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EXPLORING THE WONDERFUL MYSTERY OF TIME: "LACK OF GROUNDS" IN THE CONSTITUTIONAL JUDICIAL REVIEW AS AN EVIDENCE OF PASSIVE VIRTUES IN THE BRAZILIAN SUPREME COURT (STF)

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Abstract: Has the Brazilian Supreme Court (STF) used formal arguments to evade the judgment of conflicts submitted by the concentrated judicial review? Over the past 20 years, the Supreme Court has denied trial to a growing number of cases, citing the presence of formal defects, mainly due to the so-called incidental "lack of grounds": when, owing to the delay in assessing the conflict, alluded legal standard ceases to exist or have effect. This research starts from the Bickel's hypothesis (1962): courts deliberately use passive virtues – self-restriction techniques, usually of procedural nature, which provide the court with the option to avoid the assessment of a case – in order to seek to understand the "lack of grounds" institutional phenomenon. In this sense, data from the Brazilian Supreme Court's on the cases on which the "lack of grounds" was harvested were subjected of statistical inferences, in order to explain, through modeling, this omission behavior of the Court.

Keywords: judicial review; judicialization of politics; self-restriction; "lack of grounds".

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> *"The jurisprudence of this Supreme Court has no divergence on supervening lack of ground as prejudicial to the continuity of the ADI when befalls repeal or substantial amendment of the law in question on its constitutionality".* Min. Luiz Fux, ADI 4061.

INTRODUCTION

In Brazil, in the judicial review system it is allowed to obtain statements directly from the Highest Court (*Supremo Tribunal Federal - STF*) through specific legal instruments, which use is restricted by the Constitution to a group of few relevant political actors, such as the President, political parties and the Attorney General (TAYLOR, 2008).

The Brazilian Federal Constitution of 1988 provides a number of tools to start a concentrated constitutional review, among which one with greater use and relevance in the legal and political scenarios is the *ação direta de inconstitucionalidade* (ADI), proposed more than five thousand times throughout more than twenty years of the Federal Constitution existence, covering highly relevant issues under federal and state law (TAYLOR, 2008; VIANNA et al., 1999).

To understand the political consequences of the judicial behavior and the judicial review, as well as the variations of these consequences as well as the institutional arrangements, and the historical-political contexts involved, is presented as a profitable research agenda of social scientists of our time.

In this sense, judicial review is identified by most studies in Law and Political Science as a contingent activity of the political game (TAYLOR; DA ROS, 2008), e.g., as a potential alternative strategy to interests defeated in the legislative sphere, in order to obtain the judicial application of constitutional limits on legislative activity.

However, original data collected from the Brazilian Supreme Court's decisions in ADI cases point in the opposite direction: the self-restraint. The Court has demonstrated, over the past twenty years, a cooperative trend with the interests of the Executive branch, when triggered by constitutional review mechanisms (judicial review), whether confirming the constitutionality of legislation, or informally, simply by letting a large number of conflicts without judgment.

Take for example the following situation: on the date of October 30, 2013, was issued Federal Law # 12,875, whose content changed a previous Federal Law # 9.504 (laying down general rules on elections), setting new criteria for the distribution among the various political parties and coalitions, the schedule for the dissemination of free electoral propaganda by radio and television.

Dissatisfied with the criteria and feeling harmed by the alleged loss of time space in the free electoral propaganda and therefore, its importance in possible future electoral coalitions, the *Partido Republicano Progressista - PRP* pleaded on September 4, 2014, the *ação direta de inconstitucionalidade* (ADI) # 5159, alleging the unconstitutionality of these standards on the proportional division of the party's time on radio and television.

The political party sustained that the new law (#12,875) is an arbitrary and unconstitutional manner of the major parties to further minimize the time on radio and television of minority parties. For these reasons, the mentioned party argued that such rules would be incompatible with Articles 1, 5, 14 and 17 of the Federal Constitution of 1988 and asked the Supreme Court its declaration of unconstitutionality and the immediate suspension of its effects, so that it could benefit from the free party propaganda as the criteria set out in the repealed legislation.

This process was in the Court until the date of 1 October 2015, when it was finally dismissed in unusual ways: the Court, unanimously, held that the assessment to the alleged unconstitutionality of the challenged electoral rules would be undermined by supervening *lack of grounds*, that is: to the Justices of the Supreme Court, it would not make sense, in that moment, to discuss the constitutionality of the Federal Law # 12,875, which had established the division of party propaganda time, as this was subsequently been revoked by the Law Federal # 13,165 of September 29, 2015, which had been published just few days before the trial.

This amazing relationship between the time of judgment and the impossibility of assessing the constitutional question by the Court - before the repeal of the law questioned by later rules - would be fortuity or the result of a sophisticated self-restraint strategy adopted in response to the actors involved in the conflict theme, and / or the possible and undesirable practical consequences of any favorable judgment?

Such behavior is close to what Bickel (1962) observed in the US Supreme Court's behavior and called "passive virtues": an institutional technique that would allow the judge in the exercise of its discretion to act strategically in order to delay the analysis of problematic issues to the time when the Court was ready to deal with them, with no commitment to the principles, nor to the democratic system.

The institutional instrument mentioned allows members of any Court, before the undesirable duty to judge politically relevant conflicts, e.g., all matters of constitutional judicial review, to use procedural and formal arguments to avoid the trial and leave the conduct of policy to the other institutional bodies established by the will of the majority (LIMA, 2014).

This research starts from Bickel's hypothesis (1962): Courts can use deliberately passive virtues – self-restraint techniques, usually of a procedural nature – to avoid a case. Moreover, it will seek to understand the institutional phenomenon of "lack of grounds" repeatedly verified in the trial of *ações diretas de inconstitucionalidade* by the Brazilian Supreme Court.

In this sense, data on the cases in which the "lack of ground" were collected in the STF website were subjected to statistical inferences, in order to explain, through modeling, this omission behavior of the Court, from categorical variables possibly correlated with a strategic behavior of the Brazilian Constitutional Court.

1 JUDICIALIZATION OF POLITICS AND OMISSION BEHAVIOR IN JUDICIAL REVIEW: ALEXANDER BICKEL'S PASSIVE VIRTUES

Judicialization corresponds to the process in which the rules, procedures and legal discourse permeate almost every aspect of modern life, whose social institutions eventually adopt "quasi-judicial" mechanisms (GALANTER, 1993). On the other hand, the judicialization of politics is a more specific operational concept: which refers to the new dynamics between the legal agencies and the political environment, deals with these interactions in their institutional aspects and analyzes their impact on the behavior of political and legal actors (KOERNER; MACIEL, 2002) subsequent choices. The Courts have to define their roles, as they must make choices, fighting their "battles" carefully limited to those conflicts that can win or act more aggressively and cause counterattacks (GINSBURG, 2003).

The phenomenon manifests itself in a substantive dimension regularly, corresponding to the courts' responses, studied from the perspective of "judicial activism", thus, the confirmation of a propensity for activism would confirm the completeness – or not – of the judicialization of politics (CARVALHO, 2005).

But what is judicial activism? This is a shared discussion among political scientists and jurists, with specific characteristics and different readings of each approach (GREEN, 2009).

Among the Political Scientists, initially, regarding the collected data, departing from quantitative perspective onto other discussions, with the analysis of the causes and repercussions of a judicial behavior agenda that seeks to investigate the causes and consequences, as well as whether there is or not a tendency of judicial activism. Initially, the quantitative analysis of counter-majoritarian decisions was dominant in the literature, concerned with the frequency with which a particular judge or court invalidated the rules and other acts of other state bodies (HOWARD; SEGAL, 2004), especially the Federal Legislature. While this is a valid conception of judicial review, it is necessary to go further and investigate other positions of judges that do not fit in activism settings, seeking to know the peculiarities of self-restraint and its respective behaviors.

Recently, there had been an effort in the evaluation of more substantive aspects of the debate, beyond the statistics. Dealing with the extension of the subject matter and its approach to the legal debate, Frank B. Cross and Stefanie Lindquist (2009) set standards for activism approach or the definition of a "shyness" behavior, taking into account two reference points: the institutional one and ideological one.

Institutionally, the evaluation can be made from the constitutionality of parameters: (a) the judicial review of federal statutes; (B) judicial review of state regulations: (c) the judicial review of the actions of the federal government, including independent agencies; (D) the use of doctrines of "justiciability" (the access warranty, so the federal courts); (E) of the Supreme Court's propensity to "knock down" its earlier precedents. Whereas, the "ideological dimension" implies the study of standards for the invalidation of the rules, precedents or administrative actions of political "opponents", taking here as a criterion, the inevitable (in the US)

distinction between "liberal" or "conservative " judges (CROSS; LINDQUIST, 2009).

Back to these criteria, the characterization of a judicial activism depends on the identification of a tendency of the courts to interfere with other branches - invalidating decisions or establishing criteria for its activities - away from the canons regularly applied to judicial action - rules, precedents and doctrine.

In contrast, self-restraint can be characterized by a limitation to judicial powers. It is possible to outline an initial self-restraint design, represented, in accordance with Richard Posner (2012), in three main meanings: (I) the notion that judges are law enforcers, but not producers (legalist-formalist perspective); (II) the need for deference to other political actors (modesty, institutional competence and others); and (III) the prospect of highly reluctant judges to declare unconstitutional acts of the legislative and executive branches.

Although, the dimensions of self-restraint would present contradictions among themselves, they are facets of an attempt to understand the limits to judicial action. Technically, there would be a contradiction between the first and third dimensions, considering the possibility that the normative understanding prevents or hinders the characterization of a judicial self-restraint (POSNER, 2012). This self-restraint parameter would require that the judge wouldn´t have a clear theory of constitutional interpretation. As, given a certain construction, it would be an obstacle for keeping the norm, even if its unconstitutionality could be seen (POSNER, 1983, p. 20).

The design of self-restraint demands a particular vision of the judiciary body and its role in a democracy, changeable in accordance with the varying legal concepts. However, it covers the need for the inclusion of the Courts in a political environment – struggling with the need for acceptance of their decisions – and difficulties – including technical ones– that they face in the exercise of their activity.

In this sense, consider the remarkable contribution of Alexander Bickel, in his book published in 1962, *"The Least Dangerous Branch: the Supreme Court at the Bar of Politics.*" The author, trying to understand the role of the US Supreme Court and other lower courts in the United States, argued that their actions would be justified by the protection of the fundamental principles of society. He recognized, however, that the success of the judicial review depended, ultimately, on the popular acceptance of these judicial decisions.

According to Bickel (1962, p.16-18), judicial review is a "counter-majoritarian force in our system" and thus " a deviant institution in the American democracy." When the court invalidates the acts of the powers subject to electoral processes, this control is exercised not on behalf of the prevailing majority, but against it, "it thwarts the will of the Representatives of the actual people of the here and now", which gives veto power to a small minority, over the majority. According to this author, "[...] without mystic overtones, this is actually what happens ".

In fact, counter-majoritarian premise is the starting point for a thought-provoking discussion of the distinctive notes of the Supreme Court activity and other courts as performed by the Legislative and Executive branches (BICKEL, 1962).

While the majority branches are subject to pressures from various groups and interests in order to produce immediate results in convenience judgments, facing the pressing material needs, only the courts – especially the Supreme Court – are equipped with the essential features to articulate ,continuously and consistently, permanent values. The special responsibility of these bodies is to act as spokespersons ("pronouncers") and guardians of stable values ("enduring values") of society.

Its members, apart from conflicts of interest, have the training and the isolation needed for "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government." And the court activity should be based solely on these enduring principles, these social ideals, in order to enjoy the action of the constitutionality of other powers.

It was what Bickel called a "lincolnian tension" (BICKEL, 1961, p. 49) between principle and consent, in which sits the democratic system of government, and, in which the institution of judicial review must play its role and try to achieve some measure of agreement, a compromise between these two fundamental elements.

The conflict between the principle notions of consent and the court presents to the Court a complex problem; since to exercise their activity, need to reduce the voltage to a tolerable level. The court should not ignore the basic principles, but rather be attentive to the reality in which it operates.

In this complicated equation, according to Bickel, the constitutional doctrine and the court itself forget the triple power that the latter has, considering that its possibilities spectrum is not limited only to maintenance options or cancellation of a rule before its incompatibility with the principles. The Court has also the option of doing nothing, which makes it feasible to maintain the "tension between principle and opportunity" without the commitment of that (BICKEL, 1962, p. 69).

Passive virtues are legal arguments – often of procedural nature - which give the court the possibility of avoiding the assessment of a case that had been referred to it. Thus, it can assert its jurisdiction to decide, the absence of active applicant's legitimacy, "lack of maturity" of the case, resort to the doctrine of "political issues", among other typical arguments of the US judicial system, although akin to the procedural constructs of other systems.

Although extensively arguing on these passive virtues, pointing out the differences between these techniques, Bickel has no standards or principles to assist the court in choosing whether to use it or not, neither in choosing the "tool" to be used. This issue does not involve academic wisdom, but skills in the art of "commitment" and "familiarity with the forms," or, as the author himself prefers, the exercise of the art of prudence, distinct from the principle of judgment (BICKEL, 1962 p. 26).

For him, these techniques are tools available to judges, leaving the electoral institutions to conduct the policy, as they withdraw from it. By using this expedient, the court would act as a "political animal" (BICKEL, 1961, p. 51).

The option for the use of passive virtues can also mirror awareness of its limitations. In addressing the doctrine of political questions, Bickel recalls that this construction is supported in the sense of "lack of capacity", consisting of several factors which, together, represent the internal vulnerability of an institution, in a "mature democracy" is electorally irresponsible and has no power to enforce its decisions (BICKEL, 1962, p.184).

The initial advantage of the use of these techniques seems settled: preventing the cutting position is definitely in detriment of its role as guardian of the principles, or confronts public opinion and the majority powers. By leaving the question open, it remains faithful to its commitments.

Passive virtues still allow the court to explore the "wonderful mystery of time" (BICKEL, 1962, p.26), in its various implications. Sometimes in the subsequent opportunity of the trial, it can be concluded that it is time to directly address the issue, even if based on a principle contrary to popular expectation. To mitigate the impact of the decision contrary to the majority, Bickel suggests using "rhetorical instruments" (BICKEL, 1962, p.188).

In other cases, the court postpones the answer because it has doubts as to the controlling principle or about its meaning. Although the principles are enduring, the author believes that their design projects large shadows for the future. To solve their uncertainty, it employs temporary solutions allowing it to evaluate the public and government officials' reactions, in order to build their understanding. So, instead of simply postponing the debate, the court plays an educational role by using these interim decisions as a strategy of slow persuasion, to come up with ideas that it has already articulated in its final form.

His argument is that the period after the decision is used to build a dialogue or, as the author prefers a "conversation" between the branches of government on the principle issues involved. Thus, choosing not to decide, it is possible that the "lincolnian tension" is attenuated or even resolved by these dialogues, and the court reaches a better understanding of the issues involved for their proper resolution (BICKEL, 1962, p. 206- 261). When a Court finally decides to judge, there may be a widespread acceptance of the result, because the debate would have matured in public opinion.

2 COINCIDENCE OR STRATEGY: SUPERVENING "*LACK OF GROUNDS*" IN ABSTRACT JUDICIAL REVIEW

What would be the alleged supervening *lack of grounds* and how this formal condition would affect the continuation of the *ações diretas de inconstitucionalidade*? Understanding this phenomenon demands facing a formal

question (technical and procedural) under the Brazilian civil procedural law related to the validity of the opening and the continuity of a process: the procedural interest.

The procedural interest refers to the need and usefulness of the trial of a case by an individual or collegiate Judicial body (CUNHA, 2002; BEDAQUE, 2016): the filing of a legal action means provoking (call) the judiciary to interfere in a conflict of interest, characterized by the alleged breach by the other party of a standard, either legal or contractual.

Should the courts, thereby, verify the presence of a conflict to be resolved as a condition for a valid opening or continuity of a process? Accordingly, the prior absence of a dispute to be solved or the subsequent closure (for whatever reason) of an existing dispute characterize a **serious formal defect** that would lead immediately to extinction (closure) of the process and undermine the judgment of the contentious issue, avoiding unjustifiable or processes that do not have social utility (BEDAQUE, 2016).

Exemplifying the first situation (filing the lawsuit despite the absence of conflict to be solved by the judiciary) would lead to some hypothetical situations: a) the judicial plea of tax refund of unduly paid taxes when the same sum have been the subject of administrative application prior compensation to the tax authorities; b) the civil servant that carelessly requires judicially the implementation of a bonus already incorporated into his salaries; c) the filing of a writ of mandamus against administrative act supposedly void but without no effect to the plaintiff; d) the judicial request for the grant of retirement when such benefit has never been denied by the social security agency.

On the other hand, for the second situation (subsequent closure of a previously existing dispute) there are other hypotheses: a) the subsequent retirement of a public servant or employee who wanted the court manifestation of their working conditions; b) the final conviction of an accused occurred before the trial process in which probation was being discussed; c) discussion of the formal validity of an annual budget law after the execution of all planned expenditure for that year; d) processes that would regard irregular building in environmental preservation area when subsequent legislation changes the allocation of the area. e) verification of legal age achieved during the process, in which child support rights were being discussed.

It is this second situation that sets up the damage alleged in the trial by supervening *lack of grounds*: the Judiciary would be unable to judge the matter before it, due to the verification of events that occurred during the process whose consequences in theory, would close the dispute. So, the procedural interest disappears when it could no longer derive any utility from the judgment of the process (THEODORO JUNIOR, 2016).

> The argument of *lack of grounds* is used to terminate the process or appeal, whenever any further event will harm the solution of outstanding issues, depriving the current relevance, so that the decision would become merely academic or hypothetical (THEODORO JUNIOR, 2016, p.1037 - emphasis in original).

Regarding abstract judicial review, recurring decisions of the Supreme Court (e.g., ADIs No. 2097, 520, 2118, 763) have understood that the damage by supervening lack of grounds occurs (regardless whether the standard allegedly unconstitutional provision produces or not concrete effects) when, during the proceedings, that provision is revoked or subsequently amended in the Constitution which validates the situation before inconsistent with the Federal Constitution.

Given as examples, in the ADI No. 2971 the Supreme Court considered the supervening loss of the object for further reform via constitutional amendment, the higher standard incompatible with the challenged legislation; yet in the ADI No. 5160, the same Court understood that this procedural phenomenon was present by the withdrawal of the contested budget legislation subsequently to the commencement of proceedings.

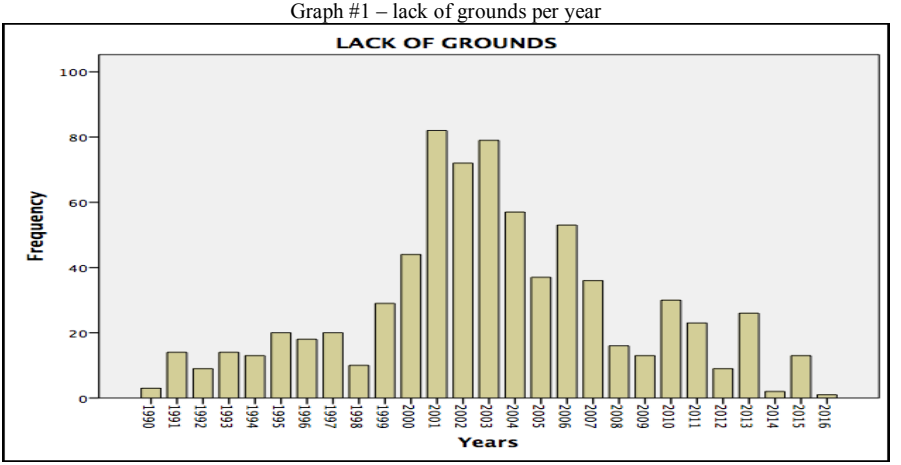
Would such simple situations be a matter of coincidence or the result of a strategic posture of the judges against disputes whose judgment would impose to the Court unnecessary political costs?

The circumstances referred to in the introduction hereinbefore (ADI No. 5159) give us evidence contrary to a mere fortuity occurrence and / or unforeseeable circumstances, able to make the process faulty and prevent its trial: the challenged legislation was not revoked shortly after filing the lawsuit.

Otherwise: the process continued for months, with no decision, and a few days after the news of the revocation of the law, it was effectively tried, alleging formal vice attributed to supervening lack of grounds, a defect of form nonexistent in the beginning, but enough to prevent the Supreme Court from deciding on the unconstitutionality of the given electoral law.

This is not an isolated situation: in the universe of 5,546 (five thousand five hundred and forty-six) ADIs presented over the 27 (twenty seven) years of the Brazilian Federal Constitution, a significant number of 743 (seven hundred and forty-three) processes were deemed impaired by supervening *lack of grounds* (13.4% of the total). This is a recurring behavior of Justices of the Brazilian Supreme Federal Court, remaining inert against the unconstitutionality questioned and only judging processes when the lack of ground hypothesis occurred.

Graph #1 – lack of grounds per year



Font: Author's original dataset from decisions available at Brazilian Supreme Court's website

The self-restraint judicial conception, among many existing definitions, can be understood as a substantive political principle used by judges when provoked to decide certain disputes, as to avoid the exercise of judicial review in circumstances whose characteristics encourage the removal of the judicial body from their primary functions (POSNER, 1983).

Silently, the Brazilian Supreme Court Justices take a stance in situations where there are presumably high political judgment costs- before the other constituted powers, considering the expectative of other political actors, their peers, the public etc. – in which case, they hand it over to the "wonderful mystery of time" (BICKEL, 1962), assuming the risk of the actual effects of the legal standard, while disputes were supposedly "spontaneously" solved.

And why would they do that? The literature provides the strategic model of the judicial behavior explanation, according to which external factors affect the judicial decisions from the judge's concern about the consequences of that particular case to society and the expectations of other actors in relation to the judgment (e.g., among others, DAHL, 1957; EPSTEIN and KNIGHT, 1998; BOILER et al., 1999; TAYLOR, 2008).

For the strategic model, the judicial behavior is explained in the abstract anticipation of the consequences and implications (pragmatic) which can (or could) result from its position on a controversial constitutional question raised by a lawsuit.

External constraints to the judicial bodies are capable of producing a network of institutional incentives favoring judiciary actors to behave strategically, e.g., considering the costs and benefits that they would have to bear, from any results of their decisions (MURPHY, 1964) whether judging in a certain way or simply not judging, alleging any technical justification.

It is precisely at this point that Bickel's (1962) argument on the passive virtues is resumed: this research starts from the assumption that the Supreme Court uses the deliberate waiting and the consequent supervening lack of grounds

argument as a technical tool of self-restraint (procedural) providing a means to the Court to avoid the assessment of a case.

In these situations, rather than assuming the costs of expressly declaring their option for self-restraint or judging the constitutionality of the legislation, the judicial bodies use time as their ally, delaying the trial until it is verified the change in the circumstances that involve the litigation and, therefore, affecting the decision with supervening lack of grounds.

3 "PASSIVE VIRTUES" IN ACTION: WHICH FACTORS INFLUENCE THE DECISION FOR LACK OF GROUNDS?

The analysis of judicial behavior, especially when it comes to high-profile decisions and obvious political consequences – e.g., the discussion of the constitutionality of a rule issued by the Congress or the Executive – is a relevant issue in the research agenda in public law and, mainly in Political Science.

If judges have a substantial amount of discretion in deciding cases, then it is important to know the motives and the value systems, which influence their exercise of discretion. [...] If the law is the way judges behave, judicial then behavior is a key to the law (PRITCHETT, C. H., 1969, p.36)

Understanding why the judges decide in this or that way enables a deeper analysis of the interactive dynamic between the various institutions that constitute the Brazilian state, contributing to discover new dimensions of the role played by the law and the judges in the political arena as well as the consequences of their behavior for democracy.

By opting for self-restraint, the judges present the various arguments as not to invalidate the tried acts, refusing expressly or tacitly, and at various levels, the exercise of power that was institutionally assigned, consequently reducing this power over the Executive and the Legislative (POSNER, 1983; LIMA, 2014).

As mentioned above, the *passive virtues* (institutional and procedural techniques) are useful to justify the non-exercise of judicial review by an agency of the Judiciary, when there are circumstances that encourage self-restraint. Knowing which factors influence that decision, which recognizes the loss of judgment for loss of object - clear expression of these passive virtues- allows attempts of exploiting primitively (in the Brazilian institutional environment) the territory of the judicial self-restraint.

In the universe of 5,546 direct actions of unconstitutionality (ADI) a random sample of 681 cases was collected, from which the analyzed variables were extracted and encoded, with a confidence level of 95% and confidence interval of 3.52%, from the collection of information publicly available on the website of the Brazilian Supreme Court (STF).

A binary dependent variable was encoded for the result of the process (1 = lack of grounds; 0 = no lack of grounds), as well as categorical explanatory variables

(dummies) were coded for legislative types, the process duration, attitudes (personal characteristics) of the judges and applicants for judicial review. Then, the variables were subjected to a binary logistic regression, or simply Logit regression: a type of statistical regression analysis used to predict the outcome of a binary categorical dependent variable, based on one or more explanatory variables.

The statistical analysis of the data collected in this study shows that, for the applicants, that is, the political actors allowed to use the concentrated judicial review (Federal Constitution, Article 103), **political parties** - as illustrated by the judicial decision on election rules mentioned above - are those most likely to have an action deemed impaired by lack of grounds.

Table 1 – Logit Model for plaintiff's block

	B	S.E.	Wald	df	Sig.	Exp(B)
The President	-18,958	40192,970	0,000	1	1,000	0,000
House of Deputie's Board	-18,958	28420,722	0,000	1	0,999	0,000
State's Legislative Board	2,022	1,265	2,555	1	0,110	7,550
Governors	,905	1,090	0,690	1	0,406	2,472
General Prosecutor	1,436	1,081	1,766	1	0,184	4,205
National BAR	1,347	1,130	1,420	1	0,233	3,845
Political Party	**1,997**	**1,081**	**3,413**	1	**0,065**	**7,366**
National Unions	1,175	1,085	1,172	1	0,279	3,238
Constant	-2,245	1,072	4,384	1	0,036	0,106

U = 5546 cases; Sample = 681
Dependent Variable: result (1 = lack of grounds, 0 = no lack of grounds)
Font: Authors' original dataset from decisions available at Brazilian Supreme Court's website

Adjusted the statistical model in this study the by forward stepwise method (conditional) - a statistical procedure available with the SPSS package and used for pattern adjustment in situations where there are a large number of potential explanatory variables, wherein each predictor is included, one by one, in the equation, excluding the interference of other variables and displaying only the one of the highest correlation with the response (ABBAD and TORRES, 2002) - the political party variable appears to be correlated with the expected result (1) with higher statistical significance.

Table 2 – Logit Model adjusted by *forward stepwise* method

	B	S. E.	Wald	Df	Sig.	Exp (B)
Political Party	.821	.204	16,252	1	.000	2,272
Constant	-1.058	.097	117,961	1	.000	.347

U = 5546 cases; Sample = 681
Dependent Variable: result (1 = lack of grounds, 0 = no lack of grounds)
R^2 = .33
Font: Authors' original dataset from decisions available at Brazilian Supreme Court's website

As supported by Taylor and Da Ros (2008), political parties, especially those of opposition or representing minority interests, sometimes defeated in the

legislative arena, use the concentrated judicial review as opposition tactics in order to delay, prevent, disparage or simply declare (to their constituents and the general public) opposition to certain laws.

While choosing this path might be successful to give visibility to the party's position, contrary to the contents of the law, one cannot say the same about the decision outcome: in the environment of the Brazilian Supreme Court, political parties are seven (7) times more likely to have its judicial review claims to be closed by supervening lack of grounds argument.

If the political parties judicialize their demands as a strategy in the political dispute, this choice is not supported by the behavior of the Brazilian Supreme Court. The evidence collected shows that when it comes to *ações diretas de inconstitucionalidade* (ADI) filled by political parties, the Justices of the STF use a passive virtue – the formal damage from lack of grounds situations – as an institutional instrument of procedural nature to justify the non-judgment of the case, which enables the self-restraint.

Before any political costs that may result from the decision (positive or negative) on the constitutionality of a legal standard object of the ADI, there is a clear choice to postpone judicial activity for the time necessary to the occurrence of the lack of grounds and set the aforementioned supervening formal defect – a choice that fits on the characteristics of the strategic explanatory model of judicial behavior and demonstrates, in these cases, a self-restrained posture of the Court.

CONCLUSIONS

Although judicial review is identified as a contingent activity of the political game (TAYLOR, DA ROS, 2008), e.g., as a potential alternative strategy to the interests defeated in the legislative sphere, assuming a predominantly activist performance of the Brazilian Supreme Court (STF), the empirical approach, concerning the judgment data, points to the contrary direction.

When it specifically comes to constitutional disputes submitted by political parties, this reductionist conception of an activist Supreme Court does not apply, resulting in a sensitive court to external factors, which initially uses the time as an ally and postpone de decision until the Court can terminate the proceedings as a result of a formal argument.

Over the past decades, the Justices of the Supreme Court, in an increasing number of cases, in these situations have denied the possibility of trial on the grounds of the presence of formal defects, especially arguing the damage to trial from supervening lack of grounds. This situation occurs when during the proceedings, that provision is revoked or occur subsequent amendment in the Constitution which validates the situation before inconsistent with the Federal Constitution.

The use of judicial review as opposition tactics (institutional instrument available to the legislative minority or momentarily defeated interests), has been

helpful to disparage or simply to declare (to their constituents and the general public) opposition to certain laws, but, as the objectives of delaying or preventing the effects of unwanted legislation, the chance of the case being judged impaired by lack of grounds is significant and concrete.

Silently, the members of the Brazilian Supreme Court simply hand over the case to the "wonderful mystery of time" (BICKEL, 1962), assuming the risk of the actual effects of the standard, while disputes were "spontaneously" solved.

Would such situations be a simple matter of coincidence? The empirical evidence collected in this research point to other direction: showing that this behavior would be the consequence of a strategic posture of the judges against disputes whose judgment would impose to the Court unnecessary political costs, which were submitted by political parties via concentrated judicial review. This choice of the Court's members confirms Bickel's (1962) hypothesis, according to which the judicial bodies, faced with undesirable situations, deliberately use *passive virtues* - self-restraint techniques, usually of a procedural nature – obviating the appreciation a case.

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