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Electoral Justice in Brazil: Autonomy and Institutional Resources

A Justiça Eleitoral no Brasil: Autonomia e Recursos Institucionais

La Justicia Electoral en Brasil: Autonomía y Recursos Institucionales

Antônio Gomes Moreira Maués *, Universidade Federal do Pará, Belém, Pará, Brasil
Juliana Rodrigues Freitas **,, Centro Universitário do Estado do Pará, Belém, Pará, Brasil

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Eixo Temático 2: Constituição, Instituições e Democracia no Brasil

Editores-chefes
Katherinne de Macêdo Maciel Mihaliuc
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
katherinne@unifor.br

Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
sidney@unifor.br

Editor Responsável
Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
sidney@unifor.br

Autores
Antônio Gomes Moreira Maués
amaues@ufpa.br
Contribuição: Conceptualization, Investigation, Writing – Original Draft, Methodology, Writing – Review & Editing ; Supervision.

Juliana Rodrigues Freitas
rodriguesfreitasjuliana@gmail.com
Contribuição: Conceptualization, Investigation, Writing – Original Draft, Methodology, Writing – Review & Editing ; Supervision.

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Abstract

The article analyzes the institutional resources that allowed the Electoral Court in Brazil to preserve its autonomy in the face of pressure exerted by the Bolsonaro government. After a summary of the history of the Electoral Court before the 1988 Constitution, the work highlights the characteristics of the institutional design of the Electoral Court in the current democratic regime, analyzing the different aspects of its autonomy based on constitutional and legal norms and empirical data on its functioning. The article then demonstrates that the Electoral Court's different electoral governance functions exercises, including the elaboration of electoral rules, generated a process of self-reinforcement of its autonomy, increasing the costs of eventual attempts to reverse it. This process was also guaranteed by the institutional articulation of the Superior Electoral Court with the Federal Supreme Court, in which the latter court acts as a self-referential veto point, which preserves the decisions of the Electoral Court.

Keywords: electoral justice; electoral governance; Brazilian electoral system.

Resumo

O artigo analisa os recursos institucionais que permitiram à Justiça Eleitoral no Brasil preservar sua autonomia diante das pressões exercidas pelo governo Bolsonaro. Após uma breve síntese da história da Justiça Eleitoral anterior à Constituição de 1988, o trabalho destaca as características do desenho institucional da Justiça Eleitoral no atual regime democrático, analisando os diferentes aspectos de sua autonomia, com base nas normas constitucionais e legais e em dados empíricos sobre seu funcionamento. Em seguida, o artigo demonstra que o exercício de diferentes funções de governança eleitoral pela Justiça Eleitoral, inclusive na elaboração de regras eleitorais, gerou um processo de autorreforço de sua autonomia, aumentando os custos das eventuais tentativas de revertê-la. Esse processo foi garantido também pela articulação institucional do Tribunal Superior Eleitoral com o Supremo Tribunal Federal, na qual este último tribunal atua como um ponto de veto autorreferente, que preserva as decisões da Justiça Eleitoral.

Palavras-chave: *justiça eleitoral; governança eleitoral; sistema eleitoral brasileiro.*

Resumen

El artículo analiza los recursos institucionales que permitieron a la Justicia Electoral en Brasil preservar su autonomía ante las presiones ejercidas por el gobierno Bolsonaro. Después de una breve síntesis de la historia de la Justicia Electoral anterior a la Constitución de 1988, el trabajo enfoca las características del diseño institucional de la Justicia Electoral en el actual régimen democrático, analizando los diferentes aspectos de su autonomía, con base en las normas constitucionales y legales y en datos empíricos sobre su funcionamiento. En seguida, el artículo demuestra que el ejercicio de diferentes funciones de gobernanza electoral por la Justicia Electoral, incluso en la creación de reglas electorales, generó un proceso de autorrefuerzo de su autonomía, aumentando los costes de los eventuales intentos de revertirla. Este proceso fue garantizado también por la articulación institucional del Tribunal Superior Electoral con el Supremo Tribunal Federal, la cual este último tribunal actúa como un punto de veto autorreferente, que preserva las decisiones de la Justicia Electoral.

Palabras clave: *justicia electoral; gobernanza electoral; sistema electoral brasileño.*

* Full Professor at the Instituto de Ciências Jurídicas, UFPA. Doctor in Law from the Universidade de São Paulo, with a research stay at the Universitat de Barcelona. Master's in Legal Sciences from the Pontifícia Universidade Católica do Rio de Janeiro. Bachelor of Law from the UFPA. Visiting Professor and Researcher at Universidad Carlos III de Madrid, University of Essex, and Brown University. Member of the Law Advisory Committee of CNPq (2012-2015). Deputy Coordinator of the Law Area at CAPES (2014-2018).

** Doctor in Law (2010 – UFPA/Università di Pisa, Itália). Master of Human Rights (2003 - UFPA). Graduate in State Law (2006 – Universidad Carlos III de Madrid, Spain). Bachelor of Law (1998 - Universidade da Amazônia). Legal Consultant and Attorney specializing in electoral and municipal law. Professor of Undergraduate and Graduate Law Programs at Centro CESUPA. Researcher at the Electoral Law Observatory (CNPq/UERJ). President of the Women Lawyers Committee, OAB/PA (2018). Member of the OAB/PA State Council (2019-2021). Consultant Member of the Special Committee on Political Reform (Federal OAB). Founding Member of the Academia Brasileira de Direito Eleitoral e Político (ABRADEP).

1 Introduction

During the Bolsonaro administration, Brazil's Electoral Justice System was subjected to constant attacks aimed at undermining its credibility and interfering in the electoral process to favor the former president's reelection campaign. Shortly after the 2018 elections, Jair Bolsonaro claimed that a "fraud" had prevented him from winning in the first round and had reduced his vote count in the second round (Reuters, 2020)[1]. Although he continued to make such claims in the following years, the president admitted in a livestream broadcast in July 2021 that he had no evidence to support his allegations—yet also argued that it was impossible to prove the electronic voting system could not be manipulated (Após três anos[...], 2021)[2]. On several occasions, Bolsonaro cast doubt on the impartiality of the presidents of the Superior Electoral Court (*Tribunal Superior Eleitoral*, TSE): Justice Roberto Barroso was accused of condoning electoral fraud (Coletta, 2021)[3], Justice Edson Fachin was said to have acted in favor of Lula's candidacy (Porto; Hahon, 2022)[4], and Justice Alexandre de Moraes was accused of making decisions aimed at harming Bolsonaro's campaign (Estadão Conteúdo, 2022)[5].

The organized and systematic spread of fake news about the elections persisted throughout Bolsonaro's term and intensified in 2022. This was documented in a legal action filed before the TSE[6], in which the preliminary injunction was partially granted. In July 2022, the president convened diplomatic representatives for a public meeting where he once again raised a series of allegations regarding the functioning of the electoral system (Eleições[...], 2022)[7]. In response to the volume of attacks, the TSE was compelled to act by launching the *Permanent Program to Combat Disinformation within the Electoral Justice System* and the *Institutional Strengthening Program through Electoral Justice Image Management*[8]. Through these initiatives, TSE began to regularly disseminate accurate information about Brazil's electoral process on social media platforms.

Bolsonaro's various actions against the Electoral Justice System cannot be separated from his broader authoritarian project. Following the example of other far-right leaders (Ginsburg; Huq, 2018), Bolsonaro sought to weaken democratic institutions in order to remain in power by dismantling checks and balances and limiting electoral competition. A key component of this strategy involved delegitimizing elections through accusations of fraud and claims of bias within electoral authorities. Thus, if defeated, the authoritarian leader would have ready-made — albeit false — arguments to reject the outcome, which would also be embraced by his supporters, encouraging them to mobilize against the inauguration of the elected officials.

This broader plan helps explain how Bolsonaro used the Armed Forces to question the integrity of the electronic voting system and his repeated efforts to implement printed ballots, which would have created multiple avenues for contesting the election results based on manipulated allegations. Although the elections were held without major incidents, the military encampments outside army barracks and the crimes committed in Brasília on January 8 demonstrate that such a strategy can have serious consequences for democracy.

Nevertheless, Bolsonaro lost the election. The unprecedented defeat of a sitting president seeking reelection suggests that a complex set of factors contributed to this outcome, including the country's economic conditions, the effects of the COVID-19 pandemic, the realignment of segments of the electorate, and the strength of the opposition's candidacy. This result would not have been possible had Brazil's Electoral Justice System yielded to pressure from the government and failed to act independently.

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1 Available from: https://www.cnnbrasil.com.br/politica/bolsonaro-diz-que-provara-que-houve-fraude-na-eleicao-de-2018/. Accessed on: 31 jul. 2023.

2 Available from: https://g1.globo.com/politica/noticia/2021/07/29/apos-tres-anos-falando-em-fraudes-eleitorais-bolsonaro-faz-live-com-noticias-falsas-e-admite-nao-ter-provas-das-acusacoes.ghtml. Accessed on: 31 jul. 2023.

3 Available from: https://www1.folha.uol.com.br/poder/2021/07/de-novo-sem-provas-bolsonaro-repete-ameaca-e-diz-que-fraude-eleitoral-esta-no-tse.shtml. Accessed on: 31 jul. 2023.

4 Available from: https://www.cnnbrasil.com.br/politica/bolsonaro-acusa-fachin-de-ter-colocado-lula-para-fora-da-cadeia-para-ser-presidente/. Accessed on: 31 jul. 2023.

5 Available from: https://gauchazh.clicrbs.com.br/politica/eleicoes/noticia/2022/09/bolsonaro-reforca-criticas-a-moraes-e-diz-que-ministro-trabalha-para-lula-cl8mxsbcg0015016uzkcpob05.html. Accessed on: 31 jul. 2023.

6 Electoral Judicial Investigation Action (AIJE) nº 0601522-38.2022.6.00.0000. Disponível em: https://www.conjur.com.br/dl/pt-suspensao-perfis-bolsonaristas-redes.pdf. Accessed on: 31 jul. 2023.

7 Available from: https://www.uol.com.br/eleicoes/2022/07/19/embaixadores-ficaram-abalados-apos-reuniao-com-bolsonaro.htm. Accessed on: 31 jul. 2023.

8 Available from: https://www.justicaeleitoral.jus.br/desinformacao/. Accessed on: 31 jul. 2023.

This article aims to examine the institutional resources that enabled Brazil's Electoral Justice System to preserve its autonomy in the face of pressure from the Bolsonaro administration. Following a brief overview of the history of the Electoral Justice System prior to the 1988 Constitution, the study highlights the features of its institutional design under the current democratic regime and analyzes the different dimensions of its autonomy, based on constitutional and legal frameworks as well as empirical data on its functioning. The article then demonstrates that the Electoral Justice System's exercise of various electoral governance functions — including the formulation of electoral rules — has generated a self-reinforcing process of autonomy, thereby raising the costs of any attempts to undermine it. This process has also been supported by the institutional coordination between the TSE and the Federal Supreme Court (*Supremo Tribunal Federal*, STF), with the latter acting as a self-referential veto point that upholds the decisions of the Electoral Justice System.

2 The Electoral Justice System in Brazil: Key Characteristics

Established in 1932 by Decree No. 21,076, the Electoral Justice System was incorporated into the 1934 Constitution but abolished by the 1937 Constitution. In 1945, Decree-Law No. 7,586 reestablished the Electoral Justice System to organize that year's general elections. All subsequent constitutions (1946, 1967, 1969, and 1988) retained the Electoral Justice System as a branch of the Judiciary.

The structure of the Electoral Justice System established by the 1988 Constitution, in Articles 118 to 121, does not differ significantly from the previous constitutional framework, which comprised the Superior Electoral Court, the Regional Electoral Courts, Electoral Judges, and Electoral Boards. The 1988 Constitution also introduced no innovations regarding the jurisdiction of the Electoral Justice System, as it contains no specific provision on the matter — unlike Article 130 of the 1969 Constitution, which addressed this explicitly.

Notably, by the time the National Constituent Assembly was convened, the Electoral Justice System had already assumed a central role in Brazil's electoral governance. As Lamounier (1989) points out, the country's process of democratic opening was based on the holding of elections, which had been maintained throughout the military regime. Elections were held for senators, federal deputies, and state deputies in 1966, 1970, 1974, 1978, and 1982, as well as for mayors every year from 1965 to 1970, and then in 1972, 1976, and 1982 following the national unification of the election calendar (Nicolau, 2012) — with the exception of mayoral races in state capitals and municipalities considered of national security interest.

Despite the political repression imposed by the authoritarian regime, these elections were administered by the Electoral Justice System. In 1974, the Brazilian Democratic Movement (*Movimento Democrático Brasileiro*, MDB) won Senate races in 16 out of 22 states, reinforcing the opposition's strategy of using elections as a means to confront the regime. Thus, even though the government repeatedly changed electoral rules to favor its own candidates, the democratic transition progressed as additional offices began to be filled through direct elections — such as state governors in 1982 and mayors of state capitals and national security municipalities in 1985.

This electoral calendar enhanced the role of the Electoral Justice System in ensuring free and fair elections in Brazil. With the end of the two-party system in 1979, the Electoral Justice System also became responsible for adjudicating requests for both provisional and definitive registration of political parties. The flexible regulations of that period quickly led to a sharp increase in the number of parties in Brazil: from 1985 to 1994, a total of 67 parties participated in various elections (Nicolau, 2012). Furthermore, for the 1986 elections — which would select the constituent deputies and senators — a full re-registration of the national electorate was conducted, including the issuance of a new voter ID card.

The distinctive role played by the Electoral Justice System in Brazil can be understood through an analysis of its responsibilities and institutional autonomy. According to Mozaffar and Schedler (2002), electoral governance operates on three levels: rule making, rule application, and rule adjudication. Rule-making activities involve the selection and definition of the basic rules of the electoral game; rule application refers to the organization and administration of elections; and rule adjudication concerns the resolution of electoral disputes and controversies. In Brazil, the Electoral Justice System is responsible not only for organizing and administering elections and resolving disputes, but also for engaging in rule making.

Thus, Brazil's Electoral Justice System encompasses both the functions of an electoral management body (EMB) and those of electoral justice. According to the definition adopted by IDEA (2014), EMBs are institutions responsible for organizing some or all components necessary for conducting elections and instruments of direct democracy. These essential components include determining voter eligibility; receiving and validating candidate nominations; conducting the vote; counting ballots; and tabulating results. In addition, EMBs may also be tasked with activities such as voter registration, constituency delimitation, voter education and information, media monitoring, and the resolution of electoral disputes (James *et al.*, 2019)[9]. According to IDEA (2010), electoral justice refers to the mechanisms that ensure the electoral process complies with the law and safeguard or restore the enjoyment of electoral rights. It encompasses both preventive measures against violations and procedures for resolving electoral disputes.

Although the 1988 Constitution did not retain the provision from the previous Constitution regarding the jurisdiction of the Electoral Justice System — deferring the matter to complementary legislation (Article 121, caput) — the status of the Electoral Courts and Judges as judicial bodies grants them authority over the protection of electoral rights and the resolution of electoral disputes. Some of these powers are explicitly set forth in the Constitution, such as the provision for challenging an elected mandate (Article 14, §10); cases involving ineligibility and the issuance of certificates of election (Article 121, §4, III); and the annulment of certificates and revocation of elected mandates (Article 121, §4, IV). In addition, the 1988 Federal Constitution also expressly assigns the Electoral Justice System responsibilities related to the financial oversight of political parties (Article 17, III) and their registration (Article 17, §2).

Besides encompassing the full range of electoral governance functions, the powers granted to the Electoral Justice System in Brazil also contribute to its institutional autonomy. According to van Ham and Garnett (2019), four powers of electoral authorities serve as indicators of their independence: ordering a vote recount, ordering new elections in specific locations, annulling an election, and announcing the results. All of these powers are exercised by Brazil's Electoral Justice System, as provided in the Electoral Code: annulling elections (Article 19, sole paragraph), ordering vote recounts (Article 181, caput and sole paragraph), announcing election results (Article 186, caput; Article 202, §1; and Article 211), and ordering new elections in specific locations (Article 224, caput and §3).

With regard to the autonomy of the Electoral Justice System, electoral bodies can be classified according to their institutional position and affiliation (IDEA, 2014; Marchetti, 2015). Based on institutional position, the following variations are observed:

a) governmental: linked to the Executive Branch;

b) independent: not linked to the Executive Branch;

c) dually independent: two electoral bodies with distinct and specific prerogatives, one responsible for rule application and the other for rule adjudication;

d) mixed: two electoral bodies with separate functions—one governmental, responsible for monitoring, supervising, and decision-making regarding the electoral process, and the other independent, tasked with implementing the electoral process.

In terms of institutional affiliation, electoral bodies may exhibit the following characteristics:

a) career-based: all members are affiliated with the Executive Branch;

b) partisan: all members are affiliated with political parties;

c) specialized: none of the members are affiliated with political parties;

d) combined: some members are affiliated with political parties, while others are not.

From the combination of these classifications, we can conclude that Brazil's Electoral Justice System is both independent and specialized, as is the case in most Latin American countries. This institutional choice, maintained by the 1988 Constitution, contributes to the system's independence. As a branch of the Judiciary, the Electoral Justice System enjoys normative, administrative, and financial autonomy, as established in Article 96 of the Federal Constitution, in addition to the judicial guarantees provided in Article 95.

Importantly, all dimensions of the autonomy of Brazil's Electoral Justice System are protected as a constitutional entrenchment clause (*cláusula pétrea*), as they fall under the prohibition of constitutional amendments that aim to abolish the separation of powers (Article 60, §4, III of the Federal Constitution).

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[9] Similarly, James et al. (2019) emphasize that, beyond the core elements required to conduct elections — such as defining eligible voters and candidates, organizing voting, counting, and validating the votes — some EMBs also engage in other stages of the electoral process. These include delimiting electoral districts, monitoring campaign financing and advertising, conducting voter education, and resolving post-election disputes.

3 Institutional Resources of the Electoral Justice System

The set of rules outlined above serves as a starting point for analyzing how the powers of the Electoral Justice System have been exercised under the 1988 Constitution as well as which instruments have contributed to safeguarding its autonomy.

Comparative studies show that the *de jure* independence of the electoral authority from the Executive Branch, while it may strengthen public trust in the electoral process, does not necessarily lead to improvements in the quality of elections (Norris, 2015). Therefore, it is necessary to examine other aspects related to the functional capacity of the electoral body in order to assess its effectiveness and autonomy in conducting elections.

According to van Ham and Garnett (2019), the autonomy of electoral bodies must be assessed, among other dimensions, from a financial standpoint. In this regard, autonomy refers to how the electoral body's budget is allocated and by whom as well as the degree of control the body has over its own financial resources. Financial autonomy also includes the authority to determine its internal organization and to hire or dismiss personnel.

An analysis of the Electoral Justice System under the 1988 Constitution shows that these requirements for financial autonomy have been met. TSE and Regional Electoral Courts manage substantial material and human resources to carry out their functions, without interference from the Executive Branch. In 2022, the Electoral Justice System employed 17,021 staff members, including both permanent and appointed positions[10]. Regarding budget, the following chart shows the evolution in general election years following the implementation of the *Plano Real*:

Chart 1. Budget of the Electoral Justice System

YEAR	AMOUNT (BRL)
1998	R$ 1,192,490,052
2002	R$ 1,600,540,339
2006	R$ 3,056,608,499
2010	R$ 5,205,604,298
2014	R$ 6,077,120,836
2018	R$ 8,928,427,580
2022	R$ 10,281,590,553

Source: prepared by the authors.

The high cost of holding elections in Brazil has been supported by a continuous real-term increase in the budget of the Electoral Justice System[11], which covers not only personnel expenses but also a wide range of costs related to polling places and materials as well as public information campaigns.

The expansion of material and human resources within the Electoral Justice System is closely linked to the regularity of elections under the 1988 Constitution. From 1989 — the year of the first presidential election under the new constitutional regime — until the most recent elections held in 2022, the number of registered voters in Brazil grew from 82,074,718 to 156,453,354. This steady increase is due to the mandatory nature of both voter registration and voting, and it requires constant updates to the Electoral Justice System's budget to ensure the fulfillment of all necessary electoral procedures. In line with the compulsory nature of voting, the Electoral Justice System significantly expanded the number of electoral districts (*zonas eleitorais*), thus facilitating the exercise of citizenship. In 1988, Brazil had 2,320 electoral districts, a figure that rose to 3,035 by 2016. In the 2022 elections, 2,636 electoral districts were operational across Brazil.

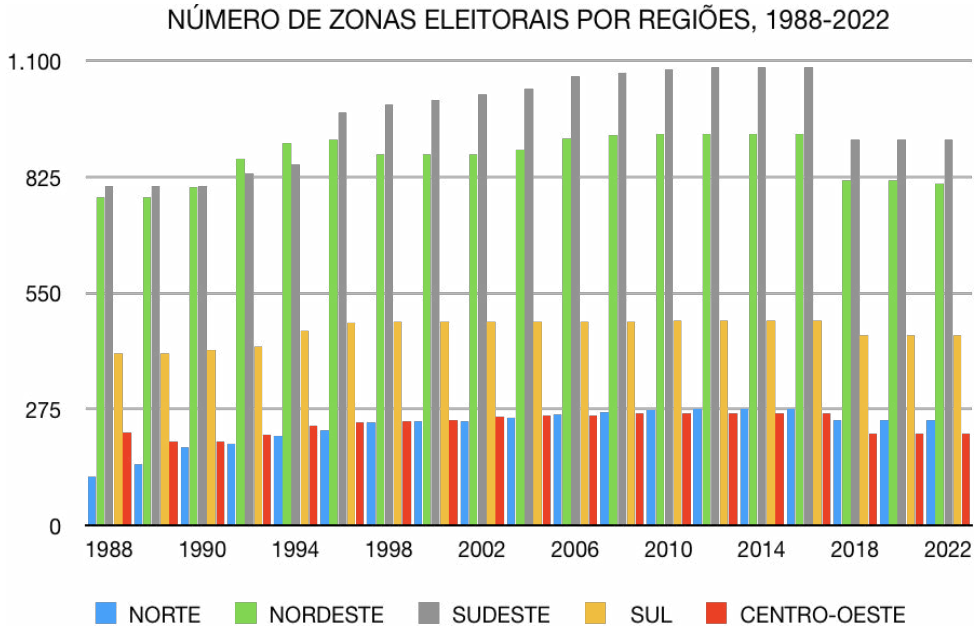
[10] Available from: https://www.tse.jus.br/transparencia-e-prestacao-de-contas/pessoal/apresentacao. Accessed on: 24 mai. 2023.

[11] As a point of reference, if the budget of the Electoral Justice System had been adjusted solely for inflation over the period — measured by the Broad National Consumer Price Index (*Índice Nacional de Preços ao Consumidor Amplo*, IPCA) — its value in 2022 would have been R$ 6,865,488,584.20. This calculation was made using the tool available from: https://www.ibge.gov.br/explica/inflacao.php.

NÚMERO DE ZONAS ELEITORAIS POR REGIÕES, 1988-2022

1.100

Graph 1. Number of Electoral Districts by Region (1988-2022)



Source: Adapted from the TSE.

In addition, the Electoral Justice System exercises several other responsibilities throughout the electoral cycle, particularly those related to political parties. According to Article 14, §3, V of the Federal Constitution of Brazil (CRFB), party affiliation is mandatory for all candidates running for elected office, and political parties are entitled to resources from the party fund and free access to radio and television (Article 17, §3). In the 2022 elections, 31 political parties were officially registered with the TSE, and 14 others were in the process of formation. The distribution of party fund resources is also handled by the Electoral Justice System[12]. Considering the years in which general elections were held since 2002, the party fund had the following amounts:

Chart 2. Party Fund

YEAR	AMOUNT (BRL)
2002	R$ 88,547,054.64
2006	R$ 142,760,217.20
2010	R$ 197,251,884.11
2014	R$ 371,955,594.00
2018	R$ 886,491,421.67
2022	R$ 1,107,076,607.00

Fonte: elaboração própria.

It is therefore not surprising that Brazil's Electoral Justice System handles a high volume of cases, reaching 1.4 million new filings in 2020 (CNJ, 2022)[13].

In addition to the broad scope of its responsibilities, the autonomy of the Electoral Justice System is also ensured by the composition of the TSE and its institutional connection with the STF. TSE is composed of seven members, each serving a 2-year term, renewable for an additional 2 years. Three of its members are justices of the STF, two are justices of the Superior Court of Justice (*Superior Tribunal de Justiça*, STJ) — all selected by their

[12] Funded by allocations from the federal budget and revenue from electoral fines, among other sources, the party fund is distributed monthly by the TSE to political parties, according to the criteria established in Article 41 of the Political Parties Law (Law No. 9,096/95). However, the TSE holds the authority to suspend the transfer of these resources in several circumstances, such as in cases involving the receipt of funds from unidentified or unclarified sources (Article 36, I of Law No. 9,096/95) or the failure to submit electoral financial statements (Article 37-A of Law No. 9,096/95).

[13] Justiça em Números 2022, p. 110. Available from: https://www.cnj.jus.br/wp-content/uploads/2022/09/justica-em-numeros-2022-1.pdf. Accessed on: 10 jul. 2023.

peers — and two are lawyers appointed by the president of the Republic from lists submitted by the STF. As such, the STF is directly or indirectly responsible for selecting the majority of TSE justices.

Moreover, decisions issued by TSE are final and unappealable, except when they contradict the Constitution or deny habeas corpus or writs of mandamus (Article 121, §3 of the Federal Constitution). According to Orozco Henríquez (2019, p. 175), this feature grants the highest degree of functional autonomy to a country's electoral justice system. In such exceptional cases, the only admissible appeals are directed to the STF, which rarely overturns TSE decisions (Marchetti, 2013, p. 47). This indicates that the overlap in the composition of the two courts contributes to the stability of the Electoral Justice System's rulings. Of the 29 STF justices who served as regular members of the TSE whose terms began under the 1988 Constitution, 17 served for more than one 2-year term (58%)[14]. Notably, the presidency and vice presidency of TSE must by law be held by members of STF.

Thus, the functioning of the Electoral Justice System under the 1988 Constitution has generated a process of positive feedback that has allowed it — especially TSE — to accumulate institutional resources for exercising electoral governance in Brazil independently. According to Pierson (2004), positive feedback or self-reinforcing processes occur when the trajectory developed by institutions in a particular direction becomes increasingly difficult to reverse. Over time, institutional functioning generates benefits and raises the costs of shifting to alternative institutional arrangements. Among the sources of positive feedback, Pierson (2004) highlights political authority, through which certain actors are empowered to impose rules on others. In this context, the exercise of authority can act as a self-reinforcing mechanism, as actors who modify the rules simultaneously increase their own capacity for political action to the detriment of their opponents.

By leveraging its normative, administrative, and financial autonomy — alongside the expansion of its material and human resources — the trajectory of Brazil's Electoral Justice System has consolidated its authority over the electoral process. In addition to the broad allocation of responsibilities under the law, the complexity of organizing elections and the increasing number of electoral disputes have further strengthened the role of the Electoral Justice System as an electoral governance body, as it has come to concentrate an increasing number of tools related to rule application and rule adjudication. Responsible for administering all stages of the electoral cycle and for adjudicating related cases, the Electoral Justice System operates independently of the Executive Branch in conducting elections, and its decisions may be appealed only to the STF. The simultaneous exercise of these powers has made them mutually reinforcing, as any attempt to restrict one could compromise the regularity of the electoral process and create uncertainty regarding the integrity of its outcomes.

However, the main test of the institutional robustness of the Electoral Justice System must be conducted by examining TSE decisions that have modified electoral rules. In fact, the exercise of rule-making functions can be understood as the highest degree of autonomy for an electoral governance body, as it allows the institution to make decisions that may limit the authority of other bodies in defining such rules. Therefore, analyzing how the Brazilian National Congress reacted to the legal innovations introduced by TSE is essential for assessing whether, in this domain as well, a self-reinforcing process of the Electoral Justice System's powers has taken place.

4 Electoral Consultations and Legal Innovations

Legally established in Article 23, XII of the Electoral Code, the mechanism of electoral consultation (*consulta eleitoral*) has enabled the TSE to issue decisions with significant impact on Brazil's electoral and party system, including cases related to coalition verticalization, party loyalty, gender quotas, and racial quotas[15].

4.1 Verticalization of Coalitions

On February 26, 2002, the TSE responded to a consultation submitted by members of the Democratic Labor Party (PDT) (*Consultation No. 715*) and issued Resolution No. 21,002/2002, reversing the position it had adopted in previous elections. According to this Resolution:

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[14] Edson Fachin (2018-2022); Roberto Barroso (2018-2022); Rosa Weber (2016-2020); Luiz Fux (2014-2018); Dias Toffoli (2012-2016); Carmen Lúcia (2009-2013; 2022-2024); Ricardo Lewandowski (2009-2013; 2022-2023); Ayres Britto (2006-2010); Gilmar Mendes (2004-2006; 2014-2018); Ellen Gracie (2001-2004); Nelson Jobim (1999-2003); Maurício Corrêa (1997-2001); Néri da Silveira (1997-2001); Ilmar Galvão (1994-1996; 1997-1999); Marco Aurélio Mello (1993-1997; 2005-2008; 2010-2014); Carlos Velloso (1992-1996; 2003-2006); Sepúlveda Pertence (1991-1994; 2001-2005).

[15] In another set of cases, the TSE also contributes to the rulemaking function by implementing, through resolutions, decisions issued by the STF, as seen in the regulation of the number of city councilors (Res. 21.702/04) and the rules for distributing the party fund (Res. 22.506/07).

> Political parties that form a coalition for the presidential election may not form coalitions for the election of state or Federal District governors, senators, federal deputies, or state or district deputies with other parties that have, either independently or in a different alliance, nominated a presidential candidate (Brasil, 2002, local. 183).

Known as the "verticalization of coalitions," this TSE decision led to the introduction of Constitutional Amendment Bill (*Proposta de Emenda Constitucional*, PEC) No. 548/2002 in the Brazilian Federal Senate. The bill proposed amending the wording of Article 17, paragraph 1 of the Federal Constitution to make it explicit that a political party could form a coalition at the state level even with a party that was its opponent in the presidential election, in the name of internal party autonomy. However, PEC No. 548/2002 did not move quickly through the National Congress and was only approved in 2006, becoming Constitutional Amendment (CA) No. 52.

In addition to the debate in the National Congress, Direct Actions of Unconstitutionality were filed before the STF challenging the aforementioned resolution (ADI 2,628[16] – PFL; ADI 2,626[17] – PCdoB, PL, PT, PSB, and PPS). However, these actions were not even admitted for consideration, and the TSE's interpretation ultimately prevailed. This case illustrates the difficulty of overturning TSE decisions, both through legislative responses — such as CAs, which involve a slower process — and due to the protection those decisions receive from the STF.

Following the enactment of CA No. 52/06, STF was once again called upon to intervene on the matter. Article 1 of CA No. 52/06 granted political parties autonomy to define their internal structure, organization, and operations, as well as to adopt their own criteria for candidate selection and rules for forming electoral coalitions, without the requirement of alignment between candidacies at the national, state, district, or municipal levels. Party statutes were required to establish rules on party discipline and loyalty — a subject that until then had been governed solely by infra-constitutional legislation, specifically Article 6 of Law No. 9,504/97. However, the amendment's enactment less than one year before the 2006 elections prompted the filing of ADI No. 3,685[18] by the Federal Council of the Brazilian Bar Association (*Ordem dos Advogados do Brasil*, OAB), with Justice Ellen Gracie serving as rapporteur.

According to the petitioner, CA No. 52/06 violated Article 16 of the Federal Constitution, which establishes a 1-year *vacatio legis* period for any rule that alters the electoral process. Therefore, the petitioner argued that the challenged provision could not apply to the elections scheduled to take place seven months after the amendment's publication because it violated the principle of electoral anteriority. The petitioner also contended that the breach of Article 16 infringed upon individual guarantees of legal certainty and due process of law, enshrined in Article 5, *caput* and item LIV of the Constitution, and derived from the foundational principle of the Democratic Rule of Law — both of which are protected under the entrenchment clause in Article 60, §4. On those grounds, the petitioner argued that Article 2 of CA No. 52/2006 should be deemed unconstitutional. Notably, 5 days before the promulgation of the constitutional amendment, the TSE had upheld its position that the rule of coalition verticalization would continue to apply to the 2006 elections (Consultation No. 1225).

On March 22, 2006, STF, by majority vote, ruled in favor of ADI No. 3,685, citing precedents set in ADI No. 354 and ADI No. 3,345. The Court reaffirmed that the purpose of the principle of electoral anteriority is to prevent the abusive or opportunistic use of the legislative process as a tool for manipulating or distorting the electoral process. It also emphasized that this principle serves as an individual guarantee for voters — original holders of the power exercised by elected representatives — "who are entitled to receive from the State a necessary degree of legal certainty and security against abrupt changes to the rules governing electoral competition". Notably, Justices Marco Aurélio and Nelson Jobim reiterated the positions they had previously taken on the matter while serving on the TSE, illustrating a tendency to maintain consistent rulings regardless of whether the justices sit on one court or the other. Furthermore, even though the constitutional amendment approved by the National Congress altered the rule previously established by the TSE — which had prevailed in two elections — it was ultimately STF that rendered the final decision on the matter.

4.2 Party Loyalty

Although the loss of office due to a party switch by an elected official was provided for in the 1969 Constitution, this provision was repealed by CA No. 25/85 and was not reinstated in the 1988 Constitution.

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16 BRASIL. Supremo Tribunal Federal. Pleno. ADI 2628. Rel. Min. Sidney Sanches. 18.04.2002. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

17 BRASIL. Supremo Tribunal Federal. Pleno. ADI 2626. Rel. Min. Sidney Sanches. 18.04.2002. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

18 BRASIL. Supremo Tribunal Federal. Pleno. ADI 3685. Rel. Min. Ellen Gracie. 28.08.2008. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

In 2007, through Resolution No. 22,526 (Consultation No. 1,398/07), the TSE, by a vote of six to one, reversed its previous jurisprudence on the matter and began recognizing that political parties and coalitions retained the right to the seat obtained under the proportional electoral system in the event of a candidate resigning from the party or transferring to a different one.

However, the TSE's position was not upheld by the Chamber of Deputies. On April 26, 2007, the Chamber's president at the time, Arlindo Chinaglia, stated that the TSE's resolution held only interpretative value and did not constitute a binding judgment. He also argued that none of the conditions for declaring a parliamentary seat vacant or for the loss of mandate had been met, as outlined in Article 55 of the Federal Constitution and Article 238 of the Chamber of Deputies' Internal Rules (*Regimento Interno da Câmara dos Deputados*, RICD).

As a result of the Speaker's actions, three separate writs of mandamus (MS No. 26,602[19], No. 26,603[20], and No. 26,604[21]) were filed before the STF, which recognized the constitutional duty to uphold the principle of party loyalty. In a departure from its previous stance, STF ruled that the parliamentary seat belongs to the political party, not the elected official. Until then, STF had consistently held that party switching should not affect a lawmaker's mandate (MS No. 20,927)[22] and this shift in interpretation was justified on the grounds of applying the technique of constitutional mutation.

In the same year, in response to Consultation No. 1,407/07, TSE held that mandates obtained through the majoritarian system also belonged to the political party, not the elected individual. Through Resolution No. 22,610/07, TSE regulated the process for loss of elective office due to party switching and established the following grounds for party disaffiliation with just cause — none of which result in loss of office: party merger or incorporation; creation of a new party; substantial change or repeated deviation from the party platform; and serious personal discrimination.

In ADIs No. 3,999[23] and No. 4,086[24], ruled only on the formal constitutionality of these resolutions, rejecting the argument of legislative usurpation on the grounds that the challenged resolutions arose in an exceptional and transitional context, serving as instruments to uphold party loyalty in the absence of applicable legislation. Later, in 2015, in the judgment of ADI No. 5,081[25], STF established the precedent that loss of office due to party switching does not apply to candidates elected under the majoritarian system, as this would violate popular sovereignty and the choices made by voters.

Although a proposal for a constitutional amendment addressing party loyalty was introduced in 2008, it was not until 2016 that CA No. 91 was approved by the National Congress[26]. Extracted from a broader political reform package, this CA merely allowed disaffiliation without loss of office during a 30-day window following its promulgation. It therefore created a temporary exception that did not overturn the TSE's jurisprudence, which had been upheld by STF.

Five years later, the approval of CA No. 111/21 exemplified the formal recognition of the Electoral Justice System's rule-making function. By adding paragraph 6 to Article 17 of the Federal Constitution, the National Congress incorporated the party loyalty rule into the constitutional text, establishing that federal, state, and district deputies,as well as city council members, "who disaffiliate from the party under which they were elected shall lose their office, except in cases of party consent or other justified circumstances established by law (...)."

4.3 Gender and Racial Quotas

In the judgment of ADI No. 5,617[27], issued on March 15, 2018, the STF, by majority vote, granted the request of the Prosecutor General to: (a) declare the unconstitutionality of the term "three" in Article 9 of Law No. 13,165/2015, thereby establishing that the minimum funding of female candidates' campaigns through the party fund would

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19 BRASIL. Supremo Tribunal Federal. Pleno. MS 26.602. Rel. Min. Eros Grau. 04.10.2007. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

20 BRASIL. Supremo Tribunal Federal. Pleno. MS 26.603. Rel. Min. Celso de Mello..04.10.2007. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

21 BRASIL. Supremo Tribunal Federal. Pleno. MS 26.604. Rel. Min. Cármen Lúcia. 04.10.2007. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

22 BRASIL. Supremo Tribunal Federal. Pleno. MS 20.927. Rel. Min. Moreira Alves. 11.10.1989 Available from: www.stf.jus.br. Accessed on: 18.11.2023.

23 BRASIL. Supremo Tribunal Federal. Pleno. ADI 3.999. Rel. Min. Joaquim Barbosa. 12.11.2008. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

24 BRASIL. Supremo Tribunal Federal. Pleno. ADI 4.086. Rel. Min. Joaquim Barbosa. 12.11.2008. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

25 BRASIL. Supremo Tribunal Federal. Pleno. ADI 5.081. Rel. Min. Luís Roberto Barroso. 27.05.2015. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

26 Previously, Law No. 13,165/15 had already amended the Political Parties Act (Article 22-A) to provide for the loss of office by a legislator in the event of party disaffiliation. Additionally, the new rule included, among the justified grounds for disaffiliation, the change of party within 30 days prior to the affiliation deadline required to run in elections. In the preliminary ruling on ADI No. 5,398, the STF upheld the validity of this new provision but did not address the lack of a legal provision regarding the creation of new parties.

27 BRASIL. Supremo Tribunal Federal. Pleno. ADI 5.617. Rel. Min. Edson Fachin. 15.03.2018. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

become a permanent rule; and (b) interpret Article 9 of Law No. 13,165/2015 in accordance with the Constitution, so that the resources allocated to female candidacies would be proportional to the number of such candidacies, with a minimum threshold of 30% as established by Article 10, §3 of Law No. 9,504/1997. Based on the principle of substantive equality and the importance of affirmative action to ensure women's political participation, the STF deemed the 5% minimum and 15% maximum limits for such funding unconstitutional.

In the same year, in response to Consultation No. 0600252-18, the TSE applied the STF's ruling to the Special Campaign Finance Fund (*Fundo Especial de Financiamento de Campanha*, FEFC), created in 2017 (Articles 16-C and 16-D of Law No. 9,504/97), as well as to the allocation of free electoral airtime on radio and television (Articles 47 et seq. of Law No. 9,504/97). The Court established that, in distributing these resources, political parties must observe the minimum threshold of 30% of candidacies per gender. In line with the precedent set by the STF in ADI No. 5,617, if the percentage of female candidates exceeds 30%, "the amount of FEFC resources and the allocation of broadcast time must be increased proportionally."

Subsequently, in Consultation No. 0600306-47, TSE issued a new decision on the distribution of party fund resources, FEFC allocations, and radio and television airtime, to take effect starting with the 2022 elections. In this case, the Court ruled that financial resources and campaign airtime allocated to female candidates "must be divided between Black and white women in strict proportion to the number of candidacies submitted by each party." Additionally, the proportionality criterion was to be applied to funding male Black candidates as well, although the TSE declined to establish a 30% quota for the nomination of Black candidates.

Continuing the series of decisions that began with the ruling in ADI No. 5,617, STF ruled on the preliminary injunction in ADPF No. 738[28] during a virtual session held from September 25 to October 2, 2020. By majority vote, the Court ordered that the incentives for Black candidates be applied starting with the 2020 elections, based on the TSE's decision in Consultation No. 0600306-47.

These decisions prompted the National Congress to revise legal norms in accordance with prevailing jurisprudence. Previously, through Article 2 of Constitutional Amendment No. 111/21, the Legislative Branch had introduced an additional mechanism to promote the candidacies of women and Black individuals by establishing that, for the purposes of calculating the distribution of resources from the party fund and the FEFC, votes cast for female candidates or Black candidates for the Chamber of Deputies in elections held between 2022 and 2030 would be counted twice.

CA No. 117/22 added paragraphs 7 and 8 to Article 17 of the Federal Constitution. Paragraph 7 establishes a minimum requirement that 5% of party fund resources be allocated to the creation and maintenance of programs promoting and disseminating women's political participation. It also prohibits the Electoral Justice System from issuing sanctions in campaign finance cases that had not reached a final judgment by the date of the amendment's promulgation. Paragraph 8 states that "the amount of the FEFC and the portion of the party fund allocated to electoral campaigns, as well as the amount of free radio and television airtime to be distributed by parties to their female candidates, must be at least 30%, proportional to the number of female candidates. The distribution must follow criteria defined by each party's leadership and statutory rules, considering party autonomy and interests." Additionally, the amendment exempts political parties from sanctions for failing to apply these resources—whether by gender or race—in elections held prior to its publication[29].

The debate over gender quotas also extended to the type of sanction applicable in cases of fraudulent compliance with the legal obligation, in which, once again, STF upheld the understanding of TSE (ADI No. 6,338). In this case, TSE had ruled that, once gender quota fraud is legally established, the Demonstrative Document of Procedural Regularity (*Demonstrativo de Regularidade de Atos Processuais*, DRAP) of the fraudulent coalition or party must be declared entirely null and void, resulting in the annulment of the election of candidates from that party.

For TSE, the essential elements required to establish fraud in these cases do not depend on the subjective element of a supposed collusion between the fictitious female candidates and the political party. It is entirely unnecessary to prove that the individuals involved acted with intent or specific malice to commit the fraudulent act. The position upheld by TSE is that indicators such as a candidate receiving zero or negligible votes; the absence

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[28] BRASIL. Supremo Tribunal Federal. Pleno. ADPF 738. Rel. Min. Ricardo Lewandowski. 05.10.2020. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

[29] Notably, Law No. 14,291/22 established that, in radio and television broadcasts outside the electoral period, at least 30% of the total airtime allocated to political parties must be dedicated to promoting and encouraging women's political participation (Article 50-B, § 2).

of financial activity; the lack of campaign materials; and evidence showing that campaign efforts were conducted on behalf of another candidate running for the same office are sufficient to demonstrate an intent to violate the legislation concerning affirmative actions related to gender quotas.

Moreover, regarding the argument that only those directly involved in the alleged wrongdoing could be subject to sanctions — based on the principle of the non-transferability of punishment (Article 5, XLV of the Federal Constitution) — the prevailing understanding in the TSE is that once gender quota fraud is established, all candidates linked to the fraudulent DRAP must have their registration annulled, their votes invalidated, and the resulting certificates of election revoked. Otherwise, the fraudulent circumvention of gender quota legislation would be allowed to persist. This also requires the recalculation of the electoral and party quotients, and the application of ineligibility penalties to those who actively engaged in or consented to the misconduct. This last consequence — loss of eligibility — only applies when the fraud is challenged through an *Electoral Judicial Investigation Action* (*Ação de Investigação Judicial Eleitoral*, AIJE).

In her opinion, Justice Rosa Weber argued that a ruling recognizing the occurrence of gender quota fraud is merely declaratory in nature, which grants it retroactive effect. If the fraudulent conduct had been identified from the outset, the registration would never have been approved. Therefore, candidacies associated with the fraudulent DRAP were irregular and illegitimate from the start, and thus cannot produce any legal effects.

As a result, if the decision is rendered after the elections, all elected candidates and alternates from the political party responsible for the fraud may lose their mandates and positions as substitutes. This measure is justified by the fact that fictitious female candidacies create a false appearance of competition for the popular vote.

Accordingly, STF held that responsibility should not be limited to those directly and explicitly involved in the fraudulent conduct. Limiting sanctions in this way would, in effect, place greater responsibility on women rather than on men, and would also weaken the coercive authority of the State. Such an approach would, in practice, reinstate the former legal regime, with the direct consequence of encouraging noncompliance with gender quota requirements — since other beneficiaries of the fraud, unless shown to have been immediately involved, would remain unaffected.

The following decisions by the TSE are expressly cited: the TSE "has consistently held that any form of fraud constitutes abusive conduct under the law, and therefore it is legitimate to use an AIJE to determine whether fraud has occurred (REspE 63.184/SC, Justice Luiz Fux, DJe 10/05/2016, e.g.), as well as an Action for Annulment of an Electoral Mandate (*Ação de Impugnação de Mandato Eletivo*, AIME) for the same purpose (REspE 76.455/PR, Justice Alexandre de Moraes, judgment on 05/06/2021, DJe 05/18/2021, e.g.)."

Once again, there is clear convergence between the jurisprudence of the TSE and the STF, as stated in the Syllabus of ADI No. 6,338[30]: "3. The recent rulings of this Federal Supreme Court and the Superior Electoral Court have been emphatic in underscoring the need to eliminate historical, cultural, social, professional, and legal stigmas with respect to women's rights.".

The analysis of these cases demonstrates that the TSE's involvement in the formulation of electoral rules has also contributed to the autonomy of the Electoral Justice System. By issuing decisions on electoral coalitions, party loyalty, and gender and racial quotas, TSE has repeatedly expanded the scope of electoral matters subject to its regulation, to the detriment of the National Congress's authority. As a result, National Congress has often been compelled to pass constitutional amendments in order to override electoral jurisprudence — an effort not always met with success. In this way, the Electoral Justice System has developed a self-reinforcing process that has strengthened its competencies, expanded its role in electoral governance, and reduced the political maneuvering space of the National Congress.

This strengthening of the TSE's authority can also be explained by its institutional alignment with the STF, which functions as a veto point against attempts to overturn decisions issued by the Electoral Justice System, thereby reducing the likelihood of such efforts succeeding. According to Pierson (2004), veto points are sources of institutional resilience, as their existence makes rule changes more difficult. This resilience increases when veto points are self-reinforcing — i.e., when the actors who exercise the veto also control the institutional review process.

The relationship between the STF and the TSE exemplifies this dynamic, as some members of the TSE are responsible for reviewing their own decisions. This institutional arrangement also means that legislative or executive initiatives aimed at restricting the TSE's exercise of authority simultaneously affect members of the STF, which is

[30] BRASIL. Supremo Tribunal Federal. Pleno. ADI 6.338. Rel. Min. Rosa Weber. 31.03.2023. Available from: www.stf.jus.br. Accessed on: 18.11.2023.

tasked with ruling on the constitutionality of laws and constitutional amendments. As such, Brazil's constitutional design creates incentives for the STF to protect the independence of the Electoral Justice System by upholding TSE decisions and obstructing legislative changes to electoral rules, since weakening the TSE's political influence would also result in diminishing the STF's own political influence.

This institutional framework helped the Electoral Justice System withstand pressure from the Bolsonaro administration because TSE had already consolidated its role in electoral governance. One further example of this can be seen in its actions to combat disinformation. In 2021, through Resolution No. 23,671, the TSE asserted its authority to order the removal of electoral propaganda containing demonstrably false or seriously misleading content. Later, in October 2022, the TSE expanded its powers through Resolution No. 23,714 to address disinformation activities that threatened electoral integrity.

At that time — on the eve of the presidential runoff — the spread of fake news had reached unprecedented levels in the country, leading TSE to adopt new measures to contain it. According to Resolution No. 23,714, any order to remove content harmful to electoral integrity could be extended *ex officio* by the TSE's presidency to "other situations with identical content," without requiring a new judicial filing. In addition, the maximum time for removal of such content by platforms and providers was reduced from 24 hours to two hours, and noncompliance could result in the suspension of access to the implicated platform. Despite concerns regarding the scope of powers granted to the TSE by this resolution, the STF rejected the claims of unconstitutionality and reaffirmed the Electoral Justice System's authority to monitor electoral propaganda. Notably, this decision was reached by a 7–2 vote, with the only dissenting opinions coming from the two justices appointed by President Bolsonaro.

5 Conclusion

During the Bolsonaro administration, Brazil's Electoral Justice System faced various forms of pressure that called into question its ability to conduct the electoral process autonomously. In this article, we sought to identify the institutional resources that enabled this specialized branch of the judiciary — particularly the TSE — to withstand such attacks and successfully organize free and fair elections in the country.

In the realm of electoral governance, the Electoral Justice System in Brazil is responsible for the formulation, implementation, and adjudication of electoral rules. As such, this branch of the Judiciary concentrates the functions of electoral management and the resolution of disputes and controversies, without requiring intervention from the Executive Branch to organize the various stages of the electoral process. At the same time, the Electoral Justice System benefits from the independence guarantees afforded to the Judiciary and, in terms of its institutional position and affiliation, is characterized as both independent and specialized.

This institutional design was strengthened under the 1988 Constitution. In addition to constitutional and legal provisions, the Electoral Justice System has had increasing access to human and material resources to carry out its duties, efficiently managing an electoral system in which the number of voters nearly doubled over a 30-year span and which includes more than 30 registered political parties. On the other hand, the Electoral Justice System's autonomy is also safeguarded by its institutional alignment with the STF. In addition to participating in the selection of TSE members, the STF is the sole appellate body for TSE decisions, which contributes to the stability of electoral jurisprudence.

The operation of the Electoral Justice System under the 1988 constitutional regime created a positive feedback loop, in which the exercise of its various powers consolidated its autonomy as the body responsible for electoral governance. By issuing decisions that altered electoral rules, the authority of the TSE extended even over the National Congress, as exemplified by the cases concerning party coalitions, party loyalty, and gender and racial quotas. In such cases, the National Congress was compelled to approve constitutional amendments to overturn electoral jurisprudence — efforts that were not always successful. TSE's role in electoral rule-making once again highlights the importance of its institutional connection with the STF, which is responsible for issuing final rulings on the constitutionality of TSE decisions — upholding them in all such cases. Since part of the TSE is composed of justices who may later review its own decisions, the STF functions as a self-reinforcing veto point, further enhancing the institutional resilience of the Electoral Justice System. Thus, Brazil's constitutional design creates strong incentives for the STF to protect the independence of the Electoral Justice System, as any reduction in the TSE's political influence would also reduce the STF's own influence.

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