

THE EFFICACY OF THE DECISIONS OF THE SUPREME FEDERAL COURT IN CONSTITUTIONAL REVIEW

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Abstract: In the current constitutionality control system prevailing in Brazil, decisions rendered incidentally to the verdict in a concrete case, which any court has competence to issue, coexist with a direct judgment, these being an exclusive attribution of the Supreme Federal Court. This Court, exercising its role as a guarantor of the Constitution, as defined by the very Magna Carta, represents not only a collegiate court inside the Judiciary structure, but also a true Constitutional Court. The objective of this paper is to analyze the effectiveness of the (un)constitutionality decisions rendered by the Supreme Federal Court, trying to establish, in principle, the differences between those which originate from direct constitutional control from the ones which originate from incidental control, while analyzing primarily the legislative and jurisprudential changes that indicate a tendency of convergence between both.

Keywords: Constitutionality Control - Erga Omnes Effectiveness - Binding Effect - Supreme Federal Court.

1. INTRODUCTION

This essay aims to debate the issue of the effectiveness of the decisions of the Supreme Federal Court on constitutional review,

questioning the common conception according to which only the decisions regarding direct and abstract control would be capable of exerting *erga omnes* effects, binding the rest of the Judiciary Branch and the Public Administration. Therefore, a first incursion in the topics of *erga omnes* effectiveness and the binding effects will be made, studying the significance and main characteristics of the institutes. Then, an analysis regarding legal conformations that have been responsible for an enlargement of the effectiveness of the Supreme Federal Court decisions, even on incidental constitutional review, shall be made. At last, the jurisprudential evolution of the Court and the eventual occurrence of a constitutional mutation regarding the themes herewithin will be addressed.

The difficulty in the dogmatic handling of the Supreme Federal Court decisions comes from the fact that Brazil's Supreme Court is not purely a Constitutional Court, but also a collegiate court within the Judiciary¹. In this manner, not only is it imbued of jurisdiction to decide questions that are strictly constitutional in nature, in a direct manner, by means of a Direct Unconstitutionality Suit, a Constitutionality Declaration Suit or a Noncompliance of Fundamental Precept Argumentation, it also decides appeals, as an extraordinary instance of judgement.

Within the same system of constitutional overview, then, coexist decisions by a same Court in abstract control – primarily – and in factual situations, incidentally. The features and effects produced by the two are, at first, essentially distinct; however, as will be demonstrated, there is a tendency to approximate both, stemming from, mainly, the institutional role of the Supreme Federal Court as the guardian of the Constitution.

2. THE EFFECTIVENESS OF THE DECISIONS OF THE SUPREME FEDERAL COURT IN DIRECT CONTROL

The binding effect and the *erga omnes* effectiveness of the rulings of the Supreme Federal Court in direct constitutional control, nowadays, are not disputed. They originate, in truth, from the Constitution itself, in the form of its Article 102, §2, and from the infra-constitutional laws, more specifically Law nº 9,868/99, which disciplines the Direct Unconstitutionality Suit.

Article 102, §2 of the Federal Constitution states, in free translation: “*the definitive merit awards rendered by the Supreme Federal Court, in Direct Unconstitutionality Suits and in Constitutionality Declaratory*

1 Cf. ZAVASCKI, Teori Albino. “It can be seen that the Supreme Federal Court is the highest collegiate court of the Judiciary and the Court of the Constitution, resolving, in original competence or in appeals, the demands in which an offense to a constitutional provision is alleged.” *Eficácia das Sentenças na Jurisdição Constitucional*. São Paulo: Revista dos Tribunais, 2001. Pág. 16.

Suits shall have erga omnes effectiveness and be binding to the Judiciary and the Public Administration, in federal, state and municipal spheres". Article 28, paragraph, of Law n° 9.868/99, in turn, states, in a slightly different manner, that "the declaration of constitutionality or unconstitutionality, including the interpretation in accordance to the Constitution and the partial declaration of constitutionality without a text reduction have erga omnes effectiveness and binding effects to all the Judiciary and the Public Administration, be it federal, state, or municipal".

Here, two digressions can be made, one of them historical, and another dogmatic. Firstly, this situation of unanimity regarding the efficacy of the decisions of the Supreme Federal Court in direct constitutional control has not always been the case in our midst. Very much the contrary, the question has been object of great discussion divergences in courts and doctrine.² Secondly, even if today there are some difficulties that stem from the very formulation found by the ordinary lawmaker, in Law 9869 and by the constitutional reformer lawmaker, in Article 102, paragraph 2, of the Federal Constitution.

Taking the historical aspect as the starting point. The current wording of Article 102, paragraph 2, of the Federal Constitution originated from the Constitutional Amendment n° 45, from December 8, 2004. Before, the Constitution had an express provision regarding the effectiveness of the merits awards of the Supreme Federal Court only for the Constitutionality Declaratory Suits, that were introduced by the Constitutional Amendment n° 3, dated March 17, 1993. The previous wording stated that *"the definitive decisions regarding the merits, rendered by the Supreme Federal Court, on the Constitutionality Declaratory Suits regarding law or federal normative act, shall produce erga omnes effectiveness and binding effects, in regards to the Judiciary and the Executive"*.

The motive behind the inclusion of only the Constitutionality Declaratory Suit was clear. If the main objective of the Direct Unconstitutionality Suit is to declare the unconstitutionality of a law or normative act, and, with this, eject it from the legal system, the very opposite is true for the Constitutionality Declaratory Suit. The intention is not to negate validity and applicability to a norm, but, in contrary, to certify its conformity with the Magna Carta. However, this measure of attesting the constitutionality of norms does not, by itself, produce a material effect, since the law does not depend of any judicial declaration for its validity. In other words, the declaration of constitutionality does

2 At least in relation to the binding effect, as shall be demonstrated; it is important to note that the *erga omnes* efficacy of these decisions has already been recognized in previous understanding of the Supreme Federal Court itself, as is stated by MORAES, Alexandre de, in: Direito Constitucional. 28ª edição. São Paulo: Atlas, 2012. Pág.790.

not cause a substantial modification in the questioned norm's statute: the norm was valid before, and will continue as such.

However, if no alteration derives from the declaration of constitutionality by the Supreme Federal Court, then what would be the meaning of this measure? This is where the necessity of an express provision for these effects is made clear, since they are not exactly a logical consequence of the confirmation of constitutionality but procedural and institutional consequences desired and conferred for by the lawmaker³. What was essentially expected was that a law or normative act that had already passed through the Supreme Federal Court oversight could not be declared unconstitutional by lower instances judges or other tribunals. What was to be guaranteed by the *erga omnes* effectiveness and the binding effects was the observance for the decision of the Supreme Court on the Constitutionality Declaratory Suit.

Regarding the Direct Unconstitutionality Suit, the situation was less problematic, for the simple reason that a law declared unconstitutional by the Supreme Court was removed from the legal system, impeding its applicability by the lower courts. In this manner, there was no necessity for this *erga omnes* effect to be expressly mentioned, since it originates from the material modification occurred in the normative system. Being confronted with an objective procedure, in which there are no parties nor a subjacent factual dispute, the effect of the Supreme Federal Court decision was not to determine the inapplicability of a law for a specific situation, but its invalidity for the regulation of any situation or legal relationship that might come to be.

The precedents of the Supreme Federal Court itself in relation to the *erga omnes* effects of the unconstitutionality decision in a direct suit were undisputed even when the constitutional wording concerned only the Constitutionality Declaratory Suit⁴. Obviously, if the declaration of

3 "From a strictly constitutional point of view, the general efficacy or the *erga omnes* efficacy impedes the question from being submitted once more by the Supreme Federal Court. Therefore, there is no *qualitative change* of the legal status. While the declaration of nullity means the repealing of the law, the declaration of unconstitutionality has no analogous effect. (...) It is, then, certain that once a norm has been declared constitutional by the Supreme Court, the Judiciary other courts have to follow suit, since the question is already decided by the Supreme Federal Court." MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet; COELHO, Inocência Mártires. Curso de Direito Constitucional. 2ª edição. São Paulo: Saraiva, 2008. p. 1275-1276. Free translation.

4 Is what can be understood from the following case law, from 1993, transcript in free translation: "As we adopt a mixed judicial unconstitutionality control system, and if an unconstitutionality is recognized, in the factual case, by the Supreme Federal Court, its efficacy limits itself to the parties in the dispute, being possible for the Senate to suspend the execution of a law declared unconstitutional by decision of the Supreme Federal Court (Article 52, X, of the Constitution). Regarding the declaration of unconstitutionality by means of Direct Unconstitutionality

unconstitutionality in abstract control did not have general efficacy it would be useless, since it would not act directly upon any real situation, nor it would be mandatory for the resolution of any future cases.

On the other hand, the same cannot be said about the binding effects. The absence of an expressed constitutional prevision about its existence on the decisions given in Direct Unconstitutionality Suits made this doubt linger on for quite some time. Undeniably, these decisions possessed *erga omnes* effects, as mentioned earlier, stemming from the very exclusion of the unconstitutional norm⁵. Also undeniable that the decisions on merits in a Constitutionality Declaratory Suit had effects towards all, as well a binding effects, as per the Constitutional Amendment n° 3. Certainty regarding the binding effect in the Direct Unconstitutionality Suits came, however, only with Constitutional Amendment n° 45, putting into law the already established views of doctrine and jurisprudence.

Even before this amendment, which determined the current wording of Article 102, paragraph 2, of the Federal Constitution, Law n° 9868/99 had already extended the binding effect to the decisions given in Direct Unconstitutionality Suits, in accordance to its Article 28, paragraph. But this was not enough to cease all discussion regarding the issue, for the question of binding effects of decision rendered by infra-constitutional courts remained open. Also on the order of the day was clarifying if the binding effects, just as the *erga omnes* efficacy, was a logical consequence of the declaration of unconstitutionality model in abstract review. In positive case, the provision by law would be a mere expression of something that, in truth, would be intrinsic to the system, inexistent any irregularity. In negative, the attribution of the binding effectiveness could only be taken into force by the same means which were in the Constitutionality Declaratory Suit, in other words, by a Constitutional Amendment.

This discussion was brought to the plenary of the Supreme Federal Court by occasion of the Interlocutory Appeal Under Court Regulations (Agravo Regimental) in the Complaint (Reclamação) n° 1880, reported by Justice Marício Corrêa⁶. What was discussed was the suitability of the Complaint filed to preserve the authority of the decision of the Supreme Federal Court rendered in a Direct Unconstitutionality Suit. Admitting the Complaint as being an appropriate measure for such would be the same as accepting the existence of a binding effect of

Suit, the efficacy of such a decision is *erga omnes* and happens, observing past experience, with the decision of the Court becoming final". Justice Moreira Alves, opinion in the Direct Unconstitutionality Suit n° 221, Plenary of the Court, D.J., 22-10-1993, *RTJ* 151/331-355.

5 In this sense: FERNANDES, André Dias. *Eficácia das Decisões do STF em ADIN e ADC*. Salvador: Editora Juspodvium, 2009. Pág. 158-160.

6 D.J., 19/03/2004.

these decisions, and the constitutionality of Article 28, paragraph, of Law n° 9868/99, since the possibility of utilizing a Complaint to discuss the non-compliance to a decision of the Supreme Court is exactly the main practical consequence of the binding effect.

This conclusion had already been reached by Justice Moreira Alves in the ruling of the Constitutionality Declaratory Suit n° 1, when he analyzed the new institute in comparison with the then existing review instruments. The following excerpt deserves to be transcribed, for its lucidity and clarity:

It is a plus in relation to the Direct Unconstitutionality Suit, thanks to which the new instrument of constitutionality control receives the necessary efficacy to deal with the problem – as before highlighted – giving reason for its creation. If the erga omnes efficacy that the decisions on the merits by the Court also possess gives them the same efficacy as the merits awards in the Direct Unconstitutionality Suits (...), from the binding effect results:

a) if the remainder of the Judiciary, in concrete cases under their judgment, do not respect the decision given in this suit, the damaged party can utilize the Complaint to request the Supreme Federal Court to guarantee the decision's authority; (...).⁷ (free translation)

Being established that the applicability of the Complaint to the Supreme Federal Court stems from the binding effect to its decision, let us see what was decided in the Interlocutory Appeal in the Complaint n° 1880. This suit was filed by the Turmalina municipality, under the premise that the Supreme Federal Court decision in the Direct Unconstitutionality Suit n° 1662⁸ had been disregarded by the President of the Regional Labor Tribunal of the 15th Region, who determined the sequester of public assets for the payment of writs of government debts arisen from labor claims.

Two questions were put forward incidentally to the merits of this Complaint: if Article 28, paragraph, of Law n° 9868/99 was

⁷ D.J., 16/06/1995.

⁸ In this case, the plaintiffs argued for the unconstitutionality of the Normative Instruction. 11/97, approved by the Resolution 67 of the Special Judging Panel of the Superior Labor Tribunal, which meant to standardize the procedures of the collection suits against the federal, states and municipal Public Treasuries, in labor courts.

constitutional; and, overcome this first topic, if the Municipality of Turmalina had legitimacy to file this suit, since it was not a party to the Direct Unconstitutionality Suit nº 1662. The analysis of this second question does not concern this essay, and, as such, only the first shall be discussed.

The plenary of the Supreme Federal Court decided, by majority, for the constitutionality of the legal provision that extended to the decisions given in Direct Unconstitutionality Suits the binding effect already conferred by the Constitution to the Constitutionality Declaratory Suit. The leading vote was the rapporteur's, Justice Maurício Corrêa, who understood there to be no grounds for a differentiation between the effects of the decisions of the Supreme Court in abstract review only by means of the instrument, the procedural vehicle, used to address the Court. In the words of the rapporteur:

Just as the Federal Public Prosecutor's Office, I understand for the possibility of harmonic coexistence between the legal disposition in question and the current constitutional order. The finding that the decision of this Court in the Constitutionality Declaratory Suit, to which the Constitution of 1988 expressly conferred binding effects (Federal Constitution, Article 102, paragraph 2), has, in essence, the same nature of a decision given in a Direct Unconstitutionality Suit. Both produce the same practical consequence, substantially differentiating between themselves for the request, being a positive order in the first and a negative in the second. (free translation).

The same reasoning was adopted by, amongst others, Justices Nelson Jobim and Gilmar Mendes, the latter saying he “*accepts the idea that a declaratory suit configures a Direct Unconstitutionality Suit, upside-down, both of them having double, ambivalent, characteristics, being difficult to admit that decisions rendered in Direct Unconstitutionality Suits having different effects or consequences from those recognized for the declaratory suit*”. However, the understanding that both suits are practically identical was not shared by all the Justices, having been, in fact, bitterly resisted by those who voted for the unconstitutionality of Article 28, paragraph, of Law nº 9868/99, specifically Justices Moreira Alves, Ilmar Galvão and Marco Aurélio.

In few and objective words, Justice Moreira Alves made clear that, in his understanding, the impossibility of the applicability of the binding effect through infra-constitutional means originated from the

principle of separation of powers. Only the constitutional lawmaker could give this new extent to the decisions of one of the powers over the rest, as was the case with the Constitutionality Declaratory Suit. Moreover, he made sure to highlight that there was no identity between the two suits, affirming that “*the declaratory suit is different from the direct suit for its function originating from the restrictive scope of its object – federal laws and acts – and its active legitimated parties: federal authorities and agencies. Its reason to be it different, and, in this manner, an analogical interpretation being impossible to appl.*”.

This debate, as already mentioned, was silenced by the passing of the Constitutional Amendment n° 45, which gave Article 102, paragraph 2, of the Federal Constitution this wording:

The final merits decisions given by the Supreme Federal Court in Direct Unconstitutionality Suits and in Constitutionality Declaratory Suits shall have erga omnes efficacy and binding effects to the remainder of the Judiciary and the direct and indirect, federal, state and municipal Public Administration. (free translation)

Nowadays, there is no more discussion regarding the constitutionality of Article 28, paragraph, of Law n° 9868/99, since the binding effect of the Supreme Federal Court decisions in Direct Unconstitutionality Suits is provisioned for in the Constitution. Nevertheless, doubts in relation to the meaning of these effects persist, since the Federal Constitution or any federal law never single out what exactly the effectiveness towards all and the binding effect are. At this point, we wrap up the historical incursion, entering now into the dogmatic dissent mentioned at the start of this paper.

As for the definition of *erga omnes* efficacy, there is not much left to debate. The doctrine is unanimous in the sense that “effectiveness towards all” means that Supreme Federal Court decisions awarded in abstract constitutional review are valid for any and all present or future cases involving the same constitutional question, not only for a determined, specific case (or, as is commonly said, the effects are not merely *inter partes*). This, because, technically, the abstract constitutional control does not address a factual, concrete question, and does not have parties to it, at least not in the traditional sense, attributed by the procedural law doctrine⁹.

9 According to André Dias Fernandes, “the affirmation that the objective constitutionality control procedure is a ‘procedure without parties’, at least in the technical-procedural sense, since there is no request regarding *subjective* interests, is commonplace”. Continues the author, arguing that he disagrees with this understanding since what is being observed is an *objective*

So, if the proceedings lack a factual conflict and parts, there would be no reason to affirm the validity of the conclusion there found in a purely concrete case situation, as normally occurs in the incidental constitutional control. The decision of the Supreme Court in a Direct Unconstitutionality Suit and in a Constitutionality Declaratory Suit shall produce effects in a general scope, which will be opposable against all who resist such decisions, private or public persons, and must be observed by all Brazil's judges, in every judicial instance.

Here, two commentaries are relevant. First, it is not only the decision for the unconstitutionality that is capable of producing *erga omnes* effects. Also in utilizing other techniques of constitutional review, such as constitutional interpretation and declaration of partial nullity without wording reduction, the Supreme Federal Court issues *erga omnes* decision. That goes to say, even when the Court limits itself to declare the constitutionality of the contested norm, *provided that* a specific interpretation is adopted, or even when it declares the unconstitutionality of a determined application of a norm, that conclusion will need to be adopted also by all judges that deal with the same *questio juris*.

If a reasonable doubt regarding this issue existed before Law nº 9868/99, its Article 28, paragraph, was sufficient to remedy it. Once more, the wording of the mentioned article: "the declarations of constitutionality or unconstitutionality, *including the interpretation according to the Constitution and the partial declaration of unconstitutionality without reduction of the wording*, have *erga omnes* effectiveness and binding effects, in relation to the Judiciary Branch and the Public Administration, be it federal, state, or municipal". This rule came to clarify that a specific interpretation given by the Supreme Federal Court to a legal provision, contested in abstract review, also has the role of obligating other instances of judgement to its observance.

Second, when discussing constitutional control by direct means, one cannot forget an instrument not yet mentioned here: the Noncompliance of Fundamental Precept Argumentation. This suit, that, just as the Direct Constitutionality Suit and the Constitutionality Declaratory Suit, directly brings to the appreciation of the Highest Court a theoretical constitutional question was regulated by Law nº 9882/99, in a very similar manner to Law nº 9868/99. Regarding what is relevant to this paper, Article 10, paragraph 3, is noteworthy. It establishes that, also for decisions given in the Noncompliance Argumentation, there

demand, and that the legitimized for action as well as the authorities who enacted the act in question can perfectly be understood as parties. Op. cit., p. 156-158. Regarding the discussion over the existence or not of parties and the contradictory in na objective procedure: DUTRA, Carlos Roberto de Alckmin. Controle Abstrato de Constitucionalidade: análise dos princípios processuais aplicáveis. São Paulo: Saraiva, 2012. p.. 198-228.

exists the *erga omnes* efficacy and the binding effect: “*The decision shall be effective against all and the binding effect relating to all other bodies of the Administration*”.

With the introduction of yet another instrument in Brazilian constitutionality control system, with the expressed guarantee that decisions rendered on it shall also produce *erga omnes* effects, the Supreme Federal Court attains an even more notable institutional position. Suffice to say that, with the Noncompliance of Fundamental Precept Argumentation, no normative act escapes the possibility of review by direct means, being worthy of citation the relevant examples of the municipal law and the law passed before the coming into force of the Federal Constitution of 1988, who are not in its Article 102, I, “a”.

The definition of the binding effect, however, generates more controversies. Contrary to the *erga omnes* efficacy, immediately recognized by the courts as a consequence of the *res judicata* resulting from an abstract proceeding¹⁰, the binding effect only surfaced as an important factor with the enactment of the Constitutional Amendment n° 3, from 1993, and the creation of the Constitutionality Declaratory Suit. From this point on, only a small portion of the experts analyzed this question, noticing the difficulties of comprehension of this new institute, to which no infra-constitutional regulation was dedicated.

In general lines, it is understood that two are the main results of the binding effect of the Supreme Federal Court decisions in abstract review: (a) the mandatory observance, by the rest of the Judiciary and the Public Administration, direct and indirect, of the *ratio decidendi* of the Supreme Court decisions, and not only its provision, that would already be covered by the *res judicata*; and (b) the possibility of holding whomever refuses to comply, without just reason, with the decision, liable, by civil or administrative means.

The obligatoriness of the observance of determinant motives of the decision gives an interesting significance to the binding effect. While the *res judicata* makes the provision of the decision immutable and mandatory, the binding effect would be responsible for imposing the compliance to the grounds of the decision, the logic that lead to the specific conclusion, that is, of a sensibly larger part of the decision. The practical consequence deriving from this is that all the bodies subjectively bound to the decision of the Supreme Federal Court (in the terms of Article 102, paragraph 2, of the Federal Constitution, the rest of the Judiciary and the direct and indirect Public Administration, federal, state or municipal) would be not only prohibited from applying a law or normative act deemed unconstitutional, but also of enacting new act in the same vein. In relation to this, the lucid comments of

10 See. note 4, *supra*.

Roger Stiefelmann Leal:

Impossible, then, to interpret that the binding effect implicates the imposition of the decision's provision against all. The binding characteristic of the provision, being an effect extracted from the res judicata, cannot, logically, correspond to the contents of the binding efficacy. (...)

As such, remains the necessity of comprehending the binding effect as an institute meant to make mandatory other parts of the decision than the provision to the governmental bodies mentioned in the normative wording. Then, its object transcends the decimum in strict sense, reaching its determinant arguments, the subjacent ratio decidendi. From the binding to the motives of the decision originates, as can be seen in other countries that adopt the binding effect, the prohibition of its recipients to reproduce in substance an act that was declared unconstitutional, upholding acts of similar content and of adopting understanding that is different from the one utilized by the Supreme Federal Court in direct constitutionality control.¹¹ (free translation)

This understanding, however, is not unanimous. Elival da Silva Ramos defends that the notion of bindingness to motives substantiating a judicial decision escapes from the scope of the constitutionality control model developed in Brazil, which always based itself in the idea of the mandatory character pertaining only to the provision of the decisions. The particular contents of the binding effect clause, then, would be another: the establishment of a *functional* obligation to comply with and give effectiveness to the decisions of the Supreme Federal Court in

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LEAL, Roger Stiefelmann. *O Efeito Vinculante na Jurisdição Constitucional*. São Paulo: Saraiva, 2006. p. 149-150. In the same sense: MENDES, Gilmar Ferreira, et. alli. "In these terms, it is made clear that the binding effect of the decision is not restricted to the provision, but covers the very determinant arguments. As can be seen, with the *binding effect* what was wanted was to grant an additional efficacy to the decisions of the Supreme Federal Court, giving them transcendent reach. The State bodies covered by the binding effect must observe, then, not only the provision but also the abstract norms that can be extracted from the decision, that is, that a specific situation, conduct or regulation – and not only the object of the jurisdictional pronouncement – is constitutional or unconstitutional and must, for this, be preserved or eliminated." Op. cit., p. 1285. Free translation.

abstract review and, consequently, holding any who does not, liable. In the words of the author:

Thus, we propose another understanding, that, does not remit to the motives of the control decisions, which would misrepresent, with unpredictable consequences, our constitutional overseeing system in direct control. At the same time, this understanding does not attribute to the expression “binding effect” merely a meaning of reinforcing the erga omnes res judicata effects.

If the addition of the binding efficacy had as a goal to oppose the unjustified resistance of the first degree judges to comply with the decision of abstract control, event when these are imbued with ample subjective efficacy, having erga omnes effects, we can conclude for the existence of a functional obligation of respect to the decision, in similar terms to the duty of the judges and administrative authorities to obey the legislator’s commands. (...) In face of the bestowment of binding effects to the final merits decisions of the Supreme Federal Court in direct constitutionality control, are the remainder of the Judiciary and administrative agencies and authorities, in due performance of their attributions, bound directly to the unconstitutionality or constitutionality declarations given by the Supreme Court, under civil or criminal penalties in case of unjustified opposition to the awards.¹²

We consider the understanding put forward by Roger Stiefelmann Leal to be correct, which would not, in truth, oppose the possibility of accountability of the noncomplying individuals, but complements it with a greater amplitude of the objective reach of the binding effects.¹³ It is certain, however, that, for the complete effectuation of the understanding that the binding to the motives of the opinions, even when they reach the same conclusions, impedes a clear identification of the *ratio decidendi* of a specific judgment, since the publication of the decisions in the official press still limits itself to the provision.

12 RAMOS, Elival da Silva. Controle de Constitucionalidade no Brasil: perspectivas de evolução. São Paulo: Saraiva, 2010. p. 294.

13 According to. LEAL, Roger Stiefellman, op. cit., p. 190-191.

3. THE EFFECTIVENESS OF THE DECISIONS OF THE SUPREME FEDERAL COURT IN INCIDENTAL CONTROL

Everything that was said until now relates to the constitutionality review by direct means, in which the Supreme Federal Court, in the judgment of an abstract procedure, without parties, analyzing the compatibility of an infraconstitutional law with the Constitution. The instruments for this control, as seen, are capable of producing decisions that have *erga omnes* efficacy and binding effect, as currently expressed in law (Article 28, paragraph, of Law 9869/00, in the Direct Unconstitutionality Suit and the Constitutionality Declaratory Suit; Article 10, paragraph 3, of law 9882/99 in the Fundamental Precept Noncompliance Argumentation) and in the Constitution itself (Article 102, paragraph 2).

Of no lesser importance is the control realized by way of incidental review. Between us, this kind of review is even quite a lot older, dating back to the First Brazilian Republic. Accomplished by diffuse means, the incidental control allows magistrates in all jurisdiction instances to judge the constitutionality of norms pertinent to a concrete case, even going as far as to declare that the laws in discussion are in inadequacy to the principles of the Constitution, deciding not to apply them.

The incidental review has essentially different characteristics from the direct review. Firstly, the declaration of constitutionality or unconstitutionality, or the interpretation in conformity with the Constitution, does not represent the main request of the dispute. As its very name suggests, the constitutionality control is made only *incidentally* to the resolution of a factual dispute. Secondly, the decision regarding the constitutionality or unconstitutionality of a law rendered in incidental review does not give rise to any modification in the legal system. That is, it does not have the power to, for example, remove from the legal system a law deemed unconstitutional. The reason for this is that what is decided is merely the impossibility for that norm to regulate the particular, concrete, case in discussion, and, consequently, not its annulment with broad reach, but only the inapplicability to that determined dispute.

From these two characteristics, derive directly two other. As the analysis of a law or normative act before the Constitution can only be made to solve a specific dispute, the decision will only be applicable to this very dispute. The effectiveness of the declaration of constitutionality or unconstitutionality, then, shall have *inter partes* efficacy, and shall not, initially, obligate courts to judge in the same way in future cases that bring similar constitutional questions. The second consequence is that there is no binding effect, for the exact same reasons that indicate the non-existence of *erga omnes* efficacy in incidental control – that

is, there could be no binding of the rest of the Judiciary and Public Administration to the determinant motivation of a decision that does not even have general efficacy, being limited to a specific concrete case.

But this consideration, despite being technically correct, being applicable in its entirety to the declaration of (un)constitutionality made by the lower courts, has been relativized when the court in question is a collegiate court, and, especially, the Supreme Federal Court. As shall be seen, procedural mechanisms were put in place to guarantee the standardization of precedents, and these mechanisms end up conferring a greater efficacy to decisions rendered incidentally, which, then, escape the narrow scope of the individual dispute, serving as a paradigm to future cases. This standardization, moreover, also serves to guarantee the equality and the legal certainty, as highlighted by Teori Albino Zavascki, who mentions the peculiar characteristics of the awards involving the judgement of the validity of a law in view of the Constitution:

As is known, the decisions given in concrete cases have a binding force limited to the parties. (...) However, if, to reach the conclusion the judge has made a judgment – positive or negative – regarding the validity of a norm, this decision gains juridically differentiated outlines, because of the constitutional principles it may involve. This, because the normative precepts have, by nature, a characteristic of generality, that is, they do not regulate specific concrete cases, but establish an abstract command applicable to an indefinite number of situations. (...) This peculiarity is especially relevant is considered together with the principle of equality in the eyes of the law, from which can be extracted primordially the necessity of giving an equal jurisdictional treatment for equal situations. It is also important considering the principle of legal certainty, which would be fatally compromised if the same law could be ruled constitutional in one case and unconstitutional in others, depending on the judge.¹⁴ (free translation)

The relativization of the purely *inter partes* effectiveness of the decision involving a judgement regarding constitutionality passed by the Supreme Federal Court has a second reasoning, just as relevant as

¹⁴ ZAVASCKI, Teori Albino, op. cit., p. 25-26.

(or even more than) the standardization of precedents. The role of the Court goes much beyond any other collegiate court in the Judiciary structure, as to it converge all the disputes of the lower courts. The role of constitutional guardian, assigned to it by the very Constitution (Article 102, *caput*), indicated that its judgements should have a greater importance than those by the lower courts, who, even though also being guardians of the laws and the Constitution, do not have the final say in this matter.

Some of the most important changes in this particular were introduced by Law nº 9756/98, which altered the 1973 Civil Procedure Code¹⁵: the introduction of Article 481 (Article 494 of the New Civil Procedure Code), which deals with the unconstitutionality argumentation incident, and the changes on Article 557 (Article 932, IV of the New Civil Procedure Code), regarding the monocratic judgement of appeals in the tribunals.

The unconstitutionality argumentation incident regulates the so called plenary reserve clause, enacted by Article 97 of the Federal Constitution, according to which “*only by the vote of the absolute majority of its members or of the members of the respective special judging panel will the tribunals be able to declare the unconstitutionality of a law or normative act of the Public Power*”. In truth, this is an old prudence rule adopted by Brazilian judges practice, much alike to what is done in the United States, pioneer nation in the incidental and diffuse constitutional review¹⁶. The necessity for the decision to be given by all the tribunal (be it the plenary or a special judging panel), and not only by its fractioned judging panels also relates to the presumption of constitutionality law enjoy, according to the lessons of Justice Moreira Alves:

In the diffuse constitutionality control system, the principle of constitutionality presumption of normative acts is, undoubtedly, applicable, with our Constitutions having consecrated such a precept, with the rule that de unconstitutionality declaration can only be made the courts with the votes of the absolute majority of their members by the members of their respective special judging panel (in this sense,

15 It is important to mention that Brazil's 1973 Civil Procedure Code has been repealed, with a new Procedure Code taking its place, in March 2016. All of the citations in the present paper remit to the previous procedural law.

16 AMARAL JÚNIOR, José Levi Mello do. Incidente de Arguição de Inconstitucionalidade: comentários ao art. 97 da Constituição e aos arts. 480 a 482 do Código de Processo Civil. São Paulo: Editora Revista dos Tribunais, 2002. p. 19-25

*still now, Article 97 of the Constitution).*¹⁷

The regulation of this clause, as said, came with Articles 480 to 482 of the Civil Procedure Code (Articles 948 to 950 of the New Civil Procedure Code). According to these articles, the fractioned judging panel of a court that encounters an argumentation of unconstitutionality that is indispensable for the resolution of the dispute must suspend the proceeding and establish an incident before the plenary of the court, or, if necessary, the special judging panel (Article 93, XI, of the Federal Constitution: “*in the tribunals with more than twenty five judges, a special judging panel can be constituted, with at least eleven members, and with the maximum number of twenty five members, to exercise administrative and jurisdictional attributions delegated from the competency of the plenary of the tribunal, half the spots being filled by seniority and the other half elected by the plenary*”).

Therefore, in the tribunals, at first glance, only the plenary or the special judging panel have the competency to judge law or normative act as unconstitutional. The fractioned panels can only accept the decision rendered, and apply it to the concrete dispute. What really ends up occurring is a “split of the competency from the functional point of view”¹⁸, once the constitutional question, put forward preliminarily, and the merits of the dispute shall be decided by distinct judgement bodies.

There are, however, two cases in which the establishment of an incident of unconstitutionality argumentation is not required – the focal point for this paper. Both are provided for in Article 481, paragraph, of the Civil Procedure Code, as follows: “*the fractioned judging panels of the tribunals shall not submit to the plenary or to the special judging panel the unconstitutionality argumentation when there is already a decision of those of from the Supreme Federal Court about the question put*”. As such, (i) when the incident has already been established in the same tribunal about the question in analysis, or (ii) when the Supreme Federal Court has already decided about the issue, *even in incidental control*, the fractioned panel is not required to establish a new incident, without breaching the plenary reserve clause.

Initially, in relation to case (i), this provision can be seen as a practice towards procedural celerity and economy, since a new procedure would be unnecessary and costly, only to reach the same conclusion already attained. Another explanation, as already mentioned, is the standardization of precedents. Utilizing a decision of the plenary of the special judging panel as a paradigm, the fractioned panels do

17 Justice-rapporteur Moreira Alves’ opinion, in STF – Pleno – ADI nº 97-7/RO – Questão de Ordem – Repertório IOB de Jurisprudência, nº 10/90 – p. 144-147.

18 VELOSO, Zeno. Controle Jurisdicional de Constitucionalidade. Belém: Cejup, 1999. Pág. 50

not suffer the risk of passing erratic judgements, that could represent disrespect for the equality and legal certainty, since they will be adopting an already well-established understanding in that particular tribunal.

Regarding case (ii), besides the question of equal judgement and legal certainty, one must take into consideration the special characteristics of the decisions of the Supreme Federal Court in matters of constitutional review, which come from its institutional role as guardian of the Constitution. The award given by the Supreme Court is not merely the result of a judgement by the highest court in Brazil's Judiciary, but the very understanding of the Constitutional Court in a determined issue. This understanding, even expressed by means of incidental control, cannot have the same effects as the decisions given by lower courts, that is, mere *inter partes* efficacy. The reflex effects of the ruling of the Constitutional Court indicate a tendency for them to have an effect progressively closer to that of the *erga omnes* efficacy, typical of the direct review.

One of these reflexes is exactly the possibility of direct application of the understanding held the Supreme Court by the fractioned panels of the remainder of the tribunals, through Article 481, paragraph, of the Civil Procedure Code, exempt from the incident mentioned before. This had been already the usual approach, even before the introduction of this law, in 1998. The question had reached the Supreme Court by 1995, when the exemption from the incident had been considered legitimate, even without expressed provision in law. In this regard, Justice Marco Aurélio's opinion, as the rapporteur, on the Interlocutory Appeal by Court Regulations in the Interlocutory Appeal nº 168149, dated 26/06/1995:

It is certain that Article 97 of the Constitution provides that only with the vote by the absolute majority of its members or by the members of the respective special judging panel, can the tribunals declare the unconstitutionality of a law or normative act of the Public Power. (...) The judging panel did not transfer the judgment to the plenary of the Court, as the Supreme Federal Court has understood for the unconstitutionality of normative act in question. Where can the reason to be of the constitutional rule be found if the bureaucratic understanding of the Tax Authorities prevails: What shall ever be of the principles of celerity and procedural economy? Even more than that, what importance has the overseeing of the Supreme Court? What was decided by the lower court respects the teleological interpretation

of Article 97 of the Constitution, not deserving of any change. The incident of unconstitutionality, sent to the Highest Panel of the lower court has become unnecessary, being prevalent the rationalization of juridical labor, since the Highest Guardian of the Constitution, the Supreme Court, has decided, even in diffuse control, that the normative act is unconstitutional¹⁹

As very well put in the Justice's opinion, the meaning of Article 97 of the Federal Constitution is completely preserved when the fractioned panel applies the Supreme Federal Court's understanding of the question, not mattering if this judgement was in direct or incidental control.

Another reflex effect, also resulting from an alteration in the 1973 Civil Procedure Code, enacted by Law nº 9756/98, regards the cases in which the rapporteur of the appeals in the tribunals is authorized to judge them monocratically, without needing to appreciate them in a collegiate body. Article 557, *caput* and paragraph 1 of the Procedural Code states:

Art. 557. The rapporteur shall deny appeal that is evidently inadmissible, unfounded or in conflict with precedents and dominant case law of the judging tribunal, the Supreme Federal Court or of Superior Court.

§ 1º-A If the appealed decision is evidently in conflict with precedents and dominant case law of the Superior Federal Court or of Superior Court, the rapporteur can provide the appeal.

As can be seen, the rules of collegiate appreciation of the appeals in the tribunals has some important exceptions, introduces, just as Article 481, paragraph, in attention to the procedural celerity principle. However, in the same way the question of the exemption of the establishment of an incident of constitutionality argumentation, also here there is a more profound meaning regarding the permission for the rendering of a monocratic decision when it derives from the existence of undisputed precedents of the Supreme Federal Courts.

The possibility for this simplified judgement makes the decisions of the Supreme Court more relevant and effective, since they

19 RTJ 162:765.

become important precedents in constitutional affairs, having their effects expanded to beyond the narrow scope of a concrete situation. Of note is that Article 557 of the Civil Procedure Code is clear to affirm that not only the existence of binding precedents (*súmula*) justifies the monocratic ruling, but also the existence of majoritarian understanding by the Supreme Court. Then, the issues addressed in incidental control have the power to consolidate case law in such a manner that it could – and should – be adopted by the lower courts, even monocratically.

It cannot be said, either, that the reference to the dominant case law of the Supreme Federal Court concerns the rulings in abstract control. This would be the same as to admit the uselessness of Article 557 of the Civil Procedure Code, once the *erga omnes* efficacy and the binding effect of the decisions made in direct constitutional control are already originated from constitutional provisions. The innovation brought by Law nº 9756/98 consisted exactly in permitting decisions in incidental control to be utilized as precedents, concretizing the “natural expansive vocation of the decisions regarding the constitutionality of norms”²⁰. That is what can be extracted from the lessons of Gilmar Ferreira Mendes:

The Civil Procedure Code, in turn, in ampliative manner, incorporated disposition that authorizes the rapporteur to grant the appeal if the appealed decision is in evident conflict with precedent or with the dominant case law of the respective tribunal, the Supreme Federal Court or of Superior Court (Article 557, paragraph 1-A, included by Law n. 9756 of 1998).

With the advent of this new formula, not only the denial of extraordinary appeals, but also the granting of such appeals in cases of unconformity with the Supreme Court precedents has begun to be admitted, by monocratic decision of the rapporteur.

It also seems evident that the lawmaker understood to be possible to extend the effects adopted by the Court, be it in case of incidental unconstitutionality declaration of specific federal, state and municipal laws – case in which it would be subject to Senate intervention – or in case of a fixed constitutional interpretation by the Court.²¹ (free translation)

20 ZAVASCKI, Teori Albino, op.. cit., p. 26.

21 MENDES, Gilmar Ferreira. “O Papel do Senado Federal no Controle de Constitucionalidade:

The examples analyzed up until now were dedicated to show how the conclusion of the Supreme Federal Court about constitutionality or unconstitutionality of laws and normative acts, in incidental control, have a tendency to become valid for all, acquiring *erga omnes* efficacy, especially because of some legal dispositions adopted by the civil procedural law. Nothing, until this point, has been said regarding the possible binding effect of these precedents, an issue that is sensibly more complex and controverse.

About this question, the analysis of Complaint n°4335, judged by the Supreme Court on March 2014²², is of great interest. Before entering this matter, it is important to remember that, as already mentioned (p. 4), the possibility of utilizing the Complaint to the preservation of the authority of the decisions given by the Supreme Court is one of the main practical consequences of the attribution of binding effect to these decisions. In this sense, the precedents of the Court have been admitting, without much discussion, the applicability of Complaints when the issue put forward is a noncompliance of a constitutionality or unconstitutionality ruling in a Direct Unconstitutionality Suit, a Constitutionality Declaratory Suit or a Fundamental Precept Noncompliance Argumentation.

In Complaint n° 4335, however, the situation was quite peculiar. This suit was filed by the Union's Public Defender Office, after the ruling of Habeas Corpus n° 82959²³, in which the plenary of the Supreme Federal Court decided for the unconstitutionality of paragraph 1 of Article 2 of Law n° 8072/1990 (Heinous Crimes Act), which, in its original wording, prohibited the downgrade in incarceration conditions in the serving of the sentence of crimes considered heinous. Since this unconstitutionality was declared by diffuse means, its application would limit itself to the case in question, without any change to the law.

For the decision of the Supreme Court to be considered mandatory, the compliance with Article 52, X, of the Federal Constitution would be necessary. This article provides for the competence of the Federal Senate to “*suspend the execution of a law, in part or entirely, that was deemed unconstitutional by definitive decision of the Supreme Federal Court*”. Only this action by the Senate would have the power to make the effects of the declaration of unconstitutionality in incidental control extend to all, by means of suppression of the very law in question.

Even though, in the case of the Habeas Corpus n° 82959,

um caso clássico de mutação constitucional”, in: Revista de Informação Legislativa, Brasília a. 41 n. 162 abr./jun. 2004, p. 161-162.

22 Rcl 4335, Rapporteur: Justice. GILMAR MENDES, Plenary, 20/03/2014, DJe-208 DIVULG 21-10-2014 PUBLIC 22-10-2014 EMENT VOL-02752-01 PP-00001.

23 Rcl 4335, Rapporteur: Justice. GILMAR MENDES, Plenary, 20/03/2014, DJe-208 DIVULG 21-10-2014 PUBLIC 22-10-2014 EMENT VOL-02752-01 PP-00001.

there was no communication to Senate nor suspension of paragraph of Article 2 of the Heinous Crimes Act, the Public Defender's Office filed a Complaint against the Court of Criminal Enforcement of Rio Branco, Acre, since it refused to analyze the possibility of the downgrade of incarceration conditions of several inmates sentenced to prison for heinous crimes. The plaintiff alleged that the lower court was disrespecting the Supreme Federal Court authority, even the decision not being awarded in direct control. In habeas reliefs, as is known, the decisions are typically incidental, as what is request by the plaintiff is not a declaration of unconstitutionality in abstract, but the concession of a material order.

However, the rapporteur of the case, Justice Gilmar Ferreira Mendes recognized the Complaint, conferring a real binding effect to what was decided in Habeas Corpus nº 82959. To decide in this manner, the Justice had to address the questions regarding the role of the Senate in the constitutionality control of laws and normative acts, because of Article 52, X, of the Constitution. If the suspension of the law deemed unconstitutional, by resolution of the Senate, was really necessary for the attribution of *erga omnes* effectiveness and binding effects, then the inexistence of such a resolution would impede the Complaint. However, if, as put forward by Justice Mendes in his opinion, the objective of the Senate intervention was only to *give publicity* to the decision of the Supreme Court, which would already have binding efficacy, then the Complaint would be perfectly possible.

Justice Gilmar Mendes, in the judgment of Complaint nº 4335 based himself in understanding already defended by him in his writings, according to which Article 52, X, of the Constitution would have suffered a mutation, particularly perceptible from observing the uses of the Court, that have been attributing transcendent effects to the rulings in incidental review. In article published in 2004, the Justice states:

In truth, the application that the Supreme Federal Court has been conferring to Article 52, X, Federal Constitution, indicated that the institute has deserved a significant reinterpretation. It is possible that the configuration of the abstract control in the new Constitution, with emphasis in the abstract model, has been decisive to the observed change, since decisions with erga omnes efficacy started to generalize themselves. (...)

Therefore, it sounds legitimate to understand that, nowadays, the formula regarding the suspension of the execution of a law by the Senate has to

*have simple publicity effects. In this manner, if the Supreme Federal Court, in incidental control, reaches the conclusion that, in final judgment, the law is unconstitutional, this decision will have general effects, with communication to the Senate, for it to publish the decision in the Congress Register. As such, it is not (anymore) the Senate's decision to grant erga omnes efficacy to the Supreme Court judgment. The decision itself has this normative force.*²⁴

The rapporteur Justice position was fully agreed to by Justice Eros Grau, who summarized the controversy in his opinion: “(...) to the Federal Senate, in face of the constitutional mutation declared in his opinion – the Rapporteur’s – and in this opinion reaffirmed, is attributed competence only to give publicity to the suspension of the execution of the law deemed unconstitutional, in part or on the whole, by definitive decision of the Supreme Federal Court. The decision itself has sufficient normative power to suspend the execution of the law deemed unconstitutional”. However, after the procedures were suspended for further examination of the case records, Binding Precedent n° 26 entered into force²⁵, making the discussion in the case irrelevant, since the Binding Precedent established a binding effect on the position of the Court regarding the possibility of the downgrade of incarceration conditions.

Therefore, in the end, the necessary majority for the granting of the award was reached not because of the incidental control decision in HC 82959²⁶, but because of the Binding Precedent 26. This is, nevertheless, a relevant precedent that deserve attention of all who are concerned in following the developments of the Supreme Federal Court precedents, since it signals a possible evolution towards attribution of greater efficacy to the precedents of the Highest Court in incidental constitutional review.

4. CONCLUSION

24 MENDES, Gilmar Ferreira, op. cit., p. 165.

25 “For downgrading of incarceration conditions in the serving of sentence for a heinous or equal crime, the decision for serving shall observe the unconstitutionality of Article 2 of Law n. 8072, of July 25, 1990, without prejudice to evaluating if the convicted has the subjective and objective requisites for the benefit, with the possibility of determining, with motive, the realization of criminological exams.”

26 In this sense, Justices Teori Zavascki, Luis Roberto Barroso, Rosa Weber e Celso de Mello. Dissenting, with opinions for thenon-granting of the Complaint, but granting Habeas Corpus, Justices Sepúlveda Pertence, Ricardo Lewandowski, Joaquim Barbosa e Marco Aurélio.

The way the oversight of the constitutionality of laws and normative acts has been executed in our system is a consequence of a long evolutionary road that stretches back, from the creation of the Republic, with the institutionalization of incidental review, inspired by the diffuse control model inaugurated by the United States. Since the beginning, despite all judges and courts having competence to decide over the constitutionality of norms created by the ordinary lawmaker or the constitutional reformer, the Supreme Federal Court has always had a distinguished role, given its institutional position as the highest collegiate court in the Brazilian Judiciary and having the last say in any and all constitutional matters.

With the creation and development of several direct constitutional control instruments, especially after the 1988 Constitution, which enlarged the list of legitimated parties to file a Direct Unconstitutionality Suit, and the Constitutional Amendment nº 3/93, which created the Constitutionality Declaratory Suit and the Fundamental Precept Noncompliance Argumentation, the abstract review gained heightened importance, in such a way that nowadays the most relevant constitutional issues to reach the Highest Court are, normally, brought by means of one of the direct constitutional suits. The Supreme Court, then, performing its role as guard of the Constitution also (and, maybe, principally) through this competence delegated by the very Magna Carta, turns into a true Constitutional Court, much alike the European ones.

The result arising from the coexistence system between incidental and direct control, despite well-functioning, in a general view, reveals some incongruences, especially in regards to the effects of the decisions given by the Supreme Court. In fact, while judgements in abstract review have *erga omnes* efficacy and binding effects, as per Article 102, paragraph 2 of the Federal Constitution, Article 28, paragraph, of Law nº 9868/99 and Article 10, paragraph 3, of Law nº 9882/99, those given in concrete control have, in principle, only an *inter partes* efficacy, without any binding effects toward the Judiciary and the Public Administration. As such, the same Court, with the same eleven Justices, could, in the same day, grant an award on unconstitutionality that had effects only to the parties involved and another with general efficacy.

A relatively recent trend, however, is observable, in which the decisions granted in incidental control can have a transcendental efficacy to the concrete case, and, even, binding to other judicial and administrative instances and courts. This happens through some procedural mechanisms created by the ordinary legislation, such as Article 481, paragraph, of the Civil Procedure Code of 1973 (Article 949 in the New Procedural Code) that permits the exemption of the mandatory establishment of an unconstitutionality incident in courts

when there is already precedent of the Supreme Federal Court addressing the matter, and Article 558, *caput*, of the same statute (Article 1012, paragraph 4, of the New Code), which makes possible the monocratic ruling of appeals when there are uncontested precedents in the Court.

The evolution that can be witnessed in this matter indicates that the next steps probably will not be taken by the lawmaker, but by the case law of the Supreme Federal Court. In Complaint nº 4335, the Supreme Court came to a result quite near the attribution of binding effect to the decisions of (un)constitutionality made incidentally, with relevant opinions in favor of the adequacy of a Complaint to preserve the authority of these decision. This ended up not materializing because of the Binding Precedent nº 26, which made possible a simpler resolution to the controversy. Even so, it is necessary to remain alert to the case law of the Supreme Federal Court, since the issue certainly will return to discussion, with the very real possibility of opinion by Justices who did not participate in the judgement of the mentioned Complaint. And, regardless of that, there is an irreversible tendency of approximation between the efficacy of decisions in concrete review and in abstract review given by the Supreme Court, representing no more than the recognition of the fair share of importance of this Court, the greatest responsible for the defense of the Magna Carta.

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