REGULATION OF THE INDIRECT PRESIDENTIAL ELECTION IN THE BRAZILIAN LEGAL SYSTEM: IMPASSES, PROPOSITIONS, AND CHALLENGES

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Abstract: The article deals with the regulation of indirect presidential elections, provided for in the Federal Constitution of 1988, but not yet attended to. It promotes an inventory of the institutional arrangements, proposed by 12 bills filed in the National Congress, since the promulgation of the Constitution. It uses the concept of electoral governance to analyze the empirical material. The results point to a diversity of proposals, but the tendency to repeat the rule making of the direct election (electoral formula, eligibility/ineligibility requirements, candidacy registration) stands out, distinguished by the fact that voting takes place in a unicameral session, of requiring an open vote from parliamentarians/electors, of the non-participation of the Electoral Court in the rule application, and of silence on the rule adjudication.

Keywords: indirect election; presidential election; Federal Constitution 1988; Electoral justice; Legislative power.

1 Introduction

The Federal Constitution of 1988 (CF 1988) determines, in its article 81, paragraph 1, that if there is the absolute absence of the President and Vice-President of the Republic when there are less than two years of the term of office, the National Congress shall elect the new officeholders within 30 days after the last vacancy is opened. The text makes no further determinations except that this election will occur as defined by law. Paragraph 2 of the same article clarifies that those elected will complete the original term of office.

The standard that establishes indirect and congressional elections, without the participation of all voters, under the exceptional conditions it establishes, is not an innovation of CF 1988 but the continuity of a tradition. The constitutions of 1934 (art. 52, paragraphs 3-4) and 1946 (art. 79, paragraph 2) also did so and in a very similar way[2].

The difference of the current legal system is that it does not bring many specifications, unlike the Constitution of 1934, or that the regulatory law has not yet been enacted, contrary to what happened in the Constitution of 1946, during which two norms were produced (Laws 1.395/1951 and 4.321/1964). Consequently, this election may become an urgent demand for which there is no valid answer, a scenario that generates legal uncertainty and political uncertainty regarding governance and the dynamics in which the dispute will take place.

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[2] The provision has been in all Constitutions since 1934, including those granted by dictatorial regimes – 1937 (art. 78), 1967 (art. 81), and Constitutional Amendment (EC in Portuguese) 1/1969 (art. 79). However, the indirect character does not differ from what was in force for the regular choice of the President. Another difference is that the vacancy was simple in the 1934 and 1937 Constitutions since there was no Vice-President (BRASIL). Const. 1934; Const. 1937; Const. 1967; EC 1/1969).

Miranda summarizes (2011, p. 22, our translation) that "the issue is controversial, difficult to address, but it corresponds to a serious gap in the normalization of national life that may generate situations of political impasse".

It has not been necessary to hold this election until the present softens the weight of the omission but does not eliminate it since the risk has been more concrete than one might imagine: the President has lost office in three presidential periods[3], and the Vice-President took over definitively[4]. If for any reason, he left the post in the final biennium, the successor would have to be chosen by the National Congress. CF 1988 has already come into force under this risk.

The article is based on the difficulty of knowing how to promote the indirect presidential election due to the few elements that the 1988 constitutional text provides and the absence of regulatory law. However, as the regulation does not exist, we turn to the promotion of the inventory of institutional arrangements proposed by the Bills (PL in Portuguese) that, since 1988, have sought to meet the constitutional determination.

The conception of electoral governance is used as an analytical guide. Although designed for direct elections, it divides the electoral process into three distinct but interconnected scopes – *rulemaking, rule application, and rule adjudication* - which can be applied to indirect elections. It also has the advantage of allowing us to identify the institutions and agents responsible for these tasks and understand the complexity of the rules and procedures that make up an election. Thus, it offers a vision centered on the institutional arrangement as a whole and, simultaneously, on the small determinations that make a difference in the election dynamics.

This article is divided into two sections, the introduction, and the conclusion. The first presents, albeit briefly, the concept of electoral governance to subsidize the following division, in which the proposals for regulating elections are analyzed.

2 Electoral governance

For Mozaffar and Schedler (2002, p. 7, our translation), electoral governance encompasses "a large number of activities that create and maintain the vast institutional framework in which voting and political competition take place". Ferraz Júnior (2008, p. 22) conceptualizes it as "the set of rules and institutions that define political-electoral competition".

The activities that compose it are distinguished into three levels or dimensions: rulemaking (formulation of the rules), rule application (administration of the rules), and rule adjudication (adjudication of conflicts around the rules).

Rulemaking takes place before the election and includes the elaboration of the standards

[3] Once for death (Tancredo Neves) and twice for impeachment (Fernando Collor and Dilma Rousseff).
[4] José Sarney (1985-1990), Itamar Franco (1992-1994), and Michel Temer (2016-2018).

that discipline the electoral process, including the organization of electoral governance:

> [...] would be the choice and definition of the basic rules of the electoral game. The electoral formula, the electoral districts, the magnitude of the elections, the dates on which they will be held, and other legal issues that allow competitors the security of how the game will be played are determined at this level of electoral governance. Some rules that received little attention from political literature are also defined here, such as the rules of (in)eligibility and the organization of the bodies responsible for the administration of elections (FERRAZ JÚNIOR, 2008, p. 23).

Rulemaking usually is also present in the Constitution. It is also complemented in infra-constitutional legislation. In this case, the formulation usually falls within the jurisdiction of the Legislative Branch. In Brazil, it is the responsibility of the Union, according to article 22, I, of the CF 1988. Article 62, paragraph 1, I, prevents the President of the Republic from drafting electoral rules, expressly prohibiting the edition of a provisional presidential decree on the matter (BRASIL. CF 1988) so that it is the private prerogative of Parliament[5].

For this reason, the regulation of article 81, paragraph 1, demanded by the Constitution, falls on the National Congress. The CF 1988 provides only the necessary conditions for calling this election (double vacancy in the Presidency in the final two years of the term of office), indicates the responsibility for the election (National Congress), and the period for holding the election (30 days after the confirmation of the last vacancy).

Rule application involves the "implementation and management of the electoral game" (FERRAZ JÚNIOR, 2008, p. 23) and includes conducting the election. It encompasses procedures that precede voting, such as voter accreditation and candidate registration, supervision of electoral propaganda, distribution of polling stations, clerk training, and installation of ballot boxes, go through the collection, counting of votes, publication of results, and finally, arrive at the certification of the elected. This logistics is simpler in an indirect election but not non-existent, as can be intuited[6].

The person responsible for developing these tasks is called the Electoral Organization (EO) and may correspond to a single institution - as occurs in Brazil, through the Electoral Justice – or be divided into two, one responsible for the accreditation of voters and the administration of the electoral registry, and another for the tasks of preparation, conducting the collection, and counting of votes.

Rule adjudication covers the settlement of disputes between competitors. It takes place before, during, and after the vote. According to Oliveira (2009, p. 22-23), it is even broader since it implies that the responsible body can act without the need to be provoked, motivated by the obligation to exercise control and certify the validity of the electoral process. This occurs,

[5] In practice, the Electoral Justice participates in the formulation of the rules, through the normative and advisory powers. The STF also participate in the decision on the constitutionality of the standards.

[6] The inauguration is not usually part of the electoral process, which ends, in the Brazilian case, with certification. Thus, the article will not provide for it, although the Bill analyzed does.

for example, when the Electoral Court rejects the registration request: since there is no conflict between parties, the action approaches voluntary jurisdiction, although the literature is divided among those who consider it an administrative or jurisdictional issue (MACEDO; SOARES, 2015). About the theme, Jorge; Liberato; Rodrigues (2017, p. 227, our translation) note that "[...] Electoral Justice exercises functions [of control] with characteristics so peculiar that they would fit into a monotypic species".

3 The regulations proposed by art. 81, paragraph 1 of the CF 1988

The fact that the law regulating the indirect presidential election has not been enacted until the present does not mean that parliamentarians have remained indifferent to the issue, nor that there are no proposals in the pipeline.

According to the survey, at least 12 Bills[7] for this purpose have been presented since 1988, 10 originating from the Chamber of Deputies[8] and two from the Federal Senate, as summarized in Chart 1. To achieve this result, the search was carried out on the websites of both houses, in the section related to the legislative activity/proposal, having as filter "PL" (in the Chamber of Deputies) or "Projeto de Lei Ordinária" (in the Senate). The keywords used were "artigo 81", mais "eleição presidencial", "eleição indireta" (and respective plurals). Subsequently, we verified if the returns obtained corresponded to the demanded theme.

Chart 1 –- Bills that regulate art. 81, paragraph 1 of CF 1988, in the National Congress (1988-2021)

Bill	Author	Party/State	Situation
1128/1988	Jorge Arbage	PDS/BA	Archived
1938/1991	Maviael Cavalcanti	PRN/PE	Archived
PLS 74/91*	Mansueto de Lavor	PMDB/PE	Ready plenary agenda
963/1995	Sérgio Barradas Carneiro	PDT/BA	Archived
1011/1995	Freire Júnior	PMDB/TO	Archived
1292/1999	Nicias Ribeiro	PSDB/PA	Ready plenary agenda
1888/1999	Freire Júnior	PMDB/TO	Attached process
5960/2005	Marcos Abramo	PFL/SP	Attached process
5821/2013	Joint Commission to consolidate federal legislation and regulate CF devices		Ready plenary agenda
PLS 725/2015	Ronaldo Caiado	DEM/GO	In progress
6781/2016	Marcos Rogério	DEM/RO	Attached process
7739/2017	Pedro Cunha Lima	PSDB/PB	Attached process

Source: BRASIL. CÂMARA DOS DEPUTADOS, 2021; BRASIL. SENADO FEDERAL, 2021
Note: * Processed in the Chamber of Deputies as Bill 2893/1992

No Bill was successful: four are archived, and eight are pending (some for over two decades). Only SLP 74/1991 achieved approval in the house in which it was proposed (Senate), and since then, it has been in the Chamber of Deputies. The other seven remain in their origin: one in the Senate (SLP 725/2015) and the others in the Chamber.

[7] It identifies the set of initiatives or those coming from the Chamber, as the case may be. When there is specific reference to those originating from the Senate, the acronym SLP (Senate Legislative Project) is adopted.
[8] In practice, there are eight separate proposals, since Bill 1011/1995 and 1888/1999 are identical to 963/1995.

Four processes are attached to Bill 1292/1999, which is "ready for agenda in plenary". This situation also includes the SLP 74/1991 and Bill 5821/2013 mentioned above, but there is no reason for optimism: this condition has remained for a long time. In addition, if any is approved, it must comply with the procedure in the other house, including SLP 74/1991, whose text approved in the Senate has already undergone modifications.

3.1 *Rulemaking*

3.1.1 Electoral formula

The CF 1988 is regarding the electoral formula to be adopted. All projects establish an absolute majority. The only one that can generate some doubt is 1938/1991, which lists "the majority of members of the National Congress", but it means "absolute" since it informs that it is necessary to win in the 1st round in the justification.

However, they differ based on calculation. Five - Bills 5960/2005, 5821/2013, and 6781/2016, plus SLP 74/1991 and 725/2015 – link it to valid votes, which repeats the model for direct election. Therefore, abstentions, null, and blank votes are excluded from the definition of the winner of the dispute.

The rest create their electoral formula, although they differ on what it would be. Three Bills - 963/1995 and its two "twins" - intentionally or inaccurately cite "the majority of votes", which leads to the assumption that the winner must obtain an absolute majority of those assigned and makes invalid votes part of the calculation. However, there is room to consider that the required votes correspond to the set of voters, so that abstention would also be counted.

Bills 1938/1991, which speaks of "the members of the National Congress", and 1202/1999, which cites "the congressmen", indicate more clearly that the calculation should be made from the total number of parliamentarians. The same cannot be said of Bill 1128/1988, which requires it from the "plenary", which can correspond to both present and parliamentarians.

There is room for more unusual proposals, such as Bill 7739/2017, which demands it in each house, not considering blank votes. By citing only the blanks, does he prove ambiguous since the nulls must be accounted for, or does he suppose that the nullity makes them so excluded from any calculation that they do not even need to be cited? In any case, it informs that the base corresponds to the votes cast, disregarding abstentions.

Another divergence concerns Bill 1938/1991, the only one that separates the elections of the President and Vice-President. Thus, one group can elect the President and another the Vice-President. This model was in force during the 1946 Constitution but contradicted that determined by CF 1988 in art. 77, paragraph 1, which binds both positions.

A second element is a possibility that no competitor reaches an absolute majority; therefore, it is necessary to hold a new round of voting. Again, there are disagreements: 11 of

the 12 Bills follow the model of direct elections and determine that the 2nd round brings together the two most-voted candidates.

However, Bill 6781/2016 chooses its model, according to which only the least voted is eliminated. The permanence of the absolute majority of valid votes is added to this rule, which makes it possible to hold several rounds of voting, always with the elimination of the least voted, until two candidates remain. SLP 74/1991 also provides for more than one 2nd vote, but only if there is a tie since it does not admit a tie-breaker criterion for this situation and demands a decision only by voting.

Bills that are not clear regarding the majority required in the 1st round advance to the detailing of the level of the 2nd round, stressing that it is enough to obtain a simple majority, such as Bills 1938/1991 and 963/1995 (and their substitutes). Others repeat the guidance of art. 77, paragraph 3 of CF 1988 requires the "majority of valid votes", similar to SLP 725/2015 and Bills 6781/2016 and 5821/2013. The remaining five are silent, most likely because they consider that, in practice, simple or absolute majorities are not distinguished if the dispute has two competitors.

Another disagreement concerns the timing of the 2nd round. SLP 74/1991 fixes it in five days, and Bill 7739/2017 within 24 hours. Or, they choose the express forecast, cases of Bill 963/1995 (plus its substitutes) and Bill 5821/2013, which determine the new vote immediately after the proclamation of the result of the 1st, and SLP 725/2015, two hours later. The others, being omitted, lead to believe that they agree with sequential voting.

This may seem like a legal filigree, but it can have a significant political impact. The longer interval between the 1st and 2nd rounds increases the period of uncertainty, and the context of the indirect election and the 30 days of waiting for the result can be challenging, in which the demand for a solution becomes more relevant than the chosen alternative. In addition, a longer interval creates more possibilities for negotiations between groups to define the elected one. The possibility of negotiations is not a problem, but the circumstances in which they can occur and the terms for obtaining the support are.

Some projects are also concerned with decision rules in the case of a tie. SLP 74/1991 and Bill 7739/2017 make it explicit that, in this case, the oldest competitor prevails to define the participants of the 2nd round. On the other hand, Bill 5821/2013 establishes this criterion as the basis for defining both the participants in the 2nd round and the winner. Bill 6781/2016 also does so but inserts it into its peculiar model from which, at each round, the least voted is excluded.

Also, in this regard, some foresee the possibility of calling the candidate who was in 3rd place, which would occur if, before the 2nd round, death, withdrawal, or impediment of any of the two most voted occurs. This is the case of Bills 5821/2013, 7739/2017, and 6781/2016. However, as the latter admits more than two rounds, the call can occur in any of the rounds.

3.1.2 Voter

Article 81, paragraph 1 of the CF 1988 determines that the National Congress must hold the indirect election. The assertion is clear, and there is no margin for the regulatory law to depart from it: the parliamentarians who exercise the term of office are responsible for the choice without requiring specific qualifications since the condition is inherited.

None of the Bills state anything to the contrary. However, this does not mean that all establish the same thing or that they do not leave room for doubt. This is because the constitutional text raises different understandings.

The difficulty is that, in operational terms, the National Congress does not exist. Except in exceptional situations – to be detailed below - the Parliament operates in the form of two houses, in which the approval of a legislative initiative must take place in both, in separate and distinct votes. Therefore, it is an abstract whole, not a univocal entity, arising from the sum of these two parts.

There are two exceptions in CF 1988. One is the constitutional revision of 1993, provided for in the Transitional Provisions (ADCT). As it is a determination already overcome, in practice, only indirect election persists. However, the text of article 81, paragraph 1, is not as specific as that of article 3 of the ADCT, which determines the “unicameral session”; it only implies that the election is the responsibility of the unified Parliament. As stated by Miranda (2011, p. 6, our translation), ”there is [explicitly] no constitutional provision for the transformation of the Federal Senate and Chamber of Deputies into a single body of voters, where each voter corresponds to a vote of equal weight."

Thus, there is room to question whether the indirect election should be promoted unicamerally or whether it can take place in the two houses, which, combined, form the National Congress. In favor of the 1st hypothesis is that this election is exceptional; it does not belong to and does not correspond to the legislative process.

The three Bills that repeat the terms of CF 1988 reproduce these ambiguities. This is the case of Bills 1128/1988, 1292/1999, and 5960/2005. Some even bring evidence that allows verifying that they provide for unicameral elections, such as 1292/1999, which establishes the need to obtain a majority of “congressmen”, a condition shared by deputies and senators, or 1128/1988, which cites a majority of the “plenary” (in the singular, to indicate a single space).

Four other Bills do not repeat the constitutional determination but include information indicating that they endorse it and, by not specifying, reproduce the uncertainty. Bill 1938/1991 states on the majority of votes of the "members of the National Congress”. Bill 963/1995 and its clones (1011/1995 and 1888/1999) cite the “suffrage of the members of the National Congress”.

The remaining five proposals are more specific and try to set a direction. Bill 7739/2017 achieves this goal. However, it does so opposite to the others since it specifies that a

parliamentary house must separate the vote.

The same success cannot be attributed to SLP 74/1991, which determines that the election must be held in a joint session of the National Congress. Thus, it indicates the formation of a single body, but the solution it proposes implies two separate votes. This occurs because "joint session" indicates that the Chamber and Senate deliberate, but not in a single act, and, much less, that they become one. This is the model required to appreciate presidential veto, for example (BRASIL. CF 1988, arts. 66, 165-166). This model presents a vote in which 513 deputies participate and another which has 81 senators. Two votes and nothing prevents two different results. There is a solution in the case of a veto: the overthrow requires that both have the same orientation; if only one does, the veto remains. This alternative is not valid for the election, as both choices are valid, and the Bill does not solve the impasse.

If the interpretation prevails that the parliamentarians belong to a single body in this election, the most specific initiatives are SLP 725/2015 and Bills 5821/2013 and 6781/2016, which register as "unicameral session". Thus, they indicate that 594 voters share, in this event and in equality, the status of members of the National Congress.

3.1.3 Candidate

In this regard, the first point concerns who should present a candidate. The proposals are distinguished into two groups: on the one hand, 10 of the 12 Bills explain that they must be presented by a political party, reproducing the current pattern for direct elections; on the other, Bills 1938/1991 and 5960/2005, which do not cite this need and open the possibility to single candidacies.

However, there are subdivisions in the first group. SLP 74/1991 and 725/2015 and Bill 963/1995 (and its two substitutes), 5821/2013, 6781/2016, and 7239/2017 bring the standard version: only registered parties can present candidates, as provided by electoral legislation. Bill 1128/1988 is restrictive and only allows it to those with representation in the National Congress. Bill 1292/1999 is even more so since it authorizes only those with representation in both legislative houses.

Some Bills expressly authorize the formation of coalitions, such as 1128/1988, 1292/1999, and 5821/2013, and SLP 725/2015. The others are silent about this possibility, which is not necessarily an impediment, given that the electoral legislation allows alliance in majority elections.

The second point concerns the candidacy model. The majority (10 of the 12) makes clear the need for party registration with presidential and vice-president candidates. SLP 74/1991 and Bills 963/1995 (and substitutes 1011/1995 and 1888/1999), 5821/2013, 6781/2016, and 7739/2017 go further and explain that the election of the President will imply that of the Vice-President, repeating the constitutional provision. Bill 1128/1988 is omitted and, therefore,

was not considered in the majority. However, it cites that "registration will be open for party candidates", which raises the interpretation of the need for registration by party. But there is a clear exception: Bill 1938/1991 fixes separate voting by position, which divides the party and makes it possible for names to be chosen from different parties or even without one, with separate candidacies for each position.

The third point concerns the conditions of eligibility and the causes of ineligibility. Among those with no provision are Bills 1128/1988, 1938/1991, and 5960/2005. The last two do not bind candidates to the parties; therefore, the omission is understood: they are silent on the topic. 1128/1988 does not require proof of affiliation, assuming that it does not limit eligibility to the formal link of the candidate to the alliance for which he competes.

The majority group comprises nine of the 12 Bills. Of these, seven propose, clearly or implicitly, to follow the determinations of CF 1988, art. 14, paragraphs 3-9, and two propose their regime, in which constitutional eligibility/ineligibility is mitigated.

In the first subgroup, Bill 1292/1999 and SLP 725/2015 establish these requirements generically: the first determines that "party legislation and ineligibilities must be observed", and the second, compliance with the "eligibility conditions established by electoral legislation". SLP 74/1991 has only one requirement: compliance with the time of membership fixed in the party statute.

Bill 963/1995 (and its substitutes) is more specific. It expresses the eligibility conditions present in CF 1988, art. 14, paragraph 3: (1) Brazilian nationality; (2) full exercise of political rights; (3) electoral registration; (4) electoral domicile in the circumscription; (5) political affiliation; (6) minimum age (35 years, in this case). It also cites compliance with the requirements of the declaratory statute on ineligibility.

Finally, Bill 7739/2017 summarizes the previous ones. It refers to the "constitutional and legal provisions on conditions of eligibility and hypotheses of ineligibility " and discriminates only that candidates must prove party affiliation within 30 days of the election[9].

In the second subgroup, Bill 5821/2013 also requires compliance with the constitutional requirements of eligibility/ineligibilities but reserves the incurrence of the obligation to de-incompatibility of public positions and functions. It justifies them through the exceptional character of indirect election. This is not an isolated position: Brandão (2017) and Sales (2017) also defend differentiated deadlines due to the unpredictability with which this election is associated and the short term of conducting it.

Another detailed Bill is 6781/2016. However, it determines that the conditions of eligibility and the causes of ineligibility applied to the election are those it defines, not those provided for in CF 1988, article 14, which would be exclusive to direct election. The

[9] The measure implies that membership must be verified on the day of confirmation of the last vacancy and convening of the session since the vote will also be held within this period.

ineligibility reproduces art. 14, paragraphs 4 and 7, and the extensive list of predictions incorporated into Declaratory Statute (LC in Portuguese) 64/1990 by the Ficha Limpa Law, which is repeated by it. However, there are exceptions concerning other devices, such as allowing governors and mayors to not resign six months before the election, to run and admit that a candidate not yet affiliated with the party that nominates them is chosen since it provides a deadline for membership to take effect.

It also adds determination that extrapolates from the electoral act: the impossibility of elected officials running for re-election at the end of the term they will complete. In other words, the provisions of article 14, paragraph 5 of the CF 1988 do not apply to indirect elections.

The Federal Supreme Court has already had the opportunity to express itself on the eligibility/ineligibility applicable to indirect elections on more than one occasion when considering direct actions of unconstitutionality (ADI in Portuguese) related to parliamentary elections of governors. The pioneer of these manifestations summarizes the understanding, having been defined in 1994:

> the eligibility conditions (CF, art.14, paragraph 3) and the hypotheses of ineligibility (CF, art. 14, paragraphs 4 to 8), including those arising from complementary legislation (CF, art. 14, paragraph 9), apply to their right, regardless of their express provision in local law, to the indirect election for governor and vice-governor of the state held by the Legislative Assembly [...] (BRASIL. STF. ADI 105703/BA, p. 302).

Concerning the de-incompatibility, the TSE consolidated the understanding that the deadlines provided in LC 64/1990 apply to supplementary elections without any flexibility[10]. As with indirect elections, supplementary elections have a shorter calendar (BARRETO; GARCIA, 2020), which does not modify the picture from the perspective of the Electoral Justice umbrella body. In this line, the STF also decided, in 2015, in the judgment of Extraordinary Appeal 843.455, with general repercussion, that the ineligibility arising from kinship – determined in article 14, paragraph 7 of CF 1988 – covers supplementary elections.

Despite the clarity of these decisions, there is no certainty that the position will be maintained if future regulatory law provides for the relaxation of any requirement. This is because they are judgments of constitutionality based on the "spirit of the norm" but are not based on an express determination of an infra-constitutional law.

The Bills are still concerned about the possibility of parties replacing candidates before the beginning of the process, according to the conditions expressed[11]. SLP 74/1991 provides for up to 48 hours if there is death, resignation, or rejection of the candidate's registration but leaves the anticipation in relation to the vote. Bills 5821/2013 and 6781/2016 require replacement 24

[10] To follow the trajectory of the TSE jurisprudence on the subject, see Kuntz (2011).
[11] As already indicated, some also provide for the substitution between the 1st and 2nd or other rounds.

hours before the voting session. SLP 725/2015 also does so, but with a stricter deadline: up to five days before the voting session.

3.1.4 Voting

Another relevant issue is the modality of the voting procedure (secret or open vote). Half of the Bills don't address the topic (1128/1988, 1938/1991, SLP 74/1991, 963/1995, and their two clones), and they are the oldest to raise that the issue has become relevant over time. The other six are equally divided.

Bills 5960/2005 and 1292/1999 and SLP 725/2015 favor the secret ballot. The first also determines the time of duration of voting in six hours, and the second that it can not exceed three hours.

In contrast, Bills 5821/2013 and 7739/2017 determine open voting, which the latter justifies because "the Republic repudiates secrets" and "[...] the possibility of direct supervision of each vote – political control by the citizen, in an instant of empowerment by the brevity for the occurrence of new elections, cannot be ruled out" (BRASIL. CÂMARA DOS DEPUTADOS. PL 7739/2017, our translation). Bill 6781/2016 is organized around the electronic process of roll-call voting, which can be verified, especially because "if the vote triggered by the congressman does not correspond to his/her will, he/she may declare the vote, immediately after the proclamation of the result, without changing it" (BRASIL. CÂMARA DOS DEPUTADOS. PL 6781/2016, our translation).

The issue proved sensitive in indirect subnational elections on more than one occasion, having reached the STF. In 1994, when Bahia approved a law regulating the indirect election of the governor, one of the predictions was the open vote (roll-call, in public session), which was challenged in ADI 1057-3/BA. The argument was that CF 1988 guarantees the secret ballot in its article 14, head provision, so it would be unconstitutional to force state deputies to express their vote publicly.

So far, the STF's decisions have been favorable to open voting, starting with ADI 1057-3/BA. However, they were based on two different grounds and, depending on the original determination of the law, will result differently.

The first responds to the authors' argument of the ADI and serves as the rationale for the decision. One affirms that the secret ballot determined in CF 1988 is specifically and exclusively addressed to the ordinary voter, aims at their protection so that they can freely and authentically express their position, and does not apply to the member of the Legislative Branch in parliamentary voting procedures. "Parliamentary deliberations are ordinarily governed by the principle of publicity, which translates the dogma of the democratic constitutional regime. Public and ostentatious voting in legislative houses constitutes one of the most significant instruments of control of state power by civil society" (BRASIL. STF. ADI 1057-3 BA, p. 303,

our translation). Additionally, because they are exceptions, the hypotheses that provide for secret voting are expressly discriminated against in CF 1988.

The second brings a contingent response. It assesses that any alternatives are possible and that the legislative body shall decide. On the one hand, it does not consider the theme determined in CF 1988. On the other, this decision is strictly within the jurisdiction of the federal entity (of its legislative body, in more exact terms). It guided some votes in this ADI, which agreed with the open vote since that was the prediction of the law (BRASIL. STF. ADI 1057-3/BA, pp. 343-352; 374-376). However, following the argument, the STF will accept the decision if any subnational law provides for secret voting.

According to the Rapporteur, it would be the basis of another decision, in 2009, in the judgment of the Precautionary Measure in ADI 4298-TO, if it was necessary to assess the matter. Again, state law 2,143/2009 (of Tocantins) that regulated indirect elections was questioned. The demand was reversed: it established a secret ballot, which was considered unconstitutional by the plaintiffs. Before the STF demonstration, the Legislative Assembly repealed it through Law 2.154/2009, which, among other modifications, determined open voting. In practice, the STF did not even appreciate the topic (BRASIL. STF. ADI 4298/TO – MC).

The secret refers to a guarantee of the voter for the free exercise of choice without suffering constraints. However, it can also direct the vote to "obscure agreements" – as Minister Peluso states (BRASIL. STF. ADI 4298/TO-MC, p. 139). In a small electoral body such as the indirect election - 594 votes for President; a maximum of 94 for Governor, and 55 for Mayor - these agreements can be decisive for the result and not allow citizens to know and supervise the choice of their representatives. Therefore, the issue is sensitive to parliamentarians, who do not shy away from challenging the legislative decision in court when their position is defeated.

3.2 *Rule application*

3.2.1 Candidate registration

This theme can be distinguished in three fields. The initial one divides the Bills regarding the requirement for candidacy registration. The second, reserved for those who demand it, refers to the institution responsible for receiving candidacies. Finally, it is worth knowing the requirements to obtain registration.

Only one of the 12 Bills does not explicitly state the need for registration. Bill 1938/1991 does not inform on the theme, nor do any related to the candidates. Among the 11 that provide a forecast, the least accurate of Bill 1128/1988, which does not clearly state such a need. However, the text indicates that there are no informal candidacies since it establishes a deadline for the beginning of compliance with this requirement (from eight days before the voting), although it does not specify with whom the registration must be requested, does not

define the final registration deadline, and does not list the documentation to be presented.

The ten Bills attentive to registration are divided into two groups concerning the definition of the electoral body. The first, formed by six Bills, assigns all responsibility to the National Congress. They are 7739/2017, 963/1995 (and their two equivalents), 5821/2013, and 6781/2016. The second, composed of four proposals (Bills 5960/2005 and 1292/1999 and SLP 74/1991 and 725/2015), demands the participation of the Electoral Justice, which becomes responsible for approving the candidacies and reporting to the Bureau Director of the National Congress.

Concerning this issue, the Electoral Justice considers that it should not participate in any stage of electoral governance of indirect elections. It understands it as an *interna corporis* matter of the relevant legislative body or, as the case may be, the Electoral College.

The first point to highlight is that this interpretation comes from a long time and has not undergone modifications. Reis (1999, p. 557-561) shows that, on the occasion of the 1985 Presidential election - which the Electoral College held -, whenever it was demanded to decide on regulations (*rulemaking*) and to settle disputes (*rule adjudication*), the TSE refused because they fall to the body responsible for the election[12].

According to Miranda (2011, p. 12-14), in 2006, when the rules that defined the indirect election for governor of Tocantins were challenged in the Regional Electoral Court (TRE) of that state, it self-excluded. The question reached the TSE, whose decision was identical: the Legislative Branch has the autonomy and jurisdiction to command the indirect election[13].

Also, – and even more important - this understanding corroborates the STF's view, manifested in ADI when analyzing state laws that regulated indirect elections for governor. It states that this is not an alternative modality to direct election but a peculiar form of assignment of terms of office commanded by the Legislative Branch to be used in exceptional situations in which it is unreasonable to assign such responsibility to those who are entitled citizens/voters. Therefore, it interprets that they are part of the autonomy of the federative entities and that the laws that organize them do not belong to electoral law since they address, in fact, political-organizational matters[14]. Because of this radical difference, the election does not have its EO in Electoral Justice and takes place entirely within the scope of Parliament, which is responsible

[12] The refusal is linked to the decision-making space of the Electoral Court since it exercised it during the civil-military dictatorship, when participation was determined in a legal norm. Reis (1999, p.758-759) cites two cases: in 1966, declaratory statute 9 gave it jurisdiction to verify compliance with the legal norms of the conventions that would define the candidates for governor; in 1973, declaratory statute 15 determined that the TSE should fix the number of delegates of the Legislative Assemblies in the electoral college responsible for the Presidential election of the following year.

[13] The decision to hold the election indirectly was made by the Judiciary, beginning with the Electoral Court (later confirmed by the Federal Supreme Court). However, it never intended to get involved in the electoral governance, which is the point at issue.

[14] This view contrasts with that adopted by the article, which emphasizes the electoral condition of these processes. The STF makers this decision because, thus, it becomes constitutional for states (and municipalities) to draft these laws, since the CF 1988 privately reserves to the National Congress to legislate on electoral law.

for the choice.

Although the position is based on this conception of the nature of indirect elections, it is emphasized that indirect and direct elections attribute political terms of office and converge in their intended purpose. Consequently, the decision of the Electoral Justice not to get involved brings a risk to the governance of indirect elections, a risk whose combat has accompanied this specialized justice since its creation. This is because if the indirect election is the exclusive prerogative of the legislature, it will be developed at the partisan level. However, since its origin, the Electoral Justice has had the mission of eliminating fraud since the competitors organize the dispute and, therefore, exclude them entirely from conducting the elections, handing it over to the theoretically neutral institution created especially for this purpose. As Guerzoni Filho (2004, p. 43) summarizes, the distrust concerning (party) politics is at the base of the creation of the Electoral Justice. Thus, it intends to "remove politicians from the management of the electoral system".

In this sense, it can be said that bringing politicians closer to electoral governance - that is, giving them autonomy to promote it as they see fit – can increase the risks of the dispute if it develops below what is desirable for *free and fair* elections. Finally, when promoted by actors directly interested in the result, without the participation of the Electoral Justice, electoral governance and the vote as a whole present more possibilities of having its quality, transparency, and integrity compromised.

Finally, there is the question of the requirements to register. In the group promoting registration in the National Congress, Bill 7739/2017 brings the least elements since it refers to the regulation of a future law of the Board of Directors. This is followed by Bill 963/1995 (and the equivalents 1011/1995 and 1888/1999), which assigns to the National Directory of parties the obligation to do so at the Senate Bureau – which is not the same as the National Congress–, within a period of up to ten days before the vote. This Bill approves or challenges the parties due to non-compliance with the eligibility/ineligibility requirements of the candidates or the deadline for applying for registration.

Bill 5821/2013 follows the same line but in more detail. It attributes to the parties and coalitions the need to register the parties with the Bureau of the National Congress within ten days after the election is called, that is, up to 18 days before the vote. It also determines a set of documents that must be included in the application, such as a copy of the minutes of the convention and documents of the candidate(s): (1) written authorization; (2) proof of party affiliation; (3) signed declaration of assets; (4) copy of the voter's title; (5) Certificate of Electoral Discharge; and (6) criminal certificates, provided by the Electoral, Federal, and State Courts.

It also establishes the rite to be followed by the Bureau in the condition of EO: (1) publish within 48 hours in the National Congress Gazette the list of requests received, (2) open

a period of 48 hours for others to challenge(s); (3) deliberate on the requests (and any challenges) within three days after the fulfillment of the 48 hours provided for appeal; (4) publish the requests granted in the National Congress Gazette. The Bill is silent only about the possibility, procedures, and deadlines for challenging the refusal of registration.

Bill 6781/2016 also provides that candidacies must be defined in a convention convened by the National Directory, although it does not establish a deadline. Subsequently, the party must request registration at the Bureau of the National Congress five days before the voting session, which must be accompanied by several documents. These are the same as those provided in Bill 5821/2013, with flexibility: the electoral title or the Electoral Discharge Certificate is required. Also, there is the specification that the criminal certificates include the Federal and State Courts of 1st and 2nd instances.

Bill 5960/2005 is in the group that assigns responsibility to the electoral justice, which requires that the parties be registered with the TSE within three business days before the voting session. It determines that it communicates the fact to the National Congress. It does not specify whether the TSE is responsible for approving the registration. Still, "communicate the fact" indicates that it is not responsible for decision-making but a mere bureaucratic function. There is a wide imprecision regarding the role of electoral justice since the Bill is also silent about the requirements to be met by candidates. However, attributing it to the TSE should not be gratuitous and evokes preference so that control does not remain exclusively with Congress.

SLP 74/1991 agrees with the proposition of the previous one; it is slightly more transparent. It requires parties to define candidates (and eventual coalitions) within five days of confirmation of the indirect election (25 days before the vote). It establishes the deadline of up to another five days for parties to request registration with the TSE. However, it is silent about the TSE's attributions after receiving the request. It can be assumed that it is necessary to verify compliance with the requirements – an affiliation of the candidate, legality of the convention, and the eventual coalition, which are the requirements it establishes. However, it is silent on who would have the power to decide, on appeal, in the event of non-approval.

SLP 725/2015 proposes a similar rite, but more precise in terms of tasks and deadlines: the parties must register with the TSE no more than 15 days before the vote; it will decide, in five days, on the applications and forward the list of candidates with deferred registration to the National Congress. Bill 1292/1999 is quite similar, differing in the time offered to the parties to hold the convention (20 days before the vote), send the registration (15 days before), and for the TSE to deliberate on the requests and communicate to the National Congress (up to three days before). This Bill expands the participation of the TSE since the President of the body has a seat at the working Bureau[15]. There is no specification of the role it will play in the session: whether

[15] It is also the only SLP that also regulates the indirect election of governors and mayors. The justification is to consider electoral matters and, consequently, the exclusive prerogative of the National Congress, according to CF

it will act in the resolution of adjudications, exercise the function of scrutineer, certify the validity of the procedures, or has only a symbolic presence.

3.2.2 Call of the voting session

The constitutional determination is to hold the election 30 days after confirming the last vacancy. CF 1988 wants to indicate voting, followed by calculation and proclamation of the results. However, some Bills are concerned with specifying deadlines, either for the convening of this session after the last vacancy is confirmed or to establish a period of anticipation that must be maintained concerning the session, which guarantees more predictability to the electoral process and establishes a more outlined time horizon for political negotiations involving such a choice. However, under normal conditions, the date of the session is already known to everyone.

Bill 5821/2013 provides that the convening takes place 48 hours after the confirmation of the last vacancy, requires a date and time defined for the session, and reinforces the need to respect the interval of up to 30 days determined by CF 1988. Thus, it does not comply since the term "until" allows it to occur in less time.

Regarding the advance of the call, as usual, the proposals diverge: Bill 1938/1991 requires it ten days in advance; SLP 74/1991 establishes that if the 30-day period coincides with parliamentary recess, an extraordinary convocation with five days must occur. Bill 1292/1999 and SLP 725/2015 establish the beginning time of the session: one at 14:00 and the other at 9:00.

There is concern about three proposals - Bill 5960/2005 and SLPs 74/1991 and 725/2015 - regarding the quorum required for beginning the voting, but no reference to the need for it for the opening of the session. The omission allows us to assume that the session can be opened without a quorum but that it must be observed to begin voting.

Bill 5960/2005 also requires the participation of most of the members of Congress for the vote to be valid. The others are omitted, possibly because they consider this specification unnecessary, either because of the prevalence of the rules of procedure for installing the sessions or because they assess that, by requiring an absolute majority of votes, the electoral formula implies this quorum.

There are also predictions about the nature of the session. Bill 963/1995 (and its substitutes) establishes a roll-call vote held in public session. Bills 5821/2013 and 6781/2016 and SLP 725/2015 emphasize that the session should be exclusive, and the inclusion of other topics and the concomitant promotion of commission meetings are prohibited.

1988.

3.2.3 Use of the tribune

Another element that merited attention from the three Bills concerns the possibility of candidates using the tribune to present themselves before beginning to vote. The others, by being omitted, do not prevent this from happening but leave it to the deliberation of the Presidency of the session or the plenary.

Bill 1292/1999 provides that candidates may use it for a maximum of ten minutes. Bill 5821/2013 extends the deadline to 20 minutes. SLP 725/2015 distinguishes the time available according to the condition of the party of the candidate for President: 20 minutes if he has representation in the National Congress and has obtained, in the last election for the Chamber, the support of at least 5% of the valid votes in at least one-third of the states, with a minimum of 2% in each. If there is a coalition, it becomes possible, to sum up the performance of the parties that compose it. If these requirements are not met, the time is five minutes. It also determines that the order of access to the tribune is established by lot and that there is no provision for asides.

3.3 *Rule adjudication*

Concerning the controversies generated by this electoral process, it is noteworthy that none of the Bills has attacked the issue and, therefore, does not indicate who is responsible for deliberating on disputes regarding the legality of EO procedures or competitors. Nor is there the concern to make explicit that some authority must confirm the validity of the election.

At most, what some Bills fix – as has been seen - is the procedure for registering candidacies. At first, this is an administrative issue. However, it belongs to the control of the electoral process (OLIVEIRA, 2009) and can become a controversy to be resolved by the EO (or even the Judiciary). Therefore, it can be considered part of the *rule adjudication*.

Concerning situations that are already born as controversies between the parties and that can be repeated in indirect elections – such as denunciation of abuse of economic power, undue propaganda, an embarrassment to voters, etc. -, there is an eloquent silence of the Bills. This is surprising, given that a dispute so relevant to the general interest and political groups will hardly fail to be judicialized should disagreements arise – and it is almost inevitable that they will appear. However, it is not the judicialization that is being addressed but the institution that will first exercise the *rule adjudication*, that is, that will become the outlet for the initial appreciation of these quarrels and that can decide them quickly so that they do not affect the progress of the electoral process, the confirmation of the result, and the inauguration of the elected.

By omission, it remains to be seen whether this role – to what extent, from what procedures, and with what decision – will be performed by the Bureau of the National Congress that, as what happens with electoral justice in direct disputes, would accumulate the administrative and jurisdictional functions of the election. Or whether it will fall to the Judiciary

and, in this case, to the TSE or directly to the STF. Or, still, if the Judiciary will not consider them as an *interna corporis* matter and it will not be able to decide on those that are presented to it.

4 Conclusion

The article sought to analyze the proposals for the institutional arrangement of the indirect presidential election, provided for by article 81, paragraph 1 of CF 1988. The option was to evaluate what the 12 Bills presented since 1988 foresee, having the notion of electoral governance as a guide.

It is an inventory of possibilities since there is no such regulation. There is no certainty that the future law will confirm the points to which they have paid the most attention and the prevailing trends, no matter how much one has tried to identify them. On the other hand, it is possible to dispense with some proposals since, even if they are approved, they will hardly overcome an ADI since there is a constitutional framework. Thus, it is not simply a speculative survey but a work survey, with the expectation of what may most likely be the rule of this election.

Rulemaking is generally performed by the National Congress in a unicameral session, in which deputies and senators will have the right to a single and equal vote, acting, in practice, in a single body formed by 594 voters. The election will be distinct from all the procedures that make up the deliberations of Parliament since none unifies both legislative houses, although some provide for joint sessions.

There is an expectation that valid rules for the direct presidential election will be reproduced. The electoral formula is one case: the party (President and Vice-President) that obtains the absolute majority of the valid votes of the members of Congress will be chosen, disregarding abstentions, null, and blank votes. If this does not occur, a 2nd round will be held immediately (or as immediately as possible), with the participation of the two most-voted candidates, again only considering valid votes. As the universe of voters is relatively small, in the case of a tie, the decision rule tends to be the highest age of the presidential candidate.

Concerning who can run, the perspective is also to repeat the valid pattern in ordinary elections: only candidates affiliated and registered by a party are accepted, most likely requiring definition by convention – although it will be possible to allow the decision of the National Directory –, including to approve any coalition with another alliance.

The same eligibility conditions and causes of ineligibility as applied to direct disputes shall be required from claimants to the indirect election. The STF has decided on this content for parliamentary elections of federative entities. But there is room for flexibility, given the uncertain nature of the call for the election and the short term for conducting it (30 days). The central claim is that the term of disincompatibility is not mandatory. However, even if approved,

such flexibilities will have to be confirmed by the Judiciary.

Similarly, the Bills differ in the mode of exercising the vote. Some choose for open voting, others for the secret. This is not a minor issue since the form the congressman is obliged to express their choice has the potential to influence/alter the option made. It can be speculated that the vote will be open, either because secret ballots are very rare in the legislative process or because social pressure (and eventual decision of the STF, if it repeats precedents) must demand the public character.

In the field of rule application, indirect elections do not require nearly the logistical effort associated with direct elections: the Bills do not concern with the distribution of ballot boxes, clerk training, voter identification, counting procedures, etc., which will obey the standard procedures of Parliament, commanded by the Bureau of the National Congress. However, some requirements remain: the parties will need to be registered with some EO, and the proposals are divided into assigning this task to the Bureau or leaving it to the TSE, as in the case of direct elections. It should be noted that, historically, Electoral Justice has been refractory to exercise electoral governance tasks in indirect elections voluntarily.

It was also observed that the rule adjudication is neglected. The omission is not minor since the advent of controversies is certain, and the experience of ordinary electoral processes shows the growing relevance of the solution of these conflicts, of the precise definition of the responsible electoral authority, and of procedures and deadlines to be followed by the actors.

Finally, it may be the repetition of a song already sufficiently known and sufficiently sung, but important. If the determination of article 81, paragraph 1 of the CF 1988 is maintained and is not changed by a proposed constitutional amendment or by a decision of the Federal Supreme Court, its regulation is necessary and is long overdue. Someday, this election may become a reality, perhaps in a surprising and unforeseen way, indeed urgent and in circumstances that may be very serious. The picture will become even more acute, complex, and uncertain if there is no institutional design that disciplines it, gives predictability, provides guarantees to society and competitors, and indicates who the EO is and its capabilities. Thus, it is better to prevent now since remediation may not be feasible when needed.

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