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Articolo Scientifico

THE JUDICIAL REVIEW WITH AN INTERNATIONAL CONVENTION AS A PARAMETER

The judicial review is a well-known activity in every normative system, especially when analysing democratic nations. However, the parameter for a traditional judicial review shall not be only a Constitution, and jurists worldwide must admit an International Convention and its values as a regular parameter.

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Introduction

Jurists have a common knowledge that must be – or should be – always with every lawmaker, which is that every piece of legislation shall be in accordance with the National Constitution. Despite the natural political basis that every law has, the production of this kind of document necessitates staying in accordance with the Constitutional Law as a Juridical Science.

First, the constitutional review can be made, previously, during the legislative process itself. Commissions must be created permanently, to facilitate and integrate the initial analysis of the project of a normative act, intended to be a future law. Therefore, all Parliamentary Systems worldwide needs to have jurists working with lawmakers.

Besides the above-mentioned previous control, the review of an ordination in a legal system occurs, often, inside a judicial process. In that case, there are two forms to control the constitutionality of a determined normative act: the so-called "**American System**" (used in some American countries) and the so-called "**Austrian System**" (used in most European Nations).

Some countries have adopted both modalities whatsoever. This is the case of Brazil. The south american nation, during the formation of its Constitutional History, created a mixed form of judicial review, adopting the above-mentioned American System, and the European or Austrian System. Therefore, the constitutional review in Brazil develops in either way.[1]

However, it is not only the Constitution that serves as a parameter for the review of an act created by the Parliament or the Congress of a specific Nation. Some countries, like, e.g., the United Kingdom, do not have a written Magna Carta, but have produced dozens of legislations that created a so-called "**Constitutional Bloc**".

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Professors Ana Maria D´Ávila Lopes (from the Federal University of Minas Gerais and from the University of Fortaleza) and Isabelle Maria Campos Vasconcelos Chebab (also from the University of Fortaleza), produced an article that served as inspiration for the present text. With this work, they affirm the possibility of the creation of a constitutional bloc, with the main goal of protection of human rights within the Brazilian reality[2]

Through this topic, it is easy to defend, as a parameter for the constitutional review, the international pacts, treaties and other pieces of legislation. These ordinations need to be seen and defended as typical acts with profound Human Rights values, with the goal to demonstrate the possibility, to be a parameter on a judicial review process, in whatever system the analysis is made.

This article has the objective to demonstrate the natural force that every principle and value carries, especially when they are viewed inside an international normative act. Not only this must be considered. The formalities of a precise piece of legislation, if international or domestic is not important. The main course of analysis must be the values and principles, that stand behind this legislative act.

1) Punctual analysis of the constitutional review systems.

The first consideration regarding the constitutional review unfolds into an analysis of the legal history of a Nation. For instance, it is possible that countries, geographically close to the United States, chose to adopt the system created by the American Courts. This is also applied to the European Nations, that **consider the Kelsenian System the one that must be important to the development of the constitutional review in a country**.

It is important to mention the elements of both systems. The so-called **American System presupposes that the review of a normative act can occur in any court,** regardless of its position on a supposed hierarchy presented inside a country and its judiciary. In that case, a Court, for instance, in New York, can consider an act from the State of New York unconstitutional.

However, it is also important to maintain that this analysis can only happen with an already existing process. It is impossible to not consider the constitutionality of a determined normative act just via a so-called abstract review. This form of constitutional control requires the presence of a judicial process, with all the bureaucracy, intrinsic in every judicial system worldwide.

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Concerning the so-called European System, it was mainly designed by Hans Kelsen, the famous Austrian jurist that shaped the clear majority of Supreme Tribunals in Continental Europe. His ideas were maintained for decades, and, until this day, nations like Germany, Italy and even Brazil chose this kind of constitutional review for their judicial systems.

The Kelsenian Modality admits numerous actions to be taken and it is used with the objective to pass the scrutiny of a specific normative in a National Supreme Court. This kind of constitutional review gives a profound juridical security, nonetheless narrows also a general discussion regarding the constitutionality of a law.

There are some countries that chose both systems whatsoever. Brazil, for instance, admits either the Kelsenian and the American modalities of judicial review. Therefore, a judge on the south american nation may produce an idea regarding the constitutionality of a law or another normative act for a determined case presented before him, and this perception is going to be applicated for the parties of that judicial process.

The constitutional review is not limited in Brazil, via the denominated American System. The Supreme Federal Tribunal also has the legal power to enforce the constitutionality or declare the unconstitutionality of a determined normative act, controlling the application, using the concrete forms of actions that are presented by the Brazilian Legislation.[3]

It is important to defend that the protection of basic rights, principles and values must be the main objective of every jurist. Generally, the Law exists only to defend the human being, a fundamental concept during historic periods, that foresee the mere possibility of violations like the ones that occurred during the Second World War.

Jurists worldwide are responsible to determine, on a primary basis, how society is going to attend the necessities of its people. Via the judicial review, judges can determine, with technical consideration, if a normative act can maintain its existence inside the Legal System of a Nation. Therefore, the profound knowledge of the above-mentioned is always positive for all jurists.

2) Principles and values of rights: the world today.

It is noticeable that the list of fundamental rights is not yet finished and shall never be. After all, the Study of Law is a never-ending work, and the output of normative acts must be determined by the routine changes made through the social tissue. All jurists must visualize this reality and provide to lawmakers every help that they might need on their daily activities.

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With this important notion in mind, the prospectus of fundamental rights must stay clear, in accordance with the values that guide the international society. The right of a life, the battle against hunger, the protection against violations of human rights during a war, the main objective of maintaining peace to all mankind, are just few of these values that cannot be forgotten.

Fundamental rights are also a direct consequence of some of the values above-mentioned. It is also important to bear in mind that values also have strong coercive force, especially when humanity is dealing with realities that range from the absurd to almost the absolute dystopia.

Human rights violations occur daily, especially on Nations that are still under non-democratic regimes. The right of free speech, for example, is a constant battle of journalists, against some governments that do not recognize one of the most basic principles of humanity. The publicity of state affairs must be a principle defended worldwide.

Another important example, that should be a mere historical curiosity, is the number of refugees in the globe. The United Nations High Commissioner for Refugees (UNCHR) demonstrates that 22.5 million people are now facing the situation analysed on this paragraph, showing that mankind is witnessing the highest numbers of intentional displacement in history.[4]

Statelessness is another reality, that is worth mentioning. Despite the existence of the **International Convention for the Reduction of Statelessness**, there are approximately 10 million people worldwide, facing this terrible situation. Even with the presence of a treaty that protects, at least ideally, people against statelessness, the number of persons involved in this condition, resembles the population of a country, like Portugal.[5][6]

Those examples showed only that the principles and values that stand behind international conventions must always be taken into consideration. Not just the physical existence of the above-mentioned pieces of legislation shall be understood to defend all people worldwide, but also the consuetudinary existence of those, must be relevant in every action taken by jurists, International Organizations and States.

Therefore, the formality of values and principles of rights must be an enforcement of protection of those rights and the direct consequence, for whom are their rightful owners. The formality shall never be taken into consideration, unless if needed only for the enforcement of the above-mentioned values and principles. After all, these are present for

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generations.

It is mandatory the presence of every International Organization in this process. The United Nations, the European Union, the African Union and the Organization of American States must demonstrate that the enforcement of non-written principles and values shall be a common sense, especially with the resurgence of the mere possibility of a reality, like the one observed during the Second World War.

The enforcement of principles and values defended here, does not demand only the actions of governments and International Organizations. It must be brought the idea that the main agents to make a law, in accordance with an International Convention, are judges worldwide, if they are either from regional and local courts or from supreme courts.

Thus, it is paramount the performance of every subject of International Law, with the main goal directed toward the enforcement of the international values and principles, regardless the formal existence of them. As it was mentioned before, rights are necessary only to protect the human being. Without this, they would only be a mere scrap of paper.

3) Possible conventions as parameters for judicial review: the International Bloc of Fundamental Principles[7]

The number of International Conventions is immense, and is not limited only to formal issues, like the production of a determined treaty, regarding subjects, like the organization of an economic union. There are International Treaties with a diverse range of matters and, the ones with the importance worth mentioning, are especially those that have a list of rights.

It is possible to imagine, for instance, an International Convention like a Bill of Rights. The enforcement of this type of legal document occurs only due to its intrinsic nature. Of course, there is also the presence, sometimes, of coercive force, notably with sanctions towards the subjects that do not respect those portions of legislation. Unfortunately, that is not the reality of the plurality of International Conventions.

Before entering the analysis of possible conventions, that could serve as parameters for Judicial Review in different Nations, it is important to defend the application of every treaty, regardless its subjects. José Francisco Rezek, a brazilian jurist and former judge at the International Court of Justice, points that every International Convention shall be respected by every citizen, and legal entities, inside the national borders, including the Government itself.[8]

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Not just this notion must be enforced, but also the one that defends the immediate adhibition of an International Treaty, inside a national legal system. In other words, every treaty, once signed by a Nation State, must be enforced nationally, despite the eventual necessity of a national legislation admitting this treaty, especially if the matter is about human and fundamental rights.

Eventually, some jurists might defend the sovereignty of one country, asserting that it is not modifiable or "trespassed" by an International Convention. However, that statement should not persist, especially when it is under scrutiny an important roster of human and fundamental rights, against a National Constitution. Nevertheless, it is clear the importance of this part of legislation. However, it may not stay on higher ground than the rights defended by itself.

Therefore, before analysing the possibilities brought by the International List of Conventions, regarding human and fundamental rights, it is defended the possibility of mitigation of the sovereignty itself, notably, when it makes impossible the immediate enforcement of an International Treaty, related to the values and principles that are beyond the existence of a Nation State as a bureaucratic legal entity.

Besides the initial analysis made previously, it is paramount the consideration of which kind of International Convention may serve as a parameter for the judicial review of a domestic piece of legislation. In this case, the sovereignty must be brought upon as a measure of defence against unreasonable intrusions, notably against mere formal modifications of a national legislation.

Thus, the main goal of this part of the article is to recommend the theoretic creation of an "**International Bloc of Fundamental Principles**". It is necessary to declare that it would not end on a few amounts of treaties, but it would be a never-ending, modifiable, and ductile set of International Conventions whatsoever. Nevertheless, this bloc could only change if incorporates another convention, and never to extirpate the ones that are already present.

This would be the accomplishment of another important goal, regarding human rights and fundamental principles, always cited by Brazilian theorists: the so-called "**Cliquet Effect**", that forbids the idea that the protection of fundamental principles may diminish. The current reality worldwide demonstrates the urgent need to acknowledge what is called, even a principle, among jurists in Brazil and might be adopted elsewhere.

The Cliquet Effect is a French creation, originally from the Superior Court of the

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European Nation. It was used as a vision to protect rights of liberties, considering that a law could only modify any consideration related to those rights (if another law came along and protected on the same manner the defended rights by the law that ceased to exist).[9][10]

International Conventions with crystalline values and principles, that resemble those of human and fundamental rights, must persist against any kind of mere formal protection, lifted by a national legislation. For instance, the **Universal Declaration of Human Rights** ought to be a piece of international law that must be enforced, regardless being admitted into a domestic legal system.[11]

The treaty above-mentioned is an important legislation for human rights, as it is desirable from its own nomenclature. The UDHR must be recognized as a typical Bill of Rights, part of the International Bloc of Fundamental Principles and, therefore, can be acknowledged as a type parameter for a judicial review, regardless at which country this control would occur.

The Preamble of the UDHR mentions that human rights must be protected by the rule of law. This demonstrates that only via a formal international document might be possible to defend every aspect and every real consequence of the recognition of human rights. Unfortunately, after the crimes committed during the Second Great War, mankind demanded a piece of legislation, nonetheless the existence of these principles and values since remote times[12]

In the Preamble, the UDHR is proclaimed as a common standard for the defence of human rights, and clearly shows the nature of the treaty as a typical International Bill of Rights. Therefore, it must be enforced that this document can be a regular parameter regarding a judicial review, and might be considered the base of the above-mentioned International Bloc of Fundamental Principles.[13]

Furthermore, it is possible to bring upon the article an immense range of International Conventions that can be viewed as typical parameters concerning the constitutional control of administrative and legal acts, inside a national juridical system. The so-called International Bloc of Fundamental Principles is not yet finished only by the UDHR.

The Office of the High Commissioner for Human Rights promotes a website with dozens of International Conventions that shall be considered part of the International Bloc of Fundamental Principles.[14] A jurist that may adopt the theory here mentioned, might also say that every piece of international legislation considered, can and must be viewed as parameters for judicial reviews worldwide.

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Thus, most relevant legal documents must be considered part of the International Bloc of Fundamental Principles. It is also helpful, analysing each case that might be presented to a domestic court, and how this process can be used into a judicial review with an International Convention as a parameter. For instance, laws that perform violations against labourers can determinate the use of conventions, regarding this matter.

The two main treaties that can be part of a basic International Bloc of Fundamental Principles are:

the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights. Either pact has rights, values and principles that coincide with the most basic needs of a human being and might be used as resources to delegitimize domestic laws, opposed to human rights and fundamental principles internationally recognized.

For instance, it is impossible to deny to every person the most basic rights of liberty, like free speech, freedom of mobility, and the inalienable right to vote. With the International Covenant on Civil and Political Rights, it is possible to understand, through the judicial activity, that mankind does not and will not tolerate any kind of administrative action towards the destruction of the so-called "**first generation´s rights**".[15]

The International Covenant on Economic, Social and Cultural Rights might be considered of even greater importance in Latin America. Governments across the continent simply try to "forget" rights like the right to a proper education, or the right to a medical treatment. The judicial activism in Brazil usually goes toward the recognition of these rights, usually, via the control using the International Covenant on Economic, Social and Cultural Rights.

It is possible to mention the current reality in Venezuela. The government of the south american nation have created dozens of normative acts that are clearly against the most basic principles emphasized by both Covenants mentioned above. For example, there are laws regarding violations of the right to vote, that can be protected by the International Covenant on Civil and Political Rights.

Shortages of basic needs, even the most primary ones, also can be evidenced in Venezuela. Normative acts from the National Government that prevent the purchase of food to certain people or at a fixed quantity, demonstrates the infringement of the International Covenant on Economic, Social and Cultural Rights. It is a possible use of the

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judicial review with an international treaty as a parameter.

Humanitarian Pacts shall also be part of an International Bloc of Fundamental Principles. These treaties were created, mainly, due to the advent of frequent and never-ending wars, especially those that can disseminate profound wounds onto the civilian society. After all, the absurdity of war should not, in any case, be felt by the population of a region or a country.

Certain administrative acts, created by what could only be called as Rogue States, can also be attacked via the judicial review with an International Convention as a parameter. Forced displacements, usual during this kind of cruel activity, must be combatted by judges worldwide, especially those that can enforce decisions with the purpose of defending the civilians during a war.

The Geneva Convention, in considering the Protection of Civilian Persons in Time of War [16], is the clear example to be mentioned. This pact goes back to the end of the Second World War, the same historical period that created the United Nations. The goal of the diplomats, responsible for the creation of this important treaty, was to remove every possibility of a new reality such the Holocaust.

The propositions are made, and it is the role of jurists worldwide to defend the creation, especially in the minds of judges everywhere, of this International Bloc of Fundamental Principles. Mankind must bear in mind that violations against the most basic human rights cannot occur anymore. And this, can be enforced via the consideration that rights, principles and values acknowledge no frontiers.

The notion that served as the base for the theoretic elaboration of the mentioned constitutional bloc, within every domestic legal system, can also be used for the case of an International Bloc of Fundamental Rights. Using this doctrine, it is reasonable to understand that human rights might become a usual reality worldwide, preventing the reoccurrence of several violations daily.

4) The judicial review of an administrative act with an international convention as a parameter.

Producing a juridical system is not only done by formal laws. Common Law demonstrates that is not always necessary to write down rules that are going to determine the immense hypothesis of clashes within a society. It is desirable to mention also that every kind of production, within a juridical system, may be part of it as a normative act.

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Therefore, it is possible to comprehend that a typical administrative act, created by the Executive Power, is part of the juridical system. As already analysed previously, this administrative act can be used on a judicial review process, regardless the parameter that might be used.

The Judicial Review, thus, is not used only for parts of legislation that are made accordingly the legislative bureaucracy domestically created. Administrative acts, produced by the Executive Branch of a country, can also be analysed by judges during a constitutional control process, especially if the effects of this administrative act can disseminate throughout society.

One clear example is the production of the so-called "**Medidas Provisórias**", transliterated as provisional measures, created by the Brazilian Constitution through a Constitutional Amendment. This piece of legislation is manufactured by the Federal Government, without the scrutiny of the National Congress and, nevertheless having a deadline to be admitted by the Parliament, have natural effects like those of a formal law. [17

Surely, this is a clear deviation of the legislative powers and it is just a grotesque example of how an administrative act can affect the lives of millions. However, it is possible to visualize a never-ending list of administrative acts that, nonetheless, having fewer effects than those within the Brazilian legal system, can proportionate several violations of fundamental principles and values.

For instance, it is possible to bring upon the text two of the most dramatic cases of violations of human rights nowadays:

the profound **economic and social crisis in Venezuela**; the **Civil War in Syria**, that catches the attention of the countries, due especially to the immense number of displacements caused by the conflict, since its beginning on the first years of this decade. The National Government of Venezuela determines, daily, an absurd range of crimes against the most basic rights, principles and values of mankind. For instance, how is possible for a family to survive only with a few grams of flour, a couple of litres of water, and, sometimes, hygienic basic products, if they are lucky. The rationing of food is an absurd reality at one of the most oil-rich Nations worldwide.

Not only the food supply has arrived at a point close to the edge of an endless cliff. The right to protest became a luxury for the people and a crime to the eyes of the Maduro/Chavez regime. The so-called Bolivarian National Guard – if they can be called "national" in any way – is, nowadays, a militia that fight field battles on the streets of Caracas, murdering anyone that just decided to fight for the right to live with a minimum dignity.

There is also another reality rarely analysed outside Latin America. Hundreds of thousands of Venezuelans, together with Bolivians, migrate towards Nations close to them, notably Brazil, Colombia, Peru, and even countries far away inside the continent, like Argentina and Chile. This humanitarian crisis cannot be a superficial problem, but a real situation that demands actions from the international community whatsoever.

With this immense plethora of human rights violations, what is possible to be done to protect Venezuelans against their own government? Is it possible to entrust a Nation that cannot even provide the most basic rights to the population? It is necessary to mention the National Constitution of Venezuela, with the objective to see if it is possible the judicial review produced by a judge, is not part of its Supreme Court.

The article 334 states that every judge, with the help of the national legal system, has the obligation to defend the Constitution of Venezuela. Proceeding with the

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analysis, it is also possible to infer that the Magna Carta of the south american nation emphasizes the judicial review, only via the Supreme Court, nonetheless, the determination made by the first part above-mentioned.[18]

With that in mind, jurists could defend that only the Kelsenian System is admitted in Venezuela. However, with the current state of chaos that is visualized, with the uttermost goal to protect the most fundamental principles that are considered in every international treaty, there is the necessity to defend the possibility of a combined action by every Venezuelan judge, to defend the people against the government.

Therefore, it is mandatory the use of the International Conventions, part of the International Bloc of Fundamental Principles, in defending the most important subject of mankind: the human being. With this consideration, a judge in Caracas might be able to sentence against the national government of Venezuela and in favour of the human rights of the whole Nation.

The Syrian Civil War is a bizarre reality known by almost every human being. After all, daily, it is presented to all humanity how destructive can be a war to civilians. It might be the first time in history where a conflict is shown worldwide via every communication channel imaginable. A quick research on Google will demonstrate how grotesque man-made situations can be.

It is paramount to mention the number of people displaced by the Civil War in Syria. Concerning the possibility that these numbers can differ from a research to another, the most recent numbers estimates that 5 million people were internationally displaced by the Syrian Civil War, the same population of urban centres like Madrid and Melbourne.[19]

However, the absurdity does not stop. There are also Syrians displaced in the national frontiers. There are more than 6 million refugees, close to the population of a major city like Berlin and larger than Sydney.[20] It is unimaginable that this kind of reality is vivid in the Twenty-First Century, especially when there is an immense number of treaties, protecting the most fundamental principles worldwide.

The cases above-mentioned are a clear and direct violation of the most basic principles, defended by the immense list of International Conventions, related to all human rights. But, are them currently defended by theorists worldwide? The main goal of jurists and the science they study, is to protect human beings.

With this notion in mind, the enforcement of the possible use of International Conventions, to control administrative activities, is mandatory, especially when the analysis of the plethora of cases, occurs, currently, everywhere. From the refugees trying to enter the European Continent, to the Judiciary and Penitentiary System in Latin America, ending, e.g., with the grotesque "wall" intended to be built by Trump, the world need to consider administrative acts as clear hypothesis of legal documents, with all the consequences that comes from this idea.

5) The Brazilian case: the "controle de convencionalidade"[21]

The Brazilian juridical system is a new one. Since the coup d'état that created the Republic in 1889, Brazil has passed through constant periods of political, social and economic instability, intercalated by brief moments of stability, that were not strong enough to produce a robust juridical system, that could guarantee all fundamental rights, entitled for human beings.

Since the ending of the Military Dictatorship on the mid-1980s, and the promulgation of the 1988 Constitution, dubbed the "Citizen Constitution", Brazil has lived – at least, a kind of – political, social and economic stability. This made possible the creation of an endless roster of laws, administrative acts, the already mentioned "Medidas Provisórias", and other normative acts that shaped the Brazilian juridical system that exists today.

Besides the importance of written normative acts through a typical Roman-Germanic system, the judicial activity is growing in importance, for all jurists that work in Brazil. Courts nationwide are called upon the social stage with an important objective, that is diminishing the social and economic gaps, that are still a shameful reality for all Brazilians.

As already analysed before, there is also a growing necessity that is rarely seen on OECD Nations: judges, especially those that are the "front door" of the Judicial

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System, are provoked by thousands of citizens to compel the National, State and Municipal Governments, to adhere to the most basic needs for the part of society relegated to the bottom of the social pyramid.

Brazilian jurists tend to comprehend this large activity of judges as a justifiable – or sometimes, unjustifiable – enlargement of the powers of the Judicial System. However, it is necessary to bear in mind that the Brazilian society is notoriously known for its social and economic gaps, together with governments that rarely – if ever – spend wisely the public money. Therefore, the activism of every judge in Brazil ought to be a sheer necessity.

With this notion, it is necessary to mention the fact that, in Brazil, were adopted both judicial review systems. Therefore, a State Judge, for instance, in São Paulo, can decide in a concrete hypothesis to oblige the Municipal Government of the City of São Paulo to provide a medicine that is not present on the Public Care System. With decision like this, it is also possible to consider a law of the City of São Paulo unconstitutional, applicable only to that case.

The judicial review does not stop on the first steps of the Judicial System. With the Austrian Method, is possible, to the Supreme Federal Tribunal, to determine the unconstitutionality of a concrete law, considering that it is no more part of the roster of normative acts currently existing. Therefore, this law would cease to produce any kind of effect, as is done in Italy or in Germany.

It is necessary, once more, to mention the profound and appalling distances between classes in Brazil. This, determines the enforcement of all human rights conventions, notably, in cases where the violations of fundamental principles are not just recurrent but came to be institutional. For example, the penitentiary system in Brazil is such an awful situation, that part of the Supreme Court coined the term "state of unconstitutional things", to define the exact nature of prisoners nationwide.[22

With these systematic violations of fundamental principles, the juridical theory in Brazil moulded the "**Controle de Convencionalidade**". Since the judicial review in Brazil is called a form of "law control", it is possible to translate this as a "**Judicial Review with an International Convention**", via the above-mentioned International Bloc of Fundamental Principles.

The doctrine produced by Valério de Oliveira Mazzuoli is the one used and considered the paradigm of the conventionality control in Brazil. The jurist created the idea that an international convention, when dealing with human rights and fundamental principles, can and will be a parameter on a judicial review process, especially when violations of the same principles became institutional.

Mazzuoli intends to determine that once an international convention of human rights became part of the constitutional system in Brazil – what, since the Constitutional Amendment number 45, occurs with every pact with this thematic – it must be considered a constitutional law, in equality with every constitutional act or even the Federal Constitutional itself.[23]

With the defence of the idea brought from France to Brazil by Mazzuoli[24], it is also possible to consider that the "constitutional control system" in Brazil is one of the most diverse worldwide. The effectivity of this so-called system, it is important to every Brazilian jurist, to defend that the law cannot be above human rights and fundamental principles produced overseas.

It is even mentioned by Mazzuoli (cited by the Brazilian colleague Ingo Wolfgang Sarlet) that, with the idea of the values and principles at the basis of the production of every human rights treaties – and, therefore, responsible for the constitution of International Bloc of Fundamental Principles – even Constitutional Acts, or the Constitution itself, can be part of a judicial review with an International Convention as a parameter, notably, if those normative acts are against the determinations of the International Treaties related to human rights.[25]

Mazzuoli considers that every human rights treaty – or fundamental principles – must be considered a parameter to be part of the judicial review in a Nation. Thus, it cannot be alleged by the domestic court, regardless the constitutional review system adopted, its impossibility, due to the cultural differences between countries. A specific treaty might not be part of the process above- mentioned.[26

The theory brought up by Mazzuoli can be used not only in Brazil. This, is the fascinating characteristic of International Law and Human Rights Law: it is the same everywhere, anywhere. Surely, some jurists might say that this would diminish sovereignty in their countries. Despite the importance of this doctrinal

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concept to Constitutional Law, frontiers are melting away with the current reality. The main question must be: why not be on the avant-garde of this new reality?

The judicial review is doing an immense contribution in Brazil. It is important that jurists in Brazil defend the "Controle de Convencionalidade" theory, considering the International Bloc of Fundamental Principles as part of the juridical system that exists inside the Brazilian borders. With this, the immense social and economic gaps in Brazil may be mitigated.

Thus, it is also paramount the defence of the International Bloc of Fundamental Principles, as part of every juridical system that exists nowadays. Either if a country, at least institutionally, respects all Human Rights, in considering the specialized doctrine, or just violates one of them, the society of nations must determine the profound respect for the roster of the most important rights that are present.

Concluding with the struggle against the violations of Human Rights, there is the celebrated idea, already admired in Brazil, of the Judicial Review with an International Convention as a parameter, that can be exported worldwide. The main goal is always the enforcement of those rights, what can occur, at least domestically, with actions taken through the Judicial administration.

6) How to enforce the International Bloc of Fundamental Principles or the sword of Justice, via the United Nations Security Council.

International Law has a problem that is impossible to dismiss: how to enforce the decisions, covenants, treaties and other normative acts emanated from International Law subjects? What makes a law effective is the coercive force that this law might have. And this coercive force demands a bureaucracy with a social contract, that may be difficult to comprehend within the international stage.

It is also difficult to defend the use of military force to make an international normative act effective. War is, itself, a polemic International Law Institute, with some jurists saying that whatever its use, the illegality is always present. Considering the importance of opinions in another direction, the use of military force cannot be an action reasonable on the present historical moment.

War always demands the sacrifices of the least empowered part of the society. There are the civilians living in a war zone. It is only necessary to analyse the actual situation in Syria. Who is suffering the most? The militaries from the Syrian Army? The so-called International Coalition? Other actors, that are not even worth mentioning? The number of displacements demonstrates that the toll is always higher with the weakest ones.

It is necessary also to bear in mind that a Nation State cannot and will not enforce an international normative act by itself, without the use of military force or strong diplomatic ties. For instance, it is possible for a dozen of countries, together, enforce an international law covenant via embargo or another form of pressure. However, and again, who is going to suffer? Surely, it will be the civilians, within the Nation that violated the International Law.

It is aware of every International Law jurist that the United Nations was created after one of the most obscure moments of world history. The amount of people that suffered the most unbearable violations of their dignity resembles the populations of the United Kingdom or Thailand nowadays. It was impossible to imagine the society of nations without the UN, after everything that took place during the Second Great War.

Also, the League of Nations, due to reasons that cannot be analysed in this article, failed completely its task to prevent the growing tensions between European Nations during the ending of the first half of the Twentieth Century, resulted on the grotesque reality saw during the beginning of the 1940s. There was the urgent need to understand that, without comprehension between the Nations, mankind could face, another time, the dark cliff of mutual destruction.

Therefore, the creation of the Security Council, with the Charter of San Francisco, was clever and was moved by the Nations that decided to create the UN. The existence of a what could be called "International Police for the Nations" was an incredible idea, nevertheless the necessity of politics to decide the exact formation of the Security Council.

It is also relevant to consider the modification of the permanent members of the Security Council. France, the People´s Republic of China, the United Kingdom, the United States and Russia, after all, were the so-called "winners" – if it is possible to determine a "winner" in a war so appalling like the World War II – of the

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conflict and decided to form the Security Council the way it was done.

It is necessary to bear in mind that the Security Council exists, and, as like never happened before, must be called upon the world stage to exercise its functions, with the important goal to promote and, mainly, to defend with the uttermost force all fundamental principles and values that, inexplicably, are still violated deep into the technological society of the XXI Century. The sword of Justice must be swift and just!

Surely, there is a diverse range of sanctions that the Security Council can take against a country, as it is knowable to every jurist that works with International Law. However, the proposition here is not to impose sanctions that only prejudicated the common people of some of the most deprived countries. Is it reasonable to impose enactment to a people that are already struggling to survive?

Some jurists, especially those that do not study profoundly Human Rights Law, might say that "the people must be accounted for its government". However, how could that be possible during a dictatorship? The people were not responsible to choose that administrative bureaucracy. The people did not even participate in the "foundation" of that Rogue State! It is impossible to say anything otherwise.

Bearing that idea in mind, it is also reasonable to say that the ones that violated the roster of Human Rights must "pay the price". Therefore, the most interesting way to enforce the respect of fundamental principles and values is to impose sanctions against the agent of the State that violated them. This is what is done with the Special Tribunals that already exist, like the one for the Rwandan violations.

Though this is an already present situation, what is proposed in the text is the use of penalties against agents of States, with the decision emanated from the Security Council itself. Once proved the violation of a fundamental principle or value within the national borders, the person that decided to forget his or her own humanity, is going to be penalized for what has done with the common people.

The goal is not to remove the due legal process. There is the necessity, previously, of an International Tribunal that could prove the occurrence of a Human Rights violation. However, the Security Council is going to be empowered with all the weapons needed to enforce, once and for all, the sanctions that must be imposed. And, this time, not against the people. But against an administrative agent.

It is also paramount that the duration of this Tribunal does not take an unreasonable amount of time. This is a difficult matter, once the bureaucracy that is needed to create this kind of court is immense. However, this is one of the main difficulties that jurists face on the present time: the just decision, during the less amount of time possible.

The sword of Lady Justice must become a reality on International Law. Notably, must become also a mean of producing just, fare, and, mostly, reasonable decisions against people that, without any explanation, decided to violate the basic rights of a person. With that, the coercive force that is expected from the normative system of International Law can be seen during the lifetime of the present generation.

7) What can be done with the dualism and the monism conflict?[27]

Excessive formality can be one of the most despicable conclusions that can result from the creation of normative acts. An ordinance needs to be the exact reflex of the reality of a society, and, in some appalling moments, a law just becomes outdated, due to endless discussions with Parliaments, that demonstrate ideas directly opposed to the ones that the society stands for.

Therefore, it is necessary to defend that the formalism beyond what is reasonable during the creation of an ordinance must be considered a situation against Human Rights themselves. With this idea, the introduction of an international treaty, especially those regarding fundamental principles – and the so-called International Bloc of Fundamental Principles – with a domestic juridical system, must be without excessive formality.

The **idea of monism** goes in this direction. This celebrated theory **determines that, when analysed both international and domestic juridical systems, either must be one**. Thus, when introducing the pact made with the world community, there will be no necessity to formalize its inserting, that can be done simply

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through the ratification of the treaty.

Monism also considers that international law is the highest ordinance in a Nation. Insomuch, national tribunals will be able to use the covenant as a paradigm into the judicial review process. Also, it is important to determine that international ordinance will be inserted into the domestic juridical system, without any kind of formal procedure, what makes this law immediately applicable.

Nations that adopted monism are the ones that treat, with the uttermost respect, all the values and principles that are paramount to the existence of mankind. The main preoccupation is to define the applicability of the international piece of legislation, that can be and must be considered in every single social relationship, that exists inside the national borders. Especially, those between the administrative authorities and the people that live in that Nation.

Obedience to international law must come with the mere ratification of that ordinance by the country that signed it. The unity of international and domestic legal systems demonstrates the desire to be on the avant-garde of relations between international law subjects, notably when the country comprehends that the international covenant is superior to every law created in its borders.

Surely, this is the perfect scenario. The better normative act will be used during the judicial process, in profound conformity with the fundamental principles that are responsible to guide humanity towards a better future. Nevertheless, there are Nations that chose a different path, using their sovereignty as an explanation, why not, adopting the theory that is clearly the one with crystalline respect to Human Rights in general.

Therefore, it is necessary to mention the dualism theory. Nonetheless, the potentiality of causing extreme damages within the rights of a human being, they are known and praised by an immense list of countries. This idea determines that the domestic normative system is divided from the international one, and, first, the roster of rights considered with an international convention is different from the ones of a National Constitution.

How bizarre is this idea! It is impossible to consider that a person from a specific country might have different rights from another that came from a different set of frontiers, remarkably, when humanity is living the longest and most prosperous moment of globalization in history. The rights of a Brazilian are the same of an Australian, and this is an endless analysis.

And the absurdity continues. Jurists and governments that intend to defend this theory also consider the necessity of a legislative process to incorporate the normative articles created by the international pact. In other words, they defend, with incomprehensible contradiction, that a covenant, that already passed through “kilometres” of international bureaucracy, must stand in front of every single alley of a national bureaucracy.

It is reasonable to ask to a citizen of every nation worldwide (and not to a jurist), what is thinkable about the legislative process. The answer might be just one: do not try to go into this treacherous terrain. And not only that: there will be years just to consider the mere possibility of using this international law during a legal process. It is possible to imagine the damages that will be caused by this theoretical thinking.

Thus, dualism is the idea defended by administrative agents that do not and will not comprehend that Human Rights acknowledges no frontiers. Beyond that, boundaries may be an excuse just not to respect fundamental principles that are the fundamental basis of civilization. It is impossible to defend otherwise, and people worldwide expect that jurists stand out against Human Rights violators.

The response to the question, made through the title of this topic, must be: there will be no more dichotomy. There will be no more dualism. Only monism, as the main reflection of the desire of humanity to enforce International Law and Human Rights Law, must prevail. With this consideration, all international ordinances will be empowered as never, notably during one of the darkest times in recent history.

8) What can be done at nations that adopted the “American system” and nations that adopted the “Austrian system”?

Another topic points that analysis formalities can be and must be diminished. The domestic process of judicial control of ordinances needs deep reforms in every juridical system. Even so, there is the necessity to elaborate an international treaty that can be the guide to all Nations in constructing their review system, or to

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States that choose – wisely – to reform the already existing ones.

With this consideration in mind, it is relevant to mention either form of judicial review. The American System is an important way to bring the judicial review closer to every citizen, notably considering that every magistrate can determine if an ordinance might be extirpated from the roster of normative acts or can prevail due to its accordance with the Constitution that exists within that judicial system.

The Kelsenian or European System is the extreme opposite. There is the necessity of a concrete action to send to the Superior Tribunal the ordinance that demands the analysis, considering the Constitutional ordinance that guides a Nation. Thus, the decision will be derived from the Major Court in the land and will command every single action from judges, within the hierarchy of that judicial system.

Either form has pros and cons. Surely, a decision emanated from a judge that works in a local community will demonstrate how close the Judiciary is to every single citizen. The verdict will be the nearest one to the concrete case and shall be a relevant way to show the Nation that a judge is a public servant that stays in a parallel reality with the demands of the people that live in a specific place.

However, the juridical security, or, in other words, the possibility of change regarding that decision exists profoundly, and cannot be dismissed, even the verdict will be applicated only in that case whatsoever. Then, when another situation, like the already analysed, is presented to the Judiciary, another decision might come directly, opposed to the one previously considered.

The Kelsenian system might be an interesting one when the decision is originated from the Supreme Tribunal of a country. Despite the juridical security of this verdict, how long can be the bureaucracy? Even so, how might be the financial costs? In some Nations, only a few numbers of attorneys can work within a superior court. The amount of money needed, could only extirpate the possibility of access to Justice, one of the most important values of civilization.

Clearly, the Constitutional history of every Nation cannot be forgotten. A country that functionates as a federation, with the endless territory, may have some difficulty in adopting the Kelsenian System. A unitary Nation, with a small territory, can have some hardship, in considering the possibility of incorporation of the American System, notably when verdicts might be swifter when emanated from a superior court.

Therefore, why not choosing either system? The Brazilian example is an important one. A federation with the immense territory, also has an Executive Federal Government with deep empowerment, notably considering the creation of laws regarding the most complex activities inside that society. Surely, the Kelsenian/American System created by the Brazilian National Constitution is not a perfect one. Yet, it can work both ways.

In conclusion, the answer to the second topic title, questioning a response is: adopt either the Kelsenian System and the American System. This can be a difficult movement. However, it is necessary to consider the particularities of the International Bloc of Fundamental Principles. If the judgement of an ordinance needs to be done with a Human Rights treaty as a parameter, the Brazilian solution might be a path to follow.

Conclusion

There are major considerations that must be concluded with this article: the analysis of the principles and values that exists to mankind after years of historical law production; the judicial review made with every single normative system and the law control that can be produced with international covenants as parameters; and, finally, the paths that can be done with the objective of protecting, empowering and expanding rights to everyone, everywhere.

Fundamental principles and values are always difficult to fixate into a closed list, that could be brought upon a judicial process with a simple subsuming of a fact to a normative act already present. The so-called Human Rights endure a never-ending creation, parallel to the changes that humanity experienced through history. In that case, the previously analysed International Bloc of Fundamental Principles will never be concluded.

However, this does not determinate that the International Bloc of Fundamental Principles cannot be enforced and protected. The United Nations was created with the goal to protect humanity from the potential damages caused by armed conflicts. Thus, using its administrative bureaucracy in that direction, is just the main

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reason for its own existence. Also, countries and its populations cannot be sanctioned due to actions of its politicians. Politicians must be accounted for.

International treaties are laws themselves. Therefore, it is important to consider the possibility of being part of a judicial review process, notably as parameters, since the importance of those ordinances, to the existence of humanity. Considering this, otherwise, would be an unreasonable diminishing of a most-needed protection, demanded by the dark days that are not only ahead, but already happening.

Not only that understanding must be empowered, but also the profound necessity of incorporation of every Human Rights and Fundamental Principles ordinance, immediately, into all domestic juridical systems, despite eventual formal process regarding this matter. Dualism is just an explanation for Nations that cannot recognize every change that has occurred for the last 100 years, related to the basis of the protection of the Human Rights. Enforcing dualism would be also the inexplicable enforcement of sovereignty, during a time where frontiers must be ductile.

Another question that must be considered is the one concerning the use of judicial review systems. Reasonable enough the understanding that every country has its own constitutional history, and eventual modifications must be also incorporated into the juridical doctrine domestically created. Yet, as already mentioned, formalities cannot surpass the protection of Fundamental Principles. Changes are hard and long but must be done.

Finally, the idea of Fundamental Principles protection, within every national juridical system must be comprehended on a different view of the one that has already been analysed until this day. The main goal of the Science of Law is the protection of mankind. And this cannot and will not be forgotten.

[1] Like happens to a vast number of Nations with recent Constitutions, Brazil chose to maintain the American System, historically derived from the early years of the Republic, brought to the South American Nation by the famous jurist Ruy Barbosa, dubbed the “Eagle of The Hague”, for his notorious speeches during The Hague Conferences on the beginning of the Twentieth Century. The so-called Kelsenian System is a clear inspiration from Continental Europe, especially from Germany, where a great number of constitutionalists studied during the second half of the past Century and is still a reality within the Brazilian juridical system. [2] Link - In Portuguese [3] The Supreme Federal Tribunal in Brazil admits a roster of legal actions that can be used by a citizen or a legal entity. Worth mentioning the so-called ADPF (Arguição de Descumprimento de Preceito Fundamental), that could be translated as an Action Regarding the Protection of Basic Rights and Principles. This modality of control of a normative act may be used when an ordinance violates basic rights, principles or even values, that might be or not be duly admitted into law. With this kind of action, the protection is vast and profound. [4] Link. [5] Ibid. [6] Link. [7] Important to consider that the Brazilian colleague Marcos Thadeu also mentions a “Bloc of Conventionality Control” within the Brazilian reality, as can be analysed on the article - Link - In Portuguese [8] José Francisco Rezek – Direito Internacional Público (Curso Elementar), Saraiva Publishing, (2011), In Portuguese [9] Link - In Portuguese [10] Brazil imported this theory with a distinct goal. Considered a Nation with profound and unbearable inequalities, sometimes the Judicial System is called upon the social stage to defend the rights of the most needed section of the population, especially those regarding public education and public health. Brazilian judges started to fight against the deep gaps inside the society, standing in opposition even with administrative acts, using the Cliquet Effect. Therefore, the Cliquet Effect commenced its adhibition with the social and economic rights, the more imperious necessities of the Brazilian society. [11] Link [12] Ibid. [13] Ibid. [14] Link [15] The theory created by Karel Vasak can also be unfolded in Brazil, brought to the South American Nation by one of the dearest constitutionalists in Brazil´s history: José Afonso da Silva. However, Brazilian jurists also begin to analyse further dimensions or generations of rights. As an example, there is the consideration of even fourth, fifth or sixth generations, concerning, for instance, the right to be in a democracy in which the politicians are chosen by direct voting, the rights related to biotechnology dignity, and even the right to a peaceful society. [16] Link [17] Link - In Portuguese [18] Link - In Spanish [19] Link [20] Ibid. [21] Valério de Oliveira Mazzuoli – O Controle Jurisdicional da Convencionalidade das Leis, Revista dos Tribunais Publishing, (2011), In Portuguese [22] Link - In Portuguese [23] Link - In Portuguese [24] Link - In Portuguese [25] Link - In Portuguese [26] Link - In Portuguese [27] Link