

# **Global Network on Electoral Justice**

## **Technical Mission Report**

### **José Luis Vargas Valdez**

Mexico, Justice of the High Chamber of the Electoral Tribunal of the Federal Judiciary, Member of the Venice Commission – Head of Mission

### **Jean-Philippe Derosier**

France, University of Lille, Member of the Scientific Committee of the GNEJ

### **Rafael Rubio**

Spain, Universidad Complutense de Madrid, Member of the Scientific Committee of the GNEJ

### **Fritz Siregar**

Indonesia, Appointed Representative of Bawaslu

### **Lolly Suhenty**

Indonesia, Commissioner of Bawaslu

### **José Ignacio Vásquez Marquez**

Chile, Minister of the Constitutional Court, Member of the Venice Commission

### **Regina Waugh**

United States, Senior Global Gender Advisor, International Foundation for Electoral Systems

### **Alberto Guevara Castro**

Mexico, Electoral Tribunal of the Federal Judiciary – Mission Coordinator

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## Introduction

On August 2, 2022, the presidency of the Global Network on Electoral Justice (GNEJ) received a request from the Superior Electoral Tribunal (TSE) of Brazil to deploy a technical mission for the general elections that were going to be held on October 2. More than 156 million voters<sup>1</sup> were eligible to elect the president of Brazil, 27 state governors, 27 senators, 513 federal representatives, and 1,059 state representatives. This includes more than 697,000 thousand people who are eligible to vote abroad, a figure that represents an increase of 39.21% compared to 2018.<sup>2</sup> For this electoral process, the Brazilian Election Justice System oversaw the installation of 496,512 polling stations in 2,637 electoral zones.

To analyze technical and legal aspects of the election, the presidency of the GNEJ summoned a group of judges, current and former electoral authorities, scholars, and practitioners with expertise on constitutional and electoral law, the use of digital technologies in elections, gender equality and women's empowerment, and the organization of elections electoral results.<sup>3</sup> The Head of the Mission was Mr. José Luis Vargas Valdez, Justice of the High Chamber of the Electoral Tribunal of the Federal Judiciary of Mexico, and member of the Venice Commission. The group included seven experts that organized this report in six general topics: 1) the institutional design of the Brazilian Electoral Justice System and its legal framework, 2) the use of digital technology in elections, 3) political violence, 4) political violence against women, 5) political finance and 6) judicial independence.<sup>4</sup>

Prior to their deployment, the experts of the GNEJ mission reviewed selected rulings of Brazil's Superior Electoral Tribunal on topics such as equality and non-discrimination, right of association, due process, transparency, use of public resources, and use of digital technologies. Then, from September 26 to October 2, the mission met in São Paulo and Brasília with electoral authorities, representatives of political parties and civil society organizations, academics, electoral experts,

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<sup>1</sup> The registry included 87,373,164 women and 74,044,065 men.

<sup>2</sup> See <https://agenciabrasil.ebc.com.br/en/geral/noticia/2022-09/elections-brazilians-abroad-vote-according-local-schedule>

<sup>3</sup> Members of the GNEJ mission were included based on their professional experience, knowledge, and profile, and given the need to analyze, from a constitutional and legal perspective, salient aspects of the Brazilian electoral process such as the use of digital technologies in campaigns, the independence of judges, political participation and representation of women, political finance, among others. The mission included members with experience in electoral observation missions with different organizations.

<sup>4</sup>

prosecutors, representatives from several tech companies, and current and former judges. The mission would like to acknowledge the support of the Regional Electoral Tribunal of São Paulo (TRE-SP), the Superior Electoral Tribunal, and the General Electoral Vice-Prosecutor Office of Brazil. The mission is also grateful to academic institutions, civil society organizations, and managerial staff from the companies who participated in the interviews, for providing relevant information for this report. The mission recognizes the interest and openness of political parties that took part in the interviews.

In these meetings, the mission took note that political parties generally accept the reliability of the electronic ballot, despite the critiques made during the campaign period by President Bolsonaro and some of his supporters. As a result of these attacks, a social and institutional mobilization was launched to defend the electoral process and its institutions, especially during the days prior to the first round of the election and during the weeks preceding to the election on October 30.

## **I. The institutional design of the Brazilian Electoral Justice System and its legal mandate**

Broadly, the Brazilian Electoral Justice is formed by the Superior Electoral Court (TSE), the regional electoral courts (one per state), the judges (*juízes eleitorais*) and the electoral boards (*juntas eleitorais*). The TSE has a triple role: it organizes the elections, issues resolutions that have the force of law on electoral matters, and acts as the judge that controls and reviews electoral processes. It is composed of seven judges: three are from the Supreme Federal Court (STF), two from the Superior Court of Justice (STJ), and two are representatives from the legal profession – lawyers with remarkable legal knowledge and competence. However, it is noticeable from a legal comparative perspective that the TSE’s sentences may be reviewed, on constitutional matters, by the STF, since three of the TSE judges are elected by the STF among its members. If there is a constitutional review of a ruling by the TSE at the STF, these three judges may end up reviewing a decision adopted by them as members of the TSE.

The mission notes that electoral reforms are carried out regularly and several interlocutors noted both the complexity of the electoral law and the degree to which it has changed in advance of every election. In the electoral reform of 2017, among other topics, the electoral campaign period

was shortened, and compulsory voting was introduced. The mission noticed that the functions of the electoral authority are increasing, both in terms of organization and on electoral disputes, and that the Brazilian electoral justice has adapted accordingly to fulfill its duties, seeking to protect the will of the electorate and citizens' political-electoral rights. In this context, the mission took note of the biometric registration of 150 million Brazilian citizens.

## **II. The use of digital technology in elections**

### *Electronic voting*

The Brazilian electoral justice system has successfully organized elections using the electronic ballot since its introduction in 1996. Since 2000, Brazil became the first country to completely administer elections using this technology and has delivered trustworthy results since then. The mission wishes to acknowledge that the efforts of the electoral authority in Brazil have allowed voting to be efficient, fast, and secure. The mission stresses that the electronic ballot boxes are designed to prevent manipulation during the election since there is no network connectivity –be it remote (Wi-Fi, Bluetooth) or by cable (e.g., ethernet)– during the voting process, and the data is recorded in the equipment and stored on a memory card that is sent to the polling station after they close.

The devices were tested several times during the electoral process. There were up to 30 trials, open to the supervision of political parties and civil society organizations. Moreover, the TSE's practice of "integrity testing" throughout the country is an additional mechanism to publicly assess the reliability of ballot boxes. For the general elections of 2 October, using a representative sample of 641 ballot boxes randomly chosen from those deployed across the country, the electoral authorities carried out a double public voting test, streamed live on YouTube –one on paper and another using the electronic ballot– to offer public guarantees that those votes cast correspond to the ones registered by the machines. The mission had the opportunity to witness the test as traditionally carried out in previous elections, as well as the pilot with biometric information. Both worked as planned during the visit of the mission.

Thanks to this process and its guarantees, more than 600 million votes were cast in the first round, where each citizen had the opportunity to vote for candidates for up to 5 different offices. In the

second round approximately 200 million votes were cast for the presidential and statewide offices. In all –more than 570,000 electronic ballots were deployed across the country. The mission welcomes the quickness and reliability of the partial results, which were released shortly after polls were closed. This undoubtedly provides certainty and confidence in the results.

While there have been attempts to return to voting on paper, they have not received enough legislative support to amend the law – the latest case is the draft bill discussed in August 2021, which fell 79 votes short to pass. Prior initiatives to include a paper complement to the electronic ballot, even when passed by the legislature, were ultimately declared unconstitutional by the judiciary on the grounds that it may affect the secrecy of the vote and the freedom to cast it without interference.<sup>5</sup>

### *Freedom of information, social media, and digital messaging services*

In Brazil, 165 million people have access to social media. It is the country with the fifth largest number of social media users in the world. Also, the migration of in-person activities to the digital environment, because of social distancing measures due to the COVID-19 pandemic, increased internet demand among households.<sup>6</sup>

This has transformed electoral campaigns. The intense use of social media and digital messaging services has led to changes in the way information is disseminated and in the possibilities of campaigning. During the electoral period, technological threats such as hacking, doxing, misinformation and hate speech, become more frequent and visible, as it is a particularly intense moment that may affect the legitimacy of the entire democratic system.<sup>7</sup>

In 2017, the TSE created an Advisory Council, which is allowed to I) “develop research and studies on electoral rules and the influence of the internet on elections, especially the risk of fake news and the use of bots in the distribution of information; II) give opinions on matters that are raised by the presidency of the TSE; and III) propose actions and objectives for the improvement of the

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<sup>5</sup> Machine prototypes to print paper supported ballots were tested in the elections of Rio de Janeiro. The decision to prevent their introduction seems driven by some difficulties and errors in this test and, most importantly, by fears of traditional corruption through vote buying, when the secrecy of the vote was weak.

<sup>6</sup> See: [https://cetic.br/media/docs/publicacoes/2/20211124201635/executive\\_summary\\_ict\\_households\\_2020.pdf](https://cetic.br/media/docs/publicacoes/2/20211124201635/executive_summary_ict_households_2020.pdf)

<sup>7</sup> Rafael Rubio. Second version of the “Glossary: Digital Media and Elections”. Deliverable of the Observatory on Social Media of the Global Network on Electoral Justice. Available at: [https://www.te.gob.mx/red\\_mundial/front/observatories/inside/4](https://www.te.gob.mx/red_mundial/front/observatories/inside/4)

rules" (art. 2). In the following years, the TSE formalized and strengthened its strategy against misinformation.<sup>8,9</sup>

In addressing the issue for the first time in 2018, the TSE recognized the need to punish candidates who attempt to alter the electoral process by means of disinformation. In a live broadcast during election day that reached over 70,000 users, was shared more than 400,000 times and had around 6 million views, a congressman claimed that there was a fraud in e-voting, among other allegations that questioned the electoral process. He won the election but was charged of abuse of power and undue use of communication media. The accusation was supported by legislation that was 30 years old, applicable to traditional media. However, the TSE argued that internet is now, in fact, part of the media, and the congressman lost his seat.<sup>10</sup>

Given the influence of lies spread on social media during the 2018 campaign and in view of the need for permanent efforts to address disinformation, the TSE created a Program to Combat Disinformation under the Election Justice in 2019, and made it permanent on August 4, 2021, through its Decree No. 510/2021. The program has the objective of protecting the Brazilian Electoral Justice, its members, the electronic voting system, and the entire electoral process.

The creation of the program is aligned with the constitutional mission of the TSE to ensure that the electoral process is developed in a legitimate and democratic manner. It falls within its administrative jurisdiction and is developed independently of any administrative or jurisdictional procedure. The actions that make up the Program to Combat Disinformation are organized in three axes: (i) to inform, aimed at the dissemination of official, reliable, and quality information; (ii) to train, in search of media education and the training of the whole society to understand the

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<sup>8</sup> Aside from the efforts at the TSE, in the House of Representatives there are already more than 50 projects about fake news. See: <https://www.camara.leg.br/noticias/673694-projeto-do-senado-de-combate-a-noticias-falsas-chega-a-camara/>

<sup>9</sup> One relevant case addresses the massive distribution of information (disparo em massa) after the dissemination of messages falsely accusing a candidate of acts of corruption, law n. 9504/1997, art. 57-J c.c. Res. TSE n. 23.610/2019, art. 28, IV, a) and b); art. 34. (REspEI no. 060002433). Given the difficulty of identifying the author, the Regional Electoral Tribunal of São Paulo considered penalizing those who disseminated the information based on art. 57-D of the electoral law (9.504/97). Despite guaranteeing freedom of expression, this law prohibits anonymity (on the internet and other means of electronic interpersonal communication) during the electoral campaign and, in its point 2, establishes that the sanction will be extended to those who disseminate the information. In another high-profile case, in 2017, the TSE issued an order to block the messaging app Telegram following repeated non-compliance with court decisions. A daily fine was even established for Telegram until the company complied with the orders of Justice Moraes, at which point the block was removed. Consequently, Telegram adopted measures to combat disinformation and the dissemination of false information through the app.

<sup>10</sup> TSE, RO 060397598.

phenomenon of disinformation and the functioning of the electoral process; and (iii) to respond, in relation to the identification of cases of disinformation and the adoption of strategies, both preventive and responsive, to contain its negative effects.

For the 2022 election, one of the main concerns of the electoral authorities was the massive dissemination of false information observed in the 2018 general elections. In line with this, the mission noticed the ruling that establishes severe criminal liability for those who promote disinformation, conduct that the TSE had already prohibited, punishable by a penalty of two to four years of imprisonment and a fine of R\$15,000 to 50,000. To prevent this, among other measures, the TSE sought to partner and sign cooperation agreements with more than 150 associates, including several fact-checking institutions and with the main digital and social media platforms active in Brazil, such as WhatsApp, Instagram, Facebook, Twitter, Google, and TikTok. The goal was to promote the dissemination of accurate content and contain the spread of false news that could endanger the legitimacy and stability of Brazilian electoral processes.<sup>11</sup> As a result of what is now a robust institutional policy, the TSE is better prepared to combat disinformation attacking the integrity of elections, and now has several normative tools and resolutions banning disinformation targeting the electoral process.<sup>12</sup>

The volume of disinformation increased considerably between the first and second rounds of the 2022 elections, especially during the final days before October 30 run-off, forcing the TSE to adopt judicial resolutions that ordered the suppression of disinformation campaigns fostered by the official campaigns and media outlets. On October 20, 2022, the TSE adopted stricter measures against misinformation, broadening its administrative authority to enable action against disinformation that could specifically affect candidates and not only the democratic integrity of institutions and the electoral process. Fines ranged from R\$100,000 to 150,000 to platforms who don't comply with the mandated elimination of false content within the required 2-hours period.<sup>13</sup>

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<sup>11</sup>The mission stresses the important partnership between the TSE and Google. Some of the main actions to support the elections are the following: offering reliable/useful information, helping voters find authentic information, publishing live results on election day, assembling a collection of civic content applications on Google Play, and supporting the development of *Comprova*, a fact-checking app built by a coalition of news media outlets from around the country. Also, YouTube has a “responsibility framework for elections”, to remove election related content that violates its policies and recognize and reward news publishers, campaigns, and political creators.

<sup>12</sup> There is an office focused on confronting fake news — fake checking.

<sup>13</sup> See the original resolution here: <https://www.tse.jus.br/comunicacao/arquivos/resolucao-desinformacao>

Social media and fake news have transformed electoral campaigns. An intensive use of digital tools has led to changes in the way in which information is disseminated and in the possibilities of political organization, particularly regarding the use of segmented advertising, financing mechanisms, and the recruitment and organization of volunteers.<sup>14</sup> Political competitors have understood this well and the Brazilian electoral justice has adapted quickly to protect the credibility and legitimacy of the electoral process.

The mission noted efforts by digital communication platforms to detect disinformation and misinformation campaigns and welcomes the coordinated actions with the authorities described in this section. However, it calls for more robust action to contribute to informed campaigns, the strengthening of efficient mechanisms to detect online activity that may compromise the integrity of electoral processes, and to work with all local, state, national, regional, and international authorities in implementing coordinated, targeted, and effective actions to promote a human rights compliant use of social media, communication platforms, and other digital technologies in electoral processes.

### III. Political violence

The mission took note of recurrent concerns about political violence during the interviews. There were hundreds of reported cases in the first months of the year and leaders of 22 parties were affected by some type of violence in the second quarter of 2022 with cases distributed across the political spectrum. The Social Democratic Party (PSD) led the ranking with 12 cases (11.9%), followed by the Liberal Party (PL), with 10 cases (9.9%), the Brazilian Social Democratic Party (PSDB) and Republicans, with nine cases each (8.9%), the Workers Party (PT) with seven (6.9%), and the Socialism and Liberty Party (PSOL) with six (5.9%). It was not possible to identify the party affiliation of eight victims.<sup>15</sup>

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<sup>14</sup> Rafael Rubio. Second version of the "Glossary: Digital Media and Elections". Deliverable of the Observatory on Social Media of the Global Network on Electoral Justice, p. 3. Available at:

[https://www.te.gob.mx/red\\_mundial/front/foro/downloadFile?file=a6b7cba90b036c1.pdf&title=Segunda%20versi%C3%B3n%20del%20Glosario%20Medios%20Digitales%20y%20Elecciones%20\(2022\)](https://www.te.gob.mx/red_mundial/front/foro/downloadFile?file=a6b7cba90b036c1.pdf&title=Segunda%20versi%C3%B3n%20del%20Glosario%20Medios%20Digitales%20y%20Elecciones%20(2022)).

<sup>15</sup> See: <http://gjel.uniriotec.br/files/Boletim%20Trimestral%20n%C2%BA%2010%20-%20Abril-Maio-Junho%202022.pdf>

The mission welcomed the decision of the TSE to restrict the carrying of firearms during the elections — with prison sentences in case of non-compliance — as this was an important measure to increase the security of voters on election day.<sup>16</sup> Gun ownership has been a sensitive issue in Brazil in recent years following legislative changes to increase access to and presence of firearms across the country. The mission noted that, in general terms, there were few violent episodes during the first round of election day and that it was carried out in a peaceful environment.

### *Intolerance and Hate Speech*

The mission was informed that, according to information provided by the Safernet National Complaint Center —a civil society organization that receives reports on potential crimes and violations to human rights on the internet— there were more complaints in the first half of 2022 than during the same period last year. The mission is concerned that, according to this organization, if this trend continues until the end of the year, 2022 will be the third consecutive election year in which there is an increase in hate crime complaints compared to previous years.<sup>17</sup>

The mission also learned about the *#VítimasDaIntolerância* (*#VictimsOfIntolerance*) project, which is a collective effort to gather the cases already reported by victims of aggressions motivated by political intolerance. The mission regrets that, according to the organization, the cases of aggression against communication professionals in a political, partisan, and electoral context are increasing considerably. The mission welcomes all actions undertaken by the authorities to stop discriminatory practices and violence during the electoral process.

## **IV. Political violence against women**

The mission learned from the Regional Electoral Tribunal of São Paulo that between April and June 2022, 101 cases of violence against women political leaders were registered, a decrease of 10.6% in relation to the previous quarter. However, the second quarter of 2022 was more violent

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<sup>16</sup> The restriction applied to those who have a permit to carry guns in Brazil, during the election day, as well as the 24 hours before and after the election.

<sup>17</sup> Source: <https://new.safernet.org.br/content/crimes-de-odio-tem-crescimento-de-ate-650-no-primeiro-semester-de-2022>

compared with the same period in 2020 and 2021. Since 2019 and until June 2022, Brazil has registered 1,209 cases of violence against women in politics in total.<sup>18</sup>

On August 4, 2021, Brazil enacted Law No. 14,192 which specifically criminalizes political violence against women, joining the ranks of Mexico, Bolivia, and other Latin American countries that have taken legislative action to prevent, repress, and combat violence against women in politics. This law defines political violence against women as “any action, conduct, or omission that has the purpose of preventing, hindering, or restricting the political rights of women,” as well as acts that “imply distinction, exclusion, or restriction in the recognition, enjoyment, or exercise of their rights and their fundamental political freedom because of their gender” (Article 3).<sup>19,20,21</sup>

Aware of the persistently low levels of women serving in elected office in Brazil, the TSE is currently taking steps to ensure that parties increase the number of women candidates after 2022. Specifically, the TSE is committed to doubling the amount of campaign funding available to women candidates and working to ensure that these candidates have access to these funds as early as possible in the electoral period. Although this is a good effort and reveals a sincere commitment, the changes within control of the TSE are at the margins. The many necessary transformations to increase the number of women in government will require sustained effort, political will, and fundamental societal transformation.

While political parties have a long history of running “fake candidates” to meet the required 30% gender quota, it was only until just recently that any litigation was brought against this action. Clearly, these types of investigations and prosecutions must continue, so that political parties are disincentivized to present women candidates that have no intention of running actual campaigns

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<sup>18</sup> See: <http://gjel.uniriotec.br/files/Boletim%20Trimestral%20n%C2%BA%2010%20-%20Abril-Maio-Junho%202022.pdf>

<sup>19</sup> See: <https://transparenciaeleitoral.com.br/wp-content/uploads/2021/12/Cartilla-ES.pdf>

<sup>20</sup> The Electoral Public Ministry opened 83 procedures for gender-based political violence in the 2022 elections. Of these episodes, 25 happened in a face-to-face environment and 38 in a virtual one. Most of the complaints are related to moral and psychological violence (27 and 25 cases, respectively). Economic and structural violence, which involved the withholding of financial resources or the candidate being unable to access radio and television time, also stood out (21 cases). See: <https://www.cnnbrasil.com.br/politica/mpf-soma-mais-de-80-procedimentos-abertos-por-violencia-politica-de-genero/>. The first criminal action for the crime of gender-based political violence registered in Brazil was the result of Rodrigo Amorim, regional deputy, calling a trans councilwoman a “sexual aberration.”

<sup>21</sup> article 326-B was added to the Code to punish with one to four years in prison and a fine anyone who harasses, embarrasses, humiliates, or threatens a candidate for elective office or the holder of an elective mandate, by any means, or employs contempt or discrimination regarding the gender, color, race, or ethnicity of a woman to prevent her from campaigning or hindering her election campaign, or performing her elective term.

and do not receive any votes as a result.<sup>22</sup> This mission considers that it is necessary to ensure that there is continued enforcement in this matter as well as continued education and publicity around the new law criminalizing political violence against women, so that those cases are prosecuted much more vigorously from the outset.

Overall, the Superior Electoral Tribunal works to improve campaign financing rules to benefit women in political parties, address political violence, and crack down on the recruitment of fake candidates to meet the gender quota. However, it is still not clear from the 2022 results how impactful those measures have been. Following the first round, from the 15 governors elected only one is a woman; out of 27 Senators elected, only 4 are women (less than 15%) and from the 513 Federal Representatives elected, 91 are women (less than 18%). In the second round, out of 12 elected governors, only one is a woman.<sup>23</sup>

The mission recognizes the current effort of the Brazilian electoral justice to face political violence against women and bolster the political participation of women. The new political violence law is a good step whose results need to be monitored to identify the number of cases, how they are adjudicated, and whether criminal penalties have a deterrent effect. However, considering the results and the number of candidates in the electoral process,<sup>24</sup> further steps need to be taken to increase the participation of women and minorities. All efforts to improve political representation are welcome, including the potential legislative analysis and debate of establishing parity thresholds in the nomination of candidates (50-50).

### *Minorities*

The mission highlights the TSE's efforts to guarantee minorities' right to vote. Based on its resolution regarding the policy of inclusion of persons with disabilities —both voters and officials— the following actions were carried out on election day: temporary transfer of the voter (reduced

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<sup>22</sup> In the case of Roberta Kely Cesar, the *Ministério Público Eleitoral* (Electoral Prosecutor) identified a fake candidacy, since she only received four votes, did not file her expenditures on time, and her social media accounts were used to promote other candidates. The Regional Tribunal of Rio de Janeiro annulled the votes and the registration of candidates of the Liberal Party in Silva Jardim for the elections of 2020. See: <https://www.mpf.mp.br/regiao2/sala-de-imprensa/noticias-r2/mp-eleitoral-rj-fraude-a-cota-de-genero-gera-anulacao-de-votos-do-pl-em-silva-jardim>

<sup>23</sup>

<sup>24</sup> Indigenous candidates at the national level: 186 (2022); at the state level (SP): 13.

Black candidates at the national level: 4129; at the state level (SP): 477

Total candidates at the national level: 29,266; at the state level (SP): 3,654

mobility modality), adequate and accessible spaces, and use of special boxes to meet the needs of voters with visual and auditory disabilities. This year, a campaign was launched to serve indigenous communities as well.

## V. Political finance

The mission learned about the financing of political parties and candidates during campaigns. Individuals are currently allowed to donate up to 10% of their annual income to electoral campaigns. While this may pose an advantage to wealthier candidates and supporters, through Portaria 647, the TSE published caps to campaign expenditures, set to R\$88,944,030.80 for those running for president in the first round and of R\$44,472,015.40 more for the second round. As a reference, in Sao Paulo the cap for expenditures in campaigns for governors were R\$26,683,209.24 for the first round and R\$13,341,604.62 more for the second round.<sup>25</sup> The oversight by the TSE ensures compliance and provides guarantees to voters.

Some small, printed publicity is allowed, and citizens are also entitled to bring flags and other promotional material, even when casting their vote, if they do it “quietly.” The fact that big format printed publicity is not allowed contributes to ecologically friendly campaigns, but also pushes them to the digital space, where financial controls are sometimes challenging.

The mission also took note of a concern by civil society organizations and other interviewees about the so called *Orçamento Secreto* (“reserved budget”), which refers to resources available to the Congress and the Senate that may be used in a discretionary way, potentially with electoral effects. Moreover, the constitutional amendment 123 of July 2022, and the related provisory measures adopted afterwards, authorized President Bolsonaro’s government to adopt measures such as increasing the amounts allocated for benefits like *Alimenta Brasil*, *Auxílio Brasil* and *Auxílio Gas*, and create benefits to truck drivers and taxi drivers. This was adopted and implemented<sup>26</sup> less than three months before the first round of elections.

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<sup>25</sup> Campaign expenditure caps for president, governors and members of the Federal Congress, are available here: [https://www.tse.jus.br/++theme++justica\\_eleitoral/pdfjs/web/viewer.html?file=https://www.tse.jus.br/eleicoes/eleicoes-2022/arquivos/limites-de-gastos-de-campanha/@@download/file/tabela-limite-gastos-eleicoes-2022.pdf](https://www.tse.jus.br/++theme++justica_eleitoral/pdfjs/web/viewer.html?file=https://www.tse.jus.br/eleicoes/eleicoes-2022/arquivos/limites-de-gastos-de-campanha/@@download/file/tabela-limite-gastos-eleicoes-2022.pdf)

## VI. Judicial Independence

### *Due Process*

The mission was informed by the Regional Electoral Tribunal of São Paulo that the Supreme Federal Court (STF) condemned federal deputy Daniel Silveira to 8 years and 9 months in prison for the crimes of threatening the democratic rule of law and coercion during the trial. For most members of the Supreme Court's plenary, the statements that motivated the complaint of the Federal Attorney General's Office (FAGO) did not qualify as opinions related to the mandate and, therefore, were not protected by parliamentary immunity or freedom of expression.

The rapporteur of the Criminal Action 1.044, Justice Alexandre de Moraes, declared that the FAGO proved, through videos and records of the Chamber of Deputies' sessions, as well as of the preliminary investigation hearing, the criminal materiality and authorship of the conduct denounced by the prosecutor's office. He pointed out that, at the time of the threats, there was already a criminal proceeding against Silveira in the Supreme Federal Court, which constitutes the crime of attempting to impede, through violence or serious threat, the free exercise of the Judiciary's functions. The following day, April 21, President Bolsonaro published in the Official Gazette of the Union a decree granting the benefit of grace (pardon of judicial penalty) to Congressman Daniel Silveira, who had been convicted by the STF, including a fine of R\$192,500.

In the text of the decree, President Bolsonaro established that all side effects of the conviction, including disqualification in Silveira's case, would also be annulled. As a result, the Congressman was able to run again in the October elections. The mission underlines that judicial independence must be considered as an element of the right to an independent and impartial judge, which in turn is one of the essential aspects of the right to due process. The mission wishes to recall that judicial independence is fundamental to maintaining the integrity of the judiciary. Judges must be free from external pressure to fairly assess the issues before them — based on the evidence presented and the relevant law.<sup>27</sup> Especially during an electoral process and in electoral justice systems, judicial

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<sup>27</sup> "Judicial Independence: Due Process, the Relationship Between the Branches of Government, and International Standards." Observatory on Judicial Independence of the Global Network on Electoral Justice. Available at: [https://www.te.gob.mx/red\\_mundial/front/foro/downloadFile?file=05ace838e69b42c.pdf&title=Independencia%20judicial%20y%20debido%20proceso%20en%20la%20justicia%20electoral%20\(2022\)](https://www.te.gob.mx/red_mundial/front/foro/downloadFile?file=05ace838e69b42c.pdf&title=Independencia%20judicial%20y%20debido%20proceso%20en%20la%20justicia%20electoral%20(2022)).

independence requires that the judiciary operates according to standards of fairness and impartiality and is immune from undue external or internal influence. As the European Commission for Democracy through Law (Venice Commission) has established, “in a democratic rule of law, the three branches of government must act on the basis of and within the limits established by law.”<sup>28</sup>

### *Transparency, Participation, and Collaboration (Open Justice)*

The mission welcomes the fact that the distribution of the rulings issued by the TSE was generally uniform among its members. Undoubtedly, this contributes to transparency when resolving electoral disputes, which is in accordance with the principles of open justice.

On the one hand, the mission welcomes the openness of the TSE in allowing to clarify any doubts around the electoral process and its results (specifically those regarding the electronic voting ballot machines).<sup>29</sup> This gives certainty to the results, which strengthens, in turn, citizens’ confidence in the electoral authority.

## Concluding remarks

From the information gathered before, during, and after the visit to Brazil, the mission appreciates all measures adopted by the Brazilian electoral justice to combat political violence under a heavily polarized political context. All necessary coordination efforts to guarantee the integrity of the electoral process and the security of citizens when casting their vote and to protect their will, are welcome.

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<sup>28</sup> Compilation of Venice Commission Opinions and Reports Concerning the Separation of Powers, 2020. Available at: <http://www.cepc.gob.es/docs/defaultsource/comisionveneciadoc/compilation-of-opinions-and-reports-concerningseparation-of-powers.pdf?sfvrsn=0>.

<sup>29</sup> In 2021, the TSE Plenary unanimously approved a proposal to turn an administrative investigation into an open procedure so that the country’s public authorities could present evidence of fraud in the electronic voting system during the 2018 elections, particularly regarding electronic voting machines. With this measure, the object of investigation of facts that could constitute abuse of economic and political power, abuse of the media, corruption, fraud, forbidden conducts of public agents, and extemporaneous (anticipated) propaganda was expanded, in the context of the attacks against the electronic voting system and the legitimacy of the 2022 general elections. See RO-EL No. 060397598.

The electronic ballot used in Brazil since 1996 has proven trustworthy and efficient. It has enjoyed majoritarian popular support, even when it was heavily questioned with misinformation campaigns during 2022. The technology of the device, including biometric verification or an authorization by the members of the voting station to open the system for casting each individual vote once they confirm the identity of the voter, provides certainty in the election and timely results. It allows for legal control of the electoral process, as the results remain in the electronic ballots up to 100 days after the elections, when political parties can request the information to carry out an audit.

The powers vested in the Brazilian electoral justice, while ample and with few comparable examples in other countries, have delivered results for decades. All electoral systems are subject to improvements in line with international democratic standards, but these are ultimately a sovereign decision of each country that must respond to their specific context.

The Brazilian electoral justice has learned from its own experience and from other democracies in combating misinformation and protecting the integrity of the electoral process. The mandate to guarantee freedom of expression and fairness in the electoral process will find new challenges as new technologies emerge. In a broad alliance with civil society, academia, media outlets, technology companies, and a wide range of political options, new legal and human rights compliant solutions should continue to be sought by the authorities.

The mission acknowledges that an independent, expert, and robust electoral institutions have guaranteed the will of the people and their freedom to cast an informed vote and enabled the participation of political parties and candidates under fair conditions. Their rights were protected throughout the process and an effective coordination with other authorities has been crucial to do so. Towards the future, the mission welcomes all statements and actions to preserve the stability of democracy, strengthen the rule of law, and sustain social peace in Brazil, with an emphasis on the continued use of institutional channels to guarantee a peaceful transition in power.

The GNEJ mission wishes to acknowledge the institutional strength of the Brazilian electoral authorities, who performed their duties with professionalism and efficiency in an environment of polarization in which fake news gained much notoriety before, during, and after election day. In fulfilling its three responsibilities, the TSE has performed as an objective, impartial, and professional institution. When faced with difficult or unprecedented situations, it has exercised its

powers to protect the integrity of the democratic process, in coordination with the *ministério público* (public prosecutors) and security forces.

The GNEJ mission benefitted from the documents provided prior to October 2 and, particularly, from the interviews carried out with several authorities and stakeholders in the days prior the first round and during election day. Voters who talked to the mission and all participants in the previous meetings provided essential information to better understand the dynamic and operation of the Brazilian electoral justice system. To the extent possible, the GNEJ welcomes the opportunity to deploy its mission and carry out interviews in safe environments during both rounds of the election in future electoral processes. The mission wishes to thank once again the authorities and staff of the Regional Electoral Tribunals of Sao Paulo and Brasilia, the international office of the TSE, the Brazilian Bar Association (OAB), the Electoral Prosecutor office, political parties, academics, civil society organizations, technology companies, and all individuals who supported its work.

The Global Network on Electoral Justice remains at the disposal of the Brazilian electoral authorities, political parties, academics, and civil society organizations to continue working with all democratic stakeholders.