

THE "ERGA OMNES" EFFECT IN DIFFUSE CONTROL OF CONSTITUTIONALITY

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In summary, this article addresses the new perspective on the effects of the decision in terms of diffuse control of constitutionality. In view of the new position of the Federal Supreme Court, decisions in diffuse or incidental control of constitutionality now have erga omnes effectiveness, as occurs in concentrated control, thus removing the need for the Federal Senate to issue a resolution, in accordance with the provisions of article 52, item X of the Federal Constitution.

Key words: Constitutionality Control. Diffuse Control. Erga Omnes.

ABSTRACT

In summary, this article approaches the new perspective on the effects of decision on diffuse control of constitutionality. In view of the new position of the Supreme Court, decisions in the diffuse or incidental control of constitutionality began to have erga omnes effectiveness, as occurs in concentrated control, thus ruling out the need for resolution editing by the Federal Senate, in accordance with the provisions of Article 52, item X of the Federal Constitution.

Keywords: Constitutionality Control. Diffuse Control. Erga Omnes.

1. INTRODUCTION

The analysis of the constitutionality of laws and normative acts, among other forms, takes place through subsequent (or repressive) control carried out by the Judiciary. In this context, we can mention concentrated or abstract control and diffuse or incidental control. As for the concentrated model, it is based on doctrine and jurisprudence that its decisions will be erga omnes and binding. However, when it comes to diffuse control, there was a recent change of understanding by the Federal Supreme Court: it began to accept that decisions in this model also have erga omnes and binding effectiveness, that is, mandatory compliance and applicability of the same understanding in all similar cases. Regarding the methodology used in this article, doctrinal works were analyzed that dealt in detail with the constitutionality control system, as well as the study of

articles of the Federal Constitution that deal with the topic, in addition to examining the jurisprudence handed down by the Federal Supreme Court.

2 JUDICIAL CONTROL OF CONSTITUTIONALITY

In the application of constitutional law in Brazil, we know that in the vast majority of cases there is the exercise of repressive (subsequent) legal or judicial constitutionality control. In other words, it is up to the Judiciary to control the law or normative act, comparing their compatibility with the Federal Constitution, and thus, being incompatible, they are removed from the legal system.

In this context, we can mention two systems or models of repressive constitutionality control carried out by the Judiciary. The first of these is concentrated control, also called via direct action, and the second is diffuse control, via exception or defense.

According to the teachings of author and professor Pedro Lenza, the concentrated control of the constitutionality of a law or normative act receives this name due to the fact that it is “concentrated” in a single court, with the questioning of constitutionality being the main issue of the legal action. (2018, p. 331). Diffuse control is that carried out by any court or tribunal of the Judiciary, with the declaration of unconstitutionality being made incidentally, when, in the specific case, it is positioned as detrimental to the examination of the merits of the action, that is, the allegation of unconstitutionality is the procedural cause of action. (2018, p. 293).

2.1 THE EFFECTS OF THE DECISION ON DIFFUSE CONTROL

According to the rule expressed in article 97 of the 1988 Federal Constitution, the declaration of unconstitutionality is only made through the vote of the absolute majority of the members of the court or its special body, and this quorum must be respected even in the case of departure from the application of the rule in the specific case, even if there is no express declaration of unconstitutionality, in accordance with the provisions of binding summary no. 10:

Art. 97. Only by the vote of the absolute majority of its members or the members of the respective special body may the courts declare the unconstitutionality of a law or normative act of the Public Power. (BRAZIL, 1988).

Binding Summary no. 10: The decision of a fractional court body that, although it does not expressly declare the unconstitutionality of a law or normative act of the Public Power, rules out its impact in whole or in part, violates the plenary reservation clause (CF, art. 97).

With regard to concentrated control, the prevailing understanding is that the decision has a binding and erga omnes effect, that is, it applies to all cases decided by the Judiciary and to the activities of the Public Administration.

However, when it comes to diffuse control, traditionally, it has always been understood that the decision that incidentally declares a law or normative act unconstitutional produces “interpartes” and non-binding effects. In other words, the decision would only apply to the specific case, with no erga omnes effect. Thus, after declaring the unconstitutionality of a law under diffuse control, the Federal Supreme Court should communicate this decision to the Federal Senate and the latter could suspend the execution, in whole or in part, of the defective law:

Art. 52. The Federal Senate is exclusively responsible for: [...]
X - Suspend the execution, in whole or in part, of a law declared unconstitutional by definitive decision of the Federal Supreme Court; (BRAZIL, 1988).

As explained by author Pedro Lenza, it was understood that the Senate's decision to suspend the execution of the law would be discretionary. If he decided to do this, the effects of the STF's unconstitutionality decision, which were interpartes, would become erga omnes. Thus, according to traditional theory, the Senate's resolution would increase the effectiveness of the diffuse control carried out by the Supreme Court. (2018, p. 305).

It turns out that the STF decided to abandon its traditional understanding and made a new interpretation of art. 52, X, of the Constitution. By 7 votes to 2, the Supreme Court decided to give binding effect and erga omnes to the decision given on the preliminary question, according to information no. 886:

If a law or normative act is declared unconstitutional by the STF, incidentally, that is, in the context of diffuse control, this decision, as happens in abstract control, also produces erga omnes effectiveness and binding effects. The STF began to accept the theory of abstracting diffuse control. Thus, if the STF Plenary decides the constitutionality or unconstitutionality of a law or normative act, even if under diffuse control, this decision will have the same effects as concentrated control, that is, erga omnes and binding effectiveness. There was a constitutional change in art. 52, X, of CF/88. The new interpretation must be the following: when the STF declares a law unconstitutional, even in the context of diffuse control, the decision already has a binding and erga omnes effect and the STF only communicates it to the Senate with the aim of having the aforementioned Legislative House publicize it. of what was decided. (STF. Plenary. ADI 3406/RJ and ADI 3470/RJ, Rel. Min. Rosa Weber, judged on 11/29/2017 (Info 886)).

In the information above, Pedro Lenza explains that, in the case in question, the declaration of unconstitutionality occurred incidentally in a process of concentrated and abstract control, which had as its main object a state law in the state of Rio de Janeiro. However, to assess the request made in the action, the court had to analyze the constitutionality of a federal law, which, however, was not the subject of the action. In other words, the declaration of unconstitutionality occurred incidentally as a prejudicial issue, just as occurs in the diffuse control of constitutionality. (2018, p. 318).

The doctrine points out that the STF started to adopt the theory of abstracting diffuse control. According to the aforementioned theory, if the STF Plenary decides on the constitutionality or unconstitutionality of a law or normative act, even if under diffuse control, this decision will have the same effects as concentrated control, that is, erga omnes and binding effectiveness.

In summary, according to information no. 886 cited above, the Supreme Court decided that, even in the case of an incidental declaration of unconstitutionality of a law, this decision will also have a binding and erga omnes effect.

FINAL CONSIDERATIONS

As explained throughout this article, the control of constitutionality, exercised by the Judiciary, provided for in our legal system, admits a concentrated (direct) or diffuse (incidental) form, given that, according to a recent decision given by the Federal Supreme Court, in both cases the effect of the decision will be binding and erga omnes, regardless of the Resolution issued by the Federal Senate.

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