FURB
Revista Jurídica

COMPARATIVE STUDIES OF CONSTITUTIONAL COURTS: THE ROLE OF ABSTRACT JUDICIAL REVIEW AND CONSENSUALISM IN DECISIONAL PROCESS AND IN DEMOCRATIC STABILITY*

ESTUDOS COMPARATIVOS DOS TRIBUNAIS CONSTITUCIONAIS: O PAPEL DO CONTROLE CONSTITUCIONAL JUDICIAL ABSTRATO NO PROCESSO DECISÓRIO E NA ESTABILIDADE DEMOCRÁTICA

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Abstract: Spain and Portugal created the Constitutional Courts and the two biggest Latin American federations (Brazil and Mexico) forged or expanded the abstract judicial review in their Supreme Courts in the 1980's and 1990's, which were the democratic consolidation decades. Despite the similarities among these countries, the degree of influence on the decisional process (the relationship between government and parliaments, and parliamentary minorities and parliamentary majorities) are not identical, as is the degree of political consensualism. In this sense, the central questions are: How effective is the abstract judicial review in decisional process? What are the differences? Do the Constitutional Courts or Supreme Cortes interfere and cancel the decisions of the other branches and political institutions with no distinction or prejudice or they support the decisions of the majority? How autonomous are the Courts and their decisions? Is the abstract judicial review an important ingredient to democracy stability, to decisions capabilities of the government and majorities and to institutional consensualism? The Law and the Political Science achieved a degree of knowledge about the participation of Courts in the decisional process. However, the comparative studies about Latin American and Iberian Courts, which use empirical data, are rare. Therefore, the aim is to determine the role of the abstract judicial review on democratic consolidation and in the decisional capability of all these countries. The research presents, in a comparative view: 1) Ações Diretas de Inconstitucionalidade, in Brazil (5.457 lawsuits, 1988-2016); 2) Acciónes de Inconstitucionalidad, in Mexico (1.146 lawsuits, 1994/2015); 3) Recursos de Inconstitucionalidad, in Spain (643 lawsuits, 1980-2016); and, 4) Fiscalização Sucessiva, in Portugal (563 lawsuits, 1983-2016). Those four types of actions are capable to realize the abstract judicial review. To understand the impacts of the abstract judicial review, the methodology of the analysis will be: (i) institutional variables (the actors, different types of lawsuits, the procedure to nominate judges, etc.), (ii) politics variables (composition of the

* The research was developed in the Research Center "DIRPOL – Law and Politics" (PPGD / UFPR – Federal University of Paraná) with funding from the CNPq (Edital 14/2014). Research project: "Political institutions, legislative and abstract judicial review: comparative study of executive/legislative relationship, the Constitutional Jurisdiction and legislative production in the sub-national units".

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parliament/government, coalitions, decision stability, nomination of judges, government or parliamentary majority opinion on unconstitutionality/constitutionality of the law). The studies, specifically, analyses the empirical validity of this hypothesis: if the Courts do not decide countermajorities or against the rights and interests of the central government. The preliminary conclusions of the data analysis indicate empirical validity on this hypothesis in Brazil, Mexico and Spain, but not in Portugal.

Keywords: Comparative Studies. Decisional Process. Powers of the State and Political Institutions. Abstract Judicial Review.

Resumo: Espanha e Portugal e as duas maiores federações latino-americanas (Brasil e México) instituíram cortes constitucionais dotadas do abstract judicial review na consolidação democrática (nas décadas de 1980 e 1990). O grau de participação dessas cortes no processo decisório (relação governo/parlamentos e maioria/minoria parlamentar) e, por decorrência, no grau de consensualismo político não é idêntico nesses estados nacionais, apesar das semelhanças culturais e jurídicas. Nesse sentido, as questões centrais tratadas são as seguintes: Como abordar metodologicamente o abstract judicial review como parte do processo decisório tendo as regras institucionais e os resultados eleitorais como variáveis explicativas do processo? Qual a extensão efetiva e a variação do abstract judicial review sobre o processo decisório? Os Tribunais Constitucionais vetam decisões dos atores políticos indistintamente ou suportam as decisões tomadas pelas coalizões majoritárias? Qual o grau de autonomia das cortes e sua determinação sobre suas decisões? Qual a contribuição desse abstract judicial review para a estabilidade democrática, para a capacidade decisória dos governos e maiorias parlamentares e para o grau de consensualismo na democracia desses países? A Ciência Política acumulou um conhecimento sobre a participação das cortes constitucionais no processo decisório. Entretanto, são escassos os estudos que comparam as cortes latino-americanas, buscando dimensionar e explicar os efeitos da judicialização da política em uma perspectiva empírica e comparada com suas congêneres europeias. O objetivo é, portanto, determinar o papel do abstract judicial review na consolidação democrática e capacidade decisória desses países. Para analisar comparativamente o papel das cortes constitucionais, o paper aborda o abstract judicial review como parte do processo decisório. Especificamente, são abordadas comparativamente as decisões dos Tribunais Constitucionais no abstract judicial review nos períodos constitucionais recentes: 1) Ações Diretas de Inconstitucionalidade, no Brasil (5.457 ações, 1988-2016); 2) Acciónes de Inconstitucionalidad, no México (1.146 ações, 1994/2015); 3) Recursos de Inconstitucionalidad, na Espanha (643 ações, 1980-2016; e, 4) Fiscalização Sucessiva, em Portugal (563 ações, 1983-2016). Na construção da abordagem teórica-metodológica, analisamos o abstract judicial review o papel institucional e a atuação do judiciário no processo decisório democrático. A judicialização e os poderes e prerrogativas institucionais atribuídos aos Tribunais Constitucionais para a revisão de constitucionalidade na construção das hipóteses sobre a judicialização do processo decisório. Ao abordar o processo decisório judicializado, tratamos esse como um conjunto de interações entre atores institucionais (individuais e coletivos) que produzem determinado conjunto de resultados políticos (policy outcomes), dependentes da variação institucional e política. As variáveis explicativas dessa abordagem são: (i) variáveis institucionais (extensão dos legitimados, tipos de ações, mandato/forma de nomeação, etc.), (ii) variáveis políticas (composição parlamento/governo, coalizões, estabilidade decisória, nomeações para cortes, posição do governo/maioria parlamentar sobre a constitucionalidade/inconstitucionalidade da lei). Especificamente, o estudo verifica a validade empírica da proposição de que tribunais não atuam contramajoritariamente ao decidir sobre legislação aprovada pela coalizão majoritária. Conclusões preliminares na análise dos dados indicam maior validade empírica dessa hipótese no Brasil, México e Espanha, mas não encontram fácil demonstração no caso de Portugal.

Palavras-chave: Estudos Comparados. Processo Decisório. Instituições Políticas. Controle de Constitucionalidade Judicial Abstrato.

1 INTRODUCTION

The central object of this paper is the judicial review as part of the decision-making/legislative process and its determinants by political institutions and relations between the powers, analyzing the judicialization of politics. The decisions of the Constitutional Courts of four Iberian countries are compared in the concentrated/abstract control of constitutionality (Centralized/Kelsenian judicial review) of legislative acts in recent constitutional periods.

The Iberian countries (Spain and Portugal) and the two largest Latin American federations (Brazil and Mexico) instituted the abstract judicial review during the period of democratic consolidation (in the 1980s and 1990s). The degree of participation of these constitutional courts in the decision-making process (government/parliamentary and parliamentary majority/minority relationships) and, consequently, the degree of political consensualism, is not identical in these national states, despite important cultural and legal similarities.

In comparation with the others three countries, Mexico introduced later the abstract judicial review. In 1994, the *Acción de Inconstitucionalidad* was created through Constitutional Reform, which allowed for an important role to be played by the *Suprema Corte de Justicia de la Nación*.[1]. The literature describes some issues responsible for determining a more independent judiciary in Mexico such as electoral defeats of the *Partido Revolucionario Institucional* (PRI), the intensification of the process of political and economic liberalization and pressure from excluded social sectors.[2]

In this comparison, Brazil is the one with the longest tradition of abstract judicial review, created by the *Representação Interventiva* (interventional federative representation) in the 1934 Constitution.[3] During the military regime, through Constitutional Amendment 16/1965, "alongside the *Representação Interventiva*, and in the same way, the abstract judicial review of state and federal norms was established, increasing the capacity of the Prosecutor-General of Republic to prosecute political conflicts" (CARVALHO, 2010, p.189). However, in the democratic institutional format, Brazilian abstract judicial review is a direct product of the 1988 Constitution and the result of the 1980s redemocratization process.

In Portugal and Spain, the abstract judicial review of both the national government and the autonomous subnationals regions was introduced into the Constitution and the political system in the 1980s (1983, Portugal, 1980, Spain) as part of the democratic institutional arrangement in the 70's.

In this article, with emphasis on empirical and comparative research, the decisions of the Constitutional Courts or Supreme Courts in the Concentrated and Abstract Control of Constitutionality of normative acts in recent constitutional periods are approached comparatively: 1) *Ações Diretas de Inconstitucionalidade*, in Brazil (5.457 lawsuits, 1988-2016); 2) *Acciónes de Inconstitucionalidad*, in Mexico (1.146 lawsuits, 1994/2015); 3) *Recursos de Inconstitucionalidad*, in Spain (643 lawsuits, 1980-2016); and, 4) *Fiscalização Sucessiva*, in Portugal (563 lawsuits, 1983-2016).

In this sense, the central questions are: How effective is the abstract judicial review in decisional process? What are the differences? Do the Constitutional Courts or Supreme Cortes interfere and cancel the decisions of the other branches and political institutions with no distinction or prejudice or they support the decisions of the majority? How autonomous are the Courts and their decisions? Is the abstract judicial review an important ingredient to democracy stability, to decisions capabilities of the government and majorities and to institutional consensualism?

The main objective is to examine the role of abstract judicial review in the democratic consolidation and the decision-making capacity of the main Ibero-American countries. The specific objective of the text is to determine the institutional constraints of the abstract judicial review and the extent and outcome of this judicial review in the declaration of nullity or annulment of national/federal legislative and executive acts (ie, the highest level of government and parliament). The empirical basis of this study is a section of approximately 2,500 decisions of the Constitutional Courts/Supreme Courts in 18 governments/coalitions of these four Ibero-American countries.

This text also seeks to measure the impact of Courts in the declaration of unconstitutionality of decision-making process, in relations between branches of constituted powers, in the relationship between government coalitions and opposition minorities, and in the dynamics between national/federal and subnational governments (restricted to the

national/federal legislative and normative acts object of judicialization). In this sense, we seek to redefine the institutional indicators that measure: the autonomy/independence of constitutional courts, the prerogatives and activism/politicization of courts, the consensualism and the absorption of the courts by the government coalition.

Anticipating some of the conclusions of this article, we can say that, in the case of the four Ibero-American countries compared, the propositions (and explanatory variables) present in the literature on institutional determinations are insufficient to explain the performance of the Constitutional Courts in decisions of unconstitutionality of National/Federal legislative and executive acts.

In fact, institutional autonomy and politicization by appointment indicate the opposite of the prevailing hypotheses in the literature on judicial intervention in the decision-making process. This means that, in addition to future efforts to redefine institutional variables, the comparative research agenda of the abstract judicial review needs to incorporate political variables in explaining the decisions of constitutional courts, as well as incorporating a methodological approach that allows intermediate *n* (A few dozen coalitions of governments). The inclusion of more coalitions of governments from other countries with abstract judicial review (Italy, Colombia, Chile, for example) can expand the approach and its explanatory capacity.

2 CONSTITUTIONAL COURTS AND SUPREME COURTS IN COMPARATIVE ABSTRACT JUDICIAL REVIEW: INSTITUTIONAL VARIABLES AND INDICATORS OF AUTONOMY/POLITICIZATION OF THE JUDICIARY

The Political Science and Constitutional Law achieved in the last decades a descriptive and analytical knowledge about the participation of the Brazilian Federal Supreme Court (STF) in the social, political and legal dynamics through studies on the decisions process of thousands of *Ações Diretas de Inconstitucionalidade* (ADI) in several aspects (VIANNA, BURGOS & SALLES, 2007; CARVALHO, 2009 and 2010; TAYLOR & DA ROS, 2008; TOMIO & ROBL, 2013 and 2015; TOMIO, ROBL & KANAYAMA, 2015 and 2017). There are also some

comparative studies on the decision-making patterns of the Constitutional Courts or Supreme Courts in Abstract Judicial Review (BZDERA, 1993; VANBERG, 1998; FIGUEROA & TAYLOR, 2006; CORKIN, 2010; ALIVIZATOS, 1995; GAROUPA & GREMBI, 2015; TSEBELIS, 2009). However, there are rare studies that investigate with empirical data the Constitutional Courts or Supreme Courts endowed with procedural institutional mechanisms of abstract judicial review, in the comparative perspective, mainly investigating constitutional courts in Latin America and Europe.

A relevant issue in the abstract judicial review is the impact of this form of judicial control over the autonomies of subnational entities. The federative control through constitutional jurisdiction involving the decisions of legal and political actors from different governmental levels (BZDERA, 1993). The abstract judicial review restricts decentralization, in decisions that involve actors from different levels of government, especially nullifying or annuling preferentially legislative and normative acts produced by subnational entities from prerogatives constitutionally consolidated by the national/federal level of power.[4]

Another approach is the construction of institutional indicators of the autonomy/independence of the Judiciary in a comparative perspective (FELD & VOIGT, 2003; STEPHENSON, 2003; LA PORTA, 2004; HAYO & VOIGT, 2007; GINSBURG & GAROUPA, 2009; FIGUEROA & STATON, 2014; MELTON & GINSBURG, 2014; TAYLOR, SHUGART, LIJPHART & GROFMAN, 2014). However, most of these studies do not restrict their scope of independent/dependents variables in judicial review (about decisions in abstract judicial review by constitutional courts), orienting themselves to aspects of economic performance resulting from judicial independence or judicial accountability mechanisms and/or rule of law.

In the construction of the theoretical-methodological approach, we analyze the abstract judicial review as a contingent effect of the strategies of the political/institutional actors in a decision-making process constrained by institutions, that is, the institutional role of the judiciary and the role of constitutional judges in the democratic decision-making process. The judicialization and the institutional powers and prerogatives assigned to the Constitutional Courts for the review of constitutionality of legislative and administrative acts (abstract judicial review) in

the construction of the hypothesis on the judicialization of the legislative/decision-making process.

The decision-making process judicialized is treated as a set of interactions between institutional actors (individual and collective) that produce a set of policy outcomes, depending on institutional and political variation. The explanatory variables of this approach are: (i) institutional variables (extension of legitimates, types of unconstitucionality actions, mandate/appointment of judges, etc.), (ii) political variables (parliament/government composition, coalitions, nominations for constitutional courts, position of the government/parliamentary majority on the constitutionality/unconstitutionality of the normative act judicialized). And, the dependent variable is the decisions in abstract judicial review during a government/coalition.

The research design proposes the construction of a set of explanatory variables on the decisions of the constitutional courts in abstract judicial review and verifies the empirical validity of three hypotheses/propositions adapted to the objectives of this study on the performance of the constitutional courts in the declaration of unconstitutionality (legislative and normative acts of the national/federal level) in the compared countries:

1) The proposition of Lijphart (2003) on the determination of judicial review and constitutional rigidity in consensualism. The independent variables operationalized are: "constitutional rigidity", parliamentary majority necessary to change the constitution (CONST_RIG, qualitative variable, ranging from "4.0", supermajorias to two thirds, "1.0", ordinary majorities); "Judicial review", measured by the attribution of this prerogative to constitutional courts and by "degrees of judicial activism" (JUD_REV, qualitative variable, between "4.0" for "strong" judicial review and "1.0" for absence of judicial review); and, an index composed of the two previous ones (IND_LIJP). The interpretation derived from Lijphart is: when is highier the independent variables, there is a major presence of the constitutional court in the decision-making process, through nullification of normative acts, as a countermajority factor or resulting from judicial activism, and there is greater policy stability. Another alternative interpretation would be that constitutional court with grand prerogatives in abstract judicial

review with low rates of nullification of normative acts could be "absorbed" by the coalition (government/parliament) as a result of the rules of nomination to the court.[5]

2) The proposition of Alivizatos (1995) that, similarly to Lijphart, proposes to explain the degree of judicial politization about the judiciary branch to be a veto player of the legislative process. The independent variables operationalized are: "judicial politization", system of judicial review (*De: decentralised system of judicial review; CC: centralised system of judicial review - constitutional courts*) added to judicial activism or degree of court politicisation (JUD_POL, qualitative variable, Ranging from "4.0", "CC" + *activist judges*, to "1.0", "De" + *self-restrained judges*)[6]; "*Number of Veto Players (VPs) in the Particular Countries*", measured by the definition of Tsebelis (2009) of institutional veto players (VP_ALIV, discrete variable, between "1,0" and "3,0", which measure the numbers of Parliaments and governments that need to agree to change the legislative *status quo*);[7] and an index composed of the two previous ones (IND_ALIV). The interpretation, wich is derived from Alivizatos and is the same as in the previous one, is: when higher the independent variables, greater is the presence of the Constitutional Court in the decision-making process, through nullification or annulment of legislative acts, as a countermajority factor or resulting from judicial activism and greater is policy stability. Also, the alternative interpretation: a constitutional court with great prerogatives in abstract judicial review, in an environment of judicial activism and with difficulty of being judicial overturn by other institutional actors (many veto players) with low rates of nulification of legislative acts could characterize the "absorption" of the constitutional court by the coalition (government/parliament), as a result of the rules of appointment to the court.

3) The proposition on *absorption rule* (TSEBELIS, 2009), where constitutional courts are not veto players, because they are absorbed by other institutional veto players (government, parliaments) by appointment procedures for constitutional courts [8] Therefore, except for policy stability (difficulty of changing the legislative *status quo*), as a function of the number and position of the veto players, which would generate the difficulty of legislative overruled by the other veto players, the courts would not act against the majority in deciding on abstract control over legislation approved by the majority coalition.[9] The independent variable operationalized here is, similar to Alivizatos, the "Number of Institutional Veto Players (VPs)", as a *proxy* for policy

stability (VP_TSEB, discrete variable, between "1.0" and "3.0", which measures the number of parliaments and governments that need to agree to change the legislative status quo). The interpretation is similar to that of Alivizatos, the greater the number of institutional veto players, the greater the possibility of independence of the constitutional courts and nullification of legislative acts.[10] Also the alternative interpretation follows the same direction: many veto players and greater policy stability, therefore, with impossibility of legislative overruled, low rates of nulification of legislative acts by the constitutional courts could characterize the "absorption" of the majority of the court by the coalition (government/Parliament) as a result of the appointment rules for the court.

Consensualism, judicial activism, prerogatives of the constitutional courts and number of veto players (policy stability, difficulty of legislative overruled) would be the explanatory keys of the abstract judicial review performance (nullification rate of the content of legislative acts and norms), according to the above propositions.The unit of analysis of the explanation is the decisions of the constitutional courts in abstract judicial review that nullify or annul national/federal legislative or normative act throughout the duration of a governmental coalition.

The definition of periods by governments (coalitions) is based on the fact that we want to explain whether the constitutional courts are absorbed by the coalitions or if they are more an institutional veto player that extends the policy stability. Therefore, the consensualism in a democratic regime, according to the conception of the democratic regime, policy stability can be perceived as more democracy (Lijphart, for the inclusion of minorities in the decision-making process) or as a risk of regime instability (presidentialism), government instability (parliamentarism) and/or autonomization of the judiciary/Bureaucracies (Tsebelis).

FIGURE 1 – Governments/Coalitions

Brazil (Br)		Mexico (Mx)		Portugal (Pt)		Spain (Sp)	
Collor	90_92	Fox	01_06	M.Soares	83_85	González	83_96
Itamar	93_95	Calderón	07_12	C. Silva	86_95	Aznar	96_04
FHC	96_02	Peña N.	13_	Guterres	96_02	Zapatero	04_11
Lula	03_10			Barroso	02_05	Rajoy	11_16
Dilma	11_16			Sócrates	05_11		
				Coelho	11_15		

Thus, the number of cases observable in the recent constitutional democratic period of the four Ibero-American countries are 18 governments (coalitions)[11] - see Figure 1, ranging from three (Mexico) to six (Portugal) occurrences

The variable dependent on the analysis is the **nullification rate** (total or partial) of the content of national/federal legislative and normative acts, through decisions of the Constitutional Courts in abstract judicial review during the period of a government/coalition (**RT_JUDREV_GOV**). Court decisions "in favor of legitimized plaintiff" are treated here as a *proxy* for "defeats" of the government/coalition in the constitutional courts. That is: when is highier the rules nullified or annulled by the constitutional court, the autonomy of the court is high and its absorption by the government/coalition is lower.

Certainly, this is a limited and imprecise perspective. The government itself can be the author of an unconstitutionality action in court against a norm approved by the parliament, which would be a kind of desertion of the parliamentary majority against the government that seeks to reestablish its preferences through the decision of the constitutional court. However, this is a rare event. The government could also support an unconstitutionality action, even though it is not the legitimized plaintiff, which is difficult to observe. Another possibility is that the government/coalition is indifferent to the nullification or annulment of a normative act, not pressing the court for a decision of abstract judicial review to be made. Also, as in the case of Brazil, it is possible to have an unconstitutional action against a normative act originating from a judicial administrative body such as the National Council of Justice (CNJ), but the number of actions against these norms is very small compared to the judicialized acts of the coalition.

However, because of the impossibility of segregating the position of the government in each unconstitutionality action, we will maintain the nullification rate as a measure of the autonomy/absorption of the majority members in the constitutional courts by the government/coalition.[12] In order to control the effects of this imprecision, we included in the analysis the nullification rate of legislative and normative acts requested by three different legitimized plaintiff: 1) parliamentary minorities / political parties (clearly opposition to the government/coalition; **RT_MINOR_JUDREV_GOV**); 2) "Prosecutor-General", the institutional actor *par excellence* of the unconstitutionality action (**RT_PGR_JUDREV_GOV**);[13] 3) subnational governments, to verify the federative constitutional conflict judicialized (**RT_SUBGOV_JUDREV_GOV**).

The proposed independent and explanatory variables are two indexes, besides those described from the propositions/hypotheses of Lijphart, Alivizatos and Tsebelis: legitimized plaintiff and autonomy of the constitutional court in the judgment of unconstitutionality actions.

1) legitimized plaintiff (**LEG_PLAINT**) and the constitutional prerogatives of these actors to initiate the unconstitutionality action. The legitimized plaintiff (authors of the unconstitutionality action) can be classified through the possibility of jurisdictional normative acts in a broad, restricted or mixed way (broad for some legitimized and restricted for others). By broad, it is understood the possibility of attacking acts of all contents, being the form restricted the legitimacy to request the unconstitutionality of specific matters. The amount of legitimized plaintiff, the size of the parliamentary minority (parties) necessary to propose unconstitutionality and the limitations as to the scope of the normative act object of questioning in Abstract Judicial Review is a fundamental determination for the quantity of actions and for the possible autonomy of the constitutional court. The variable describes the accessibility to the constitutional court to require the nullification/annulment of a norm in abstract control of constitutionality, that is, the more accessible the unconstitutionality action, the greater the number of nullifications proposed in a court. On the other hand, the index suggests that the provision of a greater body of unconstitutionality actions may favor the greater autonomy of the court, either by the increase of judicial activism, or by the greater political and social pressure to the court decision [14] or by the possibility of the judges of the constitutional court to select the actions they wish to decide. In

addition, the greater number of cases would make it difficult for all actions of unconstitutionality to be judged in a reasonable time.

The **LEG_PLAINT** index is composed of four variables that measure the access of the legitimized plaintiff to the constitutional court, varying from "1.0" to "3.0", according to the greater possibility of access to the abstract control of constitutionality: (I) the access of the parliamentary minority (**LEG_MINOR**), varying from "1.0", in Mexico, where 33% of the members of one of the parliaments are required to initiate the abstract judicial review, to "3,0" In Brazil, where all the parties with a single parliamentarian can initiate the unconstitutionality action; (II) the "Prosecutor-General" access to the constitutional court (**LEG_PGR**), ranging from "1.0", in Mexico, to the Prosecutor-General holding limited scope actions, "2.0" in Brazil, Portugal and Spain, where the prosecutor has wide scope for the unconstitutionality petition, to "3.0" in a country where the prosecutor has a monopoly on the unconstitutionality petition (as was the case of Brazil between 1967-88, during the regime military); (III) the access of interest groups and social organizations (**LEG_SOC**), varying from "1.0" in Mexico, Spain and Portugal, where these organizations do not have direct access to the courts and need the mediation of a political or institutional actor to propose actions, to "3.0", in Brazil, where even with limited scope (except for the lawyers' order, OAB, which has no scope limitations), hundreds or thousands of interest groups may initiate a action of unconstitutionality against a federal norm; (IV) the time after the promulgation of the normative act that the legitimized plaintiff can to present to the court the unconstitutionality action (**LEG_TIME**), ranging from "1.0" in Mexico (30 days after promulgation of the norm), "2,0 "In Spain (from three to nine months after the promulgation, according to the legitimized)," 3.0" in Brazil and Portugal (no time restrictions after the promulgation to start the process).[15]

As described by the variables (see descriptive tables in the annex), the number of legitimized plaintiff is broader and plural in Brazil and Mexico, which favors a greater litigation in abstract control of constitutionality. However, in Mexico, there are strong restrictions on all legitimized plaintiff, which reduces the scope of the *Acción de Inconstitucionalidad* that each legitimized can propose in the Mexican constitutional jurisdiction, moreover only a relevant parliamentary minority of 33% can initiate an unconstitutionality action. In Portugal, access to

the constitutional court is broad, even for small parliamentary minorities (10%). In Spain, access is broad for the institutional legitimized and more restricted to the parliamentary minority (fifty parlamentaries, 1/7 of the Assembly and about 1/5 of the Senate).

2) Autonomy of the constitutional court or supreme court in the trial of unconstitutionality actions (**AUT_COURT**) and the individual and collective prerogatives of the court judges. The variable describes the degree of freedom that the judges appointed to the constitutional court could have in the judgment of an unconstitutionality action based on their institutional and constitutional prerogatives. Thus, when more extensive the institutional prerogatives of judges, thera are great autonomy of the court and the possibility of absorption of the majority of judges by the government/coalition is lower. As a consequence, the expectation of nullification of national/federal normative acts by the declaration of unconstitutionality would be greater.

The **AUT_COURT** index also consists of four discrete variables ranging from "1.0" to "3.0", which vary according to the institutional prerogatives of the judges in the abstract control of constitutionality: (I) the term of office of the judges of the constitutional court (**TERM_LIMIT**), ranging from "1.0" in Spain and Portugal (9 years), "2.0" in Mexico (15 years, to age 75) and "3.0" in Brazil (life tenure, to age 75);[16] (II) the recruitment of constitutional judges, the appointment process (*nomination*) and the parliamentary confirmation quórum (**NOMINA**), ranging from "1.0" in Brazil (nomination by President, confirmed by Senate majority, without the direct participation of the Chamber of Deputies), "2.0" in Mexico (nomination a triple list by President, confirmed by 2/3 Senate) and Spain (4 by 3/5 Assembly, 4 by 3/5 Senate, 2 by Government, 2 by General Council of the Judiciary, 1/3 renewed every 3 years), to "3.0" in Portugal (10 by 2/3 Assembly of the Republic, 3 co-opted by judges appointed to the Constitutional Court);[17] (III) the time that the constitutional court has to judge an action of unconstitutionality (**JUD_TIME**), ranging from "1.0" in Spain (up to 45 days, between allegations and judgment) and in Portugal (approximately 4 months for the final judgment), "2.0" in Mexico (90 days for electoral laws and 7 months on average for other normative acts in actions of unconstitutionality)[18], "3,0" in Brazil (timeless restrictions on the judgment, with possibility of decades for the judgment of an action); (IV) the prerogative of judges to pronounce monocratic

and injunction decisions on unconstitutionality actions (**MONO_DEC**), varying from "1.0", in Portugal, Spain and Mexico (not foreseen, nonexistent or temporary expecional for the president of the court, with rapid Judgment of the court) to "3.0" in Brazil (widely used and available to all court judges).

Defining the variables, it is necessary to summarize the working hypotheses (adapted from the literature and here proposed) that are verified by empirical evidence:

H. Lijphart - Greater "constitutional rigidity" and greater "judicial review" would increase the nullification or annulment of normative acts (national/federal) through Constitutional Court decisions in abstract judicial review during a government/coalition period.

H. Alivizatos - Highiers "judicial politization" and "number of Veto Players (VPs)" (institutional veto players) would increase the nullification rate or annulment of normative acts (national/federal) through decisions of the Constitutional Courts in abstract judicial review during the period of a government/coalition.

H. Tsebelis – A big "Number of Institutional Veto Players (VPs)" as a *proxy* for policy stability would increase the nullification rate of normative acts (national/federal) through decisions of the Constitutional Courts in abstract judicial review during the period of a government/coalition.

H. 1 - A greater access of the legitimized plaintiff and its constitutional prerogatives, a substantial autonomy of the constitutional court and the individual and collective prerogatives of the court's judges would increase the nullification or annulment of normative acts (national/federal) through decisions of the Constitutional Courts in abstract judicial review during the period of a government/coalition.

H. 2 (Alternative) - Low rates of nullification or annulment of laws by constitutional courts, even endowed with broad institutional prerogatives of access of the legitimized plaintiff to the courts and high autonomy of the constitutional court and extensive individual and collective prerogatives of the judges, would characterize the "absorption" of the Majority of the constitutional court by the coalition (government/parliament) as a result of the rules of appointment to the constitutional court.

3 ABSTRACT JUDICIAL REVIEW: ANALYSIS AND EMPIRICAL EVIDENCES

The Actions of Unconstitutionality (abstract judicial review) that are analyzed in this comparison are defined in Table 1. In Constitutional Courts analyzed, there are different kinds of abstract and concentrate judicial review that can be analyzed such as: in Brazil, in addition to the Action of Unconstitutionality (ADI), ADPF (*Ação por Descumprimento de Preceito Fundamental*, when it does not attack concrete acts) e ADO (*Ação Direta de Inconstitucionalidade por Omissão*); in Spain, there is (in addition to AI) *Conflictos Constitucionales* e *Conflictos en Defensa de la Autonomía Local*; in Portugal, there is the *Controle Preventivo* (besides the *Successivo*); and in Mexico, besides AI there are *Controversias Constitucionales*.

TABLE 1 – Constitutional Courts and Abstract Judicial Review

Country	Constitutional Court	Abstract Judicial Review	Years	Actions (Total)	Actions (JUDREV_GOV)	Actions (MINOR)	Actions (PGR)	Actions (SUBGOV)
Brazil	STF – Supremo Tribunal Federal	ADI – Ação Direta de Inconstitucionalidade	1988/ 2016	4.202	1.448	495	215	114
México	SCJN – Suprema Corte de Justicia de la Nación	AI – Acción de Inconstitucionalidad	1994/ 2015	876	46	21	16	---
Spain	Tribunal Constitucional de España	RI – Recurso de Inconstitucionalidad	1980/ 2016	643	364	70	12	282
Portugal	Tribunal Constitucional	Fiscalização Sucessiva	1983/ 2016	563	472	57	162	45

Source: Constitutional Courts and Supreme Courts.

(*) Actions (Total) include actions of unconstitutionality against federal/national and against subnational normative acts; other quantitative only actions against national norms of the governments/coalitions analyzed. In Brazil, in June 2016, 5,457 ADI entered the STF, of which 4,202 were judged in a final decision or preliminary injunction. The 1,448 ADI judged against federal normative acts analyzed (5 governments), 563 were proposed by Associations/Federations (interest groups), 48 by OAB (Bar Association), 3 by President of the Republic and one by Chamber of Deputies. In Portugal, excluding Preventive Control actions. The 472 Sucessive Control against national normative acts analyzed, 137 were proposed by the "*Provedor de Justiça* " and the others (71 actions) by Public Prosecuture, President of the Republic, President of the National Assembly and Prime Minister. In Mexico, in July 2016, 1,146 AI were admitted to the Court, of which 876 AI were judged, were excluded AI was not judged, or it was impossible to define the legitimized plaintiff, Adjudicated and/or result of the judgment. The 46 AI judged in Mexico against federal normative acts, 9 were proposed by the "Human Rights Commission".

The actions of unconstitutionality defined for comparison were chosen because they are the ones that are more equal to the Direct Action of Unconstitutionality (ADI) judged by the

STF in Brazil, because, in those actions choose, is possible to direct nullifying a normative act approved by parliaments or decreed by governments and it is also possible to use more contemporary procedural techniques that impose corrective and amending decisions on the normative act, thus establishing a specific interpretation of the Constitutional Court on the meaning of the normative text that does not violate the Constitution.

The first descriptive observation of the data in the previous table indicates the large variation in the number of Actions of Unconstitutionality present in each country. The data vary from 563 in Portugal and 643 in Spain to 4,202 judgments of abstract judicial review in Brazil. This results from rules on the admissibility of Actions of Unconstitutionality in the four countries, the number of legitimized plaintiffd and the institutional restrictions to these authors.

Moreover, for comparative analysis of the data, the actions against subnational normative acts were excluded by expressing the "federative" centralization promoted by constitutional courts. Only the actions of unconstitutionality directed against federal/national legislative and normative acts and only in the period of the 18 governments/coalitions were analyzed. Likewise, the number of actions judged reduces by half the disparity between Brazil, Spain and Portugal, indicating both greater access to the legitimized plaintiffs and a greater presence of federal conflict of state normative acts by STF in Brazil. As interpreted previously, this facilitated access to the proposition of actions of unconstitutionality can indirectly provide a greater autonomy of the constitutional court.

However, in Mexico this disparity is widely described. The judgment of the abstract judicial review in this country is clear and broadly directed to subnational entities. Only 46 actions of unconstitucionality (5% of judgments) are moved against federal normative acts, indicating both the restriction of access to judicial review by parliamentary minorities (the requirement of 1/3 of the parliament) and the limitation/absorption of other legitimized plaintiffs by the Government/coalition.

In addition to the description of the absolute numbers, when the kinds of legitimized plaintiffs are analyzed by the proportion of actions initiated in each country, it is possible to verify that: in Brazil, besides the interest groups (the only case among the countries compared) are the main promoters of ADI, the parliamentary minority is responsible for 1/3, the PGR

(Prosecutor-General) for about 15%, and the states represent less than 8% of actions of unconstitucionality; in Mexico, the parliamentary minority represents almost half of the actions, even if this is only 21 actions of unconstitucionality; in Spain, the main promoter of actions against national normative acts are the regional governments (78%), and the parliamentary minority is responsible for 1/5 of the actions of unconstitucionality, indicating a strong federative conflict; and, in Portugal, the main applicant is the PGR (more than 1/3), followed by other institutional actors accessories to the judiciary itself (*Provedor de Justiça* and Public Prosecutor), with the parliamentary minority and local governments responsible for, approximately, 10% of the actions of unconstitucionality each.

The comparative and descriptive analysis of the judgments in favor of the legitimized plaintiffs against national/federal normative acts judged in the constitutional courts reveals that the Abstract Judicial Review has different results in the compared countries (see Tables in appendix). In Brazil, less than 15% of these actions of unconstitucionality were judged in favor of the legitimized plaintiffs and nullified (partially or totally) a federal normative act or altered to some extent the interpretations of the normative acts attacked, being (partially or totally) favorable to the requested by the plaintiffs.[19] In the observation restricted to the legislative acts approved by the National Congress, this percentage is less than 10% of acts nullified by ADI in Brazil. This indicates that the Abstract Control of Constitutionality by the STF, when the requirement of an ADI is made against Federal normative act, has a small impact on relative numbers. The low rate of nullification or annulment of legislative and normative acts may result from the extreme permissiveness of ADI proposition in Brazil. When restricted to the proposition of actions of unconstitutionality by the PGR, the success rate of this plaintiff is higher than 40%, that is, almost one in two ADI proposed by PGR are judged in favor to plaintiff by the Brazilian supreme court.

The data demonstrate that the Abstract Judicial Review of normative acts in the higher sphere (Federal/National) has much more expressive results of declaration of unconstitutionality by the constitutional courts in Mexico (48% of total, PGR with 63% and Parliamentary Minority with 38%), in Spain (42% of total, *Defensor del Pueblo* with 50%, Parliamentary Minority with 45%, and Subnational Governments with 41%) and Portugal (49%

of total, PGR with 69%, Parliamentary Minority with 31%, and Subnational Governments with 12%).

Portugal seems the unitary state by definition. About 80% of the subnational acts judged were declared partially or totally unconstitutional or with some modification of the interpretation of the normative acts attacked by the Constitutional Court. On the other hand, only about 10% of the legitimized plaintiffs demands of the autonomous communities against national acts were considered unconstitutional. Such as found for similar ADI in Brazil (against federal acts by initiative of state legitimized plaintiffs). However, the STF in Brazil decided in favor of plaintiffs less than 40% of the demands of legitimized federal against state acts.

In Spain, communities and autonomous regions obtain almost 50% declaration of unconstitutionality in their demands against national acts. The highest rates of the countries compared. The Spanish Constitutional Court seems to be favoring a federalization of Spain, especially in favor of the most important autonomous regions and communities.

Table 2 presents the data that will be analyzed. The data of the dependent variables for the hypotheses adapted from the propositions of Lijphart (2003), Alivizatos (1995) and Tsebelis (2009) were constructed from the authors' interpretation, as explained in the previous section. As the analysis of the determination of independent variables on the nullification rate (RT_JUDREV_GOV) of federal/national acts by the constitutional courts is still preliminary, Table 3 presents Pearson's correlation as an easily interpretable measure of the association between the different variables (and, consequently, hypotheses), measuring the direction of this correlation (whether positive or negative) between the variables. The most immediate and clear findings is that all hypotheses (Lijphart, Alivizatos, Tsebelis and ours) on the association between judicial autonomy/independence are wrong. There is a negative association between all independent variables (in general, institutional determinations) and the nullification or annulment of acts (RT_JUDREV_GOV) by constitutional courts in comparative countries.

TABLE 2 – Data on Abstract Judicial Review Rate (dependent valiable) and Institutional Determinations (independent variables)

	Judicial Review Rate	Legitimized Plaintif					Contitutional Courts Autonomy					Lijphart (2003)			Alivizatos (1995)			Tsebelis (2009)
Country/ Government Coalition	RT_JUDREV_GOV	LEG_PLAINT	LEG_MINOR	LEG_PGR	LEG_SOC	LEG_TIME	AUT_COURT	TERM_LIMIT	NOMINA	JUD_TIME	MONO_DEC	IND_LIJP	CONST_RIG	JUD_REV	IND_ALIV	JUD_POL	VP_ALIV	VP_TSEB
Br 91_92	0,1823	0,9167	3	2	3	3	0,8333	3	1	3	3	0,7500	2	4	1,0000	4	3	3
Br 93_95	0,1401	0,9167	3	2	3	3	0,8333	3	1	3	3	0,7500	2	4	1,0000	4	3	3
Br 96_02	0,1429	0,9167	3	2	3	3	0,8333	3	1	3	3	0,7500	2	4	1,0000	4	3	3
Br 03_10	0,1487	0,9167	3	2	3	3	0,8333	3	1	3	3	0,7500	2	4	1,0000	4	3	3
Br 11_16	0,1152	0,9167	3	2	3	3	0,8333	3	1	3	3	0,7500	2	4	1,0000	4	3	3
Pt 83_85	0,3750	0,6667	2	2	1	3	0,5000	1	3	1	1	0,6250	3	2	0,7143	3	2	2
Pt 86_95	0,5632	0,6667	2	2	1	3	0,5000	1	3	1	1	0,6250	3	2	0,7143	3	2	2
Pt 96_02	0,4486	0,6667	2	2	1	3	0,5000	1	3	1	1	0,6250	3	2	0,7143	3	2	2
Pt 02_05	0,4400	0,6667	2	2	1	3	0,5000	1	3	1	1	0,6250	3	2	0,7143	3	2	2
Pt 05_11	0,4038	0,6667	2	2	1	3	0,5000	1	3	1	1	0,6250	3	2	0,7143	3	2	2
Pt 11_15	0,5263	0,6667	2	2	1	3	0,5000	1	3	1	1	0,6250	3	2	0,7143	3	2	2
Sp 83_96	0,5185	0,5833	2	2	1	2	0,4167	1	2	1	1	0,7500	3	3	0,7143	3	2	1
Sp 96_04	0,7500	0,5833	2	2	1	2	0,4167	1	2	1	1	0,7500	3	3	0,7143	3	2	1
Sp 04_11	0,3944	0,5833	2	2	1	2	0,4167	1	2	1	1	0,7500	3	3	0,7143	3	2	1
Sp 11_16	0,2798	0,5833	2	2	1	2	0,4167	1	2	1	1	0,7500	3	3	0,7143	3	2	1
Mx 01_06	0,6923	0,3333	1	1	1	1	0,5833	2	2	2	1	0,6250	3	2	0,8571	3	3	3
Mx 07_12	0,3889	0,3333	1	1	1	1	0,5833	2	2	2	1	0,6250	3	2	0,8571	3	3	3
Mx 13_	0,4667	0,3333	1	1	1	1	0,5833	2	2	2	1	0,6250	3	2	0,8571	3	3	3

Sources: Constitutionals Courts and Supreme Courts; Lijphart (2003); Alivizatos (1995); Tsebelis (2009).

TABLE 3 – Correlation (Pearson) and Linear Determination (R2) on Abstract Judicial Review Rate

	Legitimized Plaintif					Contitutional Courts Autonomy					Lijphart (2003)			Alivizatos (1995)			Tsebelis (2009)
	LEG_PLAINT	LEG_MINOR	LEG_PGR	LEG_SOC	LEG_TIME	AUT_COURT	TERM_LIMIT	NOMINA	JUD_TIME	MONO_DEC	IND_LIJP	CONST_RIG	JUD_REV	IND_ALIV	JUD_POL	VP_ALIV	VP_TSEB
RT_JUDREV_GOV																	
Correlation	-0,7224	-0,7313	-0,3116	-0,8139	-0,4602	-0,7573	-0,6059	0,6344	-0,7049	-0,8139	-0,4925	0,8139	-0,7157	-0,7049	-0,8139	-0,4999	-0,4668
R_2	0,5219	0,5348	0,0971	0,6625	0,2118	0,5735	0,4969	0,4025	0,4969	0,6625	0,2426	0,6625	0,5122	0,4969	0,6625	0,2499	0,2179
RT_MINOR_ JUDREV_GOV																	
Correlation	-0,7877	-0,7410	-0,4564	-0,7077	-0,7048	-0,6713	-0,4125	0,3427	-0,5335	-0,7077	-0,2406	0,7077	-0,5124	-0,5335	-0,7077	-0,2956	-0,4373
R_2	0,6205	0,5491	0,2083	0,5009	0,4967	0,4506	0,2846	0,1174	0,2846	0,5009	0,0579	0,5009	0,2626	0,2846	0,5009	0,0874	0,1912
RT_PGR_ JUDREV_GOV																	
Correlation	-0,2724	-0,3340	-0,3107	-0,2317	-0,1172	-0,0814	-0,1299	0,3002	-0,1055	-0,2317	-0,4922	0,2317	-0,4100	-0,1055	-0,2317	0,0242	0,1965
R_2	0,0742	0,1116	0,0965	0,0537	0,0137	0,0066	0,0111	0,0901	0,0111	0,0537	0,2423	0,0537	0,1681	0,0111	0,0537	0,0006	0,0386
RT_SUBGOV_ JUDREV_GOV(*)																	
Correlation	-0,3773	-0,1950	---	-0,1950	-0,7858	-0,3386	-0,3068	-0,1917	-0,1950	-0,1950	0,5217	0,1950	0,1917	-0,1950	-0,1950	-0,1950	-0,5694
R_2	0,1424	0,0380	---	0,0380	0,6176	0,1146	0,0380	0,0368	0,0380	0,0380	0,2722	0,0380	0,0368	0,0380	0,0380	0,0380	0,3242

(*) The statistics do not include the three governments/coalitions of Mexico (only the 15 cases of the other countries), since Mexico does not foresee the possibility of subnational governments require the unconstitutionality of a federal act to the Constitutional Court.

The only independent variables that individually have a positive association with the nullification rate (RT_JUDREV_GOV) are the constitutional rigidity (CONST_RIG; Lijphart) and the process of appointing the judges of the constitutional courts (NOMINA; proposal in this research). The control of the variable dependent on the insulation of actions of unconstitutionality required by minorities (RT_MINOR_ JUDREV_GOV), a *proxy* for verification of countermajority power of the judiciary, does not present distinct associations of the general measure of nullification of federal/national acts by constitutional courts. The association for the demands of the main institutional actor, the Prosecutror-General (RT_PGR_ JUDREV_GOV), shows a lower degree of association of the variables, negative or positive, indicating that the nullification rate obtained by this legitimized plaintiff can not be easily explained by institutional variables. That is, if the constitutional court is autonomous of the coalition of government the PGR will tend to have the same direction. If the court is absorbed, the PGR will also tend to be absorbed.

Finally, the control of the measure of association by the demands of unconstitutionality of subnational entities (RT_SUBGOV_ JUDREV_GOV) is also little explanatory promising with the institutional variables present in the hypotheses. With the exception of IND_LIJP, which has a positive association. However, here we believe that the descriptive findings of an earlier study (TOMIO, ROBL and KANAYAMA, 2017) are more robust: Constitutional courts are clearly centralizing in Mexico, Portugal and Brazil, and incorporated the federative conflict in the case of Spain, which is on the boundary of a dismemberment or constitutional institutionalization as a *de facto* and *de jure* federation.

On the other hand, another simple and readily understandable measure between the independent variables and the rate of nullification or annulment of federal/national acts by the constitutional courts of the countries compared (linear regression, R^2) shows that even without indicating the meaning, the set of institutional variables proposed in this study has a greater explanatory power on the observed values for RT_JUDREV_GOV (and for RT_MINOR_JUDREV_GOV, however, this does not occur for RT_PGR_JUDREV_GOV and RT_SUBGOV_JUDREV_GOV) the support of the governments/coalitions of the Ibero-

American countries observed. In fact, the explanatory capacity is very high for the results observed in Brazil and Portugal and not so clearly observed for Spain and Mexico.

This indicates that, both for the set of actions of unconstitutionality and for the argument of the countermajoritarian power of the constitutional courts, the set of institutional variables, and the respective indices of access to demands of unconstitutionality by the legitimized plaintiffs (LEG_PLAINT) and autonomy of the constitutional courts and supreme courts with respect to the governments/coalitions (AUT_COURT) are able to explain in a more comprehensive way the values of nullification rate of federal/national acts by the constitutional courts than the variables proposed by Lijphart, Alivizatos and Tsebelis for the four countries and 18 governments analyzed.

However, for the more accurate explanation and to be able to test both hypotheses proposed (main: constitutional courts are endowed with autonomy in the actions of unconstitutionality judgments; alternative: courts are absorbed by the government/coalition), measured by the dependent variable (nullification rate of acts by the constitittionals courts in abstract judicial review during the period of a government/coalition; RT_JUDREV_GOV), it is necessary to incorporate a set of political variables (on absorption) and to improve institutional variables and indicators of judicial autonomy.

In this way, the political variables indicated as determinants for a more robust explanatory model include: composition parliament/government, coalitions in each unit of analysis; policy stability; Individualized nominations for constitutional courts and the appointed's relationship with the government/coalition (or significant minorities, in the case of nominations requiring a qualified quorum); position of the government/parliamentary majority on the constitutionality/unconstitutionality of each act in judgment by the constitutional court; time elapsed until the court decision (when there is no control over the decision of unconstitutionality by the constitutional court). Together, especially in studies compared to low or intermediate "n" (either from countries or from government coalitions), a more comprehensive and broad set of institutional and political variables allow a clearer understanding of the political, institutional and decision-making context of the nullification or annulment of acts in Constitutional Courts and

Supreme Courts, verifying the hypotheses on autonomy/absorption of courts by the government coalition.

4 CONCLUSION

The empirical data described and analyzed compare the decisions of the Constitutional Courts and Supreme Courts of four countries in the Concentrated and Abstract Control of Constitutionality of normative and legislative acts in recent constitutional periods (Brazil, Mexico, Portugal and Spain). In addition, the empirical validity of three consolidated propositions / hypotheses on the abstract judicial review (Lijphart, Alivizatos and Tsebelis) was verified and two hypotheses were proposed on autonomy/absorption of the constitutional courts as part of the decision-making process and its determinants by the arrangement of political institutions.

The basic conclusion is that in the case of the four Ibero-American countries compared, the propositions (and explanatory variables) present in the literature on institutional determinations are insufficient to explain the performance of constitutional courts in nullification or annulment of national/Federal acts. Institutional autonomy and politicization by appointment indicate the opposite of the prevailing hypotheses in the literature on judicial intervention in the decision-making process. This means that, in addition to future efforts to refine institutional variables, the comparative research agenda of the abstract judicial review needs to incorporate political variables in the explanation of the decisions (nullification of acts) of constitutional courts, yet to incorporate a methodological approach to deal with intermediaries "n" (a few dozen coalitions of governments in a few countries).

The hypotheses could only be clearly dimensioned in view of the political and electoral variation of the process of judges appointing in constitutional courts. Unfortunately, the data available at the moment does not make this verification possible for all courts, governments and parliaments. This indicates that, without political and electoral variables that make the analysis more elucidating, it is not possible to measure the effectiveness of the hypotheses about

the autonomy of the constitutional (main) courts or the absorption (alternative) in these countries.

The observation of the data also indicates the enormous difference in the number of actions of unconstitutionality in abstract judicial review present in each country. Data range from approximately a few dozen conflicting federal/national actions in Mexico, hundreds of actions in Portugal and Spain to thousands of actions of unconstitucionality in Brazil.

This results from constitutional determinations on the admissibility of the actions in abstract judicial review, the amount of legitimized plaintiffs and the restrictions that these actors have on the scope of matters to the abstract control of the Constitutional Courts and Supreme Courts.

APPENDIX

FIGURE 2 – Legitimized Plaintiffs (abstract judicial review)

Countries	Kinds on adimissility	Legitimized Plaintiffs
Brazil	**Ampla** para atores estatais nacionais, Ordem dos Advogados do Brasil e Partidos **Restrita** no escopo da demanda para Organizações Sociais e Corporativas e para os Governadores de estados-membros e as Mesas de Assembleias Legislativas **Sem restrições** de tempo decorrido da promulgação da norma para iniciar o processo	Presidente da República; Mesa do Senado Federal; Mesa da Câmara dos Deputados; Mesa de Assembleia Legislativa; Governador de Estado; Procurador-Geral da República; Conselho Federal OAB; Partido Político com representação no Congresso Nacional; Confederação sindical ou entidade de classe de âmbito nacional.
Mexico	**Ampla** para Câmara dos Deputados (contra leis federais), Senado (contra leis federais) e Executivo Federal; Legislativos Estaduais (contra leis estaduais) **Restrita para os demais legitimados** **Prazo** para iniciar a ação (até 30 dias após a promulgação da norma)	33% da Câmara dos Deputados (contra leis federais); 33% do Senado (contra leis federais e tratados internacionais); o Executivo Federal; 33% dos legislativos estaduais (contra leis do próprio legislativo estadual); Partidos Políticos com registro nacional (contra leis eleitorais federais e locais); Partidos Políticos com registro estadual (contra leis eleitorais locais); Comissão Nacional de Direitos Humanos (contra leis e tratados que violem os direitos humanos); Comissões Estaduais de Direitos Humanos (contra leis que violem os direitos humanos em seus estados); Organismo Nacional (contra leis federais e estaduais que violem o direito ao acesso a informação pública e proteção dos dados pessoais); Organismo Estadual (contra leis estaduais que violem o direito ao acesso a informação pública e proteção dos dados pessoais); Fiscal Geral da República (contra leis federais e estaduais, em matéria penal e relacionadas às suas funções.
Spain	**Ampla** para Presidente do Governo, Defensor do Povo, 50 Deputados, 50 Senadores **Restrita** para Órgãos Executivos e Legislativos das Comunidades Autônomas (ley orgânicadel tribunal constitucional espanhol) **Prazo** para iniciar a ação (variação de até três a até nove meses após a promulgação da norma)	Presidente do Governo; Defensor do Povo; 50 Deputados; 50 Senadores, Órgãos Colegiados Executivos das Comunidades Autônomas; Assembleias das Comunidades Autônomas.
Portugal	**Ampla** para todos os legitimados ativos com exceção das autoridades/órgãos das regiões autônomas **Restrita** para os legitimados das Comunidades Autônomas quanto ao escopo da ação **Sem restrições** de tempo decorrido da promulgação da norma para iniciar o processo	Presidente da República; Presidente da Assembleia da República; Primeiro-Ministro; Provedor de Justiça; Procurador-Geral da República; Um décimo dos Deputados da Assembleia da República; Representantes da República, Assembleias Legislativas das regiões autônomas, Presidentes das Assembleias Legislativas das regiões autônomas, Presidentes dos Governos Regionais ou um décimo dos deputados à respectiva Assembleia Legislativa (quando o pedido de declaração de inconstitucionalidade se fundar em violação dos direitos das regiões autônomas ou o pedido de declaração de ilegalidade se fundar em violação do respectivo estatuto).

Source: Constitutions

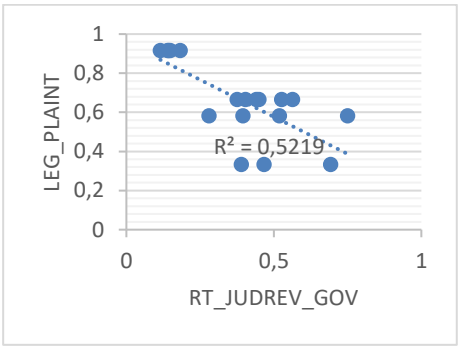
QUADRO 3 – Judges, Nomination and Terms in Constitutional Courts

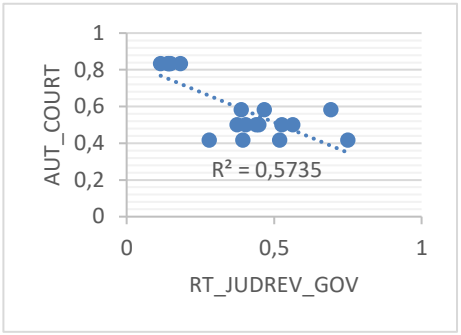
Countries	Judges	Nomination	Terms	Notes
Brazil	11	Indicação do Presidente, com aprovação pela maioria do Senado Federal	Vitalício, até os 75 anos	Liminar (Cautelar) pode ser concedida monocraticamente
Mexico	11	Presidente apresenta uma lista tríplice para o Senado, que escolhe pelo voto de dois terços	15 anos	--
Spain	12	Quatro pelo Congresso por maioria de três quintos; Quatro pelo Senado por maioria de três quintos; Dois escolhidos pelo Governo; Dois escolhidos pelo *Consejo General del Poder Judicial*	9 anos	Renovação da terça parte (quatro membros) a cada três anos
Portugal	13	Dez pela Assembleia da República (por dois terços presentes ou maioria absoluta); Três cooptados (escolhidos) pelos juízes eleitos para o Tribunal	9 anos	Seis juízes têm que ser escolhidos entre magistrados de outros tribunais

Source: Constitutions

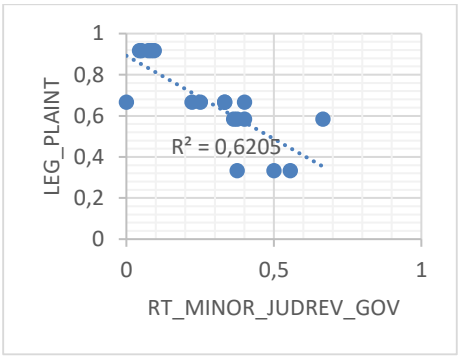
GRAPH 1 – Linear Determination (R^2) on Judicial Review

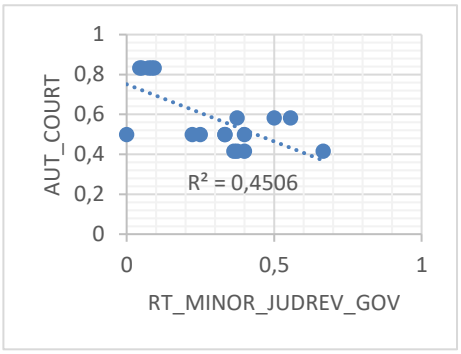
RT_JUDREV_GOV



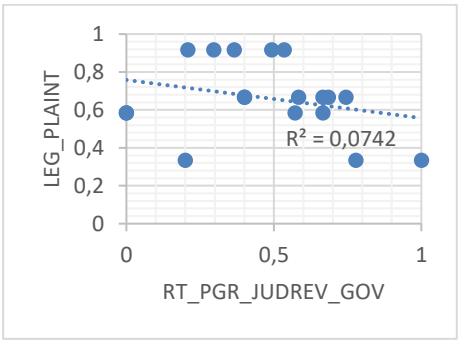


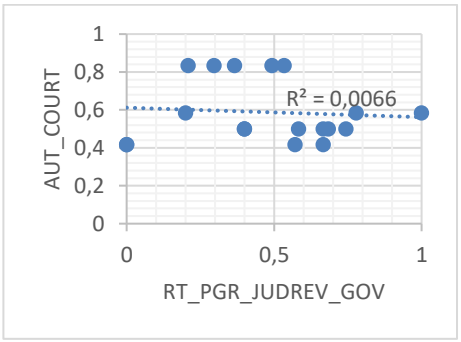
RT_MINOR_JUDREV_GOV



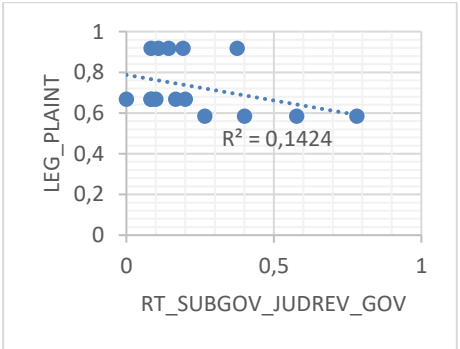


RT_PGR_JUDREV_GOV





RT_SUBGOV_JUDREV_GOV



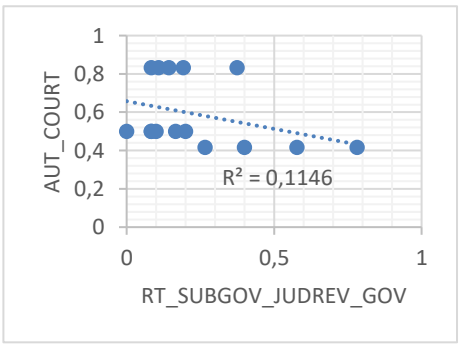


TABLE 4 – Correlation (pearson) between dependent (Judicial Review Rate) and independent variables (institutional determinants)

	RT_JUDREV_GOV	LEG_PLAINT	LEG_MINOR	LEG_PGR	LEG_TIME	LEG_SOC	AUT_COURT	TERM_LIMIT	NOMINA	JUD_TIME	MONO_DEC	CONST_RIG	JUD_REV	IND_LIJP	JUD_POL	VP_ALIV	IND_ALIV	VP_TSEB
RT_JUDREV_GOV	1,000																	
LEG_PLAINT	-0,722	1,000																
LEG_MINOR	-0,731	0,987	1,000															
LEG_PGR	-0,312	0,760	0,756	1,000														
LEG_TIME	-0,460	0,862	0,789	0,848	1,000													
LEG_SOC	-0,814	0,817	0,839	0,277	0,452	1,000												
AUT_COURT	-0,757	0,659	0,652	0,013	0,324	0,947	1,000											
TERM_LIMIT	-0,705	0,515	0,540	-0,143	0,103	0,911	0,970	1,000										
NOMINA	0,634	-0,459	-0,554	0,032	0,052	-0,840	-0,778	-0,878	1,000									
JUD_TIME	-0,705	0,515	0,540	-0,143	0,103	0,911	0,970	1,000	-0,878	1,000								
MONO_DEC	-0,814	0,817	0,839	0,277	0,452	1,000	0,947	0,911	-0,840	0,911	1,000							
CONST_RIG	0,814	-0,817	-0,839	-0,277	-0,452	-1,000	-0,947	-0,911	0,840	-0,911	-1,000	1,000						
JUD_REV	-0,716	0,751	0,836	0,408	0,323	0,888	0,716	0,740	-0,900	0,740	0,888	-0,888	1,000					
IND_LIJP	-0,493	0,551	0,676	0,447	0,146	0,620	0,374	0,447	-0,784	0,447	0,620	-0,620	0,911	1,000				
JUD_POL	-0,814	0,817	0,839	0,277	0,452	1,000	0,947	0,911	-0,840	0,911	1,000	-1,000	0,888	0,620	1,000			
VP_ALIV	-0,500	0,166	0,189	-0,500	-0,228	0,693	0,844	0,929	-0,781	0,929	0,693	-0,693	0,495	0,224	0,693	1,000		
IND_ALIV	-0,705	0,515	0,540	-0,143	0,103	0,911	0,970	1,000	-0,878	1,000	0,911	-0,911	0,740	0,447	0,911	0,929	1,000	
VP_TSEB	-0,467	0,220	0,167	-0,443	0,021	0,614	0,835	0,822	-0,474	0,822	0,614	-0,614	0,239	-0,141	0,614	0,885	0,822	1,000

TABLE 5 – Judgments Results – Portugal

LEGITIMIZED PLAINTIFFS	ADJUDICATED DECISION-MAKING PROCESS/JUDGMENT RESULTS (%)					
	NATIONAL			SUBNATIONAL		
	In favor of plaintiff	Aganist the plaintiff	n	In favor of plaintiff	Aganist the plaintiff	n
NATIONAL	**53%**	**47%**	**428**	**78%**	**22%**	**59**
Deputados	31%	69%	58	75%	25%	8
Ministério Público	89%	11%	38			
Presidente da Assembleia da República	56%	44%	16	100%	0%	1
Presidente da República	67%	33%	9			
Primeiro Ministro	25%	75%	8	100%	0%	1
Procurador-Geral	69%	31%	162	79%	21%	24
Provedor de Justiça	34%	66%	137	73%	27%	11
Representante da República (Açores)				100%	0%	3
Representante da República (Madeira)				73%	27%	11
SUBNATIONAL	**12%**	**88%**	**43**	**15%**	**85%**	**20**
Assembleia Legislativa (Açores)	33%	67%	3	100%	0%	1
Deputados Regionais (Açores)	20%	80%	5	25%	75%	4
Presidente Regional (Açores)	0%	100%	1			
Assembleia Legislativa (Madeira)	4%	96%	23	0%	100%	4
Deputados Regionais (Madeira)	0%	100%	6	11%	89%	9
Presidente Regional (Madeira)	40%	60%	5	0%	100%	2
TOTAL	**49%**	**51%**	**471**	**62%**	**38%**	**79**

Source: Tribunal Constitucional (Acórdãos de Fiscalização Sucessiva, 1983-june/2016).
(*) 563 actions; 13 data missing, impossible to define legitimized plaintiff/result.

TABLE 6 – Judgments Results – Brazil

LEGITIMIZED PLAINTIFFS	ADJUDICATED DECISION-MAKING PROCESS/JUDGMENT RESULTS (%)					
	FEDERAL			SUBNATIONAL		
	In favor of plaintiff	Aganist the plaintiff	n	In favor of plaintiff	Aganist the plaintiff	n
FEDERAL	**14%**	**86%**	**1.398**	**36%**	**64%**	**1.685**
ASSOCIAÇÃO/ CONFEDERAÇÃO	9%	91%	604	26%	74%	631
OAB	22%	78%	60	41%	59%	112
PRESIDENTE	0%	100%	3	0%	100%	1
SENADO				100%	0%	1
CÂMARA DOS DEPUTADOS	0%	100%	1			
PROCURADOR-GERAL DA REPÚBLICA	42%	58%	223	49%	51%	651
PARTIDO	7%	93%	507	30%	70%	289
SUBNATIONAL	**12%**	**88%**	**159**	**54%**	**46%**	**960**
ASSEMBLEIA	18%	82%	28	14%	86%	21
GOVERNADOR	16%	84%	87	56%	44%	932
MUNICÍPIO	0%	100%	2	0%	100%	2
PESSOA FÍSICA	0%	100%	42	0%	100%	5
Total	**14%**	**86%**	**1.557**	**43%**	**57%**	**2.645**

Source: STF – Supremo Tribunal Federal (ADI – Ação Direta de Inconstitucionalidade, 1988-june/2016).
(*) 4.202 judgments, in a final decision or injunction.

TABLE 7 – Judgments Results – Spain

LEGITIMIZED PLAINTIFFS	ADJUDICATED DECISION-MAKING PROCESS/JUDGMENT RESULTS (%)					
	NATIONAL			SUBNATIONAL		
	In favor of plaintiff	Aganist the plaintiff	n	In favor of plaintiff	Aganist the plaintiff	n
NATIONAL	**45**	**55%**	**88**	**71%**	**29%**	**272**
Presidente del Gobierno de la Nación				78%	22%	209
Defensor del Pueblo	50%	50%	12	83%	17%	6
Diputados	48%	52%	65	44%	56%	32
Senadores	27%	73%	11	36%	64%	25
SUBNATIONAL (Gobiernos/Parlamentos)	**41%**	**59%**	**283**			
Andalucía	36%	64%	28			
Aragón	29%	71%	17			
Canarias	23%	77%	30			
Cantabria	100%	0%	1			
Castilla La Mancha	11%	89%	9			
Castilla y León	17%	83%	6			
Cataluña	56%	44%	82			
Extremadura	47%	53%	15			
Galicia	62%	38%	13			
Illes Balears	67%	33%	6			
La Rioja	17%	83%	6			
Madrid	25%	75%	4			
Murcia	0%	100%	6			
Navarra	33%	67%	12			
Principapado de Asturias	13%	88%	8			
Valenciana	38%	63%	8			
Vasco	47%	53%	32			
TOTAL	**42%**	**58%**	**371**	**71%**	**29%**	**272**

Source: Tribunal Constitucional (Recurso de Inconstitucionalidad, 1980-june/2016).

TABLE 8 – Judgments Results – Mexico

LEGITIMIZED PLAINTIFFS	ADJUDICATED DECISION-MAKING PROCESS/JUDGMENT RESULTS (%)					
	FEDERAL			SUBNATIONAL		
	In favor of plaintiff	Aganist the plaintiff	n	In favor of plaintiff	Aganist the plaintiff	n
FEDERAL	**48%**	**52%**	**33**	**65%**	**35%**	**450**
Comisión de los Derechos Humanos	33%	67%	9	47%	53%	38
Minoria Parlamentar	38%	63%	8			
Procurador General de la Republica	63%	38%	16	67%	33%	412
SUBNATIONAL				**34%**	**66%**	**129**
Comisión de los Derechos Humanos				15%	85%	20
Minoria Parlamentar				38%	62%	109
POLITIC PARTY	**37%**	**63%**	**19**	**46%**	**54%**	**245**
TOTAL	**44%**	**56%**	**52**	**54%**	**46%**	**824**

Source: Suprema Corte de Justicia de la Nación (Acción de Inconstitucionalidad, 1994-2016).
(*) 876 to 1.146 actions; 270 data missing, impossible to define legitimized plaintiff, adjudicated decision-making process, results or not judgment.

NOTES

[1] See Domingo (2000, p. 706) and Ríos-Figueroa (2007, p. 36).

[2] See Ríos-Figueroa (2007, p. 36); Schor (2009, p. 179); Domingo (2000, p. 729-730); Magaloni (2008); & Finkel (2003).

[3] The *Representação Interventiva* was attributed to the Prosecutor-General of Republic and served for the judicialization of federal conflicts, being restricted to the state legislative acts conflicting with the federative principles of the 1934 Constitution (CARVALHO, 2010, p. 182).

[4] The understanding of the impact of constitutional jurisdiction on the autonomy of subnational entities and on the power exercised by central government, a hypothesis formulated by Bzdera (1993), is not the central object of this text, which aims at the decisions of constitutional courts on normative acts of national/federal levels. The institution of Abstract Control of Constitutionality consolidated the Constitutional Courts and Supreme Courts as the main (and final) arbiter of the federative conflicts. The effect of abstract judicial review can produce "centralization" or "decentralization" as central and regional governments succeed in their unconstitutionality actions against normative acts. On the federative conflicts judicialized in the countries analyzed, see Tomio & Robl (2013 e 2015) and Tomio, Robl & Kanayama (2015 e 2017).

[5] See Lijphart (2003, p. 214): "tanto la rigidez como la revisión judicial son mecanismos antimayoritarios y que las constituciones completamente flexibles y la ausencia de revisión judicial permiten el gobierno por mayoría sin restricción. El segundo es que tienen un vínculo lógico en que la revisión judicial solamente puede funcionar eficazmente si tiene el respaldo de la rigidez constitucional, y viceversa. Si existe una revisión judicial fuerte pero una constitución flexible, es fácil que la mayoría en la legislatura responda a una declaración de anticonstitucionalidad con una enmienda a la constitución. De forma similar, si la constitución es rígida, pero no está protegida por revisión judicial, la mayoría parlamentaria puede, simplemente, considerar que cualquier ley de constitucionalidad cuestionable no viola la constitución".

[6] See Alivizatos (1995, p. 571): "it is more than obvious that constitutional courts are, by definition, much more powerful than ordinary courts in decentralized systems of judicial review. This is due to the fact that contrary to these ordinary courts, which are empowered to not apply a law in the specific case where they deem it unconstitutional, constitutional courts are empowered to abrogate such law, that is to cancel it. In other words they are in a way legiferating, in the sense that they may openly veto acts of Parliament".

[7] Alivizatos (1995) defines "judicial politization" as dependent variable and "Number of Veto Players (VPs)" as independent variable. Both are treated here as independent variables, since there is no endogeny between them and our dependent variable is the performance of the constitutional court in the nullification of national laws. Alivizatos (1995, pp. 581-4) describes other four independent variables which, because not applicable, will not be considered here: *Degree of Decentralisation (DEC) of the Particular Countries*; *Degree of Polarisation (POL) of the Political Conflict in the Particular Countries on the Right Versus Left Pattern; Degree of Parliamentary Anomaly (PA) in the Particular Countries since World War I; Degree of Integration into Europe (EI) of the Particular Countries*.

[8] "PROPOSITION 2 (absorption rule): If a new veto player *D* is added within the unanimity core of any set of previously existing veto players, *D* has no effect on policy stability" (TSEBELIS, 2009, p. 53).

[9] See Tsebelis (2009, p. 311), "both the judiciary (when making statutory interpretations) and the bureaucracies can be legislatively overruled if they make choices the (legislative) veto players disagree with, so they are likely to avoid such choices. In fact, both the judiciary and the bureaucracy will try to interpret the law according to their point of view (interests?) while eliminating the possibility that they will be overruled. So, high policy stability will give more discretion to both bureaucrats and judges".

[10] See Tsebelis (2009, p. 327), "the empirical evidence corroborates the expectation that independence of the judiciary increases as a function of veto players. Inaddition, most of the time there is empirical support for the idea that federal countries will have more independent judiciary than unitary ones. There is no evidence that the judicial system of a country (common vs. civil law) or the polarization of political forces in it affect judicial independence".

[11] Three governments (coalitions) of the analysis were excluded because they were governments in the transition from the introduction of the abstract control of constitutionality in the political and jurisdictional system: Sarney (Br 85-89), Ernesto Zedillo (Mx 95_00) and Leopoldo Calvo-Sotelo (Sp 81-82).

[12] Romanelli (2016) made an interesting effort to demonstrate the position of the government in the unconstitutionality action in Brazil (ADI), adopting the argument of the AGU (Advocate General of the Union) as a *proxy* of the government's position. Unfortunately, since this information is limited in time (1995-2010) and spatially (only in Brazil), it is not possible to include this information in the analysis.

[13] Excluding social actors and parliamentary minorities, the "Prosecutor-General" is the institutional actor responsible for the majority of unconstitutionality actions in the constitutional court of all four countries, the actor who defends society and the State when requesting the nullification of a normative act by abstract unconstitutionality (in thesis): in Brazil and Portugal, this institutional actor is named "*Procurador Geral da República*"; in Spain, "*Defensor del Pueblo*"; in Mexico, "*Procurador General de la Republica*".

[14] An argument similar to this, visibility making the constitutional court more assertive and willing to political conflict with parliament and government, is proposed by Vanberg (2001). The author treats the "transparency of the political environment" (public attention to court decisions) in the legislative/judiciary relationship is verified as a favorable determinant of "judicial supremacy" (VANBERG, 2001). Vanberg's hypothesis would be as follows: the probability of a Constitutional Court overruled a legislative act increases when the political environment in which it is acting is transparent.

[15] There is no indicator for the subnational legitimized plaintiff because all countries have similarities in this aspect, scope of action proposition of unconstitutionality limited. In Mexico, more limited, it is even forbbiden to the subnational legitimized plaintiff to require the unconstitutionality of federal normative act.

[16] According to Romanelli (2015, p.5), the average longevity of the constitutional judges in the STF (Brazil) appointed since 1981 was 12 years. However, this longevity is increasing, with normal judges serving for more than 20 years.

[17] The interpretation is that the majority of judges, being chosen by a qualified quorum, in a unicameral parliament, the absorption or politicization rate of the judges will be higher. It is not a single interpretation, the opposite could be possible, with the government / coalition in a single house by simple majority absorbing most of the judges.

[18] "El tiempo promedio en que la Suprema Corte ha resuelto las acciones de inconstitucionalidade es de siete meses, dos semanas, dos días", ranging from 62 days in electoral matters to one year and two months in civil matters (LÓPEZ-AYLLÓN e VALLADARES, 2009, p. 205).

[19] See Simão (2014, pp. 173-5), "in the concentrated control unconstitutionality is taken as the main issue *(principaliter tantum*), the controlling agent having only two possibilities: to judge the action by declaring the unconstitutionality of the object norm; Or dismiss the action, declaring the norm-constitutional object. [...] The decision in the concentrated control aims at producing, in particular, a legal effect: suppression of the effectiveness of the norm object [...] Being the unconstitutionality only of the way in which the norm has been applied, the controlling agent in the concentrated control must, in the reasoning, make such a demonstration, however the device must recognize the constitutionality of the norm, since it can only have an interpretation: That which is compatible with the Constitution".

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Recebido: 5-6-2017

Aprovado: 15-9-2017