Authoritarian regimes and Institutional Change of the Supreme Court in Argentina and Brazil (1964-1985)

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“First we kill all the subversives, then we kill their collaborators, then their sympathizers, then those who remain indifferent, and finally we kill the timid ones.”

Argentinean General Ibérico Saint Jean in 1977

“All acts performed in accordance with this Act and its Complementary Acts, as well as their effects, are excluded from judicial review.”

Brazilian Institutional Act No. 6, Article 4 February 1969

Abstract

In the past century, Latin America has seen important political changes. Many countries in the region, such as Argentina and Brazil, faced harsh authoritarian governments, as well as flourishing democracies. In these two countries, the constant changes of political regimes also brought about important institutional changes in the Judicial Power, particularly in the Supreme Court. This paper will analyze the institutional change of the Supreme Court from a comparative perspective. Looking at the cases of Argentina and Brazil, we will review the trajectory of both High Courts in a violent political moment (1964 - 1985). In particular, we will analyze the ways in which these courts were altered in moments of authoritarian regimes. Our analysis will focus on the means used to alter each Court and the objectives of these modifications. Although the cases share some similarities, it is fundamental to remark that each case has its particular trajectory. To understand this, we will analyze the institutional transformation of the High Courts in Argentina and Brazil from a historical perspective, always keeping in mind the violent contexts in which these changes tend to occur.

AN APPROXIMATION

South America currently finds itself in an intense process of democratic consolidation and strengthening of the rule of law based on a search for memory, truth and justice in context of its past authoritarian regimes. In this sense, each country deals with their recent violent past in its own way. In the Brazilian case, the creation of a truth commission is another sign of progress towards the pursuit of truth, with the ideal of justice in the horizon.¹ In the Argentinean case, the process of investigation and punishment recently

¹ As the Inter-American Court of Human Rights indicated: “the activities and informations that are eventually collected (by the Court) will not substitute the obligation of the State of establishing the truth and ensuring the judicial determinations of individual responsibilities through penal processes.” (Corte IDH. Case Gomes Lund and others – Guerrilla de Araguaia – c. Brasil – sentence from 24.11.2010). Furthermore, it is part of the Court’s job to indicate the responsibility of the Judicial Power for omission or malpractice, where it exists.
implemented and approved by the most important institutions of democracy leave behind the limits imposed by the laws of “Obediencia debida” and “Punto final”. During this regional development towards the pursuit of truth and justice, the revision of what happened during the latest civic-military regimes is a challenge that involves all of society and that reconstructs the memory of recent tragic processes. In this sense, observing and understanding the institutional changes that affected the High Court in a context of terrorism of State is important to deepen our knowledge about this violent period. In the present work we will analyze the trajectories and the institutional changes of the High Courts in Argentina and Brazil during their latest civic-military regimes. In particular, we will carry out a qualitative and interdisciplinary study, based on speeches, official documents, legislation, and jurisprudence of the Supreme Courts. Furthermore, we will use secondary sources to place events in context, especially in the political arena. The period that will be studied is from 1976 to 1983 in the Argentinean case and from 1964 to 1985 in the Brazilian case, taking into account the entire period of each dictatorship. The present work tries to cooperate with the qualitative studies with historical perspective about Latin American Supreme Courts.

TRAJECTORIES, INSTITUTIONAL CHANGE AND COALITIONS
First, we will observe the process of institutional development of the High Court from a comparative perspective and through a historical lens. We will observe the gradual and the deep changes that institutions go through, not only those caused by breakdowns. There are institutions that have changed very little and very much over time. Major changes can be practiced and observed with a strong continuity. Contemporary theories of institutional development define, in general, change as an abrupt break. But rather than talk about rupture and discontinuity, we might begin to see the transformative changes that result from the accumulation of a gradual and incremental change (PIERSON 2008). Not only are major changes the product of large shocks, but they can also result from incremental changes with transformative results. What are surprising are the continuities in key characteristics of the institutions despite the context of crisis (THELEN 2004; 7). Institutional survival often involves an active political renegotiation and high doses of institutional adaptation. The important thing is to note is that an institution might exhibit a historical trajectory that is sometimes characterized by surprising continuities across periods of historical breakdowns, but these continuities also have an important and silent process of change through time. As suggested by Thelen (2004), there need not be a deep division between stability and institutional change. Sometimes institutional changes are abrupt, but other times they are not. Sometimes they show a pattern of incremental change through political realignments and renegotiation. In short, our goal is to reflect on how institutions persist and change over time, particularly the Argentinean and Brazilian Supreme Courts during the last authoritarian regimes in these countries.

Institution building involves the creation of coalitions and, therefore, the mobilization of various social and political actors in support of a particular institutional setting. Actors try to interpret or redirect institutions to achieve advantages or to pursue their own goals, interests or rules, which might conflict with their interests of the institutions themselves. Thus, political renegotiation is crucial to understanding the changes over time as institutions develop and
evolve (Thelen, 2004: 31-33). Therefore, we will observe in the course of this study the political landscape in which the High Courts develop institutionally.

Our two comparative cases are South American: Argentina and Brazil. Both countries have similar institutional structures, although historically they have opted for different paths with unique particularities. The disruption, interference, influence or interruption of the High Court can occur through both formal and informal ways. The former are specific legislation and the latter are informal, non-legislative arrangements. During the institutional development of the High Court these formal or informal arrangements shaped the circumference of the Court. In turn, these changes may affect structures or capabilities. In the first case, changing the number of ministers in the High Court, as well as the judges themselves, represents a change in structure. In the latter case, changes in capabilities may include changes of the High Court power, such as limiting or increasing the jurisdiction of the Court, among others.

Table N.1: Means and Objectives of Change in the High Court
Elaborated from our database.

<table>
<thead>
<tr>
<th>Means/Objectives</th>
<th>Structure</th>
<th>Capacity</th>
</tr>
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<tbody>
<tr>
<td>Formal</td>
<td>- Altering number of members of the HC, by law or constitutional change.</td>
<td>- Altering attributions or jurisdiction, by law or constitutional change.</td>
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<td></td>
<td>- Taking ministers to court.</td>
<td>- Creating special tribunals.</td>
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<td>- Constitutional guarantees.</td>
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<tr>
<td>Informal</td>
<td>- Political resignations.</td>
<td>- Delaying or not executing sentences.</td>
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<td></td>
<td>- Not completing vacant positions.</td>
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<tr>
<td></td>
<td>-延Delaying the confirmation of designated ministers.</td>
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The structure of the court is what political scientists usually observe, while the scholars of constitutional law, political and institutional history usually study its capacities. In this sense, observing the transformations in both the structures and the capacities at once is necessary for us to understand in more depth the characteristics of each case, as well as their commonalities. If we were to compare the Supreme Court with a racing car, the changes in structure would alter the driver. The changes in capacities would alter the engine power.

2 In a summary: The Supreme Court of the United States served as an inspiration in both Argentina and Brazil, which is reflected in the construction and in the history of the High Courts in both countries. (PADILLA 2004; PAIXÃO, DALLA VIA 2004, BIDART CAMPOS 1976, GELLI 2003; NEQUETE 1973; etc). Moreover, both Argentina and Brazil have a strong legal tradition in the region. In addition, in both countries the Supreme Court is the highest institution of a political power as well as acting Constitutional Tribunal. Both the Argentinian and the Brazilian Court are guardians of the Constitution as the Constitution of both countries determines (art. 116 in Argentina’s Constitution, art. 102 in Brazil’s Constitution). Both countries are Federal Republics, and the division of power is established by both Constitutions (art. 1 in Argentina’s Constitution, art. 1 in Brazil’s Constitution). At the same time both countries opted for a presidential system, inspired by U.S. institutions although with local characteristics.
As indicated by Montaigne, different ways may lead to the same place. But the analysis of how they lead us matters to us. In analyzing this complex historical period and its present consequences, we offer a deeper analysis of the institutional changes during the civic-military regime and authoritarian legacies in democracy.

ARGENTINA: RADICAL INSTITUTIONAL CHANGE

On March 24, 1976, the Junta of Commanders-in-Chief of the Armed Forces, composed by General Jorge Videla, Almirante Emilio Massera, and Brigadier Héctor Agosti, overthrew the constitutional president Martínez de Perón and took over government. The dictatorship, a juridical-civic-military complex, ruled Argentina from 1976 to 1983, in a self-dominated “Process of National Reorganization.” However, differently from previous military regimes, it would be the most perfidious and cruel in its means, besides producing the biggest transformations in society and its institutions. Armed struggle and state terrorism were the unfortunate daily landscape.

As soon as the Military Junta took power, Law n.21.279 (the Statute for the Process of National Reorganization) passed, dissolving Congress and the Judicial Power. Law n.21.258 particularly concerned the Judicial Power, removing all judges of the National Supreme Court of Justice (CSJN), the Superior Provincial Courts and the Attorney General, and suspending until further confirmation all of its magistrates and employees. In this law, article 5

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3 Law n.21.256, Article 2, established that a superior official of the Armed Forces would be designated by the Military Junta. In brief, four Juntas took power. The first, of longest duration and greatest violence was composed by (1976-1980): Jorge Rafael Videla, Emilio Eduardo Massera and Orlando Ramón Agosti. The second was integrated by (1980-1981): Roberto Eduardo Viola, Armando Lambruschini, Omar Domingo Rubens Graffigna. The third, leading the Falklands War (1981-1982): Leopoldo Fortunato Galtieri, Basilio Lami Dozo and Jorge Isaac Anaya. The fourth, (1982-1983): Cristino Nicolaides, Rubén Franco, Augusto Jorge Hughes. Of these Military Juntas, the following official were appointed to head the Executive Power: Jorge Rafael Videla (March 29th, 1976 to March 29th, 1981); Roberto Eduardo Viola (March 29th, 1981 to December 11th, 1981); Carlos Alberto Lacoste (December 11th, 1981 to December 22nd, 1981); Leopoldo Fortunato Galtieri (December 22nd, 1981 to June 18th, 1982); Alfredo Oscar Saint-Jean (June 18th, 1982 to July 1st, 1982) y Reynaldo Bignone (July 1st, 1982 to December 10th, 1983).

4 These documents were: Acta fijando el Propósito y los Objetivos Básicos para el Proceso de Reorganización Nacional; Acta para el Proceso de Reorganización Nacional; Proclama; Bases para la Intervención de las Fuerzas Armadas en el Proceso Nacional, Estatuto para el Proceso de Reorganización Nacional.

5 El Congreso Nacional sería reemplazado según la ley 21.256 en su artículo 3, por la Comisión de Asesoramiento Legislativo (CAL) integrada por nueve oficiales superiores, tres por cada una de las Fuerzas Armadas.

6 Art. 2º- The Military Junta may, when for reasons of State it considers convenient, remove the citizen that represents the President of the Nation, designating it's replacement through a process to be yet determined. Initially, it may also remove or designate the members of the Supreme Court of Justice, the Attorney General, and the Fiscal General of the Fiscalía Nacional de Investigaciones Administrativas.

7 Law n. 21.258. Art. 1: "Cesen en sus cargos los señores jueces de la Corte Suprema de Justicia de la Nación...” Art.2 "Cesen en sus cargos los señores miembros de los Tribunales Superiores de todas las provincias". Art. 3 "Decláranse en comisión a la totalidad de los
declared: “The magistrates and employees that are designated and confirmed, shall take an oath of observance towards the Basic Objectives fixed by the Military Junta, the Statute for the Process of National Reorganization, and the National Constitution as long as the latter does not oppose the former.” This way, not only were all the members of the Judicial Power suspended until confirmation, but all the newly designated employees had their confirmation dependent upon their acceptance of the statute. Still, most importantly, the Constitution no longer was endowed with the real constitutional supremacy devised in 1853. The kelnesian juridical construction was broken. The Constitution would be applied as a supplement to the new norms dictated by the Military Junta. In the new legislation, no independence remained for the Judicial Power. On the contrary, the new laws diminished the institutional importance of the Judiciary, removing its fundamental attributions. Particularly, the CSJN was no longer a power of the State with political attributions. The Judicial Power, in the words of the report Nunca Más (1984): “became in fact a simulation of the judicial function in order to cover its external image.” The Court would comply with and accept the new military norm.

The established legislative complex concentrated all branches of government (Executive, Legislative, and Judiciary) in the hands of the new authorities. That is to say, they held the absolute sum of public power, doing away with the division of power of the republican system. This brings to mind the opportune reflections of Montesquieu (2004): “There is no liberty if the power to judge is not separated from the Legislative and Executive powers. ... All would be lost if the same man, or same body of principles, be them of the nobility or of the people, exercised the three powers.”

With the military coup, Special Tribunals were created to judge those people included in the Repression Law. The detained were immediately judged, without the possibility of being defended by civil lawyers. The judgments were held in secret and a military official acted as the defendant of the detained (PEREIRA 2010; 199-200). The Penal Code was also altered and the death penalty introduced. Like in other Latin American countries, such as Brazil, such measure was never applied. Although in the Argentinean case, it was applied systematically extra-judicially. The legal plexus in place determined the actions...
of the CSJN. Military authorities would strictly supervise questions related to individual liberty and penal law, given their supreme objective of National Security.

Finally, the coup in Argentina deeply violated legality, and in forms more drastic than other military regimes in the region. Learning from the failure of the Chamber of Terror of 1971, the military implemented extreme measures to ensure the duration of its fight against the subversives (PEREIRA 2010; 205). They launched an intense struggle against the guerilla and other enemies, with no legal restrictions and in an extra-judicial manner. In this way, neutralizing gave way to exterminating, distancing the possibility of future civil governments setting free their adversaries. Moreover, this annulled the future possibility of a counter-offensive against the militaries. The authoritarian regime tried at all cost an alleged irreversible justice. In this sense, the Supreme Court increased popular distrust in Justice, given the institutional ineffectiveness in sensitive and urgent questions. Definitely, the institutional changes produced by the coup of 1976 were immediate and profound. The capacities of the High Tribunal were intensely altered both in shape and extent.

**CHANGES IN THE COMPOSITION OF THE HIGH COURT**

When the military government took power, one of its first acts was to declare the compulsory departure of all the member of the Supreme Court of Justice. The removed ministers had been designated by Cámara, with the avail of Juan Domingo Perón, in 1973. They represented a political-ideological line that the military junta wanted to leave behind. This way, a completely new Supreme Court would be designated at the beginning of the new government. It is important to note that all of the justices designed in this violent period were not confirmed by the Congress, and thus had no legitimacy. Initially, the Court of this period was composed by: Horacio Heredia, Adolfo Gabrielli, Alejandro Caide, Federico Videla Escalada, and Abelardo Rossi. To accede to the position, the selected ministers of the Court should swear: “according to what is prescribed by the basic objectives and the Statute for the Process of National Reorganization and the Argentinean Constitution.” Thus, the architecture and juridical hierarchy of Argentina would be profoundly altered.

During the entire period analyzed, there were modifications in the composition of the High Court. Of the 12 members designated during the regime, Videla nominated nine. And it was also during his administration that the deepest period of repression took place. It was during this initial phase of the dictatorship that the variations of the Court were important, reaching eight designations in the two first years. The stabilization occurred during the final years of this period. Two judges died while in office (Daireaux and Heredia) and two others would carry out their functions during the entire authoritarian regime (Gabrielli and Rossi). The presidency of the High Court was under the

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9 In 1971, the military regime created the Cámara Federal en lo Penal de la Nación. This chamber had a civil nature but shared the same purposes as the military tribunals. It would be nominated the Court of Terror. Its objective was to judge the violent acts of different armed groups opposed to the regime. The Penal Chamber created a fast, specialized, and centralized Court composed by judges who were sympathetic to the regime. With the Law 19.081, the military themselves were apt to investigate crimes that were within the jurisdiction of the Chamber. In two years, over 300 people accused of various political crimes were arrested (PEREIRA 2003; 39).
responsibility of Heredia until 1978. After that, Gabrielli was the president for the rest of the period. The majority of the designated justices had extensive academic and magistrate experience. The Court was not composed by ministers with long experience in politics. Most ministers had a conservative profile (WALKER 2006; 776). Many authors comment on the trajectories and characteristics of the ministers of this period (CARRIÓ 1996; 93/94, ANCAROLA 1999; 137). Nonetheless, without discrediting the hard labor of this Court, the few accepted cases (habeas corpus especially) were made insignificant by the avalanche of cases in which the Court could not be efficient in the defense of human rights (habeas corpus especially). As we can see, it is not about what they did, but exactly about what they did not do. The cycle of these magistrates in fact ended five days before the beginning of Alfonsín’s constitutional presidency, when all the members of the Supreme Court voluntarily renounced (FINKEL 2004; 62).

RELEVANT POLITICAL EVENTS

In this period, and with the horrors of state terrorism as a background, many events that impacted the military process took place. With the appointment of Martínez de Hoz as Minister of Finance and the implementation of a new economic orientation, Argentina would leave behind the few structural successes achieved in economic terms, particularly in the industrial sector. The substitution of internal production for importation was the new norm, damaging national productive structures. The devastating liberal classist economic plan that was implemented was justified for it achieved the political objectives of the transformation project proposed by the Armed Forces (CANITROT 1980; 461).

In 1978, the World Cup took place in Argentina. At this point, terrorism of state and armed struggle was in full swing. There were many complaints demanding that the event be cancelled, given the violations of human rights taking place. That same year, after Argentina rejected Britain’s arbitral ruling, the border conflict over the Beagle Canal with Chile reached its tensest moment. A year later, the Inter-American Commission on Human Rights (IACHR) visited Argentina. After two weeks of interviews, the IACHR disclosed the human rights violations perpetuated in Argentina: “The Commission has reached the conclusion that by action or by omission of the public authorities and its agents in the Republic of Argentina, numerous and grave violations of fundamental human rights have been committed during the period covered by this report – 1975 to 1979 - ...” (OEA – CIDH 1980). In 1980, Adolfo Pérez Esquivel received the Nobel Peace Prize, further exposing human rights violations in Argentina internationally and nationally legitimizing the activities and demands of human rights movements (ACUÑA y SMULOVITZ 1995; 10)

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10 The central dispositions of the economic plan of 1976 were the following: 1) Fixating a new level of real salaries 40% inferior to the average salary of the previous five years. 2) Eliminating withholdings on exports of agricultural products. 3) Applying a program of progressive reduction of the import taxes (opening the economy). 4) Eliminating subsidies for non-traditional exports, development credit, deficiacy social benefit programs (health, housing), real increase in utility rates. 5) Liberalization of exchange and financial markets (financial reform) and the financing of the public deficit through sale of titles in the capital markets. 6) Reduction in spending, in jobs, and government deficit (resizing of the State), re-privatization of companies under state control (principle of subsidiarity of the State). (CANITROT 1980; 459/60).
At the end of the same year the Pope presented its proposal mediating the border conflict with Chile. Finally, amidst the political, economic, and social crisis of the military regime, on April 2nd, 1982, Argentine troops recovered the Falkland Islands. Despite the diplomatic negotiations, conflict broke out. The war ended on June 14th, with Argentina’s rendition. The fault of the failed generals quickly became the fault of the authorities of the military regime. The sacrifice of the soldiers, victims of the incompetence of their commanders, was converted into the sacrifice of the victims of the regime. As Linz y Stepan (1996; 197) show, the military tried to impose a new game, but it failed drastically in its lack of efficiency as well as legitimacy.

As a consequence of the collapse of the authoritarian regime after the loss in the Falklands War, a civil and constitutional government returned to power. No political negotiation with the Armed Forces over the topic of human rights violations preceded the beginning of the new regime. The Armed Forces saw themselves forced to hand back power in the worst conditions they could have imagined, that is, with no guarantees as to how the new political forces would deal with the legacy of the military regime (FONTANA 1984; 35). Differently from other cases in the region (such as the Brazilian case), the politicians had no incentives to negotiate with the defeated military, which had no capacity to influence the political dynamics of the transition of power (DE RIZ 1990; 1). The defeat in the war marked a point of inflexion for the regime, and the call for elections quickly took place. Argentina was headed in the difficult task of recovering formal institutions of government, fundamental rights, and political interaction. The participation of the Supreme Court in the institutional reconstruction of the country and in the restitution of the rights of the people was fundamental.

**BRAZIL: GRADUAL AND TRANSFORMATIVE INSTITUTIONAL CHANGE**

With the coup d’état on March 31st, 1964, a civic-military regime that would last 21 years began. Differently from other constitutional interruptions, this coup did not intend to give away the control over Brazilian politics, incorporating the characteristic of permanence. With the new regime, individual freedoms and guarantees were limited. On April 9th, the military junta composed by General Artur da Costa e Silva, Lieutenant Brigadier Francisco de Assis Correia de Melo, and Vice Admiral Augusto Hamann Rademaker Grünewald dictated the Institutional Act n.1 (AI). In its first article, the act declared: “The Constitution of 1946, the state Constitutions and its respective amendments are maintained with the modifications established in this Act.” The AI n.1 also granted to the military government the authority to revoke legislative mandates, suspend political rights for 10 years, and force the retirement of any person who has made an attempt against National Security. Furthermore, the act determined indirect presidential election to take place on April 11th. The

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11 Among the opposition groups and groups in defense of human rights and liberties were: La liga Argentina por los Derechos del Hombre, la Asamblea Permanente por los Derechos Humanos (APDH), el Centro de Estudios Legales y Sociales (CELS), Las Madres de Plaza de Mayo, las Abuelas de Plaza de Mayo, and many others.

12 In this political scenarios 49 judges were removed (FAUSTO 2002; 467).
mandate shall last until January 31\textsuperscript{st}, 1966.\textsuperscript{13} Article 7 stated that “Constitutional or legal guarantees of vitality or stability are suspended for six months,” and in Item 4, which particularly affected the Supreme Federal Court (STF), it read: “The jurisdictional control of these acts shall be limited to the examination of extrinsic formalities, being prohibited the consideration of the facts that motivated the act, as well as its convenience or opportunity.” Nonetheless, this Institutional Act would not be the last.

During his presidency, Castelo Branco tried to maintain respect towards the STF. After certain decisions of the High Court, the hard liners began considering alternatives to this branch of government. In an attempt to appease the spirits of these hard liners, exasperated by certain judicial decisions of the court,\textsuperscript{14} the government dictated AI n.2 on October 27\textsuperscript{th}, 1965, affecting particularly the STF. The number of members of the High Court increased to 16, constitutional guarantees of vitality, immobility and stability were suspended, and article 19 declared that: “Shall remain excluded from judicial consideration: I – the acts practiced by the Supreme Command of the Revolution and by the Federal Government, based on the Institutional Act of April 9\textsuperscript{th}, 1964, the current Act and on complementary acts; II – the resolutions of Legislative Assemblies and Municipal Chambers that have revoked mandates or declared the impeachment of Governors, Deputies, Mayors or City Counsels, from March 31\textsuperscript{st}, 1964 till the date of this Act.” Still, other areas were also affected.\textsuperscript{15} The military had left the barracks and were at war against the STF. According to the military perception, the branches of government should walk hand in hand to endorse the continuity and deepen the revolution.

The Constitution of 1946 saw its end with the AI n.4, on December 7th 1966. The act summoned the National Congress to discuss, vote and promulgate the proposed Constitution presented by the President. According to the military government, “only a new Constitution can guarantee the continuity of the revolution.” Furthermore, the current legal mess had gotten out of control and the new Constitution sought normalization in a sense. In November 1965, the constitutional amendment n.16 would profoundly alter the Judicial Power.\textsuperscript{16} Federal Justice was institutionalized, as had been announced in the AI n.4. Still, the amendment allowed the STF to judge federal laws or acts by means of the representation of the Attorney General. Thus, the constitutional control was strengthened. In addition to the already present diffused control, a concentrated

\textsuperscript{13} On April 15th, 1964, Castelo Branco was sworn in as President. His mandate would be extended until March 15th, 1967, through the Constitutional Amendment n.9 of July 22nd, 1964.

\textsuperscript{14} It is important to note that the decisions not only exasperated certain groups within the military, but also many legislators and sectors of the press who saw the High Court in disagreement with the revolutionary mission. The attacks focused specially on Minister Hermes Lima and Evandro Lins. The habeas corpus conceded to the Governor of the State of Goiás, Borges Teixeira, and to the Ex-Governor of the State of Amazonas, Plínio Coelho, were determining.

\textsuperscript{15} The AI n.2: installed indirect presidential elections; dissolved all political parties and allowed the creation of new ones; established the presidential power to declare a state of siege for 180 days without consulting the legislature, to intervene in state politics, to declare Congressional recess, to dismiss employees due to incompatibility with the regime, and to dictate law-decrees over matters of national security. Furthermore, the President reserved the right to send constitutional ammendments to Congress, which had 30 days to appreciate the amendments and approve them with a majority of both legislative houses.

\textsuperscript{16} Some purges in the Judiciary took place in this phase (PEREIRA 2010; 91).
control was instituted (DIAS CORRÊA 1987; 16). As Vilhena Vieira (1994; 79) suggests: “The problem appears in the form through which active legitimacy was configured, that is, the capacity to provoke the jurisdiction of the Supreme Court. Such legitimacy, attributed with exclusivity to the Attorney General, dismissable ad nutum by the President, became an instrument of little value in controlling the institutional acts produced by the Executive or in its interest.”

The new constitutional text came into effect together with the swearing in of Costa e Silva as president, on March 15th, 1967. The flaming fundamental text tried to institutionalize and legalize the military regime in a more harmonious way, leaving behind the judicial mutilation of the first years of government. Nonetheless, National Security being its main objective, constitutional guarantees would be profoundly affected, especially individual freedoms. The more the revolution was institutionalized, the more it distanced itself from democracy. Habeas corpus and writ of mandamus were established, although the former would not always be effective when relating to crimes against National Security. The decree-laws played an important role as a government tool. In this sense, article 58 established: “The President of the Republic, in cases of urgency or relevant public interest, and as long as it does not result in increases in expenses, may issue decrees with the force of law over the following subjects: I – national security; II – public finances.” Nonetheless, the Constitution of 1967 would coexist with institutional acts and other legal instruments that appeared over time, constantly eroding its power.

On one hand the country went through a favorable economic situation; on the other, political opposition, social manifestations (particularly workers and students), and acts of violence multiplied. On October 1968 the Higher Censorship Council (Conselho Superior de Censura) was created (FICO 2004; 212). The military elite noticed that in spite of the measures in place to insure order, these had not produced the expected effect, creating the necessity for deeper measures. In this context, the authoritarian model darkened on December 13th, 1968, with the AI n.5. Dictated by President Arthur Costa e Silva, the Institutional Act n.5 gave ample power to the government to repress the opposition: the National Congress was shut down (following the Complementary Act N.38), democratic mandates were revoked, the political rights of any citizen could be suspended for a period of ten years, federal government could intervene in states and municipalities, good could be confiscated in case of unlawful enrichment, and habeas corpus for political crimes against National Security and the socio-economic order was suspended. After the AI n.5, the authoritarian regime increased repression and would use detention, torture and murder against its enemies or those considered as such. For example, in January 1969 forty-three congressmen were arrested. In July the Operation Bandeirantes was created, a center for repression located in São Paulo. And in September the new National Security law, which included the death penalty, was approved.

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17 With relation to the guarantees given to the judges, the new Constitution established, in article 108: “With the exemption of the restrictions expressed in this Constitution, the Judges shall enjoy the following guarantees: [...] III – irreducability of salary, subject, however, to general taxes. § 1º - Retirement shall be compulsory at 70 years of age or for proven disability, and optional after thirty years of public service, in all of these cases with full salaries.”

18 Article 1 established: “In the terms of art. 2, and its paragraphs, of the Institutional Act n.5, from December 13th, 1968, Congressional recess is declared, from this date.”
The Institutional Act n.6, from February 1969, made the Supreme Court the target one more time. First, the number of ministers was reduced to eleven. As a consequence, the ministers Evandro Lins, Hermes Lima, and Vitor Nunes Leal were pushed into forced retirement. Following this, Minister Gonçalves de Oliveira renounced in solidarity. Still, Minister Lafayette de Andrade was removed. The Supreme Court was renovated almost in its entirety. The AI n.6 also altered the capacities of the STF, increased those of the Supreme Military Tribunal, and ratified all constitutional amendments created through Complementary Acts after the AI n.5. According to article four of AI n.6, “All acts performed in accordance with this Act and its Complementary Acts, as well as their effects, are excluded from judicial review.” The STF was being pushed aside from its vital functions as an institution. This way the government avoided jurisdictional control and appreciation of law, although at cost of its legitimacy (ROSA 1985; 65). Thus, the STF had a new institutional status, with a more restricted role and a renovated composition. As Vale (1976; 166) suggests: “Since then, especially with the Acts numbers 5 and 6, conflicts ceased, and the Executive-Revolutionary Power found in the Supreme Court an administratively healthy organ, technically agile, [...] but politically dead.” In the same line, Vilhena Vieira (1994; 80) argues that as its capacities were reduced and its ministers altered, the STF no longer offered resistance to the regime.

Still, the modifications continued: on October 17th, 1969, Constitutional Amendment n.1 was declared. The amendment would make clear that power would be concentrated in the Executive branch. Its motives: “Considering that, and given that a parliamentary recess has been decreed, the Executive Federal Power is authorized to legislate over all subjects, according to clause § 1º of article 2º of the Institutional Act n. 5, of December 13th, 1968.” The amendment was extensive in the modifications it introduced to the 1967 Constitution. Not few authors admit that it served the purpose of a new constitution. The Amendment n.1 in addition to the AI n.5 intensified the concentration of power in the Executive and consolidated the legal juridical architecture of the military regime. From the structure of the Constitution of 1946, the modifications of the Constitution of 1967 and the constitutional amendment (or new constitution) of 1969 were introduced. Despite of increasing authoritarianism, certain liberal forms of governmental organization were not completely altered (the legislative and judicial powers remained) nor were citizen rights completely annihilated, although these would be restricted to its maximum.

With the swearing in of Médici as head of the Executive Power, a duality was momentarily installed. The success of economic development had important consequences in the process of legitimization of the violent regime. As Gaspari (2002b; 18) indicates, “The economic miracle was simultaneous to the repression and the armed struggle. Both real, they coexisted and denied each other.” Thus, between the governments of Costa e Silva and Médici, repression would reach its maximum expression in the armed struggle. During this period, there were more than 300 disappeared, 25,000 political prisoners, 10,000 exiles, and over 7,378 people judged by military courts for political crimes (PEREIRA 2003; 28).

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19 In brief but clear words, Soares (1994; 29) shows that: “facts confirm that political repression was concentrated in 1964, and later in the years from 1969 to 1973. This repression was
With the Geisel government, there was an attempt at a process of normalization. But the economic crisis altered the initial plans. The military regime started to lose support from the middle and high classes, which had previously sustained it. In 1974 the regime met an electoral defeat. In 1977 the constitutional amendment n.7 increased the capacities of the STF (DIAS CORRÊA 1987; 17).

The process of political opening presented many scenarios. But the military questions would be predominant. This way, the process was set to be a slow one. In June 1978 AI n. 5 was lifted. In March 1979 Figueiredo assumed the presidency. On August 22nd of that year, the Amnesty Law was approved. The Law was restricted to those involved in political crimes, although later, with the support of the Supreme Court, it was converted into a bilateral amnesty (two-ways) that benefited in an ample, general and unrestricted manner the members of the authoritarian regime. The Law passed through a process that was controlled by the regime, giving it a meaning of political-social agreement to coopt the fact that it had only partial legitimacy. This supposed legitimacy was strengthened with time, based on the legality of the law conceded by the Supreme Court. The prolonged transition towards redemocratization in Brazil, as well as the negotiation of diverse sectors and the military, would have serious repercussions in the future regarding the punishment for crimes committed during this period. With relation to the transition and action of the STF, Vilhena Vieira (1994; 81/2): “The Supreme Court collaborated towards the transition in the rhythm established by the agenda of the government. In diverse episodes in which the Supreme Court was sought after, the litigants had their pretentions frustrated by a court submissive to the will of the military.” At last, as we may observe during the course of the period being analyzed, the civic-military regime constantly altered the capacities of the High Court until they achieved to create a Supreme Court in accordance with the power and objectives of the illegitimate government. These modifications in capacities were gradual, albeit cumulative, thus succeeding to institutionally transform the role of the High Court within the national political scenario.

**COMPOSITION OF THE STF DURING THE MILITARY REGIME: 1964 – 1985**

distributed throughout all sectors of national life, including military, civilians, and parts of the State. However, regarding the question of the dissapeared, the killed, and the abused, the majority these acts appears in the second moment. More than this, we want to call to attention the fact that what changed in this second phase was the target of repression, involving sectors of the social and cultural national elites, the improvement of methods, the institutionalization and organization of the repressive system...

20 The Amnesty Law n.6.683-1979 exposed the internal disagreement amongst the military on the liberal measures taken during the period of transition (Soares, D’Araujo e Castro, 1995: 12). Currently, the amnesty law is being strongly debated, recently reaching the STF in a lawsuit demanding its revision. The Supreme Court’s early arguments were not in favor of the revision of the law.

21 As Abrão (2011: 123) shows: “… the social pressure for the investigation of crimes increased, which led the Judiciary – note: controlled by the regime – to systematically and interpretively expand the spectrum of the scope of the Law, considering the crimes committed by agents of the State as “related to political crimes,” and, moreover, applying the Law even to crimes occurred post-1979, outside its temporal validity (such as the Riocentro case in 1980), under the guise of the principle of ‘national pacification’.”
With the military regime in place, the Supreme Federal Court slowly converted itself into an uncomfortable institution for the objectives of the revolution. In spite of the fact that part of the ministers recognized the respect of President Castelo Branco towards the court, it was during his presidency that interventions in the court began. This trajectory deepened until the new regime achieved to create a Supreme Court in accordance to its wills. However, differently from the Argentine case, the modifications in the High Court happened gradually, not abruptly. In order to calm the spirits of the harsher sectors of the military, Castelo Branco implements the Brazilian Court Packing, increasing to 16 the number of members of the court with the AI n.2 of October 27th, 1965. Thus, five ministers were designated and sworn in on November 25th of the same year. This number was maintained by the Constitution of 1967. The designated ministers were Adalício Coelho Nogueira, José Eduardo do Prado Kelly, Oswaldo Trigueiro de Albuquerque Mello, Aliomar de Andrade Baleeiro, and Carlos Medeiros Silva. According to Minister Hermes Lima, the designations had honored the court, granting it Independence and quality (VALE 1976; 189).

Nonetheless, the increase in number of members and the designation of ministers did not cause the effect the military had expected. On December 13th, 1968, based on the Institutional Act n.5, three ministers were forced into compulsory retirement, leaving their positions in January of 1969. In solidarity, Minister Antonio Gonçalves de Oliveira resigned in February of 1969. Minister Antonio Carlos Lafayette de Andrada also resigned in the same period. The AI n.6 re-established the number of ministers to eleven. The three ministers who were compulsory removed were Evandro Lins, Hermes Lima, and Vitor Nunes Leal. All had had an active participation in defense of the Constitution.

During the authoritarian regime, 32 ministers were designated to the High Court, of which 12 were designated during the first four years of the regime. Without doubt, the intervention over the STF had succeeded in renovating its composition, although these changes in structure were simply complementary to the changes in the institutional role of the High Court established by the legislated implemented during the regime.

In relation to the Presidents of the High Court, it is worth paying attention to the three first. These were the only ministers nominated in democratic moments: Minister Ribeiro da Costa designated by Linhares, Minister Luiz Gallotti by Dutra, and Minister Gonçalves de Oliveira by Juscelino Kubitschek. It was during these presidencies that the STF experienced its greatest interferences and changes, and these presidents did not fail to show their dissatisfaction. After these presidencies, the role of the STF was diminished as was the importance of the president of the High Court. Definitely, the modifications in the structure of the court deepened with time: on one hand its size was modified and on the other its composition was changed. Once the military achieved to have the type of Supreme Court they wished for, institutional changes in this area were minimal. Given the strategic importance of these institutional changes in the structure of the High Court, it is important to note that followed two fundamental characteristics: In the first place, these changes were gradual and never radical or abrupt like in the Argentinean case; secondly, they were complementary to the institutional changes in the capacities of the High Court. It might be for this reason that the modifications in
the structure were gradual, since they were complementary and cumulative with the objective of achieving a solid institutional transformation.

**FINAL CONSIDERATIONS**

Throughout the institutional development of the Supreme Courts of Argentina and Brazil during their respective military regimes, constant changes happened through time. Some were the result of an accumulation of gradual and incremental changes (PIERSON 2008). Others were product of abrupt institutional change. As these cases show, major changes can happen alongside a strong sense of institutional continuity. After re-democratization, these continuities become important authoritarian legacies. Given the extensive possibilities of types of changes, this paper observed changes in structure as well as in capacity of the High Courts, always within the political and historical context in which they happened. The result is an analysis of the development of the Supreme Court through its institutional changes during authoritarian regimes.

To begin with, this paper noted the difference in the temporal period studied in each case: the civic-military regime lasted seven years in Argentina, while in Brazil the regime lasted three times as long, for 21 years. This temporal difference suggests different meanings. Nonetheless, what is important about this difference is that it clearly exposes the degree and pace of the institutional changes in each case. It shows the Brazilian gradualism and the Argentine rupture. It was during a period of five years that Brazil went through the institutional changes that finally transformed the institutional architecture of the Supreme Court and distilled its institutional role. If we consider five years in the Argentine case, we are referring to over 70% of the military regime. In this case, in less than six months the main institutional changes already had been implemented.

In both cases, the institutional changes produced through modifications in the capacities or structure transformed the role of the High Court. In this sense, the court was an institution devoid of strength or tools vital to its function. Moreover, in both cases, this lack of strength profoundly affected the role of the Supreme Court in the defense of human rights, in the context of systematic human rights violations as a consequence of state-sponsored terrorism. In each case, this violent context has unique characteristics: in Brazil it was important for the regime to maintain a certain democratic disguise; in Argentina the military opted for illegality in its pure state, the extrajudicial execution materialized in the forced disappearance of citizens. As a similarity, in the realm of human rights both cases exhibit a High Court with little importance and ineffectiveness regarding the defense of basic rights. In order to enrich our comparative perspective, we will analyze the modifications produced in the High Courts of each case study, noting similarities and individualities.

**CHANGES IN CAPACITIES**

In the Brazilian case, with the coup of 1964, the new regime established a dictatorship with a democratic and legal disguise. There were many changes in the capacities of the High Court, each with a different depth and extent. The attributions and capacities arising from the Brazilian legislation, Constitutional and national, were modified repeatedly. These ended up molding an STF with little power and diminished in its institutional role within the political system. For
example, the Institutional Acts n.5 and 6 (1968 and 1969) seriously affected the STF. The AI n.6 established, in its article 4, that: “All the acts practiced in accordance with this Institutional Act and its Complementary acts, as well as its effects, are excluded from any judicial appreciation.” In Brazil, the stability of the structure of the STF was given ultimate importance, but in order not to run any risks with its members, governments altered its capacities and even its institutional role. These changes in capacities were the principal strategy in the Brazilian case, and also served as a type of insurance for changing political regimes.

A remarkable characteristic of the Brazilian case was the modifications in capacity, which happened in a gradual and constant form. The rhythm of the changes was gradual and cumulative, and with time these changes solidified into important institutional transformations affecting the institutional role of the Supreme Court. The Brazilian gradual, cumulative, and constant changes were implemented in many different ways: Institutional Acts, decrees, constitutional amendments, and even through new constitutions. This *de facto* formality or legality was lacking legitimacy. The military governors were determined to maintain at least a façade of legality (ACUÑA y ALONSO 2001; 17). This judicial bipolarity of the regime (*de facto* legislation with democratic pretensions) would be extinguished with the implementation of the AI n.5, which legally unmasked the ruling authoritarianism.

In the Argentinean case, the development of the High Court followed a different trajectory, where the interventions in its capacities were not the main or only feature. Institutional breakdown and modifications of the hierarchy of the legal structure did alter the capacities of the High Court. The coup of 1976 is good example of a moment when the changes in capacities were deep, and also especially extreme. Law No. 21.258 of 1976, art. 5, declared that: “The magistrates and employees that are designated and confirmed shall take an oath of compliance towards the Basic Objectives as stated by the Military Junta, the Statute for the Process of National Reorganization, and the National Constitution, as long as the latter is not oppose to the former documents.” In this sense, the modification of the kelsen legal pyramid led to extreme abrupt changes in the Argentinean Supreme Court, giving this Court a new, smaller, institutional role. The loss in attributions multiplied the feeling of a functional and weak institution. The lack of defense of human rights by the Court was an example of its real incapacity as a judicial institution. During the period in which massive disappearances took place, the judicial power became an almost irrelevant resource. The modifications in the capacities of the High Court were emphatic and abrupt, eliminating the necessity for constant readjustments. Gradual processes were not needed, given the rupture in legality produced by the coup of 1976. But the Supreme Court was not the only institution affected: it followed the same luck as all the other state institutions, as a result of the de-prioritization of national legislation.

**CHANGES IN STRUCTURE**

To begin with, when changes in structure were analyzed, we focused especially in the modifications in the size of the High Court and in its composition. In the Brazilian case, with the implementation of the AI n.2 of October 27th, 1965, the number of ministers increased from 11 to 16. This was considered an attempt at a Brazilian Court Packing. Five ministers were
designated, taking office on November 25th of that same year. The total number of ministers was maintained by the Constitution of 1967. On February 1st, 1969, the Institutional Act n.6 reduced from 16 to 11 the number of members in the Supreme Court. As a consequence, three ministers were forced to retire: Evandro Lins, Hermes Lima, and Vitor Nunes Leal. Following that, Minister Gonçalves de Oliveira resigned in solidarity and Minister Lafayette de Andrada was removed. It is important to note that all of the removed ministers had been designated during democracy. Thus, the Supreme Court was renovated almost in its entirety, leaving only Justice Gallotti as a minister who has been designated during a democratic period. The military pushed away those whose interpretations did not meet revolutionary ends. Through a gradual process, the Court was purified of the ministers that bothered the illegitimate government. In the Brazilian case, the increase or decrease in number of ministers of the High Court was implemented by the civic-military regime jointly with the designation of new members or forced removal of others. In this sense, as these constant and gradual changes in structure accumulated, they ended up producing significant transformations in the institution of the Supreme Court and renovating it almost in its entirety. As we can see, small, constant modifications had a transformative power and produced important change (PIERSON 2008), which in the end re-oriented the objective of the Brazilian High Court.

On the other hand, in the Argentinian Case, the Supreme Court was composed by five ministers, a number that was kept constant throughout the entire period. This apparent and alleged stability in the size of the High Court had a direct cause: with the arrival of the civic-military government, all of the ministers were forcedly removed from their position. Thus, the characteristic in focus is the radicalism in the illegal and informal removal of the Supreme Court Justices. The complete renovation of the members of the High Court was thus an effective measure to achieve the desired institutional re-orientation sought by the authoritarian regime. It is important to note that this forced and compulsory renovation of ministers was a strategy used by de facto Argentine regimes in other points in history: 1955, 1966, and 1976 (case in question). The Argentine case presents a particularity: with the return to democratic regimes, the (de facto) judges willingly resigned. This occurred in 1958, 1962, 1973 and in 1983. It is important to keep in mind that political trial against supreme justices had only been used once before the military regime in point. During the first Perón government, four members of the CSJN were sent to trial, although one of them would resign before the end of the process. In this context, the radicalism, depth, and swiftness in the changes in structure of the High Court after the coup of 1976 is notable.

Both cases show an important issue with relation to the new designations and compulsory removals: with new designations as well as with the removals, the ministers were not subject to a formal process of designation and removal nor to a process of political trial, deepening problems of institutional legitimacy.

UNIQUE AND SHARED CHARACTERISTICS

As we have seen, every actor tries to interpret or re-direct institutions to achieve advantages towards the fulfillment of their own objectives or interests. Observing the changes in coalitions is important because institutions rely on them (Thelen, 2004: 31-33). In the Brazilian case, the Supreme Federal Court was an institution that was constantly re-directed and re-molded in a gradual
manner to meet the new necessities of the authoritarian coalition in power. In this case, the accumulation of small institutional changes ended up significantly transforming the institutional role of the Supreme Court in the national scenario. Meanwhile, in the Argentinean case, radicalism was the main feature in the measures taken to re-design institutions to achieve the interests of the authoritarian regime. Breakdown immediately provoked the desired institutional changes. There was no gradualism in the execution of these changes. On the contrary: even the end of the military regime would be abrupt. In these authoritarian processes each country had particular characteristics, although in both cases the outcome was a profound change in the High Court. Finally, with the return to democracy, each Court faced new challenges, as a result of the institutional inter-relations of democratic processes.
Bibliography


