THE BRAZILIAN BAR ASSOCIATION AND ITS ATYPICAL PREROGATIVES IN THE POLITICAL ARENA OF JUDICIAL REVIEW

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ABSTRACT

The political literature has highlighted relevant aspects regarding the legalization of politics in the Brazilian scenario. This article focuses on one of its nuances, to treat about the role of the Brazilian Bar Association (OAB) front of abstract judicial review. Unlike the other players in this select group of Article 103 of the Federal Constitution, the OAB has its operations based on three pillars: the absence of thematic relevance, lack of external control and characterization as independent public service. It is clear, therefore, that the institutional design of the Brazilian Bar Association gave a list of atypical prerogatives, signaling a strong political power, capable of generating significant costs on public authorities. In this sense, what interests and what the performance of this actor in the field of abstract judicial review? This research aims to answer this question by exploring a large dataset of constitutional actions (ADI) and searching for empirical evidence of the role played by Brazilian OAB in political judicial review arena. Overall, in conclusion, it was found that there is a higher success rate of the actions that deal with corporate interests, taking advantage of the public interest aimed at strengthening itself.


INTRODUCTION: JUDICIALIZATION OF POLITICS AND JUDICIAL REVIEW

In general, the judicialization of politics is a term that has been used to express the phenomenon of expansion of the Judiciary in matters which a priori would not be related to (TATE e VALINDER, 1995). In this sense, the expression denotes a movement of growth, of enlargement of the judicial sphere in the control of the state activities in order to enter the sphere of power.
To Hirschl (2004), the judicialization is a consequence of the new constitutionalism that is originated in the post World War II, and should be understood as a progressive step towards equality, distributive justice and control over excessively party governments.

Tate and Vallinder (1995) list some characteristics of this phenomenon, seeking to scrutinize its meaning. So it would be an influence and judicial interference in political spheres, where the judiciary does not normally be inherent in; a transfer of decision-making from the Legislative and the Executive to the Judiciary; and, finally, a transformation of a policy determination in a judicial decision.

Hirschl (2008) also examines the nature and scope of the new level of judicialized politics, and presents recent studies that advance towards providing a realistic explanation of the phenomenon in question. This author points, thus, a construction based on three levels of judicialization, first the expansion of public policies, second the expansion of the scope of administrative supervision of the Judiciary, through the proliferation of administrative agencies in the modern welfare state, and finally the allocation of trust to judges and courts to deal with matters related to mega-politics.

As a consequence of this construction, there was a transformation of the Supreme Courts (or Constitutional Courts) in most of the western democracies, in key institutions for the formulation and implementation of public policies (GINSBURG, 2003 and SWEET, 2000). Moreover, the Judiciary starts to act in various controversies, from matters related to the democratic process, to prerogatives of the other branches, a corroboration of the changes in the regime or even the definition of collective identity.

Hirschl (2008) further points out that judiciary expansion can not be understood separately from the political, social and economic struggles that make up a particular political system. It is also vital to consider the political determinants of behavior and legal empowerment and the interaction between the political and judicial spheres.

As for its operationalization, the Judiciary relies especially on the institute of constitutionality control. In general terms, this control means the possibility of resorting to a tribunal in case there is no answer in the Constitution.
As it is well known, in Brazil this institute works in a hybrid manner, and can be concentrated\(^1\) or diffuse\(^2\), which increases at least in the aspect of institutional design, the possibility of a judiciary intervention.\(^3\)

Brazilian literature has explored various aspects of this process (TAYLOR, 2008; ARANTES, 2009; CARVALHO, 2009). In this article, we will cover a small though significant portion of this vast and complex iceberg, which is the contested relationship between state and society.

Our main interest is to investigate the role of one of the legitimate actors to propose constitutional actions (ADI), present in the exhaustive Article 103 of the Federal Constitution, in which the Federal Council of the Brazilian Bar Association – OAB is (in its VII section).

While other actors, such as nationwide trade unions, Senate and Deputies have a duty to justify the existence of a formal link between the nature and the political object being disputed (thematic relevant, in technical terms), the Federal Council of the OAB has the constitutional prerogative to propose constitutional actions in any topic of political debate. So the question is; what is the relevant of constitutional actions of the OAB in the scenario of the judicialization of politics? What is the role of OAB in the political sphere of judicial review? This article aims to answer these questions through an empirical analysis based on the database about the constitutional actions (ADI) available on the website of the Supreme Court\(^4\).

THE BRAZILIAN BAR ASSOCIATION (OAB) AND ITS ATYPICAL PREROGATIVES

It seems relevant to note, in political terms, the implications of the absence of the thematic relevance to the OAB. Even if framing as a nationwide entity class, the Federal Council of the OAB was contemplated with the legitimacy for bringing in an

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\(^1\) Concentrate Control – the Constitutional Court caused by a direct action of (un)constitutionality (constitutional action) will decide on the law in question. Therefore, it is not necessary the existence of a particular legal conflict. The standard in abstractu is attained and its effect is erga omnes (against everyone). In this type of control, the Court has a monopoly of the control of constitutionality.

\(^2\) Fuzzy Control – any judge may (have the competence to) declare the unconstitutionality of laws and normative acts in the judgment of individual cases. This type of control does not affect the law in question, that is, the judged only affects the legal subject itself and the parties involved.

\(^3\) For deepening the political aspects of the institution of judicial review vide Carvalho (2010)

\(^4\) Accessible in: [http://www.stf.jus.br/portal/principal/principal.asp](http://www.stf.jus.br/portal/principal/principal.asp)
ADI in an item itself, together with its characterization as a universal asset legitimized. Thus, the Council can, unlike other nationwide association, propose ADI on any matter in which it is alleged vice of unconstitutionality.

This expansion of the legitimate assets, which led to the inclusion of the Brazilian Bar Association’s Federal Council and the consequent universal legitimacy, is due to, in legal terms, the constitutional provision of Article 133 of the Federal Constitution, which states that the lawyer is indispensable to the administration of the justice\(^5\).

Another interesting feature is that, even having a characteristic of an institution of public law, as a federal agency, the Brazilian Bar Association is not subjected to the dictates imposed on the direct and indirect Public Administration. The own Statute on Law and on the OAB (Law 8.906/94) affirms in Article 44 its public character and its functional independence, and stating the defense of the Constitution, human rights and the rule of law as its main purposes\(^6\).

Given the highlighted points, it is clear that the entity is not subjected to the rules of legal administrative system, that is, it is not subjected to any external control.

Despite the legal provision, the Supreme Federal Court, when judging the ADI 3026/DF\(^7\), additionally recognized that the OAB is an “independent public service”, reinforcing that it is not subjected to control of the Administration, nor is it tied to any of its parties.

Therefore, we realize that among the legitimated listed in the Article 103 of the Constitution, one can consider that the Federal Council of the OAB stands out as one of the most powerful players, for the lack of limitations in terms of respect to its

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\(^5\) The Article 133 of the Federal Constitution is one of the most remarkable results of the solid presence of the OAB in the National Constituent Assembly of 1987, having the following forecast: Article 133. The lawyer is indispensable for the administration of justice, being inviolable for its actions and demonstrations in the professional practice, within the law.

\(^6\) Art. 44. The Brazilian Bar Association (OAB), public service with legal personality and federative form, aims to:

I – defend the Constitution, the legal system of the democratic rule of law, human rights, social justice, and strive for good law enforcement, the rapid administration of justice and the improvement of culture and legal institutions;

II – developing, with exclusivity, the representation, defense, selection and discipline of lawyers in all the Federative Republic of Brazil.

\(^7\) We highlight in this point the most important issues present in ADI menu in question: 3. OAB is not an entity of the Indirect Administration of the Union. The Order is an independent public service, unique category in the list of exciting legal personalities in the Brazilian law. (…) 7. The Brazilian Bar Association, whose characteristics are autonomy and independence, can not be takes as a counterpart of other organisms of professional supervision. The OAB is not dedicated exclusively to corporate purposes. It has a institutional purpose.
subject field with the absence of direct state control. This means that the OAB has the prerogative to propose ADI on any topic that prevails in doubt about its constitutionality.

On the other hand, the other actors, who have the universal active legitimacy, are part of the constituted Public Authorities, except for political parties with representation in the Congress. Thus, OAB as an entity class owns through its Federal Council prerogatives beyond those granted to other political actors in the private sphere as well as some actors essentially public that have the above list.

As already pointed out, there is no doubt that the ADI constitutes a mechanism of extreme importance for the defense of citizenship and the rationalization of Public Administration, contributing therefore to the realization of justice in a democratic state law (CARVALHO, 1999). However, as pointed out by political literature (TAYLOR, 2008; CARVALHO, 2010) we noticed that the prerogative to propose this action generated visible political power to that list of actors. And in the specific case of the OAB it generated a political power with no precedents due to its broad range of action and the absence of control mechanisms, since the institution does not have, at least in theory, direct relationship with the constituted Public Powers.

We are facing a national entity that has public features and is understood as a public service, but whose performance is based on private dictates before its political independence from the constituted powers.

In summary, the Brazilian Bar Association’s Federal Council acts in the Supreme Court through the constitutional actions, according to three fundamental bases:

1) Lack of thematic relevance\(^8\);\(^9\)

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\(^8\) In the case of abstract complain of unconstitutionality, the homeland legal literature suggests that the thematic pertinence was a judicial strategy created by the Supreme Federal Court to control the significant increase in demands after the expansion of the list of legitimacies effected by the Constitutional Amendment nº 03/1993, meaning that relevance the congruence thematic between the statutory purposes or the interests of the federative union, and the content of the contested norm. In this sense, there was a division between the legitimate universal assets that has no impediment to propose depending on the object, like the Federal Council of the OAB, and special assets legitimized, which need to proof the objective bond of relevance between the challenged rule and the institutional purposes or the interests of the federal unit (CLÈVE, 1995; LOURENÇO, 1998; BARROSO, 2004; MARTINS et al., 2005; MENDES, 2011; DANTAS, 2012).

\(^9\) STF, RTJ, 142:383, 1992 ADIn 3-DF, rel. Min. Moreira Alves: “In the case of the Federal Council of the Bar Association of Brazil, placing it on the cast that is mentioned in the article, and what distinguishes it from other associations nationwide, it should be interpreted as created to allow itself,
2) Absence of external control\textsuperscript{10};

3) Characterized as an independent public service.

Apparently, facing the elements appointed, their legitimacy to largely enforce this fundamental instrument to the Brazilian democracy is linked to the protection of public interests and, residually, to maintain the prerogatives of performance of lawyers. However, what is the radius of action of OAB when provokes the Constitutional Court?

The fact that the Brazilian Bar Association’s Federal Council has an institutional incentive a hybrid format – with public outlines and private action together with the lack of limitations with respect to its subject field- has the prerogative to propose ADI on any topic which prevailing doubt about its constitutionality, since they have an interest in preserving the supremacy of the Constitution by virtue of their own institutional functions (CLÈVE, 1995; LOURENÇO, 1998)- as well as the lack of state control over its performance, eventually transformed, in our view, on of the most politically privileged actors in the process of interpreting the Constitution.

Although the OAB is a class council responsible for regulating the legal profession of a lawyer, it is naïve not to consider and frame the entity as a group of an interest group, since it as the prerogative to bring matters to be processed by the political system (SANTOS, 2011), as is the discussion about the constitutionality of laws and normative acts within the Supreme Federal Court. The fact is that the legal construction and the Brazilian jurisprudence point to a strategy of persuasion, in which the main function of this entity is to provide a public service\textsuperscript{11}.

It must be consider here that this process of allocation of OAB in the Brazilian constitutional level is perceived as a consequence of a highly guarantor constitutional design. One of the key concerns of the constituent of 1988 was to ensure at an institutional level barriers to an authoritarian backlash. Is that, unlike other Latin

\textsuperscript{10} For the purpose of further clarification on the basis of legal political role of the Federal Council of the Bar Association of Brazil, vide “The power’s owners: the OAB and its role in the concentrated judicial review” (BARBOSA, 2012).

\textsuperscript{11} Vide full content of ADI 3026/DF.
American countries, in Brazil the construction of these institutional guarantees elected the Brazilian Bar Association (OAB), the Public Prosecutor’s Office and the Judiciary, among others, as essential parts for the proper functioning of the democracy.

This Brazilian specificity is so glaring that the constitutional text itself gives lawyers the essential character to the administration of justice. Among its features, the Brazilian Constitution alludes to the term lawyer\(^\text{12}\) in 23 different times. Compared to countries that have undergone a similar process of democratization in the same historical period, like Argentina (3 times) and Chile (14 times), this fact is extremely significant, and point to the importance given by the Federal Constitution of 1988 to the role of lawyers as a maintenance agent of the Brazilian democratic context.

The table below shows the relationship of South American countries and a number of allusions to the terminology “lawyer(s)” in their constitutions:

<table>
<thead>
<tr>
<th>Países</th>
<th>Alusões constitucionais ao termo “advogado(s)”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>03</td>
</tr>
<tr>
<td>Bolívia</td>
<td>02</td>
</tr>
<tr>
<td>Brasil</td>
<td>23</td>
</tr>
<tr>
<td>Chile</td>
<td>14</td>
</tr>
<tr>
<td>Colômbia</td>
<td>06</td>
</tr>
<tr>
<td>Equador</td>
<td>11</td>
</tr>
<tr>
<td>Guiana</td>
<td>01</td>
</tr>
<tr>
<td>Guiana Francesa</td>
<td>N/A</td>
</tr>
<tr>
<td>Paraguai</td>
<td>05</td>
</tr>
<tr>
<td>Peru</td>
<td>06</td>
</tr>
<tr>
<td>Suriname</td>
<td>00</td>
</tr>
<tr>
<td>Uruguai</td>
<td>02</td>
</tr>
<tr>
<td>Venezuela</td>
<td>03</td>
</tr>
</tbody>
</table>

Table 01: Survey conducted among the 13 South American countries in the Political Database of the Political Database of The Americas, at the Center for Latin American Studies at Georgetown University (http://pdba.georgetown.edu/).

However, how to understand the participation of OAB in this process without taking into account their own interests, specially with regard to the preservation of the

\(^\text{12}\) For the construction of the table in question, we disregarded the allusions referring to “advocate(s)” present in Portuguese in the Attorney General’s Office of the Union (Constitution of Brazil), since it is a public office, different than our object of our analysis.
status quo and extend its political influence? It is naïve to consider a performance of 
the entity purely related to public interests and completely dissociated from its own 
corporate interests.

Faced with this problem, it is essential to bring the debate on the theory of 
interest groups. When addressing the Pluralistic Democratic Theory, Dahl (1956) 
perceives that the resources that contribute to the power are distributed between 
different groups. The power is shared between governmental and outside interest 
groups pressuring them. In this case we are analyzing, we noticed the presence of a 
outgroup to the sphere of government that has a strong political instrument that 
enables substantially the representation of its interests in the political process.

One of the theoretical constructions on the articulation of interests, proposed 
by Salisbury (1975), points out that the groups can be seen as (I) units of inputs, (II) 
outputs of the political system, (III) authorizative decision makers or (IV) as 
organizations. As units of inputs, interests groups are components that offer a large 
number of demands for decision-makers. It is worth noting that the Federal Council of 
the OAB is making up as an organization of excellence regarding the activity of 
provoking the Judiciary, being the owner of the legal knowledge on the instrument 
used and on the own legal argument.

Within this approach, Santos (2011) notes the work of Almond and Powell 
(1966) on the typology of interest groups, which are divided into four types:

(1) **Anomic interest groups** – spontaneous groups suddenly formed by 
individual reactions to a particular matter;

(2) **Nonassociational groups** – groups without formal constitution and rarely 
well organized, exercising punctual and sporadic activities with interests and common 
identity;

(3) **Institutional groups** – groups formally constituted in which its members 
have varied political and social functions;

(4) **Associational groups** – groups formed specifically to represent the interests 
of its members.

With respect to this classification, the OAB, out object of study, is an example 
of hybrid associational group and institutional groups, since the entity was designed to 
represent the interests of lawyers and supervise the professional activity, but also has 
the mission to defend the Constitution, human rights and the rule of law, having as
one of its typical tasks induce processing demands by the political system. And one of the channels used for such processing is the Judiciary.

Handling the system of interest representation in Brazil, the author emphasizes the importance of analyzing the institutional context for a correct dimension of the political results obtained by different groups. From rereading the works of Diniz and Boschi (1999) surges such representation of interests in this hybrid way, characterized by the existence of different patterns, from which we highlight the persistence of traditional corporatism, widely present before the democratization process, the development of groups organized according to the pluralistic logic, as well as the emergence of neo-corporatism as an alternative for the participation of private groups in certain arenas of decision. Santos (2011) points out that:

“In this decision-making process the Executive, the Legislative and the Judiciary are privileged channels for voicing such demands and become strategic arenas to put these demands on the political agenda. These demands, however, occur in a particular institutional and political context and it is expected that their pattern of interaction, its efficiency and its success depend not only on the force of the organizations, but also the institutional environment under which their claims will be received (as inputs) and treated in the decision-making process”

When analyzing the role of interest groups in the American judiciary, Neubauer et al. (2010) points out that interest groups direct their effort to the judiciary to promote public policies that favor their members. So they frequently lead causes to court specifically to develop legal doctrines to their cause.

Parallel to the discussion of the corporative questions, typical of the entity, the OAB was awarded with a roster of atypical assignments, associated with a performance directed essentially to the public interest. In this sense, the OAB can avail themselves politically from the judiciary to bring decision on public and/or corporate issues in which they have direct interests.13

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13 By analyzing the legal elites in Brazil, Almeida (2010) points out that the most radical professional groups in the agenda of transformation of justice are noticeably absent in the structures of the political field of justice and in the elite circles of the administration of state justice. Even when dealing specifically with the OAB, the author points out that despite the widespread advocacy the organization has managed to contain this expansion through a policy of control over legal education and separation of an elite stratum of the profession, through what it is called “big firm”, based on the layout of offices and services, which ultimately is embodied as a true model for all professional strata, allowing the
Considering these notes, the great issue perceived in Brazil in terms of concentrated judicial review is that the Federal Council of the BAR was established as an institutional actor that earned a roster of atypical prerogatives directly related to public performance. Thus, given this legal construction observed in the country, it becomes extremely important to verify the rationality of OAB in terms of political dimension of the ADI proposed in the Supreme Court.

**BAZILIAN BAR ASSOCIATION (OAB) IN THE ARENA OF JUDICIAL REVIEW**

In the context of abstract judicial review, the constitutional action (ADI) is embodied as the main mechanism of legal action (MENDES, 2011), even considering the number of proposed actions, if compared to other mechanisms, embodied in declaratory action of constitutionality (ADC), on complaint of breach of fundamental precept (ADPF) and the constitutional action by omission (ADO)\(^\text{14}\).

With regard to political action, constitutional action provides a discussion on the constitutionality of federal and state laws and normative acts of the public authorities, including acts of the judiciary. Therefore, represents a very strong instrument of political control of the acts of these powers\(^\text{15}\).

From a database produced by the authors, which encompasses about 4,300 constitutional actions proposals until July 2009, one realizes that the Federal Council of the OAB has a significant success\(^\text{16}\) rate, corresponding to 75% of actions judged.

The frequencies obtained in this database show that the actor in question has proposed a total of 177 (one hundred and seventy seven) ADI, of which 86 (eighty-six) were judged and 91 (ninety-one) remain pending. Among the universe of proposed actions, 24 (twenty-four) were upheld, either in whole or in part. That is, of the total approach of this segment of advocacy with the dominant pole of the legal field and political field of judicial institutions.

\(^{14}\) Data taken from the website of the Supreme Federal Court (accessible in [http://www.stf.jus.br/portal/principal/principal.asp](http://www.stf.jus.br/portal/principal/principal.asp)) points until July 2012, for a total of 4,814 ADIs, 261 ADPF, 31 ADC and 19 ADO.

\(^{15}\) There are many works that allude to the general dynamics of the process of legalization of politics via abstract review of legislation in Brazil; in this article we are interested exclusively in the performance of the OAB in this scenario.

\(^{16}\) To characterize the success rate of the actors listed, are considered here the appreciated ADI at the Supreme Federal Court, with liminar or merit decision, that is, those actions whose decisions falls between variables constitutional, partly constitutional and unconstitutional.
number of actions proposed by the OAB and considered by the Supreme Federal Court, 75% were subjected to a decision, whether in preliminary injunction or merit.

In absolute terms, taking into account the variables considered, the success rate above is only lower than those obtained by the Attorney General’s Office and the Governors of State or the Federal District (92.78% and 87.95%, respectively).

<table>
<thead>
<tr>
<th>REQUESTER</th>
<th>RESULT</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presidente da República</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Nasa Diretora do Senado Federal</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Nasa Diretora do Assembleia Legislativa ou da Cámara Distrital do DF</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Governador de Estado ou do Distrito Federal</td>
<td>287</td>
<td>56</td>
</tr>
<tr>
<td>Procurador-geral da República</td>
<td>220</td>
<td>44</td>
</tr>
<tr>
<td>Conexão Federal da Ordem dos Advogados do Brasil</td>
<td>18</td>
<td>6</td>
</tr>
<tr>
<td>Partido Político com Representação no Congresso Nacional</td>
<td>61</td>
<td>27</td>
</tr>
<tr>
<td>Confederação Sindical ou Entidade de Classe de Âmbito Nacional</td>
<td>76</td>
<td>28</td>
</tr>
<tr>
<td>Nilo e parte legítima</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL GERAL</td>
<td>670</td>
<td>162</td>
</tr>
</tbody>
</table>

Table 02: Frequencies of the constitutional actions proposals until July 2009.

<table>
<thead>
<tr>
<th>REQUESTER</th>
<th>RESULT</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Attorney of the Republic</td>
<td>92.78%</td>
</tr>
<tr>
<td>Governor of a state or FD</td>
<td>87.95%</td>
</tr>
<tr>
<td>Brazilian Bar Association’s Federal Council</td>
<td>75%</td>
</tr>
</tbody>
</table>

Table 03: Success rate of constitutional actions proposals.
The significant use in constitutional adjudication, by the absence of thematic relevant, associated with their public institutional condition and absence of state control makes the Federal Council of the OAB a privileged actor in the political arena on the abstract judicial review.

There are no institutional constraints that may limit the performance of the OAB regarding the abstract judicial review.

As noted initially, one of the goals of this study is to ascertain the relevant of the constitutional actions of the OAB in the scenario of judicialization of politics. What is the role of OAB in the political arena of abstract judicial review?

As we turn to the analysis of the interests of one of the actors with the prerogative to propose this kind of action—the Federal Council of the OAB, nothing more logical than taking advantage of the ADIs proposals at the Supreme Federal Court in order to find out the issues that the OAB has been discussing in the Constitutional Court.

However, first, it is necessary to conceptualize “public interest” and “corporate interest”. In general “public interest” corresponds to qualified interests of society (MELLO, 2006). It means the will of the majority of the human beings in society, that is, the sum of these individual interests, since this sum represents the will of the majority (MARINELA, 2011). Furthermore, it is understood “public interest” as national interest in the domestic sphere, representing the majority of the inhabitants of a country, whose interest is oppose to the particular interest of each citizen and each socio-economic groups (BOBBIO et al., 2004).

As for the “corporate interest”, it is considered in the scenario of constitutional adjudication as the one who turns to maximizing the gains for the group. This is, the group seeks the arenas of political decision aimed at promoting their own interests. In a second plan, considering Bobbio et al. (2004) we can consider it as one that turns to the interest of each of the existing socio-economic groups.

Facing the object of analysis of this study, we built a database with the constitutional actions proposed by the Federal Council of the OAB until 2012, with sums 238 (two hundred thirty-eight) ADIs.

Considering the perspective of its commencement, first we divide the ADIs between the variables “public interest” and “corporate interest”. It has been taken into account as well data related to the prosecution of ADIs, dividing them in:
constitutional; partly constitutional; unfounded; impaired; not known / refused action; awaiting trial, according the final results reported by the Federal Supreme Court.

Regarding the characterization of corporate interest, we consider all actions in which it was noticeable an approach focused on strengthening the prerogatives of lawyers or related to their professional activities. Several actions were considered of corporate interests, despite its construction and grounds are linked to the public interest\(^\text{17}\).

From this criterion, given the universe of actions proposed by the Federal Council of the OAB, 91 (ninety-one) actions deal with corporate interest, ie, deal with themes that relate to the interests of its own members, constituting a total of only 38%. Moreover, a total of 147 (one hundred and forty-seven) actions bring in a discussion focused on the public interest, representing 62% of the universe (N) of the proposed actions\(^\text{18}\).

\[\text{Graphic 01: percentage of corporative interest}\]

\(^{17}\) In this context, for example, several actions that aimed the discussion of the base value for legal costs (court fees) were deemed as corporate interest, since it directly affects the professional activities of the lawyer.

\(^{18}\) Vide Graphic 01 and Table 04.
15

To analyze the final result, we found relevant considering the success rate of the CFOAB related to the proposed actions. With regard to the success rate, we took into account only the actions with merit decision, as referenced above. Thus, for its characterization, we computed the number of total actions in reference to its provenance, constitutional and partly constitutional. The prejudiced actions are not being considered because they are not subject of a decision faced to the existence of a formal or material impediment, as the hypothesis of the loss of the subject (The extension of law or modification of the devices attacked by ADI).

As a final result, taking into consideration the merits of the actions, it is observed that 47 (forty-seven) actions were subject of final decision of merits, while 1 (fifty-one) actions remained impaired, 12 (twelve) were not known / refused to follow up, and finally 128 (one hundred and twenty-eight) remain pending. This data reveals a considerable success rate, representing the 72,3% of the judged actions.

Considering the time frame, we realize that since the year 2000 there is a significant change in the content of the actions proposed by the Federal Council of the OAB. It can be seen in Table 04 that until 1999 from the total of 76 (seventy-six) direct actions of unconstitutionality proposals, 39 (thirty-nine) actions were about corporate interests, representing the 51,36%. Between 2000 and 2012, from the total of 162 (one hundred and sixty-two) actions proposed, only 52 (fifty-two) were about corporate interest, meaning only 32,09%.

Graphic 02: Final results of the ADI proposed by the Federal Council of the OAB.
<table>
<thead>
<tr>
<th>Period</th>
<th>Number of ADI proposed</th>
<th>Corporative interest (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989 a 1999</td>
<td>76</td>
<td>39 (51.36%)</td>
</tr>
<tr>
<td>2000 a 2012</td>
<td>162</td>
<td>52 (32.09%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>238</strong></td>
<td><strong>91 (38.23%)</strong></td>
</tr>
</tbody>
</table>

Table 04: Relation between the number of actions proposed and the percentage of the corporative interest.

Graphic 03 clearly shows how the percentages relating to corporate interest are lower since 2000, despite the large number of actions proposed by the Federal Council of the OAB. The only exceptional moment of this frame is 2004, when it is found a 100% for corporate interest. Still, when it comes to the whole period, every three CFOAB, two deal with public interest.

<table>
<thead>
<tr>
<th>ADIs From 1988 to 1999</th>
<th>Constitutional</th>
<th>Partly constitutional</th>
<th>Unconstitutional</th>
<th>Impaired</th>
<th>Not known/Refused to follow up</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporative Interest</td>
<td>03</td>
<td>04</td>
<td>04</td>
<td>19</td>
<td>04</td>
<td>05</td>
</tr>
<tr>
<td>Public Interest</td>
<td>04</td>
<td>02</td>
<td>05</td>
<td>16</td>
<td>03</td>
<td>07</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>07</strong></td>
<td><strong>06</strong></td>
<td><strong>09</strong></td>
<td><strong>35</strong></td>
<td><strong>07</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

Table 05: Frequencies of the ADI proposals between 1988 and 1999.
Tables 05 and 06 show the frequencies of ADIs in the time frame mentioned (1988-1999 and 2000-2012). The data shows that the OAB has a higher success rate in the actions that deal with corporate interests, in both historical moments mentioned. At first, covering 1988-1999 (Table 05) of the eleven (11) ADI with merit decision about corporate interest, 07 (seven) are considered constitutional or partly constitutional, while 04 (four) are considered unconstitutional, representing the 63,63%. Of the 14 (fourteen) ADI worthily judged that deal with public interest, only six (06) are constitutional or partly constitutional, against 05 (five) considered unconstitutional, representing the 54,54%.

The second time frame, from 2000 to July 2012 (Table 06), from the 15 (fifteen) ADI with decision of merit and about corporate interest, thirteen (13) are considered originating constitutional or partly constitutional, while there are just 02 (two) actions unconstitutional. These figures represent a success rate of 86,66%. Moreover, of the ten (10) actions that deal with the public interest, 08 (eight) are constitutional or partly constitutional, while 2 (two) are unconstitutional. These figures show a success rate of 80%.

Another relevant information and that significantly differentiates the two historical moments is related to the number of ADIs awaiting trial. At first, there are 5 (five) actions on corporate interest and 7 (seven) on public interest pending trial. In a second instance, there are 29 (twenty-nine) ADIs on corporative interest and 87 (eighty-seven) on public interest in the same situation.

<table>
<thead>
<tr>
<th>ADIs from 2000 to 2012</th>
<th>Constitutional</th>
<th>Partly constitutional</th>
<th>Unconstitutional</th>
<th>Impaired</th>
<th>Not known/Refused to follow up</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporative Interest</td>
<td>08</td>
<td>05</td>
<td>02</td>
<td>06</td>
<td>02</td>
<td>29</td>
</tr>
<tr>
<td>Public Interest</td>
<td>07</td>
<td>01</td>
<td>02</td>
<td>10</td>
<td>03</td>
<td>87</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>06</td>
<td>04</td>
<td>16</td>
<td>05</td>
<td>116</td>
</tr>
</tbody>
</table>

Table 06: Frequencies of the ADI proposals between 2000 and July 2012.
In parallel, we must emphasize the small number of ADI dealing with corporate interest over the past two years analyzed. In 2011, of 22 (twenty-two) actions proposed, just 01 (one) is about corporate interest. In 2012, considering the data collected until July, it is observed that of 23 (twenty-three) actions proposed, none of them deal with corporate interest. This data reveals a significant number of recent actions that deal with public interest and that to some extent should be considered in the analysis.

It also appears that overall the analyzed period, of 22 (twenty-two) actions are constitutional, 15 (fifteen) of them are about actions proposed after year 2000. Of these actions, eight (08) deal with corporate interest. Graphic 04 (below) shows significant percentage of actions judged constitutional, every year, between 2002 and 2007.

Graphic 04: Relation between years and the constitutionality of the proposal.

Graphic 05: Relation between years and the partly constitutional of the proposal.
Regarding the success rate of ADI, considering the proposed theme and the results obtained, it is apparent that the number of actions PROCEDENTES and PROCEDENTES EM PARTE is even bigger in issues involving corporate interest. There are 20 (twenty) actions PROCEDENTES OU PROCEDENTES EM PARTE related to corporate interest, while only fourteen (14) ADI deal with public interest.

As for the actions considered impaired, there is a relatively large number of demands in this sense, totaling 51 (fifty-one) actions. The characterization of prejudicial does not mean the failure of the actor, but, in a sense, the relevance of the discussion and even the grounds of legal arguments, as this prejudicial comes from the loss of the object, changes or deletions of any law or normative act in the national legal system.
In this sense, with respect to this variable, we can affirm the action of the Federal Council of the OAB generates at least political costs for the public authorities when leading the reviews of acts, as well as modifications and even deletion of the legal rules of the system.

In graphic 08 it can be noticed the minimum percentage of actions not known or that refused to follow up. Moreover, it points a greater adequacy of the entity over the years in relation to the object of the issues discussed. This shows, in a sense, the relevance of the constitutional discussion given by the actor to the judiciary.

Finally, graphic 09 denotes a high level of direct actions of unconstitutionality awaiting trial. This is one of the critical points of judicial activity, which reveals a large extent the slowness of the judiciary. As it can be seen, there are significant
percentages of ADI awaiting trial across the universe of actions in that year, mainly since 1998.

In recent work, Barbosa (2008) highlights that there are no control mechanisms agenda in Supreme Federal Court with respect to the direct actions of unconstitutionality. The system adopted by the Internal Statute of the Supreme Court allows the ministers a choice about what we will or should be judged. It was also noticed that political issues or high popular clamor are usually faced by the Constitutional Court as priority, allowing a faster appreciation.

So, it can be seen a significant change in the performance of the OAB, turning to issues that deal with public interest. This paradigm shift is consistent with its institutional prerogatives and the jurisprudence construction of the Supreme Federal Court itself.

However, this reorientation has not meant an increase in the success of demands proposed by the institution. It is noticed here a mechanism of self-restraint as construction of Posner (1983), in which the Court refused to judge certain actions that deal with public interest, given the potential costs arising from this action. As the author points out:

"Judicial self-restraint can have other sources besides personality. It can arise from a straightforward concern with the overload on the federal courts system—a natural concern for any federal judge to feel today—or from fear of retribution by the political branches against a hyperactive judiciary. It can also come from theory—from the "capital preservation" theory that I mentioned earlier, or from a theory of the separation of powers such as was implicit in my earlier rejection of the idea that a judge should decide cases as the agent of the political party that supported his appointment. And judicial self-restraint is often opportunistic—as, of course, judicial activism often is also. The judge does not like his brethren's policy preferences but rather than say so he takes the "neutral" stance that the courts ought to be doing less of everything." (POSNER, 1983, p. 19)

Notwithstanding these results, pointing to a significant number of ADI on public interest awaiting trial, we must point out that the percentages of graphic 01 are extremely significant, since it tends to imagine the instrumental use of the ADI by the OAB in order to substantially protect the corporate interests of the institution.

Is that unlike actor essentially private, like AMB, ANMP, ANAMATRA and CNI, the absence of thematic pertinence causes CFOAB to propose to the Supreme
Federal Court questions related to public interest. Some studies even suggest a low use in the performance of those actors within ADI (CARVALHO, SANTOS and GOMES NETO, 2012).

By analyzing the history of actions proposed by Brazilian Bar Association Federal Council (CFOAB), it is observed that at first its use was primary intended to discuss issues relating to the practice of law as a way of consolidating the professional work of a lawyer. This, referring to the 1990s, is consistent with the situation experienced by the OAB on the national scene. According to Motta (2006):

"Vigilant and active in all episodes that could threaten the delicate task of democratic consolidation –the leadership given at the impeachment is the most obvious example of this commitment- the Order will be “released” from then to devote to “internal” issues, most related to its corporate face of representations of lawyers. The construction of the headquarters in Brasilia –the first in 1990 and the second ten years later-, and the drafting of the new statute in 1994 marked undoubtedly the investment in a project that aimed to suit the Order, at the same time, to the new political reality of the country and to the new conditions of professional market of Brazilian lawyers” (MOTTA, 2006, p. 07-08)

Even in this context of institutional reorganization, there were moments of public performance, especially in the adoption of the Brazilian National Privatization Program (PND), created in the Collor administration and developed in the Fernando Henrique administration, as well as the emergence of the institution of Provisional Measure (MP), based on the speed of legislative action, but in fact, according to their own understanding of the OAB, it was done as a legislative usurpation by the Executive Branch. Alongside this historical context, Motta (2006) states that:

“The strengthening of democratic institutions of the country, after the difficult test of resistance to which they had been submitted, paved the way for a series of measures arising from the Executive with the aim of giving a new shape to the traditional Brazilian state apparatus. Initiated during the President Itamar Franco administration (1993-1994), and accelerated over the two terms of Fernando Henrique Cardoso (1995-2002), the so called “reforms” were fought by OAB, especially those aimed at privatizing some activities and services previously controlled/monopolized by the state. On the other hand, the use of provisional measures in order to “streamline” the legislative process deserved more than severe criticism, and led the Order, especially due to the use
of Direct Actions of Unconstitutionality, the constant clashes with the Executive.” (MOTTA, 2006, p. 07)

Subsequently, there is an acting towards the public interest, participating the entity in the discussion on the constitutionality of matters of great national importance. It can be considered that over the years the gradual strengthening of democracy meant that the OAB turned its activities aimed at legitimizing its constitutional and institutional prerogatives, turning to handle issues related to the public affairs. It is not possible to sustain a broad participation in the major national political institutions without an effective political support, characterized, in the context of the actor now analyzed, by a effectively public performance.

Is in this scenario, the Supreme Federal Court publishes the ADI 3026/DF, made by the Attorney General’s Office, facing questions about the legal nature of the OAB. In that decision, the Supreme reaffirms its understanding of the unique importance of the institution in the Brazilian democracy.

Its work focused on the public interests is so notorious that, strengthening the argument of public performance, was proposed by the CFOAB, in the past two years, 44 (forty-four) direct actions of unconstitutionality about public interest while only one (01) related to corporate interest.

With regard to this period, it can be observe its performance on issues of great national importance, which we can distribute in six major blocks:

1) Lifelong Pension for former governors;
2) Pensions to widows and children of former governors;
3) Elections and political parties;
4) “Precatórios”;
5) Effect of ICMS;
6) Competency for trial the State Governor.

Among this universe of proposed actions, we highlight the actions of the first and last block; the first relates to the legislative forecast pension for former governors and the last is about competences of judging the Governor of State.

In regard to the pensions for former governors, there was a broad campaign spearheaded by the OAB. During this process, their media exposure as a defender of society against state abuses was intense. In this period of time, there were 9 (nine)
ADI filed\textsuperscript{19}, based on the understanding that the current Federal Constitution does not provide nor authorize the imposition of any kind of benefit to anyone who is not occupying any public office (elective or effective) as well as characterizing a flagrant violation of the principles of morality and impersonality, present in Article 37 of the Federal Constitution. It is important to stress that the effects of the media are part of the statement of various actions, through joined material produced by vehicles of large national circulation.

As for states laws that visualize the jurisdiction of the Legislative Assemblies for the judgment of Governors of State, the OAB promotes a real battle against State Assemblies\textsuperscript{20}. There are 20 (twenty) direct actions of unconstitutionality against state laws in all the state laws legislated by twenty (20) Legislative State Assemblies.

In these cases, the CFOAB alleges the unconstitutionality of the provision contained in the State Constitutions that determine the jurisdiction of the Legislative Assemblies to adjudicate the Governors of their states, as it is a criminal procedure and the Union is the one that should legislate privately. The entity claims that this prediction harm substantially the republican principle, the principle of separations of powers and the relative to the access to jurisdiction, as it is in Articles 1, 2 and 5 of the Federal Constitution, and are essential for a democratic state.

This is an eminently public discussion, related to the organization of the Brazilian state, dealing with the role of federal and state legislative power. It concerns to a public dimension, but at the same time a dimension essentially political and that messes with the macrostructure of the state. This point is also extremely significant because the discussion raised in constitutional basis shows the clientelistic relations between the Executive and the Legislature at the sub-national level.

One of the important points to be noted in the analysis of ADI is that in all actions the Federal Council of the OAB founds the PROPOSITURA in its universal legitimacy, considering “defender of the citizenship and the Constitution”. That is, even in those ADIs that deal mainly with corporate interests the CFOAB legitimizes its performance with a public guise. In parallel, there was still during a media

\textsuperscript{19} The next ADI were proposed: ADI 4544, ADI 4545, ADI 4547, ADI 4552, ADI 4553, ADI 4555, ADI 4556, ADI 4562, ADI 4575.

\textsuperscript{20} The next ADI are proposed: ADI 4764, ADI 4765, ADI 4766, ADI 4771, ADI 4772, ADI 4773, ADI 4777, ADI 4778, ADI 4781, ADI 4790, ADI 4791, ADI 4792, ADI 4793, ADI 4797, ADI 4798, ADI 4799, ADI 4800, ADI 4804, ADI 4805, ADI 4806, ADI 4811.
massification of the OAB, which eventually strengthened its role as spokesman for the interests of society.

In regard to its performance in the area of constitutional adjudication, the CFOAB anticipates information to the population about the commencement of the direct actions of unconstitutionality. Furthermore, stresses legal achievements against the Supreme Court in the dispute of issues that involve acts of the public powers. So we understand that all these instruments appear as an important mechanism to legitimize the actions of the Brazilian Bar Association in the concentrated control of constitutionality.

CONCLUSIONS

This article has sought to bring the discussion on the role of the OAB concentrated in judicial review, taking as parameter the direct actions of unconstitutionality, considered the most important mechanism in the arena of constitutional adjudication (CARVALHO, 2009; MENDES, 2011).

Initially, the foundations of the base of action of the Brazilian Bar Association’s Federal Council (CFOAB) were launched in the absence of thematic relevance, absence of direct state control and characterization of the entity as an independent public service, formatted in the jurisprudence of the Constitutional Court itself, whose milestone is with no doubts the ADI 3026/DF.

One of the relevant points to the discussion is that the prerogatives of CFOAB are *sui generis*, atypical, not been observed in any other country in South America. The way the OAB itself and the members of the Judiciary recognized the entity in the legal scheme of the country brings important to characterize the level of political importance in the national political scenario.

Even being a strong actor in essence of the private sphere, its participation in the democratization process produced a significant list of prerogatives, typical of an eminently public actor, and that signal a character of essentiality, which does not occur in other countries in South America even having experienced a similar political process. Thus, Brazil produced an institutional design where the defense of constitutional guarantees was divided with an actor who is not controlled by the
constituted powers, it which does not have any kind of accountability, either vertical or horizontal.

From the initial survey of the themes proposed in place of direct action of unconstitutionality, it is noticed that there is a significant role with the public interest, which apparently goes against theoretical constructs that inform the groups that cause the judiciary seeking to enlarge and strengthen their own interests (NEUBAUER, et al., 2010).

The crucial point of this discussion is the thematic relevance, which enables a clear differentiation of OAB with other actors essentially private, such as CNI and AMB (BARROSO, 2012). While the role of the trade unions confederations and national class entities, provided in section IX of Article 103 of the Constitution, turns to private interest, the Federal Council of the OAB, legitimized in another section (section VII) uses all its political arsenal, discussing issues ranging from corporate interest to issues that deal purely on public interest.

However, one should highlight that the main objective of the entity is, after all, its own empowerment. It seems that the OAB elects certain matters on favorable political contexts, in order to consolidate its image to population as protective of individual and collective rights and guarantees. It was given a public feature and, in certain political contexts, the OAB feels the need to legitimize it. And working in this direction finally legitimize directly across the political arsenal earned by the Federal Constitution.

In the Brazilian case studied here, the fact that the CFOAB does not have institutional ties with government authorities several times made possible acting independently, taking demands to the Supreme Federal Court, functioning as an effective mechanism to control the legislative activity of the state. The entity itself believes that these institutional prerogatives are indispensable to the protection of Brazilian democracy. However, the absence of any kind of accountability (institutional, social, etc.) can degenerate such arrangement, because we would be assuming that the CFOAB is composed by people with democratic and republican aspirations.

As it was demonstrated in this study, the data indicate a higher rate of success of the actions that deal with corporate interest among the universe of ADI judged, coupled as well with a significant delay in the consideration of matters that involve public interest. In terms of abstract judicial review, this may denote two different
situations: on one hand, higher costs for the Judiciary consider issues that deal effectively with the public interest (POSNER, 1983); on the other hand, the Supreme Federal Court, in concrete terms, has been judging just actions that bring as a consequence the strengthening corporate interests of the Brazilian Bar Association.

However, it is crucial to remember that there is a number of ADI related to public interest which also had success and other proposals, especially of the past three years, are awaiting trial.

Another topic to be emphasizes is that, despite the lower success rate obtained in the trial of ADI in the public interest, the main reason for the entity to continue proposing demands in this regard is the maintenance of its political agenda, establishing an active position of protecting the collective interests.

Moreover, this action is coated as an instrumentalization of its power. The OAB reinforces its essential character by dealing on main issues of political democratic nature under the Supreme Federal Court. The fact is that, historically, the OAB, as an association of lawyers, has always had a voice in the main issues of the country. Contemporaneously, supported by a constitutional legitimacy, the entity went on to own a real legal and political arsenal, being present in mayor discussions about the public life of the country.

Finally, from this work, we envisage that it has became very important to stress the need for comparative studies on the role of corporate lawyers and to what extent such activity is significant in terms of strength and quality of democracy, specially in the Latin American context.

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