

# 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 rank<sup>3</sup> and a central role in the protection of human rights and liberties<sup>4</sup>.

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 20<sup>th</sup> century<sup>5</sup>. 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

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<sup>3</sup> 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.ceeol.com/search/article-detail?id=797218>.

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

<sup>5</sup> 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 20<sup>th</sup> 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 elections<sup>6</sup>.

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

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<sup>6</sup> 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 groups<sup>7</sup>: 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 Constitution<sup>8</sup>. 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 Court<sup>9</sup>.

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

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<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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>.

term and mandatorily retire at the age of 75. Therefore, accepting the position may mark the beginning of a long trajectory of influence on constitutional politics<sup>10</sup>.

Among the several noteworthy aspects regarding the STF in the last 30 years is the fact that throughout its existence since the 19<sup>th</sup> century, of the 167 Justices who composed the Court, only 3 Justices were women. The first female justice of the STF was appointed in 2000 (Ellen Gracie) and currently there are 2 female Justices: Carmen Lucia and Rosa Weber. On that point, no political initiative to institutionally change this underrepresentation of the female gender in the STF has taken place thus far.

In addition, in 2002, the Brazilian Congress passed a law to create the TV Justice, which is a public TV channel aimed to expand judicial transparency, mainly through the live broadcasting of STF decisions. Since then, hearings, oral opinions and internal deliberations have been available on TV. This innovative change has contributed to the transparency of STF's decisions to the public. However, not only have the decisions become more public, but individual Justices have also become famous through the daily news.

Therefore, due to the main features of the Brazilian Constitution described so far, the STF was called to interpret it several times, and it developed an unwritten understanding of the content of fundamental rights. This is the case of: the unconstitutionality of hate speech, the constitutionality of embryonic stem-cells research without violation the right to life; the constitutionality of racial quotas in universities; the constitutionality of gay marriage etc.<sup>11</sup>.

Considering the prominent role of the STF, when COVID-19 pandemic arrived in Brazil it was expected that the Court could be called to perform some role in this challenging period, once pandemic still represents a difficult 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. Because of its complexity, this situation may be evaluated by different perspectives, that is, by focusing on the balance of powers, state of emergency, and, mainly, by the role of the Court.

This paper focuses only on the decisions taken by the STF in Brazil in response to the COVID-19 pandemic and, mainly, cases challenging acts of President Bolsonaro<sup>12</sup>. The reason for that choice lies in the fact that Bolsonaro publicly denied the danger of

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<sup>10</sup> For a broader panorama on judicial appointment in Brazil, see: M.A. Jardim de Santa Cruz Oliveira, N. Garoupa, *Choosing Judges in Brazil: Reassessing Legal Transplants from the U.S.*, American Journal of Comparative Law, Vol. 59, No. 2, 2011, Illinois Program in Law, Behavior and Social Science Paper No. LBSS11-04, available at: <https://ssrn.com/abstract=1739226>.

<sup>11</sup> For a detailed discussion on these cases, see: R. Becak, J. Lima *et al.* (eds), *The Unwritten Brazilian Constitution: Human Rights in the Supremo Tribunal Federal*, Washington DC: Rowman & Littlefield, 2020, pp. 247-261, pp. 256-7.

<sup>12</sup> Not all the cases were considered, there are other examples as are the cases ADPF 714, ADPF 811, and ADPF 756. The main cases discussed in this paper are available, in English, at: <http://portal.stf.jus.br/textos/verTexto.asp?servico=jurisprudenciaInternacional>.

the pandemic and continuously asked the people not to stop with their daily activities only because a “tiny flu”<sup>13</sup>. Therefore, the way the STF dealt with these cases could represent an identification of its independence from the government.

Furthermore, the reason for that choice in this paper has to do with the fact that in Brazil, pandemic did not enable the use of the constitutional exception instruments defence state and state of siege. Both are constitutional means that allow considerable restriction of fundamental rights in face of calamities, disasters or war (provisions 136-137). However, they have not been called by the authorities; instead, a decree of public calamity to facilitate public spending was enacted (Legislative Decree no. 6/2020).

## **2. The right to information**

The Brazilian Constitution protects the right to information as a fundamental right, according to the provision no. 5, items XIV and XXXIII, where everyone should have access to information, mainly from public institutions. The right to information corresponds to an essential feature of a democratic regime, because it represents an instrument for exercising government control by the citizens. That fundamental right is subject to restrictions only in specific cases where the secrecy is justified for safeguarding the society or the state. In the case ADI 6351, the STF was in front of a claim of unconstitutionality of an ordinary law that changed the Access to Information Act (Law no. 12.527/2011).

The Access to Information Act (AIC) represents the commitment of public institutions to give effectiveness to the fundamental right of information, because it regulates the procedures the citizens should follow to receive information from the government. Note that the kind of information subjected to request include not only records of the claimer, but also of the performance of civil servants, government contracts, government spending etc.

On 23 March 2020, in accordance with his constitutional competences, President Bolsonaro enacted a provisional act creating novel limits for the procedures of the AIC because of pandemic crisis, as it follows:

- a) the suspension of legal deadlines for government responses where the organ is working on emergency cases of pandemic;
- b) the suspension of the right to appeal the denial decision of access to information;
- c) the need for presenting the request again after the pandemic crisis; among others. These changes were immediately challenged before the Brazilian Supreme Court, to protect the right of information.

In the decision, the STF struck down the legislation because of its unconstitutionality. The Court acknowledged that the limitations created with the presidential act are

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<sup>13</sup>From the news: *Bolsonaro calls coronavirus a 'little flu'. Inside Brazil's hospitals, doctors know the horrifying reality*, available at: <https://edition.cnn.com/2020/05/23/americas/brazil-coronavirus-hospitals-intl/index.html>.

incompatible with the protection the Brazilian Constitution gives to the right of information. According to the ruling, that act was subverting the constitutional framework where publicity and transparency should be restricted only in particular occasions and that act did not reasonably specify them. Although the pandemic crisis imposes certain measures to avoid virus spread, this fact does not represent an adequate justification for turning access to information tremendously demanding. Therefore, the Court said that the government should be oriented by the priority of sharing public information.

The concern about information, publicity, and transparency was also a subject of decision in another case of the STF. In the case ADPF 690, the STF compelled Bolsonaro government to fully disclose the data about the pandemic situation in Brazil. On 6 June 2020, the National Health Department of Bolsonaro government intentionally deleted the data on the number of deaths caused by the pandemic. The official website stopped sharing important information, such as the evolution curve of contamination and graphs on the situation in each state-member. If it is considered that policies to fight against the virus should be based on evidences, the lack of these data had the potential to harm even more the unfavorable circumstances Brazil was under at that time.

That decision of the Health Department was taken concurrently with the change in the time of publication of the pandemic daily bulletin. Before, the official bulletin was released between 5-7 p.m. and suddenly was changed to 10 p.m. The reason for that change lies in the fact that the Brazilian mainstream TV news are broadcasted between 8-9 p.m. and, because of the increasing number of contaminations, journalists tended to highlight the omission of the President to face the problem. In delaying the release of daily bulletin to 10 p.m., the government would avoid criticisms in the main TV news. Therefore, both measures aimed to make the access to public information more difficult and then prevent the government from critiques.

In face of this case, the STF struck down the actions of the Health Department and then decided for the maintenance of the full disclosure of data, because, according to the Brazilian Constitution (provision 37), public administration should be guided by transparency and publicity of its acts. Therefore, it is unconstitutional the way the Health Department was omitting the situation of pandemic crisis in Brazil just to preserve the image of President Bolsonaro.

### **3. The indigenous case**

Brazilian history is rooted on the history of the indigenous people, which are the native people of the country. When the Portuguese colonizers came to Brazil in 1500, the land was occupied by about 3 to 5 million of natives distributed between many different tribes. Nowadays, the numbers of indigenous does not reach more than 1 million people. In the first century of contact, 90% of the indigenous people were exterminated,

mainly through diseases brought by the colonizers, such as flu, measles and smallpox. In the following centuries, thousands of victims died or were enslaved in the sugar cane plantations and in the extraction of minerals and rubber. Since the last century, the construction of hydroelectric power plants, the development of livestock on protected areas, and the conflicts of activists for land represent the contemporary genocide against the native people. That is the reason why the Brazilian Constitution of 1988 created a specific topic just for the indigenous rights, aiming to protect the vulnerability of this group of people. There are 2 great achievements for them in the constitutional text, the first one is related to the preservation of their culture, traditions, social organization and language, with the right to choose if they want to remain intact or to be integrated (provision 231). The second important constitutional provision on indigenous rights (provision 231, 1 and 2) has to do with their lands, once they are defined as “original rights”, that is, prior to the creation of the State itself and which take into account the history of domination at the time of colonization. Therefore, the lands traditionally occupied by them are destined to their permanent possession and it is the duty of the State to delimit these lands<sup>14</sup>.

In face of that scenario, in conjunction to the pandemic, it was presented before the STF the case ADPF 709, which aimed to create special health assistance to the indigenous. According to the plaintiffs – an association representing indigenous interests –, indigenous are especially vulnerable to infectious diseases, for which they have low immunity and a mortality rate above the national average. There are also signs of accelerated expansion of the virus contagion amongst its members and an allegation of insufficiency of actions taken by the government to contain it, such as: a) not containing invasions of indigenous lands; b) the entry on indigenous lands of health teams without complying with quarantine and without observing contagion prevention measures; c) leaving the indigenous living on lands with pending official approval without special assistance etc.

The STF acknowledged the urgency of the case on 8 July 2020 and ruled in order to impose on the government a set of measures, taking into account the constitutional protection of the indigenous. The omission of the government should be filled with the following actions: a) the creation of sanitary barriers that prevent the entry of non-indigenous on their territories; b) the extension of protection to the indigenous living on lands with pending official approval and c) the order to create an assistance plan for indigenous people with the participation of the National Human Rights Council and representatives of indigenous communities.

That decision represented an attempt to block the continuous practice of disregarding the indigenous life, mainly when it happens by non-action, that is, by

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<sup>14</sup> For a detailed explanation on Brazilian indigenous rights, see: V.A. da Silva, A. Harding *et al.* (eds), *The Constitution of Brazil: A Contextual Analysis (Constitutional Systems of the World)*, Hart Publishing, 2019, p. 184.



omission of the government in complying with the Constitution. Although the judicial decision is not able to solve the historical accumulation of indigenous vulnerabilities in Brazil, at least it can shed light on the real owners of this land.

#### **4. Federalism**

Since 1891, all the Brazilian Constitutions adopted federalism as a way of structuring the state. Influenced by the US federalism, but in opposition to it, the federalist movement in Brazil departed from a unitary state to divided state-members. That characteristic represents an institutional arrangement where the union still has much more power than other federal entities. Differently, in the US, the autonomy of state-members is of great relevance, once the creation of federation came from the colonies to the union.

Nowadays, the federal state in Brazil is divided into 3 levels: union, state-members, and municipalities. All of them have autonomy on their respective administrative and legislative competences, therefore there is no hierarchical relationship between them. In the matter of health, it corresponds to a social right included in the Constitution and its constitutionalization in Brazil enabled the creation of a national and free health system, which covers every citizen without any charge<sup>15</sup>.

Furthermore, there is a shared competence of the federal entities on health, which means that the 3 of them can rule on the matter and, instead of being a chaotic system where many authorities have the same competence, it was built in Brazil a harmonious practice between them, once they agreed to let to the union the competence to coordinate national policies (vaccination); the state-members are responsible to specific and complex treatments and municipalities take care of first aid and simple diseases. This design aimed to cover all the different health assistance people demand once each federal entity can act by complimenting the deficit of the other.

As mentioned before, President Bolsonaro did not take substantial measures in the coordination of a national engagement in favor of social distance, such as prohibition of parties, restriction on circulation, closure of schools etc. Therefore, state-members and municipalities started to rule on these issues in their respective territory to protect the people against the dissemination of the virus. Bolsonaro, looking at these acts in opposition to his negationist perspective, created embarrassment in the implementation of the state and municipal orders. That was the moment when the Court was called to intervene.

In the case ADPF 672, the STF confirmed that state-members and municipalities may take control of the situation against the spread of the virus without violating the

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<sup>15</sup>For a detailed explanation on the Brazilian health system, see T.M. Gonçalves Menicucci, *The Brazilian Unified Health System: Thirty Years of Advances and Resistance, Universal Health Coverage*, IntechOpen, 2019, available at: <https://www.intechopen.com/books/universal-health-coverage/the-brazilian-unified-health-system-thirty-years-of-advances-and-resistance>.

competence of the union, as the 3 are equally competent to act and rule on the protection of health, and the President, representing the union, cannot remove the decision of the other federal entities. The same conclusion was present in the case ADI 6343, when the STF stated that state-member and municipalities do not need authorization of the union to adopt policy measures in response to the COVID-19 pandemic.

### **5. Labor rights**

One of the main characteristics of the 1988 Brazilian Constitution lies in the political commitment with social rights, which are expressed in provision 6: education, health, food, work, housing, transport, leisure, security, pension, protection to maternity and childhood, and social assistance<sup>16</sup>. Brazilian history has always been distinguished by a continuous and intolerable level of social inequality, which means that Welfare State has never been a reality. In the 80's, alongside the claim for democratization of the country, there was also a broad movement from civil society to include social rights in the Constitution. By including them, constituents were highlighting the need for radically changing society by improving economic and social standards of living, because democracy would not be effective without citizens in a better equal condition.

Besides the social rights of provision 6, the Brazilian Constitution provides an extensive list of labor rights (provision 7); they represent a constitutional framework to protect the more vulnerable part in a labor relationship, which is the employee. In a society characterized by high levels of social inequalities, the freedom to sell your labor does not depart from equal conditions and that is the reason why so many labor rights were included in the Brazilian Constitution.

It is obvious that norms do not have the power to immediately change social reality, mainly when they require macroeconomic conditions and positive actions from the governments. However, the Constitution is not a mere declaration of good intentions, that is, Constitution commands to public institutions, which can be enforced by courts, mainly by judicial review. Therefore, the concurrence of these characteristics denotes that the implementation of social rights demands a continuous and progressive process which cannot be abandoned without the possibility of unconstitutionality by omission.

On 1 April 2020, President Bolsonaro enacted a provisional act (MP no. 936), creating regulations to foster the maintenance of jobs and income because of economic crisis Brazil already was living under, which got worse with the pandemic. One of the greatest controversial innovations of this act lies in the possibility that employee and employer could agree on salary decrease for 90 days. However, according to the Brazilian Constitution, employees have the right of wage irreducibility, which

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<sup>16</sup>For further explanations on that topic, see G. Bercovici, *Revolution trough constitution: the Brazilian's directive constitution debate*, Revista de Investigações Constitucionais, Curitiba, vol. 1, no. 1, Jan./Apr. 2014, pp. 7-18, available at: <http://dx.doi.org/10.5380/rinc.v1i1.40249>.

can be reduced only if it is agreed by the trade union or a collective deal. This constitutional rule corresponds to the acknowledgement of the employee vulnerability before the employer, requiring the intervention of the trade union in cases of wage reduction.

In the case ADI 6363, the STF did not strike down the legislation and held the possibility of salary decrease agreed only between employee and employers. According to the Court, the pandemic crisis corresponds to an exceptional moment where constitutional justice should be aware of the economic consequences of its decisions and should act in accordance with government attempts to enhance job market. Therefore, Bolsonaro's act is constitutional because it is made in an emergency condition and for a temporary duration.

### **III. The Romanian Constitutional Court**

#### **1. A brief overview on judicial review by the Constitutional Court of Romania. Challenges in the context of the pandemic**

Also in Romania, as in all over the world<sup>17</sup>, the COVID-19 pandemic was a real test for public authorities and a moment of assessment, both of the regulatory framework, which revealed its shortcomings only at the time of emergency enforcement, and of the functioning of constitutional relationships between public authorities. Undoubtedly, the "balance of powers" tilted significantly during this period towards the executive, sometimes with the executive authorities exceeding the constitutional framework, in a complicated political context, determined by the proximity of parliamentary elections and the accentuation of the political struggle between the main political forces: the Liberals (being in control of the Government) and the Social Democrats (the opposition, with significant parliamentary representation). The Constitutional Court of Romania was notified during this period to rule upon several cases in which acts of the legislative power (the Parliament) and the executive power (the President of Romania and the Government), in the context of the COVID-19 pandemic, were contested.

Created according to the European model of constitutional review, the Constitutional Court of Romania (hereinafter referred to as "CCR") is, according to the Fundamental Law and its organizing law, "the guarantor for the supremacy of the Constitution" and "the only authority of constitutional jurisdiction". The powers of the CCR are regulated by Article 146 of the Romanian Constitution<sup>18</sup>, as revised in 2003, and, accordingly, by

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<sup>17</sup> See I. Waismel-Manor, I. Bar-Siman-Tov, O. Rozenberg, A. Levanon, C. Benoît, G. Ifergane, *COVID-19 and Legislative Activity: A Cross-National Study*, July 2, 2020, Bar Ilan University, Faculty of Law, Research Paper No. 20-12, available at: <https://ssrn.com/abstract=3641824> or <http://dx.doi.org/10.2139/ssrn.3641824>.

<sup>18</sup> Article 146 of the Constitution: "The Constitutional Court shall have the following powers: a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the

Law no. 47/1992 on the organization and functioning of the Constitutional Court<sup>19</sup> (hereinafter referred to as “Law no. 47/1992”).

The main issues addressed to the Court in the context of the COVID-19 pandemic concerned the competence of the legislative and the executive regarding the declaration of the state of emergency (which has, in Romania, constitutional regulation) and the state of alert (which has only legal, not constitutional regulation and it is a less restrictive option in terms of measures, compared to the state of emergency). Likewise, the Court ruled on the conditions for restricting the exercise of certain rights and freedoms, the acts by which such measures may be ordered and the powers – shared or not – as the case may be, of the legislature and the executive concerning the adoption of such acts and their enforcement, the effectiveness of fundamental rights in extraordinary situations.

## ***2. Limits of competences of the public authorities: legislative versus executive in the context of the COVID-19 pandemic***

The Romanian Constitution contains express norms regarding the regulation and declaration of the **state of emergency**<sup>20</sup>. However, when the constitutional rules were applied by the public authorities, it turned out that the limits of the exercise of the constitutional powers of the Parliament, the President and the Government in such a situation were not clear. These limits were defined by the Constitutional Court

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President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People’s Advocate, a number of at least 50 deputies or at least 25 senators, as well as *ex officio*, on initiatives to revise the Constitution; b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators; c) to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 deputies or at least 25 senators; d) to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the People’s Advocate; e) to solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy; f) to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns; g) to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to Parliament and the Government; h) to give advisory opinion on the proposal to suspend from office the President of Romania; i) to guard the observance of the procedure for the organization and holding of a referendum, and to confirm its returns; j) to check the compliance with the conditions for the exercise of the legislative initiative by citizens; k) to decide on the objections of unconstitutionality of a political party; l) to carry out also other duties stipulated by the organic law of the Court”.

<sup>19</sup> Republished in the Official Gazette of Romania, Part I, no. 807 of 3 December 2010, as subsequently amended and supplemented.

<sup>20</sup> The regime of the state of siege and of the state of emergency shall be regulated, according to Article 73(3) letter g) of the Constitution, by organic law; Article 93(1) of the Romanian Constitution establishes that “*The President of Romania shall, according to the law, institute the state of siege or the state of emergency in the entire country or in some territorial-administrative units, and ask for the Parliament’s approval for the measure adopted, within five days of the date of taking it, at the latest*”.

through the decisions pronounced upon the notification of the People's Advocate. In applying the constitutional framework of reference, the Constitutional Court has established that, in Romania, in the field of establishing the state of emergency, the state authorities exercise shared powers<sup>21</sup>.

Thus, *the Parliament – a priori*, “has the power to enact, by organic law, the state of emergency, establishing the prerequisites that may determine the declaration of the state of emergency, the procedure for declaring and ceasing the state, the powers and responsibilities of public authorities, the possibility of restricting the exercise of the fundamental rights and freedoms of citizens, the obligations of natural and legal persons, the measures that may be ordered during the state of siege, the sanctions applicable in case of non-compliance with the legal provisions and the measures ordered”<sup>22</sup>.

*The President of Romania* “has the constitutional prerogative to establish the state of emergency and to enforce the legal provisions specific for the state of emergency, as established by the legislature”<sup>23</sup>.

*The Parliament – a posteriori*, after the adoption of the decree by which the state of emergency is established, “has the obligation to verify the fulfilment of the legal conditions regarding the establishment of the state of emergency, approving or not this measure, by adopting a decision in the joint sitting of the two Chambers (Senate and Chamber of Deputies). Within the procedure for approving the establishment of a state of emergency, Parliament shall carry out a thorough and legal review of the President's decree in relation to the constitutional and legal provisions concerning the legal regime of the state of emergency. If the Parliament refuses the approval, by the adopted resolution (which has the effect of revoking the administrative act issued by the President of Romania) it must give grounds for its resolution, specifying the constitutional and legal grounds which were not complied with by the administrative act”<sup>24</sup>.

As far as the Government is concerned, the Constitution does not contain special rules regarding the state of emergency, and therefore the general framework that configures its role of an executive authority is applicable<sup>25</sup>.

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<sup>21</sup> See Decision no. 152/2020, published in the Official Gazette of Romania, no. 387 of 13 May 2020, para. 92, 94.

<sup>22</sup> *Ibidem*.

<sup>23</sup> *Ibidem*.

<sup>24</sup> *Ibidem*.

<sup>25</sup> We note that similar regulations exist in other states where the President's act concerning the exceptional situation/state of emergency is subject to Parliament's approval (*e.g.* Portugal, Kyrgyzstan) or the President is obliged to inform the Parliament (*e.g.* Peru). In other states, the state of emergency is established by the Parliament itself (*e.g.* Bulgaria) or the extension can only be ordered by the Parliament (France). There are states where the measure is ordered by the Government, subject to the approval of the Parliament (Armenia), as well as states where the state of emergency/natural disaster/emergency is established by the executive authority and it is not subject to the approval of the Parliament (Italy, Hungary) or submits to the Parliament for approval only its extension (Albania, Czech Republic, Spain), Venice Commission – Observatory on emergency situations, available at <https://www.venice.coe.int/files/EmergencyPowersObservatory//T07-E.htm>.

The state of emergency initially ordered was replaced in Romania by a more relaxed framework, *“the state of alert”*. This legal concept is not stipulated in Constitution, being regulated exclusively by law. In accordance with Article 2 of the Law no. 55/2020, *“the state of alert represents the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportional to the level of severity manifested or predicted and necessary to prevent and eliminate imminent threats to life, human health, the environment, important material and cultural values or property”*.

Trying to create a concept that would mirror the state of emergency from the perspective of executive-legislative relationships, the Parliament established, in Article 4(1) of the Law no. 55/2020, that the Government shall be competent to establish the state of alert by decision, *“approved in full or with amendments”* by Parliament. However, in this way, the constitutional regime of Government decisions changed, which, instead of administrative acts of law enforcement, subject to the review of the courts of law, became administrative acts approved by Parliament, withheld from the review of the courts of law. Upon the notification of the People’s Advocate regarding the distortion of the legal regime of the Government decisions, the Court found unconstitutional this legal “construction”, namely the Government decision approved by the Parliament<sup>26</sup>.

The Court noted that, in relation to the constitutional provisions, it results that “Government decisions are normative or individual administrative acts, an expression of the original power of the Government, stipulated in the Constitution, typical for its role of public authority of the executive. (...)” (para. 42). “By approving a Government decision, the Parliament cumulates the legislative and executive powers, with the consequence of violating the principle of separation and balance of State powers, (...). At the same time, a confusing legal regime of Government decisions is created, likely to raise the issue of their exemption and, thus, to withhold from judicial control under the conditions of Article 126(6) of the Constitution, with the consequence of violating the provisions (...) of the Constitution enshrining the free access to justice and the right of the injured person by a public authority” (para. 60). According to the Court, “no law may establish or remove, by extension or restriction, a power of an authority, if such action violates the provisions or principles of the Constitution”<sup>27</sup>.

As a conclusion, the legal regime of the state of alert must comply with the constitutional regime governing the relationships between the Parliament and the Government and their acts. Consequently, insofar as the legislature has established that the state of alert is taken by a Government decision, it has settled the powers of the Government in relation to the state of alert and the acts that the Government

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<sup>26</sup> Decision no. 457 of 25 June 2020, published in the Official Gazette of Romania, no. 578 of 1 July 2020, para. 48.

<sup>27</sup> *Ibidem*.

shall adopt in the exercise of the said powers, all these can apply only within the limits of the Constitution"<sup>28</sup>.

### **3. Constitutional conditions imposed for restricting the exercise of rights and freedoms**

In the context of the COVID-19 pandemic, numerous measures restricting the exercise of fundamental rights and freedoms have been taken. The CCR was notified to decide on the observance of the constitutional conditions imposed for restricting the exercise of certain rights and freedoms, context in which it sanctioned the acts of the Government and the Parliament that did not comply with these conditions<sup>29</sup>.

Thus, the Court has sanctioned the restriction on the exercise of fundamental rights and freedoms by the Government Emergency Ordinance<sup>30</sup>. The regulatory act which restricts/affects citizens' fundamental rights and freedoms or fundamental institutions of the State can only be a law, as a formal act of the Parliament, adopted in compliance with the provisions of Article 73(3) letter g) of the Constitution, as an organic law. The Court thus found the unconstitutionality of the Government Emergency Ordinance no. 34/2020 for amending and supplementing the Government Emergency Ordinance no. 1/1999, because through its normative content it aimed at restricting the exercise of the right to property, the right to work and social protection, the right to information and economic freedom.

Based on the same legal reasoning, the Court found that the provisions of Article 4 of the Government Emergency Ordinance no. 21/2004 on the National Emergency Management System are constitutional insofar as the actions and measures ordered during the state of alert do not aim at restricting the exercise of fundamental rights or freedoms. The decisions of the CCR determined the adoption of Law no. 55/2020 by the Parliament, having as object the establishment, during the state of alert declared under the law, in order to prevent and combat the effects of the COVID-19 pandemic, gradual, in order to protect the rights to life, physical integrity and health care, including by restricting the exercise of other fundamental rights and freedoms.

For the same reasons, regarding the limits of competence of public authorities and of the relationships between the legislature and the executive in the matter, the Constitutional Court found unconstitutional the norms that allowed the Minister of Health to supplement, amend, without limitations, the regulations on the conditions

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<sup>28</sup> *Ibidem*.

<sup>29</sup> According to Article 53 of the Constitution of Romania, "(1) The exercise of certain rights or freedoms may only be restricted by law and only if necessary, as the case may be, for: defence of national security, of public order, health or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster or of an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom".

<sup>30</sup> Decision no. 152/2020, cited above.



under which persons with communicable diseases are required to declare, receive treatment or be hospitalized. Thus, having examined the referral submitted by the People's Advocate regarding the provisions of Law no. 95/2006 on health care reform and of the Government Emergency Ordinance no. 11/2020 on emergency medical stocks, the Court allowed in part the exception of unconstitutionality and found that the provisions of Article 25(2) second sentence of Law no. 95/2006 and of Article 1 of the Government Emergency Ordinance no. 11/2020 are unconstitutional, because these legal norms affect individual freedoms, free movement and intimate, family and private life, without being in compliance with the constitutional conditions regarding the restriction on the exercise of certain fundamental rights or freedoms<sup>31</sup>. The impugned provisions of Article 25(2) of the second sentence of Law no. 95/2006 expressly referred to the measures regarding the obligation of persons who have been diagnosed with some spreadable disease to declare this diagnosis, to receive treatment or to be hospitalized, even without their consent. The infringement of those rights was held to be related to the lack of clarity and predictability of the rules, which allowed for discretionary conduct by the authorities, and to the lack of guarantees which must accompany such measures. According to the Court, "the lawful detention of a person liable to spread a contagious disease is a deprivation of liberty which may be accepted in a society in order to ensure public health and safety, but which is allowed only in accordance with the conditions and procedure laid down by law, being arbitrary excluded". Likewise, "any person must enjoy the possibility to challenge in court the measure of social medical detention in a short time, so that, in case of finding the illegality of the ordered measure, he can be discharged. In other words, the person to whom the measure of social medical detention applies must have an effective right of access to justice ensuring a fast trial of the case and ordering the discharge of the illegally detained person".

In other words, even if the state of emergency caused by a pandemic has a specific configuration, in the sense of prominent (some might say dominant) role played by the medical-scientific experts<sup>32</sup>, with whom the Minister and the Ministry of Health are in direct contact, cannot be accepted the medical-scientific expert metamorphose from decision-making input into decision-maker<sup>33</sup>, just as the metamorphosis of an administrative authority enforcing legal provisions into a legislating authority cannot be accepted.

The Court also found the unconstitutionality of the provisions contained in the Government Emergency Ordinance no. 1/1999 regarding the contravention sanctioning

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<sup>31</sup> Decision no. 458 of 25 June 2020, published in the Official Gazette of Romania, no. 581 of 2 July 2020.

<sup>32</sup> E.L. Windholz, *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, in E.L. Windholz, *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy (2020) the Theory and Practice of Legislation*, Monash University, Faculty of Law Legal Studies, Research Paper No. 3659002, available at: <https://ssrn.com/abstract=3659002> or <http://dx.doi.org/10.2139/ssrn.3659002>.

<sup>33</sup> *Ibidem*.



of certain deeds, criticized by the People's Advocate because, due to the lack of clarity, they left to the ascertaining agent the possibility of a discretionary conduct. The Court upheld the exception of unconstitutionality<sup>34</sup>, noting that the impugned norms do not concretely stipulate the facts incurring the contravention liability, but they establish a general obligation to comply with the law under the undifferentiated task of the heads of public authorities, legal persons, as well as natural persons. The Court held that the provisions of Article 28(1), by the phrase "*non-compliance with the provisions of Article 9 constitutes a contravention*", qualifies as a contravention the violation of the general obligation to observe and apply all the measures established in the Government Emergency Ordinance no. 1/1999, in the related regulatory acts, as well as in the military ordinances or in orders, specific to the established state, without expressly distinguishing the acts, facts or omissions that may incur the contravention liability.

The Court held, by the same decision, the proportionality requirements that must be observed regarding the restriction on the exercise of certain rights and freedoms. According to the Court, the provisions of Article 28 of Government Emergency Ordinance no. 1/1999 – impugned and found as being unconstitutional, not only do they not concretely foresee the facts that incur the contravention liability, but they establish indiscriminately for all these facts, regardless of their nature or gravity, the same main contravention sanction. As concerns the complementary sanctions, although the law provides that they are applied according to the nature and gravity of the deed, as long as the deed is not circumscribed, it is obvious that its nature or gravity cannot be determined in order to establish the applicable complementary sanction<sup>35</sup>.

#### **4. The effectiveness of fundamental rights, in particular free access to justice**

We have shown that, in Romania, the secondary legislation can be challenged in the courts of law. Having been notified even of the procedural framework for challenging these kind of acts, containing measures taken during the pandemic, the Court found that these procedural norms are unclear. The lack of clarity of the regulation has direct consequences on the exercise of the right of access to justice, the person interested in challenging in court a Government ruling or an order, or an instruction issued under the Law no. 55/2020 being unable to identify the applicable procedural regulations and to comply with them<sup>36</sup>. Referring to the ECtHR jurisprudence

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<sup>34</sup> Decision no. 152/2020, cited above.

<sup>35</sup> For the violation of the proportionality requirement of the measures adopted in the context of the pandemic, see also the Constitutional Court of Austria, which sanctioned the lack of a clear/detailed regulation regarding the restriction of certain constitutional freedoms, V 363/2020-25, 14 July 2020, [https://www.vfgh.gv.at/downloads/V\\_363-2020\\_EN\\_Version\\_Homepage.pdf](https://www.vfgh.gv.at/downloads/V_363-2020_EN_Version_Homepage.pdf); or the Constitutional Court of Bosnia and Herzegovina, BIH-2020-1-001, AP 1217/20, 22 April 2020, Venice Commission, CODICES – <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>; U-III no. 22/20, 23 July 2020, <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>, accessed on 5 February 2020.

<sup>36</sup> Decision no. 392/2021, published in the Official Gazette of Romania, no. 688 of 12 July 2021, para. 35-38.

regarding “the close link between the requirements regarding the clarity and predictability of the procedural legal norms and the exercise of the right of free access to justice”, respectively the effectiveness of access to justice, CCR noted that “the simple reference they do it to the provisions of general law in the matter, in the conditions in which the regulations of the Law of administrative contentious no. 554/2004 are expressly excluded from the application, does not meet the conditions of clarity and predictability necessary to ensure the right of free access to justice, being defeated, consequently, the constitutional provisions of Articles 21 and 52”<sup>37</sup>.

Likewise, the Court noted that ensuring a right of effective access to justice must also be examined in the light of the effects that the judgment has on the rights of the person who has addressed justice. The provisions of Law no. 55/2020 do not contain any procedural provisions to guarantee the settlement of cases related to administrative acts of declaration or extension of the state of alert in a short time, which would ensure an effective right of access to justice. Nor do the provisions of the Law on administrative litigation no. 554/2004 meet these requirements. Even if it would urgently resolve the actions regarding the normative acts by which the state of alert is established, the court is required to ensure the fulfillment of the requirements regarding the legal summons of the parties and the right of the opposing party to file a counterclaim, as well as other legal terms. Although the rule is that of suspending the execution of the contested administrative act until the emergency settlement of the appeal [Article 20(2) of Law no. 554/2004], regarding those administrative acts issued to remove the consequences of epidemics, suspension is not possible [Article 5(3) of Law no. 554/2004]. Therefore, the application of the court procedure regulated by the Law on administrative litigation no. 554/2004 would make it impossible to pronounce a decision within a shorter period of 30 days, so that the effects of this decision would not be able to concretely remove the consequences of administrative acts issued under the Law no. 55/2020<sup>38</sup>.

### ***5. Legal effects and the impact of CCR decisions. The effectiveness of access to constitutional justice***

We consider it important to emphasize that the number of decisions and solutions pronounced by the CCR does not provide a complete picture of the acts adopted by the Romanian authorities in the context of the COVID-19 pandemic and their contestation. The competence of the CCR is one of the attributions, limited both in terms of the scope of acts that may be subject to review, subjects that may refer to the Court and the very nature of constitutional review. However, many of the specific measures in the context of the pandemic were adopted by secondary regulation acts, given in the application of the law, such as Government decisions or ministerial orders, of which the

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<sup>37</sup> Decision no. 392/2021, cited above, para. 42.

<sup>38</sup> *Ibidem*, para. 43-48.

review falls within the competence of the courts. As a result, a complete picture of the review of the acts adopted in the context of the COVID-19 pandemic in Romania would imply an examination, at the same time, of the jurisprudence of the courts. Thus, for example, in a recent case, the CCR rejected the criticisms of unconstitutionality according to which the Government extended the obligation to wear a mask, providing in Article 3 of the Annex no. 2 to the Government Decision no. 856/2020<sup>39</sup> in all open public spaces, by all persons who have reached the age of 5, noting that this aspect is not a matter of constitutionality of Law no. 55/2020, but one of legality, its review being within the competence of the competent administrative and fiscal contentious court<sup>40</sup>.

Nevertheless, the decisions taken by the CCR have had a significant impact, in terms of regulating the conduct of public authorities and complying with the fundamental rights of citizens. The most obvious example is the adoption of Law no. 55/2020, as an effect of the CCR's ascertainment of the unconstitutionality regarding the restriction of the exercise of certain rights and freedoms by Government emergency ordinances. The preamble of the law states, *inter alia*, the very fact that a law adopted by the Parliament shall be necessary *"since, in accordance with the provisions of Article 53 of the Romanian Constitution, republished, the exercise of certain rights or freedoms may be restricted only by law and only if required, as the case may be, inter alia, for the protection of order, public health, but also the citizens' rights and freedoms; given that, in the context of the crisis situation caused by the COVID-19 pandemic, the Parliament of Romania must adopt, by law, restrictive measures, essentially temporary and, where appropriate, gradual, proportional to the level of severity predicted or manifested, necessary to prevent and eliminate imminent threats to conventional, union and constitutional rights to life, physical integrity and health of persons, without discrimination, and without infringing on the existence of other fundamental rights or freedoms"*.

According to Article 147(4) of the Romanian Constitution, the decisions of the Constitutional Court are final and generally binding. This obligation applies both to the operative part and to the reasonings of the decisions. For the full effectiveness of access to constitutional justice, an active conduct of the legislator is required, emphasizing the general binding nature of the decisions of this Court, in the unit given by reasonings and operative part, in accordance with the express provisions of the Constitution. In this regard, the Court ruled in a recent decision, stating that *"in order to remove the unconstitutionality and to ensure clear regulation, in order to effectively and efficiently guarantee access to justice to persons whose rights or interests have been violated by issuing Government decisions, orders or instructions of ministers for the*

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<sup>39</sup> On the extension of the state of alert on the Romanian territory starting with 15 October 2020, as well as the establishment of the measures applied on its duration for the prevention and control of the effects of the COVID-19 pandemic, published in the Official Gazette no. 945 of 14 October 2020.

<sup>40</sup> Decision no. 391/2021, cited above, para. 46.

implementation of measures during the state of alert, pursuant to Law no. 55/2020, the legislator is called to regulate a procedure whose content is easily identifiable, clear and predictable in terms of consequences and which ensures the possibility of resolving cases in an emergency, in a very short time, so that the decisions are able to remove concretely and effectively the consequences of the contested administrative acts, during the period in which they produce effects<sup>41</sup>.

We also note that the Constitutional Court continued its activity, adapting it accordingly to this period, and quickly settled the referrals that concerned the exceptional situation caused by the pandemic. By forcing public authorities to remain within the constitutional limits of the separation and balance of State powers, the Constitutional Court and constitutional courts in general are fundamental institutions for the protection of democracy. From this perspective, we believe that it is desirable to regulate at the highest possible level (in constitutions), the state of emergency, in order to provide public authorities with clear guidance for their actions and, on the other hand, to provide “tools” for correcting the “extensions” not allowed by the jurisdiction through constitutional review.

#### IV. Concluding remarks

The task of safeguarding constitutional rights is not an easy one, and that task became more burdensome in times of a pandemic crisis across the world.

Both the Brazilian Supreme Court and the Romanian Constitutional Court were challenged to respond to the actions and omissions of other authorities, mainly the executive. In the Brazilian case, the STF provided clear decisions to the protection of fundamental rights of information and health during the pandemic, in opposition to President Bolsonaro’s negationist attempts. However, the Court did not provide the same defense when asked to protect labor rights; in that case, the STF adopted a consequentialist argument in order to converge with free market discourse, in detriment of the social commitment of the Constitution.

In Romania, the “test” of the pandemic emphasized, from a constitutional point of view, recurring problems such as exceeding the limits of legislation by the Government through emergency ordinances and lack of quality of legislation, sanctioned by the Constitutional Court through the decisions presented here. The context of the pandemic determined also a raising of awareness regarding the importance of fundamental rights and freedoms from both the population and the authorities called to defend these rights, especially the People’s Advocate, who has actively exercised this role in the context of the COVID-19 pandemic.

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<sup>41</sup> Decision no. 392/2021, cited above, para. 49.

However, both countries shared the fact that human rights were under threat either for action or for omission in that period. Analyzing both courts in that context is crucial to understanding the protection of human rights by courts in the most recent pandemic crisis. By forcing public authorities to remain within the constitutional limits of the separation and balance of State powers, the constitutional courts, the courts of law are and should be fundamental institutions for the protection of democracy.