

## **The Intersection of Federal, State and Local Government Responsibilities to Protect Public Health During the Pandemic in the United States and Brazil**

**Anne Richardson Oakes**

*Centre for American Legal Studies, Law School, Birmingham City University*

**Ilaria DiGioia**

*Centre for American Legal Studies, Law School, Birmingham City University*

**Vanice Valle**

*Rio de Janeiro City Attorney's Office*

The United States and Brazil are federal countries with constitutions that diffuse regulatory power away from the centre in favour of state and local governments. In the absence of strong presidential leadership, the frontline of response has been at these lower levels but the result has been intra-governmental conflict concerning allocation of responsibilities and a patchwork of responses that have done little to promote public confidence in the ability of their governments to control the spread of the disease. In both countries public health emergency orders which have closed businesses and schools, required masks to be worn on public transport and in public places and at their most extreme, required citizens to stay at home or ‘shelter in place’ have generated law suits framed not only in terms of infringement of constitutional rights but also of separation of powers at both horizontal and vertical levels. This paper focuses specifically on the way in which management of the pandemic has generated intra-governmental conflict at the vertical level. It notes that in the United States two-tier constitution which recognises only federal and state governments and has nothing to say regarding local autonomy, local authorities seeking to put in place increased measures of public health protection have struggled to develop legal strategies that can withstand state gubernatorial opposition. This is not the case in Brazil where the Brazilian Constitution of 1988 gives municipalities equal federative partnership with states and the federal government, a status recently confirmed in relation to the management of the pandemic by two recent decisions of the Federal Supreme Court of Brazil (SFT)

This paper considers these issues in the context of related responses, by specific reference to the role of municipalities in what Professor Hirschl terms ‘old-world’ and ‘new-world’ constitutions.<sup>1</sup> The paper is in two parts. In Part 1 we consider the position in Brazil in the context of a conflict between a federal government led by a Covid-impact-denying President and states and municipalities seeking to put in place measures for the protection of public health and the control of the pandemic. The conflict reached the STF which has been asked to pronounce specifically upon the constitutional allocation of competencies on two occasions. Part I considers these law suits and the context in which they arose with the premise that they have something important to contribute to our understanding of federalism and constitutional design in Brazil.

By way of contrast, Part II moves to the United States where the public health concern is similar but the constitutional dynamic is different. In this Part we identify and examine disputes between five states and their municipalities. In the absence of a constitutional framework that can recognise and empower local authorities vis à vis the states to which, in legal terms, they belong, the disputes to date have not made it into a federal court but are framed in terms of state law under which they stand little prospect of success. We note however that in some of the court filings it is possible to discern the rudiments of an argument for independent local autonomy which its proponents claim is deeply rooted in the U.S. concept of democracy and consider whether this is an argument whose time may now have come.

We return in conclusion to the position of municipalities in ‘old-world’ and ‘new-world’ constitutions. We note the prediction that the “new urban era has begun”<sup>2</sup> and suggest that, the formal constitutional position notwithstanding, municipalities in both Brazil and the United States will continue to conduct their intra-governmental disputes with skills that are primarily political rather than legal.

---

<sup>1</sup> RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* (2020).

<sup>2</sup> Parag Khanna, *Beyond City Limits*, 181 *FOREIGN POLICY* 120, 122 (Sept/Oct. 2010): The 21<sup>st</sup> century will not be dominated by America or China, Brazil or India, but by the city ... the age of the nation- state is over. The new urban era has begun.

## 1. Part I and Intergovernmental Relations in the Federal Republic of Brazil

In Brazil the pandemic has tested the fragilities of constitutional design at both the intersection of federal, state, and local government competencies and the processes for managing intergovernmental disputes. What has emerged is a story of a president who, for political gain, has pitted himself against the federation, but in the words of UACES commentators Rodriguez and de Valera, the result has been a “positive outcome for the Brazilian federal system”:

new horizontal intergovernmental relations have been strengthening subnational autonomy and decentralization. A broad recognition that states and municipalities are doing the right thing is spreading both national[ly] and internationally. The Brazilian federation will [...]not [be] the same after the pandemic.<sup>3</sup>

This outcome is in no small part attributable to the role of the Federal Supreme Court of Brazil (STF) which has handed down a number of major decisions which have had the effect of strengthening the autonomy of regional and local authorities as against the federal government. Part I of this article proceeds as follows. In Section 1 we briefly outline the early chronology of the federal and state responses to the emerging public health crisis. We note that the pattern of responses was shaped by underlying political conflicts which came before the STF, framed in terms of constitutional competences. In Section 2 we examine the STF responses by reference to the constitutional framework that was put in place following the adoption of a new democratic constitution in 1988. We focus specifically on these issues: a) the formalization within the new federal union of a role for municipalities as equal members the union together with the states and the federal government, b) the poor quality of constitutional drafting which has required the judiciary to take on an enhanced role in terms of filling the silences and omissions of the 1988 document; c) the judicialization of intergovernmental disputes as politics by another means and d) in the particular context of induced intergovernmental politics, the recent judicial pronouncements which have enhanced the authority of local decision-making in relation to constitutionally allocated competences. While in the context of this particular emergency, the outcome has been positive for regional government and municipal autonomy specifically, we query whether the preference for a judicial solution to what are essentially political disputes will in the longer term erode the

---

<sup>3</sup> Gilberto M. A. Rodriguez & Vanessa Oliveiras de Valera, *Brazil and: The President Against the Federation*, UACES Territorial Politics, <https://uacesterrpol.wordpress.com/2020/06/05/brazil-and--the-president-against-the-federation/>

authority of the Court which has no power of implementation that is not dependent upon the support of effective political support.

## **2. Part II Challenges to State Authority in the United States**

In the United States, as in Brazil, the absence of a strong presidential lead placed management of the pandemic at the centre of partisan politics. When for political reasons governors either refused or were slow to act, the frontline of response shifted to the local level, but the patchwork of gubernatorial and local orders requiring *e.g.* citizens to stay home, and or wear masks in public places, businesses to close and restricting attendance and the conduct of ceremonies at houses of worship, exposed intra-state governmental tensions which constitutional theory struggles to manage. Where governors refused to issue lock-down orders and mask mandates, local governments asserting legislative rights to protect the health, safety and welfare of their residents, presented governors and state attorneys-general with conflict situations to resolve. The reverse dynamic was seen, albeit to a lesser extent, when state governors who imposed lock down measures faced local authority opposition and refusal to collaborate in implementing the restrictions. In this context, disputes became sites of political rather than legal contestation as this section explores.

Part II of this article is structured as follows. In section 1 we outline briefly the orthodox explanation of the allocation of power between the two layers of government that are recognised by the U.S. federal constitution, focussing specifically on the state police power which gives to the individual states regulatory power and responsibility for ensuring the health and welfare of their citizens. We note that the orthodox explanation of intrastate relations sees municipalities as creations of the state from which they derive their powers but note also that gubernatorial restrictions have faced litigation challenges, not just from residents and businesses but also in some cases from municipalities seeking to exercise their home rule powers. In section 2 we consider some of these challenges and locate these in the wider context of assertions of municipal authority that are not unique to the issue of Covid but extend across a spectrum of seemingly diverse contentious issues. We comment on the practice of pre-emption as a strategy now routinely employed to contain these assertions and note that in the absence of constitutional recognition or grant of rights to municipalities, litigation challenges will most likely be resolved

in favour of state authority. In this situation, litigation becomes primarily a strategy of political manoeuvring, the outcome of which will reflect political skills and bargaining power as opposed to strength and quality of legal argumentation.

We conclude however with the following observations. As the significance of the place of the modern city as a service and amenity provider with a role that is central to the lives of many, if not most of the population, continues to grow, a jurisprudence which subordinates municipalities looks increasingly outdated. As a passionate advocate of local government autonomy has argued: “A modern jurisprudence recognizing a right of local, community self-government will only emerge as more municipal communities enact local laws securing and exercising that right.”<sup>4</sup> In the United States the pandemic has not been the only context for local authority and community muscle-flexing but as Georgetown University law professor Sheila R. Foster has observed, “the crisis has shown dramatically why local government, where mayors and health officials are on the frontlines of responding to global health threats like pandemics, is increasingly where effective governance happens in America.”<sup>5</sup>

The same is true of Brazil and indeed more generally as Professor Hirschl has argued. In the United States, as cities attempt to extend their regulatory ambit in relation to such contentious matters as gun control, environmental regulation and sanctuary cities<sup>6</sup> the impetus for independent local democracy will surely grow. The question then becomes, what exactly are the lessons of these conflicts and how might a response be shaped? Specifically can they be translated into constitutional terms as Professor Hirschl seems to be suggesting and if so can or indeed should, the U.S. federal constitution accommodate these changing realities? Even more specifically, are there lessons from the constitutions of the new world and in particular from Brazil which not only gives constitutional recognition to municipalities, but supplements this with legislative guidelines designed to ensure and enhance democratic city management? The authors suggest that while the lesson from the Covid-19 experience, if there is one, is that although the effective resolution of intergovernmental disputes is as much a matter of politics

---

<sup>4</sup> Thomas Linzey, *A Phoenix From the Ashes: Recognizing a Constitutional Right of Local Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENVTL. L. & POL’Y 1 59 (2017).

<sup>5</sup> Sheila R. Foster, *As Covid-19 proliferates, Mayors Take Response Lead, Sometimes in Conflicts With Their Governors.*, Georgetown Law, <https://www.law.georgetown.edu/salpal/as--proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/>.

<sup>6</sup> See generally, Carol S. Weissert et al., *Governors in Control: Executive Orders, State- Local Preemption, and the Pandemic*, 51(3) PUBLIUS 396 (2021).

and political bargaining power as it is of judicialization, the formal position matters and in the United States at least will sooner or later have to be addressed.