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ABSTRACTIVIZATION OF THE DIFFUSE CONTROL OF CONSTITUTIONALITY AND THE RELATIVIZATION OF THE TYPICAL FUNCTION OF THE BRAZILIAN LEGISLATIVE POWER

Eduardo Junges Amaral Soares
http://lattes.cnpq.br/8141207652276711

Daniela Vanila Trigo Nakalski

Abstract: This article seeks to discuss the possibility of a constitutional mutation in article 52, item X of the Federal Constitution. The research has a qualitative approach with a deductive method, based on the theory of the tripartition of constitutional powers, to understand the effects of the decision on diffuse control, based on jurisprudence and doctrine on the topic. From the data collected, it was verified that the STF has admitted the abstraction of effects in cases where unconstitutionality is incidental, therefore, giving erga omnes effect.
Keywords: diffuse control; constitutionality; abstractivization.

INTRODUCTION

The Federal Constitution adopted harmony and independence between the Powers of the Union as a fundamental principle (article 2 of the federal constitution). By adopting this article, the original Constituent Power adopted the thesis of the tripartition of Powers, idealized by Montesquieu. Throughout the constitutional normative text, the original legislator established the typical functions of each Power, citing, as an example, article 84 (private competence of the President of the Republic), article 52 (private jurisdiction of the Federal Senate) and 102, I (original jurisdiction of the Federal Supreme Court).

The Federal Legislative Branch's typical function is to create laws, this prerogative must be linked to the Brazilian constitutional order. To control the consonance between laws or normative acts and the Constitution, constitutionality control is instituted, which can be carried out preventively, that is, before the law comes into force, through the action of any of the Constitutional or repressive Powers, through abstract and diffuse constitutionality control, via the Judiciary.

In preventive measures, the Constitution, Justice and Citizenship Commission - CCJ of any of the legislative houses may carry it out, or the President of the Republic himself, through a presidential veto, and there is also the possibility of a writ of mandamus being filed by a parliamentarian., aiming not to participate in the aforementioned vote on the project.

Constitutionality control is a tool that aims to maintain Brazil's constitutional status, which is why its rules must be well defined in law and in the Constitution. Therefore, it is through the actions of the Judiciary that constitutionality control is provoked, whether incidental or abstract, generating legal consequences, as a rule, for the parties to the process or for everyone (erga omnes effect). In this sense, Luís Roberto Barroso understood that:

> The legal system is a system. A system presupposes order and unity, and its parts must coexist harmoniously. The breakdown of this harmony must trigger correction mechanisms designed to reestablish it. Constitutionality control is one of these mechanisms, probably the most important, consisting of verifying the compatibility between a law or any infra-constitutional normative act and the Constitution. (BARROSO, 2019)

To avoid normative contradictions between infra-constitutional laws and the Constitution, the Federal Supreme Court (STF) may judge the law in an abstract manner (disconnected from the specific case) and in a diffuse manner (involving procedural litigation). For each of the hypotheses there are different effects on the decision, in abstract control the effect is erga omnes, in diffuse control the effect is interpartes. However, the STF (Federal Supreme Court) has understood that in both situations the effects must be equal, in the case of a definitive decision by the Court. Such an understanding in the face of diffuse control is inconsistent with what is presented in article 52, X of the federal constitution.

The aforementioned article determines that the Senate may suspend the law judged unconstitutional by the STF (Federal Supreme Court), that is, the Senate and not the STF generates the erga omnes status, in diffuse control.

In this context, this research sought to elucidate the following question: could there be a constitutional mutation in article 52, item X of the Federal Constitution and what are its consequences for constitutional powers? The following were outlined as specific objectives of the research: a) understand the importance of maintaining typical constitutional powers, especially the Legislative Branch; and b) analyze from a doctrinal and jurisprudential point of view the understanding of the theory of abstractivization.

In an attempt to respond to the research problem, the following hypotheses were outlined: a) the Judiciary (STF) cannot carry out a mutation of 52, item abstract or due to the publication of a binding summary; and b) the immutability of article 52, item X, as the attribution given to the Federal Senate respects the independence and harmony between the powers.

The main sources of the research are academic studies on constitutionality control, recent doctrines on the role of the Senate in constitutionality control, in addition to jurisprudential analysis: ADIs 3,406/RJ and 3,470/RJ and Rcl 4335/AC.

TYPICAL AND ATYPICAL FUNCTIONS OF CONSTITUTIONAL POWERS AND CONTROL OF CONSTITUTIONALITY

Since the liberal conception, an explicit division of powers is standardized in the constitutional text, detailing their performance competencies so that there is no interference by one Power over the typical competence of another, in this sense:

> The division of State power into three distinct bodies (Legislative, Executive and Judiciary), independent and harmonious among themselves, represents the essence of the constitutional system. A Constitution that does not contain this principle is not a Constitution, as liberal theorists have stated. (MALUF, 2018)

The origin of this theory finds support in Montesquieu's work "The Spirit of the Laws". Although it is worth highlighting that, in Aristotle's work "Politics", it is possible to identify the root of the Montesquian theory, since there was the identification of the exercise of three distinct state functions, but which were concentrated in the sovereign who judged conflicts, created laws and enforced these laws.

Starting from an Aristotelian point of view, the thinker Montesquieu identified that power is one, but state functions must belong to three distinct, autonomous and independent bodies. This theory is guided by the growth of the Liberal State, which did not accept that power was concentrated in the absolutist King.

The first written Constitution that fully adopted Montesquieu's doctrine was that of Virginia, in 1776, followed by the Constitutions of Massachusetts, Maryland, New Hampshire and the United States Constitution of 1787. The principle of separation of powers is an important instrument of Western democracies, as it demonstrates the rupture of the absolutist monopoly, as each Power would have its typical and atypical functions, inherent to its nature.

In Brazil and other modern states, Montesquieu's original theory was readjusted, the powers no longer have only typical functions, in which the Judiciary resolves the dispute, the Executive administers the State and the Legislative develops the laws, to an intersection between the powers, the

so-called atypical functions, that is, the Judiciary, in addition to judging the case, also has administrative functions such as granting licenses and legislative functions such as creating the internal regulations of a body.

It is worth noting that the division of powers must not be understood as an exclusive creation of Montesquieu, since, according to Manoel Gonçalves Ferreira Filho:

> The functional division of power — or, as it is traditionally said, the 'separation of powers' — which is still the basis of the organization of government in Western democracies today, was not the genius invention of an inspired man, but rather is the empirical result of English constitutional evolution, which was enshrined in the project of Rights of 1689. In fact, the 'glorious revolution' placed royal authority and the authority of parliament on the same footing, forcing a compromise that was the division of power, reserved to the monarch certain functions, to parliament others and recognizing the independence of judges. This commitment was theorized by Locke, in the Second Treatise on Civil Government, which justified it based on the hypothesis of the state of nature. However, he gained tremendous repercussion with Montesquieu's work, The Spirit of the Laws, which transformed it into one of the most famous political doctrines of all time. (FERREIRA FILHO, 2008.)

It is important to understand that the tripartition of powers has the function of preserving individual freedom, combating the concentration of power in a single person or small group.

It is obvious that such Powers are independent in the sense of their organization and functioning, but that they are equally subordinated in a single way to manifest national sovereignty, that is, the collaboration and consensus of various state authorities is necessary in taking decisions and establishing mechanisms for monitoring and reciprocal accountability of state powers (checks and balances). It is necessary to understand that power is one, what is tripartite are the bodies that exercise this power, in this sense, Sahid Maluf understands that:

> This separation of powers cannot be understood in the absolute way that the theorists of North American "pure presidentialism" intended in the early days. Nor does it follow from Montesquieu's doctrine that each of the three classical powers must function with full independence and full autonomy, enclosed in a watertight department. It would be better to talk about separation of functions. The division is formal, not substantial. Power is one; What is divided into distinct bodies is their exercise. (MALUF, 2018)

From this perspective, it is worth stating that the Judiciary's typical function is to judge conflicts, in addition to analyzing whether a law or normative act is adequate to the internal legal system - called constitutionality control (when the parameter is the constitution) - or conventionality control (when the parameter is an international treaty with supralegal normative force, except for human rights treaties with constitutional force).

In Brazil, the body responsible for guarding the Federal Constitution is the STF (Federal Supreme Court), being considered the last constitutional interpreter, as provided in section I, paragraph b, of article 102. After the entry into force of a law or normative act, the Judiciary is responsible for the aforementioned control, which may occur in a concentrated modality, with the STF (Federal Supreme Court) being the only body to analyze the constitutionality of a law or normative act through the abstract, and through diffuse modality, characterized by the action of a single judge or court, via provocation by the party in a common process, with the judge a quo being able to resolve the question of constitutionality, and even reaching the STF (Federal Supreme Court).

In concentrated form, the STF (Federal

Supreme Court) exercises constitutionality control through specific actions (ADI, ADC, ADO and ADPF). They may be filed directly and exclusively before the STF (Federal Supreme Court), by the legitimized entities of article 103. In other words:

> The concentrated control of constitutionality (Austrian or European) defers the attribution for the judgment of constitutional issues to a higher judicial body or a Constitutional Court. Concentrated constitutionality control has a wide variety of organization, with the Constitutional Court itself being composed of life members or members holding mandates, generally for a very long term. (MENDES, 2019)

Such actions have erga omnes and effects, the latter of which may be mitigated at another time, from the decision or at a future date, through a vote of ⅔ of the members of the STF (Federal Supreme Court), as provided for in article 27 of Law 9,868/99.

In the diffuse modality, any judge or court may decide on the question of constitutionality raised in the specific case (or ex officio), as provided in article 93, item XI of the federal constitution, in this tone:

> The diffuse, concrete, or incidental constitutionality control is also fundamentally characterized in Brazilian Law, by the verification of a concrete question of unconstitutionality, that is, of doubt regarding the constitutionality of a normative act to be applied in a case submitted for consideration of the Judiciary. (MENDES, 2019)

However, constitutionality control is not the exclusive competence of the Judiciary, given that there are possibilities for preventive action by other Powers, in an attempt to prevent a law or normative act from entering into force containing an unconstitutionality defect, such as the legal veto given by the Chief of the Executive or even through analysis by the Constitution, Justice and Citizenship Commission (CCJ) of the Chamber of Deputies and the Federal Senate.

From the above, it is understood that the constitutional powers are intertwined in the execution of their typical and atypical functions for the constant fulfillment of the constitutional order, even if the greatest responsibility lies with the Judiciary, as it is up to it to resolve the question in the abstract and in concrete constitutional processes.

Thus, as this research intends to analyze the abstraction of the effects of the decision in constitutionality control, based on a procedural dispute, the next topic will present the doctrinal and STF position on the topic.

THE EFFECTS OF THE DECISION ON THE DIFFUSE CONTROL OF CONSTITUTIONALITY

Diffuse control begins in the common procedure, as both plaintiff and defendant evoke laws or normative acts that support their legal positions, the validity of which depends on following the 1988 Federal Constitution. As a consequence, any judge or court may be faced with a question of constitutionality that must be resolved to conclude the dispute. Gilmar Mendes summarizes that the

> Concrete or incidental constitutionality control, as developed in Brazilian Law, is exercised by any judicial body, in the course of proceedings within its jurisdiction. The decision, "which is not made on the main object of the dispute, but on a preliminary issue, indispensable to the judgment of the merits"404, has the sole effect of removing the incidence of the invalidated rule. Hence the suspension of execution by the Senate of laws or decrees declared unconstitutional by the Federal Supreme Court (federal constitution of 1988, article 52, X). (MENDES,2019)

The allegation of unconstitutionality in the process can be made by the parties, third parties, the Public Prosecutor's Office or

assessed ex officio by the judge, and must be assessed incidentally, that is, as a question prejudicial to the dispute between the parties. The argument of unconstitutionality in the common process is harmful, as only then can the main issue be resolved, in this sense the STF minister rules that;

> the recognition of the unconstitutionality of the law is not the object of the case, it is not the postulated measure. What the party asks for in the process is the recognition of their right, which, however, is affected by the rule whose validity is questioned. To decide on the right under discussion, the judicial body will need to form a judgment regarding the constitutionality or otherwise of the norm. (BARROSO,2019)

In the case of first degree, the resolution of the preliminary question is faced with more discretion by the magistrate, considering that he can act ex officio.

On the other hand, in state courts the resolution of the constitutional issue is seen in a more complex way, as they are governed by the principle of plenary reservation, as provided for in article 97 of the federal constitution. (absolute majority of members or by the special body).

> No fractional body of any court has the power to declare the unconstitutionality of a rule, unless this unconstitutionality has already been previously recognized by the plenary or special body of the court itself or by the plenary of the Federal Supreme Court, in incidental or main control. (BARROSO,2019).

This way, the Court's panels will exercise the power to verify the constitutionality of the law (given that all laws are presumed constitutional), but they do not have the power to declare the law unconstitutional, and must refer such question to the full body or body special, unless the STF has ruled on the topic.

With the decision of the bodies, whether full or special, it binds the fractional body (classes, chambers or sections) that will judge the main issue, maintaining what was decided in terms of constitutionality control. It is worth noting that when appealing to the STF, via Extraordinary Appeal (RE), you must challenge the ruling generated by the class, chamber or section and not the decision of the special or full body. The decision, in the first and second instance. It is imperative to emphasize that only the STF will be able to make material res judicata on the constitutional issue considered.

> In diffuse control, however, only the Federal Supreme Court has the competence to decide on the constitutionality of an act in light of the Federal Constitution as the main issue. Therefore, there is no talk of auctoritas rei iudicata in relation to the constitutional question considered by the other instances. (BARROSO,2019)

When appealing to the STF, the preliminary question, in accordance with article 9th, III, of the Internal Regulations of the STF, will be decided by the classes (first or second); but you may, according to article 11, refer to the plenary, in the following cases:

> I – when considering the argument of unconstitutionality not yet decided by the Plenary to be relevant, and the Rapporteur has not affected the judgment; II – when, despite the issue of unconstitutionality being decided by the Plenary, a Minister proposes its re-examination; III– when a Minister proposes a review of the jurisprudence included in the Summary.

In article 22, referring to the powers of the rapporteur, there are more possibilities to take the issue of unconstitutionality to the STF plenary, they are:

> a) when there are matters on which the Classes differ among themselves or any of them in relation to the Plenary; b) when, due to the relevance of the legal issue or the need to prevent divergence between the Panels, a pronouncement by the Plenary is appropriate.

The STF, when deciding in an Extraordinary Appeal that the law or normative act in question is unconstitutional (by vote of the absolute majority of its members), must submit such decision to the Federal Senate, which may suspend in whole or in part the law declared unconstitutional, by normative force of article 52, X of the federal constitution.

This constitutional provision determines that only the Federal Senate, which is not obliged to accept such a decision, will be able to give effect against everyone and will become erga omnes (for those which are not parties). In this sense, Gilmar Ferreira Mendes disciplines that:

> the suspension of execution by the Federal Senate of the act declared unconstitutional by the Excellency Court was the way defined by the constituent to lend erga omnes effectiveness to definitive decisions on unconstitutionality in extraordinary appeals. (MENDES,2019)

In this aspect, the research problem is concentrated, as article 52, item must be sent to the Federal Senate, so that all or part of the aforementioned law can be suspended, as Franco Oliveira Cocuzza explains:

> When a judge or a court declares the unconstitutionality of a federal or state law in relation to the federal constitution, in a specific case, the Constitution allows the issue to be re-examined by the STF, through the filing of an extraordinary appeal, as per provided for in its article 102, III. If the STF maintains the appealed decision, recognizing that a certain law is, in whole or in part, unconstitutional, the decision will be valid only for the parties involved and will have retroactive effect. In this case, the STF will communicate the result of the appeal to the Federal Senate, so that it can suspend the execution of the law declared unconstitutional, in accordance with the terms and limits of the court decision, and consequently, the law will no longer take effect. (MACHADO, FERRAZ, 2018)

However, the STF in some decisions generated by the judgment of the Direct Actions of Unconstitutionality (ADIs) 3406/RJ of 06/19/2023 (Rapporteur: Minister Rosa Weber) and 3470/RJ of 11/29/2017 (Rapporteur: Minister Rosa Weber), the Supreme Court changed the jurisprudential direction in view of the effects of diffuse control, starting to reinterpret article 52, X of federal constitution, as we will see below.

ABSTRACTIVIZATION THEORY AND RELATIVIZATION OF THE TYPICAL FUNCTION OF LEGISLATIVE POWER

To understand the theory of abstractivization, a small digression is necessary to understand what the effects of the decision are on diffuse control: first degree, second degree and STF = effects only for the litigants and ex tunc (retroactive to the date of the fact). Only upon suspension of the execution, by the Federal Senate, would the Supreme Court's decision have effect erga omnes and ex nunc (for the affected third parties).

However, the STF is beginning to understand that this competence of the Federal Senate is becoming merely publicity, that is, the decision would have an erga omnes effect regardless of the suspension of the Legislative House. An important point raised by indoctrinator Pedro Lenza is that:

> The erga omnes effect of the decision was only foreseen for concentrated control and for the binding summary (EC n. 45/2004), in accordance with arts. 102, § 2.º, federal constitution /88 and 103-A, and, in the case of diffuse control, under the terms of the rule of article 52, X, of federal constitution /88, only after discretionary and political action by the Federal Senate. In diffuse control, therefore, if there is no suspension of the law by the Federal Senate, the law remains valid and effective, only becoming

> null and void in the specific case, due to its non-application. (LENZA, 2O22)

This attempt to weaken the Legislative Power was addressed in 2014 through Complaint, 4335/AC, reported by Minister Gilmar Ferreira Mendes. The main question of the complaint was whether judges and courts would be obliged to adopt the decision given in HC 82.959/SP, assuming that the ruling would have an erga omnes effect. The votes in favor of the theory of abstractivization came from the rapporteur, Gilmar Mendes, and Eros Grau, who understand that there is a mutation in article 52, X, thus the Senate would merely publicize the act. On the other hand, the remaining eight ministers understood that such a constitutional change was not possible. However, it is stated that since this complaint, STF decisions regarding diffuse control have no longer been sent to the Senate.

This theory gained relevance again with the advent of the 2015 Civil Procedure Code, which sought to bring diffuse control closer to concentrated control, through arts. 525,

§12, and 535, §5.º

As a result, the STF was provoked into judging ADIs 3,406 and 3,470, which dealt with asbestos. In the judgment, the Court recognized that the STF's decision of unconstitutionality, even if incidentally, has erga omnes effects. The agreement issued does not directly confront diffuse control, but rather its characteristics. It is known that diffuse control is exercised by any judge or court in the country in a litigious process, therefore the issue of constitutionality is detrimental to the resolution of the conflict, determining unconstitutionality incidental to the case.

In the cases of ADIs 3,406 and 3,470, their object was the state laws of Rio de Janeiro that prohibited the extraction of asbestos/asbestos, but the federal law on the subject was judged unconstitutional incidentally, as it was not the object of the ADIs, but the STF gave an erga omnes and binding effect on the preliminary question.

The STF understood that there had been a typical case of constitutional mutation in article 52, Even though the decision is not under diffuse control, it is indisputable that the decree of unconstitutionality incidentally is typically an instrument of diffuse control.

Due to this fact, we can understand that there was a favorable understanding of the abstraction of the effects and mutation of the article 52, X, given that the function of the Senate was reinterpreted, no longer suspending the law to a mere publisher of understanding. This understanding is in line with the thinking of scholar Pedro Lenza, as he understands that "the STF admitted the constitutional mutation of article 52, X, prescribing, then, that the role of the Federal Senate is only to publicize the decision. The erga omnes and binding effect would arise from the judicial decision itself"

This understanding goes against the historical importance of the Federal Senate which, since the 1934 Constitution, has participated in this process.

In this context, Luís Roberto Barroso states:

> The historical – and technical – reason for the Senate's intervention is simply identifiable. In North American law, from where the model of incidental and diffuse control was transplanted, court decisions are binding on other judicial bodies subject to their revisional jurisdiction. This is valid, including, and especially, for the Supreme Court's judgments. This way, the judgment of unconstitutionality formulated by it, although relating to a specific case, produces general effects. Not so, however, in the Brazilian case, where the current Romano-Germanic tradition does not attribute binding effectiveness to judicial decisions, not even those of the Supreme Court. Thus, the reason for granting the Federal Senate the power to suspend the execution of the

> unconstitutional law was to attribute general effectiveness, in the face of everyone, erga omnes, to the decision handed down in the specific case, the effects of which radiate, ordinarily, only in relation to the parts of the process. (BARROSO,2019)

In addition to the notorious importance and historical custom of the Senate, it is possible to analyze a reduction in the competence of the Legislative House, with this the STF unbalances the constitutional powers, mitigating the role of the Senate in the role of suspending the law judged unconstitutional in the procedural dispute. Therefore, the STF takes away a constitutional prerogative from another Power, interfering in the tripartition of powers by violating the independence and harmony of powers, as argued by Minister Marco Aurélio, in his speech in the plenary of the aforementioned ADIs, in several passages he shows his repudiation to the judge:

> Strange times, where will we end up? We are 11 Presidents; part of the Supreme Court and we really have the last word on positive law. But we have the last word on positive law considered the great system revealed by the Charter of the Republic. And then, I cannot ignore what is contained in that same Charter of the Republic; I cannot ignore the fact that 81 are Senators and 513 are Deputies, elected representatives of the Brazilian people" (...). I refuse, President, to say that the Senate of the Republic is a true official diary; which simply must publish the decisions of the Supreme Court formalized in the concrete control of unconstitutionality, formalized within the scope of the diffuse control of unconstitutionality (...). "Article 52, X, addresses independence and harmony between powers; which signals that the national system is a balanced system, by predicting, and by predicting in good vernacular, that it is up to the Senate not simply to publish the decision, but to suspend the execution.

However, the aforementioned minister was defeated practically unanimously (7 to 2), with the main arguments being: "normative force of the Constitution; principle of the supremacy of the Constitution and its uniform application to all recipients; the STF as guardian of the Constitution and its highest interpreter; political dimension of the STF's decisions.

This topic in doctrine is quite troubled, given the most diverse opinions on the Senate's role in diffuse control. Luís Roberto Barroso argues that:

> A decision by the Full Federal Supreme Court, whether in incidental control or in direct action, must have the same scope and produce the same effects. Respecting the historical reason for the constitutional provision, when it was instituted in 1934, there is no longer any reasonable logic in its maintenance. (BARROSO,2019)

The position adopted by the minister is quite lucid and based on important constitutional provisions, mainly related to procedural economy, process effectiveness, procedural speed (article 5, LXXVIII). However, it lacks a constitutional provision for its implementation. To adopt the abstraction of diffuse control it is necessary to have constitutional reform, especially regarding article 52, item X and article 97 of the federal constitution.

Understanding that such reform must be carried out by the Legislative Branch, we can state that the attempt to change the constitutional means present in the ADIs violates the principles of harmony of powers, since the Judiciary, by its own decision, decides to increase its functions to the detriment of reduction of powers of the Legislative Branch. Furthermore, it separates the typical functions of the Legislature, as it creates norms and rules of the constitutional process that, in order to come into force, must go through an extensive legislative process.

The arguments that the STF has been adopting to support the abstraction of the

concrete control of constitutionality are supported by judicial activism, generating precedents based on the reception of mistaken theories. In this, it constitutes a serious claim that the Supreme Court constantly rewrites the constitutional text in the way it considers most appropriate.

FINAL CONSIDERATIONS

The research in question aimed to contribute to the debate on the tripartition of powers and the effects of the decision on the diffuse control of constitutionality, based on a study of doctrinal, jurisprudential and constitutional provisions.

It was found that the STF has understood that there may be a constitutional mutation of article52, for part of the doctrine, this STF decision directly affects diffuse control, even if it occurs in the context of an abstract control of constitutionality, since the unconstitutionality in diffuse control is incidental.

The tripartition of Powers is an essential concept for modern democracies, considering that its mechanism of checks and balances are of utmost importance for the proper functioning of the State, so that each state body does not combine the powers of the others. In order for there not to be a Power that is more sovereign than the others, it is necessary to respect the typical and atypical functions of each democratic institution.

By determining that the Federal Senate is merely responsible for publishing the STF's decision, the Court interferes in the tripartite division of Powers, given that the competence established in article 52, X of the federal constitution is to preserve the independence and harmony of the Powers. Furthermore, by changing the understanding of a constitutional procedure, the STF would be entering into the typical legislating function of the Legislative Branch, since for there to be a constitutional reform of norms and rules it is necessary to issue a law that must go through the entire rite legislative and not by decision of the Supreme Court, which must preserve the Constitution and not change it through its free will.

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