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## Changes in gender and race composition of the Brazilian Judiciary

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### Abstract

This article analyzes the impact of judicial policies aimed at promoting equity in judge's career on the race and gender composition of the Brazilian Judiciary. We investigate whether these policies impacted on the way in which judicial careers and internal promotions are gendered and racialized. The article uses quantitative data on the composition of the Brazilian judiciary by gender and race, and qualitative data obtained from various documentary sources, including the media and excerpts from interviews with judges published in academic works. The theoretical approach is the one of differences, conceiving them as constructed within the scope of culture. We conclude that despite the timid increase in the presence of Black women and men in the Brazilian judiciary, racial and gender issues have been made visible and disputed, with political movements seeking to implement these agendas, sharing identifications and vocalizing experiences of subtle discrimination.

### Key words

Judiciary; profession; gender; race; difference

### Resumen

Este artículo analiza el impacto de las políticas judiciales dirigidas a promover la equidad en la carrera de los jueces en la composición por raza y género del Poder Judicial brasileño. Investigamos si estas políticas impactaron en la forma en que las carreras

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judiciales y los ascensos internos son generificados y racializados. El artículo utiliza datos cuantitativos sobre la composición del poder judicial brasileño por género y raza, y datos cualitativos obtenidos de diversas fuentes documentales, incluidos los medios de comunicación y extractos de entrevistas con jueces publicados en trabajos académicos. El enfoque teórico es el de las diferencias, concibiéndolas como construidas en el ámbito de la cultura. Concluimos que a pesar del tímido aumento de la presencia de mujeres y hombres negros en el poder judicial brasileño, las cuestiones raciales y de género han sido visibilizadas y disputadas, con movimientos políticos que buscan implementar estas agendas, compartiendo identificaciones y vocalizando experiencias de sutil discriminación.

### **Palabras clave**

Poder judicial; profesión; género; raza; diferencia

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## 1. Introduction

Literature on gender in the Judiciary shows that women are now a visible contingent among judges, and that they have entered judicial careers in higher numbers in civil law countries than in those that adopt common law (Schultz and Shaw 2013). There are several reasons for this, with forms of court admission and nomination playing an important role. Brazil occupies an intermediate position: 38% of its magistrates (Conselho Nacional de Justiça – CNJ – 2018) are women, whereas other countries may have over 50%, or under 30%.

The Judiciary in Brazil is organized in terms of jurisdiction within the Common Justice (composed of Federal and State Justices) and the Specialized Justice (composed of Electoral, Military and Labor Justices). Both Common and Specialized Justices are structured in three instances: first the judges; second, the court of appeals; and, at last, the superior courts. The Federal Supreme Court is the highest instance. Although women were 38% of all magistrates, the Labor Justice segment had the highest proportion of women among judges, 47%. State Justice had the second highest rate, with 36% of women, and Federal Courts had 32% of women (CNJ 2018, p. 8). Admissions to the career of judge take place through entrance examinations. State judges, which accounts for more than 60% of the magistrate positions in the judicial structure, begins the career as substitute judge. The next stage is senior judge, and the last, appellate judge. In higher courts, seats of Justices are achieved by presidential nomination. In 2018, women represented 44% of substitute judges; 39% of the senior judges, 23% of the appellate judges and 15% of judges in higher courts.

According to Schultz and Shaw (2013), in all 19 of the countries studied, women remain the ‘other’ within the Judiciary, even when diversity counterbalances the traditional conceptualization of judging as a white male task, and despite the fact that increased diversity has resulted in a higher quality judiciary.

In Portugal, Duarte *et al.* (2016) linked the entrance and increase in the presence of women in the judicial careers with the democratization of the country, once the judicature was forbidden to women by the authoritarian regime until 1974. The first female judge was appointed in 1977. “The late acceptance of women into the legal professions is attributed by most to 48 years of dictatorship characterized by the oppression of women.” (Duarte *et al.* 2016, p. 492). In 2015, women already represented 59% of all judges, and 61% of all public prosecutors. Among elite male legal professionals, the judiciary in Portugal, is considered an underpaid and unappealing career, but less stressing compared to lawyering, when it comes to combine work and family life – which is considered attractive to women.

Voorhoeve (2021) conducted a case study in Tunisia, in 2008–09, before the end of the authoritarian regime in 2011, intersecting gender and social class of two female judges in a Muslim context, “to show how different women bring different experience to the bench.” (Voorhoeve 2021, p. 5). In 1968, the first woman was appointed to the Tunisian judiciary and in 2016 there were 41% of female judges, increasing the presence of women in the judicial career. Political changes have influenced the de-valorization status of judges. Instead of being part of the traditional religious elite as it was before 1956, nowadays judges are part of the upper middle class. The intertwining of a long authoritarian regime and an underpaid judiciary were observed in the feminization of

the judiciary in Portugal and Tunisia. Job security, stability and the possibility to combine family responsibilities and a judicial career are also attractive to women in the Tunisian legal profession (Hélin 1995, cited in Voorhoeve 2021).

The increasing number of women in the judicature in Brazil began after the 1988 democratization. From 1964–1985 the country was ruled by a military regime. In contrast to the underpaid judicial careers in Portugal and Tunisia, in Brazil, judges are among the best-paid careers in civil service and belong to the upper income stratum considering the national income average (Brasil Econômico 2019).<sup>1</sup> The first female judge was appointed in 1939, in a northeast state court, but her entrance was not followed by other woman in the judiciary until 1954, when a female judge was appointed in a southeast state court.

The expansion of female entrance was more expressive during the years of 1990–2000, which was also a direct result of the large female presence in Law schools.<sup>2</sup> Part of them obtain degrees and ready themselves for public tenders, despite the lack of either gender inclusive policies or quotas for the occupation of positions of power within the profession. Nevertheless, the obstacles which confront these women is revealed by the gendered patterns which characterize the Judiciary hierarchy: women's participation increases slowly, leaving men in positions of control and professional visibility (Bonelli and Oliveira 2020). Male continuing dominance cannot be explained purely by their earlier entrance into the field, but rather by the genderization processes that mark professional trajectories which, commencing during student years, are resignified through the interaction between male and female judges.

Hunter (2015, p. 119) outlines a range of reasons “for a more diverse judiciary, which include, but are not confined to, making a difference to substantive decision-making”. Focusing mainly on women judges, but mentioning that the arguments apply to diversity in general, she summarizes six arguments in the literature: three are symbolics, two are more practical and one is substantive. The symbolics reasons emphasize that the presence of diversity increases the democratic legitimacy of the judiciary; signals equality of opportunity; provides encouragement and active mentoring. The practical arguments are that diverse judges have more empathy with diverse litigants and witness; and “will exercise this same lack of toleration behind the scenes, and so operate to educate and civilize male colleagues” (Hunter 2015, p. 124). The substantive argument is that diverse judges will bring a sensibility on diversity to the decision-making process.

In spite of these arguments, and the increase in the presence of women judges, the Brazilian judiciary still faces this lack of diversity in symbolic, practical and substantive aspects.

Since 2015, through the Resolution #203 of the National Justice Council (CNJ), Brazil began to apply a 20% quota for black and brown people within the Judiciary Branch, to remain in effect until June of 2024. The unimpressive ethnic-racial diversity in the courts

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<sup>1</sup> Article 37, item XI, of the Brazil's Constitution establishes the earnings of Federal Supreme Court justices as a remuneration ceiling for holders of public positions, functions and jobs in the direct, autonomous and foundational administration, members of any of the Powers of the Union, States, the Federal District and Municipalities, holders of an elective mandate and other political agents.

<sup>2</sup> According to the 2015 National Higher Education Census women accounted for 55% of law undergraduate.

persisted, despite the fact that in 2015, 29% of law students were Brown/Black, as well as 20,5% of those who recently had obtained law degrees.<sup>3</sup>

Six years after implementing this affirmative action policy, the National Justice Council carried out research to assess the presence of Black people within the Judiciary (CNJ 2021b).<sup>4</sup> We compared the results of this 2021 survey to the sociodemographic profile of Brazilian judges put together in 2018, which provided data on women's presence in judiciary careers (analyzed by Bonelli and Oliveira 2020). Another survey, carried out in 2019, was the diagnostic research for women's participation in the Judiciary, linked to CNJ Resolution #255, of 2018, establishing the National Policy of Incentives for Female Institutional Participation in the Judiciary.

It was this institutional effort that defined the starting point of the present paper, meant to identify the impact of the aforementioned national policies (one which works through incentive and another, quotas) on the gender and race composition of the Brazilian Judiciary. Have these policies impacted on the way in which judicial careers and internal promotions are gendered and racialized?<sup>5</sup>

The approach we follow in this paper considers differences as originating at the cultural level, while inequality analysis is based more on structural aspects. The concept of culture that orients our analysis claims that meanings are not fixed, and that within social interactions, when people do things together, they negotiate interpretations and dispute meanings. These meanings encompass notions such as professional excellence, identifications that interpellate subjects – and how such subjects work these different elements into their professional identity in adult life – or what the outcomes of regulations are.

We adopt the same perspective as Bonelli (2013) on how magistrates experience difference, without attaching one fixed meaning to this concept, but detecting how male and female judges perceived it, avoiding the reification of gender stereotypes. The framework employed in that article was sustained by Avtar Brah's notion that "refers to the variety of ways in which specific discourses of difference are constructed, contested, reproduced and resignified" (Brah 1996, p. 125), with no preponderance of one singular

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<sup>3</sup> Data on undergraduate law degrees, from the 2015 National Higher Education Census.

<sup>4</sup> Research on Black men and women in the Judiciary was carried out by the CNJ's Department of Judiciary Research, coordinated by the judges Ana Lucia de Andrade and Livia Cristina Marques Peres.

<sup>5</sup> We have opted to center our analysis in the 2018 sociodemographic profile and the 2021 research on Black presence as empirical material for this paper, due to the specificity of the first database (it is the only one providing self-declaration on ethnic-racial profile for the entire sample), and the recency of the second one. Those databases are not fully comparable, since data were obtained through different methodologies. The 2018 one refers to voluntary online survey answers requesting color/racial self-identification. The response rate was 62.5%, such that, out of 18,168 magistrates, there were 11,348 who provided answers. For the latter research, 2021, courts administrators from 88 out of the 90 courts sent in information. Part of a wider study on quota positions in public tenders and racial equality training initiatives in judicial schools, our analysis focused specifically on administrators' answers to the survey, collecting quantitative data from their personnel information files. Although it was the administrators who had systematized the data, responses on color or race, when provided, had been given by judges themselves. Information on race was absent in 31,9% of all cases. Thus, beyond the self-reported information provided in the files of the 11.948 judges who provided it, data is missing on the other 5.605 cases, out of a total of 17.553 active members of the branch, in February of 2021. The smaller group of respondents in 2021, as compared to 2018, is due to the fact that some courts did not supply their data to the CNJ for the more recent survey.

identification over another, such as gender, race, class, and sexuality. This typology sets difference as experience, difference as social relation, difference as subjectivity and difference as identity.

This paper argues that although the presence of women judge is quantitatively larger than that of Black judges, there is a qualitative distinction on the pattern of their admittance to the courts, which is reflected in their own perception of difference as an identity. Women judges have had to apply for the general selection without any specific quota program demanding gender identification, while Black male and female judges were interpellated in terms of difference, having to choose to apply for the regular selection or the affirmative action policy.

As a consequence of this common entry of male and female magistrates, women were stimulated to emphasize their professional sameness to male judges when admitted to the Judiciary, erasing or keeping their gender difference more as a personal experience, an interiority matter, or a social relation, instead of an identity that provides meaning to the self. It is during the judicial career trajectory that part of these women has perceived the genderization of their legal practices, operating among peers as an implicit bias and subtle discrimination. In this regard, a collective awareness of gender difference intersecting the profession – a sense of belonging shared by a group of judges – produces a political process of identification.

Both forms of entry have contributed to a more diverse judiciary, but it is the qualitative turn in the perception of difference as identity that has provided substantive meaning to subtle contest and to resignify the essentialism of the genderization and racialization of the judicial career.

## 2. Gender and racial profiles

The IBGE (Brazilian Institute of Geography and Statistics) is responsible for the demographic census in Brazil and uses categories which derive from our national history. The first census, conducted in 1872, used the categories white, Black, Brown and “Caboclo” (for the Indigenous). In the 1890 census the term “mestizo” was used, rather than Brown. No information on race was provided in the 1900 and 1920 censuses. In 1940 demographic census, the categories used were white, Brown, Black and “Yellow”. The last one was introduced in response to Asian immigration, and no category for the Indigenous was included (Osorio 2003). Osorio states that “it is interesting to notice that, from the 1940 census and until 1991, classification referred solely to “color”.

It was through the inclusion of the indigenous category in 1991, that classification turned to “color or race”, through five categories that are used up to date” (Osorio 2003, p. 19). As no universal ethnic-racial system exists, the classificatory system used in Brazil today reflects national experience. In the years preceding 2010, eight IBGE demographic censuses were carried out. The one that was planned for 2020 has begun in 2022. IBGE also collects data on race and gender composition of the population every year in the Continuous National Survey by Household Sample (PNAD Contínua).

The composition of the Brazilian population according to color or race reported by the most recent PNAD Contínua 2019 (National Survey by Household Sample) consists of

46.8% brown, 42.7% white, 9.4% black, and 1.1% yellow and indigenous. Data on gender portray the population as 51.8% women and 48.2% men.

Using IBGE categories for race or color, the 2018 CNJ survey results for Brazilian judges were as follows: white (80.3%), Brown (16.5%), Black (1.6%), Yellow (1.6%).<sup>6</sup> In the 2021 CNJ research database, in addition to the absence of information on 32% of the cases, many respondents did not differentiate Brown from Black, disregarding both the IBGE scheme and what the research had specifically requested. The suggested terminology was “Black”, a political category joining Brown and Black in mobilization against racial discrimination and in favor of affirmative action policies. Information and classification problems regarding color/race were not anticipated in the construction of the problem that we deal with here, but add a relevant aspect for our analysis and are addressed in one of the topics below. Furthermore, although CNJ resolutions cover equality of opportunities regarding race and gender, there are many differences in the way each one is implemented.

In the case of racial categories, discursive struggles and the clash of moral schema intensified with the transition to the 21<sup>st</sup> century. Issues of classificatory systems and affirmative action policies for Black people in Brazil came into the spotlight. We analyze Judiciary data within this context, as it has unfolded over the last 20 years, whether due to the visibility of Black people among judges, or to the ways in which CNJ resolutions resonate. We observe the persistent absence of official information on color/race in judges’ records today, seven years after Resolution #203 was passed.

The data from table 1, created from the results of the 2018 survey, based on judges’ self-declaration on gender and ethnic-racial sense of belonging, provide a sketch of this professional group’s specific characteristics. The prevalence of white males, followed by white women persists, albeit slightly reduced through increased Brown and Black male presence among those who entered the profession between 2016 and 2018. Although the number of respondents in the last period represents only 7% of the total of 11.348 magistrates, it nonetheless suggests that the quota policy expanded the entrance of Brown and Black males more than that of Brown and Black females, whose proportions remain almost the same over time.

Another possibility is that men answered the survey more readily than women. The breakdown of the intersectional data on gender and race shows that there are 8% more Black and Brown judges after the implementation of the affirmative action policy, as compared to the first period, which goes up until 1999; this represents an increase from 10% to 18% of the total. The presence of Brown and Black women judges remains the same (6%) over time; that is, their participation within the profession does not increase. We also note the prevalence of Brown over Black people, which becomes visible when examining together the data provided by the two tables.

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<sup>6</sup> A mere 11 magistrates self-declared as Indigenous. Blacks make up 18.1%, which is the total of those identified as Black and Brown. The term “Yellow” refers to those of Asian origin.

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TABLE 1

Gender and race	Entrance period			Total
	Until 1999	2000-2015	2016-2018	
White men	53%	46%	47%	49%
White women	29%	33%	28%	31%
Brown/Black men	10%	12%	18%	12%
Brown/Black women	6%	7%	6%	6%
Yellow/Indigenous men	1%	1%	1%	1%
Yellow/Indigenous women	0%	1%	0%	1%
N	4,748	5,804	796	11,348

**Table 1. Judges' racial and gender profile (CNJ 2018).**  
**Source: CNJ 2018.**

In the second table, created from the results of the 2021 survey, we see closer participation rates for Black women and men during the first period, prior to the quota system, as well as in the last period, after its implementation. Black female judges represented 4% of the total judges entering the career until 1999, and 5% of those who joined the bench after the implementation of affirmative action policy. Black male judges began at 5% and reached 8% during the same period. However, the lack of information on both men and women becomes more glaring over the periods prior to and following CNJ Resolution #203. The number of judges for whom no information on color/race is provided increased from 22% among those entering before 1999, to 37% among those who joined between 2000 and 2015, and reaching a total of 39% among magistrates entering after the implementation of the resolution.

Most members of the profession on record joined before 2016. By including those judges for whom no information on color/race is given within the total, the percentage of Black men and women is even lower than the numbers that appear in mainstream and social medias. Rather than the self-declared 18% on the 2018 survey, or even the 12.8% appearing on the 2021 census – considering only reported cases – what is known for sure is that the proportion of Black male magistrates increased from 5% to 8%; that of Black women rose from 3% to 5%.

TABLE 2

Gender and race	Entrance period			Total
	Until 1999	2000-2015	2016-2021	
White men	44%	31%	29%	35%
White women	25%	24%	19%	23%
Men, no further information	15%	22%	24%	20%
Women, no further information	7%	15%	15%	12%
Black men	5%	5%	8%	5%
Black women	4%	3%	5%	3%
Yellow/Indigenous men	0%	1%	0%	1%
Yellow/Indigenous women	0%	0%	0%	0%
N	5,392	9,218	2,708	17,318*

**Table 2. Judges' racial and gender profiles.**

**Source: CNJ 2021b.**

(\*230 magistrates whose admission dates could not be verified were excluded.)

Difficulties in standardizing public records on ethnic-racial composition are noticeable when considering CNJ stipulations, and the longevity of Brazilian population census classifications for white, Brown, Black, yellow and Indigenous, which has now been in use for 30 years. Court judges' perceptions of neutrality combined with their justification that racial classification is very subjective and difficult to be put in practice have the political result of restraining diversity in their symbolic, practical and substantive meanings.

In this regard, a judge's statement given to the research conducted by Oliveira and Sadek (2022) is illustrative,

There is a big difference between racial self-identification, on the one hand, and how I am read/perceived by another person, on the other. Many are ashamed to say they are black; others take advantage of being brown and say they are black. How does society classify people? It is important to know how whites and non-whites are culturally seen. Who are blacks? There is prejudice to have prejudice. (...) Silence about data is a data. I recognize that it is often difficult to distinguish 'pardo' (brown) from 'preto' (black). But this situation should be considered. After all, the quota is for blacks who consider themselves blacks or for browns who take advantage of the situation?

This example reflects how some magistrates who are responsible for the management of forums and for the organization of entry exams react to the self-declaration of candidates of their racial identification. By introducing racial heteroidentification committees on the admission exams, they end up producing essentialisms regarding skin color instead of difference as an identity that guides the person belonging. On the other hand, the questioning about the legitimacy of brown candidates to participate in the quota policy, in addition to reproducing colorism, clashes with their inclusion already provided for in the regulation of affirmative action policy proposed by the CNJ.

The lack of information on racial profile occurs in many professional groups in Brazil, such as public prosecutors and lawyers. Several segments of the Bar Association are currently conducting a census on the sociodemographic composition of the legal professions starting from 2020, gathering data on color/race, yet racial-ethnic findings have not yet been made public. Regarding gender and age group, data on lawyers as a group are regularly updated via the webpage of the Federal Council of the Brazilian Bar Association's (OAB). This suggests that when joining the OAB, new members are not requested to report their race. The dominant professional ideology responds for such invisibility, putting emphasis on sharing a common expertise and belonging to the same profession. Legal knowledge and professionalism would overcome differences by producing sameness among peers (Freidson 2001).

### **3. Genderization and racialization**

Genderization in the profession is understood as the process by which the different bodies that enter its ranks are regulated, shaping active professional subjects through a normalization that is conceived in terms of matrixes of the masculine and the feminine. It "... performs a regulatory operation of power that naturalizes the hegemonic instance and forecloses the thinkability of its disruption" (Butler 2004, p. 43). Genderization thus produces a set of duties, roles, stereotypes, privileges, disadvantages and discriminations related to professional activity and gender performance (Butler 2003) as

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acted out through peer relations. Yet, important elements escape the apparatus of subjection to the normal: movement, the resignification of meanings and the practices which deconstruct and denaturalize binarisms, combining and inventing ways of acting within the profession. Furthermore, these “structurings” do not float above social interactions and corporeality. In the case of the judges, it is a social construction resulting from the encounter with difference that is wrought as women enter and co-exist with men within the career, gaining new contours as Black women and men become fellow travelers on these journeys in which meaning is (re) negotiated (Scott 2015).

Racialization refers to the cultural processes of racial formations (Omi and Winant 1986), their meanings and vicissitudes (Hall 1980, Milles 1989). This conception focuses on the racialized experiences of bodies and psyches (Fanon 2020), rather than structures; it avoids situating them as floating above the lives of those who experience racism (Silvério 2022). Racialization is the epidermalization of places and social positions, defining the opportunities and constraints that subjects are confronted with, as well as the internalization of such processes by those who categorize and who are categorized (Faustino 2020). Therefore, in professions, racialization originates in the universalization of the European canon; the entrance of Black professionals unfolds within this standard of white hegemony. It is through alterity that Black women and men attempt to forge their identities (Silvério 2022).

Groups that are underrepresented in judicial careers are brought into a model already established by the judges who produced the dominant professional perspective through resemblances and shared belonging. Genderization and racialization are therefore constructed upon established patterns, illustrating Butler’s point about the hegemonic instance foreclosing disruption. Colleagues embody these patterns by openly occupying career spaces and communicating their ways of conceiving personal and professional behavior, current evaluation criteria and trajectories of promotion and respectability.

The genderization of legal careers underwent modification through the participation of female judges who, upon entering the field, used and shared an already established professional identity. They interacted with colleagues according to the idea that expertise is neutral, having no race or gender marks. They do not perceive a professional identity which, in terms of race and gender, is shaped from a white male perspective as “too subjective” - the argument made by critique that attempts to make difference positive. The identities of those who resemble or belong to professional groups that enjoy high social distinction do not become the object of moral battles (Miskolci 2021), not even within academic debates around “identity essentialism”.

Thus, while the presence of women and Black persons within the Judiciary is a significant element of the pluralization of composition, by itself it does not alter the dominant ideology of professionalism. When such groups were entering the field in proportionately minuscule numbers, new participants tended to adapt to what the established group expected of them. Managing their own feelings, minorities inside the profession shared the notion of professionalism as neutral, although it was an idea constructed by a white male professional elite. To maintain such an ideology as one’s framework is also a process that genderizes and racializes, while remaining “blind” to differences.

The merit and excellence advocated in professionalism work as a “social magic” (Sommerlad 2015): dominant social relations and the power of professional elites ensure that that which is fluid, contingent and instrumental is understood as neutral and objective. “Professional excellence” is determined according to male standards, and “merit” follows along the lines of racialized informal practices.

Within current career patterns in which a greater plurality of perspectives and bodies prevail, processes of genderization and racialization – naturalized by peers who state that such marks do not interfere with magistrates’ capacity to judge – are problematized by other understandings of women and men’s careers, as well as of those, men and women, who are non-white. Sometimes these reshaped conceptions are conducive to different subjective constitutions, in terms of gender and race, making their way into places where dominant sameness once reigned supreme, the assertion of a will to internal cohesion.

Thus, new interactions emerge between the dominant ideology built by the magistrate elite, impregnated with maleness and whiteness, and the internal dissonance that defends diversity, equality and difference, even if such “new social forms do not supplant their predecessors. Social change is thus simultaneously cumulative and contested” (Sommerlad 2013, p. 358).

The author observes, while studying magistrates in England and Wales, that such subjectivities vary along a scale that goes from women judges whose performance defers to traditional meanings and hierarchies to those who articulate subtle contestation of the conventional ways of judging and work practices (Sommerlad 2013, p. 365).

Sommerlad *et al.*'s (2022) focus on race and ethnicity in the legal profession in Australia, Canada, United States, England and Wales, and the Netherlands can also shed light on similar racialization processes among

Brazilian judges. While the former three national jurisdictions were “white settler colonies which developed their own internal colonies”, the latter three functioned “as major imperial powers with substantial diasporic communities” (Sommerlad *et al.* 2022, p. 178). Analysis reveals the persistence of racialized professional closure, underlining “the significance of the colonial era in establishing contemporary ethnic and racial hierarchies” (*idem*, p. 178). The legal profession produces and maintains an order fuelled by stereotypes of inferiority that encourage the adapting of difference to suit the currently prevailing model.

#### **4. Identities and differences in the context of affirmative action in Brazil**

Hall (1997) defines four approaches to difference in cultural studies, which refer to the following levels:

1. linguistic, in Saussure – “‘difference’ matters are important because it is essential to meaning; without it, meaning could not exist” (p. 234);
2. social, in Bakhtin – “we need ‘difference’ because we can only construct meaning through a dialogue with the ‘Other’” (p. 235);
3. anthropological – “culture depends on giving things meaning by assigning them to different positions within a classificatory system” (p. 236);

4. psychoanalytical – “the 'Other' is fundamental to the constitution of the self, to us as subjects, and to sexual identity” (p. 237).

According to Hall (1997), difference, otherness and difference representation regimes are a central piece of cultural studies, always mindful of the ambivalent nature of difference, its divided legacy.

Hall (1992) approaches identity through a decentering of the Cartesian subject, resulting from ruptures within modern discourse. Identities are interrogated not as something innate, permanent, but as a constant becoming and reshaping, moving beyond imagined unity. The notion of fixed and stable identities “was de-centred into the open, contradictory, unfinished, fragmented identities of the postmodern subject” (Hall 1992, p. 290), giving place to speak of identification.

Reflections on difference in post-structuralism, in the thought of Deleuze and Guattari, also counter the interpretation that this contemporary approach leads us down the path of identity essentialisms. Rather, difference becomes a potency, a vital connection, a development that traverses the present and splits it open, that is inventive, uncertain, undetermined, that engenders something anew. Difference that abandons the matrix of existing models, creating multiple, novel and diverse spaces, countering the hegemonic Eurocentric white, male and heterosexual model of identity as stable, closed safely off to difference behind clearly drawn boundaries. From a critical perspective, difference is not an appropriation of the canonical model. Rather, counter-hegemonic identities, in their decentered fragmentation, oppose the hegemonic model, even if negating the latter somehow retains it as a reference. The reality of the discrimination and violence against stigmatized groups turns identity politics into a tool of struggle, for life and respect. In the context of changing conditions, subjects who felt trapped within specific identities see other directions emerging. New heterogeneities flow into the game of difference.<sup>7</sup>

Some analysis of gender diversity within the Judiciary engage in critical dialogue with notions of difference, identifying risks of essentialism in the latter. In general, they take off from Gilligan’s (1982) conception and its transposition to the Judiciary. Her argument on the specificities of the feminine “as a different voice” is invoked, as it relates to the presence, procedures and substantive decisions of female judges in contrast to their male counterparts.

In this paper, we use difference as an analytical tool rather than a fixed attribute of identity. We share Miskolci’s (2021, p. 90) concept that “recognizes the mediation of experience and the contextuality of identities, fragile and doomed to continuous interpellation by time and culture.” In that author’s view, difference contrasts with the use of identities in establishing impermeable boundaries.

Within Brazilian literature on racial discrimination, studies relate social mobility to whitening, particularly in relation to those who fall into the categories of less stigmatized phenotypes. In a study first published in 1955, Oracy Nogueira, comparing racial prejudice in Brazil and the United States, speaks of “prejudice of mark” in the former and “prejudice of origin” in the latter. In his view, phenotype marks are attenuated

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<sup>7</sup> Although this synthesis is entirely the authors’ responsibility, it is based on an online talk on the theme of difference by Peter Pál Pelbart, for the research group “Transnationalism and curriculum proposal for teaching racial-ethnic and difference”, 2012, and on Pelbart’s text (n.d.).

according to social status, particularly in the case of Brown people. Racialization that takes whiteness as its reference enables a whitening of the elite. Even if on a birth certificate a family defines a child as Brown or Black, “disidentification” can occur (Strauss 1997) in adulthood. In the case of judges, this phenomenon is influenced by the idea of a neutral professional identity tied to the subject, which combines with the ideology of “racial fusion and Brazilian racial democracy”. Identification is not static in time and space, but reflects how subjects are interpellated by the different positions they occupy as they move along the path of life, woven through discourse, as unity and difference. Thus, the fragmented and fluid processes which are part of their practices and social relations become connected, in a structured pattern that is not random, and which may or may not result in the sense of belonging and identifications, in domination and subordination (Slack 1996).

The political mobilization of Black men and women within the Judiciary impacts the ideology and the negative value attributed to the Black phenotype and produces positive valuation, beyond the progress of affirmative action policies. Photo 1 illustrates the organization of Black female and male judges in a moment of positive sharing of professional and racial identification, thus awarded visibility.

PHOTO 1



Photo 1. 2<sup>nd</sup> National Meeting of Black Judges, 11/09/2018. Photo by Amagis DF.

As in Hall’s approach to the decentering of fixed and stable identities, judge Flávia Martins de Carvalho, from the São Paulo Court of Law, commented on the results of the research on Black people in the Judiciary in an article published on the site *Justificando*, highlighting the importance of this political mobilization of Black magistrates, as follows,

By giving visibility to the problem of racism within the Judiciary, I frequently ask myself: who cares? When I first came to this place of power, in 2018, I thought few cared, but, over time, I discovered paths, people, groups, associations and realized it was different. The group that organized the National Meeting for Black Judges (ENAJUN), founded in 2017, represents the making of a veritable ‘quilombo’ for Black magistrates; a strengthening through the sharing of common experiences in the challenges that are

confronted by subaltern bodies who are in positions of power within the Judiciary. (Carvalho 2021)

Moehlecke (2004) summarizes two ways of understanding policies for racial equality – universalist policies and difference-oriented policies – emphasizing that public policy in Brazil is more oriented by the universalist model.

Brazilian universities' affirmative action policies tend to combine universalist and difference-based criteria. They reserve slots for students from the public education system (social class criteria) and for Black students. Implemented initially in 2002, their constitutionality was questioned within the Federal Supreme Court (STF) according to ethnic-racial parameters, yet was approved in 2012.<sup>8</sup> Research indicates change in the composition of the university student body throughout the country, resulting from these inclusive public policies.<sup>9</sup>

There are labor market inclusive policies, based on a National Justice Council resolution that is difference-oriented in perspective. Slots are reserved for Black and Brown candidates, and applicants are able to register and compete on a quota or general list. According to the CNJ 2021 survey, of all magistrates who entered the field beginning 2016 (2,713 magistrates), 3% (85 magistrates) came in through racial quotas, 1% through disability quotas, and 93% through general admission. For a final 3%, no information was available.

Supreme Court approval of racial-ethnic quota for Black candidates at universities became very controversial. Approval was appealed and subjected to further ruling as to merit. Once quotas were definitively approved, the debate took on new contours. Arguments ensued around who was or was not to be considered Black, in light of the classificatory schemes that inhere in specific contexts, in which categories regarding phenotype and skin color vary.

Yet the discussion around racial self-identification or identification by a third party persisted within universities after the ADPF (Allegation of Violation of a Fundamental Precept) 186 judicial review. There were reports of white candidates passing through the racial quota system and taking inappropriate advantage of the racial self-declaration mechanism. This led to the creation of third person identification commissions, to verify candidatures. Inquiries continued due to the subjectivity of classification criteria, since the perspective of those who carry out the classification varies.

Some newscasts went all out in addressing debate on affirmative action policies. In 2007, twin brothers applied to the Law School at the University of Brasilia through the racial quota system. Initially, one of them was accepted and the other one was not (Photo 2). After filing an appeal, provided for by existing regulations, the young man was included on the quota list, although neither brother managed to pass the university entrance exam. Ten years later, news media brought up the situation of two twin sisters who applied to the same University in 2017, using the social quota established to benefit applicants coming from the public-school system. They did not register via the racial

<sup>8</sup> It was a Brazilian Supreme Court unanimous decision. In 2012, the STF was presided by Joaquim Barbosa, the only Black justice at the Court. This result illustrates the possibility of transformation brought by difference to the Judiciary.

<sup>9</sup> On the discussion of the affirmative action policy in Brazil, see Feres Júnior *et al.* 2018.

quota; furthermore, both had been military school students and were confronted by some sort of interpretation problem regarding their school records. The case was taken to the courts and ruled in their favor (Photo 3). That same year, a candidate approved and enrolled in medical school at the Federal University of Minas Gerais through the racial quota system had his status questioned (Photo 4). His enrollment was investigated and cancelled.

PHOTO 2



Photo 2. Twin brothers who registered for the first phase of the University of Brasilia entrance exam through the racial quota system. Photo: Afropress, 6/6/2007.

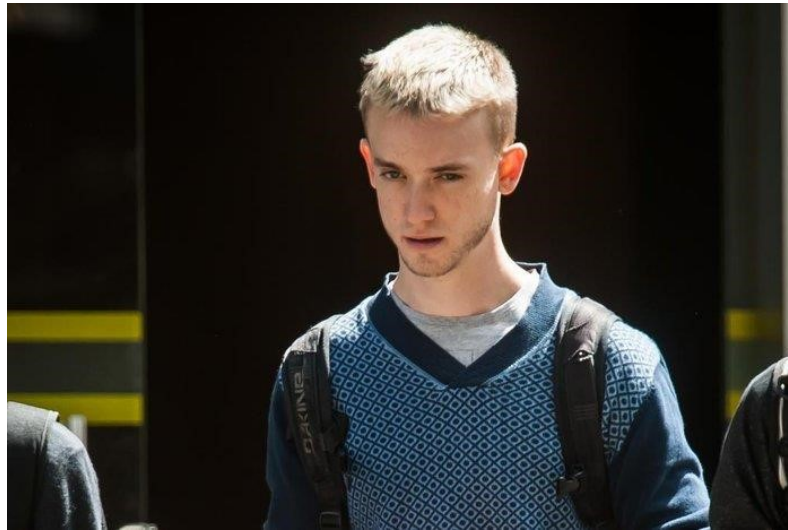
PHOTO 3



Photo 3. Twin sisters who registered for the University of Brasília access exam, in 2017, through the social quota system for public school students. Photo: Correio Braziliense, 07/24/2018.



PHOTO 4



**Photo 4. Candidate approved for entrance to the Federal University of Minas Gerais medical school in 2017, through racial quotas for Black students. Photo: Alexandre Rezende, Folhapress, 07/05/2017.**

In the case of the Judiciary, slots reserved for Black men and women are based on self-identification criteria, as declared on their application for public tenders. False declarations lead to the applicant's cancellation. If already nominated, the candidate's nomination is annulled, that is, after compliance with due administrative procedures, including right to defense.

In practice, both self-declaration and third-party identification criteria are implemented, the latter coming from a commission that has been constituted to verify the candidate's quota eligibility. There have been 115 public exams for the Judicial Branch held since 2015. Of the 56 courts with openings, 68% established eligibility commissions. Public notice or some other part of the admissions process related to racial quotas was contested in 21 courts and in five of them, Administrative Control Procedures (CNJ 2021b, pp. 27–28) were implemented. However, our attention was drawn to the fact that 14 presiding members of the court declared having difficulties in implementing the quota policy because of “lack of objective parameters to assess whether the candidate should or should not have access to quotas, doubts regarding convocation rules, percentage calculations and discussions on the heterogeneity commission” (CNJ 2021b, p. 28).

The policy of inclusion of Black and Brown magistrate candidates began to expose the various obstacles that must be overcome by quotas programs. They derive from the historical erasure of such information, as well as details that escape new norms of racial identification within the career.<sup>10</sup> As Kahwane and Severi (2019) claim, it is not only a matter of counting how many women and Black persons are judges, but also of analyzing what such presence can mean. The symbolic aspect of this visibility can contribute to the construction of a more diverse and legitimate Judiciary, yet it does not modify the methodologies that reign within practices of work and judging. Attempting to contribute to change within the latter, Rackley (2013) draws on the distinction between inclusive diversity and transformative diversity. The first, in the author's view,

<sup>10</sup> On male and female judges see Fragale Filho e Alves (2018); on the racial representation of judges see Fonsêca (2021); on racism and affirmative action program in the judiciary see CNJ 2021a.

reinforces prospects for allowing different people entrance to and inclusion within the career. On the second point, Rackley highlights meaningful institutional changes, challenging images of uniformity in terms of ideas and understanding that plural visions and experiences matter. Rather than denying this, as the ideology of neutrality does, transformative diversity seeks to flesh out how these processes effect judges and judgements. “A more diverse judiciary leads to better judging. Baroness Hale puts it more bluntly: a more diverse judiciary is a better judiciary (2008: 330)” (Rackley 2003, p. 333).

Bogéa (2021) organizes approaches on gender in the Judiciary in terms of symbolical approaches and empirical or result-oriented approaches. He believes that difference includes the risk of gender essentialism, pushing it into identity realm. Using Rackley and Young’s work – with the expansion of the courts’ social perspectives – he suggests a procedural approach which reinforces the need to diversify courtroom composition, “to avoid subjugating all of society to the decisions of homogeneously-composed organs that may act in biased and partial ways” (Bogéa 2021, p. 120).

With regard to racial diversity among judges, the literature addresses aspects that are similar to those described above. Questions examined include about whether the inclusion of Black men and women judges diversifies perspectives, and the impact and legitimacy of increased representativeness within the courts. Kastlelec (2013) points to how the presence of one black judge has impacted the decision-making process of a three-judge panel of the Court of Appeals in the United States, in favor of an affirmative action programme. His analysis shows that racial diversity has a substantial result, broader than the single vote of the black counter judge.

In the Brazilian case, the inclusion of race/gender intersection still has a long way to go, with an urgent need to establish functional routines of racial-ethnic self-identification and standards patterned after the official Brazilian demographic criteria, leaving political aspects of racial recognition to the judges, and to actions such as the national conference of Black judges. In working toward a better Brazilian judiciary, offering higher quality results, the bodily differences of those who act within the courts must be recorded. Beyond this basic level, there is also a need to encourage the presence of women and Black people in positions of power within the profession, whether promoting this through resolutions that establish quotas for certain positions, juries, events, and professional associations, or recommending that such action be taken.

Once engaged in the career, there is significant distance between white and Black men and women, in terms of hierarchy. The data on Table 3 indicate that there are more Black professionals to be found at the first levels of the career: 30% of the Black women occupy substitute positions, compared to 22% of white women; 25% for Black men, compared to 17% of white men.

There are more men than women in appellate judge positions: 8% of women, compared to 16% of men. In such positions, the distance between Black women and Black men is smaller – 2% – whereas the distance between white women and Black men is 10%.

TABLE 3

Position	Women				Men			
	White	Black	Non-identified	Total	White	Black	Non-identified	Total
Justice	0%	0%	-	0%	1%	1%	1%	1%
Appellate judge	8%	8%	9%	8%	18%	10%	14%	16%
Senior judge	70%	62%	70%	70%	65%	65%	67%	66%
Substitute judge	22%	30%	21%	22%	17%	25%	18%	17%
<b>N</b>	<b>4,109</b>	<b>587</b>	<b>2,141</b>	<b>6,897</b>	<b>6,158</b>	<b>946</b>	<b>3,460</b>	<b>10,651</b>

Table 3. Career status, according to gender and color/race.

Source: CNJ 2021b.

Judge Daniela Chaves, in her doctoral thesis on women in the federal judiciary (Chaves 2021), shows how within the Federal Justice system, which acts throughout the whole national territory, there are female judges who do not request promotion from substitute to senior, thus delaying their career progress. Families tend to be rooted in a region while promotions may imply moves to distant places, in a large country where many locations may not be easy to get to. The need to integrate professional and family demands favors the promotion of male judges and slows down women's progress within the career, involving decisions that impact their entire trajectory, including seniority. Merit-based promotion to Associate Judge involves political-professional connection, the need to promote oneself, make requests, and so forth, and many women resent how heavily contentious this tends to become.

When race and gender come into focus, we see that stereotypes are potentialized. Raíza Gomes, in her master's thesis, analyzes the racialization and genderization that Black female magistrates experience in social life and professional practice (Gomes 2018). She reports many situations referring to daily surveillance of the bodies of Black women who, as such, do not conform to the expected model of what a judge is – that is, a white man. This is expressed most frequently on the part of outsiders, that is, people from outside the court or judiciary space who, standing before a Black female judge, seem unable to recognize the role of the person who stands before them. But this may also occur amongst law professionals, as in the case of a lawyer who searches for a magistrate or a judge and is unable to acknowledge the Black woman who stands before him as such, reading bodily difference as subordinate rather than peer. While carrying out her interviews, Gomes encountered narratives on the process of understanding oneself within the career as a Black woman, some of which referred to the repercussions of affirmative action policies in cases of women who joined the career before such policies were implemented. Gomes refers to the trajectory of such women as a path from “survival” to awakening.

An example that Gomes (2018) gives mentions how Aqualtune,<sup>11</sup> a magistrate at the state level whose career extended over twenty years, married and mother of two daughters, decided to change her hairstyle, abandoning straightening treatments to own her natural curls, only to catch flak from another female judge,

<sup>11</sup> Gomes substitutes the real names of the judges she interviews with the names of Black women who were protagonists of the struggle against slavery.

So, you straighten your hair, you try to fit in... to a model dictated by prejudice, right? So, not so long ago, I decided to accept my curly hair and heard from a colleague that curly hair did not match the judges, you get it?

So, we see here that there is a judge stereotype, you understand? A stereotype that puts you inside a suit, you see? In other words, so that you fit the masculine model and so that you... you take on the straight hair biotype because they think that neat hair is a better match for a serious attitude. (Gomes 2018, pp. 76–77)

The distinction proposed by Nogueira (1998) between prejudice of mark and prejudice of origin seems too stagnant to be relevant for processes that are more fluid, since phenotype stereotypes continue to affect the lives of magistrates well after upward social mobility. A situation is reported in which a judge is asked to go back to her straightened hair style. On the other hand, the game of differences manipulates classificatory categories, and – in addition to the changes that occur in terms of identification – blackness acquires greater value within the affirmative action context.

Dandara was another magistrate that Gomes interviewed, in this case, a woman who, after eighteen years with a career in the Federal Justice system, was single, had no children and was working on a doctorate. Regarding the overflow of career into personal and family life, Gomes shows how the Judiciary creates expectations that are not only gendered but racialized, expressing greater hostility and bearing greater emotional costs for the Black women who are judges. Dandara reports people's frequent interjections that advise her to interrupt her studies, perceived as a surplus effort which harms her affective relationships. In the interview, she even mentions a comment from an appellate judge, saying she should marry soon, because a woman "becomes gynecologically obsolete" (Gomes 2018, p. 90).

Pondering the possible association between being a Black woman and the fact that her peers feel entitled to invasive comments, Dandara reports:

... I have a personality like this... I'm fierce like this, right? So... for example, the other day I was having an argument with a colleague and then he said, 'That's why you're not married! That's why you women judges don't marry?' You understand? So that is where the gender dimension shows up, you understand? Because, in his head a woman cannot contradict him, it does not matter if we are there in a... right? And there is an intersection, sometimes there are situations... that same person, once came up to me and said: 'Oh! Here comes the most beautiful mulatta in the Federal Justice!' I told him off. You understand? 'I'm not mulatta, I'm black, I'm a judge and I do not give you such license.' And then the day that happened, I remember the reaction of those around. 'Oh, Dandara, poor thing!' 'Poor thing? You feel sorry for him? You should feel sorry for me!' You see? So, when you react... because people think we have to tolerate this. (Gomes 2018, p. 90)

Dandara's narrative illustrates how Butler approaches the process of normalization in terms of gender performance of the masculine and the feminine, and also the important elements that escape the apparatus of subjection to the normal. Although it is very common fear that women's "devotion to family" is a threat to their career, in contrast to the "male standard" full-time work model, the narrative above speaks to another reality. A woman's complete professional dedication to the role of judge unsettles the norm, and the judge is expected to correspond to the women's traditional family-oriented role. Extreme devotion to work crosses male-female binary boundaries, as demonstrated by

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the reactions of the two magistrates who interact with Dandara. This is further evidence that a better Judiciary depends on a wider plurality of vision not only regarding how genderization and racialization are “done”, but how they may be undone.

## 5. Final considerations

We have sought to assess the impact of inclusive policies in shaping gender and race profiles within the Brazilian Judiciary. Examining the composition of the judges through data from 2021 (CNJ 2021b), we observe that among those who entered the career from 2015 onward, the effect of the quotas was very low, and certainly not enough to impact quantitatively the career’s racial profile.

Observing the gender and race composition for the period in which judges joined the bench, we observed small variations; the proportion of women rose from 36% among judges who were admitted up 1999, to 39% of those who entered the career as of 2016. In terms of race, Black persons represented 9% of the active judges who began their careers before 1999, reaching 13% of those admitted after quota implementation, which occurred in 2016. Given that in 2015, Blacks represented 20.5% of those who graduated from Brazilian law schools, the lack of Black candidates, an argument commonly wielded to justify Black underrepresentation within the magistrate, does not hold as an argument for explaining patterns of racial inequality.

In addition to the fact that quota policies have not yet shown strong enough results to signify a change in the racial profile of the Brazilian judges, six years after quota implementation, racial information is still lacking on 39% of the magistrates who entered the career after such policies went into effect. This suggests that little attention is given to the matter. For the active magistrates who joined in or before 1999, lack of information on color/race is seventeen percent less (22% of the total).

Although there has been only a slight increase in the presence of Black people within Brazilian judges, the racial question has been the subject of vigorous debate and growing visibility. In addition to quota policy, there are political movements seeking to implement an equity agenda, such as the abovementioned National Meeting of Black Judges. This agenda is also present in Judicial Schools. In the 12 months prior to the CNJ research, most of these schools (74%) held courses or educational activities taught by Black or Brown people; 67% of the schools promoted campaigns on racial diversity headed by Black judges and 33% offered courses on racial questions (CNJ 2021b, p. 18).

The association of social issues with the Judiciary generates reactions. In 2020, for example, a group of judges affiliated to the Pernambuco Magistrate Association, published a manifesto against the online course on “Racism and How it is Perceived in Pandemic times”, which had been promoted by the association itself. The manifesto wrought significant repercussions. The major Brazilian news daily, *Folha de São Paulo*, wrote that the document referred to an “ideological infiltration of the social causes within the association’s agenda, causing outrage and discomfort in an expressive number of associated judges” (Nunes 2020).

Judges, men and women, reach the Judiciary after taking part in genderization and racialization processes that begin way before the moment of their admission. Throughout their career, they create hierarchies, shaped in terms of privileged versus

undervalued duties, of distinctions and notions of excellence versus the common, the average. The most esteemed and the best of these assets and resources are unequally distributed among white men, white women, Black men and Black women. New stereotypes are created, such as the “panties quota” (Uliano n.d.), a derogatory way of referring to the discussion of measures which guarantee the inclusion of women on promotion lists, as well as their presence in other positions of professional power. Social stereotypes may find shelter within the career, such as the idea that a woman judge’s curly hair does not fit her rank and position. Although our article marshals a range of evidence on how necessary it is to train judges on matters of racial discrimination, a group of 34 judges was able to formally reprimand their professional association for organizing an event with such goals in mind. They referred to it as an “ideological infiltration” of the judicial mind.

In spite of the size of diversity in the courts, the paper has shown the importance of the qualitative change, that has produced difference as identity among part of the judges. They are questioning the genderization and racialization of judicial practices, and in this way, they have contributed to the growth of transformative diversity. As already mentioned, differences are not fixed or static, and such approach applies to identification.

In conclusion, as Rackley (2013) and other authors have argued, increasing the quantitative visibility of difference within the corpus of the judiciary career is not enough. Rather, greater change is on the order of the day, toward a more diverse Judiciary in a broad sense, that is, as one which generates greater justice. The transformation of routines which currently impede or hamper assessment of the ethnic-racial identification of Brazilian magistrates can help to spawn such change, in the present.

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