

Economic Analysis of Law Review

Judicial Review of Constitutionality in Brazil: A Comparative Institutional Analysis

Controle de Constitucionalidade no Brasil: Uma Análise Institucional Comparativa

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RESUMO

O controle de constitucionalidade no Brasil tem se mostrado como um dos mais complexos do mundo. O presente estudo explora as complexidades do sistema brasileiro sob a égide da Análise Institucional Comparativa – um ramo da Análise Econômica do Direito –, considerando não apenas o papel dos tribunais, mas também da economia e da política, permitindo concluir que, sem um modelo versátil e flexível, a escolha institucional torna-se produto de interesses pessoais e deixa de implementar de forma efetiva políticas públicas.

Palavras-chave: Análise Institucional Comparativa; Controle de Constitucionalidade no Brasil; Reforma Agrária; Processo Político; Processo Judicial; Economia.

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ABSTRACT

Brazil has developed one of the most complex systems of judicial review in the world. This article explores the complexities of Brazil's system through a comparative institutional analysis perspective – a strand of law and economics – considering not only the role of courts, but also the market and politics, to conclude that, without a versatile and flexible framework, institutional choice could be a result of desire and personal interests, instead of effectively implementing social policies.

Keywords: Comparative Institutional Analysis; Judicial Review in Brazil; Agrarian Reform; Political Process; Adjudicative Process; Market.

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1. Introduction

Some of the most sustained efforts of scholars in institutional² analysis are “single institutional analysis”³, focusing only on the imperfections of the market or political process. However, as Komesar has stressed, institutional analysis can play a more relevant role in a comparative institutional view.⁴

Institutional choice is the dispute over “who decides”. Richard Coase⁵ has sustained its importance. Many authors have done the same. Neil Komesar⁶ emphasizes the participation-centered approach in comparative institutional analysis. An increasing challenge is brought to the functioning and integrity of the judicial process that magnifies the importance of this perspective.

Obviously, serious comparative institutional analysis requires a strong framework and the challenge is to implement it in a functional manner. For this reason, we adopt here Komesar’s proposal: not only due to its simplicity, but also because of the versatility of the model. In this first part of the study, we “reconstruct” Komesar’s framework. After that, we make important considerations about Brazil’s judicial review system and, finally, apply the model in a civil law country.

Economics is insufficient to explain the interplay of markets, courts and politics. In order to convey a deeper appreciation of the non-efficiency objectives, John Rawls’s⁷ theory will be useful to indicate, with a philosophical perspective, the faults of economic analysis.⁸ Furthermore, an economic and a philosophical approach would not be enough to understand the complexity of institutional analysis: the law’s view is also important for comparative institutional analysis, by guaranteeing security and predictability.

Thus, comparative institutional analysis provides a creative approach to legal change.⁹ As a creative matter, the method predicts possible consequences in different institutional settings, based on the actors’ interests in each scenario. In other words, comparative institutional

² Institutions here mean “large-scale social decision-making processes – markets, communities, political processes, and courts” (NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 31 (1994)).

³ Richard Posner engages in single institutional analysis. As transaction costs rise and market performance deteriorates, Posner views courts as better decision-makers than the market. Komesar labels such analysis “single institutional” because it chooses between institutions based on variations in the performance of only one institution, the market. It ignores all the necessary considerations over other goals and, most importantly, it ignores other institutions. (NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 31 (1994)).

⁴ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 26 (1994).

⁵ Ronald H. Coase, *The Nature of the firm*, 4 *ECONOMICA* 68 (1937).

⁶ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁷ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁸ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁹ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 13 (1994).

analysis selects the best institution by defining the result that best furthers a specific social policy goal – i.e., equitable distribution of resources, justice, fairness or any other.¹⁰

The eternal search for a perfect theory is the aim of all those who call themselves “scientists”. However, as Frankenstein changed his maker, comparative institutional analysis tries to change perspectives. In this work, we strive to apply comparative institutional analysis to Brazil’s judicial review system. Because Brazil’s context has raised so many questions of legal change in such a short period, it represents a particularly fertile setting for the use of comparative institutional analysis.

Consequently, ignoring institutional choice means creating inferior public policy. In fact, because the different institutions vary so significantly in their aptitude to resolve legal conflicts, when a less “adapted” institution decides a legal question, the results can be disastrous. This case study tells such a story of institutional failure, analyzing the judicial review system in Brazil. The goal, however, is to provide a new perspective with comparative institutional analysis that might change this panorama. And, once again, the creature made by a jurist changes its creator.

2. Considerations About Brazil’s Institutional Reality: The Framework’s Flexibility

To implement institutional analysis in a functional manner, a simple and flexible analytic framework provides a necessary organizing device. Thus, by (re)constructing the framework, I do not intend to create or build a new perspective. My goals here are much simpler: I focus on considerations that could be important to the future application of the theory, adapting the framework to the specific needs of Brazil’s judicial review system.

Different perspectives, however, can be applied to approach the problem of deciding the issue of *who decides*. A single institutional analysis, as Komesar has warned¹¹, would be enough to understand the role of law and understand its goals – Posner’s¹² analysis of Common Law, for example. However, analysis of goals and value choices tells us virtually nothing about these outcomes, mainly in a comparative perspective of *Common and Civil Law*. A connection is missing in a goal-based analysis, due to the complexity of the field.¹³ Although interesting, this approach could result in false conclusions. In other words, single institutional analysis is insufficient, because it cannot evaluate the merits of imperfect institutional alternatives.¹⁴ For these reasons, the framework developed in this work is based on the idea of institutional choice.

¹⁰ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 13 (1994).

¹¹ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 16 (1994).

¹² RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1992).

¹³ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 14-18 (1994).

¹⁴ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 16 (1994), p. 16.

“The term ‘institutional’ reflects the reality that the decision of who decides is really a decision of what decides. The alternative decision-makers are not individuals or even small numbers of individuals. They are complex processes, such as the political process, the market process, and the adjudicative process, in which the interaction of many participants shape performance.”¹⁵

Through this definition, it is easy to understand that institutional choice is not limited to single institutional analysis. Institutional choice is, properly put, comparative, because the decision-making process requires a comparison of the alternatives.¹⁶ Choosing the best institution in a determined setting is the main goal of comparative institutional analysis.¹⁷ As Komesar has shown, comparative institutional analysis is based on the measurement of participation.¹⁸ The central rule of the participation-centered approach is that legal changes will not happen without an impulse from interested parties.¹⁹ Consequently, institutional choice is important to describe the real panorama and it is even more important in a context where institutions do not work properly and lack legitimacy/governability, as usually occurs in Brazil.

Actually, institutions tend to move together: *when one is at its best, the others often are too.*²⁰ The main point, nevertheless, is to choose which institution is better to solve a certain case. The problem, as Komesar has warned, is that the choice is always among imperfect alternatives – adjudicative process, politics and economics.²¹ In a comparative institutional analysis of Brazil’s judicial review system, the correct question is whether, compared with the available alternatives, the market, economics and the law are better or worse, even though they all lack legitimacy and governability.²²

2.1. The Participation-Centered Approach And Judicial Review: The Behavior Of Brazilian Institutions

Comparative institutional analysis needs a “tool” that absorbs the “universality of the institutions” to compare institutional capabilities. In Komesar’s view, this “tool” is a single

¹⁵ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 16 (1994).

¹⁶ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 16 (1994).

¹⁷ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 17-20 (1994).

¹⁸ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 18-24 (1994).

¹⁹ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 18-24 (1994).

²⁰ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994).

²¹ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994).

²² NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 09-40 (2001). 365 EALR, V. 7, n° 2, p. 362-386, Jul-Dez, 2016

parameter: *participation*.²³ The conduct of each person, in an overall analysis, permits assessing the performance of the institution as a unit.²⁴ Thus, identifying the conduct of the mass of participants is the factor that best accounts for the variation in how institutions function.²⁵ Furthermore, participation is the best aspect because it is common to all the institutions, permitting a comparison between them.²⁶

The basic model of institutional comparison is a simple economic one: the character of institutional participation is determined by the interaction between the benefits and costs of participation.²⁷ However, when applying the framework to Brazil, the failure of institutions is more common – due to the *lack of legitimacy and governability* – making it even more difficult to analyze their performance.²⁸

Economic models based on rational choice have been used to understand these outcomes. As Calabresi has shown, the combination of dispersed benefits and high costs means that rational individual behavior can harm the individual as a part of the group – “free riders.”²⁹ The extent to which per capita stakes vary within the population can be influenced by the cost of participation and information.³⁰ Information cost has a central role when analyzing cost, due to the difficulties of understanding the issue, the number of people involved, procedures and the complexity involved in analyzing Brazil, which is plagued by inequalities, lack of legitimacy and lack of governability. It is evident that rational people are far less than fully informed. The cost of information, therefore, plays an essential role in determining institutional participation and institutional performance.³¹

When the subject is the market, Coase’s³² transaction cost analysis emphasizes the cost of information and is essential to understand institutional activity. In law and economics, the Coase Theorem is related to the economic efficiency of a government’s allocation of property rights. The theorem states that, in the absence of transaction costs, all government allocations of property are equally efficient, because interested parties will bargain privately to correct any externality.³³ The reality in Brazil, however, is more complex: the problem of governmental allocation of property is based on high costs that make an unbalanced division of property. The

²³ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 8 (1994).

²⁴ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 8 (1994).

²⁵ NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 09-40 (2001).

²⁶ NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 09-40 (2001).

²⁷ Ronald H. Coase, *The Nature of the firm*, 4 *ECONOMICA* 68 (1937)..

²⁸ See: NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

²⁹ CALABRESI, Guido; MELAMED DOUGLAS, A., *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, Harvard Law Review 85:1089-128 (1972).

³⁰ NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 09-40 (2001).

³¹ See: NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

³² *apud* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 11 (1994).

³³ *apud* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 11 (1994).

inequalities in the division of the lands are the main source of disputes and the key to innumerable conflicts that aim at better division, in particular agrarian reform.³⁴

It is important to say that all institutions share some characteristics of participation costs and benefits. As a general rule, the more diffuse an interest becomes, the lower each person's stake. Consequently, slight improvements in the costs of participation deter demands to promote that interest.³⁵ At the same time, costs of organization are greater for interests that are diffusely spread because it is harder to identify those with shared interests and to prevent free riding. Furthermore, costs of participation also increase when the interest is complex or highly technical, as usually happens in Brazil's judicial review system, because it stems from the costs of obtaining information about rules and measures to change the scenario.

How can institutional analysis be applied to the real world? Is it viable? How can such a framework be structured in light of the difficulties in a country where variables are infinite and corruption has to be considered? To apply the model, the comparative institutional analyst should first elect a specific social policy.³⁶ In the second stage, one should evaluate the skills of each institution to achieve that social policy, considering the participation level of each group.³⁷ Thus, the first stage is the selection of the social policy and the second stage is the selection of the best institution to achieve the outcome. In the case here, the analysis will give directions to solve Brazil's lands distribution problems.

2.1.1. Advantages Of The Participation-Centered Model In Civil Law Countries

The participation-centered model has no predisposition towards any institution; rather, it attempts to assess objectively which institution is the best to solve an issue by weighing the benefits and costs of participation. The relevant question is whether, across the different settings, the market performs relatively better than the courts or politics, and vice versa.

In Brazil's context, several jurists claim to have performed comparative institutional analysis, when in reality their analysis has been single-institutional. Analysts in Brazil usually ignore other institutions. However, in the participation-centered model proposed by Komesar, institutional actors are "reasonable actors doing their best".³⁸ And their best is not always the best choice, because one has to analyze the performance of the others institutions.³⁹ Is it possible to apply this framework in Brazil? Is it flexible enough to adapt to very different circumstances and conditions?

³⁴ Agrarian Reform is the government redistribution of agricultural land from a relatively small number of wealthy owners to those who work the land.

³⁵ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 14 (1994).

³⁶ See "Implicit institutional choice: the problem of goals and goal choice", later in this work.

³⁷ NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 09-40 (2001).

³⁸ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

³⁹ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

Although the social policy goal must be specified, more than one goal can be analyzed under the same framework. Thus, the flexibility of the model, based on a “non-goal” focus, makes it possible to be applied to diverse settings, including civil law countries, without any impairment of the analysis.⁴⁰

2.2. Numbers And Complexity In Brazil

Comparative institutional analysis depends on the reality of institutional behavior.⁴¹ All the institutions function well when the numbers of people affected are small and the complexity of decisions is low.⁴² Nevertheless, numbers and complexity are always increasing. While the important question is how each institution compares to the others for a given legal question, some general observations about relative institutional competence have to be made. First, as Komesar⁴³ states, identifying resource allocation efficiency does not say anything about comparative institutional analysis. Public goals are not sufficient to determine the behavior of institutions – at least not in the real world. Second, for each institution, the approach assumes a particular normative vision of good performance. On the other hand, all institutions become *imperfect alternatives* when considered under high numbers and complexity.⁴⁴ However, even though an imperfect alternative, one cannot simply abandon an institution. It is necessary to identify the best institution in a relative setting, which works better than others, rather than a “good” alternative.⁴⁵ Third, institutions move together. And here is the problem. As they all tend to be in their best or worst performance at the same time, it is necessary to have a precise criterion to choose the best one.⁴⁶ Fourth, costs and benefits can exclude people from the decisional process, because institutional participation can become unequal. In the market, inadequate participation can mean cartels or monopolies. In the political process, it can mean individual interest in the enactment of laws or even absence of legislation. In courts, distorted litigation or absence of litigation can exist. As numbers and complexity increase, the analysis becomes more necessary.⁴⁷

Through its focus on a single legal question, this case study illustrates a point of wide application. It shows the ways in which failure to use the insights of comparative institutional analysis can significantly degrade public policy outcomes. In other words, comparative institutional analysis can generate better legal results and improve public policy, particularly in Brazil’s context, where there are countless opportunities for legal change.

Moreover, the adjudicative process, political process and markets are, unlike other approaches (non-participation centered), exogenous to the analysis. In institutional choice approaches, they are products of the decision-making process that are internal to the analysis.

⁴⁰ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴¹ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴² See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴³ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 13 (1994).

⁴⁴ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴⁵ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴⁶ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴⁷ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

Thus, considering Brazil's current panorama, this new framework makes it possible to understand the institutional relations without the distortions brought by an exogenous approach. As endogenous, it is possible to measure the variation of the costs without considering problems that cannot be avoided in an exogenous analysis – such as corruption in the political process and cartels in the market. It is clear that both of them do exist in Brazil and play important roles, distorting the political process and market performance. However, when considered as endogenous, both the political process and market already include the influence of these variables, changing completely the perspective sustained by single institutional analysis.⁴⁸

2.3. Institutional Behavior In Brazil

2.3.1. Political Process

The interest group theory in politics is a key tool for analyzing the behavior of politics. An interest group is a person or political organization established to influence governmental policy or legislators in a specific area of policy. Thus, small and concentrated interest groups have substantially greater political influence than groups with larger numbers but small per capita stakes.

The two-force model aims to understand the behavior of the political process. Based on a participation-centered approach, the majoritarian influence can represent a countervailing force to minoritarian influence: even though with low per capita stakes, the greater number of majoritarians can be used to dominate the political scenario, going from a dormant force to a dominant force, according to the benefits and costs of political participation, and permitting a comparison of relevant institutions.⁴⁹

Therefore, considering the purposes of this work, Brazil's complicated political scenario (politics here being totally decentralized and divided among innumerable parties) must be taken into account. The two-force model, conceived to be applied in a political structure of two parties, is not enough for Brazil's reality of many parties. However, the flexibility of the model is assured when taking into account that the two forces can be generalized to more: the *multi-force model*. The various groups' political influence can be ranked according to the factors suggested in the two-force model with the same focus given to the power of the few and the power of the many. The majoritarian and minoritarian bias and the political malfunction behavior are almost the same. However, the distribution of costs and benefits will be slightly affected, making the analysis even more complex. In sum, the political process in Brazil should be considered from the multi-force model perspective: parties have diverse possibilities to organize and change political measures.

2.3.1.1. Dynamics Of The Political Process

⁴⁸ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

⁴⁹ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

The form of political action for both large and small groups depends in good part on certain characteristics of the benefits, i.e., the distribution of per capita stakes. The greater the per capita stake, the more likely a group member will benefit from political activity and the bigger the chances that “actions” will occur.⁵⁰ However, as already explained, political action depends not only on benefits. Costs of political participation include the cost of information: the more complex the social issue, the more difficult it is to recognize one’s position. Thus, considering agrarian reform, there are different interests involved and most of the time they conflict with each other. The cost of information is based not only on the value of the land and the governmental expenses, but also the determination of the possible benefits of a new distribution – increases in production, decreases in land conflicts, etc.⁵¹

On the other hand, the costs of organization are huge: it is necessary to change the elite’s concepts and all the barriers through a new organized source of pressure in Congress.

Besides different costs, the number of free riders should also be considered in Brazil. Small groups have an advantage in collective action because the costs of overcoming free riding and inactivity are lower for them.⁵² It is easier to make a statement: since the cost is lower, small groups are more likely to produce collective political action.⁵³ On the other hand, in larger groups the number of free riders tends to be bigger. Thus, the number of free riders still influences the chances of agrarian reform in Brazil, acting as a barrier to achieving the goal of the majority, especially in the larger groups.

Furthermore, the political process can have high access costs, particularly if it is necessary to carry out expensive lobbying campaigns to achieve the intended outcome. However, there are methods of participation in the political process that are not so expensive, such as informing the public. The problem, in Brazil’s case, is that the auxiliary methods of participation are usually the worst performers, due to the dominance of a concentrated minority and the imperfect participation of the people in the democratic process. In other words, the political process tends to be influenced by this minority.⁵⁴ The lack of legitimacy and governability of institutions act as a barrier to changes not supported by elites, generating a tendency to have a minoritarian bias.⁵⁵

However, even in Brazil’s case, with lack of legitimacy and governability, one cannot simply ignore the majoritarian activities. They do exist and influence the decisions made in the political process through numerous mechanisms. As Komesar has pointed out, combining the analysis of costs and benefits makes it relatively easy to see why the dominant image of the political process is minoritarian: the concentrated few have the incentive to understand their

⁵⁰ NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 09-40 (2001).

⁵¹ NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 09-40 (2001).

⁵² See: NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁵³ See: NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁵⁴ See: NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁵⁵ See: NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

interest and organize political activities.⁵⁶ In Brazil's case, reality reflects the same principle. Therefore, the majoritarian bias is still less probable, but not impossible to occur, due to the fact that the minority has reached a level of organization and interaction that reduces the possibility of majoritarian action.⁵⁷

Nonetheless, it is necessary to consider the possibilities of majoritarian bias. Even in Brazil, where democracy lacks legitimacy, majoritarian activities are present, especially in some specific cases – for example, in issues related with human rights and health care, where the majority has high stakes. In other words, the *multi-force model* has a more important role to play here due to complexity.

The single institution system of analysis presented here was constructed to serve comparative institutional analysis. The *multi-force model* and the tradeoff between minoritarian and majoritarian bias play a significant role in the framework designed by Komesar. However, it is necessary to make some considerations about political malfunction. This will be the next step.

2.3.1.2. Political Malfunction

Two visions of political malfunction, one stressing the fear of the many and the other stressing the fear of the few, coexist in our traditional views of government. It is necessary to articulate these principles and carefully consider their relationship.

Not only in the USA, but also in Brazil, the framework shows that politics is mainly influenced by minoritarian bias. The power of the few stems from better organization and information.⁵⁸ If the per capita loss is low enough, members of the majority may not even recognize it.⁵⁹ If they do understand, they will be inclined to "free ride": they may refuse to contribute, supposing that others will "carry the load".⁶⁰ In Brazil, as the minority is concentrated on issues concerning land distribution, free riding becomes pervasive. In turn, the prospect that others will free ride and the expenditure of resources necessary to overcome it may well discourage any efforts to activate the dormant majority.

Majoritarian bias can be defined as an opposite response to the same distribution of impacts that characterized minoritarian bias. As Komesar has emphasized,

"If we suppose that everyone understands and votes their interests then, in a political process which counts votes for or against but which does not consider the severity of impact or the intensity of feeling about the issue, a low-impact majority can prevail over a high-impact minority even though the majority will gain little and the minority

⁵⁶ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 77 (1994).

⁵⁷ See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁵⁸ See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁵⁹ See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁶⁰ See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

is harmed greatly. The power of the many lies simply in their numbers and the bias arises because the few are disproportionately harmed."⁶¹

In terms of distribution of land, factors which increase information or organization costs make minoritarian bias more likely to occur. On the other hand, factors which decrease information and organization costs increase the chance of majoritarian bias. In Brazil, the minority is well organized, politically and economically. As the cost of information is higher, because of the administrative bureaucracy, just a small minority understands the issues; the majority is totally alienated, except involving public policy concerning immediate interests of actual victims.⁶² In the Brazilian setting, it is still necessary to consider that the model is not two-force, but *multi-force*. However, the focus is the same. The difference is simply that the groups are not two, but many more, increasing complexity.

Nonetheless, a concentrated subgroup can operate as a catalyst, increasing the probability of activating the majority. In Brazil, catalytic subgroups are the main chance of a majoritarian bias, because the cost of information and organization are high to the majority. As an example, we can mention the organized groups interested in agrarian reform, such as the Landless Movement (*Movimento dos Sem-Terra*) and Movement for Freedom of the Landless (*Movimento de Libertação dos Sem-Terra*).

In sum, although the political process can be an alternative for the problem of the distribution of land, it is not enough. It is necessary to analyze the other alternatives – the market and the adjudicative processes. This is the next topic.

2.3.2. Market Process

The market serves as an alternative to government action to achieve social goals. Market participation operates through transactions that, in large numbers, produce social outcomes. Similar to the political process, some people participate more effectively and the ability of the market to function is measured through participation.⁶³ The dynamics of participation in markets is almost the same as in the political process.⁶⁴ The question is: Which alternative between the imperfect alternatives is preferable? The answer depends on comparative institutional analysis.

Considering Brazil's reality, the analysis is complex, because there is a concentration of land in a minority and a small quantity of land is divided among the majority. There are, also, many who do not own any land. As Komesar has shown, in a hypothetical case where there is just one landowner in Brazil and one person without any land, but the latter has enough funds

⁶¹ Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1987-1988).

⁶² See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁶³ See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁶⁴ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

to buy land from the landowner, it would be simple to solve the division.⁶⁵ This is a situation where the market would function well. However, when the number of landowners' increases and the division of resources is unequal, it becomes harder for the landowners to sell their properties. Not only will the time and effort of government to divide the lands increase, but also the marginal benefit of each person to receive a new property is reduced.⁶⁶ The information cost, in this case, is based on the probability of effective agrarian reform and the benefits that it can bring. On the other hand, the organizational costs are based on the organization of the mass without any land. Thus, the government's initial offer will at least be the market value of the land. Anything less and the landowner will have no reason to transact. He can get market value from another buyer. The simultaneous analysis of these factors enables knowing the performance of the market to solve the problem.⁶⁷

The ability of market transactions to resolve conflicts involving diffuse interests depends on whether the transaction costs involved exceed the benefits. Those benefits correspond to the participants' stakes in the outcome. In Brazil, the current panorama is darker still. The government, although established on a democratic basis, has a variable and dissonant position which changes dramatically according to the international scenario, affecting the market's behavior and institutional analysis. Instability should be considered as an aspect that increases the cost of information in Brazil's market, reducing the participants' stakes in the outcome. Nevertheless, the structure of the analysis is still the same. The differences are concerned only with the "values" that are assigned to the variables considered in the analysis.

However, institutional analysis cannot be done without considering the other alternatives. It is not enough to consider the market and political processes, but also the adjudicative process.

2.3.3. Adjudicative Process

Three basic considerations or aspects determine the performance of the courts: dynamics of litigation, competence of adjudicative decision makers and physical capacity of the adjudicative process.⁶⁸ All of them must be taken in account when analyzing Brazil's judicial review system by comparative institutional analysis, because the interactions between the three aspects are part of the basic structure of the adjudicative process.

The courts usually deal with three main settings. The first considers uniform low stakes. Here, there is high probability of inaction (because of high costs of information and organization, with low per capita stakes and high number of free riders). Second, with uniform high stakes, the adjudicative process works better. However, this does not involve single institutional

⁶⁵ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁶⁶ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁶⁷ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁶⁸ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

analysis, but rather comparative institutional analysis. Thus, the market also is at its best performance and tends to prevail over the adjudicative process. Third, in a skewed distribution of stakes, numbers and complexity can minimize the performance of the adjudicative process, but they also undermine the other institutions. The structure, unlike the other institutions, is more formally defined (has more formal requirements for participation), is smaller (has fewer physical resources and is far more difficult to increase in size), and the officials (judges) are more independent and impartial. I will briefly consider the issues of independence, scale and competence in Brazil, as they are essential for the dynamics of litigation.⁶⁹

In Brazil, judges serve until reaching mandatory retirement age and can only be removed for narrow reasons. Most are civil servants, chosen by competitive examination. There are no elections for judges. The result is that the dominant structural characteristic of the judiciary is its abstraction from direct political pressures. Thus, longevity, high average age and extremely difficult entrance exams result in a limited interest in job mobility, making it difficult to influence judges by replacement or inducement.⁷⁰

Therefore, the same safeguards that produce independence increase the cost of participation. The innumerable requisites to judicial review in Brazil justify the high participation costs of litigation. And these costs are mainly information costs. The formalities and complexities of the process itself require such a significant accumulation of knowledge that people are led to hire experts – lawyers. Judicial independence comes at a significant cost and affects the number and type of issues handled by judiciary. In Brazil, the effects of such costs are sometimes catastrophic: many issues that should be reviewed through the adjudicative process are not brought into litigation, because costs are so high that even damages are a better alternative. In short, although institutions are struggling to change the scenario, the Constitution has become a “dead letter” and is much less enforced than it should be.

Furthermore, civil procedure is an important variable of analysis. In the USA, the more complex the issues and the less familiar the judges are with a given area, the more likely they can be influenced by information provided by litigants. In contrast, in Brazil judges do not need to have any technical knowledge, since they only apply the laws – all the factual and technical knowledge is assigned to experts.

Scale and competence are also important in the dynamics of litigation. In Komesar’s words:

“By competence, I mean the ability of trials and triers to investigate, understand and make the substantive social decisions that may come to them. By scale, I mean the resources or budget available to the judiciary and the constraints on the expansion of the size of the adjudicative process. Scale and competence interact with each other and with the

⁶⁹ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁷⁰ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

*determinants of litigation to determine the institutional ability of the adjudicative process”.*⁷¹

Considering Brazil’s adjudicative process, these variables are distorted: the limited scale of the judiciary and the formal requirements are huge barriers. Additionally, the central role of independent judges makes it doubtful that adjudicative capacity can be expanded as easily as the capacities of the market and political process, mainly in the appellate courts’ structure. The problem is that increasing the number of judges on these high courts does not necessarily increase their output. Judiciaries cannot grow at the same rate as other societal institutions – and this barrier reflects the crisis the judiciary faces in Brazil. Thus, judicial independence is linked both with higher costs of access and constraints on the ability to expand; in other words, scale and competence are limits imposed on all judiciary systems.⁷²

In terms of the analysis developed in this work, it is important to say that Brazil’s judicial review system, differently from the USA, does not contain an express reference to different levels of scrutiny, according with each type of law. Most reviews, as will be discussed further, are based on the principle of proportionality: each principle should be balanced according to others, aiming to achieve harmony with the overall system of principles and rules. Thus, the influence of the judicial review is controlled by a principle that is immanent to the system.

2.3.3.1. Correction Of Bias

According to Komesar, the question of who decides is always complex and it is necessary to know which institution is performing better in each situation.⁷³ In general, the political process has far more information and far more risk of bias. The importance of the adjudicative process is the possibility of correcting political malfunction.

To solve political malfunction, the courts can take three paths: 1) do nothing to correct the distortions; 2) indirectly correct political malfunction; 3) correct the problem through judicial review.⁷⁴

In this paper, we focus on judicial review, due to the framework’s flexibility to solve conflicts even in complex and varied settings.

3. Brazil’s Judicial Review System⁷⁵

⁷¹ NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 134 (1994).

⁷² The size and competence of the political process and the market are many times greater than the judiciary; even if the courts wanted to, they do not have the capacity and ability to review all the practices of the other institutions. See: NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁷³ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁷⁴ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁷⁵ The complexity of the relations under consideration is evident. I do not believe, however, that this will be the last word on institutional analysis in Brazil’s judicial review. This work is not the end or even the beginning of the
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3.1. Introduction

A careful analysis of institutional choice is essential for any constitutional theory and one must pay serious attention to basic features, such as physical resources and institutional size (scale), complexities of collective decision-making (dynamics of litigation), competence of the courts and comparative institutional choice.⁷⁶

However, the background is not always the same. The framework must be simultaneously simple and flexible.⁷⁷ Simplicity is essential to make it viable.⁷⁸ Flexibility, on the other hand, is essential to make its application possible in a range of different backgrounds, including institutional settings totally different from the ones for which it was built.⁷⁹ Thus, based on its flexibility, we apply Komesar's framework to a new institutional configuration: Brazil's judicial review.⁸⁰ Brazil has an extensive and complicated system of judicial review. The most distinctive feature is the coexistence of decentralized and centralized systems. Brazil adopts a decentralized system in the sense that parties can bring issues before ordinary judges in any judicial process. On the other hand, the centralized system permits certain entities to bring actions directly to the federal or state appellate courts (*Tribunais Regionais Federais* and *Tribunais de Justiça*), or the Federal Supreme Court (*Supremo Tribunal Federal*).

The Brazilian judicial review system has many particularities, because the centralized system is to some degree different from that in Europe. While in Europe there is a special Constitutional Court, the Federal Supreme Court in Brazil has competence to inquire into the constitutionality of laws or regulations without any relations to facts. Therefore, the Federal Supreme Court is not only the final tribunal for decentralized review, but also the court that can make an abstract review of the Federal Constitution.

Nonetheless, one should not forget the singularities of the decentralized system. They are analyzed in the next topic.

4. Comparative Institutional Analysis Of Brazil's Judicial Review System

end of the subject. That such analysis is difficult and even troubling cannot be denied. But it should not be avoided: it can be the solution for the inefficiency of Brazil's institutions.

⁷⁶ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁷⁷ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁷⁸ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁷⁹ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

⁸⁰ Brazil's Constitution is a complex and detailed charter with more than 250 articles. In many subjects, the constitutional text contains specific rules that are normally found only in specific statutes, creating serious problems of governability. Furthermore, Brazil's constitution is *dirigiste* and many of its provisions are *not self-executing* (requiring "complementary laws", or enabling laws, for full effect). These characteristics come with a complex and participatory system of judicial review, responsible for giving flexibility to the rigid structure of norms.

4.1. Description of the case (Direct Action for Unconstitutionality no. 2.213-0)

The case analyzed here is a Direct Action for Unconstitutionality involving the discretion of the President to issue provisional measures.⁸¹ People without land – *Sem-Terra* – invaded governmental and others properties, with the goal of promoting agrarian reform. This prompted the President to take action: issuance of a provisional measure that regulates the practices of transgression of the laws and the Constitution. The Federal Supreme Court held that there is no possible declaration of unconstitutionality when there are insufficient grounds of one of the pleadings, i.e., the provisional measure was constitutional.

4.2. Social Policy Goals

Recall that to conduct comparative institutional analysis one must first choose a social policy goal, so that the various institutions can be evaluated with reference to their ability to further that goal.⁸² It is impossible, considering the real world's complexities, to evaluate all the goals and all the possible choices in a comprehensive analysis; it is necessary to choose a focus to be able to act scientifically in a case study. To consider institutional choice in depth, however, it is important to simplify the social policy goal under discussion by assuming the goal rather than providing detailed proof. Detailing the proof would be empirical rather than political, juridical or economic. In this case, I assume as a social policy goal *resource allocation efficiency analysis*. This goal has been chosen because property must be defended in society as one of the most important institutes of capitalism and represents the main point in the case *sub judice*. Ihering defended the importance of the institute in civil law, defining property as the “visibility of the dominium”.⁸³ Nowadays, the *social function of property* asserts that contribution to the well-being of community and society should be analyzed before property ownership can receive state protection itself. Thus, the 1988 Brazilian Constitution regulates the social function of property in the following terms:

“Article 186 - The social function of rural land is met when it is used in a manner that is (i) economically rational, (ii) adequate to the available natural resources and ensures preservation of the environment, (iii) in compliance with the provisions that regulate labor relations, and (iv) favorable to the well-being of both owners and workers.”

⁸¹ Provisional measures (*medidas provisórias*) are presidential decrees that take immediate effect with status of ordinary law, but then are subject to congressional approval/rejection/amendment, under a priority regime. They are limited to “relevant and urgent” matters (“Art. 62 – In cases of relevancy and urgency, the President can issue Provisional Measures with force of law, submitting them immediately to the Congress.”). They are an important mechanism for governability in Brazil’s multiparty presidential system, but one that tempts abuse. Constitutional Amendment 32 of 2001 ended the custom of repeated reissuance of provisional measures when Congress failed to act on them within the legal time limit. Provisional measures in such a situation at the time that CA 32 took effect were allowed to remain in force under the amendment’s grandfather clause.

⁸² See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁸³ RUDOLPH VON IHERING, THE STRUGGLE FOR LAW (1997).

The division of property must consider the social costs and benefits of its distribution and, most importantly, obedience to the legal system. Analyses of cost/benefits should not only consider the divergent interests of the issue – landowners and landless – but also the judicial review system. Assuming “*cost-effective concentration of property reduction*” as a social policy goal means that the social function of property should be taken so long as those steps generate more social benefits than costs. In other words, the best division will be the one that generates the most social welfare. Social benefit can be measured by the production of the land and new places for habitation, which in turn is roughly the extent of the damages that would have resulted if an unproductive landholding structure were kept. Costs reflect both the costs of eminent domain, cost of information – which is the best land to be taken? – and the financial costs that arise from transferring ownership.

The choice in the case under analysis is hard because it involves complex constitutional principles and institutes. It includes not only the social function of property, but also eminent domain and judicial review, with the particularities of Brazil’s institutional scenario. Thus, resource allocation efficiency is analyzed as a limit for the complexity of other goals that could be focused (instead of adopting, for example, the freedom of the owners to decide the destiny of their properties). Recall that the market will not likely achieve the social policy goal if no contracts are negotiated, the courts will not achieve it if no lawsuits are brought, and Congress will be poorly suited if it is subject to bias.⁸⁴ While cost-effective analysis of the social function of property should appeal as a social policy goal, its contours are not well defined. Precise numbers are not necessary for this analysis. As Komesar has shown, the participation-centered approach does not require specification of the social policy goal to be mathematically precise.⁸⁵ Because the approach focuses on comparing the performance of each institution based on the features of the participation-centered model, it does not require any absolute measure of the extent to which any institution achieves a social policy goal.⁸⁶ The institutions will be evaluated according to their ability to give a better end to the problem of agrarian reform, considering the social function of property in a cost-effective manner.

4.3. Distribution Of Stakes

To analyze the complex scenario of agrarian reform in Brazil, it is necessary to add a new subdivision to the classification presented above. The actual beneficiaries are divided into **direct** and **indirect** beneficiaries and the actual opponents are divided into **direct** and **indirect** opponents. Even assuming that a provisional measure creates too much injury, the class of actual beneficiaries and the class of actual opponents are both relatively small, with each member having a high stake. The actual number of opponents must be small, because it involves only the government (*direct actual opponent*). However, we consider the influence of all the parties with high interest in huge properties and in maintaining the current structure of unfair division

⁸⁴ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁸⁵ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

⁸⁶ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

of property (*indirect actual opponent*). Furthermore, the President, when deciding that he should use the provisional measure mechanism as the best remedy, would be influenced only by his own party, which makes the interests even more concentrated.

The number of actual beneficiaries is small: the usage of the twin mechanism of the direct action for unconstitutionality and direct action to declare constitutionality is limited to specific persons/entities, according to Brazilian Constitution (article 103). Furthermore, it is important to consider here that the suit was proposed by a party – the Workers Party (*Partido dos Trabalhadores*, or PT) – which is the direct actual beneficiary. This emphasizes the political influence in the decision. It is still important to say that, in Brazil's context, the PT is intrinsically connected with the interest of workers and represents, in this process, the whole range of people interested in agrarian reform. We consider all pressure groups – catalyst groups – that can influence the parties in favor of agrarian reform. All these groups have high interest, because they are indirect actual beneficiaries.

It is now clear that the margins between the political process and the adjudicative process are tiny in this case. The opponent class, including the government, also seems to be relatively concentrated, populated by an entity large enough to face a real risk of being sued. Similar to actual opponents, potential opponents have a high stake in the outcome, because they face not only a high risk of being an actual opponent, but also significant financial exposure regarding property distribution, with strong possibilities of losing their land and stoppages in the political scenario.⁸⁷

In contrast to the relatively small number of potential opponents (namely, the government itself), the number of potential beneficiaries of even serious influences of the provisional measure must include anyone capable of being significantly injured by changes in regulation of agrarian reform. The number of potential beneficiaries is incalculable. In a general view, it includes millions of people. Anyone who could be influenced by agrarian reform – which means any landowner and anyone who is in need of land – is a representative of the group of potential beneficiaries. In fact, since agrarian reform can injure even a subject who never owned a huge property, the universe of potential beneficiaries extends to almost the whole country. It includes all the properties that are neither small nor productive, according to article 185 of the Constitution.⁸⁸ In other words, the risk of injury to potential beneficiaries is quite diffuse. That means that each potential beneficiary's interest in preventing the measure is low.⁸⁹

The situation of potential beneficiaries is different from the situation of actual beneficiaries. The actual beneficiary group includes all those responsible for the invasion of private properties. In this case, they are affected by the provisional measure, and the national interests

⁸⁷ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001) .

⁸⁸ “Art. 185. The following are exempt from expropriation for purposes of agrarian reform: I – small to medium rural properties, as defined in law, provided the owner does not own another property; II – *productive properties*. Sole paragraph. The law shall guarantee special treatment to productive properties and shall set the rules for satisfying the requirements of their social function.”

⁸⁹ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001) .

over agrarian reform are united in a party that could represent this interest in the Federal Supreme Court. Thus, the chances of litigation increase and the outcome is a skewed distribution of stakes.⁹⁰

4.4. The Market

The method to achieve agrarian reform in Brazil is based expropriation, an institute similar to eminent domain used in the USA.⁹¹ Because transactions to distribute land involve multiple parties, eminent domain becomes the best way to solve the issue of distributing properties. Transactions would occur if the government's initial offer is at least the market value of the land. When the price does not cover the objective value of the land, the adjudicative process might be a better alternative to solve the problem.⁹²

As Komesar has emphasized, it is clear that participation depends on the analysis of benefits and costs of that participation.⁹³ Transaction costs are the primary barrier to market performance.⁹⁴ Thus, increasing the number of parties increases, simultaneously, the cost of negotiation, because the organization of heterogeneity becomes more difficult.⁹⁵ In addition, the cost of information – including both the analysis of quality and quantity of information, and the distortions that inadequate information can cause – reacts in the same manner.⁹⁶ In Brazil, it is clear that transactions are not going to occur because people who do not have land cannot buy the land, because they do not have any money. In other words, the only solution is for the government to act. Transactions are going to occur until a certain limit – as they have already occurred – but they are not enough to establish a fair division of the land, so the status quo would be kept. The institute of expropriation (eminent domain⁹⁷) motivated by agrarian reform is the only possible way to achieve a “better division” of land, considering the multiple interests involved in the issue.

When comparative institutional analysis is applied to expropriation, landowners have high stakes and are willing to bear the costs of information.⁹⁸ They will likely inform themselves and try to track the government's progress in assembling the lands.⁹⁹ In the expropriation action (*ação de desapropriação*) for agrarian reform purposes, the landowner no longer has the

⁹⁰ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

⁹¹ In *Calder v. Bull*, Justice Chase thought it was preposterous for the government to take one person's property with no restriction and give it to another private party for their own profit. Recently, in *Kelo v. New London*, the city of New London, Connecticut wanted to condemn 115 residences. The Supreme Court decided in favor of New London, in a narrow 5-4 ruling in June 2005 that gives local governments wide latitude to decide when a seizure is for “public purposes”, including economic development.

⁹² In this case, the remedy to be used is the “Expropriation Action”, which regulated by the Decree 3,365/65.

⁹³ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

⁹⁴ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

⁹⁵ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

⁹⁶ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

⁹⁷ Thus, in Brazil the main goals of eminent domain are related with the public interest, public necessity and social interest. Unlike the mechanism in the USA, eminent domain in Brazil is not used to simply distribute lands. If one of the previously indicated reasons is present, it is possible to apply the mechanism.

⁹⁸ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

⁹⁹ See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

right to sell the land, but does receive compensation, without the opportunity to negotiate a higher price.

On the other hand, the government has a transaction cost for each property it desires to acquire. The value, however, is objectively determined in Brazil: the government pays the value of the land in the market, called “fair price”, using expropriation action. In case of disagreement, the adjudicative process is the only option to solve the conflict and the trial is restricted to price discussion. In Brazil, the solution is still harder to be reached than in the USA, because numbers and complexity exacerbate the market malfunction. For example, in expropriation for agrarian reform, the federal agency involved (the National Institute of Settlement and Agrarian Reform – INCRA) often sets the price as the land’s appraised value for tax purposes, which is usually lower than the market value based on future profitability.

Furthermore, the diffusion of potential beneficiaries’ interests in the division of land implies that the market would not generate sufficient property-division transactions to achieve agrarian reform.¹⁰⁰ In other words, transaction costs are high because they involve not only high information costs (due to the difficulties of dealing with the government and the bureaucracy involved in the process, the political controversies besides the negotiations, etc.), but also organization costs are high (the stakes are divided by innumerable parties). Thus, the transaction costs involved in a potential beneficiary’s negotiations to reduce injury would likely be larger than any individual’s stake in the outcome. It would not be worthwhile for potential beneficiaries to negotiate for greater protection because the costs of negotiating would exceed the benefits, since they would be playing in a field of “probabilities” and “uncertainties” about the real political agenda in carrying out agrarian reform. The information costs suggest that potential beneficiaries may neither recognize their vulnerability nor have any idea that they can reduce the unfair distribution of land. Again, while the overall problem persists, numbers are so big that each potential beneficiary faces such a low risk of injury, that they would not be able to organize to solve the issue.¹⁰¹ In sum, the interests are “so individualistic” that only governmental intervention can effectively change the scenario and promote fair division of land.

4.5. The Political Process

Although the market seems unable to achieve agrarian reform in Brazil, the political process does not perform better. The potential opponent class is relatively concentrated – the government (legislature), as the direct actual opponent, and the parties that support landowners, as the indirect actual opponent – and the stakes are high. Furthermore, potential beneficiaries’ interests are diffuse and small compared to the concentrated potential opponents’ high stakes.¹⁰² That skewed distribution of stakes creates unequal incentives to influence legislators, since the potential opponent has greater benefits to obstruct bills from passing than each potential beneficiary does. Nonetheless, the possibility of a single party – as a catalyst subgroup – influencing

¹⁰⁰ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

¹⁰¹ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

¹⁰² See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

the whole government to promote agrarian reform is still reduced. In sum, contradictory welfare are at play, including the interest of landowners, which highly influence national decisions – “big capital” – and the interests of poor classes that are struggling for land.

As happens in every part of the world, two political perspectives oppose in agrarian reform: individualism and common welfare. To go further, one could say that it is not only an economic issue, but also a sociological anxiety. Thus, each landowner and the government would bear a significant financial risk under a bill to permit agrarian reform, due to the significant incentive to lobby Congress to avoid any changes. Their large per capita risk makes them much more inclined to bear the costs of participation in the political process than any of the potential beneficiaries. Furthermore, their influence in the political process is bigger than the influence of potential beneficiaries, because they represent a concentrated minority with high capital – and capacity to influence – the whole society.¹⁰³

As Komesar has emphasized, problems concerning political malfunction and the possible correction through judicial review must be considered in any case that attempts comparative institutional analysis.¹⁰⁴ In Brazil’s agrarian reform, political malfunction is present in its most common sense: *minoritarian bias*. Minoritarian bias assumes a disproportionate power of the few against the many.¹⁰⁵ These few have better access to legislators through organization and information. Besides this, information costs are smaller, due to the fact that they are already part of the national political scenario.¹⁰⁶ The organization costs are also reduced, because parties are already organized in Congress to protect stakes of landowners. Only a few organized groups (MST, for instance) are influencing the majority – Workers Party (PT), as direct actual beneficiary. Even though the government party in Brazil is leftist, it is composed of a coalition of dispersed interests, leaving agrarian reform to the background.

The high costs of participation highlight the advantages the opponent class has in the legislative arena. The costs of organizing their efforts are insignificant, since most landowners have strong influence in Congress. In contrast, potential beneficiaries face huge organizational costs; many of them do not even see themselves as potential beneficiaries of agrarian reform.¹⁰⁷

Obviously, one cannot abandon the possibility of majoritarian activities, since the vote is not only a right in Brazil, but also a duty. In other words, voting is mandatory. Therefore, the chances that the majority will prevail in this context do exist. However, the corruption of the system can undermine the majority’s influence, changing election outcomes and/or competitiveness. Since this does not occur at all times, cases do exist of majoritarian bias in Brazil. However, specifically in the case under analysis (Direct Action for Unconstitutionality no. 2.213-0), the issue was not influenced directly by votes, since the President legislated unilaterally through a provisional measure, without Congress’s initial participation. On this basis, it can only be said that majoritarian bias would be an option only if the President was supporting

¹⁰³ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

¹⁰⁴ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

¹⁰⁵ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

¹⁰⁶ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

¹⁰⁷ See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

the majority's view. Nonetheless, this was not the position adopted by the President when issuing the provisional measure, which enacted the minority's view. Thus, it can be concluded that, in the case under analysis, minoritarian bias existed. However, it is still important to say that majoritarian activities are occurring and that they are able to change the general scenario, through pressure and other actions that can change the outcome of the decision-making process.¹⁰⁸

In addition to the costs of organization, information costs are much bigger for *potential beneficiaries* than for government and landowners. Opponents are aware of the various options of technical and human-powered attempts to reduce the occurrence of agrarian reform. Furthermore, the issue comprises security and stability of the rule of law. In the case under analysis, the legislative power is concentrated in the President and the other interested parties have only limited opportunities to participate in the political process. The interests are basically those implemented by the President, characterizing a case of minoritarian bias. In other words, political malfunction is quite common in Brazil, because of the incommensurable numbers of provisional measures used by the chief executive to legislate.¹⁰⁹ In sum, the model establishes that the political process is not the best institution to solve the issue; it is necessary to look for correction of political malfunction in the courts.

5. Conclusion: The Courts As The Best Institution

The dynamics of litigation is the feature of the adjudicative process that is most linked to the participation-centered model.¹¹⁰ Depending on the distribution of social losses – per capita impact, numbers and variance in distribution – and the cost of litigation, the dynamics follows a different course. As Komesar has noted, larger numbers, more complex issues, more dispersed interests and more costly litigation results in more problematic dynamics.¹¹¹ Focused on the participation-centered approach, numbers and complexity must be analyzed to conclude which mechanism is the best to solve the issue of agrarian reform in Brazil. There are two parties actually involved (*direct opponent* and *direct beneficiary*): a private party and the government. However, the party must be seen as an important actor, representative of the group interested in agrarian reform, due to the fact that just a few juridical people have “standing”¹¹² to file a direct action for unconstitutionality. The other parties are not seen in the process, due to formal barriers, but they are there. Thus, the adjudicative process has more chances to be the better choice, because its focus is retrospective, while the other mechanisms are prospective. The case under analysis, as previously shown, clearly has a skewed distribution of stakes. Furthermore, complexity comes because the case involves not only judicial review of a provisional

¹⁰⁸ See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

¹⁰⁹ Actually, this is one of the biggest issues discussed in Brazil. Limiting the legislative power of the executive branch is not only a desire, but a necessity.

¹¹⁰ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

¹¹¹ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

¹¹² In Brazil, the requirements to propose a suit are called “conditions for action”.

measure, but also important issues, such as property and its social function, the law's predictability and the rule of law.

The question is not how badly the market and/or the political process function in this context, but how they perform relative to the courts.¹¹³ Thus, one should consider that the *actual beneficiary* class does not suffer from the diffusion of stakes as does the potential beneficiary class. By definition, *actual beneficiaries* have the incentive to bear the cost of litigation in order to obtain compensation for their injuries. In a concentrated judicial review system, the interests are even higher, because the decision can declare the constitutionality/unconstitutionality of a rule.

On this basis, there are three main considerations concerning the courts. First, they have limited scale. However, in the case under analysis, *capacity is not going to be a problem, since the Brazilian Constitution limits the numbers of legitimate actors that can propose the suit*. Thus, although the effects are broad, the Federal Supreme Court has the adequate resources and capacity to decide the case, which improves judicial performance even more compared with that of other institutions.

Second, the formalities make the courts a difficult option, as the “standing” requirements are difficult to satisfy: only a national party and a few authorities have standing to bring such action. Considering the interests involved and the participants with legitimacy¹¹⁴, it becomes quite clear that the only probable representative of the issues would be a party with national representation. The other legitimate bodies/agents are probably not going to insist on the judicial review, simply because they are against agrarian reform.

Third, as considered previously, the *dynamics of litigation is complex*. One legitimate party can file the direct action for unconstitutionality. As it challenges a provisional measure in the Federal Supreme Court, the dispersed interests make the dynamics of litigation more complex. But how are these dispersed interests represented? The answer to this question is simple. The diverse and various interests are combined in one party – the Workers Party (PT) – which symbolizes the fusion of interests of all beneficiaries of agrarian reform.

Thus, by considering all these institutions, it is easy to conclude that since the market and the political process do not function – or at least would have some kind of failure to recognize and solve the problem – the courts appear as the best institution. To make it clear, who should decide? The courts.

¹¹³ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

¹¹⁴ “Art. 103. The direct action for unconstitutionality and action to declare constitutionality may be filed by: (wording given by Constitutional Amendment 45 of 2004) I – the President of the Republic; II – the Chair of the Federal Senate; III – the Chair of the Chamber of Deputies; IV the Chair of the Legislative Assembly or Legislative Chamber of the Federal District; (wording given by Constitutional Amendment 45 of 2004) V – the Governor of a State or the Federal District; (wording given by Constitutional Amendment 45 of 2004) VI – the Federal Attorney General; VII – the Federal Board of the Brazilian Bar Association; VIII – a political party with representation in the National Congress; IX – confederations of labor unions or trade associations with national scope.”

However, the decision taken by the courts is based on the need to correct political malfunction, since the executive acted based on landowners' interests, resulting in a minoritarian bias. But it is not enough. The courts also reasoned about the law's predictability and security, holding that the federal rule enacted is constitutional because it regulates the transgression of laws and the Constitution. In other words, the security of the system as a whole is more important than limiting the President's discretion.

In sum, comparative institutional analysis selects courts as the preferred institution to solve the agrarian reform issue in Brazil – at least when the problem is concerned with a provisional measure. Transaction costs in excess of potential beneficiaries' interest substantially rule out market achievement of land redistribution. On the other hand, minoritarian bias, the disproportionate influence of landowners in Congress and the legitimacy of the President to issue provisional measures prevents the political process from being the best institution. The judicial solution is more effective than the other two alternatives. It corrects the failure of the market and political process and focuses on the actual beneficiaries – who have a large stake in the outcome of the suit. Thus, the answer to the question of who decides is the courts through the adjudicative process.

6. Conclusion

Comparative institutional analysis is not only a method, but also a new perspective that can shed light on the relation of institutions' complexity. As Komesar states, single institutional analysis is not enough. Comparative institutional analysis, based on a participation-centered approach, makes possible not only a comprehensive view of the way institutions behave, but more than this, proportionate flexibility and adaptation to analyze Brazil's institutional setting.

The discussion, from now on, is not whether comparative institutional analysis can change the way institutions see themselves, but to implement its contributions. Legitimacy and governability are essential and reaching such goals requires that deep changes in Brazil's institutional context. The risks do exist. However, it is necessary to see how far the analysis can contribute to increase institutional triumphs.

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