

## Article

# Right to Water and Courts in Brazil: How Do Brazilian Courts Rule When They Frame Water as a Right?

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**Abstract:** The international protection given to the right to water has increased over the last decades, with two United Nations' resolutions establishing a freestanding right to water in 2010. Several countries have a right to water enshrined in their constitutions, while in other countries, this right has been recognised by the courts. This study aims to assess whether and how Brazilian courts are deciding water-related conflicts using the "right to water" frame, what the content given to this right is, and whose rights are protected. We created a comprehensive database of decisions issued by Brazilian courts at different levels containing the expression "right to water". Our main findings are that the great majority of decisions are from lower courts and were issued on individual cases related to water supply. Further, we have seen that courts are frequently prohibiting the disconnection of water supply services when extreme vulnerability is argued. The same has been seen in other Latin American countries, such as Argentina, Colombia, and Costa Rica, with the one main difference that in these countries, the right to water has been carved out by the Constitutional Courts. The Brazilian Federal Supreme Court, which has the last word on the interpretation of the constitution, has not issued any decisions establishing a right to water, but there is legal mobilisation aiming for this and using UN resolutions as a key argument.

**Keywords:** right to water; courts; vulnerable groups; UN resolutions



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## 1. Introduction

Brazil is one of the world's richest countries in water resources, yet conflicts around water are on the rise. Several pressing issues recur: the exploitation of water resources located in indigenous peoples' lands, both for energy production and mining activities; concerns regarding environmental protection of water sources; and the promotion of basic sanitation improvements. Such issues are also present in other Latin American countries, and the region has witnessed strong mobilisation around water rights and for water justice in the last decades, with the "water war" against privatisation of water supply utilities in Cochabamba, Bolivia, in the early 2000s as the most well-known event [1–3]. In Brazil and beyond, courts are often called upon to arbitrate these conflicts. This paper provides an overview of decisions by Brazilian courts where the "right to water" frame is used to decide water-related conflicts.

This is not a comparative study. However, we reference cases from other Latin American countries with the help of secondary sources aiming to situate our findings within the region's context concerning the construction of the right to water by national courts.

The Brazilian 1988 Constitution does not establish an independent right to water, unlike in some countries in Latin America, where a free-standing right to water was enshrined in the Constitution in the 2000s as a response to the privatisation of water utilities, such as Uruguay (2004), Ecuador (2008), and Bolivia (2009) [4–6].

In 2010, the right to water was recognised by the United Nations after decades of intense debates that originated at the 1977 UN Conference on Water in Mar del Plata,

Argentina, and culminated with the adoption of the United Nations General Assembly Resolution 64/292. The resolution, presented by Bolivia, highlighted civil society participation and was adopted without formal dissent (although with abstentions) [2,7]. The right was affirmed by the Human Rights Council in their Resolution 15/9. The Organisation of American States, in its turn, recognised the human right to water through resolution 2760/2012.

In the context of these normative developments, the Inter-American Commission on Human Rights (IACHR), following claims from civil society organisations, organised a hearing on Human Rights and Water in Latin America in 2015 and addressed the right to water on several occasions, whereas the Inter-American Court of Human Rights (IACtHR) has recognised the existence of a right to water, even though it is not explicit in the Inter-American Convention on Human Rights, by considering that the access to water is connected to other rights such as life and health [8].

The decisions from the IACtHR that explicitly refer to a “right to water” include cases that address the life conditions of indigenous peoples (*Comunidad Indígena Xákmok Kásek vs. Paraguay* and *Comunidad Indígena Sawhoymaxa vs. Paraguay*). In these cases, although water is not the main issue discussed, the court uses the International Covenant on Economic, Social, and Cultural Rights to mention a right to water and make a point about the direct link between the livelihood and the access to natural resources [9] or to water specifically [10]. In this case, the court even dedicated a short section to analyse whether Paraguay had provided the indigenous community with water in sufficient quantity and quality and concluded the country had not. In addition, in a case focused on precarious conditions on a prison environment (*Vélez Loor vs. Panamá*), the court addressed the “right to water” of prisoners who, according to the IACtHR, must have access to salubrious water in enough quantity for their daily individual needs [11]. For this, the court refers to the same Covenant as in the other cases as well as to the General Comment n. 15 from the UN’s Committee on Economic, Social, and Cultural Rights and to the recognition of water as a human right by the UN’s General Assembly [8–11].

Further, an examination of the cases decided by the IACtHR until October 2021 where Brazil is one of the parties shows that only one (*Trabajadores de la Hacienda Brasil Verde vs. Brasil*) concerns water-related issues and only incidentally. The focus of this decision is work under conditions analogous to slavery, and one of the alleged violations in the case was not having access to water suitable for human consumption.

In national litigation, in the cases of Brazil, Argentina, Colombia, Costa Rica, and Peru, the right to water has been recognised through inference from other constitutional rights or legislation as well as international instruments [2,12–18]. In Peru, decisions from the Constitutional Court establishing a right to water were followed by a constitutional reform for the enshrinement of this right in 2017 [15].

When it comes to Brazil, although there are studies pointing to the existence of court cases dealing with the right to water [12,13], there are no comprehensive studies at the national level addressing whether or not courts explicitly refer to a right to water and, if they do, what the content given to this right is.

The judicialisation phenomenon in Brazil can be traced back to international trends and the country’s institutional model. The 1988 Constitution is a landmark in Brazil’s democratisation and contains several justiciable social rights that have led to a broader awareness of rights. It has also strengthened the autonomy of two key institutions: the *Defensoria Pública* (Public Legal Defence), responsible for providing legal aid for those who need it [19] (article 134), and the *Ministério Público* (Public Prosecution Office), with the duty to defend inalienable social and individual interests [19] (article 127), along with the courts [20]. The social rights established in the Constitution have been consolidated through legislation, such as the Consumer Protection Code [21], and this context of expansion of rights and strengthening of relevant institutions has led to an increase in claims urging the courts to give decisions on the implementation of those rights and the state’s obligation to act in this process [22,23]. The hybrid constitutionality review model has a crucial role to

play as well: on the one hand, by giving the last word on the meaning of the constitution to the Federal Supreme Court, while on the other hand, by allowing every single judge at all court levels to address constitutionality [24,25].

Despite containing an extensive list of justiciable social rights, the Brazilian constitution does not establish a freestanding right to water and sanitation. This does not mean, however, that the “right to water” language has not reached the courts. This paper assesses the extent to which a right to water is being carved out by the Brazilian courts and what the content of this right is. In addition to the general judicial articulation of the right to water, we explore the articulation of the right to water on behalf of marginalised groups, such as *quilombola* communities (descendants of enslaved people) and indigenous peoples. Further, we investigate whether there has been an increase in the number of references to the right to water in decisions throughout the years, including references to the UN General Comment 15 in 2002 and the two UN resolutions in 2010: United Nations General Assembly (UNGA) Resolution 64/292 and the Human Rights Council Resolution 15/9.

We have identified that the great majority of decisions that address the “right to water” are from lower courts and were issued on individual cases related to water supply. Further, we have seen that courts are frequently prohibiting the disconnection of water supply services when extreme vulnerability is argued. The most commonly referred legal norms in the Brazilian decisions are the Constitution [19] and the Consumer Protection Code [21]. The Brazilian Federal Supreme Court, which has the last word on the interpretation of the constitution, has not issued any decisions establishing a right to water, but there is legal mobilisation using UN resolutions as one of the key arguments aiming for the recognition of this right.

## 2. Materials and Methods

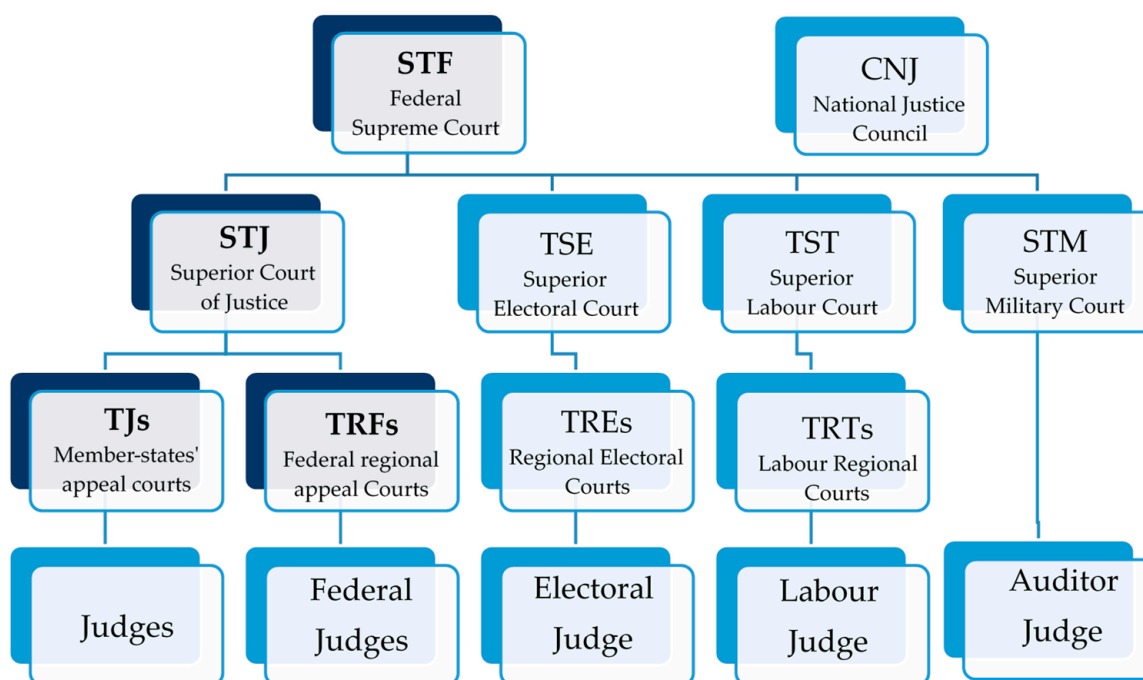
We looked at decisions from the:

- Federal Supreme Court (*Supremo Tribunal Federal, STF*);
- Superior Court of Justice (*Superior Tribunal de Justiça, STJ*) with competence, among other things, to decide on appeals from lower courts over the interpretation of treaties and federal laws;
- Federal regional appeal courts (*Tribunais Regionais Federais, TRFs*) Brazil is a federal state, and its judiciary has federal judges and federal appeal courts with competence to rule on, among other things, disputes over rights of indigenous peoples; and
- Member states’ appeal courts (*Tribunais de Justiça Estaduais, TJs*).

This study is made broad by inclusion of decisions rendered by all courts in the country except those specialised in electoral, labour, and military matters. The comprehensive scope of the decisions included in our study is illustrated in Figure 1 below.

In all studied courts, the relevant decisions for our database were selected after reading all decisions that were initially found. This enabled us to capture important nuances that would otherwise be lost by carrying out an exclusively quantitative analysis. All these court decisions were found publicly available on the website of each respective court, and searches were executed through the search tool provided for each court. All the links to the search mechanisms are available in the “Data Availability Statement” after the text. As the websites were the primary source, we have their search tool’s limitations at the time we have established the sample as caveats. At that time, some tools stated that they search for the selected expression throughout the whole decision; these were TJAC (Acre), TJAL (Alagoas), TJAM (Amazonas), TJCE (Ceará), TJDFT (Distrito Federal e Territórios), TJGO (Goiás), TJMG (Minas Gerais), TJMS (Mato Grosso do Sul), TJRR (Roraima), TJSC (Santa Catarina), TJSE (Sergipe), TJSP (São Paulo), and TJTO (Tocantins). With other mechanisms, it was only possible to search throughout the summary, as TJPR (Paraná), TJRS (Rio Grande do Sul), TJRJ (Rio de Janeiro), TJRN (Rio Grande do Norte), and TJRO (Rondônia). Other ones did not make this information available, TJAP (Amapá), TJES (Espírito Santo), TJMT (Mato Grosso), TJPA (Pará), TJPE (Pernambuco), and TJPI (Piauí). It is essential to highlight

that the arguments brought by the claimants are not always mentioned in the decisions, and we have not looked at the complaints.



**Figure 1.** Brazilian judiciary's structure. All the figures in this article have been made by the authors.

We started our study by using the search engine on the Federal Supreme Court's website to look for any type of decision (collective and monocratic) containing the expressions in Portuguese that correspond to "right to water", "fundamental right to water", and "human right to water" (respectively "*direito à água*", "*direito fundamental à água*" and "*direito humano à água*") from October 1988 (when the Constitution in power was enacted) up to 2018. We chose these keywords, as the intent of this paper is to capture the content given to the right to water by the courts. Although we are aware that our search does not collect decisions that may treat water as a right but do not use these specific expressions, we believe that the use of these expressions is important for the establishment of the right. Moreover, to make sure that no important Supreme Court decision was being left out, for this court only, we also searched for collective decisions containing the keywords in Portuguese that correspond to "water" OR "hydr\$" (words starting with "hydr") (respectively "*água*" OR "*hidr*\$") for the same period. The "OR" allows to capture any decision containing at least one of the keywords. We went through 625 decisions but could not find a single one articulating a "right to water".

For the Superior Court of Justice, we searched for collective decisions that mention the expressions "right to water", "fundamental right to water", and "human right to water" within the time frame October 1988 to 2018. Only two decisions were found.

Brazil has five federal regional appeal courts and 27 member states' appeal courts. In both federal and member states' appeal courts, we used the same criteria as for the Superior Court of Justice. Three of the five federal regional appeal courts came up with results for these criteria (TRF 2, TRF 4, and TRF 5), with a total of nine decisions. Regarding the member states' appeal courts, the search engine related to three of them (Bahia, Maranhão, and Paraíba) did not succeed in filtering out the decisions containing the selected expressions, and these states were consequently left out. For the remaining 24 member states' appeal courts, our database yielded a total of 114 collective decisions. Decisions in which the main discussion focused on procedural matters and those not related to water were not included in the database.

### 3. Results and Discussion

We present our findings organised by court. However, before proceeding, it is important to make clear that only decisions from the Federal Supreme Court can have effects *erga*

*omnes*. The Federal Supreme Court acts as a constitutional court in relation to norms in abstract, as an appeal court, and also has original jurisdiction (that is to say, the possibility of acting as a single trial court for specific cases). It is only when this court acts as a constitutional court that the decisions are automatically binding to all other courts. The decisions from the Superior Court of Justice, the Federal Regional Appeal Courts, and the member states' Appeal Courts, in their turn, are binding only for the parties involved in each particular case decided and are not binding even for the same court. However, their decisions may influence and be used as reasoning basis in other decisions. Decisions from the Federal Supreme Court or the Superior Court of Justice can be given relevant argumentative weight.

### 3.1. Federal Supreme Court (STF)

With regard to the STF, we found no matches for the search expressions “right to water”, “human right to water”, or “fundamental right to water”. This fact is a relevant finding in itself. We then carried out a new search with “water” and “hydr\$” (words starting with “hydr”) as keywords. Most of the results, however, did not relate to the right to water, and some cases with relevant themes were not accepted for judgment for procedural reasons. Examples of relevant themes are land demarcation and access to water for a *quilombola* community, the use of artesian wells for human consumption, the implementation of a state system of water resources, moral indemnity for failure in the water supply, water scarcity during military training, and agreements for water supply in semi-arid regions.

It is necessary to highlight, nonetheless, that cases that relate to water and are decided, although not mentioning the expression “right to water” in the text, may still influence the legal mobilisation towards the recognition of this right through a binding decision. An example of this is a series of tax law cases discussing the application of the tax on the distribution of goods and services (ICMS) to water supply (textbook case: Extraordinary Appeal, RE-*Recurso Extraordinário* 607.056). These decisions defined the legal nature of water as not being a commodity but, in fact, a “public good”- The decisions state that a commodity would be a movable good, which is subject to commercialisation, and that the Brazilian Constitution defines water as public good for the common use of the people. Therefore, water could not be characterised as a commodity even with treatment and other services. They are the basis for the lawsuit ADPF 680, from May 2020, proposed by the political party *Rede Sustentabilidade* against a presidential decree that excluded water supply and sanitation from the list of services to be considered essential in the context of the COVID-19 pandemic. The political party urged the STF to rule on the essential nature of water supply and sanitation services, using the “right to water” as a key argument. In short, the party claimed that even though the constitution does not contain an explicit right to access water and basic sanitation, in a systematic reading of the constitution, these rights are easily identified by deriving them from the principle of human dignity and the rights to life and health. Both the UNGA 2010 resolution and words from the UN Special Rapporteur on the Rights to Water and Sanitation, Leo Heller, are mentioned in the party's reasoning. Being a case of abstract constitutional review, once the STF makes a decision on it, it automatically becomes binding to all other courts.

With the aim of situating our findings in the Latin American context, we now bring up courts with equivalent powers in other countries in the region.

For carving out an expressly mentioned “right to water”, these courts in Colombia, Costa Rica, and Peru rely on constitutional rights, such as the right to a dignified life and to health (including those derived from international commitments), and on national laws, previous water rights decisions from the same court and, to different extents, on international legal sources. Among the latter are the International Covenant on Economic, Social, and Cultural Rights; the General Comment 15; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women [14–16,26–28].



To illustrate which themes have been decided with a reference to the right to water, we briefly present the example of Colombia, where there are decisions from the Constitutional Court establishing reconnection of water supply in case of vulnerability (the court analyses the vulnerability argument case by case); giving priority to children in water provision; and ordering the connection of a house to the public water and sanitation networks [14,18].

In sum, while the Brazilian Federal Supreme Court has not established a right to water in its decisions, thereby differing from courts with equivalent powers in other Latin American countries, the court's understanding that water is not a commodity in tax law cases has been used to push for such recognition, along with the UNGA's 2010 resolution.

### 3.2. Superior Court of Justice (STJ)

From 1988 to 2018, there are only two decisions from the STJ mentioning the right to water (one mentioning "right to water" and the other one "human right to water"), both of which were issued in 2016. The first one, RESP (*Recurso Especial*, Special Appeal) 1.616.038, concerned a neighbourhood conflict between two private companies over access to a water source for rice crop irrigation. In the Brazilian legal framework, the neighbourhood rights, established in the Civil Code, are linked to the right to property as rules for using the property [29]. According to this decision, the owner of a property has the right to build an aqueduct on the neighbour's land, regardless of the neighbour's consent, to receive water from another property, provided that there are no other means of passing water to the property in question and that there is payment of prior indemnity to the affected neighbour. The decision recognised the access to the water source as a right to water and expressly characterised the right to water as a neighbourhood right that stems from the social function of property. The decision mentions the article 1.293 of the Brazilian Civil Code [30], which establishes that "anyone is allowed to build canals through other people's properties to receive the waters to which one is entitled, indispensable to the first necessities of life (...)" (our translation and emphasis). This article is used in favour of a company that needs water for rice crop irrigation. In order to apply this article to the company, the decision characterises water as a public good, meaning that the water belongs to all and that its management must always enable the use by multiple persons.

The second one, RESP 1.629.505, concerns a conflict between a water supply company and a private individual. It addressed the indemnity for moral damages established by lower court instances. The claimant had remained without water supply for five days without any sort of assistance from the water supply company, while she had been informed that the service would be interrupted for 12 h due to maintenance on the water network. In this regard, it is interesting to note that this same problem affected several other people, but, as the case was filed as an individual claim, at least for the decision in question, only one single person was indemnified for moral damages by the water supply company. The court established that this was a consumer relationship, and for this reason, the Consumer Protection Code was applicable to extend the statute of repose to file the case [21] (article 27). When dealing with the merit of the case itself, the 2010 UN Resolution on the right to water was a central argument in the decision, quoted in the following lines: "Now, water is the starting point, it is the essence of all life, being, therefore, a basic human right, which should receive special attention from those who have the task of providing it to the population. It is worth noting that the United Nations, on the 28 July 2010, approved Resolution 64/292, in which the right to drinking water and basic sanitation was recognised as an essential human right" (our translation).

Although the Brazilian Superior Court of Justice has only issued two decisions mentioning the right to water, both of them recognise the existence of the right. One of them states that it is a neighbourhood right drawn up from the Brazilian Civil Code, and the other one uses the UN's 2010 resolution as a core element in its reasoning. As anticipated, these decisions are not binding to all but have the potential to be given strong argumentative weight and to influence other developments in terms of both stances from courts and legal mobilisation.

### 3.3. Federal Regional Appeal Courts (TRFs)

In the TRFs, we identified nine decisions that expressly mentioned the right to water in different ways, as explored below.

We considered the right to water as part of the reasoning when the judges used this right as an argument and attributed meaning to it. This happened in three out of nine decisions analysed, of which two were favourable to the right to water. One of these favourable decisions (TRF 4 *Agravo de instrumento* 5003468-44.2014.404.0000) established the duty of providing water supply to an indigenous community. The decision stated that not only must water be supplied, but the provider must also secure its quality and deliver it in a dignifying way. The other favourable decision (TRF 4-*Apelação/reexame necessário*: 5025999-72.2011.404.7100) ordered both the provision of water supply and an indemnity for moral damages to three indigenous communities. It affirmed that water is so essential that it is unnecessary for the right to water to be expressly written in the constitution in order to exist and be recognised as part of the rights to life, health, and dignity.

In another case (TRF 5-*Agravo de Instrumento*: 0805062-16.2017.4.05.0000), however, the expression “right to water” was used in a decision that did not enforce this right. This decision first acknowledged the existence of a right to water to then exempt the water supply company from providing water in water trucks to the community in question as an emergency measure. The argument for exempting the water supply company from providing water supply to the *quilombola* community was that the insufficiency or lack of water supply was common in the region and that the right to water of this *quilombola* community did not differ from that of any other person and vulnerable rural group who also lack access to water. The decision in this case was that, as the community had never before depended on the water supply company for accessing water but used a river instead, although the water from the river now had become polluted and harmful for human consumption, the company would still not be the one obliged to provide water in water trucks as an emergency measure as asked by the claimants. Even though this was not the object of the court case, the decision does not say a word about the environmental problem regarding the polluted river and the consequences to the affected communities.

In three other decisions, the right to water appeared in extracts from the previous decisions in the cases from the individual first-instance judges, which were used to strengthen the decisions’ argument. All of these decisions are favourable to the right to water as defined by the cited judge, and their themes are the provision of water supply to an indigenous community (TRF 4-*Agravo de Instrumento*: 0005160-08.2010.404.0000), a company’s right to water for industrial purposes (TRF 4-*Apelação cível*: 0000471-55.2001.404.7009), and the rules for producing and using concrete pipes for sanitation and water services (TRF 4-*Apelação cível*: 5068955-06.2011.4.04.7100).

In one of the nine cases, the right to water appeared as part of a brief from the *Ministério Público*. In this decision (TRF 2-*Agravo interno* 0012862-15.2017.4.02.0000), which addressed, among other things, the privatisation of a hitherto state-owned water supply company in the state of Rio de Janeiro, the *Ministério Público* opposed this privatisation and employed the right to water and UN’s 2010 Resolution as part of its argument. Although this decision’s reasoning does not mention the right to water, we find it important that this right and its international protection is under the *Ministério Público*’s radar and is being used to oppose privatisation.

In the two remaining decisions, the right to water appeared in the summary of the claimant’s arguments and were not addressed by the courts. For this reason, they were omitted from our study.

Looking at the decisions from the TRFs provides us with information on how the right to water has been used by courts when it comes to the rights of vulnerable peoples, in this case, the rights of indigenous and *quilombola* communities. Although in one of the cases the decision was contrary to the right to water, the decisions from the TRFs tend to be favourable to the right to water when they use the expression as part of the reasoning or



mention other decisions that have done so. Similarly, in Argentina, courts have also played a role in guaranteeing the right to water to communities in vulnerable circumstances [5].

### 3.4. Member State Appeal Courts

We will now turn to the member states' appeal courts, where we were able to identify 114 relevant decisions. The number of decisions which contain the expressions "fundamental right to water" or "human right to water" is significantly lower compared to the number of decisions containing the expression "right to water", and there are no remarkable differences in the substance of the decisions between one or other expression chosen. Our database includes decisions on individual claims, as well as class actions. This made it possible to draw some conclusions regarding a general view of the judicial recognition of the right to water in Brazil. It is, however, necessary to make clear that there are several differences between Brazilian states and regions. In this section, we work with decisions from 13 out of the 24 appeal courts: São Paulo, Paraná, Espírito Santo, Minas Gerais, Rio de Janeiro, Sergipe, Rio Grande do Norte, Amazonas, Distrito Federal e Territórios, Rio Grande do Sul, Ceará, Mato Grosso, and Pará (see Figure 2). Nine out of the 24 appeal courts did not yield any results for our research parameters, and some of them presented only a minimal number. Two among the 15 that presented results were not explored as explained in the comments to Figure 3. That is to say, not all appeal courts address the right to water by making use of this expression in Brazil, and the ones that do so do not do it to the same extent.

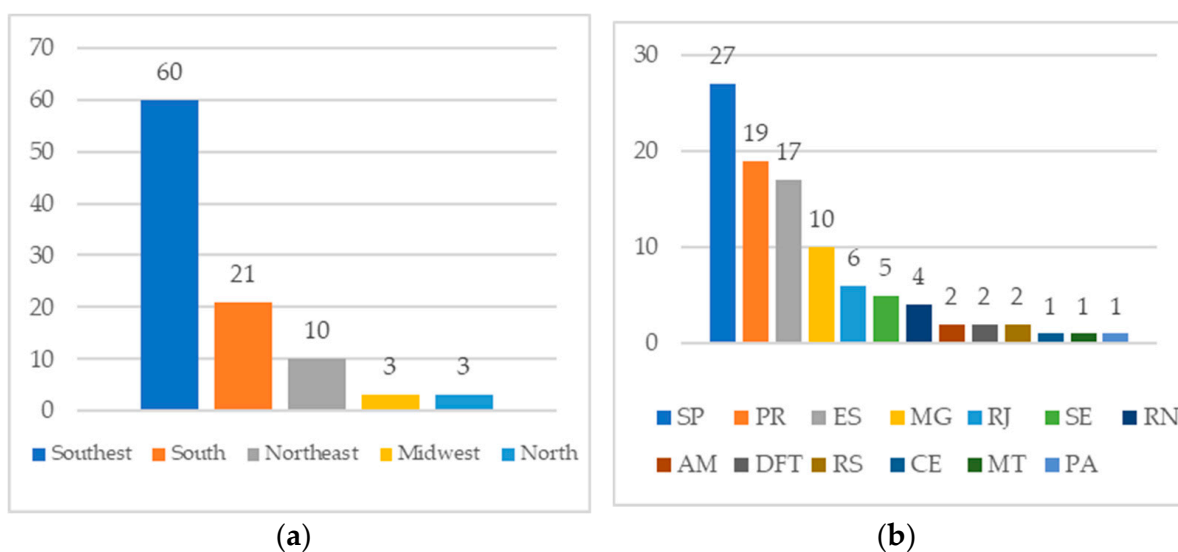
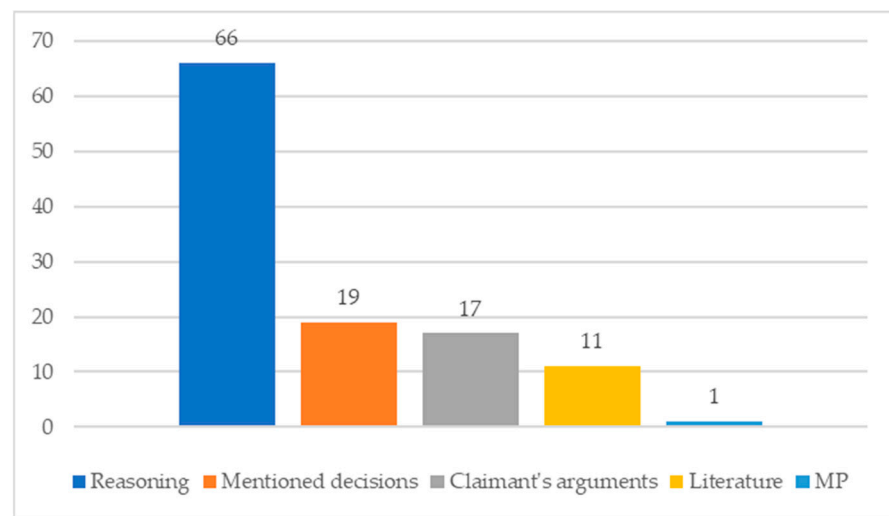


Figure 2. (a) Number of Decisions per Region; (b) Number of Decisions per State.

Most cases were found in appeal courts from states located in the southeastern and southern regions of Brazil, which correspond to the regions with the highest demographic density and Human Development Index in the country [31].

With regard to access to water, while more than 90% of the population in southeastern and southern regions have access to water supply, the numbers for the northern and northeastern regions are 47.6% and 73.4%, respectively [32]. The northeastern region is by far the most affected by water rationing and interruptions in water supply services [32]. Still, only 10 out of 97 cases come from this region (Figure 2a). However, this is not to say that problems related to access to water are not to be found in the southeastern and southern regions, where vulnerable groups, such as those living in irregular land occupations, are hardest affected.



**Figure 3.** Where in the decision the expression appears?

Further, we verified that the decisions in the database mentioned the expressions “right to water”, “human right to water”, and “fundamental right to water” in different sections, as presented in Figure 3.

As the figure above illustrates, most decisions mention the right to water in the reasoning, while in other decisions, the right is mentioned in a citation to a previous decision on the same topic (used to strengthen the reasoning), in the summary of the claimants’ arguments (but the courts do not respond to this argument in the decisions’ reasoning), in a citation to the literature (used to strengthen the reasoning), or in a brief from the *Ministério Público*. As our goal for this paper is to examine how the courts in Brazil develop the right to water, we decided to exclude from this section’s figures the 17 cases where our keywords were only mentioned in the summary of the claimant’s arguments and not addressed by the courts. That is, if the expression appears only as a citation of an argument from a claimant, the decision does not contribute to the aim of verifying how courts in Brazil construct a right to water. The figures in this section refer to the remaining 97 member state appeal courts’ decisions in the database.

Problems related to water supply count for the great majority of cases (Figure 4), and the most frequent topics within the area of water supply are indicated in Figure 5. Rising conflicts around water—often concerning exploitation of water resources and its impacts on local populations and the environment—were arbitrated by the Brazilian courts, but our database shows that the expression “right to water” is hardly ever used beyond water supply-related disputes. It is important to note that one court case can have more than one topic (for instance, disconnection and indemnity for moral damages due to the disconnection). For this reason, the sum of the numbers in the columns for each topic in the figure below (126) is higher than the number of decisions we look at here (97).

The most prevalent issue concerns indemnity for moral damages, the duty to restore the water supply service (mainly related to disconnections due to the lack of payment of water bills), and the duty to provide the service (when the necessary infrastructure is not in place or when the service is not individualised per household). A further frequent topic is the duty to improve the quality of the service. This topic is connected to the performance of the *Ministério Público* since half of these cases (which also represent half of the collective cases in the database) are decisions issued in Public Civil Actions filed by the *Ministério Público* claiming that water supply companies and municipalities must improve the quality and the regularity of the service they provide. These cases are seen in Minas Gerais, Rio Grande do Sul, and Sergipe (representing all the cases from the latter).

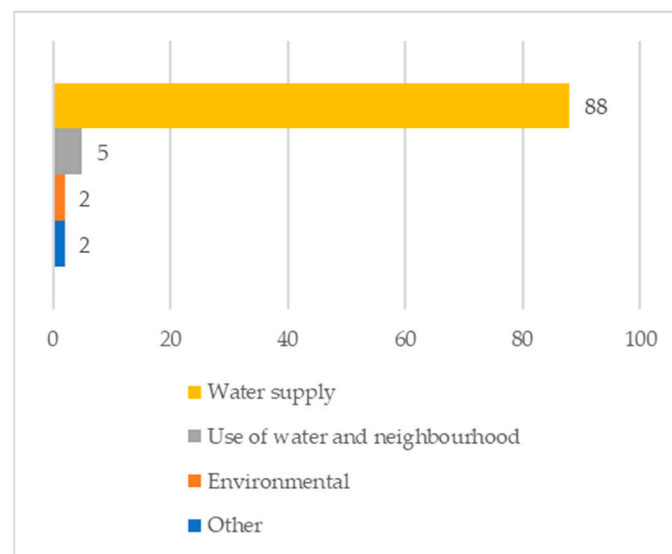


Figure 4. Decisions' topic.

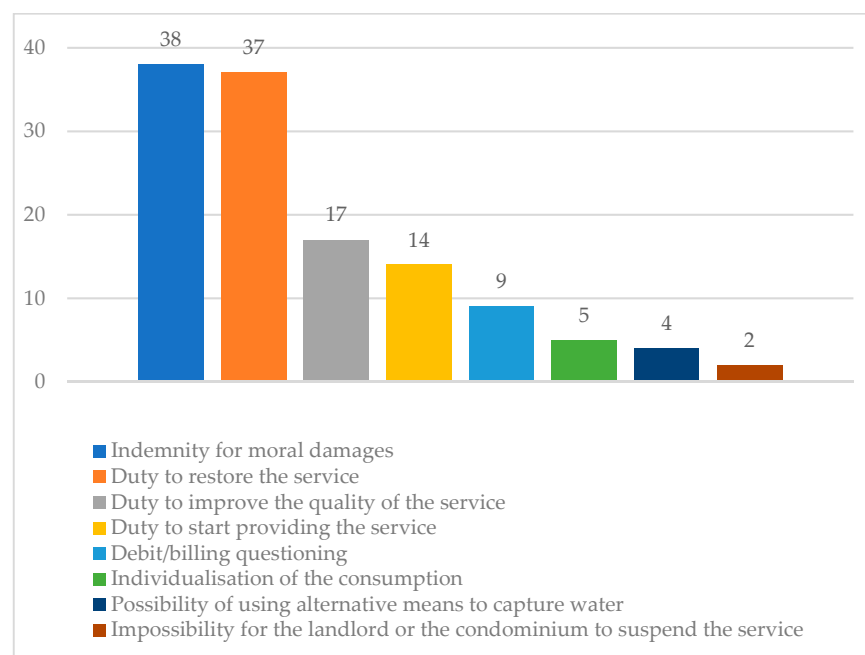


Figure 5. Most Frequent Topics within the area of water supply.

As mentioned earlier, there is a variation among the different states, and this is also reflected here. For example, all cases in the state of Espírito Santo are indemnity for moral damages taken to the courts by individuals who have had their water supply interrupted as a consequence of the rupture of a dam containing toxic substances produced by a mining company. The dam was located in Mariana, a town in the state of Minas Gerais, and its rupture affected the access to water for a large number of people in several towns and cities of the states of Espírito Santo and Minas Gerais. However, the selected decisions protect only the individual rights of those who were affected and who took the case to the courts. These 17 decisions from Espírito Santo claiming indemnity for moral damages, combined with the fact that this claim is frequently made together with disconnection claims and with claims related to the irregular service provision, help us understand why indemnity for moral damages appears as the most frequent topic in Figure 5, present in 38 decisions. These indemnities for moral damages are at the same time punitive, compensatory, and

pedagogical, as to discourage behaviours contrary to the law by water supply companies. Whether these repeated decisions establishing indemnities for moral damages achieve the goal of stimulating water supply companies to provide better services is something to be investigated.

The majority of the cases are individual claims involving an individual and a water supply company, as illustrated in Figure 6. This indicates, as previously identified for the rights to health and education [33], that the right to water has been mostly addressed as an individual right.

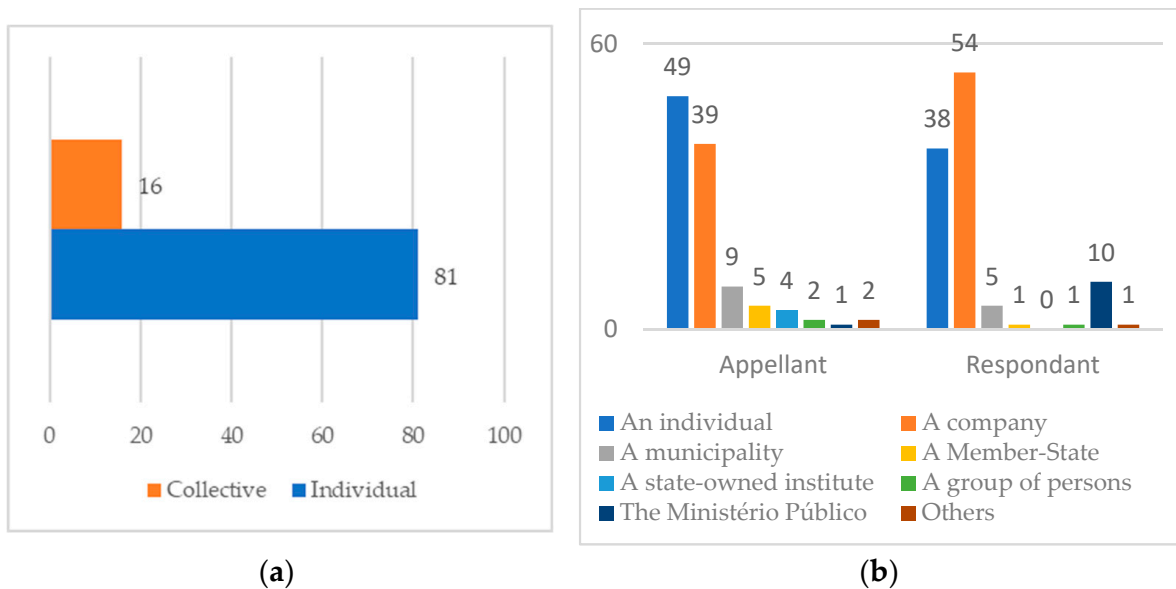


Figure 6. (a) Collective or Individual Claims? (b) Parties in conflict.

From now on, we explore how the member state appeal courts adjudicated the claims and the content given to the right to water (Figure 7).

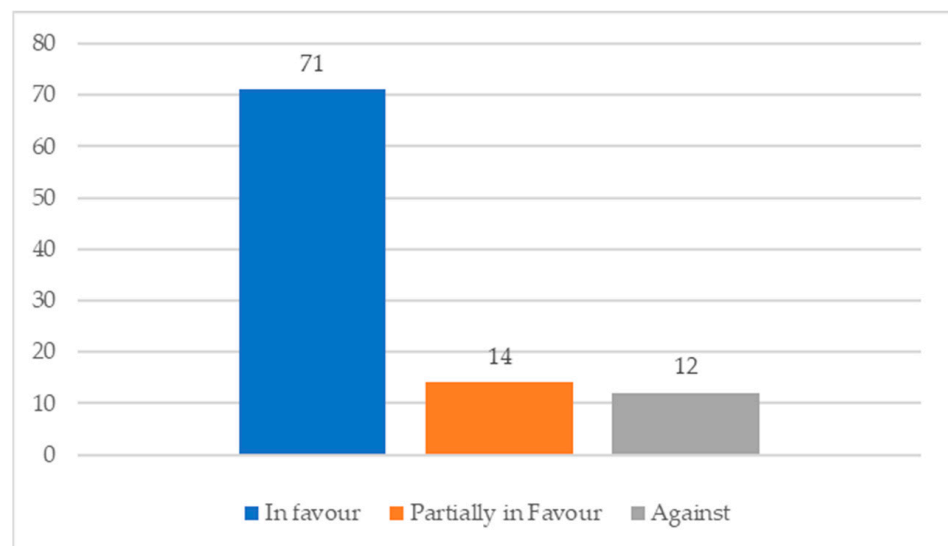


Figure 7. How the court has adjudicated the claim?

As Figure 7 indicates, most decisions were in favour of the right to water as defined by the court. We decided to classify the decisions as in favour, partially in favour, or against regarding the protection of the right to water as defined by the court because to classify the decisions as favourable or against the claim could lead to confusing results depending on

who the claimant is. We have not, however, defined the right to water or made any value judgement about the courts' definitions. We state that our study does not give a sufficient basis to establish whether there is any strong connection between the use of our keywords and more favourable decisions. Such assessment would require a larger number of relevant cases as well as comparison between decisions on the same matter, where a group of them contain the selected expressions while the other one does not contain these expressions. Although this would be an important exercise, it is not within the scope of this study.

An interesting finding is that, in the case of São Paulo, the member state appeal court with the highest number of decisions in the database (27), one single chamber (out of a total of 38 chambers that could rule on this case) was responsible for issuing 17 decisions that contain our keywords. Here, we highlight that this is not due to the specialisation of this chamber on the matter. Two reporting judges drafted 17 of the selected decisions, and only one of these judges used the expression "right to water" in the reasoning of the 12 decisions reported by him to establish that "the right to water is part of the contingent of the so-called fundamental rights, such as the right to life, health, and the dignity of the human person" (our translation). Further, we identified that the first decision reported by this particular judge in our database is from 2007, and since then, dealing with different topics, he used precisely the same text in all decisions until his last decision in the database issued in 2017. In other words, almost half of the decisions from the TJSP containing our keywords were drafted by one single judge who was convinced about the existence of a right to water since 2007, and his way of writing the reasoning for his decisions on this matter has not changed over time, even when this right has been given stronger protection in the international arena.

According to most of the cases we found in member states' appeal courts, the right to water means, in short, the right to water supply provision (even when, in individual cases, the ownership of the household or of the land where the household is built in is not proven), the individualisation of consumption, and the right not to have the service disconnected due to old unpaid water bills. A water bill is considered old when it does not refer to the actual month of consumption. As an example, we can mention a decision from the member state of Ceará (TJCE. *Agravo de Instrumento* 0623004-48.2018.8.06.0000) that refers to a bill from August as old when the disconnection happened in November that same year.

We identified that the water supply companies' denial to build the needed infrastructure for the provision of the service is in some cases based on municipal requirements establishing that the individual should be able to prove ownership of the household. This happens despite reiterated decisions by the appeal court in question establishing that access to water cannot depend on ownership titles. These decisions are particularly important in relation to vulnerable people living in irregular occupations and those who, due to bureaucratic and costly procedures, do not have the title of their property.

Moreover, also according to reiterated decisions, water supply debts are connected to the individual and not to the property, and being so, debts from a previous owner do not restrict the property in any way. As our data shows, this is also often ignored by companies, therefore leading, in our opinion, to a need for judicialisation.

In Argentina, a decision issued by the Supreme Court of the Province of Neuquen, which explicitly mentioned the right to water, established the provision of water to Valentina Norte Colony's inhabitants despite the lack of title. This decision cited the Constitution as well as the Convention on the Rights of the Child and principles of international human rights law [13,14].

As a general rule, the fact that the right to water is mentioned in the reasoning of the decisions in Brazil does not prevent disconnections when debits of water bills are recent, but there are several cases where the extreme vulnerability of the debtor resulted in decisions that establish the impossibility of disconnection due to non-payment of water bills without mentioning if they are recent or not. This resonates with Haglund's [12] findings in an extensive study on water-related decisions in the São Paulo State appeal court focusing

on cases involving basic services in the city of São Paulo, in which individual plaintiffs had demonstrable financial need. Haglund found that “the vast majority of judges handed down rulings that reflected a substantive view of state responsibility to ensure that basic human rights are respected where poverty is present, despite the formal contractual legality of cut-offs”. Other studies indicate that disconnections of the poor for non-payment of water-bills were unlawful in Argentina, Brazil, Colombia, and Venezuela [16,27,34]. Leo Heller, the Special Rapporteur on the Rights to Water and Sanitation (2014–2020), argues that “water cuts due to economic disability to pay are strictly prohibited in the human rights framework, as they constitute a stepping stone, therefore, incompatible with the principle of progressive realisation of rights” [35] (our translation).

Here, we point out that although social tariffs have been applied, mostly aimed at low-income populations, sometimes the requirements established by municipalities, regulatory bodies, and both public and private water supply companies (such as the need to prove ownership over the property) make this type of tariff unviable for the most vulnerable. The law that establishes the national guidelines for basic sanitation (Law 11.445/2007, modified by the Law 14.026/2020) sets as one of the goals of regulation to ensure reasonable tariffs (article 22, IV). Further, the law establishes the cases in which the services may be interrupted by the provider, one of them being the default of tariffs by the user. The law also establishes that the interruption or restriction of the water supply due to default of tariffs by low-income residential users benefiting from a social tariff must comply with deadlines and criteria that preserve minimum health maintenance conditions of the people affected (article 40, V, § 3). However, these criteria are not defined by law. There is a bill in process before the National Congress to create the social tariff for water and sanitation (Bill 9.543/2018). It is true that the courts alleviate the situation of those who file a case, but we have not seen in our database any decision dealing with abusive requirements which could benefit an entire population under the same circumstances. Another important point to make is that the Consumer Protection Code (Law 8.078/1990) does not exempt the consumer from paying for the services they use and that there is no law at the federal level establishing a minimum free water amount per individual per day. Further, the law that regulates the concession and permission regime for the provision of public services allows the suspension of the services due to non-payment of consumption debts on the condition that the consumer is previously notified [36] (article 6, § 3, II). According to the law, the suspension of the services due to non-payment takes into consideration the interest of the community. At the same time, another article from the Consumer Protection Code stipulates that public bodies are required to provide continuous services when they are essential [21] (article 22). The main arguments in reasoned decisions against disconnections due to the lack of payment of water bills, are that (i) water supply companies have other means to make the consumers pay for their debts, (ii) water supply is different from other services (as for instance telephony and electricity) since water is essential to life; and (iii) the law that established the national water resources policy states that water is a public good.

We now turn to the most frequent pieces of legislation used by the member state appeal courts in the decisions’ reasoning, which are illustrated in Figure 8 below. Again, the number of references is higher than the number of decisions (97) because the same decision can refer to more than one legal norm. Moreover, there are 27 decisions that do not refer to any law. However, an interesting fact is that, among the latter, 18 mention the UN resolutions. We will return to this point later on.

The most frequently mentioned norm in the decisions from member state appeal courts was the Constitution [19]. When other rights and principles are mentioned as reasoning for the decisions, the prevalent ones are the constitutional rights to health, life, and housing and the principle of human dignity, as indicated in Figure 9.



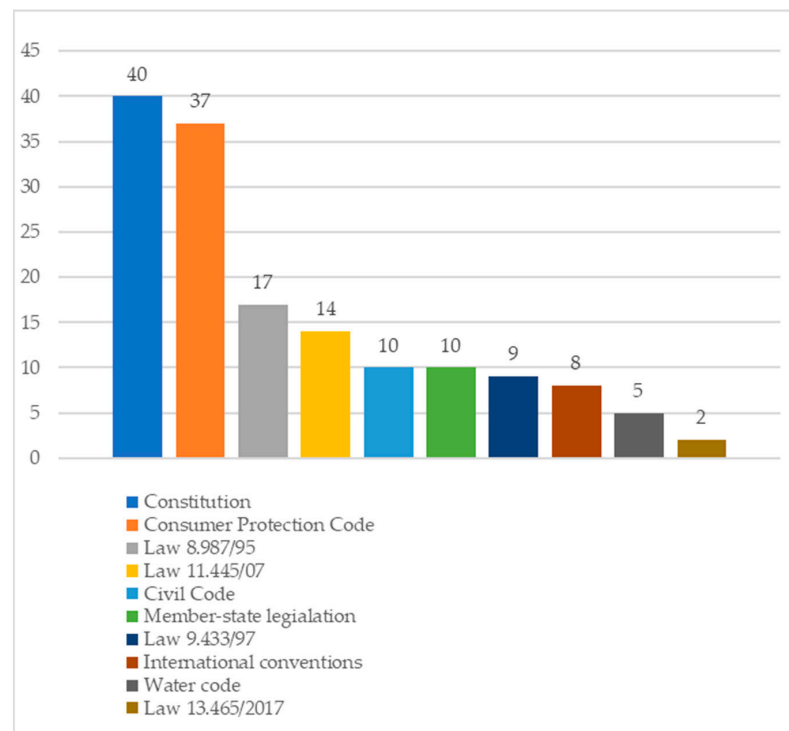


Figure 8. References to legal norms.

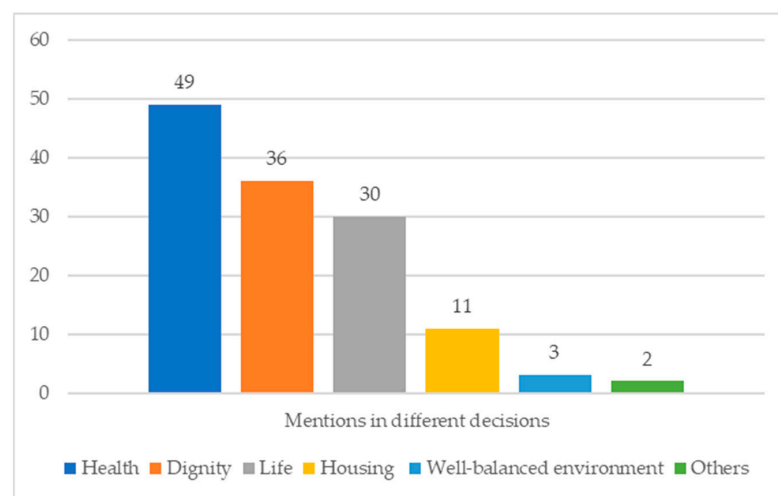


Figure 9. Rights and principles mentioned.

However, one of our findings is precisely the low number of decisions that employ rigorous legal arguments. Another study exploring right to water case law from several jurisdictions concludes that “if anything, national case law exhibits a certain immaturity in its conceptual defense of the right to water. Most judgements reference the right to water in vague, general terms, failing to outline its content and obligations conclusively” [14]. Even for the case of Colombia, where the Constitutional Court has issued decisions with clear orders and even determined the creation of monitoring system to assess the impact of measures taken [18], this does not mean that the court’s decisions on the right to water do not entail contradictions [16].

Our database contains several decisions that simply mention the right to water as part of other constitutional rights and go from there to the adjudication without providing further arguments. Often, what is mentioned is the essentiality of the water supply service in general or in relation to health and life and that water public policy is a determinant

of health. Here, we note that references to other rights and principles are not something particular to the right to water due to the lack of constitutional protection. As Hoffman and Bentes [33] pointed out, even in cases specifically related to the right to health, which has constitutional protection and is justiciable, Brazilian courts have usually relied on a variety of constitutional provisions, particularly the right to life.

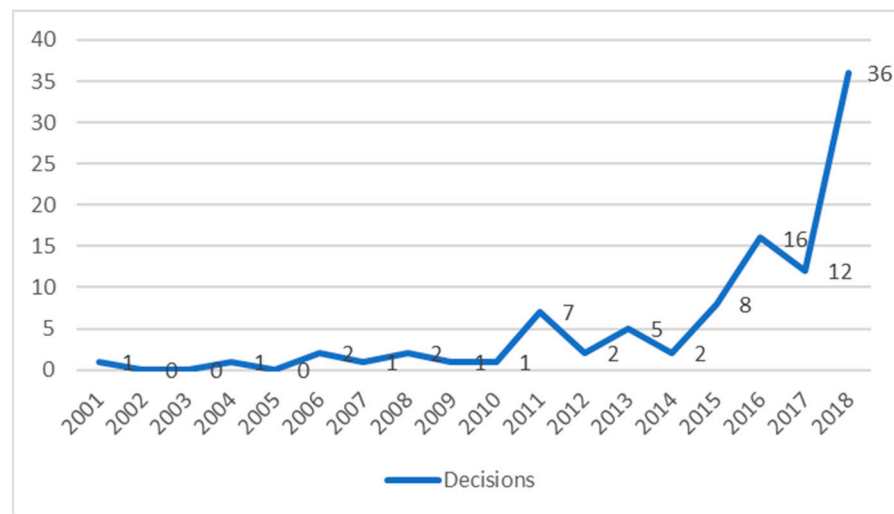
Further, despite the existence of constitutional provisions that explicitly establish a freestanding right to water in various state constitutions, such as in Amazonas, Mato Grosso, and Paraná, these have nevertheless not been referred to in any of the decisions from these states.

When it comes to the references to the Consumer Protection Code [21], which is the second most frequently mentioned norm, the courts define users of public services, which include water supply, as consumers who are given the protection established by the code regardless of who provides the service, be it a public or private company. The code's most frequent article in the decisions in our database is one that stipulates that public bodies are required to provide continuous services when they are essential [21] (article 22), as for the case of water supply. The second most frequent article (article 6) establishes the consumer's basic rights. The code also gives a strong protection in the event of faults in service provision as well as inadequate information given by the service provider, when consumers have the right to compensation for damages, both material and moral [21] (articles 14 and 22), with an extended statute of repose to file the case in comparison to the one established by the civil code [21] (article 27). This helps understand the high number of cases where indemnity for moral damages is the most frequent topic within water supply, as shown in Figure 5.

The two other most frequently mentioned norms are the Law 8.987/95 [36] on the regime of concession and permission for the provision of public services and the Law 11.445/2007 [37], which established the national guidelines for basic sanitation. They appear together in seven out of the 20 decisions from the state of Paraná that establish the water supply companies' duty to provide regular and continuous services (Law 8.987/95 [36] article 6, and Law 11.445/2007 [37]; articles 2, 3, and/or 40). All these cases are related to frequent interruptions of water supply that are not in accordance with the hypotheses established by law. As for the case of São Paulo, all decisions that refer to the Law 8.987/95 [36] mention the article that allows the interruption of public services in case of default by the user (article 6, § 3º, II) to then say that this article is not applicable in the specific case of water supply, considered an essential service for human life. In other words, the service cannot be interrupted as a way for the company to get the payment of debts.

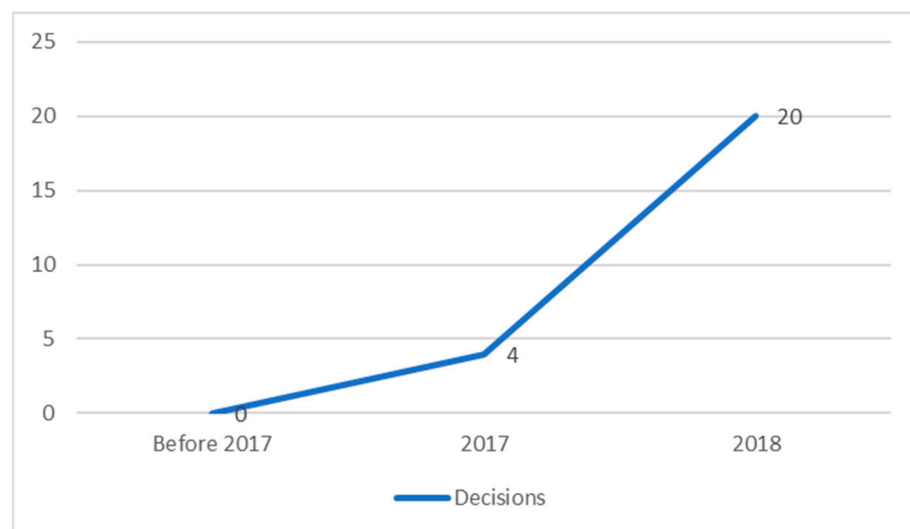
Our database points to an increase in the number of decisions referring to the right to water after 2010. As Figure 10 indicates, 89 out of 97 decisions that mentioned the right to water were issued from 2010 onwards.

What the figure does not tell us are the reasons for this increase. We identified in our database that 17 out of the 36 decisions for 2018 are the cases from the member state appeal court of Espírito Santo. These were filed in 2016 by individuals claiming indemnity for moral damages for service interruption as a consequence of the rupture of a dam containing toxic substances produced by a mining company, as mentioned in the comments to Figure 5. In any event, the number of remaining decisions for the year of 2018 (19) is higher than in previous years, so it is fair to say there has been an increase. However, although our database does not allow us to establish the causes of this, we see that this pattern coincides with urban expansion and poor urban planning combined with a trend of more judicialisation of such matters in general. Further, the stronger international protection and attention given to the right to water in the last two decades may also have a role to play, to be explored in the comments to the figure below.



**Figure 10.** Number of decisions mentioning a right to water over the years.

As Figure 11 indicates, the increase in the number of decisions referring to the right to water in Brazilian member state appeal courts coincides with an increase in the number of decisions referring to the UN's resolutions establishing a freestanding right to water.



**Figure 11.** References to UN's Resolutions over the Years.

The first decisions in our database containing references to the UN 2010 resolutions on the right to water were issued in 2017. We found, in total, 24 decisions that mention these resolutions out of 89 decisions in the database issued after 2010. We also observed that these references are concentrated; that is, they are only seen in decisions from four appeal courts (Espírito Santo, Minas Gerais, Paraná, and the Federal District). Among these, all the 17 cases from Espírito Santo, which are based on the UN 2010 resolution, deal with the same matter (indemnity for moral damages), are from the same town, were drafted by only two reporting judges from the same chamber, and were issued in 2018. This allows us to state that an explicit reference to the right to water as an international human right has not usually been part of the legal reasoning of decisions in Brazil.

Our study allows us to say that the member state appeal courts have until now been the most fertile arena for the development of a right to water through court decisions in Brazil. They have done this in different ways and to different extents, which reflects not only the disparity between Brazilian member states but also the construction of a

right through decisions without previously established parameters. Even so, an important finding is that most of the cases are individual disputes, and most of the decisions have been favourable to the right to water as defined in the ruling, and the right to water is usually derived from rights expressly guaranteed in the Constitution. Moreover, the references to a right to water are increasing in number: 89 out of 97 decisions were issued after 2010.

#### 4. Conclusions

Brazil has in recent years seen a construction of the right to water in the member states' appeal courts, the federal regional appeal courts, and the Superior Court of Justice. Still, references to such a right have not yet been observed in the Federal Supreme Court, in which the country differs from equivalent courts in other Latin American countries.

We found that the development of the right to water in Brazil has not happened in the same way in the various states and regions and that it is difficult to track whether the protection of this right on the international arena has influenced Brazilian courts.

The Brazilian Constitution does not enshrine a freestanding right to water, and the arguments to guarantee this right found in our database's decisions frequently rely on constitutionally protected rights, such as the rights to life and health, and on the principle of human dignity. The Consumer Protection Code [21] is also often used as legal basis for the decisions.

As is common in jurisprudential developments of rights and principles, it is not possible to state parameters for definition or application. We can, however, say that the number of decisions mentioning a "right to water" has increased over the years as well as the number of decisions referring to the UN resolutions on the right to water. Additionally, we can say that this right has been applied most frequently in disputes related to access to water by individuals against water supply companies.

Recurring topics in decisions from the member states' appeal courts are indemnity for moral damages, the duty to restore the service (or the right not to have the service disconnected due to old unpaid water bills), the duty to improve the quality of the service, as well as the duty to water supply provision (even when, in individual cases, the ownership of the household or of the land the house is built on is not proven).

When it comes to the question of whether those in need have their rights protected by the courts, we have seen that courts take into consideration arguments of extreme vulnerability to establish the impossibility of disconnection due to non-payment of water bills. In this regard, our findings are similar to what is seen in other Latin American countries, such as Argentina, Colombia, Costa Rica, and Peru. The key difference is that in these countries the right to water has been also established by Constitutional Courts.

The federal regional appeal courts are where all collective cases involving indigenous peoples and *quilombola* communities are to be found, and all the cases related to these vulnerable groups were taken to court by the *Ministério Público*. Apart from one case, all of them had favourable decisions establishing the duty of water companies to provide water supply. Our database indicates the relevance of the *Ministério Público* in contributing to a definition of a right to water by appeal courts as claims by the institution go beyond access to water to also encompass requirements regarding quality and dignity.

Further, the two decisions issued by the Superior Court of Justice that establish a right to water—one of them as a neighbourhood right aiming for crop irrigation and not only as a right to water supply and the other one referring to the UN's 2010 resolution as a core element in its reasoning—can be given relevant argumentative weight and influence the construction of the right in the years to come.

In the absence of decisions that face the definition and characterisation of a right to water from the Federal Supreme Court, the court that is responsible for giving the last word on the interpretation of the constitution, we can say that the two decisions by the Superior Court of Justice and the construction made by the lower courts is what we presently have when discussing the judicialisation of the right to water in Brazil. However, since the

constructed right to water is mostly referred to in individual disputes, it has not succeeded in contributing substantially to the standardisation of meaning and what such a right might possibly entail in a wider context.

Although there are no decisions establishing a right to water by the Federal Supreme Court, there is legal mobilisation before the court with an explicit right to water language building both on decisions on tax law cases, which state that water is not a commodity, and on the UNGA's 2010 resolution. As we have seen, international instruments are an important source in the construction of the right to water by courts in other Latin American countries. The litigation strategy in Brazil could eventually lead to the recognition of the right to water on a national level if the court at some point faces the argument that the right to water is implicitly present in the Brazilian constitution of 1988.

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**Data Availability Statement:** Due to the rules regarding data protection of personal data in Norway, the authors are not allowed to publicly share their database for this publication. However, all the decisions collected by the authors were publicly available at the courts' websites. The links for accessing the search mechanisms consulted are: <https://jurisprudencia.stf.jus.br/pages/search>; <https://scon.stj.jus.br/SCON/>; <https://www2.cjf.jus.br/jurisprudencia/trf1>; [https://www10.trf2.jus.br/consultas/?entqr=3&lr=lang\\_pt&ie=UTF-8&oe=UTF-8&adv=1&ulang=&access=p&entqrm=0&wc=200&wc\\_mc=0&ud=1&filter=0&getfields=\\*&q=&client=v2\\_index&proxystylesheet=v2\\_index&site=v2\\_jurisprudencia&sort=date:D:S:d1&base=JP-TRF](https://www10.trf2.jus.br/consultas/?entqr=3&lr=lang_pt&ie=UTF-8&oe=UTF-8&adv=1&ulang=&access=p&entqrm=0&wc=200&wc_mc=0&ud=1&filter=0&getfields=*&q=&client=v2_index&proxystylesheet=v2_index&site=v2_jurisprudencia&sort=date:D:S:d1&base=JP-TRF); <http://web.trf3.jus.br/base-textual>; <https://jurisprudencia.trf4.jus.br/pesquisa/pesquisa.php?tipo=%201>; <https://julia-pesquisa.trf5.jus.br/julia-pesquisa/#consulta>; <https://esaj.tjac.jus.br/cjsg/resultadoCompleta.do>; <https://www.tjal.jus.br/?pag=jurisprudencia>; <https://tucujuris.tjap.jus.br/tucujuris/pages/consultar-jurisprudencia/consultar-jurisprudencia.html>; <https://consultasaj.tjam.jus.br/cjsg/consultaCompleta.do>; <https://jurisprudencia.tjba.jus.br/>; <https://esaj.tjce.jus.br/cjsg/consultaCompleta.do>; <https://pesquisajuris.tjdf.tj.br/IndexadorAcordaos-web/sistj?visaoId=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao>; [http://aplicativos.tjes.jus.br/sistemaspublicos/consulta\\_jurisprudencia/cons\\_jurisp.cfm](http://aplicativos.tjes.jus.br/sistemaspublicos/consulta_jurisprudencia/cons_jurisp.cfm); <https://www.tjgo.jus.br/jurisprudencia/juris.php>; <https://jurisconsult.tjma.jus.br/#/sg-jurisprudence-form>; <https://jurisprudencia.tjmt.jus.br/consulta>; <https://esaj.tjms.jus.br/cjsg/consultaCompleta.do>; <https://www5.tjmg.jus.br/jurisprudencia/formEspelhoAcordao.do>; <http://gsa-index.tjpa.jus.br/consultas/search?q=&client=consultas&proxystylesheet=consultas&site=jurisprudencia&sort=date%3AD%3AS%3Ad1&aba=JP>; <https://pje-jurisprudencia.tjpb.jus.br/>; <https://portal.tjpr.jus.br/jurisprudencia/>; <https://www.tjpe.jus.br/consulta/jurisprudencia/tjpe>; <http://www.tjpi.jus.br/jurisprudencia/>; <http://www4.tjrj.jus.br/ejuris/ConsultarJurisprudencia.aspx>; <http://esaj.tjrn.jus.br/cjsg/>; <https://www.tjrs.jus.br/novo/jurisprudencia-e-legislacao/jurisprudencia/>; <https://webapp.tjro.jus.br/juris/consulta/consultaJuris.jsf>; <http://jurisprudencia.tjrr.jus.br/juris/>; [https://busca.tjsc.jus.br/jurisprudencia/#formulario\\_ancora](https://busca.tjsc.jus.br/jurisprudencia/#formulario_ancora); <https://esaj.tjsp.jus.br/cjsg/consultaCompleta.do>; <https://www.tjse.jus.br/portal/consultas/jurisprudencia/judicial>; <https://jurisprudencia.tjto.jus.br/>. Last accessed on the 18 October 2021.

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