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FORMAL PARLIAMENTARY IMMUNITY FROM PROSECUTION A COMPARATIVE LAW STUDY BETWEEN THE INSTITUTE IN BRAZIL AND SPAIN

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Abstract: This study looks at formal parliamentary immunity in the legal-constitutional contexts of Brazil and Spain, highlighting its characteristics, foundations and implications for the republican system of accountability. Through a comparative analysis, it identifies similarities, such as the recognition of formal immunity as an essential mechanism to ensure parliamentary independence and protection against external interference, and differences, such as the absence of prior authorization in the Brazilian model after Constitutional Amendment 35/2001 and the requirement for reasons and the possibility of judicial control in Spanish legislative decisions. Using a theoretical framework based on doctrine, case law and normative frameworks, the article shows that Brazil still faces challenges related to the transparency of legislative decisions on suspension of proceedings, while Spain has made progress in applying judicial control over the grounds for immunity decisions. The research concludes that the adoption of mixed practices between the two systems can improve the compatibility of the institute with republican principles and international human rights commitments, promoting the normative evolution necessary to strengthen democracy without harming parliamentary accountability.
Keywords: Parliamentary immunity, Comparative law, Liability, Brazil and Spain.

INTRODUCTION

The issue of parliamentary immunity, especially formal immunity from prosecution, is of great importance in the contemporary legal scenario, considering its role in guaranteeing the independence of the Legislative Branch vis-à-vis the other branches of government and society. This article analyzes, from the perspective of comparative law, the configuration of the institute in Brazil and Spain, with a view to understanding the mechanisms that both countries adopt to balance the protection of the parliamentary function and the fight against impunity.

Parliamentary immunity is an essentially functional prerogative, designed to safeguard the exercise of the parliamentary mandate against undue external interference. However, when not properly delimited, it can have an unwanted side effect: a sense of impunity. This paper focuses on formal immunity to the process in the Brazilian and Spanish contexts, delimiting the analysis to the normative, doctrinal and jurisprudential frameworks of each legal system.

The relevance of this study emerges from two main aspects. Firstly, from a factual point of view, the inadequate application of parliamentary immunities contributed to Brazil's condemnation in the Márcia Barbosa de Souza case by the Inter-American Court of Human Rights (IACHR), highlighting the need for a critical review of the institute. Secondly, at the normative level, Sustainable Development Goal (SDG) 16 of the United Nations 2030 Agenda encourages the strengthening of fair, effective and accountable institutions (UN, 2024).

The study therefore aims to make a contribution to improving the rules relating to parliamentary immunity. This article seeks to answer the following questions as a research problem: I) how is formal parliamentary immunity from prosecution configured in Brazil and Spain; II) what are the similarities and differences between the two systems; and III) how do these systems reconcile parliamentary immunity with the republican principle of *accountability* by public officials?

The general objective of this work is to analyze the institute of formal parliamentary immunity from prosecution in Brazil and Spain, identifying the peculiarities of each legal system. The specific objectives are: I) to examine the similarities and differences between the configurations of the institute; and II) to assess how each country makes immunity compatible with the republican regime and the need to hold public officials accountable.

This is a qualitative study of a theoretical nature, with a comparative approach. The analysis is based on primary and secondary sources, including constitutional texts, ordinary legislation, case law and specialized doctrine. The comparative method will make it possible to identify convergences and divergences between the legal systems and to propose reasoned normative improvements.

This study is based on reference works on parliamentary immunity. In the Brazilian context, the contributions of Sérgio Portilho Simão and Pedro Lenza stand out. In Spain, authors such as Pablo Lucas Murillo de la Cueva and Mercedes Cabrera provide relevant analyses of the historical evolution and contemporary challenges of the institute. In addition to the doctrine, the normative framework includes the 1988 Federal Constitution and the 1978 Spanish Constitution, complemented by case law from both nations and international decisions, such as the Márcia Barbosa de Souza case by the IACHR in 2021.

The article is structured in five parts. The first explores the concept and historical evolution of parliamentary immunities. Next, the characteristics of the institute in Brazil and Spain are analyzed in separate chapters. The fourth part compares the two systems, highlighting their peculiarities and practical implications. Finally, the conclusion summarizes the analyses and answers the questions proposed, indicating possible ways to improve the institute.

PARLIAMENTARY IMMUNITY

Parliamentary immunity is an essential prerogative of the democratic system, guaranteeing elected representatives the necessary freedom to exercise their legislative functions without fear of judicial or political retaliation. This institute, present in various legal systems, comprises material immunity, related to the inviolability of opinions, words and votes, and formal immunity, which regulates the arrest and prosecution of parliamentarians. Formal immunity, the focus of this study, ensures that parliamentarians can only be prosecuted or imprisoned under specific conditions, preserving the independence of the Legislative Branch from the other branches.

Formal immunity, also known as procedural immunity, refers to the protection afforded to parliamentarians against the initiation of legal proceedings or arbitrary arrests while they are in office. In Brazil, formal immunity is regulated by article 53 of the Federal Constitution, especially after Constitutional Amendment 35/2001 (LENZA, 2019) (BRASIL, 1988). In Spain, the institute is regulated in article 71 of the Spanish Constitution of 1978, with a focus on the need for parliamentary authorization to prosecute deputies and senators (CABRERA AND OTHERS, 2018) (SPAIN, 1978).

The institute's origins can be traced back to England, in the *Bill of Rights of* 1689, which laid the foundations for parliamentary freedom as a means of protection against abuses by the Crown. In the United States, the Constitution of 1787 consolidated the concept of formal immunity, while in France, the Revolution of 1789 reinforced these guarantees. In Brazil, the institute was introduced in the Empire Constitution of 1824 and evolved into the current model, which combines immunity and accountability of public officials (SIMÃO, 2016).

In the Spanish context, parliamentary immunity has roots in its constitutional tradition, but was significantly shaped by the 1978 Constitution, reflecting the period of democratic transition following the Franco regime (CUEVA, 2020). In Brazil, the 1988 Constitution established formal immunity as a safeguard against undue interference, but Constitutional Amendment 35/2001 brought crucial changes, transforming the need for legislative

authorization to prosecute parliamentarians into a possibility of suspending the process by decision of the Legislative Houses (LENZA, 2019).

In Spain, parliamentary immunity maintains the need for legislative authorization to prosecute parliamentarians, but case law has imposed stricter limits on its application, such as the requirement for clear grounds for decisions by the Cortes Generales and judicial control over such grounds.

Doctrine classifies parliamentary immunity into material and formal: I) material immunity, as protection for opinions, words and votes uttered in the exercise of the mandate, as provided for in article 53 of the Brazilian Constitution and article 71.1 of the Spanish Constitution; and II) formal immunity, as restrictions on the possibilities of arrest and prosecution, limited to flagrant crimes or by legislative suspension, as provided for in article 53 of the Brazilian Constitution, or with legislative authorization, as provided for in article 71.2 of the Spanish Constitution.

It is essential to emphasize that parliamentary immunity is not a personal privilege, but a functional guarantee designed to protect the exercise of the mandate. The majority of doctrine, including authors such as Alexandre de Moraes (2006) and Gilmar Mendes (2008), maintains that immunities exist to ensure the independence of the Legislative Power, protecting it from external pressure, whether from other Powers or from private individuals

PARLIAMENTARY IMMUNITY IN BRAZIL

In Brazil, parliamentary immunity is supported by the 1988 Federal Constitution (BRASIL, 1988), and is essential to protect parliamentary activity from external influence. Considering that the institute is divided into material and formal immunity, the focus of this study is on formal immunity from prosecution, which has undergone important changes throughout Brazil's constitutional history, culminating in the significant reform introduced by Constitutional Amendment 35/2001.

Formal immunity is based on protecting the independence of the Legislative Branch, safeguarding parliamentarians against the opening of criminal proceedings that may be motivated by political rivalries or interests unrelated to the common good. According to Article 53 of the Federal Constitution, parliamentarians have prerogatives that prevent arbitrary arrests and allow for the suspension of judicial proceedings by decision of the Legislature, ensuring that they are free to act in the exercise of their mandate (LENZA, 2019).

Parliamentary immunity was initially provided for in the 1824 Constitution, under a model that already included the need for legislative authorization to prosecute or arrest parliamentarians, except in flagrante delicto. The 1891 Constitution introduced a model that consolidated formal immunity, with provisions aimed at protecting legislative activity, but without any major innovations in relation to the imperial model (SIMÃO, 2016).

Finally, the 1988 Constitution adopted a robust model of formal immunity, but with Constitutional Amendment 35/2001, the paradigm shifted: from the need for authorization to prosecute to the possibility of suspending it. This paradigm shift sought to balance parliamentary protection with the fight against impunity, broadening the possibilities for holding political agents accountable.

Currently, article 53 of the Federal Constitution (BRAZIL, 1988) establishes the main prerogatives of formal immunity: I) prohibition of arrest, because parliamentarians cannot be arrested, except in flagrante delicto of an unbailable crime and, even in these cases, arrest depends on a decision by the Legislative House; and II) suspension of proceedings, be-

cause the Legislative House can suspend the progress of criminal proceedings, by decision of the majority of its members, a prerogative which, however, is subject to deadlines and requirements established in the Constitution itself.

In this context, Constitutional Amendment 35/2001 profoundly altered the institute: I) eliminating the requirement for prior authorization to prosecute parliamentarians, allowing criminal proceedings to be brought automatically; and II) introducing the possibility of suspending proceedings by decision of the legislature, limiting the scope of formal immunity and allowing parliamentarians to be held more accountable (SIMÃO, 2016).

Despite positive changes, such as the elimination of prior authorization, the institute still faces criticism, since scholars such as Alexandre de Moraes (2006) point out that, in some cases, the prerogative to halt proceedings is used to avoid criminal liability, constituting an obstacle to justice. In addition, the application of political criteria in the legislative decision on whether or not to suspend proceedings raises questions about the exemption of this prerogative (LENZA, 2019).

An analysis of the institute of formal immunity in Brazil reveals significant progress in the search for a balance between protecting parliamentary activity and the accountability of public officials with criminal liability. However, the effectiveness of the institute still depends on the consistent and impartial application of constitutional norms, as well as a restrictive interpretation that prevents its use for impunity purposes.

PARLIAMENTARY IMMUNITY IN SPAIN

Parliamentary immunity in Spain is regulated by Article 71 of the Spanish Constitution of 1978 and has peculiar characteristics that distinguish it from the Brazilian model. This institute aims to preserve the independence of parliamentarians and protect the exercise of their legislative functions against external pressure and undue interference (CABRERA AND OTHERS, 2018).

The foundation of parliamentary immunity in Spain lies in strengthening the democratic role of Parliament as a representative body, ensuring that deputies and senators can carry out their duties without fear of judicial or political persecution. Formal immunity, in this context, consists of the impossibility of arresting, prosecuting or criminally charging a parliamentarian without the prior authorization of the respective legislative house, the Chamber of Deputies or the Senate (CUEVA, 2020).

Article 71 of the Spanish Constitution establishes three main guarantees: I) inviolability guarantees parliamentarians freedom of expression in the exercise of their functions; II) immunity prohibits the arrest of parliamentarians, except in the case of flagrante delicto, and makes any criminal proceedings conditional on the authorization of the respective House; and III) the special forum determines that criminal proceedings against parliamentarians fall within the competence of the Criminal Trial Chamber of the Supreme Court (SPAIN, 1978).

These provisions are complemented by regulations of the Cortes Generales and by autonomous statutes that partly replicate these prerogatives for the Regional Legislative Assemblies. This parliamentary immunity has historical roots in Spanish constitutionalism. The 1812 Constitution of Cádiz laid the foundations for the institute, and the 1978 Constitution consolidated it as an essential tool for protecting the parliamentary function in an established democracy.

Currently, Spanish constitutional jurisprudence has evolved to require that the decisions of the Cortes Generales on granting or

denying immunity be reasoned. The lack of adequate justification can lead to the act being null and void, as the Constitutional Court has ruled in emblematic cases, such as Judgment STC 80/1985 (SPAIN).

Another significant aspect is the possibility of judicial control over the application of parliamentary immunity. This control seeks to prevent abuses and ensure that parliamentary prerogatives are not used as a shield for illicit acts, in accordance with Judgment STC 206/1992 of the Constitutional Court (SPAIN).

Therefore, recent practice reflects a movement towards a restrictive interpretation of immunity, especially in cases involving serious crimes or situations in which the indiscriminate application of the institute could compromise the credibility of Parliament. Despite the restrictive interpretation, parliamentary immunity in Spain faces criticism related to its extent and political use, because the requirement for authorization to prosecute parliamentarians, for example, is seen by some as a barrier that can foster a sense of impunity.

Finally, in the Spanish legal system, unlike in Brazil, there have been no formal changes to the constitutional wording that delimit the immunity of authorization for suspension. The changes were implemented mainly through the interpretative jurisprudence of the Constitutional Court, demonstrating the greater flexibility of the Spanish model compared to the Brazilian model, which opted for an explicit constitutional reform through Constitutional Amendment 35/2001.

COMPARISON BETWEEN FORMAL IMMUNITY IN BRAZIL AND SPAIN

The analysis of formal immunity in Brazil and Spain reveals similarities in its rationale - both based on protecting parliamentary activity from abuse and external pressure - but significant differences in the way the legal systems approach the application and limits of the institute. This chapter will explore the convergences and divergences between the two models, highlighting the implications of each approach for the republican regime of *accountability* of elected representatives.

The constitutional basis and purpose are considered to be similarities between the Brazilian and Spanish models, since in both Brazil and Spain, formal immunity is a mechanism for protecting the legislative function, ensuring that deputies and senators can carry out their roles without undue judicial or political interference. In Brazil, article 53 of the Federal Constitution reflects this guarantee, while in Spain, article 71 of the Spanish Constitution performs a similar function

The protection against arbitrary arrests is also considered a similarity, since both legal systems recognize the impossibility of arresting parliamentarians, except in cases of flagrante delicto. This protection aims to safeguard the independence of the legislature and is indispensable for the balance between the legislative, executive and judicial powers.

Another similarity between these institutes is jurisdiction, since in both countries formal immunity includes the prerogative of forum. In Brazil, the Supremo Tribunal Federal is the court competent to try federal parliamentarians, while in Spain, this function falls to the Criminal Trial Chamber of the Tribunal Supremo.

On the other hand, the differences between the Brazilian and Spanish models of formal parliamentary immunity reveal significant contrasts in their application and impact. In Brazil, Constitutional Amendment 35/2001 introduced an important change by eliminating the need for prior authorization from the Legislature to prosecute parliamentarians, replacing it with the possibility of suspension of criminal proceedings by the respective Legis-

lative House. By contrast, in Spain, the system still requires authorization from the Cortes Generales to initiate any proceedings against parliamentarians, maintaining stricter legislative control over the initiation of criminal proceedings.

Another point of divergence concerns judicial control over legislative decisions. In Brazil, there is no explicit constitutional provision allowing judicial control of legislative decisions on the suspension of criminal proceedings, which can create gaps in relation to the transparency and grounds for these decisions. In Spain, constitutional jurisprudence has evolved to require clear grounds for legislative decisions on immunity, as well as allowing judicial control of these grounds, which reduces the risk of arbitrary application of the institute.

The nature of the reforms also reflects marked differences. In Brazil, the changes were implemented through constitutional reform, with explicit changes to the text of article 53 of the Federal Constitution. In Spain, on the other hand, the changes occurred through jurisprudential interpretations and Constitutional Court decisions, without direct modifications to the constitutional text.

Regarding the impact on the republican *accountability* regime, the Brazilian model expanded the possibilities for accountability with EC 35/2001, but still faces criticism for the lack of justification in decisions to suspend criminal proceedings, as pointed out by the Inter-American Court of Human Rights in the Márcia Barbosa case. In Spain, judicial control over legislative reasoning introduces an additional mechanism for accountability, ensuring greater alignment with republican principles.

Finally, with regard to harmonizing protection for democracy and republican accountability, the Brazilian model could benefit from the Spanish experience, especially with regard to the requirement for reasons for decisions to suspend proceedings and the possibility of judicial review of these decisions. This approach could mitigate the perception of impunity and strengthen confidence in parliamentary immunity as a functional rather than personal instrument, as the IACHR has already determined in 2021.

Comparing the two systems shows that, despite the differences in their application, both share a concern with protecting parliamentary independence. Brazil could advance in making the institute compatible with the republican regime by incorporating practices adopted in Spain, such as judicial control over the grounds for legislative decisions. On the other hand, Spain could be inspired by the Brazilian model to discuss possible constitutional reforms that give greater clarity and predictability to parliamentary prerogatives.

CONCLUSION

This article analyzes formal parliamentary immunity in the legal-constitutional contexts of Brazil and Spain, highlighting its characteristics, foundations and implications for the republican regime of *accountability*. The comparative approach revealed both similarities and substantial differences, which reflect the historical and institutional specificities of each country.

In terms of similarities, it can be seen that both legal systems recognize formal parliamentary immunity as an essential mechanism for ensuring the independence of the legislative branch and protecting parliamentarians against external interference, especially from other branches of the state, which is the foundation of the democratic regime. In both Brazil and Spain, this institute is designed to prevent the political instrumentalization of legal proceedings, guaranteeing parliamentarians the stability they need to fully exercise their legislative functions.

On the other hand, the differences are just as striking. In Brazil, Constitutional Amendment 35/2001 brought about a significant transformation by eliminating the need for prior authorization from the legislature to initiate criminal proceedings against parliamentarians, replacing this procedure with a mechanism for suspending criminal proceedings, which can be decided by the respective legislative house. In Spain, however, formal immunity still requires prior authorization from the Cortes Generales, but developments in jurisprudence have imposed the need for robust and objective grounds for maintaining immunity, as well as allowing judicial control over these decisions, an approach that reflects a more restrictive and progressive interpretation of the institute in the Spanish legal system.

With regard to the impact on the republican regime and accountability, the Brazilian model tried, with the constitutional amendment, to balance the protection offered by parliamentary immunity with the need for transparency and accountability. However, there is still criticism of the practical effectiveness of this mechanism, which is often perceived as a factor of impunity. In Spain, the requirement for legislative justification and judicial control of this represents a more structured effort to prevent abuses, aligning the institute with the principles of republican *accountability*.

Another relevant point is compliance with international standards. The recent decision by the Inter-American Court of Human Rights in the Márcia Barbosa de Souza case of 2021 reinforces the importance of legislative decisions on immunity being reasoned and subject to a control of conventionality. In this sense, the Spanish model offers elements that can inspire the improvement of the Brazilian system, especially in its commitment to international human rights treaties and their respective protection systems

Given this analysis, some recommendations can be made. For Brazil, it may be valuable to adopt a hybrid system, which combines legislative control with objective reasoning requirements and the possibility of judicial control of decisions, mitigating criticism of the institute and bringing it into line with international standards. For Spain, it may be appropriate to consolidate jurisprudential advances by means of legislative reforms that reinforce transparency and the mandatory justification of decisions on immunity in the Major Law.

Therefore, it can be concluded that, despite the challenges and differences, both systems have sought ways of balancing the protection of the parliamentary mandate that is indispensable to democracy with the need to hold public officials accountable in a republican rule of law. This effort demonstrates the continuous evolution of the institute of formal immunity within the Democratic and Social Rule of Law, promoting its adaptation to the demands for justice, transparency and the strengthening of public institutions.

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