



Analysis of the exceptional capture from National Attorney's

Office according to the right to freedom

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ABSTRACT

Today, after 20 years of implementation of the accusatory criminal system in Colombia through Law 906 of 2004, society in general and a large part of the legal community is still completely unaware of the exceptional nature by which the current laws have acquired the order of capture by the Attorney General's Office, there is also controversy surrounding this fact, since, about this, a violation of a fundamental right such as freedom has arisen. It is for this reason that the main objective of this study is to take this topic into analysis to contribute and clarify the topic and the due procedure of approach by the operators of Colombian criminal law and by anyone who has an interest in it.

Keywords: acusatory penal system, exceptional capture, freedom.

INTRODUCTION

The right to liberty was established early on as a human right A fundamental system on which a Universal System of Human Rights was built, and there is consensus among the members of the international community that without freedom, it would be difficult for other rights and guarantees to be effective. In other words, freedom is a prerequisite and obligatory for thinking about human dignity from a human rights perspective.

Likewise, accusatory procedural systems are characterized by being more in accordance with the standards emanating from the Universal System for the Protection of Human Rights than the inquisitorial procedural systems, due to their particularities: celerity, orality, impartiality of the judge, adversarial procedure and unrestricted respect for human dignity during the process. In this sense, it is striking when a system that is

Accusatory self-proclamation contains norms that do not contemplate, but rather violate the principles of human rights. This is what motivates this monograph, the curiosity and

concern about how despite the implementation of the criminal procedure system accusatory in Colombia as of Law 906 of 2004, a

Article 300, which confers extraordinary powers on prosecutors to issue written arrest warrants without the need for prior judicial authorization, which is clearly in violation of Article 28 of the Colombian Political Constitution. Subsequently, issues the amending law, which managed to accommodate the assumptions of these Powers under the figure of exceptionality but without eliminating it completely and introducing certain doubts and discussions in this regard.

For all the above, this research will carry out a historical review of the laws on the subject that preceded the current one - Law 1142 of 2007 - to put the Colombian criminal legal procedure system in dialogue with human rights and consequently, reach a conclusion that is of help to colleagues or those interested in the law who wish or need to venture into the subject.

METHODOLOGY

The approach that will be used in this article is predominantly qualitative, since for the most part non-numerical data will be analyzed, that is, doctrinal

opinions,

previous research and legislative and jurisprudential background that account for the treatment in Colombian law of the subject in question.

However, quantitative edges could be flaunted since they will be sought in a reference data that indicate the number of exceptional arrests imposed by the Prosecutor's Office from the sanction of the current regulations, and thus be able to elucidate whether the regulatory changes generated a change in procedural practice.

Likewise, the research will be descriptive, since it will try to make a detailed description of the historical and legislative background, of the present and the framework

social, cultural and normative in which the problem develops; and constructivist from the perspective that the reality of the legal institute of exceptional capture responds to a complex legal framework based on the social.

The exhibitions will be carried out on the Colombian legal system from the last amending law of 2007 to the present, with a view to knowing the fiscal activity in this regard and the way in which it was developed.

The data collection techniques will mainly be the examination of doctrine and jurisprudence on the subject.

Finally, it is necessary to know the referential framework from which this article is made, which is primarily from a prism that weighs Human Rights and their effective protection from the scaffolding built on the basis of universal systems

protectors of human rights, especially of the Inter-American System to which Colombia belongs. In this order, the American Convention on Human Rights, also known as the Pact of San José, Costa Rica, and the

RESULTS AND DISCUSSION

As explained in the introduction to this article, the right to liberty is the cornerstone on which the rest of the essential rights were built, and it is even one of the most important rights in the world.

foundations on which rested, what for many is, the treaty that begins a new way of relating between States and of regulating issues related to the rights of individuals, the Declaration of the Rights of Man and of the Citizen, originated by the French Revolution. The premises for this new era were liberty, equality and fraternity, words that later took on different scopes according to the time and the development of the international doctrine of Human Rights.

Rivers of ink have been written about freedom, and the discussions have often dealt with its limitations and whether it should have them. It is generally understood that, except for the right to life – without which nothing would be materially possible – no right is absolute. Although fundamental rights protect the human being in his condition as such and protect his human dignity, For the peaceful development of life in society, it is necessary to limit the exercise of the

rights, because as José Luis Cea (2004) says, these rights are "attributes that have never been they have absolute scope, because if they possessed it they would become typical prerogatives of a despot who acts, with illicit or abusive features¹".

However, freedom is protected in many of the international treaties to which the Colombian State signs, such as the Inter-American Convention on Human Rights (1969), which mentions freedom in its Preamble and in considerations prior to its articles, establishing it as a basic condition of support for the rights and guarantees of human beings. Article 7 states:

1. Everyone has the right to liberty

and security of person.

2. No one may be deprived of his physical liberty except for reasons and conditions established in advance in the Political Constitution of the States, parties or by laws enacted in accordance with it.

3. No one may be subjected to arbitrary arrest or detention.

Other international treaties to which Colombia was a signatory and which are expressed in the same sense are the International Covenant on Economic, Social and Cultural Rights (1976) and the International Covenant on Civil and Political Rights (1966), among others.

It should be recalled that, in Article 93 of the Political Constitution of 1991 it indicates that in the

international human rights treaties prevail over domestic order, adding that "the rights and duties enshrined in this Charter shall be interpreted in accordance with the international treaties on human rights ratified by Colombia." (Political Constitution of Colombia, Art.93)

In Colombian domestic law, freedom is also guaranteed. Thus, in its Political Constitution, Article 28 states:

¹ Cea Egaña, J.L. (2004) "Derecho constitucional chileno II", Santiago, Ed. Universidad Católica de Chile.

"Every person is free. No one may be disturbed in his person or family, or reduced to prison or arrest, or detained, or his registered domicile, except by virtue of a written order of a competent judicial authority, with the legal formalities and for reasons previously defined by law. The person in preventive detention shall be placed at the disposal of the competent judge within thirty-six hours, so that the latter may adopt the corresponding decision within the term established by law (...)" (Political Constitution of Colombia, 1991, Article 28)

What can be deduced from the above is that the constituent assembly was in favor of the subjects who had the fundamental right to personal liberty. On the scope of freedom, the Constitutional Court has issued in Judgment C-276 of 2019, saying that

"It has defined personal liberty as the absence of apprehension, retention, capture, detention or any other form of limitation of the autonomy of the person. In this sense, it is a presupposition for the exercise of other freedoms and rights, since detention implies the restriction of the other prerogatives of which the person is entitled." (Constitutional Court, Judgment C-276, 2019)

It emerges from what has been stated so far that if there is one thing that is clear in the Colombian legal system, it is that personal liberty as a right is protected and its protection must be guaranteed by the State. That is why the questioning of a figure such as exceptional arrest under the jurisdiction of the Prosecutor arises strongly, which clearly violates this fundamental right, and since freedom is the prerequisite for the fulfillment of other rights, as in a domino effect other fundamental rights are also violated.

Thus, it is worth reviewing the background of this power held by the Prosecutor to understand a little of its legal nature, its foundations and why it is so resisted among the defenders of the Constitutional Rule of Law and Human Rights.

In principle, the general rule has always been that the person who can order the arrest or deprivation of liberty of another person is the competent authority, that is, the judge. This arises

in defense of certain legal principles such as legal certainty, the presumption of innocence, respect for dignity during the process, and defense in trial, among others. However, there were and are exceptions to the rule, as set forth in Article 32 of the Political Constitution:

A criminal caught in flagrante delicto may be apprehended and brought before a judge by any person. If the agents of the authority pursue him and he takes refuge in his own home, they may enter it, for the act of apprehension; if it is taken up by someone else's domicile, it must be requested from the inhabitant beforehand.

Flagrante delicto, then, stands as an exception to this idea that only the judge can legitimately deprive a citizen of his liberty. The reason that justifies this exception is that there is a conviction about the guilt of the person apprehended due to the flagrante delicto then the presumption of innocence falls, and that the opportunity to prosecute a crime could also be lost if the offender were allowed to escape. It is also understood, logically, that the situation is pressing and there is no time for a judge to issue an arrest warrant. This does not prevent the general and accepted situation from being that the judicial process must be carried out in freedom and that in the event that it cannot be so, the judge is the one who issues the order of depriving the accused of his liberty. This is what the Constitutional Court said in the following words:

Well, the general clause of personal freedom, as well as its limit and its exceptions were established in the Colombian Constitution of 1991 in articles 6, 17 and 28. The latter article provides for the immanent freedom of every person (general clause), his deprivation through a competent judicial authority (limit); in addition, article 32 of the Constitution allows the deprivation of liberty in the event of flagrante delicto (exception). (Judgment CC, C-237 of 2005)

Notwithstanding all these considerations, there is today in Colombian law another exception to the judge's reservation on the issues of freedom of the accused, and that is Article 300 of the

Law 906 amended by Law 1142 of 2007. It establishes the exceptional catch as follows:

The Attorney-General of the Nation or his delegate may, exceptionally, issue a written and reasoned arrest warrant in the events in which preventive detention is appropriate, when, for serious reasons and force majeure, a judge is not available to order it, provided that there are material elements of evidence, physical evidence or information that allow it to be reasonably inferred that the suspect is the author or participant in the conduct under investigation. and any of the following causes occur:

1. Imminent risk that the person will hide, flee or be absent from the place where the investigation is being carried out.
2. A well-founded probability of altering the means of evidence.
3. Danger to the safety of the community or the victim in that, if the arrest is not made, the suspect will engage in punishable conduct against them.

The validity of this order is subject to the possibility of access to the judge of control of guarantees to obtain it. Once the person has been captured, he or she shall be placed at the disposal of a judge responsible for the control of guarantees immediately or no later than within thirty-six (36) hours so that he or she may hold a hearing to review the legality of the order and the arrest.

Legislative, doctrinal and jurisprudential background of Article 300 of Law 906.
Analysis

To talk about the normative framework that gives life to the article that will be analyzed in this section, it is necessary to go back to 1991, the year in which the Colombian constitutional reform was finalized, after years of debates and disputes around this issue. Among the modifications implemented by the new Political Constitution, the Office of the Attorney General of the Nation is created. The latter, whose independent body, which acts in the Judicial Branch and its creation responds to the need to adapt the Colombian justice system to minimum international standards in terms of protection

of fundamental rights during the process. This implied an adaptation of the Colombian criminal procedure system to accusatory court characteristics in order to leave the inquisitorial one behind. The Attorney General's Office comes to configure this system from an accusatory and investigative work, thus differentiating itself from the judge who imposes the penalty and its adoption meant the disappearance of the Criminal Investigation Courts. The impetus for the incorporation of this new institute is given by a growing distrust in the judicial work prevailing at the time and the need to guarantee the impartiality of the judges as a primary premise of due process. This premise is found in the American Convention on Human Rights, Article 8 of which sets out the procedural guarantees that States must protect:

Every person has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or tribunal, previously established by law, in the substantiation of any criminal accusation made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

The implementation of this new criminal procedure system took place little by little, because there were several changes that were to be implemented and they were tried to be made as quickly as possible. Thus, the original Article 250 of the Political Constitution was born, instituting the Office of the Attorney General of the Nation in order to investigate the crimes that will come to its attention ex officio, by means of a complaint or complaint, promoting criminal action against the alleged offenders, qualifying the summary proceedings and declaring the investigations carried out closed, among other powers.

The Attorney General's Office obtained by constitutional delegation of competence to work throughout the national territory and finally was imposed as a task the comprehensive investigation, that is, to investigate on issues that favor or harm the accused in his case, respecting his human rights and the procedural guarantees that assist him.

At the time of enactment of the Political Constitution of 1991, the Congress of the Republic was not functioning because it had been previously dissolved by the Constituent Assembly on December 4, 2019.

July of that same year. For this reason, the President of the Republic is granted express powers of an extraordinary and transitory nature, among which was that of legislating on criminal procedure. This is how the first procedural statute was born, regulating the Attorney General's Office, among other procedural issues.

With respect to the issue that summons us in the present investigation, this codex compelled the accused to testify in the interrogation when the crime of which he was accused included a penalty of deprivation of liberty of two years or more, and the official did not believe that the arrest warrant was necessary. However, when the evidence presented was indicative of the accused, he had acted in one of the circumstances provided for in articles 29 and 40 of the Criminal Code - grounds for justification and inculpability - by not appearing at the inquiry he could be captured to comply with that instance and the corresponding order was issued that had to contain certain information: identification and individualization of the accused, reasons for which he was summoned to testify, etc.

This decree that had granted exceptional powers to the President of the Republic in office was in force for ten years. It was not until 2001, after the enactment of Law 600, that these powers ceased to be in force.

The intentions of the new law were – at least in formality – to continue bringing the Colombian criminal procedure system closer to the adversarial accusatory paradigm. However, it had a provision in Article 336 that allowed the investigating prosecutor the prerogative to issue a written arrest warrant when the evidence presented in the investigation gave rise to reasons that led one to believe that an action was being taken for an offence in which it was necessary to resolve the legal situation. In other words, the Prosecutor could dispense with the summons and issue an arrest warrant directly for the investigation.

In relation to the latter, it is necessary to make a very pertinent observation: the accusatory system tries to alleviate the accumulation of powers and prerogatives in the head of a judicial official, the judge, in order to preserve impartiality in the sentence and protect the

rights and guarantees of citizens affected by criminal proceedings. However, with the previously analyzed provision coupled with the number of powers assigned to the Attorney General's Office, the good intentions ended up tarnished because now the official who accumulates powers and prerogatives is the Prosecutor. This results in a mixed system, with all the problems that this entails.

With this in mind, the reforms continued and in this sense Legislative Act 03 of 2002 was incorporated, which was followed by Law 906 of 2004.

In the words of the Constitutional Court,

Legislative Act 03 of 2002 introduced certain amendments to the text of the 1991 Political Charter, with the purpose of designing a new model of criminal procedure based on (i) the application of the principle "nemo iudex sine actore"; (ii) the judicial nature of the investigation and prosecution body was maintained; (iii) the figure of the judge for the control of guarantees was created; (iv) the principle of opportunity was enshrined and (v) the exceptional nature of the arrests made by the Attorney General's Office.

an authority that, in turn, preserved the competence to impose measures restricting the right to privacy, but under subsequent judicial control. It should also be noted that Legislative Act 03 of 2002 introduced changes only in certain articles of the organic part of the Constitution, but not in the dogmatic part. Hence the need to interpret such amendments in the light of certain constitutional provisions, in particular articles 6, 15, 28, 29, 30, 31 and 32, and also by means of article 93 of the Political Charter, in accordance with international human rights treaties that prohibit their limitation in states of emergency.² (Judgment C-591/05)

Several issues can be inferred from the above. First of all, it is possible to note the effort to retrace the errors made in terms of the implementation of an accusatory criminal procedure system in the adjustments made in the organic part of the Political Constitution, with a view to

² N of A: Underlining belongs to me

that subsequent legislative reforms are not outdated in relation to the Magna Carta. In this sense, it is no coincidence that the dogmatic part has remained unscathed, signifying the legal framework to which any subsequent modification must cling. That is why the new accusatory criminal system must be built on the foundations offered by the Social and Democratic State of Law. This, quite the opposite of being an opinion, rests on the first article of the Political Constitution, in which it establishes a nomological context that cannot be ignored.

However, Article 300 of Law 906, also known as the Code of Criminal Procedure, states:

(...) Arrest without a warrant. In the event that preventive detention is appropriate, the Attorney-General of the Nation or his delegate may exceptionally issue arrest warrants when, in the course of the investigation, he has well-founded grounds to infer that a certain person has participated in the conduct under investigation, it is not possible to obtain a court order immediately, and at least one of the following grounds applies: 1. When there is a risk that the person will evade the action of justice. 25 2. When it poses a danger to the community or obstructs research. In these cases, the detainee shall be placed at the disposal of the judge for the control of guarantees immediately no later than within thirty-six (36) hours, so that he may resolve the pertinent matters in a hearing (...)

Likewise, in 2005 the Constitutional Court declared the unenforceability of the law under analysis in Judgment C-1001. The justification of the magistrates was sustained, not only on the fact that the provisions of the law were contrary to some articles of the Political Constitution - Articles 28, 93 and 152 - but also on the fact that the Attorney General or his delegate is subject to few requirements in order to issue the arrest warrant for the accused³, while the Judge of

³ They are that in the development of the research there are well-founded reasons to suppose the

participation of the accused in the crime under investigation, there is no possibility of obtaining an immediate order from the judge for the arrest, as well as that at least one of the following grounds must be present: risk of evasion of justice or danger to the community or to the normal course of the investigation.

Guarantees Article 308 of Law 906 requires a series of requirements to decree the due security measure:

The judge responsible for the control of guarantees, at the request of the Attorney General of the Nation or his delegate, shall order the arrest warrant when it can be reasonably inferred from the material elements of proof and physical evidence collected and secured, or from the information obtained legally, that the accused may be the author or participant in the criminal conduct under investigation. provided that one of the following requirements is met: 1. That the arrest warrant is shown to be necessary to prevent the accused from obstructing the proper exercise of justice. 2. That the accused constitutes a danger to the security of society or of the victim. 3. That it is probable that the accused will not appear at the trial or that he will not comply with the sentence.

Subsequently, Law 1142 of 2007 partially modifies some laws, including Law 906 in the article transcribed in the previous paragraph. However, this becomes unconstitutional, due to what is said by the law, in which, it is established in its article 21 amending the aforementioned article 300 of the Political Constitution of Colombia, the constituent embodied, in article 152, the procedure of the Statutory Law, which is regulatory the fundamental rights and duties of people, and the procedures and remedies they make through guardianship. Since by virtue of Law 1142, what is being regulated is a power of the Prosecutor tending to limit the personal liberty of the accused, which is a fundamental right established in Article 28 of the dogmatic part of the Political Constitution, without a doubt the pertinent treatment should be done through a norm of these characteristics. Thus, finally, Article 300 was provided as follows:

The Attorney General of the Nation or his delegate may exceptionally issue a written and reasoned arrest warrant in the events in which preventive detention is appropriate, when for serious reasons and force majeure it is not necessary to
a judge who can order it is available, provided that there are elements materials Evidentiary evidence physics or information
what Allow infer

reasonably that the suspect is the author or participant in the conduct under investigation, and any of the following causes concur:

1. Imminent risk that the person will hide, flee or be absent from the place where the investigation is being carried out.

2. A well-founded probability of altering the means of evidence.

3. Danger to the safety of the community or the victim in that, if the arrest is not made, the suspect will engage in punishable conduct against them.

The validity of this order is subject to the possibility of access to the judge of control of guarantees to obtain it. Once the person is captured, he or she shall be placed at the disposal of a judge for the control of guarantees immediately or at the latest within thirty-six hours.

(36) hours after the hearing to control the legality of the order and the arrest. (Political Constitution of Colombia, 1991, Article 300)

The article is transcribed verbatim, and the fact is that what is underlined and in bold has interpretative importance, since the first is what remains declared unenforceable by the Constitutional Court, and the second has been declared conditionally enforceable in Judgment C-185 of 2008, expressing that this new article contains requirements that the previous one did not have, thus giving it a different scope from the modified article 300. Thus, the Court's statement, the correct way to interpret the article, is that the Attorney General of the Nation or his delegate may only issue written arrest warrants on an exceptional basis, since before doing so, they must verify that they carried out all the actions within their power to find the Judge for the Control of Guarantees. In this sense, the same Law 1142 grants in its article 3 certain rules so that there is always a Judge of Guarantees in the process and thus the rights of the accused are protected.

Conclusions

Article 1 of the Constitution defines Colombia as a social state governed by the rule of law, and this basically defines how national legislative policy should be carried out: in respect of social justice and human dignity and always taking into account international human rights standards that operate as guidelines for these objectives.

The normative hierarchy that prevails in Colombia must be understood: the top of the legal pyramid is presided over by the Political Constitution, so that what the legislator has declared to be dogmatic and invariable, constitutes the core of the Constitution and serves as a limit and parameter for the organic part. That is to say, the rights, guarantees, duties and principles contained are the true spirit that the Colombian legal system must uphold. In turn, the same Constitution establishes that the International Treaties ratified by the Colombian State and those on Human Rights must contain an internal order.

For all these reasons, in no way can a rule of procedural roots be allowed to violate the fundamental rights of human beings. In the case of being under analysis, for a long time in the search for evidence and an adaptation to the forms of an accusatory criminal procedure system, norms were used that violated the right to personal liberty determined by Article 28 of the Political Constitution.

However, in the praetorian wisdom of a constant legislative inquiry, which like everything is inserted in a socioeconomic and political context, is tinged with the color of the time, the legal institute under question, since the exceptional capture by the National Attorney General's Office, has been molded to take on more exceptional and less general features, thus being able to be framed within a democratic regime of rights.

However, with what has been stated so far, it is clear that respect for constitutional precepts is of primary observation for the legal system to function as a protective framework for Colombian citizens, and in this sense the infringement that Laws 906 of 2004 and 1142 of 2007 make to Article 152 of the Constitution cannot be ignored. that leaves very

Clear rules of the game: The fundamental rights of individuals must be regulated by statutory laws and not by ordinary laws, as is the case.

In this order of things, it is imperative that legislators find the way by honoring the constitutional normative plexus, which exists in defense of human dignity and the rule of law itself.

Acknowledgment

In collaboration with and under the guidance of the research group, Faculty of Law, Universidad Libre, Bogotá, Colombia.

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