



RES JUDICATA UNCONSTITUTIONAL: THE LEGAL NATURE OF THE UNCONSTITUTIONALITY DEFECT AND THE RESCISSION OF JUDICIAL DECISION

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ABSTRACT

The present study has as its object the contrary understandings and in favour of the thesis that proposes the relativization of *res judicata* material in case of violation of constitutional standards. With the contrast between legal certainty and other constitutional values, there are doctrinal disagreements as to the legal nature of the defects of unconstitutionality (consistent in considering whether this generates the lack, the invalidity or ineffectiveness of decision of merit), which binds the choice of procedural instrument to be used for the termination of the trial. At that point, the doctrine addresses four main situations related to the legal nature of the decision and the means of termination: the ruling based on law that is subsequently declared unconstitutional by the Supreme Court; the decision established in law ever declared unconstitutional; the decision ceases to apply standard considered unconstitutional, which subsequently is declared constitutional by the Supreme Court and the decision which violates directly the Federal Constitution. The study of these issues is critical given the chance brought by articles 475-L, § 1, and 741, sole paragraph, of the Code of Civil Procedure. From the analysis of *res judicata* as unconstitutional and doctrinal positions on the subject, aims to verify the legal nature of the addiction of unconstitutionality and their consequences for possible rescission of decision, if there is a conflict between constitutional norms and values which should prevail.

KEYWORDS: constitutional standards, *res judicata*, relativization.

COISA JULGADA INCONSTITUCIONAL: A NATUREZA JURÍDICA DO VÍCIO DE INCONSTITUCIONALIDADE E A RESCISÃO DA DECISÃO JUDICIAL

RESUMO

O presente estudo tem como objeto os entendimentos contrários e favoráveis à tese que propõe a relativização da coisa julgada material em caso de violação de normas

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constitucionais. Com a contraposição entre segurança jurídica e outros valores constitucionais, há divergências doutrinárias quanto à natureza jurídica do vício de inconstitucionalidade (consistentes em considerar se essa gera a inexistência, a nulidade ou a ineficácia da decisão de mérito), a qual vincula a escolha do instrumento processual a ser utilizado para a rescisão do julgado. Nesse ponto, a doutrina aborda quatro principais situações relacionadas à natureza jurídica da decisão e o meio de rescisão: a decisão proferida com base em lei que, posteriormente, é declarada inconstitucional pelo Supremo Tribunal Federal; a decisão fundada em lei já declarada inconstitucional; a decisão que deixa de aplicar norma considerada inconstitucional, a qual, posteriormente, é declarada constitucional pelo Supremo Tribunal Federal e a decisão que viola diretamente a Constituição Federal. O estudo dessas questões é fundamental diante das hipóteses trazidas nos artigos 475-L, §1º, e 741, parágrafo único, do Código de Processo Civil. A partir da análise da coisa julgada inconstitucional e dos posicionamentos doutrinários sobre o tema, objetiva-se verificar a natureza jurídica do vício de inconstitucionalidade e suas consequências para eventual rescisão da decisão, se há conflito entre normas constitucionais e qual dos valores deverá prevalecer.

PALAVRAS-CHAVE: norma constitucional, coisa julgada, relativização.

1. INTRODUCTION

The *res judicata* is a constitutional guarantee that aims at protecting the value certainty through the impossibility of review and modification of judicial decisions on which it focuses. It is provided for in article 5, XXXVI, of the Federal Constitution[†], in article 467 of the Code of Civil Procedure[‡] and article 6, caput and paragraph 3, of the Law of Introduction to Brazilian Law Standards[§].

Regarding the resolution of the merits of the dispute, may be classified as formal *res judicata* – incident about the Supreme Court sentence with fulcrum in article 267 of the Code of Civil Procedure, or clearly, that does not resolve the merits of the deal – or material *res judicata*, which focuses on the decision to judge merit, on the basis of article 269 of the Code of Civil Procedure. This study will address only the material *res judicata*, consisting of the immutability hanging over court decisions that resolve the merits of the dispute, with the exhaustion of the appellate term.

It is known that complies to the parties contesting any *error in iudicando* and *error in procedendo* in the sentence by means of appropriate resources, which, in theory, stop the

[†] Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes: (...) XXXVI - a lei não prejudicará o direito adquirido, o ato jurídico perfeito e a coisa julgada;

[‡] Art. 467. Denomina-se coisa julgada material a eficácia, que torna imutável e indiscutível a sentença, não mais sujeita a recurso ordinário ou extraordinário.

[§] Art. 6º A Lei em vigor terá efeito imediato e geral, respeitados o ato jurídico perfeito, o direito adquirido e a coisa julgada. (...) §3º Chama-se coisa julgada ou caso julgado a decisão judicial de que já não caiba recurso.

development of *res judicata* containing defects. However, the practice demonstrates that, by several factors-such as the inability to compel the parties to have recourse, the loss of procedural time limits, the existence of legal or scientific modifications after the sentence which may make it inappropriate to land or the case, among others-, it is possible the development of *res judicata* among a final defective decision.

Thus, established the constant development of *res judicata* over sentences containing serious defects, arose the relativization thesis of *res judicata*. According to this, there are defects that are too severe for the maintenance of judicial sentence, just as there are values of equal or greater importance than the *res judicata*, so this must be relativized and its sentence rescinded or modified.

The law itself provides limitations on *res judicata* when brings instruments or legal mechanisms for their flexibility in specific hypotheses, and the theory of relativity of *res judicata* generates discussions just because it wants to increase the list of flexibility's hypotheses without specific legal statements and in disagreement with the deadlines legally established.

There are several hypotheses that can result in the relativization of *res judicata*, some of them set out in the Code of Civil Procedure and other prepared by doctrine and jurisprudence. Refers to as examples the case of material error, the null sentence, the unjust compensation, fraud, technological evolution supervening, among others. Among them, we understand that the most serious defect is the unconstitutional *res judicata*^{**}, namely the final judgment that hurts the constitutional rules - rules and principles contained in the Federal Constitution.

At first, one might think that the issue of *res judicata* unconstitutional is resolved by Article 485, V, of the Code of Civil Procedure, which brings the possibility of Rescission Action against literal infringement of the law (in which the Constitution would be included). Even without entering the discussion about what the term "literal provisions of the law" would encompass, can not forget that Article 495 of the Code of Civil Procedure brings a deadline of two years for the bringing of Rescission Action, counted from the formation of *res judicata*.

And at that point the doctrine differs: while part of it says can not occur relativization of *res judicata* for violation of the Constitution after the expiration of the limitation period of

^{**} It must be registered the unlike positioning of José Carlos Barbosa Moreira by the use of the term "res judicata unconstitutional." According to the author, it is not possible that existence of *res judicata* unconstitutional for being included in the text of the Constitution itself as a constitutional guarantee. (MOREIRA, José Carlos Barbosa. **Temas de direito processual**. Nona série. São Paulo: Saraiva, 2007. p. 236).

Rescission Action, due to the importance of legal certainty, the other portion maintains that a unconstitutional decision can not remain in the legal system, due to the principle of the supremacy of the federal constitution and the overlap value justice to the legal certainty.

In turn, the Law nº 11.232/2005 entered the articles 475-L, § 1º and 741, sole paragraph, of the Code of Civil Procedure, bringing the possibility of express provision relativization of res judicata unconstitutional by the use of challenge to the fulfillment of the sentence or stay of execution against the Government. Such devices are targets of Direct Action of Unconstitutionality No. 3740, proposed by the Federal Council of the Bar Association of Brazil, in which the violation of Article 5, XXXVI, of the Federal Constitution is object of discussion.

It is seen that the discussion is important, especially because the problem arose from specific cases faced by the Judiciary. Thus, we pass to the analysis of the doctrinal positions concerning the possibility of rescission of the decision that violated the constitutional norm.

2. THE UNCONSTITUTIONAL RES JUDICATA: THE LEGAL NATURE OF THE UNCONSTITUTIONALITY DEFECT AND RESCISSION OF JUDICIAL DECISION

Given the severity of the addiction of unconstitutionality, notably on the Principle of Supremacy of the Constitution, there are discussions about the existence, validity and effect of a decision that hurts constitutional. However, before entering this study is necessary to analyze the positions of the homeland doctrine about the relativization of material res judicata and the unconstitutional res judicata.

Among the lawyers against the flexibilization of material res judicata is Nelson Nery Junior, which states that during the dictatorial Nazi state, was enacted a law that allowed to prosecutors control over the sentences unjust and incompatible with the fundamentals of the Nazi state through the relativization of res judicata. Highlights that, even then, this control could only occur through Rescission, which demonstrates the unreasonableness of Brazilian thesis of easing of res judicata without the legal provision of procedural tool suitable for both^{††}:

Note, for timely, that even with the totalitarian dictatorship in German National Socialism, that was not founded on the democratic rule of law, as is curial, the Nazis dare not to use the "disregard" of res judicata. They created a new cause of rescission for the judgment on the merits as a res judicata attack.

In Brazil, which is founded in the republic democratic state of law, the interpreter wants to disregard the res judicata where he thinks he should do it – the interpreter

^{††} NERY JUNIOR, Nelson. **Princípios do processo na constituição federal**. 9. ed. São Paulo: Revista dos Tribunais, 2009, p. 64

wants to be worse than the Nazis. This is intolerable. The process is an instrument of democracy and not his tormentor^{‡‡}.

Arnaldo Rizzardo argues that the "*res judicata* is a principle stony, unchangeable with eternal validity"^{§§}, so its flexibility depends on express legal provision. States that "it is not allowed the mere entry of an action to set aside the verdict because unjust, illegal or unconstitutional. The attack on the illegality or morality, or the final judgment of the result of the judgment is what it seeks to recognize"^{***}.

In a different sense, Cândido Rangel Dinamarco argues that *res judicata* is not absolute and must accompany other constitutional values such as reasonableness and proportionality, the administrative morality and the fair value of indemnities:

For the systematic reconstruction of the current state of science on the topic, it is also useful to recapitulate in brief certain particular points revealed that research, namely:

I - the principle of reasonableness and proportionality as determinants of immunization judged by the authority of *res judicata*;

II - administrative morality as constitutionally declared value and whose effectiveness is obstacle to such authority over absurdly deemed harmful to the state;

III - the constitutional imperative of the fair value of the expropriation compensation in real estate, which is both transgressed when the public entity is required to pay more, as when he is allowed to pay less than the correct.^{†††}

For the author, in addition to the above principles, *res judicata* owes allegiance to the zeal for citizenship and human rights, fraud and gross error, the guarantees of an ecologically balanced environment and access to fair legal system. Also states that it is for the judge to balance between the application of the law fairly and incidence of *res judicata* when this matter in injustices, absurdities, fraud or unconstitutionality^{†††}.

José Augusto Delgado^{§§§} accompanies positioning Cândido Rangel Dinamarco stating that the occurrence of *res judicata* is limited to compliance with the constitutional principles of morality and fair compensation:

^{‡‡} NERY JUNIOR, 2009, p. 65.

^{§§} RIZZARDO, Arnaldo. **Limitações do trânsito em julgado e deconstituição da sentença**. Rio de Janeiro: Forense, 2009, p. 129-130.

^{***} Ibid., p. 130.

^{†††} DINAMARCO, Cândido Rangel. **Nova era do processo civil**. 3 ed. São Paulo: Malheiros, 2009, p. 238.

^{†††} Ibid., p. 255.

^{§§§} DELGADO, José Augusto. Reflexões contemporâneas sobre a flexibilização, revisão e relativização da coisa julgada quando a sentença fere postulados e princípios explícitos e implícitos da Constituição Federal. Manifestações doutrinárias. In: NASCIMENTO, Carlos Valder do; DELGADO, José Augusto (Org.). **Coisa julgada inconstitucional**. 2 ed. Belo Horizonte: Fórum, 2008. p. 107.

Inconceivable in the face of these ideas today invigorating the democratic rule of law, the continuity of thought that *res judicata* is intangible, even when made in obvious conflict with the postulates, principles and rules of the Federal Constitution. What every citizen expects of Judiciary is the integral defense of constitutional supremacy. Never the violation of judicial decisions. The judicial activity, by the nobility of the practice, should print the maximum legal certainty. This level is achieved only if it explicitly configure the harmony of its effects with the guidelines embodied in the text of the Constitution^{****}.

The positioning of these authors reveals the relativity theory of *res judicata*, because they propose that there is a termination due to violation of constitutional principles to understand the higher *res judicata*. Likewise, Thereza Arruda Alvim and José Miguel Garcia Medina argue that the *res judicata* can not override the principles of equal or higher hierarchy^{††††}.

Calls mention that Carlos Valder Nascimento^{††††}, Humberto Theodoro Junior^{§§§§}, Teori Albino Zavascki^{*****} and Alexandre Freitas Câmara^{†††††} appear to be favorable to the relativization of *res judicata* in case of offense to just compensation, administrative morality, justice, principles and constitutional values. The authors share the view that *res judicata* is not absolute and must yield in the face of certain constitutional values.

With respect to the legal nature of the final decision that hurts the Federal Constitution, four important situations should be considered: a) when the sentence is pronounced based on law that is later declared unconstitutional by the Supreme Court, b) when the sentence is pronounced on the basis of law that has been already declared unconstitutional by the Supreme Court c) when the judge fails to apply the norm by understand it unconstitutional and then the Supreme Court declare the constitutionality of the norm; d) when the decision brings command that directly violates the Federal Constitution.

2.1 A decision based on law that is later declared unconstitutional by the Supreme Court.

**** NASCIMENTO, 2008, p. 107.

†††† WAMBIER, Thereza Arruda Alvim; MEDINA, José Miguel Garcia. **O dogma da coisa julgada: hipóteses de relativização**. São Paulo: Revista dos Tribunais, 2003, p. 174.

†††† NASCIMENTO, Carlos Valder do. **Por uma teoria da coisa julgada inconstitucional**. Rio de Janeiro: *Lumen Juris*, 2005, p. 123.

§§§§ THEODORO JÚNIOR, Humberto; FARIA, Juliana Cordeiro de. Reflexões sobre o princípio da intangibilidade da coisa julgada e sua relativização. In: NASCIMENTO, Carlos Valder do; DELGADO, José Augusto. **Coisa julgada inconstitucional**. 2. ed. Belo Horizonte: Fórum, 2008, p. 181.

***** ZAVASCKI, Teori Albino. Ação rescisória: a súmula 343/STF e as funções institucionais do Superior Tribunal de Justiça. In: JAYME, Fernando Gonzaga; FARIA, Juliana Cordeiro de; LAUAR, Maira Terra (Coord.). **Processo civil: novas tendências**. Belo Horizonte: Del Rey, 2008, p. 349.

††††† CÂMARA, Alexandre Freitas. **Lições de direito processual civil**. Vol. 1. 20 ed. Rio de Janeiro: Editora Lumen Juris, 2010, p. 499.

The control of constitutionality in the Brazilian legal system can be diffuse or concentrated, concrete and abstract^{****}, the first being performed by a judge or court, and the second by the Supreme Court. While the Supreme Court should wait provocation to the exercise of concentrated control - through the filing of a declaratory action of constitutionality or direct Action of unconstitutionality, among others instruments - the diffuse control should be exercised by all judges, including *ex officio*.

Thus, in the diffuse control, before the final judgement, the judge must make the control of constitutionality of the norms that would be applied to that case, and checking that the rule conflicts with the Constitution, must declare its unconstitutionality and fail to apply it. Therefore, it is presumed the constitutionality of the rule until the denying of application of norms by the singular judge (presumption of constitutionality of the rules).

It happens that, when the Supreme Court declares unconstitutional a rule, this statement assigns the effect *ex tunc* or *ex nunc*, depending on the case. When assigned effects *ex tunc* at the statement, they're retroactive to reach the rule since its origin, declaring it unconstitutional since ever. When assigned *ex nunc*, the rule is unconstitutional from the declaration of unconstitutionality, so, there isn't retroactive effects to achieve legal relations prior to the declaration.

Then takes place a question: the declaration of unconstitutionality retroactively affects the final judgments, in which there was the application of the rule? To answer this question it is necessary to check whether the declaration of unconstitutionality of the law can affect a final decision.

It is known that the sentence should not be confused with the norm that applies, because the abstract rule departs from the norm applied in this case, with effect *inter partes*. The unconstitutionality of the law does not make the sentence - and therefore, the *res judicata* - automatically unconstitutional.

The legitimacy of the declaration of unconstitutionality with effect backdated over an act of the Judiciary coated by *res judicata* has been questioned, given the lack of legal provision for both. After all, the Constitution never had attributed the power to dismantle final judgements to the constitutionality control function. At this point, necessary to highlight the views of J. J. Gomes Canotilho on the subject:

^{****} Part of the doctrine defends the possibility that control of constitutionality is concrete and focused on the specific case of the plenary reserve clause, which is one exception to the general rule. However, this exception is subject to doctrinal divergence and will not be addressed in this study.

It should be noted that one thing is to control rules and another thing is to control court judgments. In other words: supervising the constitutionality of legal rules applied by the courts cannot to be confused with the review of the constitutionality of their own judicial decisions. The control of constitutionality is a normative control incident on norms, not on judgments applying the norms^{§§§§§}.

Logic indicates that the sentence applying norms that later are declared unconstitutional does not have a defect in the plane of existence or validity, but in its content - is what defends Eduardo Talamini^{*****}.

Gilmar Mendes adds that "because of the separation of planes of validity of the law and the concrete act, it follows that the acts performed with base on the unconstitutional law that no longer appear to be susceptible of revision are not affected by the declaration of unconstitutionality.^{†††††}" The Minister affirms that the decision can be attacked in Rescission Action, within the limitation period of two years, and through the impeachment compliance with judgment or motions to stay execution against public finance⁺⁺⁺⁺⁺.

Luiz Guilherme Marinoni^{§§§§§§§} believes that the decision is perfect (existing, valid and effective) because, in addition to having been legitimately issued, are operated preclusive effects of *res judicata* over the unconstitutionality argument. The author states that if the law was applied in that specific case, was because the magistrate understood it as constitutional, since all judges are performing judicial control on the law they intend to apply in this case (in reason of diffuse control).

The constitutional prevision of diffuse control imposes the duty of the judge to control the constitutional respect of a rule in a concrete case, before making its application. This constitutional obligation carries the presumption that the standard applied in this case was held constitutional by the judge in the previous control.

At the same time, the preclusive effects of *res judicata*^{*****} would mind in a presumption of keeping away a claim of unconstitutionality of the norm, in that it consists in the presumption that all claims that could have been made by the parties were repelled. The author argues that eventual claim of unconstitutionality can be deductively thought, ie, after

^{§§§§§} CANOTILHO, José Joaquim Gomes. **Direito constitucional e teoria da constituição**. 7. ed. Coimbra: Edições Almedina, 2003, p. 943.

^{*****} TALAMINI, Eduardo. **Coisa julgada e sua revisão**. São Paulo: Revista dos Tribunais, 2005, p. 415.

^{†††††} MENDES, Gilmar Ferreira. Coisa julgada inconstitucional: considerações sobre a declaração de nulidade da lei e as mudanças introduzidas pela Lei nº 11.232/2005. In: NASCIMENTO, Carlos Valder do; DELGADO, José Augusto (Org.). **Coisa julgada inconstitucional**. 2 ed. Belo Horizonte: Fórum, 2008. p. 99.

⁺⁺⁺⁺⁺ MENDES, 2008, p. 100-103.

^{§§§§§§§} MARINONI, Luiz Guilherme. **Coisa julgada inconstitucional**. São Paulo; Revista dos Tribunais, 2008, p. 19-39.

^{*****} Article 474 of the Code of Civil Procedure provides for the effective preclusiva of *res judicata*, according to which *res judicata* covers the deductible and deducted, or after final judgment are presumed alleged and repelled all possible formulations of the parties.

the final judgment, it is presumed that the part alleged the unconstitutionality of the norm and the judge departed this claim^{†††††††}.

For Nelson Nery Junior and Rosa Maria de Andrade, there are three forms of constitutional control of jurisdictional acts: ordinary appeal, extraordinary appeal and autonomous actions of challenge. Besides these methods, there is no need to speak of constitutional control of jurisdictional act of Judiciary^{†††††††}, ie, it is not possible to mitigate the *res judicata* by reason of subsequent judgment of unconstitutionality.

Aldo Ferreira da Silva Junior^{§§§§§§§} says that the decision is void, but not fully, which means that, despite its invalidity, it is required that the decision is properly terminated through appropriate procedural. According to the author, termination can only occur by reversal action (within the statute of limitations), stay of execution or challenge to court sentence to fulfill, and, in case of inability to use any of these methods, there is no way to deconstruct decision.

Important to mention that the Superior Court has precedent in that *res judicata* can not be suppressed by later declaration of unconstitutionality by the Supreme Court, under penalty of denying the diffuse control of constitutionality. This position is in line with the understanding Luiz Guilherme Marinoni, since it takes into account the diffuse control of constitutionality conducted by judges.

In contrast, Thereza Arruda Alvim Wambier and Jose Miguel Garcia Medina argue that the subsequent declaration of unconstitutionality of the norm implies the inexistence of sentence and of *res judicata*:

It doesn't seem to us that the rule declared unconstitutional by declaratory action of unconstitutionality should try to qualify as 'void' or 'voidable'. Being declared unconstitutional the rule, and having the decision effect *ex tunc*, we believe should be considered as if the law never existed. In fact, the positive legal system only 'accepts' norms compatible with the Federal Constitution. If the incompatibility between the norm and Federal Constitution has been evidenced only after the entry into force of the law, the decision recognizes that the law strictly never joined the positivised normative system, just apparently^{*****}.

They understand this way because article 27 of Law nº. 9868/99^{††††††††} expressly provides that, as a rule, the decision of unconstitutionality designs retroactively effects (*ex*

^{†††††††} MARINONI, 2008, p. 123.

^{†††††††} NERY JUNIOR, Nelson; ANDRADE NERY, Rosa Maria de. **Código de processo civil comentado e legislação extravagante**. 10. ed. São Paulo: Revista dos Tribunais, 2007, p. 686.

^{§§§§§§§} SILVA JUNIOR, Aldo Ferreira da. **Novas linhas da coisa julgada civil**. Campo Grande: Futura, 2009, p. 136-137.

^{*****} WAMBIER; MEDINA, 2003, p. 46.

^{††††††††} Art. 27. Ao declarar a inconstitucionalidade de lei ou ato normativo, e tendo em vista razões de segurança jurídica ou de excepcional interesse social, poderá o Supremo Tribunal Federal, por maioria de dois terços de seus membros, restringir os efeitos daquela declaração ou decidir que ela só tenha eficácia a partir de seu trânsito em julgado ou de outro momento que venha a ser fixado.

tunc)⁺⁺⁺⁺⁺⁺, because the declaration of unconstitutionality is retroactive and makes the sentence non-existent by legal impossibility of the request^{§§§§§§}. As it treats a case of inexistence, the authors propose the use of the declaratory action of juridic inexistence, without statute of limitations^{*****}.

It is worth mentioning that such positioning adopts the premise that the declaration of unconstitutionality of the norm reaches the court decision that applies it, without regard to the understanding of the doctrine⁺⁺⁺⁺⁺ that abstract norm should not be confused with concrete norm, ie, with the application of the rule to the concrete case by the judiciary.

Humberto Theodoro Júnior and Juliana Cordeiro Faria⁺⁺⁺⁺⁺ allege the nullity of the sentence, in reason of the *res judicata* be inferior to the Principle of Supremacy of the Constitution, what makes conclusion that doesn't exist any conflict of values:

It is strange, ab initio, assign minor relevance to the law compared to the sentence, when the unconstitutional norm is the target. A simple "law" could be invalidated, but nothing could be done against the final judgment? It doesn't seem reasonable this strange hierarchy of unconstitutionality. It is not because there is already a prior judicial pronouncement under the cloak of *res judicata* that this is immune to suffer the constitutionality control and the negative effect of the declared unconstitutional^{§§§§§§}.

The authors argue that the invalidity of the judgment may be recognized ex officio, anytime and in any case, with no statute of limitations or statutory limitation, and may be questioned by Rescission Action, declaratory action for invalidity or stays of execution, because the positive effect of *res judicata* is away for its unconstitutionality^{*****}.

However, it seems unreasonable the deconstitution of decision by declaratory action of nullity or inexistence if present assumptions procedural validity and existence of the process. Likewise, the non-imposition of statute of limitations for rescind the decision on the merits hurts the reasonableness, legality and legal certainty, because, as a rule, the institutions that serve to give legal certainty rely on legal provision for its non-incidence. So, the understanding that there is not statute of limitations for filing the declaratory action depends on express legal provision, otherwise, without it, there will be a violation of legal certainty.

⁺⁺⁺⁺⁺ WAMBIER; MEDINA, op. cit., p. 51.

^{§§§§§§} Since the Supreme Court decision makes express legal provision exists in the sense of denying the possibility of granting the request.

^{*****} WAMBIER; MEDINA, op. cit., p. 34.

⁺⁺⁺⁺⁺ As seen, Gilmar Mendes and JJ Gomes Canotilho argue that the declaration of unconstitutionality of the provision reaches only the norm in the abstract rather than the norm as applied in this case as there are differences between them.

⁺⁺⁺⁺⁺ THEODORO JÚNIOR; FARIA, 2008, p. 181.

^{§§§§§§} THEODORO JÚNIOR; FARIA, 2008, p. 180.

^{*****} Ibid., p. 188-189.

It is seen that the doctrine differs both in relation to the legal nature of the addiction of constitutionality as with the instruments able to rescind the decision containing it.

As seen, Articles 475-L, § 1, and 741, sole paragraph, of the Code of Civil Procedure bring the ability to invoke the vice of unconstitutionality by the enforcement challenge of the judgment and stay of execution, and until this moment the direct action of unconstitutionality that discusses the constitutionality of these norms or injunction granted by the Supreme Court was not judged.

Thus, with respect to the Principle of Presumption of Constitutionality, it is undeniable that the legal system brings hypothesis of termination of sentence after the final judgment in the case of unconstitutionality due to supervening binding judgment of the Supreme Court. Unless the judge to declare the unconstitutionality of diffuse control mentioned articles - for breach of *res judicata* or adopting understanding Luiz Guilherme Marinoni - the devices allow the termination of the decision on the merits and should be applied.

2.2. *A decision based on law that has already been declared unconstitutional by the Supreme Court*

In this case, the argument maintaining of the sentence consists in sanatorium effect of *res judicata*, consisting in power that has to remedy the defects of the process over which incides. The argument to the contrary is that the unconstitutionality is a irreparable defect, not likely to co-validation by substitutive effect of *res judicata*, so that the sentence is non-existent, invalid or ineffective depending on the current doctrinal adopted.

We must also mention that the magistrate who ruled on the basis of law has been declared unconstitutional^{†††††††††} disregarded the requirements of Article 28, p. single, Law 9868/1999^{‡‡‡‡‡‡‡‡‡}, authorizing the termination of the sentence through Rescission, based on Article 485, V, of the Code of Civil Procedure.

^{†††††††††} It is important to mention that the comments made in this topic also apply to cases in which the magistrate declares the unconstitutionality of the norm in difuse control, when there was already a declaration of the of the rule constitutionality in concentrated control by the Supreme Court.

^{‡‡‡‡‡‡‡‡‡} Art. 28. Dentro do prazo de dez dias após o trânsito em julgado da decisão, o Supremo Tribunal Federal fará publicar em seção especial do Diário da Justiça e do Diário Oficial da União a parte dispositiva do acórdão. Parágrafo único. A declaração de constitucionalidade ou de inconstitucionalidade, inclusive a interpretação conforme a Constituição e a declaração parcial de inconstitucionalidade sem redução de texto, têm eficácia contra todos e efeito vinculante em relação aos órgãos do Poder Judiciário e à Administração Pública federal, estadual e municipal.

According to Ivo Dantas^{§§§§§§§§§§}, the unconstitutional norm does not produce effects or generate obligations, so that the sentence that uses it no makes *res judicata*. Thereza Arruda Alvim Wambier and José Miguel Garcia Medina manifest themselves in the same sense in saying that these judgements "do not make *res judicata* because they were emitted in proceedings brought by the mere exercise of the right of petition and no by right of action, as there was not juridical possibility of the application"^{*****}.

Conversely, Eduardo Talamini^{††††††††††} argues that the lack of action does not generate juridical inexistence, and, entering the merit, unconstitutional norm generates the rejection of the application and not necessarily the lack of action. According to the author, the sentence exists, but it is unfair or wrong because there is a defect in its content and not an absence of assumptions of existence and validity. This is error in *judicando*, correctable by the mechanisms of termination provided for in law, namely the reversal action, the motions to stay execution, the objection to the execution of the judgment, among others^{††††††††††}.

As seen, one can not say that the sentence is non-existent due to the unconstitutionality if present the assumptions procedural existence to the process. In case of defect in the content of the judgement, able only to characterizes it as unjust, but not by itself, as invalid or non-existent, what makes conclusion that there is no suitability of rescission at any time or the use of declaratory action for invalidity or nonexistence.

Thus, it is admitted the termination by Rescission Action or, after the deadline of two years, through the implementation of embargoes against Treasury or the impugment to comply with sentence.

The logic imposes the possibility of termination by those means, because if the legislature allows the termination of the sentence when the declaration of unconstitutionality is after the sentence, would not let unsafe the defect when the sentence is even worse - when the unconstitutionality had already been declared and the magistrate was obliged by law to decide according to the judgment of the Supreme Court.

2.3 The decision declaring the unconstitutionality of a norm that is later declared constitutional by the Supreme Court

^{§§§§§§§§§§} DANTAS, Ivo. **Coisa julgada inconstitucional**: declaração judicial de inexistência. Revista Fórum Administrativo, maio 2002, p. 588.

^{*****} WAMBIER; MEDINA, 2003, p. 39.

^{††††††††††} TALAMINI, 2005, p. 415.

^{††††††††††} TALAMINI, 2005, p. 416.

This is the case in which the judge in his judgment of constitutionality declares the unconstitutionality of a norm and fails to apply it to this case, however, later, the norm is declared constitutional by the Supreme Court in concentrated control.

Eduardo Talamini^{§§§§§§§§§§} argues that the decision is void when there is violation in process development and unjust when the violation enters in the merits of the process, but on both are produced the *res judicata*, which authorizes termination for Rescission Action.

In turn, Thereza Arruda Alvim Wambier and Jose Miguel Garcia Medina^{*****} indicate the performance of Rescission Action in this case, because the erroneous application of the law is so grave as its not applying; at the same time, they deny the possibility of the use of stays of execution against the Treasury and the impugment to comply with sentence^{††††††††††}.

At this point, you need a criticism of expression "misapplication of the law." As seen previously, the judge is free to decide according to their beliefs and at the same time, the duty-power of diffuse constitutionality controlling of the rules. As well delineated by Luiz Guilherme Marinoni, the diffuse control of constitutionality made by the judge is legitimate, albeit in eventual dissonance, subsequently, with the future decision of the Supreme Court, because it configures the fulfillment of a constitutional duty.

Luiz Guilherme Marinoni^{††††††††††} says the situation is identical to that discussed in Section 2.1 of this study: when the judge declared the unconstitutionality of the norm, could not have foreseen the future positioning of the Supreme Court, and acted as his duty to make the power-control constitutionality of the standard, authorized and determined by the Federal Constitution, so, the judgment is perfect and can not be revised.

José Carlos Barbosa Moreira shares this understanding when he affirms that "it is inconceivable a bond that obliges a judicial organ to observe a judgement that has not been pronounced yet^{§§§§§§§§§§}."

The rationale being used here is the same as item 2.1 of this work: as determined by the Federal Constitution, the magistrate made his own constitutional control over standard which subsequently was controlled in concrete by the Supreme Court, with contrary statements resulting.

^{§§§§§§§§§§} Ibid., p. 420.

^{*****} WAMBIER; MEDINA. 2003, p. 54.

^{††††††††††} WAMBIER; Thereza Arruda Alvim; MEDINA, José Miguel Garcia. Meios de impugnação das decisões transitadas em julgado. In: NASCIMENTO, Carlos Valder do; DELGADO, José Augusto (Org.). **Coisa julgada inconstitucional**. 2. ed. Belo Horizonte: Fórum, 2008, p. 331.

^{††††††††††} MARINONI, 2008, p. 90.

^{§§§§§§§§§§} BARBOSA MOREIRA, José Carlos. **Direito aplicado II**. Rio de Janeiro: Forense, 2005. p. 239.

However, there is an undeniable possibility that a judicial sentence which presents constitutionality defect can produce *res judicata* effects (namely unconstitutional *res judicata*), and on the face the severity of the defect, several doctrinal discussions arose about whether or not to terminate the decision covered up by *res judicata*, which sets up the thesis of the relativization of *res judicata*.

Despite the existence of legal provisions allowing legal instruments for the flexibilization of *res judicata* - as the Rescission Action, the motions to stay execution against the Treasury and the impugment to the fulfillment of the sentence - part of the doctrine proposes the mitigation of *res judicata* beyond those instruments, suggesting the use of other means, for example, the declaratory action for invalidity and non-existence, and the exclusion of timing limitations. The thesis of the relativization of *res judicata* consists precisely in mitigating this constitutional guarantee through instruments not expressly provided for by law and by the deadlines provided by law.

Although the Brazilian doctrine does not present consensus regarding the assumptions and instruments relativization of *res judicata*, we can agree that the most intriguing and complex hypothesis is the unconstitutional *res judicata*, precisely because part of the doctrine understands that the defect of unconstitutionality is not subject to time limits or statute of limitations.

At this point, there are four main assumptions: a) the decision that applies rule is subsequently declared unconstitutional by the Supreme Court in constitutional concrete control; b) the decision declaring the unconstitutionality of a norm that is later recognized as constitutional by the Supreme Court in concrete control; c) the decision that applies or departs the rule in a manner contrary to what has already been decided by the Supreme Court in concrete control; d) the decision that violates a constitutional provision without decision of the Supreme Court in concrete control of constitutionality.

From there comes the discussion about the legal nature of addiction unconstitutional – that is, if the decision shows that it would be non-existent, invalid, unenforceable, or perfect – if there is possibility of termination and what instrument is appropriate for each situation. Discusses the conflict between legal certainty – for maintaining the final decision – and other constitutional principles and values.

The doctrine presents several arguments on this point, both in relation to the legal nature of defect as how to remedy the issue. Among theses, the most widespread are the unconstitutionality of that defect generates inexistence, nullity or unfairness decision and the opposite positioning that it does not present any defect after the *res judicata*.



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