THE STATE OF EXCEPTION AND JUDICIAL REVIEW: THE ROLE OF CONSTITUTIONAL COURTS IN THE PROTECTION OF FUNDAMENTAL RIGHTS

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ABSTRACT

The use of exceptional measures by governments has always been controversial due to its legitimacy. In view of this, this article aims to analyze this theme, adopting Giorgio Agamben's studies as a theoretical reference. Initially, we discuss the functions and characteristics of the new constitutionalism developed in the post-war period and the recognition of the normative power of the Constitution. After that, by means of the deductive method, starting from the main premises placed by the theorists studied, the situations of exception that occurred in the United States and in Colombia are analyzed, highlighting the justifications and execution measures. The choice for these countries occurred because they have experienced a complete cycle with the decree and execution of exceptional measures, up to the questioning before the respective constitutional courts about the constitutionality of these measures. In light of this, we analyze how the constitutional courts have acted in these cases, especially with respect to the constitutionality of the state of exception itself, as well as the constitutionality of the execution measures. Finally, the content of these decisions is analyzed, especially the treatment given to cases that resulted in restrictions to basic fundamental rights.

Keywords: State of exception; constitutional jurisdiction; control of constitutionality; fundamental rights.

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RESUMO

The use of exceptional measures by governments has always been the subject of controversy due to its legitimacy. In view of this, this article aims to analyze this theme, using as a theoretical reference the studies of Giorgio Agamben. It discusses initially the functions and characteristics of the new constitutionalism developed in the post-war period and the recognition of the normative force of the Constitution. After that, using the deductive method, starting from the main premises made by the studied theorists, it is analyzed situations of exception that occurred in the United States and Colombia, with an emphasis on justifications and measures of execution. These countries were chosen because they experienced a complete cycle with the enactment and execution of exceptional measures, until questioning before the respective constitutional courts about the constitutionality of those measures. Therefore, it is analyzed how the Constitutional Courts acted in these cases, especially with regard to the constitutionality of the enactment of the state of exception as well as of the enforcement measures. Finally, it is analyzed the content of these decisions, especially the treatment given to cases that resulted in restrictions on basic fundamental rights.

Keywords: State of exception; constitutional jurisdiction; judicial review; fundamental rights.

1. INTRODUCTION

This article aims to analyze the main theoretical conceptions about the state of exception, as well as its application in real situations in recent history. To this end, it investigates the use of exceptional measures in the United States and Colombia, focusing on the analysis of decisions handed down by the constitutional courts of these countries in the exercise of constitutionality control. In this context, through the deductive method, we analyze the way in which the Judiciary of these countries has acted when faced with exceptional situations experienced in times of crisis in recent decades.

As a starting point, we discuss the new functions attributed to constitutional courts in the role of interpreting and applying constitutional rules by means of modern methods of constitutional interpretation. The performance of the courts was verified in light of their duty to ensure the maintenance of the democratic order based on the constitutional values that guarantee fundamental rights.

Next, using Giorgio Agamben's studies on the State of Exception as a theoretical reference, we discuss the main characteristics of the institute, as well as the problems related to the legitimacy of its use. At this point, the Italian author's criticism is emphasized, especially regarding the subjectivity in determining the reasons invoked for the decree of exceptional measures.

Among his many criticisms of the institute, Agamben recalls that exceptional measures usually consist in attributing exceptional powers to the ruler, which implies the weakening of democratic pillars. The author emphasizes that the measure results in the restriction of fundamental rights and the curtailment of the other powers. He also states that the justification for the adoption of such measures ends up not having any kind of control or verification, depending only on the will of the ruler.

The author justifies his assertions with several examples in which exceptional measures, which should be transitory, ended up becoming definitive, leading to the deterioration of the democratic rule of law. On the other hand, there is a current that understands the need to

apply restrictive exceptional measures as a form of protection for democratic institutions in unstable situations.

The choice to analyze the cases of Colombia and the United States occurred because they are democratic countries that have used exceptional measures, with severe restrictions on fundamental rights, under the allegation of facing threats to national security. Given that exceptional measures are still used and that, in some cases, they are even provided for in the constitutions, this article seeks to analyze how these courts faced issues related to the theme. In this scenario, we analyze the results of actions that questioned the constitutionality of enforcement measures arising from the exceptional situation at the time.

It was verified that, to a greater or lesser extent, both the Colombian and the American courts have considered some measures that restrict fundamental rights to be constitutional, while others have not. In general, it was possible to verify that, although both courts admit measures of this nature, they have clearly emphasized that no act of government practiced in an exceptional situation is immune from constitutionality control by the Judiciary.

Finally, this article briefly analyzes exception measures enacted in some countries because of the Coronavirus Disease 2019 (Covid-19) pandemic and its possible consequences for the democratic rule of law.

2. INTERPRETATION AND THE NORMATIVE FORCE OF THE CONSTITUTION

Traditionally, hermeneutics means theory or art of interpreting and understanding texts, whose main objective is to describe how the interpretative-comprehensive process takes place, still in its traditional sense. It also has a prescriptive dimension, to the extent that, through this descriptive process, it seeks to establish a more or less coherent set of rules and methods to correctly interpret and understand the most diverse legal texts (STRECK, 2014).

In this sense, according to Streck (2014, p. 345), the constitutional rule "becomes, in all its substantiality, the hermeneutic topos that will conform the interpretation of the rest of the legal system". However, the Constitution should not be understood as an entity dispersed in the legal system, nor can it be considered a substitute for the interpretative activity. The Constitution would be, thus, the materialization of the legal order of the social contract, directing the realization of the political and social order of a community. From this, one should be aware that the principles are deontological and govern the Constitution, the regime and the legal order. It would not be only the law, "but the law in all its extension, substantiality, fullness and scope" (STRECK, 2014, p. 345).

Until the beginning of the 20th century, more specifically until the outbreak of World War II, a culture based on the law passed by parliament as the main source prevailed, relegating to constitutions a merely programmatic role, which should inspire the legislature's actions. Thus, the constitutional rule was not recognized as having a normative force that could be invoked before the Judiciary. Fundamental rights, to have validity, should be protected by law, which

often led to the predominance of the arbitrariness of the majorities installed in parliament (SARMENTO, 2009).

This picture changed substantially after this period, because the perception that political majorities can perpetrate or complicate barbarism, as occurred with Nazism, led the new constitutions to create or strengthen constitutional jurisdiction, instituting powerful mechanisms for the protection of fundamental rights, including against the legislature (SARMENTO, 2009).

Thus, the reconstitutionalization of Europe over the second half of the 20th century redefined the place of the constitution and the influence of constitutional law on contemporary institutions. The main reference in the development of the new law is the Bonn Basic Law (German Constitution) of 1949 and the creation of the Federal Constitutional Court in 1951. From that moment on, an incessant scientific and doctrinal production about Constitutional Law began in countries of Roman-Germanic tradition. In Brazil, this process intensified with the approval of the 1988 Constitution, guaranteeing the consolidation of a Democratic State of Law with relative stability (BARROSO, 2005).

According to Hesse (1991), the legal Constitution is conditioned by historical reality and cannot be separated from the concrete reality of its time - and this has to be taken into account to satisfy its claim of efficacy. It itself becomes a normative force that influences and determines political and social reality. The limits of normative force can be seen when the factors of the present change.

> If the presuppositions of normative force find a correspondence in the Constitution, if the forces in a position to violate it show themselves willing to pay homage to it, if, even in difficult times, the Constitution manages to preserve its normative force, then it is a real, living force capable of protecting the life of the State against the unrestrained onslaught of arbitrary acts. It is not, therefore, in calm and happy times that the normative Constitution undergoes its test of strength. In truth, this test takes place in emergency situations, in times of need. (HESSE, 1991, p. 25).

Since it is a norm that creates the state, its institutions, and protects rights, the Constitution must have an apparatus to protect against any attempts to weaken it. In this case, the author highlights the fact that the normative force itself can be tested at times of exceptionality, when it is argued that it is necessary to relativize its commands for some reason. In such periods, the Constitution may be tested, and it is on these occasions that its strength should be asserted.

> To a certain extent, here resides the relative truth of the well-known thesis of Carl Schmitt, according to which the state of necessity configures an essential point for the characterization of the normative force of the Constitution. What is important, however, is not to verify, exactly during the state of necessity, the superiority of the facts over the secondary meaning of the normative element, but to verify, at this moment, the superiority of the norm over the factual circumstances. (HESSE, 1991, p. 25).

In the wake of the post-war period of strengthening of the Constitution, the so-called Neoconstitutionalism was consolidated, characterized mainly by the recognition of the normative force of principles, the rejection of formalism, the use of open methods of interpretation, the constitutionalization of law and the irradiation of fundamental rights norms to all branches (SARMENTO, 2009).

Another striking feature is the focus on the Judiciary, in which the judge is conceived as a guardian of the civilizing promises of the constitutional texts. Thus, members of the Judiciary would assume a leading role in the interpretation of constitutional rules, to the detriment of the other powers, a fact that ends up becoming controversial due to the limits of this interpretive activity and the possibility of exercising judicial activism (SARMENTO, 2009).

The origin of judicial activism dates back to the period of the great crisis of 1929, when the U.S. Supreme Court was forced to decide several cases involving the New Deal. From the 1950s on, the Supreme Court began to produce progressive jurisprudence on fundamental rights (BARROSO, 2012). After that, the U.S. Supreme Court, assumed a role as protector of fundamental rights, especially of minority groups, quantitatively or representatively, such as racial minorities.

Thus, the notion of judicial activism is linked to a broader participation of the judiciary in the realization of constitutional values and purposes, with a greater role in the space of the other powers. The activist posture manifests itself, for example, through the direct application of the Constitution to situations not expressly contemplated in its text and without manifestation of the legislature, declaration of unconstitutionality in situations where it is not ostensible and imposition of conducts or abstentions to the Public Power (BARROSO, 2012).

By protecting these minority interests, the Judiciary exercises its counter-majoritarian function. Thus, in certain situations, a certain group of individuals or even the entire community may be at the mercy of suffering restrictions on the enjoyment of its most basic rights, which often occurs under a cloak of legality.

3. THE STATE OF EXCEPTION

The state of exception is usually identified as an institute related to transitory moments of alteration of the institutional order established by a rule of law. It is usually associated with measures that allow the state to act in order to correct a threat or violation of the constitutional order.

François Saint-Bonnet alludes to two meanings of the word “exception”. The first, which he calls “classic”, would consist in the moment when legal rules foreseen for a period of “calm” are transgressed or suspended in order to face a certain danger. The second, on the other hand, whose great representative is Giorgio Agamben, would point to a profound modification of certain legal systems in the face of lasting dangers, such as terrorism. The latter, according to Saint-Bonnet, should not last, because the idea of a “permanent state of exception” would be a contradiction, as exceptions would become rules (VALIM, 2018).

In this context, in Constitutional Law, under the most varied labels, “state of urgency”, “state of emergency”, “state of siege”, “constitutional dictatorship” and “constitutional government of crisis”, the exception is understood as a bundle of prerogatives that the Executive Branch uses to face anomalous situations, such as a serious institutional crisis or calamities of great proportions. It is also noteworthy the definition under the philosophical prism in which the classic statement of Carl Schmitt is found, according to which “sovereign is the one who

decides on the state of exception" (VALIM, 2018, p. 21). The sovereign would be the only one capable of making the last decision, which has for object the situation of exception.

Carl Schmitt, in turn, was one of the main theoreticians of the state of exception. His theory began to be developed in the works The Dictatorship and Political Theology. Showing fascination for the theme, the author even states that the exception is more interesting than the normal case, that the latter proves nothing and the former proves everything, which not only confirms the rule, but also the latter lives of exception (ALMEIDA; TORREÃO, 2019).

For Schmitt, the exception plays a central element, because he believes that only in the face of exceptionality one can glimpse who is the sovereign, since this is precisely who decides on the state or situation of exception. He defends a decision that comes from exceptionality, not from normativity, thus attacking the limit of the State's action given by the valid legal norm. One of his justifications was that no normative validity could do itself and that validity would be untenable when facing a situation of exception. In such situation, one can realize that the legal norm comes from a concrete normative order that would present itself in limit situations (ALVES; OLIVEIRA, 2012).

In this context, a widespread opinion is that the state of exception constitutes "a point of imbalance between public law and political fact" (AGAMBEN, 2004, p. 11). Another thought is that, if they are fruits of periods of political crisis, they should be understood in this field, and not in the legal one. The exceptional measures would find themselves in the paradoxical situation of legal measures that cannot be understood at the level of law, and the state of exception is presented as a legal form of that which cannot have a legal form (AGAMBEN, 2004).

Among the elements that make it difficult to define a state of exception is its close relationship with moments of institutional rupture, such as civil wars, insurrections and resistance. In this sense, it is worth explaining that, soon after taking power, Hitler promulgated, on February 28, a decree for the "protection of the people and the state", which suspended the articles of the Weimar Constitution regarding individual freedoms. The decree was never revoked, so that the entire Third Reich can be considered a state of exception, which lasted 12 years (AGAMBEN, 2004).

Modern Totalitarianism can be defined as the establishment, through the state of exception, of a legal civil war that allows the physical elimination not only of political opponents, but also of entire categories of citizens who seem unintegratable to the political system. Since then, the creation of a permanent state of emergency has become common practice in contemporary states, including the so-called democratic ones (AGAMBEN, 2004).

It is worth noting that there are several states of exception, that is, portions of power that lawfully or unlawfully escape the limits of the rule of law (BASILIEN-GAINCHE apud VALIM, 2018). Unlike what happens with a revolutionary movement, with the exception is not intended to openly establish a new constitutional order, it surreptitiously erodes the democratic rule of law. Although there are those who deny the legality of the exception, qualifying it as a merely political reality, everything indicates that it belongs to the law, emphasizing that the norm that determines it will never suspend itself (VALIM, 2018).

Regarding this issue, Agamben states that there is a division between those who seek to insert the state of exception within the legal system and those who consider it outside this system, as an essentially political phenomenon. In this regard, he states that

> Among the first, some - such as Santi Romano, Hauriou, Mortati - conceive the state of exception as an integral part of positive law, since the necessity that grounds it acts as an autonomous source of law; others - such as Hoerni, Ranelletti, Rossiter - understand it as a subjective right (natural or constitutional) of the State to its own conservation. The latter - among whom are Biscaretti, Balladore-Pallieri, Carré de Malberg - consider, on the contrary, the state of exception and the necessity that underlies it as factual elements that are substantially extra-legal, even though they may eventually have consequences in the field of law. (AGAMBEN, 2004, p. 38).

The author further questions:

> If what is proper of the state of exception is the suspension (total or partial) of the legal order, how can this suspension still be understood in the legal order? How can an anomie be inscribed in the legal order? And if, on the contrary, the state of exception is only a factual situation and, as such, alien or contrary to the law; how is it possible for the legal order to have a lacuna precisely as to a crucial situation? And what is the meaning of this gap? (AGAMBEN, 2004, p. 39).

After asking these questions, Agamben (2004) points out that the state of exception is neither outside nor inside the legal order, and the problem of its definition refers to a level or a gray zone in which inside and outside are not mutually exclusive, but indeterminate. The suspension of the norm does not mean its abolition, and the zone of anomie it establishes is not unrelated to the legal order.

In this context, there is an interesting debate about the foundation of the state of exception. One of the most cited currents sustains itself on the concept of necessity, resorting to the Latin adage necessitas legem non habet, which means “necessity has no law”. According to Agamben (2004), this should be understood in two opposite senses: “necessity recognizes no law” and “necessity creates its own law.

The author concludes that understanding the structure and meaning of the state of exception presupposes an analysis of the legal concept of necessity. He understands that necessity is not a source of law, nor does it suspend it, it merely subtracts a particular case from its literal application. However, he states that the modern state of exception is, in fact, an attempt to include, in the legal order, the exception itself, creating a zone of indifference in which fact and law coincide.

Finally, Agamben (2004) understands that the theory of the state of necessity does not hold, because it concerns the very nature of necessity that some authors continue to think, more or less unconsciously, as an objective situation. In such a way, the concept of necessity would be totally subjective, relative to the objective that one wants to achieve. François Saint-Bonnet states that the issue of exception in public law is not only about discarding the applicable law as a result of certain circumstances, but also refers to the subtraction of normal relations between rulers and ruled (BERCOVICI, 2014).

Thus, most constitutionalists favor the constitutionalization of the exception, whose goal would be to rationalize the extraordinary protection of the state, incorporating it into the legal system. In this vein, the exceptional powers should be expressly provided for in the Constitution to enable limitation and control, including as a way to affirm democracy (BERCOVICI, 2014).

In this line, the state of exception would prove to be controllable, manageable, if executed in the manner provided in the constitutional and legal texts. Based on Godoy (2016, p. 301): "Its effective decree, however, leads the conceptual abstraction built on normality to an aggressive and hostile political and bureaucratic structure that enables the most monstrous barbarities".

At the national level, the 1988 Federal Constitution provides for exceptional measures to defend the state and democratic institutions. The so-called constitutional crisis system has as its instruments the state of defense and the state of siege, aimed at maintaining or restoring order in times of abnormality. Therefore, crisis control is configured as a legal system formed by constitutional rules that establish and prescribe the necessary measures to solve political-institutional crises. Exceptionality would be the keynote in these cases, justifying the measures until the constitutional balance is, again, reached (FERNANDES, 2018).

4. SITUATIONS OF EXCEPTION IN RECENT HISTORY AND JUDICIAL CONTROL

After the terrorist attacks of September 11, 2001, the United States government approved several normative acts with the intention of reducing fundamental guarantees in general, under the pretext of facing, with greater rigor, and preventing acts of terrorism. On November 13, 2001, it approved the *Military Order*, which authorized indefinite detention and prosecution before *Military Commissions* of non-citizens suspected of involvement in terrorist activities. Later, on September 26, 2001, the U.S. Senate passed the Patriot Act, which, among other things, allowed the *Attorney General to detain foreigners* suspected of terrorist activities that endanger the national security of the country (AGAMBEN, 2004).

Furthermore, within seven days, the alien was to be deported or charged with violation of immigration law or some other offense. In the event, the act radically nullified all legal status of the individual, thus producing a legally unnamable and unclassifiable being. Thus, the Taliban captured in Afghanistan did not enjoy the status of prisoners of war under the Geneva Convention, nor did they enjoy the status of those accused of common crimes under U.S. law (AGAMBEN, 2004):

> Neither prisoners nor accused, but only detainees, they are the object of a pure de facto domination, of an indeterminate detention not only in the temporal sense, but also as to their very nature, because totally outside the law and judicial control. The only possible comparison is with the legal situation of the Jews in the Nazi Lager: along with citizenship, they had lost all legal identity, but kept at least the identity of Jews. (AGAMBEN, 2004, p. 14).

At other times, there has been this claim to power by the executive branch, to deal with military or economic emergencies. Such was the case with the passage of the New Deal, in which there was a delegation to the president of unlimited power to regulate and control all aspects of the country's economic life.

> It is in the perspective of this vindication of the president's sovereign powers in an emergency situation that one must consider President Bush's decision to refer to himself constantly, after September 11, 2001, as the Commander in

> chief of the army. If, as we have seen, such a title implies an immediate reference to the state of exception, Bush is seeking to produce a situation in which emergency becomes the rule and in which the very distinction between peace and war (and between foreign war and world civil war) becomes impossible. (AGAMBEM, 2004, p. 18).

Along these same lines, the Egyptian government, under former President Mohamed Morsi, published a constitutional declaration on November 22, 2012, that considered presidential decrees to be exempt from judicial review and authorized the president to implement the necessary actions to protect the country and the goals of the so-called Egyptian Revolution, which began after the deposition of Hosni Mubarak (MARTINS, 2015).

In another situation, on May 1, 1994, Decree No. 874 was approved by the government of Colombia, declaring a state of internal disturbance and determining the application of special legislation for crimes under the jurisdiction of regional courts, classified as terrorism, subversion, kidnapping, rebellion, drug trafficking, among others. An example of this special legislation was Decree No. 2271/1991, which provided for provisional release only for those over seventy years old and those who had already served pre-trial detention, for the time of the maximum penalty provided for the crime, with the intention of preventing the application of the more favorable legislation in these cases (MUÑOZ, 2002).

4.1 CONSTITUTIONAL JURISDICTION AS A MEANS OF CONTROLLING THE STATE OF EXCEPTION

Often, the constitutional system itself provides for a system of control by the Legislative and Judiciary Branches. This control should be exercised over the acts that lead to the suspension of constitutional guarantees, in order to ensure that they are pertinent to the validity of the exceptional situation. Along these lines, both in the United States and in Colombia, their respective Constitutional Courts have been called upon to exercise control over the constitutionality of the acts that implement such measures, adopted under the justification of the need for greater rigor and agility on the part of Executive Branch agencies.

In view of this, the Constitutional Court of Colombia, when asked to control the constitutionality of state of exception declarations, issued important decisions (some of which are analyzed below) to restrict the use of exceptional measures. Although it has not failed to recognize the discretion of the President of the Republic in deciding when and for how long to use the institute, the Court has recognized the possibility of full constitutionality control.

Thus, two declarations of exception were recognized as unconstitutional between 1994 and 1995. These decisions resulted in accusations of "judicial dictatorship" by the Court, for supposedly making it difficult for the government to control public order in the context of the confrontation with the Revolutionary Armed Forces of Colombia (FARC), a guerrilla group operating in that country (CAMPOS, 2016).

In these precedents, some of which are analyzed below, the Court has ensured that, although there is the faculty for the decree of exceptional measures in any of its modalities, such measures should observe the principle of proportionality and can never reduce the essential core of fundamental rights. Thus, it recognized the legitimacy of these mecha-

nisms when provided for in the Constitution itself and in international documents, but also stressed that judicial control should be unlimited and permanent (TOBÓN-TOBÓN; MENDIETA-GONZÁLEZ, 2017).

According to Muñoz (2002), former president of the Constitutional Court of Colombia, the Constitution of that country establishes three types of state of exception, namely, external war, internal commotion and emergency. The author stresses that the purpose of the constituent is to distinguish the scenarios of normality and abnormality, making it clear that the latter is subject to the rule of the constitutional rule.

On May 1, 1994, the Colombian government passed Decree No. 874, declaring a state of internal commotion, shortly after receiving a communication from the Attorney General's Office that several people accused of serious crimes were about to be released due to the expiration of the deadline for procedural instruction. The Attorney General's Office claimed that it would not be possible to consider the merits in such cases within the legal timeframe and that the delay could result in the release of 724 prisoners (MUÑOZ, 2002).

In practice, this decree would result in the maintenance of several preventive arrests without legal grounds, while the prisoners were awaiting trial. The Supreme Court held that the act was unconstitutional because it violated the right to liberty, the presumption of innocence, and the human being's capacity for self-determination, and that there could not be an objective presumption that the person under investigation, once released, would be a threat to public order (MUÑOZ, 2002).

In a judgment held under the reporting of the mentioned magistrate member of the Colombian Constitutional Court, it was stated that:

> The argument that the Government makes is absolutely dangerous, signals the Court and does not really demonstrate a risk of crisis in the declaration. It should also be noted that it violates the principle of presumption of innocence and also attacks the principles of a social state of law that relies on its own institutions. The Constitutional Court considers that in this case the mere fact that many people come out of prisons by lapse of time, due to a slowness in proceedings, there is no evident causal link with the endangering of state institutions, nor with the disturbance of public order (COLOMBIA, 1994, p. 1).

However, in another precedent, in *Sentence* No. C-556/92, the Court recognized the legitimacy of the declaration of a state of commotion, but controlled the exercise of this prerogative by verifying the presence of the formal requirements for such:

> Nevertheless, despite these caveats, the Constitutional Court declares the state of exception feasible, based on two reasons:
>
> a - The certification of the formal requirements, namely, the democratic principle and the prior approval by the senate;
>
> b - The adequacy of the powers given to the President of the Republic, namely, the non-existence of ordinary powers to prevent a crisis from occurring. (GONZÁLEZ, 2016, p. 148).

Sentence No. C-802/02 affirmed the legitimacy of the constitutionality control of acts as follows:

> In summary, the Political Charter confirms the competence of the Constitutional Court to control the formal and material constitutionality of both the legislative decrees declaring states of exception and the legislative decrees of execution. Such competence is further corroborated by the deliberations that took place in the National Constituent Assembly; by the model of constitutional law of exception chosen by the 1991 Constituent; by the regulation it made of the nature, limits, and system of control [...]; by the legal nature of the decree declaring a state of exception; and by the current conception of constitutional jurisdiction and its function (COLOMBIA, 2002, p. 1).

Furthermore, he understood that it would even be possible to suspend laws that were incompatible with the state of exception, but rights provided for in international treaties could not be suspended. In this sense:

> The Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights are the two international instruments that are considered to have been most flagrantly violated. Among the articles of the Inter-American Convention, article 8 stands out, stating the following: "Everyone arrested or detained shall be entitled to trial within a reasonable time or to release". In the same vein, the UN Human Rights Committee, in case No. 46 of 1979, held that: "The detention of an individual for more than 6 months before proceedings were initiated, and for more than two years before sentence was pronounced, would constitute excessive delays" (cited by the Constitutional Court of Colombia, Sentencia C-556 of 1992). (GONZÁLEZ, 2016, p. 147).

Even recognizing the constitutionality of the state of commotion, provided for by the constitutional order, the constitutional jurisdiction has acted to verify whether the exercise of this prerogative has been occurring regularly. Even so, it did not admit the suppression of fundamental rights and guarantees considered core to the democratic rule of law.

Along the same lines, also under the justification of facing an emergency situation, the U.S. government obtained the approval of the so-called *Patriot Act*, signed by President George W. Bush on October 26, 2001. Soon after the September 11 terrorist attacks, the law came into force under the argument of fighting terrorism, providing for a series of exceptional measures to be granted to government agencies in charge of acting in the fight against terror.

Critics of the Bush administration argued that this measure reflected a disregard for basic civil liberties. Supporters of the administration argued that it was an appropriate legislative response to the terrorist attacks. In short, the act greatly expanded investigative powers, especially broadening the possibilities for searching and acting on the Internet, authorizing clandestine personal searches, to take advantage of the new standards established by the *Foreign Intelligence Surveillance Act* (FISA) (GUIORA; JULIET, 2019).

This law, in its various chapters, provided for increased funding for military operations and increased the authority of the Executive Branch to seize the financial assets of foreign persons, countries, and entities suspected of participating in terrorist attacks. In doing so, it increased the authority of agencies charged with conducting surveillance of suspected terrorists, changed banking system regulations to combat money laundering, made it easier to request personal information from service companies, made it easier to detain suspected terrorists, and other measures (MORGAN, 2013).

The law also created a secret court with the function of legalizing, through court orders, the actions of the security agencies. This court even ordered the telecommunications com-

pany Verizon to hand over all its customers' telephone records to the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI) without being subject to any investigation. The court order also directed Verizon not to disclose the existence of the request and the court order itself (GREENWALD, 2013). Subsequently, the Supreme Court ruled for the constitutionality of this practice.

Moreover, this law allowed anyone in the world to be held in prison for an unlimited time, without a formal accusation, due process and trial. In this vein, illegal arrests and drone strikes were also "legalized" by secret courts, without any control, all under the justification of being in the war against terror (MELO, 2013).

Nevertheless, many actions of the U.S. government based on the Patriot Act have been challenged in court - some cases reaching the Supreme Court due to allegations of human rights violations, as in the case of Rasul v. Bush, in 2003. In this context, several individuals of different nationalities were captured in Afghanistan and Pakistan on suspicion of having ties to terrorist organizations. After family members of these prisoners filed Habeas Corpus petitions, the government claimed that the federal jurisdiction could not hear cases in which detainees of other nationalities were outside the U.S. territory (TAUBER; BANKS, 2019).

By six votes to three, the Supreme Court decided that, although Guantanamo Island is located in another country, the United States had full control of the naval base on Cuban territory, a situation that would be equivalent to detention on national soil. However, this decision did not result in the release of the individuals, as they were only guaranteed to submit the case to Federal Jurisdiction (UNITED STATES OF AMERICA, 2004a).

In another situation, also in the year 2004, the Supreme Court decided the case of Hamdi v. Rumsfeld, which was distinguished from the one mentioned above in that it involved a US citizen named Yaser Hamdi. Although born in Louisiana, he grew up outside the United States and was captured fighting alongside Taliban forces in Afghanistan. He was later taken to Guantanamo Bay prison when his citizenship was discovered, and was then transferred to a military prison. Initially, the prisoner was denied the right to communicate with a lawyer, which led him to argue a violation of due process of law under the fifth amendment of the US Constitution (TAUBER; BANKS, 2019).

Thus, he claimed that he was being prevented from challenging his arrest through an attorney. The American state, in turn, claimed the exclusive authority of the president to decide which prisoner would be considered an enemy combatant and that the principle of separation of powers would prevent the judiciary from interfering in this matter. The Supreme Court, by six votes to three, ruled that the president would not have exclusive authority to determine when a prisoner has the right to challenge his arrest through an advocate. *Justice* Sandra Day O'Connor stated that because Hamdi is a U.S. citizen, the government would be violating his Fifth Amendment right to due process of law, which would assure him the right to challenge his arrest (UNITED STATES OF AMERICA, 2004b).

However, in this case, there was no consensus among the justices as to the powers given to the president to detain enemy combatants. Two *Justices*, David Souter and Tuth Bader, disagreed on whether the *Authorization for Use of Military Force* (AUMF) gave such powers to the president. *Justice Souter*, in his *opinion*, pointed out that he disagreed with the others on this point. He emphasized that the government had not been able to show that the AUMF sup-

ported detention in the case at hand, and that Mr. Hamdi should be released immediately. In his view, the AUMF does not use the word detention and no interpretation of the law indicates that it is intended to give the president the authority to order detention of citizens as enemy combatants. He also argued that there would be another statute, the *Non-Detention* Act of 1971, which expressly prohibited the detention of US citizens except with the authorization of a law passed by Congress (EDELSON, 2017).

In the case of Hamdan v. Rumsfeld, judged in 2006, Salim Hamdan, who had been a driver for Osama bin Laden, was captured in Afghanistan and transferred to the Guantanamo prison, his case being under the protection of a military court, which declared him an enemy combatant. Prior to this declaration, Hamdan filed a *habeas corpus* petition before a federal court, which recognized the right to a hearing to verify the prisoner's *status* and possible submission to the rights provided for in the Geneva Convention. Such decision was reformed after appeal, under the argument that Congress had authorized the trial before the so-called Military Commissions and that the Geneva Convention would have no effect on US soil (TAUBER; BANKS, 2019).

The case was taken to the Supreme Court, which reformed the decision by five votes to three, prevailing the understanding that neither the Constitution nor any other law authorized the Military Commissions to act in this way and that the Geneva Convention should be observed in the case, since it produced effects within the national territory (UNITED STATES OF AMERICA, 2006).

After this case, Congress passed the Military Commission Act (MCA), which expressly removed from federal jurisdiction the competence to hear habeas corpus cases filed by Guantanamo prisoners. Thus, in the case Boumediene v. Bush, Lakhdar Boumediene, an Algerian citizen captured in Bosnia, suspected of planning attacks on an embassy, filed a writ of habeas corpus seeking to challenge his imprisonment. In light of this, the Supreme Court was again provoked to pronounce itself on the issue and, by five votes to four, reformed the initial decision (TAUBER; BANKS, 2019).

Thus, the understanding prevailed that the MCA could not authorize the president, by his own act, to designate prisoners as enemy combatants, or not. In addition, it reaffirmed that the guarantee of Habeas Corpus could not be suppressed despite legal provisions, because this would be contrary to the Constitution, which should be respected even in extraordinary situations (UNITED STATES OF AMERICA, 2008).

It is worth noting, in this last case, that the Justices who voted for the dismissal did so under the understanding that the guarantee of the Habeas Corpus would not extend to foreigners who support those considered enemies of the nation. In view of this, the performance of the Supreme Court was not exempt from criticism. In this sense, Guiora and Juliet (2019) state that successive governments have adopted measures that minimize individual rights. Meanwhile, Congress and the Supreme Court have failed to strengthen and rigorously apply checks and balances, failing to act in the field of combating terrorism and leaving it totally under the dominion of the Executive. The consequences of this hiatus are deleterious to fundamental rights, and it is questionable whether there is any benefit in restricting these rights.

4.2 THE COVID-19 PANDEMIC AS A REASON TO DECLARE A STATE OF EXCEPTION

At the present time, the world is in a state of complete exceptionality due to a pandemic caused by Covid-19. The high number of people infected is shaking the health systems of many different countries to different extents. Some European countries, such as Italy and Spain, have been hardest hit by having their medical care capacity completely exhausted. In these countries, it has come to the point where choices have to be made between patients who should receive respirators because there are not enough of them to meet all the needs.

Faced with many scientific uncertainties about the efficacy of medicines, the form of contagion, over the months, international experience has shown that, for the moment, the only effective way to interrupt the chain of contagion would be social isolation, with the complete paralysis of almost all activities. Thus, what was seen, in some countries, was a resistance from part of the population to comply with isolation orders imposed by the authorities.

In this scenario of exceptionality, with the need to impose measures restricting the rights to freedom, some governments, it seems, have taken advantage of this to change their constitutional orders, under the justification that they need more powers to take measures to confront the pandemic.

One of the cases that gained prominence was Hungary, where the ultra-rightist government of Viktor Orbán managed on March 30, 2020, to pass a law that extends the state of alarm indefinitely, under the pretext of combating the new coronavirus. Holding a two-thirds majority in parliament, the executive gained extraordinary powers to rule by decree, without setting a time limit and without any control, including from parliament (BLANCO, 2020).

After international pressure mainly from European countries, on June 16, the parliament withdrew the special powers given to the prime minister. However, the new rule allows the chief executive to decree, without parliamentary consent, a state of public health emergency, which would allow a return to the previous situation (LEHOTAY, 2020). The case of Hungary demonstrates how a situation of exceptional character can be used to depart from the constitutional order and, therefore, democratic pillars such as the separation of powers and fundamental freedoms. One of the measures adopted was the punishment, with up to five years in prison, for those who publish false or distorted information that “obstructs” the effective protection of the population (BLANCO, 2020).

A similar measure was discussed and passed in Bulgaria, increasing the powers of Prime Minister Boyko Borisov. However, some articles were repealed by the parliament precisely because of the fear that the measure could hurt the freedom of speech in the country. One of the measures, similar to what happened in Hungary, provided for a prison sentence of up to three years for those who spread false news. President Rumen Radev vetoed this part of the law, claiming that it could cause more problems for the country, since it would restrict access to information. The Philippines, India, Poland, and Austria have also passed measures giving more powers to their respective chief executives to fight the pandemic (BRAUN, 2020).

Italy, the country most affected by Covid-19 so far, has passed a decree law for reasons of hygiene and public safety, imposing a series of restrictions, including: a ban on residents leaving the municipality, a ban on access to certain areas, the suspension of demonstrations

and any form of assembly, the suspension of educational services for children and teenagers, and other restrictions.

In an article published on February 26, 2020, well before the outbreak of the contamination in Italy, Giorgio Agamben stated that such measures were irrational and totally immotivated, and that a state of exception was being provoked. However, subsequent events led the country to enter a total blockade, as this was the only way found to contain the wave of contagion. (AGAMBEN, 2020).

Already in early August, Parliament approved the extension of emergency powers to Prime Minister Giuseppe Conte until October 15. These powers allow the government to maintain restrictions and to respond promptly to new outbreaks with the restrictive measures it deems appropriate (HOROWITZ, 2020). So far, everything indicates that in the Italian case, the measures have indeed been adopted to last temporarily and only in order to contain the spread of the disease.

In Germany, the Federal Constitutional Court rejected applications against measures restricting the right of citizens of the Bavarian region to meet in general. The claim was that fundamental rights of freedom were being restricted too much and that there were no longer any grounds for doing so. The Court rejected the claim on the grounds that the restrictions were not unfounded and that they were pertinent to the goals of preserving public health (GERMANY, 2020).

5. CONCLUSIONS

The Constitutional Courts have the important role of protecting and enforcing the constitutional rule, guaranteeing the validity of the democratic rule of law. Thus, the order of values that make up the constitutional system remains in force in any situation that escapes normality, regardless of its denomination. Even if the constitutional system itself brings a normatization for acting in moments of crisis, the values immanent to the constitutional order remain fully in force.

Even in a situation accepted by legal systems as an emergency, the Judiciary, at any of its levels, does not fail to act in an attempt to maintain control over the constitutionality of acts practiced during a state of exception. Even if the constitutional system foresees the prerogative of the Executive Branch, with the consent of the Legislative Branch, to act with exceptional powers, the judicial control function does not suffer any restriction as to the function of evaluating the constitutionality of the acts practiced.

In this way, as much as measures that may curtail certain fundamental guarantees are authorized, the Constitutional Courts and the common Jurisdiction must act to control such measures and, above all, to prevent the provisional situation from becoming definitive and degenerating the institution. In the precedents analyzed, both courts admit the use of exceptional measures that restrict fundamental rights, but always ratifying the possibility of verifying the constitutionality of the measures used.

Comparing the cases of the United States and Colombia, it was possible to verify a different degree of tolerance with regard to the restriction of fundamental guarantees. The U.S. Court adopted, in some cases, a more restrictive position, recognizing, for example, that the prisoners in Guantánamo had the right to be submitted to Federal Jurisdiction, but without immediately recognizing the illegality of the detentions.

Therefore, we conclude that judicial control can be more effectively exercised in constitutional systems that accept and regulate the situation of exceptionality. The legitimacy of the institute is recognized, in many places, as an important and even essential tool for dealing with emergency situations related to security and health, for example. However, not all constitutions foresee the regulation of the institute, which leads to a greater margin of discussion regarding the constitutionality of the execution measures, as occurs in the United States.

In cases where there is no regulation of state action in exceptional situations, democratic institutions may become more fragile, leaving citizens subject to the discretion of the Executive Branch in the exercise of its powers of criminal prosecution. The absence of a prior definition of the limits of state power leads to the violation of rights that may be irreversible, even after obtaining a judicial remedy.

Therefore, the full operation of the other powers, during the execution of exceptional measures within the dynamics of checks and balances, is essential to maintain vigilance and control over the actions taken under the auspices of the state of emergency or similar. In this sense, under no circumstances and to no degree should one allow a reduction in the judicial capacity to evaluate the acts practiced under a state of exception. Measures that deprive the Judiciary of the ability to syndicate any act are unconstitutional in any event, and should not be accepted under any circumstances.

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