

LEGISLATION'S PERMISSIVENESS AND THE FORMATION OF BRAZILIAN POLITICAL PARTIES (1979-2018)

LEGISLAÇÃO PERMISSIVA E A CRIAÇÃO DE PARTIDOS POLÍTICOS NO BRASIL (1979-2018)

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RESUMO

Ao abordar a alta fragmentação do sistema partidário brasileiro, uma resposta comumente dada é que a legislação é permissiva. Segundo a literatura, criar um partido no Brasil é relativamente mais fácil do que em outros países. Este artigo questiona: como a legislação afetou a formação dos partidos políticos desde a redemocratização no Brasil? O artigo busca verificar tal permissividade a partir de dois enfoques de análise da legislação. O primeiro centra-se na legislação eleitoral, enquanto o segundo enfoca a legislação partidária específica. A análise confirma a perspectiva de que as leis eleitoral e partidária estruturam incentivos e constrangimentos sobre a criação de novos partidos, embora seu impacto não tenha sido uniforme ao longo do tempo. As regras se mostram condição necessária para explicar o surgimento dos partidos, porém não suficiente. Mudanças na legislação geraram janelas de oportunidade para criação de novas legendas com impactos relevantes para o desenho do sistema partidário brasileiro.

Palavras-chave: Instituições brasileiras; partidos políticos; legislação eleitoral; legislação partidária; novos partidos.

ABSTRACT

When addressing the high fragmentation of the Brazilian party system, one commonly argued response is that the legislation is permissive. According to the literature, establishing a party in Brazil is considered relatively easier than in comparison to other countries. This article questions: how has legislation affected the formation of political parties since Brazil's transition to the multiparty system? This article aims to examine this permissiveness using two approaches of analysis of the legislation. The first one is centered on the electoral legislation, whereas the second one focuses on the specific party legislation. The analysis of the regulation, including bibliographic research and the examination of the relevant laws and resolutions, confirms the perspective that rules structure incentives and constraints for the formation of parties, although their impact has not been consistent over time. Rules are a necessary condition in explaining the emergence of parties, however, not a sufficient one. Institutional changes have created windows of opportunity for the formation of parties with relevant impacts on the design of the Brazilian party system.

Keywords: Brazilian institutions; political parties; electoral legislation; party legislation; new parties.

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INTRODUCTION

How has legislation affected the formation of political parties since Brazil's transition to the multiparty system? The high fragmentation of the Brazilian party system has often been attributed to the permissive nature of its legislation². In fact, the Brazilian party system has the highest effective number of parties in the world³. In 2020, there were 30 parties with legislative representation, making Brazil the system with the highest effective number of parties ever registered: 16,46. According to the literature, establishing a party in Brazil is considered relatively easier than in comparison to other countries. It is required a program, a statute, and the signature of around 500 thousand electors⁴ to access the public resources from the Party Fund (Laws No. 6.767/1979, No. 9.504/1997, No. 11.459/2007, No. 13.165/2015) and the Special Campaign Finance Fund (Law No. 13.488/2017). This stands as a significant contrast to other nations, where parties can only access public resources after their candidates are elected. This distinction often leads to the perception that forming a party in Brazil is less challenging.

However, there are few detailed analyses about the level of permissiveness of the legislation. This article aims to fill this gap by examining this leniency using two analytical approaches. The first one focuses on the electoral legislation, exploring the rules for the allocation of seats given the distribution of votes and the impacts of coalitions for proportional representation elections when the open list system is used. The second approach focuses on the specific party legislation and its changes since the return to the multiparty system during the re-democratization process in Brazil. The methodology to achieve these approaches is descriptive and explanatory, relying on an extensive analysis of the legislation through a triangulation of bibliographic research and the examination of the relevant norms, laws and resolutions themselves.

Our analysis confirms the perspective that rules structure incentives and constraints for the formation of parties. However, we argue that the legislation did not operate uniformly over time. Rules are a necessary condition to explain the emergence of parties, however, not sufficient. Institutional changes have created windows of opportunity for the formation of parties. This changing structure, however, also required agents with interest to form parties. These processes result in relevant impacts in the party system, however, the relationship between the formation of parties and fragmentation is yet to be researched. In this article, we zoom in on the association between legislation and the formation of parties.

² Silvana Krause and Denise Paiva, "Perdas e Ganhos: Lideranças Políticas Brasileiras e Instabilidade Na Representação Dos Partidos–Lógica Nacional X Lógica Estadual (1982-2001)," in *Partidos No Cone Sul: Novos Ângulos de Pesquisa*, ed. by Céli Pinto and André Marengo (Rio de Janeiro: Konrad-Adenauer-Stiftung, 2002); Jairo Nicolau, *Multipartidarismo e Democracia: Um Estudo Sobre o Sistema Partidário Brasileiro (1985-94)* (Rio de Janeiro: Editora FGV, 1996); Cesar Zucco Jr and Timothy Power, "Fragmentation Without Cleavages? Endogenous Fractionalization in the Brazilian Party System," *Comparative Politics*, 53.3 (2021), 477–500.

³ Michael Gallagher, "Election Indices."

⁴ 0.5% of valid votes for members of Câmara dos Deputados, in the previous election.

The article is structured as follows. In the next section, we focus on the electoral legislation and its impact on party fragmentation, examining both its general effects on parties and its specific implications for Brazil. The third section initiates a discussion on how party legislation has impacted in the formation of parties, but also their access to elections and financial resources. Specifically, we delve into the Falcão Law and its impact in the process of openness during the return to the multiparty system. Subsequently, we analyze the Organic Law of Political Parties. The fourth section continues examining party legislation, with a particular focus on the role of the TSE as a legislator on party organization and discipline. Section five discusses the evolution of the party funding in the legislation, also highlighting the impact of the mini reforms of 2015 and 2017. Resuming the argument that the permissiveness of legislation is closely linked to the fragmentation of the Brazilian party system, the sixth section analyzes the trajectory of the Effective Number of Parties (ENP) as supporting evidence. The last section presents the conclusions to provide a comprehensive understanding of the relationship between party legislation, electoral access, party funding, and the fragmentation of the Brazilian party system.

Electoral institutions and the number of parties

Amorim Neto e Cox⁵ affirm that two general approaches explain the number of parties in a given system. The first one focuses on the importance of existing social cleavages. The second one addresses the role of electoral rules that influence or limit the formation of coalitions. This second view is the one we discuss in this section. The institutionalist literature focuses on fragmentation as a systemic phenomenon: institutions offer incentives and constraints that affect the number of parties operating, directly resulting in the fragmentation of the system.

Duverger's⁶ seminal perspective provided a starting point for the analysis of these institutional variables. In addition to socioeconomic features and ideology, Duverger highlighted the importance of electoral rules for the structure of a party system: in three hypotheses (law)⁷, he suggested causality between electoral formulae and the number of parties. In a logical and methodological exercise to account for the deterministic nature of such law, Lijphart⁸ also noted a high correlation between majority systems and bipartisanship, and between proportional and multiparty systems: the greater the electoral magnitude, the greater the proportionality of the vote and the more favorable are the conditions for small parties to elect candidates.

⁵ Octavio Amorim Neto and Gary W Cox, "Electoral Institutions, Cleavage Structures, and the Number of Parties," *American Journal of Political Science*, 1997, 149–74.

⁶ Maurice Duverger, *Os Partidos Políticos*, 3a edn (Rio de Janeiro: Editora Guanabara, 1987).

⁷Proportional representation tends to a system of multiple, rigid, independent and stable parties; the majority ballot of two shifts tends to a system of multiple parties, flexible, dependent and relatively stable, and; the majority single-shift ballot tends to a dualist system, with alternating of large independent parties (1987, p. 241).

⁸ Arend Lijphart, "The Political Consequences of Electoral Laws, 1945–85," *American Political Science Review*, 84.2 (1990), 481–96.

This is similar to what Duverger⁹ called the mechanical and psychological effects of electoral systems. Through the mechanical effect, electoral systems affect the plurality of preferences manifested in voting. The psychological effect accounts for the anticipation that voters make of this phenomenon: the tactical vote. The impact of those two properties is balanced by the proportionality of the system, depending on the electoral district magnitude. In single-member districts, voters need to strategize, considering the candidates most likely and sometimes giving up on electing their candidate and party of preference¹⁰. In the multi-seat districts, the greater the electoral magnitude, the greater the chances of voters being able to vote in their first choice of preference, with more chances of electing candidates for small parties. There is a consensus among analysts that the electoral system that dictates the rules of the legislative dispute has a significant impact on the party system and the number of parties¹¹.

In addition to this probabilistic relationship between proportional representation and the number of parties, some features within this system are crucial. The party system is not only the sum of its parties but also has its own properties of interaction, opportunities and conscriptions¹², such as rules concerning the conversion of votes into office. In this sense, we analyze two particularities of the Brazilian electoral system that can affect party fragmentation: the rules of distribution of seats and the formation of coalitions. These topics do not exhaust the list of possible institutional effects of the electoral system on the parties but help to understand some aspects that constrain or encourage the formation of parties in Brazil.

The Brazilian Parliament uses simple majority system for the Senate and proportional representation for the Lower Chamber. This means that for the election of senators, the distortion between voting and representation is quite high. In the case of the federal representatives, the choice for proportional representation aimed to ensure that a greater diversity of views present in society is reflected in Congress and that, as a result, there is a greater correspondence between the votes of the parties and their representation in each district. This type of representation, used as a safeguard option in democracies with diverse groups and minorities, offers more chances for smaller parties to achieve representation with votes scattered throughout the territory. However, even if corresponding mathematical equity between votes and seats for the parties is attempted, there are different methods for distributing seats¹³. These rules are not neutral and produce different results because they have different conceptions about what is proportionality and how to maximize it¹⁴.

⁹ Duverger.

¹⁰ Lijphart.

¹¹ Jairo Nicolau, *Sistemas Eleitorais* (Rio de Janeiro: Editora FGV, 2012).

¹² Carlos Ranulfo Felix de Melo, "Eleições Presidenciais, Jogos Aninhados e Sistema Partidário No Brasil," *Revista Brasileira de Ciência Política*, 4, 2010, 13–41; Giovanni Sartori, *Partidos e Sistemas Partidários* (Brasília: Universidade de Brasília, 1982).

¹³ Nicolau, *Sistemas Eleitorais*.

¹⁴ Michael Gallagher, "Proportionality, Disproportionality and Electoral System," *Electoral Studies*, 10.1 (1991), 33–51.

The Brazilian system first uses the calculation of the electoral quotient (Hare quota) for the distribution of seats, since Law N. 4.737, from 1965¹⁵. This is the fixed quota that each party needs to achieve to elect a representative. Next, the D'Hondt method is used, dividing the leftovers from the highest averages between the parties that reached the EQ (Art. 109). This calculation ends up favoring the larger parties, because the calculation of leftovers, in addition to excluding the parties that did not reach the QE, guarantees greater representativeness of the parties that obtained more votes. As Gallagher¹⁶ pointed out, the D'Hondt method is seen as the least proportional variant of PR, even if this focuses on a specific judgment on how disproportionality should be measured. Until 1998, white votes were no longer part of the count of valid votes, which further increased the electoral quotient, disfavoring small parties. The electoral quotient appears, therefore, as an implicit barrier clause of the electoral method, dissimulating party fragmentation, by hindering the representation of smaller parties, and the formation of new ones.

Another aspect of the proportional system adopted in Brazil makes the electoral design compensate small parties: the possibility of electing candidates through coalitions in proportional elections. Through this, small parties use electoral alliances as a way to circumvent this electoral barrier implicit in legislation, since the electoral quotient is then calculated for the coalition and not for the sole party. Thus, parties maintain their organizational autonomy, and present their own list of candidates, but see their votes added to other parties of the coalition. This peculiarity makes coalitions for the Lower Chamber seen by literature as one of the most evident causes of high party fragmentation in Brazil¹⁷.

It is worth noting, however, that this relationship is not direct: the transfer depends on the concentration or distribution of votes in the parties that make up the coalition. As Calvo, Guarnieri and Limongi¹⁸ pointed out, small parties usually have a higher concentration of votes for certain candidates. This phenomenon is made possible by another characteristic of the proportional representation system used in Brazil: the open list. It defines the order of distribution of seats in a coalition, or party, according to the party quotient and the method for dealing with leftovers. The open list allows voting

¹⁵ Brasil, *Lei Nº 4.737, de 15 de Julho de 1965*, 1965, Art. 106.

¹⁶ Gallagher, "Proportionality, Disproportionality and Electoral System."

¹⁷ André Borges, "Razões Da Fragmentação: Coligações e Estratégias Partidárias Na Presença de Eleições Majoritárias e Proporcionais Simultâneas," *Dados*, 62.3 (2019), 1–37; Ernesto Calvo, Fernando Guarnieri, and Fernando Limongi, "Why Coalitions? Party System Fragmentation, Small Party Bias, and Preferential Vote in Brazil," *Electoral Studies*, 39 (2015), 219–29; Jefferson Dalmoro and David Fleischer, "Eleição Proporcional: Os Efeitos Das Coligações e o Problema Da Proporcionalidade," in *Partidos e Coligações Eleitorais No Brasil*, ed. by Silvana Krause and Rogério Augusto Schmitt (São Paulo: Unesp, 2005); Humberto Dantas and Sérgio Praça, "Pequenos Partidos No Brasil: Uma Análise Do Posicionamento Ideológico Com Base Nas Coligações Municipais de 2000 a 2008" in *Coligações Partidárias Na Nova Democracia Brasileira: Perfis e Tendências*, ed. by Silvana Krause, Humberto Dantas, and Luis Felipe Miguel (Rio de Janeiro: Konrad-Adenauer-Stiftung, Unesp, 2010); Fernando Limongi and Fabricio Vasselai, "Entries and Withdrawals: Electoral Coordination across Different Offices and the Brazilian Party Systems," *Brazilian Political Science Review*, 12.3 (2018), 1–27; Nicolau, *Multipartidarismo e Democracia: Um Estudo Sobre o Sistema Partidário Brasileiro (1985-94)*.

¹⁸ Calvo, Guarnieri, and Limongi.

for a specific candidate, resulting in a ranked list, according to the total number of votes each received. The seats are then held by the candidates with more votes in the coalition, regardless of the party. Even if all parties benefit from the inclusion of “brokers” these are more common in small parties, because the most efficient strategy is to concentrate the party vote and ensure that at least one candidate is at the top of the coalition list. Enéas Carneiro in 2002 and Francisco Everardo Tiririca in 2010 are examples of “brokers” that transfer votes to other candidates.

Another main strategy for small parties is to establish electoral coalitions. This is common because, even with large votes for specific candidates, they may not be able to achieve the cut-off point of the electoral quotient. An example of this was the results of the candidate Luciana Genro in 2010: she was the fifth in the total number of votes in a district of magnitude 31, but since her party did not reach the QE, she could not be elected. The institutional design allows small parties to be able to elect candidates, facilitating their entry into Congress. Since 1981, 164 parties have applied for registration in the Superior Electoral Court (TSE). However, the advantages for small parties to survive electorally do not directly reflect in electoral fragmentation or the proliferation of party formation. Changes in the specific regulation of the party system and the possibilities of access to resources are equally important aspects.

Party system formation: from the Falcão Law to the Organic Law of Political Parties

In the next sections, we discuss the rules that affect political parties directly, considering their formation, access to elections and financial resources. They point to a frequent claim among analysts when discussing party fragmentation: the legislative is permissive¹⁹. Still, this legislation was modified several times throughout the re-democratization process. These regulations structure opportunities and constraints for the parties, creating constitutional, legal and administrative barriers over the past forty years.

The current Brazilian party legislation dates from the transition from bipartisanship²⁰, to the multiparty system still during the military dictatorship. This restitution, based on the Falcão Law, Law No. 6.767/1979²¹, was the steppingstone of the slow, gradual and safe transition process, initiated in 1974. Between 1979 and 1980, five parties obtained their records from the TSE: in support to the military regime, PDS (Social Democratic Party, *Partido Democrático Social*), and, in opposition, PMDB (Party of the Brazilian Democratic Movement, *Partido do Movimento Democrático Brasileiro*), PTB (Brazilian Labor Party, *Partido Trabalhista Brasileiro*), PDT (Democratic Labour Party, *Partido Democrático Trabalhista*) and PT (Workers’ Party, *Partido dos Trabalhadores*).

¹⁹ Krause and Paiva; Nicolau, *Multipartidarismo e Democracia: Um Estudo Sobre o Sistema Partidário Brasileiro (1985-94)*; Zucco Jr and Power.

²⁰ From 1965 to 1979, the military government implemented a legally enforced two-party system, in which supporters of the regime were in the National Renewal Alliance Party (ARENA), and the official opposition, in MDB, that stands for Brazilian Democratic Movement (*Movimento Democrático Brasileiro*).

²¹ Brasil, *Lei Nº 6.767, de 20 de Dezembro de 1979, 1979.*

Legislation is always a necessary element to explain the formation of parties, even if not enough to analyze the complexity of this process. The restricting regulation coming from the Institutional Acts (AI-2 and AI-4) promulgated by the military government, had enabled the freezing of the two-party system. From the moment the legislation imposed that it would no longer be possible to form parties, the economic, social or cultural context, nor the articulation of political elites, could affect the party system design.

As this extreme case shows, rules are essential to understanding the fragmentation of the system and the possibilities for establishing parties. They are the ones that first structure party competition, as well as access to elections and public resources. These formal rules are not neutral instruments, they are subject to change by the legislative process, and also through the Executive and Judiciary. An example of this was the promulgation of the Falcão Law itself, a way found by the military government to divide the regime's oppositionists and control the political transition²².

From this moment, with the Falcão Law, the TSE began to require a hand full of documents: a manifesto, a program, a statute, minutes of designation of provisional regional commissions, and the accreditation of six representatives of the party, and their deputies (Art. 8). The party would then have a one-year deadline to organize conventions, committees and directories in the three levels of the federation (federal, state and municipal) in at least one-third of the states. Once these steps have been proven, the party would receive its definitive registration from the election of 10% of congressional representatives; or by express support (by votes) of 5% of the electorate, in at least nine states, with a minimum of 3% in each of them (Art. 14, items I and II). According to Bennech²³, other norms that incentivized the formation of new parties in this law were: 1. the understanding that the mandate belonged to the party unless the representative participated in the foundation of another party (Art. 72); and 2. access to the Party Fund since its establishment (Art. 97), even without elected representatives. The amount of the Party Fund was to be distributed: 10% of the total equally among all parties, while 90% proportionally to the number of congressional representatives of each party.

However, the Falcão Law still imposed obstacles to the electoral success of the new parties. The mandatory word 'party' in the nomenclature (Art. 5, § 1), made to directly impact the electoral brand of the MDB, and the legal prohibition of the establishment of electoral coalitions for proportional elections at the three levels (Art. 19) were examples of these restrictions. Added to this, the presidential decree that governed the 1982 elections, called the November Package, imposed a 'tied' straight party vote (*voto vinculado*), favoring parties with capillarized structures. This resulted in an electoral competition in a remained bipartisan structure, marked by the dispute between the

²² Maria D'Alva Gil Kinzo, "A Democratização Brasileira: Um Balanço Do Processo Político Desde a Transição," *São Paulo Em Perspectiva*, 15.4 (2001), 3-12; Gláucio Ary Dillon Soares, "A Política Brasileira: Novos Partidos e Velhos Conflitos," in *Da Distensão à Abertura. As Eleições de 1982*, ed. by Alexandre de Souza Costa. Barros (Brasília: Editora Universidade de Brasília, 1988), pp. 91-118.

²³ Anna Paula Bennech, "A Emergência de Novos Partidos Políticos No Brasil (1979 - 2015): O Arcabouço Legal É Suficiente Para Explicar Este Fenômeno?" [(Mestrado em Ciência Política) - Instituto de Filosofia e Ciências Humanas, Universidade Federal do Rio Grande do Sul, 2016].

parties that inherit the two-party system, PDS and PMDB²⁴. The multiparty system was thus re-established, but with certain restrictions, resulting much more in the return of pre-1964 parties (PTB, PDT), and in the successors of the military regime (PDS, PMDB) than in the new party system. The only example of newness in the multiparty system was the PT²⁵.

In 1985, Constitutional Amendment No. 25²⁶ allowed the reorganization of the parties that had had their previous registration rejected, canceled or revoked (Art. 6), allowing the return of communist and socialist associations, such as the PCB (Brazilian Communist Party, *Partido Comunista Brasileiro*), the PCdoB (Communist Party of Brazil, *Partido Comunista do Brasil*) and the PSB (Brazilian Socialist Party, *Partido Socialista Brasileiro*). At this point, other small parties began to organize, increasing the number of parties registered by the TSE from the second half of the 1980s²⁷. The TSE allowed other 24 parties to launch candidates in the 1986 elections, for the National Constituent Assembly.

The new Constitution²⁸ established the Free Electoral Advertising Time (HGPE) on radio and television, which was firstly distributed in a beneficial way to the smaller parties²⁹. One-third of the advertising time would be divided equally between the parties, while the other two-thirds, according to the share of the parties in legislative elections, both at the state and federal levels. As a result, there was a greater institutionalization of the parties, with access to financial resources guaranteed constitutionally, which proved to be an important opportunity for the foundation of new parties, including those formed by dissident parliamentarians, since they would not lose their mandate. This was the case of PFL (Liberal Front Party, *Partido da Frente Liberal*) and PSDB (Brazilian Social Democracy Party, *Partido da Social Democracia Brasileira*), founded reflecting the specific moment of transition to democracy. PFL was dissident from PDS because of its support of the indirect election of Tancredo Neves (in PMDB)³⁰. The PSDB, in turn, was founded in 1988, by PMDB dissident parliamentarians³¹.

The progressive deepening of the re-democratization process from the second half of the 1980s promoted an even greater expansion of the multiparty system, opening the electoral space once dammed by the freezing of the two-party system. Between 1987 and

²⁴ Denise Paiva Ferreira, Carlos Marcos Batista, and Max Stabile, "A Evolução Do Sistema Partidário Brasileiro: Número de Partidos e Votação No Plano Subnacional (1982-2006)," *Opinião Pública*, 14.2 (2008), 432–53; Bolívar Lamounier, "O Brasil Autoritário Revisitado: O Impacto Das Eleições Sobre a Abertura," in *Democratizando o Brasil*, ed. by Alfred Stepan and Albert Fishlow (Rio de Janeiro: Paz e Terra, 1988), pp. 83–134; Rogério Schmitt, *Partidos Políticos No Brasil (1945-2000)* (Rio de Janeiro: Zahar, 2000).

²⁵ Margaret Keck, *PT - A Lógica Da Diferença: O Partido Dos Trabalhadores Na Construção Da Democracia Brasileira* (Rio de Janeiro: Centro Edelstein de Pesquisas Sociais, 2010); Rachel Meneguello, *PT: A Formação de Um Partido, 1979-1982* (São Paulo: Paz e Terra, 1989).

²⁶ Brasil, *Emenda Constitucional Nº 25, de 15 de Maio de 1985*, 1985.

²⁷ Ferreira, Batista, and Stabile; Nicolau, *Multipartidarismo e Democracia: Um Estudo Sobre o Sistema Partidário Brasileiro (1985-94)*.

²⁸ Brasil, *Constituição Da República Federativa Do Brasil de 1988*, 1988.

²⁹ Bennech.

³⁰ Gabriela Tarouco, "O Partido Da Frente Liberal: Trajetória e Papel No Sistema Político" ((Doutorado em Ciência Política) – Instituto de Filosofia e Ciências Humanas, Universidade Estadual de Campinas, 1999).

³¹ Celso Roma, "A Institucionalização Do PSDB Entre 1988 e 1999," *Revista Brasileira de Ciências Sociais*, 17.49 (2002), 71–92.

1990, more than 50 party registrations were requested from the TSE, and 48 new parties were provisionally approved. In the 1989 election, 22 parties submitted candidates for president. As a way of regulating the party offer and responding to the turbulent sociopolitical context of the early 1990s, Law 8.713/93³² was promulgated to regulate the 1994 elections. The candidacies were restricted to parties with registration (definitive or provisional) of at least one year, or with at least one federal representative (Art. 5). The coalitions for majority and proportional elections were also ratified (Art. 6). In the occasion of the President Collor's impeachment process, this Law also regulated how parties should manage their campaign finances, and how they could use donations³³. Until then, there was a ban on financial contributions from companies to parties and campaigns, which was not an impediment for large businessmen to make³⁴. In 1993, a ceiling was placed on donations: individuals could donate up to 10% of their income from the previous year; and legal entities, 2% of gross revenue within a specified limit (Art. 38). Furthermore, the Law modified the distribution of advertising time (Art. 65)³⁵.

To make some of the new regulations proposed in 1993 definitive, as well as guide points stated in the Constitution, the Organic Law of Political Parties - LOPP (Law No. 9.096/95)³⁶ was instituted. LOPP emphasized the internal, organizational and statutory autonomy of parties (Art. 3), within constitutionally established limitations for the maintenance of democracy. The bureaucracies for the formation of new parties were also reiterated: it now required a number in the National Registry of Legal Entities (CNPJ), reinforcing the nature of the party as a civil society association, outside the State³⁷. TSE began to require the support of 0.5% of Brazilian voters in at least nine Brazilian states for the formation of parties (§ 1 of Art. 7). This is the basis of the current legislation: the proof of support must occur through the signatures of voters, attested by the Electoral Registrar (§ 1 of Art. 9). In addition to statutes and party programs, TSE also made it necessary to publish a document with 101 founders in the Official Diary of the Union. After approved and deferred the process, the parties receive the definitive registration and could participate in elections and had access to financial resources. From 1995, the provisional character of the registry ceased to exist.

In the terms of party financing, LOPP continued to make donations from private companies possible, but without making the limits clear, in practice, removing them for

³² Brasil, *Lei Nº 8.713, de 30 de Setembro de 1993*, 1993.

³³ Silvana Krause, Maurício Rebello, and Josimar Gonçalves da Silva, "O Perfil Do Financiamento Dos Partidos Brasileiros (2006-2012): O Que as Tipologias Dizem?," *Revista Brasileira de Ciência Política*, 16, 2015, 247-72.

³⁴ Jairo Nicolau, "Os Quatro Fundamentos Da Competição Política No Brasil (1994-2014)," *Journal of Democracy (Em Português)*, 6.1 (2017), 83-106.

³⁵ For the representatives' elections, 20 minutes were distributed between all parties and 40 minutes proportional to the number of representatives in the Lower Chamber (Art. 74). In the case of presidential elections, all candidates would divide 10 minutes equally, and the other 20 minutes would be divided proportionally.

³⁶ Brasil, *Lei Nº 9.096, de 19 de Setembro de 1995*, 1995.

³⁷ Ana Lúcia Henrique Gomes, "Rebeldes Com Causa? Investigando o Multipartidarismo e a Fragmentação Partidária Na Câmara Dos Deputados Sob a Nova Lei Orgânica Dos Partidos" (Doutorado em Ciência Política) – Faculdade de Ciências Sociais, Universidade Federal de Goiás, 2016).

spending on campaigns³⁸. There was also a substantial increase in the funding of the Special Financial Assistance Fund for Political Parties. This gave greater autonomy to the parties, allowing them to consolidate their bases and penetrate the territory. This increase corresponds to the highest percentage of the fund³⁹. However, another change was even more significant: only 1% of the total was divided among all registered parties, while the 99% would be distributed proportionally to the parties that had representatives (Art. 41). This meant that this larger portion of the fund began to be divided between the parties that obtained at least 5% of valid votes for the Lower Chamber, distributed in at least nine states (Art. 13), in a barrier clause. The transitional rule approved that parties with three Members in three states could have parliamentary functioning and the resulting resources. In this new division, as much as there has been a significant increase in financial resources for all parties, including the new and the unrepresented, in the end, the share of the latter was decreased.

The centralization of incentives for the larger parties was also reflected in the case of subsidized advertising. The distribution was concentrated as a reflection of the representation in the Lower Chamber: for the larger parties, there would be space on radio and television for 20 minutes every six months. In the case of parties without representatives, the space would be 2-minute advertisement every six months (Art. 57). This harsher surrounding for smaller parties, with the decrease in direct state subsidies compared to the large parties, caused reactions and criticism regarding a possible cartelization of the system⁴⁰.

Therefore, we can affirm that LOPP was a piece of legislation that sought to regulate not only access to elections (such as the Law of 93) but also the formation of parties. It is worth noting that by 1995, 77 parties had been formed in Brazil. Most had an ephemeral existence: 50 achieved only provisional registration and were extinguished in the early 1990s. With their definitive registration rejected, without parliamentary representation, these parties had little impact on the party system⁴¹. As Nicolau⁴² points out, until 1995, the TSE was quite liberal concerning the rules for access to the election and political resources, and, at the same time, very permissive when granting permanent registrations. With more costs for the foundation of parties, there was a decline in the activism of the party elites, fewer parties being formed, and the stabilization of the offer of parties⁴³.

In 1997, the Electoral Law No. 9.504⁴⁴, the General Law of Elections maintained principles of Law No. 8.713/93, and specifically focused on the next election, adding more

³⁸ Krause, Rebello, and Silva.

³⁹ Maria do Socorro Sousa Braga and Adla Bourdoukan, "Partidos Políticos No Brasil: Organização Partidária, Competição Eleitoral e Financiamento Público," *Perspectivas: Revista de Ciências Sociais*, 35 (2009), 117–48.

⁴⁰ Richard S Katz and Peter Mair, "Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party," *Party Politics*, 1.1 (1995), 5–28.

⁴¹ David Fleischer, "Os Partidos Políticos," in *Sistema Político Brasileiro: Uma Introdução*, ed. by Lúcia Avelar and Antônio Octávio Cintra (Rio de Janeiro, São Paulo: Konrad-Adenauer-Stiftung, Unesp, 2004); Krause and Paiva.

⁴² Nicolau, *Multipartidarismo e Democracia: Um Estudo Sobre o Sistema Partidário Brasileiro (1985-94)*.

⁴³ Ferreira, Batista, and Stabile.

⁴⁴ Brasil, *Lei Nº 9.504, de 30 de Setembro de 1997*, 1997.

rules on the registration of candidates, such as the invalidation of individual candidacies (Art. 5), and the minimum time of affiliation (Art. 9). Regarding the issue of financing, it emphasized the prohibition of receiving resources from institutions related to public services or non-governmental organizations that received this type of money (Art. 24). Four financing possibilities were listed: party fund, own resources, donations from individuals (10% of gross income) and donations from legal entities (2% of gross revenues).

This Electoral Law also defined specific aspects of the HGPE. During the 90 days of the campaign, a third of the time would be distributed equally, and the remaining two-thirds, proportionally to the number of representatives (Art. 47). An important change was that the calculation of the size of the parties in the Lower Chamber came to be made based on the date of the inauguration. This ended up reinforcing the possibilities of bargaining for small parties against individual representatives because the legislation no longer used party migration in the calculation of the HGPE. Until then, a representative who entered the party added propaganda time in the next election. As a result, the competitive parties in the majority elections (states) start attracting small parties, not more representatives, increasing the size of coalitions.

Finally, regarding coalitions, this Law modified some aspects of the 1993 Law, reiterating the need for consistency in coalitions. It consolidated the correspondence between the coalitions for proportional and majority elections in the same district: the states. This means that parties that are not in a majority electoral coalition cannot be in a proportional one. In this sense, a more appropriate strategy for small parties is to give up majority candidacies for state government, more costly, to count on other related parties that can transfer votes in an election to the Lower Chamber⁴⁵.

The performance of the TSE as a legislator

The TSE began to legislate on some significant points for party competition, even changing legal arrangements approved by LOPP. Important resolutions were applied in the wake of the increased process of judicialization of politics⁴⁶. While it is worth mentioning that TSE decisions do not constitute legislation per se, they do exert an influence on the regulations that shape party choices and actions. In 1998, TSE decided to make the elected candidate possible to inaugurate their mandate, even if the party did not achieve the LOPP's threshold regarding the barrier. In 2002, TSE return to the discussion on coalitions, interpreting Art. 6 of Law 9.504/97, and decided to implement a mandatory verticalization. This meant that the parties needed to follow the party electoral coalitions formed at the national level. Resolution No. 21.002/02⁴⁷ ended up directly impacting the electoral dynamics and the number of candidates in 2002: 31 parties launched candidates

⁴⁵ Limongi and Vasselai.

⁴⁶ Vitor Marchetti and Rafael Cortez, "A Judicialização Da Competição Política: O TSE e as Coligações Eleitorais," *Opinião Pública*, 15.2 (2009), 422–50.

⁴⁷ Brasil, TSE, *Resolução Nº 21.000, de 26 de Fevereiro de 2002*, 2002.

for the Congress, but only 6 for the presidency. The parties preferred not to close coalitions at the national level to have more flexibility in proportional candidacies for state and Congress.

The role of the Judiciary in matters of legislation on party organization and discipline was also evident in Resolution No. 22.610/2007⁴⁸. From this piece of legislation, it was decided that the mandate of the representative belongs to the party unless the disaffiliation is for a just cause. According to the Resolution:

Art. 1 § 1 - The cause is considered just when:
I) incorporation or merger of the party;
II) formation of a new party;
III) substantial change or repeated deviation from the party program;
IV) serious personal discrimination.⁴⁹

This Resolution was signed as an attempt to discourage party migration. Since 1985, this has become a persistent characteristic of Brazilian politics, unparalleled in other democracies. With a wide range of choices, about 30% of elected federal deputies switched sides, at least once, between 1982 and 2005⁵⁰. As Freitas⁵¹, the parties themselves encourage and dispute to coopt migrants, as a way to increase their power in the parliamentary and electoral arena, not being only an individual decision of each representative. Even with the resolution, party windows still offer the possibility for parliamentarians to switch parties freely at periodically moments.

No doubt, this piece of legislation has had a relevant impact on the formation of parties by enabling a new strategy for the re-accommodation of party elites. This aspect was further deepened with the decision of the Supreme Court in 2012, which granted time of electoral propaganda to the newly funded PSD (Democratic Social Party, *Partido Social Democrático*), arguing that the deputy who founded a new party would carry his television time. Party migration decreased, but there was a new direct incentive for the formation of parties: eight new ones were formed between 2011 and 2018.

Party funding evolution

After the consolidation of the rules on the organization of parties, the legislation began to emphasize more the changing aspects of financing and subsidized access to media. Regarding financing through public resources, Law No. 11.459/2007⁵² recalculated the division of the Party Fund in order to decentralize and make its access more proportional: the percentage of the total divided equally between all parties was

⁴⁸ Brasil, TSE, *Resolução Nº 22.610, de 26 de Outubro de 2007*, 2007.

⁴⁹ Brasil, TSE, *Resolução Nº 22.610, de 26 de Outubro de 2007*, 2007.

⁵⁰ Scott W Desposato, "Parties for Rent? Ambition, Ideology, and Party Switching in Brazil's Chamber of Deputies," *American Journal of Political Science*, 50.1 (2006), 62-80; Carlos Ranulfo Felix de Melo, "Partidos e Migração Partidária Na Câmara Dos Deputados," *Dados*, 43.2 (2000).

⁵¹ Andréa Freitas, "Migração Partidária Na Câmara Dos Deputados de 1987 a 2009," *Dados*, 55.4 (2012), 951-86.

⁵² Brasil, *Lei Nº 11.459, de 21 de Março 2007*, 2007.

increased from 1% to 5%. This was a response to small parties' criticisms of the constitutionality of the LOPP distribution rule⁵³. The new Law also allowed the new allocation to be proportional to the representatives' number, removing the 5% barrier (Art. 41-A). This adjustment was a response to the Direct Action of Unconstitutionality (ADI) judged by the Supreme Court in 2006, which understood that this clause hurt the right to demonstrate political minorities. The new determination directly increased public resources for the new parties and for those who did not elect representation in the Lower Chamber.

In 2013, with Law No. 12.875⁵⁴, there was another amendment in LOPP, disregarding changes in party affiliation for the distribution of the fund. The new Law made an exception about mergers (Art. 29, § 6), and in this case, the previous votes to the party would be added to the calculation of the distribution of resources (Art. 29). However, the Supreme Court had decisions that contradict this aspect of the law, in the understanding that the prohibition of taking the fund and the time of propaganda runs into the principle of free formation of parties, underscoring the value to the mandate of the parliamentarian who migrates (ADI n. 5.105, 2015)⁵⁵. Law No. 12.875 also changed the 1997 Electoral Law by modifying the proportional distribution of the HPGE. Advertising times were now shared between all parties and coalitions so that the parties without representatives would be allowed to be part of the share of the 11% that would be subdivided equally (Art. 47, § 2). The distribution of HGPE was further clarified with Law No. 13.165/2015⁵⁶. In it, 10% of the television and radio time began to be distributed equally, and 90% proportionally to the size of the parties' benches in the Lower Chamber.

There have also been important changes in private financing to avoid the interference of economic power. Accepted since LOPP, the contribution of companies became more evident since the *Mensalão* scandal in 2005. Even if the previous legislation did not specify an absolute ceiling, most candidates did not declare the total donations received⁵⁷. The indeterminate use of *caixa dois* resulted in successive allegations of corruption. In 2015, the Supreme Court ruled in favor of ADI No. 4650 to reverse legislation that allowed the contribution of private companies to parties, an average amount of 75% of official spending on campaigns. This decision was considered in the promulgation of Law No. 13.165 when the veto of articles was inserted by the Presidency of the Republic. It is worth noting that, in the same year, the party fund tripled⁵⁸. The 2016 election was the first in which the only donations allowed were those of individuals. However, it is worth noting that there was no determination of an absolute ceiling: the limit was set at R\$ 80,000 (Art. 23, §7), for anyone, but donations can still be made

⁵³ Krause, Rebello, and Silva.

⁵⁴ Brasil, *Lei Nº 12.875, de 30 de Outubro 2013*, 2013.

⁵⁵ Gustavo Severo and Humberto Chaves, "A Reforma Eleitoral de 2015: Breves Comentários à Lei Nº 13.165/2015," *Revista Brasileira de Direito Eleitoral*, 7 (2019), 81-120.

⁵⁶ Brasil, *Lei Nº 13.165, de 29 de Setembro de 2015*, 2015.

⁵⁷ Nicolau, "Os Quatro Fundamentos Da Competição Política No Brasil (1994-2014)."

⁵⁸ Bruno Speck, "Recursos, Partidos e Eleições: O Papel Do Financiamento Privado, Do Fundo Partidário e Do Horário Gratuito Na Competição Política No Brasil," in *Sistema Político Brasileiro: Uma Introdução.*, ed. by Lúcia Avelar and Antônio Octávio Cintra, 3a edn (Rio de Janeiro: Konrad-Adenauer-Stiftung, 2015).

according to the income declared in income tax, limited to 10%. Thus, if someone has a higher income, they can donate more than the stipulated maximum.

Since the LOPP's approval in September 1995, many changes have been made to this Law. Law No. 13.165/2015 also modified significant questions for the formation of new parties, in a political-electoral institutional reform. First, it changed the Electoral Law reducing the election campaign period from 90 to 45 days (Art. 8). The minimum affiliations period was also reduced from one year to six months (Art. 9), which ensured that a party can be formed within six months before the election to access the ballot. Two modifications were even more relevant to the foundation of parties: it began to require that the signatures of support for the foundation of a new party were of voters not previously affiliated with another political party (amendment of Art. 7, §1, of the LOPP); and it was determined that the deadline for the verification of the approximately 500,000 signatures is in two years. This makes it more difficult to collect signatures, especially in cases of dissidence.

In addition, TSE Resolution No. 22.610/2007⁵⁹ was integrated into LOPP. However, the hypothesis of just cause for party migration was excluded when forming, merging, or incorporating parties. This was made to constrain parliamentarians to form parties. It is worth noting, however, that still in 2015, REDE (Sustainability Network, *Rede Sustentabilidade*) filed an ADI (No. 5.398), which guaranteed the party the right to just cause for 30 days. This practice was also used by PMB (Brazilian Woman Party, *Partido da Mulher Brasileira*). Law No. 13.165 made possible the migration 30 days before the affiliation deadline required to run for election, guaranteeing a party exchange window in election years.

In 2017, Constitutional Amendment No. 97⁶⁰ and Law No. 13.488⁶¹ were promulgated, in what was called electoral mini-reform. The Amendment brought one of the biggest changes: the end of coalitions in proportional elections. In addition, it proposed a new barrier clause: it modified the parties' access to the party fund and the HGPE depending on their votes. In the legislature following the 2018 elections, the parties only had access when they had at least 1.5% of the valid votes (or nine representatives) in nine states. In each national election, the percentage will increase by 0.5%. The expectation is that in 2030, parties will need to reach 3% of the valid votes to access state subsidies.

Law No. 13.488/2017 brought an important change with the conception of the Special Campaign Finance Fund. The Fund consists of budget appropriations of the Union and was R\$1.7 billion in 2018 (one-third of the total spent in the 2014 election). According to the Law, it must be distributed to the parties by the TSE according to the criteria: 2% to all registered parties; 35% to parties that have at least one representative; 48% in proportion to the number of representatives; and 15% in proportion to the number of senators (Art. 16-D).

⁵⁹ Brasil, TSE, *Resolução Nº 22.610, de 26 de Outubro de 2007*, 2007.

⁶⁰ Brasil, *Emenda Constitucional Nº 97, de 4 de Outubro de 2017*, 2017.

⁶¹ Brasil, *Lei Nº 13.488, de 6 de Outubro de 2017*, 2017.

With this, the parties have access to a new type of public subsidy, in addition to the growing party fund (almost R\$ 900 million in 2018) and advertising time (about R\$ 500 million in tax waivers). This Law considerably increased the share of public funds for political parties and was handled with agility in order to make it already operational for the 2018 election, the first in which donations from legal entities were prohibited. As Kinzo⁶² pointed out, opting for public funding for campaigns on the one hand provides more equal conditions in the electoral dispute, reducing the influence of economic power; but on the other, the amount would have to be too large to account for a country with the extension of Brazil, which would be questioned as a priority for public and social investment.

PMDB, PT and PSDB were the parties that received the higher subsidies in 2018. New parties also received large sums, and even parties without representation in Congress had access to R\$ 980.000 each. Over the last decade, the legislation sought to reduce incentives, and even add constraints, to the formation of parties. In any case, considering that public funding and subsidies have grown over time in a dizzying way, this remains an important variable for the calculation of elites when planning to form a party.

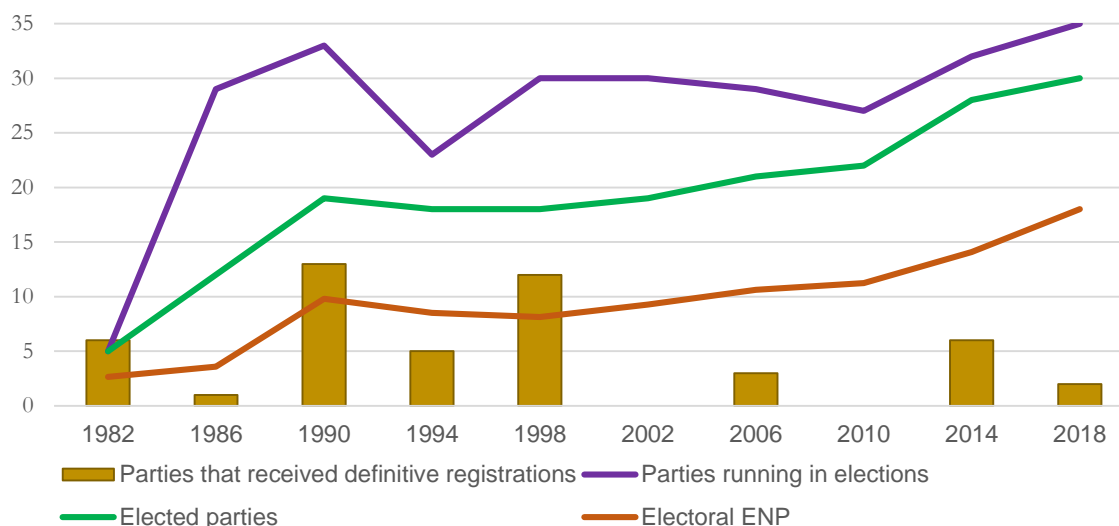
Party formation and party fragmentation

In resuming the argument that the fragmentation of the Brazilian party system is closely linked to the permissiveness of the legislation, it is necessary to analyze the trajectory of the Effective Number of Parties (ENP)⁶³. As can be seen in Figure 1, the fragmentation of the system was not always parallel to the absolute number of parties. In 1982, five parties competed in the election and obtained representation, but the ENP stood at 2.4, evidencing the continuity of the bipartisanship. In 1986, no fewer than 29 parties launched candidates, of which only 7 had a definitive registration within TSE. In this election, 12 parties elected representatives. The ENP however, remained lower than 3. Between 1987 and 1990, 13 parties received the TSE definitive registration, with 33 parties participating in the election. With 19 parties with representation in the Lower Chamber, there was the first jump of the ENP: 8.7. Exacerbated pluralism only had an impact on party fragmentation at this peak, in which many parties participated in the elections and most of them could get representation.

Figure 1 – Absolute number of parties running in elections, absolute number of elected parties and Effective Number of Electoral and Parliamentary Parties (1982-2018)

⁶² Maria D’Alva Gil Kinzo, “*Legislação Eleitoral, Sistema Partidário e Reforma Política,*” *Política & Sociedade*, 2.2 (2003), 11–21.

⁶³ This calculation, proposed by Laakso and Taguepera (1979), is $ENP = 1 / \sum p^2$, dividing 1 by the sum of the square of the proportions of seats or votes of the parties in an election.



Source: Authors, based on data from Nicolau, Gallagher and the Superior Electoral Court.

In the 1994 election, what we observe is a different process: the number of parties decreased, and several ones extinct. Five parties were formed between 1991 and 1994. In the election, 18 parties manage to elect representatives: the ENP fell from 8.7 to 8.2. The variation in the number of parties does not necessarily mean variation in fragmentation. In the 1998 election, the number of parties with definitive registration increased again. The ENP, however, fell. Even with the same number of 18 elected parties, fragmentation reached 7.1. Although more parties were participating in the elections, LOPP was essential for concentrating resources on the larger parties. This decrease in the ENP may also be related to stronger parties achieving larger benches⁶⁴, in addition to the effect of mergers⁶⁵. In 1998, the six parties that had the bigger benches for the Lower Chamber (PSDB, PFL, PMDB, PT, PP and PDT) concentrated 80.2% of the voting. However, in the following elections, this “big six” lost percentages progressively.

In 2002, these parties reached 72.5% of the voting. The number of 30 parties in the competition remained, and 19 parties elected candidates. Fragmentation grew to a level of 8.5, even if no new party has been formed. However, since 2002, the fragmentation was happening mainly because parties that were already in the system started to elect candidates. In 2006, Brazil has 21 parties in Congress. With the STF decision about the unconstitutionality of the barrier clause in 2006, and the decision on the just cause for loss of office, the trend of fragmentation that began in 1998 has no longer reversed. The parties formed so far began to participate more and more in the division of the seats of the Lower Camara.

In 2010, 27 parties participated in the election, which resulted in an ENP of more than 10. This is parallel to the increasing volume of financial resources and their greater distribution among all parties. Added to this is the regulation of the punishment of loss of mandate for party infidelity that excluded parliamentarians entering new parties. The result was increased incentives to form parties with staff recruited from within the party

⁶⁴ Paulo Tafner, *Proporcionalidades e Exclusão No Sistema Político-Eleitoral Brasileiro* (Instituto de Pesquisa Econômica Aplicada (Ipea), 1996).

⁶⁵ Gomes.

system. Between 2011 and 2014, six parties were formed, three of them with representatives elected by other parties. With these benches and the approval of the courts, these parties were entitled to proportional party resources, which ended up having a direct impact on the elections in 2014: 32 parties participated in the election, 28 of them elected candidates and the ENP reached historic 13.3. The increasing number of parties was reproduced in a greater fragmentation of the party system. In the process, large parties have declined in size and new parties have gained ground. This discussion is important in understanding that not only parties were formed in Brazil, but that both the major parties and the new and small ones have become medium.

Conclusion

Party fragmentation is considered one of the main factors of the degree of stability of the political system: the greater the number of parties with the ability to block decisions and exert veto power, the higher the level of tension among political actors⁶⁶. This observation was the basis of the pessimism of analysts and academics about Brazilian institutions during the re-democratization process. In this perspective, by combining proportional voting – and its tendency to multiparty systems – with presidentialism, Brazil would be a ticking time bomb, or, at the very least, it would be a system with fragile institutional structure. On that same hook, the parties would be weak, underdeveloped, lacking roots within society, undisciplined, clientelist and unpredictable. The fragmented party landscape would also exacerbate these challenges, as there would become difficult to build coalitions and stable alliances. That would be parallel to the proliferation of parties in a permissive environment, each with its own agenda and interests.

In analyzing the party system as a space for exchanges between parties, it is crucial to consider the institutional rules and regulations. A central question is whether the electoral formula alone can respond to the formation of new parties in Brazil, as well as the constant increase in party fragmentation. The constitutional framework design established during the transition to the re-democratization remains the same. However, it is crucial to examine the changes that have happened throughout the consolidation of the multiparty system, as well as the legislation regarding party formation and fragmentation.

The findings of this article suggest that there were indeed incentives for the formation of parties, at least before 1995, when the process became more bureaucratic with the introduction of LOPP. Many parties that were formed during this period have not received their definitive registration and have been extinguished. However, the effective number of parties continued to grow with each election. The performance of the TSE as legislator on the matter of discipline and party migration ended up encouraging the formation of parties, focusing on enabling minorities to achieve party representation.

⁶⁶ Barry Ames, *The deadlock of democracy in Brazil* (Ann Arbor: University of Michigan Press, 2002); Scott Mainwaring, *Sistemas Partidários Em Novas Democracias: O Caso Do Brasil* (Rio de Janeiro: Editora FGV, 2002).

However, as of the 2015 legislation, there has been a more evident shift towards making the party formation process more bureaucratic and demanding, potentially limiting this phenomenon. The legislation is a necessary condition for the formation of parties but not sufficient as the sole determinant. The permissiveness of the institutional environment offers windows of opportunity for party creation with few demands. However, there is a complex interplay between institutional rules, societal demands, political ambitions and historical paths that also shapes the party system in Brazil. This makes difficult to analyze a contrafactual in which fewer parties would be formed with more restrictive legislation. As permissive as the institutional environment is, offering windows of opportunity, parties are not formed spontaneously.

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