

RESPONSES TO THE COVID-19 PANDEMIC FROM THE BRAZILIAN SUPREME COURT AND ROMANIAN CONSTITUTIONAL COURT

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Abstract

During the pandemic, Brazil and Romania faced different problems regarding public authorities. While in Brazil there was an absence of a strong coordination against virus spread by the executive, because of the presidential denialism, in Romania there was the declaration of the state of emergency and, after that, the state of alert, imposing restrictions on the exercise of rights and freedoms. However, both countries shared the fact that human rights were under threat, either for action or for omission in that period. Therefore, the analysis of both courts in that context is crucial to understanding the protection of human rights in these jurisdictions.

Keywords: *Constitutional Review; Brazilian Supreme Court; Constitutional Court of Romania; COVID-19*

I. Introduction

The COVID-19 pandemic represents a real test for public authorities. From quarantine orders to current vaccination logistics, the pandemic outbreak forced governments to take decisions that sometimes exceeded the constitutional framework. This complex situation can be evaluated by focusing on the balance of powers, the state of emergency, and, mainly, on the role of the Courts. Considering that both the Brazilian Supreme Court (Supremo Tribunal Federal – STF) and the Constitutional Court of Romania (CCR) are institutions in charge of “safeguarding the Constitution” and taking into account that both are responsible for the judicial review of executive and legislative decisions, we opted for a perspective that investigates the role played by these courts during the pandemic and demonstrates the responses these courts gave to the pandemic crisis. These problems are not trivial once both of the courts develop an important function in their respective political contexts.

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In Brazil, there is a consensus about the pivotal role of the STF as a direct consequence of the constitutional institutional arrangement. The constituents drafted the Brazilian Constitution of 1988 to set an extensive system of judicial protection for fundamental rights by means of several instruments that have strengthened access to the Judiciary. In addition to constituent choices, STF centrality is a product of the legislative delegation by means of constitutional amendments and ordinary legislation. Ultimately, the STF developed a decisional pattern extending its competences in favor of non-explicit powers in the Constitution.

In Romania, the CCR is the exclusive authority of constitutional jurisdiction, having powers both in the matter of constitutional review of primary regulatory acts and of certain facts, acts, attitudes, including the settlement of legal disputes of a constitutional nature between public authorities of constitutional rank³ and a central role in the protection of human rights and liberties⁴.

Besides these similarities, during the pandemic, Brazil and Romania faced different problems regarding public authorities, while in Brazil there was an absence of a strong coordination against virus spread by the executive, because of the presidential denialism, in Romania there was the declaration of the state of emergency and, after that, the state of alert, imposing restrictions on the exercise of rights and freedoms. However, both countries shared the fact that human rights were under threat, either for action or for omission in that period. Therefore, the analysis of both courts in that context is crucial to understanding the protection of human rights in these jurisdictions.

That research is part of a first collaborative project on comparative constitutional law to highlight the differences and similarities between the Brazilian and Romanian systems.

II. The Brazilian Supreme Court

1. A brief overview on judicial review by the Brazilian Supreme Court

Since the first Brazilian republican constitution of 1891, judicial review of legislation has been present in the country, with different configurations depending on each constitution of the 20th century⁵. At that time, Brazil adopted only the US model of judicial review, that is, a diffuse and concrete one where every single judge could assess the constitutionality of the legislation and where the claim of unconstitutionality

³ See T. Toader, M. Safta, *The settlement of disputes of a constitutional nature: inside the Romanian Constitutional Court's rulings on the role and competencies of the public authorities*, Constitutional Law Review no. 2/2018, pp. 51-72, <https://www.cceol.com/search/article-detail?id=797218>.

⁴ See T. Toader, M. Safta, *The dialogue of Constitutional Judges*, Peter Lang Publishing House, 2016.

⁵ There are also some historical elements of constitutional review in the monarchical period, however, that review was not in the hands of the Judiciary, but in political institutions.

depended on a particular conflict. It was also in the Constitution of 1891 that the Brazilian Supreme Court was set as a Supreme Court in charge of judicial review. This design has been changed after the second half of the 20th century by the incorporation of distinct instruments of abstract and concentrate judicial review, hence creating a mixed model of judicial review in Brazil.

However, it is in the constituent process of 1987-1988 that we can find the main attributes of the contemporary judicial review by the Brazilian Supreme Court. The Constitution of 1988 was the result of a negotiated transition to a democratic regime, once between 1964 and 1985 Brazil experienced its longest military dictatorship in history. In 1985, the military left the Presidency of the Republic and, through an indirect election, Tancredo Neves was elected president. However, before taking office, Neves had a health problem and passed away before being sworn in as president. Therefore, the vice-president José Sarney took his place, being responsible for presenting in 1985 a constitutional amendment to convene a National Constituent Assembly.

The elections to choose the constituents took place in 1986 and from 1987 onwards the deliberations on the future constitution began. Two important facts related to this Assembly are noteworthy:

- a) the National Constituent Assembly in Brazil was not elected exclusively to draft the new constitution; the deputies and senators also served roles as ordinary representatives in the Chamber of Deputies and in the Senate;
- b) $\frac{1}{3}$ of the senators who participated in the constituent process were not elected to the National Constituent Assembly because the previous constitution determined that reelection for the Senate occurred every 4 years for between $\frac{1}{3}$ and $\frac{2}{3}$ of the members of each State, alternately. Therefore, each Senator served an 8-year term. Thus, to avoid interrupting the term of $\frac{1}{3}$ of senators who were still in the middle of their term, the political option at that time was to keep them in office with the right to participate in the National Constituent Assembly. However, according to previous rules, these senators had not been chosen through direct elections⁶.

Despite these two elements, the influential participation of organized civil society represented the main attribute of the constitutional process of 1987/1988 by means of several public hearings and popular initiatives. For this reason, the interests of various sectors of society were considered, even though they were not necessarily convergent between them. Notwithstanding, there was a strong convergent demand to restore active participation in the political life of the country, combined with abundant demands for more rights. This broad democratic opening at that time

⁶ For more details about the Brazilian constituent process, see: A.B. Vanzoff Robalinho Cavalcanti, *Brazil in comparative perspective: the legacy of the founding, and the future of constitutional development*, Revista de Investigações Constitucionais, Curitiba, vol. 6, no. 1, Jan./Apr. 2019, pp. 11-33.

resulted in a detailed and extensive constitutional text that aimed to protect the most different groups⁷: political rights, social rights, freedom of expression, independence of powers, free market, social function of property, universal healthcare, protection of indigenous people etc.

Among the main innovations brought by the Constitution of 1988 was an extensive list of fundamental rights at the beginning of the text; provision number 5 of the Constitution originally contained 77 fundamental rights. Moreover, the list corresponds to an open catalogue of rights once there could be fundamental rights implicit in the Constitution⁸. This open clause helps to “oxygenate” the constitutional system, keeping it abreast of historical developments of the fight for new rights. Finally, for those rights not only to be declared but also to be implemented in the lives of citizens, the Constitution of 1988 established a set of institutional instruments to facilitate judicial enforcement of them and, consequently, to strength judicial review by the Supreme Court⁹.

In the case of the STF, it was consolidated a court with triple functions:

- a) constitutional court, by the possibility of assessing the constitutionality of legislation through claims presented direct to the court, without any correlation with one specific case;
- b) court of appeals, by the possibility of reassessing the constitutionality of legislation through claims from the lower instances of the Judiciary;
- c) criminal court, by deciding about crimes of high authorities of the state. Consequently, the Constitution of 1988 consolidated the prior process of mixed judicial review and created instruments to enlarge abstract judicial review with *erga omnes* binding decisions, to rule on unconstitutional omissions, and to review constitutional amendments.

Nowadays, the composition of the STF consists of “eleven Justices, chosen among citizens aged between 35-65, of remarkable judicial knowledge and unimpeachable reputation”. The constitutional process of nomination is initiated by nomination by the President of the Republic, followed by approval from absolute majority of the members of the Senate after public discussion. The Justices are appointed for a life

⁷ According to the Comparative Constitutional Project ranking, the Brazilian Constitution of 1988 ranks third in terms of the longest constitutional text in number of words, only behind the Constitution of India and Nigeria.

⁸ According to provision 5, 2: The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and the principles adopted by it or from international treaties the Federative Republic of Brazil signed.

⁹ For further investigation on this topic, see: K.S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil* (April 27, 2011), American Journal of Comparative Law, October 2011, University of Miami Legal Studies Research Paper No. 2011-15, available at: <https://ssrn.com/abstract=1829134>.