A primeira e última câmara legislativa? Um estudo de caso do papel do STF na legalização da união estável homoafetiva no Brasil[+]

Leandro Molhano Ribeiro (FGV Direito Rio)

Diego Werneck Arguelhes (FGV Direito Rio)

Resumo

A literatura sobre política judicial tem teorizado a respeito do papel de tribunais constitucionais como um ator de veto no processo decisório, ao atuarem como uma espécie de terceira câmara revisora, quando acionados por minorias derrotadas no legislativo. Nesse artigo, argumentamos que essa atuação típica como ponto de veto ou ator de veto não explica casos recentes e importantes em que o Supremo Tribunal Federal (STF) foi determinante nos resultados de políticas públicas. Sustentamos que, no Brasil, existem recursos de acesso ao STF que possibilitam uma forma de participação do tribunal no processo decisório não observada na literatura: a atuação do STF na elaboração legislativa como uma espécie de primeira câmara. Ademais, apoiando-se nas cláusulas pétreas da Constituição Federal, observamos que o STF pode não apenas se sobrepor ao Congresso como ator legislativo, como pode, ainda, dar a última palavra sobre uma política pública. Descrevemos esse tipo de atuação do STF a partir de um estudo de caso a respeito da decisão do tribunal sobre a união estável homoafetiva (ADPF 132) e discutimos algumas de suas implicações normativas.

[+] Versão preparada para o encontro anual da ANPOCS, Caxambu, Outubro de 2015. Agradecemos a Andressa Carvalho, Evandro Süssekind e Luna Barroso pelo auxílio na pesquisa.

1. Introduction

In 2011, the Brazilian Supreme Court decided that the constitution should be read as directly protecting an individual right to keep a same-sex civil union for all legal purposes. In 2012, the National Council of Justice interpreted that decision as prohibiting any differentiation between the civil unions on the basis of the parties' sexual orientation; as the Brazilian Constitution says that the Law Will enable the conversion of civil unions into civil marriages, the CNJ understood that same-sex partners in civil unions could take it to the next level and marry. These two decisions – the second one, administrative, fueled by the first one, judicial – are currently the legal basis for same-sex marriages in Brazil. Such marriages are now routinely happening in the country.

This, however, was accomplished without any participation of any political branch. Some Congressmen criticized the decision; the President went on Record to praise it. But the only actual lawmaking actor involved was the Court. The challenged Law in the Court's decision was the Civil Code of 2002, which, basically reproducing art226 of the constitution, protected civil unions formed by "the union of a man and a woman". Moreover, the Civil Code did not say anything, in either direction, about same-sex marriages – once again, in doing so the Code simply copied the constitutional text. When it enacted the Code, Congress was perhaps missing the opportunity for a constitutional amendment, but in the terms of the constitution as it stood at that point it the legislators were not creating anything new.

The interplay between what legislators's rules and constitutional court's decisions has, of course, been widely studied in the literature, in several countries. Under the label of "judicialization of politics", scholars have shown how, in many democracies in whcih there is judicial review, the lawmaking process involves strategic interactions between legislators and judges. As they deliberate on a Bill, knowing that future review by a constitutional court is a possibility, legislators can choose to simply ignore the Court as a potential threat and discuss the constitutionality of the would-be Law in their own terms. They can, however, and often will, use the Court's previous decisions on these issues or similar ones in order to predict the substantive limits that would be imposed by future judicial rulings. When political minorities are expected to challenge these laws as

soon as they are enacted, the mere existence of constitutional review might be sufficient to make the court's preferences (as revealed by their past decisions) relevant in the Law-making process, as legislators try to anticipate and preempt future challenges.

However, the court's revealed preferences will be taken into account into the law-making process by means of complex interactions between different actors within the political system. As their legislative output is challenged before the court, congress and the president can react in different ways: they can (i) fully obey these decisions and stop legislating on these issues, (ii) partially take them into account as they keep enacting legislation on these issues; (iii) keep legislating on these issues while ignoring the court's signals; (iv) directly attack the decisions themselves (for example, by enacting a constitutional amendment to supersede existing judicial interpretations of the constitutional text. (Pickerill, 2004). In scenarios (i) and (ii), judicial participation in the law-making process becomes more relevant, as the court's preferences regarding the substance of permissible legislation will find their way into the legislative status quo, regardless of whether the court's participation was purely negative (as in a full, simple veto of a provision) or positive.[1]

In both scenarios, the court is therefore exerting a positive power over the political branches. But scenario (ii) contains important nuances: when other institutional actors create a law that only *partially* incorporates the court's decision, they are putting forth a compromise solution, which will then most likely be subjected to a new round of judicial review. To a large extent, the reactions found in scenario (ii) take place because executive and legislative actors wish to minimize the risk of a complete judicial rejection of their new legislative proposal. In scenarios (iii) and (iv), in contrast, the final outcome of the policymaking process on that issue is exclusively due to the political branches' preferences.[2]

---

[1] The idea that constitutional courts can (and should) only act as "negative legislators" – i.e., the can remove laws and provisions from the legal system, but not add anything new -- is credited to Hans Kelsen, in his discussion of his proposal to create a constitutional court for Austria (Kelsen, 2003). Whether the existing constitutional courts can still be considered as "negative legislators" in Kelsen's original terms is a matter of debate (Stone Sweet, 2000, Chapter V). However, as we will discuss in section II, below, as a practical matter, there are decisions by means of which a constitutional court effectively changes the substance of a law by adding something that had not been foreseen by legislators. For example, when the court reads one or more provisions into the statute in order to save it from being declared unconstitutional, or when it strikes down a law while at the same time saying that a different law, with certain provisions, could have been saved. See, generally, Stone Sweet, 2000.

[2] The likelihood of each these different scenarios taking place is influenced by: a) structural, institutional design variables, especially the design of constitutional review mechanisms (e.g., how the court's agenda is shaped; who can trigger abstract review; how can the other branches participate in the judicial decision-

In any of the scenarios sketched above, however, there is a common feature. Judicial action modulates – either directly or indirectly, by incentivizing strategic behavior – some sort of legislative *action*. The existing literature on the judicialization of politics in different national and transnational scenarios includes many variations on the possible outcomes and patterns of the interaction between "lawmakers", broadly defined, and courts. New rules are created, and the court might disagree with them to some extent, pointing to substantive changes that would be required for these rules to be constitutional; and these judicial decisions might then be anticipated in the next round of rule-making. But, in these narratives, even when they are influenced by the judicial shadow, lawmakers are still (and always) the first movers, while courts function as (actual or potential) veto players regarding the outcome of the legislative process.

In the last few years, Brazilian constitutional politics has developed in ways that point to a very different role for courts in the legislative process. The Supreme Federal Court has institutional resources to act not as a veto player, but as a *first and only legislative chamber*. Under some circumstances, when provoked by social and political actors who want to completely bypass the political decision-making process within the elected branches, the Court has delivered decisions (a) establishing rules in areas of Law where the elected branches had not taken *any* decisions for the last decades – decisions that, (b) at least in how they came to be treated by the Supreme Court itself, left no room at all for further congressional or presidential lawmaking on these topics. That is, the Supreme Court completely bypassed and foreclosed the lawmaking process.

The goal of this paper is to map the institutional conditions in which this judicial role has been taking place in Brazil, by means of a case study of the Supreme Court's decision on the constitutionality of same-sex marriage and its implications. In our reconstruction, the court's role as a first legislative chamber will appear as the outcome of a set of different variables – the political strategies by actors outside the court, the institutional configuration of the court's powers, and the specific ways by which a generation of Justices currently in the Supreme Court has been interpreting their own powers. Our discussion of the conditions under which judges have been acting as first and last legislators will reveal certain under-studied possibilities of constitutional

---

making process; who appoints the judges); and (b) contextual factors, like the intensity of political support for the court and for constitutional democracy itself, the degree of political fragmentation and the kind of policy that the political actors are trying to enact.See Rios-Figueroa & Taylor, 2006; Ginsburg, 2003.

court's role in the political decision-making process in other countries as well. Can legislative *omissions* in other countries lead to similar outcomes? If not, what properties of the Brazilian scenario have led to the judicialization of political omissions – and to high courts acting as first legislators?

The article is organized as follows. In section II, we conduct a literature review on the ways in which constitutional courts have been traditionally accounted for, in the scholarly literature, as relevant actors in the national decision-making process. Even though there are many possible variations in how constitutional politics takes place in different countries, the common image in these studies is the Court as a *third legislative chamber* (Stone, 1992) or as a kind of *veto player*. In section III, we discuss how certain institutional features of Brazilian constitutional review arrangements allow for judges to act in cases of *legislative omission* – the *mandado de injunção* and the *ação direta de inconstitucionaliade por omissão*. Such mechanisms, however, are still insufficient for the Court to fully act as a first and last legislative chamber, mainly (but not exclusively) due to the Court's own interpretation of these powers. In Section IV, we then conduct a case study of the legalization of sex-marriage in Brazil, in which the Court has actually functioned as a first legislative chamber. As the case study suggests, the *Arguição de Descumprimento de Preceito Fundamental* (ADPF) has provided the Court with opportunities to act as a first law-maker that had not been available with the mechanisms examined in section III. In Section V, we conclude by discussing how the institutional features described in section III, when combined with certain reform-centered litigation strategies from actors outside both Courts and Congress, and when interpreted in specific ways by the Justices, can produce the conditions under which the ADPF allows the Court to act as a legislator.

2. **Courts as legislators**

Constitutional Courts can play a variety of roles in the broader political decision-making process. One useful typology distinguishes between their "core" or "paradigmatic powers", which include the review and possible annulment of legislation under the constitution, and what Ginsburg and Elkins call their "ancilllary powers" (Ginsburg e Elkins, 2009).[3] Some of these ancillary roles include constitutionally

[3] To call these functions "ancillary" is not to say they are less important, but rather to point out that they are secondary in the sense that they appeared after the creation of constitutional review as a possibility, and are thus not essential features of a constitutional court.

enshrined powers to propose bills, rule on the constitutionality of political parties, decide on impeachment charges against elected politicians, and supervising elections and adjudicate problems in the electoral process.[4] Most existing comparative constitutional scholarship, however, focuses on these courts' powers to review the constitutionality of statutes, administrative measures and/or international treaties.[5]

Constitutional review includes two kinds of powers, each with its own political logic: (a) the resolution of conflicts between different political decision-makers under a vertical (federalism) or horizontal relationship (separation of powers), with the court clarifying the boundaries between these different levels of government; (b) rights adjudication, in which "the policy-making role courts is more apparent (…) because the logic of seemingly neutral dispute resolution does not really mask it".[6] Most scholarship on the judicialization of politics focuses precisely on this second dimension, as rights adjudication forces courts to determine what would be the permissible content of any statute under the constitution.[7]

More precise empirical and theoretical accounts of this kind of judicial participation in policymaking can be found in Stone Sweet's work on the French Constitutional Council as a "third legislative chamber" (Stone, 1992), which was then expanded to other Western European democracies (Stone Sweet, 2000). In his analyses of constitutional courts as *third legislative chambers,* Stone Sweet describes constitutional politics – and sometimes politics in general – as the outcome of close, recurrent legal-political interactions between courts and legislatures. (Stone Sweet 1990, 1992, 1995 e 2000).

Stone Sweet's model is built on an analysis of the actual effects of constitutional review on the broader political decision-making process. Constitutional courts' decisions

[4] Segundo os autores, o número médio de alguma dessas funções em 121 democracias analisadas era nulo até o início dos anos 1900, oscilando entre um e dois entre 1950 e 2000 e chegando a quase 3 nos anos 2000. As funções secundárias exercidas pelos tribunais constitucionais nas 121 democracias analisadas pelos autores têm a seguinte distribuições: 55% têm o poder de exercer a supervisão de eleições e julgar violações eleitorais ; 39% podem rever tratados; 30% adjudicam casos contra o Executivo; 29% adjudicam casos contra partidos políticos ilegais e 7% têm a função de rever estados de emergência.

[5] Segundo dados de 562 constituições analisadas por Ginsburg e Elkins, esse poder de controle teve um aumento proporcional crescente desde 1789 e, atualmente, mais de 80% da democracias estudas pelos autores adotam algum tipo de tribunal constitucional.

[6] According to Ginsburg and Elkins, "when the court substitutes its own judgment for that of the government or legislature, it cannot be doing anything other than policy making" Ginsburg e Elkins, 2009 : 1436.

[7] "Regardless of whether the court is functioning as a boudary-guarding dispute resolve or as a rights-enforcing constraint on goverment, a common thread in obth forms of constitucional review is judicial lawmaking" (Ginsburg e Elkins, 2009 : 1437)

actually shape the content of existing policies, as judges not only "veto" laws by voiding them but can also change their content in establishing their preferred interpretation. Moreover, as they realize the risk of their policies being challenged and defeated before the constitutional court, and because the court provides written reasons for its decisions, over time politicians will take into account constitutional arguments, extracted from the court's previous decisions, in shaping and defending their policy proposals. This mutually reinforcing interaction between judges and politicians creates a decision-making process in which legal discourse is incorporated in the political process, which then becomes *judicialized.*[8]

Judicialization's impact on the political process can be direct or indirect. In the first situation, once constitutional review is triggered, the court vetoes part or all of a given statute. In the second, as legislators decide on the contents of a given bill, they take into account the possibility of constitutional review – on the basis both of the court's caselaw and of the willingness of other political actors to challenge the policy. This leads these political actors to behave strategically, with important consequences for political interaction within the legislative arena itself, as the threat of constitutional challenges may lead to political compromises between the legislating majorities and the political opposition.

Such indirect influence can take the form of "self-limitation"[on the politicians' part], when the governing coalition *ex ante* gives up on taking a particular legislative path due to the threat of judicial review; or of "corrective revision", when legislator re-elaborate a legal text that has already been reviewed by the court so as to respond to judicial objections and, in this new attempt, secure the bill's constitutionality.[9] In any event, however, this judicialized political process is responsive to constitutional adjudication

[8] Segundo Stone Sweet, "the existence of abstract review leads (inevitably?) to the juridicization of policymaking processes; As a matter of concrete policymaking impact, constitutional courts behave as third legislative chambers whenever they engage in abstract review" (Stone, 1992 : 225). Mas conceber a atuação de tribunais constitucionais como terceira câmara legislativa não significa a considerá-los idênticos aos órgãos legislativos: não há problema no fato dos tribunais terem que ser provocados para poderem atuar; não há necessidade deles.

[9] Stone Sweet, 2002. Self-limitation can sometimes be politically beneficial to the legislating majority, in cases where it gives the government the possibility of shifting, to the constitutional courts and their legal arguments, the blame for the failure to adopt certain policies that had been demanded by the government's constituents.

and the arguments it creates, as they signal potential judicial vetoes.[10] The result is a process of "complex coordinate construction" of national policies.

There is one implicit element in Stone Sweet's model that is important for our purposes. Both when their influence on the political process is direct and when it is indirect, constitutional courts can be conceived as a *third* legislative chamber (assuming there are two chamber in the national legislature). They participate in the political process after legislators have taken the initial step, and they deliberate and decide on the basis of an actual statute adopted by a governing majority. Over time, the constitutional arguments provided by the court fuel processes of self-limitation and corrective revisions of statutes, in which the legislators try to act in a way that will decrease the risk of judicial action.[11] Even so, the first mover is always the legislature.

The court is thus intervening at the end of a formal cycle that has taken place within the legislature.[12] This, however, is not a necessary feature of the phenomenon of judicial participation in the political process. It is rather an aspect of the specific institutional design of the countries analyzed by Stone Sweet – an aspect which might not be present in other legal systems. In the next section, we will discuss some features of the Brazilian legal system which add a different element to the scenario of judicialization of politics – the possibility of high court justices enacting their preferences into positive law even in the absence of congressional manifestation on a given issue – and actually *because* of the lack of legislative output in that area of law.

3. Judicial review of legislative omissions in Brazilian law: the *mandado de injunção* as a false start

The Brazilian constitution of 1988 contains a set of mechanisms that explicitly empower the Supreme Court to exercise constitutional review of congressional *inaction.* These mechanisms, the *Mandado de Injunção* (MI) and the *Ação Direta de Inconstitucionalidade por Omissão* (ADO), were thought of as news institutional

[10] "Policy process can be described as judicialized to the extent that constitutional jurisprudence, the threat of future constitutional censure, and the pedagogical authority of past jurisprudence alter legislative outcomes" (Stone Sweet, 1995 : 207)

[11] "Constitutional jurisprudence is nothing more or less than the lasting, written record of a third reading by a third institution required to give its assent on a bill before promulgation" (Stone, 1992 : 212)

[12] A descrição do processo de elaboração legislativa como resultado da interação entre legislativo e o judiciário está presente, também, em extensa literatura sobre "diálogos institucionais" entre a Suprema Corte, o Congresso e a Presidência dos EUA na interpretação da Constituicão e construção coordenada do direito constitucional e da legislação em geral. Cf. Fisher, 1988.

solutions to an old problem. Previous Brazilian constitutions had quite a few generous and almost revolutionary provisions in terms of fundamental rights, especially social rights, which unfortunately were never enforced. These provisions almost never made any practical difference: they were not considered self-applicable – and therefore not judicially enforceable – until Congress and the president approved additional legislation.[13] As argued by many scholars since the enactment of the 1988 Constitution, and acknowledged by several Supreme Court justices over the years, the MI was conceived as an antidote for political omission in implementing fundamental rights.[14]

The MI was not the only device included in the Constitution for this purpose. In detailing the Supreme Court's powers of abstract review of legislation, Art. 103, par.2 allowed the filing of an abstract review suit (*Ação Direta de Inconstitucionalidade por Omissão,* or ADO) on the grounds that the government violated the Constitution by *its failure to enact a law.*[15] Although the purpose of the ADO is comparable to that of the MI, the mechanism is different. As an abstract review lawsuit, the ADO can be filed by a select few political actors and institutions; an MI, in contrast, can be filed by anyone who is in a situation where legislative or presidential omission has "disabled" the exercise of a fundamental right.

Both of these innovations, however, were soon interpreted in very restrictive ways by the post-transitional Supreme Court.[16] In the leading *Mandado de Injunção* case decided in 1990, (MI 107), both the MI and ADO were discussed within the more general problem of the enforceability of the Court's decisions, which was discussed by the Justices on the basis of two assumptions: (i) although congressional omissions do violate the constitution, the expected remedy – the creation of general rules to fill in the gap – was outside the appropriate scope of the Court's powers; and (ii), once we agree that the Court itself could not legislate, we should also recognize that neither could it force Congress to enact laws. In the end, all the court could do by means of a decision in a MI or a ADO was signaling to Congress or to the president that their inaction violated the Constitution. This ultimately meant that winning in an MI or a ADO case

[13] Barroso, 2001.
[14] Barroso, 2001.
[15] Article 103. (…) Paragraph 2. When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days.
[16] For detailed discussions of how the Supreme Court of the 90s read the new constitution with restrictive lenses when it came to establishing the boundaries of constitutional review, see Arguelhes (2014a); Arguelhes (2014b); Arguelhes & Prado (2015)

would only result in a judicial certification that the elected branches were violating a citizen's rights.

In such an institutional setting, the expected degree of judicialization of legislative omissions would be very low. The majority of the justices read these two institutional innovations as being the same (virtually useless) mechanism, giving parties little incentive to use them. In 1989, 1990 and 1991, the Court received 135, 91 and 90 new MIs. After 1991, however the number of new MIs drops dramatically, staying below 30 cases per year for almost every year until 2008 (see Appendix 1 for the full data). The scenario only began to change in 2008, when more than 1000 new MIs were filed. But it then changed completely: 85% of *all* 5934 MIs between 1988 and 2013 were filed in 2009 and 2010.

Although these data are preliminary and will be the object of a separate study, there is one obvious hypothesis to explain this surge of litigation using the MI, which was nearly dead in the 90s. In 2007, the Court decided two MIs (MI 708 and 712), dealing with civil servants' right to strike, in which it finally set aside the restrictive interpretation it had been adopting. In those cases, the Court decided that, considering that more than two decades had passed since the enactment of the new constitution, it could create provisional rules allowing the enforcement of rights provisions which congress had failed to regulate. These judicially-created provisions could be derogated by congress once it created the laws required by the constitution in that regard. It seems likely that, after 2007, the parties got the message: the court had a change of heart and filing a MI can actually lead to consequential outcomes in cases of legislative omission.[17]

Our preliminary data suggests, however, that this surge of MIs after the change of jurisprudence can only have a limited impact in terms of judicialization. Indeed, the subject matter of the MIs after 2008 is very restricted. Almost 88% of them were tagged by the court's own *Secretaria* as referring to "administrative law – civil servants". Taking a closer look at these cases, we found that 73% of *all* MIs between 1988 and 2013 (the absolute majority of which are located in 2009 and 2010) refer to a very specific provision of the constitution: article 40, §4o. This article guarantees that civil

[17] The Court had been tweaking its understanding of the MI for a decade before finally setting it aside in 2007. For an account of the Court's transformation of its jurisprudence in the MIs 708 and 712, see Voronoff (2011).

servants that perform dangerous or hazardous activities will be entitled to special retirement conditions, "as prescribed by law". The number of new MIs after 2008 can probably be explained mostly in terms of retired civil servants trying to obtain the same treatment administered by the Court when first applied its new jurisprudence to the first of such cases in 2007.[18]

Both of the constitutional innovations to deal with legislative omissions, therefore, had little relevance as resources for judicial participation in the policymaking process. A decision in an ADO has always meant just a judicial certification of an omission by a lawmaking authority; in the case of the MI, even after it ceased to be as inconsequential as the ADO, the explosion of litigation has centered mostly on a very specific constitutional guarantee. Although in establishing rules for the enforcement of the special retirement conditions for some categories of public servants the court *does* act as a legislator, this is an inconsequential area of law, providing limited opportunities for the Court to engage with constitutional politics as described by Stone Sweet and others. It should be noted, moreover, that the MI is very circumscribed by the constitutional text itself: it can only be filed when the constitution explicitly states, in a provision, that some kind of specific law is required of congress or other lawmaking authority before a fundamental right can be exercised.

However, there is another instrument in Brazilian constitutional law that allows the court to engage in policy areas before congress or the president have enacted any rules: the *Arguição de Descumprimento de Preceito Fundamental* (ADPF). Although the ADPF is mentioned in the original constitutional text enacted in 1988, it was not until 1999 that this lawsuit was given a more concrete form and made available for litigation.[19] It is an abstract review lawsuit, with the same standing rules as the other abstract review lawsuits before the Supreme Court.[20] In contrast to the generic "Ação Direta de Inconstitucionalidade", however, the ADPF can be used to challenge any "acts of the public powers" that violated "fundamental precepts" of the constitution. Although it was not conceived as a mechanism to deal with legislative omissions, it has been used in some high profile cases by the Supreme Court to do exactly that. In the next section,

[18] MI 721.
[19] Art. 102, par 1; Law 9.882/1999. See Dimoulis & Lunardi, 2013, p.160 (observing that the ADPF was "inactive" until 1999, and that even after that it had "limited relevance").
[20] Art. 103 of the Constitution.

we will see how litigants and the Supreme Court used ADPF 132 to legalize same-sex marriage in Brazil.

4. "The Brazilian Supreme Court legislates when Congress will not": a case study of the ADPF 132

In this section, we will discuss in detail a recent episode in which the Brazilian Supreme has been activated by litigants so as to bypass Congress and directly create rules on certain areas of Brazilian constitutional law. In the first case, the widely celebrated ADPF 132, the Supreme Court constitutionalized same-sex marriage in Brazil. The Court did so without striking a single provision enacted by Congress; instead, it interpreted the constitutional text in a way that was compatible with one and only one legal regulation of same-sex unions: full equality between heterosexual and homosexual couples in all spheres of life. In their reasoning, the Justices explicitly said that Congress had failed to update the Civil Code as the *mores* and public opinion had changed on these issues since the Constitution was enacted in 1988. Congressional inaction was presented as a necessary condition for the kind of "legislative" decision being undertaken by the Supreme Court.

Before we move to the case, however, a brief note on why we have selected it – and why it can be described as cases of "supreme court legislation". Accusing judges of "legislating from the bench" is an old and familiar practice in different countries, and it is usually grounded on alleged judicial deviation from established precedents, textual meanings or other widely accepted methods of interpretation or binding legal materials. In the ADPF132, however, the narrative of "judicial legislation" is presented by the Supreme Court Justices themselves. In their opinions in both cases, they have recognized that what they are doing is (a) something that, ideally, should have been dealt with by Congress, not by the Court; but, (b) because of Congressional inaction has threatened fundamental rights, the Court is justified in taking the step of fashioning the legal regime that should be applicable to these situations.

4.1. From Congress to the Court

Today, in Brazil, same-sex couples can get married. This recent development is the outcome of a unanimous judicial decision taken by the Supreme Court in 2011 (ADPF 132). That landmark decision was the culmination of a series of many judicial steps

that, since the 90s, had granted increased protections to same-sex couples.[21] Before the 2000s, however, such decisions would typically avoid directly facing the underlying constitutional issues of equality or individual freedom. They would focus instead on the material implications, for the right to equality, of rules that prevented people from the same gender from building and planning a life together.[22] It was not until the beginning of the last decade that lower courts began to rule on lawsuits brought by gay couples explicitly seeking legal recognition of their familial status – and even of their civil union.[23]

Even when such decisions were favorable to the plaintiffs, however, a feature of the Brazilian legal system limited their impact on the country´s constitutional law. Brazil has a dual-track system of constitutional review of legislation, combining both U.S.-style diffuse, concrete review, and a set of concentrated, abstract review mechanisms which are located only at the level of the Supreme Court. Decisions taken by any court (including the Supreme Court) in a concrete review context have only *inter partes* effect, that is, they bind only the parties involved in the litigation. It is only when the Supreme Court decides an issue by means of abstract review mechanisms that the outcome is binding to all other courts and public institutions. The limited scope of concrete review decisions eventually shaped the litigation of the legalization of same-sex unions. Even if specific gay couples could obtain a favorable decision from a high court, other courts could rule differently on similar cases. To actually change Brazilian law on same-sex unions in a stable way, one would need either a formal change in the legislation – or to have the Supreme Court issue a decision within the context of an abstract review lawsuit.[24]

The Constitution´s wording, however, poses one additional challenge for the path of enacting legislation. Art 226 states:

---

[21] For an overview of the STF´s decision within the broader context of civil rights litigation in Brazil, see Adílson José Moreira, "We are Family! Legal Recognition of Same-Sex Unions in Brazil", *American Journal of Comparative Law*, v.60, 2012.

[22] Take, for example, the 1998 decision by the Superior Court of Justice (STJ) asserting that, even in the absence of explicit legal recognition of same-sex unions, the judiciary should acknowledge the fact that people of the same gender can join their material efforts to create a life together. See Moreira, op. cit, p.1017.

[23] Moreira, p.1026-1027.

[24] See Moreira, p.1032/33 (claiming that, because "most decisions that extended full equal protection to cohabiting couples affected only individual cases, a consequence of the limited application of *stare decisis* in Brasil", "the leaders of the gay and lesbian organizations sought other ways to extend legal protection to all same-sex couples (…) that could substitute for legislative measures".). [BUT there were also Collective lawsuits by Ministério Público, gay rights as diffuse rights – p.1033]

> **Article 226.** The family, which is the foundation of society, shall enjoy special protection from the state.
>
> **Paragraph 3.** For purposes of protection by the state, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.

This explicit wording was not accidental. As Justice Lewandowski has suggested in his opinion in ADPF 132, the drafters of the provision in 1988 had been very aware that it would have blocked the recognition of same-sex couples' civil unions. But whatever the legislative intent behind paragraph 3, the provision could have easily provided a rallying point for legislators or judges eager to repel, as unconstitutional, laws protecting same-sex civil unions. Laws would not be enough. It seemed that, as the Supreme Court remained silent, the only path to create stable legal protections for same-sex unions would require amending the constitution.

On September 2nd 2003, Senator Sérgio Cabral presented to the Senate the *Proposta de Emenda Constitucional* ("Proposal to Amend the Constitution", or simply "PEC") n.70. The PEC would have explicitly changed the wording of art.226 of the Constitution, so as to remove the specification that civil unions are "between a man and a woman".[25] This formal amendment would have explicitly authorized same-sex civil unions. But Cabral´s PEC had a brief and ultimately inconsequential life within Congress.[26] In 2004, the bill´s reporter had recommended that it be debated in a public hearing with civil society organizations [*audiência pública*]. Still, Senator Cabral himself withdrew his proposal on November 5th 2006. Two weeks later, PEC n.70 was killed and sent to the congressional archives.

According to the newspaper *Folha de São Paulo*, Senator Cabral withdrew his proposal due to electoral strategic considerations. He would have backtracked in order to secure the support of Senator Marcelo Crivella – a neo-pentecostal evangelical preacher – for his bid in the electoral dispute for the governorship of Rio de Janeiro in 2007. According to *Folha,* Crivella would have explicitly required the removal of PEC n.70 as

[25] If PEC n.70 had been approved in its original version, article 226, *§ 3º* would read as follows: "For the purposes of protection by the state, the civil union between heterossexual or homossexual couples is recognized as a family entity, and the law must facilitate its conversion into marriage in the case of civil unions between a man and a woman." (translated by the authors)

[26] For more details, see: http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=61093

a condition for supporting Cabral´s campaign.[27] But the future Governor of Rio de Janeiro denied this version, suggesting instead that, given how little progress his proposal had made within Congress, he had begun to consider alternative routes to promote the constitutionalization of same-sex civil unions in Brazil.[28]

The other open path was therefore judicial, and it pointed to the Supreme Court. There had been a previous attempt to take the issue of the constitutionality of same-sex marriage to the Brazilian Supreme Court, in 2007, when a group of state-attorneys engaged in an endeavor to convince the Attorney-General at the time, Dr. Antonio Fernando de Souza, to initiate a law-suit that requested that the STF rule that it is constitutional for same-sex couples to get married. However, the Attorney-General chose not to propose this law-suit.

But another effort to judicialize the issue was in the making. On February 27th 2008, former Senator and then-Governor Cabral brought his former legislative agenda back on stage, but now via a lawsuit. The State of Rio filed ADPF n.132, asking the Supreme Court to interpret art.1723 of the Brazilian Civil Code, which basically repeats the wording of the Constitution:

> **Art. 1.723**. É reconhecida como entidade familiar a união estável entre o homem e a mulher, configurada na convivência pública, contínua e duradoura e estabelecida com o objetivo de constituição de família.

The plaintiff argued that, due to the mainstream interpretation of art.1726, the State of Rio´s homosexual civil servants could not be treated as equals with other civil servants on a number of issues, most notably the rules concerning state-provided pensions for spouses of civil servants.[29] The interim Attorney General in 2009, Dra. Deborah Duprat, on July 2nd of that year, filed a new law suit requesting the same as the ADPF 132, adding, however, a request that the decision of the Court apply to all States, not only to Rio de Janeiro, as had been requested by Governor Sergio Cabral. This suit became ADPF 178 but, upon a decision by the then Chief Justice, Gilmar Mendes, it was modified into ADI 4277.[30] In both petitions, the Court was being asked to enforce the

---

[27] http://www1.folha.uol.com.br/fsp/brasil/fc0710200627.htm; http://www1.folha.uol.com.br/folha/brasil/ult96u84800.shtml

[28] http://www1.folha.uol.com.br/fsp/brasil/fc0710200627.htm e http://www1.folha.uol.com.br/folha/brasil/ult96u84800.shtml

[29] Both the Attorney-General and the Solicitor-General wrote briefs in support of the plaintiff´s position, and a large number of *amicus curiae* brief were presented to the Court.

[30] Renamed as ADIN 4277. As opposed to the Attorney-General, Governors, although mentioned in article 103 of the Constitution, only have "special legitimacy". This means that the Attorney-General may

right to equality against the wording of art.1726, so as to assert a constitutional recognition of the right of gay couples to have civil unions, which would then be protected by the state as any other kind of family.

4.2.The Supreme Court's Decision

On May 4-5th 2011, a unanimous Court ruled that the Constitution protects stable relationships as civil unions regardless of gender or sexual orientation. [31] As we will see in section XXX, *infra*, The Justices disagreed on the exact scope of this constitutional protection, as three opinions explicitly stated that it would be up to Congress to rule on how same-sex couples should be treated in a variety of issues (child adoption, for example). Still, the Court unanimously agreed that art.226 had to include same-sex unions in the protection it gave to family units.[32] Art.226 protected the family, and par.3´s mention to civil union "between a man and a woman" was merely an example of a typical way a family is organized, but should by no means be understood as a constitutional prohibition on the recognition of same-sex unions.[33] In this way, therefore, the Court went from a constitution *prohibition* of same-sex unions to the constitutional *requirement* that these unions must be acknowledged and protected by Brazilian law.

Brazilian same sex couples then proceeded to take two other paths to obtain full equality before the law, including the right to marry. According to art. 226 of the constitution, the law must recognize the possibility of converting civil unions into

---

propose a suit questioning any law whereas the governors and the other entities which only have "special legitimacy" need to demonstrate that the law being questioned has a direct impact in the Governor's State, so as to satisfy the requirement for "thematic relevance". Therefore, in order for the Governor of Rio de Janeiro, Sergio Cabral, to have legitimacy to propose such suit, he would have to demonstrate that the interests of the State of Rio de Janeiro were specifically affected by the denial of equality to same-sex couples. This thematic relevance was proven, the plaintiff argued, because the mainstream interpretation of art.1723, when applied to the Decreto-Lei Estadual number 220, of 1975, which determined several rules for the civil servants of Rio de Janeiro, prevented homosexual civil servants from having certain rights, determining that they could not be treated as equals in comparison to other civil servants on a number of issues, most notably concerning state-provided pensions for spouses of civil servants.

[31] For an analysis of the court´s decision. Moreira, p.1037.

[32] Const protection of families extends to several different arrangments. "And const provisions do not distinguish between families derived from marriage and those solemnized by the state". The social goals of the family can be achived both by same sex and opposite sex unions." (Moreira, p.1038). "Family is an institutuion based on the premises of visibility, continuity, mutual dependence, and affection." Britto. "according to the Court, the institution of the family aims to offer emotional stability to its members and an ideal set of conditions for the development of human personality. This, not reproductive capacity, makes this institution the basis of human society." (Moreira, p. 1038).

[33] According to Justice Britto, Homssexuality as a legitimate expression of the human personality that deserves legal protection, choosing one´s partner freely is a necessary condition for individual pursuit of happiness. Gender and sexuality cannot be a legal burden (voto Britto).

marriages. Therefore, the Constitution itself grants to couple who hold civil unions the right to concert their relationship into a legal marriage. But was this provision also applicable to same-sex unions? Once again, Brazilian decentralized judicial system kicked in, with some judges accepting and some judges rejecting this argument. Some lower court decisions employed separation of powers arguments that had been mentioned by some Justices at the Supreme Court ruling. They noted that, although ADPF 132 stated that same-sex unions were under constitutional protection, the Supreme Court did not specify the full extent of legal implications and possible arrangements that would be compatible with this basic requirement.[34] It would therefore be up for Congress to decide on matters such as conversion to marriage and child adoption by same sex couples.

4.3. The National Council of Justice steps in

A new move by a new institution settled the debate in the lower courts, as the National Council of Justice (CNJ) stepped in. Although not technically a court, the CNJ is part of the judiciary (art.102 of the Constitution). It was created in 2004 to act as a "sterring committee" of the administration of the Brazilian judicial system, focusing on disciplinary proceedings against judges and the creation of policies and rules to promote judicial efficiency, transparency and accountability. On May 15th 2013, two years after the landmark Supreme Court ruling, the President of the CNJ (which is always the STF´s Chief Justice) asked his fellow CNJ members to vote on what would become Resolution n.175. Approved by 14 votes to 1, Resolution 175 [35] made it binding as an administrative matter for all public notary offices and judges in Brazil to accept the possibility of converting a same-sex civil union into a same-sex legal marriage, on the basis of art. 226, par.??.

According to Chief Justice Joaquim Barbosa, in its 2011 decisions the Supreme Court had already settled the matter in a way that did not require further congressional legislation.[36] He claimed that, as the ADPF 132 decision had clearly established that the

[34] See Moreira (1039). For examples of decisions, see Moreira, 1040, fns 103 and 104.

[35] http://www.cnj.jus.br/noticias/cnj/24686-resolucao-que-disciplina-a-atuacao-dos-cartorios-no-casamento-gay-entra-em-vigor-amanha

[36] "**CONSIDERANDO** que o Supremo Tribunal Federal, nos acórdãos prolatados em julgamento da ADPF 132/RJ e da ADI 4277/DF, reconheceu a inconstitucionalidade de distinção de tratamento legal às uniões estáveis constituídas por pessoas de mesmo sexo; **CONSIDERANDO** que as referidas decisões foram proferidas com eficácia vinculante à administração pública e aos demais órgãos do Poder Judiciário; **CONSIDERANDO** que o Superior Tribunal de Justiça, em julgamento do RESP 1.183.378/RS, decidiu inexistir óbices legais à celebração de casamento entre pessoas de mesmo sexo;

constitution forbade Congress to treat same-sex couples in different way than other couples, *in all possible dimensions*, it made no sense to wait for Congress before accepting the possibility of conversion to marriage. After all, even if Congress legislated on the matter, the only legal arrangement compatible with the constitution would still be fully equality of rights between same sex and straight couples.

5. Preliminary conclusions

The literature on the judicialization of politics across the globe has mostly been developed by observing the impacts that constitutional courts had in the policymaking process when it decides on rules that had just been created by the political branches. Some studies do focus on constitutional review of state omissions more generally, but, in these scenarios, what the court usually does is forcing the political branches to comply with existing rules.[37] Existing scholarship on judicialization in Brazil also focuses on cases in which the STF had shaped policies that had just been adopted by congress or (to a much smaller extent) the president.[38]

There is a reason why these cases are the centerpiece of judicialization studies: when it enters the policymaking process after a new statute has been enacted, the constitutional court is at its most publicly and politically exposed. When it acts as a third legislative chamber, the Court is deciding on an issue that is still very much in the governing majority's agenda. The image of the Court as a third legislative chamber, shaping law directly (by vetoing statutes or reading new clauses into them) or indirectly (as legislators start to behave strategically before the threat of judicial review), is still central to understanding judicial power in the political process.

However, in recent years, some of the most high profile cases decided by the Brazilian Supreme Court have taken a different form: the Court self-consciously stepped in to enact rules in areas in which congress had not (but should have, according to the Justices) legislated. We discussed ADPF 132 as an example of such a case, showing that it is the ADPF, and not the other two lawsuits (MI and ADO) specifically designed for

---

CONSIDERANDO a competência do Conselho Nacional de Justiça, prevista no art. 103-B, da Constituição Federal de 1988; **RESOLVE:** Art. 1º É vedada às autoridades competentes a recusa de habilitação, celebração de casamento civil ou de conversão de união estável em casamento entre pessoas de mesmo sexo. Art. 2º A recusa prevista no artigo 1º implicará a imediata comunicação ao respectivo juiz corregedor para as providências cabíveis. Art. 3º Esta resolução entra em vigor na data de sua publicação."

[37] See, in the case of Colombia, Uprimmy Yepes, 2007.

[38] See, e.g., Taylor 2007, 2008.

judicial review of legislative omissions, that has provided the Supreme Court with the most consequential opportunities to act as first legislator. ADPF 132, however, is not unique. In 2012, the STF decided, also by means of an ADPF, that the abortion provisions of the Penal Code of 1940 could only be reconciled with the 1988 constitution by creating an exception for cases in which the fetus has no brain. Still, it is not the case that this mode of operation has become pervasive in Supreme Court adjudication in Brazil. The important question, therefore, is under what set of conditions the Court will act as a *first legislative chamber*.

Although at this point our research is still at a preliminary stage, we believe that three sets of potential variables can be extracted from our analysis of ADPF 132. The first one is exogenous: litigants need to bring ADPFs with relevant topics before the Court. The incentives for such litigation are shaped in part by how close Congress would seem to be to discussing a given policy proposal, and in part by how accessible and willing to act the Court presents itself as being. This first set of variables is shaped by institutional design, which is, in turn, endogenously shaped by the Court's interpretations of its own powers.[39] Consider, for example, that Law 9.889/99 says that the ADPF can be filed against any "acts of the public powers" – and yet the Court has read it as being employable against inactions and omissions as well.[40] Perhaps a different generation of Justices would have read the same clauses in very different and more restrictive ways.

This endogenous element – judicial interpretation of the court's own powers – becomes even more decisive precisely because the scope and uses of the ADPF have been so disconnected from textual limitations. In contrast to the more circumscribed omission in the case of the *Mandado de Injunção*, which can only be filed when a constitutional provision explicitly requires the creation a specific law, the "omission" here is in the eye of the [judicial] beholder. The Supreme Court Justices have employed the language of legislative omission in cases that could perhaps be as reasonably described as cases of legislative *decision*. For example, the new Civil Code, enacted as recently as 2002, did not change existing policies regarding same sex marriage. The Justices described this an *omission*, but those legislators would arguably see themselves as presenting the

[39] Arguelhes, 2014b.

[40] Dimoulis & Lunardi, 2013, p.166. Mendes, 2009, p.76-78. Dimoulis & Lunardi also note how the scope of the ADPF is expanding in other directions as well – for example, the STF has established that, in some circumstances, it is possible to challenge *judicial decisions* by means of an ADPF (p.167).

nation with a *decision*: the existing laws are fine, and we do not need to accommodate same sex partnerships within the framework of marriage and stable unions.

In part for these reasons, the Court majority's ambitious decision in the ADPF 132 will most likely be the subject of new rounds of legislation and – once these new laws are enacted and challenged through constitutional review – perhaps even of new judicial decisions. As we saw, a majority of the Justices (and the National Council of Justices) presented their decision as actually precluding any further lawmaking attempts by Congress on this issue. It is still soon to determine whether the Court will be successful in moving from *first* legislator to *first and last* legislator on the issue of same sex marriage, and it very likely that Congress will react in one way or another. For the time being, however, ADPF 132 (as interpreted by the CNJ) stands as the law of the land: as several legislative proposals to legalize same sex marriage came to a halt within Congress, a judicial decision and an administrative resolution made this change possible in Brazil. It would be surprising if activists connected to other social and political causes missed this event, and the kind of opportunity for strategic litigation that it provides.

6. References

[…]

APPENDIX 1

Mandados de Injunção do STF -- Ano de entrada

Fonte: Banco de Dados *Supremo em Números*, FGV DIREITO RIO

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1988	51	,9	,9	,9
	1989	135	2,3	2,3	3,2
	1990	91	1,5	1,5	4,7
	1991	90	1,5	1,5	6,2
	1992	33	,6	,6	6,8
	1993	32	,5	,5	7,3
	1994	27	,5	,5	7,8
	1995	49	,8	,8	8,6
	1996	23	,4	,4	9,0
	1997	21	,4	,4	9,4
	1998	19	,3	,3	9,7
	1999	15	,3	,3	10,0
	2000	15	,3	,3	10,2
	2001	24	,4	,4	10,6
	2002	17	,3	,3	10,9
	2003	12	,2	,2	11,1
	2004	14	,2	,2	11,3
	2005	17	,3	,3	11,6
	2006	16	,3	,3	11,9
	2007	48	,8	,8	12,7
	2008	139	2,3	2,4	15,1
	2009	1370	23,1	23,3	38,3
	2010	1249	21,0	21,2	59,6
	2011	757	12,8	12,9	72,4
	2012	808	13,6	13,7	86,1
	2013	816	13,8	13,9	100,0
	Total	5888	99,2	100,0	
Missing	System	46	,8		
Total		5934	100,0		

APPENDIX 2

Mandados de Injunção – Temas

Fonte: Banco de Dados *Supremo em Números*, FGV DIREITO RIO

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Direito administrativo - servidor público	4768	80,4	80,4	80,4
	Outros temas de direito administrativo	422	7,1	7,1	87,5
	Direito civil	98	1,7	1,7	89,1
	Direito do trabalho	103	1,7	1,7	90,8
	Direito previdenciário	256	4,3	4,3	95,2
	Assuntos diversos	33	,6	,6	95,7
	Constituição Federal	38	,6	,6	96,4
	Direito eleitoral	28	,5	,5	96,8
	Processo civil e do trabalho	33	,6	,6	97,4
	Direito tributário	25	,4	,4	97,8
	Outros temas	76	1,3	1,3	99,1
	SI	54	,9	,9	100,0
	Total	5934	100,0	100,0	