The Silence of Incumbents: partisan fragmentation and judicial empowerment in Brazil[1]

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Abstract

Following the classic studies on the global expansion of the judiciary, several other more specific investigations have pointed to political-party fragmentation as the main cause of judicial empowerment. Seeking to corroborate these findings, this paper analyzes the institutional empowerment of Brazil's Judiciary branch in general, and its Supreme Court in specific from 1945 to 2016, testing the hypothesis the greater the partisan fragmentation, the greater judiciary institutional power. The dependent variable is a synthetic indicator created to measure the institutional power of the Federal Supreme Court year by year. The independent variables measure, also by year, the House of Representatives' party composition for the same period. The results show a high impact of partisan fragmentation on judiciary institutional empowerment. For this analysis two generalized linear models (GLM) were used: negative binomial and gamma. In all the tests, party fragmentation favored the adoption of constitutional changes that increased the institutional power of Brazil's Judiciary branch.

Key-words: fragmentation, empowerment, judiciary

1. Introduction

During the development and improvement of democracy, scholars focused on Representative Power. The Legislative Body has always been seen as the vector of legitimacy and sovereignty, that is, the vertex of the very idea of democratic government. Since the incremental reforms in the British model, a growing improvement of Parliament has been seen, whose power had been gradually shared with

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the Monarchy to its current institutional design, under the aegis of the principle of parliamentary sovereignty, meaning that the Legislative has the last word on constitutional matters.

In contrast to British model, James Madison with Hamilton and Jay developed a system of checks and balances where the Legislature would be separated from the Executive and judges crowded in a higher court would control the other powers through the exegetical application of the Constitution. That is, the sovereignty of the parliament would give way to the supremacy of the constitution. Under the aegis of this principle, Madison and Hamilton designed a model that allowed the Judiciary to give the ultimate word in the decision-making process through judicial review, especially after Marbury vs. Madison. The common law system itself has helped the US Supreme Court to establish its own limits and scope in its work within the framework of reviewing the acts of other powers.

This model of control by judges proved to be quite effective and worldwide spread, mainly after World War II. Since then it was able to inhibit the majority passions, avoiding dangerous politicians with legislative majority to ascend to power with no boundaries, as in the case of Germany in the Nazi period. Thus, Tate and Vallinder's classic study (1995) showed the global expansion of the judiciary, leading us to enter in the Judicial Age, which means legislators are no longer the last word in the decision-making process, but selected judges for a supreme court with special jurisdiction.

Brazil followed this global wave of expansion on Judiciary and in 1988 its constitutional design consolidated a combination of two judicial review models, the strong U.S. diffuse model and the Hans Kelsen’s concentrated one, which in the original design was exercised by an administrative body unrelated to three powers. The

Brazilian Supreme Court Brazil encompasses in one body those two models. However, this hybrid pattern did not appear randomly or accidentally. The Brazilian History of democratic ruptures and political instability would play a major role in the empowerment of our supreme court. So, the main question of this research is directed to how and why the Federal Supreme Court (*Supremo Tribunal Federal* – STF) has become so powerful? What branch endowed the STF with such power? What role democracy and dictatorship played in judicial empowerment? The main hypothesis focus on party fragmentation as the main factor to make both Legislative and Executive branches, the entrepreneurs of judicial empowerment, either by writing a new constitution or by amending it. By giving such power to STF, incumbents seek to see the Supreme Court as a guarantee to solve future deadlock and keeping the political system fluidity, and avoiding institutional paralysis.

A secondary hypothesis sets the Executive as giving the Supreme Court more power than the legislature, mainly through constitutional amendments. A third hypothesis defines democracy the period in which the Supreme Court received more power compared to dictatorial period.

To test these hypotheses, a database was set up between 1945 and 2016, where each year is an event and in which four variables are measured: a synthetic indicator of institutional empowerment of the STF (iSTF), two measures for party fragmentation through the effective number of parties (ENP) and the minimum number of parties (MNP) to implement a constitutional change and the last, a variable for political regime. Interactive terms were also created to capture the marginal effects of the scheme. Thus, the article is divided into three sections. After introduction I make a brief analysis of judicial institutions' evolution worldwide, then in Brazil specifically. Then I return to

the institutional debate, explore the data and analyze the results. In the fourth section, I bring the conclusions and final considerations.

2. A Summary of Judicial Power Evolution

In the year of 1752, Montesquieu said the Judiciary among the three powers is, to some extent, close to nothing. His work, the classic The Spirit of Laws, would become a landmark in the theory of separation of powers. In fact, the Judges did not occupy a prominent place in the construction of models of democracy, whether in Classical Antiquity or in the post-absolutism period. Not even James Madison in his federalist articles had thought in giving so much prominence to the U.S. Supreme Court. In fact on his institutional design the highest court should act as a mechanism of checks and balances within the federative-presidential logic of the American model. Indeed a set of judicial decisions[2] had built the precedent designing the strong role that the US Constitutional Court would play forward. These cases were seminal, not only to reinforce the checks and balances mechanisms, but also to illustrate the Supreme Court as a policy-maker, as outlined by Robert Dahl in a seminal article in 1957.

While the diffuse model of US judicial review found a favorable environment in the common law system, which allows the judiciary to innovate in law through the rule of precedent, the civil law model required a positive institutional design through the legislature, which somehow prevented a self-empowerment from judiciary. However, in 1920 the Austrian Hans Kelsen and the German Carl Schmitt engaged in an intense debate[3] over the adoption of a judicial intervention model that was not as strong as the United States. The result was the rise of the abstract-concentrated model, where a council outside the Judiciary and independent from other branches, would have the last word about the very meaning of the Constitution, and having as principal prerogative to

[2] I highlight two most important and paradigmatic cases: Marbury Vs. Madison in 1803 and Lochner Vs. State of New York in 1905.
[3] See full debate in Herrera, 1994.

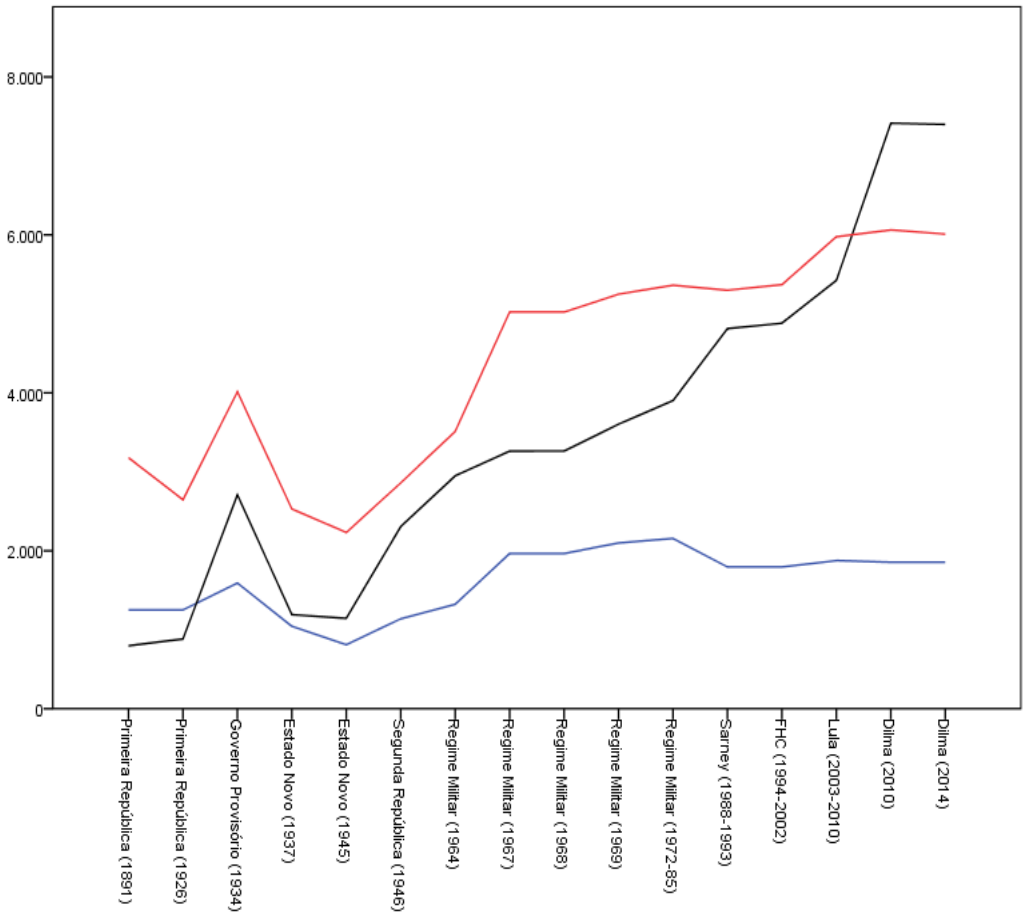
protect the *Magna Carta* from conjunctural majorities, seeking to provide legal stability over time. But this debate only gained global proportions in the post-World-War-II, when European nations were undermined by Parliament's Principle of Sovereignty[4] and sought a model capable of protect them from populism and absolute legislative majorities (or majorities' tyranny as Madison pointed). Since then Madison's institutional design consecrated the Constitution's Principle of Supremacy, which was adopted by several European and Latin American countries. That is to say, the Judicial Power came to be seen within the three powers as a factor of stability against tending legislative majorities to persecute minorities, in other words, the tyranny of the majority.

This new configuration in the separation of powers theory endowed the Judiciary with an unprecedented protagonism that (by institutionally strengthening the Supreme Court through constitutional rules) allowed Judges to intervene more forcefully and more frequently in the political arena. As Lijphart (2003: 258) pointed out, if an agent is created for the sole purpose of judicial review of legislation, it is very likely it will perform this task with some vitality. The Brazilian case is even more interesting, since its federal Supreme Court (*Supremo Tribunal Federal* – STF) is not an exclusive tribunal on constitutional judicial review. It also acts as an ordinary court of appeals in cases where the court is an original instance for judicial suits against some public authorities, in addition to assessing constitutional appeals (when STF exercises diffuse judicial review and also acts as a judicial reviewer). That is, the Brazilian model is a hybrid model that put U.S. and Kelsenian models together. However, Brazilian judicial review was a construction made in time, in a gradual and incremental way. The STF wasn't so powerful, as Aliomar Baleeiro pointed out in his book "The Supreme Federal

[4] For more about Parliament Sovereignty and Constitutional Supremacy principles, see Koopmans, 2003.

Court, that unknown branch", published in 1968. The following chart illustrates this evolution in time. Using the size of the constitutional text dedicated to each of the three powers, measured by the number of words, it is evident that 2004 (when judicial reform amendment was approved) was the time when the Judiciary (black line) passed Legislative (red line). The Executive is represented by the blue line. In 2004 the judiciary institutional design was substantially modified by constitutional amendment (called Judicial Reform), in which National Justice Council (CNJ) was created as controlling actor, making central judiciary control over other courts even stronger.

Graphic 1 – *Three Powers Evolution from 1891 to 2014*



Author's elaboration. Data source: Federal Constitutions and Constitutional Amendments

In addition to judiciary reform, Andrei Koerner (2013) pointed out that Lula as President in 2003, had difficulties in implementing his agenda through the Legislative Branch, opting for the judicial wat by appointing to STF progressive ministers linked to left and social movements (Koerner, 2013). This argument is well illustrated in the following chart, with the alignment of indicators[5] of judicial empowerment (in blue) and partisan fragmentation (in green).

Graphic 2 – *Judicial Empowerment and Partisan Fragmentation Indicators from 1945 to 2013*

Author's elaboration

The dotted line in red signifies the **point of no return**, which means, after STF become the last word on constitutional matters, any attempt to reduce its power through Constitutional Amendment, will be judged by STF, unlikely to rationally decide a self-reduction of its power. This event specifically shows that, within the current

[5] These indicators were built through factorial analysis of six variables in two blocks: 1) judicial empowerment, with variables measuring the size of the extension of the Judiciary Power in the Constitution through the number of words (NPPJ), the detailing degree of constitutional text on Judiciary (D) and the STF Empowerment Synthetic Indicator (iSTF); 2) party fragmentation, with variables measuring the effective number of parties (ENP/NEP), the Rae fractionation index (F) and the minimum number of parties to implement a constitutional change (MNP/MPN) factorized into one variable. For more details, see Barbosa (2015, pp. 63-98).

constitutional order, it is the STF that deliberates over its own powers, and the only control on such power is a self-restraint. The gray dotted line, however, illustrates Koerner's (2013) argument, exactly when indicators of partisan fragmentation and judicial empowerment are aligned in time.

The 1988 Brazilian Constitution just ignored Kelsen's concern to create a judiciary as powerful as the U.S. Supreme Court. It goes further in incorporating a milder model, which become extremely strong on Brazilian institutional design. According to Kelsen conception, concentrated judicial review should be exercised by an administrative council, outside the traditional branches, never by a judicial court as it is in Brazil. The Brazilian model makes the STF (from a prescriptive-normative point of view) an extremely institutional powerful body. However, to have an institutional power to act does not guarantee the court will use it, contradicting Lijphart's argument. In Brazil judges are inert; they need to be provoked by specific actors related to their demands or to constitutional prescriptions. And their demands are gaining strength when Supreme Court gives answers, sometimes crossing limits, characterizing what lawyers sees as judicial activism.

But what leads an elected political power to allow eleven unelected actors to definitively interfere in political decision-making? Why incumbents endowed the Judiciary with such strong institutional (normative) power?

2.2 Political Uncertainty and Insurance Logic

John Ferejohn (2002) quotes the Madisonian institutional design to argue that the political space used for political criticism and contestation may suffer various forms of abuse in a way that threatens the very operationalization of democracy. According to Ferejohn:

> Madison insisted that the spirit of faction can be dangerous to liberty and therefore, ultimately, to democracy. He also recognized, however, that in a republic, factions and parties, which serve to further both

> public and private interests, cannot be abolished without undermining republican government itself. At best, the politics of faction and party can be regulated or managed to limit the likely abuses. The most satisfactory form of regulation relies on the electoral process to correct political pathology. Of course, if democratic self-regulation fails, there are court-enforced constitutional safeguards that may be employed to limit abusive lawmaking (Ferejohn, 2002, p. 50).

Ferejohn argues (in contrast to the previous argument) the law or its application must take place within the courts. Its application is controversial, but it is to be expected that in most cases, it is a technical matter of finding the correct principles under which the dispute is established. The duty of judges is to promote fair and non-biased courts before conflicting political parties can establish their disputes with previously established legal rules (Ferejohn 2002: 50). This model, he continues, sees the courts as places where specific disputes are fought, not as an arena where general regulations are formulated. That is, a Supreme Court as an effective mechanism to prevent the tyranny of the majority or popular passions, as Jon Elster (2000, p. 156) pointed out, would become just one of his functions. Ferejohn offers two answers to this increase in the Judiciary's scope of action (judicialization of politics).

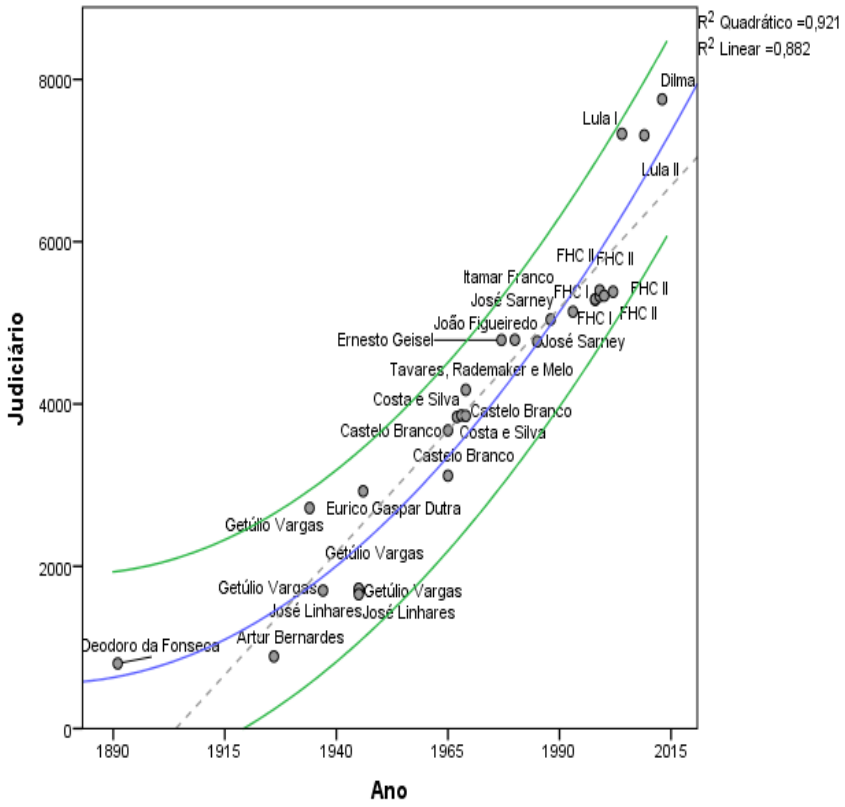
The first refers to the increase in the fragmentation of power within the three branches, which limits the capacity to legislate, or to be the place where public policies can be effectively formulated, that is, what Ferejohn calls the hypothesis of fragmentation: when the political powers can’t act, people who seek to resolve their conflicts will tend to gravitate toward institutions that can deliver solutions. The institutions that can offer this solution is the courts, especially where the legislature is divided (Ferejohn, 2002, 55). The second concerns the expectation that some courts can be trusted to protect a wide range of important values against potential political abuses. This is the legal hypothesis.

But what leads the constituents to include in the constitutional text judicial review mechanisms capable of reviewing future legislative and executive acts? According to Tom Ginsburg (2003, pp. 24-5), this depends on the incumbents' positions of power in post-constituent governments, and the key factor they take into account is the uncertainty at the moment of constitutional construction of future political configuration. Ginsburg outlines two extreme scenarios to reinforce his argument. The first concerns a single party scenario, whose incentives to establish a neutral arbiter to resolve disputes are very few. The second concerns a scenario of many political forces where no party has confidence that it will remain in power in the upcoming elections. When political forces are under a deadlock or scattered, no party can predict who will win the elections after the Constitution implementation. In other words, if no political party is confident to win elections, then they all will prefer to limit the majority, and thereafter, they will value minority institutions, such as judicial review. Ginsburg called this reasoning the insurance model of judicial review. That is, judicial review operates as an insurance policy against impasses and dispersions of political parties in the decision-making arena.

It is important to note that Tom Ginsburg's argument is for periods of drafting the Constitution. As Melo (2007) has already demonstrated, in Brazil it is not difficult to amend the Constitution, the argument gains strength not only at each constitutional period, but at every amendment that modified the Judiciary itself. From 1891 to 2013 twenty nine changes had occurred in judicial design, seven by new constitutions and 22 by constitutional amendments. Of these 22 amendments, eleven (45.5%) were authored by Legislative and twelve (54.5%) by Executive. In the post-1988 period, the PSDB (Brazilian Social-Democratic Party) on the presidency, was author of five constitutional amendments that changed the constitutional text regarding the Judiciary. During

Labor's Party (PT) administration, all three amendments were proposed by the Legislature, whose proposals were initiated in 1992, 2001 and 2006 and respectively approved in 2004, 2013 and 2009. The chart below illustrates the increase of judiciary power from 1891 to 2015. Axis "y" represents the length of judicial chapters in constitution, measured by number of words. Axis "x" represents the years. Each point represents President's terms in which there were a change in the constitutional text related to judiciary.

Graphic 3 – Judicial Empowerment by Brazil's Presidents



Author's elaboration.

It is clear that democratic governments have contributed much more to the inclination of the adjustment line than dictatorial administrations, which corroborates Grinsburg's argument, which will become even clearer in section 3, where data will give even more robust answers. Hitherto, both Ginsburg and Ferejohn have made a solid

contribution to the formulation of the hypothesis that the greater the party fragmentation, the greater the empowerment of the judiciary in Brazil.

3. Methodology and Data Analysis

The institutional changes implemented by constitutions and their respective amendments were not random or bequeathed to chance, but the result of a strategic calculation taking into account the trajectory of the Brazilian political system. The institutional aspect is central to this analysis, by verifying what institutions do, how they´re maintained and how actors behave. There are therefore two perspectives, one lies in a strategic assessment and the other on cultural aspects. Hall and Taylor (2003) argue that an individual's behavior is never entirely strategic, limited by his or her world view, that is, for culturalists or people seeking more satisfaction than an optimization. The perspective of strategic calculation goes in the opposite direction, showing that institutions are maintained because they realize something close to the Nash equilibrium. Historical institutionalists, on the other hand, work with both perspectives dealing with the relationship between institutions and action. According to Victoria Hattam (1993) the difference between institutional contexts have direct incidence on power relations.

> But historical institutionalism theorists have paid particular attention to the way in which institutions unequally share power between social groups. Thus, instead of basing their scenarios on individuals' freedom to enter into contracts, they prefer to postulate a world where institutions give certain groups or interests disproportionate access to the decision-making process (Hall and Taylor, 2003, p. 8)

For Hall and Taylor (200e) historical institutionalists see causality as context. They tend to see complex configurations of factors as being causally significants. These configurations become apparent through historical comparative observation, and it can be extremely difficult if not impossible to break these models and think of a perspective

of causal independent variables. Often there are many variables and possibly a constellation of them is what makes the model significant. Mental, economic constructions and social and political institutions interact with economic development through different paths without necessarily being able to determine which of these elements is more causal in relation to the other or whether the same combination could produce the same results. Immergut (1998) argues based on Weberian notion of elective affinities, this type of analysis is very context-sensitive and determines severe limitations to the generalization of cross-sectional models. However, even within these limits, historical institutionalists aim to test hypotheses and eventually depart from Weber's static typologies of ideal types (Immergut, 1998: 19). Historical institutionalism also seeks to show that contexts in during a certain period of time produce different results. Hall and Taylor state that

> The adherents of historical institutionalism are also closely linked to a particular conception of historical development. They have become ardent advocates of path dependent social causality, by rejecting the traditional postulate that the same active forces produce everywhere the same results in favor of a conception according to which these forces are modified by the properties of each local context, properties inherited from the past (Hall and Taylor, 2003, p. 200)

According to Mahoney (2000) with path dependence there are two distinct processes: the first creates the institution itself, the other is responsible for institutional reproduction. He says that path dependence institutions persist regardless the absence of forces responsible for their original production. Contrary to the period of institutional genesis, which is uncertain/eventual, opposing theoretical expectations, institutional reproduction is explained by mechanisms derived from prevailing theories. In fact, such reproductive mechanisms can be so casually effective when they "trap" a given institutional pattern, making it extremely difficult to abolish (Mahoney, 2000).

Institutions that decisively and quickly engage replication mechanisms are especially capable of seizing opportunities provided by uncertain events and thus triggering self-enforcement sequences that are path-dependent. Effective replication mechanisms allow an institution to quickly take advantage of contingent events that will work in its favor, solidifying a position of dominance before alternative institutional options can win back (Mahoney, 2000).

Mahoney (2000) says it is important to emphasize the power-centric approach that an institution can persist even when most individuals or groups prefer to change it, and an elite who benefits itself from the existing agreement has sufficient power to promote its reproduction. In path-dependence analyses with a power perspective, the origin of the institution is not a predictable consequence of pre-existing arrangements of power (Mahoney, 2000).

Once the institution develops itself, however, it is reinforced by predictable power dynamics: the institution initially empowers one group at the expense of other groups; the favored group uses its additional power to expand the institution; the expansion of the institution increases the power of the favored group; and the favored group encourages further institutional expansion, continues Mahoney (2000).

Due to the fact that previous events are uncertain, this sequence of empowerment may occur even if the group who benefits from the institution was initially subordinated to an alternative group that favored the adoption of a different institution. Thus, this form of path-dependent analysis can be used to show how institutions change the power structure within society by strengthening previously subordinated actors at the expense of previously dominant groups (Mahoney, 2000).

Historical institutionalism is able to blend the cultural patterns of political actors over time with political and economic instability, and the fact that a minority of elected

presidents have completed their mandates in democratic periods (the main feature of political instability), with rational choice patterns through of a strategic calculation specially made to last in time. These institutional pillars give methodological support to the present article by allowing evidence of an upward trajectory of power through well-calculated strategies in order to avoid deadlocks.

3.1 Variables and Measurements

I use time (by year) as a measure to generate the unit of analysis. Thus, dataset consists of 71 events (years), covering a period from 1945 to 2015. The dependent variable is an synthetic indicator based on Shugart and Carey (1992), who created an index of institutional powers of the President of Republic from two dimensions where one is the power to legislate and the other is non-legislative power, on a scale of zero (weak) to four (strong) in each dimension. For the dependent variable in this work, I chose not to establish a scale, but to maintain a counting pattern, mainly in function of generalized linear models. Thus, the dependent variable, here called the iSTF, can be represented by the following figure:

Figure 1 – *Synthetic Indicator of STF's Institutional Power* (iSTF)

$$iSTF = p(AA) + j(gAP)$$

The term p means the active procedural capacity, in other words, the ability to act and produce a decision when procedurally provoked by an author with active procedural legitimacy (AA). The term j means the prerogative the STF justices have to judge constitutionally prescribed actors to appear in the passive pole, either in group or individually (represented in the equation by *gAP*). In this way, the agents that can demand, together with the agents that can be sued, are counted, forming a set of institutional powers that authorize the STF to act in the most varied scenarios, whether

in the diffuse, concentrated control and even in actions against public authorities, like the President of the Republic, Parliamentarians and the upper members of the Cabinet. This indicator, therefore, measures the judicial empowerment of the Federal Supreme Court (STF).

As an independent variable, I chose to use the House of Representatives Effective Number of Parties (ENP). As an alternative to ENP I placed the Minimum Number of Parties (MNP) to implement a constitutional change. This measure was created by Gabriel Negretto (2013), to capture the exact number of games and actors with the influence of implementing constitutional changes, a situation that the ENP or Rae's F does not capture. In this sense, Negretto proposes the MNP as the size of "coalition of reform": a discrete variable indicating the minimum number of points needed to form a coalition able to achieve constitutional amendments. For him,

> If one party controls 75 percent of the seats, the minimum number of parties to pass constitutional changes will be one, whether under absolute or qualified majority. If, however, the constituent body is composed of five parties sharing, say, 49, 16, 13, 12 and 10 percent of the seats, the minimum number of parties required to pass constitutional changes is either two or three depending on whether the decision rule is absolute or two-thirds (Negretto, 2013, p. 58).

Thus, both ENP and MNP will be considered independent variables. Since there is a strong correlation between them which generates multicollinearity if put them together in the same model, them will be used separately. A binary control variable, called Regime, will also be used (as an interactive term) for a better comparative analysis between democratic and authoritarian periods effects on dependent variable. The following table summarizes the statistical characteristics of these variables.

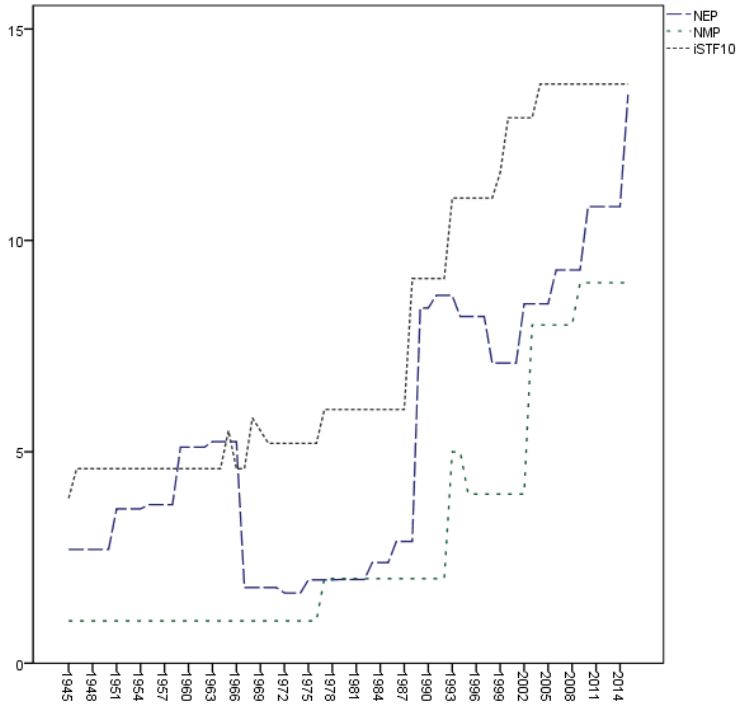
Table 1 – *Variables Features*

Variable	N	min	max	median	SD
iSTF	71	39	137	78.70	36.52
ENP	71	1.66	13.45	5.29	3.20
MNP	71	1	9	3.06	2.83
Regime	71	0	1	0.68	0.471
N valid	71				

Author's Elaboration

The following chart illustrates the relationship between party fragmentation (ENP and MNP) and STF empowerment variables. The variable iSTF have a displaced point to the left (a division by 10) for comparison purposes.

Graphic 4 – *Relationship between Partisan Fragmentation and Judicial Empowerment from 1945 to 2015*



Author's Elaboration

The relationship between the independent variables and the dependent variable is corroborated by spearman's correlation coefficient, as shown in the following table.

Tabela 2 – *Matriz de Correlação de Spearman*

		iSTF	NEP	NMP
iSTF	Spearman Coefficient	1	0.638**	0.957**
	Sig. (two-tailed)		0.000	0.000
	N	71	71	71
ENP	Spearman Coefficient		1	0.714**
	Sig. (two-tailed)			0.000
	N		71	71
MPN	Spearman Coefficient			1
	Sig. (two-tailed)			
	N			71

** Correlation is significant 0.01 level. Author's elaboration

To test the hypothesis the greater the partisan fragmentation, the greater the judicial empowerment, two generalized linear models were chosen, the negative binomial and the gamma. The choice of the model is due to the distribution of the dependent variable, which in this case violates the rules of the linear model, as normal distribution for example. The generalized linear models seeks to deal with variables that don't have normal distribution, more precisely, they seek to attend to typical distributions of counts. Several studies give theoretical support to generalized linear models, such as Nelder and Wedderburn (1972), Feigl and Zelen (1965), Berkson (1944), Dyke and Petterson (1952).

The following table shows the results of the negative binomial model. Five models were run, each with only two variables. In the first, the result was quite significant and indicates a positive impact.

Table 3 –*Negative Binomial Model*

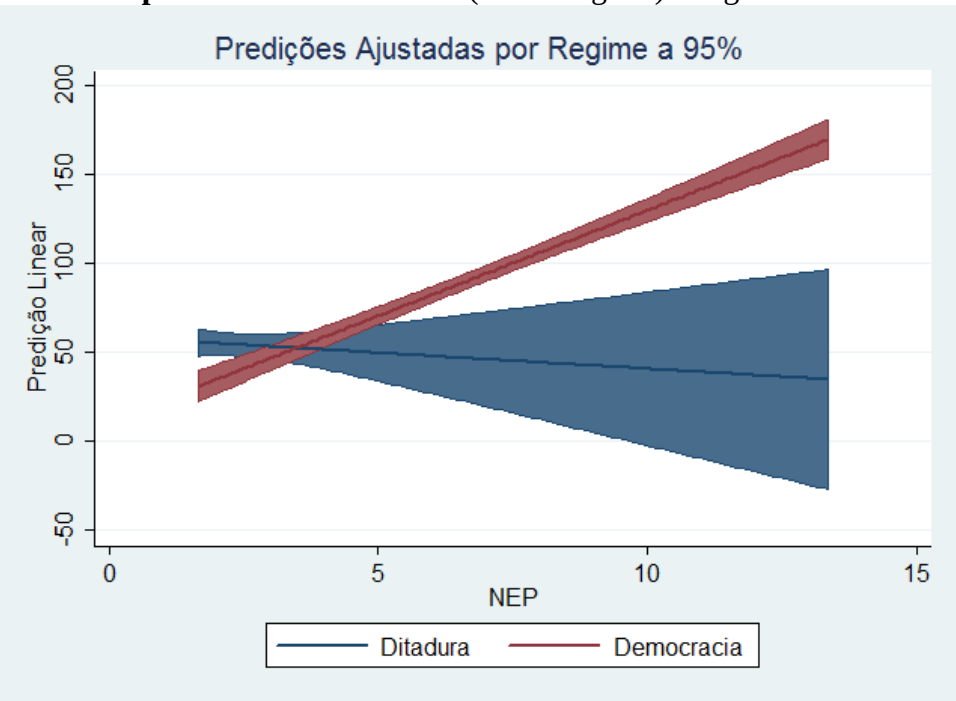
Variables/Models	1	2	3	4	5
ENP	0.0371***				
MNP		0.0450***			
Regime			0.2556**		
ENP*Regime				0.0293***	
MNP*Regime					0.0396***
Intercept	0.2300***	0.1827***	0.2104***	0.1787***	0.1583***
Log-Likelihood	10.442	11.140	3.722	9.896	11.081
model *p*-value	0.001	0.001	0.054	0.002	0.001
N	71	71	71	71	71

Author's elaboration. DV: iSTF. * p < 0.10. ** p < 0.05. *** p < 0.01.

The negative binomial model makes a logarithmic transformation in the dependent variable, so we can interpret the first model as this: by increasing one unit in the effective number of parties increases the probability of judicial empowerment by 3.71%. The second model that concerns the minimum number of parties to implement a constitutional reform, the increase of a party in the “reform coalition”, causes a probability of a 4.5% increase in the indicator of STF judicial empowerment. In model 3, the regime control variable shows that when the regime is democratic (1) the probability of increasing judicial empowerment is 25.56% when compared to the authoritarian regime (0). This shows that the STF was greatly strengthened during the democratic regime, which corroborates Ginsburg's analysis that authoritarian governments have no incentive to strengthen the judiciary. In models 4 and 5, there are two interactive terms ([ENP*Regime] and [MNP*Regime]), because according to Brambor, Clark and Golder (2006) institutional arguments often imply that the relationship between inputs and outputs varies depending on the institutional context. They were also statistically significant. The conditional hypothesis is that the impact of partisan fragmentation is less pronounced in the authoritarian period when compared to the democratic period.

The interactive term shows the impact of partisan fragmentation when the regime variable is equal to zero, that is, when there is no democracy, political fragmentation has a smaller impact on judicial empowerment when compared to the democratic period. This is shown in the graph 5, which estimates the marginal effect probability. Democracy impact is in red and dictatorship impact in blue.

Graphic 5 – Interactive term (ENP*Regime) marginal effect



Author's elaboration

The gamma model also proved to be quite adequate, mainly due to the significance of the variables and the models tested. The following table illustrates the information.

Table 4 – *Gamma Model*

Variables/Models	1	2	3	4	5
ENP	0.0084***				
MNP		0.0092**			
Regime			0.0964***		
ENP*Regime				0.0071***	
MNP*Regime					0.0081***
Intercept	0.0518***	0.0371***	0.0792***	0.0431***	0.0324***
Log-Likelihood	97.518	112.840	22.409	87.511	111.353
model *p*-value	0.000	0.000	0.000	0.000	0.000
N	71	71	71	71	71

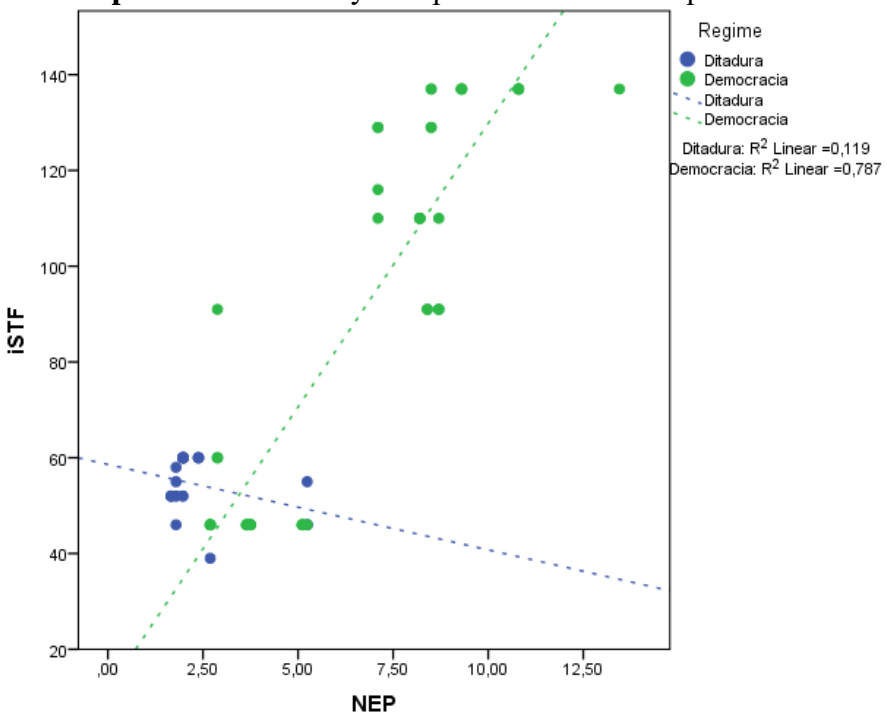
Author's elaboration. DV: iSTF. * p < 0.10. ** p < 0.05. *** p < 0.01.

In model one, by increasing one unit in the effective number of parties entails a probability of 0.84% on increasing in the indicator iSTF. In model two, the increase of one unit in MNP causes a probability of 0.92% in the increase of the iSTF indicator. On the other hand, the control variable in model three shows a 9.64% probability of an

increase in STF empowerment during the democratic regime in comparison to the authoritarian regime. The interactive terms of models four and five corroborate the conditional hypothesis that in authoritarian regimes the probability of increase is lower when compared to the democratic regime. It is also evident that the democratic regime is an important explanatory factor. The following chart shows a comparison of regimes, illustrating data analysis over time.

The adjustment lines show two divergent relationships, where blue illustrates a negative relationship between party fragmentation as measured by the NEP and judicial empowerment during the dictatorial regime, and green illustrates a positive and significant relationship between partisan fragmentation and judicial empowerment during the democratic regime. In addition to the regime relationship, the political system also illustrates the argument of partisan fragmentation as a factor of increase of the judicial power. As discussed in section 2, the issue of separation of powers is an important factor when discussing judicial review.

Graphic 6– Democracy's Impact on Judicial Empowerment

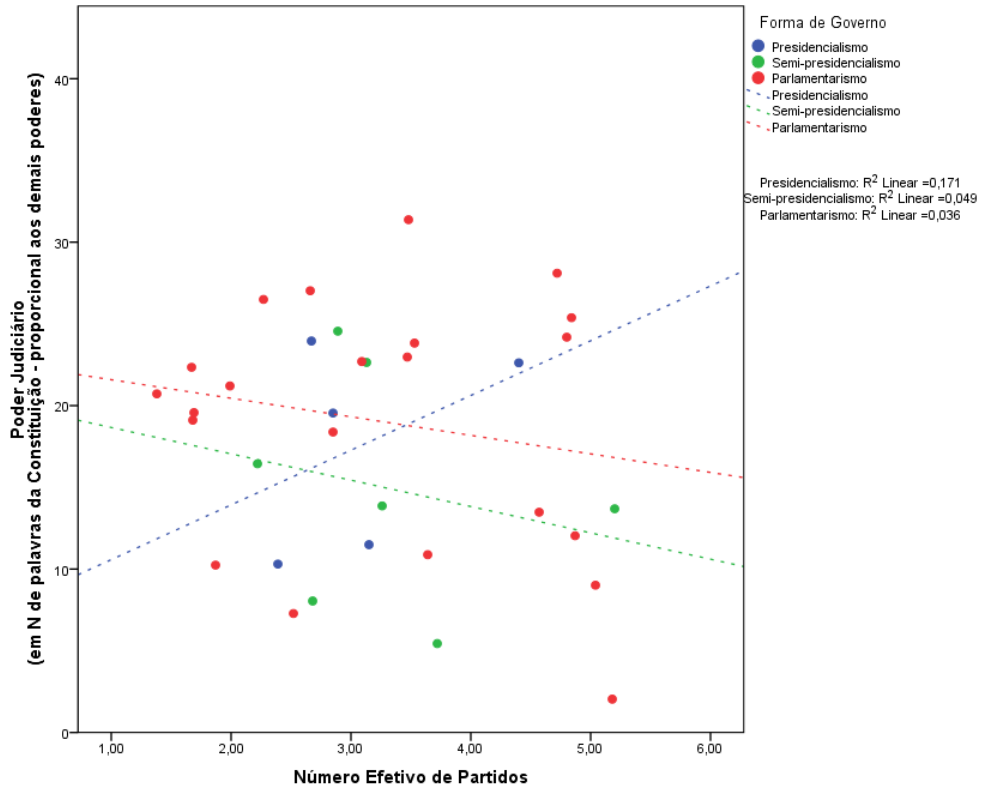


Author's elaboration

Parliamentary or semi-presidential models have from weak to a moderate judicial review (Lijphart, 2003). However in presidential countries judicial review is quite strong. The following graph uses the data from 34 countries studied by Lijphart (2003) as the unit of analysis, and the proportion of the size of the Judiciary in the constitutions in relation to the other powers.

The blue line is the adjustment line of the dispersion between ENP and the proportion of the Judiciary (measured by umber of words in the Constitution). Only in presidentialism this relationship is positive. In semipresidentialism and parliamentarism the relation is negative.

Graphic 7 – *Judicial Empowerment in Three Different Systems of Government*



Author's elaboration. Presidentialists countries are in blue, semipresidentialists in green and parliamentarists countries in red.

That is, a classic system of separation of powers has a more favorable institutional environment for the proliferation of the judiciary. Especially in Brazil, where the Executive is very strong compared to the Legislative.

4. Conclusions

If Parliament was the central institution in the resumption of democratic discussion in post-absolutism models, there is no doubt in the post-war period the judiciary has played a fundamental role. What was in Montesquieu's words close to nothing, or a stranger, as Baleeiro said, it’s almost impossible to deny the fact that today the Supreme Courts have become protagonists in the inability of elected officials to resolve political impasses.

In Brazil, this process, although consolidated by the 1988 Constitution, continued to evolve, giving the Supreme Court the chance to exercise a decision-making capacity not provided by original constitutional text. The models were clear in demonstrating that partisan fragmentation has a positive and statistically significant impact on the increased power of the Federal Supreme Court and this impact is stronger in the democratic period when compared to the dictatorial times. It has also been proven that the STF power increase mainly came from constitutional amendments, the executive been the author of the most.

The current moment of political crisis and the increasingly attentive public opinion eyes on STF decisions corroborate the growing trajectory of institutional empowerment, which authorizes the court to decide peremptorily, not only in the process of elaborating public policies, but also about the very definition of government and the freedom of its members involved in scandals. The impasses the country recently have passing through could be even more damaged if there were no direction from

Supreme Court. Therefore, the remedy for partisan fragmentation and political uncertainties is the judiciary as a kind of insurance policy. And this entire empowerment trajectory happened with the support, the consent and the silence of the incumbents.

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