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Globalization, Lawyers, and Emerging Economies

The Case of Brazil

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I GLOBALIZATION, LAWYERS, AND EMERGING ECONOMIES

In the 1990s, Brazil and other emerging economies went through a major transformation. Closed economies were opened, foreign investment was encouraged, and many state-owned enterprises were privatized. This “global transformation” had a major impact on the Brazilian legal system.

While many parts of the legal system were affected, the corporate law profession changed the most. This sector includes all the institutions and actors that provide legal advice to corporations whether domestic or foreign, public or private. Global transformation brought about major changes in the national political economy, led to a flood of new laws governing corporate activity, and created a demand for new kinds of legal services to help companies manage the new legal environment. This led to rapid growth of the complex of institutions that provide corporate legal services and affected the way lawyering was practiced and organized. Many forces came together to give new shape to the professional identity of lawyers, the structures they work in, and the roles they play. The result was the creation of a new and powerful segment of the legal profession whose activities had profound impacts on the rest of the profession, the legal system, the operation of enterprises (both public and private), state policy, and global governance.

In this book, we describe the growth of the corporate legal sector in Brazil and the impact of this development on lawmaking, legal education, regulation of the legal profession, public interest law, trade policy, and gender roles. The book is part of a larger study of global transformation and its impact on the legal profession carried out by GLEE, the project on Globalization, Lawyers,

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and Emerging Economies.¹ Based at the Harvard Law School's Center for the Legal Profession, GLEE is currently studying these developments in Brazil, India, and China, with plans to expand the project into Africa and the states of the former Soviet Union. In Brazil, GLEE's research has been based at the law school of the Fundação Getulio Vargas (FGV) in São Paulo.²

II THE LITERATURE

For more than half a century, a growing body of scholarship has documented the complex relationship between legal institutions and economic, social, and political development in the Global South. GLEE builds on this rich tradition and seeks to relate it to the Brazilian scene by exploring the impact of globalization on the legal profession, and vice versa.

The literature on the Brazilian legal profession as such is limited. To be sure, there have been numerous studies of the role of *law* in recent Brazilian development. Studies include the impact of new laws on the development of the capital market (Trubek 2011a), the legal architecture that allowed Brazil's successful conditional cash-transfer program to operate (Coutinho et al. 2013), the impact of international trade law, and other topics. But these studies paid little attention to the role of lawyers.

A lot has also been written about the role of Brazilian lawyers as statesmen and the effects of lawyers' presence in governance. Studies showed that from the beginning of the Brazilian state, lawyers played roles other than that of professionals serving clients. The first lawyers trained after independence were supposed to serve as statesmen. People with law training dominated the state at least until the 1930s and maintained some influence until the 1960s (Adorno 1998; Venâncio Filho 1978). Furthermore, while the military regime that took over in 1964 displaced lawyers from the peaks of state power,

¹ The first volume from this project, *The Indian Legal Profession in the Age of Globalization: The Rise of the Corporate Legal Sector and its Impact on Lawyers and Society*, edited by Wilkins, Khanna, and Trubek, was published by Cambridge University Press in 2017.

² Around twenty researchers and scholars in law, sociology, and political science were involved in the GLEE project's study of the corporate legal sector in Brazil and its impact. The research was conducted in 2013–2014. It focused on the states of São Paulo and Rio de Janeiro, which make up 44 percent of the Brazilian GDP and are home to almost half the lawyers in the country, the headquarters of the main Brazilian corporate law firms, and the legal departments of the largest domestic and foreign companies. To create a profile of the corporate sector, the team conducted more than fifty in-depth interviews with partners in major law firms and legal directors of large national and international companies. We also created a database that included information about the top 367 business law firms in the country. Other studies were done of the corporate sector in lawmaking, legal education, gender roles, provision of pro bono services, and trade relations.

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a mass of lawyers were trained to serve the lower-level bureaucracy (Venâncio Filho 1978; Adorno 1988; Faoro 2001). During this period, and despite some efforts at reform, the formalist and generalist tradition that was imported from Portuguese universities in the nineteenth century was deepened (Venâncio Filho 1978; Lyra Filho 1980; Faria 1987; Warat 2002; Falcão Lacerda e Rangel 2012; Trubek 2012). As a result, when the military regime ended and democracy was reestablished, lawyers within and beyond the state were not up to the needs of a society growing in complexity and diversity of interests (Lyra Filho 1980; Falcão 1984; Faria 1987; Arruda 1989; Sousa and Geraldo 1997; Warat 2002).

While there is a rich literature on law in Brazilian development and on lawyers in the Brazilian state, there has been less written on the legal profession as such. However, this has begun to change. Starting in the 1990s, scholars began to look directly at practicing lawyers and address structural tensions between the legal profession and the changes stemming from the country's development process. Topics were varied, such as gender roles in law firms (see Chapter 5), the role of lawyers in judicial reform (Almeida 2006) and access to justice (Almeida 2010; Santos and Carlet 2010; Sa e Silva 2011), and legal education (Junqueira 1999; Sa e Silva 2007). But new and even more complex challenges were to come, some of the most pressing resulting from globalization. Changes in the global economy would not only lead to a push for liberalization of the local markets and changes in balance between the state and the market but would also unleash a boom in new legislation and set in motion processes that would blur the lines between indigenous and foreign forms of law practice.

Very little has been done to capture and account for the role of lawyers in globalization and liberalization in Brazil. There is one study of efforts to train Brazilian lawyers to deal with the World Trade Organization (WTO). The most influential study to date is the pioneering work of Yves Dezalay and Bryant Garth in *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (Dezalay and Garth 2002). This book really launched the worldwide study of lawyers and globalization and provided the first analysis of this relationship in Brazil. In addition to Dezalay and Garth, Professors Shafer, Sanchez, and Rosenberg conducted a detailed study of Brazil's efforts to train lawyers to represent the country's interests in the WTO (Shafer et al. 2012). As we indicate below, GLEE builds on both of these seminal works to construct a new account of how globalization is reshaping the market for corporate legal services in Brazil and other emerging economies, and the broader implications of this restructuring.

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Our theory begins with Dezalay and Garth's trenchant observation that the massive legal changes that occurred during the 1990s were making US laws and legal institutions especially influential in the global economy. To explain this, they built accounts that rested to one degree or another on four pillars: the logic of capital accumulation in open economies, diffusion, core-periphery relations, and the sociology of the legal profession.³

The first pillar was a theory of capital accumulation in an open world economy. The grand transformation in the 1990s, which the GLEE project refers to as the "global shift," can be seen as an effort to create a single world market open to global capital. The project included efforts to integrate emerging economies into this universal system.⁴ This in turn impacted domestic law in "peripheral countries." The process included diffusion of legal rules from the core to the periphery. Dezalay and Garth noted that US legal ideas and institutions tended to be favored during the global shift even in countries with very different legal traditions and historical ties. They suggested that asymmetrical power and US hegemony are among the factors that explain why the US approach to regulation of the economy was so influential, US laws were transplanted, US styles of lawyering diffused, and US legal education was sought out by aspiring lawyers.

³ The original Dezalay-Garth theory is based on a model of institutional diffusion under conditions of core-periphery hierarchy, with economic and legal developments determined by the interaction of intraelite struggles within the legal profession and policy conflicts at the state level – which the authors refer to as "palace wars." This in turn takes place in a global context in which strong interests in the core work to engage actors in the periphery in policy changes that will benefit global capital. At the same time, local elites are able to resist some pressures from the core, leading to hybrid solutions. The overall picture that emerges from this analysis is one in which "double agents" in the North and South work together in ways that preserve and enhance international hegemony. By constructing a market for new legal forms and economic ideas while adapting them to local conditions and the interests of local elites, these double agents shore up both international hegemony and domestic systems of dominance.

⁴ Since the postwar period, many developing countries had tried to insulate themselves from the world economy. They focused on building domestic industries, protected them by high tariff walls, and placed limits on foreign investment. The state played a central role in the economy, and many sectors were dominated by state-owned enterprises (SOE). But by the 1990s, this model had become exhausted, and other possibilities had become available. Inspired in part by the model of the Asian Tigers, emerging economies began to shift to export-led growth. That, in turn, increased the need to make domestic industries competitive and attract the kinds of foreign investment that would strengthen export capacity. It also pointed to the benefits from privatizing at least some SOEs. The turn to the market and the outside world was encouraged by core countries that saw in these liberalizing and rapidly growing emerging economies prospects for new markets, opportunities for high-yielding investment, and sources of labor. Through the WTO, BITs, and the use of conditional development assistance that required market-oriented reforms, core countries helped shape global norms in ways that facilitated their entry into these emerging markets.

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This Americanization process was driven in part by the dynamics of the legal profession. Legal and corporate elites are key players in transplanting and/or implementing new legislation or professional models from developed countries (Dezalay and Trubek 1998). The impact produced by globalization in corporate law and practice depends on how it is translated by the elites involved. While traditional legal elites in many emerging economies looked to Europe for cultural inspiration and legal models, a new “modernizing” faction in countries like Brazil built closer ties to the United States. By deploying this US-oriented expertise during debates over the grand transformation, these rising elites helped steer reform in one direction while simultaneously advancing their own position within the Bar and the state.⁵

Focusing on Brazil, Dezalay and Garth described a “classic pattern” in which a legally trained elite dominated the field of state power in the nineteenth and first half of the twentieth centuries. Generalist lawyers, often trained in Europe, occupied key positions in both the legal field and the state. This socially and politically conservative elite served as a brake on efforts to modernize the economy. By the 1960s, however, this elite was losing influence. And when the military took power in 1964, the legal elite was sidelined and legal institutions, never too strong, were weakened.

Dezalay and Garth note that during the 1980s, as the military regime waned, elements in the legal elite sought to turn this situation around by exploiting US links, building on US legal ideas, and getting support from US institutions. One example they give was the development of the Pinheiro Neto law firm, which broke with the Brazilian pattern of small, family-dominated business law firms to create a US-style, full-service, corporate law firm with close ties to Wall Street firms. Another is the role played by the graduates of the Centro de Estudos e Pesquisas no Ensino do Direito (CEPED) legal education experiment. This project, which was supported by USAID and the Ford Foundation, trained several hundred Brazilian lawyers. Dezalay and Garth note that this project, run by Brazilian lawyers with close connections to international companies and contact with US-style law firms, and including visiting professors from the United States, introduced students to US legal ideas and global lawyering models. It also offered some of them access to US legal education. Once they completed the course (and some returned from LL.M.s in the United States), this group of CEPED alumni was able to parlay these credentials into important positions in business law, academia, and government. When Brazil began to restructure its economy

⁵ For subsequent applications of Dezalay and Garth’s framework to analyze the legitimization of business law in Brazil, see Engelmann (2012).

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in the 1990s, privatize state-owned firms, and attract foreign investment, there was a cadre ready, willing, and able to use its US-oriented expertise to help shape the new legal environment and build the public and private institutions it demanded.⁶ This included efforts to make the legal order more autonomous.⁷

While GLEE builds on the insights of scholars like Dezalay and Garth, the project also seeks to address critical new issues. Among them is the role of the new corporate law sector once it grew to be a major element of the profession. Dezalay and Garth and other pioneering students of law and globalization studied the early years of legal response to the global shift; GLEE has looked at this development after two decades of rapid growth of the new corporate legal sector. The GLEE project is the first effort to provide detailed data on the growth of the sector, including both in-house offices and outside law firms; to trace the interaction between Brazilian law firms and foreign ones; and to study the impact of a robust corporate law sector on other parts of the legal system.

In addition to taking account of over two decades of rapid growth of the sector, GLEE deals with changes in global and Brazilian governance and policy that have occurred since the 1990s, when the study of law and globalization began. GLEE operates in a world in which traditional ideas about the “core” and the “periphery” and the dominance of the neoliberal Washington Consensus that animated the reforms of the 1990s are far less clear than they were even a decade ago. With the rise of a “new developmental state” in the twenty-first century, Brazil saw the reemergence of industrial policy and a more robust social policy, which have created new conditions for the operation of the corporate law sector (Trubek et al. 2013).

III THE TRANSFORMATION OF BRAZIL IN THE 1990S: LIBERALIZATION, PRIVATIZATION, INTERNATIONALIZATION, DEMOCRATIZATION

Brazil was late to industrialize.⁸ As the country broke free from Portuguese colonial power (1822) and abolished slavery (1888), coffee production became the driver of the first transformation in its economic structure. Capital accumulation funded by coffee exportation led to an incipient urban bourgeoisie,

⁶ For detailed information on the CEPED experience, see Falcão et al. (2012).

⁷ Ironically, according to the Dezalay and Garth, the dominance of lawyers in the state in the earlier period had discouraged efforts to make law autonomous from power.

⁸ This section draws on Trubek (2012) and Trubek et al. (2013).

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while government incumbents at the federal level emphasized investments in heavy infrastructure, particularly in railroads (Furtado 2007).

From the 1930s to the 1950s, stronger and more conscious industrialization efforts were put in place. In the wake of the crash of 1929, Brazil took a route that would be later known as *import substitution* (Furtado 2007; Tavares 2011). This included both protectionist trade policy and stronger state activism in the economy. Imports tariffs were raised, local currency devalued, and commodity surpluses purchased by the state, thus creating resources that could be used for further industrial investments by domestic capitalists. Also, the state itself became an economic agent, whether by getting directly involved in basic industry – such as in metalwork via SOE *Volta Redonda* and oil production and processing via SOE *Petrobras* – or by funding investment projects in heavy infrastructure via the national investment bank *BNDES*. From 1930 until the end of the 1980s, economic policies basically consisted of state-led initiatives to promote import substitution, industrialization and growth using “economic law” tools, such as state-owned enterprises, economic planning, price control, sectorial regulatory and administrative authorities, and the use of tax and financial incentives.

However, between 1988 and 2004, Brazil partially dismantled these structures and policies and shifted to more market-oriented approaches. In 1988, after twenty-four years of military dictatorship and in a context of a threat of hyperinflation,⁹ Brazil passed a new constitution that has influenced and shaped policy ever since. The 1988 Constitution is a social-democratic document that includes both civil, political, and social rights and several policy goals like building a free, just, and solidarity society, fostering national development, acquiring technological autonomy, eradicating poverty and marginalization, and reducing inequalities. Many of its provisions have direct effect on government policy and budgetary allocations.

In 1989, immediately after the new constitution came into force, President Collor de Mello was elected. Adopting a rhetoric based on the need for “modernization,” Collor de Mello abruptly started a liberalization period that included drastic tariff reduction, privatization, as well as flawed attempts to control inflation.¹⁰ Under Itamar Franco, the vice president who replaced

⁹ In January 1990 inflation in Brazil reached 56 percent per month, raising to 73 percent in February and peaking at 84 percent per month in March. During the same period, inequality reached its worse level ever since it started to be measured (the Gini coefficient peaked at 0.647, according to IBGE, the Brazilian Office of Statistics).

¹⁰ Paradoxically enough, Collor harshly confiscated savings and deposits owned by Brazilian citizens. This controversial measure has raised several discussions in the Brazilian judiciary.

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Collor de Mello after he was impeached, a stabilization plan (Plano Real) was successfully adopted and inflation controlled.¹¹ Also, new legislation on social assistance and welfare for the poor was passed. Franco's Minister of Finance, Fernando Henrique Cardoso, known popularly as FHC, became the next president in 1994. During Cardoso's eight years in office, Brazil continued to move away from the *dirigiste* policies of the "developmentalist" period, embracing many of the neoliberal prescriptions favored by the Washington Consensus.¹²

In the Cardoso period, state-owned enterprises were privatized, direct subsidies for certain industries scaled back, areas of the economy deregulated, import barriers reduced, competition fostered and enforced, intellectual property rights tightened, efforts to attract foreign capital undertaken,¹³ and fiscal responsibility enhanced. Also, the currency (real) was constantly kept overvalued, and monetary stability was pursued and attained.¹⁴ Foreign investment increased and Brazilian firms could raise money in the international capital market. In place of direct state control of sectors like telecommunications and state ownership of major enterprises in steel, mining, and aircraft production, many SOEs were sold to private groups.

This process was accompanied by a veritable flood of new legislation, much of it new to the Brazilian scene. US-style independent regulatory agencies were created to monitor and regulate the newly privatized sectors. Antitrust law was updated and enforcement strengthened. New laws governing capital markets were passed and a vibrant capital market began.

These changes created whole new areas of law and generated new demands from corporate clients. Companies and governmental entities found themselves operating in a new, complex, transnationalized regulatory matrix. This created a huge demand for corporate legal services. Many of the new laws were both complex and unfamiliar to most Brazilian practitioners: for example, the independent regulatory agencies were based on foreign models that were shoe-horned into Brazilian legal categories. Lawyers had to deal with new clients and unfamiliar transactions. More and more Brazilian companies

¹¹ As Castro notes, "Despite that, a period of strong deterioration of the Balance of Payments began, which led the current-account deficit to achieve 4.0 percent of the GDP in 1998 (Castro 2008).

¹² FHC has always rejected the neoliberal label and claimed that his goal simply was to modernize the economy.

¹³ Among the measures were a series of bilateral investment treaties protecting foreign investors that were signed but never ratified.

¹⁴ Ban notes, "The goal of price stability has remained sacrosanct and the instruments for achieving this goal have been in line with the latest international fashions: central bank independence and inflation targeting" (Ban 2013, 6).

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found themselves working with foreign corporations. Transactions rarely seen in Brazil like transnational mergers and acquisitions and overseas bond and stock issues were introduced. Moreover, some of the new legal rules were derived from international sources like the WTO requiring Brazilian lawyers to master international texts and understand international institutions.

Such measures marked the beginning of a process which would ultimately led to a substantial reform of the Brazilian State. It aimed at fostering development within the new global reality by modernizing Brazilian society and economy to strengthen Brazil's position in global market. The bulk of this process, which took place between 1990 and 2000, was carried out by means of amendments to the Constitution, substantial changes in legislation and institutions, and the creation of new regulatory agencies.

While from a legislative standpoint, this new regulatory framework emerged as a result of intense political negotiation involving different social actors, its effectiveness required the existence in the country of practicing lawyers able to deal with the new reality. Regulation could only work if Brazil could count on legal professionals who, working both in the public and the private sectors, had the skills to respond to the needs of a global market whose dynamics were often at odds with the country's legal tradition and practices. Such a demand ended up by profoundly reshaping the legal profession in Brazil as it inevitably led, notably from the 1990s onward, to transformation of Brazilian law firms and to competition among them.

IV BRAZIL'S REDEMOCRATIZATION REVIVES THE RULE OF LAW AND GIVES THE LEGAL PROFESSION A CENTRAL ROLE

While primarily economic forces were influencing change in the laws affecting business and creating new demands for legal services, political developments affected the nature and status of the Brazilian legal profession and strengthened its role in the country. During the military regime (1964–1985) the profession was somewhat marginalized as technocrats took over lawmaking and political repression limited lawyer's role in civil affairs. But by the end of the 1970s social movements, in which lawyers played a prominent role, had started the transition from a military regime toward democracy. A group of legal professionals, organized around a commitment to liberal values and the rule of law, emerged and gave the country's legal elite a prominent role in the new Brazilian political and social scene. With the rule of law enshrined as a fundamental principle, this elite played a role in the development of the new environment, including the laws affecting business and the creation of the new corporate law sector.

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The reemergence of the Brazilian legal elite during redemocratization was the result of actions by individual lawyers and the Ordem dos Advogados do Brasil – the Brazilian Bar Association or OAB. They fought for human rights and defended political prisoners during the military regime. With democratization, they pushed for reforms to guarantee civil rights, protect social and economic rights, and improve access to justice. These efforts culminated in the Federal Constitution of 1988.

The 1988 Constitution ushered in other changes that strengthened the rule of law and thus increased the importance of legal professionals in the Brazilian economy, polity, and society. These included strengthening the Public Prosecutor's Office and the Judiciary which ensured greater scrutiny of executive and legislative adherence to the law and the Constitution. These measures enhanced the role of legal professionals as guardians of the new rule of law order. This capacity was used to defend clients of all types, from victims of civil rights violations to corporations, and ensured that lawyers would be in high demand as the economy grew.

V THE TRANSFORMATION OF THE CORPORATE LEGAL HEMISPHERE, 1990–2014

The global shift deeply affected the Brazilian legal market. Apart from a boom of new practice areas (e.g., capital markets, ADR, mergers and acquisitions, antitrust), there have been changes in the profile of clients, who became significantly more demanding in an increasingly competitive legal market.

Prior to the global shift, the typical Brazilian law firm in the corporate sector was relatively small. A handful of lawyers joined together to form a firm. In many cases, they were led by a “notable,” a lawyer who had gained a reputation as one learned in the law. These legal notables combined intellectual and social capital built on family connections, academic positions, and publications of doctrinal texts. The firms were managed informally and developed clients through social contacts and the reputation of the leading partner. The practice would be focused on the area of the lead lawyer's expertise. There were some exceptions, particularly in that part of the sector that catered primarily to foreign clients. There you could find larger firms offering a fuller range of services, more professional management, and emphasis on the firm's brand, not just that of an individual notable. In some cases, these firms were founded by expatriates with experience in large law firms in the United States who settled in Brazil or Brazilians with overseas experience.¹⁵

¹⁵ See Krishnan et al. (2016).