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Direct Action for Unconstitutionality by Omission (ADO): In Generality

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Abstract *— The article deals with unconstitutionality by omission within a generalist perspective, in the light of the most recent legal doctrines and analyses. Discussions that deal with the appropriateness of a writ of mandamus and the problematization with the lack of legal homogeneity in Brazil in these cases are observed here, especially about doctrinal conflicts. The actions and problems related to the ordinary effects in the ADO are debated within the recent doctrine, based on the understandings presented by the scholars, legislators, and the Superior Courts.*

I. INTRODUCTION

The issue of seeking and fighting for equality in the legal sphere to guarantee the achievement of the rights of people with disabilities has been observed in different branches of law, with emphasis on the aspect of protection in the sphere of consumer law and civil procedural law, both linked to tax matters and to constitutional and civil law.

In this way, it is understood that the search for guaranteeing the implementation of laws and the guarantee of rights is not restricted, only to the question of the individual principle, it is reasonable to understand that society has evolved in a collective scope and the repercussions, previously seen as specific issues in individual cases, needed to be looked at from the ADO's point of view. When considering collective interests, it is inherent to social issues to think of access to justice as a collective identification, not just linked to a single citizen.

The article presents a discursive analysis of the doctrines and legislation that affect the ordinary effects of decisions taken in the ADO, as well as the types of decisions: mandatory, additive and concrete.

II. THE ORDINARY EFFECTS OF DECISIONS MADE IN THE ADO

The possible decision-making possibilities to analyze the core of the discussion on the ordinary effects taken in the ADO from the Plenary of the Federal Supreme Court fall on the analysis of its effects in the scope of procedural instrumentalization, in view of the propaedeutic criteria and the specific institution of its effects within the legal determination presented in law nº 9.868/99 and in the observance of constitutionality[1]. Nevertheless, the rules on the ADO's decision must be defined from a decision by an absolute majority in the Federal Supreme Court, considering that there is an unappealable nature from the decision of the act, noting that the principle of isonomy must be respected and authority over the pronouncements and decision of the STF[1,2].

Law nº 9.868/99, in Section III, art. 12-H, deals with the observance given to its application, whose competence to adopt the necessary measures is the responsibility of the competent Power. For Costa e Silva and Cunha Junior[1] the decision in ADO has a determined rule, the effect of which will give temporary effects *ex-nunc*, in view of the applicability of nullity and the recognition of the principle of nullity in the act. In this line of analysis of the regulation, the observance presented in law nº 9.868/99 gives the STF the power to determine a prospective decision on the temporal ballast of the act, so that there is a guarantee of legal certainty, and the dictates are safeguarded, without prejudice of legal efficiency[1].

In view of the above, it is worth analyzing that, regarding the omission of unconstitutionality, it is possible to question the inertia and limitation of decisions in relation to the process, which will be incumbent on the Legislative Power[1]. It is intended here to analyze the unconstitutionality by omission in the light of art. 103 of the Federal Constitution, regarding the period of 30 days and the possibility of sanction of the inert power in these cases. According to Carvalho[3], the objective of the action of unconstitutionality by omission, from the new modality included by the Federal Constitution of 1988, is to guarantee the practice of legal execution, so that its efficiency is duly guaranteed. Therefore, according to Carvalho[3], the constitutional omission is not linked to the constitutional system, but to certain blocks that make constitutional compliance unfeasible.

It is then necessary to observe and analyze, in a doctrinal character, that the constitutional omission is observed in the light of the main need to guarantee, from the perspective of the legislation, the fulfillment and guarantee of legal efficiency. According to Costa e Silva and Cunha Junior[1], the interpretative limitation for the application of the device, regarding the deadline for sanctioning the inert power must be observed in line with the need to maintain legal effectiveness, and it is possible to establish the due provisions in the scope of direct actions of unconstitutionality. As for the characterization of unconstitutionality in the act of omission, it will be up to the addressee of the act not to do so within the required terms or within the established working period, considering the constitutional term, if specified, and compliance with the principle of reasonableness[3].

For Carvalho[3], the occurrence of the omission of unconstitutionality can occur in the face of the functions of the State, in the following way:

1. unconstitutionality due to omission of legislative acts, in which the legislator, in the face of constitutional norms not enforceable by themselves – precepts or prerogatives – does not enact the laws necessary to make them enforceable; 2. Unconstitutionality due to omission of political or government acts, when, for example, holders of constitutional positions are not appointed or laws are not enacted in Parliament; 3. Unconstitutionality by omission of the constitutional review, when the Constitution, explicitly or implicitly, requires the modification of some of its precepts or its institutes; 4. Unconstitutionality for omission of administrative acts, in the event of omission of administrative acts of execution of laws or regulations; 5. Unconstitutionality due to omission of a judicial decision, which means denial of justice.

Some characteristics about the constitutional omission will depend on the classification of modalities: absolute inertia or insufficient action by the legislator, which may then be partial or total. Partial omission refers to the absence and silence of the person responsible for the practice of the act in a part, acting incompletely to fulfill the constitutional requirements; the total, on the other hand, refers to the inertia or total and complete deficiency of the legislator, while it does not satisfy what is recommended in the constitutional commandment[3]. It is then observed that both the total omission and the partial omission fall on the understanding that there was a characterization of incompleteness or total ineffectiveness of the legislator's compliance with the act, which denotes an analysis of the conduct of legitimacy and the measurement of legitimacy – considering constitutional principles and any characteristics of legal preterition.

About the decision and the effects of unconstitutionality by omission, it is important to observe the constitutional measure and the science referring to the period (30 days), already mentioned above. According to art. 22 of law nº 9868/99, the decision must be given by at least eight Ministers. Despite being a complex issue, its characterization due to the judicial contour is inherent to the process, so that the acceptance of the action is effectively decided, without any incompleteness in the decision rendered in the Supreme Court. In the observation of Carvalho[3], as previously argued, the STF has been recognizing that the omissions in this case as a non-recognition of the positive legislator, given that discussions on political issues and purposefully atypical attributions are occurring on a recurring basis - there is not any definitive support for such a claim.

III. DECISIONS WITH MANDATORY, ADDITIVE AND NORMATIVE EFFECT

The recognition of unconstitutionality by omission denotes, in addition to specific characteristics and

typologies, criteria and possibilities that will depend on the sieve of the STF and on some evaluation factors, whose specific outline is based on three effects: mandatory effect, additive effect and the normative effect. According to Costa e Silva and Cunha Junior[1]:

It should be noted that the limitation or extent of these effects of judgments rendered in ADO will depend on the analysis of the following factors or evaluation criteria:

i. what is the constitutional norm, parameter of control and the value/legal asset that it protects.

ii. the measure of the degree of generality of the imposition.

iii. how long the omission lasts.

iv. urgent need for the solution.

v. what are the material possibilities of complying with the decision.

To verify the practical use of these criteria, a study of some cases already discussed in the Supreme will be carried out, identifying their specific characteristics and the deficiencies or innovations present in the Supreme Court's positions in these cases, to evaluate the different decision-making possibilities around ADO.

The decision of normative effect, in terms of being the one that has been used the most by the STF since the changes in art. 103 of the Federal Constitution of 1988, can be observed as the most informative and usual decision-making possibility[1]. The authors exemplify this effect from the explanation and discussion of ADI 1458-DF, in which the National Confederation of Health Workers (CNTS) was questioned in relation to the calculation of the minimum wage and the loss in the purchasing power of workers – the omission for partial unconstitutionality by Provisional Measure nº 1415/1996. It is observed here the existence of violation of the protection of workers' social rights, which confronts the constitutional regulations in art. 7 of the Federal Constitution[1].

Costa e Silva e Cunha Junior[1] analysis of this ADI 1458-DF observes a more focused discussion on the normative emphasis on compliance with the effect linked to the constitutional norm, so that the minimum wage - object of this act - is listed within a list of needs that is a worker's right and is protected within constitutional premises that cannot be disregarded, such as: health, leisure, clothing, hygiene, transport, social security, among others. This is what is observed in the extract from the ADI 1458-DF menu:

MINIMUM WAGE - SATISFACTION OF BASIC VITAL NEEDS - GUARANTEE OF PRESERVATION OF YOUR PURCHASING POWER.

The constitutional clause inscribed in art. 7, IV, of the Political Charter - in addition to the proclamation of the social guarantee of the minimum wage - it embodies a true legislative imposition, which, addressed to the Public Power, aims to bind it to the realization of a positive benefit destined (a) to satisfy the essential needs of the worker and his family and (b) to preserve, through periodic adjustments, the intrinsic value of this basic remuneration, conserving its purchasing power. MINIMUM WAGE - INSUFFICIENT AMOUNT - UNCONSTITUTIONAL SITUATION DUE TO PARTIAL OMISSION.

The decision rendered in ADI 1458-DF refers to the evaluation criterion and the degree of generality based on the constitutional norms that were observed by the Court as an act of violation of basic social rights. According to Barroso[4], social rights and constitutional guarantees should not be violated, in such a way that any action or effect, either by omission or by imposition, should not be placed above in the Federal Constitution. In the example of ADI 1458-DF presented by Costa e Silva and Cunha Junior (2017), the issue about the minimum wage for workers is observed by the STF from a perception of the generality of the violated constitutional mandate, noting that the minimum wage is a vital constitutional guarantee and its failure to pay or cut it is a constitutional violation.

The decision with mandatory effect is analyzed by Costa e Silva e Cunha and Junior[1] from ADI 3682-MT, whose questioning presented concerns the legislator's omission regarding the formulation of the complementary law for the dismemberment of municipalities in the State of Mato Thick. It is observed here that, within the field of Administrative Law, a conflict of understanding is discussed, whose omission by the legislator generated a federative conflict:

The federative conflict is established from the moment when, even in the absence of the federal rules determined by Constitutional Amendment 15/1996, which included art. 18 §4 of the Constitution, the States continued to create, incorporate, merge, and dismember Municipalities according to their needs[1].

As Costa e Silva and Cunha Junior[1] well observe, the irregularity presented in ADI 3682-MT would generate legal uncertainty under the act of unconstitutionality, thus having material and concrete possibilities of harming the restructuring of municipalities and implying in problems and worsening conditions. social and environmental benefits for the population. The mandatory action, as Palu[5] argues, concerns an assurance measure with the purpose of

preventing actions of unconstitutionality by omission, observing the dictates of the regulation and its due applications. To this end, in the case observed with ADI 3682-MT – for exemplifying purposes – the arguments analyzed by the STF observed the imposition of normative provisions and the establishment of deadlines, observing the constitutional commandments and the specified criteria.

Regarding the additive effects, it is also worth noting Costa e Silva and Cunha Junior[1] in the analysis of this possibility as a function that goes beyond the mere normality of informing, and deals with the integrative – or additive – decision. This technique originates from Italian law, whose application comes from cases of partial omission that violates the principle of isonomy, in view of cases of omission on the part of the legislator, in a group form from the actions of "forgetting" or " mistake" – noting here the measure of the so-called additive sentences – whose correction by the Court is given by the normative situation in the application. The authors bring as an example the ADO 32 presented by the Attorney General's Office to question the inertia of the Presidency of the Republic in the presentation of laws, in addition to the deliberation for the National Congress on the special retirement regime for public servants with disabilities.

In the case of ADO 32, it is observed that the PGR tried to defend the fundamental right of individuals based on the observance that retirement is a constitutional right, whose omission by the Presidency of the Republic and the National Congress could not affect the granting process. . In view of the above, it is therefore a matter of ensuring that the practice of the principle of isonomy takes place, whose part in the provocation came from the reasons exposed by the PGR when investigating the omission or "forgetfulness" on the part of the federative entities[1]. It is here to analyze the urgency of the PGR to observe the legal uncertainty, which it issued in a Writ of Injunction so that the enjoyment of the right would be extended to retired public servants with disabilities, regardless of the filing by them.

IV. THE MATERIAL AND CONCRETE POSSIBILITY OF THE DECISION BEING CARRIED OUT

As previously noted, regarding the sentences handed down in ADO by the STF, it is extremely important to capture the effects of recognition of unconstitutionality from the intrinsic characteristics that permeate the sentences handed down, especially in what fit the factors and evaluation criteria. As presented in their study, Costa e Silva and Cunha Junior[1] identify the criterion of the material possibilities of complying with the decision – focusing here on the execution of the sentence in a punitive or repressive nature by the STF.

It is then observed in an excerpt from an analyzed case:

With the conflict of principles demonstrated, the weighting judgment, already exercised daily by the Federal Supreme Court in other cases, would be sufficient to meet the material possibilities of compliance with the decision (criterion v).

This is because, in addition to being an inherent task, the Constitutional Court also counts on the support of procedural institutes created for highly complex decision-making assistance, such as the amicus curiae figure or the possibility of holding public hearings with society. in establishing decision-making and democratic parameters for the sub judice issue[1].

It is then noted that there is a weighting judgment in question, as can be seen during this ADO (ADO 22 - PGR) that there is a conflict of a legal nature, which prevented the materiality of the matter in a normative nature. This representation of generates conflicts of a social nature, whose involvement deals with issues that involve characteristics and elements of social repercussion and with expressive intersubjective meanders, tends to influence the decision of the Supreme Court, not reaching a concrete determination of its effects. In accordance with Costa e Silva and Cunha Junior[1]. compliance with the ADO decision in procedural cases of an intersubjective nature, in addition to others that present the same elements, influences the concrete effects of the solution - which influences a decision, which in many cases, it tends not to be entirely satisfactory.

The role of the STF, in addition to safeguarding the Constitution and ensuring that there is no legal uncertainty, is to enable the materiality and concreteness of the decision, so that the maintenance of innocuousness with the ADO is avoided. It is worth noting that the Supreme Court, when investigating the legislator's omission, also analyzes the merits of complying with the legislating constitutional impositions based on the object and materiality of the act - having here the mission, in addition to safeguarding the constitutional norms, to safeguard the possibility to ensure that the decision is complied with, without subjectivity or guarantee of safety[1].

The issue of collective protection under the effectiveness of collective action was guided by Brazilian legislators in the attempt to promote faster access to justice. The Federal Constitution of 1988 deals with the collective protection of transindividual rights, as a defense perspective, the guarantee of diffuse interests from the point of view of the homogenization of law within the

conception of freedom and the guarantee of rights and access to justice. The protection of rights and the guarantee of the constitutionality of collective actions derive, in the view of the legislator, from the protection of the State towards the individual through mandatory, including access to rights and justice[6].

The guarantee of reasonableness and procedural celerity presented by the collective actions denotes its legal nature of protection and defense of rights in the collective scope, as well as the reduction of the long-term effects in procedural bureaucratization, given its characteristic of instrumentalization and collective representation and meta-individuals. The Constitution deals in its art. 5, item LXXVIII that: "all, in the judicial and administrative scope, are assured of the reasonable duration of the process and the means to guarantee the speed of its processing." Therefore, due to the guarantee of rights in constitutional matters, it was a matter of guaranteeing that legal protection in the collective scope would guarantee practical measures so that there would not be a breach of rights - Constitutional Amendment nº 45/2004 added such a measure in art. 5th[7,8].

The discussion on collective actions and control of constitutionality within the aspects of tax and social security matters is the object of numerous debates in the Brazilian legal system, mainly regarding the conception of the instrumentalization of collective law. For Didier and Zanetti Junior[7] the background of all this clash denotes the understanding presented by the STF from the judgment that declared the unconstitutionality as to the appropriateness of public civil action. There is a broad discussion on the issue in Brazilian doctrine, especially magistrates, including STF ministers - such as the thesis of Min. Gilmar Mendes, from the STF, noting that it is unfeasible for public action to involve incidental control of constitutionality.

The judgment of Complaint 600-0/90-SP presented the following understanding on the diffuse control of constitutionality in relation to the public civil action:

In the public civil action, now under trial, the constitutionality of law nº 8.024/90 is controlled by diffuse means. Even admitting that the decision under examination excludes the incidence of the law that would be applicable to the concrete hypothesis, as it violates an acquired right and a perfect legal act, it is certain that the respective judgment is not immune to the control of the Federal Supreme Court, from the outset, in view of the art. 102, III, letter b, of the Major Law, behold, the final decision of the local Court will have recognized the unconstitutionality of federal law, when settling a certain conflict of interest. In this way, the coexistence of the two systems of control of constitutionality is manifested: the same federal or state law may have declared its invalidity, either in the abstract, in the concentrated way, originally in the STF (CF, art. 102, I, a), or in the diffuse way, incident tantum, at the opportunity of the debate of controversy in the defense of subjective rights of interested parties, moving away its incidence in the concrete case in judgment. 8. In class actions, the possibility of declaring unconstitutionality, incident tantum, law or federal or local normative act is not denied [...]". (CLAIMS 600 -0/90 -SP, MIN. REPORT NÉRI DA SILVEIRA, DJRN 02/05/2010)

It is salutary to observe, according to the statement made by Minister Néri da Silveira, that despite the understanding of diffuse control of constitutionality through public civil action, it must be analyzed that the harmful question only occurs in case of a motivated petition, without that there is usurpation of the jurisdiction of the STF. In addition, it is observed that in another aspect the question of judgment in confused law can be presented as the final law, being incompetent for appreciation. Didier and Zanetti Junior[7] note that diffuse control is required:

"a) that the sole object of the demand is not identified in the constitutional dispute; b) that the question of constitutionality sees and acts as a simple preliminary question; c) the existence of a concrete and specific legal relationship in the order file; d) present itself as a cause of action and not as a request for constitutional matters. Hence, the following and very important consequences can be extracted: a) the non-occurrence of res judicata on the preliminary question (art. 467, III, of the CPC); b) the non-exclusion of the contested rule incident tantum from the positive law order.

The understanding discussed by Didier and Zanetti Junior[7] observes that the question of the discussion on the unconstitutionality of the tax in collective action involves the nature of the rights at stake, so it could not be the target of a proposal presented by the Federal Public Ministry (MPF). Also, according to the authors, the filing of public civil action in tax matters must be following the MPF, based on the understanding of renowned jurists in the civil procedural area. It is noteworthy that the MPF must ensure this matter in the national tax system. Almeida[9] presents the decision of the STF, in leading case, rendered in RE 195.056-1/PR in plenary:

"Constitutional. Public Civil Action. Taxes: IPTU. Prosecutor's Office: Legitimacy. Law nº 7.374, of 1985, art. 1, II, and art. 21, with the wording of art. 117 of Law nº 8.078, of 1990 (Consumer Code); Law nº 8.625, of 1993, art. 25. C.F., articles 127 and 129, III.

I - Public civil action is used to defend homogeneous individual rights, with the Public Prosecutor's Office being legitimized to enforce it, when the holders of those interests or rights are in the situation or condition of consumers, or when there is a consumer relationship. Law nº 7.374/85, art. 1, II, and art. 21, with the wording of art. 117 of Law nº 8.078/90 (Consumer Code); Law nº 8.625, of 1993, art. 25.

II – Certain homogeneous individual rights can be classified as collective interests or rights or identified with unavailable social and individual interests. In these cases, the public civil action serves to defend these rights, legitimizing the Public Ministry for the cause. C.F., art. 127, caput, and art. 129, III.

III – The Public Prosecutor's Office has no legitimacy to file a public civil action for the purpose of challenging the collection and claiming the refund of tax – in this case the IPTU – paid unduly, nor would this action be appropriate, given that, in the case of taxes, There is not, between the active subject (public power) and the passive subject (taxpayer) a consumption relationship (Law nº 7.374/85, art. 47 – Apr./Jun. 2002 44 wording of article 117 of Law nº 8.078/90 (Consumer Code); Law nº 8.625/93, article 25, IV; C.F., article 129, III), nor would it be possible to identify the right of the taxpayer with "unavailable social and individual interests." (C.F., art. 127, caput). IV - R.E. not known.

In view of the above, Almeida[9] argues that the denial in plenary of the STF, despite all the argumentative bulge based on the prerogative of the MPF's filing, did not consider international treaties and the universal understanding of collective actions in matters of guarantee of access to justice. In this way, it is alluded that the understanding presented in the Extraordinary Report above makes it difficult to access collective rights in terms of procedural agility, having a great impact on the Judiciary, since it considers that each taxpayer - according to the understanding presented by the STF – must submit its own action to the individual title.

Almeida[9] adds that:

CF 88 constitutionalized public civil action, by including its promotion as one of the institutional functions of the Public Ministry, for the defense of the environment, public and social patrimony and "other diffuse and collective interests" (art. 129, III). This last category includes indivisible, trans-individual interests held by indeterminate persons of the collectivity, linked together by factual circumstances, as well as those held by determinable persons belonging to a group, category, or class, united with each other or with the opposing party. by a basic legal relationship. By "collective interests" are also understood the homogeneous individual rights, which are considered collective *lato sensu* – therefore, within the non-restrictive concept adopted by the FC – or "subspecies of collective interest.

The understanding observed by Almeida[9] denotes the competence of the MPF in the light of what was previously presented by the CF/1988. In this sense, it is worth mentioning that the power over taxation will be in the observance of the Public Ministry of the Union, while in infra-constitutional jurisdiction it is within its competence to comply with the matter. Zavascki[10] makes an argument about the issue of unconstitutionality based on the principle of supremacy in matters of CF/1988 and the normative force in the Constitution itself:

(...) Whatever the way in which the phenomenon of unconstitutionality is presented, it is subject to the control of the Judiciary, through mechanisms established by the Constitution itself. With regard to the normative precepts resulting from the legislative action, the judicial review of its constitutionality can be basically in two ways: a) in the judgment of a concrete case, in which, in order to protect a specific subjective right, application of norms is denied considered unconstitutional and; b) in the judgment of direct action for this purpose, in which, in order to protect the Constitution itself, the unconstitutionality or constitutionality of a certain normative precept is declared. In the first case (a) there is diffuse control of constitutionality, so called because it can be carried out by any judge or court. In the second case (b) there is concentrated control, because it is the exclusive competence of the Federal Superior Court (when the offense is against the Federal Constitution) and of the State Courts of Justice (when the State Constitution is offended).

It is understood then that, in light of the clarifications and the aforementioned decisions already presented in plenary by the STF and the SJT court, the understanding about the consensual adequacy on the promotion of public civil action under the object of unconstitutionality or does not present itself as a uniform decision in the doctrinal aspect, while the very controversy of understandings on the question of the implication of collective rights in tax matters amplifies the debate on the constitutionality of the actions filed. The doctrinal discussion, as one of the objects of discussion of this study, lacks depth on the questions of the appropriateness of public action in terms of tax object.

V. CONCLUSION

The contribution of the study is given by the debate about the instrumentalization and guarantee of procedural law. Attention is drawn to a deepening of the discussions

that permeate subjectivity in decisions rendered in Superior Courts and the absence of a specific and univocal legal rule to deal with a certain topic within the Brazilian legal framework. In addition, it is necessary to highlight the need to address this issue in academia due to its breadth of relevance, both in the social sphere and in the legal sphere under the prism of public debate.

From the point of view of practicality, the study discusses the use of ADO, an instrument that can serve mainly for minorities and the disabled.

It is observed in a technical and analytical way the breadth of its social rights, both in the constitutional point of view, as in the procedural point of view, so that there is a more effective contribution of this instrument within the scope of the Brazilian legal system.

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