



## SAME-SEX MARRIAGE IN THE BRAZILIAN SUPREME COURT

### Legal Reasoning and the Risk of a Regressive Turn<sup>1</sup>

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#### ABSTRACT

This paper investigates how far the Brazilian Supreme Court has argumentatively committed itself to upholding same-sex marriage in the face of prospective restrictive legislation based on the reasoning the court used in its 2011 ruling about same-sex domestic partnerships. The paper concludes that the separation of litigation over domestic partnerships and marriage may have led to the risk of a regressive turn concerning gay rights on this matter.

**KEYWORDS:** *same-sex marriage; same-sex domestic partnership; Brazilian Supreme Court; legal reasoning; separation of powers*

#### Casamento homoafetivo no Supremo Tribunal Federal: argumentação jurídica e o risco de retrocesso

#### RESUMO

Este artigo pretende estabelecer em que medida o STF comprometeu-se argumentativamente a sustentar a inconstitucionalidade de possível legislação restritiva ao casamento entre pessoas do mesmo sexo, com base nos argumentos que fundamentaram sua decisão sobre união estável homoafetiva. Conclui-se que a separação da litigância sobre união estável e casamento pode ter resultado em risco de retrocesso em relação aos direitos das pessoas homossexuais.

**PALAVRAS-CHAVE:** *casamento homoafetivo; união estável homoafetiva; Supremo Tribunal Federal; argumentação jurídica; separação de poderes*

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#### INTRODUCTION

The social battle for same-sex marriage in Brazil played out in the Judiciary and was accomplished through one ruling by the Supreme Court (Supremo Tribunal Federal – STF), one ruling by the Superior Court of Justice (Superior Tribunal de Justiça – STJ),<sup>2</sup> both from 2011, and one administrative act by the National Justice Council (Conselho Nacional de Justiça – CNJ), in 2013.<sup>3</sup>



What is most interesting in this case is that the ruling by the Supreme Court was in fact not about same-sex marriage, but about same-sex *domestic partnerships*. This is due to the fact that gay marriage advocates in Brazil adopted an incremental approach to gay marriage litigation, aiming first at the recognition of same-sex domestic partnerships as families under the law (Moreira [2012], note 1, pp. 1.003-7).

Based on an interpretation of the Supreme Court ruling on same-sex domestic partnerships, the Superior Court of Justice later that same year granted a lesbian couple the right to get a marriage license.

Finally, two years later, based on these High Court rulings, the National Justice Council, which is the authority responsible for regulating and supervising officials that issue marriage licenses and perform weddings, allowed same-sex marriages without the need of a prior permission issued by a court of justice.<sup>4</sup>

Between 2013 and 2016, 19,522 same-sex couples were legally married in Brazil.<sup>5</sup> In the meantime, as a reaction to these developments, Congress has been debating a new statute to expressly restrict the concept of family to heterosexual couples, therefore banning same-sex marriage (Nagamine; Barbosa [2017], p. 224).<sup>6</sup> In view of the result of the recent presidential election, won by the radically conservative Jair Bolsonaro, and of the increase in the number of conservative congressmen,<sup>7</sup> there has been concern that this or another restrictive bill will find a favorable political climate and be passed.<sup>8</sup>

Newspapers report that many gay couples rescheduled their weddings to an earlier date, fearing that they would not be able to get married anymore, once the next legislature started in 2019.<sup>9</sup>

That fear did not turn into reality during the first year of president Bolsonaro's term. Other matters—mainly a major social security reform—have dominated the political agenda thus far. But with three more years to go, the risk of a regressive turn in legislation concerning same-sex marriage is still significant.

This paper aims at assessing the chances of a statutory ban on same-sex marriage being considered constitutional by the Brazilian Supreme Court considering the *reasoning* the Supreme Court used in its 2011 domestic partnership ruling.

The goal of the paper is not to criticize the arguments used by the Supreme Court from the perspective of legal theory or constitutional doctrine,<sup>10</sup> but to establish how far the court has—or has not—argumentatively committed itself to upholding same-sex marriage in the face of (prospective) restrictive legislation when it ruled on same-sex domestic partnerships.

Clearly, the risk of a regressive turn considering same-sex marriage is not determined exclusively by the commitment of the Supreme

reviewers of *Novos Estudos* for their careful reading and criticism that resulted in the improvement of the work, and Ricardo Savignani Álvares Leite for his research assistance.

[2] The Superior Court of Justice (Superior Tribunal de Justiça) is the highest court in matters concerning federal law.

[3] Before it reached the high courts, the question made its way through lower courts. Adilson José Moreira describes this process in detail and explains why an incremental approach was the preferred litigation strategy (Moreira, 2012).

[4] CNJ (Conselho Nacional de Justiça), Resolução 175/2013. Available at: <http://www.cnj.jus.br/busca-atos-adm?documento=2504>. Last accessed on: 28 February 2019.

[5] “Em três anos, cartórios registraram 19,5 mil casamentos homoafetivos”. Available at: <http://www.cnj.jus.br/noticias/cnj/86781-em-tres-anos-cartorios-registraram-19-5-mil-casamentos-homoafetivos>. Last accessed on: 22 February 2019.

[6] In fact, Congress has been debating a number of statutes on this matter, some in favor of same-sex marriage, and others against it. Livia Gonçalves Buzolin describes and analyzes this debate in detail, taking into account the relation between Congress and the Supreme Court. According to her research, none of the bills has advanced much in the legislative process due, at least in part, to institutional aspects of the Brazilian legislative process that favor bills presented by the President over those presented by members of Congress. See Buzolin (2019), p. 110. This is a reason why the fact that the new president has an anti-gay agenda might make a difference.

[7] “Bancada evangélica cresce, mas metade não obtém reeleição”. *Folha de S.Paulo*, October 10, 2018. Available at: <https://www1.folha.uol.com.br/poder/2018/10/bancada-evangelica-cresce-mas-metade-nao-obtem-releicao.shtml>. Last accessed on: 11 March 2019.

[8] Conservative parliamentary groups in the newly elected Congress are reported to be optimistic about

advancing their political agenda. These groups, often related to Christian churches, are strongly against gay marriage and in favor of the preservation of the monogamic family formed by a man and a woman. See: Marini; Carvalho (2018).

[9] “Casais gays antecipam casamento com medo de perder direitos sob Bolsonaro”, *Folha de S.Paulo*, November 5, 2018. Available at: <https://www1.folha.uol.com.br/cotidiano/2018/11/casais-gays-antecipam-casamento-por-temer-retrocesso-em-gestao.shtml>. Last accessed on: 26 February 2019.

[10] Dimitri Dimoulis, Soraya Regina Gasparetto Lunardi, Virgílio Afonso da Silva and Paulo Gilberto Cogo Leivas make a qualitative doctrinal analysis of the Constitutional Court ruling on same-sex domestic partnerships. See: Dimoulis; Lunardi (2014); Silva (2014); and Leivas (2011).

[11] Brazilian Supreme Court justices often act individually and without much regard for coherence with past decisions. One recent example of that behavior can be seen in the way Justice Gilmar Mendes has changed his mind twice over the period of only seven years about the constitutionality of imprisoning convicted defendants in criminal cases still subject to Appeals to the Superior Court of Justice or the Supreme Court, acting as a swing vote in a highly politically charged case, involving the imprisonment of former president Luiz Inácio Lula da Silva. See: Püschel; Gebara (2018). In this context it is important to point out that, due to the Supreme Court’s institutional structure, any justice can stop any trial at will, by requesting more time to consider the case, which in practice amounts to veto power. Besides, the justice presiding over the court controls the docket and can postpone trial indefinitely. These institutional loopholes have often been used by various Supreme Court justices in politically sensitive cases and have also contributed to the court’s present legitimacy crisis. See: Arguelhes; Ribeiro (2018); and Mendes (2018).

[12] A crisis which involves the impeachment of a president and charges of corruption against several important politicians, including ex-presidents, governors and congressmen. Oscar Vilhena Vieira published

Court to its own past rulings. It may well be that coherence isn’t even one of the most relevant factors.<sup>11</sup>

Still, legal reasoning and coherence with past decisions have gained relevance due to the political context. The Supreme Court has been at the very center of the ongoing political crisis in Brazil<sup>12</sup> and under a lot of pressure regarding its relation to the Legislative and Executive branches, with accusations of erratic behavior, of surpassing its mandate, of not being impartial, and of yielding to political pressure (Dimoulis; Lunardi [2014], note 9, p. 4; Mendes [2018], note 10; Silva [2014], note 9; Nagamine; Barbosa [2017], note 5, p. 234; Vieira [2018], note 11, pp. 179, 210; Streck et al. [2009], p. 83).<sup>13</sup>

This led to a legitimacy crisis of the Supreme Court, which makes it particularly important for it to decide on the basis of legal arguments and to maintain coherence with past decisions (Vieira [2018], note 11, pp. 211-3). In face of that, the analysis of the reasoning in the 2011 same-sex partnership ruling aims at determining how difficult—or how easy—it would be for the court to yield to conservative political forces and still save, so to say, face from a legal point of view.

In other words, this paper looks at an often forgotten element of the power struggle between the Judiciary, the Legislature and the Executive, which is the relevance of legal arguments and coherence for the legitimacy of courts through the Rule of Law.<sup>14</sup>

I will start by offering a very brief view of the Brazilian Judicial System in what concerns the matter treated in this paper, focusing on the relationship between the Supreme Court and the Superior Court of Justice as well as on the legal effect of their respective rulings.

Next, I will examine the 2011 rulings by the Supreme Court and the Superior Court of Justice that led to same-sex marriage being legally admitted in Brazil. In examining the Supreme Court ruling I will focus especially on arguments relevant to the relation between same-sex domestic partnerships and marriage. As for the ruling by the Superior Court of Justice, I will aim attention at how the Superior Court of Justice interpreted the ruling by the Supreme Court as a precedent for same-sex marriage, that is, how the Superior Court of Justice built the argumentative link between the recognition of same-sex domestic partnerships by the Supreme Court and its own recognition of same-sex marriage.

Finally, I will conclude by summing up the frailties resulting from the fact that the process of legal recognition of same-sex marriage in the Brazilian experience has been based on a Supreme Court ruling about domestic partnerships and the concept of family, and by evaluating the degree to which the ruling in the domestic partnership case may represent an argumentative burden—and therefore also a political burden—to the Supreme Court if faced with regressive legislation concerning gay rights on this matter.

The practical relevance of allowing same-sex marriage is insignificant nowadays, since legal consequences of marriage and domestic partnerships are the same. The Supreme Court has itself contributed to the irrelevance of the distinction when it recently ruled it unconstitutional to distinguish inheritance rights of spouses and domestic partners.<sup>15</sup>

Still, limiting or prohibiting marriage for same-sex couples can be considered an important setback since it would mean the loss of a right. Not only that, but it would leave the door open for the reintroduction of distinctions in legal effects in the future. Most importantly, marriage seems to carry great symbolic meaning. Be that as it may, it remains a fact that many homosexual individuals consider it important and wish to get married.

### CONSTITUTIONAL REVIEW AT THE TOP OF THE BRAZILIAN JUDICIAL SYSTEM

Brazil belongs to the Civil Law tradition. The Brazilian Supreme Court is the only one with the power to judge the constitutionality of statutes or certain interpretations of statutes in the abstract.<sup>16</sup>

Constitutional control in the abstract is done by means of a few possible legal actions, that are brought directly to the Supreme Court, such as the Direct Action of Unconstitutionality, which was used in this case (art. 102, I of the Brazilian Constitution).

The Constitution establishes who is entitled to bring such direct actions, in its art. 103. In the case at hand, it was brought by the governor of the state of Rio de Janeiro and the Federal Prosecuting Office (Procuradoria-Geral da República).<sup>17</sup>

By means of a Direct Action of Unconstitutionality the entitled individual or institution asks that the Supreme Court declare the unconstitutionality of federal or state law, or of normative acts by the Administration.

There are technically no opposing parties in Direct Actions of Unconstitutionality (Dimoulis; Lunardi [2011], note 14, pp. 224-6). The plaintiff and the authority that enacted the challenged rule are heard, the head of the Federal Prosecuting Office (Procurador-Geral da República) gives a legal opinion and the Attorney General (Advogado-Geral da União) defends the challenged statute or provision (Art. 103, §1º and Art. 103, §3º of the Brazilian Constitution). Besides that, nowadays the procedure is open to interested third parties (*amici curiae*), and public hearings can be held, in which members of society have a chance to present their point of view (L. n. 9.868/1999, art. 7º, § 2º).

The rulings of the Supreme Court in Direct Actions of Unconstitutionality are binding upon the federal and state Judiciary, as well as the Administration in every level (L. n. 9.868/1999, art. 28, § único).

a detailed description and analysis of the role of the Supreme Court in the Brazilian political crisis. See: Vieira (2018), pp. 161-218.

[13] According to Dimitri Dimoulis and Soraya Regina Gasparetto Lunardi, the ruling on same-sex domestic partnerships by the Supreme Court is itself an instance in which the court preferred a result that was satisfactory from a political point of view over argumentative accuracy (Dimoulis; Lunardi, 2014, note 9, p. 17). Oscar Vilhena Vieira sees the ruling on same-sex domestic partnerships as the one in which the Supreme Court most directly challenged the will of the democratic majority (Vieira, 2018, note 11, p. 195).

[14] The relation between coherence and the Rule of Law is a theoretical premise I will not go into in this paper. For reference on this point, see: MacCormick (2005), pp. 188-203; Dworkin (1986), pp. 228-38; Püschel; Aquino (2019), pp. 187-92.

[15] Supremo Tribunal Federal, Recurso Extraordinário n. 646.721, Plenário, Relator para o acórdão: Min. Roberto Barroso, j. 10/05/2017. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=13579050>. Last accessed on: 3 December 2019.

[16] Every justice and tribunal in the country can decide constitutional matters incidentally, when they constitute a premise to the ruling of a case, as long as there is no binding ruling by the Supreme Court on the matter. See: Dimoulis; Lunardi (2011), pp. 288-9; 300-2.

[17] There were originally two different lawsuits questioning the constitutionality of the same federal statute, so they were tried as one.

Formally, the Supreme Court does not revoke statutes it rules to be unconstitutional but determines that they are not to be applied, or not to be applied in a certain way.

Alongside the Supreme Court, the Superior Court of Justice is the highest judicial authority on matters concerning Federal Law (Art. 105 of the Brazilian Constitution). It has, as every other judicial authority in the country, the power to incidentally decide matters of constitutionality but is bound by previous Supreme Court rulings in Direct Actions of Constitutionality (among other binding rulings by the Supreme Court).

Naturally, the Supreme Court is not bound by Superior Court of Justice's rulings in matters of constitutional review.

The ruling of the Superior Court of Justice on same-sex marriage is an instance of constitutional question that was decided incidentally in a case concerning the interpretation of the Brazilian Civil Code, which is a federal statute.<sup>18</sup>

In short, in this paper I will discuss one binding ruling by the Supreme Court (on the matter of same-sex domestic partnerships) and one—not binding—ruling of the Superior Court of Justice. Only the latter deals directly—albeit incidentally—with the matter of the constitutionality of a ban on same sex marriage.

As stated earlier, the idea is not to criticize the arguments used by the Supreme Court from the perspective of legal theory or constitutional doctrine, but to establish how far the court has argumentatively committed itself to upholding same-sex marriage through its ruling on same-sex domestic partnerships.

#### **FROM SAME-SEX DOMESTIC PARTNERSHIP TO SAME-SEX MARRIAGE: THE 2011 RULINGS**

##### *1. Same-sex domestic partnership at the Supreme Court*

Brazil has a very complex and detailed Constitution that contains provisions regarding family law. In its art. 226 it establishes that family is the basis of society and is entitled to special protection by the State.

On defining family, the Constitution expressly states that the domestic partnership between “a man and a woman” constitutes a family and is therefore entitled to special protection by the State. Moreover, it determines that the law must further the conversion of domestic partnerships into marriage.

Art. 1723 of the Brazilian Civil Code also explicitly determines that a domestic partnership between a man and a woman constitutes a family.

What was asked of the Supreme Court was to declare it unconstitutional to interpret the Civil Code as excluding domestic partner-

[18] There are authors who see the right to convert same-sex domestic partnerships into marriage as a simple consequence of the general binding effect of the 2011 ruling by the Supreme Court, such as Lenio Luiz Streck and Rogério Montai de Lima (2011). As we will discuss later, this is not how the Superior Court of Justice understood it.

ships between people of the same sex from being considered families for legal purposes.

The case was tried by the Supreme Court on May 2011. Ten justices took part in the trial<sup>19</sup> and unanimously voted to declare this interpretation of the Civil Code (and, therefore, of the constitutional text itself) unconstitutional. When their individual opinions and arguments are considered, however, it is possible to see a significant divide.<sup>20</sup>

Since what matters for the purposes of this paper is to what extent the ruling about same-sex domestic partnerships argumentatively implies a position of the court on same-sex marriage, I will not reconstruct the justices' opinions in full detail.<sup>21</sup>

When examined from the point of view of an argumentatively implied position on same-sex marriage, it is possible to identify in fact two lines of reasoning, which go as follows:<sup>22</sup> (a) the *systematic interpretation* line of reasoning, and (b) the *gap* in the Constitution line of reasoning.<sup>23</sup> The first one (a), adopted by six of the nine justices, is based on the systematic interpretation of the Constitution. According to these justices, to exclude same-sex couples from the concept of family would be incompatible with several constitutional principles and fundamental rights and is, therefore, unacceptable.

In the words of Minister Marco Aurélio, “the isolated and literal interpretation of art. 226, § 3º of the Constitution cannot be admitted, for it leads to a conclusion that is contrary to fundamental constitutional principles [...]”.<sup>24</sup>

It would primarily be a violation of the constitutional principles of equality (art. 5) and of non-discrimination on the basis of sex (art. 3, IV).<sup>25</sup>

In the words of Minister Ayres Britto, “equality between hetero- and homosexual couples can only be fully accomplished if it includes the equal right to form a family” (Supremo Tribunal Federal, note 24, p. 25).

Great emphasis is put on the counter-majoritarian role of Supreme Courts and the protection of minority rights.

The explicit reference made to “man and woman” in the constitutional text is tackled in different ways by justices adopting this first line of reasoning.

Some of them dismiss it by saying it was not the intention of the legislature to limit domestic partnerships to heterosexual couples.

Minister Ayres Britto, for instance, considers that “the reference to man and woman must be understood as a strategy of normative reinforcement, that is, as a way to stress that there is not to be any hierarchy between men and women, as a way to face our patriarchal tradition. It is not about excluding homosexual couples, for the point is not to

[19] Justice Dias Toffoli could not participate in the trial because he had already taken part in the case in another capacity. Justice Ellen Gracie took part in the trial and voted for the acknowledgement of same-sex domestic partnerships. At the trial session, she spoke only briefly and stated that she would give a written opinion (TV Justiça. STF, Sessão Plenária de 05/03/2011. Available at: <<https://youtu.be/SQ5iLsdMY14>>. Last accessed on: 1 December 2019). For a reason that could not be determined, her opinion is not part of the official court decision published by the Supreme Court, and, therefore, could not be considered in this article. Since Justice Gracie has since retired, arguments in her missing opinion are likely to have no influence over the court.

[20] In Brazilian Tribunals, there is no opinion of the court. Every judge writes their own opinion, and the result of the trial does not depend on there being a majority for any supporting reasoning. This means that, at least in theory, a unanimous vote in the Supreme Court may be the result of eleven different reasons, the same number as the justices that sit on the Court.

[21] A more thorough reconstruction of the arguments can be found in the works referred in note 10 and—from the point of view of critical discourse analysis—in: Moraes; Camino (2016).

[22] There are differences internal to each of the lines as well, but they are mainly in emphasis and unimportant for the goals of this paper.

[23] This difference in argument was identified also by Moraes and Camino (2016), note 30, pp. 656; 658. According to these authors, arguments based on analogy focus on the differences between heterosexual and homosexual individuals, while arguments based on constitutional principles focus on equality under the law.

[24] Supremo Tribunal Federal, Ação de Descumprimento de Preceito Fundamental n. 132, Plenário, Relator: Min. Ayres Britto, j. 05/05/2011. Available at: <http://redir.stf.jus.br/pagina.dorpub/pagina.dor.jsp?docTP=AC&docID=628633>. Last accessed on: 12 February 2019, p. 213.

[25] Among others, such as the principle of human dignity and the rights to privacy and self-determination.

distinguish heterosexuality and homosexuality” (Supremo Tribunal Federal, note 24, pp. 28-9).

According to Minister Luiz Fux, the rule was written in that way “in order to take domestic partnerships out of the shadow and include them in the concept of family. It would be perverse to give a restrictive interpretation to an indisputably emancipatory norm” (Supremo Tribunal Federal, note 24, p. 74).

Other justices, such as Minister Cármen Lúcia, acknowledge this argument to be impossible considering the records of the congressional debates that lead to the adoption of the norm, in which the goal to limit domestic partnerships to heterosexual relationships is very clear (Supremo Tribunal Federal, note 24, pp. 92-3).

The reason she considers the literal interpretation of this norm to be inadmissible is that the Constitution must be understood as a harmonious whole. Minister Cármen Lúcia says: “Once the right to freedom is granted [...] it is necessary to guarantee the possibility of actually exercising it. It would make no sense if the same Constitution that establishes a right to freedom and prohibits discrimination [...] would contradictorily prevent its exercise by submitting individuals who want to exercise their right to make free personal choices to social prejudice and discrimination” (Supremo Tribunal Federal, note 24, pp. 91-4).

Justices adopting the second line of reasoning (b), on the other hand, admit that the Constitution *does not* regulate same-sex domestic partnerships and see this as a gap in the constitutional text.

Since it would be against basic constitutional principles and fundamental rights to completely deny homosexual individuals the right to form a family, that gap must be filled by analogy. And since heterosexual domestic partnerships are the closest form of family to homosexual domestic partnerships, the rules about heterosexual domestic partnerships must be applied to homosexual partnerships, by analogy.

At first glance it might not seem like much of a difference, but this argument leaves room for distinction between heterosexual and homosexual domestic partnerships, since they are not considered to be the *same*, only *similar*. The reasoning assumes that there are (or might be) relevant differences, which means that not all rules that apply to heterosexual domestic partnerships necessarily apply to homosexual domestic partnerships.

This is made clear in the opinions of all the three justices who adopted the second line of reasoning in their opinions.

Minister Ricardo Lewandowski, for instance, explicitly states that the regulation of heterosexual domestic partnerships should be applied to homosexual domestic partnerships, but “only in aspects in which they are similar, and not in aspects that are typical of the rela-



relationship between people of opposite sexes” (Supremo Tribunal Federal, note 24, p. 112).

Minister Gilmar Mendes says that “in view of the complexity of the social phenomenon at hand there is a risk that, in simply equating heterosexual relationships with homosexual relationships, we might be treating as equal situations that will, in time, prove to be different” (Supremo Tribunal Federal, note 24, p. 138).

Minister Cezar Peluso states that not all the rules on domestic partnerships apply to homosexual domestic partnerships since they are not the same and “it is necessary to respect the particulars of each institution” (Supremo Tribunal Federal, note 24, p. 268).

None of them specifies what the relevant differences might be or what norms are not to be applied to same-sex domestic partnerships, but there are indications that they might be considering the rule that says the law must further the conversion of domestic partnerships into marriage.

Minister Gilmar Mendes, for instance, expressly refers to the conversion into marriage as an example of the aspects that could be a problem if both types of domestic partnerships were considered to be the same (Supremo Tribunal Federal, note 24, p. 195).

Finally, they also make it clear that the ruling should not be understood as excluding regulation by the Legislature (Supremo Tribunal Federal, note 24, pp. 112, 182, 269).

Minister Gilmar Mendes and Minister Ricardo Lewandowski expressly say that the ruling by the Supreme Court should be considered a temporary solution, pending statutory regulation by the Legislature (Supremo Tribunal Federal, note 24, pp. 111-2, 182).

What this closer analysis of the justices’ opinions shows is that, though it remains a fact that a six to three majority of the justices did not make any explicit distinctions between heterosexual and homosexual domestic partnerships, this point is not as uncontroversial as a unanimous vote suggests.

Besides, even the systematic interpretation reasoning endorsed by the majority of the justices is not outright pro same-sex marriage. The pleading presented to the Supreme Court framed the issue as a question of whether same-sex domestic partnerships constitute families for legal purposes. This means not only that there is no ruling about same-sex marriage by the Supreme Court, but also that, since marriage is not necessary to form a family under the law, the question of marriage doesn’t even incidentally come up in the opinions of justices that apply the systematic interpretation reasoning. Whether the justices’ argument implies the right to marry is a question of interpretation, which can be controversial in the case of some of the opinions.

Justice Ayres Britto, for instance, refers to the fact that the previous Constitution considered marriage as the *only way* to form a family under the law, unlike the present Constitution, which considers marriage as *one of various ways* to do it, so that marriage and domestic partnerships are *different*, but produce the *same result*, that is, the formation of a family under the law (Supremo Tribunal Federal, note 24, pp. 46-7).

If the relevant result is the formation of a family, and that can be achieved through domestic partnerships, does it follow that equality is satisfied by the acknowledgement of a right to form same-sex domestic partnerships? The answer to this question is unclear.

Justice Marco Aurélio states that the total impossibility of forming a family would stall the life plans of homosexual individuals and would, therefore, be a violation of their human dignity (Supremo Tribunal Federal, note 24, p. 212).

Would the relative impossibility of forming a family by marriage also be a violation of human dignity? The answer is, once more, unclear.

## *II. Same-sex marriage at the Superior Court of Justice*

Roughly five months after the ruling of the Supreme Court was issued, the Superior Court of Justice tried the case of two women who were denied a marriage license on the basis that marriage is only allowed between a man and a woman.

The case reached the court as an appeal from two previous judicial decisions against the plaintiffs. The couple argued that they were entitled to a marriage license since being of the same sex is not listed as an impediment to marriage in the Civil Code.

The statutory rule being challenged is not exactly the same as in the constitutional case, although they are both rules from the same statute, that is, the Civil Code.

It could be argued that the right to get married and, therefore, the right to be issued the necessary license is simply a regular effect of the ruling by the Supreme Court, based on the idea that, since the Constitution determines that same sex domestic partnerships can be converted into marriage and the same rules apply to either heterosexual or homosexual domestic partnerships, it makes no sense to say that same-sex marriage is legally impossible. If so, since a ruling by the Supreme Court in the abstract is binding on officials responsible for issuing marriage licenses, there wouldn't in fact be a case for the Superior Court of Justice to hear.

But this is not the way the Court itself saw the matter. It referred to the ruling by the Supreme Court but considered the question of issuing a marriage license to same-sex couples to be *different* from the question of recognizing same-sex domestic partnerships.

The panel that tried this case was made up of five justices and the vote was four to one in favor of the right of the lesbian couple to be issued a marriage license (and, therefore, of course, get married).

In this case, there was agreement among the majority concerning the basis for the decision. In the words of the rapporteur, Minister Luis Felipe Salomão, the point was to determine “whether the reasoning applied in the case of domestic partnership [by the Supreme Court] can also be applied to the case of marriage license to people of the same sex”.<sup>26</sup> He refers to the ruling by the Supreme Court and concludes that it “has indicated that the ruling adopted in that case could be applied to cases beyond same-sex domestic partnerships” (Superior Tribunal de Justiça, note 37, p. 12).

The dissenting vote is based on a different understanding of the ruling by the Supreme Court. According to Minister Raul Araújo, his colleagues are making a wrong interpretation of the Supreme Court ruling and broadening its original scope (Superior Tribunal de Justiça, note 37, p. 36).

So, this is where we stood by the end of 2011: there was a generally binding ruling on same-sex domestic partnership, but only a non-binding<sup>27</sup> ruling on same sex marriage.

There was a lot of confusion about how to interpret the ruling by the Supreme Court, especially about the possibility of converting same-sex domestic partnerships into marriage. A newspaper article from 2011 reports that in São Paulo—the largest city in the country—after the Supreme Court ruling, only 3 out of 58 registry officials were accepting such requests.<sup>28</sup>

This means that the lesbian couple who were the plaintiffs in the case before the Superior Court of Justice could get married, but other same-sex couples still had to file individual lawsuits demanding a court permit, with all the costs and risks this entails.

This situation changed when, in 2013, based on both 2011 court rulings, the National Justice Council, which is an agency responsible for the administrative supervision of the judicial system, issued its Resolução 175/2013, determining that officials cannot refuse to perform same-sex marriages or to convert same-sex domestic partnerships into marriage (Conselho Nacional de Justiça, note 3).

The National Justice Council is an administrative organ belonging to the Judicial System. It does not have either jurisdictional or legislative power, but only administrative power to regulate the Judicial System according to legislation and binding court rulings (Art. 103-B, § 4º of the Brazilian Constitution).

It is presided over by an appointed member of the Supreme Court, who at the time was Justice Joaquim Barbosa. Justice Barbosa had taken part in the 2011 trial and adopted the *systematic interpretation* line of reasoning.

[26] Superior Tribunal de Justiça, Recurso Especial n. 1.183.378, 4ª Turma, Relator Minister Luis Felipe Salomão, j. 10/25/2011. Available at: [https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1099021&num\\_registro=201000366638&data=20120201&formato=PDF](https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1099021&num_registro=201000366638&data=20120201&formato=PDF). Last accessed on: 12 February 2019, p. 13.

[27] That the ruling is non-binding means it affects only the parties to this particular lawsuit.

[28] *Folha de S.Paulo*. “Conversão de união homossexual ainda é polêmica”. Available at: <https://www1.folha.uol.com.br/fsp/cotidian/ff2105201133.htm>. Last accessed on: 1st March 2019.

The Council is composed of 14 other counselors. At the session in which the Resolução 175/2013 was passed, the representative of the Federal Prosecuting Office (Procuradoria-Geral da República) opposed it, based on the indications that some of the Supreme Court justices who took part in the trial of the same-sex domestic partnership case did not agree on the matter of same-sex marriage. As a reply to this, Justice Joaquim Barbosa stated that the difference concerning the reasoning is insignificant.<sup>29</sup>

[29] Conselho Nacional de Justiça, 169<sup>th</sup> Ordinary Session of the National Justice Council, 14/05/2013. Available at: <https://youtu.be/cL-SiREtbBbM>. Last accessed on: 2 December 2019.

The Resolução 175/2013 was passed by a majority vote and was opposed by only one of the members of the Council, Maria Cristina Peduzzi, according to whom the question of same-sex marriage must be decided by the Legislature and is therefore beyond the National Justice Council's mandate (Conselho Nacional de Justiça, note 53).

Since then, homosexual and heterosexual couples have been getting married through the exact same procedure. Still, since the National Justice Council does not have jurisdictional nor legislative power, but only administrative authority, the resolution issued by the agency doesn't have the same rank as a statute enacted by the Legislature or a final decision by the Judiciary on the interpretation of a statute or of the Constitution.

In fact, even its administrative power is debatable in this case. One political party, the Partido Social Cristão (PSC), already questioned before the Supreme Court the agency's power to regulate the matter.<sup>30</sup>

[30] Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade n. 4.966 — Andamento processual. Available at: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=4419751>. Last accessed on: 28 February 2019. Still pending trial.

Its main argument is that the Council overstepped its authority and wrongfully seized a prerogative of the National Congress (Congresso Nacional), in violation of the separation of Powers of the State. Furthermore, according to the plaintiff, the Council expanded the effects of the ruling of the Supreme Court beyond its scope, since same-sex marriage was not the object of the court's ruling.<sup>31</sup>

[31] Partido Social Cristão, Petição inicial na Ação Direta de Inconstitucionalidade n. 4.966. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3952299&prcID=4419751&id=s#>. Last accessed on: 2 December 2019. The Federal Prosecuting Office (Procuradoria-Geral da República) presented its legal opinion on this case. Contrary to the address of its representative at the session in which the National Justice Council issued its Resolução 175/2013, this time the Federal Prosecuting Office considered same-sex marriage to be simply a logical consequence of the ruling of the Supreme Court in the same-sex domestic partnership case. See: <http://redir.stf.jus.br/estfvisualizadordpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=4419751>.

#### FEET OF CLAY

The right to same-sex marriage in Brazil is based on a ruling on same-sex domestic partnerships, which does not in fact handles the matter of marriage. This resulted in soft spots that contribute to the risk of it being extinguished or limited.

Firstly, since the right to same-sex marriage was universalized by administrative regulation, it can also be de-universalized by the same means, by legislation or by a Supreme Court ruling. This would not mean the end of same-sex marriage, but couples would have to go back to individually asking for a court permit, making it considerably more difficult.

More importantly, if same-sex marriage is banned or limited by statute, the question will most certainly be submitted to the Supreme



Court. In that case, even if the court upholds its own ruling on same-sex domestic partnerships, that does not mean that it will necessarily uphold same-sex *marriage*. As shown above, both lines of reasoning that support the recognition of same-sex domestic partnerships as families under the law do not necessarily pose an argumentative constraint. The court might interpret its own precedent as being limited to same-sex domestic partnerships.

In recent years, the Supreme Court has been an important agent of progress in the protection of minority rights in Brazil (in rulings about abortion, name changing for transgender people, adoption by same-sex couples, etc.). It has done so even under president Bolsonaro, in the recent decision in which the court recognized homophobia as a crime, even in the absence of statutory provision to that effect.<sup>32</sup>

Still, the analysis of the reasoning in the ruling on same-sex domestic partnerships shows that the Supreme Court left the argumentative path clear to adaptation to a change in political climate.

Justices who adopted the *gap in the constitutional text* line of reasoning did not commit themselves to applying to same-sex domestic partnerships all the rules that apply to opposite-sex domestic partnerships. On the contrary, as mentioned above, they indicated that this must not be so.

Besides that, they indicated that the ruling by the Supreme Court on the matter should be considered a temporary solution, while there is no statutory regulation by the Legislature (Supremo Tribunal Federal, note 24, pp. 111-2, 182).

Even the justices who adopted the *systematic interpretation* line of reasoning have not expressly admitted a right to same-sex marriage, as seen above. In fact, the focus on the right to form a family might have introduced an argumentative way out of the logical implications of the *systematic interpretation* reasoning.

Considering the tension between the court and the Legislature, and since some room for legislation must be accommodated to legitimize the Supreme Court itself, a less radical conservative position such as admitting same-sex families (through domestic partnerships) while excluding same-sex marriage could very well be the court's way out of its constitutional and political conundrum.

Finally, it should be considered that president Bolsonaro will appoint at least two Supreme Court justices until the end of his term, which may affect the balance of the court, leading it in a more morally conservative direction.<sup>33</sup>

In view of that, we must conclude that the right to same-sex marriage in Brazilian law still stands on shaky ground. Even though the incremental litigation strategy used by gay marriage advocates was effective in achieving equal legal treatment, it may have resulted in

[32] Supremo Tribunal Federal, Ação Direta de Inconstitucionalidade por Omissão n. 26, j. 13/06/2019. Available at: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=4515053>. Last accessed on 03 December 2019.

[33] Since 2011, four out of the eleven justices of the Supreme Court have retired, including Justice Cezar Peluso, one of the three justices who adopted the *gap in the constitution* line of reasoning. The views concerning same-sex domestic partnerships of some of the justices who replaced them are known. Luis Roberto Barroso acted as pro bono attorney for one of the plaintiffs in the constitutional case and has published academic work expressing his approval of the legal recognition of same-sex domestic partnerships. See: Barroso (2011). Luiz Edson Fachin also has published academic work favorable to the recognition of same-sex domestic partnerships. See: Fachin (2003), p. 126. As for future retirements, two justices will leave the court until 2021: Justice Marco Aurélio and Justice Celso de Mello, both of whom adopted the *systematic interpretation* line of reasoning in the same-sex domestic partnership case.

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making the right to marry vulnerable to backlash by separating litigation over domestic partnerships and marriage, and by focusing on the right to form a family.

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