THE JUDICIAL BRANCH AS A (PRETTY) BAD POLITICAL REGULATOR: NOTES FROM BRAZIL

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1. INTRODUCTION

April 2020. Liberal democracy is kept (again, or yet) in check. Brazil is facing the rise of far-right supporters and parties, populist rhetoric, emergency measures taken in the face of a pandemic, increasing surveillance of citizens by governments and private entities. Like the United States, Brazil has 2020 municipal elections scheduled in 5,570 cities, all on October 4 with the same electoral system and the same rules. They are organized under an overpowering electoral authority (Brazilian federalism use to be —with punctual exceptions[1]— nothing more than a prediction constitutional void). The coronavirus pandemic outbreak threatens the scheduling of the 2020 elections. Some people think that to avoid the extension of mayor's terms, judges should take over the municipal administrations.[2] Thus, the Judiciary Power, the only electoral authority in the Brazilian system, must decide whether judges (recruited by a specific civil service test, a public competition based on exams, and without a democratic pedigree or even citizen-based accountability) will occupy elective positions without a popular election.

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[1] The Federal Supreme Court overturned the state constitutional rules that governed the impeachment of governors, claiming that the Member-States would have to be bound by the Federal Law No. 1079/1950. On April 15, 2020, however, in the middle of the dispute over states' measures for social isolation as a strategy to combat the spread of COVID-19 and the federal government's action not to paralyze the economy and, therefore, to remove state decrees from restricting activities, the Federal Supreme Court decided - in a precautionary measure (ADI No. 6341-MC) – on the competence of the Member-States in matters of public health.

[2] This is the opinion of some judges and also of the House of Deputies Speaker (https://politica.estadao.com.br/noticias/geral,juizes-podem-assumir-prefeituras-se-eleicoes-forem-adiadas,70003270377 https://www.correiobraziliense.com.br/app/noticia/politica/2020/04/14/interna_politica,844550/juizes-podem-assumir-prefeituras-se-eleicoes-forem-adiadas.shtml).

One of the arguments in defense of a strong role for judges in controlling elections and ensuring a competitive and fair democratic process is that the judicial branch would be neutral and politically disinterested in drafting election rules, and would act to resolve electoral disputes (Rocha Cabral 1932; Pontes de Miranda 1936; Issacharoff & Pildes 1998; Covarrubias Dueñas 2000; Orozco Henríquez 2003; Arreola Ayala 2008; Fernández Ruiz 2010; Roseno 2010; González Oropeza 2011; Sadek 2017; Barreto 2020). The Brazilian experience, however, shows that this presumption is incorrect. The strong interference of the Brazilian Judiciary in the elections did not improve competitiveness. On the contrary, its interventions undermined the space for the representation of minorities in the public debate and Parliament.

To demonstrate this, I begin by describing the Brazilian electoral authority and its powers, indicating the concentration of electoral governance competencies (2). I also refer to its composition and its advances in the normative sphere, contrary to the Constitution. At this point, it is still worth addressing the shielding of the Electoral Justice regarding judicial review. Next, I will face three relevant points in political competition: the political party system (3), campaign financing (4), and electoral communication (5). The intervention (and sometimes the passive virtues) of the Brazilian Judicial Power in these three fields shows that it will not be the judicial branch that will save democracy from shipwreck. Moreover, it stresses that only democratic politics can rescue political democracy.

2. THE BRAZILIAN ELECTION WATCHDOG: GAMEKEEPERS IN ROBES

The judicial branch carries out the control of the elections in Brazil. During the Brazilian Empire, priests were responsible for polling stations, but since 1916, judges have been responsible for registering voters and counting votes. The verification of powers, or the decision on the validity of the election, however, was the responsibility of the Legislative Power until the so-called Revolution of 1930, which had as its theme the «electoral truth» (Porto 1989; Nicolau 2002). Against the results of the 1930 election, the losers seized national executive power and established a provisional government, suspending the 1891 Constitution (Porto 2000; Meirelles 2005).

The provisional government combined the powers of the Executive and Legislative branches and established, with a panel of experts (and therefore without parliamentary debate), an electoral authority concentrated in the judicial branch. The election for the Constituent Assembly was conducted by the rules issued by the provisional government and had a minimal turnout of 3.3% of the population. The 1930 coup that seized power was able to erect an authority capable of ensuring electoral authenticity (Moraes & Lima 2006). The new model of electoral administration reached public confidence in the following elections. The 1934 Constitution confirmed the option for the «judicial watchdog». Up to the present, judges concentrate

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the responsibility for the Brazilian elections (Salgado 2016). The Electoral Justice —a branch of the Judiciary responsible for electoral matters— was dissolved in 1937 by Getúlio Vargas, who had been its creator, during the *Estado Novo* dictatorship. From October 1934 to December 1945, no elections were held in Brazil. Before his imminent fall, the dictator issued a decree (Decree-Law No. 7586/1945) that reinstated the Electoral Justice and imposed rules for presidential and parliamentary elections. Moreover, it ended the possibility of local political parties and guaranteed the parties a monopoly for the presentation of candidacies, a rule that is still in place. The Electoral Justice, as configured by the 1946 Constitution (Duarte 1947), went through democratic years, a long dictatorial period, a re-democratization and reached the 21st century as an untouchable idol. Our present Electoral Code was established under the military dictatorship a year after the 1964 coup.

Since then, the Electoral Justice has remained a specialized branch of the federal judiciary, combining state and federal magistrates on the bench. Despite its authoritarian origin and its composition and structure designed to give a lot of power to the central government over the elections, there is not much criticism of the Brazilian model. The complementary law mentioned in article 121 of the present Constitution was not elaborated under the 1988 Constitution. The Electoral Code, elaborated in the military dictatorship to provide a façade legitimacy to the authoritarian regime, was incorporated into the new constitutional order regarding the electoral authority's organization and competence. The New Republic was born in 1988 with an all-mighty guarantor of democracy, which brings together all electoral functions created by a dictator and under legislation imposed by a military coup.

However, the significant part of the books and articles on the Brazilian Electoral Justice is frankly celebratory. Its origin, its actions during the military dictatorship, the absence of parameters for decisions, the inconsistency with the precedents, the lack of care with the evidence, and the «revolving door» of jurists who are members of the courts and applicants of prominent cases.

An example of the praiseworthy position is that of Armando Antonio Sobreiro Neto (2003): «The Electoral Justice, in the performance of its constitutional role, reveals itself to be an instrument for maintaining the Democratic State of Law, as guardian of the democratic primates outlined in our Magna Carta and responsible for the administration of the electoral process ». Djalma Pinto (2006) comes to praise the absence of his own career in the electoral magistracy: «The positive side of this system resides in the fact that the Electoral Law is always oxygenated. The jurisprudence is frequently updated thanks to the new compositions of the Courts, thus responding to the expectations of society in permanent change ». As a concurrent argument, Vera Maria Nunes Michels (2002) supports the composition system as it prevents the «frequent exacerbations of passion» that magistrates sometimes also reach from interfering with the impartiality of decisions.

Joel José Cândido (2004) presents a different opinion. He asserts the need to rethink the multifaceted model of the electoral authority composition. For the author,

the existence of their own and specialized judges, as well as the functional body, is «necessary for the success in carrying out their legal functions». In the same sense, José Jairo Gomes (2004) underlines that «the ideal would be for the Electoral Justice to have its own specialized body of judges in all instances. Ideally, it should be an autonomous and independent justice, as are the other branches of the Judicial Power».

Marcelo Roseno de Oliveira (2010) recognizes that the «accumulation of functions entails some difficulties from a practical point of view, since administrative and judicial activities are guided by different principles, especially because the judge is prohibited from acting ex officio, under penalty of compromise of its impartiality and the inertia of the jurisdiction, while the administrator is required to act without provocation, observing the principle of legality». However, he claims that the delegation of the qualification of the elections, in its entirety, to a branch of the Judicial Power, «serves to provide reliability to the election control system, while guided by typically normative and jurisdictional criteria, enabling conflicts to be settled, with imperative force, by a third party, impartially, under the constitutional guarantees directed to litigants in general». And he adds: «The decisions rendered (necessarily grounded, under penalty of nullity) are controlled by a system of appeals in three degrees of jurisdiction, without excluding, in the case of allegedly facing the Constitution, the action of the Supreme Federal Court».

Carlos Eduardo de Oliveira Lula (2012) justifies the option for the electoral authority, since «the smoothness and probity of the elections require their holding by a third state body, disinterested and impartial, outside the orbit of the powers involved in the dispute, so that he can decide the electoral contests dismissal of the passions that constantly clothe the electoral procedure in contemporary democracies». He further affirms that the model «is currently being adopted in Brazil, with great success».

I insist the electoral authority in Brazil does not fit democratic demands. The inadequacy is related to three main aspects: the concentration of functions, the constitutional design, and the activist posture.

Figure 1 presents the organization chart of the Brazilian Judiciary. It visualizes the position of the Electoral Justice bodies and the possibility of appeals to the Supreme Federal Court when there is a constitutional issue.

The Electoral Justice has a very peculiar composition. Justices, federal and state judges, and lawyers work on deciding electoral issues. State judges accumulate responsibility for municipal elections, for a term of two years, without abandoning their ordinary duties. The absence of an exclusive career for electoral judges was granted to keep them away from political passions and thus ensure that their decisions were not affected by partisan bias.

Regional Electoral Courts review decisions of electoral judges (acting as a second instance when deciding questions related to municipal elections) and are responsible for organizing state elections. Its composition is quite peculiar. There are seven members who serve for a term of two years, and without the need for abandoning their ordinary duties. Two are drawn from the State Court of Appeals; two are state

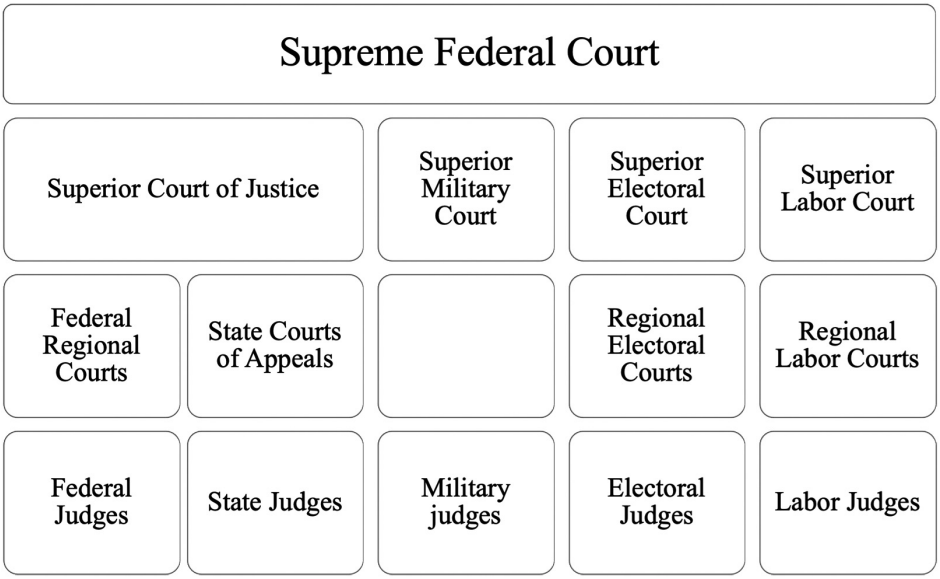

Figure 1. Brazilian Judicial Branch

judges; one federal judge and two lawyers, appointed by the President of the Republic among six nominated by the State Court of Appeals.

The Superior Electoral Court reviews decisions of the Regional Electoral Courts (acting as a second instance in state elections, and as a third instance in municipal elections) and is responsible for organizing presidential elections. The Superior Electoral Court is composed of seven Justices: three members of the Supreme Federal Court, two members of the Superior Court of Justice, and two lawyers, appointed by the President of the Republic among six nominated by the Brazilian Bar Association, all for a term of two years. Moreover, three of the remaining eight Justices from the Supreme Federal Court are «substitute members» of the Superior Electoral Tribunal.

The Supreme Federal Court can review the decisions of the Superior Electoral Court dealing with a constitutional issue (such as the right to vote, eligibility, elective mandate, and political parties). The Supreme Federal Court justices, who are also Superior Electoral Court members, can —as established by a judicial decision[3]— participate in the review of electoral decisions, even if they took part in them. This possibility tends to give those judges excessive power over their decisions, thus undermining any constitutional attempts to control them.

[3] «In the judgment of a constitutional issue, linked to the decision of the Superior Electoral Court, the Justices of the Supreme Federal Court who worked there in the same process, or in the original process, are not prevented». Precedent No. 72 of the Brazilian Federal Supreme Court.

Under the Constitution, the electoral judicial system has administrative competencies for organizing the elections and jurisdictional powers in both criminal and civil spheres. The same Electoral Court uses the administrative police power, for instance, to distribute public funding and publicity campaign quotas and decides in a judicial dispute about the abuse of economic power or irregular electoral propaganda.

The concentration of powers is accentuated by a self-recognized normative competence on the part of the Superior Electoral Court. In addition to specifying the applicable electoral legislation for any given election, the Electoral Court innovates in the legal system by issuing «judicial resolutions». In this way, the electoral authority brings together the activities of rulemaking, rule application, and rule adjudication. If any administrative action by the Electoral Justice is adjudicated, such as an injunction against the distribution of financial resources to political parties, the Electoral Justice itself decides on the matter (Salgado 2016). This creates a bulwark against constitutional challenges of electoral decisions because three of the eleven Justices of the Supreme Federal Court participated in the preparation of the case, and they can participate on this judicial review decision (Gresta 2019). Moreover, because their peers participated in the regulation of the elections as sitting member of the Superior Electoral Court, the Justices of Supreme Federal Court tend to be rather deferential when faced with electoral challenges.

Another interesting feature of the Brazilian electoral authority is the strong centralization. Although constitutionally Brazil is a Federation of twenty-six States and one Federal District where the country's capital is located, there has been no meaningful devolution for the Member-States since 1926 (Costa 2019). Thus, electoral legislation is drafted and approved only at the national level. The Constitution establishes the date of the elections, the terms of office, the electoral system, and the conditions of eligibility, both for presidential, as well as state and municipal elections. Administrative-electoral decisions are thus taken by the Superior Electoral Court and imposed on all Member-States.

The adoption of the electronic voting system illustrates this process. A major scandal in Brazil triggered the adoption of an electronic voting and vote-counting system. It happened in 1982 when in the local elections in Rio de Janeiro there was such a large inconsistency between the votes for deputy and for governor that the election for governor was held again. The vote totalization was done by data processing, from the results of each ballot box, by the sum of votes by tellers and counting officers and by the completion of the ballot bulletins (Porto 2004; Amorim & Passos 2005).

The idea of an electronic system of voting, scrutiny, and computation then began to develop within the Electoral Justice, and the first step towards its adoption was the national unification and the computerization of the electoral register, which occurred in 1986 when a law imposed the re-registration of the electorate.[4]

[4] At the Superior Electoral Court official website, there is the history of the implementation of the electronic ballot box, including publications (http://www.tse.jus.br/eleicoes/urna-eletronica/seguranca-da-urna/eleicoes).

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Federal Law No. 9100/1995, which regulated the 1996 elections, authorized the Superior Electoral Court to adopt the electronic voting system. Article 18 allowed the Superior Electoral Court to authorize the Regional Courts to use the electronic voting and counting system in one or more Electoral Zones. In this first experiment, voters in cities with more than 200,000 inhabitants had an electronic ballot box, reaching one-third of the electorate. Electronic voting machines were increasingly used by the Member-States, according to the decisions of the Superior Electoral Court. In 2000, the entire election was carried out with electronic voting machines.

The electronic voting and counting system adopted did (and still does) not have a voter-verified paper.[5] Audits carried out on the system are always internal to electronic voting machines. The legislation provides for monitoring and inspection by the Public Ministry and the Brazilian Bar Association, but there is no possibility of recounting the votes.

The Legislative Branch inserted the requirement to make the electronic system printing votes three times in the electoral legislation, in 2002, 2009, and 2015. The determination was revoked the first time by law, and on the two other occasions, the Supreme Court struck down the laws stating that the printed ballot by the electronic poll would violate the right to secrecy in voting. In 2019, a representative offered to the Chamber of Deputies a proposal to amend the Constitution (PEC No. 135/2019) to institute the printing of votes by electronic ballot boxes.

To highlight the intimate relationship between the electoral authority and the court responsible for controlling the constitutionality of election laws, it is worth mentioning a detail. The Justice-rapporteur of the action that removed the imposition of the printed vote brought by the 2009 law was, at the time of filing the action, vice-president of the Superior Electoral Court. When the issue was finally decided, she was the president of the Superior Electoral Court. The highest electoral administrative authority, which would be responsible for implementing the legislative decision, acted as a constitutional judge to remove the command.

Not only the adoption of an electronic voting system but also its design, the voting machine, everything was decided unilaterally by the Superior Electoral Court. There was no national debate about the electronic ballot box. Moreover, the judicial branch blocked all the attempts to make the system more transparent by adopting paper-proof of the vote.

The same issues arose with the biometric identification of voters. Brazil adopts mandatory voting and electoral registration. The Electoral Code, adopted the year after the 1964 military coup, restricts a series of fundamental rights to those who do not fulfill their electoral duties. Under the argument of purifying the electoral registration system, the Superior Electoral Court decided to adopt the biometric iden-

[5] As Candice Hoke (2012) states, it is necessary to have the possibility of a material audit of the votes and also the understanding of the system by the electorate, and that it is unacceptable that the announcement of the election results cannot be «recounted or otherwise checked».

tification of the electorate (Limongi 2016). Starting in the 2008 elections, the voter's recognition by a fingerprint on the electronic ballot box required a re-registration of the electorate. This was imposed by a «judicial resolution» of the Superior Electoral Court. In a gradual re-registration operation, the Electoral Justice intended to collect all the fingerprints of the entire electorate –nearly 150 million voters as of February 2020. According to information from its website, the electoral authority shares these biometric data with the Ministry of Justice to create a national civil registry.

Failure to submit a biometric information leads to the cancellation of a voter's electoral registration. Thus, without a law that determined this registration, the Superior Electoral Court excluded citizens from the electoral body. More than 3 million voters were prevented from voting in 2018, due to an administrative decision by the Superior Electoral Court, without legal basis[6]. By seven votes to two, the Supreme Federal Court upheld the resolutions that prevented the manifestation of the electoral will of citizens who did not register their fingerprints in time. The resolution passed with votes from the then members of the Superior Electoral Court and under the report of its future president.

The option for the Judiciary as a referee to prevent party interests from leading to disenfranchisement may seem appealing in scenarios where there is a system of checks and balances between different electoral authorities. In the Brazilian case, the disenfranchisement was promoted by the Judiciary as an electoral authority, with no actual legal basis, and endorsed by the Judiciary as guardian of the Constitution, with the same actors.

The performance of the electoral judicial authority on fundamental political rights goes further and reaches the political parties, campaign finance, and electoral communication.

3. ATTACKS ON PARTY AUTONOMY AND CONTRADICTORY JUDICIAL DECISIONS: THE JUDICIARY IMPOSING MODEL OF PARTY POLITICS ON BRAZILIAN DEMOCRACY

Although Brazil has had political parties since the Empire, their legal recognition only materialized in 1945. Most political parties do not have a long history, and there are many mergers, divisions, and rebranding, forming a confusing mosaic. After the 1964 coup, the military dictatorship imposed robust state control over the two parties that were then allowed to function (Moraes 2013). Thus, one party functioned as a consenting opposition, whose electoral growth was controlled by legislative

[6] The Superior Electoral Court recognized the cancellation of the registration of 3,368,447 voters only between 2016 and 2018. Since 2012, 2,808,627 more people have been removed from the electoral register. The president of the electoral authority said that the exclusion has positive results in reducing abstention levels (https://www.conjur.com.br/dl/paginador1.pdf).

changes (Salgado 2016). At the end of that period, the framers decided to guarantee party autonomy through constitutional means. By sweeping away the authoritarian rules that were in place, the democratic regime rejected the loss of mandate of the representative who left the party for which he was elected, and with the attempt to implant the plurality system for the parliamentary election (Salgado 2015).

With democracy came a multiparty system. The Constitution guarantees political parties' freedom of formation and operation. During the 30-year term of the Constitution, the culmination of multiparty system took place in 2017, with 35 parties registered with the Superior Electoral Court. In the 2018 elections, 30 parties elected representatives to the Lower House. In addition to constitutional and legal provisions, the parties had to adapt to the restrictions placed by the electoral authority and inaugurated a stalemate with the Judiciary (Salgado & Archegas 2018).

With the ban on regional political parties, Brazilian national parties bring together quite different local leaders. It has always been a common practice for parties to form different alliances across different states and at the national level. In February 2002, after three general elections, the Superior Electoral Court ruled that the national character established by the Constitution prevented political parties from making alliances freely within the Member-States. Thus, in the general elections that year, national coalitions should follow the pattern of state coalitions (Caggiano 2004; Cândido 2004). This rule invented by the electoral authority was put into a resolution and was in effect for the 2002 elections. The parties organized and approved in 2006 an amendment to the Constitution establishing «freedom to coalitions» to the constitutional section that regulates political parties. Exercising its judicial review powers, the Federal Supreme Court decided that the amendment to the Constitution should respect the principle of anteriority (or rule of anteriority, in Robert Alexy's theory), explicit in article 16, and would not be applicable to the 2006 elections, but only in 2010.

By trying to strengthen party coherence by force, the Judiciary has not promoted an improvement in democratic quality. In theory, at least, the voter's ability to determine his party and coalition could have improved, but the results of the 2002 and 2006 elections show no meaningful change in electoral behavior.

In order to decrease the high number of parties in the system, the Legislative Branch established a threshold, a minimum performance requirement in federal elections, so that the party could have access to state resources. Under the Federal Law nº. 9096/1995, the consequences would apply by transitional provisions until 2006. In late 2006, the Federal Supreme Court overturned the threshold. One of its Justices said that the tool to reduce the space for party propaganda and state financial resources «would condemn minority associations to a slow and safe death.»[7] So, we could say that this time the Judicial Branch has improved the electoral competition.

[7] Wanderley Guilherme dos Santos (2007) claims «the barrier clauses are not mechanisms to avoid excess fractionation, but mechanisms to reduce competition and parties of political representation.»

The following year, however, the Superior Electoral Court (and the Federal Supreme Court) imposed a rule of partisan fidelity preventing the change of party during the legislature. One of the exceptions to the loss of mandate was the creation of a new party. In other words, a representative can switch parties without losing her mandate if the party she will be joining is a newly minted one. Since then, the number of parties has increased dramatically.[8]

In 2015, the President of the Supreme Federal Court defended political reform and stated that a democratic system needs only a maximum of five parties: «one in the center, center-left, left, center-right and right».[9] In 2017, the Constitutional Amendment No. 97 included a performance clause in the Constitution, with a combination of different requirements.[10] Is this amendment compatible with the Constitution? Will the Supreme Federal Court strike down this clause? A request for a declaration of unconstitutionality of the amendment was filed in January 2019 (ADI No. 6063). There was no decision on the constitutional challenge at the time I was writing this article. More than half of the court did not participate in the 2006 decision, and the Court's precedents are not so binding in the Brazilian judicial practice. It is not possible to predict the Federal Supreme Court's decision.

The internal functioning of political parties is also a target of advancing electoral authority (Ferreira 2020). In response to party control in the dictatorial years, the Brazilian Constitution guarantees autonomy for the functioning of parties. The Political Parties Act of 1995 does not detail the list of party bodies, their composition, the formation of appointments, and the length of mandates. Party statutes contain rules on their structure, but they have low enforcement.

Seeking to reduce the scope of this constitutional and legal authorization, the Superior Electoral Court decided that the provisional party commissions, appointed by the higher bodies for the municipalities, must have a «reasonable» duration (Alarcon & Gresta, 2016). The seven members of the electoral authority determined that the provisional organs would be valid for 120 days (Resolution No. 23.465/2015). Issued ten months before the elections, the application of the judicially invented deadline would lead to the invalidation of the provisional municipal commissions before candidates for the 2016 election were chosen. Without municipal commissions, there is no way to hold conventions and, therefore, no candidate registration can take place.

[8] The effective number of Brazilian electoral parties goes from 7.20 in 1998 to 9.48 in 2002, 10.68 in 2006, 11.29 in 2010, 14.18 in 2014 and 18.04 in 2018 (http://shiny.cepesp.io/cepesp_indicadores/).

[9] https://internacional.estadao.com.br/blogs/claudia-trevisan/lewandowski-defende-reforma-politica-e-diz-que-pais-democratico-deve-ter-so-5-partidos/

[10] The new paragraph 3 of article 17 of the Brazilian Constitution guarantees access to public resources for parties that obtain, in elections to the Chamber of Deputies, at least 3% of valid votes, distributed in at least nine states, with a minimum of 2%of the valid votes in each of them; or who have elected at least fifteen Federal Deputies distributed in at least nine states.

In a new resolution of March 2016 (four months before the deadline for the conventions), the Superior Electoral Court inserted a provision that recognized the validity of the provisional commissions established by the statutes, as long as it is «reasonable». Parties must submit their statutory reforms to the electoral authority and the changes are not valid until they have been approved. In other words, a few months before the election, the 35 parties had to hold conventions to insert in their statutes a term for the duration of provisional commissions and submit it to the analysis of the electoral authority —which had created the rule— so that it could decide if it was a «reasonable» term and thus allow parties to participate in that year's municipal elections.

In 2017, an amendment to the Constitution specified that the parties' autonomy included the competence of determining the «duration of their permanent and provisional organs». In 2018, the Superior Electoral Court established in a resolution that «The notes related to the provisional bodies are valid for 180 (one hundred and eighty) days, unless the party statute establishes a different term.» For the 2020 municipal elections, Parliament approved a modification of the Law on Parties, establishing that «the term of validity of the provisional organs of political parties may be up to 8 (eight) years». In consultation, however, the Superior Electoral Court stated that it understands according to its 2018 Resolution. According to the Brazilian Constitution, only Parliament can modify electoral rules. But who determines whether the legal rules and their reform are valid is . . . the Judiciary.

4. MONEY IN POLITICS: UNCONSTITUTIONAL INEQUALITY IN THE MARKET, STATE PROMOTION OF INEQUALITY

Brazilian democracy has never been a model of fair competition. Fraud in the formation, manifestation, and counting of votes is part of our electoral history. The use of political power, with the use of public resources for the preservation of power, is present in everyday life (Salgado 2014a). Access to financial resources and their impact on the electoral campaigns mean that political representation is dominated by affluent people, characterizing what some scholars call a plutocracy, which is a common characteristic of profoundly unequal societies.

During the military dictatorship, the Electoral Code mentioned the prohibition of the influence of economic power over the electoral dispute, referring to a judicial investigation to curb this behavior. With a controlled party system and a facade of competition, the intention was to reduce resources to the maximum, and thus the political information to the electorate.

With democratization, the ban on donations from companies to electoral campaigns continued to apply, despite the openness to a multiparty system. In the 1989 presidential elections, the first by popular vote since 1960, twenty-two candidates came forward. The elected candidate, Fernando Collor de Mello, ended up being impeached for the use of illegal financial contributions from companies to his campaign.

President Collor's impeachment resulted in a special congressional commission's report on recommended reforms in the election law. One suggestion was to regulate corporations' donations to campaigns to assure transparency and accountability. The report stated that the money would be used in the electoral dispute, which was until then prohibited (Santano 2016).

In the days preceding the 1994 elections, the election law limited corporate total contributions to 2% of their gross revenue from the previous year or an amount close to the $ 2,350, whichever was greater. Without an absolute ceiling (just a nominal threshold), the wealthiest companies could participate in a more decisive way supporting political parties and candidacies. For the general 1996 election, the limit dropped to one percent of gross operating revenue for the previous year with no maximum amount.

In the 1997 Election Law, corporation money remained legal, limited to 2% of the gross revenue of the year before the election. This was the law for the nine following elections. After 21 years of dictatorship, indirect elections, and an impeachment proceeding, corporate money was openly used in eleven Brazilian elections. With the limits, and some fear to be bound to a particular party or candidate, companies and businesspeople also made unregistered contributions. This aspect of illegal campaign financing is known as «Cashier 2». It was a constant throughout Brazilian electoral history (Salgado 2014b). Nevertheless, the registration of companies' donations on the parties' and candidates' campaigns allowed the citizenry to know where the money came from and what interests would possibly be defended by that political alternative.

In 2015, the Supreme Federal Court declared unconstitutional companies' contributions to political parties and candidates (ADI No. 4650). The so-called legal argument at the time was the offense against the constitutional equality clause. The unequal distribution of market money, for most of the Justices, tilted the playing field and, thus, must be removed from the system (Schlickmann 2018).

The Justices presented other marginal reasons, such as the increasing cost of elections in Brazil, the impact of the big donors (Cervi 2016), and the fact they distributed money among different parties (with no ideology criteria).[11] One argument was that companies do not have political rights or their own ideology, and thus cannot participate in the political sphere. Yet, some argued that companies that donated to the winning campaigns got government contracts after the elected officials took office, so it was nothing more than rent seeking.

In fact, there is a «historical coincidence» between the big donors and the companies responsible for significant public infrastructure works. However, this is a problem to be solved by Administrative Law and not by Election Law.

[11] «In party terms, the data indicate that the Itaú group channeled its donations especially to the PSDB (39% in 2010 and 31% in 2014), seconded by PT, the governing party, which received 28% and 24% of the volume of financing in the period.» (Silva & Minella 2017).

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The ban on companies' contributions did not improve the electoral conditions. Three facts demonstrate this statement. First, journalists analyzing the 2016 campaign financing documents found that large donations continued to exist after the exclusion of corporate contributions – but now through company directors.[12] The difference was that the name of the company was no longer on the transparency page of Electoral Superior Court, but the name of a person who is sometimes unknown to the population. The replacement ends up preventing the citizenry from knowing before the election which interests may be defended by the candidate.

Second, the Supreme Federal Court's decision did not strike down the possibility of the use of personal funds to pay the whole electoral campaign, leaving a wide flank open for plutocrats. Once the financing of legal entities was removed, the most viable candidates became those with financial capital to face the costs of campaigns for highly personalized elections. The impact was evident in the following elections (Zelinski & Eduardo 2019).

For the 2018 general elections, Parliament imposed a limit of 10% of the spending ceiling on the use of candidates' resources. The President of the Republic vetoed this provision. Parliament overturned the veto, but less than a year before the election, which prevented its application, according to constitutional provisions. For the 2020 elections, unless a new surprise comes from the Judiciary, the candidate will only be able to afford one-tenth of the cost of her campaign.

Third, the Judicial Branch did not limit the absurdly unequal distribution of public resources for political parties and election campaigns. After the declaration of unconstitutionality of corporate contributions, state campaign funding became the largest source of funds (Schlickmann 2019). And the distribution of public resources is not even for parties and, within the parties, it is not even for candidates.

The Special Fund for Financial Assistance to Political Parties, composed of federal financial allocations and electoral fines, was until 2006 divided 1% evenly and 99% proportionally to the number of votes for the party in the elections for the Chamber of Deputies. Declared unconstitutional, this division is currently 5% evenly and 95% in the measure of votes, for parties that have surpassed the threshold now set in the Constitution. The monthly amount passed on to the parties in January 2020 was R$ 79,407,857.99 (something like US$ 18,527,265.05). Only 23 of the 33 parties received public funds, and with great disproportion - the Green Party gets 15% of the amount allocated to the Social Liberal Party, for example.

To face the absence of substantial resources from the donation by companies, Congress approved in 2017 the creation of a Special Fund for the Financing of Campaigns with public support.

The legislature that established the division for the 2018 elections already knew the amount that each party would have based on the 2014 elections results. The

[12] https://oglobo.globo.com/brasil/empresas-driblam-lei-para-doar-campanhas-eleitorais-20132632

division is quite offensive to the principle of equality: all parties receive equally a fraction of 2% of resources; 35% in proportion to the votes received in the 2014 election for the Chamber of Deputies; 48% for the number of representatives in the Chamber; and 15% for the number of senators. The creation of the Special Fund was challenged in the Supreme Court in October 2017, but there are still no answers.

The amount distributed for the 2018 election campaigns was R$ 1,716,209,431.00 (approximately US$ 445,167,418). The smallest parties received exactly 0.419% of the amount given to the Brazilian Democratic Movement, which received more resources.

In addition to the evident inequality promoted by the State, there are no imposing rules for the distribution of these resources among state party bodies or candidates (Rocha 2019). A court decision imposed the need to reserve 30% for women. Still, it does not prevent it from being addressed to a woman running for vice president for the Executive Branch (and in 2018, there were several) or to a specific woman from a particular region.

The Judiciary's intervention in the field of money in politics did not reduce inequality: it promoted inequality financed by public resources.

5. POLITICAL COMMUNICATION, UNFAIR ACCESS AND THE REDUCTION OF ELECTORAL INFORMATION: THE INCONSTANT REGULATOR

After the 1988 Constitution, there was a strengthening of the public debate sphere, driven mainly by rules of electoral dispute that favored political pluralism and competition. Brazil never adhered to the free market conception of political ideas. Considering the distinction between the model of free public opinion and the market model of ideas (Sánchez Muñoz 2007), the Brazilian constitutional configuration is closer to the first. The constitutional principle of maximum equality in the electoral competition (Salgado 2015) requires the restriction of campaign freedom and the role of communication in the election. As a guarantee of pluralism and freedom of opinion, access to the media (permitted by economic power or by the relationship of a party or candidate with its leaders) cannot lead to imbalance.

Over the years, however, a movement for the reduction of electoral propaganda took shape, justified by its costs. In 1999, driven by the Movement to Combat Electoral Corruption and by the National Confederation of Bishops of Brazil, electoral legislation started to consider the distribution of advertising gifts (caps, nail files, rulers, pens, T-shirts, among others) as buy votes. The conviction for violating this prohibition, sometimes based only on one witness testimonial evidence (Coelho 2015), led to the removal of thousands of local parliamentarians and numerous mayors from the office.

Election campaign time allotments are also getting shorter over time. From 120 days of an explicitly permitted electoral campaign in the first years, it shrank to about

90 days, and with the 2015 reform to 45 days. The period for disclosing applications on radio and television was reduced from 60 to 45 days, and then to 35 days. The decrease is even more drastic compared to the daily minutes for the electoral campaign in the media: 120 minutes in the 1994 election, 90 in 1996, 60 in the 1998 to 2014 elections, and 20 minutes from the 2016 elections (Salgado & Neves 2017).

To complete the picture, the division of time between candidates was becoming increasingly uneven. Initially, the command was to distribute one-third of the time equally among registered candidates and two-thirds according to the number of representatives of their parties in the Chamber of Deputies. In 2013, a reform maintained the proportional division of two-thirds, and imposed that the remaining one-third would be divided one-third evenly (therefore only one-ninth evenly) and two-thirds by the same criteria of representatives. In 2015, a new change: 10% of the time divided equally and 90% according to the party's representation in the Chamber.

The division of time was challenged in the Supreme Court. The Court ruled that the new division, «in line with the democratic clause and the proportional system, establishes a rule of equity, safeguarding the right of access to electoral propaganda by party minorities, and putting in a situation of non-odious benefit those associations that have a stronger claim to popular legitimacy. The time granted proportionally to the representativeness, although divided in a different way between the associations, does not nullify the participation of any competing legend» (ADI No. 5491).

In other words, this absurd inequality promoted by the State was endorsed by the judicial branch. With this decision, some candidates for the Presidency of the Republic in the 2018 elections had only eight seconds of air, twice a day, to publicize their proposals.

This same reading by the Federal Supreme Court applied to the rule of participation in debates. I emphasize that radio and television stations are, in the Brazilian system, public service concessions. They were not —and are not— required to organize debates, but if they do, they must obey the rules of the electoral law.

Initially, all candidates from political parties represented in the Chamber of Deputies had the right to participate in debates organized by broadcasters. In 2015, the mandatory invitation was required only for candidates whose party had more than nine federal deputies. This cut, which allowed broadcasters not to include front-runners in polls, was challenged in the Supreme Court. The Court upheld the rule and only struck down the interpretation that the participation of other candidates at the invitation of the broadcaster needed the agreement of the other candidates.

The Court said it was «a reasonable criterion for verification of the party's representativeness, as it does not prevent participation in the debates of subtitles with less representation, which is still allowed, at the discretion of the radio and television stations. The right to participate in electoral debates —unlike free electoral propaganda on radio and television— does not have a constitutional seat and may be more restricted, due to the format and purpose of this type of programming.»

The Legislative Branch changed the rule in 2017, on a case-by-case basis, including the right to participate in debates for all political party candidates with at least five representatives in the National Congress.

The broadcasting companies' power is also present in the legal authorization of pre-campaign acts (Carmo Fernandes 2020). Before convention candidates are chosen, interviews with people indicating their interest in running for office is not considered election propaganda - and therefore not prohibited. These acts give certain people, who already have political, social, or economic capital, the ability to start their electoral communication before others: an evident competitive advantage, of an anti-democratic character, maintained by the Judiciary.

This scenario is even more troubling because changes in the electoral law have gradually reduced the means of communication. Billboards, banners, signs, and easels that were once widely used to advertise electoral options to citizens have disappeared. The performance of «showmeetings» (rallies with music concerts) was also prohibited.

Individual freedom for the manifestation of political preference is strongly affected by the reforms carried out since 2009. From 2017, the general rule is the prohibition of electoral propaganda on private properties. The only possibility is the use of stickers up to half a square meter (5.38 square feet) on bicycles, motorcycles, cars, trucks, and residential windows.

Interestingly, the same Court that declared unconstitutional the restriction of humor speech against candidates and overturned the ban on disclosure of polling results in the fifteen days before the election. Vigorously defending the freedom of expression, maintains these prohibitions on the freedom of expression of citizenship. From a narrower interpretation, it is not even possible for voters to publish their election preference on social media on election day.

6. CONCLUSION: DEMOCRATIC SOLUTIONS TO DEMOCRATIC FAILURES IN DEMOCRATIC COMPETITION

A democratic constitutional design is not simple to establish. There is no one-size-fits-all model. History, constitutional values, premises, civil society influence the decisions and consequences of the political system. Obviously, political actors are particularly affected by the rules of electoral competition. They have an interest in drafting entry conditions and the chances of the dispute (Persily 2002; Persily 2009). In many cases, dominant parties seek to maximize their opportunities in future elections.

This characteristic, however, is differentiated in the Brazilian system in face of a very accentuated multiparty system that results from the proportional representation system. The accentuated pluralism in Parliament ends up reducing the strength of the big parties. Even so, a party with representation in the National Congress can contest a law before the Federal Supreme Court to evaluate its constitutionality.

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The judicial intervention, in general, did not improve the political system or promote electoral competition. Judicial decisions do not demonstrate consistency in reading the Constitution and, at times, intensify the inequality in the dispute. We can observe these effects in the field of party organization, campaign financing, and electoral communication.

The Parliament —plural, deliberative, transparent, and controllable— is the place for discussion and formulation of electoral rules. The laws formulated may undergo judicial review and contrast with the Constitution. The Judiciary Branch, therefore, can rule out a Parliament law that offends constitutional electoral principles, but cannot replace political decisions with the personal view of its Justices on democracy (Hasen 2011).

The shielding of the decisions of the Superior Electoral Court in the Supreme Federal Court, given the participation of Justices in the decisions of that, weakens the requirement of accountability of the electoral authority.

The most worrying factor is that in times of authoritarian threats to the health of Brazilian democracy, a redemptive discourse comes from a Justice, at the same time a component of the Supreme Federal Court and president of the Superior Electoral Court in the 2020 elections. For this Justice, the already powerful electoral authority must design districts to replace proportional representation with a majority system of individual districts. And, thus, bring about a reduction in political plurality in Parliament and in the options offered to the electorate.

Interestingly, at another time, the Justices of the Superior Electoral Court offered a study to replace the Brazilian proportional system and to adopt the method of election by districts. It was just after the 1964 military coup.

Although there are some authoritarian flirtations on the horizon, I argue that the 1988 Constitution and its democratic values continue to determine the limits and procedures for democratic decisions. The democratic improvement of the rules of the democratic competition must come through the democratic parliamentary debate.

Title

El Poder Judicial como un (muy) mal regulador político: notas desde Brasil

Sumario

Resumen

La regulación política es un área crucial del diseño democrático. Teniendo en cuenta el interés propio de los legisladores, el Poder Judicial parece ser un actor interesante para cumplir con los requisitos de imparcialidad para garantizar elecciones libres y justas. Utilizando la experiencia brasileña, muestro el papel del Poder Legislativo y las decisiones judiciales en tres campos principales (sistema de partidos, financiación de campañas y comunicación electoral) después de la redemocratización de 1988. El análisis evidencia el pésimo desempeño de la autoridad electoral judicial en la mejora de la competencia electoral. Debido a la peculiar conformación de la Justicia Electoral Brasileña, hay una concentración de las actividades de gobernanza electoral, y sus decisiones están blindadas (en la práctica) de la revisión judicial. En este escenario constitucional, la alternativa por el Poder Judicial es la decisión equivocada, y es mejor confiar en un Parlamento pluralista en la construcción de normas electorales.

Abstract

Political regulation is a crucial area of democratic design. Considering the self-interest of legislators, the Judicial Branch appears to be an interesting actor to fulfill the impartiality requirements to ensure free and fair elections. Using the Brazilian experience, I show the role of Legislative Branch and judicial decisions on three major fields (party system, campaign financing, and electoral communication) after 1988 re-democratization. The analysis evidences the lousy performance of judicial electoral authority on improving electoral competition. Due to the peculiar conformation of Brazilian Electoral Justice, there is a concentration of election governance activities, and their decisions are bulwarked from

judicial review. In this constitutional scenario, the judicial alternative is the wrong choice, and it is better to trust a pluralistic Parliament on the building of electoral rules.

Palabras clave

regulador político; rama judicial; elecciones; Democracia brasileña

Keywords

Political regulator; judicial branch; elections; Brazilian democracy