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National Council of Justice and the one test: Democratizing the Brazilian Judiciary

Conselho Nacional de Justiça e o teste sobre os testes: Democratizar o Judiciário Brasileiro

Consejo Nacional de Justicia y la prueba sobre las pruebas: Democratizar el Poder Judicial Brasileño

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Abstract

This article evaluates the potential impacts of the reforms introduced by the National Council of Justice on the composition of the judiciary. By examining the proposal for a unified judicial exam, it explores how this reform could alter the composition of Brazil's judicial elites by addressing two major obstacles to judicial democratization: the decentralization of justice administration and the methods of judge recruitment. To assess the centralization sought by the CNJ in contrast to the decentralization advocated by the courts of justice, the article primarily draws on Luciano Athayde's research on the judiciary as an archipelago. The second part of the article examines the two models used in Brazil for recruiting judges: public examinations and appointments. In discussing the public examination process, the article references the work of Daniela Passos. The debate over the exam is divided into two parts. The first part examines the content of the exam and the skills it prioritizes for the judiciary. It also proposes suggestions for the content of a unified exam. The second part analyzes the socioeconomic profile of judges recruited through public examinations. This is followed by an investigation into the appointment system, also examining the socioeconomic profile of appointed judges, in order to assess the effectiveness of appointments as a tool for democratizing the judiciary.

Keywords: diversity in the judiciary; National Council of Justice; judicial recruitment; national judiciary exam; appointment.

Resumo

Este artigo avalia os potenciais impactos das reformas introduzidas pelo Conselho Nacional de Justiça na composição do Judiciário. Ao examinar a proposta de um exame unificado para a ma-gistratura, explora como essa reforma pode alterar a composição das elites judiciais do Brasil, abordando dois grandes obstáculos à democratização do Judiciário: a descentralização da admi-nistração da justiça e os métodos de recrutamento de juízes. Para avaliar a centralização pretendi-da pelo CNJ em contraste com a descentralização defendida pelos tribunais de justiça, o artigo baseia-se principalmente na pesquisa de Luciano Athayde sobre o Judiciário como um arquipéla-go. A segunda parte do artigo examina os dois modelos usados no Brasil para o recrutamento de juízes: concursos públicos e nomeações. Ao discutir o processo de concurso público, o artigo faz referência ao trabalho de Daniela Passos. O debate sobre o exame é dividido em duas partes. A primeira parte examina o conteúdo do exame e as competências que ele prioriza para a judicatura. Também propõe sugestões para o conteúdo de um exame unificado. A segunda parte analisa o perfil socioeconômico dos juízes recrutados por meio de concursos públicos. Segue-se uma inves-tigação sobre o sistema de nomeações, também examinando o perfil socioeconômico dos juízes nomeados, a fim de avaliar a eficácia das nomeações como ferramenta de democratização do Judiciário.

Palavras-chave: *diversidade no Judiciário; Conselho Nacional de Justiça; recrutamento de juízes; exame nacional da magistratura; nomeação.*

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Resumen

Este artículo evalúa los posibles impactos de las reformas introducidas por el Consejo Nacional de Justicia en la composición del poder judicial. Al examinar la propuesta de un examen unifica-do para la magistratura, explora cómo esta reforma podría alterar la composición de las élites ju-diciales de Brasil, abordando dos grandes obstáculos para la democratización del poder judicial: la descentralización de la administración de la justicia y los métodos de reclutamiento de jueces. Para evaluar la centralización buscada por el CNJ en contraste con la descentralización defendida por los tribunales de justicia, el artículo se basa principalmente en la investigación de Luciano Athayde sobre el poder judicial como un archipiélago. La segunda parte del artículo examina los dos modelos utilizados en Brasil para reclutar jueces: concursos públicos y nombramientos. Al discutir el proceso de concurso público, el artículo hace referencia al trabajo de Daniela Passos. El debate sobre el examen se divide en dos partes. La primera parte examina el contenido del exa-men y las competencias que prioriza para la judicatura. También propone sugerencias para el con-tenido de un examen unificado. La segunda parte analiza el perfil socioeconómico de los jueces reclutados a través de concursos públicos. A esto le sigue una investigación sobre el sistema de nombramientos, examinando también el perfil socioeconómico de los jueces nombrados, con el fin de evaluar la efectividad de los nombramientos como herramienta de democratización del poder judicial.

Palavras-chave: *diversidad en el poder judicial; Consejo Nacional de Justicia; reclutamiento judicial; examen nacional de la magistratura; nombramientos.*

1 Introduction

On October 17, 2013, the Brazilian National Council of Justice (CNJ) published the regulatory ordinance number 301 that establishes a working group to prepare a proposal for a unified national standardized test in public contests for entry into the Judiciary (Brasil, 2023). The test will be a prerequisite for candidates to take public exams to become judges. States and regional courts will still have autonomy in the organization of their selection, but the registration will depend on prior approval in the national exam this working group is going to design. The initiative, although in line with the goal of creating a more unified system of justice, became an object of inquiry, like the one made by Chiara Ramos, president of the non-governmental organization *Equidade Racial Abayomi Juristas Negras*, who questions whether this measure would impact the participation of vulnerable candidates. According to her, the new phase could add to "the costs of registration, travel to take tests and all the factors that make it difficult for the black and indigenous population to access these judicial positions". She further points out that, the 20% slot for black people has already not been filled due to the factors mentioned above. In response to this preoccupation, the president of CNJ, Luis Roberto Barroso, said that there will be an offer of a two-year scholarship for black people who want to study to become judges as a policy to increase racial equality in the judiciary[1].

In the same direction, Barroso announces the effort to implement the gender parity policy put in place in the previous administration. A few months before, under the presidency of Rosa Weber, the body of control approved the Normative Act 0005605-48.2023.2.00.0000 that instituted affirmative actions in merit-based promotion to the court's selection. The proposal provides two lists to be used in alternation as the seats for merit criterion in the appealing courts open up: one list would be mixed, with men and women, and the other just for women. The idea is that the affirmative action will remain in force until the number of female judges increases from 23% to at least 40% (Brasil, 2023). The decision divided opinions in professional bodies. The Brazilian Federal Judges Association (BFJA), for example, ran a survey among its associates to find out what they think about the theme, which provoked the indignation of its female members. They alleged the consultation was the chauvinistic expression of a male majority[2].

The two measures above, although different in their content, share a potential common result: the transformation of the demographics of the Brazilian judiciary. This effect, obvious in the measure on gender parity, also occurs in the proposal for a unified exam, although in a more subtle way. This is because the administrative design of Brazilian justice, especially state justice, tends to privilege certain groups to the detriment of others, these are the "structuring structures" about which Pierre Bourdieu discusses. This article, therefore, proposes to debate these structures, exposing their functioning and the groups they privilege, and then suggesting possible interventions on them.

To this end, it uses bibliographic methodology. The theoretical model, resorts to Pierre Bourdieu's theory of social fields. As for the objects of analysis, it focuses on the two items that constitute the fundamental problem of the

[1] https://www1.folha.uol.com.br/poder/2023/10/barroso-cria-exame-nacional-como-pre-requisito-para-juiz-se-inscrever-em-concursos.shtml

[2] https://www.metropoles.com/colunas/guilherme-amado/associacao-pressiona-juizas-que-assinaram-carta-criticando-machismo

two novelties to be implemented by the national justice council: 1) the model of administration of state justices, which is related to the single exam and 2) The methods of recruitment of judges that relate to parity and diversity policies.

The paper begins by addressing the issue of justice administration. The CNJ, which continues to work on consolidating its role—as Gustavo Feitosa highlighted in 2007—views the decentralization of the administration of the courts of justice as an obstacle to its consolidation and, consequently, to the implementation of its policies, particularly inclusion policies. According to Luciano Athayde (2019), this fragmentation of state justice is intentional and serves to protect the interests of state judicial elites.

It then proceeds to analyze the two methods of judicial recruitment used in Brazil: the selection *via* tests and the one *via* appointment. Regarding the recruitment through public contest, the research of Daniela Passos (2018) is used to analyze, firstly, the content of the tests and the type of competence it requires from candidates. In this regard it suggests, as well, possible contents to be explored in the unified national test to come. In sequence, it analyzes the socioeconomic profile of the judges recruited through this selection model in order to determine its effectiveness in the democratization of the judiciary.

Using this same methodology and with the same intention, in the last stage it analyzes the profile of the judges of the *constitutional fifth*[3] court. It thus subjects the promises of democratization that justify the fifth to the scrutiny of the scientific method given that "all science would be superfluous if the outward appearance and the essence of things directly coincided" (Marx, 1961, p.797). The aim of this article is to reveal the structure of social reproduction embedded in the models of justice administration and judicial recruitment. In doing so, it also seeks to propose solutions that align with the transformative potential of these reforms. The discussion surrounding the unified exam, more than just evaluating candidates, tests the CNJ's ability to guide the Brazilian judiciary toward a more democratic configuration.

2 Connecting the archipelago: CNJ and the unification of the judiciary

A social field is a structured symbolic space of social relations. Therefore, individuals and their behaviors define the very group they belong to. On the other hand, these relations are structured, which implies that they are highly regulated by general laws (Bourdieu, 2002, p. 113). These laws that Bourdieu calls *nomos*, manifest themselves as structuring and structured structures, rules that at the same time characterize the field and define the dispute within it. The contenders, dominating and dominated, fight over the *ilusio*, prize that is at the same time, object that attributes value to the field, and agency to change it. Now, what the dominating and dominated want is the power over the rules of the field, and this power over the rules of the field has no other purpose but perpetuating the power over the rules of the field. In short, the dominating will always fight back any threat to their position of dominance.

This brief articulation of the theory of social fields explains the resistance to the CNJ initiative in unifying the judiciary. Taking away the autonomy of regional and state courts means the dissolution of long-established social fields and the interests of their elites. Thus, the fractioning of the judicial power is deliberate. This is what Luciano Athayde's doctorate thesis affirms, resonating the sociology of Bourdieu. Throughout more than five hundred pages, he explores the resistance to the promulgation of a National Statute of the Judiciary, and a plausible reason for that points to courts unwillingness to give up autonomy, which ends up turning Brazilian Courts of Justice into an archipelago, islands of power with no communication (Renault, 2005, p. 129).

The Brazilian Federal Constitution of 1988 in its art. 93 expressly indicates the need to create a new statute for the judiciary. This is because the diploma that governs the class is still the one established by Complementary Law nº 35 of March 14, 1979, the National Judicature Statute (NJS). This, however, does not match the expectations of control of public power existing in the new order. The NJS covers the most diverse aspects of judicial activity (recruitment, guarantees, rights, advantages, disciplines, etc.) without, however, disciplining them precisely. Such vagueness hinders accountability and pushes away the interference of other bodies, leaving a wide margin of autonomy to the courts, especially the courts of justice, in the states, to conform the judiciary to a local profile.

There is no doubt judication cannot be properly performed without autonomy; nevertheless, at its limits, the practice of this institutional guarantee produces an opaque judiciary, hermetic and not subject to external control. This inclination for unharnessed exercise, distinctive of power in any regime, manifests in democracy in a more subtle way: corporative control over the organs of control. Cappelleti points out this tendency in Italy, in the past (1989, p.

[3] This is how the Brazilian appointment is known for 1/5 of the appealing courts in Brazil are composed by appointed judges.

10). Going in another direction, experiences like in Germany, where the career is controlled by the Constitutional Court, or in Portugal, where judges are submitted to an elected Superior Council with external members, exposes the necessity of external control (Lopes, 2002, p. 78-79).

In Brazil, the corporative tendency of which Chaves talks about, is remissive to the time of Colony, and as Caldeira alludes, is intertwined with the creation of national political institutions and the State itself, as he comments when talking about the Manuelinas' Ordinances (2017, p. 39). As for the empire, the maintenance of the continental-sized state inherited by the political and judicial elites in the transition from colony to empire are due to a model of decentralized governance as Victor Nunes Leal points out (1997, p. 84).

The municipal government was the base of national integrity in the XIX century. Exploring possible justifications for the size of Brazil post colony – in comparison to the fragmentation of Spanish colonies – José Murilo de Carvalho dismisses the individual performance, at that time, of the political and judicial elite members to find in the cohesion of this group, the reason of their success (Carvalho, 2003, p. 20). In great part, this cohesion is due to the common education received in the University of Coimbra, which is different from the educational multiplicity of Spanish colonies. But this is not the primary concern, now. What matters here is that this model of education created public elites unified in purpose and methods which prevented the vast Brazilian territory from being fragmented (Carvalho, 2019, p. 37).

But a vast territory demands a vast apparatus of administration. Hence, although blessed with an elite working in unison, the state didn't have that physical structure able to make itself present – in the forceful terms proposed by Weber – in every fraction of its own land. That being so, it was necessary to delegate power to local elites. Not that the empire gladly did that. The isolation, especially evident in rural areas, relegates to local merchants, priests and mostly farmers, power over social life so that there was not much option for the state other than to come to terms with parochial control. This mediate form of presence – that, as Victor Nunes Leal mentions, was accepted with resignation rather than pleasure (Leal, 1997, p. 86) – reveals, rather than power, the weakness of the empire.

This relation molded the performance of local judges and in a big scope, the organization of the Judiciary. At these times judicature consisted in accommodating federal determinations to municipal interests[4]. In this case, the selection of judges was determined by both local and national forces. On the one hand, a judge should capitalize the ideal of technical formation expected by the state in its broad view of national interest, on the other hand, they should be able to comprehend and not hinder the idiosyncrasies of local authority, which in practice meant being selected by local authorities in their local keep by highly personal criteria (Koerner, 1998, p. 35). This historical constitution created a cleavage between federal and local governments that subsisted in the judiciary in the form of administrative independence of state courts. This autonomy throughout the XX century, and even after the promulgation of the National Statute of Judication, in 1979, remained unchecked, as its vague terms left the governance of the provincial judiciary to the discretion of the local elites.

The 1988 Constitution did not bring in such institutions of control either. However, the Constitutional Amendment of 45 of December 30th, 2004, created the CNJ whose main intent was to interfere in the judicial "closed circuit" of which Chaves talks about (2018, p. 77). But there is still a long way for the CNJ to go. Not disregarding the merits of its creation, the organ of control still hasn't established its own domain. Many of its competences still run in concomitance with the attributions of regional courts. There are measures being taken to correct that, though. The Resolution number 70, March 18th, 2009, for example, has articulated objectives and strategies such as: "a) coordination of strategic planning and management of the Judiciary" (CNJ, 2009, *online*). The declaration presents an incipient intention of unification that takes shape in 2014 through The Resolution 198, July 1st, 2014, where a new strategy of governance is established, based on a "net participation" constituted by participants of all justice segments.

But the changes the CNJ proposes go beyond court governance. The Resolution 203, June 23rd, 2015, provides 20% (twenty percent) of the reservations for black people out of the vacancies offered in public examinations for filling permanent positions and entry into the judiciary. This ordinance, deployed under the administration of Ricardo Lewandoski, moves from interfering in the business of judicial elites, to transform the composition of the cadre itself. This vein of policy has the same nature of those mentioned in the introduction, which is institutional interference aiming to transform the demographics of the judiciary. In both cases, the intervention is expected to produce results over the career in both first and second instances. The next section intends to comprehend why,

[4] According to Koerner, this equation is primarily responsible for the prolonged duration of slavery in Brazil. The judicial mediation allowed the national and international pressure to be dissipated. He comments on the case of a local judge who started looking into the legality of the slavery of a certain man and for that received an advertence of the minister of justice himself who said that in that investigation the law was being applied with "rigor contrário à utilidade pública e pensamento do governo"(Koerner, 1999, p. 47).

despite the recommendations of leaving selection in the hands of pure meritocracy, institutional interference is the only way to promote equity in courts in a reasonable time. Prior to that, though, it evaluates whether or not this meritocratic selection system is able to recruit the judge democracy needs.

3 First grade judge: who he is and what he is good at

Bourdieu defines rationality as “la formê supreme de la violence symbolic” (p. 90). To the extent that it justifies, with the claim of irrefutability, relations of power, a rational communication articulates in a logical frame, reasons to conform the dominated and dominating in their respective positions. Not withstanding the appearance, though, these reasons are not rational, they are only “parées de raison” (p. 90). In this case, fighting back these ideas requires mobilizing more resources and technical justifications to take from the dominating argument the character of universality. Now, universality is rationality’s claim, something generally undeniable will also be irresistible in particular cases.

Such is the claim of merit in opposition to racial quotas in the judiciary. Élise Tenret defines meritocracy as “principe qu’une société juste est une société qui octroie à chacun la place qu’il mérite, enfonction de ses efforts et de ses talents, plutôt qu’une place abusivement héritée.”(2011, p. 191). In short, meritocracy is a form of justice that rewards the individual upon his talents. In the specific case of the exams to join the judiciary, marks in the exam pose as an objective criterion to determine who is the best candidate. Being the best, however, is relative. Best in relation to what? And are the chosen criteria ideal to select the kind of judge Brazilian democracy needs? The work of Daniela Veloso Souza Passos responds to these questions.

3.1 The content of the judge public contest

Passos’ basic premise is that the examination assesses normative knowledge. There is occasional deliberation on complex issues such as agrarian reform and human rights, etc., but essentially what is required of the candidate is strict legal knowledge. This demand reinforces skills such as memorization capacity rather than interpretative and critical thinking. This ability, as explored by pedagogical theories, reinforces the candidate’s ability to reproduce content, but does not guarantee the use of this knowledge to solve real problems which are rarely presented like in the manuals and otherwise require the ability to deliberate creatively. Interpretation with criticality (Passos, 2018).

This choice obeys a pragmatic order. Prioritizing memorization skills allows an objective measurement of knowledge, which in turn enables a faster and cheaper selection process. The author explores, by way of comparison, Portugal’s selection process. This includes, in addition to an objective evaluation process, an internship (Passoss, 2018, p. 156). The training cycle for magistrates promoted by the Judicial Studies Center – CEJ lasts an average of 18 months and trains new judges in theoretical and practical dimensions in various skills[5] (p. 166).

The second phase of the training requires effective know-how. There, justice auditors (a title held by aspirants) already in the courts, perform practical functions, although under the supervision of a training magistrate. This phase also includes short-term internships in non-judicial entities and institutions, but essential to their service. The classification of the first and second cycles correspond to 40% and 60% of the classification weight. Once this stage is complete, justice auditors are admitted as judges or deputy prosecutors on a probationary basis for 12 months, extendable for another six months. At this stage, the judge is subjected to a workload that increases in volume and complexity. Once the stage is complete, if considered suitable, the judge will be placed on a permanent basis, or temporarily as an assistant, in the absence of vacancies. The total training time is three years (Passos, 2018, p.171).

The CEJ is an essential tool in the training of Portuguese magistrates. In research coordinated by Boaventura Sousa Santos, the Portuguese Justice Observatory analyzed the entire training process conducted by the center. He concluded, regarding the evidence phase in the first stage, that the process favors reproduction to the detriment of reflected application. The result contrasts with the opinion of judges who, in general, think the competition is too broad and should focus more on the practice of training. This opinion, according to Boaventura – despite being the opposite of the broad humanity that is required of someone who occupies the position of magistrate – “é reflexo

[5] Legal culture and general culture; capacity for consideration and decision-making, according to the law and rules of common experience; ability to carry out with rigor, balance, intellectual honesty and efficiency the different activities inherent to the functions of a judge, such as conducting investigations, evaluating evidence, justifying decisions, respecting substantive and procedural rules, respecting the rules of professional ethics; research and work organization capacity; human relationship, expressed in the ability to interact appropriately with the different procedural actors, in accordance with the rules of urbanity; attendance and punctuality (Passos, 2018, p. 168).

da forma sectarizada com a realidade social é ministrada no CEJ" (2011). This reading, coming from a sociologist, shows the difficulties of law in breaking with its hermetic structure, despite efforts. It should not be forgotten that one of the major concerns raised when the CEJ was created was the critical training of magistrates.

The school, launched at the peak of influence of the productivism model at the end of the 1970s, almost leaned towards a pedagogical direction of "knowing how to do"; however, the consideration prevailed about the inconvenience of technical knowledge disconnected from intellectual and critical understanding (Rodrigues, 2007, p. 47). Therefore, at the heart of the creation of the CEJ there is a concern to train a judge not to be tied to dogmas but to the capability of understanding social changes in order to apply the law for the benefit of civil society, as Rodrigues Cunha well defines: "O centro de Estudos Judiciários não deveria ser um espaço ideológico. Mas podia ser tudo, menos um espaço sem ideologia" (2007, p. 52).

In Brazil, there is nothing like the CEJ nor a deep and thorough selection process like in Portugal. There the selection is reduced. Vianna observes that the public contest is a short space of time that separates the law student from the judge invested with authority (1997, p. 11). Not that the selection is easy, there is no doubt about its rigor. The test has long proven effective in selecting the most capable, and the number of competitors itself effectively operates as a selection. In the survey carried out in competitions from 2016 to 2017, an average range of 4,000 to 7,000 candidates was found for a variable average of 15 to 20 vacancies. There is no doubt, therefore, that those few selected are the best among a range of 4,000 to 7,000 options, the question is: best at what? The way the test is elaborated, as Fontainha states, stresses selecting the most capable without specifying in what (2014, p. 14). But it is very unlikely that a selection method as punctual as public contests, in fact, is capable of measuring the sophisticated mix of skills required of the individual to hold a position as a judge.

A public contest for magistrate lasts an average of 18 months. The design of the tests aims to conduct a quick and safe event, with no room for appeal or any occurrence that could delay its conclusion. Given the complexity of the event, which involves thousands of competitors, the organizing committee – made up of judges elected for that specific purpose – can outsource the preparation of the first phase of the selection process to one of the many companies specialized in public contests. In the initial phase, the test consists of multiple-choice questions. There is no guideline regarding the subjects covered, but the Resolution No. 75 of the CNJ establishes the hierarchy of areas as it stipulates the minimum content to be required. The same resolution determines that objective questions reflect the understanding of the higher courts, leaving no room for interpretative variations. Passos identifies in this criterion the structuring elements of the *habitus* of the legal field (2018, p. 166).

Structuring the tests around normative knowledge – which corresponds to 98.9% of the questions in state justice and 99.8% in federal justice – supported by the understanding of the courts, shapes the candidates for the ruling hierarchy in the judiciary (2018, p. 211). This structure conveys Bourdieu's lessons about structuring in the field. The applicant accesses the game by his consent to the rules. Such rules refer to an orthodoxy which, in turn, refer to the conservative strategies of the dominant (1998, p. 31). Public contest could privilege, for example, social knowledge, which is as useful to the magistrate's activity as formal norms, as Portugal's experience shows. However, subjecting candidates to something like this would do nothing other than introduce them to knowledge of a critical nature that does nothing for the conservation of the field. Such a measure would give rise to the subversive impulse of those approved, since as Bourdieu states: "tandis que les moins pourvus de capital (qui sont aussi souvent les nouveaux venus, donc, la plupart du temps, les plus jeunes) sont enclins aux stratégies de subversion -celles de l'hérésie (2002, p. 115)". Now, heresy, heterodoxy, states Bourdieu, is a critical rupture with the values of the field. So, in the structuring of the field, there is no point in privileging critical knowledge to the detriment of doctrinal knowledge. Passos notes that this pedagogical structure comes from college, so that it is very unlikely to imagine a judge entering the judiciary without prior immersion in the process of years of dedication to uncritical education (2018 p. 210).

It is important to highlight that this technical profile is not restricted to the first phase of the objective test, it is also found in the dissertating writing and oral stages. In the dissertating phase – where it would hypothetically provide a better opportunity to evaluate critical reading, argumentation capacity, as well as resolution of problems – Passos identifies memorization as the main virtue required to succeed (2018, p. 213)[6]. The oral exams also follow the same pattern. Its format, like the previews phase, is in line with a methodology more committed to ensuring the

[6] A complementary analysis of the research results can be found in the article written by Feitosa and Passos (2017).

progress of the event without hitches, such as appeals and cancellations, to the detriment of a broad evaluation and with a certain measure of subjectivity, for example, the “le grand o” (the great oral), from the French model, explored by Fontainha (2015).

3.2 The social profile of a Brazilian first grade judge

Moreover, the nature of the knowledge evaluated is not the only thing measured in Daniele’s work. In addition to the test, her investigation also focuses on the social profile of the judge selected by this process. This seeks to answer the question about the usefulness of public contest as an instrument of social mobility. In general terms, it is noted that although the majority of vacancies still belong to more traditional families (2018, p. 219), public examinations in fact provide some sort of social ascension opportunity.

This transformation had already been observed in research carried out by Werneck Vianna back in 1997. There, Vianna identifies the institution of the public contests as resulting from two other social transformations in the legal field: bureaucratization and the proliferation of higher education institutions. Bureaucratization, a phenomenon pointed out by Max Weber as the process of professionalization and specialization of the state, resulted in the strengthening of law and its infiltration throughout the state apparatus (1978, p. 956). The increase in demand, in turn, leads to the expansion of higher education institutions in Brazil, thus breaking the monopoly of education, a resource that the dominant players in the field had to reproduce themselves in power (Vianna, 1997).

Access to education has always been an important instrument of power. In the debate aforementioned, about the formation of post colonial America, José Murilo de Carvalho, in the search for explanations about the disintegration of the Spanish colonies, supports the hypothesis that refers to the decentralization of education, in contrast to the Portuguese centralization in Coimbra, as a strong candidate (2019, p. 13). The fragmentation of education in the Hispanic America bore distinct centers of ideological formation and, therefore, distinct political and judicial elites. The multiplicity of Educational Centers has a big potential to diversify elites, as the rising of the two first law schools in Brazil also reinforces (2019, p. 59). By the same line of reasoning, it is demonstrated how the multiplication of educational institutions makes it possible, for different social classes, to gain access to the judiciary. The public contest, isolated from this factor, would only represent the reproduction of previously established standards, where elite access was the norm. Even because, as Vianna stresses, the contest itself exists as a “brief hiatus” between the faculty and the judicature (1997, p. 11).

However, this power of mobility promoted by the public contest is still limited. Although the multiplication of private universities has made access possible for the middle class, the cultural capital that guarantees access to the judiciary still remains inaccessible for marginalized groups. The average age of successful candidates ranges between 41 and 50 years old. As for gender, there is a 63% majority of men, but the research shows the continuation of the trend of feminization of judication, observed since Vianna’s research in 1997. As for the social origin of magistrates, only 7.67% of these come from families whose parents are members of the judiciary, which indicates the efficiency of the public examination in interrupting social reproduction. However, 25.21% come from families whose parents are part of the public sector, which shows the continuity of a tendency introduced with the incipient notion of merit by the Portuguese crown, back in colonial times. This reasoning is reinforced by the fact that 33% of judges have parents with higher education (Passos, 2018, p. 225).

This data on the origin and education of parents and their influence on their children’s success can be interpreted in different ways, from the impact on cultural capital (access to the library, theater, music, travel, educational institutions, etc.) necessary to enter the legal field, up to the financing of the preparation period. In this regard, the average preparation time is just over six years (Passos, 2018, p. 234) of study with an average daily time of more than five hours for more than 60% of interviewees (p. 237). It is easy to imagine the financial impact (among others) of such dedication, it is not hard either to visualize how it poses a non-transponible barrier for many others. For that reason, the average income of magistrates, during the preparation period, is higher than the national average. The data collected makes it possible to relate this stability to parental help. For, although the majority of 81.64% of judges claim to have worked while studying for the exam, 40.3% of them admit to having received financial help from family members during the period (Passos, 2018, p. 238). Studying is costly; hence, the economic aspect should not be forgotten as a cutting factor for applicants. It is hard to afford the long period of preparation. Economic status has always been a condition of access to legal education.

At the time of Coimbra, it was necessary for the family to bear the costs of sending and supporting its child in the city. The situation was attenuated, but not resolved with the creation of the universities of Recife and São Paulo. These demanded a high enrollment fee, which, combined with maintenance expenses and study materials, gave legal education a noble character (Carvalho, 2019, p. 75). This financing challenge still exists, however, transferred to a different moment. From pre to post graduation. Although, the obstacle remains similar, even in aspects such as the paying preparatory courses, as José Murilo de Carvalho describes. From Daniele's sample, 64.51% of magistrates took a course to prepare for the public contest (2018, p. 239).

The cancellation of economic necessity authorizes the emergence of a new field (Bourdieu, 1997, p. 26). It is being released from financial obligations that allows magistrates to emerge as a group, at least the 40.3% who admitted receiving help. But presumably, also the almost 63% who needed more than five hours of study per day. Leisure (in the sense of time not consumed by work) is the basis for the constitution of symbolic capital. The time allocated to the struggle for survival absorbs the possibility of dedicating oneself to the accumulation of symbolic goods. The other side of this coin is the observation that school and education, in Bourdieu's terms, are always the denial of pressing needs, such as work.

In this sense, there is a relationship of proportionality between the extension of the school experience – as a denial of the urgency of salaried work – and aristocratism: "Cette difference socialement garatie, ratifiée, authentifiée par le titre scolaire valant comme titre (bureacratique) de noblaise [...]" (Bourdieu, 1997, p. 36). Naturally, nobility, for the purposes of this research, is wider and includes even the middle class, given the socioeconomic status that provides their children the possibility of dedicating themselves to studies without the inconvenient intervention of surviving. It is pertinent to note the subtlety of this advantage can often not even be understood as such or confused as something else. Bourdieu observes that the social conditions that enable access are commonly taken – especially by those who were born immersed in this environment – "de l´élection naturelle par le don" (p.36).

Regarding the judge's academic trajectory, there is a pattern of affluence. In high school, 66.48% of judges studied at a private school (Passos, 2018, p. 228). In higher education this situation is reversed, 53.5% of judges are public university bachelors. It is pertinent to note the proximity to Vianna's figures, 54.9% in the period from 1991 to 1995, which shows that the growth trend, proportional to the increase in private institutions, predicted by the author, was not confirmed (1997). The main institutions bearing judges are still the most traditional in capitals (p. 229). This pattern, therefore, exposes how the judicature is still captive of a determined social standard and in a broader sense, of a social class. The structure of the test, organized around learning by heart techniques, favors those who, by having time and resources, can accumulate enough material in their memory. So, there is still a structure within the institutionality of public contests that benefits the reproduction of power, albeit with a better veneer of exemption. The apparent meritocracy of these public contests for judicature can be only taken as fair when seen from the surface, inside it is a system still impeditive for candidates coming from lower classes, and therefore a more sophisticated form of symbolic violence (Passos, 2018).

Notwithstanding the reserves, though, Daniele concludes that recruiting judges by public contest is still the best way. Despite mostly benefiting old elites with the disguise of neutrality, the objective criterion paves a way for minorities that, yet narrow, is better than it would be if the selection were under the absolute will of the judicial establishment. Furthermore, initiatives, like CNJ's Resolution 203/2015 that reserves 20% of positions for black people, reroute the system in the direction of democracy. To reinforce the positive prognostic, the next section will analyze what a selection made by unharnessed judicial elites looks like. Analyzing the data acquired in the research about the demographics of the constitutional fifth in the state courts makes it possible to comprehend how elites operate and what they want.

4 Constitutional fifth: A guideline on how to preserve judicial elites

The research investigated judge recruitment by appointment in Brazil. The aim was to comprehend how the official criteria of article 94 of the Federal Constitution of 1988 works. More specifically, the "notorious legal knowledge" criterion, whose meaning is the object of dispute of various social fields. Law school defines academic knowledge as the criterion of article 94; judges, on the other hand contest this interpretation emphasizing practical knowledge; lawyers in their turn claim that knowledge about the judicature is not enough, experience on both sides of the "service desk" is necessary, an opinion that is also shared by the class of prosecutors.

Each social group interprets the constitutional command in accordance with their own corporative interest. It is the dispute for the symbolic power of which Bourdieu talks about. The problem, though, is that the constitutional fifth is a process in three steps involving distinct social groups with their distinct interest. The Lawyers' Bar Association selects six names, the appealing courts pick three of the names and send them to the chief of the executive who chooses the new judge. Therefore, comprehending this system of recruitment requires mapping the interaction of these three groups on an institutional level.

An alternative option is comprehending the system by the results it produces. This latter was the focus of this research, which attempted to compose a picture of the profile of the constitutional fifth judge based on the resumés found on the internet of the state justice across the country. At the end of this process, information was collected from the websites of 19 (nineteen) courts of justice from all regions of Brazil and a total of 217 (two hundred and seventeen) judges from which the general profile was drawn up. Regarding grouping, the data was divided in the following order: social origin, academic training and democratization of access.

4.1 Social Profile

The average age of the appointed judges is 62 years old. Of the total analyzed, 63.5% are over 61 years old. Adding this value to the 31.2% in the immediate lower range, there is a total of 94.7% appointed judges over the age of 51. They are, therefore, experienced persons. The average age at the time of entry is 50 years old. There is a slight ascendancy among members of the Lawyer's Bar Association (OAB), 50.2%, against 49.8% in the Prosecutors Association (MP). Regarding age groups, it is observed that 90.3% joined after the age of 40, which suggests that the majority, when entering, had more than ten years of professional experience.

As for the place of birth, 86% of judges come from the state where they hold the position. This indicates that all the social capital of this group was built with resources provided by the federative unit itself. This makes sense under the spectrum of state justice as an island, as identified in Chaves' thesis, already cited here (2019). The people the candidate must know and the institutions they must occupy are, as a rule, in the respective federative entity where the selection begins and ends. For this relational reason, it is not important to classify the state as the limit of the field, a reason that justifies the importance for the candidate being a son of the land.

Cities of origin was also investigated but it has shown not to be too relevant, for although cohorting is a necessity it can happen in a later, more crucial moment of life.

The appointed judges have an academic trajectory similar to career judges. The place of graduation has a centralizing force. It was shown to be above the possible intersections of socialization that state and city promote. It also suggests what kind of advantages geography can offer when applying for the constitutional fifth. A life built in the capital increases the candidate's chances of having shared, at some point in his career, social spaces with his voter. But nothing compares with the integrative power of law school. The bonds that are created during this time can reverberate throughout life and be decisive later on. Imagine that among the six names sent by the OAB to the appealing court, one of the judges sees one of his colleagues from law school. It is very unlikely the personal aspect would not have weight in the decision, at least as a criterion to break a tie. Graduation experiences tend to generate a feeling of unity that ignores even social origins.

But, although it could happen in any university, one type is more efficient in producing this level of socialization. These experiences, on a regular basis, take place in public institutions, due to characteristics that, as a rule, they manifest. Therefore, the research only considers this distinction in training between public universities and private universities:

Table 1 - Higher education institutions where state justice judges from the fifth constitutional degree graduated.

University	MP	OAB	Total
Public	59	57	116
	56.7%	53.3%	55.0%
Private	45	50	95
	43.3%	46.7%	45.0%
TOTAL	104	107	211
	100.0%	100.0%	100.0%

As said before, ideological homogeneity and training were striking characteristics of the Portuguese political elite, creature and creator of the absolutist State. One of the policies of this elite was to reproduce in the colony another elite made in its image and likeness. The Brazilian elite, especially in the first half of the 19th century, received training in Coimbra focused on legal education, and became mostly public service staff, especially in the judiciary and in the army. This transposition of a leading group was perhaps more important than the transposition of the Portuguese Court itself and was a unique phenomenon in America (Carvalho, 2019, p. 37).

The cohesion of the Brazilian political elite was fundamental to the successful transition from colony to empire. This cohesion, in turn, is the result of Coimbra. Despite what authors like Oliveira Vianna preach, it was the coordination produced at the university – and not the elite's supposed innate vocation for statesmanship – that guaranteed national unity. University is an environment where young adults share the same difficulties of the transition from late adolescence to early adulthood. There, this group eager for instruction for professional life molds itself to a particular vision of the world composed not only of the influence of teachers, but also of their own colleagues, mutually. Around this mutuality, this group builds bonds that will be remembered throughout life (Marin, Stecanela, 2018).

These bonds are built out of necessity. The university presents common challenges to individuals who, realizing the efficiency of cooperation, come together to fulfill them (Delors, 2006). The university, therefore, equalizes students' experiences by imposing the same challenges on everyone, regardless of their social origin. These challenges present themselves in two dimensions, a technical one, related to the professionalization content and a social one, in addition to the subjects. The first dimension imposes a formal relationship between students and the second, an informal one (Endo, Harpel, 1982).

The conjunction of these two forms of interaction constitutes socialization at the university. However, this can occur in four degrees of depth: 1) Contraposition, where one individual rejects the other; 2) Coexistence, where individuals share the same environment without interacting; 3) Inclusion, where individuals accept each other to fulfill school requirements, but based on their own needs and 4) coexistence, where individuals accept and welcome each other in their differences, influencing and building up each other. This last dimension occurs, as a rule, in universities whose campuses offer social coexistence structures (Marin, Stecanela, 2018).

Cleveland-Ines and Emes state that a considerable part of the influence of higher education on students is due to socialization resources present in the physical space of their institution (2005). Through empirical research, the authors compare universities that in their space offer resources such as green areas, cafeterias, theaters and auditoriums for holding cultural and academic exchange events, etc. to universities whose spaces are strictly intended for formal education. Common characteristics of professional performance were noted among graduates of the first, as well as distinctive qualities in the job market. In contrast, the second group mostly does not present traces of homogeneity. The hypothesis for the characteristics of the first group refers to the intense coexistence provided by the campus.

Now, in general, in Brazil, public universities are the higher education institutions that offer these socialization resources. Their students, especially those on the day shift, live their formative years with their colleagues as their main group of friends, thus producing an intense group relationship. This same reasoning reinforces the thesis of the cohesion of Brazil's political and legal elite formed in Coimbra, especially in the period after independence, when students from the former colony began to be harassed by local students, further accentuating the process of ostracism of the Brazilian group and thus strengthening their ties (Boschi, 1991).

A similar movement was also observed at the University of São Paulo, during the empire. In his work "apprentices of power", Sérgio Adorno describes – beyond the school benches – the importance of the cultural environment of the law course in the formation of the state apparatus of the empire, as well as for the establishment and propagation of the liberal ideals that mark the institution (2019).

Universities are the place where *urbes* are formed. In addition to historical examples, there are several studies pointing out, in contemporary times, the relationship between place of higher education and composition of political elites in countries (Thelin, 2011; Adorno, 2019; Carvalho, 2019). It is worth highlighting here the study on the education of elites in England, carried out by the non-governmental organization, Social Mobility Commission. The study shows that 31% of the country's politicians come from the so-called "Oxbridge", an acronym to refer to the country's two largest universities, Oxford and Cambridge. The study also shows that 24% of members of parliament attended

Oxbridge, and 54% attended the "Russell Group University", an association of the twenty largest universities in the country. As for the House of Lords, 38% attended Oxbridge and 60% attended Russell Group University (2019).

This data has precise meaning in light of Pierre Bourdieu's sociology. The recognition of the university as a social field allows us to identify its influence on the formation of elites in two dimensions, one internal and one external. From the point of view of their internal dynamics, their *doxa*, it is possible to affirm that the so-called elite universities better prepare their students. It is important, however, to state in advance that the reason for this is not found in the formal infrastructure of these places. At least not to a large extent. The reasons for the better preparation of public university students lie not in the study material or in the teachers, but in social factors. These factors involve elements built in the past such as the academic record of students who secured for themselves a place in the most popular courses, but they also involve phenomena that occurred during the undergraduate course, such as the process of mutual stimulation produced in the collective experience. The hermitization produced by intense coexistence contributes to distinguishing one-year classmates from others and catalyzing their preparation around the object that brings them to live together, namely, professional aspirations. As Endo and Harpel highlight: "student-university interaction is important in influencing students' occupational decisions, increasing students' educational aspiration, encouraging students' persistence at an institution, and influencing intellectual/academic development, and personal/social development" (Endo; Harpel, 1982, p. 116).

However, the reasons for this group's success are not limited to preparation. Far from pure empowerment, elites mutually benefit from their emotional ties. The bonds made at university tend to reverberate throughout their professional career. As Schwartz states when referring to the generation of judges in the colony, their relation was more than institutional, there were personal bonds (1979, p. 234). We have already talked about the central role of Coimbra and its effect. But this planning was not just about professional training, it also homogenized personal experience. There was a feeling of fraternity among contemporaries that permeated other values such as social or geographic origin, and that made maintaining a strictly technical relationship between graduates difficult in the exercise of their professional activities. As Schwartz affirms the social distance between judges and lawyers was small (Schwartz, 1979, p. 234).

Now, if the ties blurred clear boundaries such as those between lawyer and judge, how much more determinant will they be in choices not bound by defined criterion such as the appointment in the constitutional fifth. As previously stated, elites recognize and help each other. But to the same extent that the influence of mutual recognition collectively promotes these individuals, it excludes those who are not part of it. Of course, as mentioned at the beginning of this section, the university allows, based on merit criteria, the grafting of people from a lower social class to the legal elites. However, this possibility operates more in theory than in practice.

Still related to education, the research analyzed post graduation studies, although not with the same scope of the last item. The analysis here seeks to find the relevance of academic training as a criterion for the appointment. Academic skill is the best candidate for the definition of "notorious knowledge". That is what suggests art. 66 of Law 9,394 of December 20, 1996, the Brazilian Education Guidelines and Bases Law. For the purposes of this research, specializations and MBAs were included in the list of *latu sensu*[7]. It was found that most judges do not have academic qualifications. There are a considerable number of graduates; 39.6% of judges did not need any degree other than a bachelor's. Furthermore, another 19.8% did so with only a specialization title, which means 59.4% of the appointed judges.

The data dethrones the academy's monopoly as the official criteria. However, disqualifying this interpretation forces the deliberation about the official criterion to consider other interpretations. It must be admitted that there has never been unanimity in professional circles regarding the supervenience of the academy. In fact, active lawyers have always shown some resistance to this interpretation that fails to consider praxis as a source of knowledge, the "other side of the forum counter" (Alochio, 2019, p. 15).

From a professional point of view, therefore, "notorious legal knowledge" is knowledge to act within the jurisdiction. But, besides all the relevance put on this experience, an activity that is not rigorously a legal practice has shown to be relevant: leadership positions; 53% of the prosecutors and 30% of the lawyers have occupied

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[7] Despite what the name MBA – Master business administration – suggests, this modality is still categorized as a latu sensu postgraduate degree, according to the information available on the Ministry of Education portal:http://portal.mec.gov.br/component/content/article?id=13072:qual-a-diferenca-entre-pos-graduacao-lato-sensu-e-stricto-sensu.

directive positions in their respective organizations. The numbers here suggest that the position in the top organs is the main criterion and the others are only accessories. The reason for this hypothesis concerns the fact that both the top positions and the constitutional fifth positions are political disputes within the body. Now, if the individual has the capillarity to be elected president of the section, nothing prevents him from using that same political capital to run for the appointment. Furthermore, even positions that do not involve a direct vote, such as vice-presidency, secretariat, etc., still demand political capillarity of their occupants, as Zaffaroni states "ya no será el presidente que nombre a sus amigos, sino que deberá permitir que también se nombre un amigo del presidente de la Corte, de un diputado o senador o del presidente de la organización de abogados." (1994, p. 13). The positions occupied are the portrait of certain symbolic capital.

Access to the judiciary by appointment, therefore, belongs to those dominant in their respective fields. It is the movement that Bourdieu calls homology. Dominating converse with dominating. The vacancy in the Court of Justice, the state's judicial elite, will be occupied, as a rule, by a member or former member of the OAB leadership, the elite of the legal profession. In both bodies, the MP or the OAB, the need for political capital to enter the court is evident.

4.2 Democratization of the access

Democratization here concerns the plural occupation of spaces of power. In the judicial archetype proposed by Zaffaroni, the arbitrariness of choosing political allies – a peculiar feature of the empirical-primitive design – is overcome by the objectivity of the techno-bureaucratic selection. However, once settled, this method revealed that it also had a corporatist predilection. The two models, therefore, have a partisan tendency when occupying the judiciary. In correcting this direction, the contemporary democratic archetype emerges. This, however, unlike the other two, is a guideline and not a proposal for a new structure "porque la dinámica histórica no se detiene y, por consiguiente, los judiciales seguirán modificando sus estructuras" (1994, p. 185). Thus, Zaffaroni does not define the contours of contemporary democracies, as he finds it "Es ilusorio –y hasta peligroso pensar en modelos perfectos de instituciones" (p. 185). It highlights, however, its need outlined only in the general oxygenation guideline – to use the recurring term in the subject – of institutions. What Boaventura de Sousa Santos calls "democratizing democracy", the process of converting formal democracy into material democracy (2003).

This process of democratization of the judiciary in Brazil consists of the inclusion of minority groups. This is because each country must search in its history which groups were left on the margins of the civilizing process. And, as Kevan Brandão concludes, when discussing the application of Boaventura's concept of democracy in the Brazilian reality, the conversion of this formal democracy into material requires dealing with several centuries of social exclusion (2012). Regarding the groups historically excluded from the civilizing process in Brazil, it was possible to measure the occupation rates, in the constitutional fifth, of two: gender and color. The elements analyzed below offer support to conclude, by inference, the conditions of access for low-income people, given that racism and sexism are often intertwined with poverty (Almeida, 2018, p. 160).

The first criterion analyzes occupation by gender. This problem, present in the whole world, also appears in Brazilian institutions. The table below presents the behavior of the fifth in the subject:

Table 2 – Appointed state court judges ranked by gender.

Gender	MP	OAB	Total
Male	88	91	179
	80.7%	84.3%	82.5%
Female	21	17	38
	19.3%	15.7%	17.5%
TOTAL	109	108	217
	100.0%	100.0%	100.0%

The judiciary is composed of mostly men. However, this difference is accentuated in the courts of justice where they are 79.5%, and even more among those judges originally selected by appointment. Male judges are 82.5% against 17.5% of female ones. This number corroborates the conclusion that the judiciary, as a profession, is part of a system that differentiates men from women (Filho, Moreira, Sciammarella, 2015).

In a further study, Feitosa, Almeida and Dias delve into the data about women, more specifically they compared the level of education of female judges. It was observed they are more qualified. Unlike the general average of judges derived from the OAB, most women in this class have *stricto sensu* academic qualifications: 52.9%. Among women, the largest number have a master's, with 29.4%. On the other hand, the general average of male judges coming from the OAB only have an undergraduate degree:a 32.4% (2021). This is very different evidence from the global analysis of the judges of the fifth, when it is observed that only 11.8% of women have an undergraduate degree as their highest qualification (CNJ, 2018).

Furthermore, the resistance to the appointment of women to the courts of justice is a portrait of a predilection for the male sex as stated by Maria da Glória Bonelli in her research on the meaning of gender in state and federal judiciary[8] (2011). The data supports Zaffaroni's observations about the absence of women in the judiciary:

> Una de las más lamentables discriminaciones es la de género. Si bien se ha abierto el camino de la mujer en cuanto a acceso a la magistratura, sigue concibiéndosela básicamente como una actividad masculina y poco se puede adaptar la mujer al estereotipo del "padre severo". De allí que la mujer jueza, dentro de estructuras no democráticas, deba asumir algunas actitudes inauténticas y hasta masculinas o quedar en posición subordinada (Zaffaroni, 1994, p. 190).

The reference above is illustrative. The naturalization of the stereotype of the judge as a strict father – and, therefore, a man and in a patriarchal structure – reinforces the idea of women's inadequacy in the judiciary. Except in a subordinate position, which refers to the recognition – on the part of the woman – of herself as an illegitimate occupant of a space essentially masculine. Or in these attitudes that the Argentinian author classifies as "inauthentic", referring to women emulating masculine behaviours to better fit. Of course, this idea of authenticity is related to the mental categories of what constitute masculine and feminine conducts which, despite naturalization stimuli, are social constructions (Bourdieu, 1998).

These behaviors, like all social constructions, have a gregarious purpose. More precisely, they obey the social interests of those dominant in the field, in this case, men. Therefore, it does not seem appropriate to classify as "inauthentic" the behavior of women who assume the "stern father" persona. The alignment here is with the behavior of the dominant people in the field, it just came in handy that they are men. Of course, "it came in handy", here, is a mere force of expression, the man's dominant position is in no way arbitrary, rather it is the result of social construction[9] (Bourdieu, 1998).

Furthermore, as the notion of *habitus* teaches, this alignment is not necessarily intentional, a nuance that adds an aggravating element to the discriminatory relationship. In effect, *habitus* presupposes a behavioral alignment between the learned and the natural, between the expressed rule and the unverbalized one. Seen in this way, the unconscious alignment of the judges of the fifth to a so-called masculine behavior, systematically repeated and without questioning as to its social origin, surreptitiously reinforces the idea that male ancestry in the judiciary is not mere prejudice, but arises from a natural order where demands in the judiciary find the best resources for their fulfillment in male nature: "La force Particulière de sociodicée masculine lui vient de ce qu'elle comule et condense deux operations: elle légitime une relation de dominatinos en l'inscrivant dans une nature biologique qui est elle-même une construiction sociale naturalisée" (1998, p. 29).

The gender relationship, in fact, highlights the process of domination in a didactic way. Therefore, for Bourdieu, male domination in the fields is "le example par excellence" of symbolic violence (1998, p. 7). The idea that men should occupy elite positions because it is inherent to their nature is a postulate that demonstrates impressive resilience even in the face of robust evidence that points to their social origin. This image of the judge as a stern father reinforces the naturalness of men occupying the judicial position. But as Bourdieu states, it is necessary to "briser la relation de familiarité trompeuse qui nous unit à notre propre tradition" (2002, p. 9). But the sexism was not the only relation of inequality analyzed, the research also explored Brazil's most particular kind of discrimination, by color.

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[8] "Nas entrevistas, as temáticas de gênero, diversidade e preconceito foram as que reuniram mais manifestações de opinião dos entrevistados: 85% deles negaram que o gênero fosse um fator que gerasse diferenças nas oportunidades de carreira na instituição, mas 75% identificaram que ele fazia diferença no exercício da judicatura" (Bonelli, 2011, p. 116).

[9] In the work "Women in law", Patrícia Tuma Martins Bertolin, shows that women, despite being the majority in law schools, as well as in law practice, are still found in smaller numbers in large companies and law firms. There are several social reasons to explain this phenomenon, such as the "happy hour". Women do not accompany their colleagues in recreational activities outside of the office and therefore miss out on a significant part of the socialization process, which is crucial for building the bonds of trust that law firms manage. (2017).

The racial issue is embedded in the Brazilian social dilemma. The centuries of overt exclusion made racial prejudice not only an individual issue, but an institutional one, what Silvio Luiz de Almeida calls structural racism: "uma forma sistemática de discriminação que tem a raça como fundamento, e que se manifesta por meio de práticas conscientes ou inconscientes que culminam em desvantagens ou privilégios, a depender ao grupo racial ao qual pertençam" (Almeida, 2018, p. 25). To the extent that it transcends intimate ethical and moral dimensions, racism must be faced with inclusionary policies. Thus, the research assesses the extent to which the fifth operates as a mechanism for correcting racial differences.

Table 3 - State court judges from the fifth by race

Race	MP	OAB	Total
White	102	104	206
	97.1%	97.2%	97.2%
Black	1	1	2
	0.95%	0.93%	0.94%
Brown	2	2	4
	1.9%	1.9%	1.9%
Indigenous	0	0	0
	0.0%	0.0%	0.0%
TOTAL	105	107	212
	100.0%	100.0%	100.0%

The numbers above do not favor the thesis that predicates the recruitment by appointment as an instrument for democratizing access to the judiciary. On the contrary. The lateral form of access to the top of the state judiciary accentuates disparities. The reason for this, however, does not refer to the presence of a special elite promotion device at the institute, in fact, what it lacks is inhibition mechanisms. The fifth is the only form of access that allows unrestricted entry to the judicial elites of the Lawyers and Prosecutors association, without the inconvenience of reserving places. The only one without an inclusion policy. There is no record of norms or guidelines to value racial quota policies as an object of deliberation at the time of choice. In contrast, for example, in the context of public examinations for the judiciary, Resolution No. 203 of June 23, 2015 of the National Council of Justice imposes the reservation of 20% of vacancies for black people.

Affirmative actions are instruments of democratization. Present in Brazil for almost 20 years, racial quotas, despite the controversies at the time they were introduced, have already proven to live up to the academic expectations of their enthusiasts, in contrast to the predictions of their critics[10]. In fact, a measure such as resolution no. 203 – as it demonstrates adherence to the thesis in a conservative field, such as law – points to the robustness of its efficiency. Therefore, there is no need to talk, in Brazil, about democratization efforts without the use of this tool. Putting aside the use of racial quotas means opening institutions up to the free movement of social reproductions. To this extent, therefore, the constitutional fifth presents itself as an instrument for perpetuating elitism in the judiciary and, as the sampling suggests, the most efficient among the forms of entrance into the judiciary. There is no doubt, as Daniella demonstrated in her research, that the judicial exams also privilege elites who have the symbolic capital necessary for competition. However, CNJ resolution 203 definitely interferes in this process, giving shades of social justice to the meritocratic logic.

Furthermore, there is impersonality in meritocracy, a value dear to democracy. Despite the limitations of the merit system, consistently repeated here, the presence within it of a selection method that is indifferent to ties, constitutes an important gain – which is why, by the way, it becomes possible to take advantage of the techno-bureaucratic structure to build a contemporary democratic judiciary –. It is interesting to note, however, that this gain is limited to access quotas. Once introduced into the judiciary, there is no path to higher spheres without a network of contacts. Now, the criteria for access to court seats, either for career judges or fifth judges, involve – as

[10] Several universities have already conducted studies to evaluate the performance of their quota students and identified, for example, similar academic performance between the two groups with localized cases of significant differences for the groups of quota students and non-quota students (Peixoto et al, 2016; Bezerra, Gurgel, 2012; Cardoso, 2008). In the same study conducted at UNB, a lower dropout rate was identified than among students from quotas.

evidenced by what has been discussed so far – a large measure of personalism[11]. Especially in the fifth, the pattern identified in this research has presented political capillarity as the major selection criterion, which suggests that the vacancies provided by the institute are the result of homologous exchanges between the elites of each of the bodies involved in the selection process.

Therefore, it is not important to identify the fifth as reinforcing discrimination in the judiciary. The institute of art. 94 of the CF, contrary to retaining, exacerbates the already glaring gender and color disparities in the judiciary, and confirms Zaffaroni's finding: "En América Latina, por lo general, contraste el color de piel de los magistrados con la composición de la población que se observa en la vía pública" (1994, p. 190).

5 Conclusion

The analysis shows that the present institutional design of Brazilian judiciary privileges traditional judicial elites. It must, therefore, be transformed. In that sense, the intervention of the National Justice Council would be useful to interfere in the reproduction of these traditional elites to construct a judiciary more in line with democratic demands.

This endeavour should be carried out on two fronts: dismantling regional bubbles of power and democratizing the access. As for the first, the establishment of accountability guidelines besieges the absolute liberality regional courts had in the past. Normative acts such as The Resolution number 70, March 18th, 2009, and The Resolution 198, July 1st, 2014, are good examples of this strategy. But it is in the centralization of administrative deliberations that resides the best strategy to deconstruct the long-established parochial mode of judicial administration. The Regulatory ordinance 301 plays that role. The Judiciary in Brazil is a conglomerate of small independent judiciaries. This phenomenon, that Chaves calls "the judiciary archipelagoes" defines an institutionality created by the necessity of the colony. The Portuguese Crown finds in unofficial power representation a solution for its difficulty to manage a vast territory. As the empire faces the same difficulty, the decentralized model persists and imposes on the national ruler the challenge of balancing the local elites' interests with a federal project. The current model of almost absolute independence of the state courts obeys this colonial logic, and like the colonial experience it has no purpose other than reserving power for the local judicial elites. Hence, the establishment of a unified national exam prior to the public contests for judges takes, from the hand of the local judicial elites, the power to decide who is allowed to be part of their cadre.

So, combined with affirmative actions such as those of the Resolution No. 203 of June 23, 2015 – that imposes the reservation of 20% of vacancies for black people – and the Normative Act 0005605-48.2023.2.00.0000 – that imposes alternation between men and women in the promotion of career judges in their respective appealing courts – the Ordinance 301 can contribute to build up a judiciary that better resembles Brazilian social diversity and therefore a more democratic institution. As the research about the Constitutional Fifth makes clear without mandatory reservation of quotas, elites tend to remain the same. Nothing justifies less than 1% of black judges appointed by the constitutional fifth in a black majority country. So, it is imperative the CNJ keep using its interventional power to promote the high ideals of social justice expected from the judiciary.

But there is a second dimension of democracy that could be achieved by Ordinance 301. This pre-test could be used to assess expertise in a field that, yet fundamental to the exercise of the judicature, has not been properly evaluated, namely, socio-legal knowledge. As Daniela's research stresses, the public contest for judges demands from the candidate memorization of legal texts. This ability suits an ideology that conceives judicature as an exercise of exegetic interpretation of a wholesome legislative product, and the judge as a neutral applicator. History, though, for the past two centuries, has done its job in discrediting such chimera. Judges are part of the normative process and as such they need to be able to respond critically to the complex challenges that social life imposes on the appropriate exercise of the judicial activity. If such abilities are necessary, they should be required from candidates.

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[11] Perhaps a little less in origin due to a career that has seniority among its promotion criteria, a sufficiently objective measure that perhaps justifies the slightly less disparate rate of career judges.

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