



Paths Towards LGBT Rights Recognition in Brazil

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Abstract

Introduction This article addresses the processes that led to the recognition of LGBT rights in Brazil, the role played by civil society mobilization, and the interaction between the Federal Supreme Court and the National Congress in these processes.

Methods The study's primary method is document analysis. Our sample was established in 2021 and includes four court decisions and 93 law proposals presented from 2011 to 2020 by 83 legislators whose profiles are also analysed (data collected in 2021). Moreover, the article references secondary source interviews conducted in 2017 and 2018.

Results The Federal Supreme Court was responsible for all the LGBT rights recognized at the federal level in Brazil. Our data shows that federal legislators, on the other hand, have been unable to make bills focused on LGBT rights (pro or against) pass. Some highlights from the results show that 46.2% of the proposals on the matter are contrary to those rights, and 48.2% of the legislators who mobilize the matter are affiliated with the Evangelical Bench, an influential conservative institution in the Brazilian National Congress. Although not yet able to make law proposals pass, those legislators with a conservative profile tend to use LGBT rights as political currency by presenting bills or making speeches against these rights. They also play a role in not allowing pro-LGBT rights achievements in the legislative arena. Aware of the legislators' profile, civil society organizations tend not to focus all their efforts on this arena and to take or create legal opportunities, even though the path through courts still represents several obstacles. Moreover, although the Brazilian Federal Supreme Court has shown a willingness to decide on LGBT rights, the outcomes of the rulings depend on the composition of the body, which is influenced by nominations made by the president. That is, the same court Brazil has relied on to recognize LGBT rights could be responsible for denying them had it had the same powers but different members.

Conclusions While the deadlock in the Federal Congress persists, and the judicial decisions that recognized LGBT rights remain effective, LGBT persons continue to exercise their conquered rights. However, the conservative wave in Brazil places the country in a context of uncertainty and vulnerability with regard to LGBT rights.

Policy Implications This study's contribution lies in showing why Brazil is an unpaired case when it comes to LGBT rights recognition and how vulnerable these conquered rights are in the country. The article provides an overview of the recognition processes taking multiple arenas and actors into account. Therefore, the analyses and the database of law proposals fill a gap in the literature and can contribute to future work from both scholars (for example, other studies from the database) and practitioners (for example, the development of legal mobilization frames and strategies).

Keywords LGBTQ · Legal processes · Legislative processes · Sexual minority groups · Legal mobilization · Gender identity · Sexual orientation

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Introduction

Several factors can influence the process of how rights are recognized. From an international perspective, some of those factors are the regional context and positions of international courts of human rights. Within countries, on the other hand, legislators' profiles and behaviour, courts' profiles and behaviour, and civil society mobilization are relevant.¹ In the search for the recognition of rights, different social groups increasingly resort to courts, and some of these courts take up the challenge (Domingo, 2006). When legislative arenas fail to protect vulnerable groups, courts can be the path towards the debate about issues that would not be put on the agenda otherwise. That is, if courts show the willingness to address the rights of groups that are underrepresented in the legislative arenas, they become the best available path for pursuing policy change (Keck, 2009).

Brazil is one of the countries in which they do. The country's sociolegal context has characteristics that make it prone to turn to courts for recognition—a solid and independent Judicial Branch, social and economic rights widely guaranteed in the Constitution and yet little legislative progress regarding the rights of some vulnerable groups (Epp, 1998; Gloppen, 2006).

Since the enactment of the Brazilian Federal Constitution in 1988, LGBT rights in Brazil have changed to a considerable extent. Some public policies adopted by the Executive Branch² were focused on the group, namely, the HIV/AIDS public policy in the 1980s (Dehesa, 2010) and the human rights national programs in the 2000s such as Brazil Without Homophobia (2004), the I National GLBT Conference (2008), the National Plan for the Citizenship and the Human Rights of LGBT persons (2009), and the National Counsel Against Discrimination and for LGBT Rights Promotion (2010) (Mello & Braz, 2020). When it comes to recognizing rights, however, courts have taken the lead.

Even though Brazil is far from being the only country where some LGBT rights arise from courts, it is a unique and interesting case for many reasons. Firstly, there are particularities, such as Brazil being the only country among the UN Member States where the criminalization of LGBT-phobia came from a court decision (ILGA World, 2020), something that illustrates

¹ Although we recognize and value international factors, for this article, we chose to focus on the factors within the country. The international ones, despite their relevance, depend on internal acts to produce effects within the country. For example, in 2018, the Inter-American Court of Human Rights issued an advisory opinion determining, among other things, that all the countries in the Organization of American States should protect the rights of homosexual couples and create tools to make it easier for trans persons to change their names. Even though the advisory opinion had already been issued, it was necessary for the Supreme Federal Court to decide about the right to adequate name and gender markers on documents so it would be guaranteed to trans persons in Brazil.

² The Executive Branch is not part of this study. We recommend Facchini and França's work (2020) to comprehend the Brazilian history of LGBT public policies.

how much the country relies on the Federal Supreme Court to recognize LGBT rights. Also, it is a country with a civil law legal system; therefore, traditionally expected to have legislation as the primary source of law (David et al., 2016). Finally, civil society organizations in Brazil repeatedly choose to mobilize the courts to guarantee certain rights, LGBT rights being the standout ones for this strategy (Corrales, 2015).

Especially over the past decade, the country has made progress in recognizing LGBT rights. Decisions from the Brazilian Federal Supreme Court guarantee the right for same-gender couples to get married, the possibility for transgender people to change their names and gender markers on documents, the criminalization of homophobia and transphobia, and the possibility for men who have sex with men to donate blood. Still, none of these issues has been addressed in legislation by 2023.

As Keck (2009) pointed out when analysing the legal victories of the LGBT movement in the USA, the causal implications of controversial court decisions over the long term tend to be complex and multidirectional, and unfolding these causal dynamics can be a difficult task to accomplish. In a scenario where judges act against the majoritarian wishes, new avenues of judicial influence are opened. Even when such decisions provoke substantial political resistance, they often launch or redirect political trajectories in consequent ways, so the response from policymakers can come in at least four different ways: resistance, compliance, compromise, and innovation (Keck, 2014).

As to legal mobilization, the possibility for civil society actors to mobilize courts depends on institutional and socio-legal factors that make up the Legal Opportunity Structure (LOS)—a concept that is connected to that of the Political Opportunity Structure. According to the approach developed by Andersen (2005), the LOS comprehends possibilities of accessing the arena, configuration of power, existence of allies and opponents, and availability of suitable legal frames. In Brazil, whereas the Federal Supreme Court has shown its willingness to rule on LGBT rights (linked to the configuration of power), the Federal Legislative Branch—with an increasingly conservative profile—undergoes a deadlock situation that prevents advances pro or against LGBT rights. And, when the political branches refuse to dialogue with civil society, turning to courts can become a way for marginalized groups to be heard (Gargarella, 2006). Therefore, organizations that work with limited resources might consider the way through courts more fruitful and associate with allies to overcome eventual challenges (i.e., accessing the arena).

This article presents a comprehensive study of the processes of LGBT rights in Brazil and the developments that followed them, considering the Federal Supreme Court, the Legislative Branch, and civil society mobilization. Further, it provides an overview of the current situation; while the Federal Supreme Court takes the lead in recognizing LGBT

rights, there is a deadlock in the Federal Legislative arena proving itself unable to legislate pro or against LGBT rights.

We consider three main topics: (i) how LGBT rights have been recognized through courts in Brazil, (ii) what the developments in the National Congress following the decisions on LGBT rights recognition were, and (iii) the Brazilian LGBT movement's choices aiming to achieve social change. And, by considering these topics, we seek to address research questions on (i) the possible political responses that are drawn up in the National Congress in the context of achievements in the recognition of LGBT rights through the courts, (ii) how civil society organizations find paths towards social change in a complex political landscape, and (iii) the effects of the particularities of the recognition processes on the reality of LGBT rights in Brazil.

We show in the article that a national legislature in a stalemate situation, featuring a significant presence of conservative religious factions, has hindered the chances of achieving tangible policy advancements on LGBT rights through legislation. We argue that, although there are various institutional obstacles when it comes to advocating within the Federal Supreme Court as well, when we take the whole context into account, the legal environment has been more receptive compared to the political landscape. Consequently, LGBT rights advocates have repeatedly and often successfully pressed their claims in court.

Methods

The main method adopted for this study is document analysis. In 2021, we collected data from documents, namely court decisions and law proposals, and examined the context in which they were issued, who authored them, the nature of the text, and the reliability of the documents (always drawn from official websites), besides the content itself (Cellard, 2014). After gathering the material, we carried out predominantly inductive research and adopted the grounded theory method. That is, we had the data as a starting point and developed hypotheses and statements from it (Cappi, 2017).

The court decisions considered in the study were issued by the Brazilian Federal Supreme Court on abstract constitutional review cases focused on LGBT rights. The Court made them publicly available online on its official website.³ We worked with the following cases: civil union for same-gender couples (ADPF n° 132 and ADI n° 4.277, 2011); change of name and gender markers on civil records for trans persons (ADI n° 4.275, 2018); criminalization of homophobia (ADO n° 26 and MI n° 4.377, 2019); and possibility for men who have sex with men to donate blood (ADI

n° 5.543, 2020). In all of them, the Federal Supreme Court issued decisions considered protective of LGBT rights.

To address the political responses drawn up in the National Congress, we looked at legislative proposals distributed from 2011 to 2020, within the same period in which the decisions were issued. They were selected using the search mechanism provided by the National Congress' websites and the following descriptors: gay*, homosexua* lesbi*, bisex*, transex*, transgen*, travest*, LGBT*, homoaffectiv*, and same-sex.⁴ Ninety-three legislative proposals were found, and so they were examined together with the profile of the 83 lawmakers (the authors of the proposals).

We approach the social movements' perspective considering the pertinent literature. Seeking to illustrate the debate and include quotes in which some organizations' representatives explain their choices in their own words, we also refer to secondary source interviews conducted with representatives from all the civil society organizations that took part—or tried to take part—as *amici curiae* in the Federal Supreme Court cases that focused on transgender rights at the time (Côrtes, 2018).⁵ The participation as *amicus curiae* is especially relevant because, at the time when all the four cases we address in this article got to the Federal Supreme Court, civil society organizations were as a rule not recognized as having standing to take abstract constitutional review cases to the Court, so it was necessary to find other ways to mobilize (Côrtes, 2020).

The text is structured as follows: we first address how the rights of LGBT persons have been recognized in Brazil—with court decisions. The following section exposes the dynamic between the Federal Supreme Court and the National Congress. Then, we give an overview of the legislative activity on the matter in the Brazilian National Congress. After, we address the legal mobilization for LGBT rights in Brazil and

⁴ The period starts in the year when the first decision from the Federal Supreme Court in the abstract constitutional review was issued on LGBT rights and corresponds to the 54th, the 55th, and the first half of the 56th Legislature. The search was carried out in Portuguese and the (*) sign in this search mechanism makes it possible to search for words that have any end. For example, homosexua* captures the use of the words: homosexuals, homosexuality, among others.

⁵ Côrtes (2018) carried out semi-structured interviews with representatives from the organizations that submitted requests to the Federal Supreme Court to act as *amici curiae* in cases focused on transgender rights. The representatives interviewed were Antonio Marcos Quinupa (Transgrupo Marcela Prado), Gabriela Rondon Rossi Louzada (ANIS—Institute of Bioethics, Human Rights, and Gender), Gisele Alessandra Schmidt e Silva (Grupo Dignidade), Juliana Cesario Alvim Gomes (UERJ Human Rights Clinic—*amicus curiae* presented by the CLAM—Latin American Centre on Sexuality and Human Rights and the LIDIS—Integrated Laboratory on Sexual Diversity, Politics, and Human Rights), Patricia Cristina Vasques de Souza Gorisch (IBDFAM—Brazilian Family Law Institute), and Paulo Roberto Iotti Vecchiatti (ABGLT—Brazilian Gay, Lesbian, Bisexual, Travesti, Transsexual and Intersex Association and GADVS—Group of Lawyers for Sexual and Gender Diversity). More details about the methodology and the complete transcription of the interviews are available online in Portuguese.

³ <https://portal.stf.jus.br/>

how this activity can influence and be influenced by the recognition practices in the country. Last, we get to the final reflections, concluding that the situation of LGBT rights in Brazil is currently characterized by uncertainty and vulnerability.

Results and Discussion

LGBT Rights in Brazil: A Way Through the Courts

In this first section, we briefly address the functioning of the Brazilian Federal Supreme Court to name the main achievements in terms of LGBT rights in the country and how they were secured—through the judicial system.

The Brazilian Constitution, issued in 1988, entitles social rights and the right to anti-discrimination in addition to organizing the Brazilian public administration. As for the Legislative Branch, the Brazilian National Congress is bicameral with a Chamber of Deputies with 513 legislators and a Federal Senate with 81 legislators. Despite the number of legislators, almost all the protection and recognition of rights for LGBT people in the country came from the Judicial Branch. During the decade of 2010, it was mainly the country's Federal Supreme Court that dealt with the matter in its decisions in constitutional review cases, securing and protecting rights, making Brazil one of the countries in Latin America and the world that has the most recognized protective rights for the LGBT peoples through the Courts (Maia et al., 2023).

It is worth highlighting, however, that stances from courts recognizing rights depend on a person or an organization taking a case to court, and that the legal mobilization does not start at the Supreme Court and comprises litigation in other instances (Figueiredo, 2021). The possibilities for reaching the Court through the abstract constitutional review model consist of the availability of a series of legal proceedings provided in the 1988 Brazilian Constitution. These proceedings enable a list of litigants to take claims directly to the Federal Supreme Court to argue that a specific act from the Legislative or the Executive powers is unconstitutional and, therefore, must be considered invalid. The decision in this kind of procedure produces effects on all people (*erga omnes*) and not only on parties in the lawsuit⁶ (Sgarbossa & Iensue, 2017). This feature of the Brazilian institutional design is especially relevant for enabling the recognition of rights through decisions from the Federal Supreme Court.

Different plaintiffs used the abstract model of constitutional review to litigate in favour of LGBT rights before the Brazilian Supreme Court and succeeded in the 2010s. Consequently,

some LGBT rights are now recognized in Brazil, and, according to Rios (2022, p. 670), the rights recognition process has advanced by moving from a discussion based on family values and assimilation to a debate about respect for differences and sexuality democracy. These rights involve anti-LGBT discrimination, family rights, and identity rights. They are presented below in chronological recognition order.

In May 2011, the Federal Supreme Court recognized civil unions of same-gender couples. This was the first major decision impacting LGBT people, not only because it made these unions recognized by the State but also because it secured rights that follow marriage and civil unions, like filiation, inheritance, and social security rights, among others. Another legal act, from the Brazilian National Council of Justice,⁷ followed this decision to secure the right to and forbid civil notaries to refuse the celebration of this kind of marriage, allowing thousands of people to get married in the past decade.

In March 2018, the Federal Supreme Court ruled in favour of the possibility for transgender people to legally change their names and gender markers on birth certificates and other civil records regardless of surgery or hormonal treatments and without having to go to court. Before this decision, due to some administrative tools, it was already possible for transgender people to adopt a social name before some institutes of the public administration, but it was not so simple to legally change it on official documents. It was necessary to file a lawsuit, and the results were unpredictable since the disparate treatment against transgender persons in the application of the Public Registry Law was frequent (Côrtes, 2019).

The decision from 2018 was also followed by an act from the Brazilian National Council of Justice. The act sets parameters for implementing the decisions. However, it still has some weaknesses, for example, requiring some paid and expensive documents or stating that it is possible for transgender people to present proof of medical treatments as part of their request.

In June 2019, the Federal Supreme Court ruled in favour of criminalizing homophobia and transphobia. By examining data gathered by the International Lesbian, Gay, Bisexual, Trans and Intersex Association on the 48 countries in the world that recognize the criminal liability for offences committed on the basis of sexual orientation (ILGA et al., 2020), it is possible to infer that Brazil is the only one that came to this point with a decision from a constitutional court and not with legislation.

⁶ In fact, in these cases, there are formally no parties in the procedural sense.

⁷ The Brazilian National Council of Justice is an institution that exercises control over the administrative and financial performance of the Judicial branch, ensuring compliance with the functional duties of the judges. Resolution n. 175/2013 is available at <https://atos.cnj.jus.br/atos/detalhar/1754>.

According to the decision, homotransphobic practices should be considered a crime of racism, and so they will be until the National Congress enacts a specific law about the criminalization of homophobia and transphobia. The crime of racism is prescribed by a federal law enforced in the whole country since 1989.

The reasoning behind this ruling is linked to the Federal Supreme Court case law. In 2003 the Court decided, in a landmark case, that anti-Semitism is a type of racism, applying a broad concept of racism, that, in a social sense, would include ethnicity, religion, and country of origin. The complaint focused on homotransphobia, in turn, urged the Federal Supreme Court to use this same broad concept to include homotransphobic acts as acts of racism. While deciding the case in 2019, the Court reaffirmed that the concept of racism goes beyond biological or phenotypical aspects and means the denial of dignity and humanity for vulnerable groups. That is why, according to the broad concept, the Court decided that homotransphobia should be interpreted as an act of racism, and, therefore, the legislation that criminalizes racism in Brazil should be interpreted as including homotransphobic acts.

Last, in May 2020, the Federal Supreme Court secured the right for men who have sex with men to donate blood, declaring unconstitutional a regulation from the Brazilian Health Sanitary Agency that prohibited blood donation from these men.

Each of these cases had unique factors that led to the recognition of the pleaded right. Those particularities involve the way the litigation was strategically taken to the Supreme Court, the civil society organizations that joined as *amici curiae* presenting arguments against or in favour of the claim, and the Supreme Court's willingness to decide the case at that moment.

It is crucial to bear in mind, however, that the rights mentioned were recognized through court decisions while, according to the data gathered for this study and presented in the next section, legislators proposed numerous bills but could not pass any law focused on LGBT rights. There are no federal laws in Brazil recognizing these rights, and, although the decisions in the abstract constitutional produce effects for all people,⁸ they do not prevent the creation of new legislation that can come against the rights secured in the decisions. Further, the existence of a decision does not mean immediate implementation. Even after the decisions,

there are, for example, cases in which notaries' offices discriminate, create obstacles, or even deny marrying same-gender couples or changing the name and gender markers on the documents of transgender persons, that is why provisions from the National Council of Justice are necessary in some cases (Figueiredo, 2021).

The LGBT rights in Brazil are, to some extent, vulnerable. As mentioned, they were guaranteed by decisions from a constitutional court that produce effects to everyone (meaning that what is decided is valid to everyone) but are not law. It means that new laws can overturn what was previously decided, and—although the new legislation can also be declared unconstitutional—the composition of the Court plays a fundamental role in the Court's stance.

The same Federal Supreme Court that recognized all those rights to LGBT people could be responsible for denying them had it had the same powers but different members. In Brazil, the President is responsible for nominating Supreme Court justices, and former President Bolsonaro (2019–2022)—openly against LGBT rights—has done it twice, the Court's stances regarding those rights can change depending on who is appointed (and who is elected president). Also, the justices have the power to control the Court's agenda, and a simple request from a justice opposed to LGBT rights for time to access the files and study the matter can prevent a case from being decided or at least significantly delay the process.

The Dynamics Between the Legislative and the Judicial Branches

While LGBT rights were recognized in Brazil, the dynamics between the Judicial and Legislative branches played a fundamental role in rights being secured through the courts and in the absence of laws about this matter. Therefore, some aspects of the movements from these branches are highlighted in this section to give an image of the Brazilian institutional scenario.

The institutional design of the Court involves individual votes issued by each justice, not a common decision written in consensus (Silva, 2013). The court sessions are broadcast on television so that the citizens can follow the debates.⁹ By watching those sessions and analysing the individual votes, it is possible to notice that not all decisions on LGBT rights were unanimous. There were divergences not only in the reasoning and legal concepts adopted but, in some cases, in the outcome of the ruling itself.

⁸ For example, if the Court decides that—in an interpretation of the Brazilian legislation that is in accordance with the Constitution—transgender people should have the right to legally change their names and gender markers, this decision is applied to all trans people who wish to make this change in Brazil.

⁹ TV Justiça is a public network that broadcasts live the debates of the Plenary of the Brazilian Supreme Court. Source (<https://www.tvjustica.jus.br/index/conheca>). Accessed on 19.01.2023.

The case of civil union for same-gender couples, for example, although unanimous in its outcome, showed divergences among the justices about the limits of the Supreme Court to rule and about whether same-gender couples could be considered the same type of family as different-gender couples. Moreover, some justices declared concern for the Court being too activist, invading the constitutional prerogative to legislate given to the Congress.

The divergence within the Court is most evident in the cases of change of name for transgender people and criminalization of homophobia and transphobia. In these cases, the justices were not unanimous regarding the outcome, and some justices expressly declared an unfavourable vote to the claimed right or the conditions according to which it was recognized (Buzolin, 2019).

The Brazilian Federal Supreme Court has eleven justices appointed by the head of the Executive Branch (the President) for life until retirement—mandatory at age 75.¹⁰ Even though the court's composition changed from 2011 to 2020, the gender representation was kept the same. In those rulings, the Federal Supreme Court had nine male Justices and two female Justices, and all the dissent opinions in the LGBT rights cases came from male Justices.

Justice Marco Aurélio was the most prominent dissenting judge, issuing a dissent opinion in over 60% of the cases that were analysed for this article. This data resonates with Oliveira's work on decision-making behaviour in Brazil's Supreme Court judicial review cases. According to her research, dissent began to increase in the Supreme Court in the 1990s after Justice Marco Aurélio was appointed, and, since then, the justice has been known as the intentional dissenter (Oliveira, 2017).

Another critical factor for understanding the Brazilian context is that it is not safe to assume that the Supreme Court justices have a clear ideological point of view that makes it possible to predict the decision on social minority rights. Even the large volume of dissenting opinions issued by Justice Marco Aurélio does not allow us to state that he has a conservative profile that is clearly against LGBT rights recognition, since he registered a high number of dissents on several other matters during his career. Bearing that in mind, civil society organizations and social movements must be creative and strategic when presenting their arguments to the justices aiming to influence the final decision.

When the Brazilian National Congress is analysed together with the decisions from the Judicial Branch, the inability to legislate about LGBT rights becomes visible. Particularly on the days that follow the final judgments on LGBT persons' rights, lawmakers tend to present a legislative proposal and

make a speech on the tribune to promote the bill, but no federal law on LGBT rights passed in the last decade.

This can be a result of the Brazilian National Congress' characteristics. There is a high rate of distributed legislative proposals combined with a low legislative success rate. Historically, a much higher number of law proposals is distributed than approved by Brazilian lawmakers. A study carried out by Montero (2009) shows that, from 1990 to 2006, only 1.9% of the proposals from the Brazilian Congress were successfully approved. The data reveals that the Brazilian National Congress has one of the lowest success rates in Latin America, as most Latin American Congresses approved more than 10% of the presented bills.

In recent years, however, legislative changes indicate a more significant institutional role for the National Congress. According to Almeida (2020), in 2008, for the first time, legislative production of parliamentary origin surpassed the presidential one, initiating an unprecedented period of congressional dominance.

Another relevant characteristic for understanding the Brazilian scenario is the profile of the legislators who engaged in debating LGBT rights at the National Congress. Opposition to the sexual and reproductive rights agenda has been exercised by political actors representing religious segments not only in Brazil but also in different Latin American countries. However, evangelical politicians have mobilized more assiduously around the sexuality agenda. As pointed out by Prandi and Santos (2017), evangelical politicians have a moral perspective on sexuality that differs from the Brazilian electorate as a whole, being more conservative than the Brazilian population and closer to the evangelical part of the electorate.

“Alliances between Catholics and Evangelicals in the Brazilian Legislative power have already been the subject of other publications. Here, we recall the fact that, while the former stood out in recent decades for opposing the right to abortion, in a rhetorical strategy of “defence of life”, evangelical politicians, as we saw in the introduction to this book, have mobilized more in the controversies around sexuality, assertively combating attempts to expand sexual rights. This is not to say that the issue of abortion was not important to them, but that the evangelical leaders felt their values threatened by a series of initiatives from the Executive, Legislative, and Judicial branches at the beginning of the 21st century, making the issue of sexuality central to their actions of various politicians and public opinion makers in this segment” (Biroli et al., 2020, p. 95)—our translation.

Many conservative religious and non-religious politicians are organized in the parliamentary front in defence of life and the family, a group popularly known as the Evangelical Bench (*Bancada Evangélica*), which brings together more than 200 lawmakers and mobilizes against LGBT rights in the National Congress. The number of

¹⁰ There is a proposal for amendment to the constitution that intends to change the mandatory retirement age to 70 years.

parliamentarians affiliated with the bench grew by more than 24% from the 54th Legislature (2011 to 2015) to the 55th Legislature (2015 to 2019), according to a study carried out by Serrano (2020).

As mentioned, lawmakers—many of them part of the Evangelical Bench—tend to react after court rulings in favour of LGBT rights by giving a speech against these rights on the tribune and distributing legislative proposals to reform decisions from the Constitutional Court. Considering that this is the most engaged supra-party organization when the topic is sexuality, the data on whether or not a congressman or congresswoman is affiliated with the Evangelical Bench was considered in the analysis of the National Congress presented in the next section.

The Legislative Activity on LGBT Rights in the Brazilian National Congress

This section presents some of the political responses that are being germinated in the Brazilian National Congress by describing the ongoing legislative activity on LGBT rights from 2011 to 2020. It presents the bills proposed by legislators and an overview of who authored these bills. As to the authors, we address how they can be ideologically categorized, their gender proportion, and whether they are affiliated with the Evangelical Bench.

The work carried out by Keck (2009, 2014) indicates that courts will be called upon to take a stance on controversial issues both by actors against and in favour of the rights of disadvantaged groups—such as sexual minorities—regardless of whether judges are seen as umpires, tyrants, or servants. The political response to judicial decisions can happen, at least, in the form of resistance, compliance, compromise, and innovation, making it a challenging task to identify these responses in practice since “the lines between these categories tend to blur” (Keck, 2014, p. 203).

We do not seek to classify the law proposals mapped in this article in the forms listed above but to illustrate the frequency of distribution of law proposals on LGBT rights and who are the legislators mobilizing the subject in the National Congress to fill an initial gap in the literature so that future research can advance on this agenda that has big potential.

The success rate on LGBT rights in the National Congress is zero because none of the law proposals, favourable or unfavourable to LGBT rights, have passed by 2023. However, this does not mean that the Brazilian legislators are indifferent to this matter. On the contrary, the legislative activity in opposite directions on LGBT rights is so expressive that it creates a deadlock in the National Congress. In this article, we aim to provide a picture that can help to understand who mobilizes the matter in the Brazilian National Congress and how rather than focus on the causes of this deadlock.

The data collected for this study shows that the legislative activity on LGBT rights in the Brazilian National Congress during the 54th Legislature (2011 to 2015), 55th Legislature (2015 to 2019), and the first 2 years of the 56th Legislature (2019 to 2020) produced a total of 93 bills presented in the period (all three legislatures considered) by a total of 83 different lawmakers (Fig. 1).

The number of law proposals that intend to assure rights to the LGBT community is quite close to the number of law proposals that are purposely contrary to the judicial decisions that recognize those rights and intend to reform them or are contrary to LGBT rights in general. According to the data, 50 law proposals are favourable to LGBT rights (53.8%), and 43 are contrary (46.2%). Although the numbers might seem favourable, as mentioned, none of those proposals has passed.

The 56th Legislature ended in 2023 and the analysis of its first 2 years (2019–2020) shows that it already had more activity on LGBT rights when compared to the period from 2011 to 2018 (54th and 55th Legislatures). In addition, there was also an inversion in the valuation of the proposals presented since, from 2011 to 2018, more proposals were distributed against the recognition of LGBT rights, whereas, from 2019 to 2020, more favourable than contrary proposals were distributed.

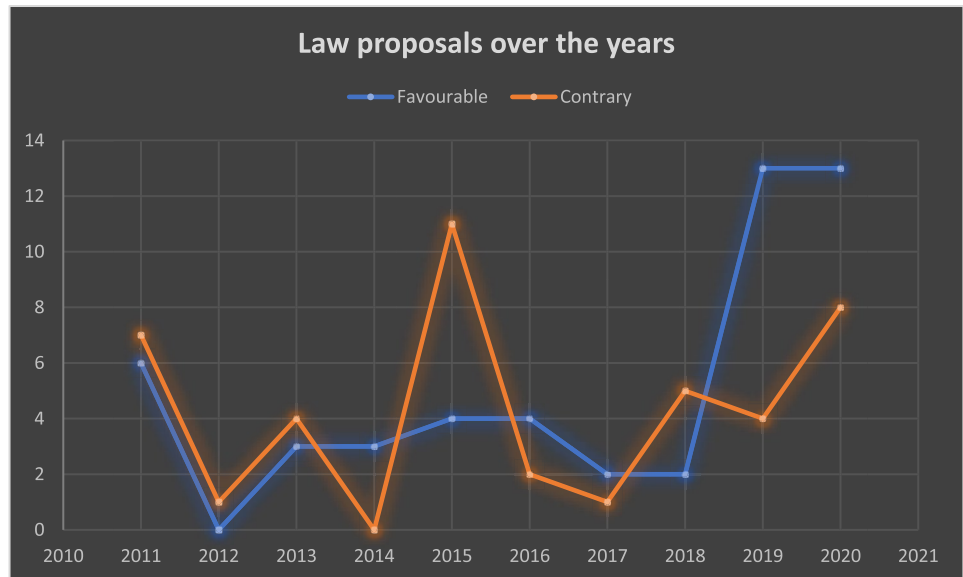
A possible explanatory hypothesis for these changes is the fact that the legislative activity of the 54th and 55th Legislatures tended to be more reactive, contrary to the first positions from the Federal Supreme Court recognizing LGBT rights. In the 56th Legislature, the more expressive volume of proposals in favour of LGBT rights can indicate both a greater acceptance of judicial decisions over time and a reaction to movements carried out by the Executive Branch, considering that the president elected in 2018 had an open discourse against sexual minorities.¹¹

A total of 83 legislators have engaged in this legislative activity—14 legislators from the 54th Legislature (2.3%), 29 from the 55th Legislature (4.8%), and 40 legislators from the 56th Legislature (6.73%). The data confirm that the mobilization of legislators on LGBT rights increased over the years, indicating that the public debate has paid more attention to gender and sexuality in recent years.

When examining the profile of those engaged in the debate about LGBT rights at the National Congress—considering only the proposal’s authors—it is possible to map their gender, ideology, and affiliation to the Evangelical Bench. In this group of legislators, 64 people are male and 19 are female. The data from their profiles reveal a higher proportional rate

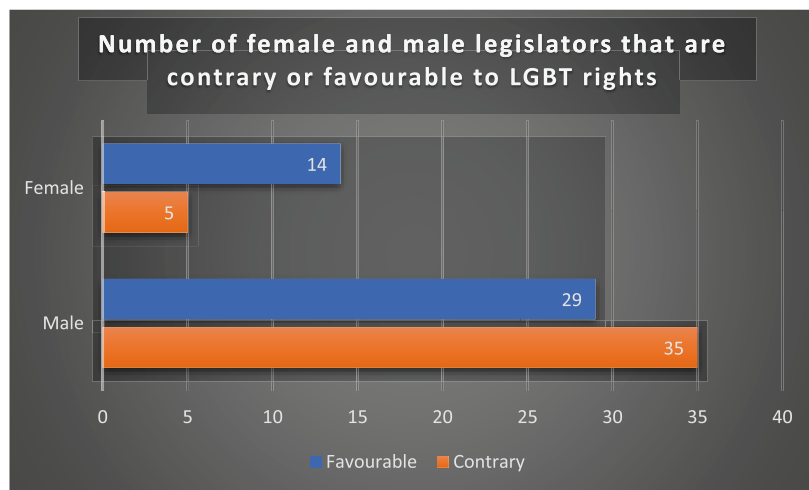
¹¹ Jair Bolsonaro was the first Brazilian President who was affiliated with the Evangelical Bench during the exercise of his mandates in the Legislative Branch, being known for statements openly contrary to LGBT rights.

Fig. 1 Law proposals over the years



Source: elaborated by the authors, based on data collected from the Brazilian National Congress' websites

Fig. 2 Number of female and male legislators that are contrary or favourable to LGBT rights



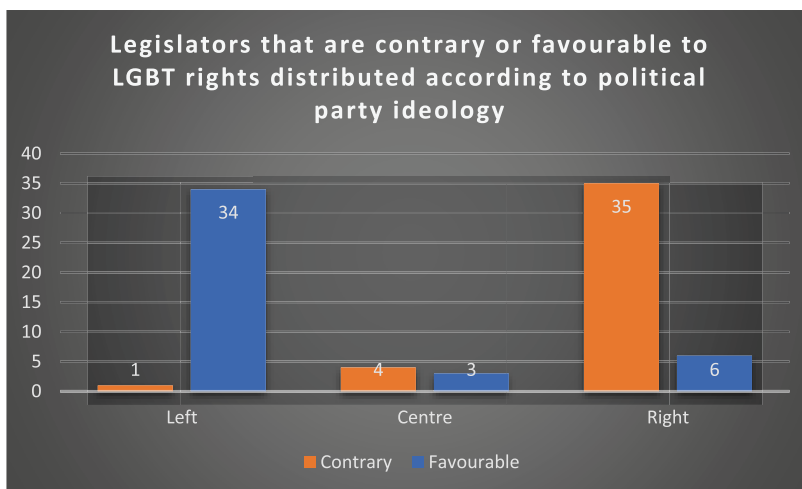
Source: elaborated by the authors, based on data collected from the Brazilian National Congress' websites.

of female legislators mobilizing proposals on LGBT rights if compared to the general gender proportion in the National Congress. Brazil has a low rate of female representation in the Legislative Branch, with approximately only 15% of female legislators in the National Congress.¹² The data also show that most of the proposals presented by female legislators are favourable to LGBT rights, while most of those presented by male legislators are contrary (Fig. 2).

¹² In the global rankings for women in executive, government, and parliamentary positions as of January 1st 2020, Brazil ranked 140th place according to the United Nations.

The Brazilian political party system is multiparty, with 33 registered political parties that can be categorized ideologically into left-wing, centre, and right-wing parties (Figueiredo & Limongi, 2001). Applying the categorization developed by Barbieri and Ramos (2019) to the bills on LGBT rights, we find that the ideology is proportionally represented in the data (Fig. 3) since most of the legislators were affiliated with right-wing parties when they presented bills linked to LGBT rights, followed by left-wing party legislators, with a small number of legislators from centre parties. Also, most right-wing legislators' proposals are contrary to LGBT rights, while most left-wing legislators' proposals are favourable.

Fig. 3 Legislators that are contrary or favourable to LGBT rights distributed according to political party ideology

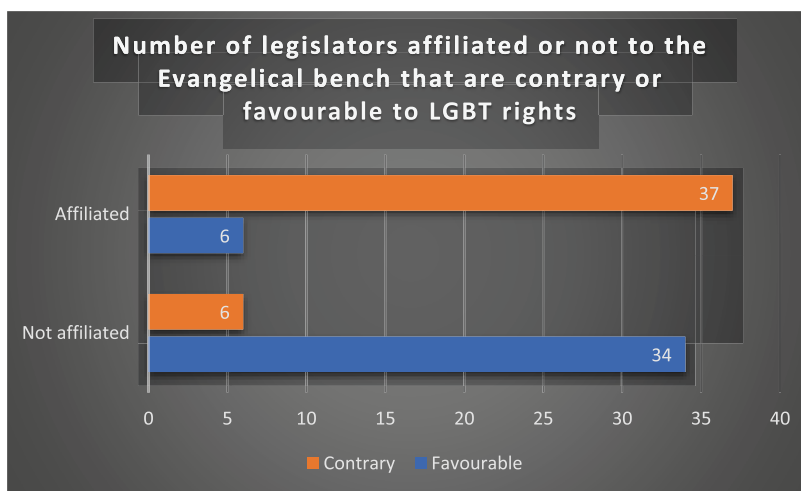


Source: elaborated by the authors, based on data collected from the Brazilian National Congress’ websites.

Finding out whether the author of a proposal is affiliated with the Evangelical Bench is also fundamental to understanding who is mobilizing the issue in the National Congress. As explained above, the Evangelical Bench is known in Brazil for opposing matters of sexuality and had a greater adherence of legislators in the 56th Legislature. With regards to this affiliation, 48.2% of the database proposals’ authors were linked to the Evangelical Bench when making the proposal; most of them were from right-wing parties, but some were from the centre, and one was from a left-wing party. Figure 4 demonstrates how this affiliation relates to the content of the law proposals presented.

So, when we consider the total number of proposals on LGBT rights, we find almost a balance between the number of favourable and contrary proposals, with a slight advantage for favourable proposals. However, when the legislative activity is analysed over the years, we see that this inversion in valuation has only recently taken place, which has also been accompanied by the engagement of a more significant number of legislators. These data do not, however, reflect a safe scenario for LGBT rights in Brazil. Not only because there is still a considerable proportion of law proposals contrary to LGBT rights (46.2%), but also because an expressive proportion of legislators are affiliated with the—conservative and against

Fig. 4 Number of legislators affiliated or not to the Evangelical Bench that are contrary or favourable to LGBT rights



Source: elaborated by the authors, based on data collected from the Brazilian National Congress’ websites.

any recognition—Evangelical Bench. Currently, there is a deadlock in the National Congress that decreases the chance of passing legislation on LGBT rights.

The Social Movement's Perspective

Given the dynamics between the Judicial and Legislative Branches and the legislative activity in the National Congress discussed in the previous section, civil society organizations often choose to mobilize the courts in Brazil. The contours that make this an attractive arena for the Brazilian LGBT movement are the subject of this section.

The academic debate on legal mobilization is extensive. It includes, on the one hand, sceptical opinions about the possibility for courts to bring up real-world social change, especially because they tend to be conservative and do not have the same resources legislative and executive branches have (Rosenberg, 1991, 2005). On the other hand, there are studies that focus on the litigation process as one possible strategy rather than on courts as agents and, even if sceptical about social change arising from courts, can see goals for mobilizing the courts that go beyond the final court decision itself. These objectives can involve the visibility of demands, possibilities of association between actors, and participation in policy debate (McCann, 1994, 2006).

From the mobilization actors' perspective, it is usually necessary to look for the most fruitful arena considering goals, resources, and possibilities. When organizations with limited human and financial resources mobilize in unfavourable conditions, they cannot dismiss available legal tools.

The possibility for civil society actors to mobilize courts depends on a configuration of institutional and sociolegal factors called Legal Opportunity Structure (LOS). This structure comprehends the configuration of power, possibilities of accessing the arena, existence of allies and opponents, and availability of cultural and legal frames (Andersen, 2005). This section addresses aspects of the Brazilian context with regard to each of those factors.

For the Brazilian LGBT movement, the legislative arena at the federal level has not shown itself able to advance public policies for LGBT persons and is not usually seen as a possible way to secure rights regarding some issues, so that organizations use to go to courts. Facchini et al. (2020) describe an increase in the mobilization for LGBT rights in Brazilian courts in the mid-2000s. According to them, activist groups search for arenas that are inclusive and make it possible for them to take part in debates that face strong opposition in the Legislative and Executive Branches. This correlates with the fact that most of the recent achievements of Brazil's LGBT movement came from decisions from the Federal Supreme Court. The tendency to go to courts when met with deadlock situations in the political arena is also identified in other Latin American countries and encompasses other vulnerable groups (Rezende, 2022).

The emphasis on the mobilization in courts is justified by representatives of some organizations with the fact that allies in Congress face a massive battle because of the conservative general profile (Côrtes, 2018). Thus, the parliamentary way is not something they would focus all their efforts on, seeing that the Federal Supreme Court has addressed even issues that polemize public opinion and the National Congress has not. This understanding of which could be a more favourable strategy came after years of mobilization and defeats in the legislative arena (Figueiredo, 2021).

Throughout its history, the LGBT movement in Brazil diversified the tools used for claiming the recognition of rights and developed strategies including lobby for legal proposals, articulation for filing legal cases, and multiple campaigns for raising awareness (Facchini & Simões, 2009).

The courts are not usually seen as the ideal and perfect arena but as the possible way to battle for rights in the Brazilian political landscape, even if there are several challenges—especially linked to costs and to accessing the arena—to overcome (Côrtes, 2018). The following excerpts from interviews with representatives of pro-LGBT organizations that mobilize the Federal Supreme Court in Brazil illustrate the circumstances and show how the dynamics explained in the previous sections affect the mobilization strategies. The quotes were extracted from the semi-structured interviews conducted by Côrtes (2018)¹³ and translated by us.

“It is complicated [the situation in the legislative power], precisely as the congresswoman Erika Kokay said; there are 513 congresspersons and her battle, the battle of someone favourable, is huge inside there. Because they do not put anything on the agenda. She said that the BBB bench, which means bullet, bible, and beef, is always there, and she says that they decide everything. Actually, in the current context of how the Congress is, I think it is difficult for them to either put on the Congress' agenda or approve anything other than what they want. This is a scenario of real setbacks concerning the rights of the LGBT population.”

[Gisele Alessandra Schmidt, member of the “Grupo Dignidade”—Brazilian LGBT organization—and the first transgender lawyer to present arguments orally to the Brazilian Federal Supreme Court] (our translation).¹⁴

¹³ The work is publicly available online as well as the interview script and the transcription of the interviews.

¹⁴ Original text in Portuguese: “É, tá complicada, exatamente como a deputada Erika Kokay ela falou né, que são 513 deputados e que a luta dele que é favorável é bem grande lá dentro porque simplesmente não é pautado absolutamente nada, né, o que ela falou sempre fica a bancada BBB, que é bala, bíblia e boi e ela fala assim que eles é que decidem tudo, né. Na realidade, assim, no atual cenário que tá lá o Congresso, eu acho difícil que vá 74 ser pautado e aprovada qualquer coisa que não seja o que eles querem, né. Isso aí é um cenário de realmente retrocesso, no que concerne aos direitos da população LGBTI.”

“So, for example, in cases discussing the rights of transgender persons, the legislative way, the political way is kind of bad, isn’t it? The parliamentary way. Thus, this is a strategy that, in this case, we are not going to use because we think it will not be as fruitful. Then we choose to focus our efforts on constitutional issues before the Federal Supreme Court.”

[Juliana Cesario Alvim Gomes, member of the Human Rights Centre of the University of the State of Rio de Janeiro (UERJ) and representative of the Latin American Centre on Sexuality and Human Rights (CLAM) and of the Integrated Lab on Sexuality and Gender Diversity and Rights (LIDIS) in the cases that addressed transgender rights before the Brazilian Federal Supreme Court] (our translation).¹⁵

Claims in this sense are supported by Bahia and Vecchiatti (2013), who mention numerous pro-LGBT rights law proposals (none of which has passed) and argue that social minorities turn to the judicial power and urge the Supreme Court to play its counter-majoritarian role when they are unable to get answers or solutions from the Legislative Branch to the discriminatory challenges they face.

With regard to the configuration of power, in the LOS, the willingness of courts and judges to decide cases and recognize the rights of a vulnerable group is a fundamental factor. In Brazil, as mentioned, the Federal Supreme Court has shown to be willing to decide about LGBT rights in a way the federal Legislative Branch never was. This is one of the factors that might influence civil society organizations to turn to courts. However, as mentioned, there is a possibility for this willingness to change if the Court’s composition changes. In that case, the social movements will have to look for alternative ways of battling for social change.

A country’s political configuration shapes the available opportunities for social movements, but, at the same time, these movements can create political opportunities with their actions (Andersen, 2005). Also, when achievements are conquered and setbacks are faced in the legal sphere (either by the group itself or similar others), they can serve as inspiration or discouragement (Gomes, 2020).

Another essential factor to have in mind for legal mobilization is the access people have to the constitutional/supreme court in each country. Although the Brazilian Constitution provides many possible proceedings, civil society organizations in Brazil face higher access barriers when compared to some other Latin American countries, such as Costa Rica and Colombia.

According to Wilson and Gianella (2019), the Costa Rican Constitutional Chamber of the Supreme Court, commonly referred to as Sala IV, receives claims from anyone in the country regardless of age, race, gender, nationality, income level, or legal training. In Colombia, in turn, cases can be filed with lower courts anywhere in the country under similar open-access conditions and cases decided by Colombia’s lower courts are automatically appealed to the Constitutional Court.

Whereas Colombian and Costa Rican Constitutional Courts have very few formalities and require no filing fees or lawyers to file a rights claim, the Brazilian one presents several obstacles to effective access. Some of them are the requirement of representation by lawyers, the need for expertise related to the Court, and specific vocabulary and clothing. Further, the Court has a quite unpredictable schedule. These challenges affect even tools that supposedly aim to democratize the arena, such as the *amicus curiae* and the public hearing (Almeida, 2015; Gomes, 2020).

When it comes to taking a case to the Federal Supreme Court in the abstract constitutional review, the rules are even more strict, and it was impossible until 2018 for most civil society organizations to do so. This happened because the traditional interpretation the Court had of the Constitution did not recognize civil society organizations as having standing to file an abstract constitutional review case (Gomes, 2020). Therefore, until recently, civil society organizations as a rule could only participate in the constitutional debates at the Court by acting as *amici curiae* or speaking in public hearings.

Mechanisms such as the *amicus curiae* and the public hearing are considered innovations towards a more transparent and democratic deliberative constitutional procedure (Gargarella, 2019). Even though public hearings at the Federal Supreme Court have an expressive civil society participation in Brazil (Silva et al., 2022), there were no public hearings for the cases focused on LGBT rights. When it comes to the *amicus curiae*, it is important to highlight as a caveat that, although the mechanism promotes meaningful pluralization of the actors who are part of the constitutional debate, the Brazilian system lacks norms that make it mandatory to consider the arguments presented by the *amici curiae* (Almeida, 2019).

The organizations that take part in constitutional debates at the Court are diverse, including academic organizations, professional entities, governmental actors, and social movements (with or without an internal legal branch). Generally, their work fields and mobilization strategies are broad (Facchini et al., 2020), but there are also legal organizations made of jurists focused on adopting legal strategies.

The institutional limitations, especially the need to be represented by an attorney, have quite an isomorphic effect on the interventions and favour those with an extensive legal “know-how”, causing them to have a legal format and language (Cardinali, 2018; Côrtes, 2018). This does not mean

¹⁵ Original text in Portuguese: “Então, por exemplo, caso de direitos de pessoas trans a via legislativa, a via política é meio ruim né, tipo, a via parlamentar. Então isso é uma estratégia que nesse caso a gente não vai muito, porque a gente acha que não vai ser tão frutífera, então a gente prefere concentrar o nosso esforço na questão constitucional do Supremo.”.

that these interventions are not important. They are invaluable, but they could be even more enriching if there was more diversity or a mechanism to also welcome other voices, not always shaped by the legal discourse. Despite these limitations, empirical studies on the interaction between civil society organizations and the Federal Supreme Court in Brazil have identified some positive developments both for the organizations and the debate (Côrtes, 2018; Ruibal, 2015).

The first time the possibility of actually proposing a case was granted happened in 2018 when Supreme Court Judge Luís Roberto Barroso decided to accept the Brazilian Lesbian, Gay, Bisexual, Travesti, Transgender, and Intersex Association (ABGLT) as a legitimate actor to file a case dealing with the right for imprisoned transgender persons to be allocated according to their gender identity (Côrtes, 2020). The reasoning for the decision involved arguing that the traditional understanding perpetuated a context in which only the groups that already had political strength had access to the Supreme Court while those who needed it the most were excluded from this possibility.

The challenges faced prevent many persons and organizations from taking their claims to the Supreme Court, especially marginalized groups and organizations with limited financial and human resources. However, they stimulate articulation among organizations and mobilization development. As mentioned, organizations engaged in mobilization can shape legal and political scenarios in the absence of current opportunities to act insofar as they can create these opportunities and influence the political configuration (Andersen, 2005). This highlights the importance of having allies and allowed LGBT organizations to take cases to the Supreme Court before 2018 through partnerships with organizations that were already recognized as having standing, for example, political parties. A great example is the case that led homotransphobia to be considered a crime. Although the official records show a political party as the applicant, the strategy was developed by Paulo Iotti, a militant lawyer who is part of LGBT organizations he had already represented before the Court as *amici curiae* (Côrtes, 2018).

Social movements have the associative capacity and can unite and search for support in different ways (Gloppen, 2006). Further, they have the possibility to establish the link between law and society, attributing new meanings to the law (Balkin & Siegel, 2006). In this manner, social movements and the law mutually influence each other.

Conclusions

This article addresses the paths towards LGBT rights recognition in Brazil considering the National Congress, the Federal Supreme Court, and the civil society mobilization. Although there are multiple studies focused on each of these

arenas, this study innovates by considering them together in a comprehensive analysis and providing an overview.

We have argued throughout the article that a deadlocked national legislature in which conservative and religious sectors are overrepresented has provided little room for advances towards LGBT rights recognition. Even though there are barriers to accessing the Federal Supreme Court, all things considered, the legal opportunity structure has been more open and productive than the political opportunity structure, and LGBT rights advocates have (often successfully) turned to the Court.

As shown, Brazil has made progress in recognizing LGBT rights, and the recognition processes happened mainly from 2011 onwards. In this period, decisions from the Brazilian Federal Supreme Court guaranteed the right to marriage for same-gender couples, the possibility for transgender people to change their names and gender markers on birth certificates, the criminalization of homophobia and transphobia, and the possibility for men who have sex with men to donate blood. Still, none of these issues was addressed in legislation by 2023.

The Federal Legislative Branch is still pending a stance on the issue, and there are law proposals aiming to, on the one hand, turn the rights recognized through judicial decisions into law and, on the other hand, legislate against what was decided by the Federal Supreme Court. The possibility exists for new legislation to represent a setback concerning these rights, especially considering that 46.2% of the bills presented in the Brazilian Federal Congress are contrary to LGBT rights, and 48.2% of the legislators who mobilize the matter are affiliated with the Evangelical Bench, a powerful institution in the Brazilian Congress. This configuration puts LGBT rights in Brazil in a position of uncertainty and vulnerability, even with the deadlock that seems to characterize the Federal Legislative power.

Aware of both the profile of legislators in Brazil and the deadlock in the Legislative arena, civil society organizations tend to not focus all their efforts on that and to take or create legal opportunities. Although the path through courts is not seen as ideal and still represents several obstacles, it can be more fruitful to articulate how to overcome these obstacles than to try to fight conservative profiles at the Brazilian Congress. The processes of recognition at hand were undoubtedly influenced by strategic litigation exercised before the Federal Supreme Court.

It is not safe, however, to rely entirely on decisions from the Court, especially considering that the outcomes of the rulings depend on the composition of the body, which is influenced by nominations made by a president who can be as openly against LGBT rights as Bolsonaro. This adds another layer to the vulnerability of LGBT rights in Brazil.

Nevertheless, the election of Luiz Inácio Lula da Silva (Workers' Party), known as Lula, for his third mandate as president of Brazil in 2022 represents some improvement in the context for now. Firstly, because most of the public policies

aimed at the LGBT population in Brazil were developed during the previous Worker's Party administrations. Secondly, for not sharing Bolsonaro's position on LGBT rights. And, finally, since the Lula administration has already at the beginning of the new mandate created a National Secretariat for the Promotion and Defence of the Rights of LGBTQIA+ People.

While the deadlock in the Federal Congress persists and the judicial decisions that recognized LGBT rights remain effective, LGBT persons continue to exercise their conquered rights. However, the conservative wave in Brazil is ongoing, as shown by the expressive election of right-wing representatives for the legislative arena in 2022. Hence, it is necessary to remain alert.

As a result of the ambition to encompass the plurality of factors involving the Legislative and Judiciary Branches and civil society organizations, the article could not explore each arena in depth. Therefore, for future studies, it can be interesting to build on the results presented in this overview to explore one specific arena or one specific right and to keep track of the developments to come.

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Code Availability Not applicable.

Declarations

Ethics Approval and Consent to Participate This study's primary research method is the document analysis of files that are public and available on official websites. Although the manuscript also quotes interviews, they are secondary source interviews that can be accessed in a published study and are publicly available on the Internet. The study does not involve human participants, their data or biological material.

Competing Interests The authors declare no competing interests.

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