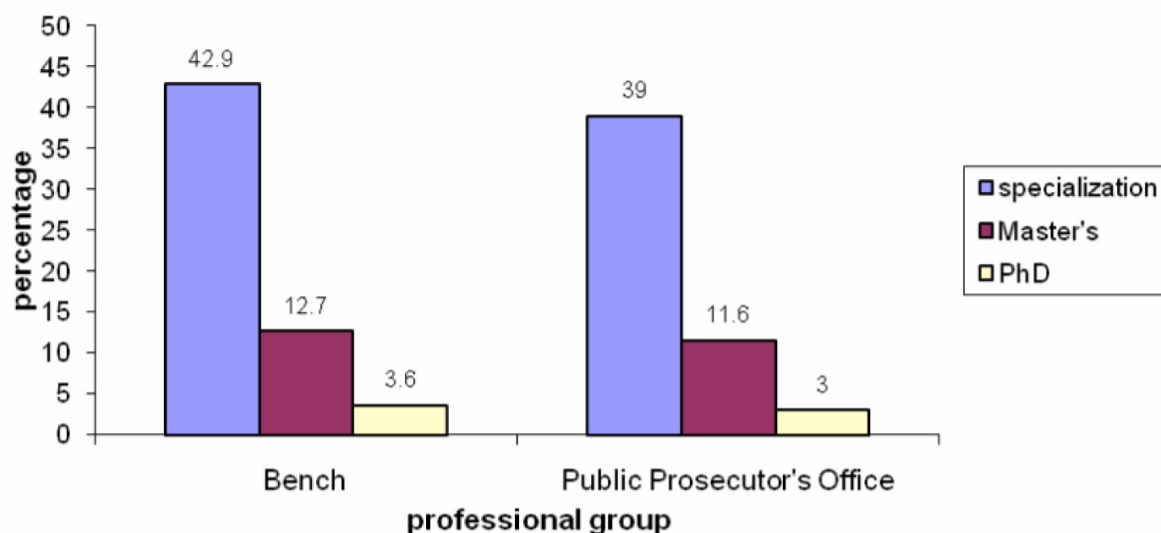
Another type of capital produced by the institutionalization of the academic field of law comes from having a post-graduate qualification and from investments in research and publication in certain areas of legal knowledge directly related to the administration of the State judicial system. By analyzing surveys of legal professions, as well as the CVs and biographies of those at the top of their field, we can deduce that the titles of Master and Doctor tend to be more valued and mobilized as a power resource among the top level of hierarchy in the field (Graph 2), to the detriment of *lato sensu*<sup>9</sup> post-graduate qualifications, held by a considerable portion of the professional bases who are simply in search of professional improvement and better positioning in their careers and in the job market (Graph 3).

**Graph 2** Percentages of members of the High Court of Labor, of the High Court of Justice and of the National Council of Justice with post-graduate and teaching qualifications (Brazil, 2007)



Source: Consultor Jurídico (2008); National Council of Justice (2010).

**Graph 3** Percentages of magistrates and members of the Public Prosecutor’s Office with post-graduate qualifications (Brazil, 2004 and 2005)



Sources: The Ministry of Justice’s Judiciary Reform Office Department of Judicial Reform (2006a); Sadek (2006).

Whether post-graduate in the academic sense or as a generic specialization, the academic investments of the members of the legal elites also made it possible to identify a repertory of specific legal knowledge, an asset used in the struggle for positions of power and in the race to the top of the State judicial system. The most evident of this specialized knowledge seems to be that of procedural law, a juridical discipline that directly relates to the functioning of the State judicial system and which in Brazil has been dominated by a group called the “Paulista<sup>10</sup> Procedural School” and organized around the Brazilian Institute of Procedural Law (IBDP), responsible for establishing a long-standing procedural theory shared (although as a reference for criticism) with other specialists groups.<sup>11</sup> However, the power of this group derives not only from the repercussion of its procedural theory in legal doctrine and in academia, but especially from their privileged access to the Brazilian legislative process and from the creation of norms of procedural law which have practically defined the normative resolution of individual and collective conflicts throughout the State judicial system (Table 1).

The strength of these jurists is explained by their combination of academic and professional capital of high conversion potential (comprising of degrees, academic production and successful professional careers) and by their original formation as a restricted group,<sup>12</sup> capable of maintaining control over their production and reproduction, even before generational successions, the inclusion of new members and the expansion of their borders beyond the “Paulista Procedural School”.

**Table 1** Academic and professional trajectories and participation in reforms of the members of the Brazilian Institute for Procedural Law

Name	Academic trajectory	Professional trajectory	Participation in legislative reforms
Alfredo Buzaid	First degree (1935) and livre-docente Translator's note: this is a postdoctoral examination that demonstrates high-level research skills, required to teach at some universities. (1946) from USP Law School; professor and director of USP Law School	Lawyer and justice of the Supreme Federal Court	Author of the Civil Prosecution Code (1973); Coordinator of the Code Review Committee (1967)
José Frederico Marques	First degree (1933) and livre-docente (1953) from USP Law School; professor at the Pontifical University of São Paulo's Law School and at USP Law School	Lawyer; judge and court judge of the São Paulo State Court of Justice	Member of the Civil Prosecution Code committee (1973); draft rapporteur of the Penal Prosecution Code (1970); member of the project Committee for the special part of the Penal Code (1970)
Cândido Rangel Dinamarco	First degree (1960), Ph.D. (1970), livre-docente (1973) and professor at USP Law School	Advisor to the minister of Justice Alfredo Buzaid; court judge of the São Paulo State Court of Justice	Member of the São Paulo Public Procurator's Office Committee for the analysis of and amendments to the draft of the Penal Prosecution Code (1977); committee member for the draft preparation of the Public Civil Action Law (1985); draft rapporteur of implementation Law of the Small Claims Courts in the State of São Paulo (1985)
Ada Pellegrini Grinover	First degree (1958), specialist (1966), Ph.D. (1970) and livre-docente (1973) from USP Law School; professor at the Vitória Law School and USP Law School	Lawyer; legal consultant; São Paulo State attorney; technical advisor to the vice-governor of the São Paulo State; head of the Legal Consultancy of the São Paulo State Department of Justice; legal advisor to Senator José Ignácio Ferreira	Committee member of the draft preparation for the Public Civil Action Law (1985); president of the preparatory committee of the Draft of the Consumer Defense Code (1990); president of the Penal Prosecution Code Reform Committee (2000); member of the Public Civil Action Law Review Committee (2008); author of the Executive Power Law Project on telephone privacy (2008)

Table cont.

Kazuo Watanabe	<p>First degree (1959), specialist (1969 and 1970), Master's (1978), and Ph.D. (1985) from USP Law School; professor of the Guarulhos Law School and USP Law School, and of the United Metropolitan Faculties</p>	<p>Lawyer; legal consultant; magistrate of the São Paulo Court of Justice</p>	<p>Committee member of the draft preparation of the Federal Law of Small Claims Courts (1984); committee member of the draft preparation of the Public Civil Action Law (1985); member of the review committee for the Civil Prosecution Code (1985); member of the preparatory committee for the Project for the State Law for the Creation of the System of Special Small Claims Courts (1986); preparatory committee member of the Consumer Defense Code Draft (1990); member of the preparatory and review Committee of reform projects of the Civil Prosecution Code (1994-1995)</p>
Antônio Magalhães Gomes Filho	<p>First degree (1970), Master's (1982), Ph.D. (1989) and livre-docente (1995) from USP Law School; specialist (1973) from Pontifical Catholic University of São Paulo's Law School; professor and vice-director of USP Law School; professor of the Law School of the Universities of Taubaté, Osasco and Itapetininga</p>	<p>Member of the São Paulo State Public Prosecutor's Office</p>	<p>Committee member of the draft preparation on Temporary Custody laid down by the São Paulo Public Security Department (1983); member of the committee set up by the Attorney General Office of Justice and the Paulista Association of the Public Prosecutor's Office, with the aim to offer studies and suggestions on the Penal Prosecution Code Project (1983); member of the committee for Studies on Changes in Penal Prosecution Legislation, set up by the Paulista Association of the Public Prosecutor's Office (1992); member of the Review Committee of the Penal Prosecution Code Reform of the Ministry of Justice (1994); member of the Prison Administration Department of the State of São Paulo's Work Group for changes in the Criminal Law (1995); member of the committee formed by professors of the University of São Paulo and judges of the Criminal Court of São Paulo for the establishment of a draft of the Special Civil and Criminal Courts Law (1995); member of the Reform Committee of the Ministry of Justice's Penal Prosecution Code (2000); member of the Federal Senate's Jurists Committee for the establishment of the Draft of the Penal Prosecution Codex (2008)</p>



Table cont.

Tereza Arruda Alvim Wambier	First degree (1980), Master's (1985), Ph.D. (1990) and livre-docente (2004) from Pontifical Catholic University of São Paulo's Law School; professor at Pontifical Catholic University of São Paulo's Law School, at Pontifical Catholic University of Paraná, at the Paranaense and Tuiuti do Paraná Universities, and at Curitiba's integrated Faculties	Lawyer; legal consultant	Rapporteur of the Jurists' Committee of the Federal Senate for the draft preparation of the Civil Prosecution Code (2009)
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Sources: Federal Supreme Court (2009); National Council for Scientific and Technological Development (2009); Moreira Alves (2003); Nalini (2003); Arantes (2002).

According to the research data, although they may not form such cohesive and influential groups as the procedural jurists linked to this school, other specialists have privileged access to the positions of power of the administration of the State judicial system. Because of their evident link to the State and to State organization of power, specialists in public law in general, but especially in constitutional and administrative law, often appear in the web of positions and trajectories of the legal elites analyzed (Table 2).

**Table 2** Area of specialization,<sup>15</sup> highest degree level and institutions of which ministers of the Supreme Federal Court are fellows (Brazil, 2007)

Minister	Area of specialization	Highest degree level	Institutions of which ministers have been fellows
Ellen Gracie Northfleet	Administrative Law	Specialist	Vale do Rio do Sinos University (private) Federal University of Rio Grande do Sul (public)
Carlos Augusto Ayres de Britto	Constitutional Law	Ph.D.	University Center of Brasília (private) Federal University of Sergipe (public) Pontifical Catholic University of São Paulo (private) Tiradentes de Aracaju Faculty (private)
Cármen Lúcia Antunes Rocha	Constitutional, State and Commercial Law	Ph.D.	Pontifical Catholic University of Minas Gerais (private)
José Celso de Mello Filho	Constitutional Law	First degree	Is not a fellow of any institution
Antonio Cezar Peluso	Civil Law	Ph.D.	Pontifical Catholic University of São Paulo (private) Catholic University of Santos (private) Mackenzie University (private)



Table cont.			
Eros Roberto Grau	Public Law	Ph.D.	State University of Campinas (public) Fundação Getúlio Vargas (private) Mackenzie University (private) Federal University of Minas Gerais (public) University of São Paulo (public)
Gilmar Mendes	Public Law	Ph.D.	University of Brasília (public)
Joaquim Benedito Barbosa Gomes	Public and Comparative Law	Ph.D.	State University of Rio de Janeiro (public)
Marco Aurélio Mendes de Farias Mello	Constitutional Law	Master's	University of Brasília (public) University Center of Brasília (private)
Carlos Alberto Menezes Direito	Constitutional and Civil Law	Ph.D.	Pontifical Catholic University of Rio de Janeiro (private)
Enrique Ricardo Lewandowski	Public Law	Ph.D.	University of São Paulo (public)

Source: Consultor Jurídico (2008).

The widening repertory of specialized knowledge in the administration of the State judicial system beyond purely legal knowledge has led to the incorporation, within the power structures of the State judicial system, of specialists outside the juridical field – mainly administrators, economists and political scientists. These new members all have professional experience, scientific and academic knowledge and production geared towards the management of organizations and State institutional performance. Rather than leading to conflict or adjustment, their incorporation into the field has in fact produced an alliance with the legal elites, including with specialists in Public and Procedural Law. Although this is a relatively recent phenomenon, the participation of these new experts seems to indicate that a new power space has been established which relates to the administration of the State judicial system (Table 3).

Another form of symbolic capital which is dominant in the political field of the State judicial system is professional capital, produced and accumulated by different professional groups in the administration of the State judicial system and which is shared by and transferred to each of its members. In this respect, according to the data collected and analyzed in this research, advocacy seems to be the professional group with the greatest capacity to transmit capital accumulated by the group to its members, especially through its professional organization, the Brazilian Bar Association (OAB). Advocacy has a privileged participation in the power structures of the administration of the State judicial system, represented by the large proportion of members of legal elites that, exclusively or not, are or were lawyers (Graph 4).

**Table 3** Academic and professional trajectories of the members of the Advisory Body of the Department of Judicial Research of the National Council of Justice (2009)

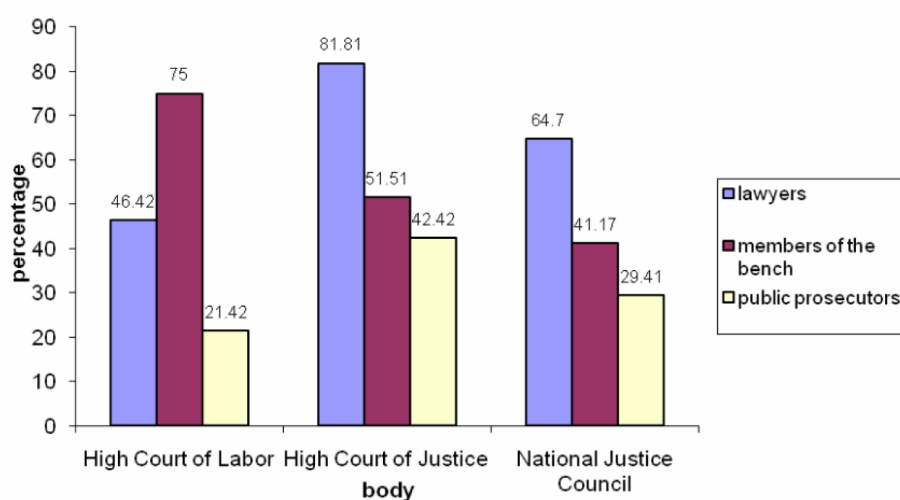
Member	Academic trajectory	Professional trajectory
Armando Manuel da Rocha Castelar Pinheiro	First degree in Electronic Engineering from the Technological Institute of Aeronautics (1977); Master's in Administration from the Federal University of Rio de Janeiro (1983); Master's in Mathematics from the National Institute Association of Pure and Applied Mathematics (1981); Ph.D. in Economy - University of California (1989)	Researcher at the Institute of Economic and Applied Research; professor at the Federal University of Rio de Janeiro
Carlos Augusto Lopes da Costa	First degree in Electronic Engineering from the Federal University of Rio de Janeiro (1986)	Executive coordinator of the Center for Strategic Planning and Evaluation of Public Policy at the Getúlio Vargas Foundation; executive director of the consulting company MCI – strategy; consultant in the area of strategic planning and coordinator of opinion and communication research of the Brazilian Support Service for Micro and Small Businesses (2001-2004); president of the Pernambuco Institute for State Planning (1999-2001); special coordinator of Institutional Relations (1998-1999) and superintendent of information technology (1996-1998) at the São Francisco Hydroelectric Company; consultant at Promon Engineering S.A.
Elizabeth da Costa Sussekind	First degree in Law from the Pontifical Catholic University of Rio de Janeiro (PUC-RJ, (1975); Master's in law and development from the Pontifical Catholic University of Rio de Janeiro (1984)	National secretary of Justice (1999-2002); researcher at the Museum of the Republic; assistant professor at PUC-RJ
Everardo Maciel	First degree in Geology (institution not given)	Tax consultant and associate-president of Logos Tax Consultancy; professor of the Brazilian Institute of Public Law; president of the Inter-American Center of Tax Administrations; secretary of the Federal Revenue (1995-2002); secretary of the Federal District Finance and Planning (1991-1994); executive secretary of the Ministries of Finance (2002), of the Interior (1987), of Education (1985), and of the Cabinet of the Presidency of the Republic (1986); interim minister of Finance, Education and the Interior; Finance secretary (1979-1982); Education secretary (1983), and Superintendent of the Pernambuco Development Council (1972-1975); professor at the Catholic University of Pernambuco (1969-1975)

Table cont.

Francisco José Cahali	First degree (1985), Master's (1995) and Ph.D. (2001) in Law from the Pontifical Catholic University of São Paulo (PUC-SP)	Lawyer; assistant-professor at PUC-SP
Kazuo Watanabe	First degree (1959), specialist (1969 e 1970), Master's (1978), and Ph.D. (1985) from the University of São Paulo Law School (USP)	Lawyer; legal consultant; magistrate of the São Paulo Court of Justice; founder and president of the Center for Legal Studies and Research; professor of the Law Schools of Guarulhos and USP, and of the United Metropolitan Faculties
Luiz Jorge Werneck Vianna	First degree in Law from the State University of Rio de Janeiro (1962); second degree in Social Sciences from the Federal University of Rio de Janeiro (1967); Ph.D. in Sociology from the University of São Paulo (1976)	Full Professor of the Rio de Janeiro University Institute for Research (IUPERJ); coordinator of the Center for Law and Society Studies (CEDES/IUPERJ)
Maria Tereza Sadek	First degree (1969) and Master's (1977) in Social Sciences from the Pontifical Catholic University of São Paulo; Ph.D. in Political Science from the University of São Paulo (1984)	Senior researcher at the Center for Legal Studies and Research (CEBEPEJ); researcher at the Institute of Economic, Social and Political Sciences (IDESP)
Vladimir Passos de Freitas	First degree in Law from the Catholic Law School of Santos (1968); Master's (1989) and Ph.D. (1999) in Law from the Federal University of Paraná	Public prosecutor, federal judge and judge of the Federal Court of Justice; professor at the Pontifical Catholic University of Paraná

Source: National Council of Justice (2010); National Council for Scientific and Technological Development (2009).

**Graph 4** Percentages of members of the High Court of Labor, the High Court of Justice and of the National Council of Justice, according to their professional careers (Brazil, 2007)



Source: Consultor Jurídico (2008); National Council of Justice (2010).

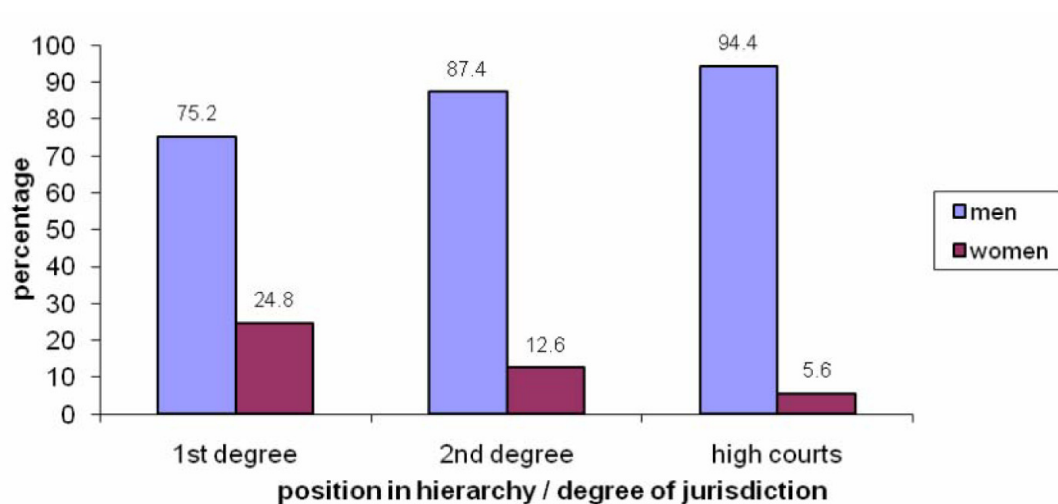
The process of institutionalization and the consolidation of a group's professional power reinforce its shared and accumulated professional capital. This is in turn consolidated by its autonomy in relation to the State and to other corresponding professions and by its capacity for self-government, accreditation and control over professional practice (Rueschemeyer 1986; Freidson 1996; 1998; Bonelli 2002). In the case of the Public Prosecutor's Office, I have explained how its secondary position in the composition of the legal elites might be associated with its still recent institutionalization and its lack of a definitive establishment of relations with the government and the world of politics (Arantes 2002; Bonelli 2002). In the case of the Brazilian Bar Association, the opposite is true: as well as this professional capital there is also the accumulated prestige from the entity's links to civil society, as a consequence of its political actions and defense of citizens' rights (Bonelli 2002; Motta 2006). It also has the largest lateral mobility of advocacy, which constitutes its identity and which allows its members to move between the legal and political fields, between their profession and the State (Engelmann 2006a).

As well as the catalyst of institutionalization, the power of a professional group also derives from its social composition and from its demographic characteristics, or rather, from its members' social capitals as well as from the way in which the political organization of the professional group manages its members' capital. The issue at play here is the balance between and the combination of the professional capital accumulated by the group and the impact of its members' social capital on the global structure of the group's capital, especially when its scope is extended and broadened. In other words, the global capital of the group is not simply the sum of the capitals of its members, or of these and the institutional capital of the organization; I believe that, on the contrary, it is the result of the professional group's management of different forms of capital produced and accumulated by the group, institutionally associated with its own organization, or brought to the group by its members. Thus, as well as the explanation related to professional institutionalization, I would suggest that the Public Prosecutor's Office's less privileged position is due to the characteristics of its social composition – less socially and educationally elitist and more female. The same seems to occur, for example, with the Public Defender's Office. On one hand, it appears that the Brazilian Bar Association, despite the rapid and rigorous expansion of advocacy, has invested in strategies that limit this evolution (through its policy of control over legal education) and which mark out an elite circle within the profession. This has been achieved through competition and diversification mechanisms of the legal service market. These have created scope for a large-scale law profession, whose patterns of organizing offices (big law firms) and of providing services (consultancy and assistance, in detriment to the traditional forensic advocacy) have become a model for all professional circles and whose structures of capital

bring this segment of advocacy closer to the dominant pole of the juridical field and to the political field of the State judicial system.

One of the factors of the social make-up of this group of professionals, whose management by professional organization seems to determine the global structure of the group's capital, is to do with gender. As my research data show, despite the fact that research and surveys clearly point towards the feminization tendencies of the professional groups, women come up against social and political barriers which restrict their access to positions of power in the group and in the political field of law (Graph 5).

**Graph 5** Percentages of men and women among magistrates, by degree of jurisdiction (Brazil, 2005)



Source: Sadek (2006).

In other words, I believe that not only the degree of feminization of the professional group, which we are able to gauge by identifying the proportions of men and women members, but especially the opportunities that the group's power structure confers on women within their organization and on their career perspectives should be considered when analyzing power in the administration of the State judicial system. Advocacy and the bench, despite the feminization tendency of their professional bases, can therefore be seen to maintain power structures in which men are dominant – in the composition of the courts, among associate leaders and associates of large firms, in the dress code and professional behavior.

Furthermore, this seems to be another factor that could explain the secondary position of the Public Prosecutor's Office, especially of the Federal Public Prosecutor's Office (MPF), in the political field of the State judicial system. As well as issues related to its recent professional institutionalization, the MPF seems to have the highest degree of feminization, both in its composition and its internal power structure, which tends to privilege women's participation and opportunities. Analyzing the data from the 1990s, Ela

Wiecko V. de Castilho and Maria Tereza Sadek (1998, 10) come to the conclusion that “the male presence, despite always holding a majority, is less conspicuous in the Federal Public Prosecutor’s Office than in the bench”. With regard to the Public Prosecutor’s Office of Labor, data from 2006 reveals that women represent 54.4% of public prosecutors of that body and 77.4% of its regional prosecutors, the next highest hierarchical position (The Ministry of Justice’s Judiciary Reform Office 2006b).

In March 2010, of the 27 state courts, only those of Alagoas, Tocantins and Bahia were headed by women.<sup>14</sup> Looking at the results of the Brazilian Bar Association’s voting processes at the end of 2009, only one of the four posts immediately below the body’s national president was occupied by a woman; of the 81 members of the Association’s Federal Council resulting from the 2009 elections, only seven (8.61%) were women; finally, it is important to point out that none of the state sections of the Brazilian Bar Association chose a woman as its president (Brazilian Bar Association 2010). In the Public Prosecutor’s Offices in each of the Brazilian states, 5 (18.5%) of the 27 state bodies were headed by women in March 2010: Ceará, Maranhão, Rio Grande do Sul, Roraima and Sergipe. As for the Federal Public Prosecutor’s Office, women represented 17 (27.4%) of the 62 sub-attorney generals with jurisdiction in Brasilia, within the body’s leadership and at the last stage of their career; and 4 of the 9 members of their High Council.<sup>15</sup>

Added to this is another explanatory factor, connected to the gender issue and which links the prestigious position of the professional group with the position of its clientele: both the Public Prosecutor’s Office and the Public Defender’s Office, groups with higher female participation, dedicate their functions to dealing with subordinate issues and clientele – the defense of the poor, the custody of minors, family rights, human rights, diffuse and minority interests.<sup>16</sup>

The geographic origin of members also seems to be a predominant factor that determines whether jurists belong to the elites of the political field of the State judicial system. Living and having a professional career in southern and south-eastern states of Brazil is a dominant characteristic of the elites, which, as along with the existence of the top juridical courses in these regions and the formation of the Paulista Procedural School, suggests the existence of a dominant regional pole in the political field of the State judicial system and the symbolic value of the capital of origin related to birth or the professional belonging to one of these states (Graph 6).

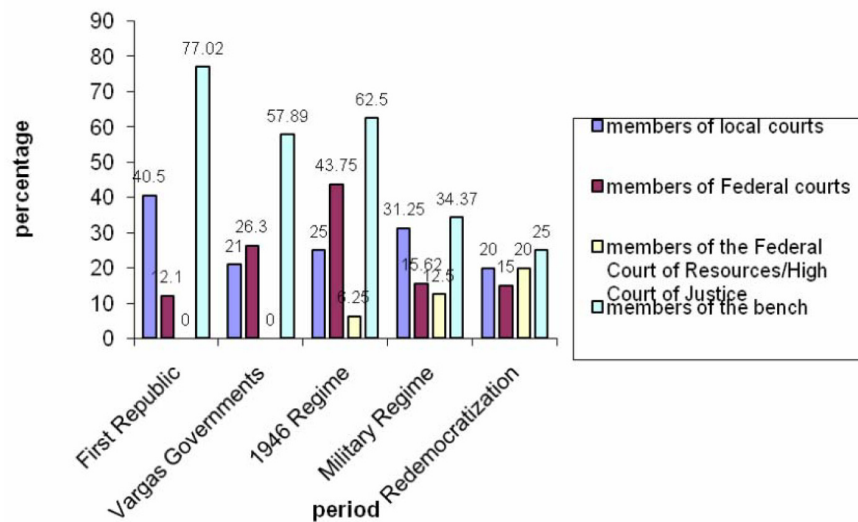
The structures of dominant symbolic capitals in the political field of the State judicial system can also be traced to professional capital accumulated by institutional leaders of the judicial system, especially by those positioned at the head of legal institutions, and even more specifically the heads of second (state and federal courts) and third (high courts) instances of Judicial Power (Graph 7).

**Graph 6** Number of ministries of the High Court of Justice, by place of origin (Brazil, 2007)



Source: Consultor Jurídico (2008).

**Graph 7** Percentages of members of the Supreme Federal Court who have passed through local, federal and state courts and through the Federal Court of Appeal/High Court of Justice<sup>17</sup>. (Brazil, 1889 a 2008)



Source: Federal Supreme Court (2009).

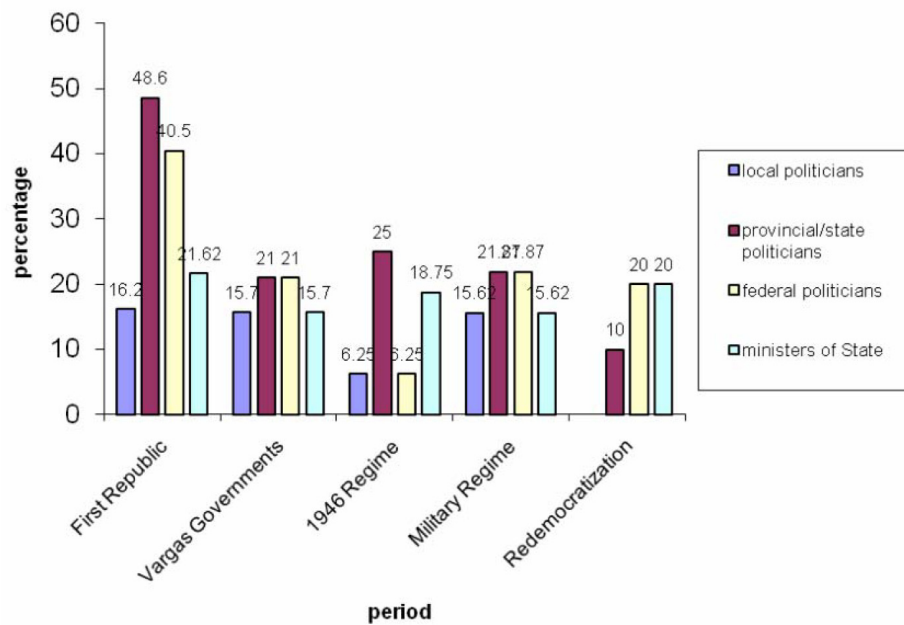
It is not only passing through these institutional positions that facilitates access to higher positions in the political field of the State judicial system (high courts, Supreme Federal Court, National Council of Justice). The research data suggests that the recent trends in jurisdictional and politico-administrative concentration of power of the State



judicial system have increasingly valued institutional leaders through mechanisms such as *stare decisis* and the repercussions of appeals to the Federal Supreme Court as well as the participation of institutional leaders in the National Council of Justice and the National Council of the Public Prosecutor’s Office.<sup>18</sup>

Lastly, the strength of the elite jurists’ political capital cannot be ignored, especially in the case of leaders of legal associations and of individuals with mobility between the political and juridical fields and who have alternated, to a greater or lesser extent in their careers, between political and juridical activities (Graph 8) – or have engaged in both, as in the case of government and parliamentary legal aides, who I have called jurists of politics.

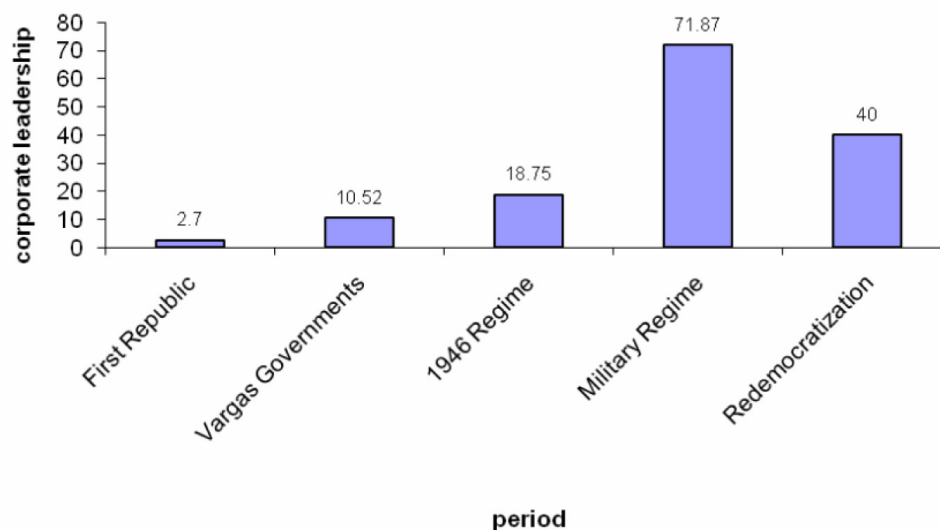
**Graph 8** Percentages of ministers of the Federal Supreme Court who have held legislative and executive political posts (Brazil, 1827 to 2008)



Source: Federal Supreme Court (2009).

In the case of the leaders of legal associations, the strength of their specific capitals allows them to act as interlocutors and legitimate contenders in the field, under relatively equal conditions to institutionally superior positions – as is seen, for example, in the cases of the presidents of the Association of Brazilian Judges, State judges in general, and the president of the association interviewed for this research, who is also a district court judge, all those involved in relations and political disputes with the Supreme Federal Court, the National Council of Justice and the Brazilian Bar Association and the leaders of their courts. Engaging in leadership activities of professional jurists’ groups also seems to be an increasingly important factor in the trajectory of legal elites in high institutional positions (Graph 9).

**Graph 9** Percentages of ministers of the Federal Supreme Court who have held corporative leadership posts (Brazil, 1827 to 2008)



Source: Federal Supreme Court (2009).

In the case of bachelor-politicians (Law graduates, without further professional practice in the area, but who use their degree title to position themselves in the political field, as is the case with most of the deputies involved in the National Congress’s Judicial Reform); jurist-politicians (jurists with a predominant involvement in politics, such as Hélio Bicudo, Zulaiê Cobra Ribeiro, Michel Temer and Nelson Jobim),<sup>19</sup> political jurists (professionals with eventual involvement in or recurring exchanges with political activity, such as José Roberto Batochio and Márcio Thomaz Bastos)<sup>20</sup> and jurists of politics (legal aides of political activity, well represented by the directors of the Ministry of Justice’s Judiciary Reform Department), represented in Diagram 1, it can be said that the capitals they accumulate form the basis of the interdependence of the juridical field and the political field, a connection that is even closer in the political field of the State judicial system. In other words, it seems that these individuals, because of the capital they accumulate, maintain only relative autonomy in the juridical field in relation to the political field – such relativity should not be seen as insufficiency or failure of the juridical field to achieve autonomy, but instead as part of this process. After all, Law is a power structure and, moreover, a structure of State power. Thus, as is seen in the dynamics of the 2004 Judicial Reform, the interaction of these jurists (who hold political capital) with members of the political field and of their own juridical field (in its lower-ranking positions) has paved the way for minimum juridical and political consensus for the approval of the Reform and for the legitimization both of demands from professional groups along with the political field and pressures for reform from the political field along with the juridical field.<sup>21</sup>

**Diagram 1** Structures of juridical and political capital in the trajectories of legal elite groups

Political capital	+	Bachelor-politicians (A)	Jurist-politicians (B)
	-	Jurists of politics (C)	Political-jurists (D)
	-	+	
	Juridical capital		

Source: Created by the author.

### The Field as a Political Space of the Judicial System

As well as enabling us to identify legal elites, a simple list of institutional positions would also lead to a formal definition of the institutional space that contains the administration of the State judicial system’s power. Nevertheless, as I suggested at the beginning of this article, I believe that the power of the administration of the State judicial system is not exerted and delimited exclusively by institutional positions and arenas. Rather, I think that the space where power is circulated and exerted, which I have called the political field of the State judicial system, is structured around the concentration of diverse forms of capital – not only institutional, but also social and political, as shown from the analysis of trajectories – and, above all, around the connection that these structures of shared capital allow between different institutional positions, held by members with similar trajectories and profiles. Furthermore, as I have shown in my analysis of specialists’ power, this power space also includes positions at the periphery of the judicial system’s organization – even though the committees for procedural reform from within the government and the National Congress, and for a judiciary research council, from within the National Council of Justice, point towards a considerable degree of formal institutionalization of these positions of power.

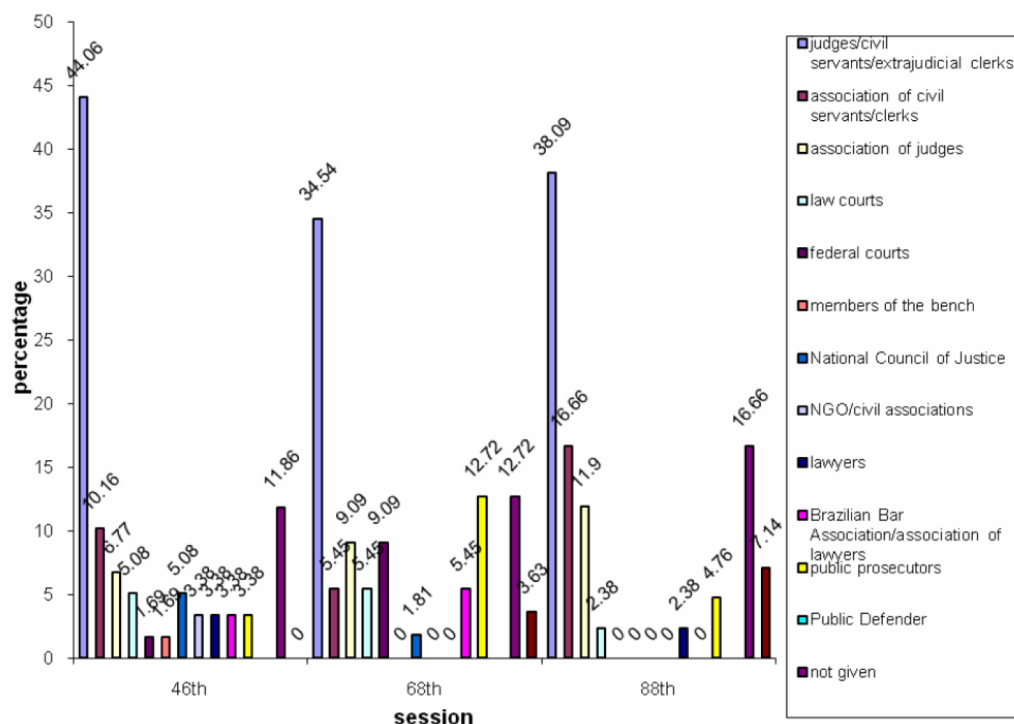
The existence of this power space, through which individuals with similar structures of capital pass, helps us to understand how national political unity comes about from a formally fragmented judicial system, considering its federative and dual structure. In this respect, the creation of the National Council of Justice and of the National Council of the Public Prosecutor’s Office, as well as the procedural mechanisms that increased the Federal Supreme Court’s jurisdictional power (*stare decisis* and general repercussion of appeals), only consolidate power already concentrated in a dominant national pole through the institutionalization of the State apparatus of the administration of judicial system. As I have explained, such power is structured around the institutional positions of the Federal Supreme Court, the High Court of Justice, the Attorney General’s Office and the Brazilian Bar Association and around their relations with the leadership of the State and Federal

judicial systems, as well as their links with well-established and consolidated groups of specialists similar to the group of procedural law specialists analyzed above.

The existence of a political and progressively institutionalized unit of the judicial system, however, does not mean that the political field of law is a conflict- and tension-free space. On the contrary, this field is riddled with struggles between different professional groups and among members of different hierarchical positions in the field in search of a greater share of control over the State judicial system. I would consider the most relevant conflicts in this context to be those between professional leaders – especially those in which the practice of Law (represented by the Brazilian Bar Association), is opposed to the bench (represented mainly by class associations), and the Public Prosecutor’s Office (represented by both its institutional and associative leaders) – and those between professional bases and leaderships.<sup>22</sup>

This type of hierarchical conflict seems to be more acute inside the Judiciary Power, as is seen from the associative mobilization resembling trade union movements and from the instrumental use that associations of magistrates and civil servants make of the National Council of Justice, in disputes with their institutional leadership (Graph 10).

**Graph 10** Percentages of administrative control processes and formal petitions, listed in the running order of the 46th, 68th and 88th ordinary sessions of the National Council of Justice, by type of petitioner (Brazil, 2007, 2008 and 2009)



Source: National Council of Justice (2010).

We also cannot ignore eventual conflicts between members of State and Federal judicial systems, as exemplified in the following cases: the resistance of the State Public Prosecutor's Office to the action of the National Council of the Public Prosecutor's Office, as told by the federal prosecutor and ex-counselor interviewed for this research;<sup>23</sup> the resistance of State courts of justice to the National Council of Justice's inspections and resolutions; and the resistance of some State sections of the Brazilian Bar Association to the implantation of a national, uniform exam for admitting new lawyers, managed by the body's Federal Council. Considering that, as we have seen, the structures of predominant capital in the political field of the State judicial system are quite exclusive and elitist, when compared to the general social profile of the professional groups, these conflicts must be interpreted as dominant class fractions scrambling for more powerful positions in the hierarchy.

## Final Thoughts

The task of identifying the elites and their sources of power in the administration of the State judicial system has not run out of steam. On the contrary, it has to do with understanding the organization of power in our society and in the formation of the Brazilian national State. It also has to do with the functioning and democratization of our judicial system. If democratization of the social structure, of the State and of law in Brazil has been on the social science agenda since at least (but not only) the political redemocratization of the 1980s (Ferreira 2001; Limongi 1999), the question is: how democratic is the Brazilian State judicial system?

There are different disputed meanings of the democratization of Law in the juridical field, all of which are in some way inter-related. One of these meanings of democratization, which relates directly to the social and political composition of law institutions, suggests that the social and ideological diversification of legal careers is a factor of democratization of the State judicial system, not only in terms of different social groups' access to its positions, but also with regard to a change in the way it acts and functions.

The increase in ideological pluralism, indicated by Werneck Vianna et al. (1997) as a consequence of the social diversification of the bench, was in fact identified by Engelmann (2006a) beyond the boundaries of this social group and in relation to other professional groups from the juridical field. Engelmann (2006a) associated the emergence of ideological divisions and disputes with new meanings of justice and the practice of law, encouraged by movements such as "alternative" or "critical Law" and the formation of professional associations, entry into the juridical field of new actors with structures of social capital that distinguish them from jurists linked to the traditional and conservative pole, generally

identified as a more homogenous social and political elite. As the cited authors point out, the entry of new groups in the juridical field, in turn, came about as a consequence of the expansion of legal education from the 1960s onwards and from the effects of social mobility experienced in Brazil during the same period.

In this respect, a first reservation must be made with regard to the extent of the expected (and sometimes announced and celebrated) democratization of the State judicial system. As Werneck Vianna et al. (1997) warn, the political positioning of magistrates cannot be inferred directly from their social origin – in the same way that the concrete practice of law cannot be inferred from the opinions expressed by judges in surveys.

Having made this reservation, it is necessary to keep in mind, firstly, that the most radical professional groups on the transformation agenda of the judicial system, generally associated with the “alternative Law” movement, are visibly absent from the structures of the political field of law and from the elite circles in the administration of the State judicial system, which I have tried to define in this study. According to Engelmann (2006a), the “critical” jurists have been accommodated in a counter-hegemonic academic space, dislocated from their positions and from their potential to transform legal careers and institutions. Their discourse of politicization and critique of the judicial tradition were also eventually, if more moderately, incorporated into the field, and were adopted as arguments by warring factions, especially by the associations representing professional bases and segmented entities with a more moderate progressive profile, such as the Association of Judges for Democracy (AJD) and, I would add, the Brazilian Institute of Criminal Sciences (IBCCRIM).

Furthermore, we must also consider the example of the Procedural Law specialists, responsible for the core procedural reforms since the 1970’s, which Werneck Vianna et al. (1999) associated with the law democratization movements, which took a firm hold as an elite group of the administration of the State judicial system, in allegiance with traditionally dominant positions in the field. In other words, it seems that the politicization of the judicial system has lost the powerful transforming impetus of its founding critical or alternative movements, but now fulfills the discursive repertory of professionals, with respect to their public functions, and of specialists and other legal elites, with regard to potentially (and apparently) controversial topics or criticisms of the status quo, such as the judicialization of politics and access to justice.

Secondly, even considering the advances of the 2004 Judicial Reform in relation to the organization of careers, how court leaderships are composed and the active participation of leaders of legal associations in the political process of the Reform and in the National Council of Justice’s role as a political resource for controlling the system, I think that the idea of an internal democratization of the State judicial system must be acknowledged with



some reservations. The first of these is that, as already mentioned, the political process of the Reform, even though it resulted in undeniable gains in transparency, rationality and organization of State legal careers, was run entirely by elites of the administration of the State judicial system whose positions had been long-established in the field, including participation in the 1986 National Constituent Assembly; their fairly homogenous social characteristics suffered little impact as a consequence of the broadening and social diversification of the professional bases of judicial careers in the last decades of the twenty-first century. Furthermore, the political space created by the actions of leaders of legal associations came about as a result of the centralization of the political field of law around its institutional leadership positions, especially those at the national level – the Supreme Federal Court, the Brazilian Bar Association, the Attorney-General's Office, the National Councils of Justice and of the Public Prosecutor's Office and, to some extent, the Ministry of Justice and its Department of Judicial Reform.

This leads us to the second reservation to do with the democratization of the State judicial system. As I have reinforced throughout this paper, I believe that the administration of the State judicial system's power is organized not only around institutional bases, as observed in the organizational structure of the constitutional design, but also around the structures of dominant capital that I have mentioned, which establish positions of power that often ignore the federative and multi-professional design of the judicial system. Thus, as is evident from the very low participation of graduates from newer and less prestigious law schools in the field and of women in legal careers and institutions, the issue is not about institutional restrictions or generational evolution, but rather about social and political barriers. After all, public service exams, constitutional rights, labor laws and criteria for job promotion lead to objective formal conditions of equality, and enough time (decades) has passed for the effects of feminization and of the expansion of legal education to be felt even at the level of legal elites.

Similarly, let us compare the Federal Supreme Court to other leading courts analyzed in this research, such as the High Court of Justice and the High Court of Labor. Despite the latter two courts having a rigid composition and recruitment criteria for the professional group of origin, as well as their high number of seats (open, therefore, to greater diversification), their recent overall composition is not very different to the general social pattern observed in the Federal Supreme Court's history, whose composition is freely and politically indicated, without restrictions of professional group of origin. This is why the reformist efforts aimed at objective changes in the formal organization of the careers and in the composition of the leading institutions of the State judicial system, although they have the ability to instill bigger and better conditions of objective equality and transparency in the organization of these institutions, cannot afford to ignore the effects of the informal



hierarchies that structure and stratify the juridical field and the political field of the State judicial system.

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## Notes

- 1 This article was developed from the final chapter of my Ph.D. thesis (Almeida 2010), and a draft paper of it was presented at the 7th Brazilian Political Science Association Meeting (august 2010). I'd like to thank Fabiano Engelmann and Andrei Koerner for their comments on the draft paper, and to Maria Tereza Sadek, Maria da Glória Bonelli, Oscar Vilhena Vieira, José Reinaldo Lima Lopes and Sérgio Adorno for their comments presented at the Ph.D.'s final exam.
- 2 The concepts of field and capital used in this research are those derived from the research of Pierre Bourdieu (2007a; 2007b) and of researchers of the same area, with specific focus on the study of juridical fields and of judicial elites and professions (Dezalay 1991; Dezalay and Trubek 1996; Dezalay and Garth 2000; 2002; Engelmann 2006a; 2006b).
- 3 On the role of this type of laudatory discourse of tributes and specialized publications in the political field of justice, see Almeida (2010).
- 4 For a more detailed analysis of the role of Law schools in the formation of judicial elites, see Almeida (2010).
- 5 The University of São Paulo's Law School (USP) and the Federal University of Pernambuco's Law School (UFPE) were Brazil's first Law schools, founded in 1827; the Federal University of Rio de Janeiro's Law School (UFRJ), the Federal University of Minas Gerais' Law School (UFMG), the Federal University of Rio Grande do Sul's Law School (UFRS), the Federal University of Bahia's Law School (UFBA) and the Federal University of Ceará's Law School (UFC) were all founded by local elites during the first years of the republican regime in Brazil, in the 1900s; the University of Brasília's Law School (UnB) was created by the federal government in the 1960s.
- 6 "My father is the son of illiterates, of Portuguese illiterates, he studied, he managed to rise as an intellectual through his own hard work. I think because of this I am, I'm... I didn't go on a course to take public service exams, right? I went with my knowledge. And he graduated in Social Sciences at 30 something years old, so quite late, and... he worked in journalism, everything was... I think he was the strongest intellectual influence for me." (interview with Ricardo Castro Nascimento, president of the Association of Federal Judges of São Paulo and Mato Grosso do Sul, graduated from USP Law School).
- 7 See, for example, the cases of Raphael de Barros Monteiro Filho, Francisco Falcão, Aldir Passarinho Filho, justices of the STJ in 2007 and sons of the former justices of the STF Raphael de Barros Monteiro (brother of the judge magistrate Washington de Barros Monteiro, of the São Paulo Court of Justice), Djaci Falcão and Aldir Guimarães Passarinho, respectively; and

- of Paulo Gallotti, minister of the STJ in 2007 and nephew of the former justice of the STF Luiz Octavio Gallotti (who is also the son of the justice of the STF, Luís Gallotti). It is even possible to cite the cases of Ives Gandra Martins Filho (justice of the High Court of Labor and member of the National Council of Justice, son of the tax lawyer of the same name and emeritus professor of the Mackenzie University); of the Jobim family, of the ex-minister of Justice and former justice of the STF Nelson Jobim, with relevant roles in advocacy and bench in the state of Rio Grande do Sul; and of the Thompson Flores family, whose most distinguished member was the justice of the STF Carlos Thompson Flores, and which also has representatives in high positions of advocacy and federal bench.
- 8 The Brazilian judicial system reflects the political federalism, introduced in Brazil by the first republican Constitution (1891), based on the Constitution of the United States of America. In this way, we have two kinds of judicial systems: the local judicial system – based on state courts, Public Prosecutor’s Offices, Public Defense’s Office, and the local council of the Brazilian Bar Association – and the federal judicial system – based on similar institutions at the federal level.
  - 9 Translator’s note: In Brazil, post-graduate courses are divided into two groups: *strito sensu* (Master’s and Doctorate) and *lato sensu* (specialization course).
  - 10 “Paulista” is someone who was born in or comes from the state of São Paulo.
  - 11 On other procedural schools in Brazil see Paula (2002). On the origins and the power of the Paulista Procedural School, see Almeida (2010).
  - 12 Analyzing the diverse possible forms of organization of the intelligentsia, Karl Mannheim (1957, 123) states that “Between the compact, caste-like organization and the open and loose group, there are numerous intermediate types of aggregations in which intellectuals may range themselves. Their mutual contacts are often informal, but the small, intimate group forms the most frequent pattern. It has played an eminently catalytic role in the formation of attitudes and thought currents.”. For Mannheim, the protagonism of the intimate (or reduced) groups is due to the density of their networks of relationships (among their members and among their patrons, be they private *maecenas* or the State) and to their capacity to select their members.
  - 13 For the purposes of what is shown in Table 2, the ministers’ area of specialization is that according to the Justice Yearbook 2008 (Consultor Jurídico 2008), which is not always equivalent to a specialization degree, but could be instead a practical specialization, as is the case of the minister Celso de Mello, considered a specialist in constitutional law, but does not have a post-graduate degree.
  - 14 Information gathered from the websites of the state courts.
  - 15 Information gathered from the websites of the Federal and State Public Prosecutor’s Offices.
  - 16 Analyzing the homology of positions among the clientele and jurists and their effect on the reproduction of the dominant internal and external relations in the field, Bourdieu (2007a, 251) states that “those who occupy inferior positions in the field (as for example in social welfare law) tend to work with a clientele composed of social inferiors who thereby increase the inferiority of these positions. Thus, their subversive efforts have less chance of overturning the power relations within the field than they do of contributing to the adaption of the juridical corpus and, thereby, to the perpetuation of the structure of the field itself.”.
  - 17 Before the Brazilian Constitution of 1988, the Federal Court of Appeals was the equivalent of the current High Court of Justice (STJ) in the judicial system.
  - 18 Attributing a binding effect to the abridgements traditionally edited by the Federal Supreme

Court – a reform measure commonly known as *stare decisis* – consists of the possibility that the Supreme Court must attribute a binding effect to some of their abridgments (i.e. the jurisprudential understandings consolidated and thus expressly considered by that Court), through the decision of two thirds of its members, in relation to the decisions of courts and judges in lower-ranking positions in the jurisdictional hierarchy – which can no longer initially decide against the understanding of the Federal Supreme Court. Therefore, the introduction of *stare decisis* undoubtedly increases the jurisdictional power of the Federal Supreme Court over the inferior positions of the judicial field and reinforces its dominant position in the political field of state justice. The general repercussion of the extraordinary appeals also consists to some extent of the aim to rationalize the work of the Federal Supreme Court and to increase its power over the flow of jurisdictional work from the lower-ranking courts and judges to the higher-ranking ones. According to this innovation brought about by the Judiciary Reform, in order to have their extraordinary appeals admitted by the Federal Supreme Court, the petitioner must demonstrate – among other requirements established by Article 102 of the Constitution – the existence of general repercussion of the issue discussed. In other words, in order to have their appeal admitted by the Court, the interested party must demonstrate that there is general interest in the analysis and decision of the issue by that Court, which, if it decides not to have such a requirement, can refuse, through a majority decision of two thirds of its members, to appreciate the appeal. The same system of power structured around the institutional leaders of the state and federal legal system, and which molds the political field of State judicial system, can also be seen in the composition of the National Justice Council: although there are previously determined seats on this Council for magistrates in the three hierarchies of courts (district, federal and high courts), the allocation of seats by lower-ranking courts has to be approved by the higher-ranking ones. Thus, the seat reserved for a state judge will be occupied by a magistrate indicated by the Supreme Federal Court; the federal judge to join the Council will be indicated by the High Court of Justice; and the labor judge, by the High Court of Labor. The same occurs with the members of the Public Prosecutor’s Office and of the advocacy, who are indicated by the Attorney General of the Republic and by the Federal Council of the Brazilian Bar Association, respectively. In the case of the member of the Public Prosecutor’s Office from the states, a choice is given from those indicated by the body’s leaders in each state; in the case of the Federal Public Prosecutor’s Office (MPF), the choice of General Attorney will be made among members of a list of three, formed from the direct election of the Federal Public Prosecutors.

- 19 Bicudo, Cobra Ribeiro, Temer and Jobim were all important jurists (lawyers or public prosecutor, in the case of Bicudo) converted to politics. They all had important roles during the legislative process of the Judiciary Reform in the National Congress, since Bicudo presented the Constitutional Amendment Proposition in 1992.
- 20 Batochio and Bastos are important criminal lawyers in São Paulo, and both had eventual political activities as representatives in the National Congress (Batochio, who was also the president of Democratic Labor Party), or as an alderman in the city of Cruzeiro and as minister of Justice (Bastos).
- 21 For a more detailed analysis of the interaction of these agents in reaching minimum consensus for the Judiciary Reform passed in 2004, see Almeida (2010).
- 22 Take, as an example of inter-professional conflicts, the recent controversy over the participation of advocacy in composing of state, federal and high courts, through the so-called “quinto constitucional”, a constitutional mechanism which states that the fifth part of all state, federal and high courts must be composed by members out of the bench, nominated by the Public Prosecutor’s Office and the Brazilian Bar Association; the polemic around the so-called “Lei da mordaca” (“Gag Law”) as a way to restrict the action of members of the Public Prosecutor’s

Office, relying on the undeclared support of the Brazilian Bar Association; and the latter's campaign for external control of the Judiciary and the Public Prosecutor's Office, while at the same time rejecting any attempt for control over its own organization.

- 23 “Yes there was a lot of resistance from the state Public Prosecutor's Office, not of the Federal, right? The Federal, in 1993 already... in our, in our annual meeting, in the letter that comes out of this annual meeting, it's already stated there that it would be recommended to have an external control of the Public Prosecutor's Office and so on... All this in 93, right? So... but the Public Prosecutor's Office, the state Public Prosecutor's Office, they really refused at first, because um... I think that this was also an order given by the Council, in this first management, which was created out of the blue regarding its administrative and financial control. So, the general-prosecutors were used to doing and undoing, to ordering and disordering, without anyone seeing this, right? So, from the moment that a National Council comes and revokes an administrative act, or suspends a competition... or suspends a promotion because it was done without criteria... these acts that nobody would dare challenge before, not even internally, right? So there was a lot of resistance from the state Public Prosecutor's Office, but afterwards this resistance was overcome because they saw that they... we struggled for this too, because yes, we had a role in it, of administrative and financial control and so on. But we also had a strategic planning role, the role of being a big ally to the Public Ministries, right?”. (Interview with Janice Ascari, federal public prosecutor and ex-counselor of the National Council of the Public Prosecutor's Office.)

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