

# Public hearings at the Brazilian Supreme Court: from strategic litigation to resolution<sup>1</sup>

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We intend to advance the research agenda on the judiciary by bringing research on conflict resolution in constitutional courts closer to that on the mobilization of laws by interest groups and social movements. The Public Hearings (PAs) held by the Supreme Court are analyzed as strategic arenas for processing contentious issues in which diverse actors have opportunities to contribute to legal practices. The central objective of the article is to identify the mechanisms of connection and transmission of deliberations present in the public hearings held by the Supreme Court (STF) in the period from 2007 to 2019. The research problem was formulated with the purpose of investigating and analyzing how civil society acts within the Supreme Court. Finally, this article's main result confirms civil society organizations as the main connector of the APs held at the STF, as they represent about 40% of the organizations present, simultaneously, in more than two hearings.

**Keywords:** Supreme Courts; public hearings; litigation

## Introduction

The success of the constitutional experiences related to the development of the United States of America and the re-democratization process in Europe after World War II led to a Western-liberal model of democracy. This latter process established constitutional jurisdiction and transformed the Constitutional Courts into a virtual arena within the political system (Shapiro, 1999).

<sup>1</sup> An earlier version of this paper was presented in Working Groups of the National Association of Research and Graduate Studies in the Social Sciences (Anpocs). In 2020, the paper was presented in Working Group 03, in session four, entitled "STF under examination and the uses of the law", which was coordinated by Cristiana Losekann (UFES) and Ligia Mori Madeira (UFRGS), whom we thank for hosting the paper. We express our sincere thanks to the debaters Jeferson Mariano Silva (USP) and Fernando Fontainha (IESP-UERJ), whose contributions enriched the work. Vanessa Elias (UFABC) and Adrian Gurza Lavalle (USP) suggested significant advances when debating the paper at the 2019 Anpocs, in the Democratic Controls Working Group. Any errors and omissions in the article are the authors' sole responsibility.

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The literature indicates that constitutional courts contribute to affirming the Rule of Law and creating an environment conducive to economic growth (Skaar, Gargarella, and Gloppen, 2004). Constitutional Courts also have an essential role in activating democracy, mainly maintaining political competition and keeping fundamental rights intact. Finally, they could encourage political and social dialogue, assuming their willingness to insert political and social actors into a deliberative dynamic (Woolman and Bishop, 2008).

In Brazil, the re-democratization process promoted an expansion of the institutional performance of the Brazilian Supreme Court (*Supremo Tribunal Federal* – STF). The constitutional design resulted in: (i) the overlapping of the Court's competencies (Vieira, 2008); (ii) the adoption of a comprehensive system of judicial review, and an extensive list of parties that are eligible to file constitutional actions (Carvalho Neto, 2005; Taylor and Ríos-Figueroa, 2006); (iii) the constitutionalizing of a vast universe of public policies (Couto and Arantes, 2003; 2006; Arantes and Couto, 2008; 2010).

A set of institutional innovations then emerged in the wake of the STF's empowerment process, aiming to minimize the resulting counter-majoritarian difficulty (Bickel, 1962). The *Amicus Curiae* and the Public Hearings (*Audiências Públicas* – AP) (Marona and Rocha, 2017) are good examples. In the first case, interested third parties – who are not the litigants – can speak on the constitutional issue raised as a “Friend of the Court” (Almeida, 2019). On the other hand, AP supposedly expand the levels of information and legitimacy of the Court's decisions (Marona and Rocha, 2017). However, literature has shown that the alleged enhancement of participation opportunities for society is more formal or symbolic than substantive (Leal, Herdy and Massadas, 2018).

These institutional innovations also constitute legal opportunities for strategic litigation – legal mobilization (Navia and Ríos-Figueroa, 2005; Sieder, Schjolden and Angell, 2005; Wilson and Cordero, 2006; Kapiszewski and Taylor, 2008; Couso, Huneeus and Sieder, 2010). In this study, the formal and descriptive analysis of the activity of civil society organizations (henceforth CSOs) in the STF, based on their performance as exhibitors<sup>6</sup> in AP, intends to confirm this latter hypothesis. Still, we do not dismiss the former, which is possible using the deliberative system approach.

We observe the *connections* set up by organizations' participation in the different arenas that constitute the comprehensive deliberative system<sup>7</sup> of contemporary democracies. Mainly, we are interested in the AP that took place at the STF. We have

<sup>6</sup> According to Marona and Rocha (2017), there are three types of participation in the APs of the STF: as spectator, without the right to issue an opinion, sending suggestions, documents useful for clarification of the issues to be discussed in the AP, by printed or electronic means and, finally, as exhibitor, in which case prior registration and approval by the Rapporteur is required. AP exhibitors are appointed to the proceeding by the parties, by state bodies and entities, and civil society entities, or by stakeholders requisitioning their participation.

<sup>7</sup> The systemic turn in the scope of deliberative theory gained more expressive contours after the publication of the book organized by John Parkinson and Jane Mansbridge (2012), entitled *Deliberative Systems*. Before its publication, however, it is possible to find the beginnings of this systemic turn in an article by Jane Mansbridge (1999) about the importance of everyday conversation for resolution in politics. John Dryzek, in his 2010 book, also proposes a systemic deliberative model.

identified the mechanisms capable of promoting the *transmission* of the resolutions made in a deliberative arena to the others. Objectively, we aim to understand how the solutions from the periphery of the system (public sphere) can influence the decisions produced in the center (legislative, executive, and judiciary), to use the language of Habermas (2006), Dryzek (2010a) and, more recently, the developments of Boswell, Hendrix, and Ercan (2016).

We assume that the transit of actors implies the circulation of ideas, arguments, values, and deliberations. However, only a comparative qualitative analysis of the content of the actors' presentations could provide the necessary analytical robustness to the data that would support that assumption. In this way, we would confirm that these are transmission mechanisms or connections in deliberative systems. However, we have evidence pointing in this direction and can guide future research.

The first section briefly reviews the theoretical framework that structures the analysis of the AP at the Brazilian STF, presented in the section that follows. Next, the third section presents the adopted methodology. Then, to conclude, we offer the results and some final considerations.

### **Deliberative systems, constitutional courts, and legal mobilization: working at an intersection of research agendas**

Traditionally, the Constitutional Courts' image is not conducive to expanded resolution (Nino, 1998). However, developments in deliberative theory (Habermas, 1995; 1997) have made it possible to advance in capturing the democratic role of the Courts. Ely (1980) and Sunstein (1995) point out that the Constitutional Courts could guard the democratic deliberative process. Fung and Wright (2003), Gastil and Levine (2005), Goodin (2008), and Parkinson and Mansbridge (2012) go further: they conceive the Courts as interlocutors within a participatory-deliberative system, which promotes the public use of reason (Habermas, 1995).

The counterpart is the perception of democracies as a comprehensive system consisting of interconnected parts (or arenas) (Parkinson and Mansbridge, 2012; Elstub, Ercan and Mendonça, 2016). The deliberative system theory claims that the processes of resolution that take place in one arena are open to the influence of others<sup>8</sup>. Accordingly, we assume that actors carry their interest issues, arguments, and discussions from one arena to another. On the other hand, institutional deliberation is carried out under strictly defined rules that establish the Government's bodies and/or sectors that make up the deliberative process (Quirk, Bendix and Bächtiger, 2018). That is why the institutional

<sup>8</sup> Studies carried out at the municipal and state levels allowed the relevance of government players to be observed as the main connectors of the subsystem (Silva and Ribeiro, 2016; Silva, Ribeiro and Ramos, 2018). Associated with a multilevel analysis, that is, with the insertion of data from another subsystem – that of state human rights conferences – these studies indicated new perspectives: strong ties between the two levels and expressiveness of the role of civil society as a connector.

design must be considered a variable of fundamental importance for structuring deliberative subsystems (Smith, 2009; Mendonça, 2016). When it comes to possibilities and patterns of access to the Courts, the concept of legal opportunity for strategic litigation (legal mobilization) allows us to capture the institutional element. It indicates various processes through which both individuals and social groups use standards, discourse, or legal symbols to influence public policies or behaviors (McCann, 1994).

The concept of legal opportunity stems from the idea of political opportunity (Koopmans, 1999; Tarrow, 1999), which is outlined by both structural and contingent factors, formal or informal, and is used by social movements and organized groups in society according to the resources available and their objectives. Virtually, changes to the framework of political opportunities should alter the strategies of social movements, following the fundamental doctrine in Political Science that “institutions matter”.

However, the judiciary has its institutional characteristics – specific rules for access and development of the judicial process, legal language, and specialized players – which should have analytical implications regarding political opportunities. Legal opportunities (Hilson, 2002; Andersen, 2005) denote the political-legal environment, which provides incentives and constraints for individuals and civil society organizations (CSOs) to litigate, affecting their expectations of success or failure (Vanhala, 2006). In these terms, we categorize the AP as an institutional innovation with the potential to expand access to constitutional jurisdiction (Marona and Rocha, 2017) within the framework of legal opportunities with an impact on the mobilization pattern of the law.

### **Constitutionality control, “friends of the court”, and public hearings at the Brazilian Supreme Court: brief considerations**

The STF is the leading institutional player in the Brazilian constitutional jurisdiction. By judging constitutional actions (ADI, ADO, ADC, and ADPF), the STF exercises concentrated control of constitutionality, evaluating the adequacy of a specific law or normative act to the constitutional order, in response to the demand of particular players, listed in article 103 of the 1988 Constitution. The list of eligible parties is quite broad, even in comparative terms (Carvalho Neto, 2005; Taylor and Ríos-Figueroa, 2006<sup>9</sup>). The STF also acts in the constitutional jurisdiction through the judgment of REXT (Extraordinary Appeals) that also convey (concrete) demands relative to the meaning and scope of the Constitution. The design favors an intense pattern of activation of the STF.

<sup>9</sup> In European countries, for instance, legitimacy is usually restricted to representatives of subnational governments (states, provinces, etc.), a fraction of members of the lower house (and the upper house, if any), in addition to the representative of the federal government itself. In Brazil, the number of members of parliament required to propose actions is lower (any party represented in Congress); furthermore, in addition to the representative of the federal government, the Attorney General also appears on the list of eligible parties. There is also the provision of legitimacy to national associations and entities, and explicit authorization to the federal council by the Bar Association to file constitutional actions.

There are at least two other means of access to constitutional jurisdiction that we should highlight. First, there is the possibility that an interested third party will intervene in the constitutionality control process as a "Friend of the Court" (Law 9.868/99). The same act also provides for Public Hearings at the Brazilian Supreme Court (STF) – regulated subsequently by the By-Laws of the Brazilian Supreme Court, which expanded the possibilities of their occurrence, eliminating the need for a specific Direct Action of Unconstitutionality (ADI).

Act 13.105 introduced several new provisions allowing *amici curiae* to spontaneously request participation in the process or even be called on by the parties or the judge (Rapporteur) of the action. It is up to the Rapporteur to decide whether the amici can join the lawsuit, considering his ability to contribute to the resolution of the controversy. Over the years, the capabilities of the amici in the process have been expanded. Currently, there is the possibility of oral support, hearings in offices, and gathering documents and information throughout the process.

In general, there are few restrictions on the entry of *amicus curiae*. Its relevance in shaping the STF's agenda is remarkable: between 1999 and 2014, more than 2,000 amici curiae acted in about a third of the total actions involving the judicial review, at a ratio of almost three amici per share (Almeida, 2016). The growth trends both in the number of amici curiae and in the percentage of lawsuits that have at least one organization manifesting itself in this capacity indicate a tendency to approach the reality of the Supreme Court of the United States of America, where up to 85% of the lawsuits involved amici curiae (2000).

In particular, the strategic litigation of organizations that defend rights encompasses the amici curiae performance: 368 organizations of this nature acted between 1999 and 2014, which represents 18% of the total amici curiae in Court in that period (Almeida, 2016).

Moreover, at the STF, the AP is an instrument for opening constitutional jurisdiction to Society, in line with Häberle's (1997) perspective on the democratic interpretation, which challenges constitutional hermeneutics in the light of democratic theories. By 2017, the Court had held more than 20 AP, on the most diverse topics, both in ADIs and ADPFs (Direct Action of Unconstitutionality and Inquiry of Noncompliance with Fundamental Precepts) processes and appeals (REXT).

More than 400 participants worked as exhibitors in the AP by 2014 – that is to say, they could defend (in person, orally) their points of view or those of the institutions they represented during the event. The exhibitors ranged from 11 to 50, and social organizations represented 37% of the total, followed by experts, who corresponded to 30%. Class entities and professional organizations outnumber associations, movements, and other types of groups (Marona and Rocha, 2017). Finally, concerning the sphere of activity, it is clear that there is a predominance of representatives from institutions located at the national level: 143 (67%) worked at the federal level, followed by 63 representatives

of bodies and institutions at the state level, and only eight at the municipal level (Marona and Rocha, 2017).

The APs represent an exciting object of analysis in this analytical framework since they are an opportunity for social players to exercise influence on issues examined by the STF. It is important to emphasize that the courts' performance impacts the panorama and the network of relationships that comprise the legal demands of organizations. Therefore, courts resolve disputes over the meaning of rights and prevent, incite, structure, displace, and transform conflicts across society, influencing the strategic actions of civil society organizations. One of the ways whereby courts do this is by acting as catalysts for public agendas: they increase the relevance of the issue, privilege some parties that have shown interest and create new opportunities for these parties to mobilize around the cause. As a result, the Court's performance provides symbolic resources for mobilization efforts in various fields. Litigation and other forms of political mobilization of the courts are part of multidimensional campaigns of social movements and civil society organizations. Law is one of the resources that can be mobilized by such groups, although its effect on social struggles is contingent.

In addition to the strategic dimension of analyzing the political mobilization of the law and the courts, it is also worth mentioning that the constitutional interpretation affirms the conception of a fair and legitimate society that invests its members – individuals, groups, and organizations – in a common worldview. This constitutive power is not the identifiable product of individual court decisions but expressed in the collected cultural legacy of its performance.

As an event inserted in a *deliberative subsystem*<sup>10</sup>, it is worth noting how the social players operate as connectors in the public hearings arena, carrying the topics, arguments<sup>11</sup>, and discussions conducted throughout the resolution process.

## Methodology

It is necessary to clarify some aspects of the collection and assembly of the database. The data were collected from the STF online database from 2007 to 2019. Only unidentified exhibitors were no longer considered in the analyses. When it was impossible

<sup>10</sup> We assume the methodological impossibility, today, of researching the deliberative system as a whole. Therefore, we suggest identifying subsystems, which can be reconstructed according to (a) the *nature* of arenas; (b) the issues discussed; or (c) the *territoriality* of the arenas. The first criterion highlights the arena of participatory forums, such as policy councils, public hearings, conferences, legislatures, parties and the connections between them. The second possibility is to define subsystems around policy *issues*. Topics or discursive clusters guide the political action around which the deliberative processes are organized. Subsystems of education, youth, human rights, and children's and adolescents' rights are examples. Finally, researchers could define subsystems within the *territoriality* of deliberative systems. Subsystems can be defined by their connection to a geographical space: a city, a region, a country, etc.

<sup>11</sup> The arguments can be understood as the means used by the players to support their ideas, in order to persuade or convince their audience (Perelman and Olbrechts-Tyteca, 1996).

to identify the organization represented by an exhibitor, we referred to it by the speaker's name. We gathered information about the exhibitors in 28 APs at the STF, and we organized an affiliation matrix to visualize how social organizations joined them. Then we managed an affiliation network to describe how they operate as connectors in deliberative subsystems.

The data have limitations, as it was impossible to consider the following elements: (1) organizations that requested to participate in the hearings and were rejected; (2) organizations that interfered in the litigation by other means, such as mandatory legal determination or institutional design<sup>12</sup>. In addition, there is no information on the preferences of justices that could influence the invitation or exclusion of organizations to act as exhibitors. Finally, we do not have information on actors and/or organizations represented by other organizations<sup>13</sup>. Therefore, analyses refer only to the performance of organizations that have reached this venue of formal participation within the STF. The theoretical and analytical formulations of Social Network Analysis<sup>14</sup> were employed following a specific technique: Affiliation Networks or Two-mode Networks. This is a technique that allows analyzing the co-participation of players in particular events, in this case, the AP at the STF. Unlike previous studies by Silva and Ribeiro (2016; 2018), the focus was on organizations (and not individuals) as connectors. However, we assume that exhibitors are experts, with a status similar to the organizational player, which justifies a possible individual referencing the exhibitor.

The methodological assumption underlying the following analyses is that the organizations present in more than one deliberative arena have a strong interest in the topics discussed. Therefore, we take the topic as an inducer of connectivity between the arenas, affecting the organization's performance, which can operate through its representatives as a vehicle that conveys information, arguments, discourses, and resolutions within the scope of the deliberative system.

## Results

The results indicate a promising path to follow. Thus, it is necessary to clarify the initial purpose of the efforts undertaken here to identify possible organizations acting as connectors of the analyzed subsystem. The techniques employed come from structural

<sup>12</sup> An example would be the Attorney General's Office, as the law determines its mandatory presence in APs.

<sup>13</sup> Our thanks to the reviewer who drew attention to this point.

<sup>14</sup> The field of social network analysis, which we use here, allows meso-level approaches – that is, with a focus on the relationships established between individuals, who, supposedly, have different performance spaces, crossed by their friendships, work relationships, leisure, sport, family etc. Generally, belonging to these different fields places individuals present in them in situations of contiguity in relation to a set of tastes and affinities. In other words, belonging to the fields tends to make individuals share or have great affinity related, for example, to the music they listen to, the movies they watch, the books they read etc. Thus, common and related themes can connect them (Faria, 2017; Lins, 2017; Silva and Ribeiro, 2018).

analyses, resulting in a “snapshot” defined in time and space. At a later stage of the research, we introduce combined qualitative techniques capable of broadening and deepening the analyses.

### *The presence of organizations and the role of the exhibitor*

From 2007 to 2019, the STF addressed 28 different topics in the APs held by it, in which 497 representatives of organizations<sup>15</sup> and 88 individuals with no identified link to the organizations participated as exhibitors<sup>16</sup>. In addition, during the period analyzed, the CSOs had 716 opportunities for participation.

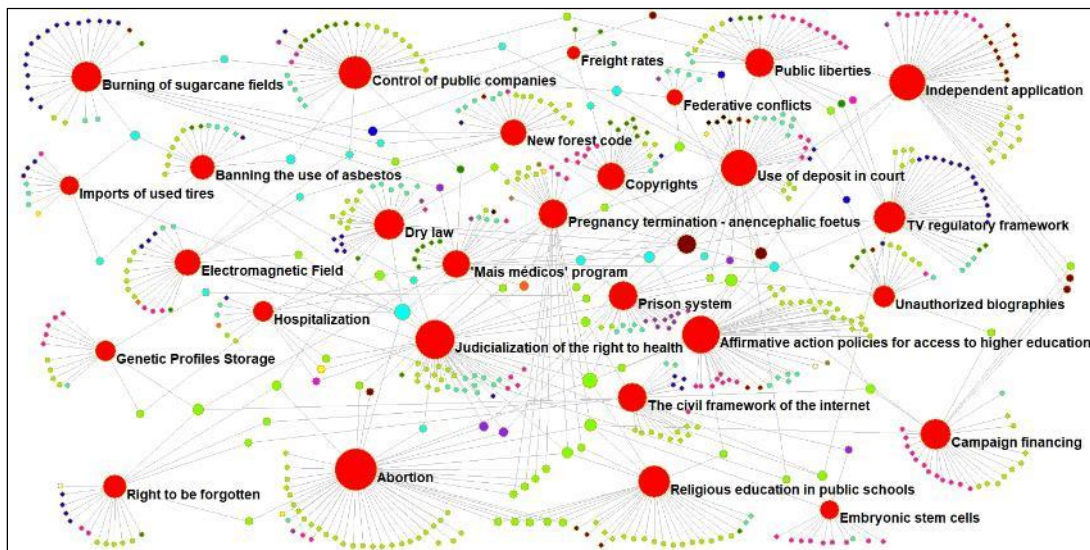
Depending on the number of exhibitors mobilized, it is possible to identify the attractiveness of a few discussions. We highlight the APs on “abortion” (53), “judicialization of the right to health” (47), “affirmative action policies for access to higher education” (44), “use of deposit in court” (41), and “independent application” (41). In contrast, the APs on “freight rates” (06) and on “federative conflicts” (08) were the ones that created the least opportunities for the performance of the exhibitor function.

It is not known, for sure, why certain levels of participation vary. We can resort only to the generic explanation that the high degree of discretion of the Rapporteur is a condition for this to be possible (Marona and Rocha, 2017). However, it is possible to see how the organizations operated through their representatives, mediating the discussions held in several APs in the STF. The sharing of exhibitors connected all the topics discussed. The predominance of the green color in Figure 1 below shows the importance of **civil society organizations**: of the 497 organizations that sent representatives to operate as exhibitors, 230 (39.32%) were organizations from the “civil society” segment.

<sup>15</sup> To identify the organizations, we have considered the exhibitors' self-declaration as representatives thereof. It was not possible to identify the organizations of 88 exhibitors, which we will refer to in the article as “undeclared representation”. We kept this group in the analysis, since they acted directly in the deliberative process in the APs.

<sup>16</sup> Participation in the APs as an exhibitor can be achieved through an invitation by the justice responsible for calling the AP, appointment by the parties or third parties involved in the proceeding, and through enrolments made directly by the expert interested in speaking out (Ariede, 2011). However, it should be noted that the criteria for submittal of invitations or the decision to grant/deny applications are not clear – that is, “we only know who has access to the Court, but not who cannot get access and why they cannot” (Guimarães, 2020, p. 262).

**Figure 1**  
**Exhibitors and topics in APs in the STF (2007-2019)**



**Source:** Elaborated by the authors from STF data. Available at <http://portal.stf.jus.br/audienciapublica/audienciaPublica.asp?tipo=realizada>. Accessed on: 26 May 2022.

**Legend:** red, APs/ topics; light green, representatives of civil society; light blue, governmental representatives; pink, unidentified representation; dark blue, market representatives; dark green, representatives of professional categories; brown, representatives of the legislative branch; purple, representatives of the judiciary branch and/or the justice system; yellow, public policy council; black, external control body; orange, professional regulation board; grey, others; white lawyer.

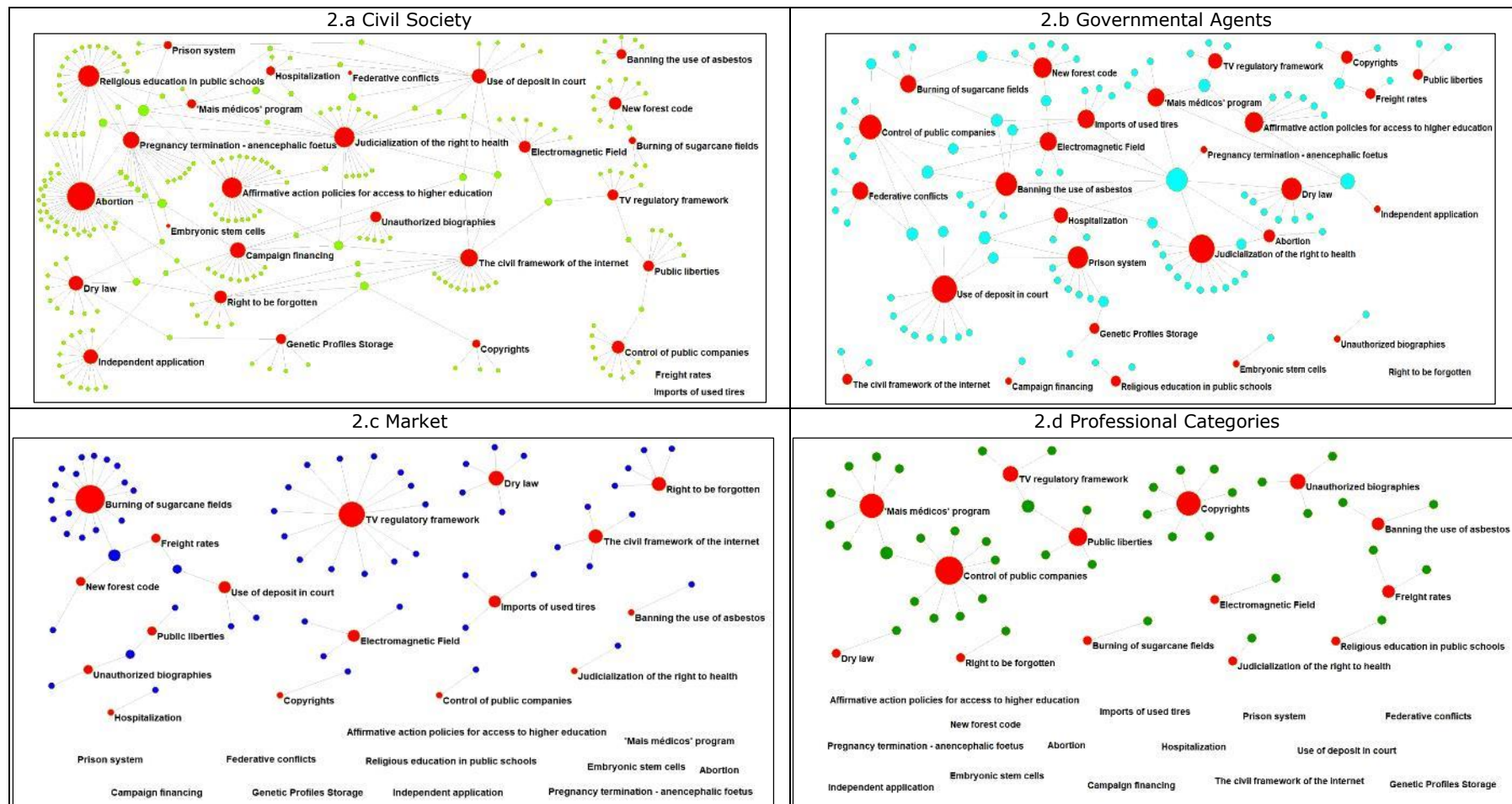
The second group with the most significant presence in APs in the role of exhibitor was “governmental agents”. Ninety-nine organizations (16.92% of the total exhibitors) hold this function. The “market” segment occupied the third place among the groups represented as exhibitors (62 organizations, or 10.60% of the total). Finally, representatives of the “professional categories” segment corresponded to 41 organizations, equivalent to 7.01% of the exhibitors.

Figure 2 compares the performance of the four segments that played the role of exhibitor most often to analyze the organizations’ fulfillment, according to their division and their topics of interest. Civil Society Organizations (CSOs) are not only more present in the STF hearings, but they are also the ones that most connect the topics discussed. Therefore, they play a fundamental role in integrating the deliberative process via AP in the STF. However, some issues have proven to be more attractive for this sector: the discussions on *abortion* (43), *religious education in public schools* (25), *higher education racial affirmative policy* (24), *judicialization of the right to health* (23), *the civil framework of the internet* (17), and *pregnancy termination – anencephalic fetus* (16) stand out. On the other hand, the group of matters not connected to any other in this segment were: (1) *banning the use of asbestos*, (2) *importing of used tires*, and (3) *freight rates*. While the

first (banning the use of asbestos) had six representatives from civil organizations, the last two (imports of used tires and freight rates) did not register a declared presence of members from civil society acting as exhibitors.

The group of governmental agents was the second segment with the most significant capacity to connect AP issues in the STF between 2007 and 2019. However, in addition to a smaller number of representatives of this segment in the role of exhibitor compared to CSOs, governmental agents play a lesser part in connecting topics (Figure 2.b). The issues with the most remarkable presence of members from this division were: *judicialization of the right to health* (13), *use of deposit in court* (12), *control of public companies* (10), *banning the use of asbestos* (9), and *prison system* (8). In addition, considering the role of government agents as exhibitors, seven topics stand out: the *right to be forgotten*, *campaign financing*, *embryonic stem cells*, *religious teaching in public schools*, *public liberties*, the *civil framework of the internet*, and *unauthorized biographies*.

The market segment (Figure 2.c), although standing out as the third group with the highest presence in APs in the STF, showed a low capacity to connect topics. The “professional categories” group – the fourth most present segment in public hearings (Figure 2.d – followed the same pattern. In both cases, the AP attendance focused on specific issues; therefore, the “market” and “professional” attendance in public hearings was specific and concentrated. Regarding the “market” segment, the most attractive topics were the *burning of sugarcane fields* (17 exhibitors) and *the TV regulatory framework* (14 exhibitors). The most engaging issues for the group of representatives of professional categories were *control of public companies*, with nine attendances, the *'mais médicos' program*, and *copyrights*, both with seven registered attendances.

**Figure 2 – Segments and topics in APs in the STF (2007-2019)**

**Legend:** red, APs/ topics; light green, representatives of civil society; light blue, governmental representatives; dark blue, market representatives; dark green, representatives of professional categories.

**Source:** Elaborated by the authors from STF data. Available at: <<http://portal.stf.jus.br/audienciapublica/audienciaPublica.asp?tipo=realizada>>. Accessed on: 26 May 2022.

Burning of sugarcane fields and the TV regulatory framework cases, the technical specification of some topics, and their link to niche markets' specific interests can explain the "market" activity in related APs. On the other hand, in the case of the AP on *banning asbestos*, the explanation for lower "market" presence seems to be another. The focus of the discussion, which took place in terms of "public health", was decisive. We should also consider that the participation was oriented in terms of a federative conflict, explaining the interest of the governmental segment.

The AP on *the burning of sugarcane fields* also brought, as a background, the federative conflict, mobilizing governmental segments. Furthermore, we noticed a clear relationship between this topic and other discussions on environmental protection. For example, from the perspective of governmental representations (Figure 2.b), as an exhibitor, the issue is directly linked to discussions on the *new forest legal code*, the *import of used tires*, and *banning the use of asbestos*.

From the view of civil organizations (Figure 2.a), the low attractiveness of these topics for the segment draws attention. What most caught the attention of the CSOs was the AP on *banning the use of asbestos*. However, exhibitors participated in the discussions representing specific organizations that have not taken in any other AP during the analyzed period. The *new forest code* discussion followed almost the same pattern; however, it was connected to the AP on the *burning of sugarcane fields* through an organization called Luiz de Queiroz Higher School of Agriculture.

Particularly in the case of the *prison system*, the fact that this AP is attractive to the governmental segment – and peripheral to the rest – is explained in terms of debate framework: the discussion was held in Court in terms of public security, a dimension of reduced participation, as the literature points out (Silva, 2010). On the contrary, one would expect the low attractiveness – especially for civil organizations – would have to be overcome if the public hearing was to be accepted and held in human rights terms. Nevertheless, unfortunately, such a theory lacks an analytical treatment anchored to qualitative techniques capable of pointing out evidence.

#### *Organizations as topic connectors in the AP*

The topics operate as inducers of participation in the deliberative systems, as they take the political players to the particular issue arenas. That is why we analyzed the presence of the organizations in the AP in light of the exhibitor's role. We also examined the performance of a select group of organizations responsible for connecting the set of topics discussed from 2007 to 2019 within the STF. We have tried to indicate the organizations that perceived in AP the opportunity to participate in thematic discussions linked to their political interests.

In all, 80 exhibitors connected the topics; 78 had declared to represent organizations, and the other two exhibitors did not declare any link. The *AP mode* among

the connecting organizations was the presence in 2 hearings<sup>17</sup>, and the *average* was 2.65 hearings. The two statistics indicate the performance of a small group of organizations participating in more than two (2) APs.

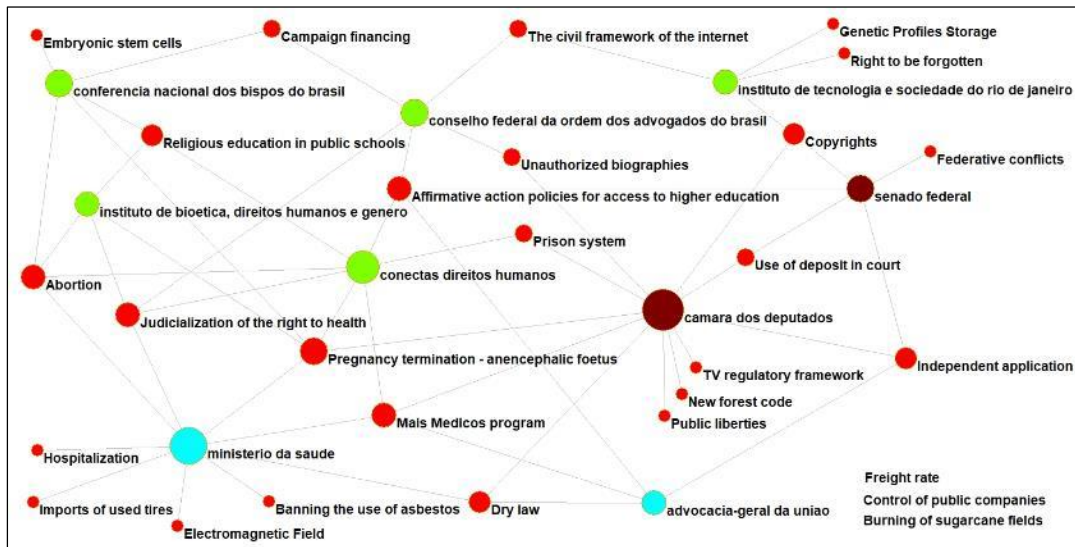
In the period analyzed (2007 to 2019), 24 organizations participated above the average, of which 15 sent an exhibitor to 3 APs. The House of Representatives and the Ministry of Health stand out in such groups, attending 11 and 9 hearings, respectively. Among the CSOs, the most active is *Conectas Direitos Humanos*, with 7 APs in the STF. The Episcopal Conference of Brazil (CNBB) and the Federal Council of the OAB (Bar Association) appear second, with 5 APs. To complete the list, the following all attended 4 APs: the Attorney General's Office (AGU), *Instituto de Tecnologia e Sociedade do Rio de Janeiro* (ITS Rio), and *Instituto de Bioética, Direitos Humanos e Gênero* (Anis).

Figure 3 below shows how the nine most active organizations have positioned themselves concerning the AP's topics in the STF. Of particular note is how Conectas articulates a set of issues based on its subject of interest: Human Rights. Conectas' operation ranged from health to education: its representatives worked in the AP on *affirmative politics in higher education, religious teaching in public schools, judicialization of the right to health, abortion, pregnancy termination – anencephalic fetus*, the '*mais médicos*' program, and the *prison system*. Anis' participation in the AP shows another case in which human rights topics induced an organization's involvement.

We also noted the relationship between AP's topics and the participation pattern in the religious field. The organization that most operated as a connector between the issues under discussion was the Episcopal Conference of Brazil (CNBB). In addition to participation in the AP on *campaign financing*, the CNBB articulated the following topics: *abortion, embryonic stem cells, abortion, pregnancy termination – anencephalic fetus*, and *religious education in public schools*.

<sup>17</sup> Our work utilizes a technique from the field of social network analysis called Affiliation Network Analyses or Two-mode Network. The first mode is called the (1) *actors* mode and the second is the (2) *events* mode. In this case, AP mode refers to network mode. This is a technical term. Examples of an event are: a party, a congress, a social protest, etc. In our study, the APs are considered the event. The actors are the participants of each AP.

**Figure 3**  
**Most active organizations in the APs in the STF (2007-2019), more than three participations**



**Legend:** red, APs/ topics; light green, representatives of civil society; light blue, governmental representatives; brown, representatives of the legislative branch.

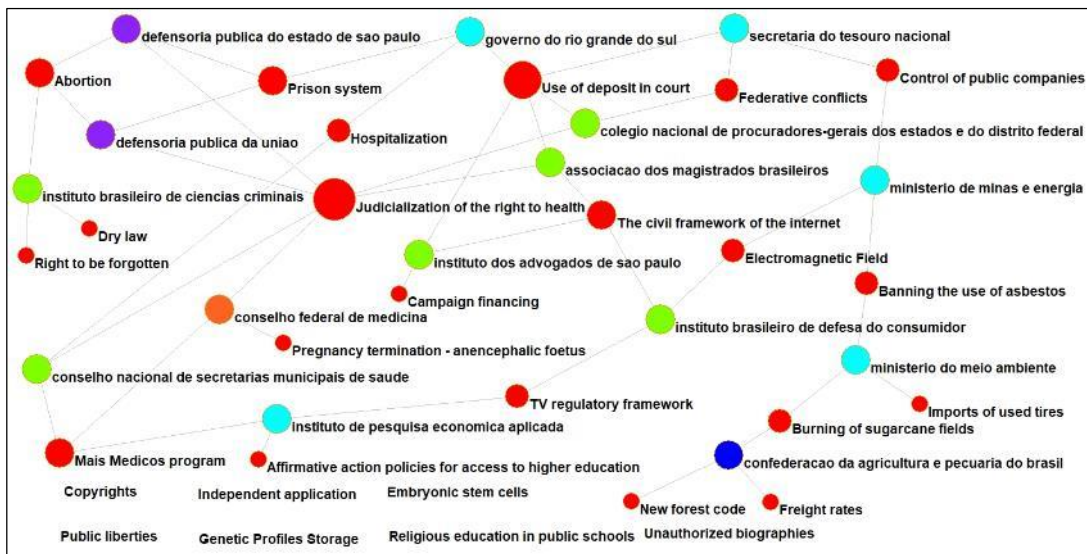
**Source:** Elaborated by the authors from STF data. Available at: <http://portal.stf.jus.br/audienciapublica/audienciaPublica.asp?tipo=realizada>. Accessed on: 26 May 2022.

The most active organizations' performance highlights the influence of issues (as inducers of participation). Figure 4 shows, for instance, the performance of the Federal Council of Medicine and the National Council of Municipal Health Secretariats. Both councils could count with exhibitors in the public hearings related to the health issue: the '*mais médicos*' program, the *judicialization of the right to health*, *hospital admission*, and *pregnancy termination/anencephalic fetus* hearings.

In the lower-right corner of Figure 4, it is possible to see the National Confederation of Agriculture and Livestock performance. It is a player in the “market” segment that operated as an AP connector which discussed topics with direct effects on the issues of interest to the economic agents working in the sector represented by this organization: *burning of sugarcane fields, freight rates, and new forest code.*

The mobilization of issues related to the environment and the federative case in Brazil provide further evidence on the relationship between topics and organizations' participation in the hearings. For example, the Ministry of Environment acted as an exhibitor in the *importing used tires*, *banning asbestos*, and *burning sugarcane fields* public hearings. Also, the National Treasury Secretariat contributed to articulating the following topics: *federative conflicts*, *control of public companies*, and *use of deposit in court*. Finally, analysis of the figure below highlights another example.

**Figure 4**  
**Most active organizations in the APs in the STF (2007-2019), three participations**



**Source:** Elaborated by the authors from STF data. Available at: <http://portal.stf.jus.br/audienciapublica/audienciaPublica.asp?tipo=realizada>. Accessed on: 26 May 2022.

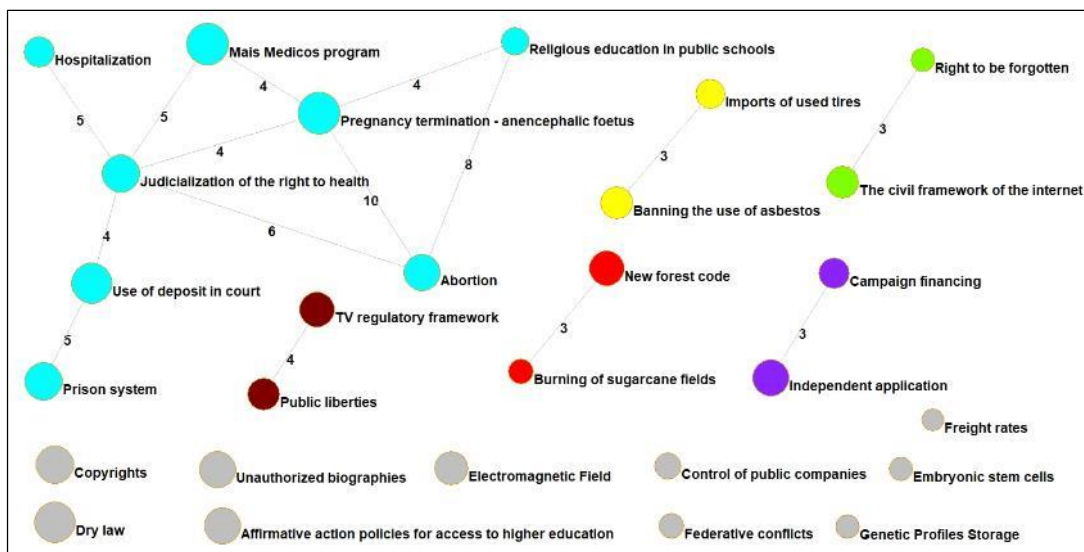
**Legend:** red, APs/topics; light green, civil society representatives; light blue, governmental representatives; dark blue, market representatives; purple, representatives of the judiciary and/or the justice system; orange, professional regulation board.

The influence of the theme in inducing participation found evidence in the analysis of how the performance of organizations connected the AP through their representatives. Therefore, we have considered the most active organizations and all connecting organizations' contributions in the following analysis. In addition, we have undertaken an island analysis to identify subgroups of at least two and at most ten APs<sup>18</sup>.

Figure 5 shows the results. The circles' size represents the AP's degree of attractiveness: the larger the circle, the more organizations participate in the AP. The values in the lines indicate the number of organizations shared by two APs.

<sup>18</sup> The minimum and maximum sizes define the number of APs that can be included in a subgroup considering the number of organizations they share (intensity of ties). The maximum number is only completed when all the players that connect to the subgroup do not exceed 10 players, if this occurs the program selects for the subgroup the number closest to the defined maximum but linked by the same intensity to the island. "Metaphorically, this situation is similar to saying that only players who are wanted in the same intensity by the group can participate in a party, observing the maximum capacity of the space where the party will take place" (Silva and Ribeiro, 2016, p. 187).

**Figure 5**  
**Islands in the APs in the STF (2007-2019)**



**Legend:** light blue, Island 1; light green, Island 2; purple, Island 3; yellow, Island 4; red, Island 5; brown, Island 6; grey, others.

**Source:** Elaborated by the authors from STF data. Available at <<http://portal.stf.jus.br/audienciapublica/audienciaPublica.asp?tipo=realizada>>. Accessed on: 26 May 2022.

It is possible to see that the most strongly connected public hearings refer to the 'health' topic – graphically represented by the largest island, highlighted in light blue, on the upper left corner of Figure 5. The AP discussions regarding the right to health involve: (i) *hospital admission criterion*; (ii) the '*mais médicos*' program; (iii) *judicialization of the right to health*; (iv) decriminalization of abortion and *pregnancy termination – anencephalic fetus*. The latter is also fundamental to the struggles for gender equality. We highlight the organizations that are the central connectors of these topics: Federal Council of Medicine, Ministry of Health, CNBB, *Conectas Direitos Humanos*, and *Anis Instituto de Bioética, Direitos Humanos e Gênero*.

The topic of *religious education in public schools* is strongly linked to abortion and the discussion on *pregnancy termination – anencephalic fetus*, highlighting the relationship of such issues with the religious sphere. The three cases involved moral and religious debate: in the first case, more broadly, because it concerns religious education in public schools, and in the second and third cases, particularly, regarding the right to life, given the discussions on pregnancy termination.

Interestingly, the debates at the AP regarding *embryonic stem cells* research followed the line proposed by the head of the Prosecutors Office (PGR), Cláudio Fonteles: a religious assumption of an offense to the right to life, considering the religious doctrine that points to conception as its initial term (Marona and Rocha, 2017). The connection with

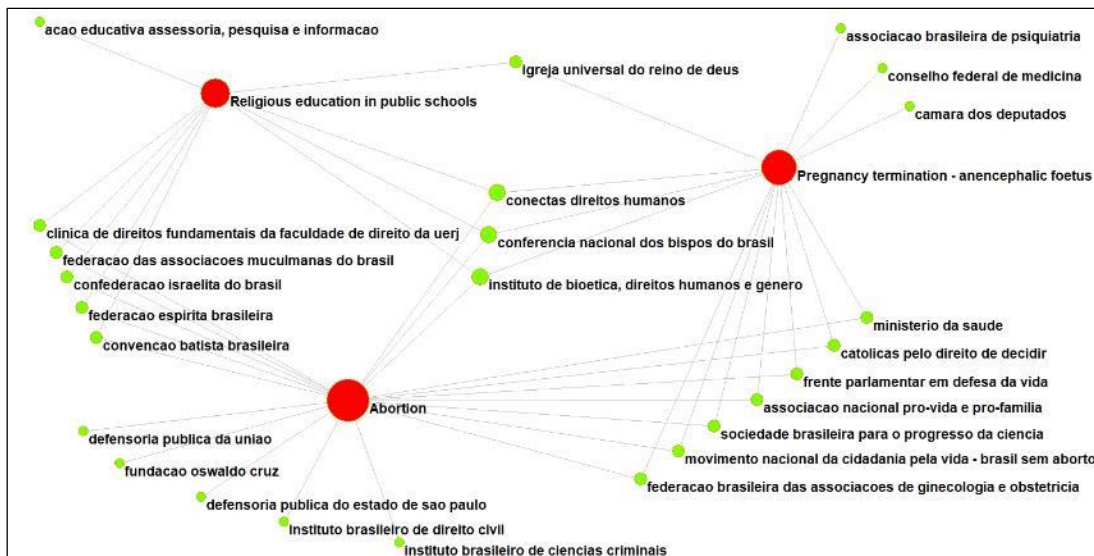
the island of health is because of the actions of the CNBB (see Figure 3<sup>19</sup>). Furthermore, the pattern results from the observation that the AP's participation occurred only through invitations sent by the Rapporteur, and appointment of experts by the PGR, Presidency of the Republic, and *Amicus Curiae*. Therefore, there was no possibility of voluntary registration for a statement regarding the exhibitor's quality in this case. In any case, it is worth emphasizing that four exhibitors from the AP of *embryonic stem cells* also participated in other health hearings<sup>20</sup>.

In particular, the thematic triad Abortion/Religious Education/Anencephalic Fetus (Figure 6, below) shows how religious organizations and others operating in Human Rights took advantage of the AP in the STF to defend their interests. We highlight, in the first place, the performance of *Conectas Direitos Humanos*, CNBB, and *Anis Instituto de Bioética, Direitos Humanos e Gênero*, articulating the three topics. Secondly, we identify the position of religious organizations acting at the intersection between discussions on *religious education in public schools* and *abortion*, adding the Universal Church's presence, linking religious education to the debate on pregnancy termination in the case of the anencephalic fetus.

<sup>19</sup> The relationship of the topic on *embryonic stem cells* research is not represented in Figure 5, as it is a weak relationship. The algorithm applied in the island analysis found, in the case analyzed in this article, that the minimum intensity of the relationship between two APs to constitute an island is equal to 3. This means that if it were considered the sharing of one or two organizations between APs, it would lead to identification of islands much higher than the defined maximum.

<sup>20</sup> Débora Diniz participated in the *embryonic stem cells* AP as an expert invited by the STF and as an Anis representative in the APs of *religious education*, *abortion and pregnancy termination – anencephalic fetus*; Lenise Aparecida Martins Garcia participated in the stem cells AP at the invitation of the PGR (MPF), and in the APs on *pregnancy termination – anencephalic fetus* and *abortion* as a representative of the National Movement for Citizenship for Life – Brazil without Abortion; Elizabeth Kipman Cerqueira was an exhibitor of the *stem cell* AP at the invitation of the PGR and a no-organization-identified expert in the AP on *pregnancy termination – anencephalic fetus*; finally, Rodolfo Acatauassu Nunes participated in the stem cells AP as a representative of the CNBB and, subsequently, as a representative of the National Pro-Life and Pro-Family Association in the AP on *pregnancy termination – anencephalic fetus*.

**Figures 6**  
**Thematic triad Abortion/Religious Education/Anencephalic Fetus**



**Source:** Elaborated by the authors from STF data. Available at: <http://portal.stf.jus.br/audienciapublica/audienciaPublica.asp?tipo=realizada>. Accessed on: 26 May 2022.

**Legend:** red, APs/topics; green, organizations.

The findings presented on the role of organizations as connectors of topics indicate that APs can bring together different perspectives, influencing the quality of discussions, as pointed out by the results of previous analyses by Marona and Rocha (2014, 2017). We also take the findings to indicate that the issues function as participation inducers in the deliberative systems. The topics take the political players to the arenas where they are discussed. In the transit between the arenas, the players can promote the connection of the deliberative system. The previously developed analyses indicate the relevance of this theoretical assumption in human rights policies (Faria, 2017; Lins, 2017; Silva and Ribeiro, 2016; 2018).

## Final considerations

The topic of participation and resolution in constitutional courts is exceptionally relevant nowadays. Recent studies indicate the significance of judicial activism for understanding the deliberative dynamics of democratic regimes. The agenda is not new, and, in the Brazilian case, it has been the object of attention of a wide range of researchers since re-democratization (Vianna, 2002; Sadek, 2004; Avritzer and Marona, 2014). This work unveils the topics and organizational players most present in STF public hearings.

The adopted theoretical and analytical perspective combined elements derived from studies on constitutional courts with the deliberative subsystems' approach. One's

assumption is that it would be challenging to develop methodologically consistent strategies to understand the workings of deliberative, as proposed by Parkinson and Mansbridge (2012). Thus, the *territorial* and the *thematic* criteria were combined to identify the players that seek to influence the AP. As suggested by the results presented, these can be seen as connectors of those arenas. The limits of this methodological strategy demand future efforts based on qualitative and comparative analyses of discourses, values, ideas, and deliberation of the actors/organizations inside the APs' deliberative process.

This article's main result confirms that civil society organizations are the main connector of the STF public hearings, as they represent about 40% of the organizations present at the same time in more than two APs. The evidence that the CSOs use the AP as an arena for political struggle must be compared with the legal mobilization agenda's theoretical formulations. The literature indicates that some organizational players can better reach, translate, and circulate demands in the national territory and, therefore, are better equipped to capture public sphere agendas and echo them in the formal political system. Conditions for the possibility of judicial action include the existence of different degrees of professionalization of civil society entities that carry out public interest litigation in Brazil, considering the existence of lawyers in the organization, as well as press relations, and administrative and professional structure with exclusive dedication and their ability to obtain international financing (Rodriguez, 2013).

On the other hand, direct access to the STF, although comprehensive in terms of constitutionality control, is not available to the CSOs. That is to say, the list of parties that are eligible to file actions in this area excludes the CSOs (CRFB/88, article 103), which have two alternatives: (i) seek some form of partnership with political parties and/or class entities of national scope or union confederations, which can embrace the cause and provoke the STF, or (ii) take part in a discussion already started by some eligible player, as *amicus curiae* or exhibitor in the AP, if called on.

The second segment with the highest representation in STF public hearings is the government sector, with around 17% simultaneous presence in two or more events. Previous analyses conducted in other arenas (municipal, state, national councils, and public hearings in the ALMG) indicated a strong predominance of the governmental segment as a connector (Silva and Ribeiro, 2016; 2018; Silva, Ribeiro and Ramos, 2018; Silame et al., 2019). It is worth mentioning that intragovernmental disputes sometimes involve lawsuits and mobilize public hearings in the STF. The scenario of judicialization of mega politics (Hirschl, 2008), which characterizes the Brazilian case of Supreme Court's protagonism, induces a more excellent circulation of governmental and parliamentary agents in all spheres – including in the public hearings.

The results indicate the relevance of topics, players, and institutional design as connectors of the subsystem analyzed. In the STF, health and the environment stand out as central issues, the former related to a wide range of related topics, and the latter to the Forest Code review, used tires, and asbestos. The topics have been studied as possible

connectors of deliberative arenas in human rights (Lins, 2017; Silva, Ribeiro and Ramos, 2018), but some cases should be more accurately investigated. One should consider the strength of the transversality and seniority of discussions related to such areas, both in government and society. The health and the environment areas are among the oldest and most institutionalized and feature solid social movements, which have organized their struggles for many years through dialogues with the Government.

The second case relates more precisely to the judicialization of public policies – particularly the systematic shift of demand to the judicial sphere into complaints about medication, hospital admission, and treatment (Oliveira, 2019). On the other hand, the economic agents that work in supplementary health (a private network), particularly health insurance companies, are powerful economically and organization-wise, seeking to act and influence several arenas, whether in the executive, legislative, or judiciary or regarding public opinion in general. Furthermore, we add the weight of *money* as one of the most relevant resources related to organizational capacity and possible exercise of influence in the centers of *power*, either through lobbying and/or instruments of organizational pressure.

The third case accounts for the professionalization of organized groups in both areas, which gives them a leading role in the political struggle. Consequently, many experts take center stage in the discussions. Their presence is essential in several arenas, given their specialized and concentrated knowledge, as we can see in the significant presence of health experts in APs carried out by legislative bodies for three consecutive legislatures (Resende, 2017), in addition to the relevance of health as a connector in national councils (Silva, Ribeiro and Ramos, 2018) and of *amici curiae* in the STF.

This article contributes to the research agenda by shedding light on the simultaneous performance players in multiple deliberative arenas. We approached players' referred transit and thematic performance as possible connectors of deliberative arenas. We considered that the simultaneous presence of players and organizations could drive speeches, interests, and perspectives to circulate between arenas (Young, 2002; Silva and Ribeiro, 2016).

Future analyses intend to include other deliberative subsystems, such as the legislative and corporate arena. A survey is also underway with the same players to introduce qualitative dimensions to the investigation, as the techniques used are structural. They allow us to make a "snapshot" of the topics and players analyzed, situating them in a framework of time and space. We know that it should be supplemented with qualitative data collected and analyzed using other research techniques.

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## Resumo

### *Audiências públicas no Supremo Tribunal Federal: do litígio estratégico à resolução*

O artigo busca avançar na agenda de investigações sobre o poder judiciário, aproximando as pesquisas sobre resolução de conflitos nos tribunais constitucionais àquelas sobre a mobilização de leis por grupos de interesse e movimentos sociais. As Audiências Públicas (APs) realizadas pelo Supremo Tribunal Federal são analisadas como arenas estratégicas de processamento de temas contenciosos nas quais atores diversos têm oportunidades de contribuir com as práticas jurídicas. O objetivo central do artigo é identificar os mecanismos de *conexão* e de transmissão das deliberações presentes nas audiências públicas realizadas pelo Supremo Tribunal Federal (STF) no período de 2007 a 2019. O problema de pesquisa foi formulado com o propósito de se investigar e analisar como a sociedade civil atua no âmbito do Supremo Tribunal Federal. O resultado do artigo confirma as organizações da sociedade civil como principal conector das APs realizadas no STF, pois representam cerca de 40% das organizações presentes, simultaneamente, em mais de duas audiências.

*Palavras-chave:* Supremo Tribunal Federal; audiências públicas; litígio

## Resumen

### *Audiencias públicas en el Tribunal Supremo: del litigio estratégico a la resolución*

El artículo busca avanzar en la agenda de investigaciones sobre el Poder Judicial integrando las investigaciones sobre resolución de conflictos en los tribunales constitucionales con aquellas sobre la movilización de leyes por grupos de interés y movimientos sociales. Las Audiencias Públicas (AP) realizadas por la Suprema Corte Federal (STF) son analizadas como espacios estratégicos para la tramitación de asuntos contenciosos en los que diferentes actores tienen oportunidades de contribuir a las prácticas legales. El objetivo principal del artículo es identificar los mecanismos de conexión y transmisión de las deliberaciones presentes en las audiencias públicas celebradas por el STF en el período de 2007 a 2019. El problema de investigación se formuló con el propósito de investigar y analizar cómo la sociedad civil opera dentro del ámbito de la Corte Suprema Federal. El resultado del artículo confirma que las organizaciones de la sociedad civil son el principal conector de las Audiencias Públicas realizadas en el STF, ya que representan alrededor del 40% de las organizaciones presentes, simultáneamente, en más de dos APs.

**Palabras clave:** Tribunal Supremo; audiencias públicas; litigios

## Résumé

### *Audiences publiques à la Cour suprême du Brésil: du litige stratégique à la résolution*

L'article cherche à faire progresser l'agenda des enquêtes sur le pouvoir judiciaire en intégrant les recherches sur la résolution des conflits dans les cours constitutionnelles à celles sur la mobilisation des lois par les groupes d'intérêt et les mouvements sociaux. Les audiences publiques (AP) organisées par la Cour fédérale suprême sont analysées comme des arènes stratégiques pour le traitement des questions litigieuses dans lesquelles différents acteurs ont la possibilité de contribuer aux pratiques juridiques. L'objectif principal de l'article est d'identifier les mécanismes de mise en relation et de transmission des délibérations présentes lors des audiences publiques tenues par le Tribunal Fédéral (STF) entre 2007 et 2019. Le problème de recherche a été formulé dans le but d'enquêter et d'analyser comment la société opère dans le cadre de la Cour suprême fédérale. Le résultat de l'article confirme que les organisations de la société civile sont le principal connecteur des audiences publiques tenues au STF, puisqu'elles représentent environ 40% des organisations présentes, simultanément, dans plus de deux AP.

**Mots-clés:** Cour suprême; audiences publiques; litiges

Artigo submetido à publicação em 12 de março de 2021.

Versão final aprovada em 24 de janeiro de 2022.

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