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BRAZILIAN SUPREME COURT AND THE RULE OF LAW CONSTRUCTION:
BUILDING THE LEGISLATIVE QUALITY INDEX (LQI).

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INTRODUCTION

Continuously, in Brazilian constitutional design, Legislative branches produce legislation in national and subnational levels concerning a very large range of political issues. A relevant fraction of such legislation is frequently submitted to judicial review while is asked the incompatibility of their provisions in relation to Brazilian Federal Constitution. But, what about the quality of Brazilian law? How it could be estimated?

In this study, Brazilian Supreme Court, judging constitutional judicial review claims, offers interesting answers to that questions, recognizing constitutional ("good quality") or unconstitutional ("bad quality") federal or state laws, approved by legislative majorities in diverse circumstances.

This research focuses in measuring through multinomial variables, v. g., institutional actors in national and subnational levels, the quality of Brazilian legislative production based in the results of constitutional actions (Adins) judged by Brazilian Supreme Court, where Federal or States' laws were considered totally or partially unconstitutional, building the Legislative Quality Index (LQI).

The LQI is a proportion between the universe of suited actions and the amount of laws totally or partially contrary to Brazilian Federal Constitution, in a scale from 0 to 1, as a continuous variable, driven to statically estimate when, and where, better or worse legislative acts were produced. That index will be explored to test the hypotheses that Brazilian Supreme Court is more receptive to political actors' claims and that national actors are powerful to obtain the exclusion of unconstitutional laws than subnational ones.

INSTITUTIONS, LEGISLATIVE QUALITY AND CONSTITUTIONAL DESIGN

In more and more situations, institutions attract researchers attention in Economy, Political Science and others social sciences because of its nature to shape human behavior.

> Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In

consequence they structure incentives in human exchange, whether political, social, or economic (NORTH, 1990, p.3).

And why they matter in political relations studies? The reason is to understand the origin and the operation of any kind of formalized political power. One central question in Political Science is to explain why institutional differences occur and "what difference those difference make for political behavior, political power and outcome of political process" (ROTHSTEIN, 1996, p.133-136).

As signed by North (1990, p.6), the "major role of institutions in a society is to reduce uncertainty by establishing a stable (but not necessarily efficient) structure to human interaction". This concept is fully compatible with the notion of rule of law. A desirable rule of law is characterized as a legal framework where property rights are respected, laws are clearly known, respected and stable, and there is an independent Judiciary to enforce such norms (KLEINFELD, 2006, p.33-34). As seen, this framework may not overstep constitutional boundaries in legislative competence or violate constitutional guarantees if there is a will to maintain stability and to promote a clear comprehension of legal prescriptions, because it can be reversed by judicial review at any time (BARBOSA; GOMES NETO; CARVALHO NETO; SANTOS, 2009).

The choices to maintain or to change an institution, a set of it, or an entire legislation, based on its constitutional compatibility, performed by judicial review instruments, in particular those played by Supreme Courts, may affect political transaction costs, because they "therefore play a crucial role in determine how rights will be used" (COASE, 1990, p.13).

> The most important message, on with profound implications for restructuring economic theory, is that when its costly to transact, institutions matter (NORTH, 1990, p.12).

So, in that methodological framework, an issue grows in importance as it might be determinant in economic or political choice: *the quality of legislation*. When it comes to analysis, searching for legislative quality means to grade the policy enforcement possibility, relative to policies proposals defined in legal institutions, *v.g.*, bills, laws or administrative acts.

[P]olicies are formulated and legislation enacted so as to solve a problem in society. That problem can only be solved if the policy is implemented and its objectives are achieved. So the implementation of policy is an essential part of the policy circle (DONELAN, 2009, p.4)

For the scope of this paper, laws were divided in two categories: 1) laws compatible with Brazilian Federal Constitution, with high chances of implementation – with plain conditions of certainty and stability – were considered "Good"; 2) laws incompatible with constitutional provisions, which have high chances to not achieve implementation or to have its implementation suspended – defining a uncertainty and unstable scenario – were considered "Bad". So, how to identify these situations?

The key is the judicial review. A large dataset of Brazilian Supreme Court decisions in constitutional claims (adins) was drawn as a source of relevant information about federal and state legislative acts quality. Controlling the information about the results of constitutional actions, positive or negative, researchers can model legislative and judiciary behavior with the aim to understand the legislative production process, in quantitative and qualitative aspects.

So, if Legislative Chambers have high level of professional expertise, avoiding constitutional claims concerning of laws, there is a solid institutional environment which permits to political actors to properly plain policies, reducing political and economic transactions costs. However, if laws are constantly submitted to the Judiciary Branch analysis, it means low legislation quality regarding to constitutional compatibility, raising judicial veto points and creating an unstable institutional environment, in a circumstance that increase transaction costs.

In this sense, political actors who had undesirable political results on the legislative arena may use judicial review procedural instruments as a tool to start Supreme Court legislative quality appraisal in order to break legislative acts stability, supposedly unconstitutional, and, as a result of Judiciary constitutional constraints, impose new transaction costs to their political opponents.

DATA AND METHODS

On methodological grounds, we employed descriptive statistics, cluster analysis and independent *t* test to analyze how Legislative Quality Index varies across national/subnational and political/institutional actors. The main purpose is to identify which actors have more success pursing their demands and which state has good/bad legislation quality. The Legislative Quality Index (LQI) represents the proportion of constitutional actions (ADINS) considered totally or partially unconstitutional by Brazilian Supreme Court divided by the total, excluding ADINS were waiting to be judge[1]. LQI is used as a proxy of law quality produced by the nine actors[2]. A higher LQI suggest higher quality legislation.

$$LQI = \frac{N\_ADINS\_totally + N\_ADINS\_partially}{N\_Total - N\_ADINS\_waiting\ to\ be\ judge} \text{ X } 100$$

The next step is to analyze the distribution of LQI.

**Table 01 – Descriptive statistics – Legislative Quality Index (LQI) per origin**

N	min	max	mean	std
28	12.18	62.50	41.58	9.26

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[1] Technically, we decided to exclude actions under appreciation since as higher its value, lower would be LQI. As we cannot anticipate how Brazilian Supreme Court will rule of constitutional actions, the inclusion of these actions as denominator would underestimate LQI real values.

[2] Methodologically we have divided the nine legitimate actors on four categories: 1) Political and national actors (President of Republic, Senate Board, Deputies Board and Political Parties); 2) Political and subnational actors (States' Governors, States' Assemblies' Board) and 3) Institutional national actors (Republics' General Prosecutor, Lawyer National Council and National Professional Associations).

Figure 01 – LQI per origin[3]
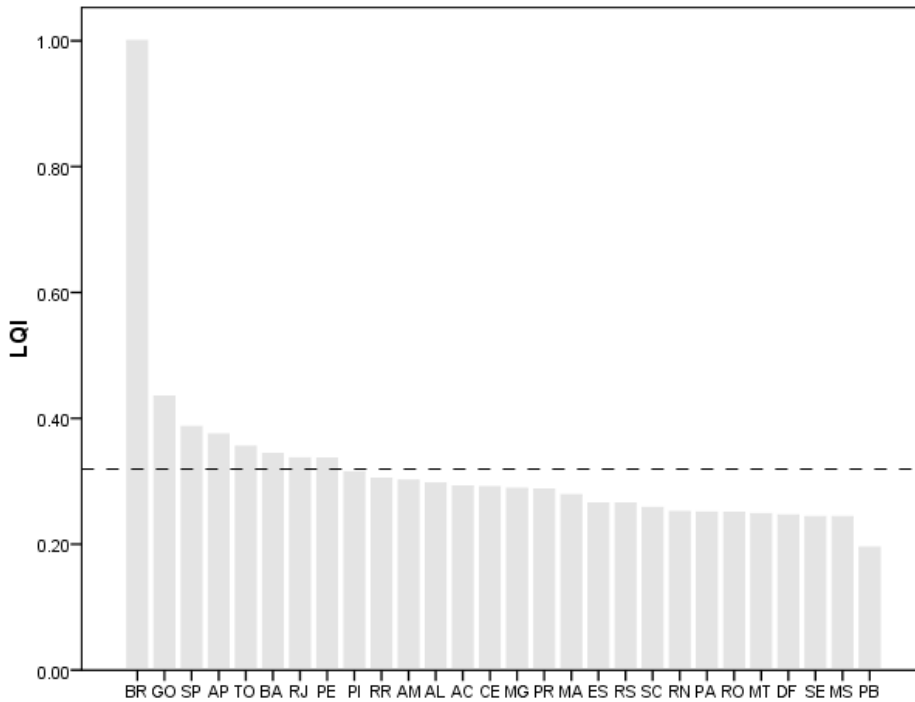
State of Paraiba (PB) shows the lowest LQI (.19) suggesting the worse case of state legislation. In the opposite, national actions show the highest level LQI (1.0) suggesting higher quality legislation. The dotted line represents the mean of the distribution (.32) and the standard deviation is .14. On average, 4 on 10 constitutional actions are struck down by Brazilian Supreme Court. On substantive grounds these results suggests that Brazil has definitively an independent and activist Judicial Branch. In addition, there is a lack of attention (intentional or not) upon constitutional principles during legislative process. Finally, in comparison with Brazilian Congress, the States' Legislative Assemblies still has expertise deficiency on their functionaries in order to support legislators.

An additional methodological procedure was to run a cluster analysis to conglomerate states according to their Legislative Quality Index (LQI). The main purpose is to aggregate similar states into the same cluster based on their LQI level. Figure below shows the results of a K-cluster analysis.

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[3] All the labels means Brazilian states, except BR, that means the Federal Union (the federal laws).

Figure 02 – Cluster Analysis of LQI per origin
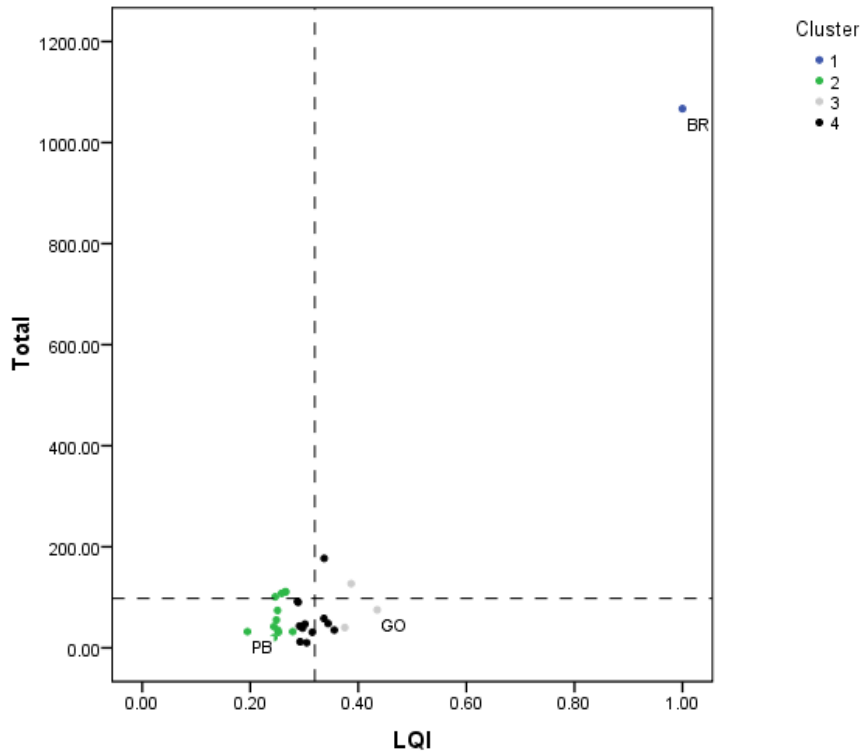
The vertical axe summarizes the total of constitutional actions as a proxy of judicial activism. The horizontal line represents the Legislative Quality Index (LQI). Both dotted lines represent the means of each variable. In the lower left corner are states with both low activism and low degree of LQI. In the lower right side are the states with low levels of judicial activism and high LQI. In the upper left side are the states with high levels of activism and low levels of LQI. Finally, in the upper right are the states that show higher levels of both activism and LQI.

Excluding state of Paraiba (PB) and federal constitutional actions (BR) leaves our sample with a very consistent pattern: states below versus states above the LQI mean. It is possible to compare the means of clusters 2 and 4. Table below summarize this information.

Table 02 – Group statistics – Legislative Quality Index (LQI) per origin

Cluster	N	mean	std	Std. Error
2	12	.25	.02	.01
4	12	.31	.02	.01

Cluster 2 conglomerates 12 states with a LQI mean of .25 and standard deviation of .01. Cluster 4 has 12 states with a mean of .31 and standard deviation of .01. Since the spread of both distributions are very similar we should assume equal variances.

Table 03 – Independent t test – Legislative Quality Index (LQI) per origin

Cluster	F	Sig.	t	df	Sig (2-tailed)
Equal variances assumed	2.568	.123	-6.887	22	.000
Equal variances not			-6.887	21.270	.000

Our assumption regarding equal variances is correct ($p = .123$). The t test (-6.887) suggest that the difference between the two groups is statistically significant ($p<.000$). We are confident to argue that some Brazilian states show higher levels of LQI than others. And these states can be conglomerated into different groups. The next step is to analyze how LQI varies according to institutional actor.

Table 04 – Descriptive statistics – Legislative Quality Index (LQI) per institutional actor

N	min	max	mean	std
8	0	52.13	21.32	20.46

According to our data, the actors which contributes to LQI decrease are the States Governors with a success rate of 52.13%. Republic's General Prosecutor comes in second place. The National Council of Brazilian Lawyers appears in third. The general mean of success rate per institutional actor is 21.23% with a standard deviation of 20.46%. Comparatively, data suggest that the spread of LQI per institutional actor is

higher than spread of LQI per origin. On less technical terms, states are more similar according to their rate of success than institutional actors.

Figure 03 – Success Rate of Actors
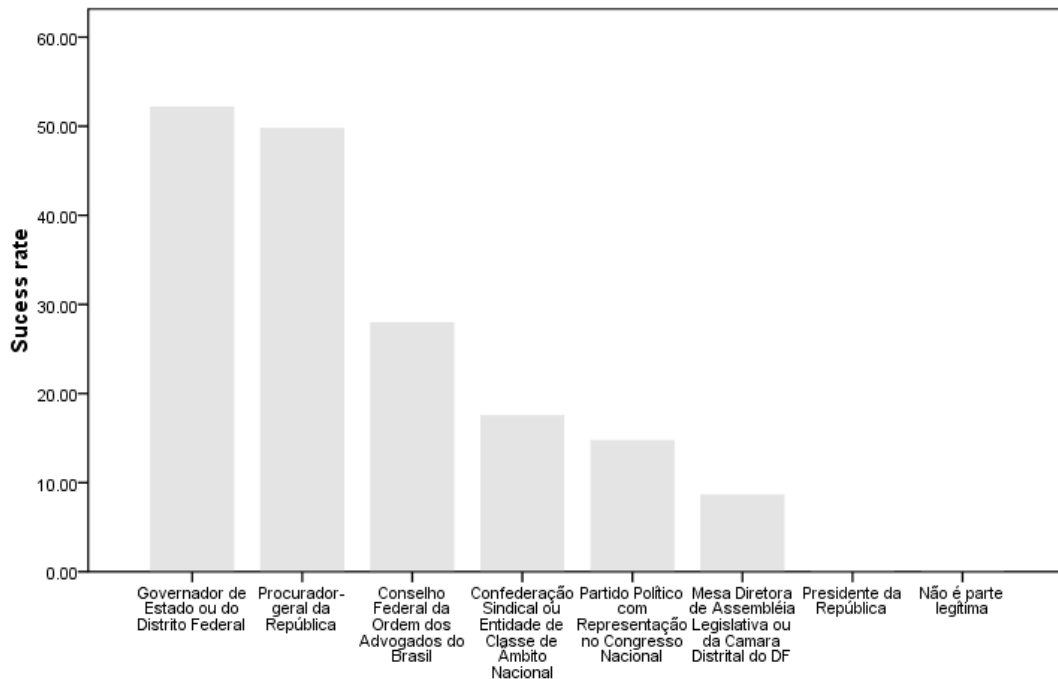
In summary, the overall mean of LQI per origin is .32. In other words, 1 on 3 constitutional actions are accepted by Brazilian Supreme Court. However, some states show higher levels of success than others. For example, Paraiba (PB) showed a LQI of .19 while Sao Paulo (SP), Brazil richest economy, has a LQI of .39. In addition, the success rate per institutional actor is 21.23% suggesting that 2 on 10 constitutional actions were considered totally or partially unconstitutional by Brazilian Supreme Court. State governors show a success rate above 50% and the Republic's General Prosecutor has a success rate of 49.72%. Others institutional actors, as for example political parties, show a success rate of 14.72%. Since our research is most exploratory, we do not have any causal explanations at the moment. The next step is to identify which variables explain the Legislative Quality Index (LQI).

Figure 04 – Legislative Quality Index per year
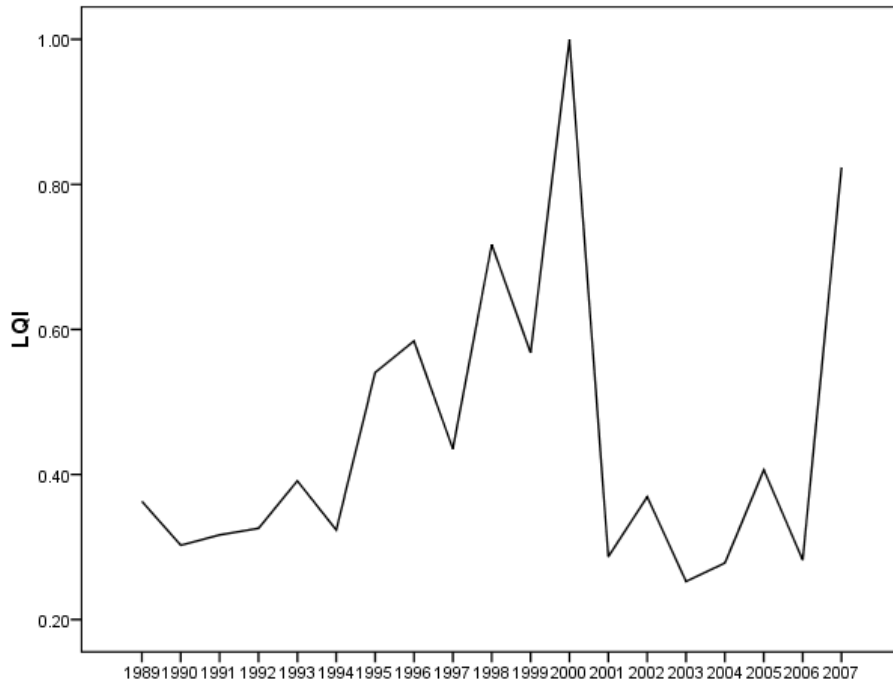
The high and low shows a pendulum movement on judicial review basically because of institutional and constitutional modifications. In 1994 Brazilian currency pattern is changed, initiating a new era of economic stabilization and inflation control, which demanded a lot of constitutional changes by amendments that put a lot of laws in conflict with the recent constitutional modifications.

On 2001 was the beginning of Fiscal Responsibility Law, what makes a lot of states to change their laws to adequate the new institutional design of spending and budget. On 2003, the Labor's Party begins to govern the Federal Government and many institutional changes occurred. The pendulum of low quality legislation registered in 1994, 2001 and 2003 is preceded by deeply institutional design modifications which justifies the numbers of laws considered unconstitutional, pushing down the LQI.

CONCLUSIONS

With an explanatory analysis and descriptive statistics we show within a 0 to 1 scale the proportion of laws considered unconstitutionally by Brazilian Supreme Courte,

inside judicial review dynamics. As shown on graphics, the State of Paraiba is an outlier and represent the worse Legislative Quality Index. On the other way, the federal legislations holds the best quality index.

Many factors can cause this lack of quality on states legislations. First of all is the functionaries' expertise. In second place the competences conflicts inside the federative pact are always solved on maintaining federal law, in other words, when states' legislations collide with federal ones, the last must prevail. On third, many laws are intentionally approved with unconstitutional contents. It occurs because not approve the law might increase electoral costs, but approving it "for sure" might costs much more. So, legislators approves the Act on being accountable to voters, but expecting Supreme Court's activism to strike down, transferring to Judiciary branch the political costs.

The last factor can be analyzed as a case study, taking the "Clean Profile Act" (*Lei Ficha Limpa*). This act was approved by National Brazilian Congress and in resume, it forbid condemned candidates to dispute an election. The entire society wanted this law approved but the politicians silently don't. So, they approved out of time (and just a few group of citizens as judges and lawyers knows about time) to be valid on next elections. So, the act was contest before the Brazilian Supreme Court and stroke down. So the Judiciary absorbed all the negative impact.

Other result corroborates our assumptions, the Brazilian Supreme Court is more sensitive to political actors (as Governors) and national institutional ones (as Republics' General Prosecutor and Brazilian National Council of Lawyers). The two first has a success rate close to 50%, which means that 1 in 2 actions has success on being accepted by Supreme Court, considering the legislation claimed unconstitutional.

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