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Artigos Originais

OPENING OF THE CASE OF ACTION AND PRECLUSIVE EFFECTIVENESS OF THE JUDGED THING

ABERTURA DA CAUSA DE PEDIR E EFICÁCIA PRECLUSIVA DA COISA JULGADA

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Abstract

The objective of this paper is to show whether or not the Federal Supreme Court of Brazil can extend the cause of action in direct (or indirect) actions of constitutionality. How this extension can be made and whether the res judicata should be observed, given that such extension was used in a previous case, attacking the same infra-constitutional law. To do so, with simplicity, but not leaving the depth aside, we will use the issue with a focus on national jurisprudence, comparative law and various doctrines. Finally, we will address objective and subjective actions and how the "erga omnes" effect occurs in these types of actions; whether only the parts of that particular process suffer the effects of the decision rendered there, or if the whole society will benefit from what was decided in that action and in what way.

Keywords: Res Judicata; Right of Action; Preclusion; Effectiveness; Pleading;

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Resumo
O objetivo do presente trabalho é mostrar se o Supremo Tribunal Federal do Brasil pode ou não ampliar a causa de pedir em ações diretas (ou indiretas) de constitucionalidade. Como essa ampliação pode ser feita e se a coisa julgada deve ser observada, tendo em vista que tal ampliação foi utilizada, em caso anterior, atacando a mesma Lei infraconstitucional. Para tanto, com simplicidade, mas não deixando a profundidade de lado, utilizaremos o tema com enfoque na jurisprudência pátria, direito comparado e diversas doutrinas. Por fim, abordaremos ações objetivas e subjetivas e como ocorre o efeito "erga omnes" nestes tipos de ações; se apenas as partes daquele determinado processo sofrem os efeitos da decisão lá prolatada, ou se toda a sociedade irá se beneficiar daquilo que naquela ação ficou decidido e de que forma.

Palavras-chave: Coisa Julgada; Causa de Pedir; Preclusão; Eficácia; Pedido;

Summary: Introduction. 2 Cause of action. 3 The judged thing.4 Subjective demands. 5 Objective demands. Conclusion. References.

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INTRODUCTION

The present work will be limited to dealing with subjective and objective actions without distinguishing the actions themselves that are capable of declaring the constitutionality or unconstitutionality of an infra-constitutional law in Brazil; such as, for example, ADIN (Direct Action of Unconstitutionality), ADC (Declaratory Action of Constitutionality), ADPF (Pleading of Non-compliance with Fundamental Precept), etc. – the present work will focus only on article 102, I, letter *a* of the Federal Constitution of Brazil, to study what we will see below.

We cede the understanding that there is more than one way to achieve the objective pursued in the sense of seeing a Law declared constitutional or unconstitutional before the Federal Supreme Court (STF), or even before the State Courts of Justice (when it comes to seeking the unconstitutionality of a State or Municipal Law that borders the Constitution of a given State) – the declaratory actions of unconstitutionality of the State will not be studied in this paper.

It is not the purpose of the present work to deal with the perspective of whether the chosen route to be declared unconstitutional (nor of the types of unconstitutionality and the requirements for such) or constitutionality of an infra-constitutional Law (not of normative act) is main or lateral/incidental, concentrated or diffuse, abstract or strict[3], subjective or objective, individual or collective, route

[3] DINAMARCO, Cândido Rangel, *Instituições de Direito Processual Civil*, I v, 6ª ed, São Paulo, Malheiros, 2009, p, 195/196. "The direct influence of the process on the life of the Constitution is given whenever the constitutional rule itself is examined and concretely implemented through the activity of the judge. This happens in the judgment of cases that include discussion on the compatibility or incompatibility between a rule of infra-constitutional law and another located at the constitutional level (diffuse control of constitutionality); or even when before the

of exception or indirect route, etc[4].. It is worth saying that these classifications do not have the necessary correspondence in other systems[5].

Nor will the present study be the object of cases in which the attacked norm has a logical correlation of dependence with another norm or norm that is extremely similar (or article or clause) and, therefore, this similar or dependent norm would also have, or not, its unconstitutionality declared by drag or attraction.

Since this is a very wide-ranging issue, the present study seeks to diagnose, with simplicity, whether at the moment the analysis of the unconstitutionality[6] of an

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Federal Supreme Court is proposed a direct action of unconstitutionality (concentrated control of constitutionality – Article 102, inc. I, letter a). in both cases, the recognition of incompatibility means moving away from the effectiveness of the infra-constitutional rule, to preserve the principle of supremacy of the Constitution.".

[4] MEDINA, Paulo Roberto de Gouvêa, *Direito Processual Constitucional*, 1, ed, Rio de Janeiro, Forense, 2003, p, 57. "The current Brazilian Constitution adopts a complex system for the control of constitutionality. Alongside the mechanisms peculiar to the diffuse system, it institutes direct action as an instrument of concentrated control at the federal level, authorizing its adoption also, as a restricted object, at the state level. It also establishes a declaratory action for constitutionality. It also provides for a special form of control by May of the claim of noncompliance with a fundamental precept. At the same time, the Constitution maintains another type of control that is a tertium genus in the matter, distinct from the diffuse system and different characteristics of concentrated control: it is the system that can be called instrumental, as it serves as an instrument for the eventual intervention of the Union in the States or of these in the respective Municipalities.".

[5] PALU, Oswaldo Luiz, *Controle de Constitucionalidade*, 2 ed, São Paulo, Revista dos Tribunais, 2001, p. 91. "In Europe, the U.S. system of judicial review (or judicial review os legislation) did not have repercussions, since in several countries it was difficult to hand over the control of the constitutionality of laws to ordinary judges, for various reasons. That was when Kelsen, in the Austrian Constitution of 1920 (amended in 1929), created what can be called the European model of control of the constitutionality of laws. It rejects the Austrian legal system (and later, with its own variants, almost all developed European countries) of the systems of judicial review and the principle of stare decisis. The Austrian author does not think of a diffuse system, but of a concentrated, non-judicial, but legislative (negative) and, to a certain extent, abstract nature. Being a legislative activity, there are no theoretical difficulties in having the decision of unconstitutionality with "force of law" and evidently *erga omnes*. The decision would be constitutive and not declaratory as in the US system; that is to say, the effects would be *ez nunc* and not *ex tunc*, something like the repeal of the law.".

[6] PALU, Oswaldo Luiz, *Op. cit*., p, 65. "The control of the constitutionality of normative acts is defined as the act of submitting to the verification of compatibility rules of a given legal system, including those arising from the derived Constituent Power, with the commands of the constitutional parameter in force,

infra-constitutional Law made by the Federal Supreme Court, which has expanded the cause of action made ex officio by the highest body and guardian of the Federal Constitution, for analysis of that request for a declaration of unconstitutionality, it will be considered immutable and unassailable, after the final and unappealable decision, considering that that particular Law was declared constitutional or unconstitutional.

In other words, the Federal Supreme Court declares that a Law is constitutional (or unconstitutional), taking into consideration that, for example, a lawsuit was filed requesting a declaration of unconstitutionality in accordance with article "x" and "y" of the Brazilian Constitution. In analyzing this request, the STF broadens the cause of action, to declare that not only is the law constitutional in view of the articles observed, but it is also constitutional in view of articles "w" and "z" of the Brazilian Constitution.

Is the Federal Supreme Court, in taking this attitude and extending the right of action for it, in some way, overstating its function? Moreover, is such decision, which has become res judicata, covered by the cloak of the preclusive immutability of the res judicata? Or will it be possible, in the future, to file another lawsuit pleading a declaration of unconstitutionality of that same infra-constitutional law, taking into account other articles of the Federal Constitution not observed in that particular judgment, even though the cause of action has been extended? Or due to the fact that the Federal Supreme Court has extended the right of action, would a new action requesting a declaration of unconstitutionality of that same Law violate the res judicata? Could the Federal Supreme Court, in due course, have extended the cause of action on its own initiative?

The questions above that will be analyzed in the present study, are intended to understand whether the Federal Supreme Court is acting in accordance with constitutional principles and with the guiding principles of civil procedure, in cases in which it extends the cause of ex-officio action in lawsuit that seek to declare the unconstitutionality of an infra-constitutional law.

The Brazilian procedural system and the Federal Constitution are rigid[7], and cases of revisiting issues that have already been res judicata[8] are rare and delicate,

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formally and materially (form, procedure and content) those that are incompatible with it.".

[7] DELLORE, Luiz, *Estudos sobre a Coisa Julgada e Controle de Constitucionalidade*, 1, ed, Rio de Janeiro, Forense, 2013, p, 223. "Thus, historically, there is only constitutionality control if we are faced with a rigid Constitution. Therefore, the theme of the control of constitutionality of laws gains prominence from the moment that there are rigid Constitutions, that is, at the end of the eighteenth century.".

[8] LIEBMAN, Enrico Tullio, *Manual de Direito Processual Civil*, v, 3. Tocantins: Intelectos, 2003, p. 169. "With the purpose of ending the disputes and giving certainty to the rights, the legislator has set a moment when a new pronouncement on what has been judged is prohibited. At this point, not only is the judgment no longer open to challenge by ordinary means (cf. 298 ff.), but the decision is binding on the parties and on the legal system and no judge can again

both from the point of view of legal security and from the point of view of the search for the nomophilacic function that is so much discussed today.

The new Code of Civil Procedure[9] has ceased to be, to a certain extent, as exclusive as the Brazilian Code of Civil Procedure of 1973[10], but this does not mean that after a final and unappealable decision is rendered, our system easily grants the re-analysis of that case or matter.

The Federal Supreme Court, when expanding the cause of action, observing other articles of the Federal Constitution, in a pleading for a declaration of unconstitutionality of an infra-constitutional law not contained in that first petition, can say that in doing so, it extended such analysis to ALL articles in the Magna Carta and, therefore, future request for a declaration of unconstitutionality of that particular law, would face one of the classic constitutional principles, that is, the res judicata.

On the other hand, if the broadening of the right of action observed other articles and did not properly observe the Brazilian Federal Constitution in its entirety, another action attacking the unconstitutionality of an infra-constitutional Law already declared constitutional in a previous action, but observing other articles of the Brazilian Federal Constitution, would not confront the res judicata, given that the request would be the same, but not the cause of action and, consequently, another action would not be identical and, therefore, would undoubtedly continue.

Finally, we will analyze requests for declarations of unconstitutionality of infra-constitutional rules in objective and subjective actions; with this, we will draw a small panorama about the res judicata "erga omnes" in the case of objective actions (concentrated control of constitutionality) and the res judicata inter parts in the case of subjective actions (diffuse control of constitutionality), and if there is the possibility of having two different judgments (not only in different cases, but with different decisions), based on the same right of action in two different actions, but being one objective and another subjective.

With great clarity and sobriety, the present work will try to elucidate the theme that is extremely arduous and complex; therefore, we will support ourselves both in jurisprudence and doctrine, in an exhaustive way in the search for answers and solutions proposed by the disturbing questions above.

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judge the same object in relation to the same parties (except for the distant possibility of filing extraordinary challenges). All that is expressed by saying that the sentence has become res judicata, that is, that it has become immutable and at the same time immutable has also become the determination contained therein, with all the effects that derive from it.".

9 BRASIL, *Código de Processo Civil*, Lei 13.105, de 16 de março de 2015, Disponível em: <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm#art1046>, Acesso em 02 jun. 2019.

10 BRASIL, *Código de Processo Civil*. Lei 5.869, de 11 de janeiro de 1973, Institui o Código de Processo Civil. Disponível em: <http://www.planalto.gov.br/ccivil_03/leis/L5869.htm>, Acesso em 02 jun. 2019.

1 CAUSE OF ACTION

Every demand requires a cause of action[11]. Without it, one of the most important procedural requirements for filing a claim will not be met and the initial claim will contain a defect.

The right of action (near or remote) in action aimed at declaring an infra-constitutional law unconstitutional is precisely the direct or indirect affront that a given law makes to the Federal Constitution, i.e., the basis on which that particular action is brought is one or more articles of the Magna Carta, which have been challenged by a given enacted infra-constitutional law.

> *"According to careful doctrine, 'causa petendi', is the fact or set of facts likely to produce, by itself, the legal effect intended by the author"*[12].

The Federal Constitution is the highest law of our legal system and all other laws enacted in our country can in no way go against what the Federal Constitution says[13].

In view of this, there may be countless causes for a lawsuit to be declared unconstitutional, i.e., the pleading will always be the same: to see a particular law declared unconstitutional because it has violated the Federal Constitution. But the cause of action may vary according to interpretation, since a certain Law may not confront some articles carved in the Major Law, but it may confront others.

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11 CARVALHO, Milton Paulo de, *Do Pedido no Processo Civil*, 1 ed, Porto Alegre, FIEO, 1992, p, 79. "It has traditionally been indicated as elements that give identity to actions (and demands) the subjects, the request and the cause to request. When it comes to analyzing these elements in order to identify a particular demand, it overcomes the cause of asking as a tuning fork and greater sensitivity than the other two elements. For this reason, and because the study of the cause of action is based on difficulties, ranging from its very admission as an identifying element, to the determination of its content, the authors observe that this is one of the most intricate points of Civil Procedural Law.".

12 NEGRÃO, Theotonio, GOUVÊA, José Roberto F., *Código de Processo Civil*, 41ª ed, São Paulo, Saraiva, 2009, p, 438.

13 DINAMARCO, Cândido Rangel. *Op. cit*., p. 195. "The indirect action of the process on the Constitution is continuously carried out in the courts and tribunals, in the day-to-day of its constant operation. Since the Constitution is the nuance that goes back to the entire legal order of the country (*tête de chapitre*), and the material infra-constitutional law is a set of developments of the way it defines the social, political and economic order, giving action to the infra-constitutional precepts means imposing the effectiveness of the constitutional rules themselves. The effectiveness of the national legal system as a whole, which is one of the political scopes of the process, is basically the effectiveness of the Constitution itself.".

This time, a lawsuit can be decided by understanding that a certain law is constitutional or that it may not have been declared unconstitutional, which for the present work, as can already be seen, is the same thing[14] (this issue will not be analyzed in detail, since it is not the purpose of the present work), but later, for different cause of action, but with the same request, may give rise to a new action, seeking the declaration of that same law as being unconstitutional, but this time, having as right of action, another article that borders the Federal Constitution other than the one analyzed in the first action, but this time, having as a cause of action[15], another article that borders the Federal Constitution that is not the one analyzed in the first action.

Currently, the Federal Supreme Court has relied on the so-called "open cause of action" institute in order to, in light of other articles of the constitution, expand the basis of the ex-officio demand and, therefore, use other constitutional articles to assess whether an infra-constitutional law whose declaration of unconstitutionality is being sought is effectively unconstitutional.

It seems to us that such a manoeuvre is completely possible[16], mainly because it does not leave certain procedural and constitutional principles aside, as is the case

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[14] PALU, Oswaldo Luiz *Op. cit*, p, 182. "In the edition of this work I added: "The binding effect provided for in article 102, paragraph 2, of the Brazilian Constitution should also apply to the case of direct action of unconstitutionality. There is no substantial or anthological difference between a direct action for unconstitutionality and a direct action for constitutionality: the ADIn (direct action for unconstitutionality) is proposed, if it is unfounded and with the procedural quorum, the law will be declared constitutional; the ADC (declaratory action for constitutionality), if it is unfounded and with the procedural quorum, the constitutionality will be declared. Effectiveness erga omnes was already understood to be present in the direct action for unconstitutionality. Otherwise, article 102 of the Constitution of the Republic, which states that the STF is the primary guardian of the Constitution, is of little practical use. (...)".".

[15] CARVALHO, Milton Paulo de, *Op. cit*, p, 79/80. "Being the cause of requesting element distinct from the request, as its basis, or *origo petitionis*, as Lopes da Costa said, is not confused with him. While it is intimate the relationship between these elements, and the cause of claim may arise as the one that identifies the claim in the case of identical claims, if there is difference what changes is the basis and not the claim. As in one of the cases provided for in art. 264 of the Brazilian CPC, if the author has another basis, in addition to that already exposed, for the request formulated in the initial petition, through another demand may formulate the same request, not considering identical claims. Or, still, in the example formulated by Liebman and collected by Vicente Greco Filho: if the author claimed fraud as a vice of consent and in the course of the cause there are references to different circumstances, which, however, compete as integral elements of the figure of fraud, there is no change in the demand. There will be, if the allegation was of coercion, or essential error.".

[16] MIRANDA, Francisco Cavalcante Pontes de, *Comentários ao Código de Processo Civil*, Tomo IV, Rio de Janeiro, Forense, 1974, p, 192. "The *petendi* cause is therefore complex. Of category or legal figure, we said. No, the category or the

with the principle of speed and the principle of onerosity. It is important to point out that every time any homeland court is called upon to pacify social conflict and, consequently, deliver the good of life to the rightful owner, the taxpayer's money is spent in order for this movement of the State machine to occur. If in the future it will be possible to file a new action, pleading the declaration of unconstitutionality of a certain infra-constitutional law, alleging a new cause of action, considering that the action with the same request, but with another right of action has already been judged, it is easy to see that both the time and the money of the Brazilian citizen was misused.

The Federal Supreme Court, by expanding the cause of action in actions of this nature, ends up prioritizing public interests in order to save money and time and, for these reasons, the expansion of the cause of action is very well used in this tuning fork and this understanding, in our opinion, should prevail.

Another but no less important aspect is the fact that an infra-constitutional rule is producing effects on the factual and legal mute and, sometimes, harming the jurisdiction if, later on, this Law is considered unconstitutional. If the Federal Supreme Court had the opportunity to examine a certain issue in light of the Federal Constitution, of course, that for a matter of common sense, and having the opportunity, it should analyze such Law according to other articles of the Federal Constitution that it deems convenient for that particular claim, and which were not

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legal figure. Even if the author is wrong on this point, which most refers to the realization of the objective right, he can change his way of seeing about the category or the figure, as long as, by changing it, the new category or figure is still reconciled with his request. Both the judge and the party are allowed to refer to another text of the Law, the category or legal figure different from that to which the initial application refers. Two consequences of this principle of fungibility of the form of the foundation: a) the defendant may be condemned even if the name given to the legal situation or to it is not exact, in good technical and adequate terminology; b) by changing the name of the relation of material law, or the text of law, the exception of res judicata is not avoided, only for this reason.”.

part of the cause of action[17] and, therefore, if using the expansion of the right of action (such maneuver is possible also in Germany)[18], brilliantly.

Having passed this point, there is still a doubt: once a lawsuit has been decided and the Federal Supreme Court has broadened the cause of action to see an infra-constitutional law declared unconstitutional, as being constitutional; could one enter at a later date with another lawsuit requesting the same thing with another cause of action? Or due to the fact that the Federal Supreme Court has broadened the cause of action, would the preclusive mantle of the res judicata stabilize and become immutable when it comes to declaring that particular Law as being unconstitutional?

2 THE JUDGED THING

In this topic, what is sought is whether the res judicata[19,20] operates in decisions in which the unconstitutionality of a certain Law has not been declared and

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17 PASSOS, Joaquim Calmon de. *Comentários ao Código de Processo Civil*, v. III, 8 ed, Rio de Janeiro, Forense, 1998, p, 159. "The least jurisdiction given to that category or provision of law invoking it to characterize it is irrelevant, if mistakenly indicated. The judge needs the fact, because it is he who knows the law. The subsumption of the fact to the rule is the duty of the judge, that is to say, the legal categorization of the fact is the task of the judge. If the fact narrated in the initial and what was requested are compatible with the new legal categorization, or with the new provision of law invoked, there is no need to talk about changing the cause of the request, or infeasibility of the request. This impracticability only occurs when the consequences derived from the new legal category cannot be attributed to the fact narrated in the initial one, nor are they contained in the request, or are incompatible with it.".

18 MARTINS, Ives Gandra da Silva; e MENDES, Gilmar Ferreira, coordenadores, *Ação Declaratória de Constitucionalidade*. 1, ed, São Paulo, Saraiva, 1994, p, 91. "This guidance undoubtedly corresponds to the nature of the abstract rule control process, which is intended not only to promptly and effectively eliminate the unconstitutional law from the legal system, but also to definitively beat up doubts that may have arisen about the constitutionality of valid laws. Such understanding seems all the more plausible if one considers that the Federal Supreme Court, like the Bundesverfassungsgericht, is not bound to the representation of unconstitutionality, to the grounds invoked by the author, and may declare the unconstitutionality by different grounds from those explained in the initial.".

19 SICA, Heitor Vitor Mendonça, *Preclusão Processual Civil*, 2ª ed, São Paulo, Atlas, 2008, p, 215/216. "The effects of the formal res judicata prevent penalties that reopen the incidental issues resolved in the same process, and, if the effects of the material res judicata are not added to them, in principle it is not forbidden to file an autonomous claim in which the same issues are again ventilated. Even here, the effects are merely endo-processes. And, if the sentence is of merit, in addition to the effect of preventing the simple of the formal res judicata, the res

that, in this process, the cause of action has been amplified; that is, the cause of action for a certain claim brings as an affront to the infra-constitutional Law articles "w" and "z" of the Federal Constitution. In judging the lawsuit, the Federal Supreme Court broadens the cause of action and analyzes the unconstitutionality of that specific law not only from the standpoint of articles "w" and "z" of the Federal Constitution, but also in accordance with articles "n" and "m" of the Constitution. The decision understands that such infra-constitutional law is not unconstitutional, therefore, constitutional.

In the future, a lawsuit will be filed requesting a declaration of unconstitutionality of the same infra-constitutional law, but now with the claim that this particular law does not violate the articles brought by the lawsuit that already have a res judicata, but brings as a new cause to request claims that such infra-constitutional law violates articles "p" and "j" in the Federal Constitution.

Due to the mere fact that the Federal Supreme Court ruled that this infra-constitutional Law was not unconstitutional, and due to the fact that in the first trial the cause of action was broadened, the second claim could not subsist, given the constitutional principle of the res judicata?

Now, as seen in the previous chapter, changed the cause of request, can enter with new lawsuit[21]. In our understanding, in order for the res judicata to be formed in cases such as the one described above, it would be necessary for the Federal Supreme Court to have analyzed ALL the articles of the Federal Constitution to observe if none of them would face the infra-constitutional law *sub judice*, which is never done.

As it would be impossible to perform this analysis with all the proceedings filed in this sense, the res judicata only operates with respect to those specific articles contained in that first decision; it is not forbidden to file a new claim having a new cause to request, that is, a cause to request different from that previously used in the pleading

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judicata will arise material that, within the subjective and objective limits imposed by law, extrapolates the process in which it was launched, imposing itself in any other effect of eadem re future, before any judge. The effects are, as we know, extra-procedural.".

[20] JUNIOR, Nelson Nery; e NERY, Rosa Maria de Andrade, *Constituição Federal Comentada e Legislação Constitucional*, 4ª ed, São Paulo, Revista dos Tribunais, 2013, p, 226. "The rule protects the thing judged material (*auctoritas rei iudicatae*), understood as the quality that makes unchangeable and indisputable the command that emerges from the dispositive part of the sentence of merit no longer subject to ordinary or extraordinary appeal (...)."

[21] LIEBMAN, Enrico Tullio. *Op. cit*, p, 177. "The determination is enunciated in the device of the sentence and represents the concrete provision pronounced by the judge, but in order to identify it exactly the indispensable elements of the *petendi* cause and the *petitum* should be sought in the motivation of the sentence. This is all the more evident since in general the provision is governed in abstract terms, which only the motivation will allow translating into clear and concrete terms (often the provision only says: "accepts" or "rejects the proposed demands"; "accepts" or "rejects the appeal" etc.). this does not mean, however, that the grounds are covered by the res judicata: on the contrary, as will be seen".

whose final and unappealable decision was made, even though the cause to request, ex officio, was expanded by the judges, when analyzing that particular claim.

Just out of curiosity it is worth mentioning that our neighbor Peru, treats the res judicata in a similar way to ours: there must be a final decision, no matter the instance in which this decision occurs and it is necessary that there has been analysis of the substance, that is, that there has been a judgment on the merits[22].

With respect to res judicata in the case of an objective and subjective action that fails to declare the unconstitutionality of an infra-constitutional law and its effects, we will deal with it immediately below.

3 SUBJECTIVE DEMANDS

This topic is important because of the aspect that demands that discuss the delivery of a certain good of life, but between private individuals, or between private individuals and public entities (or entities compared to public entities), may also contain a request for the infra-constitutional rule to be declared unconstitutional, but if this occurs, the effect generated by this statement will not be "erga omnes"; the effect generated will be only and only endo-procedural (inter parts).

Here constitutional control is diffuse and not concentrated, as we shall see ahead. This means that a single judge has discretion to control the constitutionality[23] of an infra-constitutional rule and, thus, in that specific *sub judice* relationship, that particular infra-constitutional law whose declaration of unconstitutionality has been declared cannot be used to pacify that particular concrete case.

> *"Having done so, the Brazilian Constitution grants the duty of constitutional compatibility analysis of any normative act to all judges in their jurisdictional activities."*[24].

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[22] CÓRDOVA, Luis Castillo, *Comentarios al Código Procesal Constitucional*, Tomo I, 2 ed, Lima, Palestra, 2006, p, 388. "Con el Código Procesal Constitucional la situación cambia, aunque no radicalmente. Ahora para que una resolución obtenida dentro de un proceso constitucional llegue a obtener la calidad de cosa juzgada con todas las consecuencias que ello puede suponer, deben concurrir los siguientes dos requisitos: que sea la resolución final y que haya pronunciamiento sobre el fondo. Ya no es un elemento para definir la calidad de cosa juzgada que el fallo beneficie o no al agredido en su derecho constitucional.".

[23] DANTAS, Pulo Roberto de Figueiredo, *Direito Processual Constitucional*, 3, ed, São Paulo, Atlas, 2012, p, 169. "Based on the above statements, we can conclude, in a narrow introductory synthesis, that the control of constitutionality consists precisely in the inspection of the adequacy (vertical compatibility) of the laws and other normative acts edited by the Public Power with the principles and rules existing in a rigid constitution, in order to ensure that such normative diplomas respect, both in terms of their content, and the form as produced, the hierarchically superior precepts dictated by the master charter.".

[24] BORBA, Rodrigo Esperança, Coisa Julgada versus Inconstitucionalidade – Controvérsias e Perspectivas, 1, ed, Curitiba, Juruá, 2011, p, 69.

The difficulty of the matter lies in the moment when this case is taken to the Federal Supreme Court. The specifics of the issue will remain the same, as narrated above, but the imbroglio would occur if the same Law in this process declared unconstitutional, were under analysis by the same Supreme Court, but in objective action, that is, in concentrated control of constitutionality (generating effectiveness "erga omnes").

It is important to explain, even briefly, the institute of effectiveness: the effectiveness of a decision (broad sense) is the phenomenon by which that pacifying order or understanding (decision), emanated by the State, is transferred (mirrored) in the factual world, that is, the resolution achieved in the legal world, becomes proficient in the phenomenal world (we are not talking about the effectiveness of the Law set). See that for the present work, it is enough to elucidate the effectiveness of the final decisions, not having the intention of distinguishing the effectiveness as a whole (even from the appealable sentences or the interlocutory decisions), since it does not lend itself to the present work. Therefore, analyzing the etymology of the word preclusion (*praecludere*), coming from Latin, which means to prevent, close, shut; it is the loss of the parties, and somehow the Judge, the possibility of practicing some act (or repeat this act) procedural. Therefore, with the brief explanation above, we clarify the ideas of the interlocutor so that we can move forward.

Coming back. Could the Federal Supreme Court judge the objective claim in one way and the subjective in another? Could the Federal Supreme Court suspend the subjective action, since if the trial of the objective action had the desired outcome in the subjective action, the effect "erga omnis" would also benefit from the subjective action? How would it look if the objective action were dismissed, thus declaring that the infra-constitutional law is constitutional, but having taken into consideration certain articles of the Federal Constitution, and in the subjective action the articles whose declaration of unconstitutionality of the infra-constitutional law has been searched for is others; could the Federal Supreme Court have judged the subjective action differently? Should the Federal Supreme Court have taken into consideration the articles mentioned in the subjective action before judging it?

In the study made in the present work, not all these answers were found, but below our opinion will be given observing the legal hermeneutics according to the systematic logical process and the sociological logical process.

It seems to us that since the preclusive effectiveness of the res judicata in subjective actions covers only the parties included in that proceeding, it would be imperative that the Federal Supreme Court suspend this proceeding until the final decision of the objective claim that discussed the same matter.

Not only would this be possible, but also the fact that the Federal Supreme Court, for procedural economics and legal certainty, could broaden the cause of action of the objective claim, observing the articles of the Brazilian Constitution brought up by the subjective pleading. It seems this would also avoid discrepancies in judgments and would respect legal certainty.

With the explanation of the previous paragraph, the issue would be resolved with simplicity and harmoniously in accordance with the legal precepts of the

Brazilian legal system. If the causes were not contemporary, even so the problem would have easy solution as we will see in the following topic.

4 OBJECTIVE DEMANDS

Initially, it is worth making a comparison of our legal system in relation to Peru, which, unlike ours, has an autonomous constitutional process (and a unique Constitutional Procedural Code) and which, basically, uses only two types of action (one for the consolidation of fundamental rights and the other for the constitutional processes that ensure the supremacy of the Constitution), but which independently, somewhat resembles the national legal system in other aspects. The Peruvian Constitutional process not only regulates the fundamental rights of its citizens, but also grants them the possibility of promoting actions of unconstitutionality of a law that violates constitutional rights[25].

Having drawn this parallel, it is worth going into how our legislator has dealt with the issue now being dealt with in our country, if we do not see it:

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[25] CÓRDOVA, Luis Castillo, *Op. cit*., p, 27/28. "Definido así el proceso en general, conviene volver las llamadas por la Constitución como "garantías constitucionales", para advertir de la necesidad de hacer una distinción que por elemental no es ociosa. En estricto, "no es exactamente lo mismo hablar de garantías constitucionales, también es cierto que todas las garantías constitucionales tienen por finalidad proteger exclusivamente derechos constitucionales. Las garantías constitucionales existen a fin de proteger y afianzar el cumplimiento efectivo de la Constitución en general, de todos y cada uno de sus preceptos. La garantía de derechos constitucionales sólo tendrá por finalidad garantizar la efectiva vigencia de una parte de ella, precisamente de esa parte en la que se reconocen derechos". En palabras del Tribunal Constitucional, "existen básicamente dos tipos de procesos constitucionales. En primero lugar, están los procesos destinados as afianzamiento de los derechos fundamentales; y, en segundo lugar, los procesos constitucionales que aseguran la macía de la Constitución". Es así que todas las garantías recogidas a lo largo del artículo 200 CP son garantías constitucionales, pero sólo tres de ellas –el hábeas corpus, el amparo y el hábeas data- tienen desde su formulación constitucional y como se hará notar oportunamente en este trabajo- la finalidad de proteger directamente derechos constitucionales. Esto no quiere significar –ha-brá que dejarlo claramente expresado desde ahora- que con las demás garantías constitucionales no se pueda eventualmente conseguir – aún indirectamente- la defensa de algún derecho constitucional. Por ejemplo, mediante una acción de inconstitucionalidad se pude lograr la derogación de una ley que su sola vigencia vulnera derechos constitucionales; o mediante la acción popular se puede dejar sin efecto una norma reglamentaria que servía de base a la autoridad administrativa para vulnerar derechos constitucionales. Lo único que se quiere decir es que el hábeas corpus, el amparo y el hábeas data tienen por finalidad proteger directamente derechos constitucionales; las demás garantías constitucionales sólo indirectamente y en determinadas circunstancias, podrán lograr este cometido.".

With the comparison made in the previous topic on objective demands[26] and subjective demands, we now have to deal with the objective demands regarding the concentrated and binding control (the Federal Supreme Court is the only body that has constitutional jurisdiction to do so) of constitutionality and, with respect to the possibility or not of entering into a new claim requesting the declaration of unconstitutionality of a certain infra-constitutional Law, which had its constitutionality declared by the Brazilian Federal Supreme Court, in an action whose cause of action was expanded, taking into account other articles of the Brazilian Federal Constitution, not brought before the first claim.

Germany had a similar problem and the conclusion reached was that the decision not declaring the unconstitutionality of the infra-constitutional law is not binding and, thus, future claims could be filed in order to have that particular infra-constitutional law declared unconstitutional[27].

What was not analyzed in the German case was the possibility of rediscussing an infra-constitutional law not declared unconstitutional in cases in which the Supreme Court has in the first case extended the cause of action.

However, it seems to us that the logic that permeates the question can solve the imbroglio in the same singular way. In other words, even if the Federal Supreme Court did not declare the unconstitutionality of an infra-constitutional law in a lawsuit whose cause of action was expanded, such decision would not have a binding nature and, of this magnitude, a future and new lawsuit could be filed in order to see the infra-constitutional law declared unconstitutional.

In any case, although the German judge did not mention the cause of action, the aforementioned decision resolved the issue even more broadly: if the new

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[26] MARTINS, Ives Gandra da Silva, e MENDES, Gilmar Ferreira, coordenadores, *Op. cit*, p, 94. "The declaratory action of constitutionality is a typical objective process, aimed at avoiding legal uncertainty or the state of uncertainty about the legitimacy of the law or federal normative act. The eventual applicants act in the interest of preserving legal security and not in the defense of a self-interest. Here, as in the direct action for unconstitutionality, there is a procedure without parties, in which there is a plaintiff, but there is no request. As in a direct action for unconstitutionality, the plaintiffs are entitled to a constitutional action only for the purpose of bringing or not bringing an action against the Supreme Court.".

[27] MARTINS, Ives Gandra da Silva, e MENDES, Gilmar Ferreira, coordenadores, *Op. cit*, p, 94. ""The protection for confirmatory decisions of the Constitutional Court, which transcends the res judicata itself, would not be supported by art. 94, II of the Fundamental Law. Such protection, which would ultimately prevent people not affected by the res judicata from claiming that the decision would be wrong and that, in fact, the confirmed law would be unconstitutional, would require the conversion of the force of law (Gesetzeskraft) into the force of constitution (Verfassungskraft). (...) Paragraph 31, I, of the Organic Law of the Constitutional Court provides that the force of law also reaches decisions confirming constitutionality; this extension only applies, however, to the duty of publication, because the law cannot confer effect that the Constitution does not provide (...)."".

petition were to use the same constitutional article in order to declare that infra-constitutional law unconstitutional, this would not be possible, given that one cannot use "countless means for this purpose"[28].

Therefore, it seems to us that a new lawsuit could only be filed in cases in which the cause of action was changed, even in the case of a lawsuit in which the cause of action was extended ex officio by the Supreme Court. For example, the cause of action was broadened, but the new lawsuit uses constitutional articles that were not used either in the original cause of action or in the extension of the *ex officio* cause of action by the Supreme Court, so, although the matter has already been discussed, it was not from this new standpoint, so that a new lawsuit may persist. A new lawsuit could also be filed in cases in which the infra-constitutional law was amended or in cases in which the Federal Constitution itself was changed.

This same conclusion was reached by Professor Gilmar Ferreira Mendes, current Minister of the Superior Court of Brazilian Justice[29].

CONCLUSION

In view of the greater speed and lower spending of taxpayer's money, we believe it is imperative to expand the cause of action in actions aimed at declaring the unconstitutionality of an infra-constitutional Law.

In addition to the aspects mentioned in the previous paragraph, the jurisdiction cannot suffer from legal insecurity, judging by the fact that a Law may be declared as constitutional in an action that has as its cause of action a constitutional article and, subsequently, the same Law may be the target of another action with the same purpose, but with right of action different and, of this amount, may be judged unconstitutional.

In this tuning fork, it is not plausible that at the same time the jurisdictions are harmed by having had personal actions judged in accordance with that Law that was supposedly constitutional, but was later considered unconstitutional, since the Federal Supreme Court could have expanded the cause of action and did not do so.

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[28] MARTINS, Ives Gandra da Silva, e MENDES, Gilmar Ferreira, coordenadores. *Op. cit*, p, 95. ""This idea (which reduces the force of law, in cases of declaration of constitutionality, to the mere duty of publication) only appears mandatory if the force of law is considered under § 31, II, of the Organic Law of the Constitutional Court as an institute of material character. Indeed, a decision of the Constitutional Court cannot transform an unconstitutional law into a law in conformity with the Constitution. However, if one considers the force of law as a specific institute of res judicata for the control of norms, then the *erga omnes* link does not mean a validation (Heilung) of eventual unconstitutionality of the law confirmed, but only that this question can no longer be raised in the constitutional process. The idea of the Rule of Law (more precisely, the constitutional binding of legislative activity, art. 20) requires the possibility of control of rules, but does not impose the opening of countless avenues for this purpose."".

[29] MARTINS, Ives Gandra da Silva; e MENDES, Gilmar Ferreira, coordenadores. *Op. cit.*, p. 94/98.

If this occurs, the judiciary will again be triggered by many termination actions, in order to see new decisions put in place of one that was motivated by an unconstitutional law.

For this and other reasons widely linked in the present work, it is that we understand primordial the expansion of the cause of action made by the Superior Court of Justice in objective actions.

The social benefits of broadening the cause of action outweigh the arguments of the opposing party, but what cannot be disregarded is that if an action that has had the cause of action enlarged[30], but only certain constitutional articles have been analyzed exhaustively and others have not and, subsequently, under another cause of action another claim to be filed seeking a declaration of unconstitutionality of that Law declared to be constitutional, the cloak of the res judicata would not operate and another decision, if the case, could be placed in place of the previous one. We cede the understanding in cases in which there was no expansion of the cause of action, that another demand could be proposed, with cause of action different from that of the first proceeding, without the need to speak of res judicata or, eventually, of its relativization.

Drawing a parallel between objective and subjective claims it is imperative to highlight that the subjective claims although they may be judged by the Superior Court of Justice, the effect generated by this decision is not extra-procedural, only making a res judicata between the parties in that process.

On the other hand, objective claims may have "erga omnes" effects generated by their decision, that is, the declaration of unconstitutionality of an infra-constitutional law issued by an objective claim binding the entire national territory, and all judges of the entire country will be obliged to disregard that infra-constitutional law when judging the claims assigned to them.

Finally, it is worth noting that if there is an amendment to the infra-constitutional law declared constitutional or an amendment to the Constitution itself, another lawsuit may be filed seeking the unconstitutionality of that certain law, even if it had the same cause of action; this may occur, in the same way, if there is a factual or social change in that determinate society[31].

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30 STF, ADI 1358 MC/DF, Rel. Min. Sydney Sanches, j, 18.02.1999, DJ 28.05.1999, Nesse mesmo sentido, STF, ADI 1756 MC/MA, Rel. Min, Moreira Alves, j. 23.04.1998, DJ 06.11.1998, e STF, ADI 1358 MC/DF, Rel. Min. Sydney Sanches, j. 07.12.1995, DJ 26.04.1996: "It is the jurisprudence of the Plenary, the understanding that, in the Direct Unconstitutionality Action, its judgment does not depend on the 'causa petendi' formulated in the initial, i.e., the legal grounds deducted therein, since, in this objective process, there is an argument of unconstitutionality, the Court must consider it in all aspects in light of the Constitution and not only in light of those focused on by the author.".

31 MENDES, Gilmar Ferreira, COELHO, Inocêncio Mártires, e BRANCO, Paulo Gustavo Gonet, *Curso de Direito Constitucional*, 5, ed, São Paulo, Saraiva, 2010, p, 1182/1183. "Thus, the legal rule that could not be ruled unconstitutional at the time of its issuance becomes susceptible to judicial censorship due to a profound change in factual relations, configuring the process of incostitutionalization (der

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Prozess des Verfassungswidrigwerdens). Legal dogma is limited to distinguishing between constitutional and unconstitutional acts. The declaration of unconstitutionality supposes the simple declaration or the simple recognition of a pre-existing situation. The unconstitutionality process (Verfassungswidrigwerdens) is not a dogmatic alternative, except when it results from a change in factual relations. An eventual change in the jurisprudential understanding, with the consequent affirmation of the unconstitutionality of a situation, until then considered constitutional, does not authorize the characterization of the supervening unconstitutionality. It strives to circumvent the inevitable embarrassment arising from this model, affirming that the change in the jurisprudential understanding led only to the recognition of the unconstitutionality, previously configured. Perhaps one of the richest themes of the theory of law and modern constitutional theory is that related to the evolution of jurisprudence and, especially, the possible constitutional mutation, resulting from a new interpretation of the Constitution. If its repercussion on the material level is undeniable, there are countless challenges on the level of the process in general and, above all, of the constitutional process.”.

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