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THE POLICE APPROACH AND FUNDAMENTAL RIGHTS: A GUARANTOR PERSPECTIVE

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ABSTRACT

The police approach causes different impacts on the social strata and, with the increase in crime, it has been increased as an alternative to combat it. In this scenario, the guarantee emerges as a tool for limiting the power of the State. The objective of the research is to analyze the Habeas Corpus Appeal No. 158.580, of the Superior Court of Justice, in the light of Luigi Ferrajoli's guarantee and its impact on police stops. To this end, it sought to explain the theories of guaranteeism and Fundamental Rights; and analyze the legality of police stops and their reflections on Fundamental Rights and other influences. The methodology will be bibliographic. The guiding hypothesis is that the decision in question was a guarantee.

Keywords: Fundamental Rights. Guarantee. Police power. Police approach. Founded suspicion.

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INTRODUCTION

The police approach is a widely discussed topic in the social environment, given that it can affect the daily lives of citizens, especially those who live in poorer communities. It so happens that this activity developed by the apparatus responsible for public security causes different impacts on the various layers that make up the social fabric. The relevance of the discussion on the subject stems from the continuous increase in violence and crime - crimes against property, homicides, organized crime, particularly drug trafficking - and the consequent increase in the incidence of police stops as an alternative to combat this social phenomenon.

The progressive increase in violent crime in most of the large cities of our country ends up gradually replacing the discourse of "crime control" with that of the "war on crime", which carries with it the idea of imminent danger and the need for maximum mobilization of efforts by the state apparatus. Police stops ended up suffering the impact of the popular imagination and those in charge of maintaining public order, that we are in a context of war and, consequently, began to be carried out more rigorously and, sometimes, in disrespect of the rights enshrined in the Federal Constitution.

The Theory of Guaranteeism, which has as one of its foundations the protection of individual freedoms arising from the Enlightenment doctrine, is presented as a tool that aims to aggregate legal instruments to limit the power of the State. In the normative sphere, paragraph 2 of article 240 of the Code of Criminal Procedure (CPP) establishes "well-founded suspicion" as a condition for carrying out a personal search, but without establishing a clear concept of what "well-founded suspicion" is, which allows security agents an expanded margin of discretion in their actions that, not infrequently, are influenced by discriminatory criteria.

After the decision in the Habeas Corpus Appeal No. 158.580 (RHC) of the Superior Court of Justice (STJ), there was a paradigm shift in the analysis of police stops in concrete cases, including resulting in the non-use of evidence obtained from the illegality found during some stops.

In addition to the personal interest in the research, resulting from the exercise of police activity by one of the co-authors, it is imposed due to the recurrence of discussions about the police approach. This research becomes relevant from a social point of view due to the positive effects that the study can bring to police institutions, as it will promote a debate on the police approach and the way it should be used in the most varied events, not

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only in its technical-formal aspects but also from the most current and high perspective of quality in the provision of services and the importance that it is executed by respect for Human Rights Fundamental.

The objective of the research is to analyze the RHC in light of Ferrajoli's Garantism and its impact on police stops. To this end, it was sought to explain the theories about the guarantee and Fundamental Rights; analyze the legality of police stops and their reflections on Fundamental Rights, and other implications for the performance of police institutions during the conduct of stops to citizens. Thus, it is established as a problem to be analyzed: was the decision in the RHC a guarantee to the point of preventing police stops?

The method of approach used will be deductive-exploratory, as it aims to make the problem more explicit, deepen the ideas about the object of study, in which criteria, methods, and techniques for the elaboration of the research were established, offer information about its object to guide the formulation of hypotheses. As for the procedure, it will be analytical-dogmatic, as it aims to analyze the operational concepts of research from a deductive-epistemological perspective, taking into account the multiplicity of perspectives when elaborating the answers to the research problem. The research instruments used will be data collection, bibliographic research, and analysis.

The guiding hypothesis of the work is that the decision in question was about guaranteeism. In this vein, the present work was divided into three sections, in addition to the introduction and conclusion. In the first, the theories about the theory of guarantee and Fundamental Rights will be explained. The second will explain the police power and the necessary legality in the execution of police stops. Finally, in the third section, the RHC will be analyzed in the light of Ferrajoli's guarantee and its repercussions on police stops.

CONCEPTIONS ABOUT GUARANTEES AND FUNDAMENTAL RIGHTS.

The Democratic Rule of Law, under the terms of article 1 of the CF/1988, is presented as an adjective of the Federative Republic of Brazil, and its understanding is urgent so that it can be effective with the Brazilian people and its institutions, especially those responsible for the application of the law. On the subject, Lenza (2012) argues that the provision of this legal regime is reinforced in the Constitution from the establishment that all power emanates from the people, who exercise it through elected representatives or directly, under the terms presented therein.

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When analyzing the Democratic Rule of Law in our Federal Constitution, Bruno Neto (2003) argues about the need to divide this principle into the Democratic State and the Rule of Law. The first refers to the Political Regime and allows the Brazilian people effective participation in the process of forming the public will. The second refers to the Legal Regime that self-limits the power of government to the fulfillment of the laws that subordinate everyone.

On the subject, Ferrajoli (2012) argues that the Fundamental Rights stipulated in constitutional norms should guide the production of positive law, and rigid constitutionalism is not about overcoming legal positivism, but rather about its reinforcement, representing, therefore, a complement to both legal positivism, since the "being" and the "should be" of law is positive, and the rule of law, since it entails the submission, including of legislative activity, to the law and the control of constitutionality.

In Ferrajoli's conception, unlike what occurs in the paleo positivist model, legality is no longer simply a condition for the validity of infra-legal norms but is itself conditioned, in its very validity, on the respect and performance of constitutional norms. In this way, legal constitutionalism excluded the last form of government that, in traditional representative democracy, manifested itself in the omnipotence of the majority.

It can be concluded that legal guarantees are based on individual freedoms arising from the Enlightenment doctrine, to add legal instruments for the limitation of sovereign power, restricting the powers of the republic, in the context of the guarantor doctrine, to material frameworks. According to Rosa (2011, p. 5), "[...] in the face of contemporary complexity, the legitimacy of the Democratic Rule of Law must supplant mere formal democracy, to achieve material democracy, in which Fundamental Rights must be respected [...]". It also states that Fundamental Rights, in this sense, are located in the "sphere of the undecidable", bordering on the advancement of the Legislative Power (ROSA, 2011, p. 7).

In summary, Saboia and Santiago (2018) state that guarantees, as a theory of law, postulates precepts that must be linked to the ends pursued by the Democratic Rule of Law, having as a guide the human dignity that seeks to prevent the State from failing to comply with the application of Fundamental Rights and moving away from the objectives for which it justifies its existence, while the idea of judicial activism is associated with broader and more intense participation of the Judiciary in the realization of constitutional values and purposes.

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The proclamation of the Universal Declaration of Human Rights, of 1948, allowed the promotion, in cooperation with the United Nations - UN, of universal and effective respect for human rights and fundamental freedoms, and Brazil incorporated it into its Constitution in Article 1, III, which treats it as the foundation of the Republic.

When lecturing on the subject, Ramos (2014) states that the dignity of the human person is an intrinsic and distinctive quality of each human being, which protects him against all degrading treatment and hateful discrimination, as well as ensures minimum material conditions of survival, regardless of his nationality, political option, sexual orientation, creed or other distinguishing factors, being therefore, of indispensable protection for the Brazilian Democratic State of Law. It is clear that the legislator's concern with attributing normative status to the principle of the dignity of the human person is visible, not allowing legislation to be legislated in counterpoint to its dictates, and which can be expanded, never suppressed.

When explaining the terms used to refer to the basic rights of human beings, Sampaio (2010) states that human rights would be the rights valid for all peoples or for human beings, regardless of the social context in which they are immersed. "Human" or "of man" would also be those defined not by a positive norm, but by the conception of "man" that is adopted as a source or as a value, by the axiological reference that imposes itself on any legal orders. "Fundamental Rights", on the other hand, are those that are legally valid in a given legal system or that are proclaimed inviolable in the internal or constitutional sphere (national dimension of human rights).

Fundamental rights and human rights have, in common, the condition of being provided for in positive legal norms. However, while Fundamental Rights are characterized by their positivity within the scope of the constitution of a State, human rights correspond to rights that can be entitled, by the human person, provided for by norms of international law. On the subject, Comparatto (1999), based on the Germanic doctrine, understands Fundamental Rights as human rights recognized as such by the authorities responsible for the edition of norms and their affirmation in constitutions, laws, and international treaties, thus having an effect within States and at the international level. In conclusion, the author adduces that the essentiality of human rights derives from the recognition of their structuring function to establish the limits of legal relations between the individual and the State, between groups of individuals, or about the entire human race.

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In Brazil, human rights have evolved with a view to society's desires in search of justice and the dignity of the human person, being gradually incorporated into the constitutional legal framework since the first Brazilian Constitution. This assumption made it possible for the Brazilian citizen to voluntarily choose how he would develop his personality, not allowing external interference that would result in his degradation, under the terms of article 5 of the Federal Constitution, which safeguarded the inviolability of intimacy, private life, the image of the person, his home and his correspondence and communications.

Therefore, in a country that is based on the Democratic Rule of Law, as enunciated in its Constitution, it is not conceivable that institutions, including those responsible for public security, commit violations of the Fundamental Rights of each of the Brazilian citizens during the execution of police stops, which, in theory, should provide them with a sense of security resulting from the correct application of the police power conferred on them, to preserve public order. In this scenario, the intervention of the Judiciary in the reparation of violated rights is justified, since the non-provision of public security contravenes constitutional precepts, to meet the guarantor precepts.

POLICE POWER AND STRICT LEGALITY: THE DIALECTIC OF POLICE ACTIVITY

The desire of a police organization to consolidate itself into a citizen institution permeates transparent debates regarding its working methods since it is visible that it acts in defense of the State to the detriment of the protection and rights of citizens, in a practice known as social control which, according to Abreu (2006), manifests itself as a function of a political and economic structure of power, in which groups dominate others to the extent that they are closer or more marginalized about power. The police institutions, then, are embodied in the guardians and protectors of the State, of its laws and principles, even though the marginalized of this governmental bosom are no longer served.

The FC, by adopting Fundamental Rights as the foundation of the Republic, made it clear to the police the need to establish a new form of action, as it imposes a review of procedures seeking to improve professional qualification, to respect the Democratic Rule of Law, Fundamental Rights and the physical safety of people and ceasing to be a tool for selecting those who will have, or not, of the benefits of the State.

It is noted that there is no more room for social determinism, whereby, instead of being based on free will as a factor that propels crime, it acts on exogenous factors that are

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alien to the agent, a phenomenon resulting from the erroneous interpretation of Durkheim's theory (2007) that stated that the individual is defined by the environment in which he is situated, that is, the environment in which they live forms their attitudes, ideas, and ideals. On the subject, Varez (2016) adduces that taken in isolation, each individual at birth is faced with values, customs, norms, traditions, and laws that he has not elaborated on and to which he will have to adapt to live, however, Durkheim seeks to demonstrate, contrary to utilitarianism, that society is the result of the relationships that are established between several individuals in a given time and place, therefore, individuals are not unnecessary.

However, arbitrary acts committed by police officers during approaches of citizens in places with a population with lower purchasing power or against people who fit the labels imputed to criminals are still reported, in flagrant violation of Fundamental Rights, which in its core seeks to protect individuals without distinction. In the words of Moreira and Frota (2014), the stops carried out by the police would strip the labeled citizens of their humanity, since it would restrict inalienable Fundamental Rights, given the exacerbation of what is allowed to the police forces for their action, since the suspicion required by law would be replaced by aspects of the dominant police culture and the field of subjectivity, resulting in practices riddled with arbitrariness and authoritarianism, legitimized by stigmas and prejudices.

Article 144 of the Federal Constitution establishes that public security is an obligation of the State, a right and responsibility of all, to preserve public order and the safety of people and property. Álvaro Lazzarini (1997), drawing on the knowledge of Pessoa (1971) and De Plácido e Silva (1963), understands public security as an anti-crime state resulting from compliance with the prohibitions imposed by criminal legislation, based on preventive police actions or immediate repression that make it possible to remove situations that may affect public order, through the imposition of restrictions on individual freedoms.

When focusing on the theme of public security, Abreu (1996) identifies a crisis of credibility in the police institutions of public security due to their lack of effectiveness and efficiency in pacifying society, in resolving their conflicts in the dictates of the Democratic Rule of Law, despite this, there is no unanimous condemnation of the practices of repression of crime in any way compatible with it.

Entering into the concept of public order, Lazzarini (1997) states that it is a situation opposite to disorder, being essentially of a material and external nature. The author adds

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that the notion of public order encompasses that of public security, the latter being an aspect of the former. For his part, Fernandes (2012) teaches that public order is a constitutional guarantee in favor of the rights to life, property, and social peace and the Military Police is an institutional guarantee for the efficient protection of these rights by the Brazilian State.

In their eagerness to provide security and public order, police institutions cannot distance themselves from the wishes of citizens, but must provide their personnel with a mentality and an action strategy that allows them to ensure the exercise of activities within the standards imposed by the Democratic Rule of Law. It should be emphasized that the State's obligation to preserve public order is a fundamental guarantee for the protection of the Fundamental Rights of life, property, social peace, and dignity of the human person. Thus, Cury and Oliveira (2018), drawing on Canotilho's knowledge, state that, as it is a fundamental guarantee, the concept of public order must be linked to the attributes of historicity and the prohibition of social regression.

According to Lazzarini's teaching (1997), these public security activities derive from the Police Power, which is an instrumental power of the Public Administration. For Fernandes (2012), the function of guaranteeing public order is exercised through the administrative police, whose actions are triggered through the exercise of police power, which consists of restricting individual freedoms in favor of the common interest. Cretella Júnior (1999) and Di Pietro (2003) corroborate when they state that the police power is a discretionary faculty of the State that allows it, within the law, to limit the exercise of individual rights for the benefit of the public interest. Meirelles (2010) complements by arguing that the police power seeks to hinder some harmful conduct on the part of society, to guarantee public order and the good coexistence of citizens and good neighborliness, thus avoiding the conflict of rights and ensuring the uninterrupted enjoyment of their rights, as far as it is compatible with the rights of others.

The legal definition of Police Power is based on Law No. 5,172/1966 (National Tax Code – CTN), in article 78[i]. With such power, the State can fulfill its purpose, which is the protection of the public interest in its broadest sense, refuting antisocial actions or actions harmful to the internal security of individuals. To this end, the state police institutions develop a series of activities daily, including the police approach, an action that is legally accessible due to the coercive attribute of the Police Power. However, one cannot fail to observe the attribute of discretion in the course of the approach to the individual, according

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to which it is urgent to act within the legal limits. It should be noted that the police approach and the personal search based on it find legal support in Article 244 of the CPP[ii].

In short, according to the lesson of Di Pietro (2003), the public administration has prerogatives to perform its activities, while it subjects the administrative act to the limits imposed by the legal system, to guarantee the rights of citizens, placing the authority of the Administration and individual freedom on opposite sides. Thus, for the police stop to occur, it is urgent to have a prior condition that allows the police to verify the "well-founded suspicion".

In this sense, Nucci (2016) teaches that police officers, with the fulcrum of police power, can and should search people in search of weapons, instruments of crime, objects necessary to prove the criminal fact, elements of conviction, among others, and it is only necessary that they do so in a reasoned way and not out of suspicion or at their pleasure. Lopes Júnior (2016) also states that, for the personal search to occur, there must be a "well-founded suspicion" that someone conceals a prohibited weapon (or without regular carrying), or even things found or obtained by criminal means that allows proof that the individual is involved in criminal practices.

It should be noted that the difficulty that arises is the definition of what would be "well-founded suspicion". However, in order not to violate the Fundamental Rights, affirmed in the Constitution, the police stop cannot be based on solely subjective parameters, requiring concrete elements that indicate the need for its implementation. This tenuous threshold regarding the framing of what would be "well-founded suspicion" puts the police officer in a dilemma. If the approach proceeds outside the limits of action, it may lead to liability, under the terms of Article 25 of the Abuse of Authority Law (Law No. 13,869/2019), as there would be "obtaining evidence, in an investigation or inspection procedure, by manifestly unlawful means". Likewise, the police officer may be held responsible for malfeasance (article 319 of the Penal Code), if he delays or fails to "improperly practice, an act of office, or practice it against an express provision of law, to satisfy personal interest or feeling".

To clarify the understanding, Nucci (2016) differentiates well-founded suspicion from simple suspicion, which considers a distrust or assumption, something intuitive and fragile by nature. Thus, according to the author, to carry out an approach, it is not enough for the police officer to suspect someone, and something more tangible is required of him, such as the complaint made by a third party that the person carries the instrument used to commit

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the crime, as well as he can see a protrusion under the subject's blouse, giving a clear impression that it is a revolver.

Arguing about the preventive approach, Lessa (2002) exposes that the preventive approach is an exceptional interpellation arising from the police power, with reasonableness and prior objective instinctive suspicion, not a mere supposition, which has a protective nature about an individual who represents some type of current or imminent danger to the police officer or to the public in general, thus requiring active (and never omissive) action from the social defense agencies.

Lessa (2002) elucidates that objective instinctive suspicion (suspicion + instinct + concrete fact) occurs when there is a behavior that, due to the context (scenario) or a fact (mode of action), awakens in the police officer an objective instinct (that is, a warning of reasonable danger, and not a mere whim without any foundation) that reveals the probability, the imminence or risk of threat to public order or the security of someone, and that, therefore, requires prompt and mandatory state intervention. In these cases, it should be noted, that there is no well-founded procedural suspicion of article 244 of the CPP, but rather an objective instinctive suspicion of threat to public order, which does not justify the execution of the approach or the search.

From the above, it can be seen that the social context requires a behavioral change on the part of the agents in charge of law enforcement, demystifying the idea that public security and Fundamental Rights are antagonistic fields of action because only in this way will police institutions employ tools to move towards the consolidation of citizen police. On these bases, the grounds for the judgment Appeal in Habeas Corpus No. 158580 of the Superior Court of Justice were given, which we will deal with below.

APPEAL IN HABEAS CORPUS NO. 158580 OF THE SUPERIOR COURT OF JUSTICE: GUARANTEE OR JUDICIAL ACTIVISM?

For Pinho, Albuquerque, and Sales (2019), since the publication of Law and Reason (the first Italian edition dates from 1989), Ferrajoli's work has deserved the attention of many who intend to analyze (defend or disagree) the legal guarantee. Citing the same work, he corroborates the explanation of Ippolito (2011) when he expresses that the term "guarantee" had international diffusion from the scientific, cultural, and civil activity of Luigi Ferrajoli, since his thought aroused a vast and lasting debate, profoundly influencing the Iberian and South American jus penalist culture.

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In this scenario, in the present work, Ferrajoli's guarantee will be used for the analysis of the RHC, to reveal whether the decision is configured as a guarantee. This theory was chosen, with a view to, as Ippolito (2011) explains, the guarantor paradigm of criminal law that is extracted from this theory, to support the entire arrangement of jurisdiction as a cognitive-normative activity and not evaluative-potestative, which is constituted by the principle of taxability or strict legality.

In this context, the RHC concerns the allegation that the arrest in flagrante delicto of the plaintiff, later converted into a preventive one, for the practice, in theory, of the crime of drug trafficking took place due to illicit evidence collected based on the personal search carried out by the police officers on the defendant, since it was justified only by the generic allegation that he was in a "suspicious attitude". At the outset, the vote of the rapporteur, Justice Rogerio Schietti Cruz, states that the search of the accused was based only on the vague allegation that he was in a "suspicious attitude" since the existence of a well-founded suspicion of possession of a corpus delict required by article 244 of the Code of Criminal Procedure was not demonstrated. This is why the illegality of the seizure of drugs and other objects and, consequently, of all derived evidence must be recognized.

The certainty on the part of the rapporteur that the police approach and subsequent search were carried out under the allegation that the approach was "in a suspicious attitude" originates in the police officer's statement as a driver in the arrest warrant in flagrante delicto, when he stated that on 09/05/2020, around 00:30 am, he was in vehicle 7810, on patrol along Avenida Pará, Ibirapuera neighborhood, in the municipality of Vitória da Conquista, when the garrison came across an unknown individual in a suspicious attitude, in a DAFRA 100cc motorcycle vehicle, black color, license plate JST-0530, with a backpack on his back.

As can be seen, the police approach was based on solely subjective parameters, without indicating elements that were nothing more than mere distrust and indicating the need for its implementation. However, as demonstrated elsewhere, the well-founded suspicion that justifies the police stop should be based on concrete data, since it enters the intimacy of others, to avoid the occurrence of abuses by the State. It is also necessary that the approach be related to "the possession of a prohibited weapon or objects or papers that constitute a body of crime".

For this reason, the nullity of the evidence obtained from the search carried out by the police officers was recognized, since, according to the rapporteur of the Appeal in

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question, there was a total absence of description of what motivated the suspicion, not even minimal, there is no way to relegate the explanation of the police conduct to the criminal investigation, since it directly interferes with the validity of the elements of information and, consequently, in the very existence of just cause for the exercise of criminal action. In addition, the rapporteur argued that the argument narrated in the decision of the first instance, that if illicit objects had not been found, the facts would not even have come to the attention of the Judiciary or the Public Prosecutor's Office, since no flagrante delicto would have been drawn up, would end up legitimizing any illegal search and seizure, which cannot be admitted.

Therefore, the conduct of the police officers violated Article 5, LVI, of the 1988 Constitution, which expressly states that "evidence obtained by illegal means is inadmissible in the process". This is the observance of the Theory of the Fruits of the Poisoned Tree, adopted by the Federal Supreme Court[iii], and the rapporteur also pointed out structural racism as a situation that has already been rooted in police institutions since their historical origins. In a continuous act, he presented data extracted from scientific research carried out in the military police of the states of Mato Grosso, Pernambuco, and Bahia, which show that most of the stops carried out by the police take place in young people, blacks, people with a lower level of education and in the neighborhoods of the periphery.

Thus, when the police officer decides to stop the police, before carrying out the procedure, he must pay attention to meeting all the legal requirements required to validate it. In the meantime, to guide the development of police work towards the execution of the approach in the correct way, the rapporteur lists in his decision some measures to be followed by police institutions and their agents, such as the use of cameras by security agents, audiovisual recording of the stops, installation of GPS equipment and audio and video recording systems in police vehicles and the uniforms of security agents, with the subsequent digital storage of the respective files.

The rapporteur also points out that police institutions are not the only ones to deserve criticism for the discriminatory pattern that stands out in police stops, and all members of the criminal justice system must make a joint reflection on the role they occupy in maintaining racial selectivity, since these practices are only perpetuated because they find support and seal, both police chiefs and the Public Prosecutor's Office, as well as, in

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particular, segments of the Judiciary, when validating illegal and abusive measures perpetrated by security agencies.

The decision in question makes clear the mismatch between the norms that underlie the police approach and the practice, which should be subordinated to them, which is why the judiciary was forced to intervene to better adapt the normativity and effectiveness in a clear adoption of the assumptions propagated by the guarantor theory, rescuing the possibility of propitiating, effectively, to the subjects of law, all existing Fundamental Rights, which, for Ferrajoli, allows us to assess the existence or not of a right, since it deals with the idea of validity as a form of observation of guarantees.

It should be noted that, in the words of Trindade (2017), Ferrajoli's guarantor theory, although recognizing that there are spaces for judicial discretion, does not admit that judges can create rights, warning of the need to combat the discretion arising from the power of disposition that invades the competence of the political sphere, a fact that is routinely observed in the Brazilian judiciary, above all, by the stimulus arising from the technique of weighting.

However, in the decision analyzed in this work, it is possible to verify that it was rendered within the limits of the law and linked to the constitution and that it meets the guarantor perspective, which, according to Trindade (2017) requires that the judicial decision be conditioned to four internal requirements: (a) the reconstruction of the discursive chain according to which the judge, when basing his decision, allows the reasons that led the court to that interpretation to be known; (b) the consistency or recursion that translates into the need for decisions to reproduce or re-examine what has already been established in similar decisions; (c) coherence, which refers to the need for material coherence, that is, it must observe the substantial norms that guide democratic society; and (d) integrity, by which the judge is bound by the law and obliged to base his decision respecting the requirement of integrity of the law.

Therefore, it can be seen that in the decision rendered in the Habeas Corpus Appeal No. 158580 of the Superior Court of Justice, the ground used was a guarantor because it considers that the Constitution, within the existing model, ensures the construction of a Democratic State, intended to guarantee the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and prejudice-free society, in short, Fundamental Rights. Thus, it was clear the criterion from which the rapporteur reached his decision and that it was the result

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of an argument of principle, here understood as a rule, since it was based on the constitutional text which prevailed due to the principle of specialty, that is, the prohibition of the use of illicit evidence and marked by its impartiality and total respect for procedural guarantees.

CONCLUSION

In the present research, it was found that Brazilian democracy, which is based on the notion of a Democratic State of Rights, constitutionalization, and universality of citizenship, as provided for in article 1 of the CF/1988, thus, there is no more room for social determinism, by which police institutions, instead of being based on free will as a factor of propulsion to crime, it acts on exogenous factors that are alien to the agent. In this vein, it was up to the Judiciary to guarantee fundamental rights and preserve the democratic regime, however, it cannot move away from the Constitutional Rule of Law, having as a guide human dignity and the search to prevent the State from failing to comply with the application of fundamental rights. Thus, the guarantee was presented as a viable tool for the effectiveness of control and limits to the exercise of the judiciary, to guarantee it conditions of legitimacy in its decisions.

The police stop is the object of several normative provisions, both in the constitutional and infra-constitutional spheres. However, arbitrariness committed by police officers during approaches of citizens in places with a population with lower purchasing power or against people who fit the labels imputed to criminals is still reported, as a flagrant violation of Fundamental Rights, which in its core seeks to protect individuals without distinction. The Superior Court of Justice, in a decision rendered in Habeas Corpus Appeal No. 158580, ruled on the personal search justified only by the generic allegation that he was in a "suspicious attitude". It was proven in the records that the existence of well-founded suspicion required by Article 244 of the Code of Criminal Procedure was not demonstrated, which is why the illegality of the seizure of drugs and other objects and, consequently, of all the derived evidence was recognized.

For the rapporteur of the Habeas Corpus Appeal No. 158580, the conduct of the police officers violated Article 5, LVI, of the 1988 Constitution, which expressly states that "evidence obtained by illegal means is inadmissible in the process." It is the observance of the Theory of the Fruits of the Poisoned Tree, which is implicitly present in our Constitution. From the results of the study, it can be seen that the guiding hypothesis of the research

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was confirmed, since the decision proved to be correct in the face of the consolidation of the paradigm of the Constitutional Rule of Law, it is up to the Judiciary to guarantee the Fundamental Rights and preserve the democratic regime and was limited to the material frameworks fitting the theory of legal guarantee that has as its foundation the individual freedoms arising from the Enlightenment doctrine, to add legal instruments for the limitation of sovereign power, restricting the powers of the republic.

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NOTES

[i] Article 78. Police power is considered to be an activity of the public administration that, by limiting or disciplining a right, interest [sic] or freedom, regulates the practice of an act or abstention in fact, due to public interest [sic] concerning safety, hygiene, order, customs, the discipline of production and the market, the exercise of economic activities dependent on concession or authorization by the Public Power, to public tranquility [sic] or to respect for property and individual or collective rights.
Sole Paragraph. The exercise of police power is considered to be regular when it is performed by the competent body within the limits of the applicable law, in compliance with the legal process and, in the case of an activity that the law has as discretionary, without abuse or misuse of power.

[ii] Article 244. The personal search will not depend on a warrant, in the case of arrest or when there is a well-founded suspicion that the person is in possession of a prohibited weapon or objects or papers that constitute a corpus delicto, or when the measure is determined in the course of a house search.

[iii] 1. Writ of Mandamus. 2. Administrative law. 3. Judgment of the Federal Court of Accounts (TCU). 4. Use of evidence from telephone interceptions obtained within the scope of "Operation Razor". 5. Evidence declared null and void by the Federal Supreme Court in Inquiry 3.732. 6. Doctrine of the fruits of the poisoned tree. 7. Evaluation of illicit evidence by the TCU in external control. 8. Impossibility. 9. Security granted. (RE 1358185 AgR, Rapporteur: NUNES MARQUES, Second Panel, judged on 05/16/2022, ELECTRONIC PROCESS DJe-107 DIVULG 01- 06-2022 PUBLIC 06-02-2022).