

## **Brazilian judges and the judicialization of corporatist interests**

*Juízes brasileiros e a judicialização de interesses corporativos*

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Artigo recebido em 14/02/2022 e aceito em 19/07/2022.



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### Abstract

This paper discusses the judicialization of the corporatist interests of Brazilian judges, as well as the amount of space their agenda has been able to garner in the Federal Supreme Court (STF) docket. We base our work on judicial review cases from the period spanning 1978 – 2014, concentrating on those petitioned by judges and their professional associations. Our aim is to identify the agenda of claims sent to the STF, analyzing the extent to which judges and their associations have used their own political power to i) guarantee and advance career interests and benefits; ii) ensure and expand their institutional power and iii) defend general interests (“the common good”). We also seek to identify patterns of STF response to judges’ demands, as compared to its response to claims made by other interest groups. The discussion falls within the arena of judicial behavior studies and draws from the field of the sociology of professions. Our major conclusion is that the Federal Supreme Court favored the deliberation of the judges’ career interests, thereby awarding greater priority to their claims, above those of any other organized interest group during the period we studied.

**Keywords:** Federal Supreme Court (STF); Judges; professionalism; Judicialization of corporatist interests.

### Resumo

O artigo discute a judicialização dos interesses corporativos dos juízes brasileiros, bem como o espaço que essa agenda conquistou na pauta do Supremo Tribunal Federal (STF). Para isso, baseia-se em casos de revisão judicial decididos no período de 1978 a 2014. Nosso objetivo é identificar a pauta de reivindicações encaminhadas ao STF, analisando em que medida os juízes e suas associações profissionais têm usado seu próprio poder político para i) garantir e promover os interesses e benefícios da carreira; ii) assegurar e ampliar seu poder institucional e iii) defender interesses gerais (“o bem comum”). Buscamos também identificar os padrões de resposta do STF às demandas dos juízes, em comparação com sua resposta às reivindicações feitas por outros grupos de interesse. A discussão é feita no âmbito dos estudos do comportamento judicial, apoiada em estudos no campo da sociologia das profissões. A principal conclusão é que o Supremo Tribunal Federal atuou como espaço privilegiado para a deliberação dos interesses corporativos dos magistrados, respondendo de forma significativamente mais favorável aos pleitos dos



magistrados do que de qualquer outro grupo de interesse organizado que acionou o tribunal no período.

**Palavras-chave:** Supremo Tribunal Federal (STF); Juízes; Profissionalismo; Judicialização de interesses corporativos.



## Introduction

This paper addresses the corporatist mobilization of Brazilian judges in judicial review cases within the Federal Supreme Court (STF<sup>1</sup>), in defense of benefits and the expansion of their powers and professional prerogatives. Our objective is to identify the agenda of claims made by judges to the Supreme Court, from 1978 to 2014, analyzing the extent to which judges and their professional associations have used their own political power to i) guarantee and advance career interests and benefits; ii) ensure and expand their institutional power, and iii) defend general interests (“the common good”). We also attempt to identify STF response patterns to the demands of the judges, as compared to response to claims made by other interest groups.

Brazilian Judges belong to the professional elite of law, having the best-paid career in civil service<sup>2</sup>, and constituting one of the branches of the State. As a branch of the State, they exercise control over the actions of the Executive and Legislative branches, based on judicial review. This institutionalizes them as central political actors and positions the courts as alternative arenas to representative democracy (OLIVEIRA, 2011).

As a professional group, judges affirm their autonomy through control over training and career entry credentials, the valuation of technical expertise, moral mandate, and the ideology of providing an independent and quality service to society, of serving the common good (BONELLI and OLIVEIRA, 2003).

According to Bonelli (2002), the configuration of judges as a professional group took place alongside the building of the Republic, through the attempt to differentiate their work from other bureaucratic forms of the organization of labor<sup>3</sup>. The author credits much of the success that judges achieved in their professionalization to the fact that they faced up to political power from a similar position of strength, as well as to the capacity of their associations to exert pressure over the legislative process. Bonelli (2002) identifies

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<sup>1</sup> All acronyms used in this paper correspond to the original Portuguese language names.

<sup>2</sup>Article 37, XI, of the 1988 Federal Constitution establishes that the remuneration of civil servants, including personal benefits or benefits of any other nature, and the income, pensions, or other types of remuneration, whether received cumulatively or not, cannot exceed the monthly subsidy, in kind, of the Federal Supreme Court Justices – the highest position in the national judiciary.

<sup>3</sup> According to Freidson (2001), it is possible to consider the organization of work based on three ideal types: market, bureaucracy, and professionalism. The market ideal type defends free competition and practical knowledge, with free consumer choice. The bureaucratic type advocates management, standardization, and efficiency as values, organizing vertical career paths, defending the need for control as a form of supervision based on State action. Professionalism, on the other hand, is organized according to an occupational logic, placing value on expertise, credentialism, autonomy to perform diagnoses, as well as independence from customers, the market, and the State.



the major landmarks in the professionalization of the judiciary as: i) the institution of a civil service examination for admission to the profession, in 1923; ii) the guarantee of unremovability, tenure for life and irreducibility of salaries, accorded through the Constitutional Reform of 1926, and iii) the creation of the career of judge, attained through a compulsory civil-service examination, established by the 1934 Constitution<sup>4</sup>.

The present paper follows in the wake of this argument, demonstrating that, in addition to acting as a pressure group within legislative processes, this professional group began using the judiciary to preserve its status as a professional elite distinct from the State bureaucracy. They sought support through justifications coming from the ideology of professionalism, especially when confronting administrative reforms that were seeking to impose a managerial logic within the State.

As specified by Freidson (2001:121), the ideology of professionalism upholds expertise as a differential and implies dedication to values such as justice, truth, and prosperity, which add moral substance to the technical content of professions.

Politics is a relevant variable when studying careers within the State, such as those within the judiciary (HALLIDAY, 1999). However, the politics of professionalism differs from conventional politics, as it is not only directed toward private and individual interests but also public and collective ones. According to Halliday (1999: 1054), professional political action is motivated by a mixture of “sacred” and “profane” interests, including material and career interests, and universal interests related to the common good. In the specific case of the legal professions, the conversion of technical expertise into moral authority is based on the argument in defense of interests recognized as universal - such as the rule of law and democracy. Moreover, these professions also become political actors, since they can exercise direct influence over the process of law creation and control (HALLIDAY, 1999).

Halliday (1999: 1056-1058) states that to sustain their moral mandate and speak in defense of collective interests, legal professionals must maintain ideological unity and argumentative neutrality, avoiding the politicization of their claims through involvement

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<sup>4</sup> In Brazil, the only way to enter the position of first instance (lower court) judge is through a specific civil service examination. At the second and third instances (Courts and Superior Court of Justice), the positions are divided as follows: 80% for career judges, 10% for lawyers, and 10% for members of the Public Prosecution Office (the so-called constitutional fifth). This rule has been adopted since the 1934 Federal Constitution and maintained by the Constitutions that followed. The only exception concerns the admission to the Federal Supreme Court, for which the 11 Justices are chosen from citizens over 35 and under 65 years of age, of remarkable legal knowledge and unblemished reputation, appointed by the Brazilian President after approval by an absolute majority within the Federal Senate (article 101 of the 1988 Federal Constitution).



in political struggle or positioning themselves as just another interest group defending personal interests. The author considers that politicization would have a high legitimacy cost for these professions, weakening their authority and generating tensions along the boundaries that separate profession and politics. Yet the effectiveness of the politics of professionalism lies in the ability of these professionals to act politically, influencing the political game without being identified as representatives of personal interests.

The case of “auxílio moradia” (housing stipend) is a paradigmatic illustration of Halliday’s (1999) argument, as it applies here to the political performance of Brazilian judges. The housing stipend is provided for through Complementary Law 35/1979, which regulates the career of judges. Until 2014, the concession of this benefit was limited to specific situations, mostly in the case of judges who did not reside in the district they had been assigned to. In 2013, a group of eight federal judges filed a lawsuit to extend the stipend to all members of the category, resulting in a favorable preliminary ruling by Supreme Court Justice Luís Fux. The decision was based on the argument that unequal treatment of members of the same civil service career category violates the constitutional principle of isonomy. Thus, the ruling meant that that all Brazilian federal judges were now entitled to receive the benefit.

Simoni (2020) indicates that this decision generated a “herd effect”, with new preliminary rulings extending the benefit to all Brazilian judges, causing a budgetary impact estimated at 1.6 billion reais. According to the author,

the stir did not come to an end until 2018, when Justice Fux’s new decision revoked the previous preliminary decision, recognizing the impossibility of awarding housing stipend to judges. The grounds? The budgetary impact generated by Laws 13,752/2018 and 13,753/2018, which granted a 16.38% compensation for inflation to the category (a percentage which corresponds neatly to the value of the benefit to be withdrawn). Leaving no room for doubt that the end of the payment was directly linked to the inflation compensation, Fux determined that revocation would not take place until the augmented subsidies were implemented (BRAZIL, 2013c, p. 28). Behind the scenes – not that hidden, considering how closely the whole case was followed by the press –, Supreme-Court Justices negotiated the end of the stipend alongside a salary readjustment with the Executive branch. Fux had even tipped the press off as to the content of his decision, pending approval. Many sectors identified the maneuver as a real bargaining between the judiciary and the other branches of government, rather than a proper decision based on the analysis of the benefit’s constitutionality, or lack thereof. (SIMONI, 2020: 25-26)<sup>5</sup>

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<sup>5</sup> In the original version in Portuguese, “a celeuma somente teve fim no ano de 2018, quando nova decisão monocrática do ministro Fux revogou a liminar anteriormente proferida, reconhecendo a impossibilidade do recebimento de auxílio-moradia por carreiras jurídicas. O fundamento? O impacto orçamentário gerado pelas Leis no 13.752/2018 e 13.753/2018, que estabeleceram a recomposição inflacionária no total de 16,38% nos



Simoni (2020) examined the coverage of the case by the newspaper with the highest circulation in the country, *Folha de São Paulo*, concluding that it was overwhelmingly negative, with the recurrent use of terms such as “privilege”, “adornment”, “immorality”, “illegality”, “corporatist cleverness”, “classist indulgence”. Media coverage of this case damaged the image of the judiciary, exposing judges’ salaries, which, on average, exceeded the maximum amount allowed for remuneration in the public sector. It is worth noting that the Brazilian judiciary is considered the costliest in the world in terms of the relationship between annual expenditures and GDP: it represents 1,3%, whereas no other judiciary for which public data exists exceeds the figure of 1% (SADEK, SOARES, and STEMLER, 2017).

Although paradigmatic in terms of the way judges use the judiciary to advance career interests, the case of the housing stipend is not part of the present research since it is not a judicial review case, our object here. The following four sections of the paper describe the judicial review system adopted in Brazil, and elaborate on how judges used it to advance their corporatist demands, in boundary-drawing efforts (in the sense proposed by Liu (2018), to distinguish their career from others within the State.

## 1. Judicial Review in the STF

The judicial review system in Brazil, in effect since the Constitutional Amendment nº 16 of November 26<sup>th</sup>, 1965, is hybrid, mixing diffuse and concentrated models (ARANTES, 1997; TAYLOR, 2008). The diffuse model allows every judge to exercise this review within their jurisdiction, enabling them to disregard a rule that they deem incompatible with the Constitution, in specific cases. The concentrated model, on the other hand, reserves the possibility of declaring an abstract rule unconstitutional (i.e., regardless of its application to a specific case) to the Federal Supreme Court (when the paradigmatic rule is the

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subsídios dos profissionais envolvidos (percentual esse correspondente ao valor do auxílio a ser retirado). Não deixando dúvidas de que o fim do pagamento estava diretamente vinculado ao reajuste inflacionário, Fux determinou que a cassação somente se desse quando do implemento financeiro dos futuros subsídios majorados (BRASIL, 2013c, p. 28). Nos bastidores – não tão ocultos assim, já que todo o caso foi acompanhado de perto pela imprensa -, ministros do Supremo negociavam com o Executivo a queda do auxílio mediante a sanção do reajuste salarial. Fux, inclusive, já adiantava à imprensa o teor de sua futura decisão caso as leis fossem aprovadas. Muitos setores denominaram a manobra como verdadeira barganha<sup>11</sup> do Judiciário com outros Poderes, e não um julgamento propriamente dito, com a análise da constitucionalidade ou não do benefício”.



Federal Constitution), and to the State Courts (when the parameter is a State Constitution).

The type of judicial review that interests us here is the one that was granted to the STF in 1965, when the Court was authorized to judge claims as to the unconstitutionality of state and federal rules, through a Representation of Unconstitutionality (RP) claim filed by the Federal Attorney General, appointed solely and exclusively by the President. Nonetheless, it became customary for parties and interest groups to petition the Federal Attorney General to forward their claims to the STF, allowing RP petitions to identify the parties interested in the case.

With the promulgation of Institutional Act nº 5 (AI-5), in 1968, STF jurisdiction was restricted. All guarantees of tenure for life and unremovability were suspended, and all acts performed in accordance with AI-5 and its complements were exempted from judicial review processes. According to the Supreme-Court Justice Evandro Lins e Silva (1997),

The AI-5 suppressed the power the Supreme Court should have as an organ of national sovereignty to judge the actions of the Executive branch or the laws of Congress, to declare the unconstitutionality of abusive acts performed by the President of Brazil, on the pretext of defending the country against subversion or corruption. In truth, the Supreme Court – to use a strong expression – was castrated in its power as an organ that makes up part of the system of the three branches, independent and in harmonious with one another (LINS AND SILVA, 1997: 407)<sup>6</sup>

Thus, between the time the hybrid model of the judicial review was adopted, in 1965, and the revocation of AI-5, in 1978, the STF enjoyed scant margin of action. Media coverage of STF performance during this period shows that the Court kept silent when the authoritarian regime took hold (1968-1977), returning to the political scene with the revocation of AI-5 (OLIVEIRA, 2012: 166). Hence, the choice of 1978 as the initial time-frame for this paper.

The 1988 Federal Constitution inaugurated a new political and institutional legal design, expanding the possibility of judicial review through different types of cases which organized interest groups, with national representation, could file directly to the court, without resorting to the Attorney General: the Direct Action for the Declaration of

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<sup>6</sup> In the original version in Portuguese, “Com o AI-5 suprimiu-se o poder que o Supremo deve ter, como órgão da soberania nacional, de julgar as ações do Executivo ou as leis do Congresso, de declarar a inconstitucionalidade de atos abusivos que o Presidente da República pudesse praticar, a pretexto de que estava defendendo o país contra a subversão ou a corrupção. Na verdade, o Supremo – a expressão será muito forte – foi castrado no seu poder de órgão que compõe o sistema dos três poderes independentes e harmônicos entre si.”



Unconstitutionality (ADIN), the Direct Action for the Declaration of Unconstitutionality by Omission (ADO), and the Action Against the Violation of a Fundamental Constitutional Right (ADPF)<sup>7</sup>.

This paper focuses on the ADIN since it is the primary and best-known instrument for influencing politics through the judiciary. As Taylor (2008) points out, the ADIN is heard relatively quickly; its effects are binding and cannot be appealed. The ADIN becomes an important political instrument in Brazil. As Vianna *et al.* explain (2007: 43), “The ADIN is already part of the natural scenario of modern Brazilian democracy, asserting year after year, for almost two decades, its institutional presence in different successive governments”<sup>8</sup>.

We note that, while until 1988 judicial review cases (RP) were an exclusive prerogative of the Federal Attorney General, the ADIN now allowed direct access to the Court on the part of the President of Brazil, the Board of the Federal Senate, the Board of the House of Representatives, the Board of the State Legislature, state governors, the Federal Council of the Brazilian Bar Association, political parties with representation in the National Congress and union confederations or class entities of national scope (article 103 of the 1988 Federal Constitution).

In order to access the court for judicial review, the STF has demanded, from some of its legitimate agents, the existence of a relationship between the rule that is being challenged and the institutional activity of the plaintiff. This relationship is required when the plaintiffs are the Boards of the State Legislature or the Legislative Chamber of the Federal District, state or Federal District governors, and union confederations and class entities of national scope, such as judges’ associations. As Costa and Benvindo (2014) have emphasized, associative entities’ restrictions regarding STF jurisdiction derives from Court understandings and not from the Constitution, reducing the potential of these associations to act in favor of more general interests.

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<sup>7</sup>The ADO was regulated by Law 12.063/2009. The ADPF was regulated by Law 9.882/1999.

<sup>8</sup> In the original version in Portuguese, “As ADIs já fazem parte do cenário natural da moderna democracia brasileira, afirmando ano após ano, ao longo de quase duas décadas, em sucessivos e diferentes governos, a sua presença institucional



## 2. Corporatist demands on the STF judicial review agenda

Brazil had 3,624 judges in the 1970s, increasing to 4,624 in 1980 (FALCÃO, 1988). In 1990, numbers went up to 4,930 judges (SADEK, 1995), reaching 9,745 in 2002 (CNJ, 2003), and 16,883 judges in 2010 (CNJ, 2011). The most recent data on the Brazilian Judiciary indicate that there are 18,168 judges active in the country, of which 92% declared to be associated with some entity of professional representation (CNJ, 2018).

There are a number of studies that have sought to describe Brazilian judges' associative life in terms of their participation in the country's political life and the ways in which they have attempted to influence legislative processes at different times. Santos (1996), Engelmann (2009), Vianna and Perlatto (2015), and Carvalho (2017), for example, highlight the work of judges' associations during the Constituent process that began in 1986.

In the Brazilian case, judges' and prosecutors' associations were first created as social clubs, serving as a consecration space that hosted parties, social activities and assistance programs. During the eighties and nineties, associativism built within syndicate patterns affirmed itself as the central agency for defense of corporatist interests, even if the syndicate, in such cases, was not deployed for systematic confrontation with court authorities, but maintained an ambivalent relation to them. The political engagement of judges' and prosecutors' professional associations expanded, due to corporatist demands surrounding the struggle for institutional guarantees, articulated within the context of the constitutional debate of 1988. Nonetheless, their deployment was made possible by the massification of the Judicature and Public Prosecution, and the demands for greater independence from other State powers that were generated at the end of the military period. (ENGELMANN, 2009: 187-188)<sup>9</sup>

Santos (1996) proposes to study the judicature as an institutional pressure group, stating the hypothesis that

judges effectively act as a political pressure group to maintain their benefits, increase their remuneration (even through increasing their proportion of government revenue), promote changes in the court system and in

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<sup>9</sup> In the original version in Portuguese, "No caso brasileiro, as associações de magistrados e promotores são criadas, num primeiro momento, para serem clubes sociais servindo como espaço de consagração com festas, sede social e programas de assistência aos associados. Na década de oitenta e noventa, o associativismo construído nos moldes gremiais se afirma como centralizador da articulação da defesa de interesses corporativos, e mesmo nessa tarefa, não assume a postura sindical nos termos de enfrentamento sistemático com as cúpulas dos tribunais, mantendo uma posição ambivalente em relação a estes. O engajamento político das associações profissionais de juizes e promotores se expande em função das reivindicações corporativas em torno da luta por garantias institucionais, que se articula em torno do debate constituinte de 1988. A ativação é possível, entretanto, porque já no fim do período militar há uma massificação da Magistratura e do Ministério Público e a constituição de uma demanda por maior independência frente aos outros poderes de Estado."



procedural rules capable of converging with their deeper interests (e.g., more courts in large municipalities, more positions for judges and advisors, heightened powers in judicial proceedings), and bring ever widening fields of social relations into the grip of legal norms, even at the expense of “legally” stripping citizens of their autonomy. (SANTOS, 1996: 108).<sup>10</sup>

Other studies have examined how judges use the judiciary to favor their own political agenda, which is the focus of this paper. Oliveira (2016) analyzed STF rulings on 2,712 ADINs from 1988 to 2014, discovering that 40% of them concerned civil servants’ demands, largely regarding remuneration and other career prerogatives. Almost half of these claims concerned members of the public careers of justice, including judges. Additionally, the author observed that 7% of the ADINs made claims regarding the functioning of justice institutions, concluding that,

... on the judicialization of politics in Brazil, regarding the performance of the Federal Supreme Court, [it can be said that] more than serving as a mediator of disputes between different government agencies or as an instance for implementing social and collective rights or even a countermajoritarian institution, the Court has played the role of an institution of corporatist deliberation. Of course, the STF has in some measure allowed the incorporation of minority voices in the political process. Nonetheless, its major role has been to provide governments, class associations and justice institutions (markedly, through the Office of the Attorney General) with a privileged space for interference in the implementation of public policies linked to the regulation of state bureaucracies and their prerogatives. (OLIVEIRA, 2016: 129)<sup>11</sup>

Fornara and Carvalho (2018) analyzed STF rulings on ADINs proposed by the Association of Brazilian Judges (AMB) between the years of 1988 and 2017. The authors found 93 rulings, including 43 final decisions, 40 injunction decisions, and ten claims of other types. Within these cases, they identified three themes: autonomy (including rules regarding nominations and on budgetary and disciplinary power), salaries (addressing

<sup>10</sup> In the original version in Portuguese, “os magistrados atuam efetivamente como grupo de pressão política, para manutenção de suas garantias, para fins de aumentar sua remuneração (mesmo através de maior participação proporcional na receita pública), para alterações do aparelho judiciário e das normas processuais capazes de convergir com seus interesses profundos (v.g., mais tribunais nas grandes cidades, mais cargos para juízes e assessores, maior fortalecimento da discricionariedade do juiz nos procedimentos judiciais), e ainda para em conjunto com advogados e notários absorver na normatividade jurídica campos maiores das relações sociais, ainda que à custa de despojar “legalmente” o cidadão de sua autonomia.”

<sup>11</sup> In the original version in Portuguese “... quando se fala em judicialização da política no Brasil, no que se refere à atuação do Supremo Tribunal Federal, mais do que papel de mediador de disputas entre diferentes órgãos do governo, de instância de implementação de direitos sociais e coletivos ou ainda instituição contramajoritária, o tribunal desempenhou o papel de instituição de deliberação corporativa. O STF tem, sim, permitido em alguma medida a incorporação de vozes minoritárias no processo político, mas seu papel predominante foi o de propiciar aos governos, às associações de classe e às próprias instituições de justiça (sobretudo via Procuradoria-Geral da República) um espaço privilegiado de interferência na implementação de políticas públicas ligadas à regulação das burocracias do Estado e suas prerrogativas.”



benefits and taxation) and retirement rules. They note that the STF responded favorably to AMB in 74% of these requests, which should raise some doubts since STF judges are interested parties to some of these claims (members of the same professional category and career) as well as decision-makers, casting a shadow on expectations of judicial impartiality. According to the authors, the STF is a “privileged space for the association’s performance, which makes its relationship between the production of legal knowledge and the power of agenda an effective means of preserving and expanding corporatist benefits in favor of the judiciary.” (FORNARA and CARVALHO, 2018: 252)<sup>12</sup>.

Oliveira and Arguelhes (2021) also report judges’ high rates of success in judicializing corporatist demands. The authors analyzed the initial complaints of 115 ADINs filed in Court between 1988 and 2018 that made arguments regarding the unconstitutionality of amendments to the Constitution. They discovered that 25% of these petitions were made by judges’ associations and aimed, above all, to block disadvantageous changes in rules on retirement, social security contributions, and salaries. Another 10% of the claims filed came from associations representing other public justice careers. Therefore, one out of every three requests for the unconstitutionality rulings on amendments to the Constitution were made by associations representing parties with public careers in the judicial system, conveying demands for the protection of their corporatist interests.

According to Oliveira and Arguelhes (2021) findings, the STF responded favorably to requests to block constitutional change 20% of the time, suspending the effects of provisions or modulating legislative changes by adopting a constitutionalist interpretation. According to the authors, justice career associations were those most benefitted by STF decisions, with the Court being “particularly responsive to claims against amendments that conflicted with the interests of judges and other public justice careers.” (OLIVEIRA and ARGUELHES, 2021: 16)<sup>13</sup>.

In this paper, we join these studies to investigate the judicialization of corporatist demands, covering a more extensive period of time. We consider all the RPs judged

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<sup>12</sup> In the original version in Portuguese “espaço privilegiado para a atuação da associação, que faz da sua relação entre a produção do saber jurídico e o poder de agenda um meio eficaz da preservação e ampliação de benefícios corporativos para a magistratura.”

<sup>13</sup> In the original version in Portuguese, “particularmente responsivo a emendas que conflitem com os interesses de magistrados e outras carreiras públicas da justiça”.



between 1978 and 1988<sup>14</sup> that were sent to the Attorney General by judges or their associations, and all the ADINs judged between 1989 and 2014<sup>15</sup> proposed by judges' associations. We consider only those claims that received a final STF ruling during the period under consideration.

Between January 1<sup>st</sup>, 1978, and October 4<sup>th</sup>, 1988, the STF ruled on 703 RPs (TABLE 1). The most frequent plaintiffs were the government - governors, legislative assemblies, mayors, deputies, senators, ministers, and the President of Brazil. Governors were responsible for 20% of all requests, and were the most recurrently interested party. The second most frequent category was State bureaucracy, excluding professionals from the justice system, who formed their own specific categories. The category's expressiveness is due largely to the President of the Brazilian Institute of Geography and Statistics (IBGE) who was the second most frequent RP plaintiff, responsible for 17% of the claims during the period, questioning state laws regarding the creation of municipalities. Lawyers appear in third place, followed by companies and business syndicates, and public justice careers (including public prosecutors, police chiefs and public lawyers, but excluding judges and their associations). Judges were responsible for 29 RPs (4% of the total in the period). Lastly, we find professional associations (excluding legal careers) and other segments of civil society.

Between 1989 and 2014, 2,716 ADINs were adjudicated. The government prevails as the major interested party, responsible for almost one-third of all claims, among which governors were the most frequent plaintiffs. Public justice careers come in second place, with the Attorney General appearing most frequently as plaintiff, responsible for 20% of the claims filed. Political parties come next, followed by economic interests and State bureaucracy, professional interests, and organized workers. Lawyers come in seventh place, responsible for 4% of the claims. Judges and their associations come in eighth place, responsible for 79 claims (3%).

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<sup>14</sup> The data are part of the research project "The Federal Supreme Court and politics in the period of democratic transition", funded by FAPESP (18/00395-9).

<sup>15</sup> The data are part of the research project "The role of career trajectory in the formation of voting groups and networks in the Federal Supreme Court", funded by FAPESP (13/08188-9).



**TABLE 1. Plaintiffs of RPs (1978-1988) and ADINs (1989-2014)**

| Plaintiff (interested party) | RPs (1978-1988) |            | ADINs (1989-2014) |            |
|------------------------------|-----------------|------------|-------------------|------------|
|                              | N               | %          | N                 | %          |
| Government                   | 268             | 38,1       | 780               | 28,7       |
| Public Justice Careers       | 44              | 6,2        | 621               | 22,9       |
| Political Parties            | -               | -          | 573               | 21,1       |
| Economic Interests           | 82              | 11,7       | 228               | 8,4        |
| State Bureaucracy            | 148             | 21,1       | 154               | 5,7        |
| Professionals                | 26              | 3,7        | 126               | 4,6        |
| Lawyers                      | 88              | 12,5       | 107               | 3,9        |
| Judges                       | 29              | 4,1        | 79                | 2,9        |
| Society                      | 18              | 2,6        | 48                | 1,8        |
| <b>Total</b>                 | <b>703</b>      | <b>100</b> | <b>2,716</b>      | <b>100</b> |

Over the first period, matters of public administration, concerning the government (including the creation of municipalities, organization of powers, and budget) took up 41% of the Court's agenda (TABLE 2). The second most frequent theme concerned public agents (civil service and public justice careers), occupying 25% of the agenda, 7% of which were issues related to public justice careers and 18% to other State careers. The organization of justice institutions (referring to the functioning of justice institutions, including notary offices, court structure and fees, procedural law issues) comes next, accounting for 14% of all claims.

**TABLE 2. Themes of RPs (1978-1988) and ADINs (1989-2014), by plaintiff**

| Themes                               | RP Plaintiff (1978-1988) |            |            | ADIN Plaintiff (1989-2014) |              |              |
|--------------------------------------|--------------------------|------------|------------|----------------------------|--------------|--------------|
|                                      | Judges                   | Others     | Total      | Judges                     | Others       | Total        |
| Civil Service                        | -                        | 18%        | 18%        | -                          | 22%          | 21%          |
| Public Justice Careers               | 39%                      | 6%         | 7%         | 78%                        | 17%          | 19%          |
| Public Administration                | 3%                       | 42%        | 41%        | -                          | 15%          | 15%          |
| Fundamental Rights                   | 3%                       | 6%         | 6%         | 1%                         | 15%          | 14%          |
| Tax Policy                           | -                        | 8%         | 8%         | -                          | 11%          | 10%          |
| Organization of Justice Institutions | 55%                      | 12%        | 14%        | 20%                        | 7%           | 8%           |
| Economic Policy                      | -                        | 6%         | 6%         | -                          | 9%           | 8%           |
| Electoral-Political System           | -                        | 2%         | 2%         | 1%                         | 5%           | 5%           |
| <b>N</b>                             | <b>29</b>                | <b>674</b> | <b>703</b> | <b>79</b>                  | <b>2,637</b> | <b>2,716</b> |

Regarding the claims filed by the judges during this period, we note that 55% concern institutional organization, such as installation of courts and districts, and rules for the elections of court leadership. The second most frequent theme regards the judiciary's career benefits (39%), such as salaries, housing stipend, bonuses and wage



adjustments. Judges resorted less to the Courts over fundamental rights and other issues related to the common good, and were represented here by only two claims (6%), one on exemption from court fees and the other on the creation of a municipality.

The most frequent theme of the second period is civil service (40%), with 19% of the claims addressing justice careers and 21% related to other State careers. Public administration comes in second place (15%), followed by claims related to fundamental rights (14%), tax policy (10%), and the organization of justice institutions (8%).

Regarding the claims that had judges as plaintiffs, the most frequent theme is career-related: 78% of the claims filed by judges' associations address salary, promotion, retirement, and other issues related to advantages and benefits. The second most frequent theme is institutional organization (20%), with examples such as the establishment of state councils of justice, the functioning of notary offices and judiciary bonds. Themes related to fundamental rights were residual (2%) – there was one claim for access to justice, regarding non-mandatory representation by lawyers in small-claims courts and another requesting changes in succession rules for the Sergipe state Executive Power, in case of vacancies in positions.

Claims files by judges are analyzed in details in the next two sections.

### **3. The demands of judges in the STF via RPs (1978-1988)**

Judges were responsible for 29 claims of unconstitutionality taken to the STF between 1978 and 1988 - 4% of the concentrated control claims decided in the period. A little over half of these requests claimed the unconstitutionality of state laws (52%), 31% disputed norms of the judiciary, and 17% made claims regarding federal legislation.

The most frequent demand from judges (TABLE 3) aimed to safeguard the institutional powers of the judiciary (45% of all requests) through administrative autonomy and independence. There were, for example, claims arguing the unconstitutionality of state laws that determined the installation of Courts or created new counties without consulting the courts, and laws that changed rules of admission to the judicature (violating the principle of competitive public civil service examination).



The second most frequent demand concerned the guarantee of financial benefits, such as remuneration, housing stipends, and bonuses, as well as claims against the equalization of salaries in other careers to those of judges.

The category “internal governance” (17%) refers to demands related to the functioning of notary offices, judicial fees, and organization of court internal elections. Finally, “defense of the common good” refers to the defense of broader interests, that is, claims made in defense of society (such as fundamental rights).

**TABLE 3. Demand content of RPs (1978-1988)**

| <b>Demand content</b>                               | <b>N</b>  | <b>%</b>   |
|---|-----------|------------|
| Defense of independence and administrative autonomy | 13        | 45         |
| Guarantee of Career Benefits                        | 7         | 24         |
| Internal Governance                                 | 5         | 17         |
| Defense of the common good                          | 4         | 14         |
| <b>Total</b>  | <b>29</b> | <b>100</b> |

Our findings show that the STF responded in a predominantly favorable manner to the judges’ requests: 21 claims (76% of the claims filed by judges) were granted, in whole or in part; and 8 (24%) claims were not granted – in two of the non-granted cases, the contested law was revoked before the Supreme Court was able to issue a ruling.

The proportion of favorable response given to judges appears much higher than the general patterns of STF response to other actors (TABLE 4). Chi-square testing indicates the difference in that proportion is statistically significant, which enables us to affirm that the STF responded more favorably to judges than to the other actors and interest groups that resorted to the Court (via the Federal Attorney General’s Office) during that period.

**TABLE 4. STF ruling on RPs claims, by plaintiff**

| STF’s Decision | Plaintiff |            | Total      |
|----------------|-----------|------------|------------|
|                | Judges    | Others     |            |
| Granted        | 76%       | 56%        | 57%        |
| Not Granted    | 24%       | 44%        | 44%        |
| <b>N</b>       | <b>29</b> | <b>674</b> | <b>703</b> |

*Sig.  $\chi^2 = 0,002$*

The Supreme Court ruled in favor of 86% of claims to guarantee financial benefits of judges’ careers, 75% of the claims in defense of the common good, 69% of the claims in



defense of independence and administrative autonomy, and 60% of demands regarding internal governance. Lastly, we observed Supreme Court rulings on the vast majority of state and federal government policies that judges took to the STF: 86% of state rules and 80% of federal rules were found unconstitutional. Nonetheless, the same court tended not to interfere with most of the rules originating within the judiciary itself - less than half (44%) of the judicial policies to which the judges objected via RP were ruled unconstitutional.

#### **4. The demands of judges in the STF via ADINs (1989-2014)**

Judges' associations were plaintiffs in 79 ADINs that were ruled by the STF between 1989-2014 - 3% of the total in the period. Just over half of these requests claimed the unconstitutionality of state rules (53%), whereas 27% disputed laws originated in the Judicial branch and 20% concerned rulings of the Federal Executive or Legislative branches.

Primary demands made by judges' associations during this period (TABLE 5) concerned the guarantee of career benefits (60%), salary equalization between judges and other legal professionals within the justice system, promotion criteria, salary cap, retirement, and vacations. The second most frequent demand was the defense of independence and administrative autonomy (27%), questioning judicial rules about disciplinary procedures against judges, state rules on the installation of justice councils, and the reform of the judicial branch (Constitutional Amendment 45/2004), especially the creation of the National Council of Justice (CNJ). Demands regarding internal governance corresponded to 9% of the claims, questioning the reach of rules prohibiting nepotism, the functioning of judicial and extrajudicial notary offices, and court internal elections. Demands related to the defense of the common good were residual, amounting to only two cases.



**TABLE 5. Demand content of ADINs (1989-2014)**

| <b>Demand content</b>                               | <b>N</b>  | <b>%</b>   |
|---|-----------|------------|
| Guarantee of career benefits                        | 47        | 60         |
| Defense of independence and administrative autonomy | 21        | 27         |
| Internal governance                                 | 9         | 11         |
| Defense of the common good                          | 2         | 2          |
| <b>Total</b>  | <b>79</b> | <b>100</b> |

The STF responded favorably to just over half of the judges' claims: 41 claims (52% of the claims filed by judges) were granted, in whole or in part; and 38 (48%) were not granted - ten of which had the contested law revoked before the Supreme Court issued a ruling.

Once again, the proportion of favorable responses to judges' claims was higher than the pattern of STF responses to other actors (TABLE 6). Using a chi-square test, our findings indicate statistical significance. Thus, the Supreme Court pattern of responding more favorably to judges than to other actors repeats itself during this period.

**TABLE 6. STF rulings on ADINs claims, by plaintiff**

| STF's Decision | Plaintiff |        | Total |
|----------------|-----------|--------|-------|
|                | Judges    | Others |       |
| Granted        | 52%       | 32%    | 33%   |
| Not Granted    | 48%       | 68%    | 67%   |
| <b>N</b>       | 79        | 2.637  | 2.716 |

*Sig.  $\chi^2 = 0,000$*

The Supreme Court responded favorably to the two claims made in defense of the common good, to 55% of the claims aimed at guaranteeing financial benefits to career judges, 52% of the claims in defense of independence and administrative autonomy and 22% of the claims on internal governance. It granted a ruling of unconstitutionality to 74% of the state laws questioned by judges' associations, 30% of the laws originated within the judiciary and 19% of the claims regarding federal law.

## Conclusion

As demonstrated in the introduction to this paper, issues regarding the organization of judicial institutions and careers within them took up significant space on the STF agenda



for judicial review: 21% of all RP rulings between 1978 and 1988, and 27% of rulings on ADINs made between 1989 and 2014 addressed these issues (TABLE 2).

Judges and their professional associations occupied a small portion of this space – they were the plaintiffs of only 4% and 3% of the total claims, respectively (TABLE 1). The Supreme Court has responded favorably to 72% of the RRs in which judges figured as the plaintiffs. The second most favored group were business interests, awarded 59% of favorable responses, followed by governors and other government members, with 55% (TABLE 7). Judges' associations also encountered a very responsive court in the period that followed the promulgation of 1988 Constitution, for whom 52% of the ADINs were granted. Governors and other government actors also received a similarly favorable response, at 51%.

In both periods, STF decision-making patterns indicate that judges were consistently more successful in their claims than all other interest groups that resorted to the Court.

**TABLE 7: Success rate of interest groups claims to the STF, by period**

| Interest group         | RP (1978-1988) | ADIN (1989-2014) |
|------------------------|----------------|------------------|
| Judges                 | 76%            | 52%              |
| Government             | 66%            | 51%              |
| Public justice careers | 61%            | 45%              |
| Lawyers                | 55%            | 34%              |
| Political Parties      | -              | 16%              |
| Economic interests     | 59%            | 15%              |
| Bureaucracy            | 41%            | 10%              |
| Professionals          | 23%            | 4%               |
| Society                | 56%            | 0%               |
| Total                  | 57%            | 33%              |

Prior to the 1988 Constitution, judges' primary demands were institutional, in defense of independence and administrative autonomy (45%), followed by career interests, primarily economic benefits (24%). After the promulgation of the 1988 Constitution, this order was reversed: judges' associations primarily pursued career interests (60%), with institutional defense taking second place (27%). Claims with a broader scope and themes related to fundamental rights and the common good were residual, representing 14% in the first period and 2% in the second (TABLES 3 and 5).

One of the reasons put forward to explain the concentration of judges' corporatist demands after the 1988 Constitution has been the STF's understanding of thematic relevance as a criterion that legitimates associations' claims for judicial review, reducing



their potential to act in favor of general interests (COSTA and BENVINDO, 2014). However, as Fornara and Carvalho (2018: 288) remind us, a wide range of issues concerning the judiciary and fundamental rights fall within its sphere of thematic relevance, and for which little interest was shown – the use of the judiciary for the defense of broader interests and rights corresponded to 14% of cases in the first period, dropping to 2% in the second.

Since judges and other public justice careers obtained a high percentage of favorable response to their demands, it is possible to suggest that professional expertise also helps to explain the high presence and success of corporatist demands on the decision-making agenda of the STF during the period. As these professionals have control of the field and of the functioning of the judiciary's institutional mechanisms, they tend to use these mechanisms on their own behalf and with greater skill than other actors.

In sum, data analyzed in this paper show that judges initially used their maximum political power to claim institutional power, demanding independence and administrative autonomy; after obtaining these constitutional guarantees, which included financial autonomy, they went on to use judicial review mostly to advance corporatist interests, distancing themselves from other state bureaucracy - managing “the boundaries between their profession and the social world outside” (Liu, 2018: 54). Acting in this way, they resemble any other economic actor. As Posner (1993) argues, judges are individuals interested in themselves and willing to maximize their own personal utility.

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**The author is solely responsible for writing the article.**

