PEDRO HENRIQUE ARCAIN RICCETTO

STRIKING DOWN CONSTITUTIONAL AMENDMENTS:

When Do Courts Enhance Democracy in Latin America?

Ph.D. Dissertation

Supervisor: Assistant Professor Conrado Hübner Mendes

UNIVERSITY OF SÃO PAULO

FACULTY OF LAW

SÃO PAULO - SP

2020

PEDRO HENRIQUE ARCAIN RICCETTO

STRIKING DOWN CONSTITUTIONAL AMENDMENTS:

When Do Courts Enhance Democracy in Latin America?

Thesis submitted in partial fulfilment of the requirements for the degree of Ph.D. in Public Law (Constitutional Law) at University of São Paulo, Faculty of Law, under the supervision of Assistant Professor of Law Conrado Hübner Mendes.

UNIVERSITY OF SÃO PAULO

FACULTY OF LAW

SÃO PAULO - SP

2020

Catalogação da Publicação
Serviço de Biblioteca e Documentação
Faculdade de Direito da Universidade de São Paulo

Arcain Riccetto, Pedro Henrique
Striking Down Constitutional Amendments: When Do Courts Enhance Democracy in Latin America? ; Pedro Henrique Arcain Riccetto ; orientador Conrado Hübner Mendes -- São Paulo, 2020.
192
Tese (Doutorado - Programa de Pós-Graduação em Direito do Estado) - Faculdade de Direito, Universidade de São Paulo, 2020.

1. Public Law. 2. Judicial Politics. 3. Courts. 4. Constitutional Amendments. 5. Latin America. I. Mendes, Conrado Hübner, orient. II. Título.

ACKNOWLEDGEMENTS

The doctoral experience was life-changing for me, and I owe many thanks for what I have learned. During the past years, I crossed paths with brilliant, inspiring, and supportive people. Each of them made me thankful for the opportunities I had and thrilled about what comes next. My frankest gratitude to Professors Conrado Mendes, who gently guided me throughout this expedition as my supervisor, and Sergio Resende de Barros, who first trusted me as his doctoral supervisee. This journey would not have been viable without their work. I also wish to thank the readers of this dissertation, Professors Rogério Arantes, Virgílio Afonso da Silva, Luciana de Oliveira Ramos, and Diego Werneck Arguelhes, for their time and feedback.

The academic environment may be hostile to some, but what I found at the University of São Paulo was a group of colleagues fully dedicated to cooperation. I wish to thank to the good friends I have made here, for their partnership inside and outside the classroom: Túlio Jales, Nicola Tommasini, Beatriz Kira, Lívia Guimarães, Enrico Misasi, Cecília Barreto, Pedro Banhos, Vivian Rocha, Bonifácio Andrada, Lilian Cintra, Karina Denari, Gabriel Calil, Beatriz Nimer, Guilherme Jardim Duarte, Jeferson Mariano Silva, Matheus Souza, Victor Marcel, among others. Also, I am grateful for all the support provided by the research cluster "Constitution, Politics, and Institutions" and its members.

During these years, I was incredibly lucky to have the possibility of pursuing research abroad. I had the pleasure of being a visiting researcher at Yale University's Department of Political Science, under the guidance of Professor Frances Rosenbluth. Her friendship, dedication and inputs were essential for my development as a researcher, and our weekly lunch discussions at the Dining Hall were the highlights of my stay. Yale has grown the sense of community in me, and I would like to give special thanks to Rafael Bezerra Nunes, Raquel Mattos Pimenta, Guilherme Palu, Renan Kalil, Cathy Greene, Antonio Davola, Fernando Bracaccini, Paula Perez, Franziska Bantliin, Anat Lior, and Quirin Weinzierl.

I undertook a pre-doctoral fellowship at the University of Oxford, position that was sponsored by Professor Ezequiel Gonzalez-Ocantos, to whom I will always be indebted for his generosity and advice. I also want to show my gratitude for the Latin American Centre and the dedication of Professors Tim Power and Andreza Aruska. I also need to thank Luis Fernando Matricardi, Bernardo Medeiros, Cristina Maglia,

Leonardo Gil, Pedro Felipe Santos, Filip Bubenheimer, Darlan Cândido, and the Brazilian Society members. Special thanks to Baroness Shas Sheehan for giving me the chance to learn from the UK Parliament daily activities. Also, I could not skip the mention to 10 Rectory Road (and Rosanna, Tom, Ellie, and Angharad), a house that will always be in my heart.

I thank Professor Scott Mainwaring for granting me the Democratic Governance Fellowship at Harvard Kennedy School. I definitely benefited from his supervision and insightful comments. The period I spent there was highly productive and I learned a lot from the community of scholars engaged in politics and policy-making in Latin America. I am grateful for the frequent discussions I had with Kaori Urayama, Candelaria Garay, Daniel Hidalgo, Aisha Moodie-Mills, Heidi Heitkamp, and Roger Stiefelmann Leal.

I am indebted to many other scholars for their help in many stages of my doctoral journey. For commenting on pieces of this dissertation or papers I wrote for events, I would like to thank Daniel Cappechi, Renê Chiquetti, Vera Chueiri, Yaniv Roznai, Linda Greenhouse, and Lee Epstein. I am also grateful for the insights I received from David Landau, Ran Hirschl. I am equally thankful to the researchers I met in the short research periods I spent at the Max Planck Institute in Heidelberg and Sciences Po Paris.

I empashize my thanks for the financial support received from CAPES, which funded in more than opportunity my research through scholarships and travel grants. It is also thanks to CAPES that I was able to conduct my doctoral research in other countries.

Parts of the section 2.1 of this dissertation (especially 2.1.1.1) were adapted from a paper I co-authored with Nicola Tommasini and Yaniv Roznai, entitled "When Overrides and Backlashes Do Not Scare: The Power to Review Constitutional Amendments and the Case of Brazil" (not published yet). I thank the co-authors for giving me permission to integrate the argument of the paper to the broader argument developed here.

I would like to thank my family - my mother, my father, my sister and my nephew - for all their support from when I decided to follow the academic path.

Pursuing a PhD was only possible because of their love, hard work and trust in me, and receiving this degree will be fully dedicated to them.

Finally, this would not have been possible without the tireless help of my husband, Paul-Louis Lecomte. He was my biggest supporter, advisor and discussant. From when we met in those tiny streets full of castle-like buildings in Oxford, I was sure I had found a partnership for life. At that time, I was looking for answers for my research, but I ended up finding something much more precious. To him, my deepest thanks.

RICCETTO, Pedro Henrique Arcain. Striking Down Constitutional Amendments: When Do Courts Enhance Democracy in Latin America? January 2020, 190 pages, Ph.D. Dissertation, Faculty of Law, University of São Paulo, São Paulo.

ABSTRACT

The role of the Courts in the review of constitutional amendments is often pictured as a detractor of the democratic quality of a political system, as many scholars argue it endangers the will of a qualified elected majority. However, there may be cases where the judicial intervention enhances democracy by improving the political decision-making standards. The dissertation aims to answer under which circumstances the power granted to justices to review constitutional amendments produces democratic outcomes. To address the question, I considered institutional and political settings of several Latin American countries (Argentina, Brazil, Colombia, and Peru) and performed a comparative analysis to test whether the presence or absence of some variables allows a democratic judicial review of constitutional amendments. The political and institutional attributes discussed are (I) Judicial Independence, (II) Political Competition, and (III) Legitimacy of the Courts, identified from previous literature in judicial politics. I tested if the presence of these variables fulfils three criteria established as a measure for democracy: (i) the existence of deliberative processes inside and outside the courts, (i) the possibility of overrides and backlashes, and (iii) the non-partisanship of the judicial rulings, in the review of constitutional amendments. I then chose two countries for the testing of each attribute (I, II, III), one where this attribute is present and another where it is absent. For testing this model, I adopted the rational choice theory applied to judicial behaviour. The results show that the presence of some combinations of institutional attributes enhance the democratic quality of the judicial review of constitutional amendments. The dissertation intends to provide scholars with a better understanding of the constitutional amendment dynamics. It also aims to develop a tangible guide to assist constitutional practitioners on deciding the role of the courts in the judicial review of constitutional amendments and determining what are the best institutional scenarios for granting justices with this power.

Keywords: Judicial Politics; Courts; Constitutional Amendments; Latin America.

RICCETTO, Pedro Henrique Arcain. Control de Enmiendas Constitucionales: ¿Cuándo Consiguen las Cortes Mejorar los Estándares Democráticos en América Latina? Enero de 2020, 190 páginas, Tesis Doctoral, Facultad de Derecho, Universidad de São Paulo.

RESUMEN

El papel las Cortes en el control de enmiendas constitucionales suele ser considerado como un detractor de la calidad democrática de un sistema político, ya que muchos argumentan que un grupo de jueces non elegidos puede rebatir la voluntad de una mayoría elegida y cualificada. Sin embargo, es posible que existan casos en los que la intervención judicial resulta más democrática gracias a la mejora de la calidad de las decisiones políticas. Esta tesis tiene por objetivo entender bajo qué circunstancias el poder otorgado a los Ministros para controlar enmiendas produce resultados democráticos. Para responder a esta pregunta, considero el marco político e institucional de varios países Latinoamericanos (Argentina, Brasil, Colombia y Perú) para realizar un análisis comparativo y definir si la presencia o ausencia de una serie de Atributos Institucionales contribuye a un control judicial de enmiendas constitucionales más democrático. Estos Atributos Institucionales son: (I) Independencia Judicial, (II) Competencia Política y (III) Legitimidad de la Corte, basados en literatura previa sobre política judicial. En mi estudio, evaluó si la presencia de estos atributos satisface tres criterios que establezco como medidas de democracia: (i) la existencia de procesos de deliberación de la Corte, (ii) la posibilidad de oposición a la decisión judicial o a la Corte, (iii) la imparcialidad de las decisiones judiciales, en el control de enmiendas constitucionales. El análisis es comparativo, lo que significa que para evaluar el aporte de cada Atributo Institucional (I, II, III) escojo un país donde el atributo está presente y otro en el que está ausente. Cabe mencionar que, a lo largo del desarrollo del análisis de este modelo, utilizo la teoría de elección racional aplicada al comportamiento judicial. Los resultados muestran que algunas combinaciones de Atributos Institucionales mejoran la calidad democrática del control judicial de enmiendas constitucionales. Esta tesis pretende ofrecer un mayor entendimiento de las prácticas y dinámicas del control de enmiendas constitucionales para académicos e investigadores. También tiene por objetivo desarrollar una guía practica para ayudar a determinar el papel de las cortes en el control de enmiendas constitucionales y determinar cuáles son los escenarios en los que otorgar este poder a los Ministros es más adecuado.

Palabras Clave: Política Judicial, Cortes, Enmiendas Constitucionales, América Latina

RICCETTO, Pedro Henrique Arcain. Controle Judicial de Emendas Constitucionais: Democracia e Constitucionalismo na América Latina. Janeiro de 2020, 190 páginas, Tese de Doutorado, Faculdade de Direito, Universidade de São Paulo.

RESUMO

O papel das Cortes no controle de emendas constitucionais é usualmente considerado deletério à qualidade democrática de um sistema político, uma vez que permite a um grupo de juízes não eleitos confrontar a vontade de uma maioria eleita e qualificada. No entanto, é possível que a intervenção judicial resulte em mais democracia e, portanto, melhore a qualidade da decisão política. Esta tese tem como objetivo entender sob quais circunstâncias o poder de controlar emendas concedido às Cortes Constitucionais produz resultados democráticos. Para responder à pergunta, considero particularidades políticas e institucionais de diversos países latino-americanos (Argentina, Brasil, Colômbia e Peru) para realizar análise comparativa e definir se a presença ou ausência de uma série de Atributos Institucionais contribui para um controle de emendas constitucionais mais democrático. Baseado em literatura prévia sobre política judicial, defino que esses Atributos Institucionais são: (I) Independência Judicial; (II) Competição Política; e (III) Legitimidade das Cortes. No estudo, avalio se a presença desses atributos satisfaz três critérios que estabeleço como medidas de democracia: (i) a existência de processos de deliberação na Corte; (ii) a possibilidade de oposição à decisão judicial ou à Corte enquanto instituição; e (iii) a imparcialidade das decisões judiciais, todos verificados dentro do controle de emendas constitucionais. A análise é comparativa, o que significa que para avaliar a contribuição de cada Atributo Institucional (I, II, III) eu escolho um país onde o atributo está presente e outro em que está ausente. Cabe mencionar que, ao longo do desenvolvimento da análise deste modelo, utilizo a teoria da escolha racional aplicada ao comportamento judicial. Os resultados mostram que algumas combinações de Atributos Institucionais melhoram a qualidade democrática do controle judicial de emendas constitucionais. Esta tese pretende oferecer um melhor entendimento das práticas e dinâmicas do controle de emendas constitucionais para acadêmicos e investigadores. Também tem por objetivo desenvolver um guia prático para ajudar a determinar o papel das Cortes no controle de emendas constitucionais e estabelecer quais são os cenários em que conceder esse poder aos Ministros é mais adequado.

Palavras-Chave: Política Judicial, Cortes Constitucionais, Emendas Constitucionais, América Latina.

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF ABBREVIATIONS

AC – "*Ação Cautelar"*

AI – "*Acción de Inconstitucionalidad"*

ADI – "*Ação Direta de Inconstitucionalidade"*

ADPF – "*Ação de Descumprimento de Preceito Fundamental"*

CA – Constitutional Amendment

CCC – "*Corte Constitutional de Colombia"*

C-No – Country-No

CSJ – "*Corte Suprema de Justicia de La de la Nácion Argentina"*

C-Yes – Country-Yes

ENP – Effective Number of Parties

FSR – Forecasted Success Rate

JR – Judicial Review

JRCA – Judicial Review of Constitutional Amendments

PCA - Proposal of Constitutional Amendment

STF – "*Supremo Tribunal Federal"*

TC – "*Tribunal Constitucional"* (Peruvian)

TRF – "*Tribunal Regional Federal*"

INTRODUCTION

When should justices have the power to review constitutional amendments? How can the judicial power to review such amendments allow democratic decisions? The democratic implications of granting judges the power to review statues have long been debated. Justices are unelected officials that may nonetheless strike down legislation enacted by the parliament, and the lack of accountability when exercising this power could lead them to become uncontrollable and subvert democracy[1]. For some scholars, the aptitude to be invested in their roles without going through periodic elections would have a negative impact on their authority to strike down legislation (Tushnet, 2000; Kramer, 2005; Waldron 1999; 2006). Being able to hold their position would blind the justices from the longings of society, isolating policy-making from the difficulties inherent to democratic politics and thus resulting in what is sometimes called "juristocracy" (Hirschl, 2007).

Whether these theories are accurate or not, there is a need to justify judicial review. The tension created by unelected judges overruling the will of an elected majority – the counter-majoritarian difficulty (Bickel, 1986) - has always raised issues that have important implications for democracy. Putting in question the role of judges could drastically alter the dynamics of democratic decision-making by impacting the balance between Powers. The issue, however, matters beyond procedural aspects and has an impact on the concept of democracy itself, once judges would be responsible for protecting minorities from pure majoritarianism.[2]

This debate has always been relevant, but one of the most meaningful discussions on the effects of judicial review to democracy was held in the Philadelphia

[1] See The Anti-Federalist Papers N. 78-79 (C. Kenyon ed. 1966).
[2] See The Federalist n. 78 (Dutton ed. 1948).

Convention (1787), during the conception of the American Constitution. For the Federalists -judicial review partisans- the legislative authority could only be preserved if courts were adopted as moderators of the will of the majority. On the other side, the Anti-Federalists, opposed to the power of reviewing legislation, were insisting on the potential tyranny of judges. This debate has also received attention lately given the court's increasing importance in constitutional systems. In 2008, courts granted with this power were present in 139 countries, representing the greatest part of the democratic systems in the world[3]. This is the result of the increasing relevance of courts worldwide after World War II, when courts started becoming the main protectors of fundamental rights (Ginsburg, 2008).

The question of why judges should have the power to review the laws has been the center of intense academic controversy. However, little has been discussed about how this power is applied to constitutional amendments processes. The judicial review of constitutional amendments is, in many countries, taken for granted, as a pure extension of the power to strike down statutes. For instance, the Brazilian Supreme Court decided to grant itself the powers to strike down constitutional amendments in 1993, amplifying the scope of their ordinary powers to review the laws[4]. Just as in Brazil, many other courts have been progressively embracing this power to review constitutional amendments. India, Colombia, Romania, Angola, Switzerland, Portugal, Turkey and Taiwan are countries in which supreme courts have the power to review and invalidate amendments, proving the growing popularity of this practice. But, does this power extension represent a danger for democracy?

[3] According to Tom Ginsburg (2008), 79 written constitutions have provisions creating a constitutional court or a council to review the laws, while other 60 have provisions for judicial review by a supreme court or ordinary courts.

[4] See *"Ação Direta de Inconstitucionalidade"* – ADI N. 829/1993. Further analysis of this case of Brazil will be made on Chapter 2.1.

The difficulties of extending judicial review to constitutional amendments have been pointed out in some occasions[5], but they are critical given that amendments are a higher representation of the will of the people (Albert, 2009). Constitutional amendments are the result of the consensus of super-majorities to make a change, thus discussing the existence of this power becomes increasingly important. If the counter-majoritarian difficulty is a relevant question for democratic theory, debating the judicial review of constitutional amendments is central, as the impact of striking down an amendment is presumably more undemocratic than striking down an ordinary law.

More importantly, nothing has been discussed about the circumstances under which courts are able to make democratic decisions when reviewing constitutional amendments. Assuming this power is granted to justices, it is critical to find out *how* judicial review of constitutional amendments can result in democratic decisions. What institutional variables matter for the achievement of democratic decisions in judicial review of constitutional amendments? Under which scenarios can giving this power to judges be an effectively democratic measure? These questions derive from the broader question of whether judicial review is compatible with democracy. However, this more specific issue deserves special attention as its answer will allow an enhancement of judicial decision-making for fostering democracy. The dissertation aims to find out the optimal conditions to grant this power to justices will help guaranteeing that the most democratic procedure is applied in every different country.

In countries where judges are empowered to review amendments, I will perform a cross-country comparative analysis to answer the research question: Under which institutional circumstances the judicial review of constitutional amendments enhances democracy? I will go through the countries' institutional characteristics to evaluate

[5] For scholarship tackling the issue, see, *e.g.*, Mendes, Conrado Hübner (2005), "Judicial Review of Constitutional Amendments in the Brazilian Supreme Court". *Florida Journal of International Law,* v. 17; and Roznai, Yaniv (2017) Unconstitutional Constitutional Amendments. Oxford University Press.

which factors ensure the democratic functioning of this procedure. The comparative approach will enable the measurement of the democratic impact of granting this power to judges in a certain institutional layout. After performing the analysis, we should be able to assert in which cases the power to strike down constitutional amendments enhances democracy and in which it does not.

The research design focuses on Latin American countries in which the power of judges to review amendments is present. I will define a set of variables -guided by previous legal and political science studies- to justify the presence of a democratic system of judicial review of amendments. In every country, I will assess under which institutional circumstances these variables exist. This will allow us to prove that a democratic outcome is possible when in the presence of certain institutional attributes.

Based on previous literature on judicial politics, I define that the variables indicating the presence of a democratic judicial review of constitutional amendments are: Deliberation (i), or the existence of deliberative processes inside and outside the court; The Possibility of Overrides and Backlashes (ii) of judicial decisions that review constitutional amendments; and the perceived Non-Partisanship (iii) of this judicial ruling. I therefore consider that the judicial review of constitutional amendments is more democratic when these variables, that I call Democratic Criteria, are met.

These Democratic Criteria will be tested in countries in which of the following Institutional Attributes are present or absent: Judicial Independence (I), Political Competition (II), and Legitimacy of the Courts (III). In my analysis, I will confirm if the Democratic Criteria (i, ii and iii) are met in every country-case, to prove that the presence of these Institutional Attributes allows a democratic judicial review of amendments. Finally, based on this analysis, I will assess under which combination of Institutional Attributes (I, II and III) the power to review amendments should be allocated to courts.

Although there are correlations amongst (I), (II), (III), every attribute will be tested separately to isolate the focus attribute and ensure a structured flow. For every Institutional Attribute respectively, I chose the case of a country in which the attribute is present (Country-Yes) and another country in which the attribute is not present (Country-No). For Judicial Independence (I), Country-Yes will be Brazil, where the Supreme Court has gained an undisputed power and is nowadays responsible for mediating virtually every political conflict in the country, acting with complete independence. Country-No will be Argentina, where the Supreme Court, despite varying across time, is known for its low level of Judicial Independence. For the Political Competition attribute (II), Country-Yes will be Peru, given the presence of highly divided political authority in the elected bodies, party volatility and weak Presidents. Country-No will be Brazil from 2003 to 2010, where the Executive held a consistent coalition in Parliament, notwithstanding the high number of parties in Congress. Lastly, regarding the Legitimacy of the Courts (III), Country-Yes will be Colombia, which is known by the popular support given to its Supreme Courts. Country-No will be Brazil, in which the Courts' popularity has fallen significantly due to its poor mediation of political conflicts.

This cross-country comparison will allow me to prove my main hypothesis (H1), which is that the presence (or absence in some cases) of the Institutional Attributes (I, II, III) in a country allows democratic decisions in the judicial review of constitutional amendments, by meeting our Democratic Criteria (i, ii, iii).

The fact that the research is made only in Latin American countries enables us a better isolation of the influence of the attributes studied, given that all countries share macro-institutional similarities. All of them share the same type of government, civil law system, and they all are constitutional democracies with a very similar level of

consolidation of the rule-of-law[6]. However, while the study focuses on Latin American countries, it has much broader implications as the question of judicial review of constitutional amendments is becoming one of the most burning questions in global constitutionalism (Roznai, 2017; Yap, 2015; Halmai, 2012).

I will start the first chapter of this dissertation reviewing the scholarship that have tackled the issue of judicial review and how it relates to democracy. Theories which support or are against granting this power to judges will be discussed. From these theories, I will then set the normative guidelines of our study, justifying the set of variables which are indicators of the presence of a democratic system (Democratic Criteria). To finish building the model, I justify the chosen set of Institutional Attributes that I consider as triggering the correct functioning of the judicial power to review constitutional amendments. This will pave the way for us to justify the set of hypotheses tested in the second chapter of this study. Each hypothesis sets the guidelines to evaluate the effects of each Institutional Attribute on the fulfillment of the Democratic Criteria.

In the second chapter I will dive into the comparative analysis, which will be split into three parts, mirroring our three Institutional Attributes. The first part will address the issue of Judicial Independence, the second tackles Political Competition and the third Legitimacy of the Courts. A cross-country qualitative analysis will be performed, comparing a set of two countries in each part. We will then, in the third chapter, extract the overall results and draw conclusions and recommendations to handle the power to review constitutional amendments.

[6] The country-cases I will analyse are all constitutional democracies with presidential systems and a "civil law" legal system. In addition to that, all of them are considered "Free" (score 1,1) by the Freedom House Index, have similar scores on the Rule of Law Index (~7 points), and on the Democratic Development Index (~9 points).

CHAPTER 1 – BUILDING A MODEL FOR ASSESSING THE DEMOCRATIC QUALITY OF THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

1.1 INTRODUCTION OF THE MODEL

The objective of the dissertation is to describe under which circumstances the judicial review of constitutional amendments can ensure democratic decisions. This will be done by analyzing judicial decisions in different countries and assessing how institutional settings affect their compatibility with democracy. In this chapter, I will explain the model employed to answer this question. However, before entering the cross-country comparison, I first need to define what is understood as democratic judicial decision-making.

Literature usually relies on the counter-majoritarian debate to consider whether the judicial power to review the laws can be exercised democratically. On the one hand, the main argument favouring the existence of this power was raised by the Federalists. Madison (1948) argued that the power to judicially review lays was needed in order to avoid a tyranny of the majority. Many authors rely on this argument to justify the need for judicial review. Jon Hart Ely (1980) supports this argument but additionally points out that judicial review also plays the important role of enforcing majoritarian legislation. Moreover, some authors show that the counter-majoritarian activity of the courts is, as a matter of fact, not extremely common, and that in most cases justices' decisions end up being aligned with the majority's preferences (Hall and Ura, 2015; Bonilla, 2014; Landau, (2010); Benvindo and Costa (2014). For others, judicial review may have the capacity to improve democracy through an increase in the quality and consistency of deliberation (Mendes, 2014). Dworkin (1986; 1987) argues that there is no harm to democracy if courts make the right decisions. One of the reasons courts reach

best decisions is because they are impartial and insulated from the dynamics of majority politics, important institutional settings for constitutional rights adjudication. In a more extreme perspective, Luis Roberto Barroso (2018) argues that courts would even have a role of "enlightenment", meaning that they would guide the country forward in critical moments of history.

On the other hand, some scholars advocate against the democratic value of judicial review. Critics following the Anti-federalist reasoning insist on the uncontrollability of a group of unelected justices to review legislation. Jeremy Waldron (1999), for instance, states that there is always a loss of democracy when judicial review happens. According to Waldron, courts are not a democratic body themselves, so liaising them to the procedure of legal revision would entail democratic flaws. Instead, Legislative decision-making would be the appropriate forum for ensuring rights protection. Some others, like Robert Dahl (1957), mention it is not easy to understand which are the motivations for why a group of politically unaccountable individuals for defending the rights of minorities. In addition to that, if they did, which minority would they support and why? The "juristocracy" concept is also a strong argument against courts' empowerment (Hirschl, 2007). This theory supports that certain social and economic groups may create a barrier from the majority, keeping the entirety of policymaking power in the hands of the courts.

If democracy is understood as the will of the people manifested through majoritarian decision-making, then constitutional amendments are one of its highest expressions (Albert, 2009). Amendments usually result from the consensus of super-majorities, although their deeper democratic legitimacy is defended by scholars even when this super-majoritarian consensus is not required (Roznai, 2017). As a result, the power to review constitutional amendments has a presumably deeper impact on democracy. Declaring whether an amendment is unconstitutional may represent a

power in the same level of the one creating the amendment itself. But could this power to review amendments allow democratic decisions? How do we define the concept of "democratic"?

Scholarship that relies on the democratic deficit of courts should take into consideration a few procedural variables that may justify the role of the courts in the review of constitutional amendments. First, the deliberative practices that courts adopt in the review of amendments are a key-factor to be considered in order to justify this power. For instance, Mendes (2014) argues that the democratic authority of courts originates from their deliberative capacity. Therefore, the obedience to these deliberative standards makes the courts a constitutive part of democracy. Second, if the majoritarian body can override judicial rulings striking down amendments by passing new amendments, then it may be true that democracy is enhanced by the checks between elected bodies and courts. Hence, the effective possibility of overrides is one of the indicators implying the existence of democratic decision making. Third, it seems logical to believe that partisan court rulings will never be equated to majoritarian politics. Judges are unelected and politically unaccountable, which would make them unworthy to speak for the people. Thus, courts that review amendments based on partisan reasoning might not produce democratic decisions. Also, courts are not considered as reliable if other actors perceive them as not impartial.

Therefore, for the scope of the dissertation, I understand that a system of judicial review of constitutional amendments allows democratic decisions when they meet three Democratic Criteria: *deliberation* must be present (i); there must be a possibility of *overriding* the judicial decisions[7] (ii); and these decisions must *not* be the result of *partisanship* (iii). We need to bear in mind that these three criteria must be met in the

[7] 'Overrides' here must be interpreted broadly. Although I will explain the distinction between what I understand as 'overrides' on chapter 2, differentiating it from 'backlashes', I do not make this distinctions in many other opportunities in this dissertation.

moment justices are reviewing constitutional amendments. These three will be the variables used in order to evaluate in which cases the judicial review of amendments should be adopted, when these are met in the presence of certain Institutional Attributes.

The deliberation criteria (i) focusses on decision-making dynamics inside courts. I define a deliberative system as one where the judicial review accounts for the participation of civil society and elected representatives in the discussions. The decisions coming from a deliberative system must also be the outcome of a sensible dialogue between the justices after reaching consensus. Deliberation would therefore entail democracy.

The possibility of overriding a decision ruling for the (un)constitutionality of an amendment (ii) is key for the accountability of courts. If there is no material means for the parliament to overcome a judicial decision, justices can become uncontrollable. Changing the outcomes of a court's ruling would also require extra-constitutional means. This is why the existence of effective tools to override a court's decision is an essential component of democratic systems.

Lastly, judicial decisions must not be the outcome of partisanship (iii). I consider them to be non-democratic when they are partisan rulings. When a judicial decision is biased by political ideologies instead of being the result of legal reasoning, courts would take a position that is not originally given to them in democratic systems. They unduly get into the role of the parliament, which is the institution specifically designed for party-politics decision-making.

These three Democratic Criteria will be the components of the definition of a democratic decision system in this study. Once we have a definition of "democratic" in the judicial review of amendments by the means of our Democratic Criteria, we can

now assess what are the characteristics in a country's institutional system that stimulate democratic decisions.

Countries with certain characteristics in their institutional design are an optimal field for this judicial power to be present, but what are these characteristics? Why is granting this power to the judiciary is more adequate in some countries?

Hypothetically, there are three Institutional Attributes of a country's institutional system that allow the correct functioning of this power to review amendments: (I) Judicial Independence, (II) Political Competition and (III) Legitimacy of the Courts.

Judicial Independence is taken as "decisional independence". For a court to be independent, judges must be able to decide without the interference from other political actors (Ferejohn, Rosenbluth, and Shipan, 2007). This capacity is significant to democracy, as a system of checks and balances depends upon a certain degree of freedom attributed to judges. As Hamilton pointed out in the Federalist Papers nº 78, "the complete independence of the courts of justice is particularly essential in a limited constitution". However, courts that are too independent may become uncontrollable. If justices are completely independent, self-interest, ideological dedication and corruption may drive judicial decisions (Warren, 2003). Therefore, it seems that the degrees of judicial independence have an impact on the ability to produce democratic rulings.

I define Political Competition as the division of the legislative authority between elected actors with different preferences (Leiras, Giraudy, Tunon, 2014). Congressmen can only change the constitution when they are able to gather a group with enough votes for passing an amendment. In cases of unified governments, one-party control or strong super-majoritarian coalitions, reviewing the constitution is significantly easier, which reduces the checks on the Executive. The greater the division of the authority, the more difficult it becomes to reach the required number of votes for passing an amendment. Reaching a consensus in these cases will come from an intense dialogue for

decision, which reflects democracy. Hence, in cases of strong competition, striking down an amendment that results from these highly consensual legislative decisions may be going against democracy. This means there could be a correlation between political competition and the proper performance of a system where the judiciary can review amendments.

Legitimacy of courts refers here to what Fallon Jr. (2005) calls sociological legitimacy. In this sense, courts are legitimate when the public perceives them as deserving respect and obedience. Gibson and Caldeira (2009) say that courts need some degree of "loyalty, not just approval, of their constituents". Legitimacy is one of the main sources of a court's political capital. This is because constitutional judges must earn political capital from their legitimacy to oppose majoritarian opinions. So, if courts do not hold enough legitimacy, they would not have the political capital to effectively review constitutional amendments. In this case, justices would face trouble enforcing their decisions. Thus, the level of legitimacy could have an impact on the functioning of the judicial power to review amendments, which affects the capability to render democratic decisions.

These three Institutional Attributes intensely interact with each other. For instance, it is usually said that the existence of significant political competition entitles judges with independence. Also, it is common to read that high levels of legitimacy increase judicial independence by securing compliance to the judicial decision. However, because I want to assess the impact of each Institutional Attribute individually, I decided to analyse the three of them separately. I will perform a cross-country analysis and evaluate whether our Democratic Criteria are met in the presence of the Institutional Attributes, in countries where the judicial power to review amendments exists. We will find out whether our Political Attributes are the differential factors granting a system where the judicial review of constitutional amendments is

more justifiable. Figure 1 (below) illustrates the research model adopted by the dissertation for the comparative analysis.

My hypothesis (H1) is that the presence (or absence in some cases) of the Institutional Attributes (I, II, III) in a country creates an environment where, once this power over amendments exists, the system allows democratic decisions by meeting our Democratic Criteria (i, ii, iii). My hypotheses are the following:

> H1.1: A moderate level of Judicial Independence (I) creates a better environment for democratic judicial review of constitutional amendments (i,ii,iii).
>
> H1.2: The absence of Political Competition (II) creates a better environment for democratic judicial review of constitutional amendments (i,ii,iii).
>
> H1.3: Legitimate Courts (III) creates a better environment for democratic judicial review of constitutional amendments (i,ii,iii).

These three hypotheses are complementary, meaning that meeting H1.1, H1.2, H1.3 is needed in order to confirm H1. Still, there may be reasons that are not embraced by this model to consider when asserting whether a country should adopt the judicial review of constitutional amendments. Variables related to constitutions (constitutional rigidity; the length of the constitution; what subjects are formally constitutional); to the judicial career and court's composition (who appoints the judges; if tenure is granted); to judicial decision-making (quorum to strike down an amendment; if decisions may contain abstract prevision replacing the content of the amendment); or even related to the psychology and socialization of judges (with which groups they interact; how they perceive their institution role) may interfere in how democratic these specific type of judicial review is exercised.

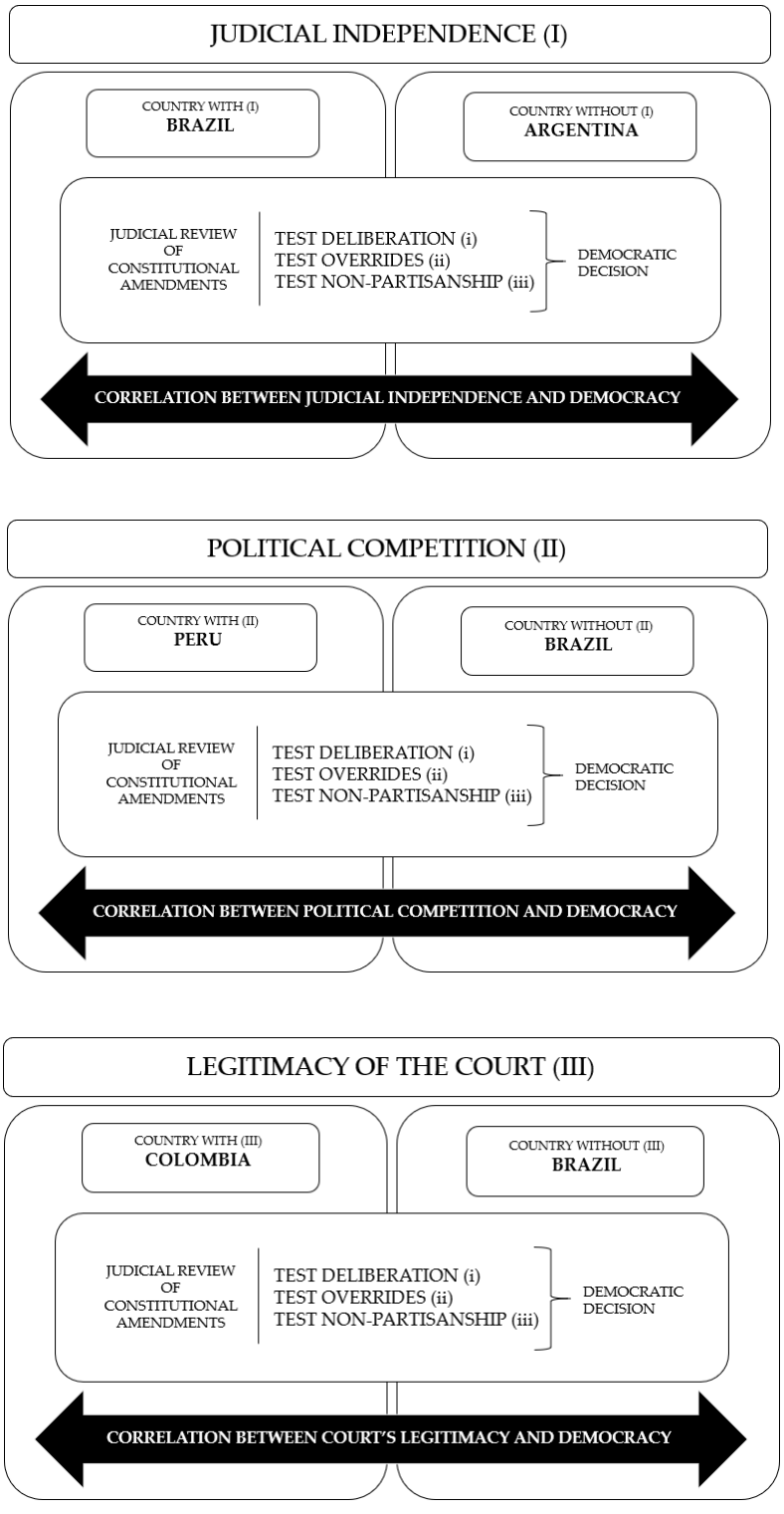


Figure 1. Research Model illustrated

1.2 A RATIONAL CHOICE APPROACH TO THE RESEARCH PROBLEM

Understanding whether a decision reviewing a constitutional amendment is democratic demands understanding how justices behave in specific circumstances. Thus, the dissertation will adopt the rational choice theory to perform the analysis. First, the option relies on its power to explain judicial behaviour in broader institutional and political contexts. Second, the attention given to the theory in the last decades is a positive factor: Many recent studies on judicial review were based on rational choice analyses, and we might find synergies between their results to approach the research question.

In the search for better understanding how judges decide, different theoretical models that attempt an overarching explanation have been tested. The literature on this subject usually emphasizes three models: legal, attitudinal and strategic. The legal model states that justices only consider the law when deciding cases. In this case, non-legal factors do not play a role in judicial decision-making as legal constraints are sufficiently substantial. Although some subjectivity may be inherent when identifying and applying the law – even positivists would probably agree that some degree of judicial creativity is unavoidable[8] – judges will do their best to fill in these semantic ambiguities and gaps as objectively as possible and by following the criteria furnished by the legal system. As far as normative models of judicial behavior go, the legal model checks several boxes: judges are impartial, neutral and are strictly bound to law. However, as a descriptive model, it is insufficient insofar as it depicts an idyllic and unrealistic judge that ignores everything (including her own preferences) but the law. We can thus disregard it from our study.

[8] Even Kelsen, in chapter 8 of The Pure Theory of Law recognizes that "the interpretation of a statute... need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law." (Kelsen, 1967).

Conversely, a rational choice approach to judicial behavior considers judges as utility maximizers (Olson 1965). Their actions are labeled as rational when they pursue personal preferences by means that are efficient and effective. This theoretical framework encompasses the attitudinal and strategic models as it attempts to explain how judges go about deciding constitutional disputes[9].

The attitudinal model argues that judges' decisions are motivated by their own policy preferences[10], and legal factors are only employed as a *posteriori* rationalization of their personal ideology (Segal, Spaeth, 1993, 2002). This model stems from the teachings of judicial realism, that ultimately concludes that established legislation can almost always be interpreted to fit the preferences of the interpreter, and thus cannot objectively bound him (Maveety, 2006). For the legal realist, the constitution is what the Supreme Court says it is, and the constitution's text and spirit have little bearing over the outcome of constitutional disputes. Drawing from this idea, the attitudinal model believes that a judge's ideology will define the outcome of judicial decisions, without any textual or other substantial constraint to their personal preferences[11].

Finally, the strategic model also believes that a judge's goal in decision-making is to maximize her policy preferences. However, it adds another layer to the analysis of judicial behavior. Because other political players also act in order to further their own

[9] At first, the attitudinal model was strongly influenced by the behavioral revolution in Political Science in the 1930s (Epstein *et al*, 2003). The model adopted a *stimuli-response (S-R)* logic from the social psychology to analyze judicial behavior, stating that the stimulus of an individual preference would immediately be translated as the decision outcome (Segal 1984). However, later scholarship revisited the attitudinal to a position closer to the rational choice theory, understanding the judicial actors as conscious preference maximizers, and not simply as decision-makers who immediately react to impulses (Segal, Spaeth, 2002; Epstein, Landes, Posner, 2013). Finally, there is rational choice theory scholarship empirically testing the influence of legal constraints in decision-making, but they do not claim that these are the only factors to play a role in judicial behavior (Bailey and Maltzman 2011), distancing from the legal model.

[10] The words 'policy preferences', 'personal preferences' and 'ideology' are used interchangeably here.

[11] The attitudinal model scholarship tends to embrace large-N analysis to demonstrate the high level of correspondence between the judge's ideology and decision outcomes – in some cases reaching close to 80% (Segal, Spaeth, 1993). So, if a judge is categorized as liberal, she will decide for a liberal outcome; if conservative, for a conservative outcome, no matter what the law says.

preferences, judges sometimes modulate their preferences and opt for second-best choices (Epstein, Knight, 1998). Unlike attitudinalists, this model encompasses insincere action. For example, a liberal judge still has liberal decision outcomes as preferred goals, but would decide for a moderate outcome if she faces a conservative congress willing to override her decisions. Of course, judges differ in their inclinations towards strategic and sincere choices, and the personality of a judge may be decisive in this regard (Baum, 2009).

For the dissertation, I choose a frame that has not yet been observed in the court's decision-making studies, analysing how some institutional and political circumstances affects the democratic level of the power to review constitutional amendments. As I argue, these circumstances may have a profound impact on the justice's behavior and therefore on the democratic aspect of the judicial rulings.

I pay special attention to Judicial Independence, Political Competition and Legitimacy of the Courts given they are recognized crucial factors that determines judicial behaviour within the rational choice theory (Epstein, 2016). For example, if the court's independence is strong to the point where it need not consider second-best decisions, then evidence of attitudinal behavior gets stronger. And this has impacts for democracy as there may be no more effective space for overriding judicial decisions; it may progressively undermine deliberation due to the increase of individualism; or the evident adopting of purely ideological reasoning may let the court be perceived as a partisan body. The same variations can be noticed for the other two Institutional Attributes.

It is important to note that recent literature has questioned the explanatory power of the rational choice model (Baum, 2009; Braman, 2016). Judges may not be that rational after all, as their decision-making may be marred with cognitive biases. However, although rationality is not the only component in behavior prediction and

may not account for hidden irrationality, it would be a mistake to consider that judges do not factor in the Democratic Criteria. The possibility of backlashes and overrides, the impacts of deliberation in a ruling's outcome or their perception as impartial arbiters do matter for their action. Consequently, the rational choice is still a valuable theoretical premise.

CHAPTER 2 – INSTITUTIONAL ATTRIBUTES AND JUDICIAL BEHAVIOUR: TESTING THE MODEL IN LATIN AMERICAN COUNTRIES

Having introduced the explanatory model, I will in this Chapter perform the qualitative analysis of the selected Latin American country-cases. I will test the possibility of democratic decision making in the presence and absence of three different institutional attributes: Judicial Independence (I), Political Competition (II) and Legitimacy of the Courts (III). The countries will be tested in the context of judicial review of constitutional amendments in every country-case. As mentioned before, our model considers that democratic decision making is defined as a combination of: the existence of deliberation (i), the possibility of backlashes and overrides (ii), and the non-partisanship of the rulings (iii).

I will use many different sources of information to complete my analysis. Courts official websites and existing research databases[12] will provide me with the ruling details and the adequate tools to analyse the judicial decisions. As the analysis will not be restricted to judicial decisions, Congress official websites will be useful for gathering information on legislative activity. Also, I will dig into databases such as The Latin American Public Opinion Project (AmericasBarometer) and LatinoBarometer to give a holistic picture of the Judiciaries in Latin America, enriching the data with the public perception of the Court and other institutions. Press articles narrating political events that are relevant for the research will be reviewed. Lastly, I conducted interviews with

[12] I gathered data from the following Court's websites: Argentinian Supreme Court (www.csjn.gov.ar); Brazilian Supreme Court (www.stj.just.br); Peruvian Constitutional Court (www.tc.gob.pe); and Colombian Constitutional Court (www.corteconstitucional.gov.co). I also used as a source the following databases: Americas Barometer (The Latin American Public Opinion Project); LatinBarometer; Freedom House Index; The Constitute Project; Comparative Constitutions Project; and Jeferson Mariano Silva's database available at Harvard Dataverse ("*Jurisdição Constitucional no Brasil (1966-2015)*").

officials, congressmen, and scholars in order to deepen my qualitative understanding of the analysis.

For judicial rulings, I will analyse a set of court decisions striking down or upholding an amendment. I will consider both definitive and provisional rulings on the constitutionality of an amendment, given that both are illustrative of the Court's behaviour and provide me with a larger sample size. My analysis will look at many characteristics of the rulings studied, depending on the Democratic Criteria I am evaluating (e.g. for deliberation, I will verify the number and quality of the interventions from external actors, the usage of tools available for justices, subject being discussed, and many others).

2.1 PROVING THE IMPACT OF JUDICIAL INDEPENDENCE ON THE DEMOCRATIC QUALITY OF THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

It is usually said that Judicial Independence is a central part of a healthy and stable separation of powers. A system of "checks and balances" depends upon the ability of judges to decide without undue interference from other political actors. However, it is no easy task to allocate powers among these different political agents in such a way as to allow for an adequate measure of autonomy and, at the same time, establish institutional safeguards that will effectively bar excesses. In new democracies, this problem presents itself with even more challenges because designers must draw up new systems with little support from its own previous experiences.

In this context, one of the challenges is to correctly predict the impact of specific institutional features on the "checks and balances" mechanism, especially when these features have not been extensively tested in other constitutional systems. One example is the power of courts to review the 'constitutionality' of constitutional amendments enacted by Congress. Even though there are perhaps good normative reasons to sustain the existence of such a power (Roznai, 2017), it is unclear how this allocation affects the balance of the separation of powers or, more specifically, if it will add a layer of judicial independence that will fundamentally alter the behaviour of political actors.

I take judicial independence to be the degree of freedom of courts from interference of other political actors. As Ferejohn, Rosenbluth and Shipan (2007) put it, "to the extent that a court is able to make decisions free of influence from other political actors, and to pursue its goals without having to worry about the consequences from other institutions, it is independent." As the influence of other political branches on the judiciary increases, judicial independence decreases and vice-versa. Independence can thus be curtailed by increasing influence on the "court's personnel, its case selection,

decision rules, jurisdiction, and enforcement of laws" (Ferejohn, Rosenbluth and Shipan, 2007).

How does Judicial Independence influence judicial behaviour? The strategic model posits that institutional constraints bear upon the ability of the court to implement its preferred policy and that judges would usually anticipate the political branches' reactions in order to search for the best possible alternative. So, the extent to which a court would pursue its own preferred policy is determined by its independence. For instance, as the risk of backlashes and overrides increases, courts would increasingly opt for milder and more insincere decisions. In other words, as independence decreases, judges would correspondingly dial back on decisions that carry through their own policy preferences, at least in situations where their preference clashes with that of the legislatures.

In consequence, when the institutional framework guarantees high levels of judicial independence and courts act unconstrained by the possibility of overrides and backlashes, judges will not be especially considerate of the preferences of other political branches. Courts will impose their preferences with less concern for how the decision may be received by other political agents. So, when there are little to no constraints and all decisions are equally available to judges, the strategic model collapses into the attitudinal model. After all, it also supports the rational choice theoretical proposition that judges will implement their preferred policy.

The same happens when analysing the partisanship of judicial decisions. The degrees of judicial independence may also foster or suppress the partisanship of a court ruling. Courts are supposed to act as impartial bodies that decide cases based on legal reasoning. In a case where judges are independent enough to continuously act sincerely and freely advance their ideological preferences, there would be a case of partisanship. Conversely, judges that are not independent would act in a partisan

fashion because would consistently mirror the will of the majoritarian government instead of acting impartially.

Lastly, when the degree of Judicial Independence is too high, it is expected that deliberation is undermined, as the will of other actors does not need to be considered by the judges when deciding cases. Equally, good deliberative standards would not be achieved in the absence of Judicial Independence. In this case, the judicial decisions are aligned with the preferences of the elected bodies as a way for the Court to protect itself against retaliation. This makes the Court's role less significant in political decision-making and fosters strategic behaviour from the justices.

This allows a fundamental claim about the relation between Judicial Independence and judicial behaviour that derives from the rational choice approach: as courts become more independent, they will increasingly impose their own policy preferences and consequently become more sincere when advancing their policy preferences. On the other hand, as independence is cut short, courts will be more mindful of legislative decisions and become increasingly strategic. This leads us to the first hypothesis of the dissertation: a moderate level of judicial independence creates a better environment for democratic review of constitutional amendments.

If this extrapolation of the rational theory is true, it might be one of the key factors to explaining why the Brazilian Supreme Court is constantly making bold decisions that fly in the face of legislative or executive preferences. Its significant independence, secured by its power to review constitutional amendments, has guaranteed that there is little reason to be especially considerate towards the policy preferences of the elected branches of government. It could also explain why the power to review amendments in the Argentine Supreme Court has not been used significantly. Moreover, it could confirm why the Court is more likely uphold the amendments enacted by the majoritarian government.

2.1.1 The Case Of Brazil: Excessively High Levels Of Judicial Independence In The Supreme Court

To better understand the impact of the power to review amendments on the separation of powers, we may observe the case of Brazil's Supreme Court. Reeling from a military dictatorship that lasted over twenty years, the founders of the Brazilian Constitution of 1988 thought it best to create a very strong judicial power that could defend and protect the newly established constitution (Arguelhes, 2014). In order to effectively "guard the constitution", the Supreme Court (*Supremo Tribunal Federal* - STF) was awarded the prominent role of having the last word on all important constitutional questions due to mechanisms that allow it to review virtually every statute enacted by Congress. In 1993, this power was significantly expanded when the court proclaimed it could also review the constitutionality of constitutional amendments (Scotti, 2018; Benvindo, 2018). Although there are many factors that influence judicial behaviour, Brazil's STF presents an interesting case-study on how amendment review may create unbalance within a system of "checks and balances".

It has now become commonplace to describe the Brazilian Supreme Court as a "very strong" court. Some diagnoses go as far as to suggest that Brazil has become a "supremocracy" (Vieira, 2005; with new analysis in Vieira, 2018), which means the court now occupies the centre of political power as a "rule-maker". In other words, the Supreme Court is not afraid, in most cases, of imposing its own policy preference by striking down a legislative act or even by establishing general norms when legislation is lacking. I argue in the following subsections that this strength may in part be attributed to the variance in the Democratic Criteria, granting the court the last word in

constitutional disputes and not meeting the deliberative standards required for a democratic judicial review of constitutional amendments (i); not allowing for several common types of legislative backlashes (ii); and allowing justices to advance their own preferred policies instead of caring about impartiality (iii). In a nutshell, the courts' high judicial independence allows it to advance its own policy preferences without having to consider second-best choices.

2.1.1.1 Impact on the Possibility of Overrides and Backlashes

The Brazilian Supreme Court's power to strike down constitutional amendments may effectively strip the political branches of their ultimate override tool. Although Congress, with the President's push, may in many cases be able to enact overriding constitutional amendments with relative ease, the court can just as easily strike down the amendment and re-implement its preferred policy without having to appeal to second-best solutions.

A court may of course decide to maintain the overriding amendment, especially if it attempts to meet some sort of middle-ground or if it believes extra-legal reactions are not out of the question. As we have already stated, the power to review the constitutionality of amendments is not the only variable that counts towards defining judicial independence. Nonetheless, the Supreme Court does get to decide whether the amendment is compatible with the Constitution's unamendable core. After all, the court can use the power to review amendments "as a strategic trump card, by applying it selectively" (Roznai, 2017 and also Mohallem, 2011). Theoretically, this impacts judicial behaviour insofar as the Supreme Court worries less about effective legislative overrides. Instead of tempering its decisions and reaching a middle ground, the Court may act more freely in rendering more sincere decisions.

Judicial independence, from the perspective of the rational theory, is usually measured with reference to two broad categories: overrides and backlashes. Overrides refer to future legislative acts that review judicial decisions. They may reverse decisions completely, try to establish some intermediary solution that take the court's view into account, or may in fact take steps to deepen the policy differences between the branches by extending or amplifying the policy features that the court disagreed with. Backlashes, on the other hand, describe actions that intend to disturb the workings and composition of the court, either by punishing its members individually or targeting the institution as a whole.

From a practical point of view, in most constitutional systems, political actors can override court decisions by enacting constitutional amendments that place the dispute beyond judicial scrutiny (Dixon, 2011). Courts must therefore be aware that their decisions may ultimately not stand - or even worse, that Congress and President act as to deepen the policy disagreements. In Brazil, given flexible amendment rules and a high amendment rate, one should expect courts to be even more wary of overrides, especially in times where the President controls a strong legislative coalition. As a matter of fact, all federal governments in Brazil have had a "constitutional reform agenda" (Couto, Arantes 2006), which roughly means that the implementation of their political program is contingent upon the approval of constitutional amendments.

A first good indicator that the Supreme Court of Brazil is not afraid of overrides comes from the fact that Congress has only really attempted overrides via constitutional amendments nine times, despite the fact that the Supreme Court has interfered with numerous federal policies and that the amendment process – and the 'amendment culture' to use Ginsburg and Melton (2015) – is relatively flexible. Furthermore, many of these amendments cannot really be considered overrides in the sense that Congress and the Court are in dispute as to who gets the final word on policy, for the following

reasons: First, in two out of these nine amendments, Congress acted after the Supreme Court expressly affirmed that the policy would be valid if instated through an amendment. Amendment N. 29, for example, instituted a progressive urban property tax after the Court's overridden decision had already stated that such a tax system would be possible if constitutionally authorized. Amendment N. 89 also was enacted after the Supreme Court stated that the desired tax redistribution could be done via constitutional amendment. In both these cases, the Supreme Court and Congress did not disagree on the content of the policy, but rather on how it should be introduced in the legal system. The Supreme Court actually helped Congress by indicating which route it should take in order to instate the policy - once the proper route procedural form was adopted, no disagreement remained.

Second, in another decision, the Supreme Court created temporary rules so as to not leave gaps that would only remain in effect until Congress enacted the necessary legislation. This is the case of Amendment N. 58, which established rules as to the number of municipal legislators, "overruling" the Supreme Court's prior decision. But the Supreme Court itself had no intention of imposing a complete policy, but rather had stated that it would prefer Congress to enact the necessary regulation within reasonable limits. Consequently, the overruling was requested by the Supreme Court and can hardly be described as a policy dispute.

Third, Amendment N. 57 also apparently validated a series of municipality dismemberments that had been based on statutes already declared unconstitutional by the Supreme Court. However, in these cases the Court decided that although the statutes that authorized the dismemberments were contrary to the Constitution, they should remain in effect for two years until new legislation be enacted and that the dismemberments should be maintained. Again, this is hardly a legislative reaction and can best be described as a validation of the Court's decision.

Congress' ability to successfully override the Supreme Court's decisions is much more limited when amendments themselves can be invalidated. However, more than just that, Congress also has very limited institutional tools to promote backlashes against the court. Again, this is essentially because any alteration must pass the court's scrutiny, so only in special circumstances will the court allow its own independence to be undercut by congressional action.

*Withdrawing Court jurisdiction over certain subject*s *and removing the power of judicial review* - The first type of backlash to consider is a reduction of the court's jurisdiction as a response to one or several decisions that interfere with legislative preferences. Congress may, for example, strip courts of important parts of their jurisdiction, such as their judicial review powers. In Brazil, given the Supreme Court's ample jurisdiction over matters that range from constitutional adjudication to criminal cases and extradition, political agents might attempt to diminish the Court's range, thus mitigating its interference in the political process.

In Brazil, however, the Supreme Court's jurisdiction is very well detailed in the constitution, so any attempt to influence the court by shrinking its reach must be accomplished by formal amendment. But, as we have seen, even if Congress manages to stir up the necessary votes, the power to hold amendments unconstitutional allows the Court to review the new amendment and effectively pick and choose which alterations it wishes to keep. Legislative reaction here also seems to generate little to no judicial dependence, because the Court will most certainly have the last word on the matter.

As a matter of fact, the Court's jurisdictional reach has been amplified since 1988. It must now rule on suits against the National Council of Justice (CNJ) and National Council of the Public Prosecution (CNMP) and on requests that it declare statutes to be constitutional with binding and *erga omnes* effects, so as to prohibit other courts and judges from holding the statute unconstitutional (*Ação Direta de Constitutionalidade*). It

has only lost the less significant attribution of enforcing foreign judicial decisions and conceding "exequatur" to rogatory letters. In summary, the court's constitutional jurisdiction has grown. The minor reductions that can be observed have come at the behest of the own Court's desire to control its caseload (Sadek, 2004).

Allowing appeal from the Supreme Court to a more "representative" tribunal - Also, legislators might consider adding a mechanism of review or appeal from Supreme Court decisions. The constitution already incorporates an important provision to this effect that could theoretically prove very effective in controlling the court's judicial review powers. Article 52, X, establishes that the Senate has the power to "suspend the execution, in part of entirely, of laws declared to be unconstitutional by definitive decision of the Supreme Court". The most intuitive reading of this provision would indicate that for the Court's decisions of unconstitutionality to extend beyond the litigants of the specific case tried, the Senate must suspend the statute.

If such a rule were taken seriously, perhaps the Court would render decisions that the Senate would vigorously not oppose, so as to encourage the statute's suspension. In other words, it would act strategically in order to see its second-best option implemented to as many people as possible. However, the Supreme Court has taken this power away from the Senate via interpretation. First, it declared that the suspension would be unnecessary in cases of abstract review, because of the very "nature" of this type of review. Second, Gilmar Ferreira Mendes, one of Court more influential Justices, has long been arguing that the provision has suffered a "constitutional mutation" and can no longer be invoked in order to limit the effects of the Supreme Court's decisions also in concrete judicial review cases. The Court has backed Mendes' argument, when ruling that Senate should be only communicated about the judicial decision taken by the STF.

Congress has also proposed to submit the Supreme Court's decision to legislative review. Amendment Proposal n. 33/2011, for example, sought, among other things, to subordinate the Supreme Court's abstract decisions on constitutionality to Congress, by delaying its binding and *erga omnes* effects. The proposal established that if Congress, by three-fifths quorum, disagreed with the Supreme Court's decision, then the decision should be submitted to popular review. However, constitutional commentators were quick to pounce on the proposal and denounce it as absurdly and flagrantly unconstitutional, as they did not believe the court's independence should be messed with, so it was eventually scrapped. Even if it had been approved, however, the Supreme Court could have – and almost certainly would have – held the amendment unconstitutional for violating the *cláusulas pétreas.*

Requiring extraordinary majorities for declarations of unconstitutionality - Congress may also enact statutes or amendments requiring extraordinary majorities for declarations of unconstitutionality. Article 97 of the Brazilian Constitution establishes that a court need only absolute majority to hold a statute unconstitutional. This same majority requirement has been extended to declaration of unconstitutionality of constitutional amendments.

The aforementioned Amendment Proposal n. 33/2011 also proposed to modify article 97 and change the requirement to four-fifth for declarations of unconstitutionality. But again, because the Supreme Court can review the constitutionality of amendments, it could strike down this requirement under the "separation of powers" eternal clause. Unless other important variables are at play (such as the Court's legitimacy, its popularity, etc.) changes in the Court's institutional structure can hardly be imposed upon it.

Limiting access to the Supreme Court - Congress could also theoretically limit access to the Supreme Court by establishing new requisites for cases to be heard or by

stripping the legitimacy to challenge statutes from some actors altogether. This way, only specific constitutional disputes would reach the court and its influence would be greatly reduced. In some systems, depending on the rules of access, courts may be even more prone to second-best solutions when it is uncertain the dispute will ever reach them again. Access to the Brazilian Supreme Court, however, is extremely easy, be it through individual claims or in abstract review of legislation. This can be easily demonstrated by the court's vast caseload. The court thus knows that any relevant (and many irrelevant) constitutional disputes will in no time at all be submitted to its analysis.

Limiting access, therefore, could be an effective response to judicial sincerity. However, as is the case with jurisdiction, rules of access are for the most part explicit in the constitution. Significant changes would have to be introduced via amendment and, even then, the court could easily strike them down by arguing that the measures "tend to abolish" the "separation of powers" (article 60, §4, III).

Access to the Supreme Court has changed significantly since the constitution was first promulgated in 1988. Most of these changes, however, have come via constitutional and statutory interpretation as a response to the court's growing caseload. In concrete review, several requisites and limitations were placed upon litigants, in a specific type of judicial policy that came to be known under the derogatory term "defensive jurisprudence" (Kapiszewski, 2010). Moreover, in abstract constitutional review, the court established that certain actors can only provoke the court when they successfully show they are relevantly related to the challenged statute (*pertinência temática*). These important changes can evidently not be described as backlashes given they do not originate from other coordinate branches, but rather stem from the court's own management problems.

One of the most significant access-limiting mechanisms, however, was introduced by Congress via Constitutional Amendment n. 45. Similar to the *writ of certiorari* of the US Supreme Court, the *repercussão geral* establishes that only claims that are legally, socially, economically or politically relevant can be analyzed in appeals to the Supreme Court. This change, however, came at the behest of the Supreme Court, which asked for such a mechanism so it could control its own caseload. Further, this mechanism does in fact give the Supreme Court even more power to, with almost total discretion (at least within legal realism), pick and choose that which it wishes to analyze.

In short, although in some systems the relevant actors may agree among themselves not to present the constitutionality of legislation to the courts, in Brazil there are numerous avenues through which legislation can be challenged. Many actors are constitutionally authorized to bring abstract challenges straight to the court, including any party that has at least one representative in National Congress. Given there are, at present time, more than twenty parties in that condition, it is almost certain that at least one of them will not agree with the outcome of legislative deliberation and challenge it in the Supreme Court. Even if none do, however, new amendments can still be challenged in any concrete dispute, even if the parties do not request the law be reviewed, and the matter can then be appealed and make its way to the Supreme Court (Tommasini and Da Silva, 2018). The Supreme Court, therefore, will always be instigated to review the constitutionality of new amendments and political actors will only be able to set up access filters when the court deems it appropriate.

Altering Court size and composition – Finally, Congress may alter the Court's size, thus allowing new appointments and consequently new majorities to be formed. Recently elected President Jair Bolsonaro, at the beginning of his campaign run, floated the proposal that the number of justices of the Supreme Court should increase from 11

to 21, but the idea was not well received so he gave up on it. Interestingly, in Brazil, Congress passed an amendment to the exact opposite effect: it increased the compulsory retirement age and perpetuated the Court's composition. However, this amendment had the very specific purpose of not allowing President Dilma Rousseff to appoint new justices and "politicize" the Court.

Altering court composition, especially by forcing some members into retirement, is not unprecedented in Brazil. During the military dictatorship, three justices were retired in order to form the necessary court majority (Recondo, 2018). In today's context, although such changes would be challenged in the Supreme Court and it is likely that they would be struck down, it is important to consider that if a measure as drastic as this managed to garner three-fifths support from both houses of Congress, perhaps the Court's legitimacy is so tarnished that it may not have sufficient political capital to stand in the way of Congress. Still, the mere possibility of review means that the political branches must be wary of the possibility of a declaration of unconstitutionality and, at the same time, guarantees that the Court may stand its ground if it so wishes.

Lastly, Congress may impeach members of the Supreme Court if certain conditions are met. In theory, the Court only reviews the procedural correctness of impeachment proceedings and does not actually analyze if the merit conditions were met. Thus, this seems to be perhaps the best way Congress can control Justices. Yet, no Justices has ever been impeached under the 1988 Constitution, nor has any impeachment proceeding ever advanced through preliminary stages. Although it is hard to pinpoint exactly why this is, perhaps it has something to do with the justice's ancillary power to judge senators, congressmen and the president for criminal charges committed during his term and related to his public functions. After all, one would not like to make an enemy out of the person deciding such an important matter.

If all we have said so far turns out to be true, judicial independence is key to regulate excessive actions from the courts. In search for their preferred policies, judges will consider how other political branches react to their decisions. As other actors are more empowered to respond, justices must modulate their preferred policies to advance their preferences more cautiously.

This provides a practical tool for implementing normative models of judicial behaviour: judicial independence can be set to the extent that judges should be able to implement their own policy agenda by acting in a more constrained or unconstrained fashion. We should concede more independence to judges if we wish they adopt an attitudinal behaviour. On the other hand, if we desire higher levels of dialogue between courts and the legislative policy preferences, we must reduce their independence to an intermediary position. We must state that reducing their independence drastically may also be an incentive to attitudinal behaviour, as the courts know their preferences will be substituted by the ones from the other branches as they wish.

In Brazil, if one considers the Supreme Court's "supremocratic" behaviour a problem to be solved, it may be an option to engage in the unpopular and counter-intuitive proposal of decreasing their independence, perhaps by reducing or banning their power to review amendments. That way, they will search for second-best choices and be more respectful of legislative deliberations.

2.1.1.2 Impact on Deliberation

Excessive levels of judicial independence may undermine deliberation inside courts. Too much sincerity may concede too little consideration for other political

actor's preferences. Not taking into consideration other preferences could obstruct a democratic dialogue to reach the best possible outcome. In this section I analyse whether this is the case of Brazil, which is known for being a case of strong judicial independence. Does this high independence allow a proper deliberative system? How does this high level of independence impact the deliberation standards, and therefore the democratic quality of the Brazilian judicial review of constitutional amendments?

The analysis considers that there is deliberation when the judicial review accounts for the participation of civil society and elected representatives in the discussions. Moreover, there must be a thoughtful and balanced intra-court dialogue between the justices themselves and between the justices and external actors. Deliberation would therefore enhance democracy, as these decisions would be the outcome of a reasonable and more informed consensus.

The existence of deliberation can be identified with reference to several different indicators. Some indicators measure the interaction and participation of civil society in the judicial debate and procedures. The active participation of Amici Curiae and oral hearings, for instance, is related to the direct involvement of the people inside courtrooms. Also, we can observe a positive case of deliberation when the Senate and the House of Representatives enter the court to present their arguments regarding the constitutionality of an amendment they enacted. This participation of external actors fosters the quality of the debate and enhances the democratic character of the judicial decision-making.

There are some other indicators of deliberation which are linked to the internal dynamics of the court: The preponderance of collegiate decision-making replacing individual rulings indicates a strong sign of a functional deliberative system (Mendes, 2010; Arguelhes and Molhano, 2018). In the case of Brazil, we may also look at the "*Pedido de Vista*", which is a request made by any justice to halt the judgment and hold

the case files for further individual analysis. Originally, this tool was established to enhance deliberation and allow justices to understand complex cases in which deeper judicial analysis may be needed.

For testing the quality of deliberation, I analysed the existence of all the aforementioned indicators of deliberation in each of the 73 cases the Brazilian Supreme Court has reviewed a constitutional amendment (from 1998 to 2018). I scrutinized every case, assessing the existence of deliberation derived from the indicators mentioned above. For each case, judicial procedures, petitions, actors and decisions were filed and examined (see Annex 1).

The collected data shows that almost half (47,9%) of the cases had petitions from Amicus Curiae. This proportion shows quite a relevant participation from these external actors in judicial cases, suggesting the existence of a certain deliberative environment. This situation would not have been possible without Judicial Independence. The Brazilian institutional landscape seems to be open – at least formally - to the acceptance of different points of view. The analysis show that up to 107 different Amici Curiae engaged in judicial deliberation, and they come from many different types of organizations (Class Associations, Syndicates, Public Organizations, Federative Units, Political Parties, Research Institutes, and Individuals). My findings also show that the number of Amicus Curiae petitions (158) is higher than the number of cases discussing amendments (73), meaning there is an average of 2,1 Amici Curiae petitions per case. In addition to this number of cases and the apparent variety of the actors involved, we can observe that the number of cases where there is Amicus Curiae interventions rose by 833,3% in the last 15 years (2003-2018 vs. 1988-2002). There was an even larger increase in the number of interventions (petitions) themselves when looking at the same periods two periods (+1362,5%, 2003-2018 vs. 1988-2002). This significant growth follows the trend of increasing Judicial Independence in Brazil in the latest

years, when the Supreme Court changed from unknown to the mediator of virtually every political dispute in the country (Falcão and Oliveira, 2013; Vieira, 2018).

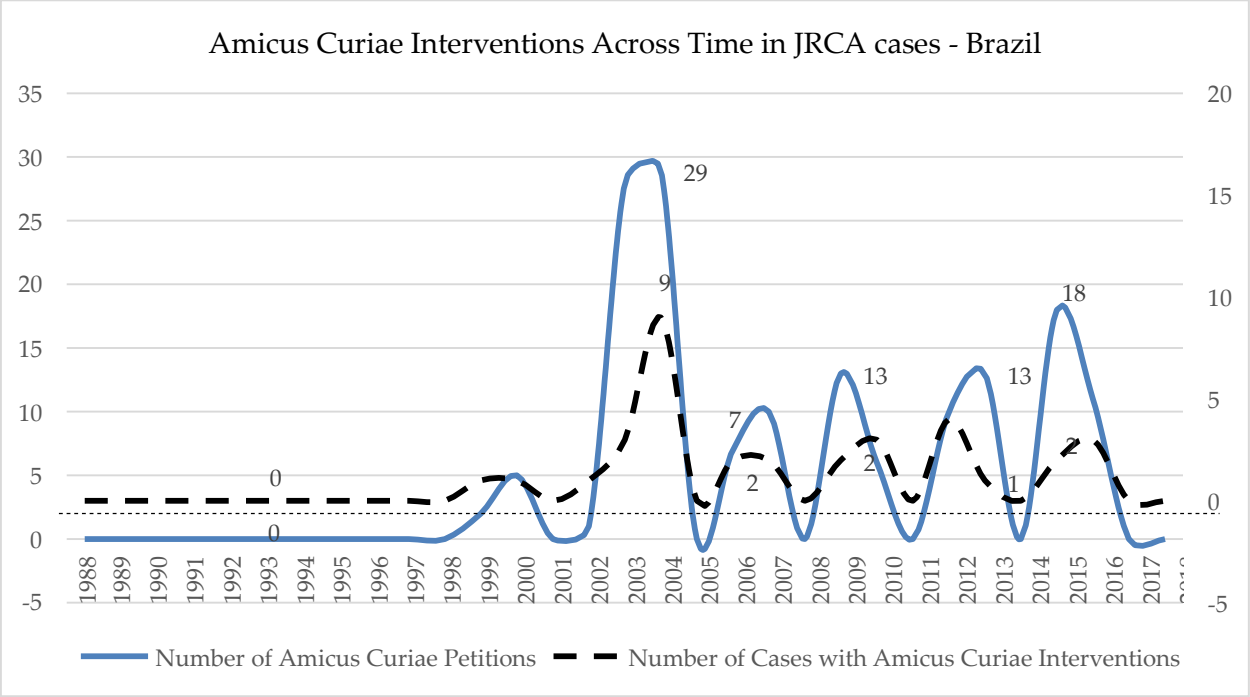


Figure 2. Amicus Curiae Petitions Across Time in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court Website.

I also analysed the cases in which the Senate has participated in the procedures reviewing the constitutionality of an amendment. It was involved in the vast majority (71,2%) of cases, giving the impression that there was an inter-institutional dialogue leading to deliberation. In addition to that, in all cases Senate has presented arguments for both the formal and material constitutionality of the amendments. This could mean that the Senate not only argued for the obedience of internal procedures in numerous cases, but they also justified the substantial accordance of the amendment to the constitutional text. Nevertheless, it is worth mentioning that this participation of the

Senate is required by law, which leads to doubts on the motivation of the Senate's engagement in the debates. The interventions of actors whose presence is required mandatorily should not have a strong weight in the determination of high-quality deliberation.

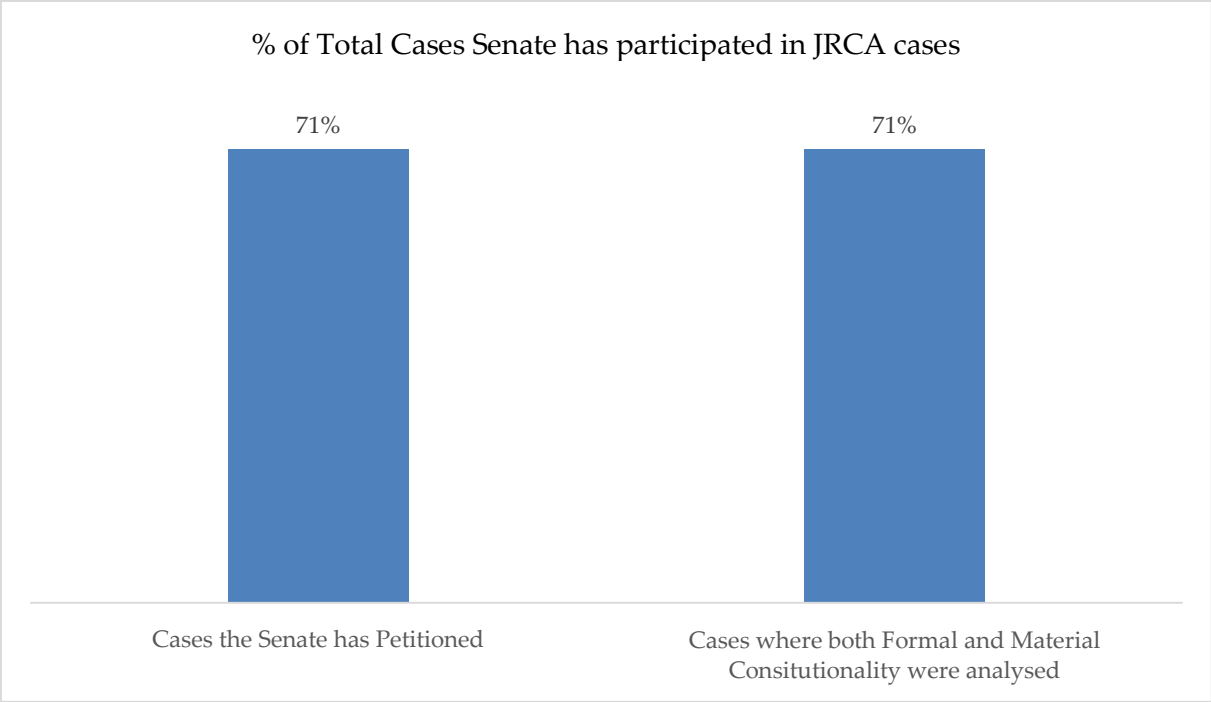


Figure 3. Participation of the Senate in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court Website.

Out of the cases which had their urgent claims examined by non-definitive rulings (or Preliminary Decisions), 80,8% were Collegiate. This means preliminary decisions were made by the majority of the justices in a Plenary, proving a positive case of institutionalization. On the other hand, only 6,8% of all the 73 cases had an individual preliminary ruling, and out of this small portion, 60,0% were confirmed by the plenary, showing an apparently optimistic picture in terms of deliberation when looking at preliminary decisions in the case of Brazil.

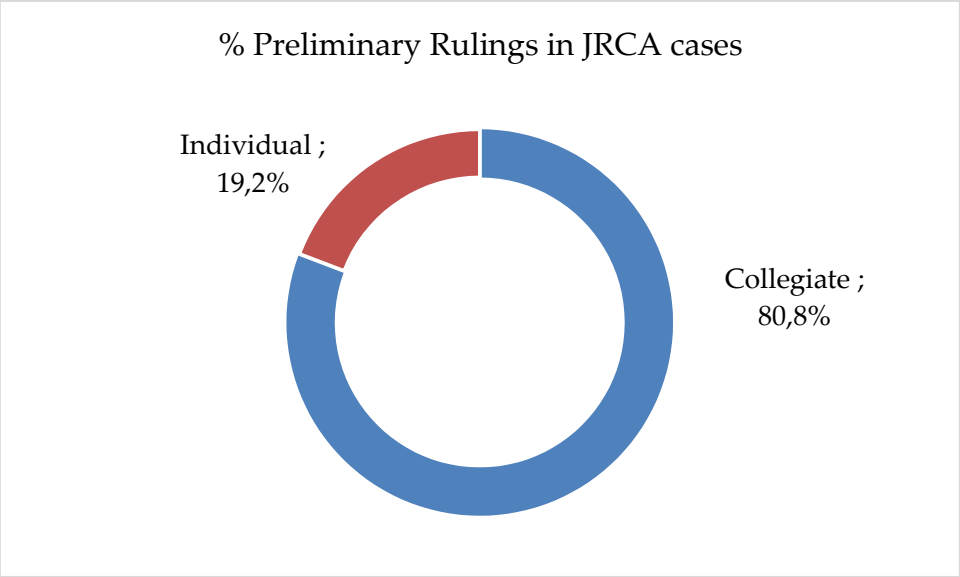


Figure 4. Percentage of preliminary rulings in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court Website.

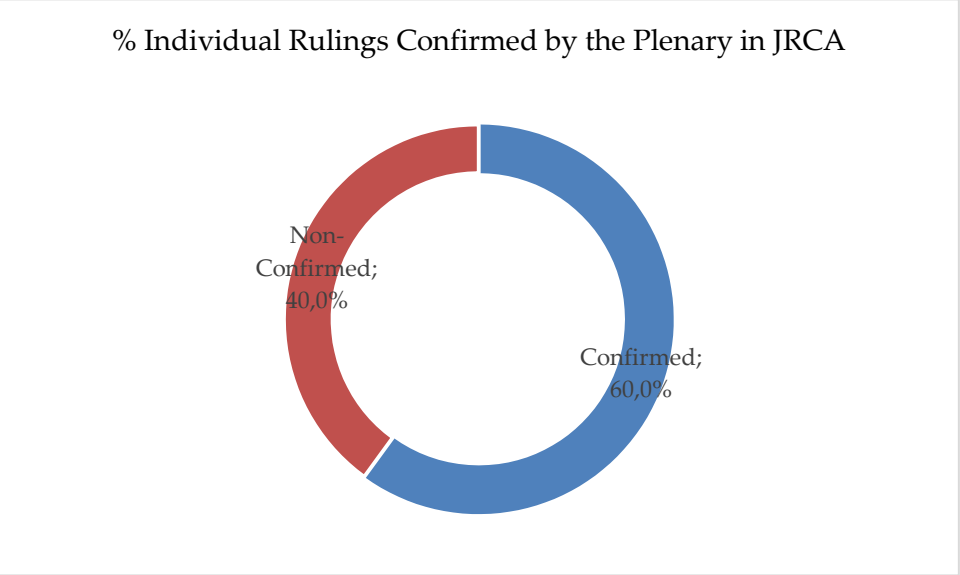


Figure 5. Percentage of individual rulings confirmed by the plenary in JRCA – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court website.

Further, justices made use of the "*Pedidos de Vista*" in 19,2% of the cases. The fact that almost one of every five cases had this unusual procedure reveals that, apparently,

justices showed the will to be deeply involved in understanding the legal matters of the cases. The use of judicial independence for handling this tool is a driver of deliberation. Independent justices are dive into the analysis of other opinions to come back with the best possible solution, fostering dialogue inside the courts. As justice Dias Toffoli mentioned during the judgement of ADI 4425: "Chief Justice, I request a *Pedido de Vista* of the case files, because I want to bring a deeper understanding about the subject, anticipating that I had before voted in this sense, but I want to understand better this matter".

Thus, at a first glance, after analysing the interventions, tools and procedures superficially, the Brazilian Supreme Court might give an impression of a court that, despite being highly independent fosters deliberation.

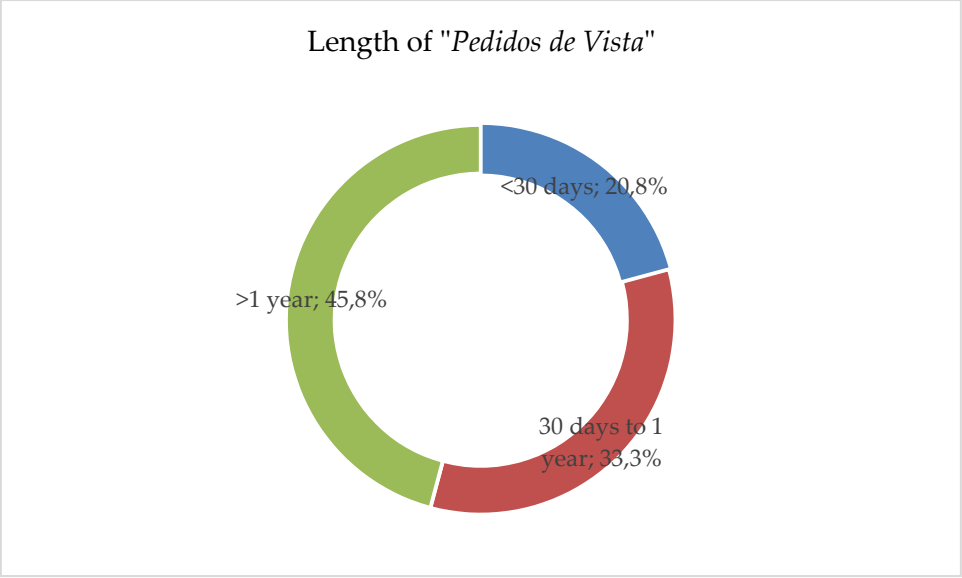


Figure 6. Length of "*Pedidos de Vista*" in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court website.

The previous data-based arguments seem to show a picture were Judicial Independence fosters dialogue between judges, takes into consideration other actors'

points of view and overall allows a well-functioning system of deliberation. Nevertheless, after getting a closer look at the data, we can find that the excess of judicial independence in Brazil may have subverted the true quality of a deliberative Supreme Court. My findings show evidence of a flawed system, that enhances judicial individual power and obviates the will of other actors. These findings confirm the research results obtained by Arguelhes and Molhano (2018).

To start with, although "*Pedidos de Vista"* are supposed to enable a proper deliberation, it is in fact used as a tool favouring individual justices' agendas, obstructing collegiate decision making (Arguelhes and Molhando, 2018). According to the internal procedure rules of the Brazilian Supreme Court (Art. 134 "*Regimento Interno do STF*"), once a "Pedido de Vista" is requested, it shall be returned within the following two ordinary sessions. In average, this should represent a deadline of about a month (30 days), considering vacation periods, and that ordinary sessions are held twice a week. However, data shows that 79,1% of the requests disrespected this deadline, going far beyond it. Almost half (45,8%) of the cases were held by a justice for more than a year. Justices are thus taking advantage of their excessive independence by using this tool to block the collegiate's decision-making power, holding a case in their hands, for as long as it is convenient for them to advance their individual preferences.

Similar problems arise in relation to Amicus Curiae cases. The participation of Amici Curiae is supposed to enrich the deliberative standards through the opinion of external actors coming from diverse backgrounds. However, the system lacks real diversity. In almost two thirds (63.2%) of the cases, the external actors participating were Associations, Entities, Councils (35.8%), and Syndicates (27.4%) defending the interest of public service careers instead of effectively providing high quality information to improve the deliberation inside the Supreme Court. I call this group of actors "Public Corporations", and their important influence proves that the Brazilian

system of Amicus Curiae is not as effective as it should be. It is fair to say that it does not function as a channel for proper dialogue with civil society, which is even more expected in the case of the judicial review of constitutional amendments. This data matches the general results found by Eloísa Machado de Almeida (2016) and Débora Ferreira (2018) in their research about Amici Curiae in Brazil, and that can be expanded to Livia Gil Guimarães (2017) results on the small impact of oral hearings in the Brazilian Supreme Court.

The proportion of actors that are known for their expertise and valuable quality of information to the deliberative processes is surprisingly small. Research Institutes represented only 0,9% of the Amici Curiae involved in the cases of judicial review of constitutional amendments, while Individual Experts and Civil Society Organisms represented only 10,4%. These actors' insights are one of the main reasons the Amicus Curiae system exists, but voice is nonetheless overshadowed by the functional lobbying of "Public Corporations". The important autonomy of the justices makes that these participations do not need to be effectively considered for issuing a ruling, which in consequence disincentivizes the participation of these groups.

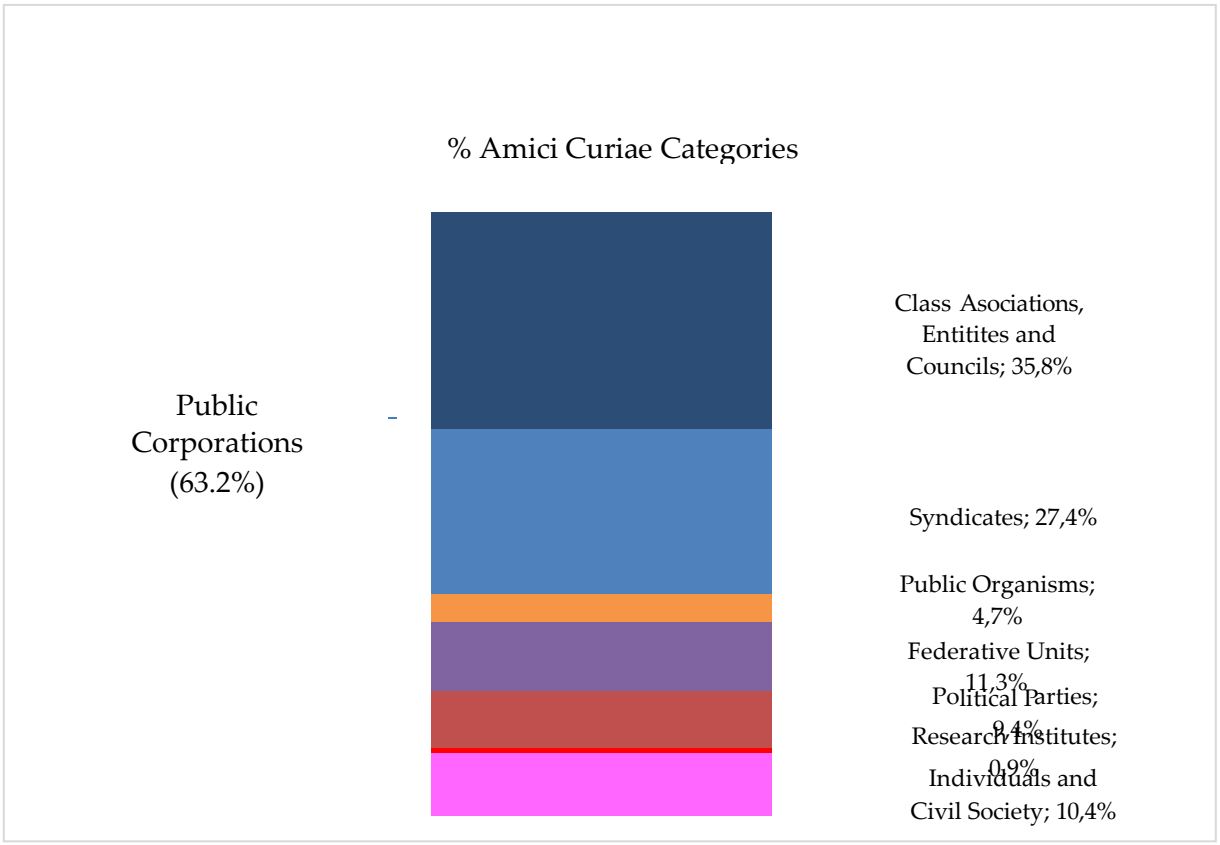


Figure 7. Participation of amici curiae by category in JRCA cases – Brazilian Supreme Court (1988-2018)
Source: Brazilian Supreme Court website

When analysing the different actors contained in the "Public Corporations" group, most (67,2%) of the Amici Curiae are in fact representing two major specific groups influencing decision-making: Legal (46,3%) and Fiscal Careers (20,9%). These dominant groups are known for advancing the interests and protecting the career benefits of judges, prosecutors and auditors. They benefit from their closeness to the justices (coming from the same background) in order to advance professional group interests. In addition to that, their strong presence hinders the desired diversity that the Amicus Curiae system is supposed to bring, given that Legal Careers and the courts' members will tend to have a similar mindset. This unbalanced situation could be the result of the close relationship between "Public Corporations" and the Courts as a result

of their strong Judicial Independence. Justices seem to not hesitate to bring groups they have bonds with to join the court as Amici Curiae.

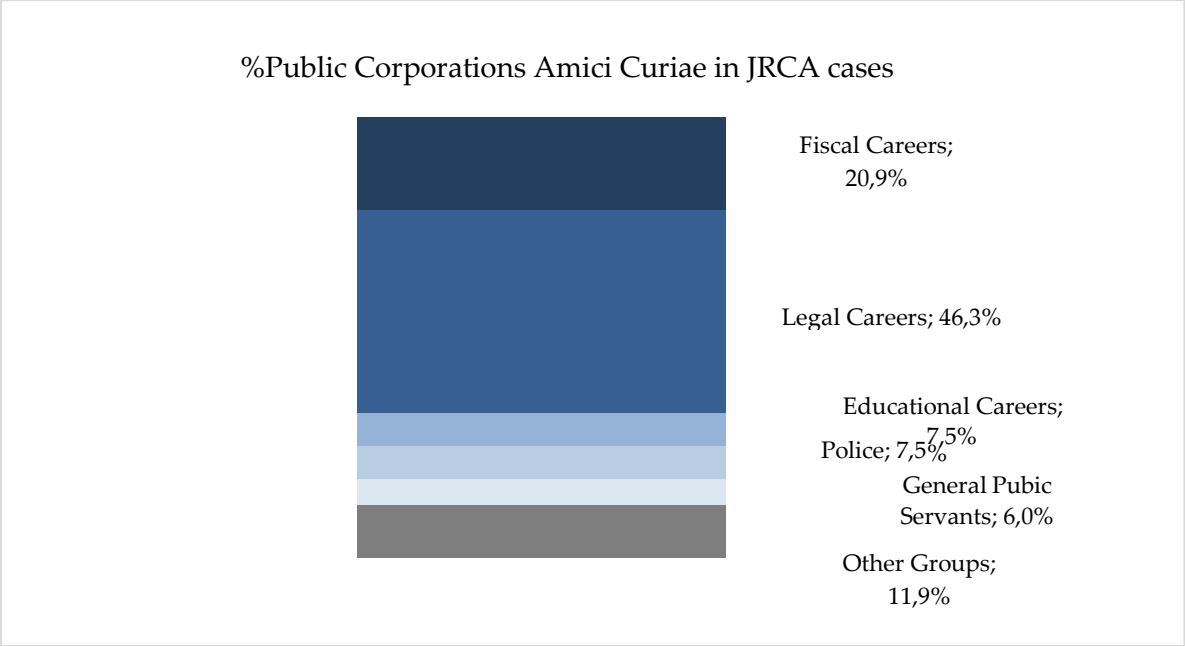


Figure 8. Public Corporations as amici curiae in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court website.

Participation of the House of Representatives in the judicial review of constitutional amendments is low if compared to the Senate, even if also required by law. This elected body only participated in 26,0% (11,0% of petitions for Formal Constitutionality and 15,1% of petitions for Material Constitutionality) of the cases, among which 42,1% only mentioned the compliance with the rules of legislative procedure. This means that, in the largest amount of cases, the body which is the most relevant representative of the majoritarian democracy has not presented the reasons why they believed that amendment is constitutional.

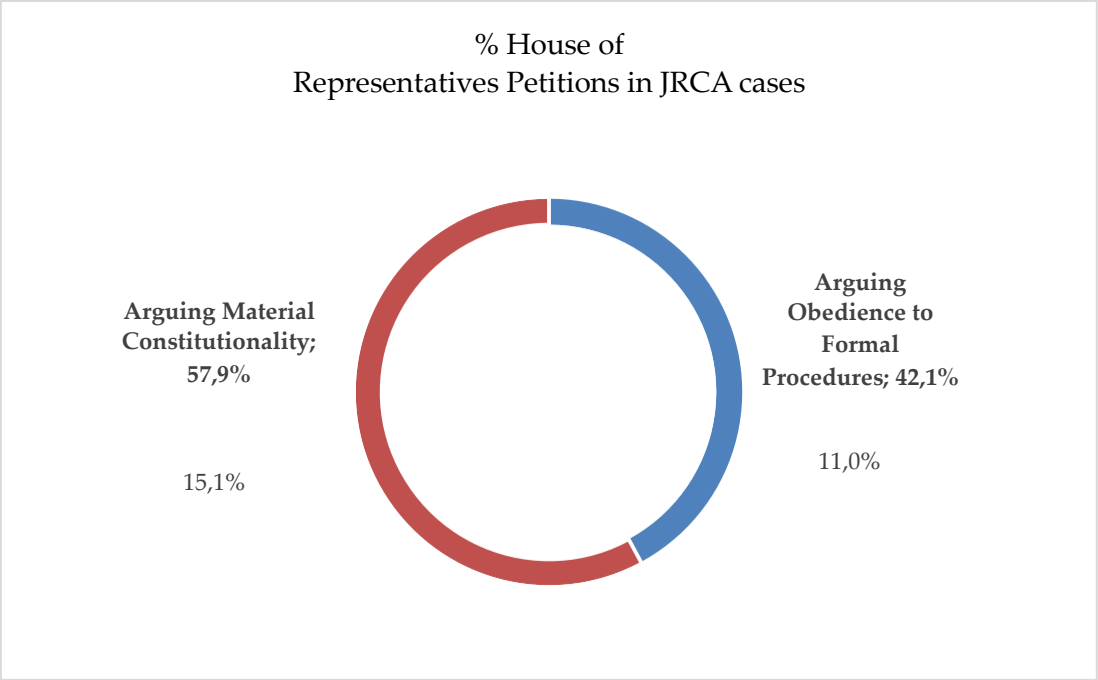


Figure 9. Participation of the House of Representatives in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court website.

Regarding Shifting Votes, the analysis shows that only in 2,7% of the cases a justice changed his initial vote. This means that, in thirty years, there were only two cases of Shifting Votes. In almost all cases Brazilian justices stuck to their initial choice without letting the debates influence their decision. This is probably the biggest indicator of a poor deliberative system, where either there is little discussion, or this discussion is not effective. This very small number of cases with shifting votes is even more worrisome if we consider that 19,2% of the cases had a "*Pedido de Vista*". This tool is supposed to guarantee deeper reflection on the case; instead it appears that it has been used to impact the timing of the decision.

Further, when analysing the transcriptions of the ruling sessions, we can see an evidence of justices acting as separate elements that do not interact among themselves. Scholars illustrates the Brazilian Supreme Court as eleven islands (representing the

eleven justices) isolated from each other (Mendes, 2010; Falcão and Arguelhes, 2017). For instance, Justice Luiz Fux said (ADI 4425) "To be honest, we all had our votes – well, not sure if everyone- but we had our votes ready for every single matter [that will be discussed]". Justice Dias Toffoli confirms this rigid practice of not deliberating and adds "My vote is long, and I will not stay here reading it. Everyone here already has a defined opinion [regarding the outcomes]". In another case, Fux complains about the Court's practices: "Each one of us votes as we wish. It is impossible, Chief Justice. It is impossible because there is some inappropriateness ("*irritualidade*") to, let's say, this Collegiate behaviour. Why?" (ADI 4357). This proves that dialogue in the court is more formal than substantial.

In summary, the deliberative standards of the Brazilian Supreme Court seem to be, at a first glance, positive and enhancing democracy. However, a further analysis of the country-case shows that deliberation standards have been deteriorated by the extremely high levels of judicial independence. Justices abuse the existence of the available tools to obstruct deliberation and they do not seem to get any major input from the existing debates due to their individualism. Also, the participants, that seem to be diverse and numerous, are in many cases the fruit of a mandatory presence or motivated by corporate interests. The small participation of civil society, universities and research institutes -that could enhance the quality of the debate by bringing more information and the broader representation of society- is also alarming. The important autonomy of the justices makes that these participations do not need to be effectively considered for issuing a ruling. Hence, deliberation is negatively impacted by the excessive Judicial Independence of the Brazilian Court.

2.1.1.3 Impact on Non-Partisanship

When constitution-makers grant justices the power to review laws, they expect an input that is different from the one of the elected representatives in the parliament. Many scholars justify the existence of judicial review by the procedures of judicial decision-making: justices must follow a technical reasoning and be impartial. Therefore, the counter-majoritarian role attributed to courts should be secured by non-partisan groups, insulated from ordinary majoritarian politics.

It has long been stipulated that Judicial Independence affects non-partisanship (impartiality). If justices have too little independence, there is space for strong interferences in their decisions. In these cases, their rulings would echo governmental preferences, and will not be impartial. On the opposite case, if justices are too independent, high levels of autonomy could lead to a strong 'sincerity'. Justices would act according to their individual preferences, disregarding external actors and their own collegiate colleagues, allowing partisanship. The case of Brazil is clearly one of excessive Judicial Independence. As already diagnosed in Overrides and Backlashes (2.1.1.1) and Deliberation (2.1.1.2) analyses, justices are free to act boldly and favour a part or their own interests.

In Brazil, high levels of Judicial Independence have resulted in a system in which not only the Court itself has enough strength to oppose other Powers, but also individual justices have the capability to impose their personal preferences. For instance, in holiday periods (around sixty days every year) the preliminary decisions are made exclusively by the Chief Justice, who can – individually - decide on extremely salient cases (article 13, VIII, *"Regimento Interno do STF"*). This prevision played a very important role in the case "*Associação Nacional dos Procuradores Federais vs. National Congress"* – *ADI* 5.017. In 2013, Congress enacted Constitutional Amendment N. º 73,

creating four new Federal Courts in Brazil. The amendment obeyed the legislative procedures: it was approved by two thirds of the House of Representatives and the Senate, in two turns in each Chamber. In July 17th of 2013, during the Supreme Court's holidays, a federal attorney association filed an *Ação Direta de Inconstitucionalidade* questioning the accordance of the amendment with the Constitution. During the Court's vacation, Chief Justice Joaquim Barbosa suspended the creation of the courts in an individual preliminary ruling based on the article 13, VIII of the Supreme Court internal rules. This individual decision drastically obliterated all the previous consensus and processes on the matter. It is worth mentioning that Barbosa had pronounced himself against the creation of the new Federal Courts on several occasions. In interviews given for the press before the case came to his hand, the Chief Justice was quite critical to the idea of creating these new Federal Courts. He mentioned that judges were acting in "sneaky" ways to approve the amendment and that the new courts would raise the Judiciary spending in 8 billion *reais* a year without solving the institution's problems[13]. In the preliminary ruling, Chief Justice Joaquim Barbosa argued that "it is very likely that the Federal budget ("*União*") is facing more important needs and requests than the creation of fours courts. (…) The Federal budget will not have the essential resources for fulfilling its role towards the citizens". In addition to that, Barbosa insisted on his opinion about the proper budget allocation: "You do not value the Judiciary by creating courts; you value the Judiciary by honouring and shaping the judges, especially those who are distant from the ideal structure for them to act in balance and without damaging their personal life"[14]. Chief Justice Joaquim Barbosa thus took advantage of article 13, VII, granting him with this momentary

[13] See "Joaquim Barbosa suspende a criação de novos tribunais federais" (Folha de São Paulo, July 17, 2013).
[14] See "'Nada a dizer', diz Barbosa sobre novos TRFs" (Folha de Sâo Paulo, June 06, 2013).

power during vacation to act sincerely, following his own preferences in a way that indicates a lack of impartiality.

As shown, justices in Brazil can easily take advantage of the benefits that Judicial Independence grants them with, in order to act partially without fearing sanctions. This is only one of the many examples that showcases that the excessive judicial independence in Brazil exposes decision-making to deficiencies in the judicial review of constitutional amendments system and therefore endangers democracy.

2.1.2 The Case Of Argentina: The Lack Of Independence Of The Court

Drafted in 1853, Argentina's Constitution is known for being a replica of the United States Constitution. It inherited the U.S. main institutional settings of Republicanism, Presidentialism, and Federalism (at least formally[15]). Scholars argue that adopting the U.S. Constitution as a model was a way of keeping the power within the Federal Executive and constraining judicial activity (Verbistky, 1993). These institutional design choices have affected the evolution of judicial review and still impacts judicial independence.

During the establishment of the first and only Constitution (1853), the governing body centralized most of the power in the Executive. This emphasis on the President was made in order to palliate the instability of the previous regimes and was influenced by the Spanish system known for its strong governmental power (Helmke, 2005). We can therefore say that the courts' power was already weakened from the establishment

[15] For some critiques on the adoption of US institutions in Argentina, see Eduardo Zimmermann (1998) "El Poder Judicial, la construcción del Estado, y el federalism: Argentina, 1860-1880"; Manuel José García-Mansilla (2004), "Separation of Powers Crisis: The Case of Argentina"; and Susan Rose-Ackerman, Diane A. Desierto and Natalia Volosin (2011), "Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines".

of the Argentinian system, and we will see that some other factors have made it even weaker.

The political conjuncture from 1930 to today has not favoured judicial empowerment. A succession of military coups d'état and unified governments has centralized the power in the Executive body to even higher levels. The six military coups in nine decades (1930, 1943, 1955, 1962, 1966, and 1976) allowed for a constant rise of authoritarianism and executive-focussed regimes, which were alleviated by also executive-focussed democratic elected governments. These power dynamics have caused a situation called "hyper-presidentialism" (Nino, 1992; O'Donnell, 1994). In these occasions the Legislative body was co-opted by the Executive, and it became difficult for the courts to hold a minimum level of independence. Judicial behaviour became aligned to the Executive because of the fear of retaliation. In many cases, any sign of disobedience was punished by impeachment or other threats to judicial guarantees. The Argentinian system created a scenario lacking the necessary mechanism to effectively protect judges against undue interferences.

I will bring Argentina under the same analysis as I did for Brazil. Following the same model, I will test whether these low levels of Judicial Independence allow democratic decisions reviewing constitutional amendments. Brazil was our country-case with high levels of Judicial Independence (C-Yes), and Argentina will be the one with the low levels (C-No). We can expect the results to contrast those of Brazil and show that these low levels of Judicial Independence will have a completely different impact on the power to review amendments. But will this low Judicial Independence create a favourable environment for the judicial review of amendments? I will test this by finding evidence of the presence of our three Democratic Criteria (Deliberation (i), Possibility of Overrides and Backlashes (ii), and Non-Partisanship (iii). Opposingly to the Brazilian case, it is expected that the Argentinian Court acts in a more "insincere"

way, heavily considering the government's interest in the cases, and mirroring its will. This excessively strategic judicial decision-making would therefore not have positive effects on the democratic quality of the rulings.

The Argentinian case only offers two opportunities to analyse the judicial review of constitutional amendments. Despite having been drafted in 1853, the Argentinian Constitution has only been altered seven times[16]. In only two cases, the courts have manifested about the constitutionality of an amendment: the "*Ríos case*" (1993) and the "*Fayt case*" (1998). I will analyse these two decisions, but also complete the case study with other sources of contextual reasoning tackling the capability of a democratic judicial review of constitutional amendments system in Argentina.

2.1.2.1. Impact on the Possibility of Overrides and Backlashes

As we saw for the case of Brazil, excessive levels of Judicial Independence created a scenario where backlashes and overrides are not possible. This means the court`s workings and composition cannot be disturbed by the other powers, and that overcoming judicial decisions is only possible when authorized by the own Court. Moreover, this impossibility of backlashes and overrides has detrimental effects on democracy. Overrides and backlashes are a key characteristic of an accountable, non-authoritarian regime, given their relevance to calibrate "checks and balances". In the case of Argentina, given the low levels of Judicial Independence, it could be expected that backlashes and overrides would be possible, enabling a democratic system of judicial review of constitutional amendments. However, after getting a complete picture of the Argentinian system, I realised that the levels of judicial independence are too low to enable this. As I will show, the Argentinian government has consistently curbed the

[16] 1860, 1866, 1898, 1957, and 1994

courts, continuously creating an atmosphere of fear of retaliation among the justices (Helmke, 2005; Chavez, 2007). A situation where courts feel threatened by the strong power of the Executive and Legislative can create a shift in the justices' behaviour towards insincerity. These circumstances make it easier to manipulate the court and therefore backlashes and overrides to occur.

The consequences of the banalization of the overrides and backlash tools can have negative effects on the institutional dynamics. If this happens, Courts become subservient to government, and therefore do not play their counter-majoritarian role of protecting minorities. There were no overrides or backlashes as a direct consequence of the two cases of Argentinian judicial review of amendments, but the Supreme court has been subject to many undue interferences across history that are relevant examples of backlashes. The structure and components of the Court have been altered many times in the past fifty years, and the majority of its members have been replaced fully in nine occasions (Chavez, 2007). The Court was constantly modelled and transformed according to the government's will.

In the 1950's, President Peron shrunk the number of justices from eight to five and then President Frondizi raised it back to seven in the next mandate. Under the 1966 military government the number was reduced to five again. More recently, President Cristina Kirchner brought back the number of justices from nine to seven. Not only the size of the apex judicial organ was altered, but also its components. Constant purges were made in 1946, 1955, 1966, 1973, 1976 and 1983, and justices were successively appointed and then removed. President Peron's party impeached several justices in 1947, as a retaliation to unfavourable rulings (Levistky and Murillo, 2005). The only justice who held his position in that purge was known for being a supporter of the President (Helmke, 2005). In the 1990´s, President Menem added five additional

members to the Supreme Court and created an "Automatic Majority" that would grant him the approval of the Judiciary in every case (Chavez, 2004).

These constant modifications created an unstable ground for the Court to stand on and impose itself, weakening its power in front of the Executive and Legislative combined. Courts performed their duties with a constant fear of sanctions, being unable to protect the expected democratic standards. When Peron impeached four justices in 1947, it was clear for the justices that challenging the government and going against its interest would have consequences for their positions (Chavez, 2007). Justices' behaviour was therefore restrained, and not many were willing to speak up against government.

It is easy to see how these considerably low levels of judicial independence in Argentina, instead of allowing a balance between the three Powers, have had a negative impact on the institutional dynamics. Although I could not find evidence of direct overrides in the scope of judicial review of amendments in Argentina, the extremely low levels of judicial independence in the country could justify dreadful consequences in these situations. The review of amendments could be considered as redundant, or a mere formality, and therefore ineffective. In this case, declaring an amendment as unconstitutional, means ruling against government. Leaving the maintenance of the Constitution in the hands of the Executive could create a scenario where the President turns into an authoritarian de facto Constituent Power, eroding democracy. In the case of Argentina, there were no overrides and backlashes against the Court in the judicial review of constitutional amendments because they were not necessary. The extremely low levels of Judicial Independence made that the elected bodies did not even have to rely on these tools to oppose to the Courts. The power to review amendments was virtually taken away from the Courts and captured by the elected bodies, due to the unbalance of powers. Hence, the Democratic Criteria of Possibility of Overrides and Backlashes was not met in the absence of Judicial Independence.

2.1.2.2 Impact on Deliberation

Low levels of Judicial Independence could compromise the deliberative standards of a court. In the case of Argentina, we have seen the Court is mostly dependent, as it shows signs of institutional weakness. In this scenario, the Supreme Court is not considered a key player in political decision-making, and therefore its deliberative processes become less relevant or merely formal. This situation does not offer incentives for external actors to defend their preferences against government inside the Court, given that it will be, in most cases, aligned with the Executive. Thus, the idea of substantial deliberation fades, and is replaced by a system in which the Judiciary simply mirrors the Executive power.

We could observe the results of this low Judicial Independence on deliberation in Argentina. Following a similar way of thought as for the Brazil deliberation analysis, I have looked at the presence of indicators proving the presence or absence of deliberation in judicial review of constitutional amendments. The small sample size of two cases already suggests that deliberation in the case of Argentina is not an extremely significant variable, and that no Judicial Independence leads, by definition, to a lack of deliberation. The case of Argentina, with its excessively low independence, helps us proving this point. Looking at the same indicators as we did for Brazil, I analysed the presence dialogue of the courts.

In relation to the participation of Amicus Curiae, just as in Brazil, law allows this practice as civil society to supplies the court with additional key information that could be relevant for decision outcomes since the 1990's (Abregú and Courtis, 1998). However, Argentina has never made use of this practice for the review of constitutional amendments, while Brazil used it in 35 cases. Although it was not possible to collect the

data for the total number of Amicus Curiae petitions in Argentina, the Argentinian Supreme Court website only shows 14 general judicial review cases with presence of Amici Curiae, while the Brazilian Supreme Court website shows 285 collegiate rulings[17]. I am aware this data does not represent the strongest evidence, but a reasonable estimation of the available information leads to the conclusion that the Amicus Curiae practice in Argentina is less usual than in Brazil. This comparatively small number of Amici Curiae could be the result of Argentina's significantly low levels of Judicial Independence. If the court does not hold the sufficient ground to stand against the Executive, it lacks incentives to make use of the perspective of external actors (Amici). Courts seem to be, in any case, aligned with governmental preferences, therefore the use of resources to oppose the Executive becomes redundant, and there is no need to bring supporting materials for deliberation.

Another studied indicator of external deliberation in Brazil is the presence of Congress – Senate and House of Representatives – in the judicial review of constitutional amendments. Congress is definitely absent in judicial discussions over the constitutionality of an amendment in Argentina. The dialogue between the Legislative – responsible for enacting the amendment- and the Judiciary – holding the power to strike it down – does not exist. This contrasts with the Brazilian case, where, even by law, Congress is called to participate in the decision making (Act. 9868/1999). This dialogue can be beneficial for the discussions in some countries but becomes unnecessary in the case of Argentina. Given the scenario of hyper-presidentialism, the preferences of Congress and the Supreme Court tend to be predominantly a reflection of the Executive's will; consequently, the preferences of different actors become the same. This situation becomes a "*jeu de miroirs*", where all the actors involved in the

[17] On the Argentina's Supreme Court website, I clicked on the tab "Amigos Del Tribunal (Amicus Curiae)", on the section "Causas". For the Brazilian Supreme Court website, I clicked on "Jurisprudência", followed by "Pesquisa", and searched for the words "Amicus Curiae".

decision will replicate the verdict of the Executive. Knowing that courts will favour government in their decision-making, Congress has no incentives for participating in this deliberation process, consequently losing much of its value.

When analysing the internal deliberation indicators in Argentina, I obtained very similar results to the ones for the external indicators. I started by checking the individual preliminary rulings in Argentina. There were no decisions of this kind in collegiate bodies during the review of constitutional amendments. The Argentinian ruling system does not count on preliminary rulings of this kind. Given the low levels of Judicial Independence, it is hard to see how one justice alone would oppose to the Executive, if the whole collegiate does not. I also verified that in both constitutional amendment cases (*"Ríos"*and *"Fayt"*, that will be explained in the next section), no justice shifted its opinion during the judicial debates. It is worth mentioning that -despite being judged in more than one instance- both cases were deliberated during one session per instance each, showing that deliberation was speedy, especially when comparing to Brazil. This celerity might depict the judiciary's intervention as a less notable step in the broader political decision-making process in Argentina.

There are some positive aspects of deliberation in the review of constitutional amendments in Argentina. For instance, in the "*Fayt*" case, justices were engaged in the discussion about the doctrine of justiciability of political causes. Drawing from previous minority opinions of the court – both issued by Justice Fayt, who was also acting as the plaintiff in this case – the court changed its position about the subject and ruled for the partial unconstitutionality of the 1994 amendment. In this case, the court was careful in justifying the new position and showed the will to reconsider its past rulings. We must weight however that the cases reviewing amendments did not effectively opposed the Executive's interest, but, instead, dealt with provincial law or questions restricted to judicial administration.

In summary, low levels of Judicial Independence refrain deliberation, or make it unnecessary, given that the will of the Executive is systematically mirrored by the Courts, even in the judicial review of constitutional amendments. In some cases, deliberation was lacking to the point that the Court was a mere "automatic majority" favouring the President.

2.1.2.3 Impact on Non-Partisanship

Low Judicial Independence can also affect the impartiality of the courts, and this is the case of Argentina. When performing the analysis of the judicial review of constitutional amendments in Argentina, I came across several quotes from the judges in other constitutional cases (unrelated to amendments), that I found worth mentioning for illustrating my arguments. For instance, Justice Rodolfo Barra stated, when referring to President Menem, that his "only bosses are Peron and Menem" (Verbitsky, 1993). He also declared: "I only issue rulings that are favorable to administration officials" (Chavez, Ferejohn, and Weintgast, 2011). Similarly, Justice Adolfo Vazquez (also nominated by Menem) stated "When there is a case against the government, I do not rule against the administration". Vazquez also added "the functions are three, but the power is one " (Helmke and Rios-Figueroa, 2011)". These three quotes clearly state how, in Argentina, the low levels of Judicial Independence made the courts partisan of the government. These quotes are especially important because they were made during the years Menem was in power (1989-1999), as were the two cases of judicial review of amendments (1993 and 1998). This partisanship driven by low Judicial Independence simply favours governmental preferences and this judicial partiality does not allow true democracy.

It is easy to see the reason behind this partisanship of the Argentinian Court. The strong Executive power as a result of the successive dictatorships and newly instituted democracies (with a large portion of power allocated to the President) led to a weakened judiciary. This power dynamics made the judiciary an institution that is easy to shape and manipulate. Justices were appointed by Dictators and Presidents, and obviously confirmed by the Senate as a result of the strong alignment between Executive and Legislative. This alignment even permitted President Menem to raise the number of justices from five to nine in 1990, appointing four justices that reflected his preferences. As aforementioned, at the time, the judicial majority favouring government was even known as the "automatic Menemist majority".

In the "*Ríos*" case, the Supreme Court argued in *obter dictum* that constitutional conventions to reform the Constitution do not hold absolute discretion. It stated that two limits should be respected when passing constitutional amendments: the definition of the subjects that will be discussed by the convention, and the principles of the Constitution. However, the case cannot be considered as a defeat of the government, as the Supreme Court ruled that the question *sub judice* was a matter of provincial law, and not federal – thus declining the case (Gomez, 2000). This proves how, in order to avoid conflict with the elected bodies, the Court was ready to give up its power to review the constitutional amendments.

The "*Fayt*" case was the first to rule the partial unconstitutionality an amendment. The case was decided in first and second instance by district courts, having never reached the Supreme Court. Nevertheless, this defeat a district court has imposed to the Executive must be understood considering the very specific political context of the time. In 1997, the midterm elections had defeated Menem's political group, dissipating his strong government and creating a new cycle of political division. The "*Fayt*" case was ruled in 1998, when the Executive was not as strong as in the last few

years. In fact, President Menem's mandate was over the next year, in 1999. This situation may confirm Gretchen Helmke's argument: judiciaries may rule against government even in cases of low Judicial Independence if government is about to leave power. Thus, it would be a clear case of what Helmke calls strategic defection (2002; 2005).

In Argentina, the low Judicial Independence was a key-factor for the lack of impartiality of the court. The judicial review of constitutional amendments in this scenario may not be democratic as, when it exists, will be used as a tool to mirror the preferences of the constituted government.

2.1.3 Partial Conclusions Of The Effects Of Judicial Independence

There is a correlation between the level of Judicial Independence that a country has and the level of democracy coming from the decision of its courts and this level of democracy becomes even more important when discussing the judicial review of constitutional amendments. As we have seen, the level of Judicial Independence has an impact on our Democratic Criteria: Deliberation (i), Possibility of Overrides and Backlashes (ii), and Non-Partisanship (iii). It is therefore important to assess what is the measure of Judicial Independence in a country before granting justices the power to review constitutional amendments. The degree of freedom of a Supreme Court can affect the whole institutional landscape of a country through the effect it has on the system of "checks and balances".

Getting the right degree of Judicial Independence is key to the obtention of a democratic system for reviewing constitutional amendments. In the case of Brazil, as we have seen, its excessive empowerment of the Supreme Court has a detrimental effect on

the existence of the democratic criteria. These high levels of Judicial Independence have created a scenario where overrides and backlashes are virtually impossible. The Court can use the power to review amendments to avoid any eventual backlash or override, even by striking down an new constitutional amendment enacted by the Parliament. Justices do not have to consider the preferences of other actors (external or their own colleagues) when deciding. This level of independence enhances individuality and disincentivizes proper deliberation. This degree of autonomy also allows Brazilian justices to act according to their own preferences without fearing sanctions. This opens a gap for partisan behaviour. Then, if the control mechanisms to secure impartiality does not function adequately, the justices feel unconstrained to go over and above the ethical guidelines of the profession. Therefore, the Brazilian case proves that a level of Judicial Independence that is too high does not allow the proper functioning of the judicial review of constitutional amendments.

However, as we saw in the case of Argentina, excessively low levels of Judicial Independence are also unfavourable for an adequate system of judicial review of constitutional amendments. In these circumstances, as the likeliness of Overrides and Backlashes increases, courts start acting insincerely to protect themselves. Courts do not oppose government, reducing the utility of amendment review. Following this defensive logic, Courts mirror the Executive preferences, creating a situation of clear partisanship. Regarding deliberation, the low independence of the Supreme Court makes it lose relevance in the broader political decision-making dynamics, given that they generally rule in alignment with the government, and there is no real incentive for external actors to participate in judicial debates. The result is a less democratic decision coming from the judiciary. Thus, the Argentinian case proves that a level of Judicial Independence that is too low does not allow a proper environment for the review of constitutional amendments either.

Hence, an intermediary level of Judicial Independence is needed for achieving a democratic functioning in the judicial review of constitutional amendments. This means a court should ideally:

Regarding the Overrides and Backlashes, be ruling in a system where it is possible for the other Powers to override its decisions, but also a court must be relevant in the interaction with other Powers, having the strength to rule against them when necessary.

Regarding Deliberation, be ruling in a system where justices must cooperate with other actors, including their own colleagues, and truly consider their preferences in the decision-making. In addition to that, courts must also have a voice in the dialogues with the other Powers.

Regarding Non-Partisanship, ruling in a system where the individual preferences of a justice cannot be controlling of the whole outcome of the judicial decision. Justices must also have guarantees that they will not be retaliated if they rule against government or other entities.

2.2 PROVING THE IMPACT OF POLITICAL COMPETITION ON THE DEMOCRATIC QUALITY OF THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

Before explaining the relationship between the presence of Political Competition and a democratic system of judicial review of amendments, I need to define what I understand as Political Competition in my analysis. Political Competition is the division of political authority between agents with different preferences inside the elected bodies (Leiras, Giraudy, and Tunon, 2014). When present, different ideological groups are contributing jointly to political decision-making in the Executive and Legislative. Thus, Political Competition creates a more diverse picture inside Congress, where congressmen from different parties will advance their preferences. However, we must keep in mind that having a wide array of parties in Congress does not necessarily imply Political Competition. In some cases, countries with many parties hold a presidential coalition that is so strong that it essentially confirms the President's will. Therefore, for assessing Political Competition, rather than analysing the effective number of parties in Congress (ENP), I will focus on the level of support each of them gives to the President. If these parties are merging their decisions to mirror the President, we will conclude there is no Political Competition.

Latin America offers an interesting landscape for the analysis of Political Competition, as it is houses many "hyper-presidential" systems (Cheibub, Elkins and Ginsburg, 2011; Alegre and Maisley, 2019). Not all countries are always subject to this phenomenon, but in many cases there is a strong concentration of power in the Executive that affects the dynamics of the other Powers. Presidents with excessive power will hold large coalitions of parties in Congress that will mirror their preferences (Figueiredo and Limongi, 2000; Power, 2010), obliterating Political Competition. We can therefore expect that Political Competition plays an important role in the enacting of

constitutional amendments: having a high number of congressmen confirming the Executive's preferences simplifies the obtention of the quorums required for a constitutional reform.

Political Competition plays an important role in the judicial review of constitutional amendments through its effect on the presence of our Democratic Criteria: Deliberation (i), Possibility of Overrides and Backlashes (ii), and Non-Partisanship (iii). I will analyse if the Democratic Criteria are fulfilled in the presence or absence of Political Competition to assess whether this variable creates an adequate scenario for implementing a system of judicial review of constitutional amendments.

I expect that the quality of deliberation is impacted by the presence of Political Competition. The diversity of opinions coming from the wide range of preferences in Congress could create an intense debate that could somehow affect the behaviour of the Judiciary. Justices could be restraining themselves from striking down an amendment if they observe the amendment is a result of intense agreement between different political groups.

Regarding the possibility of overrides and backlashes, high levels of Political Competition could affect the ability of government to run against courts. The division of political authority will have a negative effect of diffusing power inside the elected bodies, making it more difficult for overrides and backlashes to happen. This situation creates a scenario where it is less likely that the elected bodies will reach an agreement to overrule the Judiciary.

It is also expected that justices will be less constrained to advance their own agendas in the presence of Political Competition, given that it is more difficult to run against them, eroding judicial impartiality through the weakness of the system of checks and balances. However, we can also suppose that justices will be more moderate, given that the confirmation of their appointment is the product of a

consensus between political actors with different preferences. Thus Non-Partisanship will also be impacted.

I will assess how Political Competition (II) affects the three Democratic Criteria (i,ii,iii) through the analysis of two country-cases: Brazil and Peru. Both countries have been exposed to the presence and absence of Political Competition across time and they offer an good comparative scenario to evaluate whether the presence of this variable is adequate for a democratic judicial review of constitutional amendments. Brazil will be our Country-No for Political Competition, while Peru will be the Country-Yes.

2.2.1 The Case Of Brazil: Low Political Competition Caused By Strong Presidential Coalitions

The case of Brazil will help us understand the effects of adopting the judicial review of constitutional amendments in a country with low levels of Political Competition. I will focus my analysis on the period from 2003 to 2010, under the presidency of Luis Inácio Lula da Silva, when the coalition between the President and the political parties inside Congress was strong (low levels of Political Competition). Notwithstanding the high number of parties inside Congress (21 different parties with at least one representative), we can observe the levels of Political Competition are in fact low. Lula managed to maintain a loyal coalition of parties accounting for 51% of the members of the House of Representatives, with a very high (more than 90%) support to the President.

% of Individual votes supporting the Executive in the House of Representatives - Coalition Parties (Lula I and II)

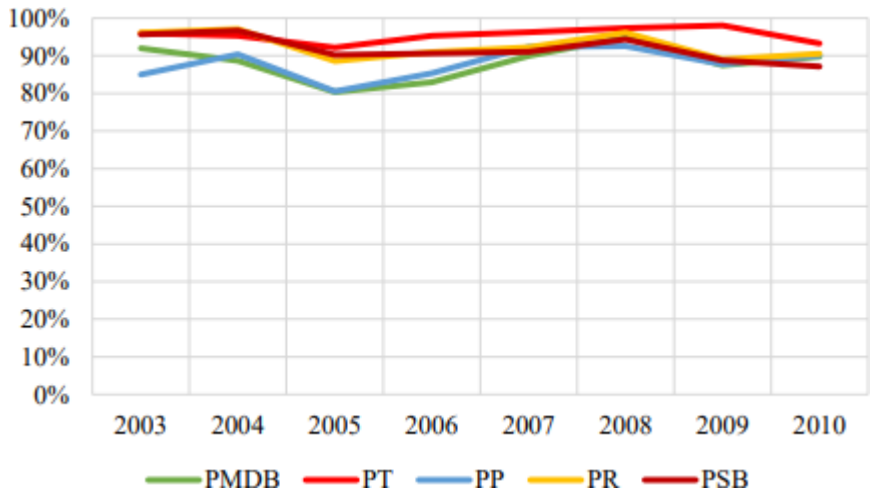


Figure 10. Coalition Strength in Brazil under Lula I and II (2003-2010)
Source: Ribamar Cezar Rambourg Junior (2019), dados CEBRAP.

This strong support from the coalition parties contrasts, for instance, with the Government of Dilma Rousseff, where the President gradually lost support in Congress until she was impeached in 2016. The scenario shifted dramatically from one with a significant coalition under Lula (2003-2010) to one with a higher level of Political Competition under Dilma (2011-2016).

% of Individual votes supporting the Executive in the House of Representatives - Coalition Parties (Dilma I and II)

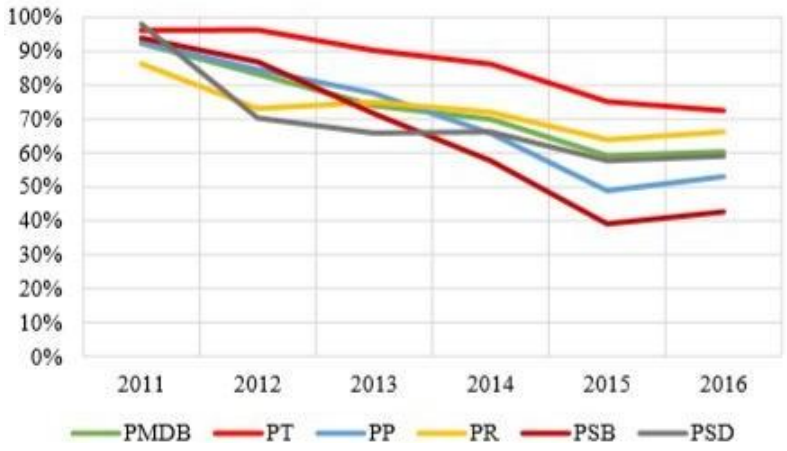


Figure 11. Coalition Strength in Brazil under Dilma I and II (2011-2016)
Source: Ribamar Cezar Rambourg Junior (2019), dados CEBRAP.

Lula also counted on the active backing from parties representing between 11% (under Lula I) and 13% (under Lula II) of the composition of the House of Representatives. Considering that the proportion of votes needed in order to approve an amendment is 60% (three fifths), we can affirm that Lula had a supermajority in Congress.

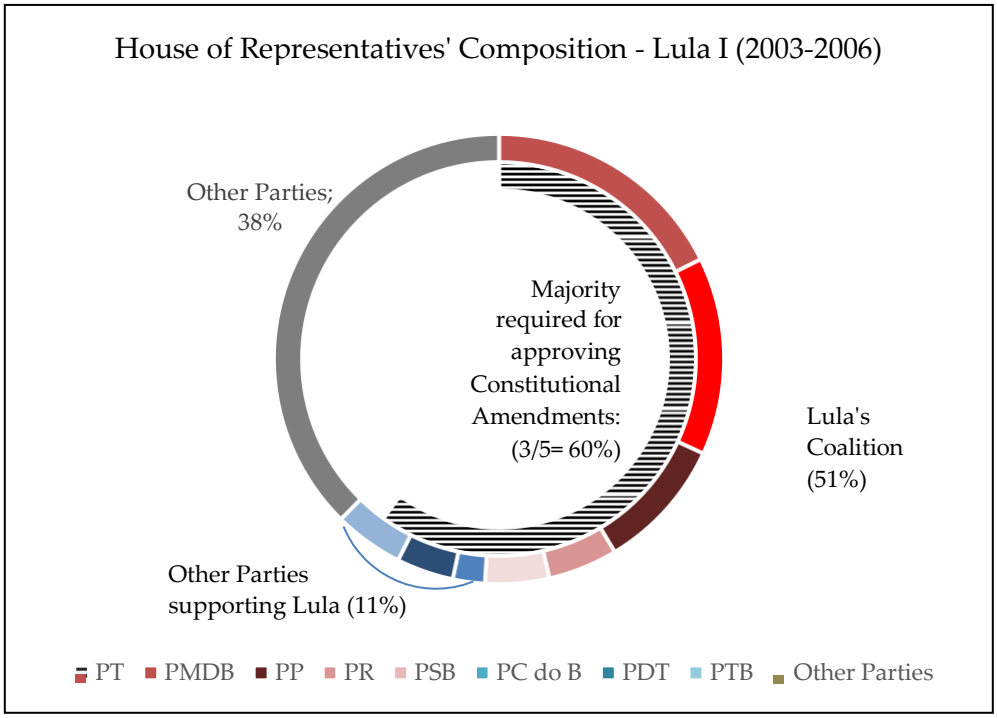


Figure 12. Composition of the Brazilian House of Representatives (2003-2006). Source: Brazilian House of Representatives website.

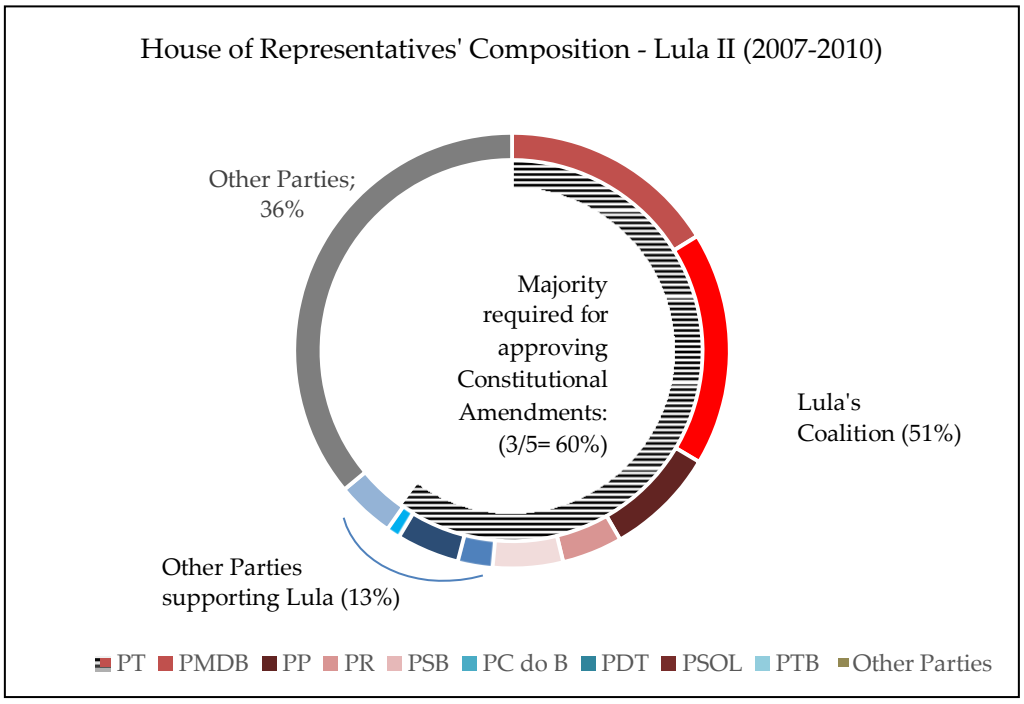


Figure 13. Composition of the Brazilian House of Representatives (2007-2010). Source: Brazilian House of Representatives website.

This situation of low Political Competition unifies the political authority under the Executive, which is aligned with the trend of powerful Presidents in Latin America. Under these circumstances the President dictates the political agenda of the country, including constitutional politics.

I will explain how low Political Competition in Lula's Brazil has an impact on our Democratic Criteria and creates an adequate scenario for the judicial review of constitutional amendments. I will not only benchmark the Brazil country-case against Peru, but I will also compare different periods with different level of Political Competition inside Brazil, in order to increase the reliability of my analysis.

2.2.1.1 Impact on Deliberation

The first Democratic Criteria under analysis is Deliberation. In order to assess how deliberation is affected by Political Competition in Brazil, I analysed the dynamics of political decision-making in the country and how it is affected by the levels of Political Competition. Under a situation of strong Political Competition, decisions inside Congress require a more elaborate debate in order to reach the consensus between actors having different preferences. In the opposite case, when Political Competition is absent or weak, it is expected that the decisions in Congress will be made in a more straightforward fashion, without entailing much debate. In one of the interviews I conducted, a congressman claimed: "Plenary sessions (*"Ordem do dia")* used to take much less time under Lula and Temer's governments and even under Dilma's, it was less time consuming than nowadays (…). Not having a coalition makes us stay here until midnight every Tuesdays and Wednesdays, having to listen to all this obstruction discourses (…)". It is therefore expected that the debates inside parliament are more frequent under a situation of high Political Competition, with the need for agreement

between many political groups in order to pass constitutional amendments. But how is the Judiciary affected in this context?

I could observe a shift in judicial behaviour as a consequence of the variation in the levels of Political Competition. High levels of Political Competition create these intense debates inside Congress that involve a large number of actors from different – and even opposed - groups supporting the final agreement for approving the amendment. These debates take large importance proportions and shift the behaviour of the courts to a strategic, insincere one. Striking down this amendment means opposing a substantial number of political groups, within different ideologies. This opposition would represent a high political cost for the justices, which as a result restrains themselves from ruling the amendment unconstitutional. In this case the Brazilian Court is restrained in the review of amendments, and its deliberative power is weakened by the circumstances. The Democratic Criteria of Deliberation (ii) is not present in the judicial review of constitutional amendments in this case of strong Political Competition in Brazil. An evidence supporting the argument can be seen through the analysis of the proportion of constitutional amendments ruled unconstitutional. Between 2002 and 2010, when there was a low level of Political Competition, the vast majority (83%) of amendments were ruled partially unconstitutional by preliminary or final rulings. However, with a clear increase in Political Competition under Dilma's government, the Supreme Court was more self-restrained and stroke down only one third (33%) of constitutional amendments.

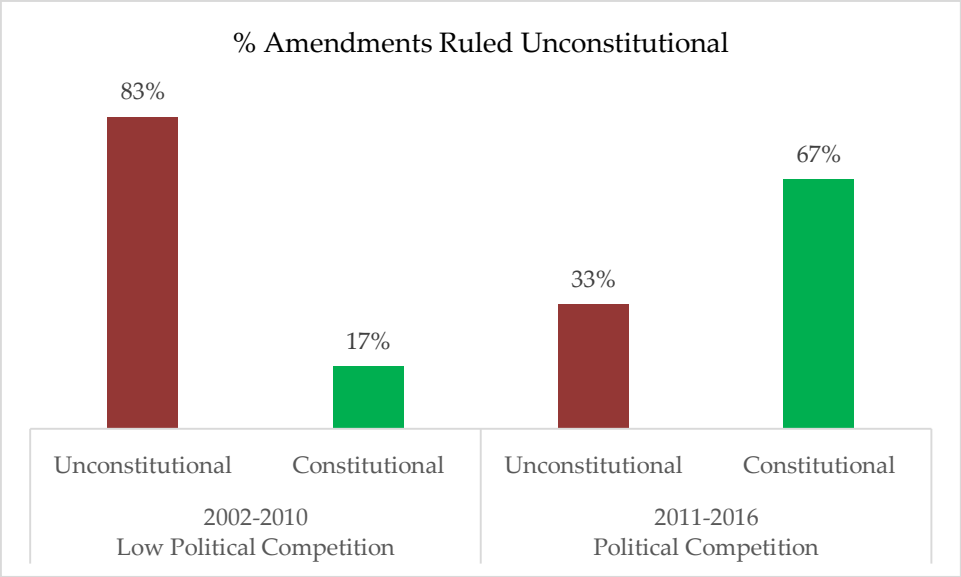


Figure 14. Percentage of Amendments ruled unconstitutional (partially or fully) by the Brazilian Supreme Court (2002-2016). Source: Brazilian Supreme Court website.

This proves that Political Competition is a detractor of authentic deliberation of courts, incentivising a strategic behaviour from the justices. This correlation will also be shown in the Peru case analysis of Political Competition, reinforcing the results. However, if we dig deeper into Brazil's political history and consider the government of Fernando Henrique Cardoso (FHC) (1994-2002), we can observe that courts were acting in a bold fashion when ruling amendments unconstitutional, similar to their behaviour under Lula. We need to keep in mind that the levels of Political Competition under Cardoso were slightly higher than under Lula's government (2003-2010), but still significantly lower than under Dilma (2011-2016) – overall showing a very strong presidential coalition and low Political Competition.

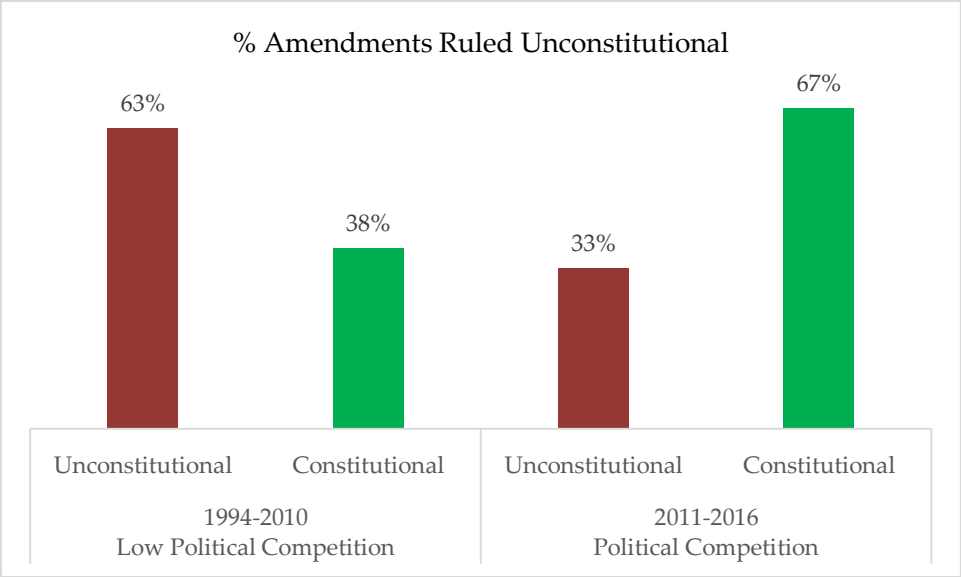


Figure 15. Percentage of the amendments ruled unconstitutional (partially or fully) by the Brazilian Supreme Court (1994-2016). Source: Brazilian Supreme Court website.

Hence, the presence of Political Competition makes the core of the deliberative debate to happen in Congress, taken away from the Court. The fear of ruling against the will of many political groups will make the Court rule more amendments constitutional, refraining itself from authentic deliberation. However in Brazil's period of low Political Competition (1994 to 2010), we can observe that Courts are showing a stronger presence in the dialogue and ruling more amendments unconstitutional.

2.2.1.2 Impact on the Possibility of Overrides and Backlashes

Given the excessively high levels of Judicial Independence in Brazil, I considered it was not judicious to analyse the possibility of overrides and backlashes as a result of Political Competition. Even if there was low Political Competition in Brazil, the Supreme Court would still be able to avoid attempts of overrides and backlashes (as seen in item 2.1. Judicial Independence). In this case, the levels of Judicial Independence

are so high that they would bias the results of this section. The effects of this bias and its implications for the proper understanding and use of the model developed in this dissertation will be considered in the conclusion. In addition to that, the effects of low Political Competition on the Possibility of Overrides and Backlashes will be analysed in the Peru country-case, which, despite being our example of presence of this Institutional Attribute (C-Yes), also went through a phase of low Political Competition.

2.2.1.3 Impact on Non-Partisanship

According to the rational choice theory, it is expected that the President will appoint more moderate justices under high Political Competition. In these cases, the components of the Parliament will be more divided in terms of preferences, and it will be therefore more difficult to reach consensus for the confirmation of radical candidates. The appointees will have to obtain the confirmation votes from very different members of Congress in order to be nominated. It is thus expected that under high Political Competition justices will be less prone to act in a partisan fashion from the moment they are invested as justices.

It is not easy to assess a proper measure of partisanship inside courts. Many factors (formal or informal) can lead to partial judicial decision-making. This wide array of sources influencing judicial behaviour makes it difficult to verify impartiality, especially given the subjective aspect it can have. However, scholars tend to use the correlation between the ideology of the President appointing the justices (iP) and the ideology of the individual justices (iJ), measured by the outcomes of their decisions. Adopting this method, when the difference between iP and iJ is minimal, I consider that justices are acting in a more partisan way, mirroring the President's will. I am therefore

considering the difference in ideologies between the President and the Brazilian Court through the analysis of their decision outcomes to evaluate impartiality. In addition to that, I will analyse the internal cohesion between justices nominated by the same President in order to give a more complete measure of the impartiality of justices in Brazil. When there is 100% internal cohesion, it means that all justices appointed by the same President have voted for the same outcome in all the cases.

Using the data from Fabiane Luci de Oliveira (2014) for all judicial decisions in *"Ação Direta de Inconstitucionalidade"* (ADI) in Brazil from 1988 to 2010, I observed there is less cohesion between the Justices appointed by the President when Political Competition is higher. Comparing across five different governments in Brazil, I found that, the lower the level of Political Competition, the higher is the internal cohesion inside groups appointed by the same President (called "blocks"). Therefore, a situation of low Political Competition at the time of the appointment of the justices entails that these justices nominated by the same President will vote in the same direction in more cases. On the contrary case, when justices were nominated under a situation of high Political Competition, they tend to be less cohesive as a block, with justices from the same block voting in different directions more often. We can infer that there is less impartiality when the cohesion between justices from the same block is high, as an indicator that they voted following partisan lines.

In my analysis, considering the data from Fabiane Luci de Oliveira referring to all the ADI cases in general from 1988 to 2010, I could observe that in blocks appointed under governments with low levels of Political Competition, such as the Military, Fernando Henrique Cardoso or Lula, the levels of internal cohesion are the highest (Military: 93%, FHC: 96%, Lula 84% cohesion). This confirms that when appointed under more unified governments, justices tend to vote together in blocks, suggesting more partiality. On the opposite case, when Political Competition is higher at the time

of the justices' block appointment, we can see that the levels of internal cohesion are lower. Justices nominated under Collor reached cohesion levels of only 68%, and this President is known for the weak coalition he held in Parliament (higher Political Competition).

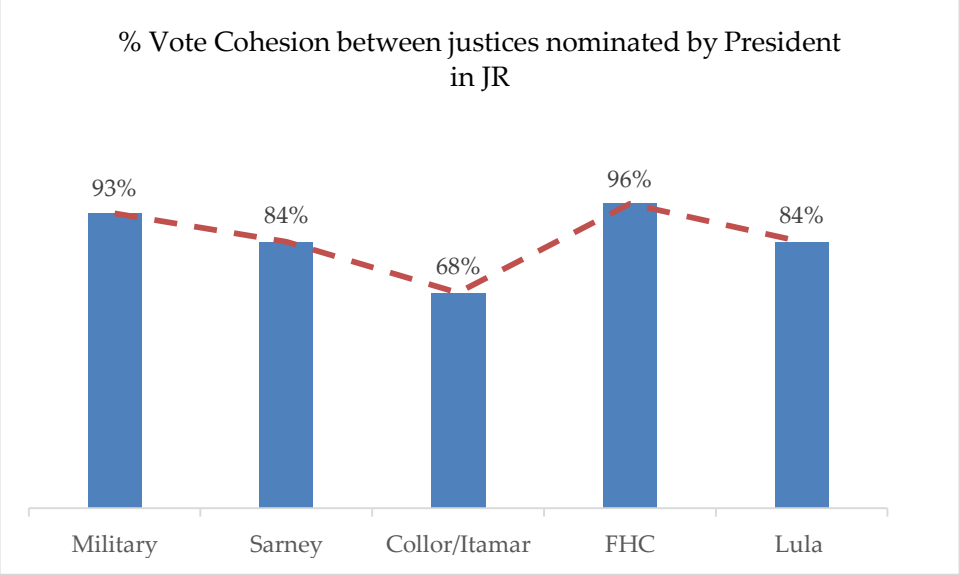


Figure 16. Percentage of vote cohesion by Brazilian justices appointed by the same President in all abstract review cases (1988-2016). Source: Fabiana Luci de Oliveira (2012).

However, these results do not focus solely on the judicial review of constitutional amendments. Would this correlation between Political Competition and Impartiality be confirmed in the review of amendments? In order to answer this question, I analysed the cohesion for these cases only. The findings show that not only this correlation exists, but this trend is also accentuated in the cases of judicial review of constitutional amendments.

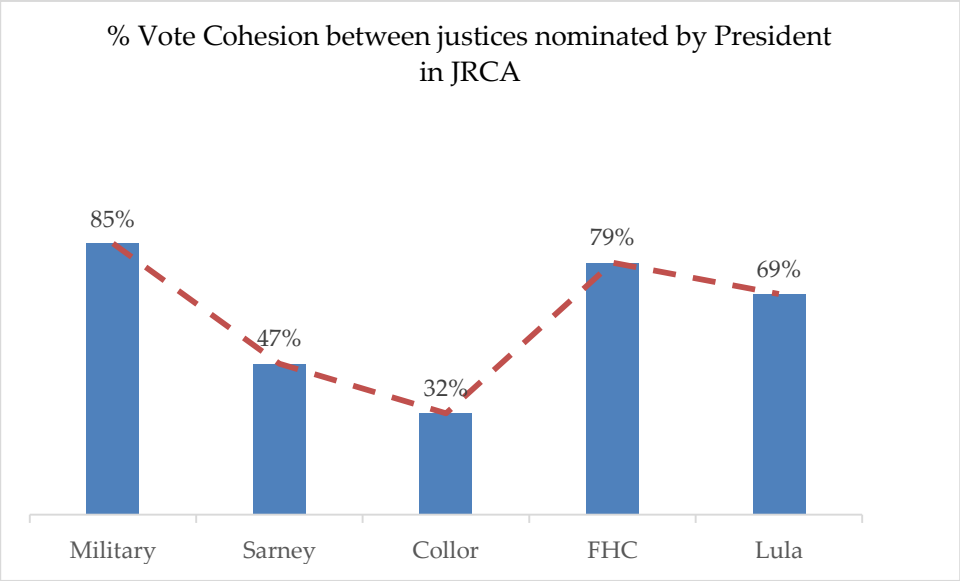


Figure 17. Percentage of vote cohesion by Brazilian justices appointed by the same President in JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court website.

We can observe that blocks nominated under low levels of Political Competition (Military, FHC, Lula) still have the highest levels of cohesion (Military: 85%, FHC: 79%, Lula: 69%), while those nominated under divided political authority (Sarney: 47%, Collor: 32%) show less cohesion.

The case of Lula is even more significant given that he had the opportunity to appoint a total of eight justices, making cases of cohesion less likely to happen. However, this cohesion still happened in 69% of the cases. Ayres Britto is the only outlier within the block of justices appointed by Lula, voting differently from the other seven members of the block. When disregarding Britto's votes, Lula's block even attains a cohesion level of 100% for the judicial review of constitutional amendments.

These findings confirm that justices appointed under lower levels of Political Competition vote in cohesive blocks, inferring they are more likely to be partisan, less impartial, according to our proxy. These findings also assert our expectations and could

mean that justices in blocks nominated under low Political Competition tend to mirror the President's preferences.

Previous analysis by Desposato, Ingram, and Lannes (2014) shows the dispersion of the justices' ideal points in all ADI decisions. In the figures below (Figures 18 and 19), the more spread across the scatter plot the justices are, the more they differ in their voting. On the contrary case, justices are more aligned in their votes when the points representing the justices are closer to each other. When observing the whole collegiate of Brazilian Justices in two different time frames, there is a clear distinction in terms of dispersion. In the 1990 to 2002 period (Fig 18), we can see justices are spread across the scatter plot, acting less cohesively, inferring there was more impartiality in their decisions. In the following scatter plot (Fig 19), we can observe that more cohesive blocks have formed (e.g. the red spots belonging to the Lula block), and that, as a whole, the collegiate is acting in a more aligned fashion, gathering their decision ideal points to the centre of the graph.

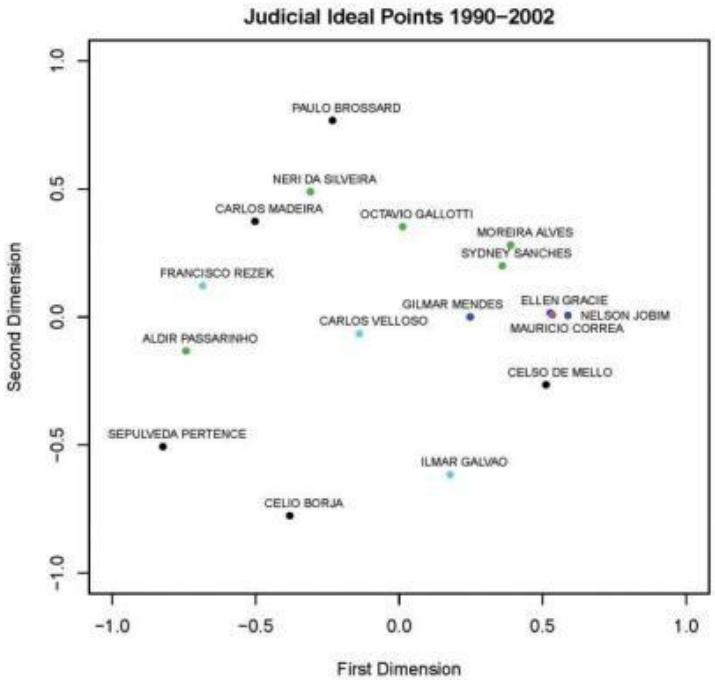


Figure 18. Brazilian justices' ideal points (1990-2002). Source: Desposato, Ingram, and Lannes (2014).

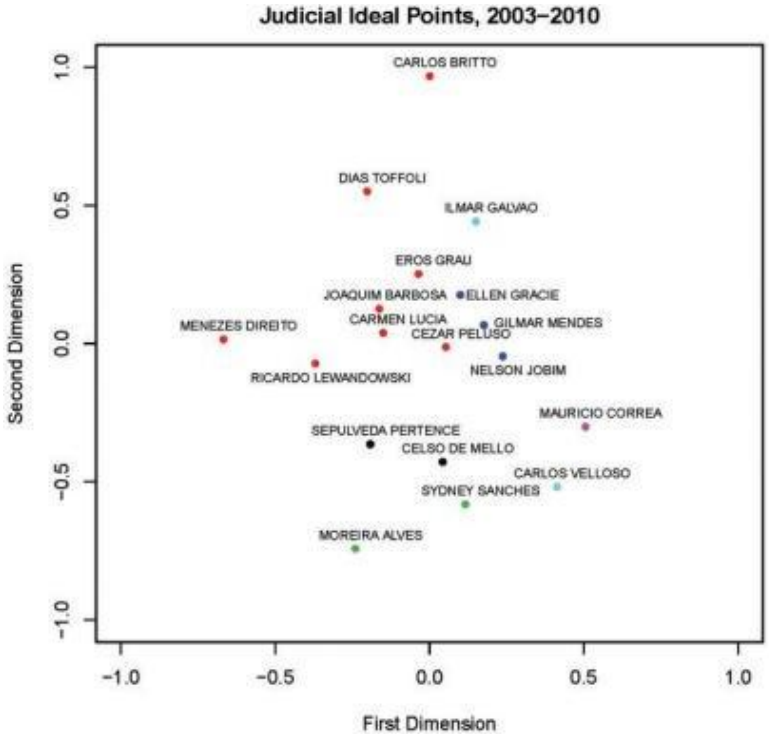


Figure 19. Brazilian justices' ideal points (2003-2010). Source: Desposato, Ingram, and Lannes (2014).

In terms of Political Competition, there is a difference between two displayed periods. The period from 2003 to 2010 (Fig. 19), when Lula was President, is known for stronger levels of coalition and thus low levels of Political Competition. Under President Collor (1990-1992) there was a very weak coalition in Parliament, and under Itamar (1992-1993) and FHC (1994-2002), the levels of coalition were high, but not as high as under Lula. We can see a reflection of FHC's unified government in how close the decision points of justices are in his block (dark blue spots in Fig 18). This coalition (and low levels of Political Competition) inside Parliament under FHC, could have created a scenario where it was possible for the President to appoint fewer moderate justices in court. In any case, the Political Competition between 1990-2002 was higher than 2003-2010. Hence, as we can observe in both figures, the lower the Political

Competition level, the less spread are the justices' decision points, meaning they are acting more consistently between them. This could be because justices are mirroring more intensely the President's ideology.

I also examined the decisions restricted to the judicial review of constitutional amendment cases, in order to identify any trends that could suggest a variation in justices' behaviour as a product of the changing Political Competition levels of each government. As for the previous analysis, I split the justices in blocks according to the President that appointed them. I then analysed the cohesion levels in each case at the time the final decision was made. Decisions were split in different time frames, following the President in office at the time they were made, to evaluate any evolution between mandates. Not only does this analysis take into account justices' behaviour considering the time they were appointed (therefore placing them into a certain block), but also the time in which the decision was made.

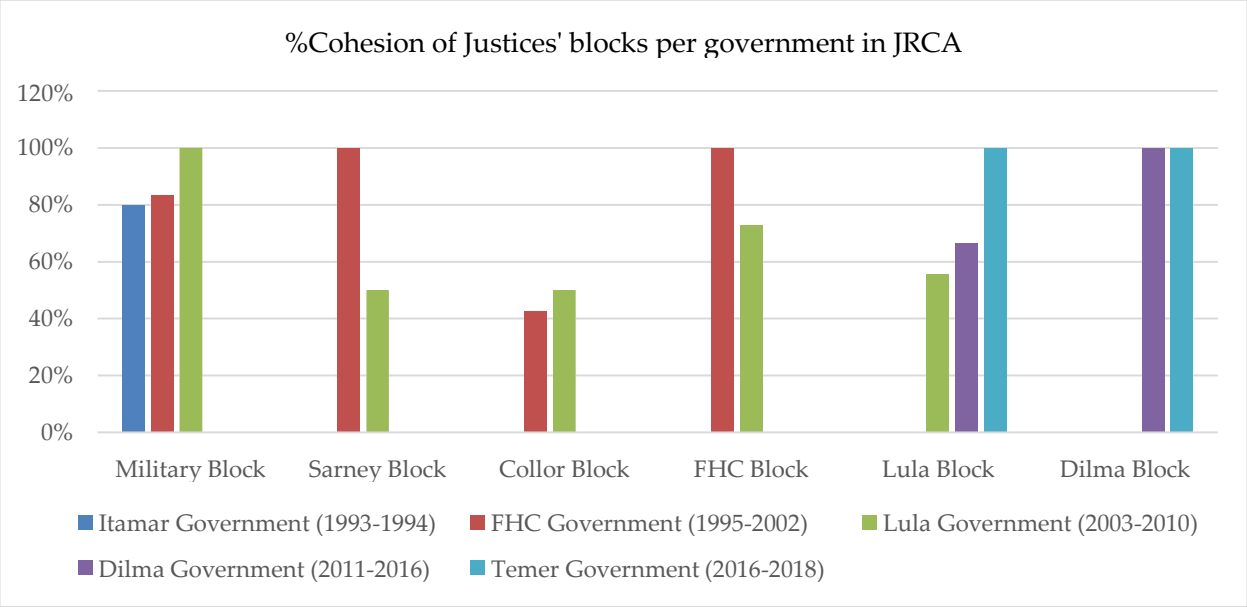


Figure 20. Percentage of justices' blocks cohesion per government in JRCA – Brazilian Supreme Court. Source: Brazilian Supreme Court website.

Findings show that Justices nominated under low Political Competition (e.g. Military Block, Lula Block) vote in a more cohesive way with their peers across time. In three consecutive mandates, both the Military and the Lula block reached a cohesiveness of 100%; the Military increased its cohesiveness by 20 points, and the Lula one grew it by 44 points from one President to another. Justices nominated under a low Political Competition government not only tend to act together in a more cohesive way, but also increase this cohesiveness, and presumably partisanship, across time.

In the case of the FHC Block, where it was expected to see the levels to be maintained at 100% (as seen in the FHC government), these levels seem to decrease by 27 points. A deeper look at the data showed this decrease was entirely driven by Ellen Gracie, a justice that voted differently from her peers in three occasions. Out of these three occasions, two were decisions ruled in the same session, and in the third one she differentiated her position to the others only for defending the constitutionality of one article that other members of her block did not agree with. Hence this difference in cohesiveness is not as substantial as it may seem at a first glance.

In the judicial review of constitutional amendments, Political Competition at the moment justices were elected influences their level of partisanship, and this effect becomes increasingly important across time. In the case of Brazil, most justices were appointed under low Political Competition dynamics since the military took government in 1964. It is therefore possible to see strong internal cohesion between the blocks that the justices belong to, meaning they could be acting along partisan lines. If so, this behaviour does not comply with the Democratic Criteria under scrutiny.

2.2.2 The Case Of Peru: High Political Competition And Weak Presidencies

The Peruvian context offers the possibility to study a case of high presence of Political Competition. Analysing the Peruvian case will be useful for understanding how a system of judicial review of constitutional amendments functions in countries where this characteristic is present. In addition to that, Peru has been through different levels of Political Competition across time and this variation will help us to better evaluate their impact on the democratic quality of this judicial review of amendments.

Under Alberto Fujimori's mandates, the presidency held a coalition accounting for more than half of Congress (55% between 1992 and 1995, and 52% between 1995 and 2001). However, since the exile of former President Fujimori, in 2001, the Peruvian Presidents needed to act accordingly to the preferences of other groups in Congress in order to advance their agenda (Levistky, 1999). The strong coalition existent until 2001 gave place to a significantly divided political landscape (2001-2006 in Figure 21) that persists until nowadays.

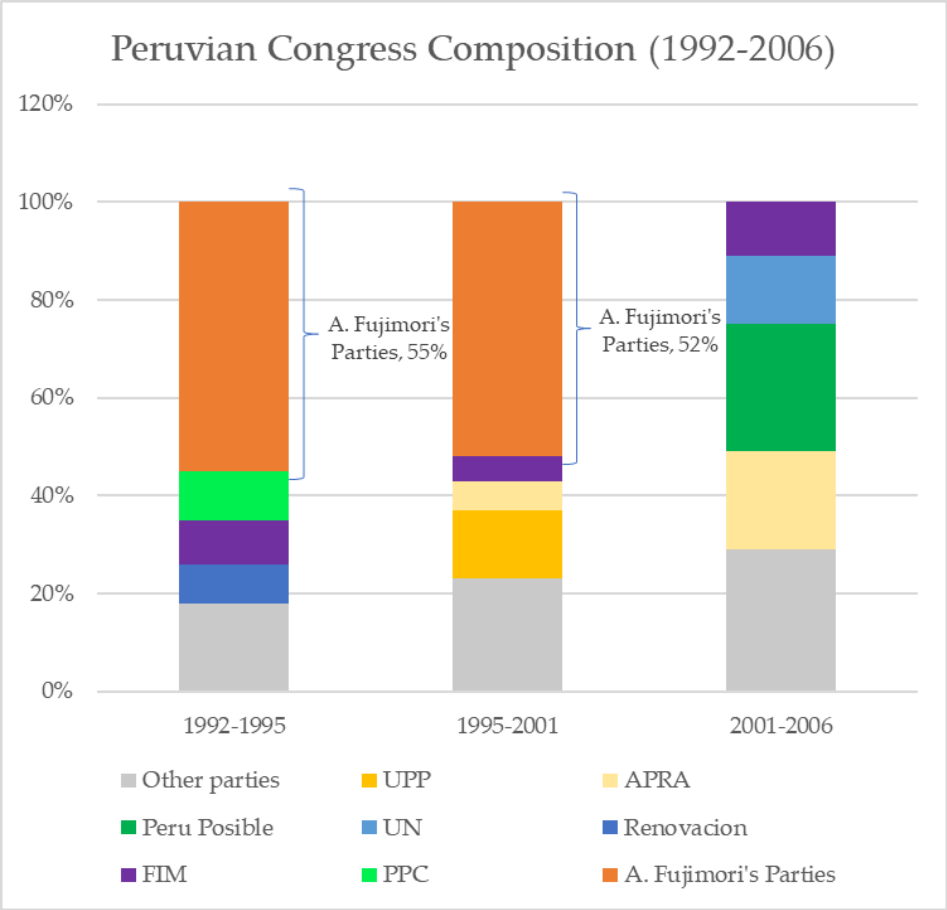


Figure 21. Peruvian Congress composition (1992-2006).
Source: Peruvian Congress website.

This Peruvian Congress is a unicameral body composed of 130 seats since 1992, meaning there is not a second House (e.g. Senate) in the Legislative body checking the parliamentary activity. Holding the majority of these seats made A. Fujimori a very powerful President, able to dominate decision-making thanks to the lack of Political Competition. This scenario made his regime be considered by many as authoritarian, especially after the "self-coup" or "fuji-coup" held in 1992 (Bejar, 2015). After Fujimori, however, Peru offered a considerably different picture, showing a scenario of high Political Competition. With a more balanced Parliament, none of the Presidents was able to hold a strong coalition in Congress, and in some cases the Executive even had to

face a super-majoritarian opposition inside the Legislative (e.g. President Pedro Pablo Kuczynski, 2017-2018, and his successor, Martín Vizcarra, 2018-nowadays).

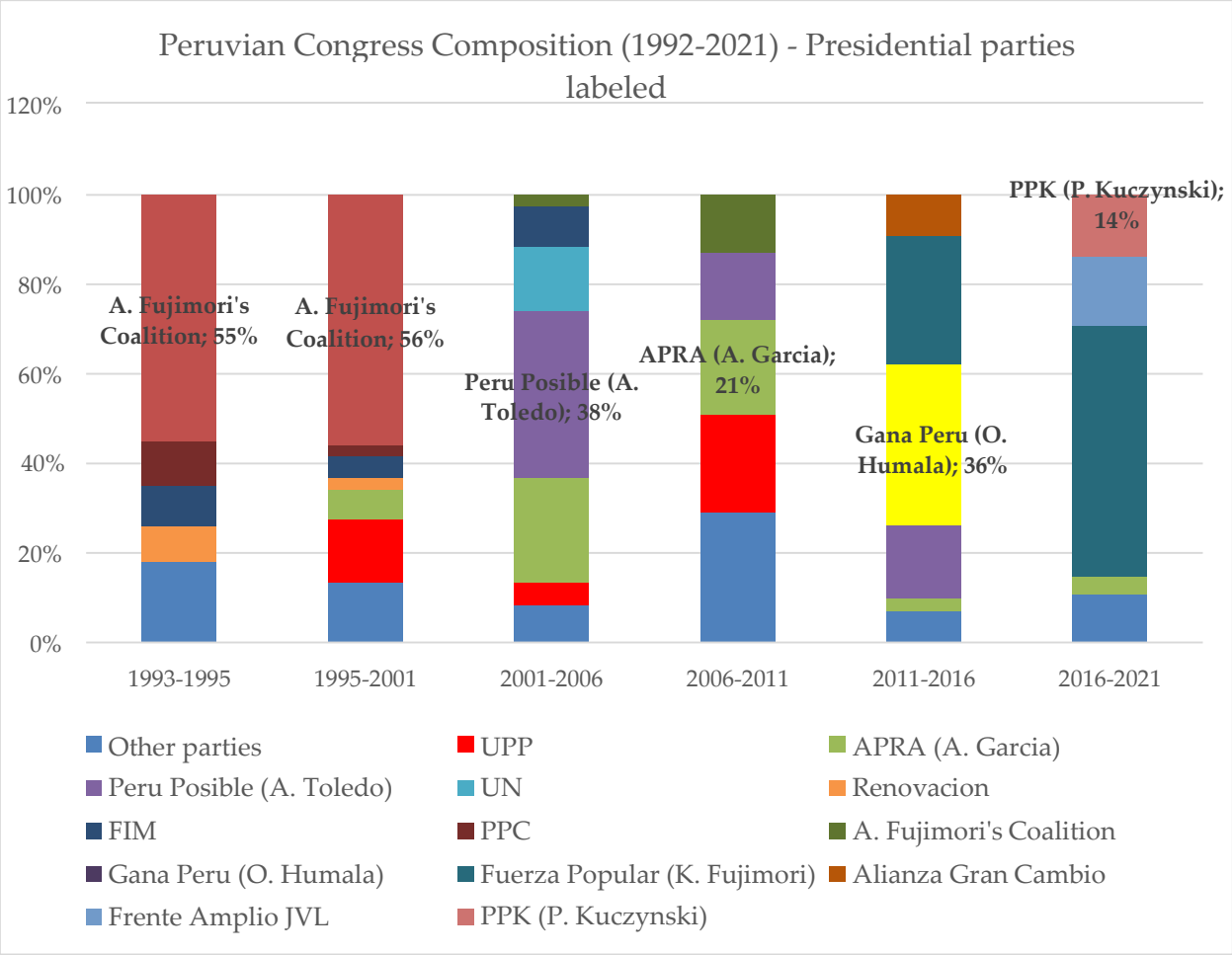


Figure 22. Peruvian Congress Composition (1992-today) Source: Peruvian Congress website.

The Peruvian Constitution of 1993, drafted after Fujimori's "self-coup", was amended several times over the years (in 1995, 2000, 2002, 2004, 2005, 2009, 2015, 2017, and 2018), sometimes more than once a year. The amendments ("*Ley de Reforma Constitucional*") dealt with different subjects, such as the social security reform, a few electoral reforms, or even decentralization policies (Peru is a Federal State). Despite

these amendments being recurrent over the years, the judicial review of constitutional amendments was unusual. The Peruvian Court has ruled over the constitutionality of the amendments in only eight cases in abstract review, having also been called to decide about the constitutionality of the whole Constitution of 1993 (AI 14-2003) and of a law calling for a full reform of the Constitution (AI 14-2002).

Before performing my analysis, it is important to point out several characteristics of the Peruvian Court that will be key for the study. The Court ("*Tribunal Constitucional - TC"*) consists of seven justices appointed by the unicameral Parliament under a supermajority quorum required of two thirds of Congress (86 out of 130). Other political bodies do not participate in the nomination process. Peruvian justices rule during five year mandates, without immediate re-appointment, and their mandates are simultaneous to congressmen. The Court is responsible for the analysis of constitutional cases, deciding cases of abstract review (*"Acción de Inconstitucionalidad*"), and concrete review (in *habeas corpus* and "*amparo"*).

In contrast with Brazil (C-No), Peru (2001-nowadays) will be our country-case studied for the presence of Political Competition (C-Yes). I will therefore determine if the defined Democratic Criteria are met in the analysed period in Peru, in the cases of judicial review of constitutional amendments.

2.2.2.1 Impact on Deliberation

Using the same reasoning as for Brazil, I assume that under higher levels of Political Competition, the debates for enacting a constitutional amendment happen mostly inside the Parliament. The consensus needed for passing such amendment is more difficult to obtain and gathers the preferences of several distinct political groups. It would therefore entail a higher political capital and risk to stand up against this more

elaborate decision. Thus, it is expected that justices will restrain themselves more, acting strategically. This supposition is even more expected to be confirmed in Peru, given the difficulty that enacting an amendment represents in this country. If the Brazilian Constitution already poses a complex procedure for the enacting of an amendment, the Peruvian Constitution sets an even tougher course of action. Article 206 of the Peruvian Constitution of 1993 states that "Any initiative of constitutional reform must be adopted by Congress through an absolute majority of the legal number of its members and must be ratified by a referendum. The referendum may be exempted when the consent of Congress is obtained in two successive regular sessions, with a favorable vote of greater than two thirds of the legal number of congressmen in each case." Given the procedural difficulty that this imposes, in cases of Political Competition and after Congress has managed to enact a constitutional amendment, we expect that Courts will not consider entering the debate with the same intensity as they would do in an ordinary judicial review case. Courts would therefore restrain themselves and declare less amendments unconstitutional.

In the case of Peru, the first case of judicial review of constitutional amendment happened in 2004, although the Court announced its possibility in an ordinary judicial review ruling in 2002 (AI 14-2002). This restricts our time scope to 2004 onwards. We will only consider Toledo's (2001-2006) and Kuczynski's (2016-2018) governments given that these are the only mandates under which the judicial review of constitutional amendments happened. Kuczynski's levels of coalition were much lower than Toledo's. Toledo's party held 38% of the seats in Congress, while Kuczynski's had only 14%. As we can see in the graph below (Figure 23), when the President held a weaker support in congress (Political Competition was higher), 100% of the constitutional amendments were ruled constitutional. On the other hand, under Toledo's congress, with lower

Political Competition, only 17% of the amendments reviewed were ruled constitutional, as courts were less constrained by Political Competition.

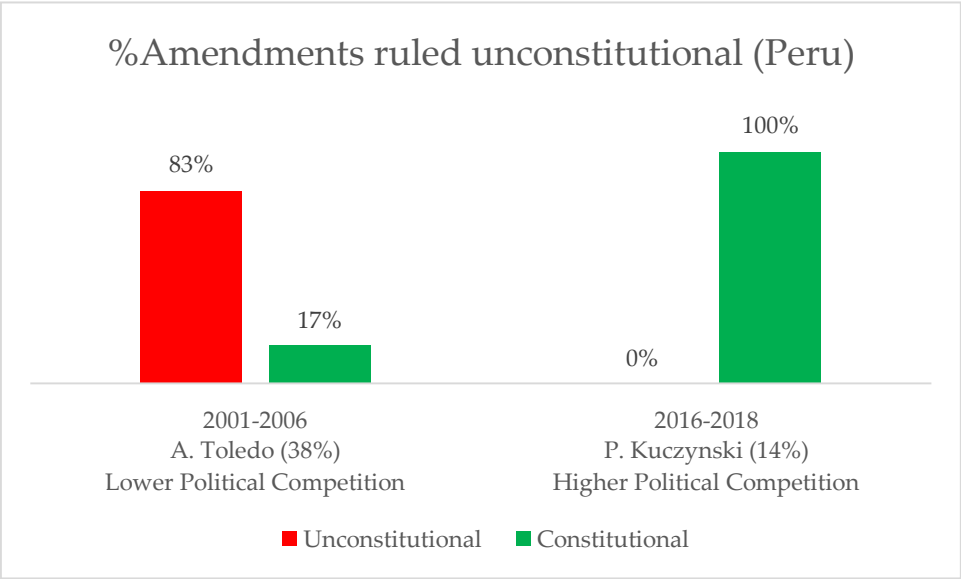


Figure 23. Percentage of amendments ruled unconstitutional by the Peruvian Constitutional Court (2001-2018). Source: Peruvian Constitutional Court website.

Thus, just as in Brazil, the quality of judicial deliberation is affected by the levels of Political Competition. When this Institutional Attribute is present, the deliberation will tend to be taken away from the Courts to the elected bodies. Courts will therefore restrain themselves from ruling amendments unconstitutional, given the political risks of standing against many political groups that reached a consensus and went through a complex process for enacting the amendment. Hence, Political Competition is a detractor of proper deliberation of the Courts.

2.2.2.2 Impact on the Possibility of Overrides and Backlashes

I will now analyse how Political Competition affects the Possibility of Overrides and Backlashes, one of the Democratic Criteria, in Peru. It is expected that high levels of Political Competition will influence the ability of government to run against courts. The

higher division of power makes it harder for the elected bodies to reach the consensus required to override a judicial decision or to concretize any backlash against the courts. On the contrary, if the power is more unified, courts tend to be more overruled as it is more likely that the elected bodies will reach an agreement against their rulings.

For Peru, I will benchmark two periods with different levels of Political Competition (as for Brazil). The first period is Alberto Fujimori's government (1990-2000), where the President held the majority in Congress and, especially after the "self-coup" in 1992, concentrated a significant amount of power in the Executive, showing low levels of Political Competition (Bejar, 2005). The second period will be represented by the "after-Fujimori Era", starting in 2001 until nowadays (Levistky, 1999). Although there are no cases for the judicial review of constitutional amendments before 2004, I decided to compare these two periods in Peru in order to test whether Political Competition creates the possibility of overriding the Court, and how this possibility is suitable or detrimental to the judicial review of amendments.

As showed in the previous sections, Political Competition was significantly low under A. Fujimori. Despite not having data on the review of constitutional amendments in this period, the happenings during the review of infra-constitutional laws offer some guidance for the analysis. However, before starting the analysis, we must consider that under Fujimori, despite having low levels of Political Competition, there were extremely low levels of Judicial Independence. This variable, as studied in the section for Judicial Independence, is very likely to negatively impact the democratic quality of a hypothetical judicial review of constitutional amendments. Nevertheless, we will set aside the low levels of Judicial Independence and focus on the relation between Political Competition and the Possibility of Overrides and Backlashes.

In August 1996, the Peruvian Congress enacted the "Law of Authentic Interpretation of Article 112 of the Constitution" (*"Ley n.º 26.657"*). The law defined the

correct interpretation of the article in the Constitution regulating presidential re-election procedures, by stating that "The re-election refers and applies to the presidential terms of office that begins subsequent to the date on which the Constitution was enacted into law". In sum, Fujimori's majority in Congress wanted to allow him to run for office again in the 2000's election by ignoring his first term in power, thus securing compliance with the presidential mandate limits set by the Constitution (Dargent, 2009).

This Law was questioned in the Court by the Lima Bar Association. Justices were exposed to a significant pressure and held a second voting session after the first results were unfavourable to Fujimori (Perea, 2006; Levistky and Ziblatt, 2018). Despite this pressure, three of the seven justices of the Court voted for the unconstitutionality of the Law. These three justices (Manuel Aguirre Roca, Guillermo Rey Terry, and Delia Revoredo Marsano de Mur) were impeached in May 1997 by the Congressional Permanent Commission (legislative decisions n. 002, 003, and 004-97-CR).

In a nutshell, under Fujimori's period of low Political Competition, running against the Court, or even impeaching justices that opposed to government, was easy for the President. Due to the lack of political diversity inside Congress, it was unchallenging for Fujimori to reach the majority required for the impeachment of the three justices. We could expect the same would have happened for the judicial review of constitutional amendments, if it would have happened at the time.

In Fujimori's Peru, low Political Competition allowed a situation where it was possible to override the Court, meeting the Democratic Criteria of Possibility of Overrides and Backlashes. The case of Peru in what concerns Overrides and Backlashes helped me understanding the relation between Political Competition and the possibility of overriding the Court. The lower the level of Political Competition, the easier it becomes to run against a court.

It may seem a contradiction to say that the Democratic Criterium was met in a case where the Executive uses the Possibility of Overrides and Backlashes as a tool to curb the Court. However, we should keep in mind that this variable must be understood as an isolated variable. It does not take into account the broader context that includes other factors, e.g., the excessive low levels of Judicial Independence. More than that, we want to determine when the adoption of the judicial review of constitutional amendments is democratic, and not to measure the democratic quality of the Peruvian political system.

Regarding the post-Fujimori period, when Political Competition was higher, there were no cases of Overrides and Backlashes in the judicial review of constitutional amendments. As expected, they did not happen in any of the eight cases. If we analyse the cases of judicial review of constitutional amendments that had a final decision, we observe that only two topics were discussed: the reform of the social security system in 2004 (0050-2004, 0051-2004, 004-2005, 007-2005, and 009-2005 AI/TC), and the possibility of mayors' to run for re-election in 2018 (008-2018 AI/TC). In both cases, the Court's decision did not really confront Congress. The amendment extinguishing the possibility of mayors to run for re-election was enacted by Congress and upheld by the Court. Also, the amendment reforming the social security system was ruled partially unconstitutional, but the Court stroke down only very specific rules related to the social security mechanisms, not striking down the main structure of the public policy advocate by Congress (which would be the bolder position suggested, e.g., by the InterAmerican Commission on Human Rights on the "Report N. 38/2009, Case 12.670").

This shows how the division of authority inside the elected bodies represents a barrier for the Court to declare amendments unconstitutional. It is expected that in this scenario where Courts do not run against the elected bodies, there is a certain level of reciprocity that makes the elected bodies also less prone to attack the Court. So, because

the Court's rulings did not represent any threat or effective opposition to Congress, they were well received and did not rise any confrontation. This dynamic consequently generated a case of no overrides and backlashes. Also, there was a more diverse scene inside Congress, leading to a higher Political Competition levels, protecting the Courts from a situation where it is excessively easy to override them. Hence, Peru after Fujimori (under high Political Competition) shows a picture of certain balance between the Powers, but where overrides and backlashes are not feasible.

2.2.2.3 Impact on Non-Partisanship

In most cases, when the Legislative power is not fragmented and there is no Political Competition inside Congress, the Executive becomes over-empowered, especially in the Latin American context. This logic will help us understanding the mechanics between the Three Branches, when they are exposed to different levels of Political Competition. A power unbalance usually interferes in the capability of justices to be impartial. Justices' behaviour can be skewed towards other branches' preferences when these are over-empowered, or towards themselves when the courts are excessively strong.

As we saw in the Brazil case-study on Political Competition, the absence of Political Competition arising from strong presidential coalitions results in a scenario where justices tend to vote according to the ideology of the President that appointed them. Justices tend to vote in blocks composed of other justices that were nominated by the same President when Political Competition is lower (both during nomination time and decision-making time). In addition to that, this skewing in their behaviour becomes more accentuated across time.

I therefore tested if the opposite scenario was observed in Peru, where Political Competition levels are higher than in Brazil. Tiede and Ponce (2014) analysed a dataset with the rulings for all abstract review cases in the Peruvian Court from 2001 to 2011 (period where Political Competition was present in the Peruvian Congress). Their findings show that justices tend to vote in accordance with Congress, the institutional body that elects them. They will be less prone to rule constitutional the laws enacted by the Congress (-49%) than the ones enacted by the Executive (-37%), if compared to State laws. They will also tend to vote reflecting the will of the ones currently in power, in any level, thus less likely to declare the laws they enacted unconstitutional (-12%) due to fear of rejection from the current Powers[18]. Therefore, in Peru, justices vote reflecting the congressional will, instead of being influenced by the Presidents' ideologies, as we saw in Brazil. In theory, a court that acts biased by the congressional preferences is partial, as a result of strategic behaviour.

However, when comparing partiality in Peru and in Brazil, we can infer that Peru's partiality results in a more democratic functioning of judicial review. As a result of Political Competition, the Peruvian Court that is reflecting the will of Congress, is in fact confirming the decisions of a plural body composed by distinct political groups. The authority inside Congress under Peru's Political Competition is more diffused, making the confirmation by the Court more democratic than in the case of Brazil, where it confirms the will of only one dominant ideology: the one of the President. We can therefore conclude that, indirectly, under Political Competition, judicial review can be biased but still somehow democratic. The Court is not fulfilling its true role in both cases, as it does not act impartially, but it respects more the democratic values in the

[18] Important to mention that they also found evidence that the Peruvian Constitutional Court is less likely to rule laws unconstitutional under Political Competition, going in the opposite ways of my findings for the judicial review of constitutional amendments.

context of Political Competition when biased towards a diverse elected body. We must however take this analysis as guidance only, as it appears to be quite controversial.

When analysing if the Peruvian case also seemed more democratic when restricted to the judicial review of constitutional amendments, I faced the challenge of a small sample size of only eight cases. Despite the sample being small, data shows that the preferences of the elected body do not drive the final decision of the amendment review, and that the court is acting more impartially than in the general abstract review cases.

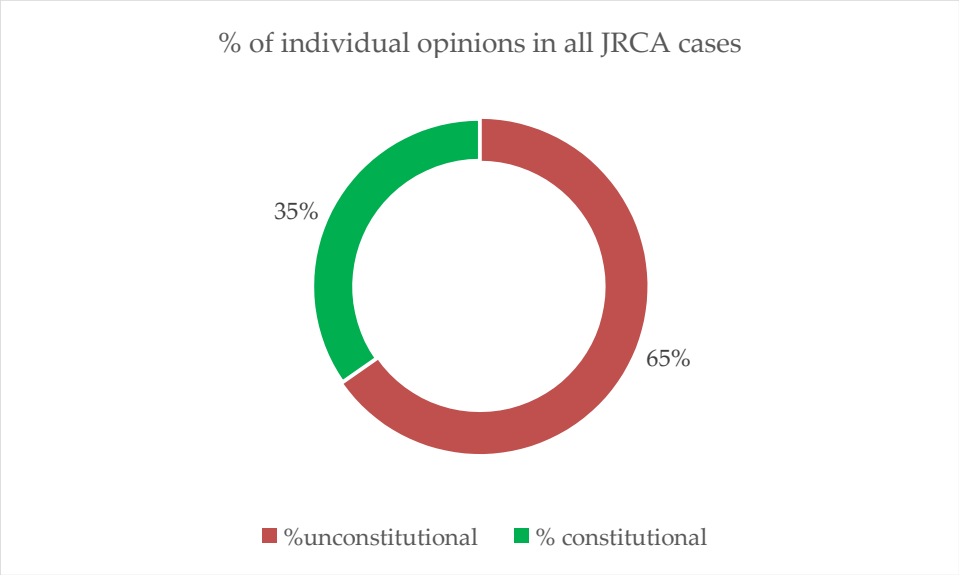


Figure 24. Outcome of individual opinions in all JRCA cases in Peru – Peruvian Constitutional Court (2001-2018). Source: Peruvian Constitutional Court website.

The Court has ruled for the (partial) unconstitutionality of the amendments in 65% of the cases, going against the elected bodies that check on them, showing impartiality for the cases of review of amendments. Hence Peru's Political Competition

offers a positive layout in terms of impartiality for a democratic judicial review and is increasingly less partisan for the judicial review of constitutional amendments.

2.2.3 Partial Conclusions On The Effects of Political Competition

We have seen there is a relationship between Political Competition and the Democratic Criteria (Deliberation (i), Possibility of Overrides and Backlashes (ii) and Non-Partisanship (iii)). Therefore, the levels of Political Competition have an impact on the democratic quality of the judicial review of constitutional amendments.

For deliberation, as we have seen in the case of Brazil, the low levels of Political Competition resulting from strong and long-lasting presidential coalitions make the Court less restrained, ruling more amendments unconstitutional. The higher the levels of Political Competition, the more restrained a Court is. When the need for a consensus appears in Parliament in cases of high Political Competition, the discussion process tends to take place in Parliament, taking deliberation away from the Court. This phenomenon is also observed in Peru. If the Court refrains from deliberative procedures, we can conclude that the democratic criteria are not met.

In the case of Peru in what concerns Overrides and Backlashes I found that the possibility of overriding the courts is possible under cases of low Political Competition, and that the likelihood of overrides grows as the Political Competition levels decline. This is due to the fact that the political authority is more concentrated, making it easier for the elected bodies to reach a consensus and majority to run against the Court. On the other hand, after Fujimori, when Political Competition was higher, overrides and backlashes were not possible. Confrontation between the elected bodies and the court becomes less likely under high Political Competition. Hence, none of the actors

attempts to override the other. It also becomes more difficult for Congress to reach consensus and majority to run against the court.

Regarding Non-Partisanship, we could observe loyalty from the justices towards the elected bodies (especially towards the President) that appointed them in situations of low Political Competition. Political Competition is thus a driver of impartiality in courts, and the levels of partiality of justices appointed in times of low Political Competition in Brazil seem to persist across years, or even increase. Hence, in order to assess if a system is adequate for the implementation of the judicial review of constitutional amendments, not only should we consider the levels of Political Competition in the current conjuncture, but also these levels at the time the justices were appointed. In the case of Peru, although Courts' decisions are slightly biased towards the Congress that elected the justices in general judicial review cases, this bias does not seem to appear in the review of constitutional amendments. In addition to that, given that the Peruvian Court is reflecting the will of a diverse elected body (due to Political Competition), they are indirectly acting more democratically than the Brazilian one, which would only reflect the preferences of a single-minded presidential coalition. Hence, Peru's Political Competition offers a better layout in terms of impartiality for a democratic judicial review of constitutional amendments.

2.3 PROVING THE IMPACT OF LEGITIMACY OF A COURT ON THE DEMOCRATIC QUALITY OF THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

I understand Legitimacy as the quality of acceptance to the Courts actions, as well as the respect to the Court's authority from society. In sum, it is a measure of diffused support to the Supreme Court by society. Richard Fallon (2005) frames this attribute as "sociological legitimacy". I will assess whether this legitimacy of the Courts creates a positive environment for the judicial review of constitutional amendments. For doing so, I will study two country-cases: one where the Court has higher levels of legitimacy, and the other with lower levels of legitimacy. In both country-cases, I will test how our Democratic Criteria are impacted by the presence (or the absence) of Legitimacy. Before performing the analysis, I assume that a scenario where a court is more legitimate and owns a certain political capital and respect from society, is a scenario where the Democratic Criteria will be met. In hypothetical terms, in a legitimate court, judicial deliberation (i) will be fostered, overrides (ii) will be possible and the court will not act in a partisan (iii) way.

I measured Legitimacy in several Latin American courts and decided to select the cases of Colombia and Brazil[19]. These cases are ideal for illustrating how Legitimacy impacts our Democratic Criteria, as they show different levels of Legitimacy between them, which might allow us to identify any variations in the democratic quality of the judicial review of constitutional amendments resulting from these changes.

The Colombian Court is popular not only amongst constitutional law scholars, who see it as an impactful court from the "Global South", but it also received intense diffuse support from the population in its way of becoming a key-actor in Colombian

[19] I used the data from The Latin American Public Opinion Project (LAPOP - Americas Barometer) for measuring Legitimacy (Topic: Political System Support, Variable: ¿ *hasta qué punto tiene usted confianza en la corte constitutional?*).

politics, facing salient political issues that were omitted by the elected bodies (Landau and Lopez-Murcia, 2009). When analysing the trust or confidence of the Colombian population in the judicial institutions as an indicator of Legitimacy, I can observe a period of high legitimacy of the Constitutional Court. The Constitutional Court showed a strong popularity, reaching trust levels of 52% in 2010[20]. On average, from 2006 to 2016, the percentage of population trusting the Court was 39%, while the percentage of the population not trusting was 12%. Hence, I will consider Colombia as a country with high Legitimacy of the Court (C-Yes).

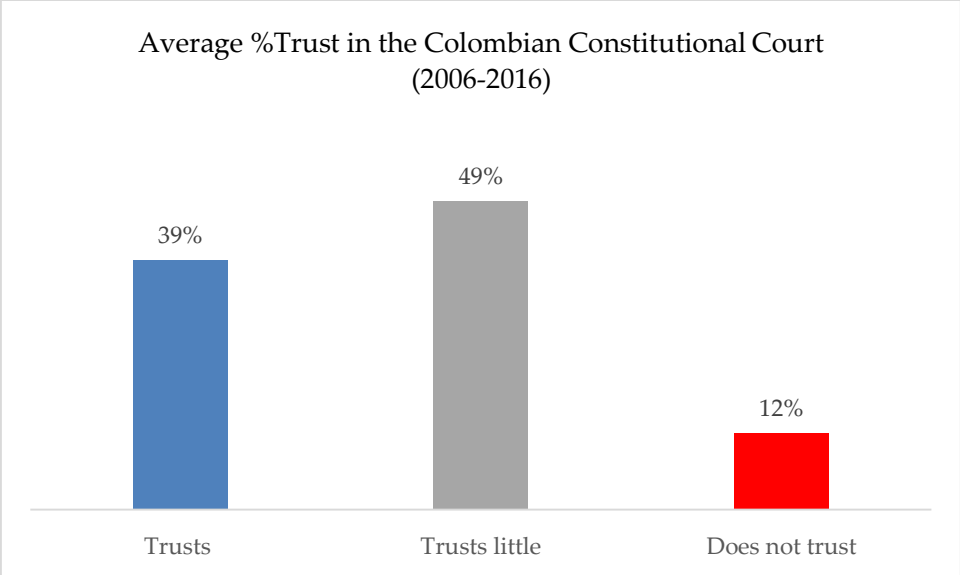


Figure 25. Average Trust in the Colombian Constitutional Court (2006-2016) Source: Americas Barometer database– The Latin America Public Opinion Project (LAPOP).

On the other hand, the Brazilian Supreme Court shows lower levels of confidence, and will be considered as our C-No, with low Legitimacy. In average, 33%

[20] Same as before, I used the data from The Latin American Public Opinion Project (LAPOP - Americas Barometer) for measuring the Legitimacy of the Colombian Constitutional Court. I selected the topic: "Political System Support" and the variable: "¿ *hasta qué punto tiene usted confianza en la corte constitutional?*" for all the years available (2006, 2008, 2010, 2012, 2014, and 2016). The results showed a range from 1 (minimum trust) to 7 (maximum trust). For the figure 25, I take "Does not trust" as the sum of scores 1; "Trusts a little", the sum of scores 2, and 3, and 4; and "Trusts a Lot", the sum of scores 5, 6, and 7.

of the Brazilian population does not trust the Supreme Court, while only 17% trust this institution. We need to take into account that the Brazilian data for this study on confidence was sourced from six surveys, and that two were responded in 2012, two in 2017 and two in 2018, making the data less spread across time when comparing against Colombia. The Colombian data was collected regularly every two years from 2006 to 2016. However, other sources of data also confirmed this picture of low legitimacy of the Brazilian Supreme Court. For instance, the ICJ-FGV (Justice Confidence Index), shows that, in 2017, only 24% of the population trusted the Brazilian Court (FGV, 2017).

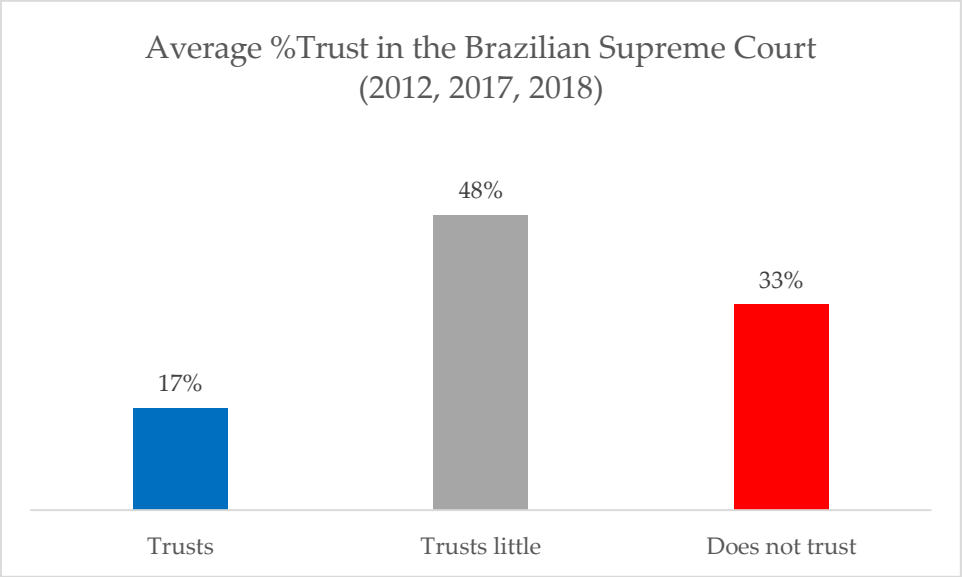


Figure 26. Average Trust in the Brazilian Supreme Court (2012, 2017, 2018). Source: Instituto Datafolha.

Other than this low confidence levels in the Court, the Brazilian case also shows other indicators that made me choose it as an example of low Legitimacy. When diving into the popularity of the Supreme Court, we can see that Brazilian justices face rejection and increasingly high levels of disapproval. For instance, only 1% of the population approves justice Gilmar Mendes, while 85% disapprove of him. The other

justices also face high rejection, and even less polemic figures such as justice Edson Fachin are disapproved by more than half of the population (52%) (Estadão-Ipsos, 2017).

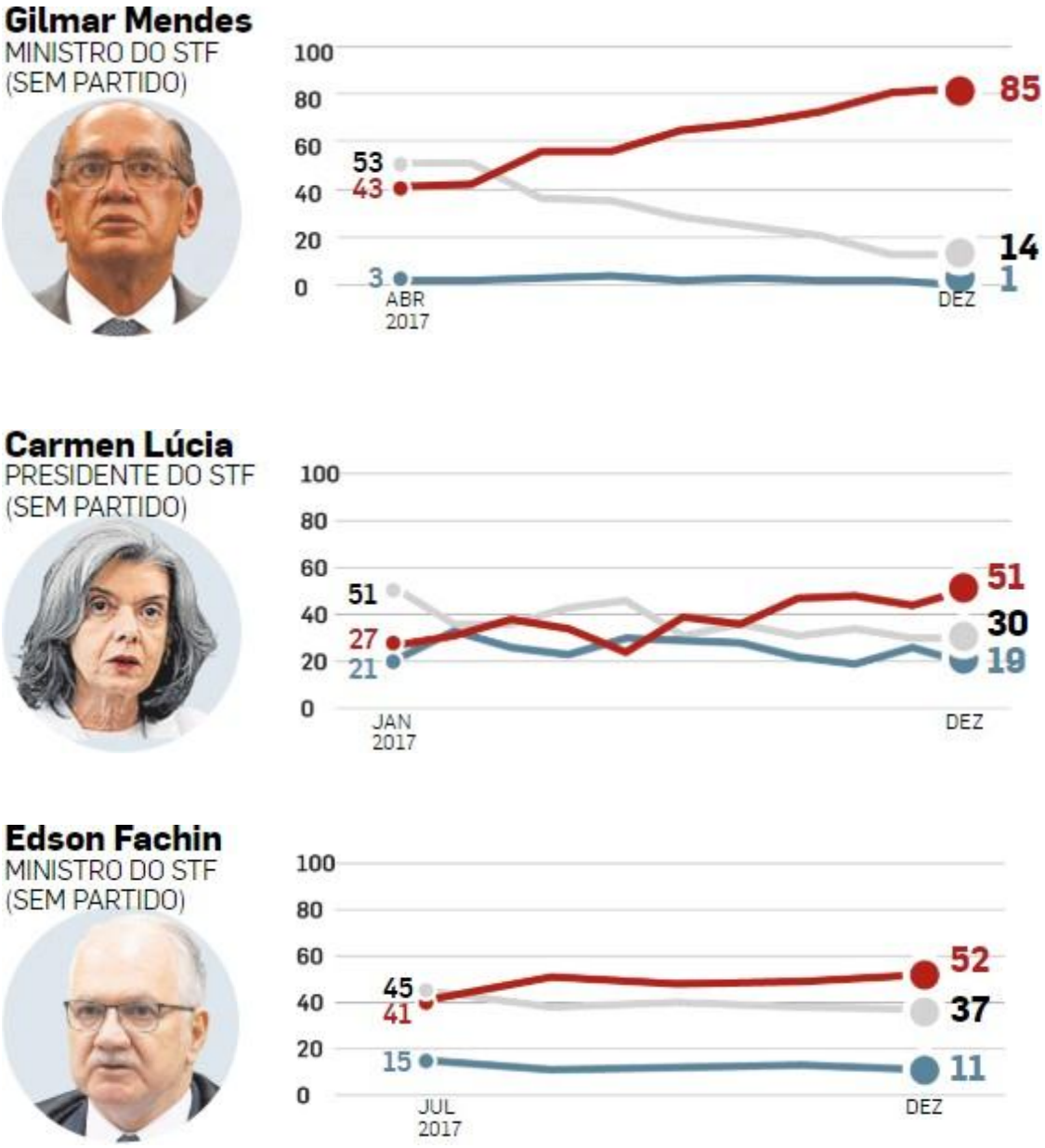


Figure 27. Justices Gilmar Mendes, Carmen Lúcia and Edson Fachin approval rates – Brazilian Supreme Court (2017). Source: Estadão-Ipsos, Politico Barômetro (2017).

After observing all these Legitimacy indicators, I concluded that Brazil will be our C-No for Legitimacy, while Colombia will be the C-Yes.

2.3.1 The Case of Colombia: A Highly Legitimate Supreme Court

The Colombian Constitutional Court was created by the Constitution of 1991 and is composed by nine justices confirmed by the Senate for an eight-year mandate. The appointment is not exclusive to one institution: three justices are appointed by the President, three by the Supreme Court of Justice, and three by the Council of State. The Constitutional Court has the power to rule over abstract review cases – initiated by any citizen at any time - and appeals from lower courts. Until 2003, the Court's power in the review of constitutional amendments was restricted to matters of form and legislative procedures (articles 241 and 371, Colombian Constitution), but after that, the Court expanded its power to substance matters (Sentence C-551-2003).

The Colombian Court is recognized as one of the most legitimate in Latin America and one of the most prominent in the "Global South" (Cajas-Sarria, 2017). The recognition and respect from the people and other institutions can be attributed to the protection this Court has exerted on minorities and attention to latent social issues. (Cepeda-Espinosa, 2004; Eslava, 2009). In addition to that, the Colombian Court represents a relevant, powerful body with the power to check on the elected bodies, especially strong presidencies, that have sometimes shown to be abusive in Colombia (Landau, 2014). The most relevant case to illustrate this check is the President Alvaro Uribe's re-election case. In this occasion, the Court ruled unconstitutional the

amendment that allowed Uribe to run for the presidency for a third term, imposing a relevant defeat to a popular President that was still in power. The Colombian Court was a pioneer in the region to raise itself as an effective scrutinizer of the presidential powers.

Regarding the protection of minorities, the Court shows to involve itself in many cases that would have been disregarded by the elected bodies, which granted it with a strong popularity and thus Legitimacy (Gonzalez, 2017). The court has actively ruled for the benefit of the minorities in cases of access to basic needs, rights of prisoners, sexual and racial diversity cases and litigation of social rights broadly, among others.

I expect the case of Colombia to prove how the presence of Legitimacy in the court can have a positive impact on the judicial review of constitutional amendments. I will analyse how, under high Legitimacy levels, the three Democratic Criteria are fulfilled. I will show how a legitimate court tends to foster richer debates allowing higher deliberative standards (i), with the possibility of overriding its decisions (ii) and without acting in a partisan way (iii).

2.3.1.1 Impact on Deliberation

When analysing how Legitimacy affects the deliberative quality of the judicial review of constitutional amendments, I had several hypotheses regarding Colombia: First, that a more legitimate court would create more engagement and participation volume in the judicial debate; second, that it would attract a wider array of actors in the judicial decision-making, in terms of variety of their background; and third, that it would engage more participation from civil society and individuals than a non-legitimate court.

The rationale behind this reasoning is simple. A court that is more legitimate will be perceived as a more relevant actor and a protector of the people in political decision-making and institutional dynamics. It then gains the interest of different actors to bring inputs to the court as its rulings will effectively influence the political landscape and, more importantly, will be complied with. In combination with transparency policies, a higher degree of legitimacy can create a stronger engagement of the population and organised groups in judicial deliberation. This high Legitimacy has the power to build a solid bond between the Court and the population and will therefore foster exchanges and deliberation.

The data available for this analysis allowed me to examine deliberation between the Court and external actors. I believed that, as Legitimacy is dictated by the perception of external actors, it was relevant and more evident to focus the analysis on the deliberation between the Court and these external actors, rather than on the intra-courts debates, which will be dealt with in the Non-Partisanship section (2.3.1.3).

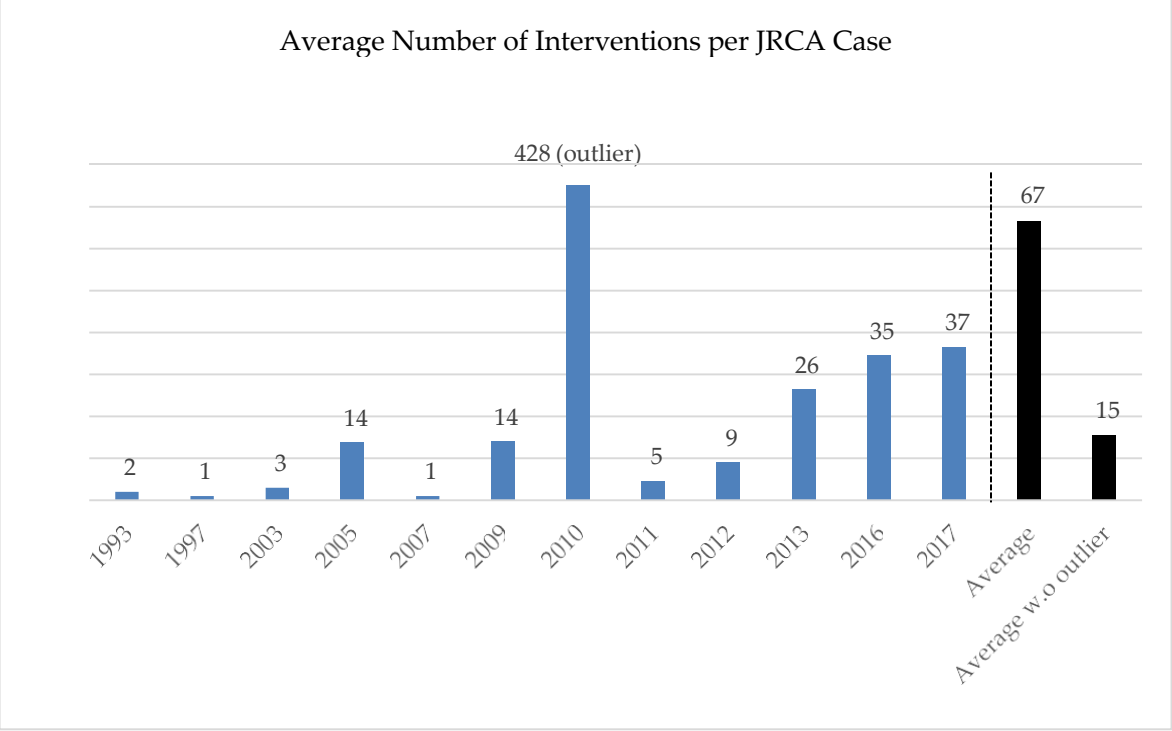


Figure 28. Average number of interventions per case in JRCA in Colombia – Colombian Constitutional Court (1993-2017). Source: Colombian Constitutional Court website.

As we can see in the figure above (Figure 28), the participation in the judicial review of constitutional amendments is considerably high. The yearly average number of interventions per case is 67, showing a strong engagement from external actors in the Court's activities. However, it is important to note that in 2010, one case lead to the intervention of a total of 1278 individual citizens, making the average number of interventions per case grow considerably. The sentence C-141-10 (outlier) is marked with a white stone in the Colombian political history, as the Court was debating the constitutionality of the then President Alvaro Uribe running for a third term. But even if we remove the data from this outlier case, Colombia still shows a yearly average of 15 interventions per case in the judicial review of constitutional amendment – very likely the highest average in the whole Latin America for the review of constitutional amendments or even broad judicial review cases. I will benchmark this number with the one from Brazil to prove our point in the partial conclusions of this cross-country comparison.

Not only are the actors more numerous in cases ruled by legitimate courts, but also the quality of the participants changes. In the judicial review of constitutional amendment cases, I split the participants in seven major groups. We can observe that the high legitimacy of the Colombian Court would bring the input of a diverse set of actors to the discussions.

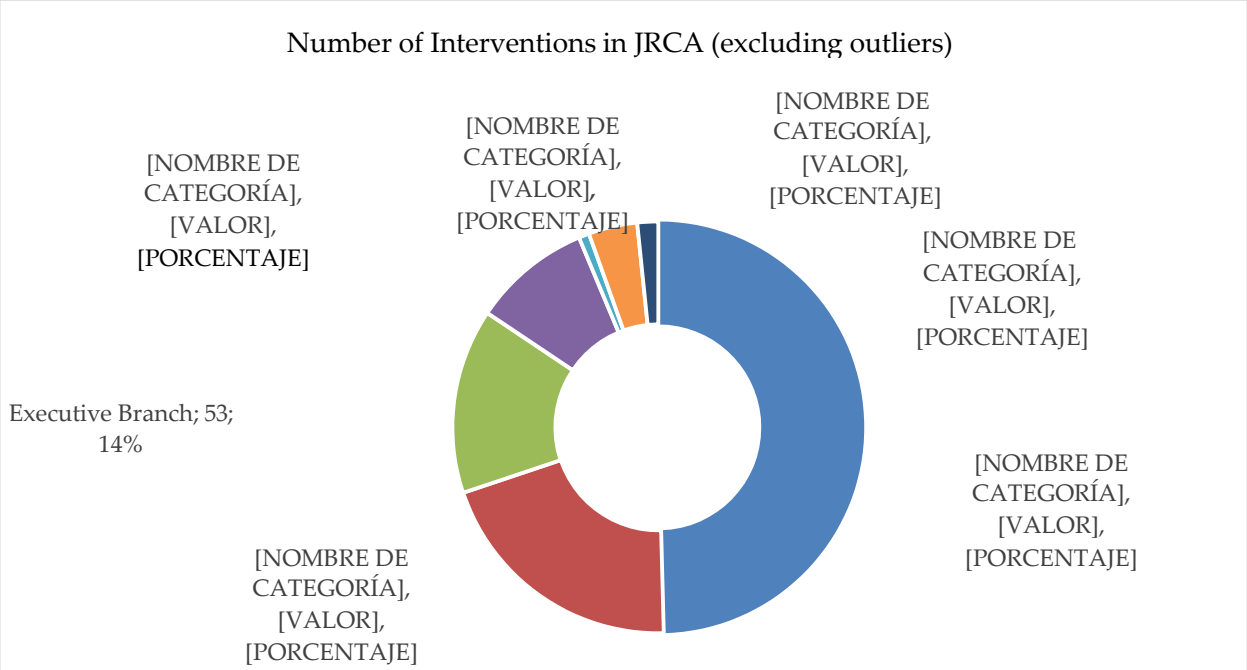


Figure 29. Number of interventions in cases of JRCA in Colombia – Colombian Constitutional Court. Source: Colombian Constitutional Court website.

It can be noticed that the participation in the review of amendments was spread into four major groups: Individuals and Civil Society (who represent 50% of the interventions, even removing the C-141-10 outlying case), Research Institutes, Universities and experts (20% of the interventions), the Executive (14% of the interventions) and the Legislative (9%). However other actors also intervened, such as Other National Institutions (4%), Class Associations, Syndicates and Labour Entities (2%), and International Public Organizations (1%), proving the variety of actors involved in the deliberative procedures and interested in the outcome. More importantly, the quality of the participants shows a high representation of direct popular engagement, given that Individuals and Civil Society represent half (50%) of all interventions in the judicial review of constitutional amendments.

It is also noticeable that the involvement of the Executive and Legislative Powers is quite significant, with 14% and 9% respectively. More than exposing their points of view and preferences on the matter, they are also ready to comply with the Court even if the final rulings do not favour their preferences. When benchmarking against Brazil (C-No for Legitimacy), we will also confirm whether this high participation of the other Powers can be linked to Legitimacy.

As we have seen in the case of Colombia, the presence of Legitimacy can create a favourable environment and rise the deliberative standards of the Court. It creates a link between the Court and the population that will foster exchanges and thus bring the inputs of a wide array of external actors, involving them in the judicial decision-making. Also, it is important to note that this presence of external actors inside the court will function as a check on the court's deliberation, as they expect not only to influence the final ruling but also that their inputs are considered for the final decision; thus, improving the democratic quality of the deliberation.

2.3.1.2 Impact on the Possibility of Overrides and Backlashes

Continuing my analysis, I also tested how the Legitimacy of a court affects the possibility of the elected bodies to override the Colombian Constitutional Court. Firstly, I found that the high Legitimacy of this Court secures compliance to its rulings, no matter how politically charged these decisions are. It is then less likely that other actors will override a highly legitimate court, given the political risk this entails. Secondly, the findings show that the Court's Legitimacy levels alone did not prevent the court from being overridden, and that this Democratic Criteria was met in Colombia. Third, that the Colombian Court was very successful in instrumentalising its high Legitimacy in

order to avoid backlashes or overrides. Lastly, that there are some caveats to this reasoning that are illustrated by the recent loss of popularity of the Colombian Court and must be considered.

The Colombian Court managed to build Legitimacy because of its successful action on restricting the aggrandisement of the Executive and preserving the democratic rules of the game (Landau, 2014). Not less important were the Court's rulings on socioeconomic rights, that made it famous for being a "transformative" court and were well received by the Colombian population in general (Cepeda-Espinosa, 2004; Bonilla, (2012). For instance, when reviewing amendments, the Court ruled unconstitutional the disposition allowing the extraordinary presidential powers to perdure (C-1200-03); it also ruled unconstitutional the attempt of former President Alvaro Uribe to run for a third term (C-141-10). In social rights matters, it declared constitutional the amendments responsible for securing human rights trials (C-579-13) and the use of international treaties on human rights to guide criminal cases interpretation (C-084-16). All these cases reviewing constitutional amendments, as well as many other relevant ones in general judicial review, created a high degree of popularity that raised the Court's Legitimacy.

The popularity of the Colombian Court created a scenario where it became difficult to override its rulings without facing the public opinion. The Court has not faced a single case of disobedience to its rulings, proving the intangible cost that opposing to it would mean. Compliance happened even in extremely politically charged cases, such as Uribe's attempted second re-election case, where the Court imposed a defeat on an also very popular Executive. This reflects how the high Legitimacy of the Court made it less likely for the other agents to disagree with its rulings. Compliance, however, does not entail a complete absence of overrides and backlashes. Running against the Court in Colombia was possible, and it happened in

some instances. For example, one of the most relevant cases of backlash was the suspension of justice Jorge Pretelt, member of the Constitutional Court, in 2016, Pretelt was suspended by the Senate from his role in the Constitutional Court, facing a political trial in Congress and a criminal trial in the Supreme Court. He was accused of corruption by a former colleague in the Constitutional Court, for supposedly asking for five hundred million *pesos* to influence other justices to rule in favour of the Fidupetrol company[21]. The corruption scandal reduced the political risks of running against the Court and allowed the Senate to suspend the justice, in an effective case of backlash.

Inside the scope of constitutional amendments, a case that deserves attention is the President Juan Manuel Santos' successful measure in Congress to promote fiscal sustainability, which directly affected the Court's functioning. The Court would have to ensure that the social spending coming from its rulings to be fiscally sustainable in order to avoid decisions that were too costly to the Executive's budget. Once the case was questioned in the Constitutional Court, the justices ruled for the constitutionality of the amendment. Although the Court ended up interpreting the amendment in a more restrictive way than what Congress preferred, its activity was somehow controlled by legislative action.

Hence, these examples show that despite entailing high political costs, the possibility of overriding the Court exists, but is not necessarily linked to the presence of Legitimacy of the Court. It is difficult to see a direct effect of Legitimacy on the possibility of overriding the Court's decisions. Legitimacy only gives a certain political capital to the Court, but the possibility of overriding the court or not depends more on the Court's ability to instrumentalise this political capital. This instrumentalization depends on other institutional factors.

[21] See "*Pretelt, suspendido de la Corte Constitucional*", Semana, August 24, 2016 (https://www.semana.com/nacion/articulo/caso-jorge-pretelt-el-magistrado-fue-suspendido-de-la-corte-constitucional/491095).

The Colombian Court managed to effectively instrumentalise its Legitimacy in order to raise its voice in the political scenario. The Court built alliances with the academics and some sectors of the civil society to successfully mobilise their opinion about the Court, enhance their participation in judicial deliberation and promote the activities of the courts. This instrumentalization of Legitimacy acted as a protection against the opposition of the Court to avoid overrides and backlashes. David Landau (2014) shows how the Court has mobilised these groups against the legislative attempts to reduce the use of a very popular legal instrument, the "*tutela*". This "*tutela*" is a bridge between society and the Court and is used as way to reach the Court easily in order to make petitions. When the use of this "tutela" was threatened by the elected bodies, it became very easy for the Constitutional Court to gain the favour of the population and showcase the situation as a power abuse. The Court's used this capability to gain support as a way of protecting itself effectively against the elected bodies.

In theory, this protection that the Court built against the intervention of other Powers is a positive feature, given that it grants the public support and avoids the undue interference of the elected body by mobilising public opinion. However, this use of popular support shows some important caveats that are worth debating in the case of Colombia. In certain cases, this popular protection (or Legitimacy) was used as a way of holding judicial power and avoiding overrides and backlashes when they targeted the institutional design or accountability mechanisms related to the Colombian Constitutional Court (Cajas-Sarria, 2016).

An amendment enacted by Congress in order to reform the Judiciary was ruled unconstitutional in 2016. The amendment was passed by Congress and supported by civil society to monitor the Judiciary that was already involved in corruption scandals. This amendment created a Judicial Council (*"Consejo de Gobierno Judicial"*) to manage

the administrative activity of the Judiciary, and the Commission of Officials with Trial Prerogatives ("*Comisión de Aforados*") to prosecute the judges in the Colombian High Courts, including the Constitutional Court justices. The Court, using its strong political capital obtained from the previous decade's high Legitimacy, stroke down the amendment by arguing undue interference in the Judiciary and a threat to the separation of powers (C-285-16 and C-373-16).

This strategic instrumentalization of Legitimacy in the Colombian case shows that when Legitimacy is combined with a high degree of judicial empowerment, it can be used as a tool to protect the Court from any possible override. This creates an over-empowered and unaccountable Judiciary that would impact the democratic quality of the institutions.

The impact of Legitimacy on the possibility of overrides and backlashes in the Colombian Court is not easy to assess. The Court is highly legitimate, and it is therefore less likely to be overridden and suffer backlashes due to its popularity among other actors and the population. In the case of Colombia, we showed that the possibility of overriding the Court and running against it is possible. However, there are some evident caveats: I could not prove that this possibility of overrides did effectively come from Legitimacy. Also a highly legitimate court will source a strong political capital from this Legitimacy and could use it as a way to avoid opposition, which would endanger its democratic quality of amendment review. Finding the fine line between the power sourced from the high legitimacy of a court and the possibility of overriding this power is key to the democratic functioning of a system where the judicial review of amendments exists.

2.3.1.3 Impact on Non-Partisanship

The high Legitimacy of the Colombian Court is in part due to its highly institutionalised structure. Since its creation in 1991, the Court is known for its strong collegiate behaviour and academic quality (at least until 2009) (Merhof, 2015; Nunes, 2010; Lizarazo-Rodrigues, 2011). This reflects in a cohesive jurisprudence that deeply analyses constitutional issues that arise. This tradition, as many authors have pointed out, is one of the key drivers of the Court's popularity. David Landau (2014) identifies that the difficulty of packing the court, and thus making it act in a partisan fashion, lies on this strong institutional tradition. The academic culture, unique to the Court, made it difficult for newly appointed justices to influence the collegiate decisions, as they relied on older members and clerks that were in their positions since long ago. The Court was effectively bounded by the institutional dynamics and jurisprudence, making it less likely that external influences or personal ideologies would be the key factor shaping decision-making. Hence, in the case of Colombia, the high Legitimacy of the Court was in part creating a scenario where impartiality was incentivised, meeting the Democratic Criteria.

There are other arguments that do not rely on the rational theory, but in ideational perspectives that may complement our thoughts. The Colombian cases of judicial review of constitutional amendments were ruled by a collegiate composed of a high proportion of constitutional experts who used complex theories and reasonings for solving the cases (Nunes, 2010). This complexity made it more difficult for the elected bodies to push their preferences on a Court that obeyed its own jurisprudence. It also became more difficult for new justices with potential partisan ideologies to gather majorities in the Court in order to overrule these decisions (Landau, 2014). This creates

a jurisprudence that is stable across time and driven by academic and theoretical expertise, instead of partisanship.

In order to confirm these expectations, I analysed the evolution of the decisions in the review of constitutional amendments and the composition of the collegiate. We can observe that, even if the number of constitutional experts fades, the decision outcomes remain consistent and stable (when the same cases were debated in different moments).

Constitutional Law Experts on the Colombian Court

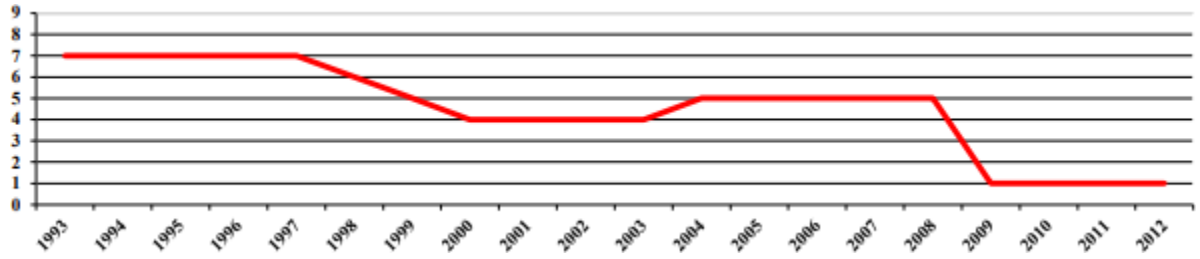


Figure 30. Number of Constitutional Law Experts on the Colombian Constitutional Court (1993-2012). Source: David Landau (2014).

One example of this stability is the so-called "replacement doctrine", adopted by the Court to strike down constitutional amendments on substantial grounds when the amendment "substitutes" the basic structures of the constitution. The Court uses the doctrine in the review of amendments since 2003 (C-551-2003) and it has been consistently applied to the Court's decision-making (Bernal-Pulido, 2013), despite the renovation of its justices or their expertise in Constitutional Law.

The justices' nomination process also plays a role in the lack of identifiable ideological groups inside the Colombian Court. There are four different actors involved in the selection process: The Senate confirms the appointees from three different lists created by the President, the Council of State and the Supreme Court. This makes it more difficult for one external actor to push their ideologies on to the Court as whole, refraining partisanship (Rodriguez-Raga, 2011)[22].

Another argument that could be raised here is the one of the unlikelihood of a Court to act partially when it holds the support of the population. When public opinion consistently supports the Court, it would be less likely that it would act in a partisan way to reach the support of the elected bodies and maintain their institutional safety. For instance, if the Court holds a strong political capital coming from its Legitimacy, it would be less prone to negotiate with Congress or the Executive to secure its position in the political decision-making dynamics and the compliance with its decisions.

This argument is proven by some phenomena that were observed when Legitimacy decreased in Colombia in the past few years. We can observe that, when the Court starts losing its popularity, the Court went against its previous and stable jurisprudence, dramatically softening the interpretative standards in order to yield to governmental preferences. In 2016, the Court had lost most of its popularity, with only 23% of the population trusting the institution (Figure 31).

[22] Although the President's ideology or political strength do not affect levels of judicial deference, Rodriguez-Raga found that justices are more prone to be deferent when cases have high political priority. His argument goes in the same direction as the one the results that will be obtained in this chapter.

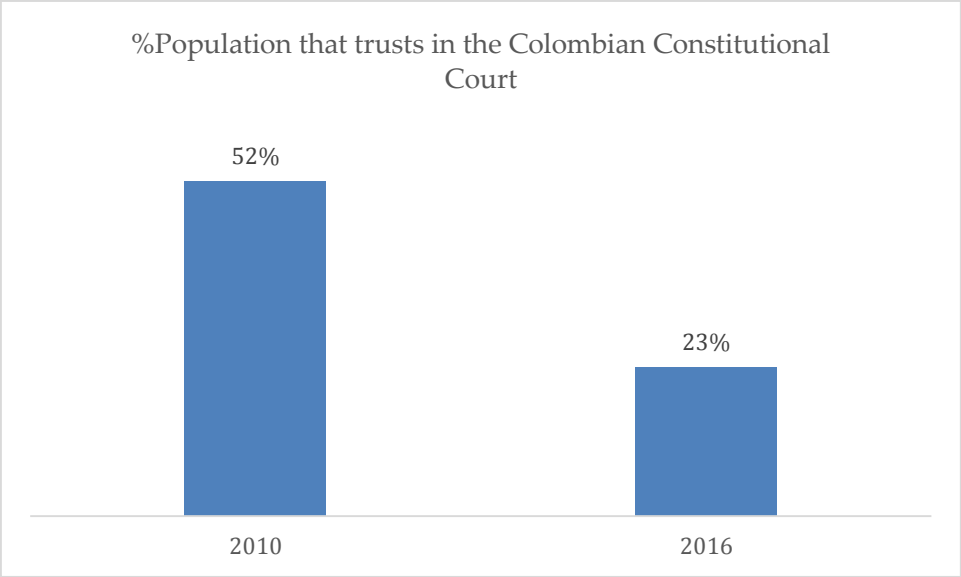


Figure 31. Percentage of the population the trusts in the Colombian Constitutional Court (2010, 2016). Source: Americas Barometer database – The Latin American Public Opinion Project (LAPOP).

In the notorious "peace agreement" cases (C-699-16, C-332-17, and C-630-17), the Court succumbed to the pressure of the elected bodies to soften their scrutiny standards in order to declare constitutional an amendment that would alter legislative procedures related to the peace negotiations between the FARC and the Government. This represented an important shift in the usual interpretative theory – "replacement doctrine" - used since 2003 by the Court to analyse constitutional amendments. This softening of the scrutiny standards was recurrent in the following rulings, in 2016 and 2017, related to the same peace agreement (Benítez-R, 2017).

Hence, we could observe that, when the Colombian Court started losing Legitimacy, it opened the possibility for it to yield to the will of the other Powers, even bypassing some of the Court's jurisprudential traditions. In addition to that, this flexibility of the jurisprudence, ignoring the high level of institutionalisation of the

Court, was not well perceived by the population, making the Court lose even more popularity and thus Legitimacy.[23]

In summary, we can see that the high legitimacy and institutionalisation of the Colombian Court results in more impartiality. Also, the support of the people refrains the Court from ruling according to the will of the elected bodies. Finally, I showed how this was illustrated by the peace process, where the gradual loss of legitimacy entailed that the Court was more prone to listen to the elected bodies instead of maintaining a bolder posture.

2.3.2 The Case of Brazil: Legitimacy Crisis in the Supreme Court

Opposed to Colombia, Brazil nowadays is known for the little popularity of its Supreme Court ("*Supremo Tribunal Federal*"). As aforementioned, on average one third (33%) of the population does not trust the Supreme Court (see Figure 26), and some of its justices currently face a disapproval rate of 85% (Figure 27). Therefore, Brazil offers an ideal scenario for studying how a Court with lower Legitimacy could adopt the judicial review of constitutional amendments.

As for Colombia, we will study how the levels of Legitimacy that the Brazilian Court shows affect our three Democratic Criteria for the judicial review of constitutional amendments. Does low Legitimacy necessarily entail that the Democratic Criteria are not met? In what measure should a country with low Legitimacy adopt the judicial review of amendments?

[23] President Santos clearly stated that declaring constitutional amendment that created 'fast track' procedures for the peace agreement was important, as any delay on the negotiations would endanger the ceasefire. Moreover, scholars point outed the Constitutional Court's deadlock: on the one side, the Court goes against its solid jurisprudence and soften the scrutiny on the judicial review of amendments; on the other, faces the risks of undermining the peace agreement (Albarracín, 2016).

Regarding Deliberation, I expect that external actors will have a negative view of the institution and, therefore, will engage less in the judicial deliberation. I also expect that Overrides and Backlashes will be more likely to happen to a Court with low Legitimacy, even to the extreme cases of non-compliance or extinction. Lastly, given the need to survive in the institutional context, and in opposition with the Colombian case, I expect that Courts will tend to be more partisan as it would probably make deals with the other branches in order to secure compliance or avoid authoritarian measures against itself.

2.3.2.1 Impact on Deliberation

When analysing the Legitimacy impact on Deliberation in Brazil, I expected that the deliberative standards are negatively impacted by the low Legitimacy of the Supreme Court. I expected the opposite of the Colombian case, where the legitimate Court fosters the presence of many different actors and a high number of interventions per case. As in the case of Colombia, the institutional design of the Brazilian Supreme Court offers the possibility of intervention from a wide array of actors from civil society and other institutions. However, there is a critical difference between both institutions: The Brazilian Supreme Court does not own the trust and appreciation of the population. In this case, it is expected that, despite having enough tools to participate in the deliberation process, the other actors will not engage as much in the discussions. The lack of participation in the Court discussions is driven by the perception that the Court does not judge according to lawful, legitimate standards. Therefore, engagement in the debates can be perceived as an ineffective measure. In the case of Brazil, the argument that the interventions of Amici Curiae are in fact not considered in the decision-making also exists (Almeida, 2016). This lack of consideration would drive a

disengagement or discouragement from external actors to participate in the judicial review and thus undermine deliberation.

I analysed 24 years of judicial review of constitutional amendments cases (from 1993 until 2017), with special attention to the participation of external actors and their interventions. I observed that, as I expected, in Brazil the yearly average number of interventions per case is low, reaching only 4 interventions, with a minimum of 1 and a maximum of 14 interventions per case. This number is low, and the issue becomes even more concerning given that it also considers the interventions of the Attorney-General, which are mandatory by law. Without considering these mandatory interventions, the participation of external actors in the deliberation would fall close to zero in many cases.

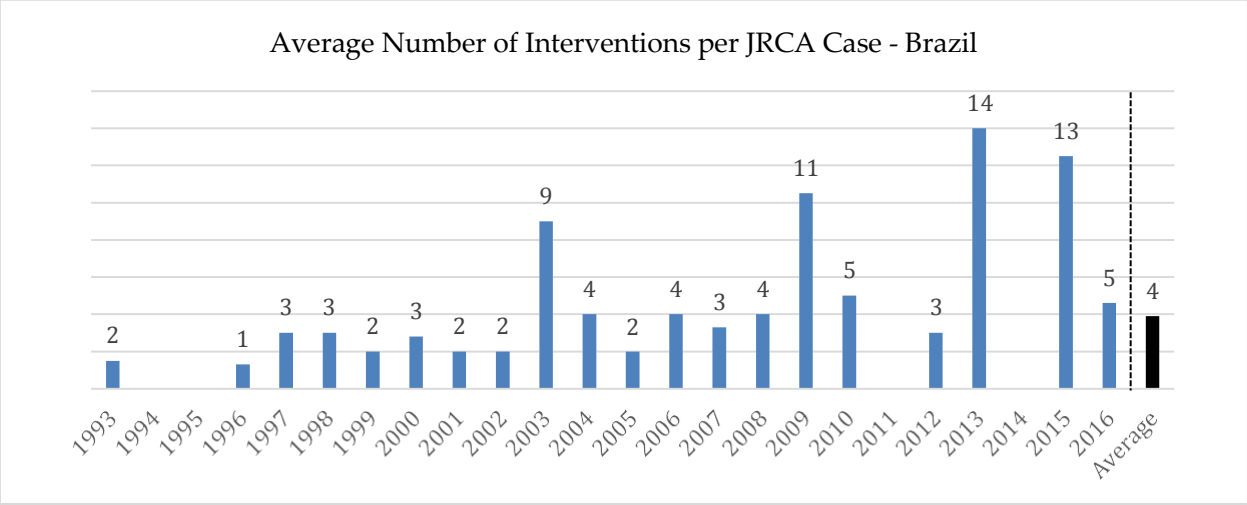


Figure 32. Average Number of Interventions per JRCA case – Brazilian Constitutional Court (1993-2016). Source: Brazilian Constitutional Court website.

Not only is the yearly average number of interventions low (4, compared to 15 in Colombia), the quality of the interventions also suffers from the low Legitimacy of the Brazilian Court. Out of 295 interventions, 56% were from the Executive (Federal and State-level) and Legislative (Federal and State-level plus Political Parties). A large portion of these interventions were mandatory, which makes the actual number of Legitimacy-motivated interventions even lower. It is also important to notice that, in contrast with Colombia, the proportion of Individuals and Civil Society interventions is much lower, reaching only 4% (against 50% in Colombia). The same occurs with Research Institutes, Experts and Universities interventions, accounting for 1% only (against 20% in Colombia). When I studied the interventions of Class Associations, Syndicates and Labour Entities in the Judicial Independence section of this dissertation I reached some conclusions that will also be important take-outs for this part on Legitimacy: Although they represent 35% of the total interventions, the majority is issuing from judges, prosecutors and public servant associations, meaning that they lack the presence of the general public. These interventions are mostly a tool to support the interests of some public corporations.

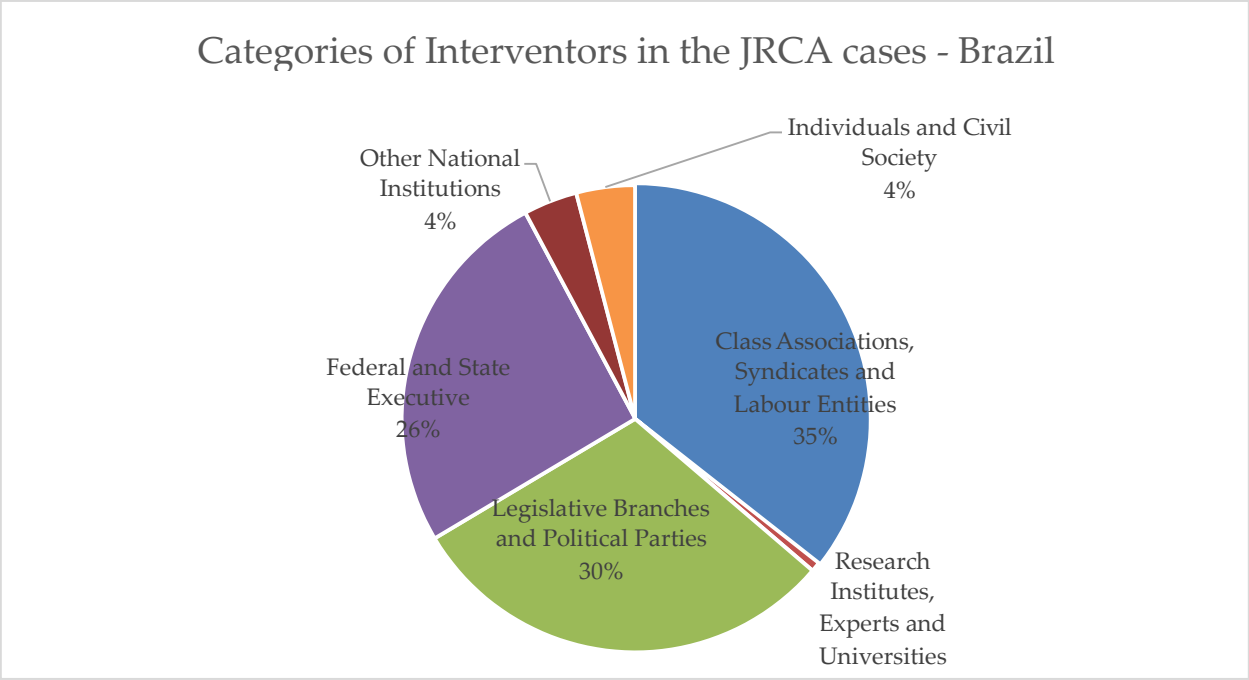


Figure 33. Categories of Intervention in the JRCA cases – Brazilian Supreme Court (1988-2018). Source: Brazilian Supreme Court website.

Also, regarding deliberation inside the Court, we saw in the section for Judicial Independence that the Brazilian justices vote more individually as a result of Brazil's extremely high levels of Judicial Independence. However, we can also infer that, as a result of this lack of Legitimacy of the Court, justices will feel less motivated to vote jointly or act collegiately, given that the Court is less institutionalised when comparing to the Colombian one. The lack of belonging to a legitimate, relevant body could push the justices to vote individually disregarding the collegiate obligations. There are, of course, other reasons for this individual behaviour, such the Brazilian Supreme Court institutional design, but Legitimacy should still be taken as a factor that impacts in the Court's deliberative standards.

Hence, as predicted, a Court with low Legitimacy will not only show lower presence of external actors inside it, but also a poorer quality in its deliberation standards, as illustrated by the case of Brazil. The low Legitimacy of the Court

disincentivises the participation of external actors who could enrich the deliberative standards. Thus, the low Legitimacy of Brazil caused a breach in our Democratic Criteria in what concerns Deliberation, proving to be less democratic as a system for the judicial review of constitutional amendments.

2.3.1.2 Impact on the Possibility of Overrides and Backlashes

It seems clear that the levels of Legitimacy of a Court will affect the compliance with its decisions, as literature in judicial politics has shown in many opportunities (Gibson and Caldeira, 1995). The Legitimacy of the Brazilian Supreme Court has decreased from 2013 onwards because of its poor mediation of the political crisis in Brazil. The bad exposure the Court received and the decrease in its support by the population were key factors driving the non-compliance attempts it suffered when ruling against powerful political actors in the past few years. In opposition to the Colombian case, the Brazilian context shows evidence of how low Legitimacy drives non-compliance with the Court's rulings, which is illustrated by two cases outside the judicial review of constitutional amendments: the "*Ação de Descumprimento de Preceito Fundamental*" (ADPF) N. 402, where the Court ruled against former President of the Senate, Renan Calheiros, and the "*Ação Cautelar*" (AC) N. 4327, ruled against former Senator Aécio Neves.

In an individual ruling issued by Justice Marco Aurélio, the Supreme Court decided to remove Senator Renan Calheiros from the Presidency of the Senate in 2016. According to the justice, a Senator that is being prosecuted by crimes is not able to succeed the President of the Republic, even temporarily. However, Calheiros showed an evasive behaviour when the officials tried to notify him about the decision, in a clear attempt to disregard the Court's ruling. On the following day, the directive body of the

Senate issued a note stating eleven reasons why Senator Calheiros would only obey a final collegiate Court decision, and not only the individual ruling signed by Marco Aurélio. The collegiate body then issued a final decision, mentioning in several opportunities the attempt of non-compliance: They eventually decided that Calheiros would not be removed from the Presidency of the Senate, but would not be able to substitute the President of the Republic in any case.

The second case, AC N. 4237, was decided in 2017, when the Supreme Court decided to suspend the mandate of Senator Aécio Neves due to criminal prosecution based on allegations of corruption and obstruction of justice. Right after the Court's decision, the then President of the Senate, Eunício Oliveira, declared to the press that he would not comply with the Supreme Court's ruling because there is no such provision in the Constitution as suspending a Senator's mandate.

These cases illustrate well how the pressure of non-compliance was felt by the Court, and how this is a real possibility when a Court holds low levels of Legitimacy as in the case of Brazil. In the first case, the Court even changed the outcome of the decision to secure compliance and palliate its lack of Legitimacy.

Moreover, I expect that a Court that is not legitimate will be more likely to be overridden or to have the elected bodies running against it. In the case of Brazil, however, due to the extremely high levels of Judicial Independence, this possibility does not exist (as shown in the chapter for Judicial Independence). Although there is a strong bias in this case, I decided to analyse if a Court with low levels of Legitimacy would suffer more attempts to be overridden (even if unsuccessful). To measure that, I analysed the proposals of constitutional amendments that aim to reform the Supreme Court across time (2002-2019) in both Legislative Houses. One of the main challenges in my analysis was the lack of quantitative data to support the loss of Legitimacy of the Brazilian Supreme Court. However, there is plenty of qualitative data supporting this

low Legitimacy. Many scholars point out 2013 as the year where the Supreme Court lost the Legitimacy it owned, given the poor mediation of a political crisis that created numerous popular protests across the country.

Despite the relative lack of quantitative data for the Brazilian Supreme Court's Legitimacy, I could obtain the levels of trust in this institution in some years and observed a declining trend in the proportion of the population trusting the Court. Only 24% of the population expressed their trust towards the Supreme Court in 2017. On the other hand, we can observe that, as Legitimacy decreases, the number of proposals of constitutional amendments in Congress to reform the Supreme Court grows significantly (see Figure 34). In the latest seven years since 2013 (representing the beginning of the Brazilian political crisis), we could observe a growth of 86% in the number of proposals versus the seven years before 2013.

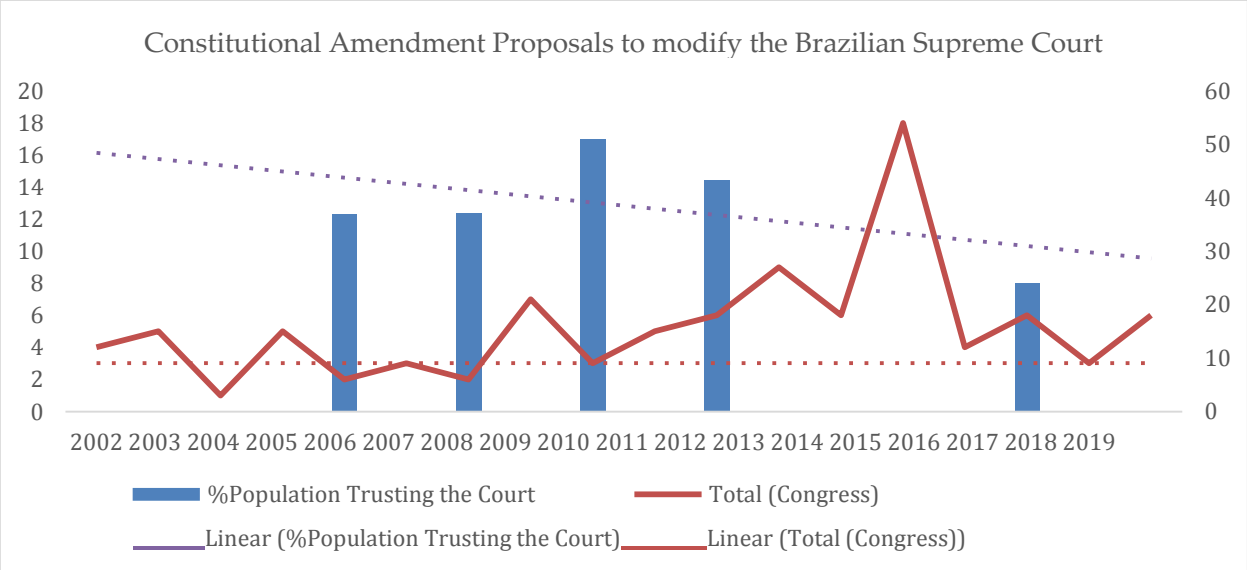


Figure 34. Number of Constitutional Amendment Proposals to modify the Brazilian Supreme Court (2002-2019). Source: Brazilian House of Representatives and Brazilian Senate websites.

The peak in proposals to override the Court in 2015 (18 proposals) is a response to the extremely politically charged corruption scandal that splashed the Court's

Legitimacy and deteriorated its reputation ("*Mensalão*"case). This peak is considerable given that each of these 18 proposals required the signature of one third of the House issuing such proposal, meaning at least 171 signatures in the House of Representatives, or 27 signatures from Senators.

In summary, we first saw that holding low levels of Legitimacy might entail the disobedience of judicial decisions. Although none of these cases have happened inside the scope of the judicial review of constitutional amendments, Brazil shows a certain difficulty to override the Court given its high Judicial Independence. In order to show that Legitimacy affects the Possibility of Overrides and Backlashes, I measured the Legislative activity attempting to run against the Court. I observed that these attempts to modify the Court's dynamics grew significantly as its Legitimacy declined. Therefore, the loss of Legitimacy did create a stronger will to run against the Brazilian Court, which, in the long term could create strong pressure to override the Court. However, the possibility (and not the willingness) of overrides and backlashes (which is our Democratic Criteria) was not directly affected by Legitimacy.

2.3.1.3 Impact on Non-Partisanship

After analyzing the partisanship of the Brazilian Supreme Court, I noticed three main links with its low Legitimacy. The Court currently faces a Legitimacy crisis and has lost the support and trust of the population in general, which has created some scenarios that are fostering the partiality of its justices. Firstly, the low Legitimacy of the Court is driven by the fact that the Court is not deeply institutionalised, which makes justices less constrained by the traditional legal practices and more by external elements. The diagnostic applies to the review of constitutional amendments, as the Court disregards even the precedents that granted it with this extraordinary power.

Secondly, the lack of support of the public creates a need to reach other political bodies in order to create alliances to secure the Court's empowerment. Thirdly, the Court behaves strategically and adopts measures out of its regular scope in order to protect itself from the dangers of the negative views of the population.

One of the main arguments supporting the low institutionalization of the Brazilian Supreme Court is that it does not behave as a collegiate body. Instead, it is driven by individual action and there is plenty of empirical and theoretical evidence supporting this argument. For instance, the Court uses "*Pedidos de Vista*" (which is a tool for justices to hold the case to scrutinize it in more detail) as an individual power to obstruct the collegiate agenda, as shown in section 2.1.1.2 of this dissertation (Arguelhes and Molhano, 2018). Another example is the docket control exerted only by the Chief Justice, responsible for setting the agenda of the Court, or his exclusive power to rule in urgent cases during the recess months (Arguelhes, 2017). Even the method utilised by the justices to vote in the Brazilian Court (*seriatim*) enhances the high individualism, given that justices vote one after the other, monologuing for hours, handing pre-written opinions while engaging in artificial debates (Silva, 2013). This individualistic behaviour incentivises partiality because it creates more opportunities for undue external influences inside the Court, which is boosted by the lack of sanctions to the justices that are not impartial[24].

The lack of institutionalization of the Court is also proven by the absence of a cohesive jurisprudence. The Brazilian Court is criticised by academics and the population for constantly changing its position on salient cases. Moreover, it is frequently said that the decision-making dynamics inside the Court make it difficult to

[24] Study on the Brazilian Supreme Court shows that none out 111 requests to declare justices impartial for deciding a case, none of them was fruitful, and in 20 cases the Chief Justice (unlawfully) ignored the Court internal rules to decide these cases (FGV SP, 2019). See https://oglobo.globo.com/brasil/stf-arquivou-todos-os-pedidos-de-impedimento-suspeicao-contra-seus-ministros-diz-estudo-23872527.

find a "*ratio decidendi*" or the substantial content of a precedent. These uncertainties create a scenario of legal instability that reflects in the political decision-making and, internally, makes the justices less constrained by their past decisions. If a justice is less constrained by previous decisions, there is more space left for the unlawful influence of other actors or even for personal interests, which is detrimental to impartiality. The results are similar for the judicial review of constitutional amendments. In 1993, the Brazilian Supreme Court granted itself the power to review constitutional amendments by arguing that an amendment may be ruled unconstitutional if running against the constitutional eternal clauses ("*cláusulas pétreas"*). However, a qualitative analysis of all the Supreme Court decisions reviewing amendments allows me to conclude that this admission filter is not even mentioned by the Court in many cases. Even when it is mentioned, I noticed that the Court's understanding of what is considered an eternal clause is quite blurry, opening space for the review of virtually any amendment. As a result of that, it is difficult to argue that the Court has a cohesive line of thought or set of precedents on the subject, but instead it bypasses the theoretical filter. In this deinstitutionalized scenario, it is easier for the Court to advance personal or external preferences, not acting with the expected impartiality.

In the case of Brazil, the low Legitimacy of the Supreme Court can also be traced as the cause for strategic alliances with the elected bodies and other political actors in order to protect itself. As exposed, I expected that a Court that does not hold popular support would act strategically to build agreements with other Powers to guarantee compliance with its decisions, avoid institutional attacks or to maintain its level of empowerment. The Brazilian case shows how a Court that becomes more unpopular every day has negotiated with the Executive and Legislative to avoid heavier institutional conflicts.

In 2019, Chief Justice Dias Toffoli expressed his will to make a pact between the Brazilian Supreme Court, the Congress, and the Presidency in order to deal with the loss of popularity of the Court and its frequent critiques from the population in general. The Supreme Court agreed to prioritize and support a series of economic reforms to modify the Constitution sent to Congress by President Jair Bolsonaro (especially the reform of the social security system). In order to protect itself from the critiques and possible retaliation of the elected bodies, the Chief Justice agreed to stand up for the enactment of these economic reforms, while knowing that, once these constitutional amendments are approved, they would be questioned in the Supreme Court[25]. This strategic behaviour shows a disregard for the impartiality expected from a judicial body and would interfere in the judicial review of the amendments resulting from these reforms.

The same self-protective behaviour was noticed towards the public opinion. If the Court is not skilled enough to gain the favour of the general population to grow Legitimacy, the Brazilian Court opted for different mechanisms to reach its critiques outside the political institutions. In order to palliate the attacks coming from civil society, the Chief Justice Dias Toffoli started a broad confidential investigation procedure ("*Inquérito"*) to prosecute individuals that criticise the Court[26]. The idea is to tone down the popular criticism by opening criminal lawsuits against any individual that "offends" the Court. This shows how low Legitimacy can directly drive the Court's partisanship to defend its own interests, which goes against democracy.

[25] See, *e.g.*, "*Planalto, Congresso e STF combinam assinar pacto em resposta a protestos*", Folha de Sâo Paulo, May, 2019 (https://www1.folha.uol.com.br/poder/2019/05/planalto-congresso-e-stf-combinam-de-assinar-pacto-em-resposta-a-protestos.shtml); "*Entenda o Pacto discutido por Bolsonaro com Toffoli e Alcolumbre"*, Folha de Sâo Paulo, June, 2019 (https://www1.folha.uol.com.br/poder/2019/06/entenda-o-pacto-discutido-por-bolsonaro-com-toffoli-maia-e-alcolumbre.shtml).

[26] For more details on the *"Inquérito*", see Felipe Recondo (2019), "Os Onze: O STF, seus bastidores e suas crises", Companhia das Letras.

Thus, a Court with low levels of Legitimacy will tend to act partisan, either by supporting other political actors or defending its own (corporate or personal) interests. This represents a negative circumstance for a democratic judicial review of constitutional amendments.

2.3.3 Partial Conclusions On The Effects of Legitimacy Of The Courts

The cases of Colombia and Brazil helped me understanding the relationship between Legitimacy and the Democratic Criteria. Colombia, known for having one of the most legitimate courts of Latin America, offered a perfect scenario to benchmark against the case of the Brazilian Court, which is currently facing a Legitimacy crisis.

For Deliberation, I could observe that Legitimacy fosters judicial debate. Higher levels of Legitimacy mean more participation and an improvement of the quality of the participation engaged in the judicial review of constitutional amendments. Colombia showed an average number of 15 yearly interventions in the judicial review of amendments cases, while the Brazilian Court could only reach an average of 4. Also, in terms of participation, the quality of the debate and engagement of civil society was clearly more important in a legitimate court, with Colombia showing a participation of Civil Society and Individuals of 50%, against only 4% in Brazil. Universities and Research Institutes, which are known for enriching the discussions providing technical information, had a participation of 20% in Colombia, and only 1% in Brazil. The Brazilian judicial review of constitutional amendments had considerable participation of "Public Corporations", especially judge and prosecutor associations, showing a more strategic technical profile and less openness in the deliberation. Hence, Legitimacy creates a stronger bond between the Court and external actors and therefore drives their engagement and participation that is valuable for the debate and that.

Regarding the possibility of Overrides and Backlashes, we observed that Legitimacy is more likely to create compliance with the Court's rulings in Colombia, while Brazil faced important threats of disobedience from Congress. In the judicial review of constitutional amendments, Overrides and Backlashes were proved to be possible in Colombia, but not likely given the high Legitimacy of its Court. On the other hand, Brazil showed a strong will to run against its Court in numerous occasions, but this was not possible due to Judicial Independence. In addition to that, Colombia showed that a Court that is over-empowered due to its high Legitimacy might instrumentalize its political capital as a shield against overrides, which represents a threat to democracy in the judicial review of amendments. Thus, although Legitimacy does not allow or restrict the possibility of overrides directly, it does moderate the willingness to run against a court. Moreover, if combined with a strong empowerment of the court, Legitimacy can be used as a tool that is detrimental to democracy

Lastly, there is a strong relation between Legitimacy and Non-Partisanship. The levels of institutionalisation of the Colombian Court -related to its high Legitimacy- create incentives for the impartiality of its justices, by binding them to the respect of a cohesive jurisprudence and a predominant collegiate behaviour. Brazil's low levels of institutionalisation, which are linked to its Court's Legitimacy, have created a scenario in which justices act in a more individual way and without cohesive jurisprudence. This opens space for partisan interactions. Also, Colombia showed how a Court that holds strong popular support does not need to reach out to other political powers to defend its position and is therefore more likely to act impartially. On the other hand, when it lost its Legitimacy, the Brazilian Court made agreements with the elected bodies to fight against popular criticism and adopted questionable procedures. These arrangements are directly related to the constitutional amendments that are then reviewed by the

Court, proving the undue political participation of the Court in these cases and the lack of partiality.

3 CONCLUSIONS

3.1 RESULTS

We have analysed how the Institutional Attributes (Judicial Independence (I), Political Competition (II), and Legitimacy of the Courts (III)) affect the democratic quality of the judicial review of constitutional amendments. This democratic quality was defined by a set of conditions that I called Democratic Criteria (Deliberation (i), Possibility of Overrides and Backlashes (ii), and Non-Partisanship (iii)). I compared the democratic quality of the judicial review of constitutional amendments in Latin American countries where the Institutional Attributes were present (Country-Yes) and absent (Country-No), respectively. This cross-country comparison allowed me to observe in the presence of which Institutional Attributes the Democratic Criteria were met.

Results for Brazil and Argentina show that Judicial Independence (the degree of freedom of a court from interference of other political actors) does have an important effect on the Democratic criteria. Excessive levels of Judicial Independence represent an obstacle for the democratic review of amendments. In this circumstance, Courts do not have to consider the preferences of other actors when making decisions, which creates a scenario where overrides and backlashes are virtually impossible. Individuality coming from this independence also deteriorates the deliberative standards of a court. Also, the Court does not fear sanctions, which allows them to act in a partial fashion. On the other hand, a level of Judicial Independence that is too low is also detrimental to the democratic quality of the judicial review of constitutional amendments. Courts tend to act strategically in order to protect themselves from overrides, to the point that this power to review amendments becomes useless, given that the Court mirrors the will of the elected bodies, acting partially. The same mechanics apply to deliberation, given

that the Court's role becomes less relevant in the political decision-making, and there are no incentives for other actors to engage in judicial debates. Hence, an intermediary level of Judicial Independence is needed to allow the correct functioning of a system of checks and balances for the judicial review of constitutional amendments to reach a democratic character. Democracy is endangered if the power to validate amendments is allocated to an over-empowered body (Court or elected bodies), thus a balanced distribution of power is essential for the review of constitutional amendments.

The cases of Peru and Brazil were used for assessing the effects of Political Competition on our Democratic Criteria. We saw that the division of political authority between actors with different preferences inside the elected bodies impacted the democratic quality of the judicial review of amendments. For deliberation, we could see that the higher the levels of Political Competition, the more intense the role of the Parliament becomes in the discussions. This erodes the democratic quality of the judicial review of constitutional amendments by taking deliberation away from the Court. On the other hand, under lower Political Competition, less discussions and consensus are needed in Congress for enacting an amendment, given that debates gather less political actors and this makes it less politically costly for the Court to oppose the elected bodies. This mechanics will bring deliberation inside Courts, calling civil society and the less influent political groups to join the Court in the debate. For Overrides and Backlashes I found that the possibility of overriding the courts exists under cases of low Political Competition, and that it increases as the Political Competition levels decrease. This happens because of the concentration of political authority, which facilitates the achievement of a majority to override the Court. However, under high Political Competition, the Possibility of Overrides and Backlashes vanishes, as confrontation between the elected bodies and the court becomes less likely.

Legitimacy -or the acceptability and respect to the Court's actions and authority from society- was also an important attribute affecting most of our Democratic Criteria in Colombia and Brazil. Although the effect of the Possibility of Overrides and Backlashes was difficult to find, it did have an impact on Deliberation and Non-Partisanship. High Legitimacy enhances the deliberative standards of a Court by creating a bond between the population and the Court. Not only do more actors participate in the judicial review of amendments, but also the quality of the participants is improved. Civil Society, Research Institutes, Universities and other knowledgeable, relevant actors engage to enrich the discussion when Legitimacy is high. The opposite happens in the case of low Legitimacy, where less actors join the debates, and when they do, their motivations to participate are mostly strategic. The Possibility of Overrides and Backlashes was not directly affected by Legitimacy. This attribute only had an impact on the likelihood of running against the Court, but not on its possibility. Regarding the Non-Partisanship, Court with high Legitimacy are more impartial due to the higher levels of institutionalisation it shows. In this case, the existence of a cohesive jurisprudence and a collegiate behaviour refrained justices from acting in partisan ways. Also, it is less likely that a Court that holds strong popular support will make agreements with the elected bodies in order to guarantee compliance with its decisions. Opposingly, a Court with low levels of Legitimacy will not be sufficiently able to constrain its justices from disregarding the collegiate or disobeying the jurisprudence, which fosters partial behaviour. A non-legitimate Court will also be more prone to make deals with the elected bodies or to adopt questionable procedures to fight against popular criticism and secure compliance.

3.2 INSIGHTS FOR DECISION-MAKING

As we have seen in our results, the Democratic Criteria (Deliberation (i), Possibility of Overrides and Backlashes (ii) and Non-Partisanship (iii)) are met in different ways in the presence or absence of our Institutional Attributes (Judicial Independence (I), Political Competition (II) and Legitimacy of the Court (III)). The presence of some Attributes guarantees a more complete fulfilment of the democratic judicial review of constitutional amendments, while other Attributes have a less significant effect on this democratic quality. However, we must understand that, in practice, these Attributes need to be considered in combination. Some of our three Institutional Attributes can be present in a country, while others are absent, making the number of possible combinations rise. In order to determine which combinations of Institutional Attributes are more suitable for the judicial review of amendments, I needed to build a decision tree including all possible combinations. For assessing which combination means a more -or less- democratic judicial review of amendments, I gave every Attribute a value based on its fulfilment of the Democratic Criteria. For instance, we have seen that the presence of Political Competition (II) fosters Non-Partisanship (iii) but is a detractor of Deliberation (i) and Possibility of Overrides and Backlashes (ii). Hence, the presence of Political Competition is allocated a score of only one (1) point out of three. The allocation of scores per Institutional Attributes can be observed in the table below (Table 1).

		Democratic Criteria			Score
		Deliberation (i)	Possbility of Overrides and Backlashes (ii)	Non-Partisanship (iii)	
Institutional Attributes	High Judicial Independence (I)	Not met	Not met	Not met	0
	Moderate Judicial Independence (I)	**Met**	**Met**	**Met**	3
	Low Judicial Independence (I)	Not met	Not met	Not met	0
	Presence of Political Competition (II)	Not met	Not met	**Met**	1
	Absence of Political Competition (II)	**Met**	**Met**	Not met	2
	Presence of Legitimacy of the Court (III)	**Met**	Little interaction	**Met**	2
	Absence of Legitimacy of the Court (III)	Not met	Little interaction	Not met	0

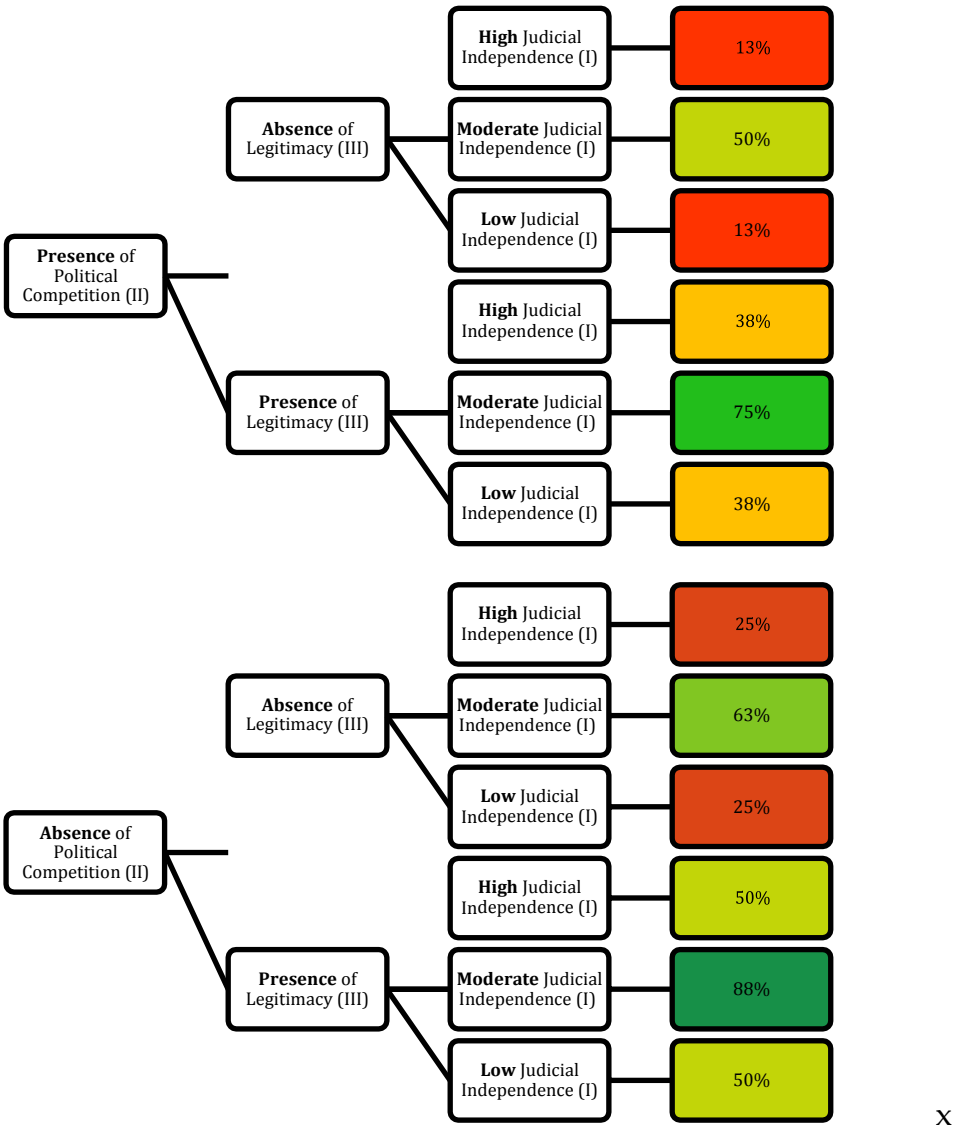
Table 1. Allocation of Scores to the Presence or Absence of Institutional Attributes for the fulfillment of Democratic Criteria.

The results on Judicial Independence showed that a moderate level is needed for the three Democratic Criteria to be met and is actually the Institutional Attribute that brings more democratic value to the judicial review of constitutional amendments (3 points). A country with excessively low or high levels of Judicial Independence could not fulfil any of the three Democratic Criteria as we saw for the cases of Brazil and

Argentina, proving that the judicial review of constitutional amendments should only be implemented when Judicial Independence is moderate.

For the assessment of the most suitable combination of Institutional Attributes a country should have for adopting the judicial review of constitutional amendments, I created a decision tree (Figure 35, below). In this tree, all possible combinations of Institutional Attributes are laid out, showing twelve possible outcomes. Each outcome is given a Forecasted Success Ratio (FSR) for the adoption of the judicial review of amendments. The FSR is calculated by summing the scores obtained in the fulfilment of Democratic Criteria (expressed by "**Met**" in Table 1) and dividing by eight (8), which is the maximum number of interactions between Institutional Attributes and Democratic Criteria. We could think that the maximum number of interactions is nine (9), given that we have three (3) Institutional Attributes and three (3) Democratic Criteria (3 x 3 = 9), however our findings showed that Legitimacy does not have a direct impact on the Possibility of Overrides and Backlashes ("Little interaction" on Table 1), which reduces the maximum number of interactions to eight (8).

The Forecasted Success of Judicial Review of Constitutional Amendments Decision Tree (Figure 35) shows all the possible combinations of Institutional Attributes in a country, with their Forecasted Success Ratio (FSR) obtained through the fulfilment of Democratic Criteria.



x

Figure 35. Forecasted Success of Judicial Review of Constitutional Amendments Decision Tree.

This decision tree allows us to assess whether the judicial review of constitutional amendments enhances democracy and should therefore be adopted. We can observe that the Forecasted Success Ratios (FSR) go from 13% in the worst-case scenario, to 88% in the best one. The best combination of Institutional Attributes for this power to be granted to the Courts is when there is an absence of Political Competition, the presence of Legitimacy and a moderate level of Judicial Independence, with an FSR of 88%. Our analysis shows that this combination allows the Court to check the concentrated power

of the elected bodies while holding popular support for these actions. The court would also protect itself from abuses of other actors while the circumstances would prevent judicial over-empowerment.

On the other hand, the worst-case scenarios show a combination of presence of Political Competition, an absence of Legitimacy and excessive or lacking sufficient Judicial Independence, with an FSR of 13%. In these cases, the court's decision to strike down a constitutional amendment is opposing a political decision that is the fruit of a consensus between several political groups without holding popular support. These two, combined with an excessively high level of Judicial Independence would create an unaccountable court. If combined with low levels of Judicial Independence, it would be a case of impossibility of this power of striking down the amendment to be exerted democratically, given that the power would be captured by other actors and would not effectively belong to the court.

There are twelve different combinations in the decision tree, showing how the presence or absence of Institutional Attributes can have gradually diverse effects on the democratic quality of the judicial review of amendments. This decision tree is intended to guide constitution practitioners to decide on the adoption of the judicial review of amendments. In extreme cases, where the FSR is extremely low, the recommendation would be not to grant justices with the power to review constitutional amendments. On the other hand, when the FSR is significantly high, it is suggested to adopt this kind of judicial review. For the cases in between, with an average FSR, the answer could be the adoption of a formal review of constitutional amendments, instead of substantial. This would allow the court to review the compliance with all the procedures required for enacting an amendment and therefore changing the constitution, but without endangering the checks and balances dynamics.

It is important to consider that the model has its limitations. I only considered three Institutional Attributes and three Democratic Criteria, which I thought to be the most relevant for the judicial review of constitutional amendments following the rational choice theory. However, we could answer the research question by enriching our model with other inputs, such as the adoption of or other variables to the analysis. For instance, variables related to constitutions (constitutional rigidity, length of the constitution, what subjects are formally constitutional), to the judicial career and justice's background (if tenure is granted, if justices were judges, academics or politicans), to judicial decision-making procedures (quorum to strike down an amendment, if decisions may contain abstract provisions replacing the content of the amendments struck down), or even related to the psychology and socialization of justices (with which groups they interact, how their perceive their institutional role and mission). Other theories may also help us enriching the understanding on the subject, by selection, e.g., an ideational, historical or sociological approach to the research question. In any case, the dissertation aims to bring a contribution to the study of constitutional amendments and assess the role of the Judiciary in the institutional dynamics.

REFERENCES

Abregú, Martin and Christian Courtis (1998). "Perspectivas y posibilidades del amicus curiae en el derecho argentino". *La aplicación de los Tratados sobre Derechos Humanos por los Tribunales Locales*, Martin Abregú and Chirstian Courtis (eds.), Buenos Aires: del Puerto.

Albert, Richard (2009). "Nonconstitutional Constitutional Amendments". *Canadian Journal of Law and Jurisprudence 22.*

Almeida, Eloísa Machado de (2016). "*Amicus Curiae* no Supremo Tribunal Federal". Ph.D. Dissertation, Faculty of Law, University of São Paulo.

Arguelhes, Diego Werneck (2014). "Old Courts, New Beginnings: Judicial Continuity and Constitutional Transformation in Argentina and Brazil". JSD Dissertation, Yale Law School.

Arguelhes, Diego Werneck and Ivar Hartmann (2017). "Timing Control Without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda". *Journal of Law and Courts* 5, n. 1 (Spring).

Arguelhes, Diego Werneck and Ribeiro, Leandro Molhano. (2018). Ministrocracia: O Supremo Tribunal individual e o processo democrático brasileiro. Novos estud. CEBRAP [online]. 37(1).

Bailey, A. Michael and Maltzman, Forrest. (2011). The Constrained Court: Law, Politics, and the Decisions Justices Make. Princeton: Princeton University Press.

Barroso, Luis Roberto (2018). "Contramajoritário, Representativo e Iluminista: Os Papeis dos Tribunais Constitucionais nas Democracias Contemporâneas". *Revista Direito & Praxis*, v. 9, n. 4.

Baum, Lawrence. (2009). The Puzzle of Judicial Behavior. Ann Arbor: University of Michigan Press.

Bejar, Trilce Oblitas (2015). "Party System Fragmentation and Democratic Representation in Peru, 1980-2011". Master Thesis, Faculty of Social and Behavioural Sciences, Institute of Political Science, Leiden University.

Benítez-R, Vincente (2017). "Judicial Review of Constitutional Amendments in Times of Peace: The Colombian Case". *IACL-AIDC Blog*, April 26, 2017.

Benvindo, Juliano Zaiden and Alexandre Araújo Costa (2014). "A Quem Interessa o Controle de Constitucionalidade: O Descompasso Entre Teoria e Prática na Defesa dos Direitos Fundamentais". Working Paper, University of Brasilia.

Benvindo, Juliano Zaiden. (2018). "Brazil in the Context of the Debate Over Unamendability in Latin America". In *An Unconstitutional Constitution? Unamendability in Constitutional Democracies,* eds. Richard Albert and Bertil Emrah Oder, pp. 345-364. Springer International Publishing.

Bernal-Pulido, Carlos (2013). "Unconstitutional Constitutional Amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine". *International Journal of Constitutional Law,* v. 11, n. 2, 339-357.

Bickel, Alexander (1986). "The Least Dangerous Branch: The Supreme Court at The Bar of Politics". Yale University Press, 2. Ed.

Bonilla, Daniel (2012). "Towards a Constitutionalism of the Global South". Available at SSRN: https://ssrn.com/abstract=2497585 or http://dx.doi.org/10.2139/ssrn.2497585.

Bonilla, Daniel (ed.). "Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia". Cambridge University Press.

Braman, Eileen. (2016). "Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning". Charlottesville: University of Virginia Press.

Cajas-Sarria, Mario Alberto (2017). "Judicial Review of Constitutional Amendments in Colombia: a political and historical perspective (1955-2016)". *The Theory and Practice of Legislation*, v. 5, n. 3.

Cepeda-Espinosa, Manuel Jose (2004). "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court". *3 Washington University Global Studies Law Rev. 539*

Chavez, Rebecca Bill (2003). "The Construction of the Rule of Law in Argentina: A Tale of Two Provinces". *Comparative Politics* 35(4), 417.

Chavez, Rebecca Bill (2004). "The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System". *Journal of Latin American Studies*, v. 36, n. 3.

Chavez, Rebecca Bill (2007). "The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence. *Latin American Politics and Society*, v. 49, 2.

Chavez, Rebecca Bill, John Ferejohn, and Barry Weintgast (2011). "A Theory of the Politically Independent Judiciary". In *Latin American Courts* (Gretchen Helmke and Julio Rios-Figueroa eds.). Cambridge University Press.

Cheibub, José Antonio, Zachary Elkins and Tom Ginsburg (2011). "Latin American Presidentialism in Comparative and Historical Perspective". *89 Texas Law Review 1708.*

Couto, Cláudio Gonçalves and Rogério Arantes. (2006). "Constituição, Governo e Democracia no Brasil". Revista Brasileira de Ciências Sociais. 21(61), 41-62.

Dahl, Robert (1957). "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker". 6 *Journal of Public Law* 279.

Dargent, Eduardo (2009). "Determinants of Judicial Independence: Lessons from Three 'Cases' of Constitutional Courts in Peru (1982-2007)". *Journal of Latin American Studies*, v. 41.

Desposato, Scott, Matthew Ingram and Osmar Lannes Jr (2015). Power, Composition, and Decision Making: The Behavioral Consequences of Institutional Reform on Brazil's Supremo Tribunal Federal. "Journal of Law, Economics, and Organization", v. 31, 3.

Dixon, Rosalind. (2011). "Constitutional Amendment Rules: A Comparative Perspective". In eds. Ginsburg, Tom and Dixon, Rosalind. Comparative Constitutional Law. Cheltenham and Northampton: Edward Elgar Publishing. pp: 96-111.

Dworkin, Ronald (1986). "Law's Empire". Harvard University Press.

Dworkin, Ronald (1987). "What is Equality? Part 4: Political Equality". Harvard University Press.

Ely, Jon Hart (1980). "Democracy and Distrust". Harvard University Press.

Epstein, Lee (2015-2016). "Some Thoughts on the Study of Judicial Behavior". William & Mary Law Review 57: 2017-2054.

Epstein, Lee *et al.* 2003. "The Political (Science) Context of Judging". *Saint Louis University Law Journal* 47: 783-817.

Epstein, Lee, and Knight, Jack. (1998). The Choices Justices Make. Washington, DC: CQ Press.

Epstein, Lee, Landes, William M, and Posner, Richard A. (2013). "The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice". Cambridge and London: Harvard University Press.

Eslava, Luis (2009). "Constitutionalization of Rights in Colombia: Establishing a ground for meaningful comparisons". *Revista Derecho del Estado, n. 22*.

Fallon Jr, Richard (2005). Legitimacy and The Constitution. "Harvard Law Review", v. 118, n. 6: 1787-1853.

Ferejohn, John A. and Rosenbluth, Frances McCall and Shipan, Charles R.. (2007) "Comparative Judicial Politics" In The Oxford Handbook of Comparative Politics. Ed Carles Boix and Susan C. Stokes. Oxford and New York: Oxford University Press. pp: 727-751.

Ferreira, Débora Costa (2018). "De Quem a Corte Quer Ser Amiga? Análise Estratégica do Amicus Curiae". Lumen Juris Editors.

Figueiredo, Argelina and Fernando Limongi (2000). "Presidential Power, Legislative Organisation, and Party Behaviour in the Brazilian Legislature". *Comparative Politics* v. 32, n. 2.

García-Mansilla, Manuel José (2004), "Separation of Powers Crisis: The Case of Argentina". 32 *Georgia Journal of Comparative and International Law* 307.

Gibson, James L. and Gregory A. Caldeira (1995). "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice". *American Journal of Political Science,* v. 39, n. 2, pp. 459-489.

Gibson, James L. and Gregory A. Caldeira (2009). "Citizens, Courts, and Confirmations: Positivity Theory and The Judgments of American People". Princeton: Princeton University Press.

Ginsburg, Tom (2008). "The Global Spread of Judicial Review". *Oxford Handbook of Law and Politics* (Keith Whittington and Daniel Keleman, eds.).

Ginsburg, Tom and Melton, James. (2015). "Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty". *International Journal of Constitutional Law*. 13(3): 686–713.

Gomez, Ileana. "Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead". *The University of Miami Inter-American Law Review*, v. 31, n. 1.

Gonzalez, Diego Andres (2017). "The Colombian Constitutional Court: Building Legitimacy in its First Period". Working Paper, Universidad Externado.

Guimarães, Livia Gil (2017). "Audiências Públicas no Supremo Tribunal Federal: discurso, prática e lobby". Master Thesis, Faculty of Law, University of São Paulo.
Hall, Matthew E. K, and Daniel Ura (2015). "Judicial Majoritarianism". *The Journal of Politics* 77, n. 3.

Halmai, Gábor. (2012). "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?". Constellations. 19(2): 182-203.

Hamilton, Alexander, James Madison and John Jay (1948). "The Federalist, or The New Constitution". New York: Dutton.

Helmke, Gretchen (2005). "Courts Under Constraints: Judges, Generals and Presidents in Argentina". Cambridge: Cambridge University Press.

Helmke, Gretchen and Julio Rios-Figueroa (2011). "Courts in Latin America". Cambridge University Press.

Hirschl, Ran (2007). "Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. Harvard University Press.

Kapiszeski, Diana. (2010) "How Courts Work: Culture, Institutions, and the Brazilian Supreme Tribunal Federal". In Cultures of Legality: judicialization and Political

Activism in Latin America. Eds Javier Couso, Alexandra Huneeus and Rachel Sieder. Cambridge: Cambridge University Press.

Kapiszewski, Diana. (2012). "High Courts and Economic Governance in Argentina and Brazil". Cambridge University Press.

Kelsen, Hans. (1967). Pure Theory of Law. Trs. Max Knight. Berkeley and Los Angeles: University of California Press. The Lawbook Exchange edition 2009. p. 351.

Kramer, Larry D. (2005). "The People Themselves: Popular Constitutionalism and Judicial Review". Oxford University Press, 1. ed.

Landau, David (2010). "Political Institutions and Judicial Role in Comparative Constitutional Law". 51 *Harvard International Law Journal* 319.

Landau, David (2014). "Beyond Judicial Independence: The Construction of Judicial Power in Colombia". Ph.D. Dissertation, School of Arts and Sciences (Department of Government), Harvard University.

Landau, David and Julian Daniel López-Murcia (2009). "Political Institutions and Judicial Role: An Approach in Context, The Case of the Colombian Constitutional Court". *Vniversitas,* Bogotá (Colombia), v. 119.

Leiras, Marcelo, Agustina Giraudy and Guadalupe Tuñon (2014). "Who Wants an Independent Court? Political Competition and Supreme Court Instability in the Argentine Provinces (1984-2008)". The Journal of Politics, v. 77, n. 1.

Levistky, Steven, and Daniel Ziblatt (2018). "How Democracy Dies". Washington, DC: Crown.

Levitsky, Steven (1999). "Fujimori and Post-Party Politics in Peru". *Journal of Democracy*, v. 10, n. 3.

Levitsky, Steven and Maria Victoria Murillo (2011). "The Politics of Institutional Weakness". Penn State University Press.

Lizarazo-Rodrigues, Liliana (2011). "Constitutional Adjudication in Colombia: Avant-Garde or Case Law Transplant? A literature review". *Estudos Socio-Jurídicos*, v. 13, n. 1, pp. 145-182.

Maveety, Nancy. (2006). The Pioneers of Judicial Behavior. Ann Arbor Michigan: University of Michigan Press.

Mendes, Conrado Hübner (2005). "Judicial Review of Constitutional Amendments in The Brazilian Supreme Court". *Florida Journal of International Law,* v, 17.

Mendes, Conrado Hübner (2010). "Onze Ilhas". Op-ed, Folha de São Paulo. February 1st, 2010.

Mendes, Conrado Hübner (2014). "Constitutional Courts and Deliberative Democracy". Oxford University Press.

Merhof, Katrin (2015). "Building a Bridge Between Reality and the Constitution: The establishment and development of the Colombian Constitutional Court". *International Journal of Constitutional Law,* v. 13, n. 3, 714-732;

Mohallem, Michael Freitas. (2011). "Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority". International Journal of Human Rights. 15(5): 765-786.

Nino, Carlos Santiago (1992). "The Debate over Constitutional Reform in Latin America"16 Fordham International Law Journal 635.

Nunes, Rodrigo (2010). "Ideational origins of progressive judicial activism: The Colombian constitutional court and the right to health". *Latin American Politics and Society*, 52(3), 67–97.

O'Donnell, Guillermo (2006). "On Informal Institutions, Once Again". *Informal Institutions and Democracy: Lessons from Latin America* (Gretchen Helmke and Steven Levistky (eds.).

Oliveira, Fabiane Luci de. (2012). Processo Decisório no Supremo Tribunal Federal: Coalizões e "Panelinhas". "Revista de Sociologia e Política", v. 20, n. 44, pp. 139-153.

Olson, Mancur. (1965). "The Logic of Collective Action". Cambridge and London: Harvard University Press.

Perea, Juan Francisco (2006). "Of Presidents and Precedents: The Role of Judicial Review in Presidential Election in Peru, Costa Rica, and the United States". Working Paper, University of Florida Levin College of Law.

Rambourg Jr., Ribamar Cezar (2019). "A Crise na Coalizão e o Impeachment de Dilma Roussef". Master's Thesis in Political Science, University of São Paulo.

Recondo, Felipe (2019). "Os Onze: O STF, seus bastidores e suas crises". São Paulo: Companhia das Letras.

Recondo, Felipe. (2018). "Tanques e Togas: O STF e a Ditadura Militar". São Paulo: Companhia das Letras.

Rodriguez-Raga, Juan Carlos (2011). "Strategic Prudence in the Colombian Constitutional Court". Ph.D Dissertation, Political Science, University of Pittsburgh.

Roznai, Yaniv. (2017). Unconstitutional Constitutional Amendments. Oxford University Press.

Sadek, Maria Tereza (2004). "Judiciário: Mudanças e Reformas". *Estudos Avançados* 18(51): 79-101.

Scotti, Valentina Rita. (2018). "Constitutional amendments and constitutional core values: the Brazilian case in a comparative perspective" *Revista de Investigações Constitucionais* 5(3): 59-76

Segal, A. Jeffrey and Spaeth, J. Harold. (1993). The Supreme Court and the Attitudinal Model. New York: Cambridge University Press.

Segal, A. Jeffrey and Spaeth, J. Harold. (2002). The Supreme Court and the Attitudinal Model Revisited. New York, NY: Cambridge University Press.

Segal, Jeffrey A. 1984. "Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases (1962-1981)." American Political Science Review 78: 891-900.

Silva, Virgílio Afonso da (2013). "Deciding Without Deliberating". *International Journal of Constitutional Law*, v. 11, n. 3, 557-584.

Susan Rose-Ackerman, Diane A. Desierto and Natalia Volosin (2011), "Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines". Yale Faculty Scholarship Series 4155.

The Anti-Federalist Papers (1966). Indianapolis, Cecília Kenyon ed.

Tiede, Lydia Brashear and Aldo Fernando Ponce (2014). "Evaluating Theories of Decision-making on the Peruvian Constitutional Tribunal". *Journal of Politics in Latin America*, v. 6, n. 2.

Tommasini, Nicola and da Silva, Roberto Baptista Dias. (2018) "Reflexões Críticas sobre a declaração de inconstitucional de ofício". Revista de Investigações Constitucionais 5(2): 187-208.

Tushnet, Mark (2000). "Taking the Constitution Away From the Courts". Princeton University Press.

Verbitsky, Horacio (1993). "Hacer la Corte: La Construcción de un Poder Absoluto sin Justicia ni Control ". Buenos Aires: Planeta.

Vieira, Oscar Vilhena (2018). "A batalha dos poderes". São Paulo: Cia das Letras.

Vieira, Oscar Vilhena. (2008). "Supremocracia". Revista Direito Gv. 4(2):441-464.

Waldron, Jeremy (1999). "Law and Disagreement". Oxford University Press.

Waldron, Jeremy (2006). "The Core of The Case Against Judicial Review". 115 Yale Law Journal

Warren, Roger K. (2003). "The Importance of Judicial Independence and Accountability". Washington, DC: National Center for State Courts.

Yap, Po Jen. (2015). "The Conundrum of Unconstitutional Constitutional Amendments" Global Constitutionalism 4(1): 114– 136.

ANNEX 1 - JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS IN BRAZIL (1988-2018)

ADI Nº	Filing Date	Amendment	Individual Preliminary Decisions	Collegiate Preliminary Decisions	Final Decisions Confirming Preliminary Decisions	Amicus Curiae Petitions	Senate Petitions	House of Repr. Petitions	Shifting Votes	"Pedido de Vista"	Pending Cases
829	1993	CA 2/92					x				
830	1993	CA 2/92						x			
833	1993	CA 2/92		x	x					x	
913	1993	CA 3/93									
926	1993	CA 3/93		x			x				
939	1993	CA 3/93		x	x		x	x			
949	1993	CA 3/93		x	x						
1420	1996	CA 10/96		x	x		x				
1497	1996	CA 12/96		x	x					x	
1501	1996	CA 12/96		x	x					x	
1749	1997	CA 14/96		x			x	x			
1805	1998	CA 16/97		x			x	x			x
1946	1999	CA 20/98		x	x		x	x			
2024	1999	CA 20/99		x	x	x	x				
2027	1999	CA 21/99		x			x				
2031	1999	CA 21/99		x	x		x				
2047	1999	CA 19/98									
2096	1999	CA 20/98					x	x			x
2135	2000	CA 19/98				x	x			x	x
2159	2000	CA 19/98					x	x			
2242	2000	CA 20/98					x				x
2356	2000	CA 30/00		x			x			x	x
2362	2000	CA 30/00		x						x	
2395	2001	CA 15/98					x				
2666	2002	CA 37/02					x				
2673	2002	CA 37/02					x				
2732	2002	CA 29/00				x	x				
2760	2002	CA 20/98									
2883	2003	CA 20/98					x				
3099	2003	CA 41/03				x	x				

3104	2003	CA 41/03				x	x				
3105	2003	CA 41/03				x	x			x	
3128	2004	CA 41/03				x	x			x	
3133	2004	CA 41/03				x				x	x
3138	2004	CA 41/03				x	x				
3143	2004	CA 41/03				x	x			x	x
3172	2004	CA 41/03				x					
3184	2004	CA 41/03				x				x	x
3291	2004	CA 41/03									
3297	2004	CA 41/03				x	x				x
3308	2004	CA 41/03; 20/98				x	x	x			x
3363	2004	CA 41/03; 20/98				x	x				x
3367	2004	CA 45/04					x				
3395	2005	CA 45/04	x	x			x				x
3472	2005	CA 45/04		x			x				
3529	2005	CA 45/04									
3684	2006	CA 45/04		x		x	x	x			x
3685	2006	CA 52/06				x	x				
3686	2006	CA 52/06									
3843	2007	CA 45/04					x				
3854	2007	CA 41/03		x							x
3855	2007	CA 41/03					x				x
3867	2007	CA 41/03					x				
3872	2007	CA 41/03				x	x				x
3998	2007	CA 41/03; 20/98				x	x				x
4014	2008	CA 41/03					x	x			x
4307	2009	CA 58/09	x		x	x					
4357	2009	CA 62/09				x	x	x	x	x	
4372	2010	CA 62/09	x		x	x	x	x			
4400	2010	CA 62/09				x	x	x			
4425	2010	CA 62/09				x	x	x	x	x	
4802	2012	CA 41/03; 20/98									x
4803	2012	CA 41/03; 20/98									x
4885	2012	CA 41/03				x	x	x			x
4887	2012	CA 41/03				x	x				x
4888	2012	CA 41/03				x	x				x
4889	2012	CA 20/98				x					x
5017	2013	CA 73/13	x			x					x
5296	2015	CA 74/13		x		x	x	x		x	x
5316	2015	CA 88/15		x		x	x	x			x
5497	2016	CA 91/16				x	x	x			x
5595	2016	CA 86/15	x			x	x				x
5633	2016	CA 95/16				x	x	x			x

Total	**Deliberation Characteristics**	Individual Preliminary Decisions	Collegiate Preliminary Decisions	Final Decisions Confirming Preliminary Decisions	Amicus Curiae Petitions	Senate Petitions	House of Repr. Petitions	Shifting Votes	"Pedido de Vista"	Pending Cases
73	**Number of Cases**	5	21	11	34	52	19	2	14	30
	%	6.8%	28.8%	15.1%	46.6%	71.2%	26.0%	2.7%	19.2%	41.1%

ANNEX 2 - BRAZILIAN SUPREME COURT DECISIONS ("*ADIs*") REVIEWING CONSTITUTIONAL AMENDMENTS

FILES: Number of the *ADI*; Plaintiffs; Defendants; A) Amendment being questioned; B) Subject being discussed; C) *Amici Curiae* petitions; D) Authorities petitions; E) Presence or absence of preliminary rulings (*"liminares"*); F) Final decisions; G) Presence or absence of *"pedidos de vista"* and dates; H) Presence or absence of shifting votes.

ADI 5633 – Associação Nacional dos Magistrados Brasileiros, Associação Nacional dos Magistrados da Justiça do Trabalho, Associação dos Juízes Federais vs. National Congress. **A**) Amendment being questioned: CA 95/2016 (articles 101 a 104, ADCT); **B)** Subject: Public spending limits ("*Teto dos Gastos*"), arguing violation of the separation of powers and that the participation of the Judiciary on the amendment process in this case should be mandatory; **C)** *Amici Curiae* petitions: União Nacional dos Juízes Federais do Brasil, Sindicato União dos Servidores Públicos do Judiciário do Estado de São Paulo e Defensoria Pública da União; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** No preliminary ruling (Justice Rosa Weber; art. 10, Act 9868/99). **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 5595 – Solicitor-General of the Republic vs. National Congress. **A)** Amendment being questioned: CA 86/2015 (articles 2º e 3º, CA 86/2015); **B)** Subject: Public Budget ("*Orçamento Impositivo"*), arguing the reduction of funding for health services; **C)** *Amici Curiae* Petitions: Associação Nacional do Ministério Público de Contas, Instituto de Direito Sanitário Aplicado, Central Única dos Trabalhadores, Instituto de Direito Sanitário Aplicado; **D)** Authorities Petitions: Senate; Attorney-General; **E)** Positive preliminar ruling (Individual - Justice Ricardo Lewandowski). **F)** No final decision (preliminary ruling still in effect); **G)** No "*Pedido de Vista"*. **H)** No shifting votes.

ADI 5497 – Partido Trabalhista Nacional – PTN vs. National Congress. **A)** Amendment being questioned: CA 91/2016 (article 1º, CA 91/2016); **B)** Subject: Distribution of TV and

Radio time in electoral campaigns ("*Janela Partidária*"). **C)** *Amici Curiae* Petitions: Partido da República – PR; Partido da Mulher Brasileira – PMB; Partido Republicano Progressista – PRP; Partido Progressista – PP; Partido Humanista da Solidariedade – PHS; **D)** Authorities Petitions: Senate; House of Representatives (only formal analysis); Attorney-General; Solicitor-General; **E)** No preliminary rulings (Dias Toffoli, art. 12, Act 9869/99), however there is a mention to the lack of plausibility of the request; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 5316 – Associação Nacional dos Magistrados Brasileiros, Associação Nacional dos Magistrados da Justiça do Trabalho, Associação dos Juízes Federal vs. National Congress. **A)** Amendments being questioned: CA 88/2015 (art. 2º, CA 88/2015 – art. 100, *ADCT*, Constitution). **B)** Subject: Requirement for a second Senate confirmation for judges who reach the age of 70 years old ("*PEC da Bengala*"). **C)** *Amici Curiae* Petitions: Associação Nacional de Desembargadores; **D)** Authorities Petitions: Senate; House of Representatives (only formal analysis); Attorney-General; Solicitor-General; **E)** Positive Preliminary ruling (Collegiate – Plenary); **F)** No final decision; **G)** No "*Pedido de Vista*"; **H)** No shifting votes.

ADI 5296 – President of the Republic (Dilma Rousseff) X National Congress. **A)** Amendment being questioned: CA 74/2013 (full text). **B)** Subject: Financial Autonomy of the Federal Public Defenders, arguing that Congress had invaded the President's competence to decide about the legal regime of public servants; **C)** *Amici Curiae* Petitions: Associação Nacional dos Defensores Públicos Federais, Defensoria Pública da União, União dos Advogados Públicos Federais do Brasil, Partido Popular Socialista – PPS, Sindicato Nacional dos Procuradores da Fazenda Nacional; Defensoria Pública do Distrito Federal, Associação Nacional dos Defensores Públicos, SOLIDARIEDADE, Associação Nacional dos Advogados da União, Estado de São Paulo, Defensoria Pública da União, Estado do Espírito Santo, Estado do Acre, Defensoria Pública do Estado do Espírito Santo, Estado do Amazonas, Estado de Roraima, Defensoria Pública do Estado de São Paulo; **D)** Authorities Petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** Negative preliminary ruling (Collegiate – Plenary); **F)** No final decision; **G)** *"Pedidos de Vista"*: Justice Edson Fachin (Requested: 08/10/2015; Returned: 13/10/2015; 5 days); Justice Dias Toffoli (Requested: 22/10/2015; Returned: 18/12/2015; 57 days); **H)** No shifting votes.

ADI 5017 – Associação Nacional Dos Procuradores Federais vs. National Congress. **A)** Amendment being questioned: CA 73/2013 (full text). **B)** Subject: Creation of new Federal Court of Appeals (*Tribunais Regionais* Federais). **C)** *Amici Curiae* Petitions: Conselho Federal da Ordem dos Advogados do Brasil, Associação Nacional dos Magistrados Brasileiros, Estado do Paraná, Associação dos Juízes Feder ais do Brasil, Estado de Minas Gerais, Associação Paranaense de Juízes Federais, Associação Nacional dos Procuradores da República, Associação Nacional dos Procuradores Municipais, Município de Salvador, OAB Minas Gerais, OAB Bahia, Confederação dos Trabalhadores no Serviço Público Federal e Federação dos Trabalhadores no Serviço Público Federal, Rafael Costa Monteiro; **D)** Authorities Petitions: Attorney-General; Solicitor-General; **E)** Positive preliminary ruling (Individual – Chief Justice Joaquim Barbosa); **F)** No final decisions; **G)** No "*Pedido de Vista*"; **H)** No shifting votes.

ADI 4889 – Partido Socialismo e Liberdade vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (full text). **B)** Subject: Reform of the Social Security System (vote-buying in Congress to approve the amendment). **C)** *Amicus Curiae* Petitions: Confederação dos Trabalhadores no Serviço Público Federal, Sindicato Nacional dos Servidores Federais da Educação Básica, Profissional e Tecnológica; **D)** Authorities Petitions: Attorney-General; Solicitor-General; **E)** No preliminary rulings; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4888 – Confederação Dos Servidores Públicos Do Brasil vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (articles 1º and 4º, CA 41/2003). **B)** Subject: Subject: Reform of the Social Security System (vote-buying in Congress to approve the amendment). **C)** *Amicus Curiae* Petitions: Sindicato Nacional dos Auditores-Fiscais da Receita Federal do Brasil, Sindicato Nacional dos Servidores Federais Autárquicos nos Entes de Formulação, Promoção e Fiscalização da Política da Moeda e do Crédito, Sindicato dos Agentes Fiscais de Rendas do Estado de São Paulo; **D)** Authorities Petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminar ruling; **F)** No final decision; ; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4887 – Associação Dos Delegados De Polícia Do Brasil vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (articles 1 and 4, CA 41/2003). **B)** Subject:

Reform of the Social Security System (vote-buying in Congress to approve the amendment); **C)** *Amicus Curiae* Petitions: Sindicato Nacional dos Auditores-Fiscais da Receita Federal do Brasil, Sindicato dos Auditores Fiscais da Receita Estadual do Rio de Janeiro, Sindicato Nacional dos Servidores Federais Autárquicos nos Entes de Formulação, Promoção e Fiscalização da Política da Moeda e do Crédito; **D)** Authorities Petitions: Senate; Attorney-General; **E)** No preliminar ruling; **F)** No final decision; ; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4885 – Associação Dos Magistrados Brasileiros, Associação Nacional Dos Magistrados Da Justiça Do Trabalho vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003) **B)** Subject: Reform of the Social Security System (vote-buying in Congress to approve the amendment); **C)** *Amicus Curiae* Petitions: Sindicato Nacional dos Auditores-Fiscais da Receita Federal do Brasil, Estado do Rio Grande do Sul; **D)** Authorities Petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** Negative preliminar ruling (Collegiate – Plenary); **F)** No final decision ; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4803 – Associação Dos Magistrados Brasileiros vs. National Congress. Joint processing (ADIs 3308, 3363, 4802, 4802). **A)** Amendment being questioned: CA 20/1998 and CA 41/2003 (article 1, CA 20/1998; §§ 2 e 3, article 1, CA 41/2003). **B)** Subject: Social Security System for Judges; **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4802 - Associação Dos Magistrados Brasileiros vs. National Congress. Joint processing (ADIs 3308, 3363, 4802, 4802). **A)** Amendment being questioned: CA 20/1998 and CA 41/2003 (article 1, CA 20/1998; §§ 2 e 3, article 1, CA 41/2003). **B)** Subject: Social Security System for Judges; **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4425 – Confederação Nacional Das Indústrias vs. National Congress. Joint processing (ADIs 4357, 4372, 4400 e 4425) **A)** Amendment being questioned: CA 62/2009 (articles 1, 2, 3, 4, and 6, CA 62/2009); **B)** Subject: Public Payment Orders ("*Precatórios*");

C) *Amicus Curiae* petitions: Estado do Pará, Conselho Federal da OAB; **D)** Authorities petitions: Senate; House of Representatives (only formal analysis); Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Final decision for the partial unconstitutionality of the amendment; **G)** "*Pedidos de Vista"*: Justice Luiz Fux (Required: 6/10/2011; Returned 08/02/2013; 491 days); Justice Luis Roberto Barroso (Required: 24/10/2013; Returned: 06/02/2014, 105 days); Justice Dias Toffoli (Required: 19/03/2014; Returned: 02/03/2015, 348 days); **H)** Shifting votes: Justices Luiz Fux, Luis Roberto Barroso, Dias Toffoli and Gilmar Mendes.

ADI 4400 – Associação Nacional Dos Magistrados Da Justiça Do Trabalho vs. National Congress. Joint processing (ADIs 4357, 4372, 4400 e 4425). **A)** Amendment being questioned: CA 62/2009 (article 100, § 9, 10, 12, and 15, Federal Constitution); **B)** Subject: Public Payment Orders ("*Precatórios*"); **C)** *Amicus Curiae* petitions; Estado do Pará; **D)** Authorities petitions: Senate, House of Representatives (only formal analysis), Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Final decision (extinct for formal reasons); **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4372 – Associação Nacional Dos Magistrados Estaduais vs. National Congress. Joint processing (ADIs 4357, 4372, 4400 e 4425). **A)** Amendment being questioned: CA 62/2009 (articles 100, §§ 2, 9, 10, and 12, Federal Constitution, and article 97, §§ 1, 2, 6, 7, 8, 9, and 16, *ADCT*; **B)** Subject: Public Payment Orders ("*Precatórios*"); **C)** *Amicus Curiae* petitions: Conselho Federal da OAB, Município de Belém, Estado do Pará; **D)** Authorities petitions: Senate; House of Representatives (only formal analysis); Attorney-General; **E)** Positive preliminary ruling (Individual – Justice Ayres Britto); **F)** Final decision (extinct for formal reasons); **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4357 – Associação Dos Magistrados Brasileiros vs. National Congress. Joint processing (ADIs 4357, 4372, 4400 e 4425). **A)** Amendment being questioned: CA 62/2009 (full text). **B)** Subject: Public Payment Orders ("*Precatórios"*); **C)** *Amicus Curiae* petitions: Sindicato dos Especialistas de Educação do Ensino Público Municipal, Frente Nacional de Prefeitos, Fórum de Professores das Instituições Federais de Ensino Superior, Estado do Pará, Associação Nacional para Defesa da Cidadania, Meio Ambiente e Democracia, Município de Porto Alegre; **D)** Authorities petitions: Senate; House of Representatives (only formal analysis); Attorney-General; Solicitor-General; **E)**

No preliminary ruling; **F)** Final decision for the partial unconstitutionality of the amendment; **G)** "*Pedidos de Vista"*: Justice Luiz Fux (Required: 6/10/2011; Returned 08/02/2013; 491 days); Justice Luis Roberto Barroso (Required: 24/10/2013; Returned: 06/02/2014, 105 days); Justice Dias Toffoli (Required: 19/03/2014; Returned: 02/03/2015, 348 days); **H)** Shifting votes: Justices Luiz Fux, Luis Roberto Barroso, Dias Toffoli and Gilmar Mendes.

ADI 4307 – Solicitor-General of the Republic vs. National Congress. **A)** Amendment being questioned: CA 58/2009 (article 3, I, CA 58/2009); **B)** Subject: Electoral Reform (principle of anteriority); **C)** *Amicus Curiae* petitions: Geraldo Sales Ferreira, Idenor Machado, Juarez de Oliveira, Jucemar Almeida Arnal, Laudir Antônio Munaretto, Valter Ribeiro Hora (deputy councilmen), Partido Humanista da Solidariedade – PHS, Mario Heringer (congressman), Associação Brasileira das Câmaras Municipais, Diretório Municipal do DEM de Santa Cruz do Sul – RS, Admilson Rossi (deputy councilman); **D)** Authorities petitions: Attorney-General; **E)** Positive preliminar ruling (Individual – Justice Carmen Lúcia; confirmed by the plenary); **F)** Final decision (confirmed the preliminary ruling); **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 4014 – Associação Nacional Dos Magistrados Estaduais vs. National Congress. Joint Processing (ADIs 4014, 3855, 3854, 3872). **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003); **B)** Subject: Judges' subsidies; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives (only formal analysis); Attorney-General; National Council of Justice; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3998 – Associação Nacional Dos Juízes Federais vs. National Congress. **A)** Amendment being questioned: CA 20/1998 and CA 41/2003; **B)** Subject: Judges' Social Security Sistem ("*Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Associação Paulista de Magistrados, Associação dos Magistrados Mineiros, Associação dos Juízes do Rio Grande do Sul, Associação Nacional dos Magistrados Estaduais; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3872 – Partido Trabalhista Brasileiro – PTB vs. National Congress. Joint processing (ADIs 3855, 3854, 3872). **A)** Amendment being questioned: CA 41/2003 (article 1, C 41/2003); **B)** Subject: Public Servants' subsidies ("*Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Sindicato dos Servidores da Fazenda do Estado da Bahia, Sindicato dos Fiscais de Rendas do Estado do Rio de Janeiro, Sindicato dos Auditores Fiscais da Fazenda Estadual do Estado do Piauí, Sindicato dos Fiscais de Tributos Estaduais de Mato Grosso, Sindicato dos Agentes Fiscais de Rendas do Estado de São Paulo, Sindicato do Fisco do Estado de Alagoas; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3867 – Partido Democrático Trabalhista – PDT vs. National Congress. **A)** Amendment being questioned: CA 19/1998 and CA 41/2003 (articles 3 and 5, CA 19/1998, articles 8 and 9, CA 41/2003; **B)** Subject: Social Security Reform (*"Reforma da Previdência"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3855 – Associação Dos Delegados De Polícia Do Brasil vs. National Congress. Joint processing (ADIs 4014, 3855, 3854, 3872). **A)** Amendment being questioned: CA 41/2003 (art. 1º); **B)** Subject: Public Servants' Salary Limits; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3854 – Associação Dos Magistrados Brasileiros vs. National Congress. Joint processing (ADIs 4014, 3855, 3854, 3872). **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003); **B)** Subject: Judges' subsidies ("*Reforma da Previdência"*); **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** Positive preliminary ruling (Collegiate – plenary); **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3843 – Associação Nacional Dos Magistrados Estaduais vs. National Congress. **A)** Amendment being questioned: CA 45/2004 (article 1, CA 45/2004); **B)** Subject: Reform of Judiciary; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-

General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3686 – Associação Nacional Dos Membros Do Ministério Público vs. National Congress. **A)** Amendment being questioned: CA 52/2006 (articles 1 and 2, CA 52/2006); **B)** Subject: Party Alliance Systems ("*Coligações Partidárias*"); **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3685 – Conselho Federal Da Ordem Dos Advogados Do Brasil vs. National Congress. **A)** Amendment being questioned: CA 52/2006 (article 2, CA 52/2006); **B)** Subject: Party Alliance Systems ("*Coligações Partidárias*"); **C)** *Amicus Curiae* petitions: Partido Social Liberal – PSL (participation denied), Assembleia Legislativa do Estado do Rio de Janeiro, Partido da Frente Liberal – PFL, Partido do Movimento Democrático Brasileiro – PMDB, Partido Democrático Trabalhista – PDT, Partido Popular Socialista – PPS; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Positive ffinal decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3684 – Solicitor-General of the Republic vs. National Congress. **A)** Amendment being questioned: CA 45/2004 (article 114, I and IV, Federal Constitution); **B)** Subject: competence of the Labour Justice ("*Reforma do Judiciário*"); **C)** *Amicus Curiae* petitions: Associação Nacional dos Procuradores do Trabalho, Associação Nacional dos Magistrados da Justiça do Trabalho.; **D)** Authorities petitions: Senate; House of Representatives (only formal analysis); Attorney-General; **E)** Positive preliminary ruling (Collegiate – plenary); **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3472 – Associação Nacional Dos Membros Do Ministério Público vs. National Congress. **A)** Amendment being questioned: CA 45/2004 (art. 5, § 1, CA 45/2004); **B)** Subject: Attributions of the National Council of Justice ("*Reforma do Judiciário*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Positive preliminary ruling (Collegiate – plenary); **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3529 – Associação Nacional Dos Magistrados Estaduais vs. National Congress. **A)** Amendment being questioned: CA 45/2004 (article 1, CA 45/2004); **B)** Subject: Competence of the Labour Justice ("*Reforma do Judiciário*"); **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3395 – Associação Dos Juízes Federais Do Brasil vs. National Congress. **A)** Amendment being questioned: CA 45/2004 (article 114, I, Federal Constitution); **B)** Subject: Competence of the Labour Justice; **C)** *Amicus Curiae* petitions: Associação dos Magistrados da Justiça do Trabalho, Associação Nacional dos Procuradores do Trabalho; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Preliminary ruling (Individual – Justice Nelson Jobim (27/01/2005); confirmed by the plenary (05/04/2006)); **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3367 – Associação Dos Magistrados Brasileiros vs. National Congress. **A)** Amendment being questioned: CA 42/2004 (articles 1 and 2, CA 42/2004); **B)** Subject: Creation of the National Council of Justice; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3363 – Associação Nacional Dos Magistrados Da Justiça Do Trabalho vs. National Congress. Joint processing (ADIs 3308, 3363, 4802, 4803). **A)** Amendment being questioned: CA 20/1998 and CA 21/2003(article 1, CA 20/1998, article 2, §§ 2 and 3, CA 41/2003). **B)** Subject: Judges' Social Security System ("*Reforma da Previdência*"); **C)** *Amicus Curiae* petitions: Associação do Ministério Público do Distrito Federal e Territórios; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3308 – Associação Nacional Dos Magistrados Da Justiça Do Trabalho vs. National Congress. Joint processing (ADIs 3308, 3363, 4802, 4803). **A)** Amendment being questioned: CA 20/1998 and CA 21/2003(article 1, CA 20/1998, article 2, §§ 2 and 3, CA 41/2003); **B)** Subject: Judges' Social Security System ("*Reforma da Previdência*"); **C)** *Amicus Curiae* petitions: Associação o Ministério Público do Distrito Federal e Territórios,

Associação Nacional dos Membros do Ministério Público; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3297 – Associação Dos Magistrados Brasileiros vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003); **B)** Subject: Judges' Social Security Systems and Subsidies; **C)** *Amicus Curiae* petitions: Sindicato dos Agentes Fiscais de Rendas do Estado de São Paulo; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3291 – Associação Nacional Dos Magistrados Da Justiça Do Trabalho vs. National Congress. Joint processing (ADIs 3291 and 3104); **A)** Amendment being questioned: CA 41/2003 (articles 2 and 10, CA 41/2003); **B)** Subject: Judges' Social Security System (*"Reforma da Previdência"*); **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3184 – Associação Dos Magistrados Brasileiros vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003); **B)** Subject: Social Security System ("*Reforma da Previdência*"); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Federação Nacional dos Auditores Fiscais da Previdência Social, Sindicato dos Trabalhos do Poder Judiciário e do Ministério Público da União no Distrito Federal, Federal Nacional dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Auditores Fiscais da Receita Federal.; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** "*Pedido de Vista":* Justice Ayres Britto (Requested: 21/09/2011; Returned: 18/12/2018 – Justice Carmen Lúcia; 2645 days); **H)** No shifting votes.

ADI 3172 – Associação Nacional Dos Magistrados Da Justiça Do Trabalho vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003); **B)** Subject: Judges' Social Security System ("*Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior,

Federação Nacional dos Auditores Fiscais da Previdência Social, Sindicato dos Trabalhos do Poder Judiciário e do Ministério Público da União no Distrito Federal, Federal Nacional dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Auditores Fiscais da Receita Federal; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3143 – Confederação Dos Servidores Públicos Do Brasil vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 1, CA 41/2003); **B)** Subject: Public Servants' Social Security System (*"Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Federação Nacional dos Auditores Fiscais da Previdência Social, Sindicato dos Trabalhos do Poder Judiciário e do Ministério Público da União no Distrito Federal, Federal Nacional dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Auditores Fiscais da Receita Federal, Sindicato Nacional dos Procuradores da Previdência Social (participation denied); **D)** Authorities petitions; Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** "*Pedido de Vista"*: Justice Ayres Britto (Requested: 21/09/2011; Returned: 18/12/2018 – Justice Carmen Lúcia; 2645 days); **H)** No shifting votes.

ADI 3138 – Associação Dos Magistrados Brasileiros vs. National Congress. **A)** Amendment being questioned: Ca 41/2003 (article 1, CA 41/2003); **B)** Subject: Social Security Contribution ("*Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Negative preliminary ruling (collegiate – plenary); **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3133- Partido De Reedificação Da Ordem Nacional – PRONA vs. National Congress. **A)** Amendment being questioned CA 41/2003 (articles 1 and, 4, *caput*, I and II, CA 41/2003) **B)** Subject: Social Security System (*"Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Federação Nacional dos Auditores Fiscais da Previdência Social, Sindicato dos Trabalhos do Poder Judiciário e do Ministério Público da União no Distrito Federal, Federação Nacional dos Trabalhadores do Judiciário Federal e Ministério Público da

União, Sindicato Nacional dos Auditores Fiscais da Receita Federal; **D)** Authorities petitions: Attorney-General; Prosecutor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** "*Pedido de Vista"*: Justice Ayres Britto (Requested: 21/09/2011; Returned: 18/12/2018 – Justice Carmen Lúcia; 2645 days); **H)** No shifting votes.

ADI 3128 – Associação Nacional Dos Procuradores da República vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 4, CA 41/2003); **B)** Subject: Social Security System ("*Reforma da Previdência*"); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Sindicato dos Trabalhos do Poder Judiciário e do Ministério Público da União no Distrito Federal, Federação Nacional dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Auditores Fiscais da Receita Federal.; **D)** Authorities petitions: Senate; Attorney-General; **E)** No preliminary ruling; **F)** No final decision; **G)**"*Pedido de Vista":* Justice Cesar Peluzo (Requested: 23/06/2004; Returned: 17/08/2004; 55 days); **H)** No shifting votes.

ADI 3105 – Associação Nacional Dos Membros Do Ministério Público vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (article 4, CA 41/2003); **B)** Subject: Social Security System (*"Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Associação Nacional dos Auditores Fiscais da Previdência Social, Associação Nacional dos Advogados da União, Sindicato dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Federação Nacional dos Auditores Fiscais da Previdência Social, Sindicato dos Policiais Civis de Londrina e Região, Associação Nacional dos Advogados da União e dos Advogados das Entidades Federais, ASSINPM, CBOPPM-PB, COPM-PB, Associação dos Procuradores Federais no Estado do Rio de Janeiro; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Partially positive final decision; **G)**"*Pedido de Vista":* Justice Cesar Peluzo (Requested: 23/06/2004; Returned: 17/08/2004; 55 days); **H)** No shifting votes.

ADI 3104 – Associação Nacional Dos Membros Do Ministério Público vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (articles 2 and 10, CA 41/2003); **B)** Subject: Social Security System ("*Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Associação Nacional dos Auditores Fiscais da Previdência Social, Associação Nacional

dos Advogados da União, Sindicato dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Federação Nacional dos Auditores Fiscais da Previdência Social; **D)** No Authorities petitions: Senate; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 3099 – Partido Democrático Trabalhista – PDT vs. National Congress. **A)** Amendment being questioned: CA 41/2003 (articles 1 and 4, CA 41/2003); **B)** Subject: Social Security System ("*Reforma da Previdência*"); **C)** *Amicus Curiae* petitions: Associação Nacional dos Auditores Fiscais da Previdência Social, SINDIPÚBLICO/ES, SINDIUPES, SINDIJUDICIÁRIO/ES, SINDISAÚDE/ES, ASSINPOL/ES, Sindicato Nacional dos Técnicos da Receita Federal, Associação Nacional dos Auditores Fiscais da Previdência Social, Associação Nacional dos Advogados da União, Sindicato dos Trabalhadores do Judiciário Federal e Ministério Público da União, Sindicato Nacional dos Docentes das Instituições de Ensino Superior, Federação Nacional dos Auditores Fiscais da Previdência Social.; **D)** Authorities petitions: Senate; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2883 – Partido Verde – PV vs. National Congress. **A)** Amendment being questioned: CA 20/1998 (article 1, CA 20/1998); **B)** Subject: Social Security System (*"Reforma da Previdência"*); **C)** No *Amicus Curiae* petitions: ; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2760 – Partido Social Liberal – PSL vs. National Congress. **A)** Amendment being questioned: CA 20/1998 (article 1, CA 20/1998); **B)** Subject: Social Security System ("*Reforma da Previdência*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2732 – Confederação Nacional Do Comércio vs. National Congress. **A)** Amendment being questioned: CA 29/2000 (article 3, CA 2000); **B)** Subject: Progressive Taxation ("*IPTU Progressivo"*); **C)** *Amicus Curiae* petitions: Município de São Paulo; **D)**

Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2673 – Partido Socialista Brasileiro – PSB vs. National Congress. **A)** Amendment being questioned: CA 37/2002 (article 4); **B)** Subject: Creation of a New Tax ("*CPMF"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2666 – Partido Social Liberal – PSL vs. National Congress. **A)** Amendment being questioned: CA 37/2002 (article 3, CA 37/02); **B)** Subject: Creation of a New Tax ("*CPMF"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2395 –Mesa Da Assembleia Legislativa Do Estado Do Rio Grande Do Sul vs. National Congress. **A)** Amendment being questioned: CA 15/1996 (article 18, § 4, Federal Constitution; **B)** Subject: Creation, Merger and Dismemberment of Municipalities; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2362 – Conselho Federal Da Ordem Dos Advogados Do Brasil vs. National Congress. Joint Processing (ADIS 2362 and 2356). **A)** Amendment being questioned: CA 30/2000 (article 2, CA 30/2000; **B)** Subject: Public Payment Orders ("*Precatórios"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Solicitor-General; **E)** Positive preliminary ruling (Collegiate – plenary); **F)** No final decision; **G)** "*Pedido de Vista"*: Justice Ellen Gracie (Requested: 18/02/2002; Returned: 29/07/2004; 892 days); Justice Cezar Peluso (Requested: 02/09/2004; Returned: 03/07/2009; 1765 days).; **H)** No shifting votes.

ADI 2356 – Confederação Nacional Da Indústria vs. National Congress. **A)** Amendment being questioned: CA 30/2000 (article 2, CA 30/2000); **B)** Subject: Public Payment Orders ("*Precatórios*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; **E)**

Positive preliminary ruling (Collegiate – Plenary); **F)** No final decision; **G)** "*Pedido de Vista"*: Justice Ellen Gracie (Requested: 18/02/2002; Returned: 29/07/2004; 892 days); Justice Cezar Peluso (Requested: 02/09/2004; Returned: 03/07/2009; 1765 days); **H)** No shifting votes.

ADI 2242 – Mesa Da Assembleia Legislativa Do Estado Do Paraná vs. National Congress. **A)** Amendment being questioned: CA 20/1998 (article 93, VI, Federal Constitution); **B)** Subject: Public Servants' Social Security System ("*Reforma da Previdência"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2159 – Partido Social Liberal - PSL vs. National Congress. **A)** Amendment being questioned: CA 19/1998 (article 7, CA 19/1998); **B)** Subject: Justices' subsidies ("*Reforma Administrativa"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2135 – Partido Dos Trabalhadores – PT, Partido Democrático Trabalhista – PDT, Partido Comunista Do Brasil – PC DO B, Partido Socialista Do Brasil – PSB vs. National Congress. **A)** Amendment being questioned: CA 19/1998; **B)** Subject: Public Servants' Subsidies ("*Reforma Administrativa*"); **C)** *Amicus Curiae* petitions: Sindicato dos Trabalhadores em Saúde Preventiva e Combate às Endemias do Estado do Rio de Janeiro, Conselho Federal de Farmácia, Conselho Regional de Corretores de Imóveis do Rio de Janeiro, Conselho Federal de Engenharia e Agronomia, Federal Nacional dos Trabalhadores do Judiciário Federal e do Ministério Público da União, Federal Nacional dos Trabalhadores nas Autarquias de Fiscalização do Exercício Profissional e nas Entidades Coligadas e Afins (participation denied), Sindicato Nacional dos Trabalhadores em Fundações Públicas Federais em Geografia e Estatística (participation denied), Conselho Federal de Administração (participation denied), Sindicato dos Trabalhadores do Serviço Público Federal no Estado do Rio de Janeiro, Associação Nacional dos Beneficiados pela Lei n.º 8.878/94 (participation denied); **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Partially positive preliminary ruling (Collegiate – Plenary); **F)** No final decision; **G)** "*Pedido de Vista"*: Justice Ellen

Gracie (Requested: 08/11/2001; Returned: 27/06/2002; 231 days); Justice Nelson Jobim (Requested: 27/06/2002; Returned: 23/03/2006; 1365 days), Justice Ricardo Lewandowski (Requested: 23/03/2006, Returned: 18/04/2006; 26 days); Justice Cezar Peluso (Requested: 22/06/2006; Returned: 26/06/2007; 369 days); **H)** No shifting votes.

ADI 2096 – Confederação Nacional Dos Trabalhadores Da Indústria vs. National Congress. **A)** Amendment being questioned: CA 20/1998; **B)** Subject: Minor's Labour Restrictions; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2047 – Partido Comunista Do Brasil – PC DO B vs. National Congress. **A)** Amendment being questioned: CA 19/1998 (full text); **B)** Subject: Public Servants' tenure; **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2031 – Partido Dos Trabalhadores – PT vs. National Congress. Joint processing (ADIs 2031, 2027). **A)** Amendment being questioned: CA 21/1998 (full text); **B)** Subject: Extension of Tax Validity ("*CPMF"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Positive preliminary ruling (Collegiate – Plenary); **F)** Positive final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2027 – Confederação Nacional Das Profissões Liberais vs. National Congress. Joint processing (ADIs 2031, 2027). **A)** Amendment being questioned: CA 21/1998 (full text); **B)** Subject: Extension of Tax Validity ("*CPMF"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Positive preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 2024 – Governor of the State of Mato Grosso do Sul vs. National Congress. **A)** Amendment being questioned: CA 20/1998 (article 40, § 3, Federal Constitution); **B)** Subject: Public Servants' Social Security System ("*Reforma da Previdência"*); **C)** *Amicus Curiae* petitions: Sindicato Nacional dos Docentes das Instituições de Ensino Superior,

Federação Nacional dos Trabalhadores do Poder Judiciário e do Ministério Público da União; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Negative preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 1946 – Partido Socialista Brasileiro – PSB vs. National Congress. **A)** Amendment being questioned: CA 20/1998 (article 14, CA 20/1998); **B)** Subject: SociaI Security System ("*Reforma da Previdência"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; Minister of Social Security and Aid; **E)** Positive preliminary ruling; **F)** Partially positive final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 1805 – Partido Democrático Trabalhista – PDT, Partido Dos Trabalhadores – PT, Partido Comunista Do Brasil – PC DO B, Partido Liberal – PL vs. National Congress. **A)** Amendment being questioned: CA 16/997 (article 1, CA 16/1997); **B)** Subject: Reelection for the Executive offices; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** Negative preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 1749 – Partido Dos Trabalhadores – PT, Partido Democrático Trabalhista – PDT, Partido Comunista Do Brasil – PC DO B, Partido Do Movimento Democrático Brasileiro – PMDB, Partido Verde – PV vs. National Congress. **A)** Amendment being questioned: CA 14/1996 (full text); **B)** Subject: Allocation of Municipalities' budget; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** Negative preliminary ruling (Collegiate – Plenary); **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 1501 – Confederação Nacional De Dirigentes Lojistas vs. National Congress. Joint processing (ADIs 1501 and 1497). **A)** Amendment being questioned: CA 12/1996 (full text); **B)** Subject: Creation of a New Tax ("*CPMF"*); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** Negative preliminary ruling; **F)** Negative final decision; **G)** "*Pedido de Vista"*: Justice Carlos Velloso (Requested: 18/09/1996; Returned: 09/10/1996; 21 days); **H)** No shifting votes.

ADI 1497 – Confederação Nacional Dos Trabalhadores Da Saúde vs. National Congress. Joint processing (ADIs 1501 and 1497). **A)** Amendment being questioned: CA 12/1996 (full text); **B)** Subject: Creation of a New Tax ("*CPMF*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** Negative preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista*": Justice Carlos Velloso (Requested: 18/09/1996; Returned: 09/10/1996; 21 days); **H)** No shifting votes.

ADI 1420 – Partido Liberal – PL vs. National Congress. **A)** Amendment being questioned: CA 10/1996 (articles 1 and 2, CA 10/1996; **B)** Subject: Creation of the Fiscal Stabilization Fund ("*Fundo da Estabilização Fiscal*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; **E)** Negative preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista*"; **H)** No shifting votes.

ADI 949 – Conselho Federal Da Ordem Dos Advogados vs. National Congress. **A)** Amendment being questioned: Ca 3/1993 (article 2, CA 3/1993); **B)** Subject: Creation of a New Tax ("*IPMF*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** Negative preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista*"; **H)** No shifting votes.

ADI 939 – Confederação Nacional Dos Trabalhados No Comércio vs. National Congress. **A)** Amendment being questioned: CA 3/1993 (full text); **B)** Subject: Creation of a New Tax ("*IPMF*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; House of Representatives; Attorney-General; Solicitor-General; **E)** Positive preliminary ruling; **F)** Positive final decision; **G)** No "*Pedido de Vista*"; **H)** No shifting votes.

ADI 926 – Governor of the State of Paraná, Governor of the State of Santa Catarina, Governor of the State of Mato Grosso Do Sul, Governor of the State of Mato Grosso vs. National Congress. **A)** Amendment being questioned: CA 3/1993 (article 2, § 2, CA 3/1993); **B)** Subject: Creation of a New Tax ("*IPMF*"); **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** Positive preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista*"; **H)** No shifting votes.

ADI 913 – Associação Dos Magistrados Brasileiros vs. National Congress. **A)** Amendment being questioned: CA 3/1993 (article 1, CA 3/1992); **B)** Subject: Creation of New Judicial Procedures ("*Ação Declaratória de Constitucionalidade*"); **C)** No *Amicus Curiae* petitions; **D)** No authorities petitions; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 833 – Governor of the State of Paraná vs. National Congress. **A)** Amendment being questioned: CA 2/1992 (full text); **B)** Subject: Referendum to define the system of government; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Attorney-General; Solicitor-General; **E)** Negative preliminary ruling; **F)** Negative final decision; **G)** "*Pedido de Vista"*: Justice Marco Aurélio (Requested: 17/02/1993; Returned: 04/03/1993; 15 days); **H)** No shifting votes.

ADI 830 – Partido Socialista Brasileiro - PSB, Partido Democrático Trabalhista – PDT vs. National Congress. **A)** Amendment being questioned: Ca 2/1992 (full text); **B)** Subject: Referendum to define the system of government; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: House of Representatives; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** No final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ADI 829 – Partido De Reedificação Da Ordem Nacional – PRONA vs. National Congress. **A)** Amendment being questioned: CA 2/1992 (full text); **B)** Subject: Referendum to define the system of government; **C)** No *Amicus Curiae* petitions; **D)** Authorities petitions: Senate; Attorney-General; Solicitor-General; **E)** No preliminary ruling; **F)** Negative final decision; **G)** No "*Pedido de Vista"*; **H)** No shifting votes.

ANNEX 3 - PERUVIAN CONSTITUTIONAL COURT DECISIONS (*"AIs"*)
REVIEWING CONSTITUTIONAL AMENDMENTS

FILES: Number of the *AI*; Plaintiffs; Defendants; A) Dates of filing and final decision; B) Amendment being questioned; C) Subject; D) Congress' Answer to the Complaint; E) Presence or absence of oral hearings; F) Final decisions.

AI 00050-2004 – Colegio del Abogados del Cusco vs. National Congress. Joint processing (*AI's* 00050-2004; 00051-2004; 00004-2005; 00007-2005; 00009-2005) **A)** Filed: 06/12/2004; Final Decision: 06/06/2005. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 28389* (articles 1, 2, and 3, *LRC* Nº 28389). **C)** Subject: Social Security System; **D)** National Congress participation; **E)** Oral Hearings (04/05/2005); **F)** Amendment ruled partially unconstitutional (unanimous).

AI 00051-2004 – Colegio del Abogados del Callao vs. National Congress. Joint processing (*AI's* 00050-2004; 00051-2004; 00004-2005; 00007-2005; 00009-2005) **A)** Filed: 07/12/2004; Final Decision: 06/06/2005. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 28389* (article 3, *LRC* Nº 28389). **C)** Subject: Social Security System; **D)**

National Congress participation; **E)** Oral Hearings (04/05/2005); **F)** Amendment ruled partially unconstitutional (unanimous).

AI 00004-2005 – 5.000 Peruvian Citizens (Juan Figueroa and others) vs. National Congress. Joint processing (*AI's* 00050-2004; 00051-2004; 00004-2005; 00007-2005; 00009-2005) **A)** Filed: 15/02/2005; Final Decision: 06/06/2005. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 28389* (article 3, *LRC* Nº 28389). **C)** Subject: Social Security System; **D)** National Congress participation; **E)** Oral Hearings (04/05/2005); **F)** Amendment ruled partially unconstitutional (unanimous).

AI 00007-2005 – 6.744 Peruvian Citizens (Raul Vizcardo Otazo and others) vs. National Congress. Joint processing (*AI's* 00050-2004; 00051-2004; 00004-2005; 00007-2005; 00009-2005) **A)** Filed: 03/03/2005; Final Decision: 06/06/2005. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 28389* (article 3, *LRC* Nº 28389). **C)** Subject: Social Security System; **D)** National Congress participation; **E)** Oral Hearings (04/05/2005); **F)** Amendment ruled partially unconstitutional (unanimous).

AI 00009-2005 – Colegio de Abogados del Cusco vs. National Congress. Joint processing (*AI's* 00050-2004; 00051-2004; 00004-2005; 00007-2005; 00009-2005) **A)** Filed: 09/03/2005; Final Decision: 06/06/2005. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 28389* (article 3, *LRC* Nº 28389). **C)** Subject: Social Security System; **D)** National Congress participation; **E)** Oral Hearings (04/05/2005); **F)** Amendment ruled partially unconstitutional (unanimous).

AI 00029-2005 – Gobierno Regional de Loreto (Robinson Riyadeneyra Reatequi) vs. National Congress. **A)** Filed: 02/11/2005; Final Decision: 11/01/2006. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 28607* (full text). **C)** Subject: Electoral Rules (*"Incompatibilidad Electoral"*); **D)** No Congress manifestation; **E)** No Oral Hearings; **F)** Ruled inhibited (unanimous).

AI 00010-2017 – Colegio de Abogados de Piura vs. The President of Peru. **A)** Filed: 07/08/2017; Final Decision: 23/01/2018. **B)** Amendment being questioned: *Proyecto de Ley de Reforma Constitucional N.º 1720/2017* (full text). **C)** Subject: National Judiciary Council;

D) No Congress manifestation; **F)** No Oral Hearings; **G)** Ruling: Impossibility of judicial review of amendment proposals (unanimous).

AI 00008-2018 – 5.323 Peruvian Citizens (Jesus Galindo Alvizuri and others) vs. National Congress. **A)** Filed: 12/04/2018; Final Decision: 05/10/2018. **B)** Amendment being questioned: *Ley de Reforma Constitucional N.º 30305* (full text). **C)** Subject: Electoral Rules – Mayors' Re-election; **D)** Congress manifestation; **E)** Oral Hearings (24/08/2018); **F)** Amended ruled constitutional (4 separate opinions).

ANNEX 4 - BRAZILIAN JUSTICES APPOINTED BY EACH PRESIDENT

(Supreme Court's Composition since 1988)

Justice	Years in Court	Appointed by the President
Moreira Alves	1975-2003	Ernesto Geisel -Military
Neri da Silveira	1981-2002	João Figueiredo – Military
Aldir Passarinho	1982-1991	João Figueiredo – Military
Sidney Sanches	1984-2003	João Figueiredo – Military
Octavio Gallotti	1984-2000	João Figueiredo -Military
Carlos Madeira	1985-1990	João Figueiredo – Military
Célio Borja	1986-1992	José Sarney
Paulo Brossard	1989-1994	José Sarney
Sepúlveda Pertence	1989-2007	José Sarney
Celso de Mello	1989-now	José Sarney
Marco Aurélio	1990-now	Fernando Collor
Ilmar Galvão	1991-2003	Fernando Collor
Francisco Rezek	1992-1997	Fernando Collor
Maurício Côrrea	1994-2004	Itamar Franco
Nelson Jobim	1997-2006	Fernando Henrique Cardoso (FHC)
Ellen Gracie	2000-2011	Fernando Henrique Cardoso (FHC)
Gilmar Mendes	2002-now	Fernando Henrique Cardoso (FHC)
Cezar Peluso	2003-2012	Luis Inácio Lula da Silva (Lula)

Ayres Britto	2003-2012	Luis Inácio Lula da Silva (Lula)
Joaquim Barbosa	2003-2014	Luis Inácio Lula da Silva (Lula)
Eros Grau	2004-2010	Luis Inácio Lula da Silva (Lula)
Ricardo Lewandowski	2006-now	Luis Inácio Lula da Silva (Lula)
Cármen Lúcia	2006-now	Luis Inácio Lula da Silva (Lula)
Menezes Direito	2007-2009	Luis Inácio Lula da Silva (Lula)
Dias Toffoli	2009-now	Luis Inácio Lula da Silva (Lula)
Luiz Fux	2011-now	Dilma Rousseff
Rosa Weber	2011-now	Dilma Rousseff
Teori Zavascki	2012-now	Dilma Rousseff
Roberto Barroso	2013-now	Dilma Rousseff
Edson Fachin	2015-now	Dilma Rousseff
Alexandre de Moraes	2017-now	Michel Temer

ANNEX 5 - ANNEX 5 – CONSTITUTIONAL AMENDMENT PROCEDURES AND COURT'S INSTITUTIONAL INFORMATION

(Argentina, Brazil, Colombia, And Peru)

FILES - Country: A) Amendment Procedure (Constitutional Provision); B) Number of Justices; C) Justice's Appointment Procedure; D) Justice's Mandate; E) Competence for judicial review.

Argentina: A) Congress (2/3 quorum) must declare the need for a reform. A Convention then takes place in order to change the Constitution (Article 30, Constitution of 1853); **B)** 5 justices (since 2006); **C)** Justice appointed by the President and confirmed by the Senate (2/3 quorum); **D)** Life Tenure (retirement: 75 years old, with the opportunity to keep the role for 5 years depending on the President and Senate confirmation); **E)** Concrete judicial review.

Brazil: A) Congress (2/3 quorum each house, in two turns). Constitutional amendments may be proposed by 1/3 of the House of Representatives or the Senate; the President of the Republic; or more than half of the State Legislative (by simple majority in each State) (Article 60, Constitution of 1988). **B)** 11 justices; **C)** Justice appointed by the President and confirmed by the Senate (absolute majority); **D)** Life Tenure (retirement: 75 years old); **E)** Concrete and abstract judicial review.

Colombia: A) Congress (first round, simple majority; second round, absolute majority) plus possibility of new Constituent Assembly. Constitutional amendments may be proposed by 5% of the electorate or 35% of the congressmen (Articles 155 and 375, Constitution of 1991). **B)** 9 justices; **C)** Justices appointed by the President, the Supreme Court, and the Council of State, in ternary lists; **D)** 8 years mandate, without re-election; **E)** Concrete and abstract judicial review.

Peru: A) Congress (absolute majority) plus ratification by popular referendum or two thirds of Congress in two successive ordinary legislatures (Article 206, Constitution of); **B)** 7 justices; **C)** Justice appointed by Congress (2/3 quorum); **D)** 5 years, without immediate re-election; **E)** Concrete an

ANNEX 6 – COLOMBIAN COURT DECISIONS IN ABSTRACT REVIEW REVIEWING CONSTITUTIONAL AMENDMENTS

FILES: Number given to the case; Plaintiffs; Defendants; A) Amendment being questioned; B) Subject; C) Interventions (including *amicus curiae*); D) Solicitor-General position; E) Final ruling; F) Date of final ruling.

C-027-93 – Orlando Fals Borda and Adalberto Carvajal Salcedo vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo*") 001/1996 (full text); B) Subject: Electoral Reform (Composition and Competence of State Assemblies); C) Interventions: Ministry of Interior; 1 citizen; D) Solicitor-General position: for the constitutionality; E) Ruled constitutional (unanimous); F) April 27, 1997.

C-387-97 – Manuel Barreto Soler, Carlos Rodríguez Mejía, and Gustavo Gallón Giraldo vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo*") 002/1995 (full text); B) Subject: Competence of the Military Justice; C) Interventions:

Ministry of Defence; D) Solicitor-General position: for the constitutionality; E) Ruled constitutional (non-unanimous); F) August 19, 1997.

C-1200-03 – Antonio José Cancino Moreno, David Teleki Ayala and other 17 citizens vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 003/2002 (articles 4 and 5); B) Subject: Extraordinary Presidential Powers; C) Interventions: Ministry of Interior and Justice; *Universidad Santo Tomás*; Attorney-General; D) Solicitor-General position: for the constitutionality; E) Ruled for the inhibition of the case (non-unanimous); F) December 9, 2003.

C-208-05 – Paula Cadavid Londoño vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2003 (article 13, itens 3 and 4); B) Subject: Electoral Reform ("*voto en lista*"); C) Interventions: Ministry of Interior and Justice; National Electoral Council; *Academia Colombiana de Jurisprudencia*; *Universidad del Rosario*; D) Solicitor-General position: for the constitutionality; E) Ruled constitutional (non-unanimous); F) March 10, 2005.

C-1040-05 – Blanca Linday Enciso vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 002/2004 (full text); B) Subject: Presidential Re-election; C) Interventions: President of the Republic; National Congress; Ministry of Interior and Justice; *Academia Colombiana de Jurisprudencia*; *Pontificia Universidad Javeriana*; *Universidad Antioquia*; *Universidad del Norte*; Senator Hernán Andrade Serrano; Governor of Valle del Cauca; *Universidad Popular del César*; 6 citizens; *Universidad Sergio Arboleda*; D) Solicitor-General position: for the unconstitutionality; E) Ruled partially unconstitutional (non-unanimous); F) October 19, 2005.

C-1041-05 – Wilson Afonso Borja Díaz vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 002/2004 (full text); B) Subject: Presidential Re-election; C) Interventions: Ministry of Interior and Justice; National Congress; Senator Hernán Andrade Serrano; 9 citizens; *Universidad Sergio Arboleda*; D) Solicitor-General position: for the unconstitutionality; E) Ruled partially unconstitutional (non-unanimous); F) October 19, 2005.

C-1053-05 – Jairo Bautista vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 002/2004 (full text); B) Subject: Presidential Re-election; C) Interventions: Ministry of Interior and Justice; National Congress; 3 citizens; Governor of Valle del Cauca; D) Solicitor-General position: for the unconstitutionality; E) Ruled constitutional (non-unanimous); F) October 19, 2005.

C-178-07 – Elson Rafael Rodrigo Rodríguez Beltrán vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2005 (articles 1 and 2); B) Subject: Social Security Reform; C) Interventions: Ministry of Finance; Ministry of Social Protection D) Solicitor-General position: for the constitutionality; E) Ruled constitutional (non-unanimous); F) March 14, 2007.

C-588-09 – Mauricio Bedoya Vidal vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2008 (article 1); B) Subject: Administrative Reform (Public Service Regime); C) Interventions: National Committee on Civil Service; Public Servants' Administrative Department; *Universidad del Rosario*; *Confederación de Trabajadores de Colombia - C.T.C*; *Sindicato Nacional de Servidores Públicos de las Empresas Sociales del Estado - SINALTRAESES*; *Asociación de Etnoeducadores Afrocolombianos del Pacífico Sur - MARES*; 8 citizens. D) Solicitor-General position: for the unconstitutionality; E) Ruled unconstitutional (non-unanimous); F) August 27, 2009.

C-141-10 – No Plaintiff (case of automatic judicial review); A) Amendment being questioned: Law ("Ley") n.º 1354/2009 (Proposed Constitutional Amendment, with a pending referendum); B) Subject: Presidential Re-election; C) Interventions: 1.278 citizens; D) Solicitor-General position: for the partial unconstitutionality; E) Ruled unconstitutional (non-unanimous); F) February 26, 2010.

C-303-10 – Sonia Patricia Téllez Beltrán vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2009 (article 1, first paragraph); B) Subject: Electoral Reform (Period for shifting parties without sanctions); C) Interventions: Ministry of Interior and Justice; *Universidad Nacional de Colombia*; *Universidad de Ibagué*; *Universidad del Rosario*; *Academia Colombiana de Jurisprudencia*. D) Solicitor-General

position: for the constitutionality; E) Ruled constitutional (non-unanimous); F) April 28, 2010.

C-702-10 – Marcos Aníbal Avirama Avirama and Miguel Antonio Gálvis. vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2009 (article 2, item 8); B) Subject: Electoral Reform ("*Clausula de barrera"* and party affiliation rules for minorities and ethnical groups); C) Interventions: Ministry of Interior and Justice; *Universidade Nacional de Colombia*. D) Solicitor-General position: for the unconstitutionality; E) Ruled unconstitutional (non-unanimous); F) September 6, 2010.

C-170-12 – Yolanda Naranjo Jaramillo and others vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 002/2011 (full text); B) Subject: TV regulation (concession, control, and services); C) Interventions: Ministry of Interior and Justice; Ministry of Technology, Information, and Communications; Committee on Communication Regulation; National Commission on Television; *Universidad del Norte*; *Universidad Javeriana*; *Universidad Externado*; 5 citizens. D) Solicitor-General position: for the constitutionality; E) Ruled constitutional (non-unanimous); F) March 7, 2012.

C-249-12 – Miguel Ángel González Ocampo, Giovany Alexander Gutiérrez Rodríguez, and Rafael Cañón González vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 004/2011 (full text); B) Subject: Administrative Reform (Public Service Selection Processes); C) Interventions: National Commission on Civil Service; *Universidad Externado*; 4 citizens. D) Solicitor-General position: for the unconstitutionality; E) Ruled unconstitutional (non-unanimous); F) March 29, 2012.

C-474-13 – Pablo Bustos Sánchez (D-9200) y Alfredo Castaño Martínez (D-9208) vs. National Congress; A) Amendment being questioned: CA ("*Acto Legislativo"*) 007/2011, Proposal of Constitutional Amendment n.º 09, 11, 12, and 13/2011 (full text); B) Subject: Reform of the Judiciary; C) Interventions: Nation Congress; Ministry of Justice and Law; Ministry of Interior; Legal Secretariat of the Presidency; Council of State; 9 citizens; *Instituto Colombiano de Derecho Procesal*; *Partido Polo Democrático Alternativo*; *Universidad Libre*; *Colegio de Abogados del Trabajo*; *Partido Verde*; *Universidad Santo Tomás*; *Comisión*

Colombiana de Juristas. D) Solicitor-General position: for the inhibition; E) Ruled inhibited (non-unanimous); F) July 24, 2013.

C-524-13 – Jaime Araujo Rentería vs. National Congress; A) Amendment being questioned: Proposed Constitutional Amendment ("*Proyecto de Acto Legislativo*") 007-2011-Senate/143-2011-House of Representatives (full text); B) Subject: Reform of the Judiciary; C) Interventions: Ministry of Justice; Council of State; Legal Secretariat of the Presidency; Ministry of Interior; *Partido Polo Democrático Ativo*; *Partido Verde*; *Partido Liberal Colombiano*; *Centro Colombiano de Derecho Procesal Constitucional*; *Universidad Externado*; 2 citizens. D) Solicitor-General position: for the inhibition; E) Ruled inhibited (non-unanimous); F) August 14, 2013.

C-579-13 – Gustavo Gallón Giraldo and others vs. National Congress. A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2012 (article 1); B) Subject: Transitional Justice (Human Rights Trials regulation); C) Interventions: National Government (Ministry of Interior; Ministry of Justice; High Commissioner for Peace; Social Prosperity Department; Colombian Agency for Reintegration; Legal Secretariat for the Presidency; Presidential Program on Human Rights and Humanitarian International Law; Attention and Repair for Victims Unit); *Fundación de Ideas para la Paz*; *Centro Internacional para la Justicia Transicional*; *Universidad Sergio Arboleda*; *Universidad Libre*; *Pontificia Universidad Javeriana*; *Universidad del Rosario*; 8 citizens; International Criminal Court; Human Rights Watch; Amnesty International; 5 experts (professors); President of the Republic; *Comisión Colombiana de Juristas*; President of the Congress; President of the Criminal Chamber of the High Court of Justice; *Centro de Estudios de Derecho*, *Justicia y Sociedad - Dejusticia*; *Fundación Centro de Pensamiento Primero Colombia; Public Defenders; Centro de Investigación y Educación Popular –CINEP*; Attorney-General; *CODHES*; *Fundación País Libre*; *Asociación Caminos de Esperanza, Madres de la Candelaria*; *Universidad de los Andes*; *Universidad del Sinú*; *Universidad Nacional de Colombia*; United Nations High Commissioner for Human Rights in Colombia. D) Solicitor-General position: for the inhibition; E) Ruled constitutional (non-unanimous); F) August 28, 2013.

C-084-16 – Gustavo Gallón Giraldo, Jomary Ortegón Osorio, and others vs. National Congress. A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2015 (article 1);

B) Subject: Criminal prosecution for Military crimes (application of Humanitarian International Law); C) Interventions: Ministry of Defence; Legal Secretariat of the Presidency; *Universidad Libre*; *Universidad Santo Tomás*; *Pontificia Universidad Javeriana*; *Universidad Externado*; *Universidad de Ibagué*; *Universidad Industrial de Santander*; *Colectivo de Abogados Luis Carlos Pérez*; *Universidad Militar Nueva Granada*; United Nations High Commissioner for Human Rights in Colombia; *Comisión Internacional de Juristas*; *Organización Mundial contra la Tortura*; *Federación Internacional de Derechos Humanos*; *Abogados sin Fronteras –ASFC*; Garden Court International; Garden Court Chambers; *Corporación Acción Humanitaria por la Convivencia y la Paz –Cahopana*; *Asociación para la Promoción Social Alternativa –Minga*; *Mesa de trabajo sobre Ejecuciones Extrajudiciales de la Coordinación Colombia, Europa, Estados Unidos*; *Asociación colombiana de Oficiales en retiro de las Fuerzas Militares –Acore; Centro de Estudios de Derecho, Justicia y Sociedad –Dejusticia*; 6 citizens. D) Solicitor-General position: for the inhibition; E) Ruled constitutional (non-unanimous); F) February 24, 2016.

C-230-16 – Jorge Kenneth Burbano Villamarin, Jorge Ricardo Palomares García, Edgar Valdeleón Pabón, and Javier Enrique Santander Díaz vs. National Congress. A) Amendment being questioned: CA ("*Acto Legislativo"*) 002/2015 (article 9); B) Subject: Presidential re-election; C) Interventions: Ministry of Interior; Ministry of Justice and Law; Legal Secretariat of the Presidency; *Universidad Javeriana*; *Universidad Santo Tomás*; 6 citizens. D) Solicitor-General position: for the inhibition; E) Ruled inhibited (unanimous); F) May 11, 2016.

C-285-16 – Carlos Santiago Pérez Pinto vs. National Congress. A) Amendment being questioned: CA ("*Acto Legislativo"*) 002/2015 (articles 15, 16, 17, 18, 19, and 26); B) Subject: National Council of Justice; C) Interventions: A*cademia Colombiana de Jurisprudencia*, Ministry of Justice, Ministry of Interior, *Universidad de la Sabana*, Attorney-General, *Corporación Excelencia en la Justicia*, 2 citizens, *Mesa Regional Caribe y representantes de los distritos judiciales de Bogotá, Medellín y Villavicencio*; National Council of Justice; *Presidencia de la Sala Administrativa del Consejo Seccional de la Judicatura de Cundinamarca*; President of the Criminal Chamber of the High Court of Justice; Council of Justice of Caldas; National Congress; President of the Supreme Court of Justice; Council of State; Court of Appeals of Bogotá; 1 congressman; 2 experts (professors). D)

Solicitor-General position: for the inhibition; E) Ruled partially unconstitutional (non-unanimous); F) June 1, 2016.

C-699-16 – Jesús Pérez González-Rubio vs. National Congress. A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2016 (articles 1 and 2); B) Subject: Peace-Building Agreement (Legislative Procedures); C) Interventions: National Government (Ministry of Interior; Ministry of Justice; High Commissioner for Peace; Legal Secretariat of the Presidency; Senior Advisor for Post-Conflict and Human Rights; Attention and Repair of the Victims Unit; National Center of Historical Memory; Colombian Agency for Reintegration; Presidential Advisor for Human Rights; Social Prosperity Department); Public Defenders; *Centro de Investigación y Educación Popular*; *Programa por la Paz – CinepPPP*; F*ederación Colombiana de Municipios – Fedemunicipios*; *Universidad de Cartagena*; 46 citizens; *Universidad Externado*; *Universidad Industrial de Santander; Universidad Sergio Arboleda*; *Colectivo de Abogados José Alvear Restrepo*; *Corporación Cultura y Educación para la Paz – Cepaz*; *Mesa Nacional de Participación Efectiva de Víctimas*; House of Representatives; *Familiares de los Diputados del Valle del Cauca*; *Partido Centro Democrático*; *Federación Comunal del Departamento de Putumayo*; *Mesa de Participación de Víctimas*; *Red Jóvenes Sinestesia*; *El Avispero*; *Paz a la Calle*; *Seamos Democracia Digital*; *Paziempre Movimiento Estudiantil*; *Javerianos por la Paz*; *Campamento por la Paz*. D) Solicitor-General position: for the inhibition; E) Ruled constitutional (non-unanimous); F) December 13, 2016.

C-332-17 - Iván Duque Márquez and others vs. National Congress. A) Amendment being questioned: CA ("*Acto Legislativo"*) 001/2016 (articles 1 and 2); B) Subject: Peace-Building Agreement (Legislative Procedures); C) Interventions: National Center of Historic Memory; *Academia Colombiana de Jurisprudencia*; *Conferencia Episcopal de Colombia*; *Universidad Libre*; *Universidad del Rosario*; *Comisión Colombiana de Juristas*; *Universidad Sergio Arboleda*; *Universidad Santo Tomás*; 14 citizens; 15 senators; *Agencia Colombiana para la Reintegración de Personas y Grupos Alzados en Armas*; *Universidad Militar Nueva Granada*; *Universidad Industrial de Santander*; *Universidad Autónoma de Bucaramanga*; President of the Senate; Ministry of Interior; High Commissioner for Peace; Council of State; *Mesa Nacional de Víctimas*; *Academia Colombiana de Derecho Internacional.* D) Solicitor-General position: for the unconstitutionality; E) Ruled partially unconstitutional (non-unanimous); F) May 17, 2017.

C-630-17 – No Plaintiff (case of automatic judicial review). A) Amendment being questioned: CA (*"Acto Legislativo"*) 002/2017 (full text); B) Subject: Peace-Building Agreement (Interpretative Guidelines); C) Interventions: Legal Secretariat of the Presidency; *Universidad Externado*; *Universidad Sergio Arboleda*; *Universidad Santo Tomás de Bogotá*; *Universidad Libre*; *Centro de Estudios de Derecho, Justicia y Sociedad - Dejusticia*; *Comisión Colombiana de Juristas*; *Colectivo de Abogados "José Alvear Restrepo"*; *Movimiento Nacional de Víctimas de Crímenes de Estado*; *Corporación Jurídica Yira Castro*; *Consultoría para los Derechos Humanos y el Desplazamiento (CODHES)*; *Organización Ruta Pacífica de las Mujeres*; 14 citizens. D) Solicitor-General position: for the constitutionality; E) Ruled partially unconstitutional (non-unanimous); F) October 11, 2017.