

Constitutionality control of pre-constitutional norms

The Supreme Federal Court (STF) has the power to decide on the constitutionality of the laws that had been enacted before the Constitution of 1988. Brazil adopts a mixed model of constitutionality control. There is no doubt about the possibility of constitutionality control of pre-constitutional norms through diffuse control.

As for the concentrated model, initially, the STF found admissible to adjudicate on issues of collision between the pre-constitutional norm and the Constitution which was in force at the time of the court proceedings. In this case, the Court recognized the existence of the incompatibility between the pre-constitutional law and the new Constitution, but the action was considered unfounded. (Rp. 946, Rel Xavier de Albuquerque, RTJ, 82 (1) / 44; Rp. 969, Rel Antônio Nader, RTJ, 99 (2) / 544).

This position was abandoned by the STF, which came to understand that the concentrated control of norms is basically directed at examining the constitutionality of post-constitutional norms (Rp. 946, Rel. Xavier de Albuquerque, RTJ, 82 (1) /44; Rp. 969, Rel. Antonio Nader, RTJ, 99 (2) /544). The collision between the pre-constitutional law and the new Constitution would have to be decided according to principles of intertemporal law, that is, it referred to mere revocation of a previous law by a subsequent one (the Rp. 1.012, Rel. Moreira Alves, RTJ, 95 (3) /990).

At the judgment of the Direct Action of Unconstitutionality (ADI) N. 2, rapporteur Justice Paulo Brossard, (D.J.U 21.11.1997), the Court reaffirmed this thesis. The STF dismissed a request for abstract control of constitutionality of a pre-constitutional law based on the Constitution which was in force at the time of the court proceedings.

For some time, therefore, the constitutionality control of pre-constitutional laws was only possible through diffuse control of norms. The advent of the Federal Law N. 9882/99, which regulates the claim of non-compliance with fundamental precept (ADPF – Arguição de Descumprimento de Preceito Fundamental), modified the trend towards the concentrated control of norms. This law expressly established the possibility of examining the compatibility of the pre-constitutional law with norms of

the current Constitution of the Republic. Article 1, sole paragraph, of the Law N. 9882/99 prescribes:

Art. 1. The claim prescribed in § 1 of art. 102 of the Federal Constitution will be filed before the Supreme Federal Court, and will aim to prevent or repair damage to a fundamental precept resulting from an act of the Public Power.

Sole Paragraph. The claim of non-compliance with fundamental precept will also be admissible:

I - when the grounds of the constitutional issue over federal, state or municipal law or normative act, including the ones prior to the Constitution, are relevant;

Thus, ADPF is admissible every time there is a relevant controversy on the legitimacy of federal, state or municipal law prior to the Constitution based on a fundamental precept of the Constitution. In this sense, the Supreme Federal Court decided on ADPF N. 33, rapporteur Justice Gilmar Mendes, D.J.U. of 27.10.2006, as follows:

Abstract: [...] 6. Admissibility of claim of non-compliance with fundamental precept to solve controversy on the legitimacy of federal, state or municipal law or normative act, included the ones prior to the Constitution (pre-constitutional law).[...] 9. ADPF is a modality of integration between the models of diffuse and concentrated judicial review before the Supreme Federal Court. 10. Revocation of the law or legislative act does not prevent adjudication on the issue brought by ADPF because the plaintiff claims a declaration of illegitimacy or non-reception of that norm by the supervenient constitutional order. **11. Potential question on the unconstitutionality of the challenged law based on the previous Constitution, under whose effects the law was enacted, does not constitute an obstacle to the admissibility of the claim of non-compliance with fundamental precept, since this action seeks the examination of the compatibility, or not, of the pre-constitutional norm with the supervenient constitutional order.** [...] 15. Claim of non-compliance with fundamental precept is founded to declare the illegitimacy (non-reception) of the Rules of Staff of the extinguished IDESP based on the federative principle and on the prohibition of tying wages to multiples of the minimum wage (Article 60, § 4, I, combined with art. 7, section IV, in fine, of the Federal Constitution).

In this judgment, it was also discussed the possibility of examining the constitutionality of a pre-constitutional norm in light of the Constitution in force at the time the norm was enacted. As already stated, this can be done in the diffuse control of constitutionality. However, at the concentrated control of norms, the Supreme Federal Court states that the parameter of control to be used is always the current Constitution. In this sense, Justice Gilmar Mendes noted, when debating with Justice Sepúlveda Pertence:

[...]

Justice SEPÚLVEDA PERTENCE (PRESIDENT): Yes, I only think that the problem of control of constitutionality of pre-constitutional law is not presented here, because, rigorously, they are decrees already unconstitutional in light of the past Charter of 1969.

Justice GILMAR MENDES (RAPPORTEUR) - Yes, but we could not make it in light of the same instrument, that is to say, we would have the same deficiencies and the same needs. If, in the future, there is claim of potential non-application, it will only be possible in the diffuse system.

Justice SEPÚLVEDA PERTENCE (PRESIDENT) - So, your Honor declares the illegitimacy starting from the 1988 Constitution.

Justice GILMAR MENDES (RAPPORTEUR) – Only that. If this question will potentially be raised, [...] (ADPF N. 33, rapporteur Gilmar Mendes, D.J.U. of 27.10.2006).

Thus, on the concentrate control of constitutionality, pre-constitutional laws may have their constitutionality challenged in light of the current Constitution through ADPF only. Through the Direct Action of Constitutionality, only the analysis of post-constitutional laws is allowed.

The Court however has been giving signals of change in this jurisprudence. In the judgment of ADI-MC N. 3.833, rapporteur Justice Carlos Britto, D.J.U. of 14.11.2008, it was under analysis a normative act which is after-constitutional in relation to the Constitution of 1988 and pre-constitutional in relation to the alteration made by Constitutional Amendment N. 41/2003. In this case, the Court reaffirmed the non-admissibility of concentrated control of constitutionality of norms enacted when the primitive writing of the 1988 Constitution was in force (that is, the original text, without the Constitutional Amendments). Several Justices, however, indicated a positioning change by raising the possibility of challenging the effectiveness of the pre-

constitutional norm in light of the current Constitution (in this case, the constitutional text of 1988 with the modifications made by Constitutional Amendment 41/2003).

The Supreme Federal Court reaffirmed the understanding that, through Direct Action of Constitutionality, the Court can not examine the constitutionality of pre-constitutional law in the light of the Constitution in force at the date of the judgment, but innovated by declaring the loss of efficacy of the norm in light of the current Constitution. This new approach therefore points out to the possibility of withdrawal the normative force of the pre-constitutional norm at issue through ADI, because it became incompatible with the new writing of the Constitution after Constitutional Amendment 41/03.

Thus, until the present moment of jurisprudential evolution, the ADPF is the only way of constitutionality control of pre-constitutional laws in light of the current Constitution (of 1988). It should be noted, however, that the judgment of ADI-MC N. 3.833 directs to a change in jurisprudence.