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## FEDERALISM AND JUDICIAL REVIEW: THE ROLE OF BRAZILIAN STATES' COURTS OF APPEAL.

*A case study in Pernambuco's State Court of Appeals.*

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### ABSTRACT

As a effect of Brazilian model of federalism adopted by 1988's Federal Constitution, all the 26 Brazilian States and the Federal District were authorized to create subnational constitutions as fonts of constitutional supplementary checks to the power exercised by Governors, Mayors, State Assemblies and Municipal Councils, v. g., limiting issues that can or can not be object of legislative deliberation in state and municipal level. This study explores, through normative analysis and empirical data, the role played by a subnational court (*Tribunal de Justiça do Estado de Pernambuco*) in enforcing judicial review when a state or municipal legislative act is claimed to be unconstitutional, because it's assumed to be against State Constitution provisions. Born as a check instrument of state and municipal legislation, in other to protect Pernambuco's State Constitution, the judicial review played by the Court of Appeal is submitted to an analysis of its institutional design and contribution to judicialization of politics in state level.

KEYWORDS: POLITICAL SCIENCE. CONSTITUTIONAL LAW. JUDICIAL REVIEW. FEDERALISM. BRAZILIAN STATES.

## INTRODUCTION

Since Brazilian Republic was proclaimed and Federalism was first adopted as a system of government, the original provinces turned to co-members States of the Federation, displacing power from the central government to the periphery (centrifugal federalism) while constitutional design gives the idea of power decentralization and pursues administrative specialization and efficiency. However, the Federation members exercise of political power, as limited by legislative competence boundaries fixed in Brazilian Federal Constitution, in some situations, can be arbitrary or a result of administrative vices, demanding institutional checks in the rule-making process.

Judicial review is a relevant mechanism to promote political balance and to protect administrative environment, liberties and civil rights from eventual damages derived from unconstitutional legislation or public policies, preserving fundamental values set in constitutional provisions. There is common sense in modern constitutionalism that “[...] *Constitutions* express the 'positivization' of higher values; *judicial review* is the method for rendering such values effective [...]”(CAPPELLETTI, 1971, p.x). Those characters justifies the existence of judicial instruments as methods to protect constitutional values from public acts whose content challenge them.

Inspired on Hans Kelsen (*Pure Theory of Law*), the judicial review focused in abstract, is prosecuted by special proceedings, because the Constitution is the top of Kelsen's hierarchy pyramid of norms, not accepting a lower norm against the “Major Law”.

The concentrated judicial review was created in 1920 on Austria, where the Constitutional Court was created: a part of Judiciary branch which function was to perform the abstract concentrate control of norms, as soon as the union of French revolutionary ideas about judicial review and kelsenian hierarchy of norms took place (CAPPELLETTI, 1971, p.46-47). The existence of a concentrated method of judicial review rather than diffuse one – the review from American Marshal's tradition – conducts to the recognition of constitutional jurisdiction politicization (BONAVIDES, 2004, p.131).

In Brazil, the review system performed by Judiciary is known as shared:

judicial review is practiced both by diffuse and concentrate ways because it is possible to obtain decisions from Judiciary Branch by appeals or by specific procedural instruments (BARBOSA; GOMES NETO; CARVALHO; SANTOS, 2009).

If a legislative act or a public policy defeats the effectiveness of Federal Constitution provisions, the native *forum* to submit these questions is Brazilian Supreme Court (*Supremo Tribunal Federal*); in other instance, if those norms are contrary to State Constitutions, specie of subnational constitutions genre, all claims must be placed by constitutional actions driven to State Courts of Appeals (*Tribunais de Justiça*).

As a effect of Brazilian model of federalism adopted by 1988's Federal Constitution, all the 26 Brazilian States and the Federal District were authorized to create subnational constitutions as fonts of constitutional supplementary checks to the power exercised by Governors, Mayors, State Assemblies and Municipal Councils, v. g., limiting issues that can or can not be object of legislative deliberation in state and municipal level.

This study explores, through normative analysis and empirical data, the role played by a subnational court (*Tribunal de Justiça do Estado de Pernambuco*) in enforcing judicial review when a state or municipal legislative act is claimed to be unconstitutional, because it's assumed to be against State Constitution provisions. Born as a check instrument of state and municipal legislation, in other to protect Pernambuco's State Constitution, the judicial review played by the Court of Appeal is submitted to an analysis of its institutional design and contribution to judicialization of politics in state level.

## FEDERALISM AND LEGISLATIVE COMPETENCE DISTRIBUTION

Brazilian Republic was strongly influenced in its institutional design by north-american model of federalism. However, differently from United States, where a centripetal movement occurred (power allocation from periphery to center), Brazilian movement were centrifugal (power allocation from center to periphery), because republican agreed to share power with local oligarchies.

After Brazilian Federal Constitution promulgation, in 1988, Brazilian model of federalism adopts municipalities as federal actors, giving administrative autonomy and limited legislative competence, in a political arrangement called "*cooperative*

*federalism*" (ALMEIDA, 1991, p.32). This kind of federalism absorbs three counterparts (Union, States and municipalities) reflecting a long-run tradition of municipal autonomy and the relative absence of institutional control mechanisms on local matters.

Constitutionally, Federalism founds its two-dimensions structure: one express the territorial power sharing; other, the legislative competence partition throughout Federation members. Thus, legislative competence distribution, fractioning the law-production activities, is a federalist essence reflex and consists in a federative entities autonomy presupposition.

So, why Brazilian Constitution delegates power to States and municipalities to legislate over predefined issues? The answer is on power-sharing, a key characteristic of Federalism, applied through public interest predominance constitutional principle: States and Federal District might legislate on regional issues and Municipalities can only legislate on local issues (SILVA, 2003, p.52). The Union sustains for itself the main legislative competences, detailed in Federal Constitution, while States and Federal District have residual competence in issues implicitly not reserved to Presidency nor to Federal Congress.

These quoted residual legislative competences will be shared one more time by State Constitutions (subnational constitutions) by defining what issues are State's legislative monopoly and what issues can be considered local interests – in some cases reproducing Federal Constitution provisions – distributing the power to edit law through Federation members. In other hand, despite Brazilian federalism is theoretically classified as cooperative – equal legislative distribution for each level, based on central, regional and local equilibrium – in practice, constitutional provisions gives center predominance over States and State predominance over Municipalities. These inequalities in power-sharing generates different policy capacities and not stimulates the balance between federal members because the absence of functional constitutional instruments driven to foment desirable cooperation (SOUZA, 2005).

By the way, the original theoretical logic that conducts competence distribution in Federalism is not effectively applied in Brazilian reality because constitutional institutions indirectly concentrate the power that should be distributed. Two major trends in Brazilian political literature tries to explain such phenomena: one, based on political institutions, says that Governors exercises informal power over States

representatives in national Congress (SOUZA, 2005) arguing that Federation is dominated regional (state) interests (ABRÚCIO, 1998); other, sees Federation power-sharing as fractioned through a lot of power focuses with unequal capacities, competing between themselves – so, federal, state and municipal governments share the power to deliberate over their own interests (SOUZA, 2005).

While it's possible to say that legislative competence distribution favors Union over other Federations members, mainly because its control over most public budget distribution and a broad spectrum of legislative competence; it's also possible to verify that institutional design also permits the expansion of local power during constitutional democratic age.

The competence distribution analysis is indispensable to understand Brazilian federative system, where cooperative characteristic is being replaced by competitive behavior and a strong power concentration in center: Union has predominance over others members; States have predominance over Municipalities. In this context, the judicial review mechanisms applied in state level offer relevant information about this tension environment between Federation members and competitive power-sharing.

## **STATE CONSTITUTIONS AND CONCENTRATED JUDICIAL REVIEW OF STATE AND MUNICIPAL LAW**

As a consequence of Brazilian Federalism adoption, States (including Federal District) have autonomy to build their institutional design, including the municipalities that exists in their territory, by editing State Constitutions (specie from subnational constitution genre), where are included administrative settings, regional public values – sometimes reproducing Federal Constitutions provisions – as well as the definition of competences, between legislative, executive or judicial actors in state and municipal levels. At the same time, these state constitutional arrangements also guarantee a judicial review institutional tool to preserve their provisions from the existence unconstitutional normative acts (state or municipal laws): the *ação direta de inconstitucionalidade estadual*, or simply state *ADIV*.

The idea to create a institutional instrument applied to control *in abstract* unconstitutional state legislative documents, protecting State Constitutions, first surged into Brazilian constitutional law in 1965, by the 16<sup>th</sup> Amendment to 1946

Federal Constitution. In a second moment, the 1<sup>st</sup> Amendment to 1967 Federal Constitution reiterates the desire to create such kind of a institutional check without detailing how it would works (LEONCY, 2007, p.36, 40).

Nowadays, the 2<sup>nd</sup> paragraph of article 125 of 1988 Brazilian Federal Constitution says that State Judiciaries have competence to decide about claims that argue the unconstitutionality of state or municipal legislation in the face of state constitutional provisions, introducing state judicial review (MORAES, 2007, p.710). That institutional design converts State Courts of Appeals (*Tribunais de Justiça dos Estados*) in real Constitutional Courts, playing judicial review in concentrate mode and controlling state and municipal legislative behavior contrary to State Constitution (ROSA, 2008, p.4).

One can note that Brazilian State Courts of Appeal often declare unconstitutional a legislative act in face of the Federal Constitution or the State Constitution in diffuse mode while judging appeals, with effects restricted to the plaintiff and the defendant (*inter pars*). However, the most relevant role played by States Courts of Appeal is to guarantee State Constitution supremacy by applying judicial review methods in concentrated mode, producing legal effects to every actor in the State respective territory (*erga omnes*) and excluding unconstitutional law (ROSA, 2008, p.8). Hence, Pernambuco State Constitution literally permits state judicial review in concentrate mode when establish the State Court of Appeal competence to judge state *ADIN*(article 61, I, "a").

The judicial review instrument mentioned above might be object of a suit filed against supposed unconstitutional legislative act authors (Governor, State Assemblies, Mayors and Municipal Councils) by few political actors previously selected in State Constitution provisions. By the way, Brazilian 1988 Federal Constitution (2<sup>nd</sup> paragraph of article 125) forbids state constitutional provisions to establish monopoly when trying to restrict the use of state *ADIN* to just one political actor (LEONCY, 2008, p.56-57). In other hand, Brazilian Supreme Court (*Supremo Tribunal Federal*) said that the list of plaintiffs authorized to file state *ADIN* suits don't have to be symmetric to the group of actors accepted in federal level<sup>1</sup> (article 103 of 1988 Federal Constitution), giving freedom to state legislators to choose can play the relevant role to start judicial review.

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1 BRASIL. Supremo Tribunal Federal. Adin 558/RJ, Rel. Min. Sepúlveda Pertence, DJU March 26<sup>th</sup> 1993.

Anyway, Pernambuco's State Constitution (article 63) have chosen nine specific political actors of both state and municipal levels to have the prerogative to file a suit in State Court of Appeals (state *ADIN*) against law in abstract, supposed to be unconstitutional because contrary to State Constitution provisions:

Table #1: Political actors that have legitimacy to file state *Adins* in Brazilian State of Pernambuco

STATE ADIN PROCEDURAL LEGITIMACY
Governor
State Assembly
Mayors (*)
Municipal Councils (*)
General State Prosecutor
Political Party
Professional Regulatory Comissions
Unions

Font: Authors' construction based on Pernambuco's constitutional provisions  
(\*) Mayors and Municipal Councils only can file state *ADIN* suit if regarding to respective local legislation.

One can note that Pernambuco's Constitution, as well as the majority of Brazilian Subnational Constitutions, adopts a large and democratic spectrum of political actors authorized to use state concentrate judicial review instrument to block unconstitutional state and municipal law and preserve state constitutional provisions that reflect their political preferences.

The hypothesis described above can be easy read as a relevant *veto point* when used to impose limits to state and legislative production content trough judicialization<sup>2</sup> of local and regional political conflicts, changing the decision arena from executive and legislative branches to judiciary. This political scenario reflects some characteristics of inter-branches relations in federal level, specially the role played by Brazilian Supreme Court (*Supremo Tribunal Federal*) as an arbitrator in political disputes while judging federal *ADINS* filed against federal or state laws allegedly to be unconstitutional when confronted to Federal Constitution provisions (TAYLOR, 2008; CARVALHO NETO, 2007; TAYLOR; DA ROS, 2008).

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2 This paper uses the term "judicialization" as the diffusion of judicial decision-making arena and/or adoption of judicial mechanisms in political decision arenas (TATE & VALLINDER, 1995).

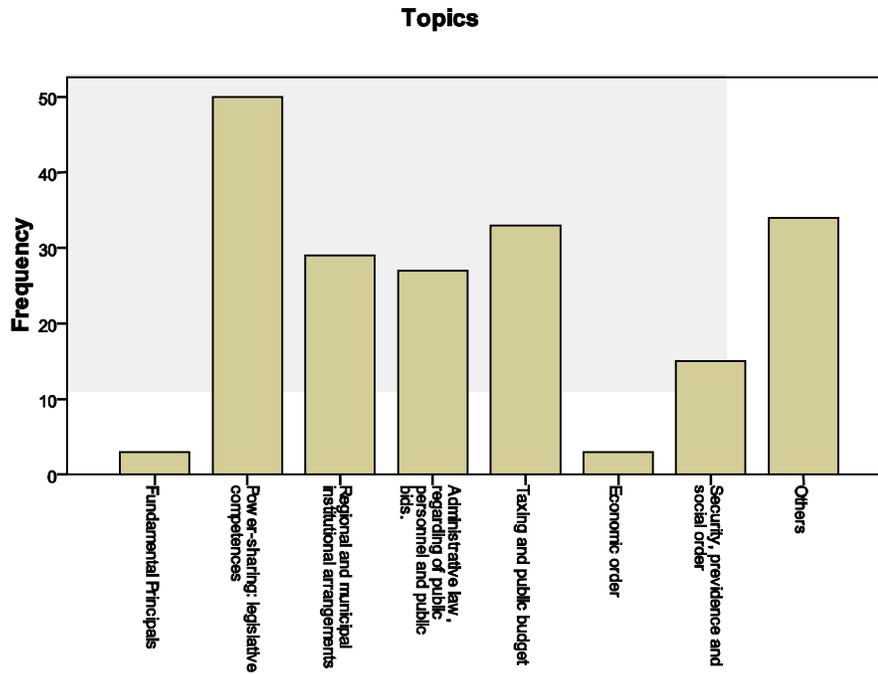
For these reasons judicial actors and judicial review tools available in state level have attracted constitutional law and political science research interests in Brazil, specially to understand its institutional design and the role played by State Courts in constitutional disputes. This case study aims to explain some elements of Pernambuco's State Court of Appeals (*Tribunal de Justiça do Estado de Pernambuco*) exercise of concentrate judicial review and to expose its behavior when asked to settle political disputes related to the production of unconstitutional law.

### **A CASE STUDY OF PERNAMBUCO'S STATE COURT OF APPEALS EXERCISE OF CONCENTRATE JUDICIAL REVIEW.**

In the execution of this research a sample of 194 (one hundred eighty four) state *ADINs* existing in Pernambuco's State Court of Appeals was prepared, covering the period from Pernambuco's State Constitution edition in 1989 to end of the 2009 year and containing relevant data as the constitutional issues that are object of such processes; the subnational constitutional provisions that were argued to be disrespected by state and municipal law; the results obtained. All data was collected directly from processes in the sample without any interference of Judiciary bodies because the lack of such kind of information in official Judiciary databases nor in Pernambuco's State Court of Appeals website, in contrast with Brazilian Supreme Court dataset that is largely available for public and academic consult in its own website.

First, as can be noted in Graph #1, four constitutional subjects get relevance in state judicial review: 1) power-sharing: legislative competences; 2) taxing and public budget; 3) regional and municipal institutional arrangements; 4) administrative law, regarding of public personnel and public bids.

Graph#1: State judicial review distribution by topics



Font: Pernambuco's State Court of Appeals. Elaborated by authors.

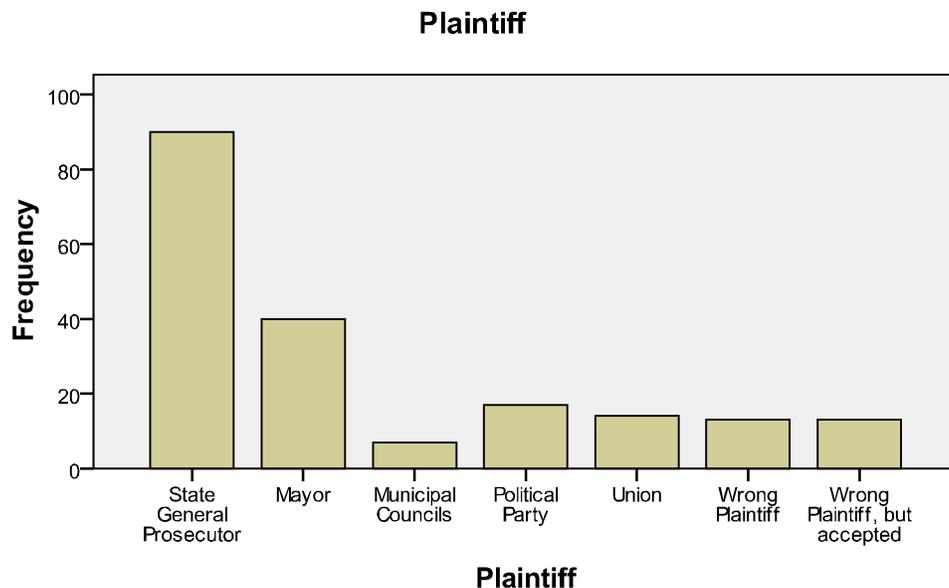
The predominance of judicial review situations related to supposed legislative competences violations, in large majority caused by Municipalities, configures a political scenario that is a consequence of Brazilian Federal system: State Constitutions reproduce the institutional design and Federalism model taken from Federal Constitution concentrating power in Governors. Municipalities tend to overflow its constitutional limits in rule-making procedures, invading States legislative competences and, as a result, editing unconstitutional laws.

That phenomena occurs as a response to Brazilian Federalism: in original models, political power is shared trough a territory, preserving federation members autonomy while linked to a central government; however, Brazilian three-way Federalism still concentrates power in State Executive and only permits that Municipalities – in a condition of weak law production – only legislate about local issues, *v.g.*, urban policy directives (BRANCO, 2007, p.109, 123). Thus, local political interests interferes on legislative process pushing Mayors and Municipal Councils beyond their legislative competences, disrespecting State Constitution as searching to go forward municipal autonomy and get institutional changes, such as evidenced

in producing or reforming rules about budget management.

Although it may appear as a powerful tool to stop unconstitutional policies – clearly a *veto point* in state level – Governors and State Assemblies did not have interest in the judicial review played in Pernambuco’s State Court of Appeals: the leading plaintiff is the State General Prosecutor (chief of *Ministério Público* in state level) followed by Mayors and Political Parties (see Graph #2). The leading position of *Ministério Público* in the exercise of state judicial review is explained by Federal and State constitutional design that offers strong political independence in political scenario and gives the prerogative to start judicial review as one of its institutional primary activities (CARVALHO NETO, 2005).

Graph#2: State judicial review distribution by Plaintiff

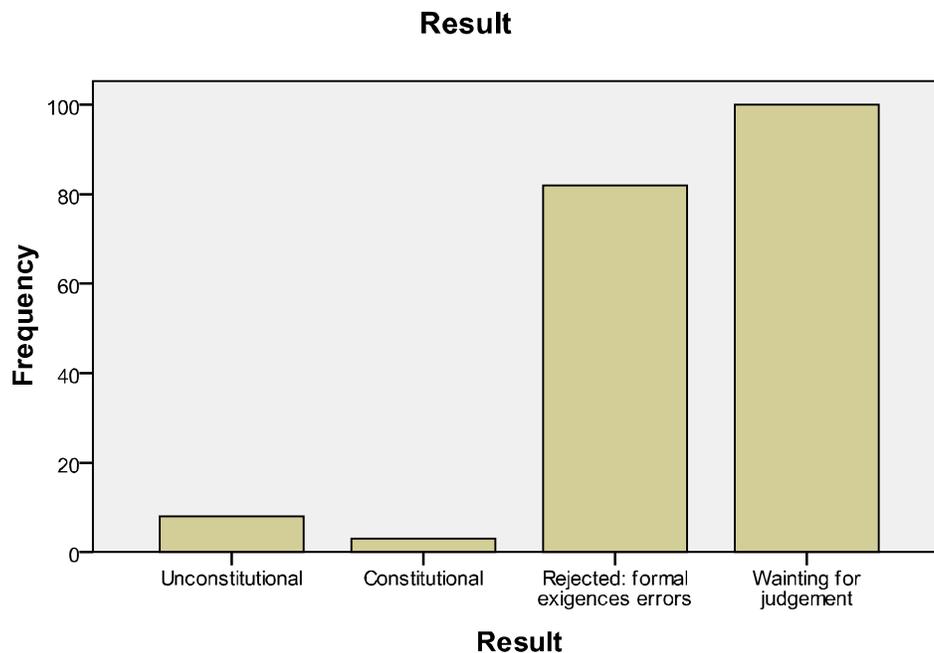


Font: Pernambuco’s State Court of Appeals. Elaborated by authors.

The role played by Mayors and Municipal Councils is also relevant: those state *ADINs* were filed by these actors against laws approved in previous tenures, mainly by opposition parties, supposedly unconstitutional in their content, but imposing public expenditure in undesirable situations. This may offer a very interesting counter-majoritarian veto point to unconstitutional law approved and promulgated by majoritarian forces in local political situations.

And how about the effective results of state concentrate judicial review in stopping concrete effects of state and/or municipal law? The frequency data shown in Graph #3 reveals a curious and paradoxical characteristic of Pernambuco's State Court of Appeals judicial review exercise: quantitatively, *state constitutional cases have not been judged* - the very large majority of process were submitted to two situations: they were rejected, by considering formal exigences errors, or wait for judgement for long periods of time, counted in years.

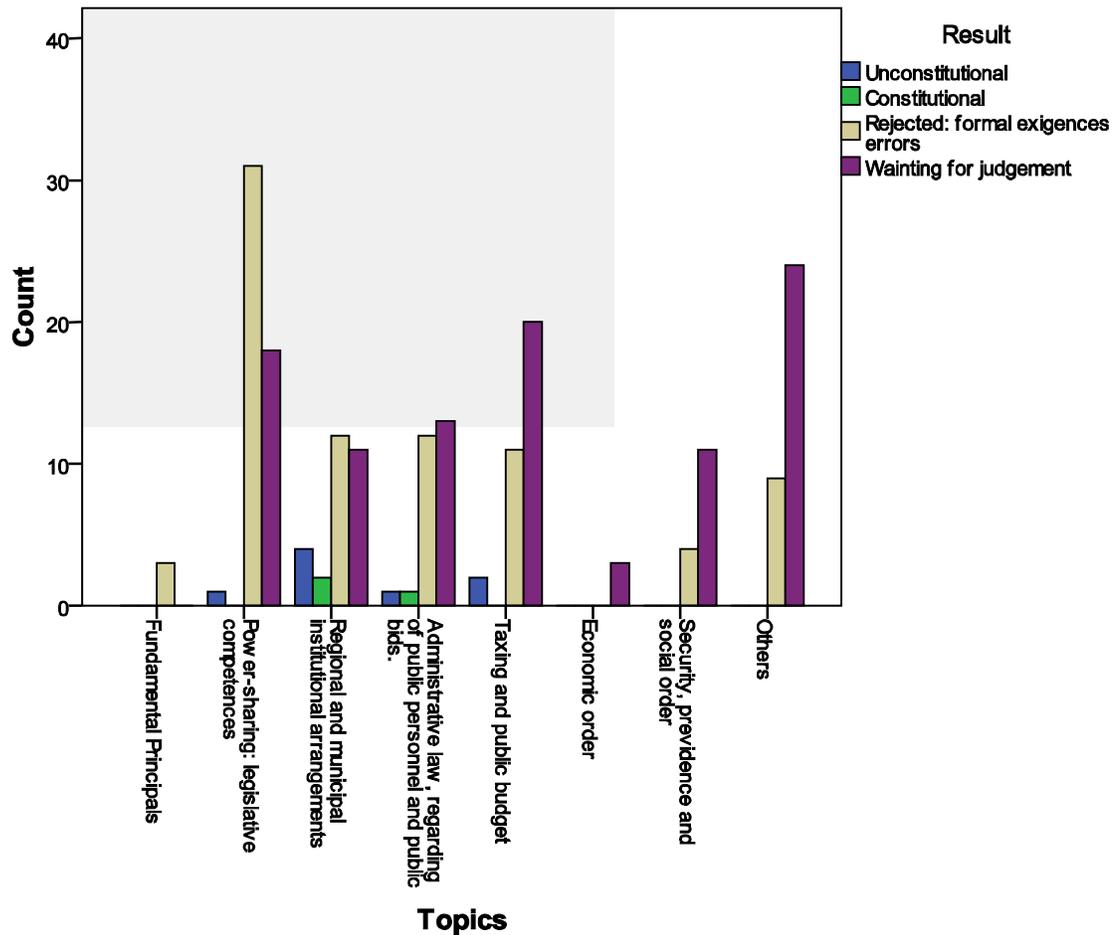
Graph#3: State judicial review distribution by Result



Font: Pernambuco's State Court of Appeals. Elaborated by authors.

Thus, Pernambuco's State Court of Appeals Justices choices, in general, to privilege the importance of declaring formal procedure errors over unconstitutionality and to merely leave out their institutional duties, informally plays a significant political role in state constitutional system. State constitutional provisions loose legitimacy and effectiveness when such kind of omission is actually verified because, in absence of judicial review judgement, state and municipal laws claimed remain intact in their contents and effects, although persists the constitutionality doubt.

Graph#4: State judicial review distribution by Results x Topics

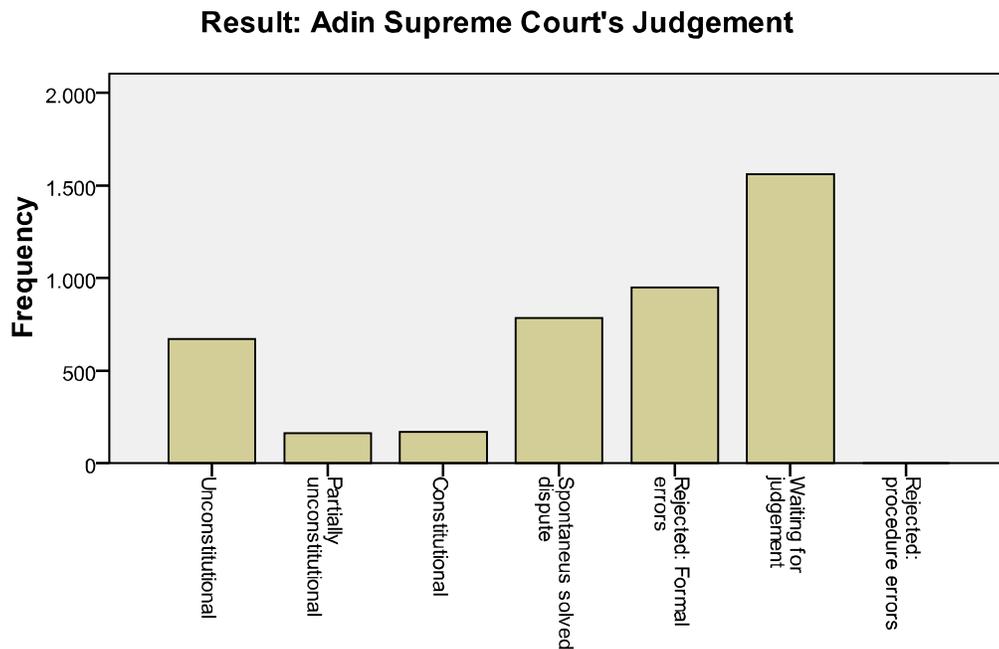


Font: Pernambuco's State Court of Appeals. Elaborated by authors.

One finding that may be important to measure the Federalist balance between Pernambuco State and respective Municipalities: the main issue that justifies concentrated constitutional claims (power-sharing and legislative competences) is less judged than others constitutional topics like taxing or municipal institutional arrangements (Graph #4).

The absence of concentrate judicial review judgement played by Pernambuco's State Court of Appeals basically excludes state constitutional checks in legislative competences subject, expanding municipal rule-making powers and weakening state central government (Governors and State Assembly) influence in such constitutional issues.

Graph#5: Federal Judicial Review: Supreme Court's Results



Font: Brazilian Supreme Court website. Supreme Court dataset elaborated by authors, previously utilized in (BARBOSA; GOMES NETO; CARVALHO; SANTOS, 2009).

Nevertheless, looking to Brazilian Supreme Court data about *ADINs* judgment (Graph #5) and comparing to Pernambuco's State Court of Appeals role in abstract judicial review, this research found a probable pattern behavior among Brazilian Constitutional Courts (federal and state level).

Analyzing the more than four thousand concentrate constitutional suits (federal ADINs) filed on Brazilian Supreme Court, this study detected the same kind of absence behavior, in a proportional lesser degree: Pernambuco's State Court of Appeals have a portion of 94,3% absence behavior (42,5% rejected by formal exigences and 51,8% waiting for judgement) while Supreme Court have an absence tax of 58, 4% (22,1% rejected by formal exigences and 36,3% waiting for judgement).

These high level results are products of Pernambuco's State Court of Appeals institutional design that does not offers positive or negative incentives to State Justices to behave in favor to judge *ADINs*, tolerating absence in professional duties, weakening a constitutional remedy against political arbitrary acts and, indirectly, fomenting the production of unconstitutional laws (in state and municipal level).

## CONCLUSIONS

In Brazilian legal system, by the influence of Federalism democratic model, Federal Constitution provisions specific residual legislative competences to States, will be shared one more time by State Constitutions (subnational constitutions) when defining what issues are State's legislative monopoly and what issues can be considered local interests – in some cases reproducing Federal Constitution provisions – distributing the power to edit law through Federation members (Union, States and Municipalities).

The competence distribution analysis is indispensable to understand Brazilian federative system and the judicial review mechanisms applied in state level offer relevant information about this tension environment between Federation members and competitive power-sharing. This case study started to explain some elements of Pernambuco's State Court of Appeals exercise of concentrate judicial review and to expose its behavior when asked to settle political disputes related to the production of unconstitutional law.

Although this research found a predominance of judicial review situations related to supposed legislative competences violations practiced by Municipalities, exposing the actual tension between regional and local federal entities, it also found a curious and paradoxical characteristic of Pernambuco's State Court of Appeals judicial review exercise: quantitatively, *state constitutional cases have not been judged*.

Appeals Justices choices, in general, to privilege the importance of declaring formal procedure errors over unconstitutionality and to merely leave out their institutional duties, because Pernambuco's State Court of Appeals institutional design that does not offers positive or negative incentives to State Justices to behave in favor to judge *ADMs*, tolerating absence in professional duties, weakening a constitutional remedy against political arbitrary acts and, indirectly, fomenting the production of unconstitutional laws (in state and municipal level).

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