Institutional dialogues and constitutional review: paths for interpreting item X of article 52 of the Federal Constitution

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Abstract: The article examines the interpretation of article 52, item X, of the Federal Constitution, which grants the Senate the power to suspend the enforcement of laws declared unconstitutional by the Supreme Federal Court. It analyzes the jurisprudential evolution of this provision, with an emphasis on the theory of constitutional mutation and the abstraction of diffuse judicial review. The study is based on the theory of institutional dialogues, exploring the tensions between the Judiciary and the Legislative branches. The research proposes a dialogical approach to the interpretation of the cited provision, framing it as a technique for institutional dialogues between the Court and Parliament, aimed at adopting minimalist stances in constitutional jurisdiction.

Keywords: institutional dialogues; judicial review; article 52, item X, of the Federal Constitution; Federal Senate; Supreme Federal Court; minimalism.

1. Introduction

At least since the enactment of Constitutional Amendment No. 45/2004, which instituted, among other changes, the regime of general repercussion, there has been a doctrinal controversy regarding the interpretation to be given to item X of art. 52 of the Federal Constitution. Said provision grants the Senate the exclusive power to suspend the execution, in whole or in part, of a law declared unconstitutional by a final decision of the Supreme Federal Court. That is, it granted the Senate the power to attribute binding and erga omnes effect to pronouncements that, at the time of the promulgation of the Constitution, would not have such effective content. Critics argue that this model generates legal uncertainty and procedural delays, since the effective suspension of an unconstitutional rule depends on political deliberation by the Senate.

In recent years, the provision has been the subject of intense debate, especially due to the thesis of constitutional mutation, which proposes the abstraction of diffuse control of constitutionality. This article reviews the main understandings on the subject from the normative, jurisprudential and doctrinal perspectives.

Over the years, the STF has reinterpreted the provision in order to minimize the role of the Federal Senate. In the judgment of Constitutional Complaint 4,335/AC, Justices Gilmar Mendes and Eros Grau argued that there had been a constitutional mutation in art. 52, item X, which made it unnecessary for the Senate to issue a resolution for decisions in diffuse control to produce erga omnes effects. More recently, this understanding was strengthened by the judgment of ADI3,406, in which the majority of the justices recognized that the role of the Senate would be limited to the mere publicity of STF decisions and consolidated the abstraction of diffuse control. Justice Eros Grau, in agreement with the vote presented by Justice Gilmar Mendes, understood that a constitutional mutation had occurred.

There would therefore be "an inconsistency between the constitutional norm and constitutional reality" (Dau-Lin, 1998, p. 75), in the sense that the extracted norm would be:

> The Federal Senate is empowered to publicize the suspension of the execution of a law declared unconstitutional, in whole or in part, by a final decision of the Supreme Federal Court. According to this view, the Supreme Court's decision itself contains sufficient normative force to suspend the execution of the law declared unconstitutional.

The doctrine presents divergent views on the constitutional mutation of art. 52, item X. Proponents of the constitutional mutation argue that the evolution of constitutionality control in Brazil favors the immediate effectiveness of STF decisions, regardless of the Senate's action. They also argue that the traditional model creates legal uncertainty and allows the survival of unconstitutional norms, and that the valorization of binding precedents of the Superior Courts is a trend in the contemporary legal system. On the other hand, critics of the constitutional mutation argue that the change in interpretation represents a judicial overflow that usurps powers of Legislature. They claim that art. 52, item X, was designed to ensure harmony between the Powers and allow a certain political control over the suspension of unconstitutional norms. They also argue that the Federal Constitution already provides for formal mechanisms for changing norms, through constitutional amendments, not through jurisprudential changes (Streck; Lima; Oliveira, 2007, p. 45-68; Carvalho Netto apud Oliveira, 2004; Pedron, 2015, p. 213-237; Pedron; Ommati; Soares, 2021, p. 205-221; Pedron, 2019).

The constitutional mutation in Article 52, item X, reflects a conflict between legal certainty and the separation of powers. The jurisprudence of the STF has tended to abstract diffuse control and reduce the role of the Federal Senate. However, this trend is not unanimous in the doctrine, which questions the compatibility of the constitutional mutation with the text of the 1988 Constitution. The debate remains open, and any definition on the subject will require either consolidation of the jurisprudence of the STF or formal amendment of the Constitution, through the appropriate legislative process.

2. Theoretical premise: institutional dialogues

In reaction to the nature of this speech, in the United States, under the presidency of Chief Justice Warren, Alexander Bickel developed a theory about the strategic use of the Supreme Court's power not to decide. For Bickel, silence on certain constitutional issues is essential to promote debate in civil society on the subject, as well as for eventual decision-making by Parliament, which represents the people (Bickel, 1962). In Bickel's words, this would be the virtuous use of the power not to decide.

After this seminal work, several studies were carried out on the theory of constitutional dialogues. The issue, previously limited to the dualism of Parliament versus Court, changes its epistemological paradigm. Under the aegis of the paradigm of institutional dialogues or constitutional dialogues, the courts do not hold a monopoly on constitutional interpretation, nor do they have the final word on the normative interpretation of the Constitution. In short, "there are formal and informal mechanisms of interaction between the judiciary, the other branches of government and social agents that give the process of interpreting and applying the Constitution a political nature that is not taken into account by conventional legal knowledge" (Brandão, 2015, p. 4).

From this perspective, Roberto Gargarella highlights the tension between dialogical constitutionalism and the classical system of checks and balances described by Montesquieu and perfected by the federalists. papers (Gargarella, 2013). Indeed, the adoption of a dialogical paradigm of constitutional interpretation is capable of generating tensions between institutions and civil society, as well as having the ability to problematize the traditional conception of deliberative democracy (Dworkin, 1995, p. 2-11). According to Gargarella, a constitutional system based on the idea of dialogical constitutionalism should replace the traditional system of checks and balances. In this conception, social agents play a participatory role in the interpretation of the Constitution through formal and informal mechanisms of participation, which allows the exercise of normative competence by citizens as well (Rousseau, 2022, p. 75).

However, these studies on constitutional dialogues focus more on controversies related to the legitimacy of the Courts or Parliament than on a concrete analysis of the mechanisms that broaden the debate. In short, these studies have become a debate limited to constitutional theory, to the detriment of a case-by-case analysis of the Constitutional Courts and the instruments by which these dialogues are guaranteed and, more than that, capable of providing adequate responses to the resolution of fundamental rights problems.

Some recent works address this issue. Roberto Gargarella produced a brief analytical comparison between the legal systems of Canada and the United States (Gargarella, 2013). In Brazil, Rodrigo Brandão published a work in which he compares the mechanisms of dialogue in Brazil and the United States (Brandão, 2015). More recently, Luiz Guilherme Marinoni devoted his work to the subject, also drawing on theories of constitutional dialogues, in defense of certain decision-making positions of courts, with evident inspiration from the minimalist theories of Cass Sunstein (Marinoni, 2021).

Since the Supreme Court does not have the final say, other institutions and civil society can react to any Court decisions with which they disagree regarding the normative interpretation of the Constitution. The empirical nature of dialogical constitutionalism demonstrates that these interactions exist naturally, but are sometimes not studied as facets of the same phenomenon. This is the case, for example, of the backlash effect of Parliament. As Rodrigo Brandão explains, "there are formal and informal mechanisms of interaction between the Judiciary, the other branches of government and social agents that give a political nature to the process of interpreting and applying the Constitution that is not captured by conventional legal knowledge" (Brandão, 2015, p. 4).

3. The dialogical tension between institutions

Theories of constitutional dialogues agree that this paradigm has a significant impact on the interaction between institutions and the separation of powers. For some, dialogue is a necessary product of the separation of powers, as a result of the institutional design, not necessarily the will of the powers to engage in dialogue. This is essentially an empirical theory (Mendes, 2008; Bateup,

2006). The separation of powers does not imply peaceful harmony between the powers, as there may be overlaps between them, either due to the obscurity of the border zones between the powers, or because they voluntarily create areas of dispute intrinsic to the organization of power. In fact, constitutional jurisdiction "has been a vehicle for modernizing the concept of separation of powers" (Roblot-Troizier, 2012, p. 92).

This zone of dialogical tension presupposes a clash over the definition of the normative meaning of the Constitution. It therefore manifests itself in the context of a debate, excluding the use of artifices mobilized with the aim of institutionally constraining another Power. Rodrigo Brandão sheds light, for example, on certain mechanisms considered as a reaction of Parliament to judicial decisions which it deems incorrect. This is the hypothesis of control by changing the budget and salaries of judges and changing the appointment process, for example (Brandão, 2022, p. 413); including court packing, which consists of changing the general number of judges in the Court with the underlying intention of imposing an ideological profile on the Court.

For others, dialogical constitutionalism leads to a rethinking of theories of separation of powers. Roberto Gargarella emphasizes the need for a certain balance between the powers. He explains, for example, the impossibility of dialogue flourishing in a political system that concentrates power in the hands of the Executive, as is the case in some Latin American countries, which suffer, according to the author, from a certain hypertrophied presidentialism[1]; or when parliaments are too far removed from society, which reveals a lack of fidelity to popular representation (Gargarella, 2013).

The institutionalist character of dialogic theories lies in the fact that they go beyond the interpretivist approach that popularized the debate on the legitimacy of the Courts. Previously, the controversy centered on the different conceptions of constitutional interpretation, the so-called decision theories.[2] Dialogue, however, recognizes the participation of the Courts as part of an institutional system of organization of the Powers. Dialogical constitutionalisms recognize not only that these Courts play an important role in defining policies (as already analyzed) but also recognize the role of other institutions in constitutional interpretation, which constitutes a fatal blow to the perception that the Judiciary holds the monopoly of interpretation.

The separation of powers, at least according to the seminal formula developed by Montesquieu, is subject to various conceptions. This is the case of the model proposed by the federalists, in relation to the United States, which assumed that human nature is neither angelic nor adept at the consecration of the common good by public servants. The separation of powers is necessary as a mechanism to avoid mutual oppression between groups (Gargarella, 2013, p. 11). In the Latin American reality, on the other hand, the "purist" model of the United States gave way to a corrupt vision, according to Roberto Gargarella, with an unequal distribution of power, especially with the centralization of powers in the figure of the Executive, which would have created a system closed to dialogue.[3] However, Gargarella's dialogical constitutionalism focuses on the interaction between the

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1 At times, Gargarella's writings on Latin America suffer from a generalizing universalist tendency. Regarding this issue, Marcelo Leonardo Tavares is right, in the sense that, in Brazil, we have a weak president in a strong presidency. (Tavares, 2017, p. 59-78).

2 In the United States, for example, the debate over interpretivism and non-interpretivism has been the touchstone of the discussion about the legitimacy of the Supreme Court.

3 "El sistema de frenos y contrapesos creado en el siglo 18, en cualquiera de sus dos versiones principales (ya sea en la versión más "pura" de los Estados Unidos, ya sea en la versión "desbalanceada" de América Latina) apareció desde entonces como un sistema poco favorable a la cooperación política y el diálogo. Más específicamente, el modelo en cuestión, antes que alentar la cooperación, buscaba contener la confrontación; antes que promover el diálogo, buscaba

constituted powers and the need to establish checks and balances. It ignores the relationship between the powers and civil society, which is the starting point of the dialogical constitutionalism proposed in this work.

Since the Court does not have the final say, other institutions and civil society can react to any Court decisions with which they disagree regarding the normative interpretation of the Constitution. The empirical nature of dialogical constitutionalism demonstrates that these interactions exist naturally but are sometimes not studied as facets of the same phenomenon. This is the case, for example, of the backlash effect of Parliament. As Rodrigo Brandão explains, "there are formal and informal mechanisms of interaction between the Judiciary, the other branches of government and social agents that give a political nature to the process of interpreting and applying the Constitution that is not captured by conventional legal knowledge" (Brandão, 2015, p. 4).

Christine Bateup has argued that the Supreme Court would only be controlled if it moved too far away from the views of the political branches and other social forces. It is even possible that, even if the Court objectively moved away from the political arena, other political branches would decide to do nothing, either through inertia (Bateup, 2006, p. 1139)[4] or political calculation.

However, it should be noted that these interactions should be seen as a space of permanent tension between institutions. As an example, Barry Friedman observes that, in the case of the United States Supreme Court, when it decides beyond what is considered acceptable by Parliament or the people, political limitations are imposed on it, such as the backlash effect or popular disapproval. In dialogical constitutionalism, these interactions come to be seen as a natural consequence of the interaction between the Powers, the institutions and civil society.

The recognition of this zone of institutional tension is equally important for defining what is prescriptive or descriptive in dialogic theories. Luiz Guilherme Marinoni, in works dedicated to the subject, also uses dialogic theories. The writings seek references both in constitutional dialogues and in theories of judicial minimalism, which will be the object of more careful reflections in the second part of this work. However, dialogism is used as an argument in defense of a certain more restrained stance of the Court and to confront the existence of an alleged "ideology" of judicial supremacy (Marinoni, 2023).[5]

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canalizar la agresión; antes que favorecer el aprendizaje y la ayuda mutua, buscaba impedir la destrucción de unos a otros" (Gargarella, 2013, p. 15).

4 "In these circumstances, the Court will only be checked if it steps too far out of line with the views of the political branches and other social forces. Additionally, it may not be checked at all if legislative inertia about a particular issue is too great, or if the political branches prefer the judiciary to maintain control over a particular issue. The result of this interactive process in which no branch dominates and in which constitutional meaning steadily forms is constitutional dialogue".

5 This is what is extracted from several passages of his works dedicated to the subject, of which it is worth mentioning: "Arising from the use of the idea of judicial supremacy as an ideology, the result of the equalization between precedent and the monopoly of constitutional interpretation, despite being imposed surreptitiously, is highly harmful when people are faced with decisions that concern the destiny of their lives and those of their children" (Marinoni, 2023, p. RB-5.3).

4. Article 52, item X, of the Federal Constitution and the strength of precedents in Brazilian law

The nature of the function of the Superior Courts is a fruitful source of debate in Brazilian doctrine. In this source, Daniel Mitidiero (2018) and Luiz Guilherme Marinoni (2019, chap. 3) emerge as important defenders of the Superior Courts, known as the apex courts, as Supreme Courts tasked with the function of interpreting (and pacifying the interpretation, in the so-called nomophilic function) constitutional law (STF) and infraconstitutional law (STJ), through the formation of precedents – which would be, for the authors, always endowed with binding force (Mitidiero, 2018, p. 81).[6] Another premise is to understand that the Supreme Courts hold the final word (Mitidiero, 2018, p. 84).[7] A natural consequence of this premise lies in the understanding of the Supreme Courts as producers of precedents endowed with binding force.

The Supreme Courts produce precedents, but not all precedents have a binding effect, as indicated by the normative provisions that seek to confer binding effect on pronouncements that, although they constitute precedent, do not have a binding effect. if this effective aptitude. This is what is seen, for example, in the rule enshrined in item X of art. 52 of the Federal Constitution, which provides for the possibility of suspending a law declared unconstitutional in an incidental review of constitutionality, by a judgment of convenience of the Federal Senate. Therefore, we disagree with Luiz Guilherme Marinoni, for whom the existence of this rule in no way alters the binding force of all judicial precedents, on the grounds that it serves to provide the Senate with the opportunity, "even if aware of the impossibility of judges applying the law, to suspend its execution to prevent it from being re-enforced or revived by the Court itself" (Marinoni, 2021, p. 962). We do not agree with this perception, not only for the reasons already explained, but also for the evident, and undue, import of one of the reasons for the existence of stares decisis, from US law to the Brazilian model – which makes it, to a certain extent, quite implausible.

A logical corollary of this provision is to understand that not all precedents arising from this type of judgment are endowed with binding effect. This evidence is confirmed when it is verified that, in the extraordinary appeal processing circuit, in the STF, the general repercussion serves as a filter for the selection of all appeals. However, in some specific cases, the appeal is judged in a different and rarer system, in which there is a delimitation of the topic, with consequent formation of a precedent with binding effect.[8]

There is particular confusion regarding the controversy over the normative force of precedents and the dichotomy "binding or non-binding", "obligatory or persuasive", which is found in part of the doctrine. Likewise, this debate is often limited to the common dichotomy of common law and civil law, in which the first is attributed the nature of all precedents being mandatory. Michele Taruffo warns of the inappropriateness of this argument, not only due to the evident approximation of the

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6 Hence the defense that control over the application of the precedent should not fall to the court that conceived it, but to the Courts of Justice, to whom complaints should be addressed.

7 For Daniel Mitidiero, the Court of Precedent is "in charge of giving the final word on the meaning of constitutional law or federal law."

8 The topic is well explored by Paulo Mendes de Oliveira in the article Extraordinary appeal and its procedural circuits : The adequate understanding of the extraordinary appeal procedure will greatly assist in regulating the requirement of relevance of the special appeal , available at < https://www.jota.info/opiniao-e-analise/colunas/coluna-cpc-nos-tribunais/recurso-extraordinario-e-seus-circuitos-processuais-15102022 > , accessed on 1/7/2022.

two systems, at present, but also due to the existence of non-binding precedents in the common law system (Taruffo, 1994).

When analyzing similar questions, Neil Duxbury recognizes the inadequacy of the positivist approach that associates the legal norm exclusively with its sanction. Aligned with the ideas of Herbert Hart, Neil Duxbury argues that, when deciding based on precedents, judges do not act out of fear of imposing a sanction, but because the precedent is considered, among judges, as correct practice – a norm whose deviation is perceived negatively. Continuing, the precise understanding of the effectiveness of precedent implies recognizing the limitations of positivist paradigms that conceive of law as a coercive order, which subjects the norm to sanction.[9] For Duxbury, the binding nature of precedent means that judges will be bound by it, or, at least, committed to considering it (Duxbury, 2008, p. 21). This does not imply, however, the absence of sanction in the event of a violation of the precedent norm. In other words, as a norm, the precedent can be more adequately described not as a legal rule, but as an instance of communication of an authoritative example. That is, even though it is sometimes not endowed with binding force, or lacking its sanctioning character, the precedent is a norm precisely because it is considered, from the internal point of view of the legal system, as a standard of behavior to be pursued.[10]

5. Article 52, item X, of the Federal Constitution, as a mechanism for institutional dialogue

What seems to escape traditional thinking is the aptitude that the aforementioned device would have to serve as a technique for dialogue between the Court and Parliament. The existence of pronouncements, in terms of constitutionality control, that are not endowed with binding effectiveness and erga effect omnes , as well as the relative discretion of the Court in selecting the cases that will be judged in a systematic way of forming a binding precedent (the general repercussion as a "judgment technique"), reveal an unexplored field of application of the rule contained in art. 52, item X, when interpreting it based on a dialogical paradigm of interpretation.

This is particularly relevant in cases involving reasonable moral disagreements and, therefore, involving equally legitimate solutions that would require parliamentary provocation. In this scenario, the Court could recognize the unconstitutionality of a given rule, but, in a deferential stance to Parliament, shift the scope of its effects to the Senate for evaluation.

Without doing so, the current extraordinary appeal processing circuit gives the STF the power to determine which constitutional cases deserve to be raised for judgment with binding effectiveness and erga omnes effect, and which would not "deserve" this jurisdiction. The establishment of a dialogic bridge through art. 52, item X, of the Constitution not only gives normative density (effectiveness) to the device but also improves the control of constitutionality similar to the idea of second look.

The theories of the second look (Calabresi, 1991, p. 80-104)[11] defend a certain provisional decision to invalidate a law, based on the notion that the Judiciary does not decide definitively, but rather acts

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[9] This is what is seen, for example, in the work of Hans Kelsen, for whom the legal norm binds, due to its content, to sanction, despite recognizing, in his Pure Theory of Law, legal duties without sanction, such as natural obligations (Kelsen, 1985, p. 55-57).

[10] One could argue that, in this way, precedent would be synonymous with jurisprudence, which is equally rejected. The distinction between the two is quantitative and qualitative and is very well elaborated by Taruffo and De Teffé (2014).

[11] Judge Guido Calabresi is quite famous in the United States for his second look theory.

as a mechanism to hold Parliament accountable, which forces it to reexamine the content of a given law. This theory is often associated with judicial minimalism, whose precursor was Alexander Bickel with his concept of "passive virtues", which gained great importance in Cass Sunstein. For minimalists, the judge should not say in a judicial decision more than is necessary to justify a result and should leave as much as possible to indecision. The extremist approach manifests itself in the power to not decide in order to launch the discussion in the public space, so that other social agents can debate the constitutional issue. Obviously, this approach generally implies a more moderate and often proceduralist view of judicial control.

In this sense, this technique can operate in favor of a merely provisional decision to invalidate the law, based on the notion that the Judiciary does not decide definitively, but functions as an accountability mechanism, which causes Parliament to reexamine the content of a certain law, even if it ends up deciding to reintroduce the invalidated law.

In a comparative law news item, one can mention the delayed declaration of invalidity, also called suspended declaration, which have special relevance in Canadian law. The reason for this importance is the result of a 1985 decision by the Supreme Court of Canada (Canada, 1985)[12], in apparent contradiction to the express provision contained in the Constitutional Act, 1982, which, in section 52, states that "any law which is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". In deferred declarations, the Court refrains from declaring the invalidity of the law, at least for a specified period, after which the decision has its immediate effect of invalidation. In fact, this technique has become the rule of Canadian jurisprudence (Hoole, 2011, p. 105-148).

Initially conceived to avoid catastrophic legal effects with the immediate declaration of invalidity, the technique began to be applied based on the idea that the Courts are bound by the prerogative of the Legislature to select, among possible options to remedy the unconstitutionality, the one it deems most appropriate. The Court also considers that the exercise of this prerogative is inevitably terminated when the Court simply expunges a rule from the legal system (Hoole, 2011, p. 105-148).

Thus, the application of the aforementioned provision can be associated with dialogic judgment techniques, in which the Court transfers to Parliament the power to grant binding effect to pronouncements that deliberately did not have such effective content. This is, therefore, a deferential judicial decision, in which the Court defers to another decision-making forum the power to decide on a given constitutional issue. In the case at hand, the Court would defer to the Senate the power to decide on the effective content of a given decision that, by decision of the Court, was not subject to the technique of formation of precedents of compulsory applicability.

6. Conclusion

The interpretation of Article 52, item X, of the Federal Constitution has been one of the central points in the debates on the Brazilian model of constitutional review. The evolution of the jurisprudence of the Supreme Federal Court, notably with the thesis of the abstraction of diffuse review, has progressively minimized the role of the Federal Senate in the process of consolidating the effects of

[12] This is the case of Manitoba Language Reference, in which the Manitoba Legislative Assembly ignored, for 95 years, the constitutional provision that required laws to be enacted in the country's two official languages. At the time, the Court understood that a mere declaration of unconstitutionality would be disastrous, since it would produce a chaotic state of chain invalidation of laws and other normative acts.

decisions of unconstitutionality. However, instead of being treated as a remnant of an outdated model, this provision can be reinterpreted in light of the theories of institutional dialogues and minimalist techniques of constitutional decision-making and acquire new functionality within the current constitutional order.

From this perspective, art. 52, item X, can be understood as a second mechanism look, which allows Parliament to have institutional space to evaluate the normative and political implications of a certain unconstitutionality decision by the STF before its effects are amplified beyond the specific case. Unlike a simple bureaucratic act of publicity, the suspension of the execution of the norm by the Senate can be seen as a deliberative filter that provides time and space for interinstitutional dialogue, which prevents the Supreme Court from unilaterally imposing its view on the constitutionality of certain norms without broader reflection.

This dialogic approach does not compromise the authority of the Supreme Court, but recognizes that, in a constitutional system based on the separation of powers, the final word on the practical repeal of a certain norm may involve not only the constitutional jurisdiction, but also the political sphere. Judicial minimalism, as formulated by Cass Sunstein, suggests that constitutional courts should avoid broad-ranging decisions when there are significant normative and social uncertainties. Thus, art. 52, item X, can operate as a technique to modulate the effects of Supreme Court decisions, and function as a mechanism for the Senate, in a dialogic role, to participate in the construction of the normativity resulting from the review of constitutionality.

Furthermore, this interpretation avoids the trap of unrestricted judicial supremacy and allows for a model in which Parliament can play an active role in the reception of judicial precedents and, eventually, give rise to legislative reforms necessary to improve the coherence of the legal system. In this way, the provision ceases to be a bureaucratic obstacle to the effectiveness of the STF's decisions and becomes a legitimate instrument of interaction between the Branches, which strengthens the democratic legitimacy of decisions of unconstitutionality.

In view of this, it is concluded that Article 52, item X, should be reinterpreted from a dialogical perspective, in which its application is not limited to a remnant of an outdated model of constitutionality control, but to a deliberative technique that allows the Federal Senate to confer effects on decisions of the STF that the Court itself deliberately chose not to invest with binding effect. This approach reinforces the democratic legitimacy of constitutional decisions, safeguards the separation of powers and encourages a more interactive model of constitutional governance that is responsive to the normative challenges of the contemporary State.

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