



## THE RESTRICTION OF FUNDAMENTAL RIGHTS IN THE FACE OF PUBLIC SECURITY

### ORIGINAL ARTICLE

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### ABSTRACT

The 1988 Brazilian Constitution guarantees the right to life, freedom, health, work, housing, leisure, assistance to the homeless, among others, as well as the right to security. Public security is a complex issue with peculiarities that evolve with society, and it is a constitutional right. In the military regime of 1964, fundamentals were repressed and restricted. With the inauguration of a civilian president, Brazil takes as scope, the formation of a democratic country, formed in 1985. There was the construction of a new Constitution, which only on October 5, 1988 was finalized and promulgated. The objective of this article is to carry out an approach on Public Security and its restrictions in the light of the Brazilian constitutions granted or enacted during and after the military regime. A bibliographical research was carried out in the databases of the World Wide Web. It brings together a theoretical basis on fundamental rights and their restrictions as a consequence of guaranteeing public security, throughout the Constitutions of 1967 and 1969, in contrast to the affirmation of these rights on the Federal Constitution of 1988. It can be seen that, in normative terms, there has been an evolution in the guarantee of fundamental rights, as well as in the scope of public security.



Keywords: Military Regime, Constitution, Fundamental Rights, Public Security.

## INTRODUCTION

Under the terms of Title II - Fundamental Rights and Guarantees of the 1988 Constitution of the Federative Republic of Brazil, the rights inherent to man are assured. These being the right to life, freedom, health, work, housing, leisure, assistance to the homeless, among others, as well as the right to safety (BRASIL, 1988). These provide for human rights, a corollary of a progressive human construction throughout history. Typified by the natural law doctrine, they are unavailable, very personal, imprescriptible, non-waivable, they do not have an absolute (limitable) nature, they are concurrent, universal, inalienable, indivisible, having a prohibition against retrogression (CAVALCANTE FILHO, 2011; NETO *et al.*, 2021).

Public security is a complex subject with peculiarities that evolve with society. In International Treaties and Conventions, the subject is addressed as a right of the person that enables the exercise of other rights provided for in the legal system. Which transcends the idea of not being robbed or attacked, but guarantees the individual to be supported in a situation of illness, disability, invoking the role of the State to preserve the dignity of the human person (MINUSCOLI and ALMEIDA, 2016). Therefore, the Federal Constitution of 1988 establishes Public Security as a diffuse right, under the terms of articles 5º, 6º and 144, it is denoted to all Brazilians, as it has a status of fundamental right in art. 5, it is verified in art. 6º as a social value, therefore a goal to be achieved, and in art. 144 determines Democratic Public Security as a duty of the State and responsibility of all.



## THE BEGINNING OF THE MILITARY REGIME AND THE 1967 CONSTITUTION

In 1964, with the pretext of organizing the administrative management of Brazil, the military staged a coup d'état and assumed power, initiating the Military Regime. Under the dictatorial regime, fundamental rights were severely affected from the first hours, on March 31, 1964 (GROFF, 2008):

Os militares quiseram manter uma aparência de legalidade na sua ação, para legitimar o regime ditatorial. Para isso, mantiveram formalmente a Constituição de 1946. Contudo, a Constituição não tinha mais a supremacia na ordem jurídica do país. Os 'Atos Institucionais' (AI) ocuparam o lugar central, como pode ser ilustrado pelo artigo 10 do Ato Institucional n. 5: 'no interesse da paz e da honra nacional, e sem as limitações previstas na Constituição, os chefes da revolução, que estabelecem o presente ato [...] (GROFF, 2008, p.120).

The institutional acts of fundamental rights were important instruments for the implementation of the military regime in Brazil during the period of 1964 and 1985. Concomitantly, they were repressed and restricted, because soon after the fourth act, the government granted the 1967 constitution that the previous acts, with the exception of the first, which was attributed to the 1946 Constitution (BRASIL, 2017).

Military thought was based on "helping the homeland in danger", later, in the 1967 Charter, the military assumed the idea of full power, in which the exercise of security becomes the safeguarded instance of the other exercises of the public function, the The National Security Doctrine, created in the United States in the Cold War and adopted by the military, dealt with positivist measures and policies, which initiated an effective process of regulating citizenship and citizens along militaristic lines. An example was the access to justice that could be limited by law, which could condition this right to the possibility of being exhausted in administrative ways (SANTOS, 2017).



In this way, in 1967 it became apparent that political practices, the organizational culture of institutions, legislative and structural reforms were being carried out under a specifically military ideological order that did not admit divergences, conflicts and contestation. Thus, public security corporations were subjected to the process of militarization (SANTOS, 2017).

## **AI-5 AND THE 1969 CONSTITUTION**

The 1969 Magna Carta swelled institutional acts, employing federal intervention in the States, revoked autonomy, centralized power, imposed limitations on the Legislative Power, legitimized the regime of decree-laws, “guaranteed” security for individuals, preserved the restrictive measures of the previous constitution, whether in matters of individual guarantees or in matters of social rights (GROFF, 2008).

The 1969 Constitution legitimized the 1968 AI-5, all to guarantee public security and stability for the people, according to the military. Institutional Act No. 5 was a set of elements authorized by various representatives of the period, which incorporated authoritarian norms into the text to be developed as a way to legitimize the suspension of freedom. Among the ways to restrict this, there are: the prohibition of universal suffrage; prohibition of demonstrations of political origin; serviceability, essential, to security measures; limitations on the freedom to come and go, disavowal of going to specific places and specific domiciles (GROFF, 2008).

Among the restrictions, one that had great social repercussions was the restriction of due process of law, a procedural principle that guarantees the individual the right to defend himself along with the judicial protection provided by the State, raising in due process a dispute (BRASIL, 1968 ).

The limitation of this principle during the dictatorship guaranteed the military the authority to arrest any individual who allegedly went against the Government, threatened public order and the safety of all, under the pretext of ensuring



“protection” for the people, since the military stated that all those who opposed the military system were considered terrorists (GROFF, 2008).

In 1979 came the political amnesty, with Law n. 6,683, of August 28. It granted amnesty to politically persecuted people and those who committed crimes in the name of the regime (GROFF, 2008).

The Amnesty Law granted those who committed crimes, whether political or in the name of the regime, some considered terrorists, absorption. As a way of forgiving the mistakes made by both sides, since not only did the people commit crimes against the regime, in addition, the regime also committed crimes against the dignity of citizens (BRASIL, 1979).

## **1988 CONSTITUTION**

After the 21 years of experience of the Military Regime, Brazil is going through a very discrepant change in political management. The lapse between 1978 and 1985 is marked by the beginning of the democratic era with the return to multipartyism, in 1982 direct elections for governors take place. In 1984, there was the emergence of demonstrations with the colloquial name of “*Diretas Já*”, with the ideal of defending the approval in the National Congress of the Constitutional Amendment Dante de Oliveira, aspiring to the future direct election for President of the Republic (GROFF, 2008).

This movement reached a large mass through awareness, thus being a milestone for democratization in its essence, despite the fact that the Amendment was not approved on this date. It is exclusively in the Federal Constitution of 1988 that elections at all levels were direct (GROFF, 2008).

With the inauguration of a civilian president, Brazil takes as scope, the formation of a democratic country, forming in 1985, through an amendment, a National



Constituent Assembly, which established the construction of a new Constitution, which only on October 5 of 1988 was finalized and enacted (BRASIL, 1988).

The 1988 constitutional charter, from its Preamble, makes evident the new Democratic government regime, when mentioning that it was elaborated and promulgated by representatives of the people, being also called "Citizen Constitution" (GROFF, 2008).

It was a big change after 21 years of military rule, especially in terms of fundamental rights, as the 1988 Magna Carta has a great focus on these, making them positive in its provisions. In addition, public security, which was the subject of great discussion during the military period, which was exercised by the military themselves, gains competence and jurisdiction in article 144 of the new constitution, assigning this function to competent bodies to exercise it effectively and fairly (BRASIL, 1988b).

## **CURRENT AFFAIRS**

According to the citations and comparisons made, it is observed that in the 1967 constitution the search for social security was a farce for the preservation of the military government, in comparison the 1988 Constitution, the citizen constitution, emphasizes fundamental rights, concluding public order as a frontal consequence of effective rights. However, actual surveys show that even with all the legal and constitutional support, in contemporary times, fundamental rights continue to be contained (RIBEIRO and DÉA, 2021).

The 3rd National Report on Human Rights in Brazil (2007) points out flaws in the police and penitentiary systems and denounces the participation of authorities in human rights violations. According to the document, most homicides are poorly investigated and a "very small number of those responsible are denounced and convicted." According to a 2012 survey, only 5% to 8% of registered homicides in



the country are solved by the police forces. The conclusion is that there was a setback in this regard between 2002 and 2005 (GOMES, 2012).

According to information from the Ministry of Health in 2016, Brazil reached the historical mark of 62,517 homicides. This equates to a rate of 30.3 deaths per 100,000 inhabitants, one of the highest rates of intentional homicide in the world. The limit considered bearable by the World Health Organization (WHO) is 10 homicides per 100,000 inhabitants (BUENO and LIMA, 2021).

Therefore, the country's instability is noted, with high rates of violence and impunity, rates that are inconsistent with the constitution, which protects rights, however, in its applicability it is not fully effective.

## **OBJECTIVE**

This work aims to carry out an approach on Public Security and its restrictions in the light of the Brazilian constitutions granted or enacted during and after the military regime.

## **METHOD**

The present study consists of a bibliographical research, in the databases of the World Wide Web. It brings together a theoretical basis on fundamental rights and their restrictions as a consequence of guaranteeing public security, in the course of the 1967 and 1969 Constitutions, in contrast to the affirmation of these rights on the Federal Constitution of 1988.

## **RESULTS AND DISCUSSION**

Public security is a second generation fundamental right, as it aims to provide citizens with the conditions to have a dignified life, through more effective actions aimed at security, in an equal and universal way, so that they can exercise their





rights and citizenship. This is a duty of the State, a right and responsibility of all, being exercised for the preservation of public order and the safety of people and property. As provided for in Article 144 of the Federal Constitution of 1988 (BRASIL, 1988).

In 1964, the State that held such a duty, used and abused the restriction of fundamental rights with the argument of guaranteeing the fulfillment of that obligation, however, it was just a way of alienating citizens and guaranteeing that no individual would contradict the dictatorial regime, since, with the rights of the human person, the people would have more positions related to *status libertatis*, by Jellinek, who stated that such a position gave the people the power to act free from the state's actions. Fearing losing control of citizens' actions, the Government claimed that such revolts would be harmful to public security, hurting national order, considering all those who opposed the regime to be criminals. Therefore, in 1988, most of the irregularities foreseen in the dictatorial regime were remedied, as well as the restriction of fundamental rights and the crimes committed, through the new enacted constitution (DINIZ, 2014).

## FINAL CONSIDERATIONS

In view of the above, when comparing the 1967, 1969 and 1988 constitutions, it is clear that, in normative terms, there has been an evolution in the guarantee of fundamental rights, as well as in the scope of public security. Primarily, the positive norms were changed, with a broad attention turned to social issues, considering 1988, the citizen constitution. Despite the performance of the competent public security bodies, it is clear that the resources due to remedy criminal rates are slowly used. For, even with normative evolution, the social field continues to have vast problems, such as high criminal rates and actions that violate human dignity. In view of this, one cannot lose sight of the horizon of hope in which not only the law is the social ideal, but also effective applicability in society, thus obtaining the effectiveness of the norm.





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