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Abstract judicial review in the brazilian Supreme Federal Court (Supremo Tribunal Federal): Theoretical structures and empirical analysis of 25 years of abstract judicial review under the 1988 Brazilian Federal Constitution[3]

Keywords: Brazilian Supreme Federal Court (STF), judicial review, institutional/collective *veto players*
Słowa kluczowe: Brazylijski Federalny Sąd Najwyższy (STF), kontrola sądowa, podmioty polityczne

Summary

This paper analyzes judicial review (concentrated and abstract) exercised by the Brazilian Federal Supreme Court (STF) and the methods for and theories that allow an empirical ap-

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proach to this phenomenon as a decision-making process, making use of political institutions (distribution of powers and competences) and legal interpretation (legal literature and concepts). The institutional context of the decision-making process assigned by the Brazilian Constitution to the Federal Supreme Court (STF) makes it act by means of concentrated judicial review, ascribing to it the power to judge the constitutionality of federal and state law or normative acts, judicially reviewing these norms. The objective of this study is to determine the role of judicial review and the extent of concentrated judicial review, using as empirical basis the decisions of the Supreme Court in 5011 Direct Actions of Unconstitutionality (ADIs), adjudicated between 1988 and 2013. In the empirical test, there are the following main and mutually exclusive hypotheses: H1- Judicial review adds an institutional/collective *veto player* in decision-making (institutional analysis), increasing *policy stability* while reducing size the *winning set of the status quo* or expanding the *core of unanimity*; H2- Judicial review does not add an institutional/collective *veto player*, because, institutionally, the constitutional design and the process of appointment of the members of STF indicates the validity of the *absorption rule* of the Court in concentrated judicial review by other *veto players*. Secondly, there are the following hypotheses: H3 – The number of *legitimized plaintiffs* for the petition of judicial review cases (ADI) increases *policy stability* and reduces importance of *agenda setting* and decision-making capacity of majority coalitions in decision making; H4 – The number of *legitimate plaintiffs for* the petition of judicializing measures increases the *state/federative policy stability* and is innocuous to federal *policy stability* and decision-making. Conclusions: The data demonstrates that H1 is supported in federative/state decision-making and little evident national level, partially refuting H2. However, given the number of *legitimized plaintiffs*, the massive introduction of judicializing measures at the national level indicates that judicial review is used by minorities as signaling for political positioning and maximizing future electoral opportunities without effectively restricting government (H3). Judicial review is directed preferentially to increase federative/state *policy stability*, reducing the role of opposition majorities or restricting decisions to extend the federal decentralization by state decision making (H4).

Streszczenie

Abstrakcyjna kontrola konstytucyjności – 25 lat doświadczeń Najwyższego Sądu Federacji Brazylii

Artykuł podejmuje temat scentralizowanej i abstrakcyjnej kontroli konstytucyjności dokonywanej przez Federalny Sąd Najwyższy Brazylii oraz metody i teoretyczne podejścia w zakresie empirycznych badań procesu podejmowania decyzji i interpretacji prawa. Artykuł obejmuje swoim zakresem badanie 5011 decyzji Sądu podjętych w latach 1988–2013, przyjmując cztery wzajemnie się wykluczające hipotezy: H1) Sąd w procesie podejmowa-

nia decyzji o niekonstytucyjności przyjmuje rolę *veto player* (podmiotu, bez którego zgody nie można dokonać zmiany *status quo*), zwiększając polityczną stabilność poprzez redukowanie znaczenia wyboru większości i eksponowanie istoty jednomyślności, H2) sąd konstytucyjny nie jest podmiotem o randze *veto player,* ponieważ instytucjonalnie proces powoływania sędziów sądu wskazuje na absorbowanie przez sąd roli innych *veto players* w procesie kontroli, a w konsekwencji: H3) liczba podmiotów uprawnionych do wszczynania postępowania przed sądem wpływa na zwiększenie stabilności prowadzonej polityki i redukuje znaczenie obranych celów polityki rządzącej większości oraz H4) liczba tych podmiotów wyznacza wzrost stabilizacji polityki stanów w federacji i pozostaje bez szkody dla polityki federalnej. W konkluzji, będącej efektem rozległych badań empirycznych, autorzy znajdują potwierdzenie hipotezy pierwszej (H1) w procesie podejmowania decyzji na poziomie stanowym i nieco mniej na poziomie federalnym, odrzucając częściowo hipotezę drugą (H2). Wskazują także, badając strukturę podmiotów składających wnioski do sądu o badanie konstytucyjności, że sądowa kontrola jest używana przez mniejszości w celu wskazania swojej politycznej pozycji i zwiększenia szans na sukces wyborczy w przyszłości (H3). Sądowa kontrola jest skierowana na wzrost stabilności polityki stanów, redukując rolę większości w decentralizacji władzy państwa federacyjnego (H4).

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I.

This paper studies judicial review (judicialization) as an integral part of the decision-making process in the democratic State and its dependence on the arrangement of federative political institutions and the mutual relation of the federative powers. Specifically, we analyze the decisions of the Brazilian Federal Supreme Court (Supremo Tribunal Federal – STF) on the concentrated and abstract judicial review *(Ações Diretas de Inconstitucionalidade* – ADIs) as a veto power in the Brazilian decision-making process. The central questions addressed in this paper are: How to conceive the concentrated judicial review by means of the ADI measure as part of the decision-making process? What is the effective extent of concentrated and abstract judicial review in the decision-making process? Does the Federal Supreme Court „veto" decisions from other political actors? What are the effects of judicial review and the extent of the concentrated and abstract judicial review creat-

ed in 1988 over the decision-making process? Does this judicializing of politics alter in equal measure the decision-making process in the Union and the member-states of the Brazilian Federation?

In the first part we present the theoretical approach of judicial review as a contingent effect of the strategy of political and institutional players in a decision-making process molded by institutions (as rules of the decision-making game), that is, the institutional role and the activity of the judiciary on the democratic decision-making process. Judicializing is approached as an essential/incidental restriction of the constituent process[4]. Furthermore, this section confronts the central question of the study: the judicializing and the powers and prerogatives attributed to the STF and those legitimized to propose this measure as seen through the *veto players* theory designed by Tsebelis[5], making this the theoretical and methodological structure for the construction of hypotheses over the judicializing of the decision-making process.

In the following sections we present the empirical evidences and the conclusions that permit us to specify the role of judicial review and the extent of concentrated and abstract review, using as empirical basis the decisions of the Federal Supreme Court in 5011 ADIs that were adjudicated from 1988 to December 2013[6].

II.

When we study the decision-making and law-making process and the role of the Federal Supreme Court as a judicial review authority, we take this procedure as a set of interactions between institutional players (individual and collective) that produce a determined set of political outcomes, dependent on institutional variations (game rules/interaction) and the desires and beliefs

[4] J. Elster, *Ulisses Liberto:* Estudos sobre Racionalidade, Pré-Compromisso e Restrições. SP: Unesp, 2009.

[5] G. Tsebelis, *Atores com Poder de Veto*. Rio de Janeiro: EdFGV, 2009.

[6] The database for the empirical analysis is made up of 5011 ADIs collected and cataloged by the participants of the research group „Núcleo de Pesquisa „Direito e Política" (DIRPOL) do PPGD/UFPR" trough the information made available by the STF in its website „Acompanhamento Processual" http://www.stf.jus.br/portal/processo/pesquisarProcesso.asp, from August/October 2012 and March 2014.

of players involved in a strategical interaction. As such there is no substantive definition of political institutions in the theoretical and methodological approach of this study. What we propose is to analyze institutions as a thought-out and intentional project of political players that regulate the interaction of these same players and other political players[7]. These political players will expect a certain outcome out of this interaction process[8]. This approach prioritizes the study of the interaction between the players by methodological individualism and rational choice theory.

The devised analysis of judicial review and the division of powers will be related to the creation and inner workings of institutions, as well as the expectations over the results generated in the interaction between political players in a determined political arrangement[9]. Obviously there is no principle or normative incompatibility in this approach. The separation of powers is connected with the fundamental idea of avoiding tyranny and guaranteeing individual and collective fundamental rights against acts of political and institutional players[10].

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[7] According to Elster institutions are created by political players and, as such, „to talk about institutions is simply to talk about individuals that interact with one-another and with people outside the institutions. Whatever the result of the interaction, it must be explained relative to the motives and opportunities of these individuals", J. Elster, *Peças e Engrenagens das Ciências Sociais*. RJ: Relume-Dumará, 1994, p. 186.

[8] For Tsebelis, the „rate of investment of institutions derives from the fact that people use resources to create institutions; and, once these are created, institutions generate with time an income flow, namely they contribute resources that may be employed at any moment in the political arena [...] the creation of institutions is the result of a rational project", G. Tsebelis G., *Jogos Ocultos*. São Paulo: Edusp, 1998, p. 103.

[9] Truly this appears to be the spirit of the argument made by Hamilton, Madison and Jay to justify ratification of the Constitution that was written by the Philadelphia Convention. A. Hamilton, J. E. Madison, J. Jay, *O Federalista*. Campinas: Russell, 2009. According to Limongi, „The Federalist seeks new grounds for popular government and, to protect the separation of powers, seeks constitutional measures, guarantees to the autonomy of different branches of power, placed relative to one another that they mutually control and restrict themselves, ultimately as to the little virtuous characteristic of man, and his personal interests and ambitions in the accumulation of power. This ambition will be incentivized to confront ambition. Personal interests will be linked to constitutional rights". (The Federalist Papers, n. 51) F. P. Limongi, F.Weffort (org.). *Os Clássicos da Política*. Vol. 1, 10. Ed. São Paulo: Ática, 2000, p. 251.

[10] In this sense over Article 78, that stipulates judicial review, Hamilton states that „There is no position that does not lies in the clearest principles than that of declaring null

What we intend to observe is the institutional arrangement (distribution of constitutional powers) by the proposition of restriction theory. That is, if we take Constitutions as self-restrictions, when a constituent majority represented by the Legislative branch, that expects to be simple legislative majority, it limits its parliamentary powers, ceding them to other governmental institutions by the division of powers and judicial review[11]. In other words, judicializing is taken as a set of restrictions to future legislative minorities or majorities by the imposition of majority quorums for constitutional alterations and by judicial review[12].

Still, the constitutional phenomenon proposes restrictions to the exercise of power of other political and social players such as the Executive and Judiciary branches. In this case the Constitution created by the Legislative branch imposes restrictions on other political players.

Methodologically, according to Elster, aside from the distinctions between self-restrictions, to avoid falling in the functional explanation trap, we must distinguish two types of constitutional restrictions: essential (intentionally created for the expected benefits) and incidental (that promotes determined effects that were not originally planned by the players that created them)[13]. Only the first have a constitutional agreement nature, as they are a form of deliberate rationality that an individual or a constituent majority promote the restriction[14].

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an act of a delegated authority that is not in tune with the stipulations of the one that delegated the authority. Consequently any legal act contrary to the constitution will not be valid. To deny such evidence amounts to claim that the representative is superior to the represented, that the slave is more graduated than the master, that delegates of the people are above the people themselves, that those who act by delegation of powers are impeded not only to do what those powers do not authorize, but also what they prohibit". A. Hamilton, J. E. Madison, J. Jay, *O Federalista...*, p. 479.

[11] It is important to register that the Brazilian Federal Constitution of 1988 was drafted by the National Congress (Federal Legislative branch) by an important dialogue with groups of civil society after the 1964–1985 Military Dictatorship. In this manner the National Congress established limits to its ordinary power to legislate and decide.

[12] J. Elster, *Ulisses Liberto...*, p. 124–128.

[13] Ibidem, p. 120.

[14] Elster states that collective players (majorities in a constituent process) desire to „surpass passions and interests" as the main motive to cede power and self-restrict themselves (other motives might be „surpass the hyperbolic discount", „surpass the temporal strategic

The relevance for the methodological incorporation of the theory of restriction to the study of the effects of the Federal Constitution is in observing and comprehending it as a restriction to others (for example, impeding federative decentralization in certain matters) and/or as a preliminary agreement of constituent/legislators to avoid conceding to their passions and interests (the demands of their electoral base, for example), constitutionally limiting their autonomy. As such, when we think of judicial review in the decision-making/lawmaking process, the interpretative emphasis of political institutions on the restriction/self-restriction would lie in the powers attributed to the Federal Supreme Court (STF) and in the extension of plaintiffs legitimized to petition for a sentence by the STF, which would result in barriers to the federal legislators themselves and, overwhelmingly, to legislative activity in state parliaments/governments.

III.

Judicial Review was developed in the United States with the primary goal of overseeing the activity of the Legislative Branch and guaranteeing constitutional decisions effected and the rights attributed to individuals. In this sense Hamilton, Madison and Jay[15] defended a relevant independence that magistrates of the Legislative and Executive branch must have, because this autonomy is „necessary to the defense of the Constitution and individual rights against effects of those encroachments that, by the intrigues of the malicious or the influence of certain conjectures sometimes poison the people".

In truth, until recently, the guarantee to the rights of citizens and social groups was the main basis for judicial review. For example, Dworkin[16] stipulates the necessity for judges to make concrete the central legal and moral principles inscribed in the Constitution, as these principles are sources of

inconsistency" and „secure efficiency"). The constitutional norms for the pre-commitment would be: „cost imposition", „exclusion of options", „creation of tardiness", „obligation of ample majorities" and „separation of powers". In the case of constitutional agreements especially the latter three, J. Elster, *Ulisses Liberto...*, p. 122.

[15] A. Hamilton, J. E. Madison, J. Jay, *O Federalista...*, p. 481.

[16] R. Dworkin, *O direito da Liberdade: a Leitura Moral da Constituição,* São Paulo: Martins Fontes, 2006, p. 2–3.

fundamental rights. Besides the mainstream thought of Constitutional Law relevant jurists in countries that went through re-democratization processes in the 1970's and 1980's defend judicial review from the perspective of its importance for the guarantee of individual and groups rights[17].

On the other hand judicial review in federative States establishes judges as relevant arbiters in disputes amongst federative players (Union/member-states). This function was originally also constructed and theorized by American authors[18] and adopted by contemporary constitutional federalism practice and theory[19].

Brazil is structured as a federation since 1889 and represents a model of a federation with great concentration of legal and administrative powers. Since the 1934 Constitution[20], which promoted great centralization, the state decision-making process suffers strong limitations over the breadth of its scope due to the institutional design of Brazilian federalism. In particular the 1988 Constitution minutely detailed the attributions of the Union, states and municipalities[21].

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[17] Analyzing the Argentinean right of protest, Gargarella states that the fundamental role of judges is to guarantee individual and collective rights, although claiming that the Argentine judiciary does not adequately promote this function due to structural problems and the profile of judges. R. Gargarella, *El Derecho Frente a la Protesta Social,* [in:] R. Gargarella, *Teoría y Crítica del Derecho Constitucional,* Buenos Aires: Abeledo-Perrot, 2008, p. 827––837. Canotilho analyzing the Portuguese Constitutional Court, establishes the relevance of judicial review, amongst other reasons, in the defense of minorities and as a restriction to the power of majorities in Parliament. J. J. G. Canotilho, *Direito Constitucional e Teoria da Constituição*, 7. ed. Coimbra: Almedina, 2003, p. 682. Clève in turn claims the importance of judicial review in the protection of fundamental rights. C. M. Clève, *Controle de Constitucionalidade e Democracia*, [in:] A. G. M. Maués, *Constituição e Democracia*. São Paulo: Max Limonad, 2001, p. 54–60.

[18] A. Hamilton, J. E. Madison, J. Jay, *O Federalista...*, p. 489–494.

[19] J. J. G. Canotilho, *Direito Constitucional...*, p. 892–894.

[20] During the Imperial Era (1822–1889), Brazil was a unitary State guided by the 1824 Constitution, without a proper judicial review process. In the Republican Era, from 1889 onwards, Brazil became a Federation with reasonable autonomy in its Member-states (1891 Constitution) and a greatly centralized Federal State (1934, 1937, 1946, 1967 Constitutions, Constitutional Amendment n. 1 of 1969 and the 1988 Constitution).

[21] The privative lawmaking powers of the Union is very ample, defined by articles 21 and 23 of the Federal Constitution of 1988, leaving very limited lawmaking powers to the states. On the distribution of lawmaking powers in the Brazilian Federation, see F. R. L. Tomio, P. Ricci P, *Seis Déca-*

In this manner it is possible to verify the concentration of legislative competences in the Union, turning the competence much more an administrative than legislative matter. There is, as such, great restriction to the decision freedom of state political players. This is demonstrable by the decisions of the Federal Supreme Court in concentrated and abstract judicial review on the present constitutional context.

As our object is not judicial review as a restriction to others or a self-restriction imposed by the Constituents, we must in this moment make a brief historical retrospective of these mechanisms of judicial review in the Brazilian Republic. The first system of judicial review (abstract review) replicated the American counterpart without producing the same effects over the decision-making process, since its influence over this process was limited.

In the 1934 Constitution the Constituents clearly avoided restrictions by the judiciary and sought to mitigate the impact of judicial decisions in matters relevant to the executive and legislative branches (imposing that decisions over constitutionality of normative acts should be taken by a majority of judges in the court; disallowing the judiciary to rule over „exclusively political matters" – Article 68), but created a rough draft of concentrated judicial review, overall directed to restrict sub-national political players and to maintain the bases of the concentrated federalism created in the 1930's (attributing to the senate the competence to apply *erga omnes* effects to acts declared unconstitutional by the Federal Supreme Court; and overall, by the creation of *intervening representation* against state acts that disobeyed the federative principle, attributing this power to the Prosecutor-General of the Republic – Procurador-Geral da República)[22].

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das de Processo Legislativo Estadual: Processo Decisório e Relações Executivo/Legislativo nos Estados (1951–2010), „Cadernos da Escola do Legislativo" 2012, v. 13, p. 57–108, idem: *O Governo Estadual na Experiência Política Brasileira: As Performances Legislativas das Assembléias Estaduais,* „Revista de Sociologia e Política" 2012, v. 21, p. 193–259; *O Poder da Caneta. A Medida Provisória no Processo Legislativo Estadual,* „Opinião Pública" 2012 and F. R. L. Tomio, M. Ortolan, F. S. Camargo, *Análise Comparativa dos Modelos de Repartição de Competências Legislativas nos Estados Federados,* „Revista da Faculdade de Direito". Universidade Federal do Paraná, 2010, v. 51, p. 73–100.

[22] The intervention in the Judiciary branch precedes the 1934 Constitution itself, „in 08/11/01931 Vargas reduced from fifteen to eleven the number of Federal Supreme Court (STF) ministers; in 23/11/1931 he summarily retired six ministers alleging reasons of public order [...]; in 03/02/1932 he instituted the Electoral Code, that allowed the judiciary to judge the validity of

The 1937 Constitution created the suspension of sentences of the Federal Supreme Court, allowing the President, with approval of 2/3 of both houses of parliament, to revoke the Supreme Court decision. In the 1946 Constitution the Constituents restored the most part of the cannons of judicial review of 1934, although they revoked the restriction to the decision over certain matters of political nature and amplified the powers of the Prosecutor-General (Procurador-Geral) for the proposition of judicial review. In this sense „the Brazilian Constituent of 1946 is the first to signal the interest in adjudicating matters that before were restricted to the political world". Even if in „a process of judicializing under the tutelage of the executive branch" and whose „effects of judicializing were reserved to the state and municipal spheres"[23].

The 1964 dictatorship is responsible for the introduction of concentrated and abstract judicial review as an explicit restriction to the powers of the National Congress. The 2nd Institutional Act of 1965 extinguished life-long membership and the impossibility of demotion of judges and Amendment 16 from 1965 established concentrated and abstract judicial review by the Federal Supreme Court, provoked by the Prosecutor-General, of state and federal norms[24]. Namely this amplified judicializing by the authoritarian government of political conflicts and the legislative production of any sphere of federative parliament, which were kept functioning during the anti-democratic regime.

The Constituent of 1988 expanded the concentrated and abstract judicial review introduced by the authoritarian regime and maintained all structure for abstract judicial review. Contradictorily, the increment of the number of legitimized plaintiffs in abstract judicial review cases (Article 103 of the 1988

elections and proclaim the elects". E. Carvalho, *Trajetória da Revisão Judicial no Desenho Constitucional Brasileiro: Tutela, Autonomia e Judicialização,* „Sociologias" (UFRGS. Impresso), 2010, p. 181.

[23] E. Carvalho, *Trajetória da Revisão Judicial...,* p. 180–187. In the field of political theory the concept of judicializing was coined „in the literature by Tate & Vallinder (1995). Their creation expresses a political process that would affect contemporary democracies and, in general, had two vectors: (a) 'The process by which courts and judges come to make or increasingly dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies; and (b) The process by which on-judicial negotiating, and decision-making forums come to be dominated by *quasi*-judicial (legalistic) rules and procedures'", A. Veronese, *A Judicialização da Política na América Latina: Panorama do Debate Teórico Contemporâneo,* [in:] *6o Encontro Brasileiro de Ciência Política*, 2008, Campinas. 6o Encontro Brasileiro de Ciência Política, 2008, p. 5.

[24] E. Carvalho, *Trajetória da Revisão Judicial...,* p. 199–191.

Constitution) in reducing the political costs of litigation was responsible for a certain „senselessness of the abstract judicial review"[25].

In the point of view of a strict institutional arrangement, the expansion of the legitimized plaintiffs[26], the autonomy of the judiciary (and the Prosecutor and Attorney-General) and of the mechanisms of concentrated judicial review[27] by the Federal Supreme Court seem to express, in their essential sense: i) a self-restriction of the majority of the Constituents to the parliamentary action of congress; ii) the introduction of a restriction to (and elimination of the control of) the fed-

[25] According to Carvalho „ the National Congress rejected the model adopted by most countries that have abstract judicial review. In this model the legitimized plaintiffs to promote an Action of Unconstitutionality are restricted to 1/3 of parliament. As such the control of agenda of what may be adjudicated is much more rigorous than our own". E. Carvalho, *Trajetória da Revisão Judicial...,* p. 196.

[26] Formally there are nine groups of legitimized plaintiffs although there are sometimes several of these plaintiffs in each group, as for example the Confederation of Labor Unions and Class Unions of national reach. In fact, almost a hundred political and institutional players may litigate in abstract judicial review without restrictions of appreciation by the STF (items I and VIII) and hundreds (or millions) of interest groups have the same prerogative in their sphere of action. This is possibly the most ample list of legitimized plaintiffs allowed by the Constitution in any contemporary institutional context. Article 103 (CF 1988) „Those that may propose direct action of unconstitutionality and declaratory action of constitutionality are: I – The President of the Republic; II – The Leadership of Federal Senate; III – The Leadership of the Chamber of Representatives; IV – The leadership of the state Assemblies or the Assembly of the Federal District; VI – The Prosecutor-General of the Republic; VII – The Federal Council of the Bar Association (OAB); VIII – Any political party with representatives in the National Congress; IX – Any Labor Union Confederation or Class Union with national scope".

[27] There are four mechanisms of concentrated and abstract judicial review constitutionally allowed. In this study we concentrate on the ADI (Ação Direta de Inconstitucionalidade) stipulated in Article 102, I, 'a' of the 1988 CF, that represents over 90% of concentrated and abstract judicial reviews in the Federal Supreme Court. The other mechanisms are: ADC (ação declaratória de constitucionalidade), seen in Article 102, I, 'a' of the Constitution; ADPF (arguição de descumprimento de preceito fundamental), seen in Article. 102, § 1º; ADO (ação direta de inconstitucionalidade por omissão) stipulated in Article 103, § 2º CF. By an ADI it is possible to attack federal and state normative acts. By normative acts we mean those inscribed in Article 59 of the Constitution (Amendment to the Constitution, Complementary Laws, Delegated Laws, Ordinary Laws, Executive Acts, Legislative Decrees and Resolutions) and other acts with general normative content promulgated by the three branches. On laws and normative acts in Brazil see: P. E. A. P. Serrano, *O Desvio de Poder na Função Legislativ,.* São Paulo: FTD, 1997 and J. A. da Silva, *Processo Constitucional de Formação das Leis*. 2. ed. São Paulo: Malheiros, 2006.

eral Executive by means of judicializing measures and; iii) the reproduction of centralizing restrictions to the legislative and federative autonomy of state players.

The judicializing of politics by concentrated and abstract judicial review and the approach of the Federal Supreme Court as a possible player with veto powers in the decision-making process are different from judicial activism, because that approach is restricted to the approach of the judicial arrangement (game rules) of strategical interaction and the effects of the decision-making process[28]. In other words, the causes of judicializing (in special of concentrated judicial review) must be searched for in the rules of the decision-making process constructed by the majority of Constituents to restrict other players or to promote self-restrictions.

The questions, restructured theoretically, would be: what are the effects of judicial review and extension of concentrated review promoted by the institutional arrangement of 1988 over the decision-making or legislative process? Does this judicializing of politics equally alter the decision-making process of the Union and the states? In what manner does the amplification of the legitimized plaintiffs for the petition of ADIs alter the dynamics of judicial review and the decisions taken by other political and judicial players?

IV.

Before we present our hypotheses to be tested over the concentrated and abstract judicial control of the Federal Supreme Court, it is imperative first to explain briefly of the theory of players with veto powers. Tsebelis[29] defines *players with veto powers* as individual or collective players „whose consent is necessary for an alteration of the *status quo*". As such, the greater the distance (of preferences) of these players, and the greater their numbers, the „more difficult is a significant change in the *status quo*" (decision stability).

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[28] In this topic we follow Carvalho's proposition: „In our analysis judicialization will be taken as a phenomenon that propitiates participation of members of the judiciary in policy-making. We then distinguish the character of potentiality that is defined by the formal or procedural aspects of its substantive character, that is the intent of the interprets of the law to participate in policy-making. In our interpretation the substantive dimension refers to another phenomenon: judicial activism". E. Carvalho, *Judicialização da Política no Brasil: controle de constitucionalidade e racionalidade política*, „Análise Social" (Lisboa), v. XLIV, 2009, p. 316.

[29] G. Tsebelis, *Atores com Poder...*, p. 18.

The theory is complemented by two other concepts: wining set of the *status quo*, that is „the set of points with a empty winning set" (which are found amongst the preferences of players with veto power) and that „cannot be defeated". According to[30], „the definition of the core of unanimity logically leads to the conclusion that its size is a proxy to decision stability".

The Constitution determines the institutional players with veto powers through the distribution of powers (horizontal, as the division of powers; and vertical, as the attributions of federative players), while political and electoral results (or rules for appointments) generate the political players with veto powers that act trough institutional collective players according to the rules of the decision-making process (simple majorities, special majorities or unanimity). Thus, by the proposed analysis, to claim that the Supreme Federal Court is an agent with veto power in a determined decision-making process, it would be necessary to verify if the median preference of the Courts Judges (of the majority, by the decision-making rules of the STF) is within the core of unanimity of other institutional players with veto power (Presidency, Senate, Congress) or if the winning set of *status quo* that results from the preferences of the other players would allow the eventual legislative suppression of Supreme Federal Court decisions.

In Brazil the judges (Ministers) of the Supreme Federal Court are nominated by the Presidency amongst citizens with more than 35 and less than 66 years of age with notable legal knowledge and irreproachable moral, pending the approval of an absolute majority of the federal Senate members, as stipulated by article 101, CF[31].

Tsebelis expresses in three propositions the argument presented above. The fist describes the „numerical criterion":

Proposition 1: The addition of a new player with veto power augments the decision-making stability or maintains it unaltered (either by reducing the size of the winning set of *status quo*, or either by amplifying the size of the core of unanimity, or either by maintaining both equal)[32].

The second proposition describes the „rule of absorption":

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[30] Ibidem, p. 43–45.

[31] On others similarities and differences in the choice of Federal Supreme Court Judges to the American Supreme Court, see M. A. J. S. C. E. Oliveira, N. M. Garoupa, *Choosing Judges in Brazil: Reassessing Legal Transplants from the U.S.* „American Journal of Comparative Law", January 2011, Vol. 59, No. 2.

[32] G. Tsebelis, *Atores com Poder...*, p. 49.

Proposition 2 (rule of absorption): If a new agent with veto powers D is added to the core of unanimity of any other set of preexisting players with veto powers, D will not have effect over the decision-making stability[33].

The third proposition describes the „rule of *quasi*-equivalence"[34]:

Proposition 3 (rule of *quasi*-equivalence): For any set of players with its existing veto powers S, a necessary and sufficient condition that a new agent with veto power D does not affect the winning set of any SQ is that D be located in the core of unanimity of S[35].

In this manner, only if the preference of D (for example, the Judiciary/ Federal Supreme Court) is divergent from that of others players, would it result that the winning set of *status quo* and D would necessarily amount to an agent with non absorbed veto powers. Thus, in the concentrated control of constitutionality, the inclusion of the judiciary (Federal Supreme Court) might be, at least logically, different in the decision-making process of the Union and the member-state because state authorities (State Governor and chamber of representatives – state legislative power) do not participate directly of the appointment of a Supreme Court judge.

In the analysis of federal normative acts, there are three institutional players (Presidency of the Republic, National Senate, and Chamber of Representatives)[36], as the first two are responsible by the appointment members of the Federal Supreme Court the hypothesis of propositions 2 and 3 (absorption and *quasi*-equivalence) are reinforced[37]. Although, with the participation of the Federal Supreme Court in the state/federative decision-making process,

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[33] G. Tsebelis, *Atores com Poder...*, p. 53.

[34] Tsebelis calls this the *quasi*-equivalence rule „because it demonstrates that two criteria of decision stability utilized are almost equivalent: if you add a player with veto powers this does not increase the size of the core, also it does not reduce the winning set of any *status quo*". G. Tsebelis, *Atores com Poder...*, p. 54.

[35] Ibidem.

[36] Here we purposely simplify the decision-making process of institutional collective players (Senate and Chamber of Representatives) that could be split into more institutional and political players with veto power. Tsebelis, on the contrary, makes more sophisticated propositions that treat these situations in which institutional and political players participate to determine decision stability. Ibidem, p. 67 ss.

[37] In Tsebelis: „the restrictions imposed on the selection of members of the higher institutions of the judiciary limit extreme positions and practically guarantee that the median line of the Court's decision space is centrally located".

that has two players with institutional veto powers (governor and legislative assembly), allows for the claim that the rule of absorption would not necessarily be present in this decision-making process, as these state players do not participate of the appointment of judges of the Supreme Court.

Due to this fact the hypothesis based on proposition 1, that predicts an augment of decision-making stability by the inclusion of a third institutional player with veto powers (Supreme Federal Court) in the state decision-making process, becomes more sustainable. Especially because, given the institutional arrangement, this third player could not be affected by decisions (legislative/constitutional) promoted the other two players[38].

To take on the questions previously presented and to respond the paper's goals (determining the role of judicial review and the extent of concentrated judicial review in Brazil) – that is, if the Federal Supreme Court is a player with veto power in the legislative/decision-making process – we stipulate four hypothesis for empirical study:

H1 – The judicial review adds a player with veto power over the decision-making process (institutional analysis), increasing the decision-making stability as it reduces the winning set of *status quo* or increases the core of unanimity;

H2 – Judicial review does not add a player with veto powers because institutionally the constitutional design and process of the appointment of members of the Supreme Court point to the validity of the rule of absorption of the Federal Supreme Court in concentrated judicial review by other players with veto powers;

H3 – The number of legitimized plaintiffs for the proposal of judicializing measures (ADI) increases the decision-making stability and reduces the power of agenda and decision-making capacity of majority coalitions in the decision-making process;

H4 – The number of legitimized plaintiffs for the proposal of judicializing measures increases state/federal decision-making stability and is innocuous/not relevant to the stability of federal decision-making process.

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[38] In case of the declaration of unconstitutionality (ADI) of federal law in relation to the Federal Constitution, the National Congress, with support of the Presidency of the Republic, may alter the Constitution in some themes and maintain the decision pronounced unconstitutional by the Federal Supreme Court. On the other hand the state legislative assembly does not have this legal and political power.

Hypothesis 1 and 2 are alternative in each decision-making process (Union and state/federative). As such they may be partially claimed/rebutted by the empirical data of concentrated and abstract judicial review of the Federal Supreme Court. In fact this is possibility addressed by the secondary hypothesis, which describes the participation of legitimized plaintiffs in judicialization. Hypothesis 3 and 4 are directly derived from these constitutional mechanisms. In other words, we seek to verify if there is a greater probability of the Supreme Federal Court in vetoing a state normative act (state/federative sphere) than a federal normative act (union) due to the distribution of legislative powers in Brazilian federalism. This is verified by hypothesis 4.

Although, if we take preferences in account, logically each agent will search for something that lies close to his preferences. Hypothesis 3 seeks to measure the effect of the number of legitimized proponents over the power of agenda[39]. Namely we seek to verify if concentrated and abstract judicial review, when Hypothesis 1 is sustainable, reduces the power of agenda of institutional players in the decision-making process.

To develop and confirm the hypothesis all the ADIs proposed (between 1988 and December 2013) and their decisions by the Federal Supreme Court will be analyzed. Analytically, we limit the more detailed analysis to ADIs that had as central matter the unconstitutionality of laws, emends to the constitution and executive acts[40].

V.

In this section we will systematically analyze the ADIs that were proposed in the Federal Supreme Court and the decisions of STF judges. By the analysis of this

[39] Tsebelis presents a fifth proposition over the power of agenda: „the player with veto power that establishes an agenda that has an important advantage: he may consider the wining set of other players in relation to his restriction and choose within this set the result of his preference". Besides this he establishes as one of the bases of this proposition that the „importance of determining the agenda diminishes as the decision stability increases", G. Tsebelis, *Atores com Poder...*, p. 60–61.

[40] Executive acts (Medidas Provisórias) are edited by the President of the Republic in case of relevance and urgency, taking on force of law. On the other hand, they must be afterwards formally converted into law by the National Congress as stated in Article 62 of the Federal Constitution. Governors (state executive) may also create executive acts in the case these provisions exist in state constitutions.

data by the testing of the hypothesis previously presented we intend to demonstrate, firstly (hypothesis 1 e 2), that the decisions over concentrated judicial review by the Federal Supreme Court are directed, primarily, to the state decision-making process, much more than the federal decision-making process.

This obviously does not occur by mere chance, it is not incidental. The definition, by the Constituents, the Federal Supreme Court as an instance of judicial review of the state decision-making process impedes that a local judicial organism be subject to the rule of absorption that, eventually, would limit effective judicializing of normative acts promulgated by state parliaments.

In this manner we strive to demonstrate that the Federal Supreme Court must be comprehended as an agent with veto powers in the state/federative decision-making process, independently from local decision-making stability. Besides this we also measure, with the same base of data in decisions of ADIs by the Federal Supreme Court that have as object a decision-making process, the validity of hypothesis 3 and 4.

Table 1. Concentrated Judicial Review – ADI 1998–2013 – STF

Decisions	ADI Result	Adjudicated Decision-making Process (STF)							Total	
		Federal		State		Municipal				
		n	%	N	%	N	%	n	%	
Final	In favor of plaintiff	N	96	12%	687	88%			783	100%
		%	5%		22%				16%	
	Partially in favor of plaintiff	n	48	22%	174	78%			222	100%
		%	3%		6%				4%	
	Aganist the plaintif	n	95	46%	113	54%			208	100%
		%	5%		4%				4%	
	Not admited	n	37	34%	72	66%			109	100%
		%	2%		2%				2%	
	No sentence	n	953	49%	942	48%	49	3%	1944	100%
		%	53%		30%		100%		39%	
	Total (Final)	n	1229	38%	1988	61%	49	2%	3266	100%
		%	68%		63%		100%		65%	

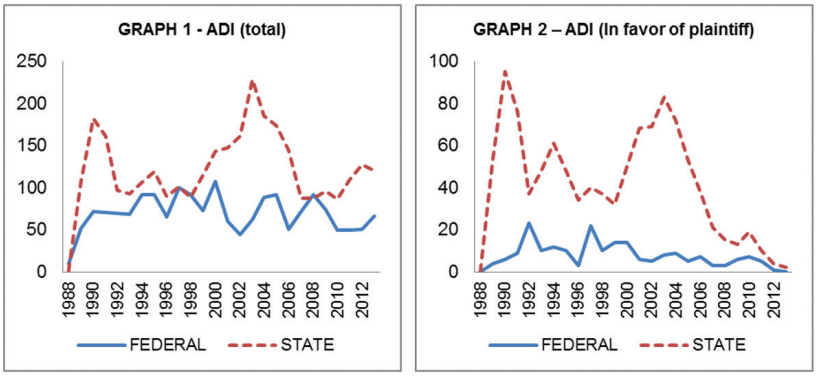
Decisions	ADI Result	Adjudicated Decision-making Process (STF)							Total	
		Federal		State		Municipal				
		n	%	N	%	N	%	n	%	
Injunctions	In favor of plaintiff	n	35	16%	178	84%			213	100%
		%	2%		6%				4%	
	Partially in favor of plaintiff	n	23	37%	39	63%			62	100%
		%	1%		1%				1%	
	Aganist the plaintif	n	50	46%	59	54%			109	100%
		%	3%		2%				2%	
	Not admited	n	9	60%	6	40%			15	100%
		%	0%		0%				0%	
	Total (Injunctions)	n	117	29%	282	71%			399	100%
		%	6%		9%				8%	
ADI Pending Trial %		n	464	34%	882	66%			1346	100%
		26%		28%				27%		
Total (ADI) %		n	1810	36%	3152	63%	49	1%	5011	100%
		100%		100%		100%		100%		

Source: STF (ADI 1988/2013) – database organized by the authors.

Table 1 and Graphs 1, 2 and 3 clearly demonstrate that the state decision-making process is the most present in concentrated judicial review (ADI). In the analysis we observe that two thirds (63%; 3.125 ADIs) of 5.011 ADIs petitioned in the STF between 1988 and December 2013 had as object a normative act of the state decision-making process.

Besides this, 35% of ADIs directed to the state/federative decision-making process were judged pro-plaintiff (22% In favor of plaintiff, 6% Partially in favor of plaintiff, 6% injunctions in favor of plaintiff and 1% of injunctions partially in favor of plaintiff) particularly granted in favor of those that propose cases in the Federal Supreme Court. On the other hand only 11% of ADIs over the federal decision-making process were judged in favor of the plaintiff[41].

[41] In Table 1, in the case of ADI has an injunction granted and is judged in favor of the plaintiff, this case is only registered in the „in favor of plaintiff" item of the Table. The ADI



Source: STF (ADI 1988/2013) – data-base organized by the authors.
(*) Sentenced „in favor of plaintiff", in total or partially, in final sentences or injunctions on 31/dez/2013.

The index of pro-plaintiff sentences related to the state decision-making process is that is three times the decision-making process of the Union. This means that judicializing of concentrated and abstract judicial review by the Federal Supreme Court (ADI), both in quantitative as proportional terms, is more accentuated over normative acts, as in Constitution, laws and infra-legal norms related to the decision-making process that involves the institutional players of the states (government, assemblies, courts, etc.).

Nominally, the Federal Supreme Court is an institutional agent (with veto powers) much more present in the state decision-making process, as such their decisions increase the decision stability of the internal conflicts of the states and between the states (federative). This data allows us to partially claim the validity of Hypothesis (1) and refute partially Hypothesis (2).

Thus, what we seek to understand is if the Federal Supreme Court lies inside the core of unanimity or not. That is, if it is an agent with power of veto or is absorbed. It must be stressed that the more ample the core of unanimity is, the more difficult to implement significant normative changes in the *status quo*. Given that the Federal Supreme Court has altered the decisions of the state legislative process in the most ample form, when it is not absorbed by other players, Hypothesis 1 has significant robustness in the state/federative process, while Hy-

will be noted on the „injunction in favor of plaintiff", „injunction partially in favor of plaintiff" and „no admitted" only if it was subject to a final decision.

pothesis 2 best describes the federal decision-making process. This argument is reinforced by the content of Tables 2 and 3, that demonstrate the least judicial review of the federal legislative process vis a vis the state legislative process.

Table 2. ADI/Decision-making process (by judicial measure/favorable judgments; 1998–2013)

Type of adjudicated norm	Decision-Making Process							
	Federal				State/Federative			
	In favor of plaintiff (Total)	Partially in favor of plaintiff	Total ADIs	% In favor of plaintiff (Total/ Partially)	In favor of plaintiff (Total)	Partially in favor of plaintiff	Total ADIs	% In favor of plaintiff (Total/ Partially)
Constitution	6	8	120	12%	254	83	800	42%
Law	39	32	787	9%	387	79	1945	24%
Executive act	4	3	364	2%			5	0%
Others	47	5	539	10%	46	12	402	14%
Total	96	48	1810	8%	687	174	3152	27%

Source: STF (ADI 1988/2013) – database organized by the authors.

Table 3. ADI/Legitimized Plaintiffs (Constitution-Law-Executive act/sentence result; 1998–2013)

Type of norm adjudicated/ Legitimized plaintiff	Decision-Making Process					
	Federal			State/Federative		
	In favor of plaintiff (Total/ Partially)	Total ADI	% In favor of plaintiff (Total/ Partially)	In favor of plaintiff (Total/ Partially)	Total ADI	% In favor of plaintiff (Total/ Partially)
Constitution/ Ammendment	14	120	12%	337	800	42%
Assembly	1	5	20%		5	0%
Society/Confederation	4	61	7%	27	113	24%
Governor	1	9	11%	145	302	48%

Type of norm adjudicated/ Legitimized plaintiff	Decision-Making Process					
	Federal			State/Federative		
	In favor of plaintiff (Total/ Partially)	Total ADI	% In favor of plaintiff (Total/ Partially)	In favor of plaintiff (Total/ Partially)	Total ADI	% In favor of plaintiff (Total/ Partially)
Bar association – Ordem dos Advogados do Brasil (OAB)	2	5	40%	6	50	12%
Political party	3	35	9%	47	102	46%
Prosecutor-General	3	5	60%	112	228	49%
Ordinary laws/ Complementary laws	71	787	9%	466	1945	24%
Assembly		15	0%	2	9	22%
Society/Confederation	19	364	5%	67	541	12%
Governor	5	36	14%	232	693	33%
Municipality					1	0%
Bar association (OAB)	3	44	7%	17	85	20%
Political Party	14	180	8%	21	168	13%
Citizen		10	0%		1	0%
President		1	0%		6	0%
Prosecutor-General	30	137	22%	127	440	29%
Senate					1	0%
Executive acts (Medida provisória)	7	364	2%		5	0%
Assembly		2	0%			
Society/Confederation	3	120	3%		1	0%
Governor		4	0%			
Bar association (OAB)	3	44	7%	17	85	20%
Political Party	14	180	8%	21	168	13%
Prosecutor-General	30	137	22%	127	440	29%
Total	92	1271	7%	803	2750	29%

Source: STF (ADI 1988/2013) – database organized by the authors.

Table 3, limited to the ADIs that question dispositions of Constitution, Laws and Executive Acts and specifies the legitimized plaintiffs, allows us to verify the validity of the complementary Hypothesis (3 and 4). As there are hundreds, maybe thousands, of legitimized proponents that may request the judgment of the Federal Supreme Court over the unconstitutionality of state and federal law, as expected millions of ADIs were proposed in the period.

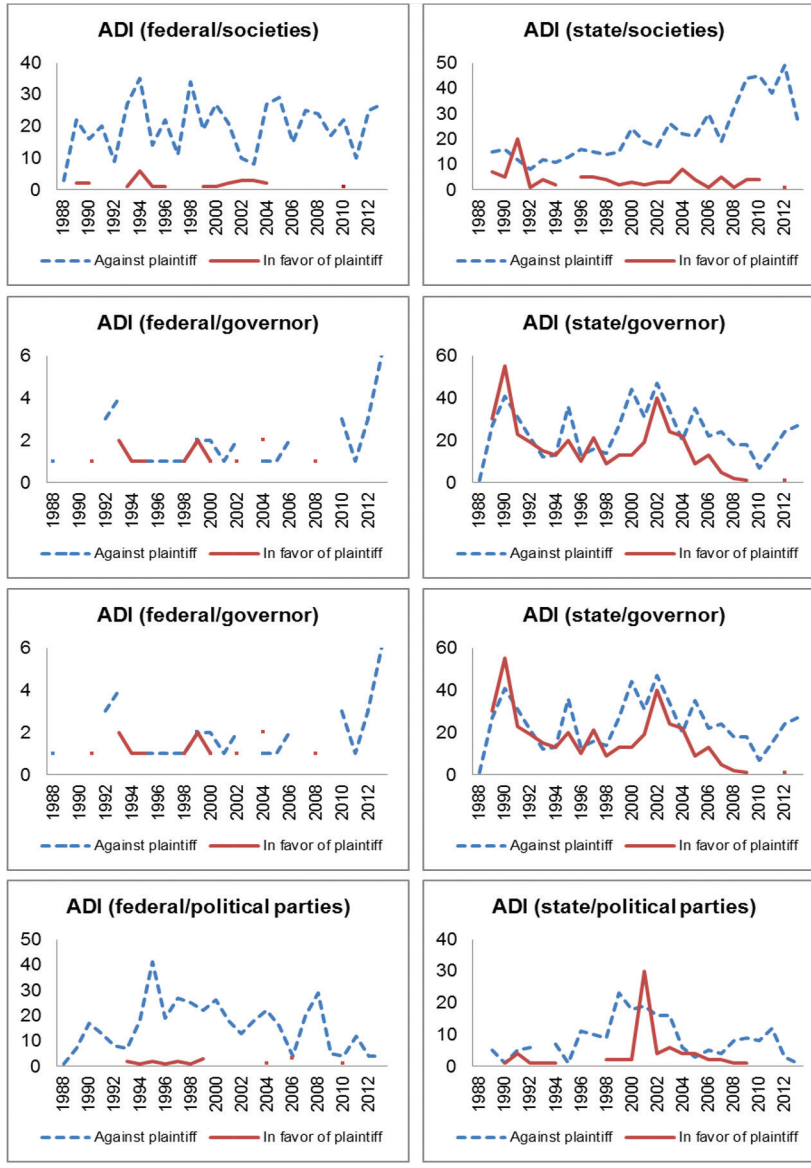
The question is to know if the impossibility of filtering the concentrated judicial review, that occurred only in the period the Prosecutor-General of the Republic was legitimized as a plaintiff (before 1988) would pressure the STF out of the core of unanimity, avoiding its absorption by other institutional players. In other words, would the number of legitimized proponents increase the decision-making stability and limit the action of legislative majorities or majority coalitions in the state and federal, state spheres or both?

As described previously, generally the concentrated and abstract judicial review affects primarily the decision-making stability of the state legislative process. While one federal normative decision (constitutional amendment, law or executive measure) in every 14 object of the ADI is revised by the Federal Supreme Court (judged in favor of the plaintiff, totally or in part), one in every three ADIs over state legislation is judged in favor of the plaintiff by the STF.

In a simpler manner, the set of the period (1988–2013) there is a five times greater probability for an ADI to alter a state normative decision when compared to adjudicated federal legislation. In thus sense judicializing at the federal level has a more prominent character of signaling of a political positioning for legislative minorities and unfruitful attempts of interest groups to avoid legislation, causing little effect over the power of agenda of the government and the majority coalitions.

This is particularly visible when we verify the reduced effect of ADIs over federal executive acts. On the other hand the ADIs increase the state decision-making process, either limiting the legislative decisions of opposition majorities (by judicializing measures initiated by governors), or by restricting decisions of majority state coalitions (judicializing measures promoted by governments and the Prosecutor-General).

Graph 3. ADI/Legislative process/Legitimized plaintiffs (final sentences; *n*, 1998–2013)



Source: STF (ADI 1988/2013) – data-base organized by the authors.

(*) ADIs (n) by Legitimized plaintiff: Federal (545/Societies, 49/Governor, 151/Prosecutor-General e 420/Political Parties); State (655/Societies, 995/Governor, 668/Prosecutor-General e 274/Political Parties)

In spite of, in the whole, this being the prevalent situation in federal/state legislative processes subject to the concentrated and abstract judicial review, the exam of judicializing by legitimized plaintiffs allows us to verify in a more detailed manner the operation of this logic. Graph 3 seeks to describe dually the impact of legitimized plaintiffs that most require the ruling of the Supreme Federal Court by ADI.

Firstly, societies (union confederations or national class unions) are the plaintiffs that propose the most ADIs over federal legislation and are also relevant plaintiffs in the state sphere. Legitimized plaintiffs limited to their sphere of interests, these entities obtain limited success in their litigation in the Federal Supreme Court, below the average of ADIs judged in favor of the plaintiff in each decision sphere. Furthermore, almost halve the ADIs of societies judged in favor of plaintiffs are adjudicated by entities that represent public servants, especially in the judiciary and similar branches (judges, public prosecutors, state attorneys and police chiefs). Besides being a typically corporative judicialization measure, the corporations closer to the judiciary are those that obtain a positive response in the Supreme Federal Court in their cases against legislative decisions.

The second group of legitimized plaintiffs most active are state governors. Of the 1044 ADIs adjudicated by governors against normative decisions, the immense majority are directed to provoke the sentencing of the Federal Supreme Court over state normative acts (995 ADIs), being that ¾ are directed against legislation approved by the state assemblies themselves and the remaining are directed against legislative decisions of other states.

In this manner the state governors are legitimized plaintiffs with high success rates when limiting legislative decisions of opposition/rebel majorities in their states and when they impede legislative decisions of other federative units (approximately 40% of ADIs sentenced in favor of the plaintiff). The state governors make use as constitutional basis for ADIs primarily Articles 88 (that stipulates distribution of legislative powers); 61, § 1 (powers exclusive to the executive branch); 22 (powers exclusive to the union).

The third legitimized plaintiff most present in concentrated judicial review against normative decisions is the Prosecutor-General of the Republic. In the tradition of judicial review most of ADIs initiated by the Prosecutor-General seek to restrict the state decision-making process, maintaining

the bases of federalism as to the distribution of legislative powers, greatly centralized in Brazil since the 1930's.

In this role the Prosecutor-General had high success rates in his cases in the Federal Supreme Court (almost 40% of ADIs judged in favor of the plaintiff). Although, after 1988, the Prosecutor-General became more autonomous from the federal government and became also a legitimized plaintiff in the federal decision-making process, becoming the plaintiff that obtained in absolute (30 ADIs) and relative (22% of ADIs judged in favor of plaintiff) terms the most success in requiring that the STF veto the legislative decisions (ordinary and complementary laws) of the Federal Congress.

On the other hand, this does not appear to have had a significant effect over the power of agenda in majority coalitions. A relevant data over the activity of the Prosecutor-General's office as a legitimized proponent, in the period of 1988 to 2013, is its inactivity from 1997 to 2002. It is possible that the Prosecutor-General, in the period of the Fernando Henrique Cardoso presidency, was incorporated to the coalition of government, denoting a lesser degree of autonomy from the federal executive branch.

Lastly there is the activity of political parties as legitimized plaintiffs in ADIs. In general, given the low efficacy of such judicial measures, especially in the federal sphere, the judicilization by political parties is part of a strategy by opposition minorities that make use of concentrated judicial review by the Federal Supreme Court to signal their positions to the electorate and create political and electoral costs to the government.

VI.

The data demonstrates that H1 is corroborated in the federative/state decision-making process, but is little evident in the national sphere, refuting partially H2. On the other hand, given the number of legitimized plaintiffs, the numerous introduction of judicializing measures at the national level is utilized by minorities as a signal of political positioning and maximizing of future political opportunities without restricting the government effectively (H3). Judicial review is preferentially directed to the increasing of state/federal decision-making stability, reducing the role of opposition majorities that

increase the decentralization of the federation by the state decision-making process (H4).

These, however, are conclusions that deserve greater detailing in a future research agenda that inserts concentrated and abstract judicial review as an integral part of the institutional arrangement, which is determinant in the decision-making process. Especially imperative is the analysis of the role of the Federal Supreme Court as an institutional agent with veto powers in the legislative process. Namely, besides the refinement of the theoretical-methodological approach that makes it possible to incorporate the judiciary as an agent of the decision-making process, it is also opportune to systemize the empirical data of these decisions as a test of specific hypothesis of: i) the subject of norms judicialized; ii) the actions/beliefs/interests of legitimized plaintiffs; iii) the content and judicial-political effects of ADIs; and iv) the difference in the judicializing that takes place between the states members.

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