



VARIETIES OF ELECTORAL INTEGRITY RISK: PROTECTING ELECTIONS IN BRAZIL

Case study, July 2023

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INTRODUCTION

This case study examines several kinds of risks to electoral integrity present in Brazil and the role that the Electoral Justice plays in preventing and combating them.

Brazil's capacity to confront risks and threats, and the limits thereof, relate to the institutional design of its electoral governance. This provides total autonomy from government and political parties while concentrating electoral management and electoral adjudication functions in the same institution (the Electoral Justice).

Institutional risks are fully addressed in the risk management policy, while some electoral risks remain beyond the control of the electoral institution. This case study addresses the two kinds of risks, describing in each case the preventive policies as well as occasions on which some risks have materialized as threats. The paper also highlights some crisis management procedures in particular timely communication and proactive tools. Finally, the study concludes with some lessons learned and challenges to be faced.

BACKGROUND

Brazil's political history in relation to electoral integrity can be divided into before and after 1932, when the Electoral Justice was established.

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The period between the deposition of the monarchy in 1889 and the 1930 revolution is called the First Republic, also known as the Old Republic. During that period, politics worked through agreements among regional elites, who kept control over election results through pervasive fraud. Local political parties were responsible for voter registration. The vote was not secret, tallying of votes was tampered with, and challengers who got elected had their certification denied.

Fighting electoral fraud was one of the main pledges of the 1930 revolution, which gave birth to the 'Vargas Era' (1930–1945), in reference to Getulio Vargas, who took on the presidency after winning the revolution. A new electoral law enacted in 1932 granted women the right to vote, guaranteed ballot secrecy, regulated voter and candidate registration, and created the Electoral Justice (Brazil 1932). Since then, electoral management and electoral adjudication in Brazil have been the responsibility of an arm of the judicial branch, organized into a national supreme electoral court (the Tribunal Superior Eleitoral [Supreme Electoral Court], TSE) and 27 state courts (the Tribunais Regionais Eleitorais [Regional Electoral Courts], TREs) (Marchetti 2012).

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The Brazilian Electoral Justice is thus older than the country's democracy. It has survived five constitutions (1934, 1937, 1946, 1967 and 1988), three electoral laws (1945, 1950 and 1965), and two dictatorships (1937–1945 and 1964–1984). The institutionalization of its electoral management functions has put an end to those fraudulent practices common in the Old Republic. However, new forms of electoral fraud have since appeared and likewise new ways of combating them, including by technological means. Today, electronic voting machines avoid tampering, which was quite common until the 1990s during counting of paper ballots (Ricci and Zulini 2012, 2016; Nicolau 2012, 2015; Jokura 2021), and biometric identification avoids multiple votes from the same person.

The TSE is imbued with both management and adjudication functions, which means that it organizes and conducts the elections and also resolves electoral disputes, including by judging electoral litigation. Like most electoral management bodies (EMBs) in Latin America, the TSE is independent of the executive branch. The TSE has a highly qualified, professional and tenured bureaucracy. Its high council, however, is composed on a rotation basis for terms of two to four years by seven ministers. Five of them are tenured judges at other courts (the Federal Supreme Court and the Superior Court of Justice) who hold their original positions in parallel with their terms at the TSE.

TSE is responsible for avoiding and combating two kinds of risks: (a) direct risks to the integrity of electoral processes; and (b) institutional risks to the EMB itself. Both kinds of risks threaten electoral integrity and democracy, either directly by flawed procedures at any step of the electoral cycle or indirectly by compromising institutional capacity, autonomy, and effectiveness.

DIRECT ELECTORAL PROCESS RISKS

The first kind of risks includes electoral fraud and manipulation, unfair competition, gender bias, illegal practices during electoral campaigns, and violence. Political violence against politicians and between their respective supporters has been increasing in Brazil since 2020 (Tarouco 2023b) but is outside the TSE's remit, while fraud and manipulation are avoided with technology, as mentioned.

Unfair competition and illegal campaigning, meanwhile, is dealt with through ex-post judicial punishments. Therefore, the first source of information that the TSE gathers about electoral risks flows from its adjudication role. Information can come from political stakeholders who file lawsuits against each other or appeal against an EMB decision, or from the Electoral Public Prosecutor's office (Ministério Público Eleitoral). There are numerous cases in which the TSE, in response to legal demands, orders the removal of digital media content that violates campaign rules or disseminates disinformation. By resolving these disputes, the TSE learns about emerging violations and what rights and rules may be at risk during the electoral cycle.

Another source of knowledge is reports from other institutions. For example, in their final report on the 2018 election, the Organization of American States (OAS) considered the gender quota policy to be ineffective for bolstering female participation because of bias in campaign financing by political parties, among other factors (OAS 2018). The report recommended regulating distribution of public funds within political parties, creating a gender policy unit in the TSE, and programmes to increase women's political participation. Another example is the 2021 report from the Tribunal de Contas da União (TCU—Brazil's federal audit office, and the auditor of the TSE since that year) recommending that the TSE should improve communication on the voting system's auditability, transparency and security (TCU 2021).

The TSE's primary prevention efforts against electoral risks are aimed at fighting disinformation. This is critical to the continuity of its work, because disinformation has the potential to compromise the TSE's legitimacy as the electoral authority. Strategies involve traditional and social media campaigns and much content on the TSE webpage,¹ such as fact-checking. This strand of work was greatly emphasized in the institutional strengthening programme (Alvim 2022; Osorio et al. 2022) and merited a dedicated unit, the TSE's Special Advising Committee on Combating Disinformation (Assessoria Especial de Enfrentamento à Desinformação).

Gender equality

Other prevention efforts concern gender inequality in elections. TSE strategies against this risk are limited to campaigns and surveillance. Brazil has a gross gender disparity in candidacies and elected offices. The gender quota, not to mention being very disproportional (30 per cent women candidates in

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¹ <<https://www.tse.jus.br>>.

party lists), is violated in several ways. Political parties usually register fake candidates just to fulfil the legal requirements (*candidatas laranja*) or refuse to share resources proportionally for women candidates' campaigns.

The tools available to the TSE to fight these frauds are infra-legal regulation (resolutions) and adjudication. The former allows for setting procedures that political parties must follow, while law-making is the prerogative of the legislative branch. Through the adjudication function—judging and punishing political parties that violate the quota—the TSE has consolidated two kinds of answers to the gender risk: setting up some general criteria to distinguish fake candidacies from weak ones (women 'candidates' with no votes, no campaigning activity, no campaign spending to be overseen) and imposing a harsh punishment on the political party in question, namely nullifying the entire list of candidates. As adjudication is a lengthy process, discovery of fraud in the gender quota can eject some male candidates even after being sworn into elected office.

For example, the TSE nullified all the votes given to the MDB party (Brazilian Democratic Movement) in the 2020 election for municipal councillors in a city in Alagoas state because the party had put fictitious female candidacies on its list (TSE 2022c). After a lengthy investigation and adjudication process, the fake candidates were caught because they lacked votes, spent negligible amounts in the campaign, presented identical expense reports, and did not perform any campaign activity. Consequently, all four men from that party elected in 2020 for that municipal legislature lost their offices in 2022.

Following the OAS's 2018 recommendations, the TSE created in 2019 a permanent committee (TSE Mulheres) that has struggled to diagnose cases of gender quota fraud (TSE 2019). The committee is not a unit, meaning that its members (administrators from all across the organization) can dedicate time to work on it only as their primary responsibilities allow.

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INSTITUTIONAL RISKS

Institutional risks to the EMB include threats against the organization and its staff members, buildings, property, data, equipment and reputation. The institutional risk management policy (TSE 2017a) established guidelines and responsibilities and created a process and a committee for risk management. The policy must be followed in every unit and by each administrator in the TSE.

Once identified and assessed at the unit level, the list of risks is reported to the TSE's Department of Strategic and Socio-environmental Management (Secretaria de Modernização, Gestão Estratégica e Socioambiental), an advisory office ancillary to the General Director (the second highest official in the EMB). This department plays the role of a risk management unit, although it also has several other remits.

The lists of risks collected are ordered according to priorities by the highest office (the president and vice-president), thereby defining a threshold for risk tolerance (risk appetite). That threshold is a strategic decision necessary in order to allocate budget and effort in fighting some risks considered more serious or more probable (a cyberattack against the EMB's systems, for example) as against others considered less probable or not avoidable (e.g. an attack on the headquarters or a natural disaster).

Once the decision is made, each unit plans a protocol in coordination with the Secretaria de Modernização to manage its risks and prevent them from materializing. Then, each unit immediately starts to implement its protocol. The risk registers and their levels of priority are reviewed periodically.

The primary efforts to prevent institutional risks in Brazil are fighting disinformation and protecting the tallying and adjudication systems. Any failures of these systems are critical risks to the TSE because they can compromise its operational capacity and its legitimacy as the EMB. They are prevented with several cumulative security mechanisms such as regular public tests of the voting system.

RISK MANAGEMENT POLICY

Regarding the transparency of risk management, the TSE publishes several materials about its policy on its webpage. What is not transparent—and should not be, for obvious security reasons—is the threshold of tolerance (the risk appetite) and the aggregate risk list with their levels of priority. Risk management within the TSE does not seem to be institutionalized, perhaps partly for this reason. As with other preventive policies, risk management is invisible until it fails.

Direct electoral risks are addressed by judges (ministros), while institutional risks—as we have seen—are also addressed by lower tiers of management. The institution has a high degree of autonomy to pursue its goals by issuing regulations and counteracting interests. TSE officials have job security, as mentioned, and this insulates them from political pressures.

Electoral risks are addressed by ministros in their judicial role, with the help of some specific advisory offices and committees. In so doing they safeguard the main goals of electoral governance: providing certainty on procedures and on results; assuring political rights; producing legitimate rules and decisions; managing the contest impartially; and upholding democratic values. In making judicial decisions, the high councillors learn from the stakeholders' demands and answer them by issuing administrative decisions.² This allows for some discretionary decisions on the part of the TSE president, who usually wants to

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² The TSE's decisions are called *resoluções* (resolutions), instead of laws (the latter are the prerogative of the legislative branch). They correspond to what is called 'delegated legislation' in other countries (Clegg et al. 2016).

leave some legacy achievements from their term in office. For example, special committees and functional units—risk management included—are strongly associated with the chief justice in whose term they were created.

Institutional risks, in turn, are assessed and managed by civil servants with tenure, within their administrative responsibilities. As well as being confidential, decisions about thresholds of risk tolerance (risk appetite) are not consolidated in strategic and operational plans. Instead, decisions are ad hoc, while practical preventive actions run parallel to the institution's work process. Risk management happens 'as the process flows', which means that it depends upon the initiative of individual officials.

On the other hand, administrators operate 'by the book', following uniform and formal instructions provided in documents and through mandatory training courses. Every unit must abide by a Risk Management Handbook (TSE 2022b) which describes steps, procedures and relevant tools. The organization has a high capacity to protect itself from institutional risks, no matter who is the chief justice currently in charge of the TSE presidency. Its resiliency comes from being part of the judicial branch, which enjoys reasonably high levels of public trust (Haerpfer et al. 2022) and whose independence and tenured composition precludes its capture or rigging by partisan interests. TSE personnel are also highly qualified, with many staff members holding master's or doctoral degrees.

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RESILIENCE TO STRESSES AND SHOCKS

In the TSE's history, electoral integrity risks have materialized in events such as fraud, the Covid-19 pandemic, and political attacks against the voting system. In other words, they have on these occasions become threats.

When Brazil still used paper ballots, the leading form of fraud consisted in rigging the vote counting and tallying process. In the 1994 general elections, voters in Rio de Janeiro had to go back to the polls after the election for deputies was annulled due to blatant fraud in vote counting (Schneider 2020). This led to adoption of the electronic vote in 1996. Electronic voting machines spread gradually across municipalities and by 2000 were the only voting system throughout the country. The current voting system is thus protected from fraud all the way from the ballot to tallying. Not being linked to the Internet, the system is also safe from cyberattacks throughout the electoral cycle. Electronic voting machines rely on several simultaneous layers of safety devices, including software, hardware and redundant safety processes.

Another kind of fraud remains to be fully eliminated, namely voter identification fraud in which someone could either impersonate another voter or vote in more than one polling station. Biometric identification (fingerprint scanning) was introduced from 2008 onwards and is expected to be completed in time for the 2026 elections. As the voters' register is updated, biometric identification

is identifying many cases throughout the country of voters who had multiple ID documents and could therefore vote multiple times (TSE 2017b). Once detected, those irregular registers are promptly cancelled.

A particular risk materialized in the municipal elections scheduled for October 2020. As in several other countries, holding an election during the pandemic was seen as a health risk, but not holding it would be a risk to democracy (James, Clark and Asplund 2023). The TSE answered that threat through intense collaboration with other state agencies and experts, based on contingency plans and centring on three actions. First, it consulted with health experts who advised the TSE about the cycles of Covid-19 infection. Second, it collaborated with the legislative branch to get approval for a one-month postponement of the election. Third, it adopted a special health protocol for the 2020 election that included waiving the biometric identification of voters to prevent them from touching the scanner lens. The correct identification of voters and therefore fighting the risk of this fraud was the responsibility of poll workers, who checked voters' photo IDs (Tarouco 2023a).

These responses to Covid-19 benefited from the strategy of constituting a joint crisis committee (*gabinete de crise*) which brought together the TSE's high council and other authorities such as the public security minister, the attorney general and the president of the Brazilian Bar Association. This strategy was also used in confronting two other materialized threats: the disinformation attacks against the TSE during the 2018 electoral campaign—here, the official media and fact-checking response was coordinated with civil society organizations—and the threats to the electoral process during campaigning in 2022.

In 2022, the emphasis was on reinforcing the Electoral Justice as the only legitimate electoral authority in Brazil. That involved public position-taking, international visibility, and collaboration with other institutions (the Supreme Court and Federal Police). For instance, the TSE created a Transparency Committee which gathered many scholars from universities and several civil society institutions to address government accusations about fraud from inside the TSE (TSE 2022a; OAS 2022). Military representatives on that Transparency Committee repeatedly raised suspicions about the electoral process. The answer from the TSE came through public statements on its legal prerogatives to make decisions about election administration (Tarouco 2023b). A large fine was levied on the president's party (PL, Partido Liberal) for having falsely alleged irregularities in the voting machines of specific poll stations where its candidate had lost (TSE 2022d; Al Jazeera 2022).

RECOVERY FROM CRISIS

The TSE's Risk Management Handbook (2022b) establishes four alternative responses to each risk: accept it; share it with other institutions; avoid it happening; or reduce its consequences. However, no public document reports

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which risk has received which treatment. Because of that, it is not possible to know whether some of the challenges faced in the 2022 elections were considered a crisis from the electoral management point of view. Regarding crisis management procedures, there are redundancies in each critical activity and plans for keeping them working, including where physical resources are damaged.

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The TSE's usual communication strategy has protected its reputation effectively against minor crises, such as in countering waves of disinformation. For example, when local elections were held under pandemic conditions in 2020, there was a slight delay in the publication of the results. New hardware took more time than expected to do the counting, and the first-round results were announced three hours later than expected. The chief justice promptly appeared on television to explain the actions taken to resolve the issue and to ensure there were no cyberattacks against the voting system (Tarouco 2023a).

Against major crises, the TSE has proactive tools such as judicial orders and fines. For example, when in 2022 the government deployed the highway police in order to hamper opposition voters' access to polling stations, the TSE ordered the immediate suspension of road traffic oversight operations—backed by the threat of a fine against the relevant police leadership director (Stargardter 2022).

However, two worrisome crises have harmed electoral integrity in Brazil with no possible answer from the TSE. The first was the violent protest in Brasília against the 2022 election results when supporters of the defeated presidential candidate broke into government, Congress and Supreme Court offices (Tarouco 2023b). That was undoubtedly a crisis that threatened Brazilian democracy. However, as it happened after the electoral cycle was concluded and the elected president had been sworn in, it became the responsibility of the police and criminal justice system, not of electoral authorities.

The second such crisis and, by contrast, one that remains ongoing, is manipulation of rules by the political parties in the legislature to amnesty themselves from violating regulations on the distribution of public funds. Aside from the (unambitious) gender quota in the candidates list, Brazilian law states that political parties must share campaign resources—money and broadcast time—among candidates proportionally to their gender and race. Political parties seldom comply with that rule, so the Electoral Justice punishes them by means of fines, recall of public funds already issued, and suspension of further payments (as happened with e.g. the Socialist People's Party—PPS—in Rio Grande do Sul after the 2018 campaign). The former legislature waived the sanctions for 2018 violations, and the current one is trying to pass another amendment to postpone law enforcement once again (Mesquita 2023). As it is a matter of legislation, this is the prerogative of the legislative branch, and TSE can do nothing but apply the current law, whatever it is.

CONCLUSIONS

Brazilian electoral integrity has severely ebbed and flowed over the last decade. The country's score in the Perception of Electoral Integrity Index dropped from 68 in 2014 to 60 in 2018 and then up again to 69 in 2022 (Garnett, James and MacGregor 2022, 2023) without any corrective institutional reform having taken place since. Risks and threats and prevention and mitigation efforts reported in this case study surely played a role, although we would need a longer time series analysis to draw ultimate causal conclusions.

The main lesson learned is about the inevitable limits to an EMB's remit and capacity. Brazilian electoral management officers have been very effective in protecting the voting system against attacks and the electoral authority's public reputation against disinformation campaigns. However, regarding other kinds of risks, there is room for improvement in Brazil's governance institutions as a whole.

In 2022, despite international observers reporting the election as fairly conducted, electoral malpractices committed by the government and its supporters made the competition unbalanced (Tarouco 2023b). As the government has no role in electoral governance, those malpractices represented an electoral risk to democracy but not an institutional risk that could be avoided by the Electoral Justice. Protection against these kinds of risks depends on the help of other institutions, such as the Federal Police and the Supreme Court.

Among the risks that may threaten elections, gender bias and disinformation cannot be tackled by the EMB alone: in both cases, TSE is limited in its possible reactions by a lack of effective legislation. Gender balance among candidates depends, among other things, on political parties passing legislation improving gender quotas. Legislators, however, are partisan actors, mostly men, who set the rules for their own game. A better (more inclusive and enforceable) gender quota law is not attractive to entrenched elites because it would increase intra-party competition and decrease male politicians' own chances of re-election.

As for disinformation, the risk to electoral integrity has been growing with the expansion of social media in Brazilian political campaigns. Rumours, fake news and conspiracy theories spread quickly in the country, mainly through messaging applications like WhatsApp. Brazilian campaign regulations allow political marketing through the Internet (except for unsolicited mass mailing), but do enable the TSE to limit false, offensive or defamatory content. The actions against disinformation available to the TSE are restricted to the judicial decisions in lawsuits on illegal campaigning. At the time of writing there is a vigorous public debate on Internet regulation, with opinion divided between distinct legal reform proposals.

The most impactful case of electoral adjudication against electoral integrity risks in Brazil happened while this case study was being finished. The TSE has just decided to ban former president Bolsonaro from electoral competitions

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for eight years in a lawsuit moved in 2022 by a political party (PDT—Partido Democrático Trabalhista). The former president was accused of abusing his power when he called foreign diplomats for a meeting at the official residence to falsely claim that the Brazilian voting system was vulnerable to hacking and fraud (Plummer 2023).

Whether Brazilian democracy is in crisis or not is an ongoing debate in Brazil, among both political scientists and politicians. Chief justices who have successively served as presidents of the TSE also disagree on the subject, some emphasizing that ‘institutions are working’; others that ‘democracy is under threat’. What is not a matter of opinion is the need to approach electoral integrity in terms of risk management.

ANNEX A

Risk management guidelines

The process of risk management described in the Risk Management Handbook (Manual de Gestão de Riscos) has instructions on seven areas, each covered by a unit through a set of worksheets to be filled, namely: contextualizing, identifying, analysing, evaluating, treating, monitoring and communicating risks (TSE 2022b).

The Manual builds on the COSO methodology (Committee of Sponsoring Organizations of the Treadway Commission, see: <www.coso.org>) and the Brazilian norm ABNT NBR ISO 31000:2009, a set of quality standards for several kind of products and processes. Regarding risk management, the ABNT norm mirrors the international norm ISO 31000 which was introduced not by order of the government, but simultaneously in both the judicial and executive branches in 2017.³

In assessing risks, the Manual distinguishes four categories of risks: (a) strategic (those that directly affect the TSE’s objectives); (b) operational (those that can influence the activities to be performed); (c) budgetary (those that may compromise financial resources or the ability to rely on the available budget); and (d) reputational (those that can critically undermine public trust in the organization).

For the evaluation, the Manual instructs on how to estimate probabilities and impact in order to calculate risk levels. Probability refers to the frequency observed throughout history and scales from 1 (for rare events that happened up to five times in history) to 5 (for predictable events that happened more than 20 times in history). Impact also scales from 1 to 5, according to how much the costs increase, how much the time needed increases, and how much quality the activity loses.

³ The Brazilian National School of Public Administration (ENAP), <<https://enap.gov.br/en>>, offers courses on risk management in the public sector using the ISO 31000 norm in their teaching materials. Applying ISO norms in general is usually seen as good practice in Brazil.

Thus, the risk level is calculated by multiplying the probability by impact and varies from 1 to 25. The Manual splits the scale into four categories: small (1 to 3), medium (4 to 5), high (6 to 14), and critical (15 to 25). High and critical risks must necessarily have controls implemented at the level of each unit inside the TSE.

Each TSE unit has an official responsible for promoting and spreading a culture of risk management.

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