Judicial review and criminal trials: considerations in comparative law

Controle judicial e julgamentos penais: considerações em direito comparado

Revisión judicial y juicios penales: consideraciones en el derecho comparado

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Abstract

The present article has, as its main objective, to analyze the trials of the GSS Torture Case by Israel’s Supreme Court and the *Habeas Corpus* 126.292, by the Brazilian Supreme Court under the point of view of Minister Luís Roberto Barroso’s vote, aiming to reflect on the Judicial Review institute through the analysis of such cases. For such task, the article has employed the individual analysis of each one of the chosen cases and, in sequence, analyzed bibliographic works on the matter. The results attained by the research showed, therefore, that both cases involve situations in which the Judicial Review has been employed to grant legitimacy to determined positionings to the detriment of the legal order. Ultimately, it was possible to observe that the Judicial Review is an institute whose inadequate application can cause the most diverse range of damages, although it can also be considered as an important tool in the task of maintenance of the constitutional order.

**Keywords:** Judicial Review. *Habeas Corpus* 126.292. Israeli Torture Trials.

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Resumo
O presente artigo tem como principal objetivo analisar os julgamentos do Caso de Tortura GSS pelo Supremo Tribunal de Israel e o Habeas Corpus 126.292, pelo Supremo Tribunal do Brasil sob o ponto de vista do voto do ministro Luís Roberto Barroso, visando refletir sobre o Instituto de Fiscalização Judicial através da análise de tais casos. Para tal tarefa, o artigo tem empregado a análise individual de cada um dos casos escolhidos e, em sequência, analisado trabalhos bibliográficos sobre o assunto. Os resultados obtidos pela investigação demonstraram, por conseguinte, que ambos os processos envolvem situações em que a fiscalização jurisdicional foi utilizada para conferir legitimidade a determinados cargos em detrimento da ordem jurídica. Em última análise, foi possível observar que a fiscalização jurisdicional é um instituto cuja aplicação inadequada pode causar a mais variada gama de danos, embora possa também ser considerada um instrumento importante na tarefa de manutenção da ordem constitucional.


Resumen
El presente artículo tiene como principal objetivo analizar los juicios del Caso de Tortura del Servicio de Seguridad General por parte de la Corte Suprema de Israel y el Habeas Corpus 126.292, por parte de la Corte Suprema de Brasil bajo el punto de vista del voto del Ministro Luís Roberto Barroso, con el objetivo de reflexionar sobre el Instituto de Revisión Judicial a través del análisis de dichos casos. Para tal tarea, el artículo ha empleado el análisis individual de cada uno de los casos escogidos y, en secuencia, ha analizado trabajos bibliográficos sobre la materia. Los resultados obtenidos por la investigación mostraron, por lo tanto, que ambos casos involucran situaciones en las que se ha empleado la Revisión Judicial para otorgar legitimidad a determinados posicionamientos en detrimento del orden jurídico. En definitiva, se pudo observar que la Revisión Judicial es un instituto cuya aplicación inadecuada puede causar la más diversa gama de daños, aunque también puede considerarse como una herramienta importante en la tarea de mantenimiento del orden constitucional.

Introduction

Judicial review is a controversial theme. It has been ever since its creation during the *Marbury v. Madison* trial, held by the North-American Supreme Court in the year of 1803. After all, if judges can control laws’ validity, who controls the validity of such judges’ decisions? Anyway, stemming from the premisses formulated by such trial, it was possible to visualize the repetition of such practice by the judiciary Power in the most diverse countries throughout time, making it possible to observe emblematic trials that make way for deep reflections on the judiciary Power’s acting in the face of specific legislative acts. Such discussion gains even more importance in the evaluation of the limits imposed to such Power and the subsequente ascertainment of the violation of the competences that are inherent to it.

This paper will analyze the judicial review under the optics of two paradigmatic trials involving such matter. The first of them is related to the series of trials held by the Israeli Supreme Court on the practice of torture by the Country’s General Security Service (GSS) during the years of 1971 to 1986. The second is the trial of the Habeas Corpus 126.292, held by the Brazilian Supreme Court in 2016. The objective is to show that there are many similarities not only in the results, but also in the way of building such trials. Besides, this paper seeks to indicate the problems found in the arguments developed in such trials’ decisory reasons. After, objections to the theoretical and practical configuration of the judicial review systems will be presented, critically analyzing the way such trials deal with the aforementioned issues.

1.1 The Israeli General Security Service’s Torture Case

This section will approach the trial related to the analysis of the torture practices developed by the Israeli General Security Services (GSS). The trial’s scenario begins in June, 1987, date in which, after a scandal involving the practice of physical abuses by the GSS during the interrogation of an Israeli soldier, the President of the Israeli Supreme Court, Meir Shamgar, established an inquiry committee with the purpose of analyzing the interrogation practices held by the GSS (IMSEIS, 2001, p. 333). The report produced by such committee,
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named Landau Commission Report, showed that, between the years of 1971 and 1986, the GSS had employed “physical pressure” in interrogation proceedings applied in suspects of Palestine origin, such proceedings were also employed to attain convictions with the Israeli Military Courts. Furthermore, the document recognized that the GSS officers had practiced the crime of perjury in many different episodes during the aforementioned period, in a clear violation of legal norms established by the Israeli legislation (IMSEIS, 2001, p. 333/334).

Taking into consideration the results attained by the aforementioned investigation, the Commission, despite having analyzed the previously described transgressor events, brought, as results of its research, a countless number of justifier reasons for the practices employed by the GSS, fundamenting its understanding, mostly, in the fact that the “physical pressure” acts employed by the GSS in the repression of acts of terrorist nature practiced by Palestine groups were different from those practiced in any other situation that did not involve the defense of State interests.

The Commission understood that, first of all, the State of Israel shouldn’t apply any criminal conviction proceedings to the ones accused of the practice of perjury during the evaluated period, since it would cause an unnecessary paralisation of the State machine in order to judicially analyze such cases. It manifested, also, the favorably to the possibility of employing coercion practices, as long as the government legally admited those practices and kept a regular monitoring over them. It concluded, finally, that the employment of “physical pressure” would be admited in the search for the truth in every situation in which the use of the so-called “psychological pressure”, i.e., every manner of coercion that didn’t involve physical violence wasn’t enough to ensure the attainment of truth. The approach to the “Defense State” institute was also important for the analysis developed by the Landau Commission, whose employment to the analyzed cases was also defended by the Commission. Such institute, bred in the Israeli Criminal Law, finds legal provision under the Section 34 (11) of the Israeli Criminal Law (Israel, 1977) and has the following concept:

A person shall bear no criminal liability for an act required to have been done immediately by him to save his or another's life, freedom, body or property from an imminent danger of serious injury deriving from the circumstances at the time of the act, and for which no alternative act was available.

Therefore, The Commission understood that it would be possible to extend such concept so that it would be applied to situations in which the prevalence of the Israeli State’s
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interests over the prisoner’s individual freedom was necessary (IMSEIS, 2001, p. 335). Immediately after the creation of the Landau Commision Report, the palestinian insurrection named Intifadah happened in the year of 1987 and resulted in the prison and torture of palestinians accused of terrorist acts during the years of 1987 to 1993. As a consequence, the irresignation of the offended was materialized through a series of lawsuits promoted by tortured victims, as well as by the NGO “Public Committee Against Torture in Israel”, which raised the awareness of the international community and also caused the intervention of the United Nations Committee Against Torture through many clarification requests made to the State of Israel on the matter. Seeking to ease the pressure caused by the described situation, the Israeli Supreme Court scheduled a hearing whose main purpose was to evaluate the practices raised by the authorities during the Intifadah period.

In such evaluation, the Supreme Court identified three cornerstones in order to discuss the matter, the first of those being related to the legitimacy granted by the Israeli Law to the GSS’ investigators to conduct interrogations. If such question had a positive answer, this cornerstone would be followed by debating if the applicable laws granted powers to the GSS’ investigators to employ physical means conducting interrogations. Otherwise, if the first question had a negative answer, the third cornerstone to be analysed would be the possibility of any of the GSS members to allege the “Defense State” in their defense, according to the standards established by the Landau Commission.

As to the first cornerstone, the Israeli Supreme Court understood that, even though there was no law attributing, specifically, any legitimacy to the GSS’ members to conduct interrogations, such legitimacy could be attained from the analysis of the article 2 (1) of the Israeli Criminal Procedure Law, which regulates the right of officers linked to the police or similar institutions, to perform interrogations (IMSEIS, 2001, p. 340).

Also, the Court understood that, when it comes to the granting of powers, by the Israeli law, to the GSS members to employ physical cohercion methods, that it represents a harsh violation of the investigated individuals’ freedom and dignity, making it possible to observe a “shock of values” between such rights in the analysed case, as well as the “wish to find the truth” established by the Israeli State. Finally, after an evaluation of the torture methods presented by the petitioners’ pleads presented to the Israeli Supreme Court, the later understood for the absence of authorization, in the Israeli law in effect at the moment of the analysis, for the practice of such cohercion methods (IMSEIS, 2001, p. 340).
Finally, on the third cornerstone of the approached debate, that is, the applicability of the “Defense State” as a justification for the employment of the studied physical coercion methods, the Court understood that, even though a torture convicted GSS member could claim such institute in its defense, the institution wouldn’t be allowed to practice torture and be covered by such concept. That because, according to the Court’s vision, the “Defense State” only would manifest itself in exceptional situations, and those situations don’t include interrogations conducted by intelligence services (IMSEIS, 2001, p. 340).

It is also important to highlight that, even though the previously described torture theme has been analysed by the Israeli Supreme Court, the Israeli political and social scenarios at the time of the trial were responsible for the demand for a positioning from the Court in the shape of a judicial review of the State’s actions that caused restrictions to such fundamental rights. This situation comes close to the Brazilian scenario observed in the trial of the Habeas Corpus 126.292, in which, even though it is not possible to verify such a boiling social contexto like the Israeli one, it is possible to see that the importance of the discussed matter and the social pressure were responsible for the Brazilian Supreme Court’s call to action and for the trial’s results.

The Habeas Corpus 126.292 Trial by the Brazilian Supreme Court

The Habeas Corpus 126.292 tackled the patient’s conviction to a reclusion sentence due to the practice of the theft crime, increased by the use of firearms. The defense tried to discuss, first before the Superior Tribunal de Justiça, and then before the Brazilian Supreme Court, the possibility of incarcerating the convicted defendant even in a situation in which any appeals to such courts were still pending. Such trial developed based on two distinct moments when it comes to the prison of defendants convicted in criminal lawsuits.

As Minister Luís Roberto Barroso’s vote established, until 2009 the Brazilian Supreme Court discarded the possibility of maintaining the convicted defendant’s freedom even though there were appeals of any kind to superior courts still pending. In 2009, however, the Court changed its positioning on the matter, establishing that until the Judgement’s execution, while appeals were still pending, offended the right to a full defense and due legal process. In such moment, the understanding that the defendant should stay in liberty until an eventual appeal was judged by the superior courts was adopted. The Habeas Corpus’ judgment rapporteur, Minister Teori Zavaski, argued in his vote that, even though there were eminently opposed
understandings until that particular moment, there were no obstacles to the change of such judicial understanding in order to authorize, once again, the provisory compliance with judgement of defendants when in situations of pending appeals in Superior Courts. In his argument, the minister emphasized that the evaluation of fact-probative matters linked to criminal cases is up to first degree judges, as well as to local courts in the analysis of eventual appeals, considering rare any cases in which an effective change in the defendants’ convictions could be verified after the trials held by Superior Courts.

For this reason, Zavascki concluded that even though such understanding promoted a limitation to the Criminal Law’s Inocence Presumption principle, such limitation wouldn’t cause greater damage to the analyzed cases, once the referred principle would be rigorously followed during the lawsuit’s progress through ordinary routes. The referred vote brings, also, previous jurisprudence from different countries that corroborated its thesis and adds, also, that it is up to the extraordinary appeals to “preserve the normative system healthiness” and not to “examine the fairness or unfairness of decisions produced in concrete cases” (STF, 2016, p. 12).

Barroso, on the other hand, sustains, in his vote, that two distinct constitutional mutation moments happened on the matter. The first being related to the consequences brought by the establishing of such understandings: a greater difficulty of putting criminal justice in practice. The negative results brought by the understanding established by the Court in 2009 are synthesized through three main arguments. The first being the discouraging of delaying appeals’ interposition: such change in the Court’s understanding would provide that only cases in which it would be possible to observe the actual need for upper instances evaluation would come to the analysis of the Brazilian Supreme Court. According to the minister’s words:

In the real world, the percentage of extraordinary appeals granted favorably to the defendant are irrisory, inferior to 1,5%. Even more relevant: from 01.01.2009 to 19.04.2016, in 25,707 merit decisions in nominal appeals delivered by the Brazilian Supreme Court (REs and agravos), the absolutory decisions don’t reach 0,1% of the decisions’ total number (STF, 2016, p. 33).

The minister argues, also, that the proposed modification would reduce the selectivity of the Brazilian criminal system, hence it would stop the freedom of the defendants in criminal lawsuits to be conditioned to such defendant’s financial conditions to hire lawyers to present the referred appeals (STF, 2016, p. 7 and 8). Finally, the minister asserts that the understanding
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presented until such moment by the Brazilian Supreme Court’s jurisprudence caused the criminal system’s discredit with the Brazilian society, due to the existence of defendants still free even after their conviction, in situations in which it could be possible that those wouldn’t even get to serve their sentences due to the possibility of time-barring of the punitive pretension related to such lawsuits (STF, 2016, p. 8).

Based in such premises, Barroso sustains that the recovery of the understanding initially presented would be the most reasonable measure in front of the reflexes that the perpetrated change had caused, fundamenting his understanding in a combined analysis of the items LVII and LXI of the Brazilian Federal Constitution. In this point, the Minister argues that, even though there was no *res judicata* in the discussed chronological moment of the lawsuit, the constitutional text made no difference between the culpability and prison institutes, which should, consequently, be treated differently between themselves.

Finally, Barroso concludes his vote discussing Robert Alexy’s theory by arguing that the weighting between the inocence presumption and the constitutional interest in the criminal law’s effectiveness theories should be made. Reinforcing the arguments brought in his understanding, mainly in regard to the three main cornerstones that Barroso argues that are fundamental to the matter’s analysis, the latter establishes that it would be possible, therefore, to mitigate the inocence presumption principle on behalf of the criminal law’s effectiveness.

**Critical Considerations on the Analysed Cases**

After the judgements’ descriptions, it is possible to analyse them under the judicial review’s conceptual prism in order to reflect on those decisions and on such mechanism’s role in the judiciary power. With such objective in mind, the following items will bring new considerations on the judicial review. Such system derives from the Constitution’s supremacy and involves not only situations in which the alteration of laws cause oppositions to the Constitution’s text, but also situations in which the absence of applicable rules to some cases implies on the violation to constitutional precepts (Silva, 2005, p. 46/48).

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5 LVII - Nobody will be considered guilty until the criminal judgement’s *res judicata*;
6 LXI - Nobody will be taken under arrest unless if during an offence’s commitment or by written and legally based order from a competent legal authority, except in military transgression or military crime cases, as defined by law.
3.1 Critical Considerations on the Torture Trials Case

On the GSS’ torture trials, IMSEIS (2001) pointed criticisms that are able allow a broader understanding of the concepts involved in such case. In a first moment, the author points out that the judgement wasn’t able to envolve all of the torture practices employed by the GSS in interrogation procedures, since the Landau Commission Report only described the torture practices involved in the agency’s acting in a classified annex, which was kept classified when the trial held by the Israeli Supreme Court judged the matter. This happened because, even though the Supreme Court had determined the disclosure of the cohercion methods employed, the determination wasn’t followed. Such situation caused the Israel State’s refusal to presente the solicited data due to the lack of an official order, although it suggested the possibility of presenting a video of the employed tortures, which was rejected by the victims who filed the lawsuit (IMSEIS, 2001,p. 341).

Taking into account the obstacles found in the demonstration of the aforementioned torture techniques, the Supreme Court structured its trial over the five torture techniques related by the lawsuit’s applicants and whose existence was known at the time of the trial, such techniques being: violent shakings, shabeh (method in which the victims were seated on chairs in extremely uncomfortable positions, with their heads covered, for long periods), “frog crouches”, excessive tightening of handcuffs and prolonged sleep deprivation. Therefore, the trial was only restricted to the aforementioned torture techniques, not including any other whose existence was known. Also, no further investigations on the matter were raised, since the Israeli Supreme Court didn’t determine the mandatory exhibition of the classified annexes on the matter. The Court avoided the utter appreciation of the problem by judging only partially the scenario exposed by the applicants.

Consequently, even though the Supreme Court understood the employment of physical torture methods to attain the truth as inadequate, the trial was restricted to the torture methods whose existence was proved. In this regard, Amand (2000, p. 676) states that such dimension attributed to the trial not only didn’t stop the use of torture by the GSS, but also allowed it to be employed by the institution as long as it didn’t happen in the same ways analysed by the judgement, which represent a minimal percentage among the many torture methods whose application is widely known.

Aside from this, the trial only approached the methods employed by the GSS. This means that the analysis didn’t take other defense institutions created by the State of Israel into
consideration, such as the Israeli Defense Forces (IDF) and the Israeli police. There was no restriction to the employment of torture by these agencies (IMSEIS, 2001, p. 342). Finally, the approach developed by the Israeli Supreme Court was restricted to the analysis of the torture practices employed by the GSS during the interrogation phase of arrest and detention, not covering any other practices held in post-arrest and/or pre-interrogation phases. This particular aspect would, therefore, legitimize its employment in such situations.

For all of this, the Israeli Supreme Court’s decision didn’t prevent the employment of “physical means” of coercion based in the fact that they were torture practices. It simply pointed out that a new law would be needed to regulate the practices employed by the GSS. Actually, the Court adopted an omissive proceeding when discussing the torture practices, referring exclusively to technical matters when, in fact, it should cover the political and social situations involved in the case (IMSEIS, 2001, p. 346).

Such arguments refer to Troper’s analysis (2003, p. 109/110) on the judicial review, which approaches, in a critical way, the Constitution’s conception and the judicial review as mechanisms that would tend to prevent unbalances in the shock between qualitative majorities and minorities inside a democratic process, preventing, therefore, the oppression of the latter’s interests by the first. The author was emphatic, in his analysis, by establishing that such premise doesn’t sustain itself, once a Court with the power to review the conformity of laws with a vague bill of rights wouldn’t find any obstacle in adopting an interpretation aligned with the interests of qualitative majorities. The interests of minorities would, therefore, be easily oppressed by such interpretation, which would count with legitimacy granted by the Constitution in force at the time. The author also affirms that the act by which a constitutional court declares that representatives of the people have exceeded the limits of their power is an act of sheer interpretation and not one of empirical evaluation, in a way that would relegate to the members of such institution the role of deciding if determined law expresses the people’s will or not.

In the same sense, the trial held by the Israeli Supreme Court is an exemplary one. The legal interpretation tried, in this case, to only confirm the state’s agentes behavior and the interests of a qualitative majority. This was highlighted by the judgement itself when taking into consideration that it analyses the confrontation between the Israeli State’s interests and the ones of interrogated individuals who did not pose any threat to the State. In this case, as well as in all others, the weighting between the State interests and the individual rights leads to the elimination of the later and the protection of the first.
3.2 Critical Considerations on the *Habeas Corpus 126.292 Trial*

Following the same line of reasoning, the HC 126.292 trial was the second change of the same understanding by the Brazilian Supreme Court in a short period of time (2009 to 2016), and a third change would occur three years later. In all of those cases, the Court performed an activity of mere legal interpretation, not bringing any empirical bases on the case, although minister Luís Roberto Barroso’s arguments try to show the opposite.

Aside from this, the trial is based in the rhetorical figure of the shock between the innocence presumption principle and the Court’s practical experience on the maintenance of the defendants’ freedom while appeals were still pending. In no moment there was any sort of empirical and factual demonstration of how much a restriction in the innocence presumption would favor the preservation of the public security. Especially because this sort of demonstration is impossible, once such values are not only different between themselves, but also immeasurable (Laurentii, 2017, p. 151).

For Minister Barroso, this shock must be solved through the employment of Robert Alexy’s weighting theory. The proportionality principle would allow, in the same sense, to realize that the restriction to the innocence presumption principle would be compensated by the gains in credibility protection and effectiveness of the Brazilian judiciary Power. As a general rule, and according to the model adopted by the Brazilian law, the implementation of such technique involves the employment of three tests (adequation, need and strict sense proportionality), that would allow the reaching of the adequate weighing between the fundamental rules in shock and would grant it an adequate parameter for the decision of conflicts.

In the analyzed case, there are severe problems on the employment of Alexy’s technique, once, even though in his decision, Minister Barroso, brings concepts of the author’s work, these are not adequately developed in terms of methodology in such lawsuit. Actually, this vote applies to the weighting directly, without any approach of the other steps described in Alexy’s work. Hence, it’s about a purê and simple exercise of weighting and voluntarism. Such problem worsens by the use of an unconventional proportionality test. According to the Minister:

The proportionality principle, such as it is understood nowadays, has not only one negative dimension, related to the prevention of the excesso, which acts as a limit to the inadequate, unnecessary or strict sense unproportional restriction of fundamental
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It also involves a positive dimension, referred to the prevention to the insufficient State protection of rights and principles constitutionally guarded. The idea is that the State also violates the Constitution when it doesn’t act or acts inadequately or poorly in the protection of relevant judicial assets. Such principle has been applied by this Court’s jurisprudence in many diverse occasions to drive away the application of rules that imply a poor tutelage of constitutional precepts (STF, 2016, p. 42).

Therefore, a poor protection means the proportionality only as a form and as a control instrument of legislative omissions. This is an interesting and highly contradictory application of such test. It causes interest and awe because the proportionality rule or principle has always been seen and was built during centuries as a control instrument for State interventions in the area of fundamental rights’ protection. As a control instrument for interventions, it is more than obvious that the application of this test assumes the identification of a restrictive state action of fundamental rights - of the innocence presumption, in this particular case. More than this, the whole proportionality test was conceived and is structured as a way to evaluate the causality relation between means and ends (Barak, 2012), which makes room for the empirical evaluation of the restriction imposed to the fundamental right and its eventual relation to the end pursued by the State through such act. In the case of the poor protection this doesn’t happen at all. In this hypothesis, it is not an action that is evaluated, but a State omission and, as everyone knows, the omission of an act is a non-act – a nothing. And a nothing can only, by a physics definition, cause absolutely nothing. There is not a minimum clue of how and why the proportionality could develop this miracle operation: knowing in which measure the nothing affects the fundamental rights or the State interests.

This shows that, by employing the poor protection figure, the judge (minister or a properly said judge) is not controlling a previous State action anymore. He transforms, here, in the creator of laws that, under his own vision, are more adequate to protect, instigate or safeguard fundamental rights and the State’s objectives. What is not explained or shown by the defenders of this figure and by the judges who employ it i show and why – based on which criteria – they choose the measures considered more adequate to protect and supervise fundamental rights. Some examples, to illustrate. The fundamental right to the freedom of coming and going can be performed in most diverse manners: people can go home by bycicle, skate, car, bus or helicopter. The State must make all of these transportation means available to the people or only one of them? If it must provide only one, then which one should be? The problem can multiply: if there is a variety of possible treatments for a disease (câncer,
rheumatism or kidney failure), the State must offer all of the available cure, treatment and medicine or only one? In the Criminal Law and criminal policy the same doubt remains: to fight crime effectively, what must be done? Hire more police officers, judges, district attorneys? Buy more equipment, instruments of investigation, instruction, intelligence, harvest and sharing of evidence? Educate people and distribute income in a more equalitary way? Or, beyond all of this, is it also necessary to change laws and the Constitution? This is not an easy choice. It involves empirical, social, economic and ideological variables. In this case, it is about a political choice, one that must be single and exclusively performed by elected representatives of the people, with the competence to create rules and general and abstract laws, and not by judges (Dimoulis; Martins, 2014, p. 50).

There is no proof for judicial technique that substantiates the choice between completely uneven measures and there is so much disparity between the hiring of police officers and the elaboration of punitive laws as with the choice between going to the steakhouse or the ice cream parlor. It is all a matter of choice and option. The matter that has no answer in the HC’s decision or in the texts written by those who defend the principles theory is: after all, why do people have to accept the choices made by judges in these situations? Why choices between criminal policy options are made by judges with no further problems but the choice of what one’s going to have for dinner is treated differently? Everything is a subjective and an option matter, but it is naturally accepted that a judge tells – based in a poorly based figure like the poor protection – if it is better for everyone to create a law – or, in the case, a constitutional norm – more punitive or build schools. Why? There are two answers for this question. First, people think judges have some sort of magical power that makes them smarter and more virtuous than everybody just by the simple fact that they know the law. This makes them think that any choice made by judges – even those without any legal basis – is better than the decisions made by people. They forget that judges are also people and that any and every person is fallible, because all of them have a limited capability of absorbing information and processing data – nobody, not even judges, is perfect. Therefore, what is done when the decisory competence is transferred to judges is not necessarily the creation of a better decision. With this procedure, all that happens is transferring the possibility of having someone making the last mistake (Waldron, 2006).

Second, the people who argument infuriated and passionately against all of those “benefitted” by the innocence presumption rule probably have never participated or put themselves in the role of one who must defend himself from an unfair criminal lawsuit. These
people invert judge Blackstone’s rule – “It is better to free five guilty defendants than arresting an innocent one” (Baradaran, 2011, p. 737) – Because not only they think that the punitive rule will more probably hit the guilty than the innocent, but also believe that they will never be in the role of the guilty convicted or the unjusticed innocent. Realizing these very same people seek justice and employ every single mean available in Law to deend themselves when they are indicted of the commitment of a crime is not only a paradox. Actually, it is even more harsh and disturbing to note that this same kind of people preach the equalitary justice speech – they say, just like Minister Barroso, that the innocence presumption creates a selective criminal system, that punishes the poor and saves the rich (STF, 2016, p. 34) – to reach the conclusion that everyone must be deprived of a fundamental right. As if taking away the rights of some would automatically create more rights for others. The argument here is not only authoritarian, but also hypocritical.

Of the same species are the affirmations, also found in Minister Barroso’s vote, according to which there is a negligible number of extraordinary appeals in which the accused are freed after the judging of appeals of constitutional order. If this is true, what matters, then? Are people who had any success in their appeals (of special or extraordinary order) less important than the ones who didn’t had the same luck? And wouldn’t this be a note that leads straight to the opposite conclusion of the one had by Minister Barroso: the fact that a person who’s been benefitted by the innocence presumption rule is already more than enough to justify the existence and defense of such rule. After all, isn’t this the exact role of the judiciary: to defend minorities (a single person who won in an extraordinary appeal) against the will of the many?

The third aspect listed in the rationale of Minister Luís Roberto Barroso’s vote must also be highlighted, in which the latter sustains that the impossibility of arresting defendants convicted in the first degree contributes for the criminal system’s discredit with the society, since it would grant margin for the punitive pretension’s time-barring and would urge the sense of impunity not only in the defendants in criminal procedures, but also in the society at large:

In third place, the new understanding contributes significantly to worsen the criminal system’s discredit with the society. The need of waiting for a \textit{res judicata} of the REsp and the RE to start the criminal sentence’s execution has been conducting massively to the punitive pretension’s time-barring or to the humungous time distancing between the crime itself and the definitive punishment. In both cases, a pernicious sense of impunity, which compromises the penalty’s objectives, of special and general
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prevention. A demoralized justice system is worthless to the Judiciary, to the society, to the defendants and even less for the attorneys (STF, 2016, p. 34).

The Minister seems to highlight with his vote that more important than the law’s obedience or even the solving of crimes is to face the criminal system’s discredit with the society, as well as the sense of impunity brought by the delay in the starting of the penalty fulfillment, which can only be adequately faced, according to what can be deduced by his vote, with a fast penalty application.

Radical changes on the penalty fulfillment system, such as the one observed in this trial tend to come close to the creation of indefinite and arbitrary penalties, typical of Absolutist States, which breaks not only with the judiciary’s guidelines, but also with the democratic State based on the rule of law (Busato, 2016, p. 71).

Instigating the reflection and bringing an approach on the reasons that lead the judiciary to the adoption of measures such as the one derived from the vote hereby analysed, Lorenzoni and Maia (2019, p. 193) stem from Ulrick Beck’s considerations in the book La Sociedad de Riesgo. Hacia una Nueva Modernidade when defending that the post-modern society, characterized by the impossibility of the population to control their fears’ causes, has an endless pursuit for the prevention of crimes that can’t even be known or predicted, which generates a series of decisions that can infiltrate in the most varied social areas, from the judiciary’s work to the adoption of public policies, characterized by the despair and by the attempt of establishing some sort of social control, resulting in the so-called risk society.

Therefore, in the same sense, the highlighted mentality reflects on criminal policies through the adoption of measures that seek the realization of a safety ideal that aims to protect the society against every possible crime, which ends impairing, paradoxically, the individual freedoms on behalf of an idea of absolute safety.

As a practical consequence of such scenario over the constituted powers, an increase in social pressures over the legislative and judiciary powers excels, such increase has the defiance of such powers to attend to claims for more safety as its main goal. This speech suffers strong influences of the media and tends to hold the measures taken by such powers under the influence of criminal populism, in total opposition to its fundamental goals (Lorenzoni; Maia, 2019, p. 194).

However, the measures taken by the judiciary, in this sense, can’t succeed, since they depart from a merely symbolic conception of the criminal law and tend to fight a feeling of
impunity that, exactly for being a feeling, can be totally detached from the social scenario’s reality an from the criminality’s concrete numbers.

By commenting on the Brazilian Supreme Court’s positioning, Santos states that:

The decision bets in the criminality control with criminal penalties, taking over the repressive criminal policy inspired by etiological Criminology, interested in the efficiency and effectiveness of social control, unlike the critical Criminology, that explains criminality through structural and institutional inequalities of the capitalist social formation and, therefore, is interested in protecting the citizen against the State violence (SANTOS, 2019, p. 3).

By discussing the modern criminal racionality, well illustrated in the analysed judgement, Pires (2004), asserts that the first establishes a relation between crime and penalty, in such a way that one can believe that only the later can diminish crime. This new way of thinking about criminal matters implies in a more recent processo f judicializing the public opinion.

However, the author warns that it is not that the criminal system transfers its decision power to the public, but it decides if, when and how the public will be integrated on it. In this contexto, “one may ask if criminal courts are not on the way to become closer to the exercise of the political system’s function in some key aspects of the decision-making process” (PIRES, 2004, p. 49). Hence, it is possible to realize that, through the analysis of Minister Barroso’s vote’s excerpt, the adoption of a speech focused on attending to popular appeals, bringing forth to the discussion arguments that can answer to such appeals, which makes it gain political aspects to the detriment of judicial aspects-focused discussions.

Due to all of the highlighted arguments, the judgement of this HC is absolutely fragile not only in its theoretical and dogmatic construction, but also in its practical consequences. Under the practical prism, the anticipation of the res judicata in criminal cases is in conflict with the legal procedural system as a whole. The acts of civil execution that cause the constriction or disposal of assets demand a guarantee, which secures the executed part against eventual damages caused by judiciary mistakes (art. 520, IV, CPC). There is no sense in provisionally executing a criminal judgement if the procedural system doesn’t grant the executed this same level of protection (Laurentiis, 2013). Under the theoretical perspective, as previously stated, there is no sense in talking about a poor protection when the judge who employs such figure is not a judge who’s defending the Constitution and applying the juridical rules, but a tyrant who wants to impose his own will. A Wolf in a sheep’s skin.
3.3 Critical Considerations on the Judicial Review

At this point, it is possible to contrast Robert Alexy and Michel Troper’s theories on the judicial review in order to realize the dimension of the discussion involved in the analysed judgements. Alexy (2000, p. 40/41) states that, even though the presence of a judicature of constitutional nature can be a way of controlling the democratic process, its disadvantages can overcome the advantages of its establishing if an adequate participation of the judiciary is not verified in such activities. Ultimately, the creation of an arbitrary jurisdictional power can only be prevented if the judges behave as a neutral and rational reflection instance, one that treats the political process in a distant way. This is be the only way by which the power exercised by judges can be accepted in the society: the arguments presented by said judges must create a rational judicial-constitutional speech that finds the adequate social feedback and doesn’t gain any characteristics of unjustified imperativity.

Troper (2003, p. 108), by his turn, states that the judicial review is not a means by which the Constitution’s supremacy can be ensured, but an instrument that ensures the supremacy of constitutional rules produced by the authority that wields such instrument. In opposition to Alexy’s theory, the author doesn’t understand that the judicial review is a direct reflex of the democracy (TROPER, 2003, p. 110). There are many democratic countries (United Kingdom and New Zealand), which doesn’t adopt any form of judicial review of laws. More than this: once the decision power over the constituted powers’ limits transposition is attributed to the judiciary, the interpretative activity of courts becomes discretionary, because their decisions can change laws and rules with no prior empirical justification. Stemming from such premise, justifying the judicial review considering it as a reflex of democracy would be an argument based in a distortion of the concept of democracy itself, once such distortion would be conceived not as an autonomy system or as the power of the people exercised through elected authorities, but as the power exercised in the name of the people by representatives among which only a few would have been elected.

The author’s analysis on the justifications presented by the doctrine for the employment of the judicial review allows to realize a complementary bias between his ideas. Actually, Troper (2003, p. 120) doesn’t understand the judicial review as essentially flawed. His criticisms are pointed only towards the justifications employed by the doctrine about its importance inside the democratic process. For him, these justifications are incorrect. The constitutional courts exercise discretionary power through such activity and don’t act apart
from the Legislative power when verifying the compatibility between certain rules and the Constitution, but in a joint effort. It is, therefore, an illusion created by the own judiciary to say that the judicial review Always and necessarily protects the weaker and the oppressed. The judgements analysed here corroborate this thesis.

By analysing Troper and Alexy’s ideas together, it is possible to observe that Alexy’s arguments on the risks of the inadequate practice of the judicial review find an important complement in Troper’s theory. After all, every institute, including the judicial review, is subject to mistakes and to the discretion of courts and judges. There is always a tendency to the creation of scenarios in which its application happens based on particular perceptions from court members. For the same reason, the judicial acting must be guided by caution and minimalismo: judges must solve the conflicts that are presented to them, with no creation of generalizing theories and not going beyond the cognoscitive and institutional capacities of the institution that they are linked to. What sets apart these two actors is the belief in the reason and dialogue’s potential to control judges’ decisions. For Alexy, reason can a must be materialized in the institutional dialogue that happens not only between court members (internal deliberation), but also between such actors and the society as a whole (external deliberation). This means that “the dialogue task between the court and other actors, whatever they may be, can be exercised by judges in their individual acting outside court but also, and most important for this paper’s objectives, through the dialogue between powers, of a “constitutional dialogue” (Silva, 2009, p. 213).

This metaphor – “institutional dialogue” – on one hand, makes the analysis more difficult, because it is not possible to know exactly which parameter was chosen to decide if a court decides in a dialogical and fundamented manner. Without this, judicial decisions may simply report to this metaphor not only to justify themselves, but also to imunize their contente against eventual criticisms. Therefore, the dialogue is converted in a n instrument of increase of the judicial power (Leclair, 2003). Also, the dialogue metaphor invites judges to speak directly to the public and to the society as a whole, as if the judicial decisions needed the general approval to legitimize themselves. This is a dangerous path, that not only generates politization, but also radicalization of justice, because the public is the locus of the ideological confrontation and the judge who inserts himself in the public assumes, necessarily, one of the sides on such conflict.

Soon, the judicial review reveals itself as a double sided instrument. It is capable of preventing the irregular application of rules and stand for the minorities’ rights, but can also
be the doorway that leads to authoritative decisions and to the judicial populism. In cases involving the application, interpretation and validity control of criminal laws, such characteristics are worsened, not only because the life and freedom of many people are put in the discussion in such cases, but also because the public’s passions emerge more passionately in said cases. In these situations, judges and courts must be doubly prudent, in order to avoid innovations and decisions that flee from the evident content of judicial rules. This is not what happened in the cases hereby analysed, which is a fact that brings them closer and indicates the need for constant and careful reflection and evaluation of the decisions proffered by Supreme Courts in the most diverse countries. Not only because such institutions and their judges must decide important and sensitive matters for society, but also because they can be the source for the most diverse inequities and injustices.

Conclusions

After the presentation of the judicial and factual scenarios involved in each of the trials, it was possible, at a reflexive level, to analyse the arguments that based each of the judicial review techniques applied in each one, as well as to build a counterbalance of the decisions between themselves as well as between each one of them in relation to the judicial review institute.

Through the analysis of the Israeli General Security Service’s Torture Case, it was possible to realize a scenario in which the creation of vague laws has legitimized the use of the judicial review as a mechanism of interpretation of the same laws by the Supreme Court’s members, who did it according to personal beliefs that caused the legitimation of torture practices, ensuring the State’s interests to the detriment of individual rights of such torture cases’ victims.

The analysis of the *Habeas Corpus* 126.292 by the Brazilian Supreme Court, on the other hand, allowed to perceive a different situation, in which the adopted decision gained political characteristics that led the discussion away from the judicial scope and towards discussions of a more political order, which was confirmed through an analysis of criminologic bias on the excerpt in which the Minister alludes to the discredit of the criminal law’s system with the society and the need to fight the sense of impunity brought by the delay in the starting of the judicial sentence’s execution. Ultimately, it was possible to realize that the political discussions approached clouded the regular application of the judicial review and
distorted its main goal: to analyse the evaluated situation’s conformation to the parameters set by the Constitution.

Finally, due to all of the exposed arguments, it was possible to reflect on the judicial review and its dubious nature, making it possible to perceive that, while, in a determined argumentative bias, it is possible to see that the concept gives margin to its own subversion to the benefit of hidden interests and discussions out from its focus, causing exactly what the institution tries to avoid: the arbitrariness of the judiciary to the detriment of fundamental rights.

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