Judicialization and Municipal Electoral competition in Brazil

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RESUMO

O principal objetivo deste trabalho é verificar se o presssuposto de Marchetti (2013) de que a competição eleitoral recente é marcada pela judicialização também se aplica ao âmbito das eleições suplementares. A hipótese é que a judicialização da competição eleitoral municipal tornou-se uma estratégia adicional utilizada pelos atores políticos em razão de sua efetividade. Os resultados indicam que, aproximadamente 58% das Eleições Complementares ocorridas no período, foram motivadas exclusivamente por processos movidos por grupos políticos da oposição. Nestes casos, a oposição elege os novos prefeitos em 62% das eleições.

Palavras-chave: Judicialização; Competição Eleitoral; Eleições suplementares.

ABSTRACT

The main objective of this paper is to verify whether Marchetti's (2013) assumption that recent electoral competition is marked by judicialization also applies to the scope of supplementary elections. The hypothesis is that the judicialization of municipal electoral competition has become an additional strategy used by political actors because of its effectiveness. The results indicate that approximately 58% of the Supplementary Elections that occurred in the period were motivated solely by lawsuits filed by opposition political groups. In these cases, the opposition can elect the new mayors in 62% of situations.

Keywords: Judicialization; Electoral Competition; Supplementary Elections.

1.1 INTRODUCTION

This judicialization of the municipal electoral competition that culminates in the deposition and consequent call of new elections is the subject of this paper. The 433 municipal supplementary elections that took place in Brazil from November 2004 to October 2018, related to the regular elections of 2004, 2008, 2012 and 2016, were analyzed. The sample is intended to map more than 80% of all the supplementary elections already held in Brazil.

The main objective of this paper is to verify whether Marchetti's (2013) assumption that recent electoral competition is marked by judicialization also applies to the scope of supplementary elections. In other words, the paper attempts to measure the impact of what was conventionally called the "judicialization of politics" (TATE, 1995) in the phenomenon of Brazilian municipal supplementary elections. The main hypothesis of the work is that the judicialization of municipal electoral competition has become an additional campaign strategy used by political actors because of its effectiveness.

The role of the judiciary has been called by some, the "judicialization of politics" (VALLINDER, 1995) and by others, "judicial activism" (KMIEC, 2004). Although the concept of the "judicialization of politics" is subject to criticism, (HAMLIN, KAWAR, SALA, 2015), even authors who discard their validity as an interpretative category in the literature, we understand that the term fulfills a relevant descriptive role regarding the activism exercised by the Judiciary in the democracies in the last two decades (KOERNER; INATOMI; BARATTO, 2011).

The paper is divided into five sections. In the first section, the work methodology is presented. The following section presents the studies on the judicialization of electoral competition in Brazil. The fourth section defines supplementary election and presents the empirical results of the research. Finally, the conclusion points the final considerations about the theme.

1.2 METHODOLOGY

The dataset used was constructed from four different sources and and is available online (XXXXX, 2019). The first is the Superior Electoral Court (TSE) data repository, which contains information about the results of the elections in Brazil, especially those elected in regular and supplementary elections, their respective votes and the total number of voters able to vote in those elections. The second data source, also managed by the TSE, is the system for the dissemination of candidacies and accountability (DivulgaCandContas), from which data can be obtained on the party coalitions that competed in the regular and supplementary elections.

Finally, data on the population estimated for the municipalities studied were obtained from the Brazilian Institute of Geography and Statistics (IBGE). The information on the reasons that determined the new elections in each municipality, as well as the respective legal grounds, were obtained in the systems of the Regional Electoral Courts of the States (TRE's).

The composition of his party coalition was used as a criterion to position a candidate as being opposed to the previous government. If the former mayor's party was part of the coalition of the next mayor, he was treated as an ally candidate. Otherwise, it was considered as opposing. This same criterion was adopted in the alignment of the authorship of the deposition actions. If they were tried by a party or coalition of which the defendant was not part, they remained classified as opposing.

Kinzo's criterion (2004, 2007) was used to establish the ideological position of the parties (left, center and right). When the party was only the result of a name change or the split of another party, the ideological alignment of the original party was considered. When the party was effectively a new political actor, its most common alliances and possible positions on substantive issues were considered (KINZO, 2007, p, 153).

Regarding the date of the decision to cancel the plaque or the rejection of the candidature registration, the date of the first decision pronounced by a collegiate body (TRE or TSE) was chosen, either by confirming the first-degree judgment that had already determined the rejection of the registration or the plaque, or by reforming the decision that had allowed the subsequently deposed candidate to compete.

Thus, the date considered will always be that of the decision rendered by a collegiate body that gave rise to a new election. It is justified to adopt this criterion because the collegiate decision became the starting point for the determination of ineligibility based on the Clean Registry Act. In practice, it means to say that the decision that effectively "has validity" is that which is pronounced by a collegiate body.

The research then mapped 433 supplementary elections pertaining to the municipal elections of 2004, 2008, 2012

and 2016, all of which had occurred in 411 cities. The discrepancy between the numbers is due to the occurrence of more than one supplementary election in the same municipality.

1.3 JUDICIALIZATION OF ELECTORAL COMPETITION IN BRAZIL

This section intends to discuss the judicialization of electoral competition in Brazil, from the main national authors. Like Marchetti (2013) and Zalamena (2013), we adopt the assumption that the recent political-partisan competition is marked by the judicialization. And we do it for basically two reasons: the structure of electoral governance in Brazil, which is extremely judicialized, and the positions of the High Courts on eminently electoral issues.

The Electoral Justice of Brazil is a product of the Revolution of 1930 and was inspired by the flags raised at the time: criticism of the competitive oligarchy that had settled along the first republic and the evident discredit of the electoral process, marked by *coronelismo*[1] (Marchetti, 2013 , p. 41).

The concept of electoral governance gained academic prominence from Huntington's work (1994), which points to the emergence of concern about the credibility of electoral results in democracies born in the third democratic wave. The concern of these new regimes would be to ensure that poll results are fair, transparent and accepted by political competitors.

For Mozafar and Schedler (2002), electoral governance would be a comprehensive number of activities that create and maintain the vast institutional framework in which voting and electoral competition take place. It operates on three different levels: rule-making, rule-application, and adjudication. These three functions would not be attributions of one organ only. According to the authors, the first function would be at the legislative level, the second at the administrative level and the third at the judicial level.

In the Brazilian case, the electoral body is made up of the TSE, the TRE's of the States, the electoral judges and the electoral boards. As the juridical legal theory emphasizes (Gomes, 2017; Ribeiro, 1990), electoral justice exercises administrative, jurisdictional, normative and consultative functions. In other words, it is not only responsible for organizing elections (the application of rules) and for judging electoral disputes (adjudication of rules), but also for formulating resolutions of a clearly normative nature (rule-making), as well as providing information on concrete issues to legally legitimize interested parties.

Thus, the way the Brazilian electoral body is structured by itself favors the judicialization of any electoral issues. After all, the executive body of the country's electoral body is made up of judges who accumulate administrative functions.

As already anticipated, the second reason we adopted the assumption of the judicialization of political-partisan competition would be the decisions of the TSE and the STF that impacted the rules of competitive play compiled by Marchetti's (2013) work: the decision on the verticalization of party coalitions; the decision that reduced the number of city councilors in Brazil; the unconstitutionality of the barrier clause and the division of the party fund; and the decision on party loyalty. Zauli (2011) adds to the list the TSE's decision on the validity of Complementary Law 135/10 (Clean Register Act) for the 2010 elections.

According to Paranhos *et al* (2014), the studies on electoral judicialization in Brazil are quite small and do not have a comprehensive research agenda. The mentioned authors affirm that in the period between 1996 and 2013 only ten articles published in Brazil referred directly to elections, that is, those that dealt with the judicialization of the electoral system and some other subareas.

The next section will present the concept of supplementary elections and the results of the research.

1.4 SUPPLEMENTARY ELECTIONS

The concept of supplementary elections is drawn from Article 224 of the Electoral Code, which provides for the holding of new elections in basically two hypotheses: the first, when there is a nullity of votes that reaches more than half of the vote for the majority positions of President of the Republic, Governor or Mayor.

[1]Coronelismo is a Brazilianism used to define the complex power structure that begins at the municipal level, exercised with private hypertrophy - the figure of the coronel - on the public power - the State, and having as secondary characters the electoral fraud and disorganization of public services - and encompassed the entire political system of the country during the Brazilian Old Republic.

The second case of additional election occurs when the decision of the Electoral Court is to decide whether to reject the registration, the annulment of the diploma, or the loss of the mandate of the candidate elected in majority, regardless of the number of votes annulled. Initially not foreseen in the original wording of Article 224 of the Electoral Code, this hypothesis was included by Law 13,165/2015, which added the third and fourth paragraphs to that article.

Thus, supplementary elections occur whenever the previous election is nullified, either by the annulment of more than half the votes, or by the removal of the elected plaque (by denial of registration, annulment of the diploma or loss of office) in the regular election.

Supplementary elections are still a subject of little explored research in the national literature. Bibliographical research with the thesis and dissertations bank of Coordination for the Improvement of Higher Education Personnel (CAPES) detected the existence of only five dissertations (ZALAMENA, 2013, COELHO, 2014, GARCIA, 2016, CRESPO, 2017, MOURA, 2018) and an article (CRESPO; PEIXOTO, 2018).

This literature, however, presents limitations that need to be highlighted. Some works were restricted to a State of the Federation and to a specific year (ZALAMENA, 2013, COELHO, 2014), while others, although they analyzed elections that occurred throughout the country, also restricted the period studied (GARCIA, 2014; PIXOTO, 2018).

As mentioned earlier, 433 municipal elections were held in Brazil between November 2004 and October 2018, of which only six were not motivated by lawsuits[2]. The table below shows the frequency of the supplementary elections held as a basis in the years of the invalidated elections.

Table 1.1. Frequency of the supplementary elections per year of the Regular Election invalidated.

Year (regular election)	Frequency	Percentage
2004	65	15.0
2008	149	34.4
2012	113	26.1
2016	106	24.5
Total	**433**	**100.0**

Source: Own elaboration (2018).

Table 3.2 below shows the frequency of reasons for the occurrence of new elections. In it, it is possible to observe 11 different legal grounds for the annulment of the regular elections and the consequent deposition of the elected mayors.

Table 1.2. Reasons for supplementary elections

Reasons	Frequency	Percentage
Vote buying	136	31.4
Clean Register Act	106	24.5
Sealed ducts	53	12.2
Inelegibilities	47	10.9
Power Abuse	32	7.4
Slush Funds	17	3.9

[2]In the cities of Jumirim and Vargem, referring to the regular elections of 2012 and in Alpestre (RS) in the 2016 elections, the municipal elections were annulled by a decision of the Municipal Legislative (Article 4, VII, Decree 201/67). In the city of Virgínia/MG (2008), there were vacancies in the positions. In Dourados/MS (2008) and Pocrane/MG (2016) the elected (and the vice) died.

Professional Mayor	15	3.5
Formal irregularity	14	3.2
Nepotism	7	1.6
Impeachment	3	0.7
Vacancy	3	0.7
Total	**433**	**100.0**

Source: Own elaboration (2018).

As can be seen, the illicit capture of suffrage, popularly known as "vote buying," is the main reason for the occurrence of new elections (31.4%), closely followed by the ineligibility of the Clean Register Act (24.5%). However, when all the modalities of ineligibility (before and after the Clean Register Act) are added, they occupy the first position, with a little more than 34% of the cases.

The purchase of votes is a phenomenon widely reported in the political history of Brazil (PORTO, 1989; NICOLAU, 2002) and constitutes one of the facets of typical *coronelismo* in the interior of the country (LEAL, 1975). On the other hand, the change in the regime of ineligibilities promoted by Complementary Law 135/10 (Clean Register Act) is the result of a wide range of civil society entities, among which include the Movement for Combating Election Corruption and the Association of Brazilian Magistrates (BARBOSA, 2010, p.20). The new legal system was responsible for the removal of thousands of politicians from the electoral contest. This action of the social movements and other members of the civil society in the formulation of laws that increase the power of the cuts is foreseen by the Tate's model (TATE, 1995) and appears like one of the facilitating conditions of the judicialization.

Although the national academic production, in a largely majority way, has always been dedicated to the study of the courts when it intends to deal with the judicialization of the electoral competition (MARCHETTI, 2008, 2013; ZAULI, 2011; STEIBEL, 2007; BITENCOURT, 2009; MARCHETTI, CORTEZ, 2009; POZZOBON, 2009; COSTA, 2013, NUNES JUNIOR, 2014, LIMA; BEÇAK, 2016; OLIVEIRA, 2018), we observe that the phenomenon of judicialization is not limited to the higher courts.

When the origin of the deposition decisions is observed, there is a clear predominance of the singular judge or first instance judges in the deposition processes. The first instance is therefore responsible for approximately 73% of all decisions leading to further elections.

In fact, the role of the first instance of the judiciary in the electoral sphere cannot be neglected. The Justice in Numbers report (CNJ, 2018) points out that the external recess index of the Electoral Court in Brazil in 2017 was 4.4%. That is, only 4% of the sentences handed down by electoral judges were appealed to the High Courts, which leads to the inference that a minimum percentage of first instance judicial decisions in the Electoral Court are subject to change.

When one observes the historical series, it is verified that even in election years the index does not exceed 20%. This is a good indication of the power of electoral judges and how their interference from the electoral game can effectively define the direction of competition.

However, except in cases of explicit judicial activism, the judicialization is a phenomenon that needs actors that lead to the judiciary to deal with. That is, the parties must bring the discussion that they wish to see judicialized to the knowledge of the judiciary. When it comes to the judicialization of electoral competition, the parties may be the Public Prosecutor's office, candidates and coalitions, representatives of political parties, citizens and even judicial bodies, since the Electoral Court has the sui generis characteristic of performing administrative functions in parallel to the judges (GOMES, 2017, p.2409).

Approximately 58% of the supplementary elections were motivated solely by opposition political parties. That is, in 250 elections, the opposition was solely responsible for investigating, collecting evidence and provoking the judiciary to carry out the deposition of the originally elected mayor. It should be remembered that all actions that culminate in depositions analyzed in this work are not criminal in nature and absent the plaintiffs' action, the political situation of the municipalities would not change. In approximately 22% of cases, the opposition acted incisively together with the Public Prosecutor. The Public Prosecutor acted alone in only 18% of the cases.

The scenarios in which opposition parties acted as authors or coauthors of the actions cover 80% of the supplementary elections, which suggests that the parties are the main ones responsible for the judicialization of the elections that ended invalidated, either by the cassation, or by the rejection of the registration of the plaque winner. In a little more than 2% of the supplementary elections, the judiciary ordered the dismissal of the *ex officio* registration, in the exercise of its administrative attribution.

The case of the municipality of Água Preta/PE, in which the candidate Armando Almeida Souto of the PDT had its registration contested by allies for irregularities in the party convention, deserves record. The candidate was re-elected in the subsequent supplementary election. This was the only case in which the cassation took place on the initiative of a party allied with the elected candidate.

A natural unfolding of our working hypothesis about the high judicialization of municipal electoral competition, seen through the supplementary elections, would be the realization that prosecution is a usual strategy of political contenders. However, the question remains about the validity of this strategy.

The frequency of supplementary elections provoked by opposition groups confirms the first assertion and, in fact, judicialization seems to be an additional strategy in municipal electoral competition. After all, if a strategy does not work, it tends to be abandoned, or at least underutilized.

This makes relevant the intersection between the authorship of the actions and the political alignment of the mayors elected in the supplementary elections in relation to the deposed mayors. That is, the objective is to know if, after the accomplishment of the supplementary election, the political coalition in power was renewed.

When we observe the results of all the supplementary elections surveyed, we can see an apparent balance, with opposition political parties electing 216 mayors and the political coalition of the previous mayor choosing 217. In other words, opposition political parties manage to take power in approximately 50% of the cases. The figures are somewhat lower than those recorded by Garcia (2014, p. 155), who pointed out that the group winning the ordinary election would continue in the municipal government in 53.3% of the cases. However, the database of that work computed only 113 supplementary elections, referring to 112 municipalities, regarding the regular elections of 2012.

When opposition groups act alone in deposition actions, approximately 63% of the supplementary elections that they dispute are due. Apparently, judicializing electoral competition brings benefits to opposition political parties and allows for increased chances of victory in a sort of court-ordered “third round.”

1.5 CONCLUSION

The theme of the municipal supplementary elections is still little explored in the Brazilian academy. The few existing works, such as Zalamena (2013), Coelho (2014), Garcia (2016) and Crespo (2017) deal with the theme in a limited way in space or time.

The data collected indicate that the use of actions aimed at the deposition of mayors has become an additional strategy in electoral competition. After all, approximately 58% of the actions were moved solely by opposition parties. When the cases in which the opposition acted jointly with the Public Prosecutor’s office are added to the figures, the figure reaches a staggering 80% of the cases.

When opposition groups act alone in deposition actions, approximately 63% of the supplementary elections that they dispute are due. As Coelho (2014, p. 141) points out, “political actors note that they can obtain electoral gains through legal devices, and do not hesitate to use them”.

This discussion is not only of a theoretical nature, because the consequences of the judicialization are not always visible immediately. In the electoral context, the well-known slowness of the judicial apparatus, which is often recognized as necessary for the reliability of decisions, can produce the opposite effect and discredit justice.

It is hoped, therefore, that new work on the subject will emerge and that it can be included in the public debate, since elections constitute the guarantor of the legitimacy of democratic governments and no better alternative has been found in the Modern Constitutional State.

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