

Ethical issue in the Brazilian Electoral Courts

Aspecte etice Tribunalele Electorale din Brazilia

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Abstract: *Electoral Justice is a branch of the Brazilian Judiciary that is specialized in electoral claims and lawsuits, and also has the function of administrating the elections – from the candidacies registration to accreditation of the elected. The constitutional model that defines how the Electoral Courts are composed presents issues to implement the Code of Ethics of National Magistrature since it is essentially different from the rest of the Brazilian Judiciary.*

This paper aims to relate the idiosyncrasies of the Electoral Courts and the impossibility of fulfilling the ethical principles stated in the Code, especially independence and impartiality. The methodology is essentially a literature review, focusing on the normative determinations in Brazilian law. As a result, the paper points out that the implementation of the ethical principles described in the Code is impossible in the constitutional interpretation that imposes to the Electoral Justice a completely different model than the other Judiciary branches.

Keywords: *Electoral Courts, guarantees, independence, Electoral Justice, Cod of Ethics*

Rezumat: *Justiția Electorală este o ramură a sistemului judiciar brazilian care este specializată în cereri și procese electorale și are, de asemenea, funcția de administrare a alegerilor – de la înregistrarea candidaturilor până la acreditarea aleșilor. Modelul constituțional care definește modul în care sunt compuse Curțile Electorale prezintă probleme pentru implementarea Codului de Etică al Magistraturii Naționale, deoarece este esențial diferit de restul sistemului judiciar brazilian. Lucrarea își propune să relaționeze idiosincraziile instanțelor electorale și imposibilitatea îndeplinirii principiilor etice enunțate în Cod, în special independența și imparțialitatea. Metodologia este, în esență, o revizuire a literaturii, concentrându-se pe determinările normative din*

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dreptul brazilian. În consecință, lucrarea arată că implementarea principiilor etice descrise în Cod este imposibilă în interpretarea constituțională care impune Justiției Electorale un model complet diferit față de celelalte ramuri ale Justiției.

Cuvinte cheie: instanțele electorale, garanții, independență, justiție electorală, cod de etică

1. Introduction

Brazil has a specialized branch of the Judiciary to analyze electoral claims and lawsuits. It is called the Electoral Justice. Besides solving conflicts in elections and related to campaigns and political propaganda, it is responsible to operationalize the elections i.e. administrating the whole electoral process, from the acquisition and programming of the electronic ballot boxes to the counting of votes and the accreditation of those elected.

Despite its importance, the constitutional definitions of Electoral Justice are massively different from the rest of the judiciary branches. Those differences can have huge effects on ethical definitions of the Judiciary, especially concerning the independence and impartiality of the judges.

This paper aims to analyze the applicability of the Brazilian Code of Ethics of the National Magistrature in the Electoral Courts, the idiosyncrasies of that judiciary branch, and the conflicts that may arise from those.

To present this conflict, the paper begins by describing briefly the Brazilian Electoral Justice Model, as well as how the magistrates that compose its body are selected. Then it points out the necessary guarantees and limitations imposed by constitutional decree and necessary to maintain the impartiality and independence of the judges.

There is a discussion on how the Brazilian Code of Ethics in National Magistrature defined the main ethical principles to be complied with by Brazilian magistrates, focusing on impartiality and independence – aspects that will be addressed further on, when assessing the model for Electoral Justice and its issues on the fulfillment of the ethical parameters defined in the Code.

2. Brief description of the Brazilian Electoral Justice Model

The Electoral Justice has Federal jurisdiction, and its composition is: the TSE (*Tribunaj Superior Eleitoral* - Superior Electoral Court), as the summit organ having the final word in electoral themes, composed of seven judges; the TREs (*Tribunais Regionais Eleitorais* - Regional Electoral Courts), existing one in each federate state, and the Electoral Judges, monocratic organs (that are not strictly Courts in Brazil)

which stand at the first level of the Electoral judiciary system. Such is the model defined in the Brazilian Constitution (Congresso Nacional, 1988): art. 118. „Are organs of the Electoral Justice:

- I. The Superior Electoral Court;
- II. The Regional Electoral Courts;
- III. The Electoral Judges”

Besides those organs, there's a fourth: the Electoral Juntas, composed of the Electoral Judge and four other citizens. Their role is to solve issues concerning vote counting, for instance. But its role was emptied by the advent of the electronic ballot box.

But there is a point where the Electoral Justice differentiates itself from the other branches of the Judiciary: it has no judges of its own and is formed by magistrates from different organs of the Judiciary. In the collegiate organs are also two openings for jurists - lawyers with remarkable juridical knowledge and unblemished reputation. That being said, the composition of the Electoral Courts is presented in articles 119 and 120 of the Brazilian Constitution (Congresso Nacional, 1988):

“Art. 119. The Superior Electoral Court is composed of, at least, seven members, chosen from:

I - by election, with secret votes:

- a) three judges from the Ministers of the Supreme Federal Court;
- b) two judges from the Ministers of the Superior Justice Court;

II - by the nomination of the President of the Republic, two judges among six lawyers with remarkable juridical knowledge and moral character, indicated by the Supreme Federal Court.

Art. 120. There will be one Regional Electoral Court in the Capital of each state and the Federal District.

§1º - The Regional Electoral Courts are composed of:

I - by election, with secret votes:

- a) two appeal judges from the judges of Justice Court;
- b) two first-level judges chosen by the Justice Court;

II – one judge from the Federal Regional Court with headquarters in the Capital of the state or the Federal District, or if there is not one, a federal judge chosen by the respective Federal Regional Court;

III - by the nomination of the President of the Republic, two judges among six lawyers with remarkable juridical knowledge and moral character, indicated by the Justice Court”.

The „borrowed” judges that compose the Electoral Justice Courts and the judges from the jurist vacancies can remain in service for a two-year term, and never for more than two terms.

When the Constitution presents this model, without judges of its own, it places the Electoral Court in a very different position than the regular model of the rest of the Judiciary. The other organs of this branch have judges who are sworn in the function after a public selection, usually with tests and evaluation of titles. Despite that difference, it is made clear that the electoral magistrates shall have the same guarantees other judges have (Figueiredo, 2022).

It is important to mention that the judges who are in the Elections Court must also fulfil the duties in their regular offices.

3. Guarantees and limitations for judges' impartiality in Brazilian law

Brazilian Constitution points out that the judges (including electoral ones) have tenure, irremovability, and irreducibility of salaries. Those are some guarantees that allow the magistrate to judge freely and independently (Friede, 2019). But there is no form to make the guarantees be upheld within the model adopted by the Electoral Justice.

Tenure is the guarantee of permanence in the office, only possible to be cast aside by judicial decision, mandatory retirement, or the own judge's will. But this guarantee is incompatible with the two-year term model adopted in Electoral Courts. Of course that judges from different Justice organs will have this guarantee in their original offices, but the jurists will not.

Irreducibility of salaries cannot be implemented as well. Despite the determination of the impossibility of reducing the salaries of magistrates, Law 8.350/1991 determines that the Electoral Court judges receive a bonus for each session of the Court they participate (Congresso Nacional, 1991). But the law also imposes a limit for the number of sessions possible in a month: eight regularly and fifteen during the election period. As such, the salary value changes according to the number of Court sessions.

Only the irremovability, the impossibility of being transferred territorially to another office, is possible of being implemented. Therefore, the Electoral Court judges do not have the same guarantees as their peers from other branches of the Judiciary, as constitutionally intended.

On the other hand, magistrates in Brazil have limitations that aim to keep their impartiality: among them, it is important to point out that the Brazilian Constitution dictates that they cannot practice law. The prohibition remains after the judge leaves the office for a period of three years, to avoid any conflict of interest.

But the jurists that are members of the Electoral Court still can practice law. Brazilian Supreme Court decided that „the incompatibility with the practice of law

does not reach the electoral judges and their replacements, such is the composition of the Electoral Justice established in the Constitution (STF, ADI 1.127/DF). The National Council of Justice, an administrative organ that regulates the Judiciary, imposes at least one limit to the practice of law by the jurist members: they cannot practice in the Court they are part of. The scene is absurd: they can practice in other courts, including those of their fellow peers originally come from.

4. The Code of Ethics of National Magistrature and the issues in the Electoral Courts model

In the 66th ordinary session of the National Justice Council, the organ approved the Code of Ethics for the National Magistrature. As such, it presents the main principles that must be observed by all judges in Brazil. Those principles are independence, impartiality, knowledge, capacitation, courtesy, transparency, professional secrecy, prudence, diligence, professional and personal integrity, honor, and decorum.

In this digression, the focus will be on two of those: independence and impartiality.

The Code of Ethics states that the magistrate should be independent and not interfere, in any way, in his peers' ruling, except in respect of legal determinations.

In Elections Courts, each judge has his functional independence, and they can decide in the way they think is right. But there is one problem that emerges from the model: there is a hierarchical relation between the members of the Court.

Serejo (2011) affirms that the judge should cultivate his independency and respect his peers, especially concerning the appeal judges.

The appeal judges in the TREs and the Supreme Court Ministers in the TSE have an administrative hierarchy over the judges and Superior Justice Court Ministers, respectively. In the TREs cases, the appeal judges can even influence the career development of the judges in their original Court, the Justice Tribunal. As such, despite the functional independence, there is almost a hierarchical obedience that may present itself.

The same author (Serejo, 2011) states that independence is based on the achievement of guarantees of tenure, irremovability, and irreducibility of salaries. As was pointed out before, in the Electoral Court those guarantees are rarely present, creating opportunities for bias in the judicial decisions.

The absence of limitations for jurist members to practice law is also an open door for breach of impartiality. Since the judge can advocate in other Courts and Judiciary branches, he can act, eventually, in front of his Electoral Court peers. The advantage – even if not desired – is unfathomable.

Impartiality exists in the very definition of jurisdiction since the judge will always be a third party equidistant to the parts in the lawsuit (Carneiro, 2010; Neves, 2018; Didier Júnior, 2016; Theodoro Júnior, 2017). This principle is also a Human Right, as stated in the São José da Costa Rica Pact (Congreso Nacional, 1992).

On the topic of impartiality, the possibility jurist-judges have to practice law is a menace to the whole judicial system. Usually, when sworn into Electoral office, the jurists keep their firms (many of those acting in the Electoral Justice) and remain practicing law in other organs of the Judiciary.

That allows for them to advocate among their electoral peers in other law fields – where those peers (Justice Courts, Federal Judges, Superior Justice Court, or Supreme Federal Court) originally are from.

It cannot be understated the importance of comprehending the Electoral Courts as political courts. Their members are chosen by vote or appointment, and not by the regular criteria implemented in Brazilian law – public selections for judges, merit or seniority for appeal judges. As such, with the judges' brief terms, the composition of Electoral Courts can be changed from one election to another – since Brazil holds elections every two years.

Understanding the political characteristic of the Electoral Courts presents an even greater problem: the possibility to change the Courts in the interest of the other Judiciary organs (choosing the judge members by vote) or the Executive (nominating the jurist members). This possible influence forbids the existence of any independence to judge the lawsuits presented to the court, sometimes by the very same person that nominates the magistrate.

5. Conclusions

The different treatment the Constitution decided to give the Electoral Justice imposes several challenges to comply with the Brazilian Code of Ethics of National Magistrature.

The two first principles stated in the code, impartiality, and independence, are at risk with the very definition of the judges that will compose the Courts.

The political decisions in nominations and elections of Electoral Court members associated with the removal of some guarantees of the magistrature result in a possible biased composition of the Court. This may lead to decisions that privilege specific groups related to the organs that selected the Court members.

To allow the jurist judges to practice law, even among their Court peers is an abomination that has to be purged from Brazilian law. This understanding, a result of a Supreme Court decision, is by itself an aberration that offends fiercely the Code of Ethics.

The administrative hierarchical relationship between Court members is also an issue to be dealt with if independence is to be achieved. Even unwillingly, this relation may result in obedience that can redefine the decision of the Court.

In essence, the Brazilian constitutional model for Electoral Justice forbids the implementation of the ethical principles inscribed in the Code of Ethics of National Magistrature. The future of Brazilian Electoral Justice – especially with the crescent judicialization of politics – demands impartiality and independence, as they are mandatory, in a State guided by the rule of law, to make the judicial decisions reliable and trustworthy.

The 2022 elections – which repercussions are still to be discovered – are a prime example of the necessity to rethink the Brazilian Electoral model. Future studies may relate the results of this year's election – such as political violence, fake news, political fraud, and irregular propaganda – and the decisions of the courts, as long as their political and organizational aspects, and their relation to the ethical principles described in the Code.

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