

BRAZILIAN ACADEMY OF ELECTORAL AND POLITICAL LAW (ABRADEP)

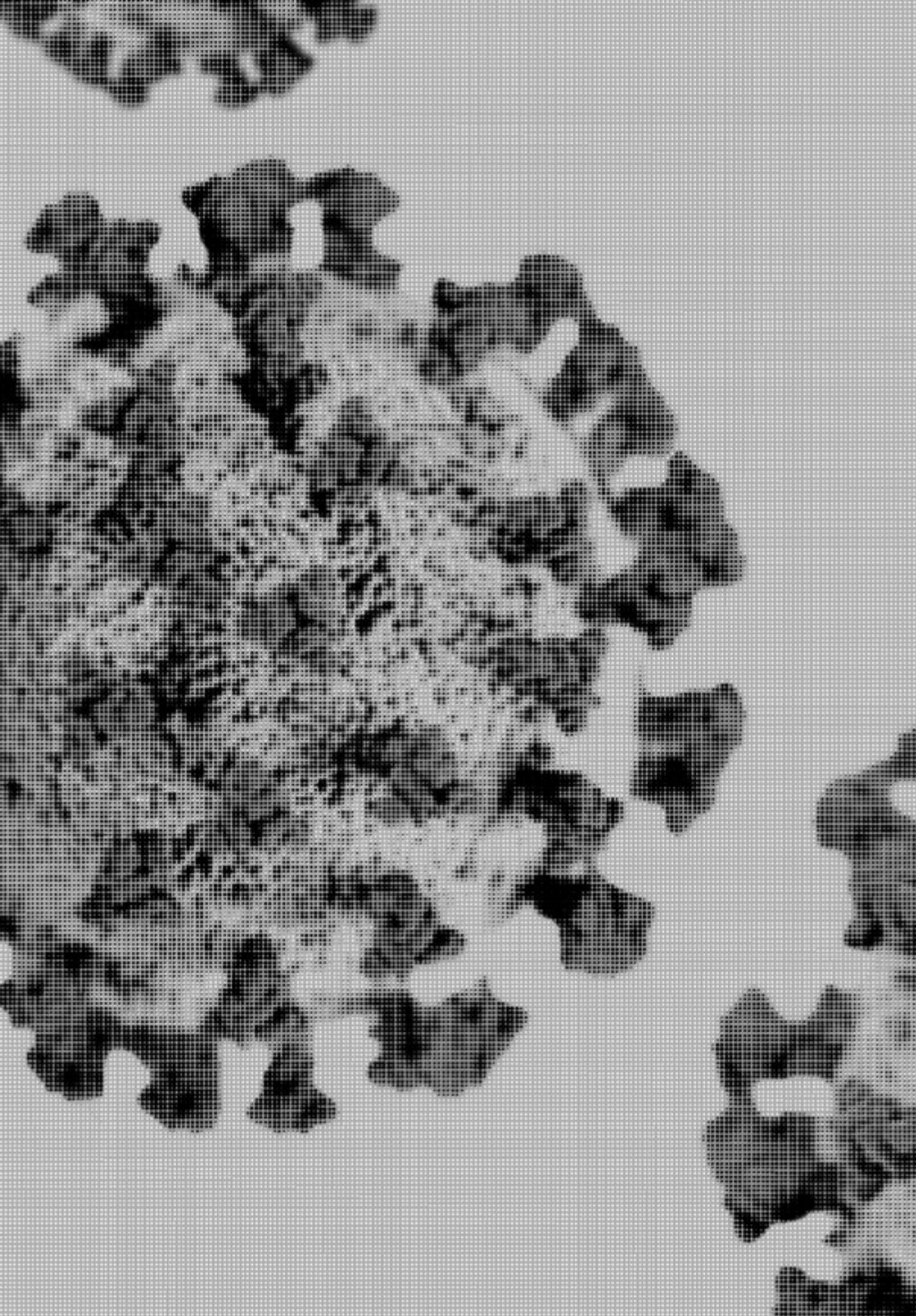
BRAZILIAN ELECTIONS'
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ABRADEP'S CONTRIBUTION TO THE DEBATE

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ABRADEP
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BRAZILIAN ACADEMY OF ELECTORAL AND POLITICAL LAW (ABRADEP)

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Brazilian elections' ways through the pandemic:
ABRADEP's contribution to the debate

Translated by Thalysor Mota Vidal Nóbrega

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Founded in March 2015, headquartered in Brasília - Distrito Federal, the Brazilian Academy of Electoral and Political Law (ABRADEP) is composed of several professionals from the most varied backgrounds (lawyers, professors, electoral judges, members of the public ministry, media professionals, political scientists, among others) and its mainly purpose is to **foster a balanced, transparent, objective and qualified debate on political reform, promoting the diffusion of themes related to electoral law and the intersection between law and politics.** Through more than 260 associate members, the Academy finds representation in 25 Brazilian states and is guided by its prestige to plurality.

The timing could not be more exceptional.

Many argue that the historic phase triggered at the beginning of the year 2020 will represent the “natural or biological” landmark to symbolize the end of the 20th century and the beginning of the 21st century. Others claim that the year 2020 and the events recorded therein will bring about the end of the modern era and the beginning of a new journey in the path of humanity.

In fact, the occurrence of a pandemic with such expressive parameters of human, social and economic losses is a profound scourge, of long and painful recovery, with possible irreversible scars in each one of us.

“The pandemic that becomes collective trauma, the widespread fear, the lurking pain, all this disorients us and ends up inviting us to order affections, tenderness, sadness - and thus to discover unforeseen nostalgia, to lament previously unsuspected losses”. It is the delicate passage of Julián Fuks, verbalizing the depth of the changes experienced by each one of us in these times of uncertainty and also, of changes.

As it is intuitive, the advent of a serious global health crisis imposed on leaders in general, and on Brazilians in particular, the realization of a series of “tragic choices”, which involve the best allocation of public resources in the treatment of infected people, when there is no reliable scientific research on the best treatment available; that revolve around the best way to provide social cushioning to people in situations of economic vulnerability, considering the natural crisis, derived from a context of fear and illness; which refer to ways of preserving productive activities, democratic practices, when it is necessary, above all, to protect human lives.

In a country of continental dimensions and social gaps as deep as Brazil, the disease naturally made its tragic effects felt asymmetrically. Federalism, ensured by the Federal Supreme Court on a

public health issue, enabled the decentralization of solutions and the dispersion of decision-making nuclei, allowing each location (State or Municipality) to have their specific reality considered and faced by the nearest authority and therefore, in theory, more qualified to do so.

The dispersion of the decision-making nuclei, however, in a context of insecurities and uncertainties resulting from an unknown disease, resulted in the choice of the most diverse solutions, with the Judiciary being multiply triggered, which generated an even greater amplitude in the list of decision-makers, now including Judges of all levels, up to the Federal Supreme Court.

The challenges posed by a phase that can be considered a true rite of passage to an uncertain future are immense.

Problems are sensitive. The dilemmas, complex.

That is where the impulse felt within the Brazilian Academy of Electoral and Political Law – ABRADep came from.

An impulse to participate. Less to offer solutions. More to share the doubts and reflections that pervade each of the difficult choices that have determined the country's course in a pandemic theme.

That is why a Working Group on the “COVID-19 pandemic crisis and the implications for the Brazilian elections 2020, on Electoral Law and the Democratic Rule of Law” was created. The creation of the group came with an invitation to all members of the Academy, so that they could take part in this “*thinking space*”. To discuss. To weigh. To present possibilities.

As the problems were multiple, four subgroups were created: the first of them analyzed the “The impact of the pandemic on the calendar of municipal elections: coping proposals”, under the Rapporteur of Guilherme Gonçalves; the second, focused on “The role of the Electoral Justice in its relations with voters, political parties and other agents: how to guarantee efficacy and effectiveness in opposition to the risks offered by the coronavirus?”, under the leadership of Lara Marina Ferreira; the third, faced the challenge of analyzing “Elections, Technology and new technological voting

tools due to the pandemic”, under the supervision of Rafael Morgental Soares; and the fourth, reported by Joelson Dias, focused his analysis on the “The pandemic crisis and the new ways of the Democratic Rule of Law”.

Each of the Final Reports, presented by each Subgroup, deserved the most diverse suggestions and, subsequently, were submitted to voting by the entire entity, with subsequent approval.

Finally, this publication, which is, more than anything, an invitation to reflection, and which crystallizes in time, for historical record, all the anxieties and all the thinking of an Academy that, formed by Lawyers, Servants, Members of the Public Ministry and Magistrates, felt compelled to embrace the moment of uncertainty and to take part in the debates, with only five years of existence.

Maria Claudia Bucchianeri Pinheiro

WORKING GROUP

Brazilian elections' ways through the pandemic:
ABRADEP's contribution to the debate

WORKING SUBGROUP 1

THE IMPACT OF THE PANDEMIC ON THE MUNICIPAL
ELECTIONS CALENDAR: COPING PROPOSALS

FINAL REPORT

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BRASÍLIA, 2020

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PRESENTATION

The spread of the COVID-19 pandemic produced fears across Brazilian society, especially concerning issues related to health and economy. However, the concerns were not limited to these; in this scenario, rumors about the feasibility of holding the 2020 Municipal Elections are growing.

The work that is now presented looked at equally opportune and controversial topics such as the unification of elections, extension of mandates and postponement of the 2020 election.

Regarding the idea of elections unification, conclusions raised point to an evident unconstitutionality, since they represent a clear attempt to abolish the periodicity of the elections, which would imply the restriction of the political rights of voters and candidates, taking undue advantage from an exceptional situation.

The position is consolidated by a historic judgment of the Federal Supreme Court, which has already considered the matter and was opposed to the change.

On the other hand, countless meta-legal arguments are presented in order to rule out the possibility of concentration of elections, among which: the importance of the educational function of elections, the need for periodic elections to guarantee social respect to democratic practices.

As for the postponement of Municipal Elections, the group presents a solid proposal with two possible dates for the election: November 15 or December 6. Care was also taken to organize the hermeneutic and legislative consequences of the rescheduling, including making suggestions for adapting the electoral deadlines set in infraconstitutional rules.

At the end, the working group even presented proposals for the text to be drafted amending the Federal Constitution and rescheduling the 2020 Municipal Elections.

The challenging moment represented by the pandemic cannot be used for rupture, on the contrary, it should serve as an amalgamation to strengthen Brazilian democracy. Therefore, it is very important that lessons are learned, and the symbolism of the moment is recognized.

Holding the 2020 Municipal Elections on November 15 would mean praising the republican and democratic history of Brazil. Likewise, it would represent praising the 1988 Constitution, which attended its first election on 15/11/1989, a feast day on which, after a period of almost 30 years, Brazilians chose their President of the Republic.

On the other hand, if the election takes place on December 6, it will be a symbol of the end of a challenging year with full success and will show that democracy even placidly manages to overcome the most unexpected obstacles.

After three decades, the Citizen Charter shall assist another election, this time, to choose mayors, but also with respect to its precepts and above all with the protection of Brazilians' political rights.

1. DELIMITATION OF THE OBJECT OF ANALYSIS

Given the circumstances resulting from the pandemic of the new coronavirus, the debate on the possibility of postponing municipal elections has started to gain prominence in the legal media and with the press.

On Sunday, 29/03/2020, the President of the Superior Electoral Court (TSE), Minister Rosa Weber, stated that the 2020 electoral calendar is being fulfilled. Cautiously, the Minister herself notes that the evolution of the pandemic situation requires constant assessment of the measures.

Considering that the election postponement – in addition to requiring numerous legal provisions, such as regulatory changes, etc. – has a significant impact on the democratic principle and, therefore, it must be seriously analyzed; the Brazilian Academy of Electoral and Political Law (ABRADEP) brought together scholars on elections and political scientists in order to produce material capable of evaluating, from a constitutional and electoral point of view, the implications of the pandemic for the 2020 legal-electoral scenario.

The material is divided into four analysis fronts, each in charge of a working subgroup: a) The impact of the pandemic on the calendar of municipal elections: coping proposals; b) The role of the Electoral Justice in its relations with voters, political parties and other agents: how to guarantee efficacy and effectiveness in opposition to the risks offered by the coronavirus?; c) Elections, Technology and new technological voting tools due to the pandemic; d) The pandemic crisis and the new ways of the Democratic Rule of Law.

This Report represents the efforts of the subgroup in charge of topic 1, namely, the impact of the pandemic on the calendar of municipal elections: coping proposals.

In order to organize, didactically, the analysis, this topic was considered from the following aspects: Unconstitutionality and inconvenience of the elections' unification; Fundamentals and Hypotheses of Scenarios that would justify the postponement of the elections; Projects and Suggestions for Postponement Regulation.

2. IMPACT OF MEASURES TO COMBAT THE CORONAVIRUS PANDEMIC ON THE MUNICIPAL ELECTIONS CALENDAR AND COPING PROPOSALS

The last week of March 2020 was marked by the discussion of some bills and other amendments to the Constitution, aimed at regulating the postponement of elections. Among them, the Constitutional Amendment of Senator Elmano Ferrer stands out, which proposes the unification of the elections.

In justifying the proposal, despite referring to the pandemic, Hon. Mr. Senator of the Republic concludes: "A great motivation for this proposition, it is worth mentioning, is the need to seek more efficiency in political activity. More public management and less political campaign". According to the Senator, the "current asphyxiating model, with elections every two years, causes the political class to turn to election campaigns in alternate years, interspersed with years in which political agents try to organize the Administration and the legislative houses, although necessarily with their eyes on the next year's election. It is a perverse and counter-productive model"¹.

The proposal of Senator Major Olímpio is identical. Besides, there are other proposals under analysis in the Federal Senate that call for the unification of federal, state and municipal elections. The most recent (PEC n°. 143/2019) was prepared by Senator Luiz do Carmo (MDB-GO), who intends to change the term of office of the mayors and city councilors elected in 2020 to enable the general coincidence of the mandates from 2026.

News on the page of the Federal Senate on the world wide web says that the senator even sent a letter to the Presidency of the Superior Electoral Court, suggesting changing the term for

¹ Source: Senate Agency. Also available in **Revista Consultor Jurídico**, March 25, 2020.

affiliations, from April 3 to May 3. He also asked for the election date to be reset, according to the progress of the epidemic.

There are oral records in official pronouncements revealing the draft of a proposal for a Constitutional Amendment in which it is proposed to hold municipal elections within 120 days from the moment the Ministry of Health attests to the end of the public health crisis².

In the Chamber of Deputies, parliamentarians also presented proposals that interfere with the institutional legal framework of municipal elections.

We highlight the one that intends to allocate R\$ 2.035 billion from the Special Campaign Financing Fund (FEFC) to actions to combat the pandemic. The objective of the initiative, in terms of its own text, is that “as long as the fight against COVID-19 lasts, the resources provided for electoral campaigns are sent to the public health service”. Some projects go even further and suggest, “part of the money from the Party Fund should also be used in actions against the pandemic”³.

On April 3, 2020, when analyzing a preliminary injunction deducted by Progressives (PP) in the context of Direct Action of Unconstitutionality (ADI), in which it postulated the suspension for 30 days of the party affiliation term, voting residence and resignation, the Minister Rosa Weber, dismissed the claim, as she understood that, at this moment, “the immediate suspension of the term would have as an ‘unacceptable’ consequence the weakening of protections against abuse of the exercise of function, position or employment in the direct or indirect administration”.

The Rapporteur also considered that this would disproportionately increase the risk to the normality and legitimacy of the elections and, consequently, would produce a state of things with

² Source: Senate Agency. Accessed on 04/04/2020.

³ Source: News Chamber Agency. Accessed on 04/04/2020.

an even greater potential for violating the democratic principle and popular sovereignty⁴.

Recently, at the initiative of Minister Rosa Weber, a Working Group was formed within the scope of the Superior Electoral Court to study and propose alternatives if, in fact, measures to combat the pandemic - especially those that demand greater degrees of social isolation - prevent the holding of party conventions, electoral campaign acts and the normal voting procedure, which demand intense social contact and crowding of people.

Another movement to reveal the importance and relevance of the debate, considering the exceptionality of the moment experienced, and to justify the participation of this Brazilian Academy of Electoral and Political Law, with the possible and appropriate contributions.

2.1. UNCONSTITUTIONALITY AND INCONVENIENCE OF ELECTIONS UNIFICATION

2.1.1. High-impact political reforms should not be carried out in times of exception: opportunism of the debate during the COVID-19 crisis

Political reforms should never be carried out in times of exception, especially when their content indicates legislative changes that tend to be permanent even after the return to normality.

It cannot be ignored that at the current situation, it is not feasible to carry out a discussion with serenity, depth and calm that could allow careful consideration of all the variables resulting from the eventual unification of the claims, especially when considering that the existence of the so-called mid-term elections remains stable under the 1988 Charter.

⁴ BRAZIL, Federal Supreme Court. Direct Action of Unconstitutionality 6359, Rap. Min. Rosa Weber, decision on 03/04/2020.

The peculiarities of the situation experienced in the country prevent a rational and qualified debate about the real consequences of the unification of the elections.

It is worth remembering that the National Congress, in a normal situation, has already debated the issue on more than one occasion, always rejecting the position of unification: it can be deduced from it that a possible change of position during the crisis of COVID-19 would represent an unfortunate behavior.

It should also be noted that the intention to postpone this year's elections to October 2022, through the deliberation of a proposal to unify municipal elections with state and national elections, would necessarily mean allowing some heads of Municipal Executive Power to remain for up to 10 years in the exercise of their mandate, an unprecedented situation in democratic conditions and absolutely incompatible with the republican principle and with the constitutional clause of alternation.

In this sense, although it is permissible, in *ultima ratio* and only under extreme conditions, the postponement of the 2020 municipal election to mid-2021 – with a short delay of the current city councilors and mayors elected in 2016 – there is a consensus that the unification of the elections, through an unorthodox extension of current mandates, is blatantly unconstitutional⁵, as further explained.

⁵ In this very sense, recent statements by the President-elect of the TSE, Minister Luís Roberto Barroso, who thus obtained: **“Mistureba** *Against unifying this year's elections with those of 2022, Minister Luís Roberto Barroso, of the Supreme and next president of the TSE (Superior Electoral Court), says that the junction does not seem good in three aspects: constitutional, institutional and managerial. Excessive* *He says that the change would disrespect the mandate given by the voter, of four years, would confuse the population by putting seven positions at the same time in voting and, finally, would cause ‘a real managerial hell’, also considering the difficulty in dividing television time. Exception* *In defense of postponing the 2020 election only for as long as necessary to hold it safely, Barroso also points out that the precedent in the Brazilian history of term extension occurred in the military dictatorship. ‘A constitutional amendment extended until 1982 the term of mayors and councilors*

2.1.2. Unification of municipal elections with state and national elections, with the creation of buffer mandates: violation of a entrenched clause and constitutional rule that enshrines a fundamental right: weakening of democratic institutions

Having said that, it should be emphasized that the unification of the elections, with the extension of mandates in course, violates the rule inscribed in Article 60, § 4 of the Political Charter⁶, clear in the sense that it is not possible to decide on a constitutional amendment aimed at fundamental guarantee of vote periodicity.

Citizenship is one of the Republic fundamentals, so voting and being voted on a regular basis is a fundamental right. It is important to note that there are restrictions on the limitations of fundamental rights, even if by constitutional amendment.

In this sense, the unification of elections, in times of crisis, such as the coronavirus pandemic, should be interpreted as an attempt to abolish the reasonable and acceptable periodicity of the elections, while still restricting the passive and active electoral capacity using a situation of exception as a subterfuge.

It is important to emphasize that in times of crisis, such as a state of defense or a siege, it is impossible to propose constitutional amendments⁷, due to circumstantial limitations, precisely due to the need, in exceptional situations, to preserve democratic institutions themselves.

elected in 1976, which was due to end in 1980’, he says.” Available at: <<https://www1.folha.uol.com.br/colunas/painel/2020/04/barroso-diz-que-unificar-eleicoes-deste-ano-com-as-de-2022-desrespeitaria-eleitor-e-criaria-inferno-gerencial.shtml?origin=uol>>.

⁶ Art. 60 [...] § 4th It shall not be object of the deliberation the proposal of amendment aimed at abolishing; II – the direct, secret, universal and periodic vote [...]; IV – individual rights and guarantees.

⁷ Art. 60. The Constitution may be amended by means of a proposal: § 1st The Constitution may not be amended in the presence of federal intervention, a state of defense or a state of siege.

The sad moment of crisis that society is going through and the declaration of a state of national public calamity⁸ refer to the need to strengthen democratic institutions.

Therefore, a constitutional amendment proposing unification of the elections, due to a global pandemic, besides being opportunistic, since it is proposed on a factual basis that does not legitimize it (since it is unlikely that the public health crisis that Brazil and the world is going through lasts for two years), culminates in reducing and compromising, in a worrying way, the liveliness of the democratic debate⁹, thus contributing to the very weakening of democratic practices.

Certainly, the legislative option will be appreciated by the Judiciary, which has been signaling the unconstitutionality of an Amendment that intends to unify elections by extending current mandates, even in the context of the current pandemic.

The possibility of postponing¹⁰ electoral deadlines and elections to the end of the year is being vented, as well as of an eventual postponement to mid-2021, which is not even close to being confused with the anomalous extension for two more years of the current mandates.

In this sense, it is important to mention that the Brazilian Academy of Electoral and Political Law, in 2015 and from the perspective of political reform projects under debate at the time in the National Congress, has already prepared a study in which it maintained its position against the unification of elections, even if, then, the possibility of extending current mandates was not being debated¹¹.

⁸ <http://www.planalto.gov.br/ccivil_03/portaria/DLG6-2020.htm>.

⁹ The United States held elections in times of crisis such as World War II.

¹⁰ Several countries in the world are postponing the elections to the month of October, which would take place in the months of April, May and June, like Chile, Uruguay, Bolivia among others.

¹¹ DIAS, Joelson; SILVEIRA, Marilda de Paula; REIS, Daniel Gustavo Falcão Pimentel. Unificação das eleições: quem mais perde é o eleitor. In: PEREIRA,

2.1.3. Precedent of the Supreme Court against the extension of mandates and unconstitutionality due to the unification of the elections; violation of republican and democratic principles

On the subject of term extension there is precedent of the Supreme Federal Court, in the records of Representation 322/GO, which had the following menu:

Representation – unconstitutionality of Act of the Legislative Assembly of Goiás that extends for another year, the mandates of Governor, Vice-Governor and Mayors. The extension of the term violates the republican form and the democratic principle of temporary functions (Representation 322/GO, Rapporteur Minister Candido Mota Filho, September 18, 1957. Unanimity).

Even though such a judgment took place in the distant past, it is worth noting that the decision was taken under the republican and democratic spirit of the 1946 Charter, with the Rapporteur Minister having carried out a careful and in-depth study on the inexorable relations between the temporary exercise of power and the principles of democracy and republicanism: “in order to assess the importance of the temporary mandate, it is enough to consider that its idea is linked to the idea of freedom. Without temporariness, there is no freedom”.

At the time of the trial, Minister Candidate Mota Filho reminded the importance of a fixed term, *verbis*:

The term of office, therefore, always has a limit and it cannot be extended in any way by those who exercise it

Rodolfo Viana; ALENCAR, Gabriela Rollemberg de (Orgs). **Teses sobre a reforma política**: memória da participação da ABRADep nas reformas de 2015. Brasília: ABRADep, 2016. p. 29/40.

for their own exercise, because that would be ignoring the specific and legal reality of the term.

In the same line, Minister Barros Barreto voted:

The extension of elective mandates flagrantly violates the representative form of the Republic, a current constitutional imperative, which cannot be removed, and its disrespect would imply a sad despotism.

It should be noted that the perceived threat to freedom, the Republic and Democracy was verified with the simple hypothesis of extending terms of office by one year - a less serious situation, therefore, than the possibility now posed.

The Federal Supreme Court's decision was still based on doctrines and historical analysis of the entire republican period. Thus, what was written in 1891 and which was valid for 1957, as it is an elementary principle of Brazilian constitutional democracy, continues to be fully valid in 2020.

2.1.4. Unification compromises election administration and electoral jurisdiction

The Electoral Justice organizes and manages the electoral process, which is a set of acts that together culminate in the final result - elections that take place on the first Sunday of October.

At least one year before election day, the Electoral Justice begins the process of organizing the election, issuing resolutions, receiving electoral affiliations and enlistments, receiving the registration of candidates and processing/judging them, control and inspection of electoral advertising, and organization of the ballot boxes and electronic voting system.

The logic of the elections division into municipal and state/nationals also reflects in the way the Electoral Justice manages the

elections, and the merger of the elections, instead of generating efficiency, will certainly compromise the election administration by disrupting this electoral administrative logic, which may also even have repercussions on access to justice and electoral litigation.

For now, it would suffice to bring the example of the workload of the Electoral Courts by having to judge, in an ordinary degree, the candidacy records in the state elections and in an appeals degree, in the municipal ones, in the short and impractical period of 45 to 50 days.

The dynamics of municipal elections differ from state and national in several aspects, since the number of candidates, as well as the increased attention that is given to the police power of the Electoral Judge.

It is concluded, in this regard, that the proposal to unify the election does not bring any efficiency, but rather overload and breach of the administrative - and also jurisdictional - logic of the Electoral Justice, which, due to its own institutional design (composition, staff, etc.) and the accumulation of two functions (intense administrative and judicial), its efficiency is maximized and not impaired with the current model.

2.1.5. Unification would not make electoral law easier or more understandable by the electorate

Electoral law is directly related to the exercise of power by the people; it regulates the access of political power by the population over which the norms emanating from that power will be sovereign.

It is important that the electorate understands how the electoral rules apply, that is, who can be a candidate, what is the role of political parties in this process, how their vote count, what is the legitimate way to ask for a vote.

The electorate needs to know how their political preference - manifested in the vote - will contribute and in what way, so that those elected occupy the political power and, thus, have legitimacy

to impose new norms that could restrict their rights and freedoms, all in terms of the constitutional pact.

Education for citizenship is a fundamental right and duty of the State provided for in Article 205 of the Federal Constitution¹². The electorate, every 2 years, is called to reflect on the political situation and, thus, to try to understand the normative system that regulates the exercise of their vote.

Citizen participation in everyday politics is very low and political apathy and its contemporary, historical and cultural reasons will not be the subject of this brief text; however, regarding this apathy, it is important to state that the unification of the elections strengthens it to the extent that the voter, already distant from everyday political affairs, will only be called, every 4 years, to do institutional politics.

2.1.6. Unification leads society to underestimate the political system and democratic practices

In addition to the previous topic, in which an analysis of the importance of periodic citizen participation was made more effectively in the composition of political power, the unification of the election, likewise, leads society to underestimate even more the political system and democratic practices.

System is a set of parts whose whole is related; in the case of the political-electoral, the parts of these systems are the votes and the whole is democracy. The way these parts interact with each other defines the system modality, whether the majority and the proportional (in the case of systems adopted in Brazil). And each modality has a democratic and legitimate way of counting votes.

¹² Art. 205. Education, a right for all and the duty of the State and the family, shall be promoted and encouraged with the collaboration of society, aiming at the full development of the person, their preparation for the exercise of citizenship and their qualification for work.

Citizen participation, every 2 years - and not every 4 years, favors democratic practices and an understanding of the political-electoral system that will define how and in which way your vote will be transformed into office.

Article 93-A¹³ from Law n. 9.504/97, even establishes that it is the duty of the Superior Electoral Court, from April 1 to July 30, to carry out institutional advertising, on radio and TV, with the purpose of clarifying to the population the rules of operation of the Brazilian electoral system.

If, in a shorter period of time (every 2 years), these clarifications are carried out and, even so, there is a large portion of the population without understanding the dynamics of the systems, this scenario would certainly be even worse.

The shorter periodicity of the elections still derives from the republican principle, whose core lies in the constant rotation of mandates; it also stems from the democratic principle that, more than any other, demands that people - at reasonable intervals - constantly be called upon to choose their own representatives.

The unification of the elections would stifle democratic practices which, every 2 years, provide an opportunity to promote the oxygenation of politics with new ideas and managers.

2.1.7. The costs of the electoral process

Regarding the costs of the electoral campaign, much has been debated about the use of the special electoral campaign fund to fight the coronavirus. In this sense, it is important to emphasize

¹³ Art. 93-A. The Superior Electoral Court, in the period between April 1st and July 30 of the electoral years, shall promote, in up to five minutes daily, continuous or not, requested to radio and television stations, institutional advertising, on radio and television, aimed at encouraging the participation of women, young people and the black community in politics, as well as to inform citizens about the rules and functioning of the Brazilian electoral system.

that democracy costs financially, which means to say that, although there is a difficulty in relation to the pandemic, electoral campaigns represent the maintenance of democracy in the country.

There is no reason to think that the cost of the campaigns would decrease with the unification, since they would be the same positions in dispute, with the same number of competitors. The tendency, therefore, would be only to concentrate expenditures, except in a situation where municipal campaigns are sacrificed, which is certainly not desired by anyone.

Therefore, the idea of discussing the cost of electoral campaigns escapes the debate about unification.

On the other hand, with regard to the cost of the electoral process, there are also no clear elements to indicate its possible decrease, since the fixed costs of the Electoral Justice, with servers and structure, which represent the majority of their expenses, should not be changed, under penalty of making the super election that would be disputed every four years unfeasible.

2.1.8. The absence of the need for unification due to the coronavirus

Finally, it should be noted that the health doctors' opinions have shown that the contagion curve¹⁴ in Brazil follows the trends of European countries, as shown in some graphics produced by BBC News Brazil with data from the World Health Organization (WHO). The growth of confirmed cases follows a pace similar to that of countries like Germany, France and the United Kingdom.

This means, theoretically, that in October there will have already been a decline in the contagion curve, which does not justify the extension of mandates, reinforcing the opportunism of the discussion about unification.

¹⁴ Available at: <<https://www.bbc.com/portuguese/internacional-51969288>>. Accessed on 05.04.2020.

2.2. FUNDAMENTALS AND SCENARIOS THAT WOULD JUSTIFY THE POSTPONMENT OF ELECTIONS

In this fork, a series of scenarios and repercussions of the inevitable growth of the pandemic of the new coronavirus in Brazil have been speculated since the community transmission of the virus began and the country's health system points to a collapse in a short period of time.

There are 3 reasonable scenarios presented by political scientist Adriano Oliveira on the website www.cenariointeligencia.com.br:

Scenario 1: The highest number of coronavirus victims reaches its peak in April. Normality in Brazil returns from the month of May with the end of several measures already taken by the governments. Given this scenario, elections are not postponed.

Scenario 2: The highest number of coronavirus victims reaches its peak in May. Normality in Brazil returns from the month of June. Several candidates request the postponement to the TSE and Congress, alleging lack of time to organize the campaign. The elections are postponed until November.

Scenario 3: The highest number of coronavirus victims reaches its peak in June or July. Normality in Brazil returns from the month of August. TSE and Congress allege lack of time to organize the election. The elections are postponed until the end of 2021 at the latest. Probably in March.

However, in the unanimous opinion of scholars on the subject, it is not necessary, at the present moment, to consider a scenario that does not admit the mandatory holding of elections in 2020 or, at the most, in the middle of 2021, mainly due to the uncons-

tutionality of extending mandates with a certain duration, when the elections for the current city councilors and mayors are held – except for the shortest possible period of time in view of the possible need to hold elections in mid-2021.

At the time of producing this Report, as already stated above, the extension of the terms of mayors and city councilors is not yet seen as a feasible scenario, due to the unconstitutional nature of this alternative. However, it is urgent to point to the north of the supposed need to face the postponement of the elections, admitting the perpetration of the harmful effects of the pandemic as a probable scenario, demanding the maintenance of social isolation until, at least, the end of the month of July, reason why we justify the legal opinion and the studies in question.

It is necessary to make it very clear: even imagining the most serious scenarios of the development of the pandemic of COVID-19, under no circumstances a real attack to democratic stability could be admitted, based on this exceptional situation of public health crisis, which would result in the acceptance of a proposal for unification of the elections and extension, from four to six years, of the current mayors and city councilors mandates.

It is necessary to highlight that, throughout the week that started on April 6, and until April 20, in view of the forecasts and evolution of the Corona Virus pandemic, several leaders of the Judiciary Power and, above all, of the National Congress have already manifested themselves in the sense of being able, through constitutional amendment, to postpone the electoral calendar and hold the elections on November 15, 2020. Or, as some TSE Ministers recently admitted, for the beginning of December 2020¹⁵, corroborating the proposals that are part of this Report/Study.

¹⁵ Accordingly, on April 3, Minister Luís Roberto Barroso declared (<https://oglobo.globo.com/brasil/ministros-do-tse-discutem-adiar-eleicoes-para-dezembro-mas-descartam-prorrogar-mandatos-1-24348434>):

Furthermore, even in the most aggravating scenarios of the COVID-19 pandemic, there remains consensus in the Judiciary (especially among members of the TSE and the Superior Federal Court)¹⁶, and in the vast majority of deputies and senators, the repudiation of the unification of elections and a two-year extension of the terms of the current mayors and city councilors.

2.3. PROJECTS AND SUGGESTIONS FOR POSTPONEMENT REGULATION

Justified the unconstitutionality of the unification of the elections and the extension of the terms of mayors and city councilors, issues that were even subject of confrontation by the Supreme Federal Court in the historic judgment of Representation 322-DF/GO, of September 18, 1957¹⁷, as well as outlined the scenarios that would justify the postponement of the elections, we will explain the competent legal environment for the regulation of such postponement.

“Public health, the health of the population, is the greatest thing to be preserved. That is why, at the right time, it will be necessary to make a careful assessment on this issue of postponing elections. But we are in April. The debate is still early. It is not certain how the contamination will evolve. In the event of postponement, it must be for the minimum period necessary so that the elections can be held safely for the population. We’re talking about weeks, maybe December.” - said Minister Luís Roberto Barroso, who will preside over the SEC in May.

¹⁶ In the same aforementioned matter, His Excellency also declared:

“The idea of extending the mandates of current mayors and city councilors until 2022 does not seem to me to be a good one. From the perspective of democracy, the extension undermines the mandate given by the voter, which was four years, and deprives that voter of the right to vote for the renewal of municipal leaders. If it is inevitable to postpone the elections, ideally they should be held this year, so that there is no need to extend the mandates of the current mayors and councilors.”

¹⁷ Menu: Representation. Unconstitutionality of Legislative Assembly Act. De Goiaz, which extends for another year, the terms of Governor, Vice-Governor and Mayor. The extension of the mandate federates the republican form and the democratic principle of temporary functions. (BRAZIL, Superior Federal Court. Representation 322 DF-GO, Min. Candido Mota Filho, j. 18.09.1957)

2.3.1. Changes that necessarily depend on amendment to the constitution

PROPOSAL N.º 1:

THE POSTPONEMENT OF MUNICIPAL ELECTIONS SHOULD BE CARRIED OUT, IF NECESSARY, BY ISSUING A CONSTITUTIONAL AMENDMENT TO THE ADCT (ACT OF TRANSITIONAL CONSTITUTIONAL PROVISIONS).

Proposal that requires legislative change through Constitutional Amendment

A scenario of postponement of the elections, in which they take place this year, requires analysis of what is contained in article 29, II, of the Constitution, according to which, the election of the Mayor and the Vice-Mayor must be held on the first Sunday of October of the year prior to the end of the mandate of those who must succeed, applying the rules of article 77, in the case of Municipalities with more than two hundred thousand voters. As will be seen, the change in the date foreseen in the referred constitutional norm would generate a cascade effect that would require regulation of some aspects by infraconstitutional legislation.

With regard, therefore, to this first point, namely, the change in the date of the election, this would require the inclusion of a provision in the Transitional Constitutional Provisions Act (*ADCT*). It is true that the *ADCT* intends to establish a link between two constitutional orders, allowing for a legal transition between them, which ends and begins: “it is aimed at establishing an intermediate regime between two laws, allowing the reconciliation of pending legal situations with the new legislative order”¹⁸.

However, it has not been uncommon to establish transition rules, relating to the course of the current constitutional order. For example,

¹⁸ FERRAZ, Anna Cândida da Cunha. A Transição Constitucional e o Ato das Disposições Constitucionais Transitórias da Constituição de 05.10.1988. **Caderno de Direito Constitucional e Ciência Política**. Revista dos Tribunais, São Paulo, v.7, jan./mar. 1999. p. 56.

the recent Constitutional Amendments n.º. 94 and 99, which established provisional rules on the special regime for payment of court orders, establishing a temporary term for the same, should be mentioned.

In this context, it is understood that a Constitutional Amendment, dealing with the theme, should insert a material legal precept within the scope of the transitional constitutional provisions, given the exceptional and transitory nature of the rule that will specifically deal with the 2020 municipal election. Unlike, however, some existing proposals, the insertion of the constitutional norm must occur not at the end of the *ADCT* (with the inclusion of an article 115, as some senators are defending), but at the beginning, in order to give thematic adequacy to the constitutional text.

It is explained: the general rules related to the elaboration of legal norms in the national legal system are sculpted in the Complementary Law n.º. 95/98, which provides for the elaboration, writing, alteration and consolidation of laws, as determined by the sole paragraph Article 59 of the Federal Constitution.

According to article 11, III, of the Complementary Law, the content of each article must be restricted to a single subject or principle in order to obtain a logical order. In this way, if there is in the transitional constitutional charter a part that specifically tries to exception the general date of the elections set by the constitutional text, as a matter of fact there actually is, the insertion of a new norm, with the same purpose and theme, must occur in such part of the *ADCT*.

PROPOSAL N^o. 2:

2020 MUNICIPAL ELECTIONS SHOULD BE RESCHEDULED FOR ONE OF THE FOLLOWING DATES: 11/15 OR 12/6.

Proposal that requires legislative change through Constitutional Amendment

It is suggested that article 5-A be included in the *ADCT*, setting the date of the new election, which seems better, for November 15, 2020 or for the first Sunday of December, in the first round.

Exceptionally, if there is an effective need to postpone until mid-2021 – which we admit, as stated before, only as the last, extremely exceptional and ultimate alternative, and only if there is a need to maintain striking measures of social isolation until the end of September 2020 – evidently, the legal discipline must undergo the necessary adaptations, according to this new date of the election. As well as the temporary and exceptional extension of the current mayors' and city councilors' mandates until the elected officials take office should be legally provided, always as a temporary and temporally linked provision.

It should be noted that the technique of repeating the article number followed by capital letters, authorized by article 12, III, b, of Complementary Law n^o. 95/98 was already adopted in the *ADCT* itself, when Constitutional Amendment n^o. 93 altered and expanded the regulation brought from article 96, of the Transitional Constitutional Provisions Act.

PROPOSAL N^o. 3:

THE ELECTORAL DEADLINES, CONSTITUTIONALLY PROVIDED FOR AND INDEXED TO THE ELECTION DATE, WILL BE AUTOMATICALLY UPDATED.

Proposal that does not require legislative change; proposal that ends in the scope of legal interpretation

Due to the deadline discipline technique adopted by the constituent legislator, always linking legal-electoral facts to the election date, the change in the moment of the election will automatically result in the alteration of other time frames established in the constitutional text, such as for example: the term for the resignation of the President of the Republic, the Governors and the Mayors who intend to run for other positions (six months before the election – article 14, paragraph 6, of the CF); the final date for filing an action to challenge an elective mandate (fifteen days after the diploma of article 14, § 11, of the Constitution), just in relation to this, the redefinition of the diploma period, by modifying the infraconstitutional norm. These are precepts that do not require constitutional legislative changes, since the date they stipulate is directly related to the date of the election, so modifying it is enough, as seen.

The change in this date impacts on the infraconstitutional discipline of some election aspects and on the electoral calendar itself, as will be further seen.

2.3.2. Changes that depend on infraconstitutional law

PROPOSAL Nº. 4:

THE ELECTORAL DEADLINES, PROVIDED FOR IN INFRACONSTITUTIONAL RULES AND INDEXED TO THE ELECTION DATE, WILL BE AUTOMATICALLY UPDATED.

*Proposal that does not require legislative change;
proposal that ends in the scope of legal interpretation*

Following the logic of what was exposed above, it is possible to see that some deadlines related to events in the electoral process should be automatically changed as soon as the election date is modified – especially considering that the logic of deadlines in the Brazilian electoral system has as an efficient landmark the day of the election, even as a result of the constitutional clause as mentioned above.

This is the case with all periods that are retroactively counted based on the date of the election, which occurs, for example, in the following situations:

- A)** maximum membership deadlines, definition of the electoral domicile and sending lists of members (six months and until April 15 of the election year, according to Law nº 9.096/95);
- B)** resignation deadlines (Complementary Law 64/90);
- C)** minimum deadline for party affiliation and voting residence (Law nº 9.504/97, article 9, *caput*, and Law nº 9.096/95, article 20, *caput*);
- D)** deadlines for the incidence of prohibited conducts (articles 73 to 78 of Law 9.504/97);
- E)** deadline for filling remaining vacancies (article 10, § 5, of Law nº 9.504/97);

- F)** deadline for the publication by the political parties of coalition formation rules etc. (Law nº 9.504/1997, article 7, § 1);
- G)** enlistment change deadline (Law nº 9.504/1997, article 91, *caput*);

Special attention should be paid to the periods of prohibited conduct that apply during the election year. These must remain unchanged. However, the term of article 73, VII, of Law 9.504/97 will deserve adaptation, due to the extension of the beginning of the electoral period by 2 months. For this purpose, the annex contains a proposal for the regulation of such a forecast that exists today.

In this regard, at the time of the presentation of this study, the deadline for the would-be candidates for elective office in the 2020 elections to have domicile and affiliation (04/04/2020) will have already passed.

It will also have elapsed the period of the party window, that is, the hypothesis of just cause for the change of party by the holders of the position of city councilor, to run for the majority or proportional election (Law nº 9.096/95, article 22-A, III).

It will then be incumbent upon the Superior Electoral Court to change the date of the electoral calendar, today regulated by TSE Resolution nº 23.606/19, by editing a new resolution, as will be seen below – considering either the date of November 15, or the date of the first Sunday of December, for the day of the election, always as soon as possible to avoid that it advances to 2021 without the possession of the new mayors and councilors.

In the case of the exceptional need to postpone the election date to mid-2021, the same rationality of the necessary legislative measures must be followed, with the necessary adaptations to the Electoral Calendar.

PROPOSAL Nº 5:

THE ELECTORAL DEADLINES, FORESEEN IN
INFRACONSTITUTIONAL NORMS, WHICH FIX DATES,
MUST BE ALTERED FROM TIME TO TIME, IN VIEW
OF THE POSTPONEMENT OF THE ELECTION.

Proposal that requires legislative change

However, not all electoral legislation deadlines are counted retroactively or from the date of the election and it is necessary to be more careful with them, through an express ordinary legislative proposal, on the matter.

Article 11, § 9, of Law nº 9.504/97 establishes that the Electoral Justice shall send to the political parties, in the respective constituency, by June 5 of the election year, the list of all debtors of an electoral fine, which will be the basis for issuing electoral discharge certificates.

It is suggested that, if it is established on November 15, either the first Sunday of October or December as the date for holding the 2020 election in the first round, changes in the infraconstitutional legislation should be approved, modifying this term imputed to electoral justice, extending it to August 5th.

The same is true in relation to the current term of Article 16-C, of Law nº 9.504/97, which stipulates that the National Treasury shall deposit funds in *Banco do Brasil*, in a special account available to the Superior Electoral Court, until the first business day of the June of the election year. An amendment is suggested, extending this period to the first business day of August of the election year.

In addition, the prohibition imposed on broadcasters from transmitting a program presented or commented on by a pre-candidate, as of June 30 of the election year (article 45, paragraph 1), should be extended to August 31.

Crowdfunding, provided from May 15 of the electoral year (article 22-A, § 3, Law nº 9.504/97), to pre-candidates who intend to raise funds beforehand, would be postponed, to begin on 15 July.

The TSE's role in encouraging female participation in the electoral process (article 93-A, Law nº 9.504/97) would also be worthy of alteration by infraconstitutional law, starting to be executed through institutional advertising in the four-month period from June to September.

The choice of candidates by the parties and the deliberation on coalitions, usually held from July 20 to August 5 of the election year (party conventions), would be restricted to the period between August 30 and September 15, in the event of elections being postponed to November 15, or from September 20 to October 5, in the event that elections are designated for the first Sunday of December 2020. It is salutary, here, that the infraconstitutional legislation, regardless of the public health situation in the country (due to the pandemic), is immediately modified to allow the use of non-presential communication instruments.

It is not unknown that part of the Brazilian population does not have access to the Internet or even to technological communication tools that allow wide integration at a distance between affiliates. However, the provision authorizing political parties to make conventions by digital means, when possible to ensure the democratic participation of their affiliates, would be welcome in terms of the legal security of party acts, especially with regard to such a relevant moment in the electoral process, as conventions are. However, it should be noted that this topic is the object of study by another working subgroup, observing, still, only the opportunity to regulate the matter by infraconstitutional law.

Continuing in the analysis of what needs regulation by infraconstitutional law, there is the final moment of registration of candidacies, today corresponding to August 15 at 7pm (article 11, of Law nº 9.504/97 and article 93 of the CE) and the starting date of the electoral marketing, that is, August 16 (article 57-A

and article 240 of the Electoral Code). Such deadlines would be extended, respectively and according to the date of the election (11/15 or first Sunday of December), to 25 and 26 September or 15 and 16 October.

Together with the Law on Political Parties (Law 9.096/95), the deadline for sending the list of members (article 19) would be changed to the second week of June.

It is necessary to demand special attention with the term of accountability, that is, which ends 30 days after the election (article 29, Law n° 9.504/97). It is known that there is a logical relationship between this term, the diploma and the electoral actions that aim to inhibit the abuse of economic power resulting from the purchase of votes (article 41-A) and campaign slush fund (fundraising and illegal spending of resources, Article 30-A). The logic is that the campaign accounts are provided and analyzed before the diploma, allowing the period to start the filing of the referred lawsuits, starting with the interested parties having access to the accounts of candidates and parties, in order to carry out due analysis and possible discussion and challenge by the appropriate procedural means.

However, with an exceptional electoral calendar, with the election taking place on November 15 or on the first Sunday of December, it would be necessary to make the deadlines for accountability compatible with the dates of the 2nd round (where necessary) and of the diploma, ensuring that the rendering of accounts is at least rendered until the diploma, allowing access to them to be possible in order to enable the regular exercise of the right of action, consistent in the management of the mentioned actions. As such actions are handled after the diploma, the rendering of accounts must have already been rendered at the beginning of the counting of such deadlines.

Thus, it seems to be the case of greatly shortening the deadline for accountability for the current elections. This would be a rule valid only for the 2020 elections and which would exception the

term of article 29, III, Law n° 9.504/97, which would not apply to these elections. It is, therefore, suggested that:

In case the election is held on November 15, 2020, the second round takes place on the first Sunday of December, expiring the deadline for accountability on the second Sunday, that is, accountability would occur from 4 days after the election up to 23 days after the elections (where there is only a 1st round) and up to 7 days after (where there is a 2nd round), a reasonable measure that would allow the diploma to take place until December 30, and each Judge in his respective Electoral Zone can proceed qualifications, depending on the specificity of each municipality. Such measures would allow the investiture to occur, regularly, on January 1.

With the election remaining for the first Sunday of December, the 2nd round should take place on the third Sunday, with the deadline for accountability expiring on the fourth Sunday, that is, the accountability would occur up to 14 days after the elections (where there is only 1 round) and up to 7 days after (where there is a 2nd round), a reasonable measure that would allow the diploma to take place between December 28 and 30.

Such measures, in both cases, would allow the investiture to take place, regularly, on January 1.

In these two circumstances, in relation to the Appeal against the Issuance of a Diploma, it is understood that, in this case, the three-day period for filing it would only begin to count from January 21, 2021, pursuant to paragraph 3, of article 262 of the Electoral Code. As stated, since the rule of article 29, III, of Law 9.504/97 is departing, such measure would require infraconstitutional law.

Finally, it is necessary to highlight that, still in the field of infraconstitutional legislation, it is necessary to adapt the prescriptions regarding prohibited conduct also to these new deadlines, especially those provided in article 73 of the Elections Law, adapting them to the criteria established therein whose incidence date is three months before the election day. Regarding the prohibitions in paragraphs

10 and 11 of the said provision, since the year of the election has an impact, it does not seem necessary to make any changes.

Regarding item VII of the same provision - which establishes institutional advertising spending limits with reference to spending in the years preceding the election - we suggest that the timeframe for the semester be modified by that of the four-month period, according to the proposed bill that we attach.

In any case, it was decided to insert a device, only and only in view of the exceptionality of combating the pandemic, to allow emergency expenses and values higher than those allowed in municipalities with recognized emergency or public calamity and with the full incidence of proviso contained in article 73, VI, b of the Elections Law.

Especially because the eventual decree of state of emergency and/or public calamity already entails several exceptions to these prohibitions, depending on the normative program of the devices under examination, of the Conduct Prohibited to Public Agents, especially in relation to paragraphs a and b of item VI of Article 73 of Law n° 9.504/97, which already contains in its wording the hypotheses of exceptionality resulting from a pandemic, such as the one currently being faced.

2.3.3. Changes that depend on the Superior Electoral Court resolution (TSE)

PROPOSAL N° 6:
THE ELECTORAL DEADLINES, STATED IN THE TSE RESOLUTIONS, MUST BE ALTERED FROM TIME TO TIME, WITH A VIEW TO POSTPONING THE ELECTION.
*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Among the electoral regulations stated in the Resolutions of the Superior Electoral Court, the main one that will suffer the greatest impact with the postponement of the elections is the current TSE Resolution n° 23.606/19, which sets the electoral calendar.

Traditionally, such resolution, issued every two years, aims to compile the main dates of the election year calendar, a measure that guarantees greater information to the voter, as well as transparency and legal security for candidates and actors in the electoral process.

Thus, it is imperative that the TSE issue a new resolution for this purpose. In it, it should be made clear that terms such as those of the party window, affiliation and voting residence will be considered “reopened”, in order to ensure the widest participation in the electoral process.

Likewise, rules related to the operational schedule of the electoral register for Elections 2020 (TSE Resolution n° 23.601/19) and the inspection and audit procedures of the electronic voting system (TSE Resolution n° 23.603/19) will need to be adapted to the new electoral calendar.

Other norms that work with deadlines, today contained in Resolutions such as the registration of candidacy (TSE Resolution n° 23.609/19) and electoral advertising (TSE Resolution n° 23.610/19) would not even need to be changed, because they would have an interpretation in accordance with its assumption

of validity, namely, the Amendment to the Constitution that included Article 5-A, in the *ADCT* and the Ordinary Law that would set new deadlines and dates for the 2020 elections, as explained above.

3. CONCLUSION

The discussion currently taking place around the unification of the elections (proposal immediately repudiated) and its postponement, due to the current pandemic scenario, involves sensitive aspects of Democracy. Thus, the proposal was considered in the light of three different scenarios in the present work, always favoring the postponement to some date in 2020 - but understanding that the postponement to mid-2021, even if it may occur, must be the last alternative. Thus, proposals to change the electoral process must be approached with care and in order to have less impact on the necessary process of alternating power.

The acclaimed American political scientist, Robert Dahl, in his work “On Democracy”, establishes some criteria for the effective establishment of a democratic process. Among the five criteria presented by him, three are cited: “effective participation”, “clarified understanding” and “control of the planning program”. Effective participation ensures that before a policy is put into practice, members of a given society should have the opportunity to learn about the different opinions about that policy, but, by an informed understanding, it is understood the need to guarantee the members of such a society equal opportunities to understand and discuss new policies within reasonable time limits, being able to decide how and which policies should be placed in the society’s planning (program control)¹⁹. However, for this to happen, instruments are essential to guarantee constant processes of choice, such as periodic elections.

It is concluded, therefore, that the proposals presented here are those that best fit the democratic principle. The existence of periodic elections, in which the principle of alternation and non-perpetuation of power prevails, “is one of the bases of democratic

¹⁹ DAHL, Robert. **Sobre a Democracia**. Brasília: UNB, 2001. p. 52-53.

legitimacy, consistent with the preservation of the full and free sovereignty of the citizen to define, alongside his equals, his destiny and the directions of political society”. Still, taking the words of Jaime Barreiros Neto, “The electoral period must favor reflection and democratic maturation, so that the people can legitimately exercise popular sovereignty”. Therefore, “the electoral calendar, in this sense, must be elaborated based on a main objective: to make possible the normality and legitimacy of the exercise of the sovereign and autonomous will of the people in front of the polls”²⁰.

²⁰ BARREIROS NETO, Jaime. **Os Impactos do Covid-19 nas eleições 2020 e a proposta de unificação do calendário eleitoral**. Brasília: Academia Brasileira de Direito Eleitoral e Política (ABRADEP). Available at: <<http://abradep.org/>>, of April 1, 2020.

REFERENCES

BARREIROS NETO, Jaime. **Os Impactos do Covid-19 nas eleições 2020 e a proposta de unificação do calendário eleitoral**. Brasília: Academia Brasileira de Direito Eleitoral e Política (ABRADEP). Available at: <<http://abradep.org/>>. Accessed on: 1 April 2020.

BRASIL, Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade 6359, Rel. Min. Rosa Weber, decision of 03/04/2020.

DAHL, Robert. **Sobre a Democracia**. Brasília: UNB, 2001. p. 52-53.

DIAS, Joelson; SILVEIRA, Marilda de Paula; REIS, Daniel Gustavo Falcão Pimentel. Unificação das eleições: quem mais perde é o eleitor. In: PEREIRA, Rodolfo Viana; ALENCAR, Gabriela Rollemberg de (Orgs). **Teses sobre a reforma política**: memória da participação da ABRADEP nas reformas de 2015. Brasília: ABRADEP, 2016.

FERRAZ, Anna Cândida da Cunha. A Transição Constitucional e o Ato das Disposições Constitucionais Transitórias da Constituição de 05.10.1988. **Caderno de Direito Constitucional e Ciência Política**. Revista dos Tribunais, São Paulo, v.7, jan./mar. 1999.

AMENDMENT TO THE CONSTITUTION PROPOSAL

It inserts art. 5-A in the Transitional Constitutional Provisions Act (ADCT) and establishes a date for the 2020 municipal elections

The Boards of the Chamber of Deputies and the Federal Senate, according to paragraph 3 of art. 60 of the Federal Constitution, enact the following Amendment to the constitutional text:

Art. 1 The Transitional Constitutional Provisions Act (*ADCT*) has now been added of the following art. 5-A:

Art. 5-A. The municipal elections of the year 2020 will take place on November 15, 2020 (or on December 6, 2020), in the first round, and on December 6, 2020 (or on December 20, 2020), in the second round, when necessary, pursuant to the provisions of this Constitution.

Art. 2 This Constitutional Amendment enters into force on the date of its publication.

ORDINARY LAW PROPOSAL

It adapts the electoral legislation to the new dates for the 2020 municipal elections, due to the exceptional postponement due to the COVID-19 pandemic.

Art. 1 The municipal elections of the year 2020 will take place on November 15, 2020 (or on December 6, 2020), in the first round, and on December 6, 2020 (or on December 20, 2020), in the second round, when necessary, under the terms of the Constitution.

Art. 2 The terms of disqualification (Complementary Law 64/90), party affiliation and electoral domicile persist (Law n° 9.504/997, art. 9, caput, and Law n° 9.096/1995, art. 20, caput), just cause for changing party by city councilors, without loss of mandate (Law n° 9.096/1995, art. 22-A, III), prohibited conducts (art. 73 to 78 of Law 9.504/97), filling of remaining vacancies (art. 10, paragraph 5, of Law 9.504/97), publication by the parties of coalition formation rules and the similar cases (Law n° 9.504/1997, art. 7, § 1) and amendment of the electoral enlistment (Law n° 9.504/1997, 91, caput), all counted, however, retroactively, to the date of the election mentioned in art. 1.

§ 1 The remaining deadlines set by law and which are retroactively counted to the date of the election persist.

§ 2 The conduct prohibited to public agents that affect the election year remains unchanged, and the provisions of the *caput* do not apply to them.

§ 3 In relation to the sealed conduct provided for in art. 73, item VII, of Law 9.504/97, its temporal scope, for the 2020 elections, is now eight months, and it is forbidden to carry out, in the first two quarters of the election year, advertising expenses of the municipal public organs, or the respective indirect administration entities, which exceed the average spending in the first two quarters of the last three years preceding the election.

§ 4 If extraordinary expenses on institutional advertising are proven to be necessary in municipalities that are in a state of emergency or public calamity, specifically due to the pandemic of COVID-19, expenses exceeding the limits set out in § 3 of this article will be allowed, provided the other rules are observed relating to the placement of institutional advertising in the year of the election, especially that regulated by item “b” of item VI of article 73 of Law 9.504/97.

Art. 3 The prior fundraising referred to in art. 22-A, par. 3, of Law 9.504/97, is authorized to pre-candidates from July 15, 2020.

Art. 4 The obligation in art. 11, par. 9, of Law 9.504/97, of sending the list of all debtors of electoral fines, in the respective circumscription, by the Electoral Justice to the political parties, which will be the basis for the issuance of electoral discharge certificates, must be fulfilled by the August 5, 2020.

Art. 5 The National Treasury shall deposit the resources mentioned in art. 16-C, of Law 9.504/97, into a special account in *Banco do Brasil*, available to the Superior Electoral Court, until the first business day of August 2020.

Art. 6 Broadcasters are prohibited from transmitting a program presented or commented on by a pre-candidate, as of August 31, 2020, in compliance with the provisions of art. 45, paragraph 1, of Law 9.504/97.

Art. 7 The performance of the Superior Electoral Court in encouraging female participation in the electoral process, referred to in art. 93-A, of Law 9.504/97, shall be executed through institutional advertising in the four-month period from June to September 2020.

Art. 8 The choice of candidates by the parties and the deliberation on coalitions, in party conventions, should take place between the 5th and 20th of September (between the 20th of September and the 5th of October).

Sole paragraph Regardless of the public health situation in the country, the use of technological communication instruments that allow distance integration between affiliates is authorized, provided that their broad democratic participation and security regarding party decisions and deliberations are ensured.

Art. 9 The requests for application registration, governed by article 11, of Law 9.504/97 and article 93 of Law 4.737/65, must be formalized to the Electoral Court by noon on September 30 (October 15), with the beginning of electoral advertising starting on October 1 (October 16) 2020.

Art. 10 Parties and candidates must report to the Electoral Justice, pursuant to article 29, of Law 9.504/97, regardless of the occurrence of a second round, until December 20 (December 27) 2020.

Sole paragraph Partial accountability shall be done by November 01 (15), 2020.

Art. 11 The electoral judges will designate the diploma for the period between the end of the election and the December 30.

Art. 12 The deadlines for filing the actions of art. 30-A and 41-A, of Law 9.504/97 remain, counted from the diploma, with the exception of the three-day period for filing an appeal against the issuance of a diploma, which will begin on January 21, 2021, pursuant to paragraph 3, of article 262 of the Electoral Code.

Art. 13 The procedural deadlines, in electoral deeds, shall run on weekends and holidays, until the date of the diploma.

Art. 14 The Superior Electoral Court shall issue a new Resolution on the electoral calendar, adapting it to the provisions of this law, as well as regulating other issues necessary for the effective conduct of the elections.

Art. 15 This law enters into force on the date of its publication.

WORKING GROUP

Brazilian elections' ways through the pandemic:
ABRADEP's contribution to the debate

WORKING SUBGROUP 2

THE ROLE OF THE ELECTORAL JUSTICE IN ITS RELATIONS WITH
VOTERS, POLITICAL PARTIES AND OTHER AGENTS: HOW TO
GUARANTEE EFFICACY AND EFFECTIVENESS IN OPPOSITION TO
THE RISKS OFFERED BY THE CORONAVIRUS?

FINAL REPORT

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RAIMUNDO AUGUSTO FERNANDES NETO • SABRINA DE PAULA BRAGA*

BRASÍLIA, 2020

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Brazil has held elections since 1532 and since the beginning of the second reign they have become regulars. The only event that prevented, even partially, the holding of an election in Brazil was the Paraguayan War.

The work here presented has as main objective to verify the impacts of the pandemic of COVID-19 on the electoral calendar and to offer alternatives to guarantee the occurrence of the coming Municipal Elections.

Therefore, all phases of the electoral process were analyzed using the impact generated by social isolation as a criterion. Observing the uncovered scenario, 26 suggestions were offered to mitigate the damage resulting from the pandemic, guaranteeing the fulfillment of the election and respect for candidates and voters political rights.

In the electoral enlistment, the main concern is with maintaining remote attendance and with the creation of mechanisms that ensure the political participation of prisoners, people with physical disabilities and security agents, as well as with the creation of security protocols for the face-to-face assistance of voters.

Regarding EviD Operators (EO), preventive measures would include reducing the number of people drafted by polling station, strengthening volunteer programs and virtual training and developing a protocol for cleaning materials used in polling stations.

Entering the party and candidates, the most evident concerns are related to the need to maintain social distance and the need to legitimize and strengthen virtual mechanisms for the temporary replacement of face-to-face meetings.

In this scenario, it is suggested that the conventions, the pre-campaign, the advertising and the electoral financing be adapted

to these new needs, and we also discuss the most appropriate mechanisms to achieve the objective with greater success.

The candidacy registration process is the phase of the electoral process with the least problems, due to the Electronic Judicial Process universalization in the Electoral Justice, however, there is still a need to equalize the isolation reality and the theoretical need to conduct hearings, which could occur virtually.

The apex of the whole process will certainly be the voting day, a time when the largest gathering of people will occur and, at this moment, it is impossible to be carried out virtually. The proposals presented take into consideration the possibility of increasing the number of polling stations and the extension of voting hours, which would dilute the frequency of voters to the polling stations over time.

In addition, it is suggested to create a health protocol for voting, which would include waiving the voter's biometric recognition.

Finally, in the procedural area, it is necessary to regulate the performance of procedural acts virtually, as well as, the necessary mechanisms to introduce lawyers to this new reality.

A country that has gone to the polls for five centuries has already developed the capacity to reinvent itself electorally and has shown indisputable resilience. Thus, the COVID-19 pandemic must be seen as a fully transposable obstacle, which translates into a real opportunity for reinventing the electoral process, leaving valuable fruits for future elections, especially related to the good use of technology.

1. DELIMITATION OF THE OBJECT OF ANALYSIS

The group's scope of analysis is, as a central object, limited to verifying the impacts of the coronavirus pandemic on the electoral calendar already foreseen for the 2020 elections, in the form of TSE Resolution n°. 23.606/2019.

It is intended, therefore, to evaluate how the determination of physical isolation - which is the main guideline of the international health authorities - will intervene in the different phases of the electoral process, thus contributing to the eventual need for specific regulation, by law or by resolutions issued by the Electoral justice.

The work will be developed from 09 thematic axes, corresponding to specific phases of the electoral process: a) Enlistment of voters and biometrics; b) Summons of EviD Operators; c) Holding of Party Conventions; d) Pre-campaign; e) Electoral advertising; f) Electoral Financing; g) Candidacies Registrations; h) Elections: voting process; i) Sessions of judgment, participation and monitoring of decisions.

It should be noted that the affiliation and setting of voting residence phase for the would-be candidates for the 2020 elections were not dealt with in this report, since they were closed on 04/04/2020, before, therefore, the development of this work.

It should also be noted that the information from Technical Note n°. 3, produced by the Department of Production Engineering and by the Center for Education in Collective Health, was established as analysis premises in relation to the COVID-19 pandemic, both from the Federal University of Minas Gerais - UFMG.

In that note, the authors offer a mathematical model for predicting the availability of beds during the pandemic, and present, for that purpose, the number of cases expected in the coming months and the likely pattern of development of the pandemic.

The infection model assumes that the number of COVID-19 cases over time should follow a logistical distribution, which is a type of distribution suitable for modeling the spread of epidemics. This model assumes that the number of cases grows exponentially at the beginning of the epidemic and that after reaching half of the population to be infected, the slope of this curve is smoothed until it becomes asymptotic in relation to the total number of people to be infected²¹.

Taking the state of Minas Gerais as the parameter indicated in the study, it is observed that the highest incidence period of new cases is located between the beginning of May and the beginning of July. From the first half of July, the curve is expected to smooth out.

FIGURE 1 – ILLUSTRATIVE CURVE OF THE DISTRIBUTION OF NEW DAILY CASES IN MG (02/04/2020)



SOURCE: Technical Note n°. 4 – School of Engineering of UFMG

²¹ “TECHNICAL NOTE n°. 4- School of Engineering of UFMG.” 2 April 2020. Available at: <<https://www.eng.ufmg.br/portal/wp-content/uploads/2020/04/Nota-Tecnica-NT4-Covid-19-0204.pdf>>. Accessed on 20 April 2020.

In turn, according to a previous study²² by Professor Rafael Ribeiro, of the Public Policy and Development Group (GPPD), linked to the Faculty of Economic Sciences at UFMG, the peak of contamination of COVID-19 varies between the different Federative Units, but mostly located between the second half of April and the first half of May. The need for social distance during this period is, according to the study, the only necessary measure that has been shown to be effective in flattening the curves in the number of infected people and, consequently, in deaths, hospitalizations and individuals who need intensive care until the end of the pandemic (RIBEIRO, 2020, p. 12).

Imperial College London report²³ points out that, in the case of maintaining improved social distance from the elderly, a situation in which there is social distance between the elderly in the proportion of 60% and other inhabitants in the proportion of up to 44%, the number of deaths in Brazil can reach 529,779 people, with 3,222,096 hospitalizations and 702,497 individuals in need of intensive care until the end of the pandemic.

Regarding the prediction of virus behavior in Brazil, it is important to mention the technical note²⁴ “Challenges and proposals

²² RIBEIRO, R. S. M. (2020). **Previsões a partir do modelo epidemiológico SIR para os casos de infecção pelo COVID-19:** uma aplicação para os estados de SP, MG, RJ, DF e CE. Technical Note - 01/2020 - Public Policy and Development Group (GPPD), Belo Horizonte, MG, date 30/03/2020. Available at: <<https://pesquisas.face.ufmg.br/gppd/wp-content/uploads/sites/24/2020/03/30.03-Previs%3%b5es-de-infec%3%a7%-c3%a3o-pelo-COVID-19-Aplica%3%a7%c3%a3o-para-os-Estados-Brasileiros.pdf>>. Accessed on 20 April 2020.

²³ WALKER, Patrick GT, WHITTAKER Charles, WATSON, Oliver *et al.* The Global Impact of COVID-19 and Strategies for Mitigation and Suppression. **Imperial College London (26-03-2020)**, doi: <https://doi.org/10.25561/77735>. “Report 12: The global impact of COVID-19 and ... - Spiral.” 26 Mar. 2020. Available at: <<https://spiral.imperial.ac.uk:8443/handle/10044/1/77735>>. Accessed on 20 Apr. 2020.

²⁴ TONUCCI FILHO, João B. M.; PATRÍCIO, Pedro Araújo; BASTOS, Camila (2020). **Technical note - challenges and proposals for coping with**

for coping with COVID-19 in urban peripheries: analysis of housing and sanitary conditions of urban households in Brazil and in the Metropolitan Region of Belo Horizonte”, according to which at least 50% of homes in Brazilian cities are marked by some form of irregularity or illegality. These informal urban settlements are characterized, in general, by high population density, precarious housing, irregular water supply; precarious or nonexistent collection of sewage and solid waste; and restricted access to public services, such as health. The authors state that:

The main recommendations of health agencies to prevent the spread of the virus - such as washing hands, isolating oneself and physically distancing themselves - are practically impossible to be strictly followed under such conditions, as they require basic living conditions and access to essential services (eg water, space, etc.).

The scenario based on this report as an analysis premise is, therefore, as follows: high incidence of contamination between the end of April and the beginning of July 2020, with uneven and more severe distribution in the peripheries of the urban centers ahead. Faced with this scenario, the need for physical isolation as the main control and flattening measure of the COVID-19 contamination curve is imposed.

Our proposal is to assess, based on this prediction and the electoral calendar for the 2020 elections, how isolation may intervene in each of the phases of the electoral process, indicating, due to the

Covid-19 in urban peripheries: analysis of housing and sanitary conditions of urban households in Brazil and the Metropolitan Region of Belo Horizonte. Available at: <<https://www.cedeplar.ufmg.br/noticias/1229-nota-tecnica-desafios-e-propostas-para-enfrentamento-da-covid-19-nas-periferias-urbanas-analise-das-condicoes-habitacionais-e-sanitarias-dos-domicilios-urbanos-no-brasil-e-na-regiao-metropolitana-de-belo-horizonte>>. Accessed on 20 April 2020.

period of completion of each phase, the specific risks, classified as very high, high, medium or low impact.

Here is the pertinent analysis for each of the phases of the electoral process.

2. IMPACT OF MEASURES TO COMBAT CORONAVIRUS PANDEMICS ON THE ELECTORAL PROCESS AND COPING PROPOSALS

2.1. VOTERS LISTING AND BIOMETRY

Risk indicator: Very high impact risk

Period: end of April and until 6/05/2020

TSE Resolution n°. 23.606/2019, which establishes the 2020 Electoral Calendar, provides, in Annex I, that May 6 is the last day for voters to request enrollment, transfer and review operations. Thus, between the last day of suspension of face-to-face service in the Electoral Court, determined in TSE Resolution n°. 23.615 of 2020, and the final deadline for requesting registration, transfer and revision of electoral registration, we will be in the period in which, according to what they point out studies, the rates of transmission of the virus will be high.

Considering that most of the people who seek the services of the Electoral Registry cannot even follow the guidelines of the health agencies to prevent the spread of the virus, and the enrollment, transfer and review operations require, in large part, the collection of biometric data, the Electoral Justice urgently needs to review its working method in order to protect not only the health of the citizen who seeks its services, as well as the health of its employees, highly exposed to contamination by the coronavirus.

During the production of this report, the Superior Electoral Court published TSE Resolution n°. 23.616/20, which added Articles 3-A and 3-B to TSE Resolution n°. 23.615/20, “which establishes an Extraordinary Duty regime to standardize the functioning of judicial services in order to prevent contagion by the New Coronavirus (COVID-19), and to guarantee access to justice in this emergency period”.

According to the Resolution, the operations of the National Register of Voters are limited to cases of (I) enlistment, (II) transfer,

(III) revision with change of the Electoral Zone, in case of justified need to facilitate voter mobility, (IV) revision for alteration of data indispensable for the issuance of documents or exercise of rights and (V) revision for regularization of canceled registration.

The option to process the Electoral Enlistment Requirements (RAE) without the collection of biometric data was allowed, with the possibility of using the previous electoral attendance - Net Title and postponing until after the validity period of TSE Resolution N°. 23.615/20 - April 30, 2020 - the requirement that the voter must appear in person at the respective Electoral Registry.

It is suggested, as the main proposal related to this topic, that the measure be extended to cover the entire term of the end of the enlistment and, at least, until the end of May. It is also important to avoid, as much as possible, the physical attendance of the voter in the electoral registries and, therefore, it is necessary to regulate more specifically strategies in this sense.

It is also necessary to expand remote registration strategies for the enlistment of pre-trial prisoners and for the temporary transfer of voters with disabilities or reduced mobility, military personnel, transit and public security agents, municipal guards, electoral judges, Electoral Justice servants and electoral promoters in service, whose term ends on 08/20/2020.

PROPOSAL N°. 1:

MAINTENANCE OF THE SUSPENSION OF FACE-TO-FACE SERVICE UNTIL, AT LEAST, THE END OF MAY

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

What is proposed is the maintenance of the suspension of face-to-face service, given the permanence of the exceptional situation to cover the entire period from the end of the enlistment (until 05/06/2020) and, at least, until the end of May (for the subsidiary voter service).

In cases of possible loss of rights before other public and private entities, the Electoral Justice may authorize the issuance of a detailed certificate, informing about the impossibility of face-to-face service in view of the suspension, a certificate to be made available on the websites of the Regional Courts and the Superior Electoral Court.

Maintaining the proposed suspension, it is necessary to improve and expand the list of services available to voters on the websites of the Regional Electoral Courts and the TSE. In addition, it is suggested that the methodology for providing services under the remote work regime be organized and improved, with an increased capacity for remote access to the Electoral Justice systems such as INFODIP, ELO and SOS, in addition to hosting training for servers on websites that can be accessed at home, such as TSE Remote Teaching.

PROPOSAL Nº. 2:

DEVELOPMENT OF A STRATEGY FOR REMOTE REGISTRATION OF PRE-TRIAL PRISONERS AND FOR THE TEMPORARY TRANSFER OF VOTERS WITH DISABILITIES OR REDUCED MOBILITY, MILITARY PERSONNEL, TRAFFIC AND PUBLIC SECURITY OFFICERS, MUNICIPAL GUARDS, ELECTORAL JUDGES, ELECTORAL JUSTICE SERVANTS AND ELECTORAL PROMOTERS IN SERVICE.

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

As provided for in the Electoral Calendar of Elections 2020 (TSE Resolution nº. 23.606/2019), 08/20/2020 is the last day for the registration of pre-trial prisoners and also for the registration of provisional transfers of persons with disabilities and other categories.

The Electoral Justice will have already tried, therefore, remote registration strategies for voters in general and may also expand the use of these strategies to register these voters.

Although, according to the studies, August is already a month of smoothing the contagion curve, once the strategies have already been developed and tried, it is understood that expanding its use would not imply additional costs and would be beneficial to meet the eventual extension of physical distance guideline.

Another solution to be verified would be the creation of remote teams to assist these voters, duly equipped with specific personal protective equipment to combat COVID-19, such as those used in the risk areas of hospitals.

PROPOSAL Nº. 3:

REGULATION OF SANITARY CONTROL MEASURES
WHEN RETURNING FROM FACE-TO-FACE ASSISTANCE

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

At the end of the suspension of face-to-face assistance, it is considered necessary to adopt sanitary measures to control the spread of the virus, which can even be practiced permanently to prevent the contagion of servers and voters by COVID-19 and also other diseases and illnesses.

It is understood that the health protocols of successful countries in the fight against the pandemic of COVID-19 should be adopted as a paradigm, with emphasis on the case of South Korea. Just as an initial indication, it is proposed:

- A)** service provided exclusively or primarily by prior appointment. If the voter does not have access to the World Wide Web, Internet, or telephone to make an appointment via the Regional website or by the Elector's Dial, respectively, he/she may, exceptionally, attend the Electoral Registry to be served or, depending on the concrete situation, for a server to schedule, within the service capacity of the unit (as already occurs in the agencies of the Federal Revenue of Brazil, under the terms of article 12 of Ordinance RFB nº. 457 of 28 March 2016);
- B)** provision of personal protective equipment for servers, such as gloves, masks and even face shields (viewfinders) that provide an effective barrier against droplets or aerosols;

- C) installation of transparent acrylic panels in the service windows;
- D) supply of products for cleaning and sanitizing workstations;
- E) supply of hand sanitizer and liquid soap for servers and voters to clean their hands before and after the service;
- F) suspension of biometric data collection until official health agencies declare an end to the pandemic. If not, the acquisition of more accurate digital readers is proposed, thus avoiding the contact of the server with the voter when collecting the fingerprints;
- G) make an agreement with health agencies to guide civil servants in relation to the necessary security measures for their protection and that of the voter;
- H) exclusion, from the face-to-face scale, of employees and collaborators identified as at risk group, comprising the elderly, people with chronic, immunodepressed, respiratory and other pre-existing comorbidities that may lead to a worsening of the general health status from contagion, with special attention to diabetes, tuberculosis, kidney diseases, HIV and co-infections, or those who returned in the last fourteen days, from trips in regions with a high level of contagion.

2.2. CALL FOR EVID OPERATORS

Risk indicator: High impact risk

Period: end of May (selection and availability check of the polling station) and until 08/05/2020 (deadline for call)

The participation of EViD Operators in Brazilian elections is provided for in Article 120 of the Electoral Code. They are the representatives of the Electoral Justice before the polling stations, and are distinguished as presidents, members, secretaries and alternates. Their appointment does not require a specific hearing preceded by 5 days prior to the announcement by announcement of the nominees, 60 days prior to the elections.

TSE Resolution n°. 23,611/19, which deals with the general acts of the 2020 elections, in Article 20, establishes the period between July 7 and August 5, 2020, for the constitution of the polling stations and justification stations. Units allocated to detention facilities and juvenile detention facilities will have a deadline for appointing the receiving desks until August 28, 2020.

TSE Resolution 23.606/19, which deals with the Electoral Calendar for Elections 2020, lists, in a definitive way, the dates related to the formation and appointment of the members of the polling stations (EViD Operators) to be observed by the bodies of the Electoral Justice. These are the main mentions:

July 7 - Tuesday

Date from which, until August 5, 2020, the electoral judge will appoint the members of the polling stations and the logistical support staff of the polling stations for the first and possible second rounds of voting.

July 14 - Tuesday

5. Date from which, until August 28, 2020, EViD Operators and those summoned as logistical support who will

act in a section or location different from their section of origin, including those who will act at the tables installed in the penal and detention facilities for adolescents, may request temporary transfer of section, provided that it belongs to the same municipality.

August 5 - Wednesday (60 days before)

4. Last day for the nomination of the members of the receiving desks and the logistical support staff for the first and eventual second rounds of voting, with the exception of the EViD Operators who will act in the sections installed in penal establishments and in the juvenile detention units, who will be appointed until August 28 (Electoral Code, art. 120, § 30).

5. Last day for publication in the *Diário da Justiça Eletrônico* (Electronic Official Journal), in the capitals, and, in the form established by the regional electoral courts, in other locations, of the notice containing the nominations of the receiving desks members and those summoned for logistical support (Electoral Code, art. 120, § 3°).

August 10 - Monday

1. Last day for the receiving desks members and those summoned for logistical support to refuse the appointment, observing the period of 5 (five) days counted from this act, except for the hypothesis of supervening impediment (Electoral Code, art. 120, § 4°).

2. Last day for political parties to complain to the electoral judge about the appointment of the polling stations members and those summoned to logistically support the polling places, observing the period of 5 (five) days from the publication of the nominations or the supervening situations provided for by law (Law n°. 9.504/1997, art. 63, caput and Electoral Code art. 121, § 2°).

August 12 - Wednesday

1. Last day for the electoral judge to decide on complaints regarding the composition of the polling and receiving desks and the voters appointed for logistical support (Law n°. 9.504/1997, art. 63, caput).

August 15 - Saturday

10. Last day for political parties to appeal against the decision of the electoral judge on the appointment of receiving desks members and those summoned for logistical support, subject to a period of 3 (three) days from the publication of the decision (Law n°. 9.504/1997, art. 63, § 1°).

August 28 - Friday (37 days before)

1. Last day for the appointment of receiving desks members in the sections installed in penal establishments and in the juvenile detention units, for the first and eventual second rounds of voting (Electoral Code, art. 120, § 3°).

September 4 - Friday (30 days before)

1. Last day for the electoral judge to decide on the complaints regarding the composition of the voting receiving desks installed in the penal and detention centers for adolescents (Law n°. 9.504/1997, art. 63, caput).

September 7 - Monday

1. Last day for political parties to appeal against the decision of the electoral judge on the appointment of members of the polling stations' receiving desks of the criminal establishments and the detention of adolescents, observing the period of 3 (three) days from the publication of the decision (Law n°. 9.504/1997, art. 63, § 1°).

October 1 - Thursday (3 days before)

1. Date from which the electoral court or the president of the receiving table may issue a safe-conduct in favor

of voters who suffer moral or physical violence in their freedom to vote (Electoral Code, art. 235, sole paragraph).

October 4 - Sunday - ELECTION DAY (1st round)

1. Date on which the first round of elections will be held, by universal suffrage and direct and secret vote, observing, in the electoral section, according to local time:

2. From 7am

2.1.1. Installation of the polling station (Electoral Code, art. 142).

October 25 - Sunday ELECTION DAY (2nd round)

1. Date on which, in municipalities with more than 200,000 voters where there was no absolute majority in the mayoral vote, the second round of elections will be held, by universal suffrage and direct and secret vote, observing in the electoral section, according to local time:

1. From 7am

1.1. Installation of the polling station (Electoral Code, art. 142).

As noted by the electoral deadlines, the date July 7 to August 5, 2020, extending until August 28, 2020, in the specific case of the receiving and justification tables of the prison units and for the recovery of juvenile offenders, are officially the convocation and homologation period.

Before this period, however, the process of attracting people interested in volunteering as an EViD Operator is already observed, through the Electoral Justice Volunteer EViD Operator Program²⁵.

In most Brazilian cities, especially small ones, the personal summons of EViD Operators is still used, through the diligence of

²⁵ “Volunteer EViD Operator — Superior Electoral Court - TSE.” <<http://www.tse.jus.br/eleitor/mesario/programa-mesario-voluntario>>. Accessed on 22 April 2020.

a bailiff or members of the electoral registry offices. However, the summons and appointment process are also carried out remotely, via telephone or by e-mail, with no need for physical meetings during the summons and approval phase. Therefore, it is necessary to evaluate the possibility of extending the forms of remote summons also to small municipalities.

One factor that may constitute an obstacle to the formation of the EViD Operators for the 2020 elections is the quantitative, since the number of those summoned to contribute to the electoral process is significant. According to data from the Electoral Justice²⁶, the 2018 elections counted on two million EViD Operators called; half of this number were volunteers.

The pandemic would likely cause difficulty in recruiting volunteer staff, who, in theory, could stop joining the Electoral Justice program. This is because the moment of attracting volunteers will be crossed by the peak of contagion and pressure on the health system, a context that will obviously generate generalized anxiety and stress. In such a context, it is natural for people to try to focus their attention on their most immediate and pressing activities, which is why it is reasonable to expect a drop in the number of volunteers.

Even for the identification of suitable profiles to be summoned, the Electoral Justice may face some difficulty, due to the attendance drop in the final registration period. It is generally in face-to-face assistance that the profile of the voter to act as EViD Operator is identified. In addition, the most recent movement of the register usually guarantees the correctness of the information necessary for the call - address, telephone, means of contact, etc.

As for the training of EViD Operators provided for in article 122 of the Electoral Code, which usually takes place from August,

²⁶ “Voting mobilizes about 2 million EViD Operator in the country - TSE.” 26 Oct. 2018. Available at: <<http://www.tse.jus.br/imprensa/noticias-tse/2018/Outubro/votacao-mobiliza-cerca-de-2-milhoes-de-mesarios-no-pais>>. Accessed on 22 Apr. 2020.

although this is the expected period of smoothing the curve, it is necessary to prepare for any extension of the guideline to avoid agglomerations. In this case, it is noted that the Electoral Justice already has tools for virtual or remote training of EViD Operators, through the TSE's²⁷ distance training portal, which also developed an application²⁸ with the same purpose. However, it would be necessary to assess the effective reach of these tools.

Having overcome the barriers to attracting, appointing and training EViD Operators, their indispensable attendance remains on election day, which is considered irreplaceable in the current technological moment.

It is worth mentioning that TSE Resolution n°. 23.611/19 (article 16, single paragraph) provides for the possibility of reducing the format of the tables receiving justifications for two members. It is suggested that the possibility of adopting a similar measure be evaluated in the case of voting receiving desks, which would result in a significant reduction in the number of EViD Operators to be called.

²⁷ "EAD-TSE." Available at: <<https://educacao.tse.jus.br/>>. Accessed 22 April 2020.

²⁸ "EViD Operators Channel — Superior Electoral Court - TSE." Available at: <<http://www.tse.jus.br/eleitor/mesario/canal-do-mesario>>. Accessed on 22 Apr. 2020.

PROPOSAL N.º. 4:
REDUCTION OF THE NUMBER OF EViD OPERATORS FOR THE 2020 ELECTIONS
*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

In view of the general context of difficulty in attracting polling stations and also due to the possibility of extending the guideline to avoid agglomerations, it is suggested to reduce the number of EViD Operators at the receiving desks, with the same minimum number used for the justification tables (two members), or even setting the number of 3 EViD Operators, in case of eventual absence.

PROPOSAL N^o. 5:
IMPROVEMENT OF THE VOLUNTARY EVID OPERATORS PROGRAM

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

As noted, it is reasonable to expect that one of the consequences of the pandemic will be the reduction in adherence to the Electoral Justice volunteer EVID Operators program. For this reason, it is proposed that the dissemination of the program be reinforced on social networks and virtual communication channels.

It is also suggested that a work be carried out to attract and encourage the participation of volunteer EVID Operators who worked in the last elections, clarifying the need for their participation in the general scenario.

PROPOSAL N^o. 6:
IMPROVEMENT OF THE VIRTUAL TRAINING PROGRAM FOR EVID OPERATORS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

It is suggested that the remote training strategies be improved, based on the experience that the Electoral Justice already has with the Remote Training and App of the EVID Operator, channels that achieved efficiency in the last elections.

It is also interesting to evaluate the performance, in cooperation, with higher education institutions, since many of them are currently using distance learning and could encourage their students to carry out virtual training and to act as voluntary teachers, with the offer corresponding extracurricular hours.

PROPOSAL Nº. 7:

ADOPTION OF HEALTH SECURITY PROTOCOLS FOR THE ASSEMBLY AND SENDING OF MATERIALS TO EVID OPERATORS AT POLLING STATIONS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Even though the preparation and sending of the EVID Operators material are activities to be carried out in a date close to the elections – and therefore, outside the period of the rising curve and the peak of the pandemic–, the measures regarding the purchase of the material must already be taken now, in the first semester, and the likely permanence of health guidelines will need to be taken into account.

It will be necessary, therefore, to foresee strategies and instruments to be sent to polling stations, such as PPE equipment, hand sanitizer, masks, gloves and, eventually, specific clothes for EVID Operators.

Also, in relation to this topic, it is considered convenient to adopt as a paradigm the South Korea's health security protocol, used for the elections held on April 15, 2020, which were attended by about 29 million voters. In the voting process carried out by the South Koreans; the temperature of the voters was measured before entering the polling place, in such a way that, if a person presented a feverish frame, they were taken to a special booth. In addition, each voter was given a glove before entering the polling place and was required to pass hand sanitizer on their hands at the exit. Voters and EVID Operators also had to wear masks.

In addition to the concern on what will compose the material to be used in the polling stations, the Electoral Court must prevent the material itself – even electronic ballot boxes – from becoming vectors of contamination. It will be necessary to adopt a strict protocol for cleaning the material that will be sent to the sections.

2.3. HOLDING OF PARTY CONVENTIONS

Risk indicator: High impact risk

Período de realização: final de julho e até 05/08/2020

Called by Delmiro Campos Neto as the trigger of the elections (2018), it is known that party conventions mark the beginning of candidates choice and the celebration of majority coalitions, enshrined in article 3 of Law 9.096/95 and article 7 and the following ones of Law nº. 9.504/97, with the reform brought by Law nº. 13.165/15; they should be carried out in the period from July 20 to August 5 of the year in which the elections are held.

This is crux of the Brazilian electoral process, at which human contact is intense and important for the consolidation of political strategies. Walber Agra (2016) teaches that the party convention is nothing more than a meeting or assembly in which people discuss or decide on which candidates will run for election and which compositions will be the best for acronyms. Therefore, it takes place with the physical meeting of supporters, party leaders, affiliates and would-be candidates and, even though it is inserted in a period in which the contagion curve is expected to stabilize, it can be crossed by the extension of the isolation directive or that agglomerations are avoided.

It should be noted that the definition of how to carry out the conventions is within the scope of the party autonomy of associations, and it is up to them to define, in their statutes, the relevant rules. If the party does not have predefined rules that regulate its realization, they have up to 180 days to edit them and forward them to the TSE.

Thus, it will be up to the Electoral Justice to assess the need for regulation and encourage the virtual realization of the conventions by political parties, with the promotion of communication campaigns especially in small cities, with the local party bodies. It

is understood that the strategy needs to be made with the necessary advance so that the party leaders are able to organize and properly communicate the affiliates, especially since these are municipal elections, traditionally marked by physical contact.

A second suggestion would be to postpone, as much as possible, the date of the conventions. Traditionally, political arrangements have meant that conventions mostly take place on the last day of the electoral calendar (August 5), that is, 10 days before the final date for candidacy registration.

This suggestion, however, would require legislative change, which should observe the debate about the application or not of the electoral annuality rule provided for in article 16 of the Federal Constitution.

PROPOSAL N^o. 8:
ENCOURAGING POLITICAL PARTIES TO USE VIDEOCONFERENCES
AT CONVENTIONS/MEETINGS
*Proposal that does not require legislative change;
proposal that takes into account party autonomy with the
possibility of guidance by the Electoral Justice*

Due to possibility of extending the physical isolation and the need to avoid crowds of people, it is suggested that the Political Parties, with the collaboration of the Electoral Justice, change their party guidelines (statutes) to encourage the use of virtual strategies for the conventions, allowing party conventions/meetings to be held by videoconference.

These technology tools to be used by the parties must be authenticated/regulated according to the systems and programs of the Electoral Justice, in which it will be possible to electronically sign the presence and other acts to validate the decisions taken there.

There is a need for this stimulus to take into account the reality of most municipal party bodies and their affiliates, which traditionally define political strategies in physical meetings. Therefore, they tend to resist and have more difficulty with the use of information technologies.

Besides, it should be noted that those entitled to participate and with voting power are the so-called conventionals, who are part of the internal structure of acronyms and that, in a significant part, legitimize their actions through provisional bodies, passing the deliberations through the sieve, from the hierarchically top directory. However, access to the platform, during meetings, must also be available to members, electoral justice officials and the community in general.

It is suggested that campaigns to disseminate the importance of such preparation be formatted, with the indication of applications and free platforms for holding virtual meetings. The campaigns can

be carried out with the collaboration of companies that offer the service and also in conjunction with the *OAB* (Order of Attorneys of Brazil) and the national directories of the parties, which can collaborate for the capillarization of information.

PROPOSAL Nº. 09:

ASSESS THE NEED FOR A RESOLUTION TO REGULATE THE REQUIREMENTS FOR THE HOLDING OF VIRTUAL CONVENTIONS

*Proposal that does not require legislative change;
proposal that takes into account party autonomy with t
he possibility of guidance by the Electoral Justice*

The holding of party conventions is a step that falls within the scope of the autonomy of associations, which are responsible for regulating their requirements and formats in the statutes.

However, due to the need to migrate physical conventions to the virtual environment, it is understood that it will be the case of assessing whether the technology tools to be used by the parties should be minimally authenticated/regulated by the Electoral Justice, so that it is possible to make use of electronic presence signature and other mechanisms that guarantee the monitoring of the conventions.

It is registered, on the subject, the processing of Bill nº. 2.197/20, which intends to change the Law of Elections to expressly provide for the holding of an online party convention, with the need to observe certification protocols.

2.4. PRE-CAMPAIGN

Risk indicator: Very high impact risk

Period: before 16/08/2020 and, especially, in the months of April, May and June.

Law n°. 13.165/15, giving new wording to Article 36-A of Law n°. 9.504/97, marked significant changes in the incidence of early election advertising. Thus, a “Pre-Campaign” scenario was inaugurated, with broad traces of freedom of expression, demonstration and thought for all actors in the electoral process, as this institute is nothing more than an exclusionary type of early electoral advertising.

In these terms, the legislator chose to point out in the items of article 36-A, a series of conducts - which are understood to be part of an exemplary list - of acts considered legitimate to be developed by the alleged candidates.

In fact, it is worth noting that the pre-campaign period is considered to be one of the biggest time lapses within the electoral microprocess, as it embraces a gigantic phase, once it encompasses everything that precedes the August 16 (inaugural milestone of electoral advertising, itself). Therefore, this phase is pointed out as one of the foundations of the electoral process, when several pre-candidate actions are carried out to plan and make possible their candidacies and future electoral campaigns, with the linking of strategies and political support, viability verification and chances of successful victory at the polls, etc.

The electoral microsystem authorizes the perpetration of several conducts capable of being used by the pre-candidates, which can be carried out, as long as they do not contain the infamous “explicit request to vote”. Therefore, there are numerous pre-campaign acts included in the items of article 36-A at the disposal of the would-be candidates. Let’s look at each of the acts described in that article:

I - the participation of members of political parties or pre-candidates in interviews, programs, meetings or debates on radio, television and the Internet, including the exposure of political platforms and projects, observed by radio and television stations the duty to confer isonomic treatment.

There is, therefore, a high impact that the measures of physical isolation due to the coronavirus pandemic (COVID-19) may cause to this phase of the electoral process. Despite the possibility that interviews may take place by remote strategies, it has been seen that the media are broadcasting news of the pandemic more vehemently when compared with other subjects, which may end up restricting the space for the participation of pre-candidates for discussing this year’s municipal elections. In this way, it is pointed out that the political projects and platforms of the pre-candidates may not be being properly publicized (which is perfectly credible, at the moment), differently from what we are used to witnessing in the previous phase of party conventions.

II - the holding of meetings, seminars or congresses, in a closed environment and at the expense of political parties, to deal with the organization of electoral processes, discussion of public policies, government plans or party alliances aimed at the elections, and such activities may be disclosed through the instruments of intra-party communication;

Another point in which impacts are already observed, since the device determines the realization of events in a closed environment - a determination that finds obstacles in the respective state and municipal decrees that prohibit any type of crowding. Strategies for holding virtual meetings may come up against the effective economic and technical capacity of associations - especially in small municipalities - for their viability.

In this way, the consequences of the coronavirus pandemic in the intra-party environment are already visible, since several acts approved by the legislator in the pre-campaign period and which, traditionally, would already be occurring in the months of April, May and June, will be harmed by the need to social isolation.

Bearing that in mind, party organization is a key factor in the development of activities promoted by political parties – especially during this period – since previous discussions are key and vital mechanisms for the development of subsequent acts in the electoral process, and their practice is a support for the democratic aspect.

III – the holding of party previews and the respective distribution of information material, the disclosure of the names of the members who will participate in the dispute and the holding of debates among the pre-candidates;

On this point, it appears that the internal, healthy and suitable dispute between pre-candidates will have to be perfected and remodeled by the actors of the electoral process, since the face-to-face acts are discarded – for now – from the political-party life. Given this context, it is revealed that the migration of this debate to the virtual platforms will require a greater internal organization of the associations so that the affiliates and pre-candidates can expose their observations in strict compliance with the party statutes, without the social isolation causing damage to intra-party democracies.

Soon, the parties will have to improve the way they will conduct these essential acts for the electoral process, as this stage of the electoral microsystem requires the gathering of people to discuss, debate, give opinions and decide on the direction of the parties in the coming elections, especially when it comes to municipal elections. The use of virtual applications and strategies will be a great novelty, with relevant challenges, since the physical presen-

ce through the “melee” is a historical path and already rooted in Brazilian politics.

IV – the disclosure of parliamentary acts and legislative debates, as long as no request for votes is made;

V – the disclosure of personal positions on political issues, including on social networks;

Of all the acts recorded in article 36-A, these are the ones that will have a reduced impact with the determination of physical isolation, since the disclosure of parliamentary acts and personal positioning on political issues are instruments already widely disseminated in virtual environments. Even so, it is stated that the measures to control the pandemic imply some loss, considering that the physical public meetings in which the pre-candidates propagate a kind of “accountability of the mandate” cannot happen.

VI – holding, at the expense of the political party, meetings of the initiative of civil society, a vehicle or means of communication or the party itself, in any location, to disseminate ideas, objectives and party proposals.

Here is another hypothesis in which the determination of social isolation will imply the need for the virtual realization of acts that traditionally took place with physical encounters between people. Thus, the occurrence of these crucial acts for the party experience should be treated carefully by the associations so that part of civil society will not be harmed, especially those who have greater difficulty in accessing and handling information technology means – in meetings and virtual debates. Removing or hindering voter participation in the internal lives of these bodies constitutes severe damage to the Democratic Rule of Law.

VII – prior fundraising campaign in the form provided for in item IV of § 4 of art. 23 of this Law.

The item above asserts about the possibility of crowdfunding, a matter that will be addressed in the topic on campaign financing.

Well, given this brief outline, it appears that the pre-campaign acts are already being affected by the measures taken to control the COVID-19 pandemic, since practically all pre-campaign activities materialize with the merger of people.

It is also added, the unbelievable argument that the restriction of these physical events provides a favorable environment for the current representatives and pre-candidates coming from the media, since it is the political actors that are already known to the voters, which obviously puts them in an even more preferential and privileged position in the electoral competition.

There is already some news published in the sense of the need to extend the electoral calendar contained in TSE Resolution n°. 23.606/2019. Undoubtedly, such a change would be beneficial, in the cut made in this topic, to guarantee the fullness of the pre-campaign acts.

Keeping the current calendar, the proposals made here are aimed at expanding the reach of the virtualization strategies of pre-campaign acts, as a way of mitigating the verified loss.

PROPOSAL N°. 10:

DEVELOPMENT OF A CAMPAIGN TO STIMULATE RADIO, TELEVISION AND INTERNET PLATFORMS TO CONDUCT INTERVIEWS, PROGRAMS, MEETINGS OR DEBATES BETWEEN PRE-CANDIDATES

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

It is suggested that the Electoral Justice promote, together with the political party directories, a campaign to stimulate traditional communication channels (radio and TV) and also with Internet platforms for holding debates, meetings, programs and interviews on the elections, with the participation of pre-candidates in conditions of equality.

It is understood that the institutional weight of this Specialized Justice will contribute to feed this important agenda, thus qualifying the debates related to the current electoral cycle. Furthermore, it is necessary to point out that the current parliamentarians who will have their mandates ended at the end of the year (City Councilors and Mayors) are gaining prominence in the media, motivated by the pronouncements and decrees pertaining to COVID-19, which, consequently, grants them a privileged position in the forthcoming dispute when compared with the would-be candidates.

It is, therefore, that the Electoral Justice and the Political Parties must act in a harmonious way with a view to privileging the smoothness, equality and health of the electoral election, since the pre-campaign acts are being tacitly suppressed by the pandemic that ravages our country.

PROPOSAL Nº. 11:

ENCOURAGING POLITICAL PARTIES TO USE INFORMATION TECHNOLOGY STRATEGIES TO HOLD MEETINGS, SEMINARS, DEBATES IN A VIRTUAL ENVIRONMENT DURING THE PRE-CAMPAIGN.

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Similar to the what was outlined in proposal nº. 8, and due to the determination of physical isolation, the need for the Electoral Justice to collaborate with the party bodies is reiterated to encourage the use of virtual strategies for holding meetings, seminars or congresses to deal with the organization of electoral processes, discussion of public policies, government plans or party alliances aimed at elections. Also, for holding party previews and events with civil society.

It should be noted, once again, the need for this stimulus to take into account the reality of most municipal party bodies and their affiliates, especially those that have greater difficulty with the use of information technologies.

The campaign can be carried out with the collaboration of companies that offer the service and also in conjunction with the OAB and with the national directories of the parties, which can collaborate for the capillarization of information. Therefore, the digital platform will be a determining mechanism for society to know their would-be candidates and their projects for the Government. So, the parties will have to develop virtual mechanisms that propitiate and foster debates and discussions on political issues so that intra-party democracy attuned to freedom of expression and demonstration are foundations maintained in favor of the Democratic Rule of Law.

2.5. CAMPAIGN ADVERTISING

Risk indicator: Average impact risk

Period: from 16/08/2020

If the prediction set out in the Technical Note indicated in the present study comes true, the period of the electoral campaign itself, starting on August 16, will be outside the peak of the pandemic. According to experts and scholars, the hope is that, starting in July, cases will begin to drop precipitously.

Along this path, the permissive period for the dissemination of candidacies through printed advertising (flyers, newspapers and magazines), as well as for the holding of rallies, carts and events that promote physical encounters will be crossed by reduced impact, especially if the measure physical isolation of the Brazilian population has had the expected effect.

Even so, it is necessary to consider the hypothesis of extending the physical isolation guideline, as well as the persistence, quite likely, of legitimate fears of crowds of people. It should be noted that there are types of electoral advertising that cause concern and greater attention in relation to this aspect, such as rallies, marches, walks and caravans.

Thus, there is a need to adapt the governing legislation to any health measures, with more incisive and restrictive regulation of such modality. It is considered that, for this purpose, a regulatory rule from the Electoral Justice itself would be sufficient, with the necessary adaptations to TSE Resolution nº. 23.610/19, as it is not a question of suppressing the electoral legal system already set, but rather an adaptation without the Superior Electoral Court using its regulatory power to a wide extent. Therefore, we understand that specific changes to the aforementioned Resolution will already have significant advances in the sense that the agglomerations of people do not result in a new pandemic

cycle in the country, since the world will no longer be the same in the post-COVID-19 era.

As an example, it should be noted that the distribution of campaign material on tables under the terms of article 37, §6 of Law n°. 9.504/97 is one of the measures that can be restricted by a new Resolution of the Superior Electoral Court, to the extent in which physical contact is intense and practically uninterrupted.

On the other hand, electoral advertising on the Internet gains importance in this context, since it does not require the gathering of people and the reach in the media is intense and instantaneous. Therefore, it is stressed that the digital platform will be a crucial instrument for the development of electoral campaigns; as in the previous elections, the Internet already gained a prominent position among the forms of advertising, as the vast majority of the population is connected in the media social - proof of this is the possibility of even promoting candidates' campaign content.

It is worth noting that the reduction of some electoral advertising means may contribute to favor the current representatives, since the would-be candidates - new to politics - will have greater difficulties in getting the voter to know them. Once again, we highlight the need for the more intense use of Internet advertising to take into account the risk of accentuating inequalities, with the exclusion of candidates and voters who have difficulties in using information technologies.

PROPOSAL Nº. 12:

REGULATION OF RESTRICTIVE MEASURES, CONSISTENT WITH POSSIBLE SANITARY MEASURES, FOR ADVERTISING MODALITIES THAT IMPLY PHYSICAL CONTACT

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Due to the possibility of extending the physical isolation directive, it is suggested that TSE Resolution n°. 23.610/19 be updated to adapt the means of execution of advertisements that matter in physical contact between people to the security measures recommended for the period.

As an example, we mention the edition of Municipal Decree n°. 17.332, of April 16, 2020, in Belo Horizonte, which made “the use of masks or coverings over the nose and mouth in all public spaces, equipment public transportation and commercial, industrial and service establishments in the Municipality obligatory”; and that determined that health services, clinics, laboratories and hospitals “should ensure a minimum radius of two meters between people”.

It is understood that such regulatory update should be edited later, in order to observe the recommended measures for the months of August and September.

So, there is no doubt that the Electoral Justice, through its normative power, should act with a different perspective on the rules of electoral advertising, since the use of protective tools (masks and hand sanitizer) will be part of society for a long period of time. Therefore, the TSE will have to establish a firm positioning that has systemic compatibility.

PROPOSAL Nº. 13:

CAMPAIGN TO STIMULATE ELECTORAL ADVERTISING ON THE INTERNET

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

In the same way as registered in proposals nº. 6 and nº. 8, it is suggested that the Electoral Justice promote, in collaboration with political parties and related institutions and companies, campaigns to encourage the use of electoral advertising on the internet, thus contributing for the knowledge and technical training of candidates.

We would like to call attention to the need for these campaigns to take into account, especially, the realities of municipalities and candidates that present increased difficulty in the use of virtual resources, in order to mitigate, as much as possible, the difficulty of accessing these strategies.

Having said that, it is practically a consensus that the Internet will be a fundamental vector for the constitutional principles of freedom of expression and demonstration to be safeguarded by the Electoral Justice, since it does not require physical contact and emerges as - ideal modality - for the use of electoral advertising.

2.6. ELECTORAL FINANCING

Risk indicator: Average impact risk

*Period: from 05/15 (collective financing) and, fundamentally,
in the months of August and September*

As a general rule, fundraising for campaigns and spending requires the following steps: submission of the candidacy registration; obtaining the campaign *CNPJ* (National Registry of Legal Entity); opening a specific bank account and issuing electoral receipts. This is the prediction that is traditionally found in TSE resolutions issued at each electoral election and also in the most recent TSE Resolution nº. 23.607/19, in its article 3. Thus, it is seen that the acts related to the financing of electoral campaigns will be carried out from August, therefore, outside the period in which the contagion peak of COVID-19 is expected (May and June).

It should be noted, however, that since the 2017 mini-reform, the electoral legislation allows for the prior collection of funds through the virtual collective financing or virtual kitty modality. This form of collective campaign financing may be used by pre-candidates from May 15 of the electoral year and allows for the prior collection of resources, the use of which is subject to the effective registration of candidacy, after the choice in party conventions.

It seems that the feasibility of using this mechanism will be little achieved by physical isolation, given that the early collection of resources is done virtually, as well as the registration of the collecting entities with the TSE is done virtually. In spite of this, it is reasonable to expect that this instrument will suffer a significant financial impact, given the situation of shrinkage in the Brazilian economy due to the pandemic. In this context - and especially in the peak months of the pandemic, fundraising would be difficult, since the moment is not the most propitious for individuals - the

only donor currently admitted – to be willing to transfer funds to pre-candidacy applications.

The lesser disposition for donations may extend to the campaign period, depending on the effective economic recession that will be experienced in the coming months. In addition, donations from candidates are restricted, from the 2020 elections, to a maximum of 10% of the spending limit provided for the position, under the terms of article 23, § 2-A of the Elections Law, included by Law n°. 13.878/19. Thus, there is a reasonable probability that the 2020 election campaigns will be especially marked by dependence on public funds, and especially in relation to the *FEFC* (Special Campaign Financing Fund) – whose estimated value is in the order of R\$ 2.034 billion.

The conclusion set out above points out to two issues; the first one is the importance that *FEFC* resources take to make campaigning actions possible in the 2020 elections and the need to maintain them.

There is news of filing of judicial measures, including the granting of injunctions, in which it is pleaded the destination of the public resources of the *FEFC* to finance the measures to combat the pandemic of COVID-19. In the National Congress, Senator Lasier Martins's proposal (Podemos-RS) intends to allocate *FEFC* resources (Bill n°. 1.123/20) for this purpose. The projects of senators Randolfe Rodrigues (Rede-AP) and Alessandro Vieira (Cidadania-SE), in addition to *FEFC*, also suggest allocating the resources of the Party Fund, about R\$ 1 billion, to combat the pandemic (Bill n°. 772/20 and Bill 870/20).

It is maintained here that any legislative change, in addition to having to observe the debate on the application or not the electoral annuality rule provided for in article 16 of the Federal Constitution, will result in severe difficulties for the conduct of electoral campaigns. The current reading in Political Science is that the absence or restriction to campaign acts presents a disproportionate advantage to candidates seeking re-election or to those already known.

In addition, a second issue that unfolds from the outlined diagnosis concerns the distribution, within the associations, of public resources for electoral campaigns, in a context of absolute centrality of these resources in the 2020 campaigns.

According to the current legislation, it is the associations themselves that establish the guidelines for the distribution of resources among their various candidates. The exception to this broad autonomy is the case of the financing of female candidacies, to which at least 30% of the *FEFC* resources and the resources of the Party Fund must be allocated in the electoral campaigns, in accordance with the understanding established by the Supreme Federal Court in the *ADI* (Action Direct of Unconstitutionality) 5617. Thus, there is a difficulty in equal access to resources by male candidates and even by female candidates – since the resources may be concentrated in a few campaigns. Regarding this second issue, it is understood that facing it would also require legislative changes, which should observe the debate on the application or not of the rule of electoral annuality provided for in article 16 of the Federal Constitution.

Finally, it should be noted that, in the event that the physical isolation guideline advances to the months of the election campaign – August and September, donation modalities that involve physical contact will suffer considerable restrictions. It would be especially the case for fundraising events, regulated by article 30 of TSE Resolution n°. 23.607/19, which would need to be restricted or adapted to the sanitary measures oriented for the period.

Another modality that will be affected by social isolation measures is the donation of financial resources physically carried out at bank branches. Although it is possible to carry out banking operations through applications, one must take into account the realities of the various Brazilian municipalities and also of social categories especially distanced from the means of information technology.

The need for thousands of bank branch candidates to physically attend to open the campaign bank account is another aspect that could be circumvented – or at least minimized – with the adoption of virtual strategies or even automatic opening of accounts by the institutions banking.

PROPOSAL Nº. 14:

CAMPAIGN TO PUBLICIZE THE VIRTUAL CROWDFUNDING MODALITY

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

It is suggested that the Electoral Justice, in collaboration with political parties and fund-raising entities, promote a campaign to publicize the virtual crowdfunding modality – new in the scope of municipal elections, so that pre-candidates and candidates can make use of this resource in the election of this year.

It should be noted that, even in the 2018 general elections, when the mechanism was used for the first time, 27 companies made it possible to collect R\$ 20,310,698.61, amount that corresponds to about 2% of the total private resources contributed to the electoral campaigns of that year (data verified in *DivulgaCandContas* 2018).

Therefore, there is an underutilization of this type of financing, which acquires, due to the need to restrict physical contact, central importance for the forthcoming election.

PROPOSAL Nº. 15:

REGULATION OF HOW EVENTS ARE HELD FOR COLLECTION,
APPROPRIATE TO SANITARY MEASURES

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

In the same way as pointed out in Proposal n°. 9, due to the possibility of extending the physical isolation, it is suggested that the TSE Resolution n°. 23.607/19 be updated to adapt the ways of holding events to raise funds to the security measures recommended for the period.

PROPOSAL Nº. 16:

CAMPAIGN TO ENCOURAGE THE USE OF BANKING APPLICATIONS
TO MAKE ELECTORAL DONATIONS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Also due to the possibility of extending the physical isolation, it is suggested that the Electoral Justice promote, in partnership with political parties and banking institutions, a campaign to encourage the use of applications to make electoral donations.

It should be noted that there is a need for such campaign to be developed in a way as to encompass the diverse realities of Brazilian municipalities and donors who are especially distant from the use of virtual means to carry out bank transactions.

PROPOSAL Nº. 17:

DEVELOPMENT OF STRATEGIES FOR AUTOMATIC OPENING OF BANK ACCOUNTS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

In order to avoid the need for the physical presence of thousands of candidates in the country to bank branches so that the opening of campaign bank accounts can be provided, it is suggested that strategies for virtual account opening be adopted, or that an agreement be signed among the Electoral Justice and the banking institutions so that this measure - required by law and absolutely central to the transparency of financial information - is carried out automatically, from the issuance of campaign *CNPJs* (National Registry of Legal Entity) by the Federal Revenue Service.

2.7. CANDIDACIES REGISTRATIONS

Risk indicator: Low impact risk

*Period: from 08/05/2020 and especially concentrated
in the months of August and September*

The request for the Candidacies Registration is provided for in Article 11 of the Elections Law and can be made until 7pm on August 15, 2020, by the Parties (proportional and majority election) and Coalitions (majority), which have complied with the antecedent stages of the electoral process - party conventions for choosing candidates and formalizing (majority) coalitions, within the period from July 15 to August 5, 2020, according to the content of article 8 of the same legislation.

In a previous topic, the questions related to the physical presence of people in municipal conventions for the choice of candidacies and deliberation of the majority coalitions are dealt with; in this topic we intend to analyze to what extent the guideline of physical isolation impacts the phase of registration of candidacies.

The registration request protocol will be forwarded to the Electoral Justice in the form of TSE Resolution nº. 23.609/19, through the CANDex electronic system, which must be completed and sent by 11:59pm on the 14th, digitally, or through personal delivery of the media until the date provided for in the caput of article 11 of Law nº. 9.504/97.

If the candidacy registration by the party or coalition is not sent within the previously established deadline, the candidates themselves may request the registration of their candidacies directly by the means previously established, within 48 hours of the deadline for publication of the notice with the names of the requested registrations (Article 11, § 4 of Law nº. 9.504/97).

It can be seen, therefore, that the Statement of Regularity of Party Acts - *DRAP* and the Individual Registration Processes -

RCAND, with or without the presence of an Action to Challenge the Candidacy Registration, are processed through an electronic judicial process - *PJE*, in all applicable instances (Electoral Zone, Regional Electoral Court, Superior Electoral Court and, exceptionally, Supreme Federal Court).

In addition, the candidacy registration process is almost always accompanied by documentary evidence. It may, exceptionally, demand the performance of acts in a hearing (article 3 and following of Complementary Law 64/90), which can be regulated to occur remotely. In the courts they proceed with priority and can perfectly be judged in virtual sessions, which have already occurred, since the beginning of the isolation period, in the Regional Electoral Courts, in the Superior Electoral Court and the Supreme Federal Court.

It can be seen, therefore, that the processing of the Candidacy Registration, which already occurs remotely through an electronic process, would not be severely impacted due to the pandemic period, even in the event of the extension of the physical isolation beyond the month of August.

As a suggestion, it should be noted the need for the administrative dialogue of the Electoral Justice, with the other Courts (Federal, State and Military) in order to guarantee a quick and remote channel of access to the certificates and documents necessary for the application registration process, which would avoid agglomerations at the headquarters of the judicial bodies.

PROPOSAL Nº. 18:

REGULATION OF VIRTUAL CONDUCT OF HEARINGS IN
THE CANDIDACY REGISTRATION PROCESS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

It is suggested that the holding of virtual hearings in the candidature registration processes be specifically regulated, which are the responsibility of the electoral zones in municipal elections.

It should be noted that the experience of virtual trial sessions, implemented and strengthened since the beginning of the period of determination of social isolation, has been carried out in the collegiate bodies, in a specific way and using different mechanisms in each regional.

It is important that, based on these experiences, each regional draws a unified strategy for holding virtual hearings for each of the electoral zones in the procedures for registering candidates.

2.8. ELECTIONS: VOTING PROCESS

Risk indicator: Average impact risk

Period: 10/4/2020 and 10/25/2020

The voting process in Brazil is scheduled to take place in 2020 on October 4 (first round) and October 25 (second round), under the terms of TSE Resolution n°. 23,606/19. These dates reflect the constitutional provision of article 29, II with article 77, which determine the holding of the elections on the first Sunday of October and, in the case of the second round, on the last Sunday of this month.

In this report, the impact of the COVID-19 pandemic is analyzed considering the maintenance of these dates for the holding of elections. Thus, in view of the prediction of smoothing the contagion curve from July 2020, it is reasonable to expect that the voting process will not be impacted very severely by the physical isolation guideline - indicated, at least at first, for the months April, May and June.

Even so, considering the hypothesis of possible extension of sanitary isolation measures, we present a diagnosis of the issues to be faced.

The way in which the voting process takes place in Brazil requires the physical presence of EViD Operators, the formation of queues at polling stations, the presentation of identity documents to EViD Operators, the physical contact of voters with the biometric identification terminal and with the keys of the electronic ballot box, the signing of voting books and the delivery of physical voting slip.

Voters who are outside their voting residence, on the other hand, must attend the polling stations and specific tables to register their justification, with the presentation of documents and the submission of a paper application.

It should be highlighted that, since voting is mandatory in Brazil, attendance at the polls requires the displacement of an immense contingent of people. In the 2018 elections, 117,364,560 voters

(representing 79.67% of the Brazilian electoral body) physically attended the polling stations.

Thus, if the need for physical isolation is also imposed on the scheduled dates for the elections, the challenges to its observance will be enormous.

Each polling station corresponds to a voting receiving desk, pursuant to article 119 of the Electoral Code. Article 117 establishes that the polling stations, organized as registration applications are granted, will have no more than 400 voters in the capitals and 300 in the other locations, nor less than 50 voters.

In order to reduce the number of voters circulating in the polling stations during the voting process, it is proposed that the feasibility of two proposals be analyzed: creation of new polling stations, to link fewer voters to each one; or extension of the time or even the voting day to Saturday and Sunday.

It is also necessary to adopt sanitary measures to mitigate contamination, such as the use of masks in the polling stations, determination of minimum distance between voters and use of hand sanitizer to handle the biometrics terminals and the keys of the electronic ballot box, etc. In this regard, it is also suggested to evaluate the possibility of waiving biometric identification in this election, in order to reduce the points of physical contact of voters with electronic voting equipment.

In relation to electoral justifications, it is necessary to devise virtual registration strategies for them, thus contributing to reduce the number of people circulating in the polling places, on election day, and also within 60 days after the election.

PROPOSAL N^o. 19:

CREATION OF NEW POLLING STATIONS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

It is suggested that the possibility of creating new polling stations be verified in order to reduce the number of voters linked to each station – an important step to reduce the possibility of contagion among voters.

There are, however, significant developments for the adoption of this measure: the need to change the stations already indicated for voters at the time of registration (and which appear in the electoral titles already issued); the need for efficient communication with the electorate regarding possible changes; the need to increase the number of electronic ballot boxes, since each voting station corresponds to equipment, with changes also in the number of contingency urns; increased demand for physical polling places, a change that would also imply the need for efficient voter communication.

PROPOSAL N^o. 20:

EXTENSION OF VOTING TIME AND/OR VOTING DAYS.

Proposal requiring legislative change

Another alternative to reduce the number of people circulating would be to extend the voting time. Pursuant to Electoral Code article 144, voting begins at 8am and ends at 5 pm, ensuring the attendance of voters who are in line at this time. The suggestion, which requires legislative changes, is to extend the voting time to include the night period as well.

Furthermore, it is suggested that the possibility of extending the days for the elections to two days – Saturday and Sunday – be evaluated, also with the aim of reducing the number of voters circulating in the polling stations each day. This measure also requires legislative change, through constitutional amendment, with the need to face the debate about the application or not of the electoral annuality rule.

For the adoption of one or both of the proposals presented, it will be necessary to develop strategies to encourage dispersion of voter turnout during the voting process – through applications, for example, that could suggest to voters a specific time for voting. In addition, it would require considerable security logistics to be set up at polling places, to guard electronic ballot boxes, which would spend the night in the sections. It is also necessary to increase the number of contingency ballot boxes and external batteries, because with the increase in the hours of operation of the electronic equipment, the greater need for exchanges and repairs is expected.

PROPOSAL N^o. 21:

SPECIFIC REGULATION OF THE VOTING PROCESS TO ADAPT IT TO
SANITARY MEASURES TO COMBAT THE PANDEMIC

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Given the possibility of extending the isolation and physical distance also on the date of the elections, it will be necessary to regulate the voting process to adapt it to the sanitary measures in force at the time.

For the sake of examples only, we indicate here the need for minimum distance in the lines; the indication of the need for the use of masks by voters and, mandatorily, by EViD Operators; the provision of gloves and hand sanitizer for polling stations; the decrease in the number of voter biometric recognition attempts - or even their suspension - in order to decrease the length of time people stay in polling stations; that the signature of the voting book by the electorate and the physical delivery of the voting receipt are waived, etc.

On this point, the convenience of observing the health protocol used by South Korea, in the elections held in April 2020, and also dealt with in Proposal n^o. 8, on the material of EViD Operators, is reiterated again.

Another specific suggestion that is registered is the prior preparation of the polling places, with the call of employees to attend the schools and buildings, the day before the elections. In this way, it will be possible to evaluate, in each case, the possibility of installing the voting stations with possible distance between them.

PROPOSAL N^o. 22:

WAIVER OF VOTERS' BIOMETRIC IDENTIFICATION IN THE 2020 ELECTIONS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

In order to reduce physical contact between voters, EViD Operators and equipment, it is suggested that the voter biometric identification, which requires one more point of physical contact - often with the need for several attempts and still in need of intervention and/or physical assistance to be provided by the EViD Operator - at the polling station terminal, be waived.

It is understood that, exceptionally in this year's elections, identification can be made through the document to be presented by the voter himself, without the need for physical contact with the polling station, through the biometrics device.

PROPOSAL Nº. 23:

APPLICATION DEVELOPMENT FOR VIRTUAL RECEIPT OF JUSTIFICATION REQUIREMENTS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Also, due to the possible need to maintain isolation and physical distance on the scheduled dates for the elections, it is suggested that strategies be developed to avoid the physical presence of voters, in the polling stations, for the registration of justification.

The ideal would be to use an application or another possibility for remote justifications registration, on election day and also within the legal period of 60 days after the elections date - a hypothesis that will require a detailed study of its feasibility and specific regulation.

2.9. JUDGING SESSIONS, PARTICIPATION AND MONITORING OF DECISIONS

Risk indicator: High impact risk

Period: March, April and May, decreasing risk from then on

With the emergence of policies to combat and prevent coronavirus (COVID-19), TSE Resolution 23.615/20 was issued, which establishes, within the scope of Electoral Justice, an Extraordinary Duty regime, to standardize the functioning of the judicial services, at first, until 04/30/2020 (article 11).

In order to prevent contagion by the new Coronavirus and guarantee access to justice in this emergency period, the Regional Courts issued ordinances/resolutions to regulate, among other topics, teleworking and judgment sessions.

The practice of procedural acts through videoconferencing has been current in Brazilian courts for a while now, especially after the advent of the judicial process in electronic media, instituted by Law nº. 11.419/06. The National Council of Justice itself, through Resolution nº. 105/10, formulated rules regarding the documentation of testimonies through the audiovisual system and the interrogation and questioning of witnesses by videoconference. Previously, the Criminal Procedure Code already contained rules on the subject, notably in Articles 185, 217 and 222.

With the advent of Law nº. 13.105/15, which instituted the new Civil Procedure Code, the use of the technological resource of videoconferencing was definitely consolidated in the legal system. The new Code provides for the practice of procedural acts in this way in Articles 236, 385, 453, 461 and 937. Such acts comprise depositions of the parties and witnesses, in addition to the hypothesis of oral support by the lawyers. The recurring expression in the devices of the new CPC is the following “... through videoconference or other technological resource for broadcasting sounds and images in real time”.

Currently, the courts use the videoconference resource through the so-called Judiciary Infovia. This technology uses dedicated lines of communication and currently connects the headquarters of the courts to each other, as well as the National Council of Justice and the Councils of Federal Justice and Superior Labor Justice²⁹.

A survey carried out by the WG indicates that the virtual trial sessions were implemented in all electoral regions in the months of March and April, and that also in all the Electronic Judicial Process - *PJE* is already in place, which makes it possible to monitor and publicize the decisions.

In Rondônia, for instance, the virtual sessions are being broadcast live on youtube. Attorneys who are interested in supporting orally must request registration through the email address provided on the website of the Regional Electoral Court, 24 hours in advance.

Having said that, the first proposal is to extend the extraordinary duty until at least the end of May - to contribute to the social isolation guideline in the months expected to reach the contagion peak.

In addition, procedures reflecting the trials, such as the delivery and dispatch of memorials, stand out as an issue to be faced.

The Civil Procedure Code waives numerous mechanisms for the enforcement of material law, one of which is oral support in the Courts, whose efficiency can be implemented by handling so-called memorials. It turns out that, unlike the oral argument, the procedure for delivering and dispatching memorials is not provided for in the legislation and there is no knowledge of RI that face the matter.

Article 35, IV, of Complementary Law n°. 35/79 (Organic Law of the National Judiciary), establishes among the duties of the magistrate, the obligation to “treat the parties, the members of the Public Ministry, lawyers, witnesses, the employees and assistants of the Justice with urbanity, and to assist those who look for them,

²⁹ “ National Videoconference System - Portal CNJ.” <<https://www.cnj.jus.br/sistemas/sistema-nacional-de-videoconferencia/>>. Accessed on 22 April 2020.

at any time, when it is a measure that complains and allows an urgent solution”.

Article 7, VIII, of the Advocacy Statute provides, by listing the rights of the lawyer: “Addressing directly to the magistrates in the work rooms and offices, regardless of previously scheduled time or other condition, observing the order of arrival”. The interpretation of the infraconstitutional legislation is clear when determining the magistrates’ obligation to attend lawyers who look for them, which is reinforced by the legal prerogative that allows lawyers the necessary freedom to perform their duties, which cannot be mitigated by bureaucratic expedients imposed by the Government.

In the lesson of Minister Celso de Mello, “nothing can justify the disrespect to the prerogatives that the Constitution itself and the laws of the Republic attribute to the Lawyer, because the act of affronting to the legal status of the Advocacy represents, in the perspective of our normative system, an unacceptable offense act to the constitutional text itself and to the public liberties regime enshrined therein.” (Supreme Federal Court - MS 23.576 MCDF, JD from 7.12.1999).

Another issue worth mentioning is the possibility that, given the extension of the physical isolation guideline, the facts directly related to the 2020 electoral process – candidacy registrations and electoral advertising - are judged in virtual sessions. In this case, given the speed that marks the electoral period - when the inclusion of facts on the agenda is then observed shortly before the session is held - it is necessary that the Electoral Justice be structured to allow the immediate entry of lawyers in virtual environments, including to perform oral support.

Therefore, after this brief diagnosis presented, here are the suggestions indicated on the topic.

PROPOSAL N^o. 24:

EXTENSION OF THE SUSPENSION OF PROCEDURAL DEADLINES, AT LEAST UNTIL 31/05, WITH THE EXCEPTION OF THOSE ABSOLUTELY NECESSARY FOR THE PRESERVATION OF RIGHTS

*Obs: it does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

According to the information in the Technical Note, the end of May will coincide with the highest point of the COVID-19 contagion curve and, from there, it is expected to see a progressive drop in the number of new cases.

It is suggested, therefore, that the suspension of procedural deadlines, initially foreseen until April 30, be extended until the end of May, since it will still be necessary to comply with the social isolation guidelines, with the implementation of telework to magistrates, lawyers and civil servants of the Electoral Justice.

PROPOSAL N^o. 25:

REGULATION OF THE REMOTE ASSISTANCE PROCEDURE, BY ELECTORAL MAGISTRATES, OF LAWYERS IN ORDER TO FORWARD MEMORIALS AND DISPATCHES.

*Obs: it does not require legislative changes;
proposal that ends in the scope of the Electoral Justice*

As outlined, although there were already experiences in the national Judiciary with the practice of virtual trial sessions, including the possibility of oral argument, there are no predictions regarding the forwarding of memorials and the possibility of remote assistance to lawyers, for clarifications from *sub judice* cases.

It is necessary, therefore, to regulate such practice, as provided for in the relevant legislation (*LOMAN* and Statute of Advocacy) and necessary for the effective implementation of the principle of non-avoidability of jurisdiction.

PROPOSAL Nº. 26:

REGULATION OF STRATEGIES FOR IMMEDIATE ACCESS/REGISTRATION OF LAWYERS
IN THE TRIAL SESSIONS HELD DURING THE ELECTORAL PERIOD

*Obs: it does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

As highlighted in the diagnosis, given the speed of processing the facts in the electoral period and the possibility that the facts related to the 2020 electoral process will be judged in virtual environments, it will be necessary to develop and regulate the possibility of immediate access for lawyers in these environments, since it will not be possible to wait for the time limit for the prior registration of attorneys.

3. CONCLUSION

This study, which is part of the Work Group -19 pandemic crisis and the implications for the 2020 Brazilian elections, Electoral Law and Democratic Rule of Law, from the Brazilian Academy of Electoral and Political Law presented suggestions and action proposals for the Electoral Justice in its relations with voters, political parties and other agents, in the context of the COVID-19 pandemic context.

To this end, the dates already set by the Electoral Calendar foreseen for the 2020 Elections were taken into account, which were opposed to more recent perspectives on the evolution of the coronavirus curve in Brazil, which is expected to reach its peak of infection in the months of April, May and June.

Thus, due to the physical isolation directive imposed for the months of March and April, most of the 20 proposals presented here move towards the need to extend this more drastic restrictive measure to the activities of the Electoral Justice until, at least, the end of the month of May.

Even for acts that take place after this period, it is suggested that strategies for the virtualization of acts and procedures are thought out, so that agglomerations and physical contacts are avoided as much as possible.

In the event that physical contacts are essential, it is suggested that the adoption of sanitary measures - minimum distance, use of masks and hygiene material - be regulated, in order to minimize contagion even in the months of August, September and October.

AGRA, Walber de Moura. **Manual prático de direito eleitoral**. Belo Horizonte: Fórum, 2016.

BRASIL. Receita Federal do Brasil. **Portaria RFB nº 457 de 28 de março de 2016**. Estabelece padrões para o atendimento presencial nas unidades de atendimento da Secretaria da Receita Federal do Brasil. Diário Oficial da União, Brasília, DF, 30 de março de 2016, p. 24.

CAMPOS NETO, Delmiro Dantas. Convenções: Ato Político – Partidário. In: **Tratado de Direito Eleitoral**. Direito partidário. 2. v. Belo Horizonte: Fórum, 2018.

WORKING GROUP

Brazilian elections' ways through the pandemic:
ABRADEP's contribution to the debate

WORKING SUBGROUP 3

ELECTIONS, TECHNOLOGY AND NEW TECHNOLOGICAL
VOTING TOOLS DUE TO THE PANDEMIC

FINAL REPORT

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BRASÍLIA, 2020

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PRESENTATION

The Brazilian Electoral Justice, since its birth, has embraced technological innovations, understanding them as a concrete opportunity to improve the mechanisms of popular participation. From the voting machine conceived by Assis Brasil in the 1930s to the current moment.

The COVID-19 pandemic is a unique opportunity for the Electoral Justice, once again, to stand out in the defense of political rights with the help of technological tools.

The present work verified which innovations could be used to improve the Brazilian electoral system in the Municipal Elections of 2020 and in the next elections. For that purpose, different phases of the electoral process were analyzed: the electoral register, the party conventions, the election preparatory acts and the voting.

For the electoral registration phase, the suggestion was to improve and standardize virtual mechanisms to assist voters and keep them as a rule from now on.

In the party conventions, it was suggested the use of programs that allow their broadcast in a virtual environment to avoid the need for crowds of people.

The election preparatory acts phase involves numerous procedures that guarantee elections security and fairness, and other practical actions that mean the physical movement of the election materials, including the ballot boxes.

For the safety phases, it is proposed to hold all public hearings in a virtual environment and, for the treatment and displacement of materials phases, the adoption of a sanitary protocol to avoid contamination of the materials.

Finally, the analysis of the references to the vote was split into two. In the first half, a more immediate solution is offered with suggestions to avoid crowding people at polling places. In the se-

cond half, bases are created for a future study, more accurate, on the feasibility of adopting virtual voting mechanisms in Brazil.

The unexpected pandemic caused by the spread of the new coronavirus should serve for the electoral bodies, once more, to reinvent themselves welcoming the available technologies, to guarantee the success of the coming Municipal Elections.

However, this is not enough. It is necessary that the bitter moment can leave sweet fruits, with the adoption of measures on a permanent basis and the opening for the study of new paths and possibilities that may lead Brazilians, perhaps, towards a connected democracy.

1. DELIMITATION OF THE TOPIC AND OBJECT OF ANALYSIS

In Brazil, it is known that the months of March, April and May 2020 have been restrictive in terms of mobility, with social isolation measures to contain the new coronavirus contagion, such as the suspension of economic, educational, cultural and sports activities.

Unfortunately, the discussion in Brazil about the consequences of the COVID-19 pandemic on the 2020 municipal elections calendar is based on the premise that there are still no official projections that indicate, with scientific security, whether or not the country is at the peak of the sanitary crisis.

Until the conclusion of this paper, the Brazilian authorities count, in an ascending curve, more than 170,000 confirmed cases, surpassing the mark of more than 12,000 deaths³⁰.

The unpredictability of the disease evolution in Brazil, therefore, affects more precise decision-making, which reinforces the correct cautious position of the national electoral authorities to remain in line with the maintenance of the elections, without prejudice to the continuous and periodic monitoring and evaluation.

To date, the Superior Electoral Court (TSE), the governing body of the elections in Brazil, have not signed a definitive position on maintaining the 2020 electoral calendar yet, maintaining the constitutional provision for simultaneous elections in the 5.570 municipalities, on the first Sunday in October (4th).

For this purpose, the Superior Electoral Court established, under the terms of Ordinances n°. 242/20³¹ and n°. 244/20³², a

³⁰ According to data from the Ministry of Health, in the 19th epidemiological week. Fonte: <<https://covid.saude.gov.br>>. Accessed on 12 May 2020.

³¹ Source: <<http://www.tse.jus.br/legislacao/compilada/prt/2020/portaria-no-242-de-06-de-abril-de-2020>>. Accessed on 22 April. 2020.

³² Source: <<http://www.tse.jus.br/legislacao/compilada/prt/2020/portaria-n-deg-244-de-07-de-abril-de-2020-1>>. Accessed on 22 April 2020.

Working Group (WG) aimed at assessing the impacts of the new coronavirus pandemic on the activities of Electoral Justice in the management of municipal elections in 2020.

In the first three weekly reports, dated 17.04.2020, 24.04.2020 and 29.04.2020, respectively, the WG concluded that “Electoral Justice, up to the present moment, has material conditions for the implementation of the elections this year”³³.

In that pitch, the future President of the Superior Electoral Court, Minister Luis Roberto Barroso, argues that, although there is a risk of postponement, decision making is hasty, since the TSE still has until June for the real assessment of the scenario; and more: if the decision is for postponement, the Minister maintains that it should occur, preferably, for the months of November or December, ensuring the inauguration of the elected in January and, thus, avoiding the extension of mandates³⁴.

In addition to the eventual legal and sanitary challenges to make the control of the pandemic evolution compatible with the maintenance of the Brazilian municipal elections of 2020, this work understands that one of the legacies of the COVID-19 crisis will

³³ First report available at: <http://www.tse.jus.br/imprensa/noticias-tse/arquivos/20-04-2020-relatorio-semanal-1/rybena_pdf?file=http://www.tse.jus.br/imprensa/noticias-tse/arquivos/20-04-2020-relatorio-semanal-1/at_download/file>. Accessed on 28 April 2020.

Second report available at: <http://www.tse.jus.br/imprensa/noticias-tse/arquivos/relatorio-semanal-do-gt-sobre-impactos-do-covid-19-24-04-2020/rybena_pdf?file=http://www.tse.jus.br/imprensa/noticias-tse/arquivos/relatorio-semanal-do-gt-sobre-impactos-do-covid-19-24-04-2020/at_download/file>. Accessed on 28 April 2020.

Third report available at: <http://www.tse.jus.br/imprensa/noticias-tse/arquivos/30-04-2020-relatorio-semanal-3/rybena_pdf?file=http://www.tse.jus.br/imprensa/noticias-tse/arquivos/30-04-2020-relatorio-semanal-3/at_download/file>. Accessed on 28th April 2020.

³⁴ Interview conducted by the Minister of the Supreme Federal Court and future President of the Superior Electoral Court, Luis Roberto Barroso, on 27th April 2020 for Portal Jota. day Available at: <<https://www.youtube.com/watch?v=WzbtbnuHmyO0>>. Accessed on 27 April 2020.

be to anticipate the debate on the introduction of new technological tools in the daily exercise of Brazilian democracy, fostering new experiences of citizen participation through remote platforms, predominantly via the world wide web.

In this sense, it appears that the Brazilian electoral authorities - with the Superior Electoral Court having the most outstanding role - have the possibility to build, with creativity and innovation, electronic means of participation in practically all phases of the electoral process.

This work aims to: identify the impact of the pandemic on the technological dimension of the electoral process and propose solutions in the field of election administration, with an emphasis on the electronic voting system, to guarantee the holding of the 2020 elections, in view of the technological resources available.

To facilitate its understanding, the work was divided into thematic axes corresponding to specific phases of the electoral process: a) Electoral register; b) Party conventions; c) Preparatory acts and d) Voting: The present and the future.

As will be further seen, the use of new technological tools and new logistical protocols should not be restricted to voting itself, but in improving the essential phases of the electoral process, such as enlistment (electoral registration), choice of candidates (conventions), registration of candidacy, political campaign and advertising of candidates, training of workers and volunteers in the voting process, preparation of voting kits, transportation logistics for voting kits and organization of polling stations, among others.

2.1. ELECTORAL REGISTRATION

One of the examples of technological innovation sponsored by the Electoral Justice as a result of the COVID-19 crisis occurred, on an emergency basis, in the electoral registration phase.

Even with the electoral registries closed for face-to-face service, the quick adaptation of the Electoral Justice to social restrictions opened new perspectives in the field of information and communication technology for the continuity of the electoral registration service, starting from the mitigation of the voter's presence for the realization of his registration or transfer, under the terms of the recent TSE Resolution n°. 23.616/2020, which added Article 3-A to TSE Resolution n°. 23.615/2019.

In this regard, the aforementioned article also guarantees the exemption of the voter from being present when the Regional Court has a technological solution that accurately ensures the identification of the applicant (article 3-A, § 7) or, even when adopted the so-called Electoral Pre-Attendance - Net Title, containing attachment in the application, "in selfie style, photograph of the applicant showing, next to his face, the official identification document also attached to the application" (Article 3-A, § 8).

PROPOSAL Nº. 1:

IMPROVEMENT AND STANDARDIZATION OF THE VOTER'S REMOTE SERVICE
PLATFORM AND PERMANENT MAINTENANCE OF THE MECHANISM

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

It is important that a specific and uniform application is developed throughout the country for remote assistance. In addition, the Net Title platform should be improved with new versions that allow full virtualization of service.

It is known that there are already some experiences with remote registration and identity verification platforms without face-to-face contact, with satisfactory results and reliability, within a global perspective of fostering and consolidating electronic government (e-gov).

With these innovations, the only time in which face-to-face service would remain would be at the phase of completing the national biometric re-registration or to assist voters with difficulty accessing the internet or special needs.

Finally, it is recommended that these changes in the electoral register not only be limited to the period of the pandemic, but that they have a vocation for permanence, so that, once normality is resumed, technological advances are maintained.

2.2. PARTY CONVENTIONS

In the midst of a pandemic, several private legal entities that needed collective decision-making environments found themselves forced to seek alternatives to keep their mandatory deliberative instances in operation, like the assemblies in cooperatives and public limited companies.

To ensure legal certainty for the business community, the Federal Executive Branch issued Provisional Measure n°. 931, March 30, 2020, in order to authorize the partner to participate and vote, electronically and remotely, in meetings or corporate assemblies, as well as members in cooperatives and shareholders of publicly-held companies (Articles 7 to 9 of Provisional Measure n°. 931/2020³⁵).

A continuous act, under the terms of the aforementioned MP, the National Department of Business Registration and Integration (*DREI*) regulated participation and remote voting in closed, limited and cooperative corporations' meetings and assemblies, through Normative Instruction-*DREI* n°. 79/20³⁶. Likewise, the Brazilian Securities and Exchange Commission (*CVM*) also did so with the edition of *CVM* Instruction n°. 622/20³⁷ for publicly held companies.

With regard to publicly held companies, *CVM* Instruction n°. 622/20 determines that the company must ensure that the electronic system ensures the presence registration of shareholders and the respective votes, as well as, in case of distance participation, at least: I - the possibility of manifestation and simultaneous access to documents presented during the meeting that have not been previously made available; II - the full recording of the meeting; and III - the possibility of communication between shareholders.

³⁵ <http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Mpv/mpv931.htm>.

³⁶ <http://www.mdic.gov.br/images/REPOSITORIO/SEMPE/DREI/INs_EM_VIGOR/IN_DREI_79_2020.pdf>.

³⁷ <<http://www.cvm.gov.br/legislacao/instrucoes/inst622.html>>.

PROPOSAL N^o. 2:

RECOGNITION OF THE POSSIBILITY FOR POLITICAL PARTIES TO CARRY
OUT THEIR CONVENTIONS THROUGH VIRTUAL MEANS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

The holding of conventions in digital media can stimulate the intraparty democracy, leveling the actors and expanding the general participation of the affiliates, provided that, as with public companies, remote participation and interaction of the affiliates, the presence registration and their respective votes are assured, as well as access to documents eventually presented during the virtual meeting and full recording of the convention.

As an example, intra-party debates can take place on tools such as Zoom, Google Hangouts, Microsoft Teams or any other, at the party's discretion. On the other hand, there are several technological tools available on the market, including free ones, that make the digital electronic process viable³⁸.

In addition, once partially or entirely carried out by the digital method, it is suggested that it be authorized that the convention can also be broadcast live on the web, with respect to the principles of advertising and transparency.

Currently, Bill n^o. 2.197/20, drafted by Deputies Soraya Santos and Margarete Coelho, is in the National Congress, which seeks to discipline the eventual use of a virtual environment in party conventions, adding § 3 to article 8 of the Law n^o. 9.504/97, with the following wording:

³⁸ As an example, the free platform HeliosVoting (<https://heliosvoting.org>) that conducts elections through the internet. This platform is used, for example, by the Federal University of Santa Catarina - UFSC (<https://e.ufsc.br/e-democracia/>) and by the Brazilian Academy of Electoral and Political Law - ABRADEP. It is free software, with technical and user documentation, with auditing open to the public (End-to-end voter verifiable - E2E).

Art. 8^o [...] § 3 Party conventions may be carried out in a virtual environment through the use of a digital platform that even allows certification of the requirements required in electoral legislation and in the statutes of political parties.

Certainly, the lack of technological infrastructure in the municipal directories is a barrier to be overcome. However, it is not an obstacle to its implementation, taking into account that there are resources from the Party Fund that could be used to implement this logistics.

In the medium term, the Electoral Justice may also develop an application that can be made available to the parties, as done with Filiaweb, CandEx and Electoral Accountability System (SPCE) and the Annual Accountability System (SPCA).

This new application to be developed by the Electoral Justice - as suggested - will not only provide all affiliates with a greater degree of reliability in the act (convention and its respective minutes), but will also guarantee integration and compatibility with the candidature system (CandEx) - reducing risks of fraud and resulting jurisdictional conflicts.

In addition, the development of an application for party conventions will offer the Electoral Justice the opportunity to test new voting technologies, walking towards a process of forming a culture of digital democracy, having as an apex, as soon as possible, voting on the internet.

2.3. ELECTION PREPARATORY ACTS

The topic related to the implementation of sanitary protocols and SOPs (standard operating procedure) to mitigate contagion during preparatory acts will not be developed in this report, as it is not within its specific scope of action. However, it is recommended to analyze the use of digital technology to replace physical contact with virtual contact.

2.3.1. Election software validation phase

The production and external validation of the election software do not suffer losses. Routines are regulated by Resolution, not by law. This facilitates eventual operational reorganization.

PROPOSAL N^o. 3:

HOLDING PUBLIC CEREMONIES FOR VALIDATING SOFTWARE USED IN
ELECTRONIC BALLOT BOXES VIA VIRTUAL MEDIA

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

Public validation ceremonies may be carried out without the physical presence of technicians and can be followed remotely by interested parties and representatives of political parties, with live and open broadcast on the web, including the possibility of interaction (formulation of questions and respective answers).

The migration of this phase - partially or completely - to a virtual environment will be an excellent opportunity to enable the monitoring and inspection of citizens and political parties and, thus, contribute to the affirmation of the electronic ballot box reliability and, as a consequence, to fight against misinformation.

2.3.2. Training of EViD Operators and assistants

The TSE Personnel Management Secretariat (SGP) is already evaluating a contingency plan for employees and assistants. The waiving of the risk groups and the availability of personal protective equipment (mask and gloves) will, evidently, be some of these measures.

PROPOSAL N^o. 4:

CONDUCTING TRAINING FOR EViD OPERATORS AND ASSISTANTS IN A VIRTUAL ENVIRONMENT USING REMOTE TEACHING TECHNIQUES

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

From a technological point of view, it is necessary to conduct remote training, including for the training of EViD Operators and assistants on the health protocols to be complied with in the electoral process, including the organization of queues to establish a safe distance between voters, cleaning the biometric reader and the electronic ballot box after each vote; guidance to voters on the use of masks and hand hygiene with hand sanitizer before and after voting.

Still on remote training, the participation of the Electoral Judicial Schools in the development of the content is suggested.

Finally, for medium-term implementation, it is suggested that the Electoral Justice promote the development of a support service to the EViD Operator by video call, so that the assembly of the electoral section and exceptional occurrences are resolved with the Electoral Justice remote supervision.

2.3.3. Polling stations preparation

Mapping and inspecting polling stations has become a sensitive step. The distance between voters and between voters and EViD Operators should be considered when setting up a safe voting environment. This may imply an increase in the number of locations, in order to better distribute the electorate. It is suggested to support the decision on sites in an epidemiological risk calculation.

PROPOSAL N^o. 5:

USE OF SPECIFIC SOFTWARE FOR INSPECTION AND MAPPING OF POLLING STATIONS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

In this regard, there is a software available for this need, which crosses dynamic databases on the evolution of the pandemic with the characteristics and location of the property. And, thus, it will be possible to determine with precision the ideal capacity of each polling station.

2.3.4. Electronic ballot boxes preparation

According to some predictions of the Ministry of Health, the return to normality in Brazil would only occur in September. If so, equipment preparation will still happen under the aegis of the pandemic.

And the danger of contagion is high in the handling of electronic ballot boxes and their accessories, especially in four moments: a) Maintenance (cleaning, checking and charging the batteries, checking functionalities - screen, keyboard, sounds, drives, terminal of the EViD Operator); b) Functional tests (simulations); c) Preparation (data insertion and sealing); d) Distribution.

PROPOSAL Nº. 6:

DEVELOPMENT OF A SANITARY PROTOCOL FOR HANDLING ELECTRONIC
BALLOT BOXES AT ALL PREPARATION STAGES

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

These phases involve not only the Electoral Justice workforce, but also the presence of external inspection. Therefore, for full protection, it is necessary to change the ballot management routine, as an example: a) Reduction of the number of people involved, extending the completion period; or b) Increase in the space where the ballot boxes are handled, to guarantee the distance.

In addition, as well as in the software verification stage, it is suggested that the official media generation ceremonies and electronic ballot loading ceremonies be broadcasted live on the web, under the responsibility of each electoral registry, increasing the transparency of the process and the compliance with health protocols.

2.4. VOTING: THE PRESENT AND THE FUTURE

2.4.1. Electronic scheduling and control of live voting flow through conventional electronic ballot boxes

PROPOSAL Nº. 7:

DEVELOPMENT OF A VOTING PROTOCOL WITH THE USE OF TECHNOLOGIES TO
AVOID THE AGGLOMERATION OF VOTERS IN THE POLLING STATIONS

*Proposal that does not require legislative change;
proposal that ends in the scope of the Electoral Justice*

From the proposal presented for the phase of preparing the polling stations and starting from the premise that the gathering of people on election day can be configured as electoral illicit, we understand that the main suggestions for the process voting itself in electronic ballot boxes are in the field of adopting sanitary protocols.

From a technological point of view, what can be suggested is the development or introduction of applications that organize the flow of people or even institute, although in selected locations (on an experimental basis), the vote by appointment.

In this sense, the Electoral Justice can provide electronic forms with the times available for choosing, verifying the voter's identity in the same way as occurs with the registration steps. It is recommended that, for security matters, only the voter knows the scheduled time.

As for the screening of voter tickets with scheduling, it is understood that this control, even if on an experimental basis, can also be automated, using QR CODE, in a model similar to the one used in airports.

2.4.2. Promoting an environment for a digital democracy of the future: Internet voting

PROPOSAL N^o. 8:

CREATION OF A WORKING GROUP TO STUDY THE FEASIBILITY OF ADOPTING MECHANISMS FOR THE ADOPTION OF VOTING IN A VIRTUAL ENVIRONMENT IN BRAZIL

Proposal that does not require legislative change

Despite the uncertainties brought about by the pandemic, democratic nations have shown themselves willing to keep their electoral routines as much as possible.

Brazil is expected to follow the path of constitutionalism. Here the mandates have a fixed date and must be renewed for the vitality of democracy.

It turns out that the duration of the pandemic is undetermined. With the problem of the new coronavirus posed, it is necessary to anticipate scenarios and act.

The excellent model of electronic ballot boxes must be kept as possible. Even so, elections cannot be stopped in a timely manner if this model proves incompatible with the demands of the health field.

Thus, we are not criticizing the reliability of in-person electronic ballot boxes but arguing that it is time to think about having other forms of voting, in addition to in-person electronic ballot boxes.

Therefore, there is an opportunity to bequeath to the next generations the marks of a digital democracy. In other words, the COVID-19 crisis precipitated a discussion that would inevitably arrive: the construction of alternative digital voting tools. Situations such as the present pandemic, which can lengthen and repeat in an increasingly globalized world, are left unanswered and can make electoral routines unfeasible again.

Voting based on electronic ballot boxes has, until now, met the requirements of Brazilian democracy, however the new social reality demands new horizons.

As if that were not enough, the consolidation of communication and information technologies in people's daily lives tends to increase the strangeness of younger voters with the current model.

Why not vote online if I can do everything online? This question may not occur to older generations, but it certainly makes sense for an increasing share of the electorate.

It seems clear that this demand will arise, along with the demand for greater political participation, not only to elect representatives, but also to make public choices.

If there is one thing that illustrates the democratic deficit in Brazil, it is the absence of more and better channels for citizen action. With technology, the Electoral Justice can, for instance, make the constitutional forms of participatory democracy (semi-direct) more effective.

The mobility and immediacy of a digital system would enable the legislature to consult the people in referendums and to receive popular law initiatives more frequently.

And so, this bridge created between representatives and the people would contribute to decision making on relevant issues, stimulating a more active and dynamic regime and expanding the effectiveness of democratic governance as a whole.

In view of this, the virtue of creating an alternative voting method (digital voting) is not just guaranteeing the holding of elections in times of pandemic. Should the emergency solution be successful, it may become a preferred model.

Furthermore, if, on the one hand, there is security and reliability in electronic ballot boxes, one cannot escape the discussion of its logistical cost. This is because the current model involves bulky, heavy equipment, which requires guarding, renovation, maintenance, distribution, collection and a rigid timetable, in addition to the voter's travel to the polling station.

Besides, the COVID-19 crisis has also highlighted the losses of having only one (in-person) voting method. This is because,

despite all these sanitary measures to circumvent the pandemic or, even, the eventual controlled postponement of the elections (for a brief period), one cannot rule out the occurrence of an extreme scenario – as in the hypothesis of occurrence of a second peak of the disease, something that could make the election even more difficult. In other words, the exclusivity of a single mechanism for externalizing and launching the vote is also something that makes it difficult – and very much – to make an election possible in times of pandemic.

It is known that there are countries that continue to adopt postal voting, with all the disadvantages and negative points inherent to it, such as the increased probability of external interference in the voter's free will. This is the case in the United States.

The COVID-19 crisis encouraged American states, such as Ohio and Wisconsin, to try to increase the chances of voting by absentee ballots³⁹ in the primaries and in local votes, but they were not accepted by the American Supreme Court⁴⁰, basically because it was understood that it could not (in this case, the State of Wisconsin) change the rules of the electoral process on the eve of the election⁴¹.

Still in the United States of America, a group of Senators presented a Bill entitled Natural Disaster and Emergency Ballot Act of 2020, containing a set of rules that guarantee the exercise and full vote in times of natural crises and states of emergency⁴², focusing

³⁹ BRIFFAULT, Richard. Covid-19 and the Law: Elections. In: PISTOR, Katharina (org). **Law in the Time of COVID-19**. New York: Columbia University, 2020. pp. 35-47. Available at: <<https://scholarship.law.columbia.edu/books/240>>. Acesso em: 28 abr. 2020.

⁴⁰ Available at: <https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf>. Accessed on 28 April 2020.

⁴¹ In that judgment, the American Supreme Court ruled that its pronouncement was restricted to the limits of the specific case analyzed (elections held in Wisconsin) and should not be understood as an opinion on possible reforms or changes in electoral procedures in the light of COVID-19

⁴² Available at: <<https://www.congress.gov/116/bills/s3529/BILLS-116s3529is.pdf>>. Accessed on 28 April 2020.

on postal voting⁴³, a solution that is considered not to be the most appropriate for the Brazilian reality.

Therefore, the need for Electoral Justice – as the greatest guardian of elections in Brazil – to lead an effort to conduct studies for the implementation of other alternative remote voting formats is revealed, in particular, for the purpose of consolidating the remote electronic vote via the Internet.

As stated earlier, the delay in developing new ways of voting can lead to a point of no return, putting future elections at risk. Digital voting on the Internet, therefore, appears as an alternative, and may reach, in whole or in part, the electorate, reducing the number of in-person votes.

In a more favorable scenario, it could be adopted on an experimental basis, in locations that meet the starting conditions for a migration to digital democracy.

Although dispersed, there are solutions ranging from applications for voting over the Internet to end-to-end encryption tools, through activation mechanisms and secure user authentication. Therefore, the virtualization of electoral choice is a winning challenge.

Still on remote electronic voting, it should be noted that the Committee of Ministers of the European Council approved Recommendation CM/Rec (2017)5 containing principles and standards for its implementation, such as respect for universal suffrage, equality, freedom of suffrage, the secrecy of the vote, transparency, auditability, integrity and security of the system. This is an excellent normative framework to guide Brazilian electoral authorities regarding the development and operationalization of other technological voting tools.

⁴³ Summary containing the main points of the project available at: <<https://www.wyden.senate.gov/imo/media/doc/Natural%20Disaster%20and%20Emergency%20Ballot%20Act%20of%202020%20One%20Pager.pdf>>. Accessed on 28 April 2020.

It should be reiterated that *ABRADEP*'s position is that this implantation must be carried out gradually, ensuring another (alternative) voting method, starting in places with logistical conditions (information technology network and communication) to do so.

The gradual adoption of innovation is an advisable option. The qualification of a portion of the electorate to vote on the Internet can mark the beginning of a transition, with the same approach of adopting the electronic ballot box, which took 3 electoral cycles to complete (1996, 1998 and 2000). In the end, the venture could turn Brazil into the largest digital democracy in the world.

2.4.2.1. The challenge of consolidating a remote voting platform that respects basic voter guarantees and elections and democratic legitimacy

The first is to build a computational platform that meets, in line with the provisions of Recommendation CM/Rec (2017)5 of the Committee of Ministers of the European Council, legal requirements, among which:

- A)** Universal suffrage: the technology must be accessible to all voters;
- B)** Identity: the voter must be correctly registered and identified;
- C)** Equality: one voter, one vote;
- D)** Freedom and Secrecy of Voting: voters cannot be coerced in the act of voting;
- E)** Fairness: the vote must be correctly registered and counted; and finally,
- F)** Reliability: the entire system must be secure and auditable.

2.4.2.1.1. Universal suffrage

Despite the regrettable rates of social exclusion (illiteracy, lack of basic sanitation, malnutrition, among others), urban life requires that citizens must be in touch, in some way, with the new communication and information technology tools. It can be said, therefore, that the vast majority of the population is connected and that, in many situations, urban life is confused with digital (virtual) life.

However, the digital divide is still a heavy reality. Even though it is understood that Internet access can currently be considered a fundamental right, the data network does not cover – with quality and security – a good part of the national territory yet.

Furthermore, although the advancement in the use of telephony is recognized (more phones than inhabitants), not every citizen has a smartphone and quality Internet access. So, Brazil still needs to evolve – and a lot – in the structure, universality and accessibility of communication and information technology.

Therefore, in order to guarantee universal suffrage, one of the structuring principles of democracy, it is necessary that the remote voting method implementation (via internet) occurs gradually, in addition to being considered an option for the voter at the time of voting, without prejudice to his use of the presential vote.

Thus, the voter would be offered the right to choose the vote through an electronic ballot box or through the remote platform (Internet voting).

The aforementioned Recommendation CM/Rec (2017)5 of the Committee of Ministers of the European Council also highlights some points about universal suffrage in the remote and electronic method that deserve to be considered when implanting in Brazil:

- A)** The interface of the electronic voting system must be accessible and easy to understand for all voters;

- B)** The electronic voting system should also be designed to ensure, as far as possible, that people with disabilities and special needs can vote independently;
- C)** While remote electronic voting channels are not universally accessible, they should only be one of the optional means of voting;

2.4.2.1.2. Identity

One of the assets of the current system is the reliability of the electoral register. Today, more than 80% of voters already have biometric identification, with facial photo and fingerprints stored by the electoral justice, along with biographical data.

This contingent can use the combination of biographical and biometric data to activate, for example, a mobile application (smartphone application) capable of collecting a safe vote.

Through the remote checking of biographical and biometric data, the Electoral Justice can be sure that it is activating the voter's own cell phone.

In addition, the use of tokens on the smartphone can increase the security of access to the system. Currently, it is known that the banking system, one of the safest in the world, works with tokens. This guarantees multi-level authentication (biometrics + token).

Such measures would enshrine the maxim "one cell phone, one vote", making only the smartphones activated by the users themselves points of votes receiving. Once the device is activated (authorized), the voter entrance door is defined.

2.4.2.1.3. Equality

Only one vote per voter must be counted to obtain electoral results. This rule must be strictly enforced, in order to avoid that the voter - having two or more voting method options (in person and remote) - may have two or more votes counted.

The understanding that remote electronic voting is an option provided to the voter will obviously require the development of integration tools between the electronic system and the traditional electronic ballot boxes system, thus avoiding the possibility of double voting (voter to vote by electronic ballot box and by remote way in the same election). Another suggestion would be to require voters to choose the electronic voting system in advance (days before election day), disabling them from the in-person option for that election.

2.4.2.1.4. Voting freedom and secrecy

Voting secrecy (Article 14 of the Federal Constitution) is a precondition for voter freedom. It encompasses respect for confidentiality regarding voters' preferences, which should be protected by the electronic voting system. In this way, remote electronic voting must contain tools that guarantee that the voter who cast the vote does not obtain a correlation, and, in the same way, prevent the voter from being able to prove that voted according to this or that preference.

The referred Recommendation CM/Rec (2017)5 of the Committee of Ministers of the European Council also highlights some points about the freedom and secrecy of voting in the remote and electronic method:

- A)** The voters' will cannot be affected by the voting system or any other undue influence;
- B)** It must be ensured that the voting system presents an authentic ballot and correct information to voters;
- C)** The way in which voters are directed in the electronic voting process cannot lead them to vote from voting hastily or without confirmation;

- D) The electronic voting system must provide the voter with the right to vote blank or abstain, that is, the possibility of not choosing for any of the options presented;
- E) The electronic voting system should give voters a stage in which they can accurately verify what options were made by them and, if so, that their vote is effectively cast and sealed in the “virtual ballot box”, with all the systemic security that ensures vote integrity and secrecy;
- F) Voters must receive confirmation by electronic system that their vote has been successfully cast and completed;
- G) The voting system must provide solid evidence, duly auditable and independently verifiable, of the authenticity of each vote and its respective inclusion in the accounting of electoral results; and, these results must also be auditable and verifiable independently.
- H) Electronic voting should be organized to ensure that voting secrecy is respected at all stages of the voting process;
- I) The electronic voting system must process and store only the personal data necessary for conducting the electronic election and as long as it lasts;
- J) The electronic voting system must protect authentication data in order not to allow it to be misused, intercepted, modified or used for other purposes;
- K) Voters records stored in the electronic voting system may only be accessible to authorized parties;
- L) The electronic voting system cannot provide the voter with proof of the vote content for external use or presentation to third parties;

- M) The electronic voting system cannot allow the number of votes counted during the voting process. This disclosure will only be made after the closing of the voting period;
- N) The electronic voting system must guarantee the secrecy of previous choices registered and deleted or modified by voters before the confirmation and final issuance of their vote;
- O) The voting and electronic counting process must be organized in such a way that it is not possible to correlate the voting options and the voter.

2.4.2.1.5. Fairness

The issue of fairness is already posed in the model of electronic ballot boxes. Currently, there is a lot of noise about the security of the electronic voting system, based on the false idea that elections can be manipulated during data transmission. How to ensure that the vote given is the vote counted?

Actually, the great virtue of electronic ballot boxes is simplicity. As they do not involve an Internet connection, the ballot boxes issue the final result on paper (ballot), allowing a simple arithmetic sum to be compared with the digital totalization. Therefore, innovating in this regard means taking risks that do not exist today.

But despite the statement that there is no connection completely immune to invasions, today there are solutions that make the risk of interference statistically negligible; more than that, they make the invasion an innocuous undertaking. Through dedicated connections (exclusive digital tracks), votes can travel with a very low risk of interception. And end-to-end encryption prevents the data packet from being interpreted. The encryption author himself may be prevented from understanding the data.

The adoption of digital voting appears as a great opportunity to oppose the questions to the Electoral Justice, not by the way of voting, but by the underlying technology.

Blockchain has spread as an infrastructure for secure digital operations. This technology was launched in 2009 as the basis for bitcoin, the world's first cryptographic, and today it serves an infinite number of applications, suiting the digital vote.

Records based on the blockchain methodology are indelible, which means that no one is able to change any record on the network; any attempt is detected and wrecks. Once the adopted protocol has been described and sealed, no vote can be changed, and the record will be marked on both the smartphone and the totalizer, without breach of confidentiality.

It should be noted that what is said to be indelible does not mean the possibility of consultation on the voter's option; it will only be used for conferences, to demonstrate that there was no alteration of the voter's option, fulfilling a function similar to that of the current ballot box: every time the sum of the isolated results is made, the final result will be the same, which guarantees the fairness.

There are still other points extracted from Recommendation CM/Rec (2017)5 of the Committee of Ministers of the European Council, namely:

- A)** The introduction of electronic voting must be carried out gradually and progressively, through legal discipline;
- B)** The relevant legislation should also regulate the responsibilities for the functioning of the electronic voting system and the guarantee that the electoral administration body has control over it;
- C)** Inspection and observer participation must be guaranteed in all phases of the voting process, including

counting, which is the responsibility of the electoral administration body;

- D)** Transparency must be there in all aspects and phases of remote electronic voting;
- E)** The public, voters in particular, must be informed way before the voting starts, in a clear and simple language about: all the requirements for the voter to participate and vote; the use and correct functioning of the electronic voting system; the electronic voting calendar, including all stages;
- F)** The components of the voting system must be disclosed for the purposes of verification and certification;

The use of open standards will also guarantee the fairness of the electronic voting process, insofar as they will provide independence for the computing platform used (an achievement introduced, for example, by Article 194 of the Civil Procedure Code).

It means that the computer systems used in remote electronic voting come to follow general communication standards commonly used on the internet, regardless of the type of hardware, software or operating systems that citizens use. Thus, any network access equipment must be able to communicate with the electronic voting platform to be implemented.

2.4.2.1.6. Reliability and auditability

It must be developed a remote electronic voting system containing technical requirements for assessment and certification, compatible with constitutional, legal and democratic principles, duly updated.

In addition, there must be tests and simulations prior to the implementation of the remote electronic voting system, with the

participation of political parties, members of the Public Ministry, social organizations, academic representations and any other interested parties;

The voting system must also guarantee auditability. It refers to information, kept selectively protected, so that actions that may affect the fairness of the voting process can be tracked by the audit of the electoral administration body itself or by the external audit (political party or external observers).

Corrupt voters or attackers (hackers) may attempt to modify votes and/or the counting system. Therefore, all internal operations must be controlled, without violating the principle of confidentiality, as well as all previous administrative operations (including system programming and the testing phase). Any eventual non-conformities of the system during the preparatory, development or conclusive stages of the voting procedures must be registered for future checking and confirmation of possible fraud.

The Electoral Justice should also be the guardian of the availability, reliability, operability, usability and security of electronic voting. And only people who apply for accreditation to the aforementioned electoral administration body can access the infrastructure and data of the electronic system during the voting process.

2.4.2.2. The logistic challenge

The excluded ones may receive access equipment from the State. And points without coverage can be met by expansion measures adopted by telecommunication companies, guided by electoral justice. Far from representing a barrier, the requirement of universality of the electoral system provides the opportunity to boost the full digital inclusion of Brazilians. At a time when several public institutions are vying for the formation of digital registries to offer remote services, the universalization of digital democracy makes the electoral registry an important referential

center or link; unlike all other registries, the electoral system is one that treats the person as a citizen.

In addition, we highlight, among other measures, (I) the consolidation of public policies that finance the acquisition of technological information and communication equipment compatible with the voting platform and (II) the implementation of public policies that seek universal access to the World Wide Web⁴⁴.

2.4.2.3. The challenge from a political perspective

The political challenge is to convince public opinion and the population of the new technology viability, effectiveness and safety. In this regard, the experience of social isolation has brought to everyone the need to rethink their interaction between the physical and the virtual world.

The Brazilian electoral regime has already pioneered a major technological leap: the electronic ballot box has surpassed the manual counting paradigm. This latest digital revolution is a close experience from which it is feasible to learn.

On the other hand, precedents such as Estonia's digital democracy show that Brazil is not alone in its quest to expand the reach of political rights.

The implementation of voting over the Internet would require a collective effort involving Electoral Justice, the Public Ministry, Political Parties, congressmen, scientists, the press, segments of the public sector, the market, civil society and, obviously, voters themselves.

2.4.2.4. The normative challenge

As much as the scope of the normative power of the Superior Electoral Court is respected through its resolutions, we understand

⁴⁴ Available at: <http://www.btdt.uerj.br/tde_busca/arquivo.php?codArquivo=10567>.

that the introduction of new voting methods must occur through legislative changes. It is suggested, here, the elaboration of a normative text that authorizes the Electoral Justice, after the development, simulation and tests, to promote the gradual introduction of another voting method, in the retake mode, without having to stop offering the electronic ballot boxes (presential vote).

In addition, the rule that will institute remote and alternative electronic voting must be in line with the *Marco Civil da Internet* (Brazilian Civil Rights Framework for the Internet) (Law n°. 12.965/14) and with the General Data Protection Law (Law n°. 13.709/18).

3. CONCLUSION

Even though the COVID-19 crisis has generated suffering, sadness and the loss of many human lives, one of its legacies is the beginning of a profound discussion about the future of democracy, especially in the need to build alternatives for remote exercise of the right to vote and democratic participation.

For the 2020 municipal elections, this paper presents suggestions for technological ways to mitigate the contagion risks of COVID-19 during phases of the electoral process, especially regarding the electoral register, party conventions, preparatory acts and the vote itself (scheduling and electronic control of the live voting flow).

In addition, the Brazilian Electoral Justice has the great opportunity to lead a collective effort to conduct studies for the implementation of other alternative remote voting means, in particular, for the purposes of consolidating non-presential electronic voting via the internet.

An environment for the digital democracy of the future that, in line with Recommendation CM/Rec (2017)5 of the Committee of Ministers of the European Council, guarantees a remote electronic voting platform that respects, among other requirements, universal suffrage, equality, the freedom of suffrage, the secrecy of the vote, transparency, auditability, integrity and security of the system.

REFERENCES

BRIFFAULT, Richard. Covid-19 and the Law: Elections. In: PISTOR, Katharina (org). **Law in the Time of COVID-19**. New York: Columbia University, 2020. Available at: <<https://scholarship.law.columbia.edu/books/240>>. Accessed on 28 April 2020.

WORKING GROUP

Brazilian elections' ways through the pandemic:
ABRADEP's contribution to the debate

WORKING SUBGROUP 4

THE PANDEMIC CRISIS AND THE NEW PATHS
OF THE DEMOCRATIC RULE OF LAW

FINAL REPORT

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History teaches that, in times of acute opportunistic crises, it is possible to take advantage of the situation to target democracy and the Democratic Rule of Law. The COVID-19 pandemic is a classic example of these opportunities, so it is necessary that the set of protective measures provided in this difficult time include the defense of the democratic ideals under which the 1988 Constitution was brought up.

The Democratic Rule of Law assumes the role of fulfilling the promises of modernity that have remained only at the ideal level, and this is not limited to political participation, but must include, with the same importance, the consolidation of all fundamental rights, especially social rights.

Following this line, the Brazilian State remains the engine of the transformation of the Brazilian reality, protecting the conquered rights and acting in the consolidation of the new rights.

Specifically, the State adopted measures to combat the effects of the pandemic aimed at protecting the community and, whether in the health or in the economic field, it must remain vigilant, due to the increasingly permanent need for action by a provider State, in the ways of the classic Welfare State.

The Judiciary Power also plays an important role in this area, acting independently to guarantee the respect and defense of fundamental rights and, especially, stopping any possibility of regression in this area.

On the other hand, everyone must remain vigilant in this difficult moment so that there is no possibility of breaking the institutional normality, and it should be emphasized that the exceptional measures provided for in the Constitution, state of siege and state of defense, should not be handled randomly and improperly.

The sanitary struggle in defense of lives, must, permanently, be supported by the defense and consolidation of the Democratic Rule of Law. Only under the aegis of a strong democratic regime there will be real conditions for economic recovery and protection of life.

1. DELIMITATION OF THE OBJECT OF ANALYSIS

The growth of coronavirus cases in the country and the consequent emergency measures adopted by the Federal Government, as well as by the Federal District, States and Municipalities, to face the pandemic, increased the debate about the possible implications for the Brazilian elections of 2020, Electoral Law and the Democratic Rule of Law.

This work has as its theme the pandemic crisis and the new paths of the Democratic Rule of Law, associating the current scenario with reflections on the Democratic Rule of Law, the right to information, respect for science and truth, awareness about the health rights, as well as the organization of public health, in order to allow a wide public debate.

The analysis was structured in 4 thematic axes: a) What is this, the Democratic Rule of Law?; b) the role of the Brazilian state in the outbreak of covid-19 - implementing, although late, the democratic rule of law; c) emergency measures adopted by the Brazilian State in the outbreak of COVID-19; d) Judicial independence as guarantee of the project of nation established in the constitutional text - guarantee of individual rights, guarantee of social rights and prohibition of regression; e) Emergency, defense, siege and exception - the “eternal surveillance” due to authoritarian outbreaks.

2.1. WHAT IS THIS, THE DEMOCRATIC RULE OF LAW?

The Democratic Rule of Law reconciles the Democratic State and the Rule of Law, but it does not consist only of the formal gathering of the elements of these two types of State.

The configuration of the Democratic Rule of Law does not only mean formally joining the concepts of Democratic State and Rule of Law. It consists, in fact, in the creation of a new concept, which takes into account the concepts of the component elements, but surpasses them insofar as it incorporates a revolutionary component of the transformation of the *status quo*.

Consequently, this is the paradigm of the Democratic Rule of Law; a new concept with new and sensitive guidelines with a strong transformative power – and extremely salutary, it must be said, especially when one carefully observes those opaque events that ended up triggering in the advent of World War II.

Hence, at the end of the day, that the Democratic Rule of Law is the dawn of a new era, which arises, precisely, to rescue all the unfulfilled promises of Modernity.

The objective of the Democratic Rule of Law is to turn unfulfilled demands into reality. And the democratic state, in order not to fall into democratic totalitarianism, has to be a democratic rule of law⁴⁵.

And then we see the extreme importance of Article 1 of the 1988 Constitution, when it states that the Federative Republic of Brazil constitutes a Democratic State of Law, not as a mere promise

⁴⁵ DÍAZ, Elías. **Estado de Derecho y Democracia**. Available at: <http://dialnet.unirioja.es/descarga/articulo/831255.pdf>. Accessed on 23-04-2020.

to organize such a State, as the Constitution is already proclaiming and founding⁴⁶ it.

The notion of a Democratic Rule of Law is, therefore, [...] inextricably linked to fundamental rights realization. It is from this inseparable link that what can be called the normative plus of the Democratic Rule of Law comes. More than a classification of the State or a variant of its historical evolution, the Democratic Rule of Law synthesizes the previous phases, adding the construction of possibility conditions to fill previous stages gaps, represented by the need to rescue the promises of modernity, such as equality, social justice and the guarantee of fundamental human rights.⁴⁷

And this notion of State is coupled with the content of the Constitutions, through the ideal of life embodied in the principles that point to a change in the society's *status quo*⁴⁸.

Thus, the Constitution of a Democratic State has as mission: [...] to convey minimum consensus, essential for the people's dignity and for the functioning of the democratic regime, which cannot be affected by occasional political majorities. These elementary consensuses, although they may vary depending on the political, social and historical circumstances of each country, involve the guarantee of fundamental rights, the separation and organization of the constituted powers and the setting of certain purposes of a political nature.⁴⁹ Therefore, in the Democratic Rule of Law, the law (Constitution) becomes a privileged way of instrumentalizing the State's action seeking the objectives

⁴⁶ SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 14. ed. São Paulo: Malheiros, 1997.

⁴⁷ STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do Direito**. 11. ed. Porto Alegre: Livraria do Advogado, 2014. p. 54.

⁴⁸ DÍAZ, Elías. **Estado de Derecho y Democracia**. Available at: <<http://dialnet.unirioja.es/descarga/articulo/831255.pdf>>. Accessed on 23-04-2020.

⁴⁹ BARROSO, Luis Roberto. **Curso de Direito Constitucional**. São Paulo: Saraiva, 2011. p. 90.

pointed out by the constitutional text, understood in its whole principle-based governing⁵⁰.

2.2. THE ROLE OF THE BRAZILIAN STATE IN THE OUTBREAK OF COVID-19 - IMPLEMENTING, ALTHOUGH LATE, THE DEMOCRATIC RULE OF LAW

In Brazil, the main components of the Democratic Rule of Law, which were born in the 1986-1988 constituent process, are still awaiting implementation⁵¹.

As the Brazilian Constitution is, therefore, a social, directing and compromising Constitution - according to the concept that the (authentic) tradition bequeathed to us -, it is absolutely possible to affirm that its content is targeted/directed towards the rescue of the (unfulfilled) promises of modernity (promises understood as rights inscribed in democratically produced legal texts)⁵².

According to Streck, "the thesis of constitutional leadership remains valid as long as the dialectical triangle advocated by Canotilho himself is not resolved (lack of security, poverty and lack of political equality)"⁵³. The Constitution still holds. Until we resolve these three types of violence, it is not possible to make a leap towards deconstitutionalization⁵⁴.

⁵⁰ STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do Direito**. 11. ed. Porto Alegre: Livraria do Advogado, 2014. p. 54.

⁵¹ STRECK, Lenio Luiz. **Jurisdição constitucional e decisão jurídica**. 4. ed. São Paulo: Revista dos Tribunais, 2014. p. 38.

⁵² STRECK, Lenio Luiz. **Jurisdição constitucional e decisão jurídica**. 4. ed. São Paulo: Revista dos Tribunais, 2014, p. 39.

⁵³ STRECK, Lenio Luiz. Rumo a Norundi, a bordo da CDI - Constituição Dirigente Invertida. **Revista Consultor Jurídico**. Available at: <<http://www.conjur.com.br/2016-out-27/senso-incumom-rumo-norundi-bordo-cdi-constituicao-dirigente-invertida>>. Accessed on 23 April 2020.

⁵⁴ STRECK, Lenio Luiz. Rumo a Norundi, a bordo da CDI - Constituição Dirigente Invertida. **Revista Consultor Jurídico**. Available at: <<http://www.conjur.com.br/2016-out-27/senso-incumom-rumo-norundi-bordo-cdi-constituicao-dirigente-invertida>>.

A Theory of the Adequate Governing Constitution to countries of late modernity, which can also be understood as a theory of the adequate governing Constituent suitable to peripheral countries, must therefore deal with the construction of the possibility conditions for rescuing promises of modernity that were not fulfilled, which, as we know, put in check the two pillars that support the Democratic Rule of Law⁵⁵.

It seems evident, therefore, that, when talking about a governing Constitution, one is not – and could not – sustain a constitutional normativism (revolutionary or not) capable of, by itself, operating emancipatory transformations⁵⁶.

What remains of the notion of the governing Constitution is the link between the legislator and the dictates of the Constitution's materiality, for the exact reason that, in this context, the law continues to be an instrument for the implementation of public policies. So, it is possible to assure the continuity of the governing Constitution thesis validity (once appropriate to each country, with an emphasis on countries like Brazil, where the coefficient of modernity promises not kept is extremely high)⁵⁷.

The Constitution, already in its preamble, proclaims the establishment of a Democratic Rule of Law and is based, moreover, on some basic guidelines:

www.conjur.com.br/2016-out-27/senso-incumom-rumo-norundi-bordo-c-di-constituicao-dirigente-invertida>. Accessed on 23 April 2020.

⁵⁵ STRECK, Lenio Luiz. *Jurisdição Constitucional e Hermenêutica: Perspectivas e Possibilidades de Concretização dos Direitos Fundamentais-Sociais no Brasil*. **Novos Estudos Jurídicos** - Volume 8 - Nº 2 - p.257-301, maio/ago. 2003.

⁵⁶ STRECK, Lenio Luiz. *Jurisdição Constitucional e Hermenêutica: Perspectivas e Possibilidades de Concretização dos Direitos Fundamentais-Sociais no Brasil*. **Novos Estudos Jurídicos** - Volume 8 - Nº 2 - p.257-301, maio/ago. 2003.

⁵⁷ STRECK, Lenio Luiz. *Jurisdição Constitucional e Hermenêutica: Perspectivas e Possibilidades de Concretização dos Direitos Fundamentais-Sociais no Brasil*. **Novos Estudos Jurídicos** - Volume 8 - Nº 2 - p.257-301, maio/ago. 2003.

We, representatives of the Brazilian people, gathered in a National Constituent Assembly to establish a Democratic State, aimed at ensuring the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, internally and internationally, to the peaceful settlement of disputes, promulgate, under the protection of God, the following CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL⁵⁸.

As fundamental objectives of the Federative Republic of Brazil, among others, are, according to Article 3 of the Charter, “to build a free, fair and solidary society; and to eradicate poverty and marginalization and to reduce social and regional inequalities”⁵⁹. The Brazilian Constitution, basically, appears as compromise-governing. The aforementioned constitutional text is the norm and, as such, binds or, in other words, subordinates the constituted power, becoming the State's action.

Furthermore, this content is aimed at a basic purpose, namely, to rescue the promises not fulfilled in modern times, that is, to enforce rights that, even enlisted, did not obtain implementation (and Brazil is a categorical example of this).

Finally, the key guideline of the Brazilian Democratic Rule of Law is to promote the transformation of the Brazilian reality, in such a way that the ideas in the Constitution must necessarily be preserved, as something that has “normative force able to en-

⁵⁸ BRASIL. **Constituição da República Federativa do Brasil**. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on 23 April 2020.

⁵⁹ BRASIL. **Constituição da República Federativa do Brasil**. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on 23 April 2020.

sure this core of late modernity not fulfilled”⁶⁰. This nucleus is embodied in the purposes of the State established in article 3. The fulfillment of these social and economic purposes is a condition for the possibility of National State insertion into the field of globalizing postmodernity⁶¹.

The Constitution “establishes the conditions for political-state action”⁶². In other words, the Constitution is not only tasked with pointing to the future. It also has the relevant function of protecting the rights already assured⁶³. However, the Brazilian reality has shown the opposite. It seems to us that there was not the assimilation of this new (today not so much) paradigm that was forged in the constitutionalism of the post-war period and that ended up being enshrined in Brazil through the promulgation of the 1988 Charter. Indeed, in Brazil, for a long time, “there is an imaginary of constitutional non-compliance”⁶⁴. The time has come, therefore, to turn this path. After the pandemic that has been plaguing us, and it will pass, the recession will approach. Once all this unfortunate situation is over, and finally the constitutional project of the nation

⁶⁰ BERCOVICI, Gilberto; MASSONETTO, Luís Fernando. A **constituição dirigente invertida**: a blindagem da Constituição Financeira e a agonia da Constituição Económica. Faculdade de Direito da Universidade de Coimbra URL persistente: URI: <<http://hdl.handle.net/10316.2/24845>>. Accessed on 23 April 2020.

⁶¹ BERCOVICI, Gilberto; MASSONETTO, Luís Fernando. A **constituição dirigente invertida**: a blindagem da Constituição Financeira e a agonia da Constituição Económica. Faculdade de Direito da Universidade de Coimbra URL persistente: URI: <<http://hdl.handle.net/10316.2/24845>>. Accessed on 23 April 2020.

⁶² STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise**: uma exploração hermenêutica da construção do Direito. 11. ed. Porto Alegre: Livraria do Advogado, 2014, p. 57.

⁶³ STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise**: uma exploração hermenêutica da construção do Direito. 11. ed. Porto Alegre: Livraria do Advogado, 2014, p. 68.

⁶⁴ STRECK, Lenio Luiz. **Jurisdição constitucional e decisão jurídica**. 4. ed. São Paulo: Revista dos Tribunais, 2014, p. 30.

is fulfilled, the Brazilian State (Legislative, Executive and Judiciary) will have a central role.

Thus, even with the pandemic, or especially due to the pandemic, our Democratic Rule of Law needs to be preserved, keeping democracy and the performance of public institutions healthy in facing this health crisis.

2.3. EMERGENCY MEASURES ADOPTED BY THE BRAZILIAN STATE IN THE OUTBREAK OF COVID-19

The global crisis experienced today due to the pandemic, therefore, ends up generating a vast network of international norms, and the challenge will be to instrumentalize the application and implementation of international public policies, decided both at the regional and supranational levels, without preventing the collaboration so that international institutions of global scope can also guarantee the effectiveness of their standards and policies in all regions of the world.

However, in the case of Brazil, it appears that the challenge will not only be to instrumentalize the application and implementation of international public policies, but the autonomy of its own federative entities (article 18 of the Federal Constitution) to implement health policy measures inherent to the common legislative and administrative competence for health care (article 23, II, and article 24, XII of the CF), direct the single system (article 198, I, CF) and, above all, carry out health and epidemiological surveillance actions (article 200, II, CF).

At first, Law n°. 13.979/20 was enacted, regulated by Ordinance n°. 356/20, which establishes the possibility of isolation and quarantine. Whereas the first measure advocates the separation of sick or contaminated people, or luggage, means of transport, goods or affected postal parcels, the second institute prescribes the restriction of activities or separation of people suspected of being infected

from people who are not sick, or from luggage, containers, animals, means of transport or goods suspected of being contaminated⁶⁵.

The normative frameworks have not established which of the two ways should be adopted, prescribing only that the isolation measure will take place on the recommendation of the epidemiological surveillance agent and that the quarantine measure will be determined through a formal and duly motivated administrative act, edited by Health Secretary of the State, Municipality, Federal District or Health Minister of State or higher in each management level, published in the Official Gazette and widely disseminated by the media.

It was also agreed that the quarantine measure will be adopted for a period of up to 40 days, and may be extended for the necessary time to reduce community transmission and guarantee the maintenance of health services in the territory⁶⁶.

São Paulo, for example, was the only one among the states with the most cases to adopt the term quarantine; through Decree n°. 64.881/20, São Paulo restricted activities in the state in order to avoid contamination or spread of the coronavirus. Other federal units have also suspended the operation of numerous activities, such as Goiás, Ceará, Minas Gerais and the Federal District.

In view of the restraints carried out, in which many commercial activities were suspended, a series of discussions began about the impacts of this decision on the country's economy.

For example, the honking that took place on March 26 and April 11, 2020 protested against measures of social isolation, calling for the reopening of commercial establishments and the adoption of vertical isolation.

In this context, a false asymmetry was installed. In a shallow analysis, a dichotomy is announced between measures to contain

⁶⁵ BRAZIL, Law n°. 13.979, 6 February, 2020.

⁶⁶ BRAZIL, Ordinance n°. 356, 11 March 2020.

the contagion curve and the preservation of the country's economy. This conclusion ignores that it is the State's responsibility to ensure that the population has resources (both economic and basic services such as health) to overcome the health crisis.

The strengthening, in this scenario, of a neoliberal speech that exempts state responsibility and restricts it to safeguard the business community directly attacks the Democratic Rule of Law, since the population does not have to choose between one guarantee or another, but it is assured that they have both, under the terms of the Charter.

The welfare state remains at the center of post-war political discussions. For some time now, a conclusion has been revisited that social policy unfolds in the context of a transformed global economy that has damaged social and economic aspects, foundations of the welfare state.

Pierson (2008) mentions that democracies are already in a stage of permanent austerity. Low economic growth at the global level, together with the challenges of job creation and population aging are already generating intense pressures. Payroll tax burdens and their possible adverse impact on employment and wages create tensions in traditional coalitions in support of the welfare state. For the author, except in the event of an extremely unlikely return to the era of high economic growth, pressures on welfare states will certainly intensify⁶⁷.

Despite the prospect of permanent austerity, the crisis arising from the pandemic was added to the coalition of threat to a state of well-being, dividing positions among those who seek, as far as possible, to maintain the *status quo* and those who wish to dismantle basic social protections.

⁶⁷ PIERSON, Paul. Coping with Permanent Austerity. In: LEIBFRIED, Stephan; MAU, Steffen (org.), **Welfare States: Construction, Deconstruction, Reconstruction II**. ISBN 9781847200808 (3 volume set). MPG Books: Cornwall, 2008.

Pierson (2008) mentions that in countries where staunch supporters of neoliberalism are in power, such as New Zealand and even the United Kingdom, this division is already clear. In Brazil, in a place where social trends coupled with the pandemic make budgetary pressures intense and relentless, cleavages are likely to become more complex.

It is true that social rights cost. The guarantee of health, social and individual rights, the containment of poverty in times of unemployment, the granting of emergency aid, will all be supported by a budget that is finite, limited, and insufficient. On the other hand, some issues must be considered.

The first is that quarantine can benefit the economy in the long run. As recommended by the World Health Organization (WHO), isolation is still one of the safest ways to avoid contagion with the new coronavirus, and, as a result, it is a way to guarantee the citizen's right to health. On the other hand, the study by Correia, Luck and Verner (2020), carried out by the American Central Bank in partnership with MIT, indicates that preventing people from working at the present time can bring long-term economic benefits⁶⁸.

It is evident that the economy will be largely affected. Unemployment will increase and incomes will decrease. But, as the study shows, this is an effect of the pandemic, not of quarantine.

A period of normality cannot be used as a comparison. For this reason, economists used the 1918 flu, the latest pandemic comparable to the current one (although, as the authors acknowledge, the 1918 flu was more deadly than COVID-19), concluding that the places that fought the pandemic with longer-lasting measures had, in addition to greater control in the

⁶⁸ CORREIA, Sergio; LUCK, Stephan; VERNER, Emil. **Pandemics Depress the Economy, Public Health Interventions Do Not:** Evidence from the 1918 Flu (March 30, 2020). Available at SSRN: <<https://ssrn.com/abstract=3561560>> or <<http://dx.doi.org/10.2139/ssrn.3561560>>.

lethality of the disease, better results in employment, production and credit indicators⁶⁹.

It is imperative to note that it will be up to the State to safeguard citizens' right to health and life. In a scenario in which financial resources are scarce, the economy collapses and unemployment rates rise, it is not possible to remove the responsibility of the State to guarantee fundamental rights, especially for economic reasons, when there is evidence that, once health recommendations are maintained, it is possible to recover the economy in the long run.

In conclusion, it is certain that the restructuring due to the new reality will include preservation and modernization elements of the social contract. What should be sought is to do so in a way that it does not create unsustainable budgetary burdens, but that gives emerging social demands some chance to compete for available public resources, even contributing to future economic performance.

Measures such as emergency aid should be encouraged, in the same way that provisions such as MP 936/2020 (already amended, but which provided for the possibility of suspending employment contracts, without remuneration), must be rejected. The moment of health crisis experienced justifies an even greater protection of social rights, never a justification for reducing them, especially when other guarantees are already being affected, such as the complete freedom to come and go, for example.

⁶⁹ In the original, the authors' conclusion is that: "First, the pandemic leads to a sharp and persistent fall in real economic activity. We find negative effects on manufacturing activity, the stock of durable goods, and bank assets, which suggests that the pandemic depresses economic activity through both supply and demand-side effects. Second, cities that implemented more rapid and forceful non-pharmaceutical health interventions do not experience worse downturns. In contrast, evidence on manufacturing activity and bank assets suggests that the economy performed better in areas with more aggressive NPIs after the pandemic. Altogether, our evidence implies that pandemics are highly disruptive for economic activity. However, timely measures that mitigate the severity of the pandemic may also reduce the severity of the persistent economic downturn. That is, NPIs can reduce mortality while at the same time being economically beneficial".

The changes in the global and national economy due to the pandemic will not be irrelevant, but it is also the social and economic transformations that occur within democracies that put pressure on mature welfare states and that demonstrate the state's capacity to enforce rights and guarantee the Democratic State.

In addition to establishing the possibility of isolation and quarantine, Law n°. 13.979/20 provided for the duty to share essential data between Public Administrations and private legal entities, when requested, with the aim of tracking infected people or those suspected of coronavirus infection, with the sole purpose of preventing its spread.

On 4/17/2020, the President of the Republic also issued Provisional Measure 954/20, providing for the sharing of user data by telecommunications service providers with the Brazilian Institute of Geography and Statistics (IBGE), to support the official statistical production during the coronavirus pandemic. The MP mentioned above obliges the landline and mobile telephone companies to make available to the IBGE Foundation the list of names, telephone numbers and addresses of their consumers, individuals or legal entities.

Having been the subject of several Direct Unconstitutionality Actions (ADIs), the measure was suspended by a preliminary decision by Minister Rosa Weber, on 4/24/2020, endorsed by the STF Plenary on 4/7/2020.

The Supreme Court considered that there was no legitimate public interest in sharing personal data, since it was not yet defined how and what the collected data would be used for, and it is not possible to assess the need and adequacy of the measure.

Furthermore, it was considered that MP n°. 954/20 did not present a mechanism capable of protecting personal data from accidental leaks, unauthorized access or misuse, in its transmission or treatment - an omission that threatens fundamental rights of Brazilians.

As known, the legal instrument that regulates the protection of personal data is the General Data Protection Law (Law n°.

13.709/18), which, despite being expected to enter into force only in August this year, established principled guidelines to be fulfilled that have already been used in judicial decisions through extensive interpretation of the Constitution and through the interpretation of existing laws (Brazilian Civil Rights Framework for the Internet and the Consumer's Defense Code).

The LGPD allows the treatment and sharing of personal data by the public administration for the implementation of public policies, establishing rules and criteria to be obeyed, defining criteria for the liability of agents for eventual damages caused by the processing of personal data, especially regarding health data, which are considered sensitive and subject to greater restrictions.

It so happens that initiatives by the Legislative and Executive branches are seeking to increase the LGPD's *vacatio legis* term, postponing effective data protection legislation when it is most needed.

When editing Provisional Measure n°. 959/20, which deals with the operationalization of the emergency aid for the preservation of employment and income and the monthly emergency aid, the Presidency of the Republic also introduced the extension of the LGPD *vacatio legis* for more than a year, until 3/5/2021, running over the Parliament that was already discussing the matter (ex: Bill 1.179/20). Besides, the simple fact that the norm was included in a rule that deals with a different subject is already quite worrying.

The existence of a pandemic promotes the increasing use of technologies for tracking people and collecting biological data to contain the spread of the disease, which can lead to many positive results, but also represents a great risk to the intimacy and privacy of citizens.

Considering that many authorities often take advantage of turbulent times to extend their powers of surveillance over the population, also that these instruments can be used for purposes that go far beyond combating the pandemic, and the urgency and speed with which measures are taken during a crisis, it is neces-

sary to intensify the inspection of legislative production and the adoption of provisional measures.

Philosopher Yuval Noah Harari warns about the danger in case companies and governments start to collect our biometric data massively, being able to use them to predict the feelings of citizens and also manipulate them to sell what they want – be it a product, be it a politician.

He also warns about the possibility that biometric surveillance taken as a temporary measure during a state of emergency be indefinitely extended even when coronavirus infections fall to zero, under government arguments that they need to keep biometric surveillance systems up and running because they fear a second wave of coronavirus or because there is a new strain of Ebola evolving in central Africa or similar situations.

Actually, the necessary personal data protection should not nullify the also necessary data collection for the protection of people's lives and health, on the contrary, the two rights must go hand in hand, harmoniously; however, for this, good intentions are not enough, effective legal measures are needed to guarantee these rights.

Moreover, the extension of the General Data Protection Law vacancy by MP n°. 959/20 should be evaluated under the perspective of adequacy and necessity, due to the purpose of the rule, in the same way the Supreme Court did in relation to the MP n°. 954/20.

2.4. JUDICIAL INDEPENDENCE AS GUARANTEE OF THE PROJECT OF NATION ESTABLISHED IN THE CONSTITUTIONAL TEXT - GUARANTEE OF INDIVIDUAL RIGHTS, GUARANTEE OF SOCIAL RIGHTS AND PROHIBITION OF REGRESSION

It can be said that the Brazilian Federation is a real tangle of competences of the various federative entities, which end up being responsible for some topics exclusively, others privately and many

concurrently and/or supplementary with the others, as is the case of public health.

In practice, therefore, and without going down to minutiae, it is obvious that the Union (legal entity governed by domestic public law; an autonomous federative entity in relation to the Federative States, Municipalities and the Federal District, with constitutionally determined administrative and legislative powers), the Federative States and Municipalities are mutually competent to take care, from the normativity point of view (articles 24, XII⁷⁰ and 30, I and II⁷¹, CF) and the action (articles 23, II⁷² and 198, I⁷³, CF), citizens' health.

That is why the first impasse already experienced due to the crisis caused by the pandemic is, therefore, as seen, a certain mismatch in the actions taken between the Federal Government and each unit of the federation.

This true normative-executive labyrinth, which is much more disorienting than it provides the necessary guidelines for managers and the population, caused the Supreme Federal Court to be provoked, at a level of concentrated control of constitutionality, so that it dictated the rules of the game in the exceptional context now experienced.

In ADPF n°. 672, Rapporteur Min. Alexandre de Moraes, judged on 4/8/2020, the Supreme Federal Court understood that:

⁷⁰ “Art. 24. The Union, the states and the Federal District have the power to legislate concurrently on: (...) XII – social security, protection and defense of health”.

⁷¹ “Art. 30. The municipalities have the power to: I – legislate upon matters of local interest; II – supplement federal and state legislations where pertinent”.

⁷² “Art. 23. The Union, the states, the Federal District and the municipalities, in common, have the power: (...) II – provide for health and public assistance, for the protection and safeguard of handicapped persons”.

⁷³ “Art. 198. Health actions and public services integrate a regionalized and hierarchical network and constitute a single system, organized according to the following directives: I – decentralization, with a single management in each sphere of government”.

DETERMINE effective compliance with articles 23, II and IX; 24, XII; 30, II and 198, all of the Federal Constitution in the application of Law 13,979/20 and related provisions, RECOGNIZING AND ENSURING THE EXERCISE OF THE CONCURRENT COMPETENCE OF THE STATE AND DISTRICT GOVERNMENTS AND SUPPLEMENTARY COMPETENCE OF THE MUNICIPAL GOVERNMENTS, each in the exercise of their powers and within the scope of their respective territories, for the adoption or maintenance of restrictive measures legally permitted during the pandemic, such as the imposition of distancing/social isolation, quarantine, suspension of teaching activities, trade restrictions, cultural activities and the circulation of people, among others; REGARDLESS OF SUPERVENIENCE OF FEDERAL ACT IN CONTRARY SENSE, without prejudice to the GENERAL COMPETENCE OF THE UNION to establish restrictive measures throughout the national territory, if deemed necessary. Obviously, the formal and material validity of each specific state, district or municipal regulatory act can be analyzed individually . (ADPF 672, Rapporteur Min. Alexandre de Moraes, published in ELECTRONIC PROCESS DJe-089 PUBLISHED ON 04/14/2020)

In ADI n°. 6.341, draftsman for the judgment, Min. Edson Fachin, the STF “partially granted the injunction to give interpretation according to the Constitution to § 9 of article 3 of Law n°. 11.979/20, in order to explain that, preserving the attribution of each sphere of government, under the terms of item I of article 198 of the Constitution, the President of the Republic may dispose, by decree, on public services and essential activities”.

Well, if within the limits of its primary function - which is to arbitrate federative conflicts - the Supreme Federal Court, as the Higher Court of the Judiciary, can do little, imagine the damage to governance caused by the excessive intervention of Judges in

the current moment of exception experienced by the three levels of government within the scope of our Federalism.

In other words, if it is already very difficult for the Brazilian judiciary to decipher the rules of legislative and executive competence of the four federative entities, imagine replacing them in their competences so that they could, without any basis of know-how, expertise or popular legitimacy, implement measures such as social isolation, quarantine, lockdown and the like.

The theory of institutional capacities, also called “institutional capacities argument”⁷⁴, has been increasingly invoked as a way to guide and criticize the performance of the Judiciary when analyzing sensitive issues that could claim a different attitude to the other institution of country’s legal-institutional framework.

Arguelhes and Leal define, in general and succinctly, the general structure of the argument:

[...] it is certain that the Judiciary can provide some answer to a given set of questions that are being submitted for judicial review. However, when we compare the resources and limitations of the Judiciary with those of other institutions that could provide their own answers to the type of problem under examination, we find that judicial performance is not good enough.⁷⁵

That is to say, the theory “as a justification for the adoption of a more self-contained stance when acting in areas in which there is a great need for technical expertise or free consideration between multiple and complex political variables”⁷⁶ is invoked.

⁷⁴ ARGUELHES, Diego Werneck; LEAL, Fernando. O argumento das “capacidades institucionais” entre a banalidade, a redundância e o absurdo. In **Direito, Estado e Sociedade**. n. 38, jan/jun 2011, pp. 6 a 50.

⁷⁵ Op. cit., p. 7.

⁷⁶ Idem, ibidem.

According to Adrian Vermeule, “the judicial review of legal texts constitutionality and the judicial decision-making processes aimed at constitutional interpretation must be carried out in the light of institutional capacities”.⁷⁷⁻⁷⁸

Contrary to what one might think, the Judiciary would not be exempting itself from its responsibility as a social peacemaker and guarantor of legal security. In fact, by taking a self-contained stance on certain issues, it would be guaranteeing harmony between the institutions and promoting the adoption of the best possible solution, given its functional limitation to resolve the issue brought to your attention.

On the topic, the lesson of Frederick Schauer is valuable and he says, “*an agent who says, ‘This is not my job’, is not necessarily abdicating responsibility. One form of taking responsibility consists in taking the responsibility for leaving certain responsibilities to others*”.⁷⁹

This does not signal the absolute impossibility of decisions being taken by the Judiciary on the subject of COVID-19. However, it serves as a guide to regulate that its performance must be exceptional, only when based on incontrovertible scientific studies that absolutely disqualify the syndicated government decision.

In Brazil, the theory has already been invoked in a vote made by Minister Luiz Fux in the judgment of the Cesare Battisti case, in which he stated:

⁷⁷ VERMEULE, Adrian. **Judging under Uncertainty**: an institutional theory of legal interpretation. London: Harvard University Press, 2006. p. 230.

⁷⁸ Free translation of the text: “Judicial review of statutes for constitutionality and judicial decision-procedures for constitutional interpretation must be assessed in light of institutional capacities”.

⁷⁹ SCHAUER, Frederick. **Playing by the Rules**: a philosophical examination of rule-based decision-making in law and in life. Oxford/New York: Oxford University Press, 1991, p. 162 apud ARGUELHES, Diego Werneck; LEAL, Fernando. op. cit., p. 10. Free translation: “An agent who says, ‘This is not my job’, is not necessarily abdicating responsibility. One form of taking responsibility consists in taking the responsibility for leaving certain responsibilities to others”.

[It is necessary to define who is responsible for exercising the value judgment on the existence, or not, of political persecution in the face of the said extradite. As this is an eminently international relationship, the dialogue between the requesting and requested States must be carried out through the authorities that represent such legal entities under external public law. In Brazil, as known, the Head of State is the President of the Republic. When deciding on the extradition of a foreigner, the President does not act as Head of the Federal Executive Branch (art. 76 of the CRFB), but as a representative of the Federative Republic of Brazil. It is incumbent upon the President of the Republic, within the interpretative freedom that arises from his duties as Head of State, to characterize the nature of the crimes, to appreciate the current political context and possible persecutions against the extradited in relation to the present, which is permitted by the text of Treaty signed (art. III, 1, f). The Federal Supreme Court, in addition to not having the constitutional competence to carry out such an examination, lacks the institutional capacity to do so. It is applicable here the notion of “institutional capacities”, coined by Cass Sunstein and Adrian Vermeule (Interpretation and Institutions. U Chicago Law & Economics, Olin Working Paper, n°. 156, 2002; U Chicago Public Law Research Paper n°. 28. (. ..)) – the Judiciary was not constitutionally designed to take political decisions at the international level; it is the role of the President of the Republic, who is democratically elected, and has the legitimacy to defend the State’s interests abroad.⁸⁰

In Extraordinary Appeal n°. 848826/DF, Minister Luiz Fux again invoked the argument in a vote grounded like this:

Here, for the time being, I believe that the institutional capacities argument can be invoked to justify the adoption

⁸⁰ Separate petition in Extradition no. 1085 / Complaint no. 11243. Vote by Minister Luiz Fux, p. 33.

of this constitutional arrangement of competencies. As a result, in doctrinal terms (FUX Luiz. Electoral Principles. In.: NORONHA, João Otávio; PAE KIM, Richard. Studies in Tribute to Minister Dias Toffoli – press), the argument of institutional capacities contains an informative principle of the electoral magistrate’s performance, according to which he/she must recognize his/her cognitive limitations to enter the merit of certain matters that require some expertise, as well as to analyze the possible systemic effects of pronouncements, anchored in the doctrine of Cass Sunstein (SUNSTEIN, Cass R. Beyond Judicial Minimalism. Chicago Law School Public Law and Legal Theory Working Paper, 2008, p. 1). In other words, the thesis of institutional capacities can – and should – be understood as an interpretive vector to subsidize the investor whenever there is reasonable doubt about the best exegesis of a given constitutional provision, precisely the hypothesis of the case, which discusses the meaning and scope of arts. 31, § 2; 71, I; and 75, all of the Magna Carta. Applying the institutional capacities argument to the present case, the Court of Accounts has greater expertise and know-how to assess the specific management accounts, when compared with the Municipal Councils.⁸¹

Regarding this last issue involving the competence of City Councils or Courts of Accounts to analyze and judge mayors’ management accounts, the electoral doctrine⁸² has also used the argument of institutional capacities, to reveal the growth of exploitation of this theory in the Brazilian legal scope.

⁸¹ P. 15 from the vote of the Minister Luiz Fux. RE 848826, Rapporteur (a): Min. ROBERTO BARROSO, Rapporteur for Appeal Decision: Min. RICARDO LEWANDOWSKI, Full Court, judged on 10/08/2016, ELECTRONIC JUDGMENT GENERAL REPERCUSSION – MÉRITO DJe-187 DIVULG 23-08-2017 PUBLISHED 24-08-2017

⁸² FRAZÃO, Carlos Eduardo. A competência para julgamento das contas de governo de gestão dos Prefeitos: o argumento das capacidades institucionais. In.: FUX, Luiz; FRAZÃO, Carlos Eduardo. **Novos Paradigmas do Direito Eleitoral**. Fórum: Belo Horizonte: 2016, p. 149-159.

The theory of institutional capacities takes seriously the merits and demerits of different institutions in a given institutional arrangement to deal with a varying range of issues.

Still, it is imperative to reflect on the role of the Judiciary in a Democratic Rule of Law. After all, “[...] how to understand the role of the Judiciary from a conception of constitutionalism that has as its base element a greater democratic deepening?”⁸³. And how to understand the role of the Judiciary in this pandemic scenario?

In effect, once again the Judiciary has been called upon to speak out on various topics. In view of this scenario, from which the remarkable judicialization of today’s politics emerges, it is necessary to (re)discuss the role of the Brazilian Justice, giving primary focus to the issue surrounding the content of the respective decisions, in order to make them compatible with the (new) model arising from Democratic Rule of Law, after which “[...] a certain shift from the center of the legislative and executive decisions to the plan of constitutional justice”⁸⁴.

In other words, if with the advent of the Welfare State and the State’s strongly interventionist role the focus of power/tension has shifted to the Executive, then there is a change in this profile in the Democratic Rule of Law.

Inertia of the Executive and the lack of action by the Legislature can – in certain circumstances – be supplied by the Judiciary, precisely through the use of the legal mechanisms provided for in the Constitution that established the Democratic Rule of Law.⁸⁵

⁸³ TASSINARI, Clarissa. A atuação do Judiciário em tempos de Constitucionalismo Contemporâneo. **Revista da Faculdade de Direito do Sul de Minas**, Pouso Alegre, v. 28, n. 2, p. 31-46, jul./dez. 2012. p. 32.

⁸⁴ STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do Direito**. 11. ed. Porto Alegre: Livraria do Advogado, 2014. p. 64.

⁸⁵ STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do Direito**. 11. ed. Porto Alegre: Livraria do Advogado, 2014. p. 64.

This, anyway, to all evidence, in Streck's diction: [...] will demand strict control of judicial decisions and judges. After all, if it is inexorable that someone has to decide, and also the growth of demands for rights (fundamental-social, mainly) which increases the power of constitutional justice as a result, it seems evident that this cannot come to compromise one of the supporting pillars of the Constitutionalist paradigm: democracy.⁸⁶

The Constitution mission of a Democratic State is to convey minimal consensus, which is essential for the dignity of the people and for the functioning of the democratic regime, and which must not be affected by occasional political majorities. These elementary consensus, although they may vary depending on the political, social and historical circumstances of each country, involve the guarantee of fundamental rights, the separation and organization of the constituted powers and the setting of certain ends of a political nature.⁸⁷

Therefore, in the Democratic Rule of Law, “[...]the law (Constitution) becomes, therefore, a privileged way of instrumentalizing the State's action seeking the objectives pointed out by the constitutional text, understood in its whole principle-based governing”⁸⁸.

And, thus, “[...] the notion of a Democratic State of Law – standardized in article 1 of the Brazilian Constitution – demands the existence of a (basic) core that houses the hosts conquests based on the binomial democracy and fundamental-social human rights”⁸⁹.

This core coming from the Democratic Rule of Law is, today, part of a basic general-universal nucleus containing elements that

⁸⁶ STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do Direito**. 11. ed. Porto Alegre: Livraria do Advogado, 2014. p. 65.

⁸⁷ BARROSO, Luis Roberto. **Curso de Direito Constitucional**. São Paulo: Saraiva, 2011. p. 90.

⁸⁸ STRECK, op., cit., p. 54.

⁸⁹ STRECK, Lenio Luiz; MORAIS, José Luiz Bolzan de. Estado Democrático de Direito. In: CANOTILHO, J. J. Gomes et al. **Comentários à Constituição do Brasil**. São Paulo: Saraiva: Almedina, 2013. p. 236-237.

could comfort a (general) theory of the Constitution and constitutionalism of the West.

The other constitutional substrates capable of comforting an adequate understanding of the concept come from the regional specificities and the national identity of each State⁹⁰. In other words, apart from the universal minimum core, which can be considered common to all countries that have adopted democratic-constitutional forms of government, there is a specific core of each Constitution, which, inexorably, will be differentiated from State to State.

It is what can be called the core of social-fundamental rights embodied in each text that meet the fulfillment of the promises of modernity. It is in this context that the normative plus represented by the Democratic Rule of Law must be understood⁹¹.

Hence, at the end of the day, the understanding about the meaning of contemporary constitutionalism, understood as the constitutionalism of the Democratic Rule of Law, to all evidence, “[...] implies the necessary understanding of the existing relationship between Constitution and constitutional jurisdiction.”⁹² This means that, while the Constitution is the foundation of (superior) validity of the order and substantiates the political-state activity itself, constitutional jurisdiction becomes the condition for the possibility of the Democratic Rule of Law⁹³.

It is necessary to remember, however, the distinction between judicialization of politics and judicial activism. The first is contingent in nature. The second, behavioral, decisional, occurring when the autonomy of the law is replaced by moral, political or even economic arguments, by the will or worldview of the interpreter. Complying with the Constitution is not activism, let it be clear.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² STRECK, Lenio Luiz. **Jurisdição constitucional e decisão jurídica**. 4. ed. São Paulo: Revista dos Tribunais, 2014. p. 37.

⁹³ Ibid.

The question then arises: what, after all, would be the limits of this performance? Indeed, the limit of the limits would be, fair and precipitously, in the very distinction between judicialization and activism. In an environment whose judicialization has been a recurring feature, “[...] the distinction between activism and judicialization of politics presents itself as indispensable, preventing the Law from being reduced to just a product of judicial decisions, which affects the democratic bases that found the Brazilian State.”⁹⁴

The phenomenon of (life and/or social)politics judicialization arises from different situations, resulting in a phenomenon that does not depend on the designs of Judiciary members. It is, therefore, a phenomenon that finds in its genesis factors of a *contingent* nature⁹⁵.

As contingent factors of this phenomenon of politics judicialization, in the sense of a greater Judiciary interference in the socio-political scene, we mention: a) the governing constitutionalism (governing, compromising and normative constitution, with an extensive catalog of individual and social fundamental rights)⁹⁶; b) legislative inflation; c) political crises and policy shortcomings in the implementation of social and collective rights; d) the crisis of democracy, which tends to produce an increasing and complex number of regulations; e) greater access to justice; f) society expansion, which is increasingly marked by profound complexity. It is, then, the judicialization of politics (and of the social), a movement that denotes a facet of our daily judicial protagonism⁹⁷, materia-

⁹⁴ TASSINARI, Clarissa. A atuação do Judiciário em tempos de Constitucionalismo Contemporâneo. **Revista da Faculdade de Direito do Sul de Minas**, Pouso Alegre, v. 28, n. 2, p. 31-46, jul./dez. 2012. p. 39.

⁹⁵ BARCELOS, Guilherme. **Judicialização da Política e Ativismo Judicial**. Florianópolis: Habitus. 2018, p. 22.

⁹⁶ “Ontem os Códigos, hoje as Constituições!”, recalling the famous words of Paulo Bonavides.

⁹⁷ Lenio Streck considers judicial protagonism as a gender, whereas judicialization of politics and judicial activism are the respective species.

lizing in a phenomenon “[...] migratory of the Legislative’s own decision-making power to the Judiciary”⁹⁸, whose genesis finds its seat in contingency factors, as stated. Among them, the above.

Deepening the theme, Tassinari argues that the politics judicialization should also be understood as a circumstantial phenomenon, as it arises from a context of strengthening jurisdiction after the Second World War, and, at the same time, contingency, “[...] meaning that the Judiciary is called upon to intervene due to the inertia of any of the other State Powers, presenting itself, therefore, much more as the result of a political-social conjuncture”⁹⁹. Thus, the Judiciary started to play a determining role in defining certain standards to be respected.

It is feasible, therefore, to identify the phenomenon of the politics judicialization as a result of the leading and compromising character of the Constitutions, the emergence and consolidation of the Constitutional Courts (in Europe and Brazil), the increase in litigation and legislative inflation, the greater access to justice and, lastly, the crisis of democracy.

So, it becomes perfectly possible (and correct) to identify the phenomenon of judicialization as arising from different situations, such as the compromising and governing character of the Constitutions, the increase in litigation and access to justice, the legislative inflation in certain matters, the crisis of democracy with a “numberless” of the most diverse regulations, etc.

After everything, however, it remains evident that politics judicialization, as a kind of judicial protagonist, is a phenomenon that does not depend on the designs of the Judiciary members.

Judicialization is definitely a phenomenon that emerges from the relationship between the State Powers, representing a political-legal phenomenon generated by current democracies.

⁹⁸ STRECK, Lenio Luiz. **Jurisdição constitucional e decisão jurídica**. 4. ed. São Paulo: Revista dos Tribunais, 2014. p. 47.

⁹⁹ TASSINARI, Clarissa. A atuação do Judiciário em tempos de Constitucionalismo Contemporâneo. **Revista da Faculdade de Direito do Sul de Minas**, Pouso Alegre, v. 28, n. 2, p. 31-46, jul./dez. 2012. p. 41.

Politics judicialization, consequently, is not an evil in itself, but something of a contingent and circumstantial nature, the result of multiple factors, and especially in the context of modern democracies¹⁰⁰.

Judicial activism, in turn, is a different phenomenon. According to Oliveira et al., although not expressly mentioning, Antoine Garapon, in his *The Keeper of Promises*, “[...] correctly perceives the element that marks the dividing line that separates judicialization from activism”¹⁰¹.

Indeed, after a thorough analysis of the way contemporary society sees topics such as politics and democracy, demonstrating how contemporary democracy ended up making some room for judicialization¹⁰², Garapon asserts the following: “Activism begins when, among several possible solutions, the choice of the judge is dependent on the desire to accelerate social change or, on the contrary, to stop it”¹⁰³.

According to Lenio Streck, for whom the issue of activism in Brazil is extremely misunderstood, a judge or court practices activism: [...] when deciding on the basis of political or moral arguments, in short, when the law is replaced by the personal convictions of each magistrate (or a group of magistrates); whereas judicialization is a phenomenon that emerges from the relationship

¹⁰⁰ BARCELOS, Guilherme. **Judicialização da Política e Ativismo Judicial**. Florianópolis: Habitus. 2018, p. 22.

¹⁰¹ OLIVEIRA, Rafael Tomaz de et al. A jurisdição constitucional entre a judicialização e o ativismo: percursos para uma necessária diferenciação. In: SIMPÓSIO NACIONAL DE DIREITO CONSTITUCIONAL, 10. 2011. **Anais**. Available at: <<http://www.abdconst.com.br/anais2/JurisdicaoRafael.pdf>>. Accessed on: 05 May 2020. p. 283

¹⁰² OLIVEIRA, Rafael Tomaz de et al. A jurisdição constitucional entre a judicialização e o ativismo: percursos para uma necessária diferenciação. In: SIMPÓSIO NACIONAL DE DIREITO CONSTITUCIONAL, 10. 2011. **Anais**. Available at: <<http://www.abdconst.com.br/anais2/JurisdicaoRafael.pdf>>. Accessed on: 05 May 2020. p. 283.

¹⁰³ GARAPON, Antoine. **O guardador de promessas: justiça e democracia**. Lisboa: Instituto Piaget, 1998. p. 54 apud OLIVEIRA, op. cit., p. 283.

between the powers of the State (imagine, here, in the displacement of the tension pole of the Executive and Legislative Powers towards constitutional justice) [...].¹⁰⁴

There it is the main differentiation between judicialization and activism, which is: while judicialization is a problem of contemporary democracies, and its genesis is contingent/circumstantial, judicial activism is a phenomenon marked by behavioral factors, depending on a volitional act (or will) of the judging body.

In other words, activism occurs when the judge or the Court decides on moral or political arguments and related ones; when the law (or its autonomy) ends up being replaced by the judge’s personal convictions.

It is not different, as appropriate, what Oliveira et al. teaches, when he says “[...] judicialization is a political phenomenon generated by contemporary democracies, whereas activism is an interpretive problem, a chapter in the theory of law (and the Constitution).”¹⁰⁵

Therefore, judicialization and activism are species of the judicial protagonist genre. However, whereas judicialization is notable for contingent/circumstantial factors, activism is characterized by a problem derived from behavioral factors.

In a pandemic universe, this issue is looming, be it due to the abrupt increase in demands before the Judiciary, or due to the multiplicity of cause of actions that each of them present – for instance, they go from requirements to suspend measures adopted by the other Powers, to requirements of a service nature, such as the lockdown decree, the reservation of beds in Intensive Care Units (ICU) and even the repositioning of positions in hospitalization

¹⁰⁴ STRECK, Lenio Luiz. **Verdade e consenso: constituição, hermenêutica e teorias discursivas**. 4. ed. São Paulo: Saraiva, 2011. p. 589.

¹⁰⁵ OLIVEIRA, Rafael Tomaz de et al. A jurisdição constitucional entre a judicialização e o ativismo: percursos para uma necessária diferenciação. In: SIMPÓSIO NACIONAL DE DIREITO CONSTITUCIONAL, 10. 2011. **Anais...** Available at: <<http://www.abdconst.com.br/anais2/JurisdicaoRafael.pdf>>. Accessed on 5 May 2020. p. 271.

queues. In this universe, the line between judicialization and activism becomes even more fine. This problem must be contextualized, with recent and concrete examples emanating from the Brazilian institutional framework.

On April 30, 2020, in response to a request from the Public Prosecutor's Office, a judge of the District Court of Diffuse and Collective Interests of the District of São Luís decreed, by judicial means, a ban on the movement of people (lockdown) in four cities in the metropolitan region from the capital of the state of Maranhão, starting on May 5.

Notwithstanding the "intentions" underlying the decision, there is an example of an activist decision, where legality ended up being replaced by the intentions of the decision-maker and which exceeded the space limits for judicial action, without having the aforementioned Power, the capacity to articulate the decree itself.

Public policies execution is the responsibility of the Executive, and the Executive has the knowledge of the current situation, the scope of the measures taken until then to contain the pandemic, the conditions to increase the reach of the same measures and, more than that, the knowledge of the available resources to face this public health storm.

The question here, according to the information, would not even be the Executive in Maranhão inertia, but the disrespect to the public health organs recommendations by the population. Other alternatives could replace the total blockade, who knows. However, the analysis of the relevance of these alternative measures, or even the inexistence or insufficiency of them, would be, necessarily, up to the Executive, as administrator of the situation and holder of the key to the safe.

Still as an example, another delicate situation would lie in the eventual judicial determination to open ICU beds, on a generalized or individual basis, or even to reposition positions in hospitalization queues. It is natural that individuals seek the Judiciary to try to

assert their rights, notably the right to health. The right to petition and access to the judiciary are also fundamental rights. It is understandable, therefore. And not objectionable. The question is what to do from there. How to decide? Here is the issue.

In this way, it seems clear to us that "[...] judicial intervention within the perspective of the search for an adequate answer"¹⁰⁶ is appropriate. Starting from this premise, finally, "[...] the search for criteria to guide the jurisprudential interpretation [...]"¹⁰⁷, criteria that must necessarily be linked to what was exposed above in the case of eventual intervention by the judiciary, especially due to the fact that, if constitutional jurisdiction becomes, at this stage, a real condition for the possibility of democracy, it seems to us evident that it or the respective exercise cannot attack the regime itself.

Therefore: first, the formulation of public policies falls to the Legislative and Executive branches, since these options are a result of representative democracy and, sometimes, of participatory democracy.

Therefore, there is no case for a jurisprudential manifestation¹⁰⁸. Second, in cases of inefficiency or omission in the implementation

¹⁰⁶ LIMBERGER, Têmis. Direito à saúde e políticas públicas: a necessidade de critérios judiciais, a partir dos preceitos constitucionais. **Revista de Direito Administrativo**, Rio de Janeiro, v. 251, p. 180-199, 2009. Available at: <<http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/viewFile/7534/6028>>. Accessed on 05 May 2020.

¹⁰⁷ LIMBERGER, Têmis. Direito à saúde e políticas públicas: a necessidade de critérios judiciais, a partir dos preceitos constitucionais. **Revista de Direito Administrativo**, Rio de Janeiro, v. 251, p. 180-199, 2009. Available at: <<http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/viewFile/7534/6028>>. Accessed on 05 May 2020.

¹⁰⁸ LIMBERGER, Têmis. Direito à saúde e políticas públicas: a necessidade de critérios judiciais, a partir dos preceitos constitucionais. **Revista de Direito Administrativo**, Rio de Janeiro, v. 251, p. 180-199, 2009. Available at: <<http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/viewFile/7534/6028>>. Accessed on 05 May 2020.

of public policies, judicial intervention is required. Some situations may be brought up then.

The Judiciary is authorized to intervene when the government fails to make the contribution required by the Constitution¹⁰⁹. This statement could, finally, remain materialized in the hypothesis of inertia in the generalized opening of ICU beds, even though there are public resources for it, whose omission of the Public Power is due to wrong choices in resources allocation, due to the ignorance about the imperative current need.

A different situation, however, would be the determination of the provision of an ICU bed to a particular individual, ignoring the general scarcity that encompasses Brazil, or even the change in the queue destined for hospitalization, benefiting that subject who sought the judicial way to the detriment of all others.

Hence, taking all these situations into account, a previous question becomes salutary: would the concession be universal? Or, otherwise, could the granting of a bed to an individual be universalized? If so, the context demands the concession. Otherwise, for the sake of equality, no.

The concession for one, ignoring all the others, would represent an activist judicial decision – therefore breaking equality. The ideal would be to have beds for everyone. Resources for everyone.

However, between ideal and real, the distance is oceanic, especially in countries of late modernity such as Brazil, where the social state, even under a Constitution that determines the construction of a fair and solidary society and that condenses, in its Article 6, a range of rights of a service nature, is nothing more than a sham.

Finally, one should not invade the action space of the other branches of government, which, as far as possible, are acting notably

¹⁰⁹ STRECK, Lenio Luiz. *Decisionismo e discricionariedade judicial em tempos pós-positivistas: o solipsismo hermenêutico e os obstáculos à concretização da Constituição no Brasil. Separata: o Direito e o Futuro do Direito*. Coimbra: Almedina, 2008 apud LIMBERGER, op. cit., p. 18.

in the municipal and state spheres, despite budget deficits and the sanitary structure. And the Unified Health System (SUS), in this way, has been the great balance of the scale in Brazil.

Furthermore, in terms of judicial intervention, two recent decisions, both issued by the Supreme Court, are excellent examples of constitutionally adequate responses from the Judiciary, whether restoring individual rights, against the Union's attacks, or enforcing, against the attacks of the same Union, social rights enshrined in the constitutional text.

As for the first, it was the decision of the rapporteur of Min. Rosa Weber, who, following a postulate formulated by political parties and by the OAB, suspended the effects of Provisional Measure n°. 954/20, which allowed the sharing of registration information of telephone lines users with the Brazilian Institute of Geography and Statistics (IBGE).

In the decision, the Minister stated that MP issued by the Federal Executive, if its effects were maintained, would cause irreparable damage “to the intimacy and confidentiality of the private life of more than one hundred million users of landline and mobile telephony services”.

Under no circumstances was the relevance of the aforementioned sharing for the effective fight against the COVID-19 pandemic that is plaguing Brazil justified by the federal government, nor was the lack of other measures as effective as this one to combat the spread of the virus.

How effective would the sharing of registration information be? Are there other less invasive measures able to achieve the same goal? None of this was justified. Thus, the judicial decision, even though it interfered with the Executive's prerogatives, was way correct – since it was constitutionally correct.

As for the second, it was a decision of the STF Plenary that suspended the effectiveness of two provisions of Provisional Measure n°. 927/20, which authorizes employers to adopt exceptional

measures due to the state of public calamity resulting from the new coronavirus pandemic.

By a majority, Article 29 of the aforementioned Provisional Measure (MP), which did not consider workers contamination cases by the coronavirus to be an occupational disease, and Article 31 of the same MP, which limited the performance of labor tax auditors to the activity of guidance, were suspended.

So, it is in this pandemic context that the judiciary gains even more prominence, notably through the exercise of constitutional jurisdiction (through diffuse or concentrated means), either to enforce individual rights (against, for example, monitoring and data sharing at bulk, without proper reasoning - without demonstrating suitability, necessity and proportionality in a strict sense - which violates the privacy of others), or to enforce, observing the constitutional text, the action scope of the other powers in the promotion of public policies, administration of resources by the Executive and the universal character of eventual judicial decisions, social rights against possible actions or omissions from the public power (especially in the protection of health, social assistance and social security), or to prevent the retrogression by actions of the other powers that can eventually take advantage of the exceptionality of the moment to vilify long-established guarantees. Judicialization or activism? Here's the answer.

2.5. EMERGENCY, DEFENSE, SIEGE AND EXCEPTION - THE "ETERNAL SURVEILLANCE" DUE TO AUTHORITARIAN OUTBREAKS

The emergency situation experienced today, as seen above, can lead many governments to abuse the measures to be taken under the guidance of health authorities to further centralize power and neutralize any dissidents, fostering a true authoritarian wave.

In this way, the first step towards arbitration is precisely to restrict the right to association and assembly, freedom of expression and press freedom.

The state of emergency, even enacted by the federal government, is not, however, a *carte blanche* for the adoption of authoritarian measures or for the suspension of constitutional rights and guarantees.

Therefore, do not confuse a state of emergency with a state of exception or even with a state of defense and a state of siege (specific exceptions predicted in the constitutional text due to concrete situations and complex procedures).

The state of defense is provided for in article 136 of the Federal Constitution - The President of the Republic may, after hearing the Council of the Republic and the National Defense Council, decree a state of defense to preserve or promptly restore, in restricted and determined places, the public order or social peace threatened by serious and imminent institutional instability or affected by major calamities in nature.

Through this constitutional institute, there may be restrictions on meeting rights, confidentiality of correspondence and telegraph and telephone communication.

The state of defense shall be given by Decree of the President of the Republic, after consultation with the Councils of the Republic and National Defense. Up to 24 hours later, the decree must be submitted to Congress, which may maintain or revoke it. For its implementation, it has to be said, the reasons must be properly demonstrated, as well as the infeasibility of measures other than the extreme state of defense decree. Jurisdictional control can never be suppressed.

The state of siege is found in article 137 of the Constitution - The President of the Republic may, after hearing the Council of the Republic and the National Defense Council, request the National Congress to authorize the state of siege in cases of: I - serious disturbance with nationwide effects or occurrence of facts that evidence the ineffectiveness of a measure taken during the state of defense; II - declaration of a state of war or response to foreign armed aggression.

The ratio of the state of siege is precisely to preserve or restore constitutional normality, due to the serious commotion of national repercussion, ineffectiveness of the measure taken during the state of defense and declaration of a state of war or response to foreign armed aggression. The President needs prior authorization from the National Congress, in addition to the non-binding opinions of the Councils of the Republic and National Defense. The institution of the state of siege is also made by decree.

The Brazilian current situation does not authorize, even in the slightest, the call of these exceptional institutes, whose main effects are the partial or total suspension of constitutional guarantees. The suspension of constitutional normativity would not only appear as impertinent, given the current situation, but also absurdly unnecessary. It is in times of crisis that the Constitution is most needed. The Constitution exists mainly for times of difficulties. And, considering the effects of the existing pandemic, it is even more necessary.

The current state of emergency, therefore, is not to be confused with a state of siege and defense. And it does not authorize the suspension of any constitutional guarantees. Authoritarian, opportunistic outbreaks should not happen using COVID-19 as an excuse. Obviously, in the light of factuality, some individual rights may suffer some restrictions (as has been the case with social isolation). These restrictions, however, must be taken only in order to safeguard human life and public health, avoiding sanitary chaos throughout Brazil and the collapse of the health system; it is the burden of public authorities to demonstrate the need from exhaustive reasoning (scientific, by the way).

For the rest, Thomas Jefferson's statement must never be forgotten: "Eternal vigilance is the price of freedom".

It is the responsibility of the public authorities to demonstrate the relevance of any and all measures to be taken that involve limitations on individual rights. In this regard, historical and recent decisions by the German Constitutional Court are cited, namely:

A) as for the right to demonstrate and to assemble (absence of justification for the act of public authority limiting the practice): this is Constitutional Complaint BVerfG 1 BvR 828/20, judged on 4/15/2020. The Constitutional Court upheld the constitutional complaint filed, recognizing the undue restriction on freedom of assembly and demonstration. According to the 1st Senate of the Court, Article 8, item 1 of the Basic Law guarantees all Germans the right to meet peacefully and unarmed, regardless of communication or authorization. This right may, however, be restricted by law when dealing with open-air meetings, under the terms of item 2 of article 8 of the *Grundgesetz* (GG). According to the Court, the Hessen State Decree (*Verordnung zur Bekämpfung des Corona-Virus*, of 3/14/2020, amended on 3/30/2020) does not contain a general ban on agglomerations with more than two people. Paragraph 1, item 1 of the said diploma only says that contact with other people, not resident in the same property, must be limited to the absolutely minimum necessary. In addition, the analysis of the compatibility of the public demonstration with the prohibition of the State Decree needs to be made considering all the circumstances of the specific case, under penalty of emptying the content of article 8, item 1 of the Basic Law. According to the BVerfG, however, this was not the position of the municipality, which simply prohibited the protest from taking place without considering all the circumstances of the case, including that the demonstration would observe the protective measures ordered to prevent contagion from COVID-19, such as maintaining the minimum distance between participants and wearing appropriate masks. Accordingly, the *Bundesverfassungsgericht* concluded that the lower courts violated

the fundamental right to free association for the plaintiff of the constitutional complaint¹¹⁰;

- B)** regarding the breach of privacy (breach of confidential data): according to the German Court, judging a Constitutional Complaint against the noisy registration law, the legislator must observe the constitutional principle of proportionality in its regulations. This principle “results from the very essence of fundamental rights, which, as an expression of the general legal claim of citizen freedom from the State, can only be limited by the public power when this is essential for the protection of public interests (BVerfGE 19, 342 [348]; consolidated jurisprudence). The legislator must, more than before, take organizational and procedural precautions that combat the danger of a right to personality violation (cf. BVerfGE 53, 30 [65]; 63, 131 [143])”. The TFC decision used the general personality right as a constitutional parameter to then extract a “right of self-determination over information”. From reading the classic German precedent, it is extracted that data sharing depends, among other requirements, on the observance of the following criteria: a) purpose of use in a precise manner; b) demonstration that the data are adequate and necessary; c) access to data in the minimum necessary to achieve its intended objective; d) need for protection, “considering the dangers of electronic data processing”¹¹¹⁻¹¹².

¹¹⁰ FRITZ, Karina Nunes. **Tribunal Constitucional Alemão garante manifestações**. Available at: <<https://www.migalhas.com.br/coluna/german-report/325145/tribunal-constitucional-alemao-garante-direito-de-manifestacao-mesmo-em-tempos-de-coronavirus>>. Accessed on: 24 April 2020.

¹¹¹ SCHWABE, Jürgen. **Cinquenta Anos de Jurisprudência do Tribunal Constitucional Federal Alemão**. Konrad Adenauer-Stiftung, 2005, pp. 237 ss.

¹¹² SCALETSKY, Felipe Santa Cruz Oliveira (Presidente Nacional da OAB); COELHO, Marcus Vinicius Furtado (Presidente da Comissão Nacional de

Luckily, any and all measures taken by the Public Power in the fight against coronavirus must be preceded by ample information and publicity.

As stated by Celso Antônio Bandeira de Mello, “there cannot be in a Democratic Rule of Law, in which the power emanates from the people (article 1, sole paragraph, of the Federal Constitution), concealment from the subjects of matters that interest everyone, and much less in relation to the subjects individually affected by some measure.”¹¹³

Furthermore, with the necessary information, not only the spread of the coronavirus is avoided, but the collective panic, which could also result in arbitrary actions, compromising the Democratic Rule of Law.

The duty of transparency and publicity of acts, therefore, imposes itself as fundamental to the existence of a democratic and antidote regime for the pretensions of eventual tyrants, always on the prowl.

According to Bobbio “there is always a difference between autocracy and democracy, since in that case State secrecy is a rule and in this case it is an exception regulated by laws that do not allow an undue extension.”¹¹⁴

The principle of administrative publicity is characterized as a fundamental right of the citizen, inseparable from the democratic principle, and in the respective state duty to guarantee ample and free access to information as a necessary condition for knowledge, participation and control by the administration, although there is, in some cases, the exception for the practice of secret and confidential acts.

Estudos Constitucionais); MARTINS, Karoline Ferreira. **Ação Direta de Inconstitucionalidade**. Ordem dos Advogados do Brasil vs. Medida Provisória n° 954, de 17 de abril de 2020, pp. 12 ss.

¹¹³ **Curso de Direito Administrativo**. 14^a ed., São Paulo: Malheiros, 2002, p. 96.

¹¹⁴ BOBBIO, Norberto, **O futuro da democracia**. (trad.) Marco Aurélio Nogueira, 10. ed. São Paulo: Paz e Terra, 2000, p. 114.

Transparency requires, however, not only available information, but also understandable information, which become materialized, according to Martins Júnior¹¹⁵ “through advertising, motivation, and popular participation in which access, information, due process rights are articulated as forms of performance”.

Along with the principle of publicity and transparency, the right of access to information goes as a true guarantee of the Democratic Rule of Law.

Therefore, “it is not possible to recognize democracy in an environment where the citizen is not able to access the information that is under the custody of the state, and consequently, where the public agent is not accountable for the exercise of his/her function”.¹¹⁶

According to Rui Barbosa “the word bothers arbitrary States so much, because the word is the irresistible instrument of the freedom conquest. Set it free, wherever it may be, and despotism is dead.”

Therefore, access to information is a fundamental right and is a clearly democratic practice. Without it, there is no exercise of power in a fair and temperate way, and popular participation is one of the requirements of modern democracy.¹¹⁷

¹¹⁵ MARTINS JÚNIOR, Wallace Paiva. **Transparência Administrativa: publicidade, motivação e participação popular**. 2. Ed. São Paulo: Saraiva, 2010.

¹¹⁶ PIRES JÚNIOR, José Fernandes. **O sofrimento dos filósofos**. São Paulo: Biblioteca 24 horas, 2014. 128.

¹¹⁷ HEINEN, Juliano. **Comentários à lei de acesso à informação**. Belo Horizonte: Fórum, 2014. 310.

The COVID-19 pandemic, despite its dire humanitarian consequences, is an important opportunity to discuss the importance of the Democratic Rule of Law and its importance.

Democracy is becoming stronger, more and more as the most relevant way to achieve and consolidate the plan of fundamental rights and not just political rights.

In the current epidemiological scenario, there is a clear example of this, with the effective action of the State, protecting society on different fronts, mainly, sanitary and economic. However, more is needed and there are nuances on the horizon of a necessary reinvention of the performance of the providing State, such as the Welfare State in its post-war moments.

Likewise, the Democratic Rule of Law is a vector for the defense of individual freedom and a way to curb any authoritarian outburst, ensuring that the bitter extreme remedies provided for in the Federal Constitution, especially the state of siege and the state of defense, are not inappropriately and opportunistically managed.

The pandemic, despite its undoubtedly tragic character, should be an opportunity for growth and consolidation of Brazilian democracy and proof of the resilience of the constitutional regime started in 1988.

ARGUELHES, Diego Werneck; LEAL, Fernando. O argumento das “capacidades institucionais” entre a banalidade, a redundância e o absurdo. In **Direito, Estado e Sociedade**. n. 38, jan/jun 2011, pp. 6 a 50.

BARCELOS, Guilherme. **Judicialização da Política e Ativismo Judicial**. Florianópolis: Habitus, 2018.

BARROSO, Luis Roberto. **Curso de Direito Constitucional**. São Paulo: Saraiva, 2011.

BERCOVICI, Gilberto; MASSONETTO, Luís Fernando. **A constituição dirigente invertida: a blindagem da Constituição Financeira e a agonia da Constituição Económica**. Faculdade de Direito da Universidade de Coimbra available at: <<http://hdl.handle.net/10316.2/24845>>. Accessed on 23 April 2020.

BOBBIO, Norberto, **O futuro da democracia**. (trad.) Marco Aurélio Nogueira, 10. ed. São Paulo: Paz e Terra, 2000.

BRASIL. **Constituição da República Federativa do Brasil**. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on 23 April 2020.

CORREIA, Sergio; LUCK, Stephan; VERNER, Emil. **Pandemics Depress the Economy, Public Health Interventions Do Not: Evidence from the 1918 Flu** (March 30, 2020). Available at: <<https://ssrn.com/abstract=3561560>>.

DÍAZ, Elías. **Estado de Derecho y Democracia**. Available at: <<http://dialnet.unirioja.es/descarga/articulo/831255.pdf>>. Accessed on 23 April 2020.

FRAZÃO, Carlos Eduardo. A competência para julgamento das contas de governo de gestão dos Prefeitos: o argumento das capa-

idades institucionais. In.: FUX, Luiz; FRAZÃO, Carlos Eduardo. **Novos Paradigmas do Direito Eleitoral**. Fórum: Belo Horizonte: 2016, p. 149-159.

FRITZ, Karina Nunes. **Tribunal Constitucional Alemão garante manifestações**. Available at: <<https://www.migalhas.com.br/coluna/german-report/325145/tribunal-constitucional-alemao-garante-direito-de-manifestacao-mesmo-em-tempos-de-coronavirus>>. Accessed on 24 April 2020.

HEINEN, Juliano. **Comentários à lei de acesso à informação**. Belo Horizonte: Fórum, 2014.

LIMBERGER, Têmis. Direito à saúde e políticas públicas: a necessidade de critérios judiciais, a partir dos preceitos constitucionais. **Revista de Direito Administrativo**, Rio de Janeiro, v. 251, p. 180-199, 2009.

MARTINS JÚNIOR, Wallace Paiva. **Transparência Administrativa: publicidade, motivação e participação popular**. 2. ed. São Paulo: Saraiva, 2010.

OLIVEIRA, Rafael Tomaz de et al. A jurisdição constitucional entre a judicialização e o ativismo: percursos para uma necessária diferenciação. In: Simpósio Nacional de Direito Constitucional, 10. 2011. **Anais**. Available at: <<http://www.abdconst.com.br/anais2/JurisdicaoRafael.pdf>>. Accessed on 05 May 2020.

PIERSON, Paul. Coping with Permanent Austerity, in LEIBFRIED, Stephan; MAU, Steffen (org.), **Welfare States: Construction, Deconstruction, Reconstruction II**. MPG Books: Cornwall, 2008.

PIRES JÚNIOR, José Fernandes. **O sofrimento dos filósofos**. São Paulo: Biblioteca 24 horas, 2014.

SCALETSKY, Felipe Santa Cruz Oliveira (Presidente Nacional da OAB); COELHO, Marcus Vinicius Furtado (Presidente da Comissão Nacional de Estudos Constitucionais); MARTINS, Karoline Ferreira. **Ação Direta de Inconstitucionalidade**. Ordem dos

Advogados do Brasil vs. Medida Provisória nº 954, de 17 de abril de 2020, pp. 12 ss.

SCHWABE, Jürgen. **Cinquenta Anos de Jurisprudência do Tribunal Constitucional Federal Alemão**. Konrad Adenauer-Stiftung, 2005, pp. 237 ss.

SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 14. ed. São Paulo: Malheiros, 1997.

STRECK, Lenio Luiz. **Hermenêutica jurídica e(m) crise: uma exploração hermenêutica da construção do Direito**. 11. ed. Porto Alegre: Livraria do Advogado, 2014.

_____. **Jurisdição constitucional e decisão jurídica**. 4. ed. São Paulo: Revista dos Tribunais, 2014.

_____. Jurisdição Constitucional e Hermenêutica: Perspectivas e Possibilidades de Concretização dos Direitos Fundamentais-Sociais no Brasil. **Novos Estudos Jurídicos** – V. 8 – N. 2 – p.257-301, mai/ago. 2003.

_____. Rumo a Norundi, a bordo da CDI – constituição dirigente invertida. **Revista Consultor Jurídico**. Available at: <<http://www.conjur.com.br/2016-out-27/senso-incumom-rumo-norundi-bordo-cdi-constituicao-dirigente-invertida>>. Accessed on 23 April 2020.

_____. **Verdade e consenso: constituição, hermenêutica e teorias discursivas**. 4. ed. São Paulo: Saraiva, 2011.

_____; MORAIS, José Luiz Bolzan de. Estado Democrático de Direito. In: CANOTILHO, J. J. Gomes et al. **Comentários à Constituição do Brasil**. São Paulo: Saraiva: Almedina, 2013.

TASSINARI, Clarissa. A atuação do Judiciário em tempos de Constitucionalismo Contemporâneo. **Revista da Faculdade de Direito do Sul de Minas**, Pouso Alegre, v. 28, n. 2, p. 31-46, jul./dez. 2012.

VERMEULE, Adrian. **Judging under Uncertainty**: an institutional theory of legal interpretation. London: Harvard University Press, 2006.

COVER TEXTS

FRONT COVER FLAP

The Brazilian Academy of Electoral and Political Law - ABRADEP presents to the public its initial studies about the impacts of the pandemic on the 2020 Elections in Brazil. In a context still full of uncertainties, the book offers scenario analysis, spots sensitive points and suggests alternatives to make the elections feasible. The texts were produced by four working groups, systematized under the coordination of Maria Cláudia Bucchianeri Pinheiro, and then widely discussed among the members of the Academy. The approved proposals go into the hands of the reader, organized by theme: electoral calendar, relationship of the Electoral Justice with the citizens, technological alternatives and paths of the Democratic Rule of Law.

BACK COVER FLAP

The ABRADEP was founded on March 20, 2015, in Belo Horizonte – Minas Gerais. Headquartered in Brasília – Distrito Federal, the Academy is represented in 25 Brazilian states. Its distinctive feature is plurality: among its more than 230 members, there are professors, lawyers, judges, officials of the Electoral Justice, members of the Public Ministry, political scientists and media and political marketing professionals. The ABRADEP is engaged in a balanced, transparent, objective and qualified academic debate on democracy and elections. Its activities include thematic studies, scientific and technical works publication, the holding of events and the institutional dialogue with the National Congress, the Electoral Courts and national and international entities that operate in related areas.

BACK COVER

In the first semester of 2020, the COVID-19 pandemic took over the world. The serious consequences are measured in human losses, social and economic damage and, also, in risks to the holding of periodic elections planned in several countries. In Brazil, opportunism quickly showed its face through propositions in favor of unifying the elections in 2022 and suspending transfers from public funds' resources for parties and candidacies. In this context, the Brazilian Academy of Electoral and Political Law - ABRADEP organized four thematic groups, dedicated to analyzing the impact of the pandemic on the electoral calendar, the sensitive adjustments in the relationship of the Electoral Justice with the citizens, the possible technological solutions and, finally, the new paths that democracy will need to take in the pandemic and post-pandemic world. The outcome can be seen in this book.

Roberta Maia Gresta, Academic Coordinator of the ABRADEP





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