RUY BARBOSA

MARTIAL LAW:

ITS CONSTITUTION, LIMITS AND EFFECTS.

APPLICATION

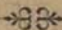
MADE TO THE

FEDERAL SUPREME COURT

FOR

HABEAS-CORPUS

on behalf of the Persons arrested in virtue of Decrees of April 10 and 12, 1892.



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TYP. ALDINA DE A. J. LAMOUREUX & Co.
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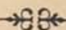

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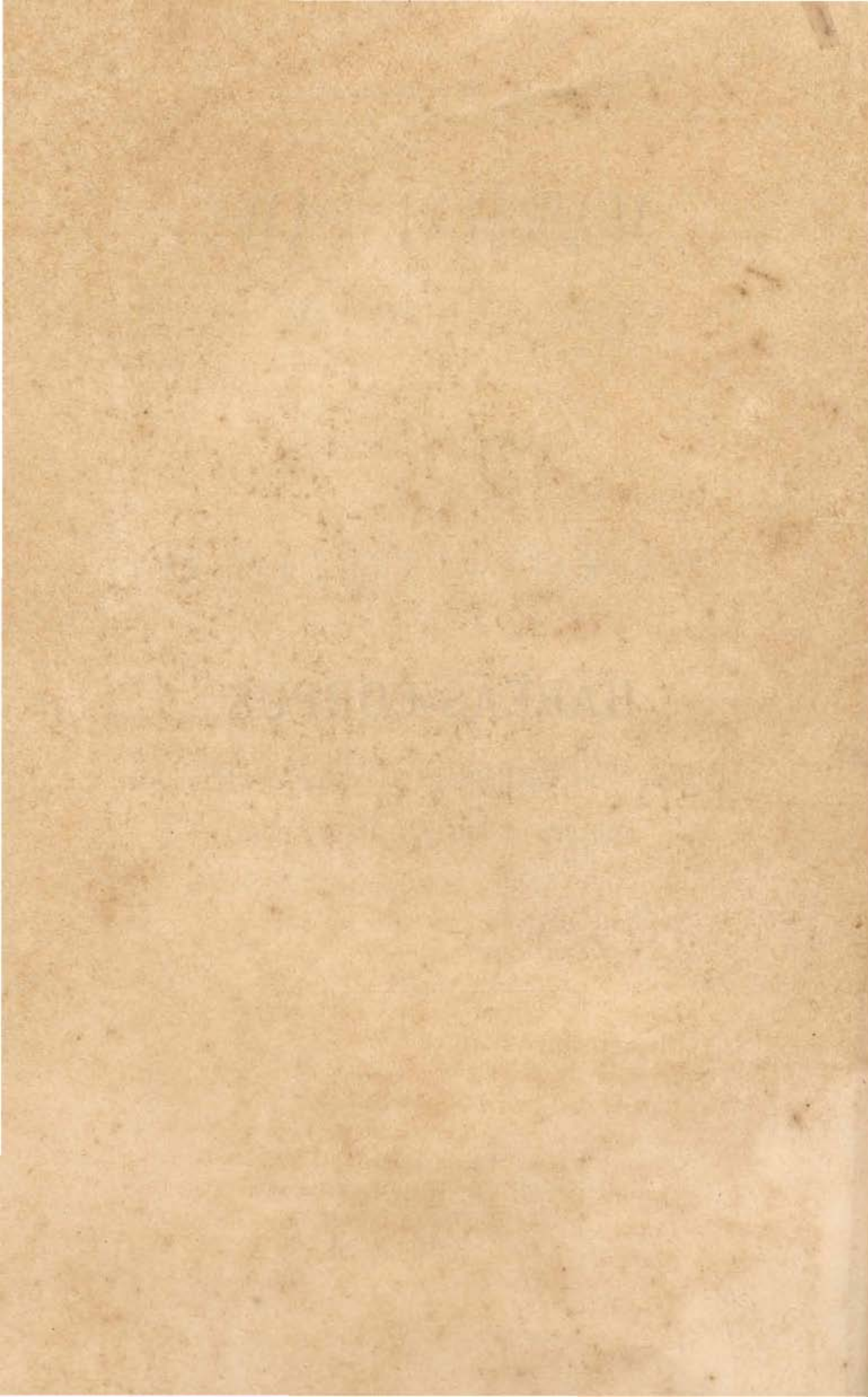

To the Judges of the Federal Supreme Court.

Ruy Barbosa in virtue of the right assured him by Decree N.° 848, of October 11, 1890, Art. 45, comes before the Federal Supreme Court for the purpose of applying for a writ of habeas corpus on behalf of the citizens illegally arrested and held in durance or threatened therewith by Decree of the 10th inst., which declared martial law in this city.

The names of these citizens are as follows:

Senator Vice-Admiral Eduardo Wandenkolk.
Senator Marshal José de Almeida Barreto.
Senator Dr. Pinheiro Guedes.
Senator Colonel João Soares Neiva.
Deputy Lieutenant-Colonel Antonio Adolpho Fontoura Menna Barreto.
Deputy Dr. João da Matta Machado.
Deputy Dr. José Joaquim Seabra.
Deputy Colonel Alfredo Ernesto Jaques Ourique.
Deputy Rear-Admiral Dyonisio Manhães Barreto.
Deputy Domingos Jesuino de Albuquerque.
Deputy First-Lieutenant João da Silva Retumba.
Marshal José Clarindo de Queiroz.

Marshal Antonio Maria Coelho.
Colonel Antonio Carlos da Silva Piragibe.
Lieut.-Colonel Gregorio Thaumaturgo de Azevedo.
Captain Duarte Huet Barcellar Pinto Guedes.
Major Sebastião Bandeira.
First-Lieutenant Bento José Manso Sayão.
Captain Antonio Raymundo Miranda de Carvalho
Captain Felisberto Piá de Andrade.
Ensign Carlos Jansen Junior.
Ensign Alfredo Martins Pereira.
Antonio Bandeira Junior.
José Joaquim Ferreira Junior.
Egas Muniz Barreto de Aragão.
Ignacio Alves Corrêa Carneiro.
José Carlos do Patrocinio.
Placido de Abreu.
José Carlos Pardal de Medeiros Mallet.
Olavo dos Guimarães Bilac.
Dr. Dermeval da Fonseca.
Manoel Lavrador.
Dr. Arthur Fernandes Campos da Paz.
Conde de Leopoldina.
José Carlos de Carvalho.
Sabino Ignacio Nogueira da Gama.
Dr. Climaco Barbosa.
Francisco Gomes Machado.
Dr. Francisco Antonio de Almeida.
Dr. Francisco Portella.
José Elysio dos Reis.

To the Judges of the Federal Supreme Court.

The decision to which this application will lead is of the greatest civic importance, fraught with the most far reaching moral consequences that have ever depended upon the decision of a Brazilian court of justice. Would that this question had been brought up by one of those mighty intellects that illuminate the bar with their splendor and compel the admiration and captivate the favor of the bench. But fortunately the mere statement of the case, the simplicity, the force and the dignity appertaining to the justice of this cause more than compensate for the inferiority of its humble advocate.

Unbiased by personal interest (in his soul and conscience he affirms it) he obeys only the dictates of the noble duties of this profession, which, linked most intimately to the priesthood of justice, imposes upon the advocate the mission of struggling for right against power, on behalf of the defenseless, of proscripts and of victims of oppression, whose right to the protection of the law increases in proportion to the strength of the despotism that crushes them, and also in proportion to the completeness of the void that surrounds them through the ignorance and cowardice of some, discouragement of others and the lethargy of nearly all. Never was more fully justified the wisdom of the rules of judicial procedure, which for the vindication of violated liberty recognises every intelligent man as the natural attorney of the oppressed, comprehending that in such cases the warrant naturally results from social

interest, and that in the midst of a free people there must always be some men ready to labor disinterestedly and to expose themselves to the resentment of the powerful for the sake of restoring the rights of their fellow-citizens.

In the nations that are considered in contemporary civilisation types of civil and political liberty—England and the United States—the bar has always been a most potent factor in the education of popular sentiment. No people has a greater need than ours of this juridical perception, this supreme quality of free races, whose expansion constitutes the secret of the wonders wrought by American democracy, whose weakness among us explains the ruin of the institutions of representative monarchy and whose steady decay is reviving, under an admirable republican Constitution,the terrors that hurried the reign of the first monarch of Brazil to a gloomy and untimely close. And while the highest intellects see in that education of Americans in law-abiding principles and the tenacity with which they cling to constitutional forms and doctrines the origin of the incomparable virility of that people, we, who have sought in their example the model for our liberal reconstruction, initiate the new system with a total eclipse of juridical sentiment, an eclipse from which there is no escape, if the judiciary of the Republic does not offer us in the organization and faculties of this court the organ of reparation that was wanting under the monarchy.

It is the first time, gentlemen, that this court has to perform with all solemnity its important duty in the most delicate and most serious of its relations with the moral life of the country, interposing itself between the unarmed rights of the individual and the violent blows of authority. Pardon, then, the somewhat impetuous language of the petitioner and hear with indulgence the long explanations which the subject requires. Under the impression of the immediate responsibility which connects him with this Constitution, in whose framing it was his lot to take one of the most ample and preponderating parts, he feels intensely the importance of the sentence which you are about to deliver in delineating the physiognomy of this tribunal, in its historical destiny, in consolidating the Federative Republic which, in the United States, is essentially the fruit of the decisions of the Federal Supreme Court. Feeling this, the petitioner cannot contemplate without emotion the fate of this petition.

In fact, gentlemen, you are going to decide, according to the side to which you incline, whether, by the compact of February 24th, we are really under the sway of a Republican Constitution, or whether this exterior only masks the omnipotence of the harshest military despotism.

For in reality if, for the grossest tyranny evinced by declaration of martial law in a manner contrary to the terms established in the federal charter, aggrieved citizens find no corrective in your justice, whose model should be that of the United States, its moral progenitor, and if the exceptional measures adopted during the suspension of constitutional guarantees should be prolonged beyond the period for which they were suspended, then the country is virtually converted into a military camp, while for the Brazilian citizen liberty is only a precarious gift, doled to him by indulgent rulers, and the revolution of November 15th, of which our new institutions and this very court are the offspring, will have accomplished nothing more than to transfer to ourselves the bondage, from which on the 13th of May we had freed our slaves. Those who labored for the redemption of the latter often felt, as keenly as if they themselves were the sufferers, from the impulse of sympathy and of universal fraternity, the shame and degradation ot their brethren, and it is under almost the same impression that those liberators now find themselves, on contemplating their position in view of the astonishing measures with which we have been startled, of the mischievous precedents thus established and of the preposterous theories with which they are defended. The difference between the freeman and the slave is simply the difference between subjection to law and subjection to a tyrant's will, and the submission of civil society to military domination does not substantially differ from the submission of the negro to the control of the white man.

To take this view of the case it is not necessary to approve of acts which martial law was intended to repress. No one is farther from harboring such an inclination than your petitioner, who, unalterably opposed to all extra-legal movements in republican politics, is widely separated both in a personal and a political capacity from those who are the chief sufferers from this act of tyranny. But from the condemnation which disorder naturally excites in all conservative spirits it does not follow that they are obliged to believe in the guilt of the citizens accused by the govern-

ment. It is not the place of the Executive to judge or condemn. The government is, at the utmost, merely a plaintiff in the criminal courts. Moreover in political matters its accusations are always open to suspicion. It has no right whatever to brand any one as a criminal merely because he is so classed by its fallible and prejudiced police; for in a free country criminals are only those who have been convicted of crime in a court of justice. Only a society devoid of morality, unworthy of possessing courts of justice, would be capable of ratifying this judgment, incompetently rendered by administrative precipitation.

The petitioner, gentlemen, would be wanting in respect to his own conscience, to yours and to those of our fellow-citizens, if in this supreme sanctuary of law he did not consider indisputable the presumption in favor of his clients' innocence, of which the Executive has no power to deprive them, and to which every one has an inalienable right, until the courts, which are the only interpreters of justice, have decided otherwise.

In the midst of the chaos of moral heresies, whose propagation we are witnessing, you will not wonder that your petitioner feels the necessity of establishing these preliminaries, derived from the most elementary rules of evidence; for the iniquity which he asks you to remedy rests entirely on the dissolution of the elements of constitutional truth and of the most ordinary juridical axioms accepted in civilized countries.

Gentlemen, the citizens for whom I solicit *habeas-corpus* are divided into three classes, and it is necessary to examine separately the situation of each of these classes, which are as follows:

I. Those arrested before the declaration of martial law.

II. Those considered subject to arrest by the official declaration that put an end to martial law.

III. Those arrested during the period of martial law.

I

Prisoners Arrested before the Declaration of Martial Law.

The following citizens were arrested before the declaration of martial law:

Deputy Dr. José Joaquim Seabra.
Deputy Colonel Menna Barreto.
Dr. Campos da Paz.
Dr. Climaco Barbosa.
José Carlos Pardal de Medeiros Mallet.
Olavo dos Guimarães Bilac.
Manoel Lavrador.
Severiano Rodrigues da Fonseca.
José Elysio dos Reis.
José Joaquim Ferreira Junior.
Constantino de Oliveira.

It will not be difficult to prove the illegality of the restraint in which these citizens are held.

Their arrest, of which all the press of the 11th gave an account as news of the previous day, was undoubtedly, then, effected on the 10th.

On that morning not one of the newspapers in this city knew of the promulgation of the decree, which was only published in the *Diario Official.*

It is true that the 10th was the ostensible date of that decree; but circumstantial evidence conclusively demonstrates that it was not written on that day. In the first place the *Jornal do Commercio*, a paper which cannot be accused of being unfavorable to the government, states, in

its issue of April 12th (doc. No. 1), that the decree "was signed yesterday at 4:30 a. m." Besides, if the 10th were the real date of the decree, the period of martial law would have terminated on the 12th by simple lapse of the time fixed; yet its close, ordered by the government on that day in special bulletins, is presented as the fruit of a generous resolution hastening the event, not because the time was completed, but because the motives which led to the act had "ceased to exist."

Besides this the declaratory decree contains another gross irregularity, in violation of the provisions that govern the matter in this part of the question. The Constitution of the Republic (Art. 80) provides that the suspension of constitutional guarantees cannot be decreed except "for a fixed time." The previous fixing of the time is consequently a substantial requisite of martial law. The absence of this requisite produces, then, the invalidity of the measure and destroys the permanence of the acts committed under its warrant. Now the government neglected this essential, declaring martial law for a period of 72 hours, *but failing to mark the hour at which this period should commence.* If the time were counted by days, the date at which it begins would be understood to be that at which the decree was promulgated. But, as the time fixed is limited to hours, there is no way of deciding at what hour it commenced. Now in legal matters, especially in those relating to personal faculties subject to a question of time, the difference is not more or less illegal, more or less vitiating, for being one of hours or days.

The acts of the legislative and executive branches of the government, when they create, extinguish or suspend obligations or rights for citizens, especially in penal matters, *have no legal existence except after their publication.*

Therefore the decree in question could have no juridical force, except from the moment of its promulgation, that is on the morning of the 11th, when it was published in the *Diario Official.*

Consequently the arrests on the day or night of the 10th, made in anticipation of martial law not yet declared, are from their very inception null and void; undoubtedly, then, they are embraced in the provision of the federal compact, Art. 72, § 22, which assures *habeas-corpus* "to every person who suffers violence or compulsion through illegality or abuse of power."

In this situation more especially are those, who, like Deputy José Joaquim Seabra, are protected by constitutional immunities, and are consequently privileged from arrest by the Executive, save through the suspension of guarantees and solely while such suspension lasts.

The executive department of the government, in its decree, acknowledges that these citizens "are entitled to immunities prescribed by law;" a phrase which from the originality of its redundance seems to mean *legislated laws*, if it does not signify laws that are obsolete or fallen into prescription and disuse, which in that document would be a woeful, but perchance just, epigram on the republican Constitution. Whatever may be the sense, however, that is to be attributed to the term *prescribed*, the constitutional law provides in Art. 20 that "deputies and senators from the time of receiving their credentials up to the next election cannot be arrested nor tried for criminal offenses, without previous consent of their chambers, except when taken in the act of committing an unbailable crime."

And, if the President of the Republic himself in the said decree acknowledges the necessity of declaring martial law for the arrest of members of Congress, it is plain that his own words prove the illegality of arresting them, as he did, before martial law was declared.

And it cannot be admitted that the subsequent declaration of martial law remedied the irregularity resulting from the previous omission. If the senator or deputy at the moment of his arrest was fully entitled to his immunities, the act of the government in arresting him amounts to the crime of abuse of power; and a crime cannot create rights nor establish legal consequences in favor of the criminal against his victim.

The *Diario Official* of the 11th inst. stated that Lieutenant-Colonel Adolpho Fontoura Menna Barreto had been arrested early on the night of the 10th "in the flagrant crime of *sedition*." Now Col. Menna Barreto is a deputy to the National Congress. His arrest took place, according to the official paper, at the moment when the Chief of State arrived from his private residence at Piedade on his way to Itamaraty palace. The government, then, had not yet signed the decree declaring martial law, which was only decided and signed after the Chief of State had reached his official residence and conferred with his ministers on the early morning of the following day. The

decree, therefore, did not then exist even in the President's cabinet. Guarantees had not then been suspended. Col. Menna Barreto was thus in the full enjoyment of his constitutional privileges, which authorized his arrest only "in the very act of committing an *unbailable* crime." Now sedition, "when the seditious purpose shall not have been accomplished." is merely punishable with close imprisonment for from three months to one year (Penal Code, Art. 118), and consequently, according to the terms of the Penal Code, Art. 406, it is one of the crimes *subject to bail.* This representative of the nation, therefore, *arrested for a bailable crime before the existence of martial law*, was illegally arrested, and is still illegally held in restraint.

In regard to the other prisoners the decree of April 12th permits us to perceive the pretext, that will be used against them.

This decree marks another characteristic in the irregular act, that has violated the laws most worthy of respect. The decree of April 10th referred only to the hypothesis of "sedition." But sedition is a bailable crime. The official jurists afterwards discovered their error and, perceiving that this too lenient classification would allow many of those who had incurred the government's suspicion to escape from the net of the police, they bifurcated and aggravated the penal classification in the decree of April 12th, accusing the prisoners indiscriminately and indistinctively of sedition and *conspiracy*. Conspiracy seemed a better term, for, since it is an unbailable offence, it would serve to validate the arrest of those who had been illegally arrested before the declaration of martial law. This strategem is obvious, if we consider that the facts known on the 12th differed in no way from those known on the 10th, and consequently this variation in the juridical criterion adopted in two decrees, separated by the space of only 48 hours, has no legitimate explanation.

But the stratagem fails precisely on account of the ignorance of the law displayed by the government in its second act. The decree of April 12th modifies in fact the previous accusation, asserting that, "on pretext of a demonstration in honor of the citizen who first held the office of President of the Republic, there were committed well defined acts of *conspiracy* and sedition."

Now what is, in substance, known in regard to the events on the night of the 10th, through the account pub-

lished in the *Diario Official*, a source which cannot be suspected of connivance at the offence, is that a body of seditious persons paraded some of the streets, cheering Marshal Deodoro, and that from the windows of the latter's house sundry persons made violent speeches, urging those who took part in the demonstration to go and depose Marshal Floriano Peixoto. But from the silence of the government organ, so much interested in exaggerating the facts, it may unquestionably be concluded that the incendiary language of the orators failed to persuade the audience, and that the very instigators of the multitude refrained from executing their purpose; for, if this movement had not subsided, without producing consequences rendering liable to punishment those who took part therein, the official version of the affair would assuredly not have concealed the criminal acts, that followed the incendiary speeches.

If such, then, are the only facts in the case, your petitioner, in order to refute the charges made in the decree of April 12th, has only to quote Art. 115 of the Penal Code, which thus defines the crime of conspiracy:

"The crime of conspiracy is a combination of twenty or more persons for the purpose:

"§ 1.—Of attempting directly and by overt acts to destroy national integrity;

"§ 2.—Of attempting directly and by overt acts to violently change the Constitution of the Federal Republic, or of the States, or the form of government by them established;

"§ 3.—Of attempting directly and by overt acts to separate any State from the Federal Union;

"§ 4.—Of opposing directly and by overt acts the free exercise of the constitutional faculties of the legislative, executive and juridical departments of the Federal Government or of the Governments of the States;

"§ 5.—Of opposing directly and by overt acts the meeting of Congress and that of the legislative assemblies of the States."

To discuss, however, the events of the 10th, around which the decree of the 12th has woven a web, whose threads are entirely drawn from the imagination, and to show now the disparity between those events and what legally constitutes a conspiracy, in view of the above quoted article of the Penal Code, would be like an aspersion on the judgment of the Federal Court.

Under these circumstances, in a disturbance whose insignificant proportions required no action superior to that of the police, where is there any proof that more than twenty agitators formed an organized plot for destroying national integrity ? for violently changing the Constitution and the form of government ? for promoting the separation of the States ? for hindering the meeting of Congress, or of the local assemblies ? for directly opposing the free exercise of the faculties of the constitutional authorities ?

It is necessary to interpret penal laws, not with the calm judgment of a magistrate, but with the preconceived purposes of a tyrant, to classify under any of those heads an episode whose only importance is that derived from the theatrical display of force with which it was suppressed and which to the impartial view presents the appearance of a chance assemblage of fortuitous, unconnected elements, thrown together by accidental coincidences, without the congruence and solidity necessary to form a conspiracy with the material and moral characteristics by which it is legally defined.

Deprived, then, of the baseless hypothesis of this accusation, the preamble of the decree of April 12th is reduced to a mere series of gratuitous libels on persecuted, gagged and helpless adversaries, of imprudent recriminations of political passion in regard to military insubordination, petty struggles for supremacy, disorganization of States, annihilation of public and private wealth, all of which could be appropriately turned against the government, if the prisoners were not deprived of the defence, which is never denied save by criminals to the innocent, and of declamatory digressions entirely without justification in the juridical impropriety of the statements and in the absolute want of legal accuracy altogether unusual in documents emanating from rulers of nations.

Then, if these prisoners were not arrested during the period in which guarantees were suspended, if the question of the legitimacy of their arrest belongs rightly to the ordinary rules of procedure, and if these rules, rejecting the hypothesis of a conspiracy, which is reduced, at the utmost, to a seditious movement, do not authorize the acts which deprived these citizens of their liberty,—then, I say, the restraint in which the latter are held, finds no justification even in the pretext that has been alleged to defend it.

The *habeas-corpus*, for which application has been made on their behalf, is consequently an unevadable demand of justice.

II

Arrests Made after the Restoration of Guarantees.

Here, gentlemen, the constitutional jurisprudence inaugurated by acts whose effects you are asked to remedy assumes fantastic proportions.

Martial law has ceased to exist. But citizens who only in virtue of martial law and during its existence could be arrested are still subject to arrest for political causes, that is, liable to be hunted by the police, until the government shall have them in its clutches and lock them up ! This heteroclitic invention, gentlemen, in an assemblage of jurisconsults like this deserves at most the honors of ridicule ; for in truth there is no record of a court of justice ever before being called upon to consider so preposterous an eccentricity. But, since in virtue thereof there are citizens, representatives of the Nation, senators of the Republic, wounded in their liberty and their life, or threatened with this fate, by means of homicidal exile, we are obliged to take a serious view of this odious anomaly and to depict it juridically in characters that will recommend it to your severity.

The official bulletin which on the 13th announced the suspension of martial law, established at once a reservation, by which citizens, who "as authors, promoters and accomplices of the crime of conspiracy, or as connivers thereat, had been *cited* or *inscribed* as guilty of this offense," would not be permitted to enter into the enjoyment of their political rights and constitutional immunities.

In consequence of this revolting doctrine, which is a mockery of constitutional right and which will be immortalized in history among anecdotes of absurdity and grotesqueness carried to their greatest lengths, Admiral Eduardo Wandenkolk, senator for the Capital of the Union, was arrested on the 14th inst., when entitled to the full enjoyment of his constitutional immunities, and Bachelor Egas Muniz Barreto de Aragão, driven from his home, in spite of the individual guarantees which the Constitution and the Code assure him, awaits the moment when he shall fall into the clutches ot informers.

We have now, then, an *inscription* of persons threatened with incarceration and banishment, an inscription whose implacable sentences project beyond the period of martial law and will continue in force until every hiding place shall give up its tenant, worn out or discouraged by solitude or disgust. And everyone of those enrolled by a gesture of the sovereign impartiality of the government in that ominous register is without remedy and, belonging no longer to the community of free citizens, is forced to hide like a wild beast, outlawed by official decree, until the keen scent of the minions of the police shall vanquish the instinct of freedom and the damp and mouldy confines of fortresses, or the malaria of the Amazon, shall have received their destined prey.

Gentlemen, come to the rescue of the law and, in saving the law, save Brazilian society. Convince us that the constitutional system is not a pungent epigram. Assure us of what has been confided to the guard of your tutelary majesty, of what the federal charter has promised us: the condition of subjects of the law. Free us from military slavery, under this form, which finds no parallel in the most abominable precedents and makes the liberty of all Brazilians the ridiculous plaything of the will of the Executive.

What is meant by being *inscribed during the existence of martial law to be afterwards incarcerated or banished?* What inscription is this? Who is the depositary of this secret bristling with threats? What law has created this chamber of proscription? Over whose heads are the threats suspended? Of those only, whose names have been published? And why not with the same foundation, on the same principle, under the same authority, those of all who are enrolled on the secret list fo

official suspicion ? Why, then, gentlemen, it seems that the time has come for me to ask you for a writ of *habeas corpus* for the whole Brazilian nation. It is law itself that has been banished from law.

Two barriers, high as justice, did the Constitution erect to check the excesses of the government in the use of its faculty of suspending guarantees : that which binds it not to suspend them save "for a fixed time" (Art. 80 pr.) and that which provides that the measures of repression admissible (imprisonment or banishment) shall not be employed except *"during the existence of martial law."* (Id. § 2)

The practice initiated by the present government, however, annuls with a gross sophism these preservative restrictions. The period of martial law is apparently limited. But the limitation is palpably evaded and the government continues to arrest and deport after the cessation of martial law in virtue of powers which without martial law are inadmissible. The Constitution declares : You shall not arrest, neither shall you banish, except *during* the suspension of guarantees. But the government re-establishes guarantees and yet continues to imprison and banish citizens, just as if those guarantees were still suspended.

To justify this crime, they have invented a perfidious myth, which has no parallel in the annals of martial law even in its worst days, under the most inventive of those who have resorted to it. This myth is suppositious imprisonment. A man is *cited* or merely *inscribed* (where?) as guilty, at the government's will, and *he is considered arrested*. But this species of conventional imprisonment, this juridical fiction, worthy of the cunning of the inventors of torture, is something unknown in the science of law in ancient or modern codes. Arrest is a positive reality. There is no prisoner, who is not made so by actually falling into the hands of the authorities who arrest him. If it is only during the existence of martial law that the government can arrest without regard to forms of law or constitutional immunities, those who during this period were not actually arrested, enter afterwards into the absolute enjoyment of the re-established guarantees.

Did the government find it necessary to arrest them at all hazards ? In that case it should have prolonged martial law. If it suspended it, all must profit thereby, as

all would have been threatened, had it continued to exist. The reverse is contrary to common sense and destructive of constitutional law.

Supported by these reasons, gentlemen, your petitioner applies for the *habeas corpus*, to which the two citizens above mentioned have the most indisputable right.

III

Prisoners Arrested during Martial Law.

Under this head there are three propositions, that your petitioner proposes to demonstrate:

First: In the declaration of martial law the constitutional requisites were not observed, and consequently the repressive measures adopted during its existence are juridically null and void.

Second: Of the unconstitutionality of these measures the Federal Supreme Court is competent to take cognizance.

Third: With the cessation of martial law commences the right of the political prisoners to be tried according to the ordinary rules of procedure.

If the two first premises obtain your acquiescence, *habeas corpus* will necessarily result therefrom.

But, supposing that you do not accept them, your acceptance of the third will be sufficient to establish this right.

Inverting the order of the first two propositions, your petitioner will commence with the second.

§

COMPETENCE OF THE COURT.

A superficial view of this matter might lead one to suppose that this question should be preliminary to all others arising from this petition, and consequently that in placing it here a logical inversion has been committed.

Such, however, is not the case. The competence of federal courts to take cognizance of the legality of the arrests made before the suspension of guarantees cannot be a subject of controversy ; for this class of abuses belongs to the ordinary sphere of the excesses of authority, against which *habeas corpus* was already the usual remedy under the old form of government. In fact, what up to this point has been discussed, is simply the material relation between the arrests and the existence of martial law. Were they made while the latter was in force ? Then they are legitimate. Were they made before, or afterwards ? Then they are illegal.

It now, however, becomes necessary to inquire into the arrests, which, having been made during the existence of martial law, would on this account be lawful, if martial law were, in this instance, constitutional. The present, then, is the proper occasion for learning whether the errors of the Executive in relation to the constitutional rules that regulate the suspension of guarantees find no corrective in the authority of the Federal Supreme Court.

Grave, delicate and new among us, the subject requires careful and cautious deductions, on which the mind cannot be too closely concentrated.

Under the federal system, writes the great expounder of parliamentary sovereignty in England,[1] comparing it with the system that we have adopted, " it is otherwise. The legal supremacy of the Constitution is essential to the existence of the State ; the glory of the founders of the United States is to have devised or adopted arrangements under which the Constitution became in reality, as well as in name, the supreme law of the land. This end they attained by adherence to a very obvious principle, and by the invention of appropriate machinery for carrying this principle into effect." This principle (says Chancellor Kent) is that "every act of Congress, and every act of the legislatures of the States, which are repugnant to the Constitution of the United States, is necessarily void." [2] And the active organ of this supremacy is the Federal Supreme Court.

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1 Dicey : *The Law of the Constitution* (Lond., 1885) ; p. 144.

2 Hitchcock : *Constitutional Development in the United States as Influenced by Chief Justice Marshall* ; p. 79.

These principles, derived from the essence of the system, apply to "every written constitution under which there exists an independent judiciary and a legislature with limited powers." [1] And our present Constitution expressly adopted them, conferring on the Federal Supreme Court competence for a final decision "in questions settled by federal judges and courts" (Art. 59, III, § 1.), in which are included "the cases in which one of the parties founds his action or defence on provisions of the federal Constitution. (Art. 60, *a*.)"

The American Constitution, American jurisprudence and American constitutional authorities are consequently the sources of interpretation for the new system among us, since, with much greater force than that with which it was said in 1860 in the convention of the Argentine Republic, whose Constitution of 1853 was moreover a copy of that of the United States, it may be asserted that federative public law is entirely devoid of historical antecedents in this country.

Now, among the publicists of that nationality there has never existed the slightest doubt that the faculty conferred on the federal courts of rectifying the unconstitutionality of legislative acts extended *a fortiori* to infractions of the Constitution by the Executive. It would indeed be a palpable absurdity to apply to law-makers the constitutional check, represented by the judiciary, and at the same time to free from this check those who execute the law. "The universal sense of America has decided," writes Story, "that, in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and State governments. It follows that, when they are subjected to the cognizance of the judiciary, its judgments must be conclusive; for otherwise they may be disregarded and the acts of the legislature and Executive enjoy a secure and irresistible triumph." [1]

After Story the language of jurisconsults and historians becomes more and more emphatic. "While the judicial department of the general government," observes Curtis, "is designed to enforce the duties and protect the

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1 KENT: *Commentaries on the American Law*: I, p. 314.

1 STORY: *Commentaries* (ed. of 1873): V. II, § 1576, p. 381.

rights of individuals, the mere act of determining the existence of such rights or duties may involve an adjudication upon the question whether acts of legislative or *executive* power are in conformity with the requirements of fundamental law." [1]

Cooley, in a work which is accepted as a classic in the United States, adverting to the expedience of courts not diverging, except for weighty motives, from the interpretation given by the other two branches of the government, within their respective spheres, to constitutional provisions, adds the following: "The judiciary have often yielded to it when the correctness of a practical construction of the law by the executive departments, in the performance of their own duties, was in question; but they can not do this when, in the opinion of the court, the construction is plainly in violation of the Constitution." [2] From the same author [3] are the following precious remarks:

"The judiciary has no control whatever over legislation, and no power whatever to question its purpose or animus, provided always that legislation is kept within the limits of the constitutional grant. The remark is equally true, when applied to executive power. Within the sphere of his authority under the Constitution the Executive is independent, and judicial process can not reach him. But when he exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the *Executive* within the sphere of his authority, by refusing to give the sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability."

In the political treatise of Woolsey more than one passage points out the same truth: "The judges are the great defenders of established order against the legislative and the *executive* departments of society." [4] And in an-

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1 GEORGE F. CURTIS: *Constitutional History of the United States* (New York edition); V. I, p. 592.

2 THOMAS COOLEY: *The General Principles of Constitutional Law* (Boston, 1880); C. VI, p. 140.

3 Ibid.; C. VII, p. 157.

4 THEODORE WOOLSEY: *Political Science and the State* (New York, 1886); V. II, § 230, p. 331.

other place[1]: " Unless in constitutional states there is a power able to watch over the Constitution and *prevent invasions of it, especially by the Executive, it must become a sham*, of force against the people, but unable to put a check on the arbitrary acts of the public officers."

Recently, moreover, in an extensive monograph written by several American jurists and constitutional lawyers in regard to the part taken by the Supreme Court in constitutional development,[2] the following ideas are found: " All acts of federal officials which the Constitution does not authorize are legally void. . .[3] The ultimate determination of all such questions rests with the Supreme Court . . .[4] The validity of a statute, or an *act of the Executive* may be unquestioned for years. If then a suit arises in which the claims of one party are based on such act, its constitutionality must be decided by the courts . . .[5] The President may order his subordinates to act on his views of constitutional law in opposition to those of the courts, but he can hardly protect them from the consequences of assailing the rights of individuals in obedience to such orders." [6]

Adopting this constitutional form, and expressly embodying in the text of our supreme law the interpretative sovereignty of the judiciary as a defence of the Constitution against legislative measures, which violate it, the founders of the federal charter had in view to subordinate *ipso facto* the acts of the Executive to the same supervising jurisdiction. " What ought mainly to characterize the necessity of an immediate organization of federal justice," says Dr. Campos Salles, Minister of Justice in the Provisional Government, in his statement of motives in the preamble of Decree No. 848, of October 11, 1890, " is the highly preponderating part which it is intended to take, as an organ of a department of government in the social organism. I do not refer to the ordinary courts of justice with jurisdiction purely and simply limited to applying the law, in the manifold relations of private rights. The courts now

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1 Ibid., p. 333.

2 *Constitutional History of the United States as seen in the Development of American Law*. New York, 1889.

3 Ib. DANIEL CHAMBERLAIN: *Constitutional Development in the United States as Influenced by the Decisions of the Supreme Court since* 1864. p. 203.

4 Ibid.

5 Ibid., 204.

6 Ibid., p. 205.

installed in the country, thanks to the republican system of government, are not blind instruments or mere interpreters in the execution of legislative acts. Before applying the law, they have a right to examine it and to refuse to sanction it, if it seems to them to be contrary to the Constitution. . . Here, then, is the great difference between the judiciary, as it existed under the former system of government, and that which is now inaugurated, formed in the democratic moulds of the federal system. From the subordinate power that it was, it is transformed into a sovereign power, qualified in its elevated sphere of activity to employ the beneficent influence of its decisions in maintaining equilibrium, regularity and even independence for other departments of government, *assuring to citizens at the same time the free exercise of their rights.* Hence it is that in the great American Union the judiciary is rightly considered the corner-stone of the federal edifice and the only branch of government capable of *efficaciously defending personal rights and liberty.* Legislative errors crumble under the influence of its real sovereignty, *and the crimes committed by the depositaries of executive power are handed over to the severity of the law.*"

Incomparable, then, is the situation of the courts and especially that of the Supreme Court in the organism of our present institutions; for, while the errors of the other two departments of government find their most efficacious corrective in the action of the judiciary, the courts of the Republic operate as something approaching to an oracle in the declaration of constitutional right, having no other security for their fidelity to their mission than the organic nature of their legal correlations, their inexpugnable position in political agitations and the vigilance of national opinion. As "the final interpreter of the Constitution,"[1] the Federal Supreme Court is "the final judge of its own authority."[2]

No one, gentlemen, in the face of the authorities cited in support of this view of your constitutional dignity, will accuse your petitioner of exaggerating it. There is only one limit to the exercise of your functions in this respect: the rule that you can give no decision except in an actual

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1 DICEY: *Op. cit.*, p. 146.

2 COOLEY: *The Federal Supreme Court: Its Place in the American Constitutional System*; p. 40

suit. This is not an advisory body. You do not repeal acts of the legislature or the Executive. You do not constitute, as has inconsiderately been represented, a species of last resort, superior to the other departments of government. No. But any individual injured by the usurpations of Congress, or of the President of the Republic, has always, in judicial remedies, the means of defending his rights, by obtaining, as plaintiff or defendant, from the Supreme Court a reparative sentence, from which there is no appeal. The Executive, for instance, freely appoints, dismisses or retires officers subject to its discretionary authority; but if the administration, exceeding its proper limits, should retire or dismiss officers not subject to dismissal or retirement, or in the exercise of its discretion should fail to respect the legal restraints thereto appertaining,—the legal opposition of the injured person, regulated and submitted to your judgment, under the ordinary form of procedure, would uphold his rights against the abuse. And in this faculty, duly exercised by means of the necessary resort to law, rests the security for your own inviolability, the base of the invincible resistance of members of this court to any usurping attempt to overcome the lasting tenure of their functions.

This being then the mission of the Federal Supreme Court, if it is demonstrated, as your petitioner will demonstrate, that the suspension of guarantees, in the manner in which it was accomplished, violates constitutional requirements in the relation to the exercise of this prerogative, there can be no doubt whatever that those, who suffer from this act of violence, are on legal ground, when they ask you to restore them their liberty. "To deprive a man of his existence," writes Blackstone, [1] "or to violently confiscate his fortune without accusation or trial would give such monstrous proportions to despotism that the cry of tyranny would at once resound throughout the land. But to deliver a man to the privacy of prison walls, where his sufferings are unknown, or forgotten, is an invention of arbitrary force less likely to move one's feelings or excite his indignation and consequently far more dangerous." And yet this is the condition of those who have been struck down by the blow which to our amazement has

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1 BLACKSTONE: *Commentaries*; I, 136.

been dealt under the rule of republican government. And for this crime is there no remedy whatever in the courts of law? In this case those personal rights, which our Constitution has solemnly proclaimed, are nothing but the most contemptible of delusions.

More than six hundred and seventy years ago the Magna Charter torn from King John of England assured to all freemen the right of not being arrested, exiled or condemned to any penalty except through legal forms after trial by their peers. "*Nullus liber homo capiatur vel imprisonetur aut dissaisiatur, nec super eum ibimus aut utlagetur, aut aliquo modo destruatur, nec super eum ibimus nise per legale judicium parium suorum vel per legem terrae.*"[1] This provision of the celebrated article 39 of the first charter of English liberties, which in the opinion of Chatham is alone worth all the classics together, embodies the spirit of all the revolutions that for the last century have agitated western civilization and condenses the most vital part of all modern constitutions. And if in the Republic established by the national movement of November 15th, there is no judicial means of disincarcerating and redeeming citizens condemned to dungeons and exile under cover of martial law decreed in an unconstitutional manner, then Brazilian constitutionality has morally still to pass through seven centuries at least to reach the juridical standard of Norman barons, who by force of arms in 1215 obliged the English despot to confirm the laws of Edward the Confessor. But this rudimentary state of the knowledge of right is not consistent with the lofty purposes displayed in the transplantation of the American Supreme Court with its important faculties to the Brazilian Constitution.

Let it not be alleged against *habeas corpus* that martial law is a political measure, and should consequently be included in those in which the jurisprudence of the United States prohibits the intervention of the Supreme Court.

This argument is an evasion and cannot be accepted.

Judge Cooley, enumerating the questions comprehended in this exception to the reparative authority of the federal court, classifies under this title "the questions relating to the existence of war and to the re-establishment

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1 STUBLES: *Charters*; p. 301.

of peace, to the occupation of foreign territory, to the authority of ambassadors and ministers of other countries, to the admission of a State into the Union, to the restoration of constitutional relations between the government of the Republic and that of insurgent states, to the limits of the jurisdiction of foreign powers, to the right of bodies of Indians to be recognized as tribes." [1]

All these questions, as we see, are *purely* political. And it is only from political questions that the action of the federal courts is excluded. "Questions purely political are not within the province of the courts." [2]

But, in cases that, while in one way they relate to political interests, in another involve personal rights, the intervention of the courts, the shield of personal liberty against the invasions of the Executive, cannot be prohibited.

In American authors there will be found hypothetical cases similar to the present one. Let the venerable judges deign to listen, *ápropos* to this, to the reflections of the most recent and one of the most authorized commentators of the Constitution of the United States. [3] The case supposed by him is still graver. It relates to a state of insurrection in the presence of the enemy, and to the acknowledged right of the government, in such cases, to arrest the suspected persons holding, them in custody, or, in still more urgent cases, to subject them to trial by military courts. But even in this extreme case the judicial responsibility of the agents of the Executive continues to exist.

"All these steps," says Hare, "must be taken, not against the law, but within its limits, and the authors of such measures are accountable to judge and jury, when the courts are reopened and justice resumes its normal course. These acts can only be justified by proving that circumstances forced the post commander to violate the rights of some persons for the good of all. Thus understood, martial law forms a part of the Constitution of the United States; and the cases of Mitchell v. Harmony and *ex-parte* Milligan prove that it is not permitted to extend it beyond those limits, *even in the event of a war and under the authority of an act of Congress.* In this way

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1 THOMAS COOLEY: *Constitutional Law*; C. VI, p. 138.

2 HENRY HITCHCOCK: Op. cit., p. 80.

3 CLARK HARE: — *American Constitutional Law* — (Boston, 1889); V. II, sec. XLIV, p. 955.

the right of military leaders to make use of the necessary measures for repelling the enemy, putting down sedition and maintaining their position is reconciled with the nature of free government, since these severities are subject to the ulterior examination of judicial inquiry, to the punishment of excesses and to the rigor exceeded that which the occasion inevitably required.

There could not be a more positive answer to the sophism that is here forestalled.

Wherever there is a personal right violated, there is a judicial remedy for the injustice: this is a fundamental principle in all free constitutions. If, under the pretext of the political nature of the necessities that legitimize this frightful parenthesis in constitutional order known as martial law, the government, exceeding the bounds fixed by law, can use the arbitrary measure against its political antagonists and if violated rights fail to find in courts of justice their natural protectors, who will be able to restrain the abuses of the Executive ? Whenever it wishes to eliminate its adversaries in legislative bodies and thereby obtain an artificial majority by violating the immunities of the people's representatives, who will be able to check it ? And when in this very court it wishes to secure impunity by removing judges that incur its suspicion, what will become of the supreme judges of the Union, what will become of you, if you voluntarily deprive yourselves of your constitutional prerogative, which I now invoke, and subscribe to a declaration of incompetence in a case of *habeas corpus* demanded by the victims of an unconstitutional suspension of guarantees ?

Discussing the suspension of *habeas corpus* during the great rebellion in the United States, a notable publicist wrote as follows: "From a political point of view, the great value of *habeas corpus* is that it protects citizens from a dangerous tendency which is *generally found in those who exercise the powers of government.* These rulers of men often want to rid themselves quickly of their personal enemies *or of those whom they choose to the consider enemies of their country ;* and one of the easiest methods is to arrest on any sort of charge or suspicion, and keep the victim in confinement *simply by not allowing him to be brought to trial.*" [1]

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1 SYDNEY G. FISHER: *The Suspension of Habeas Corpus during the War of the Rebellion ;* in the *Political Science Quarterly*, V. III (1888), p 454.

In countries otherwise free, like the United States, there unfortunately occur such instances, whose type finds its most detestable expression in the history of Latin republics. Jackson (to cite a name) "always believed that the salvation of the country depended on his being absolute master of every one about him; and this trait had probably as much to do with the declaration of martial law as any difficulty or danger in his situation." [1]

Your petitioner in no way desires to offend the exalted magistracy of the Executive, whose glories, if they are achieved lawfully, will redound to the glory of republican institutions and to the honor of all the citizens of Brazil. Your petitioner believes in the patriotism of those to whom the administration of the Republic is now confided; but, whatever may be the merit of the head of a republican government, it does not make him superior to the law, and the excesses of a government, when it shakes off all legal restraint, are so much the more dangerous from the purity of its intentions, from its confidence in its own mistaken impulses and from the deserved popularity of its members. The history of the world is full "of the irreparable injury that may be inflicted where power is wielded arbitrarily by persons who cannot be made answerable for their conduct, although there is no intention to be unjust." [2]

Of all the exceptional measures authorized for political reasons there is none more utterly removed from the guarantees that protect personal liberty, than the establishment of military courts and commissions. And yet in this respect in North America the doctrine is sustained that Congress itself could not give a definite character to the sentences of these terrible courts, when a citizen unduly placed under their jurisdiction has in his favor circumstances, that subject him to the action of the civil magistracy. [3] And if it were not for this restraint, says an American jurisconsult, "the government of the United States might, on the occurrence of hostilities, be converted into a military despotism." [4] How, then, can we hesitate to apply to the state of siege the tutelary principle which the American

1 Ib., p. 481.
2 HARE: Op. cit., V. II, p. 978, *n*.
3 Ib., p. 983.
4 Ibid.

Constitution, the mother of ours, does not give up even under the most rigorous sway of martial law ?

If the effects of the state of siege were *exclusively* political, the federal courts would certainly have nothing to do with its consequences. But since these affect the private rights and civil personality of citizens, placing them in jeopardy of the most intolerable horrors of oppression, no mere interest of administrative expediency can rob the victims of the faculty of appealing to the courts. "The government of the United States has been emphatically termed a government of laws and not of men," said, in one of his memorable decisions, Justice Marshall, the greatest judicial interpreter of the American constitution, the "Expounder of the Constitution;" [1] "and it would certainly cease to deserve this appellation, if the laws furnished no remedy for the violation of a vested legal right."

When the necessity for the preservation of these rights, whose declared inviolability is the pride of contemporaneous democracies, is complicated, in government measures, with the demands of social order (as is the case in the question of martial law), the mingling of the two elements requires a conciliation between them, instead of the absorption of one by the other ; and this conciliation can only be obtained by recognizing the competence of the legislative as the organ of political interests and that of the judiciary as the organ of personal rights. There is no contradiction between these two species of competence, both of which are recognized in Art. 80 of the Constitution: the first in § 3, by which the President of the Republic is required, as soon as Congress meets, to inform it of the exceptional measures he has taken and to give his reasons therefor ; the second in § 4, according to which "the authorities who have ordered such measures are responsible for the abuses committed." These two jurisdictions do not mutually annul each other. Each has its peculiar function. Congress examines the political fact as a question of expediency, or of fundamental law. The judiciary enters into the civil questions, restoring personal rights, when the Executive for the purpose of wounding them has transcended its constitutional limits. The poli-

1 *Marbury* vs. *Madison: The Writings of* JOHN MARSHALL, *late Chief Justice of the United States, upon the Federal Constitution.* (Boston, MDCCCXXXIX), p. 11.

tical sanction of the legislature does not exclude the necessity of vindicating personal liberty oppressed or stifled by the violence of administrative authority; and for this vindication and for the restoration of justice wounded in the clash of conflicting passions the legislature has neither the specific aptitude nor the constitutional capacity.

Moreover, even though it were not absurd to adulterate the organic nature of Congress, by converting it into a court of justice, to decide on the claims of violated personal rights,—this resource would be subject to delays, that would destroy its utility. The chambers meet only four months every year. In the intervening eight months the experience of the last half year authorizes us to imagine the possibility of two or three suspensions of guarantees, or of one, we will say, if you prefer it. In this interval many persons may be imprisoned and banished. And it is not compatible with the spirit and principles of this form of government that those who are banished, segregated at the nod of one man, should pine in prisons at penal stations, or be poisoned by the malaria of marshes, without help from the courts of justice, excluded all alone, perhaps as criminals, perhaps as innocent martyrs, from the general communion of the law, from the common protection of the courts.

And, moreover, gentlemen, what hope is this of the final intervention of Congress? Congress itself, in the persons of its members, perhaps more than any other class of citizens, stands in need of the guarantee which is now asked of you. Without *habeas corpus* Congress will only meet whenever the Executive wishes. Without *habeas corpus* Congress will only meet when the Executive, eliminating its adversaries by means of martial law, can count on a sufficient majority to shield it from the consequences of its crime. At the present moment not less than four senators and seven deputies are in exile or in prison, and, when the votes are almost equally divided between the opposition and the government, this is enough to ensure a victory to the latter. The thunderbolts hurled by decrees of proscription at representatives of the nation assure to the government, it is believed, numerical superiority in the two houses of Congress. Such is the result, if not the motive, of these proscriptions. What kind of court of appeals, then, is Congress, if its own members are the first to suffer from the violence which it is asked to remedy?

What check, then, is this whose destruction is the immediate result of the first movement of the power whose excesses it is sought to restrain ?

You see then, gentlemen, that when the judicial ægis of personal rights is broken, all rights disappear, all authorities are subverted, the legislature itself crumbles in the hands of violence ; only one reality survives, the omnipotence of the Executive which will devour you too, if you divest yourselves of your undoubted competence in all questions relating to personal liberty.

Only one guarantee suffices, only one guarantee protects, only one guarantee is proof against sophistry : that of *habeas corpus* in its august simplicity, with its unforbiddable faculty of penetrating wherever the violence of authority is felt.

This guarantee in the present case will shelter the independence of Congress, whose integrity is broken. It is in your hands to restore to the Nation its representatives, or to condemn it to the hypocrisy of representative government manipulated by police detectives. The decision that you will render, bindsthe future, deciding whether henceforth legislative majorities shall be obtained by means of debate, or by the violence of martial law.

It is for Congress, in the persons of the imprisoned senators and deputies, that *habeas corpus* is asked of you.

Thus the very political element in this question confirms the necessity of your investigating jurisdiction for examining the constitutionality of this species of measure.

§

UNCONSTITUTIONALITY OF MARTIAL LAW.

Of all the weapons confided by necessity to governments, the suspension of guarantees, even when limited, is the most tremendous. Many writers condemn it *in limine* and do not admit it, even when attenuated, in free constitutions. Those guarantees, in their opinion, can be "maintained and observed at all times, in the midst of violent commotions, just as much as in moments of the greatest tranquillity." [1] To suspend these essential conditions of security, liberty and property, these writers consider "a

1 PINHEIRO FERREIRA : *Principes du Droit Public*, t. I, p. 85.

positive inconsistency in the constitutional system; for it is easier to abuse so dangerous a measure than to make good use thereof." [1] Elizalde, with the bitter experience of his country, said in 1862 in the Argentine Senate: "Tan mal uso se ha hecho de este medio, que solo decir la palabra, es decir que una provincia está amenazada de los mas grandes males y calamidades... La declaracion de estado de sitio es sumamente perjudicial, y con ella se han hecho las mas grandes violaciones y males." Valentin Alsina added: "No solamente esa medida es completamente inutil: no solamente non aumenta en um ápice los recursos ó medios, con que cuenta el gobierno para contener una commocion interior, sinó tambien es perjudicial bajo el aspecto del credito del pais en el estranjero." Rawson declared in that debate: "Siempre ha sido mi opinion que el estado de sitio es inutil por ineficaz, o es pernicioso cuando se leva a efecto." Irigoyen described it as a relic "originario de épocas remotas, en que la libertad y las garantias no jogaban como hoy el rol de primordiales elementos de felicidad social." And Emilio Alvear in the convention of 1870 denounced it as "el último refujio dejado á la dictatura... un estado de miedo, di complicidad, ó impotencia del gobernante."

All these, with a practical school of the effects of martial law in their country, devastated by retaliations between governments and parties, labored for the suppression of this measure as the wish of all "que anhelan ver realizado solidamente el gobierno de la libertad." On the other hand some advocate it as a fatal necessity. But even these, acknowledging its dangers, wish to surround it with insuperable legal barriers. Conspicuous among them is Alcorta, one of the ablest Argentine writers, who says: "La salvacion del órdem social es la suprema aspiracion, *pero no interpretado el peligro por la voluntad ó el capricho de los gobernantes*, sinó por los preceptos de la ley y en la forma que ella determina. Habrá quizá la omnipotencia de una constitucion, pero no la omnipotencia de un hombre." [2]

It is evident, then, that our constituent congress, under the ardent democratic blast that inflamed it, could

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1 LASTARRIA: *La Constitucion Politica de la Republica de Chile Commentada*, p. 127.

2 AMANCIO ALCORTA: *Las Garantias Constitucionales* (Buenos Aires, 1881), p. 164.

not have made this concession to the restrictive school, save with the thought of reducing arbitrary power to the minimum.

We must understand it, then, in this part, not in an ample but in the most rigorously restricted sense, so much the more that here applies more than to any other imaginable hypothesis the *odiosa restringenda*.

In English and American law the suspension of *habeas corpus* is not permitted except in cases of rebellion and invasion, "a very just and salutary limitation, which at one stroke cuts off an efficient means of oppression capable of being abused in evil days for the most condemnable purposes." [1] In fact, the American law, adopted on April 20, 1871, (six years after the end of the war of secession) only authorizes this exceptional measure, "whenever the unlawful combinations shall be organized and armed and so numerous and powerful as to be able by violence to either overthrow or set at defiance the constituted authorities." [2]

In France the matter has been successively regulated by the law of 10 Fructidor, year V, that of August 9th, 1839, that of April 28th, 1871, that of April 3rd, 1878. The last mentioned, which is now in force, requires (Art. 1) for the declaration of martial law "imminent danger resulting from a foreign war, *or from an armed insurrection*."

In Chile the Constitution of May 22nd, 1883, Art. 82 § 20, established the following: "Em caso de *commocion interior*, la declaracion de hallar-se uno ó varios puntos en estado de sitio corresponde al Congreso; pero si este no se hallar reunido, puede el presidente hacerla com acuerdo del Consejo de Estado por un determinado tiempo."

In the Republic of Uruguay the Constitution of September 10th, 1829, among the powers vested in the President, enumerates (Art. 81) that of "tomar medidas promptas de seguridad en los casos graves ó imprevistos de ataque exterior, ó *commocion interior*."

In Ecuador, by the Constitution of 1839, Art. 60 § 12, the Executive is empowered to "declarar en estado de sitio, con acuerdo del Congreso, ó, en su receso, del Consejo de Estado, integra ó parcialmente, el territorio de la Republica por tiempo determinado, en caso de suceder ó amenazar ataque esterior, ó *commocion interior*."

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1 STORY: *Commentaries*, V. II, § 1341, p. 208.

2 HARE: Op. cit., V. II, p. 982.

In Venezuela the constitutions of the states more or less fully authorize the Executive to suspend guarantees in case of "*commocion interior.*"

The Paraguayan Constitution, adopted in 1870, prescribed in Art. 9: "En caso de *commocion interior*, ó ataque esterior, *que ponga en peligro el ejercicio de esta Constitucion* y de las autoridades creadas por ella, se declarará en estado de sitio una parte ó todo el territorio paraguayo, por un termino limitado." The same phrase "*commocion interior*" is repeated in Art. 72, § 22.

In Bolivia the Constitution of February 28th, 1878, which of all known constitutions is that which most fully treats of martial law, only admits it (Art. 26) "en los casos de *grave peligro por causa de commocion interior*, ó de guerra esterior."

A similar provision is contained in the Argentine Constitution, whose 23rd article says: "En caso de *commocion interior* ó de ataque esterior que pongan en peligro el ejercicio de esta Constitucion y de las autoridades creadas por ella, se declarará en estado de sitio la provincia ó territorio, en donde exista *la perturbacion del órden.*"

All these constitutions, as is seen, are alike, descend from each other, being in some places literal copies. They all subordinate the possibility of martial law to the existence of a foreign war, or of an internal disturbance involving extreme peril to constitutional order. In these requirements our own imperial constitution (Art. 179 § 35) coincided, and also that of Portugal (Art. 145 § 34), not permitting the declaration of martial law by the Executive save when, in the absence of the chambers, *the country is in imminent danger.*

Still stricter than all these constitutions is our federal charter, which provides (Art. 80) as follows:

" Martial law may be declared in any part of the Union and constitutional guarantees suspended therein for a fixed time, when the *safety of the Republic* requires it, in case of foreign aggression, or *internal disturbance.*"

" § 1. When Congress is not in session and *the country is in imminent danger*, the executive branch of the federal government will exercise this faculty. "

The constitutionality of martial law, then, depends on three conditions:

Internal disturbance ;

Imminent danger, resulting from the disturbance or from the causes that produce it ;

Such an extent of danger that it may jeopardize the *country* or the *safety of the Republic.*

Evidently *country* and *safety of the Republic* here represent the same idea. The intervention of the legislator, imperfectly defined in the word *country*, is concreted and assumes a technical, positive form in the phrase *safety of the Republic.*

What was meant, then, was violence against the constitutional life of the Nation, a blow at the institutions or at general order which sustains them.

The danger foreseen, then, is a political danger, and not what we may call a *police danger*, that is a danger that may be avoided by ordinary means of repression. The interpretation here must be of the strictest kind; otherwise martial law would be converted into an ordinary measure and constitutional government would be transformed into a government of alternated constitutional and dictatorial vicissitudes.. The will of the Executive would thus become the real constitution of the country, and the rights of the nation with their supreme guarantees would be subordinated to the personal emotions of the President of the Republic, to his weaknesses, his passions and his whims. With a looser construction, gentlemen, we will fall into the situation of those Latin republics, of which the nearest example is the Argentine Republic, of which it may be said, in the language of one of its own writers, who, by the way, was a warm defender of this measure, that "since 1853 it lives permanently under martial law." [1] A simple fire in the Jesuit College at the capital on the 28th of February, 1875, was enough to cause the President to declare martial law in the province of Buenos Aires. [2] Now, although in the Senate the eloquence of Sarmiento was exerted to justify this measure, by recalling the most prodigious examples of incendiary fanaticism, such as the general conflagration in former times of Catholic temples throughout the length and breadth of England, and the fantastic circle of flames, which, at a signal from Barcelona, in Spain, only sixty-two years ago, in the midst of the nineteenth century, consumed, in the space of three days, five hundred convents and forty millions of property—the opinion of competent persons has condemned that act of the Argentine government.

1 ALCORTA: Op. cit., p. 198.

2 Ibid: p. 197, 212—17.

One of the most conservative minds in that country, who devoted many pages to defending the necessity of martial law, condemns this application of the measure in terms which it is well to copy here, to assist in the elucidation of good doctrines, terms so applicable that they seem to have been written *ad hoc* for our own case:

"El incendio del Colegio del Salvador por sí solo no pudo ser bastante en ningun caso para autorizar el estado de sitio, por mas que sus autores mereceran el mas severo castigo. Se trataba de un delito comun, previsto y castigado por la ley penal, y la fuerza publica tenia los elementos bastantes para contenerlo, como efectivamente sucedió con su sola presencia." [1]

And really, if there is a point on which the constituent legislator should take special pains to check arbitrary action and to limit the latitude left to the discretion of the Executive—it is this; for it is impossible to imagine a faculty more capable of changing a legal government into dictatorship.

What then, *stricto sensu*, shall we understand by *internal disturbance with imminent danger to the Republic?*

Putting together these provisions, which follow each other in Art. 80, we will almost have *prima facie* the definition of the legislator's intention.

In the scale of possible disturbances there are almost imperceptible gradations. Disturbances may result from material conflicts more or less limited in their areas or the number, character and disposition of their authors. Disturbances may be caused in a city by the insubordination of the guard. Disturbances may be caused by the repetition of certain accidents, or by their extent. The disorganization of administrative services may produce a state of disturbance in public feeling. We have all been kept in a continued state of disturbance and terror by the daily repetition of accidents on the railways, by the demoralization of our telegraph service, by the scandalous thefts of postal matter, by the general injury caused to trade by the block at the custom-house. Disturbances have spread throughout the states in consequence of the revolutionary deposition of governors. We are passing through a generalized and permanent state of disturbance, caused by financial panic and by the dangerous appetites created, in

1 Ibid: p 15.

certain classes, by the food crisis. Violent impressions of consternation, generated by inoffensive circumstances, which the imagination exaggerates, sometimes cause the strongest public disturbances. And there are cases in which a simple individual fact, the atrocity of a crime, the insolence of abuse of power, produces in public feeling intense and widespread disturbance.

But none of these is the *internal disturbance*, to which the Constitution refers. Why? Because such disturbances the government by the ordinary means of action at its disposal is able to resist. Because such facts do not endanger the security of the Republic. Because, if we apply the vague phrase "internal disturbance" to all this variety of situations, for which there are normal remedies, the fate of our rights and liberties will hereafter depend on the capricious variations of light and shade in the imagination of the government. A disturbance in the constitutional sense means that the safety of the Republic is endangered. Now in order not only to shake but to "endanger" the Republic several things are requisite. *First*, there must be organized elements of disturbance, capable of violent action. *Second*, the object of the disturbing action must be feasible. *Third*, it must be demonstrated that by means of the police, of the armed force and of the courts, the government was unable to repress the disturbance.

It is indeed plainly evident that, if the Executive by means of the courts, police or military can prevent or repress the movement, if the latter can count only scattered, disorganized and impotent elements, if its object is unfeasible, if, for instance, as in the present hypothesis, the alleged object is to seditiously proclaim President a man on his death-bed, a dead man, we may say, then to decree measures of oppression and terror, in such a case, in which those of law and justice would triumph, is to make a mockery of right and justice and criminally affront truth and public morality.

For such cases there is the public force, and it should suffice to enforce order and deter the guilty. If it is not so, if it is necessary in all these situations to resort to martial law, then we may say, with the Supreme Court of the United States, that, "when to save a country governed by free institutions it is required to sacrifice frequently cardinal principles that assure human rights, it is not worth while to save such a country."

The Constitution of the United States, which is the model on which ours is framed, says (Art. 1, section 9): "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The authors of that Constitution clearly perceived that "only *great national emergencies* could justify or excuse" this formidable measure. The authors of ours receive their inspiration directly from that source and could draw therefrom no other doctrine.

Even in the Spanish republics, in which the abuses of the government, however, have rendered almost normal this exceptional measure, the theory of constitutionalists repudiates this fatal elasticity of which the sophistry of political interests makes use to the detriment of liberty.

In order that this exceptional right may be exercised, says Alcorta, "it is indispensable that a real necessity, thoroughly characterized, should occur, or an imminent danger of such a necessity. Beyond this the interest of a greater social development, a situation, which, while open to improvement, does not directly threaten public order or general stability, cannot produce extreme measures without converting the exception into the rule and completely destroying liberty. Thus all constitutions, from that of Rome to that of Bolivia, admit the exceptional measure, but only in cases equally exceptional, *when the organism of ordinary life is not sufficient*, with its elements, to maintain public order."

In the debate in the Argentine Chambers in 1870 in relation to extending to Corrientes and Santa Fé martial law, which had been declared in Entre Rios, on account of the revolt of Lopes Jordan, Senator Quintana, impugning the illegality of this measure, said, "No basta que haya un ataque esterior, que ponga em pelegro el ejercicio de la constitucion; es necesario además establecer este antecedente constitutional é indispensable: que ese ataque, que esa commocion interior produsca una perturbacion, que ponga en peligro el ejercicio de la constitucion y el respeto de las autoridades en el logar que pretenda someter-se al duro imperio del estado de sitio."

The real definition of the matter, however, was emphasized, more than by anyone else, by Tejedor, the celebrated Argentine statesman, in the message which, as governor of the province of Buenos Aires, he addressed,

on March 1st, to the legislative assembly: "Fuera de estos cesos," he said, "*del alzamiento en armas, del alzamiento publico*, no hay, no puede haher declaracion de estado de sitio."

"A public and armed insurrection"— this is what embodies the juridicial idea expressed in the Constitution by the words "internal disturbance with imminent danger to the Republic." Tejedor's interpretation, in truth, is that which strictly conforms to the historical connection of constitutional law. "Insurrection" is the term employed by English lawyers; "rebellion" is that employed in the American constitution. Now, English law engendered the American constitution, just as the latter engendered the Argentine constitution and ours.

There is no other way to check arbitrary power than to give definite and unequivocal form to the condition that limits it. There is nothing more uncertain than the acceptation of the words "internal disturbance," considered alone, without the explanatory assistance of their complementary antecedents and subsequents. Nothing, on the other hand, is clearer than its meaning, if we subject it to the test of the words with which the legislator threw light upon it, alluding to the imminent danger to the Republic. Only an open and armed revolt in the streets, or an organized and minacious revolt, with means of action capable of preventing the government from maintaining order, —a revolt, in short, under any of its potent and disquieting forms, can constitute for the Republic "an imminent danger." What is meant is not imminent danger for the bystander, threatened with a riot more or less violent, more or less sanguinary, but local, circumscribed, and repressible. It is the danger that immediately threatens the Republic and the instruments placed for its defence in the hands of the government. For if the danger threatens only the quiet of a street, or a neighborhood, or a town, if it displays itself in noisy but inoffensive demonstrations, if it does not oppose the working of the institutions in such a manner as to threaten to inutilize or overthrow them—the Republic is not in danger. To restore tranquillity, the police has only to redouble its vigilance and the government its activity. And if the threat is directed positively against the Republic, even then the latter is not in danger, provided the government can count on the support of public opinion, on the impartiality of the courts,

on the fidelity of the police, and on the loyalty of the military force. Tranquillity can be restored by administrative and judicial measures, by the arrest of the persons implicated, by the trial of anarchists, and by the conviction of the criminals.

Observe, gentleman, the phrase "internal disturbance" in the text forms a part of the same masonry (if the expression be permitted) as the phrase "foreign invasion," to which it is joined, united and inseparably connected. The danger that it is intended to avoid, is that anomalous and supreme danger measured by the hypothesis of *foreign* invasion. With the idea of this calamity the law associates the commensurate idea of *internal disturbance.* The similarity is manifest and undoubted. The evil from which it is sought to preserve the country is the same: the imminent danger of the Republic. This danger may arise from either of these two causes: internal disturbance, or foreign invasion. Consequently in order that internal disturbance should occur in the sense meant by the text, it is necessary that it should be similar in its gravity to the effect produced by the presence of the enemy on the soil of our country.

An internal disturbance is characterized by great public anxiety, with anarchy at the gates, and the government full of doubts of its own power, while public feelings are under the shadow of impressions similar to those which are aroused by the profanation of the sacred soil of our country with a foeman's tread.

Now it is evident that in the case in question not the slightest of the characteristics of contingencies of this kind is to be found. Resemblance between what is contemplated in the Constitution and the events of the 10th cannot be discovered, not even with all the arts of the rhetoric of terrorism employed by that orator of the Hellenic decadence, Kleitarchos, son of Deinon, who (says Demetrius), describing the habits of a bee, spoke just as if he had been speaking of the Erymanthian boar.

The *Diario Official* and the officious journals have already given those events the coloring natural to pictures of that origin. And from all that official imagination has so vividly depicted, what is to be inferred? The history of an unarmed, unenlightened, frivolous demonstration against Marshal Floriano, surrounded by the army, in favor of Marshal Deodoro, lying on the bed of death, incapable

even of understanding what was occurring, in which without his knowledge his glorious and beneficent name was involved. There was no attack, not a single drop of blood was shed, not a weapon was raised against anyone. The enthusiasm of the multitude was diffused in acclamations. Its anarchical spirit evaporated in speeches and applause. The flourish which accompanied them is that of a military band, which is not accused of sedition, the band of the 24th battalion of infantry, which, having been met *en route*, is indulgently and spontaneously added to the procession in some mysterious way in which chance seems to assume all the skill of art. In one word, there is in all this an absolute absence of force, of weapons or of surroundings favorable to disorder, a total lack of unity as to the object and of agreement as to the measures, of seriousness in the actors, of importance in their characters. There is only a vague aspiration of imprudent imaginations, sterilized by the unfeasibility of its object. You will not fail to see the juridical importance of this last circumstance. If the purpose and the crime of that ephemeral and frivolous agitation were to replace Marshal Floriano, in the presidency of the Republic, by Marshal Deodoro, the situation of the latter *in extremis*, paralytic and almost lifeless, after he had received extreme unction and turned his thoughts to another world, suffices to prove the absolute impossibility of his acclamation, which is stated to be the origin and object of that movement. There is no crime and can be none (unless this legal principle has been abolished by the dictatorship of chaos) if the accomplishment of the criminal purpose is physically impossible. "The attempt is not possible," says the Penal Code Art. 14 §, "in case of the absolute inefficiency of the means employed or of the absolute impossibility of the object which the offender has in view." That describes the case: the prisoners are represented as endeavoring to defeat an army with music and torches and to seize upon the government for a dying man. But, if the crime is impossible on account of the radical inefficiency of the means employed and the absolute unfeasibility of the object proposed,—then for the same reasons it was impossible that there should be any danger.

Now without danger and general danger *for the country* and *imminent* danger at that, the suspension of guarantees is constitutionally illegitimate.

Vague apprehensions, frivolous reports and loquacious assemblages do not produce an internal disturbance, not even in the ideal kingdom of Beotia, to which we are drifting.

"The scandals," to which the decree of the 12th inst. timidly refers, do not matter in the least. If they are civil scandals, they can be corrected by the police; if military, by court martial. Such scandals are less scandalous, less disturbing, less anarchical, less fatal to the credit of the government and to the reputation of the country abroad than brutal violations of the Constitution perpetrated by the administration supported by military force. The government that rests on these two basis of impunity to the extent of dictatorially retiring by a stroke of the pen, with sovereign disdain for Art. 74 of the Constitution, thirteen general officers, without exciting the slightest resistance from those thus wronged nor from the army itself threatened by this act in all its rights, in the name of which it had revolted against the monarchy, in whose annals there is not to be found a single instance of such an arbitrary exercise of power—the government, I say, that, without arousing even legal reaction, had successfully accomplished these audacious schemes, cannot now, under the cover of imaginary circumstances, declare the country in danger on account of an agitation whose participants, according to journals not open to suspicion, were so insignificant in number as barely to fill *one or two street-cars*. With a little dexterity the danger to the Republic might have taken a tilbury and disappeared around the first corner.

But even admit that it was a real sedition, as the first decree describes it. Sedition is an act subject to the police, regulated by criminal laws and not by political jurisprudence. The government that finds such an obstacle in its path, has only to open the Penal Code, and there in Art. 121 it will find a complete solution in this preremptory provision, the efficiency of whose action is as thorough as the ease with which it is executed. It says: "And when the proper police officer is informed of the existence of a *sedition*," (as in the present case), "he will go to the place, and, on discovering that it is an unlawful assemblage and detrimental to public order, he will so declare to the persons present and order them to disperse." "If the officer is not obeyed after the third warning, he will *employ force, to disperse the assemblage, and will arrest the ringleaders*."

Peruse and reperuse the Constitution. There you will see the faculties of the two branches of government in relation to martial law discriminated in two different provisions. In the first is established the legislative prerogative, with ample discretion for deciding when the Republic requires this measure. In the second, which extends this prerogative to the Executive, there is an additional restriction by which it is limited, by its dependence on *imminent* calamities endangering the *country*. The *country* is the embodiment of all Brazilian interests, the union of political and social institutions, the people and the state, the organic harmony between the human and legal elements of nationality. Now, gentlemen, was the country really in danger, when the head of the nation, defended by *mitrailleuses* and surrounded by his troops, confronted at his ease a small body of thoughtless men, who with a spurious contingent of certain agents of *public order*, worthy of the nickname by which they are known, proclaimed a dying leader and disappeared, without a struggle and without leaving an echo or a trace behind them, in the midst of general indifference? An Argentine publicist, explaining the reasons why the requirement of "imminent danger" is placed as a check on the Executive in cases of internal disturbance, says: "Internal disturbance does not always require prompt and vigorous action; its consequences in any case are not so grave as those of a foreign invasion. It is nearly always preceded by political strife, in which partisan passion makes use of every means to obtain office or annihilate its adversaries, and, as the nature of such a disturbance may be misinterpreted, either through ignorance or design, for the sake of a pretence for suspending constitutional guarantees, it is prudent to subject the matter to a debate reflecting the views of the different political parties that are represented in congress." [1] But, if insignificant and ridiculous incidents, like those on the evening of the 10th, assume the juridical proportions of imminent danger to the country and internal disturbance in the Republic, if martial law, declared under frivolous pretexts like this, should be considered constitutional, or if the federal courts are not permitted to view the matter in its proper light, and protect personal liberty from the adulteration of our system of government, then, gentlemen, your abdication is declared, as well as the abdication of

1 Alcorta: *Op. cit.*, p. 250.

Congress, whose resolutions will be filtered through the permanent dictatorship of the Executive, which will likewise be the sovereign supervisor of your independence. If political arrests have already deprived Congress of eleven of its members, why may they not to-morrow carry off members of this court ?

If you recoil before this absurdity, you must accept the conclusion that, when martial law is declared in violation of constitutional law, *habeas corpus* is the palladium of a city threatened by tyranny; and, if this conclusion is inevitable, you cannot hesitate to grant this petition, recognizing that the government transcended its proper limits in the adoption of this measure, which is as unjustifiable in the light of the Federal Constitution as it is in that of humanity, of political expediency and of the credit of our country.

§

WITH THE CESSATION OF MARTIAL LAW ITS EFFECTS ALSO CEASE.

With the termination of martial law its effects disappear, including those connected with the repressive measures adopted during its existence.

And this is why, even if you divest yourselves of your authority to decide as to the constitutional opportunity of the measure and the consequent nullity of the arrests made under pretext thereof,—the incarcerated and banished prisoners still retain their right to *habeas corpus*.

The enjoyment of liberty must be restored to them, for the action of the Executive on their persons ceases with the restoration of guarantees.

This is another new and important question, in which you have to establish a precedent.

Reverently, then, your petitioner solicits your most earnest attention.

Consider, gentlemen, the nature of the faculties exercised by the Executive during the existence of martial law.

The pettifoggers of the period, with a wealth of juridical ignorance that is not to be equalled in the smallest village, attribute judicial functions to these acts. Thus we have the Executive defining crimes, convicting the criminals and applying the penalty. Gentlemen, if a student of elementary law should perpetrate such a crime against

the juridical alphabet, he would not escape the indignation of the most indulgent of professors. With the first academical rudiments one learns, when he begins to lisp the Constitution, that the Executive *never judges;* and, as the conviction of prisoners with the application of penalties constitutes a judicial function, the novice never more forgets that, where there is a crime to be judged, or an offense to be punished, that is the place of the magistrate. If the Senate judges the crimes of the President of the Republic and some other functionaries, it is because the Constitution expressly confers upon it the exclusive faculty "of judging" this class of criminals (Art. 33), and for this purpose authorizes it to "impose penalties" (§ 3), to "make condemnatory decisions" (§ 2) and "to proceed as a court of justice" (§ 1). One can imagine, then, what will be your amazement on learning that an article of the highest origin, published in the *Diario Official* of the day before yesterday, speaks of the "punishment of the guilty" by the government, of the "classification of crimes" by the government, of the "application of penalties" by the government, terminating with the positive assertion that *the Constitution authorizes the Executive to impose the penalty of banishment.* (Doc. N°. ———).

Now, gentlemen, no one who has ever read the Constitution can slander it with such a shameful imputation. The Constitution bestowed upon us a presidential federative republic, which is, *par excellence,* the system of the *discrimination of the powers of government:* the Legislature makes the law; the Executive executes it; the Judiciary judges the constitutionality of the Legislature in the making of laws and the fidelity of the Executive in their execution. There is no confusion, no interference in each other's functions. In irreprehensible conformity with these rules is the whole chapter relating to the executive branch of the government. Only administrative and governing faculties can be found therein. That which led the official writers into the inexplicable paradox of converting the Executive into a criminal court you know, gentlemen, to be something else with an entirely different name. It is enough to read the text with ordinary comprehension of the words, to see this and to feel it.

In fact, the text in Art. 80, which is the foundation of the matter, reads as follows:

"§ 2 The latter (the Executive) during the existence

of martial law will limit its action, in the measures of repression it shall adopt against the persons of offenders, to the following :

"1st. Imprisonment in a place not used for persons accused of ordinary crimes ;

"2nd. Banishment to other points in the national territory."

Exactly. The government is empowered to make use of imprisonment and banishment, not as penalties, but as "*measures of repression*." They are measures intended to stop an evil, and not punishments for the expiation of a crime. They are instruments for the restoration of peace and not means for punishing criminals. They are political police measures of a high order and not sentences. They constitute only administrative and not judicial functions. They do not involve any classification of crime : they merely amount to a restraint on social disorder.

A wide chasm separates these two ideas. The judiciary examines the offense, classifies the crime and inflicts punishment. The police and political administration prevents, hinders and combats anarchy. The Constitution confers on the Executive the faculty of repressing by means of exceptional measures exceptional cases of disorder, placing at its disposal " repressive means of action." It would not make use of this expression, if it wished to grant the right to punish ; for the manifestations of this right are invariably classed under the head of *penalties*, a term which in law has no synonym. Examine the Penal Code : you will there find no other designation. Read the Constitution from beginning to end : you will never find the verb *to judge*, nor the substantive *penalty*, save among the prerogatives of the judiciary.

Do you wish still further proofs ? Examine Art. 80 §§ 3 and 4 : "As soon as Congress meets," says the first, "the President will inform it of the exceptional measures, which have been taken, stating the reasons therefor." "The authorities that have taken such measures," adds the other, "are responsible for the abuses committed." Now, the branch of government that has the faculty of judging and of imposing penalties, is not required to justify its sentences to any other branch of government constituted a tribunal with power to call it to account. The definite imposition of a penalty is not subject to an ulterior judgment against the magistrate that imposed it. With the

promulgation of the penal sentence the question is settled and the possibility of considering it ceases to exist. There is still the hypothesis of revision; but even this does not signify jurisdiction of one branch of government over another: it is the competence of the judiciary in relation to itself; it belongs exclusively to the judicial branch of government, represented by the Federal Supreme Court. (Constit., Art. 81.)

But, gentlemen, this is not all. If the deprivation of personal liberty by act of the Executive, during the existence of martial law, constituted a sentence, there would be a form of procedure embracing accusation and defence. The defendant would necessarily have to be notified of the crime, of which he was accused, to answer the questions of the judge and to allege what he saw fit in his defence. This is a point, which no dictatorship can pass, at which all sophisms must crumble. Even before military courts *there is no conviction without defence*. "Oppressive as was the suspension of *habeas corpus* in England in 1817, the investigation of a committee of the House of Lords showed that none had been imprisoned save on sworn information and proof of the offense through trustworthy evidence." [1] Even in trials before military courts the accused has a right to counsel, and this rule was always observed in the most critical periods of the American civil war. [2] You may even go back to the Reign of Terror and examine the records of the atrocious courts of the French revolution in 1793; even there in the most rapid transitions from liberty to the guillotine you will always find, more or less curtailed, more or less coerced, more or less mutilated, but always acknowledged, the right of defense. But the persons imprisoned and banished by the government of Marshal Floriano did not even have the slightest pretense of a trial, were allowed to say nothing in their defense, underwent no examination and were not even asked their names. (Dec. c. m.) They were thrown, like so much dead freight, into fortresses, into arsenals, into war-vessels. And yet—they are *tried!* and yet they are *condemned!* and yet they suffer *punishment!* Gentlemen, this immensity of legal ignorance, this delirium of unconscious abuses characterize the period and disgrace the nation in whose

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1 HARE, op. cit. V. II, p. 960.

2 Ibid: p. 971, n. 1.

names such anarchy is perpetrated and such doctrines sustained. If the Brazilian Constitution of 1890, decreed under the invocation of the most transcendent liberty and the amplest democracy, sanctioned such principles, attached to these declarations the character of sentences, considered these measures as penalties, branded these helpless victims as criminals, then, gentlemen, in the history of political monstrosities this Constitution would be without parentage, without kindred and worthy of the liberal democracy... in Mozambique.

Does not this suffice, gentlemen? Very well. The republican Constitution, Art. 72, § 15, provides that "no one shall be condemned, save by proper authority *in virtue of a previous law and in the manner therein prescribed.*" What is the law, that regulates the trial of persons subject to imprisonment and banishment by sentence of the Executive? Such jurisdiction has never been known; it would be something altogether new. Such a trial has never existed; it would be necessary to invent it. The Judiciary never judges except through pre-established forms. The Constitution does not permit it. Could the Executive be exempt from the same tutelary limitation, in cases of trial submitted to it? But why and where may be the distinction? It would be absurd. If the Executive is empowered to judge, it must do so through some established form. And the form of trial, like that of classifying crimes, must be regulated by some pre-existing law. If no such law exists, then the courts cannot perform their functions.

The Constitution in Art. 80 does not define offenses. It gives weapons to the Executive against disorder, and says to it: "you may arrest, or banish." But, if these comminations involve penalties, they are subordinated to the rule of Art. 72, § 15, which does not permit their application, until its form shall have been prescribed.

Let it, however, be admitted for a moment that imprisonment and banishment, as authorized by that constitutional provision, are real penalties. Now all penalties — *all, without a single exception*, gentlemen, — have a duration fixed in the sentence that imposes them. The convict is not the slave of arbitrary power, not even of the power of the courts. The expiation, which he has to undergo, is duly measured, and beyond this justice has no power over him. And yet, if the rules of the *novum jus*

should prevail, the persons imprisoned and banished by decree of April 12 would be imprisoned and banished *indefinitely*, for a week, for a month, for a year, or for a life-time — until the political resentment, incarnated in the government, should be satiated, or until the political passions that are blown across the congressional sky should roll to some other point in the horizon. Martial law has ceased to exist except for these political galley-slaves. In the midst of criminals they constitute a peculiar class, a class of convicts condemned to perpetual uncertainty. The very galley-slaves know their fate. But these political *suspects*, less fortunate than they, only know that their fate is in the hands of the government. Their state is thus a specie of mendicancy to the government through themselves, their families and their friends a new army of dependants, created in favor of omnipotent authority. You clearly perceive, gentlemen, that, if this were our law, it would repeal all criminal science — the certainty of the penalty, the regularity of the trial and the indispensableness of defence.

The simple fact of no limit being fixed to imprisonment and banishment, authorized by Art. 80, shows that there was no intention of establishing a penalty, but merely transient measures, naturally limited in their duration by the temporary duration of the danger which they are intended to remove.

All known legislation and jurisprudence are opposed to the confusion, in which it is sought to identify the idea of a penalty with that of this exceptional authority conferred on the Executive.

Let us take the English law. The power of the ministry, during the suspension of *habeas corpus* consists in arresting without the hinderances of ordinary process of law, and delivering to the courts for trial persons arrested on the charge of crimes against the national Constitution. [1]

In the United States we are taught by constitutional lawyers that "the sole effect of such a suspension is to enable the government to hold the persons, whom it has arrested, until they can be brought before a court and jury." [2] The suspension of *habeas corpus*, writes another

1 Dicey: *The Law of the Constitution*, p. 243.

2 Hare: Op. cit., V. II. p. 960.

famous commentator, does not "give any greater authority to the Executive than that of detaining *suspected persons in custody*, whom it would else be obliged to bring to a speedy trial, or release on bail." [1] When the laws are subverted and "an attempt is made forcibly to overthrow the government," says Hare, "force must be repelled by force, and everything will be lawful which is necessary to render the use of force effectual." [2] But note well the exact extent of this unavoidable anomaly. This we learn from another American authority. "Necessity creates an exception to the rule of the constitution, and the constitution itself creates another exception by allowing the suspension of *habeas corpus*." But it is to be observed that the suspension of *habeas corpus* gives the power to arrest and hold, but not to try and punish." [3] Let us examine other American constitutions.

That of Chile, regulating martial law, says (Art. 161): "No podrá la autoridad publica condenar por si, ni aplicar penas. Las medidas que tomase en estos casos contra las personas, no pueden esceder de un arresto ó translacion a qualquer punto de la Republica."

That of Uruguay provides as follows (Art. 83): "El presidente... en el caso de exigirlo así urgentemente el interés público, se limitará al simple arresto de la persona, con obligacion de ponerla en el perentorio termino de veinte y quatro horas á disposicion de su juez competente."

The Bolivian Constitution (Art. 27, 5) requires for the same purpose the term of seventy-two hours, and adds: "Se el proceso no puede tener lugar en dicho término, los acusados podran ser retenidos hasta el momento en que el órden material sea restablecido."

The Argentine Constitution (Art. 23) says: "Peró durante esta suspension no podrá el presidente de la Republica condenar por si, ni aplicar penas. Su poder se limitará en tal caso, respecto de las personas, a arrestarlas ó trasladarlas de un punto á otro de la Confederacion."

Even the Paraguayan Constitution is framed on the same pattern. In Art. 72, § 22, it disposes as follows: "Durante este tiempo el poder del presidente de la Republica se limitará a arrestar á las personas ó á trasladarlas de

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1 Pomeroy: *An Introduction to the Constitutional Law of the United States.* 10—ed (Boston, 1888) § 708, p. 593

2 Op. cit., V. II, p 954

3 Sidney G. Fisher: Op. cit., p. 478.

un punto á otro de la nacion, si ellas no prefieren salir fuera del pais."

This right of option, assured to suspected persons, between imprisonment and leaving the country is also found in the Constitution of Bolivia (Art. 27) and in that of the Argentine Republic (Art. 23). Now there could not be a more conclusive sign that these coercive measures, far from constituting penalties, are purely measures of safety.

The language of commentators and statesmen is alike. "Se detiene á un individuo, se cambia su residencia, sin someterlo al magistrado, pero non se le aplica pena," writes Alcorta. [1] "El gobierno" said Senator Sarmiento in 1876 in the Argentine Republic, "no puede castigar el individuo, pero si puede detener su persona."

Now our Constitution descends from these. By them, then, must be understood ours, especially when the contrary interpretation involves, as in this case it would involve, oppression and inhumanity.

There are countries, in which comminations applied under martial law have the character of penalties. This is the case with France. But it is because in those countries the imposition of such an expiation belongs, not to the administration, but to military tribunals, *which are courts*, and in this capacity judge, sentence and punish. The French law is as follows:

"*Art. 7. Aussitôt l'état de siège declaré, les pouvoirs dont l'authorité civile était revêtue pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire. L'autorité civil econtinue néanmoins à exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas desaisie.*

"*Art. 8. Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûretê de la République, contre la constitution, contre l'ordre et la paix publique, quelque soit la qualité des auteurs principaux et des complices.*"

These courts decide according to the forms of trial, which the military law predetermines, classify offenses according to rules which the military law pre-establishes, and distribute the penalties, whose nature and *duration* the military law previously limits.

But it is not necessary to resort to this source, to aid us to interpret the provision of the Brazilian eharter,

1 *Garantias Constitucionales*, p. 166.

which is sufficiently clear. It does not tolerate martial law except "for a fixed period," and only authorizes the Executive to make use of the repressive measures, which it indicates, "during the existence of martial law." But, if such a measure should continue in force for the persons affected by them, then for these persons martial law would be prolonged indefinitely, which the Constitution does not permit.

It may be said: "No; since imprisonment or banishment was declared during the existence of martial law, the Executive confined its action to the respective limit. It is the *exercise* of these functions that has to be kept within this limit; but the law contains nothing that prevents its *effects* from extending beyond." But this argument could only be accepted, if the term of imprisonment or banishment should be fixed at the moment in which the arrest is made. In that case, the period of the political segregation being fixed, the action of the government, which imposed it, would cease. But, if the government does not fix the term, for which this coercion is inflicted, and reserves the right of suspending it whenever it pleases in an indefinite future, in this case the maintenance of the repressive measure means a continuation of the government's action, carried beyond the period of martial law, of which it is thus an indefinite prolongation. And this is in manifest incongruity with the two constitutional provisions.

Not even the Russian autocrat displays this odious abuse of power. The nihilists, professed and implacable exterminators of all social order, members of a vast, ramified and tenebrous conspiracy, whose secret and unexpected blows everywhere carry dynamite, blood and the dread of its impenetrable mystery, even these pass through the form of trial, before being expatriated to Siberia. Here, inoffensive citizens with unsullied names, patriots known by their devotion to constitutional forms, members of the government that established the Republic, promoters of the legalist movement which placed the present President upon the ruins of the *coup d'état*, at one stroke of the Marshal's sword, are buried in prison, in exile, without even notification of the crime which condemns them. The imperial dictatorship of the Czar—what is it, gentlemen, compared with the authority which the President of the Brazilian Republic has assumed? This a

Republic, gentlemen! It may yet be one, if you re-establish the sway of constitutional rights.

You behold, gentlemen, the yawning chasm of absurdity, to which we are led by this aduiteration of the law for the sake of monstrous iniquities.

So great is this transgression of legality that, in justice to the transgressors, we must suppose that they would not have perpetrated the crime, if they had had the slightest idea of what they were sacrificing. Indulgence towards them requires us to believe that they know not what they do.

These agents of power are essentially ignorant of the nature, extent and functions of the authority that they wield. They do not reflect that the Federal Constitution, when it placed " repressive measures " in the hands of the government, only sought to furnish it the means of overcoming a threatening crisis, by removing its elements until it should disappear. When a powerful conspiracy is discovered, and anarchy is detected, if its resources are greater than those of the government, are such as seriously to disquiet it, then the government may seize upon suspected persons, and segregate them, or remove them from the scene of danger or of conflict. But, when they are scattered and impotent, the situation that justifies repressive measures, ceases to exist, and every one is restored to the enjoyment of his personal rights.

If they are really criminals, and if there are proofs against them, showing them to be guilty of crimes classified in the code, the political action of the Executive terminates and the judicial mission of the courts then begins. The rôle of the government is that of a formidable obstacle suddenly thrust into the machinery of the plot, unexpectedly paralyzing its action, separating its parts, destroying its secrecy, frustrating its purposes, tearing to pieces, scattering and inutilizing its instruments. After the blast of authority upon this entity, whose force consisted in its secrecy, has separated its members; *disjecta membra*, there is no way of reconstructing it. Whatever still remains on the surface, is nothing but the flotsam and jetsam of a shipwrecked idea, whose recomposition would be still more difficult than the unsuccessful attempt.

And if in the midst of the wreck there should be discovered any positive crime against the penal law, these cases belong to the courts.

The present case well exemplifies this truth. The political object of martial law, the object of repressive measures, has been more than perfectly accomplished. The plan of subversion, if it ever existed, has vanished.

It has not only disappeared, but it is demoralized. To revive it now would be a task a hundred times more arduous than that which, in consequence of a slight effort on the part of the government, produced such bitter fruits for those who were engaged therein. What further interest has society in the suffering of the impotent? In the punishment of criminals it is indeed interested; but for this very reason it is necessary to remove the administrative interdict, thas has been placed upon them, so that the courts may be allowed to perform their duty.

These prisoners were either guilty of the crime attributed to them, or they are victims of an odious slander. Are they guilty? No one can say, until the courts can decide. Are they innocent? Then it is necessary for the courts to rehabilitate them; for the rehabilitation of persecuted innocence is the greatest of moral interests in a christian society. In either case judgment is indispensable, and trial is urgent. No political authority has the right to postpone it.

This government, which considers itself fit for the calm mission of distributing justice, a mission of kindness, of protection to innocence, of impartiality between militant hatreds in the struggle for power, displays, in the art with which it has aggravated the sufferings of its victims, feelings of rancor that are a disgrace to Brazilian mercy. Legislation regulating martial law, emphasizing its character as a preventive and police measure, seeks to diminish in every way the harshness of these comminations, that may readily be converted into instruments of persecution of political opponents. The Constitution of Ecuador (Art. 61) does not permit a greater distance than 250 kilometres (42 leagues) between the place of banishment and the residence of the banished person. That of Bolivia (Art. 27) limits the distance to 50 leagues, and requires that the place of banishment shall be healthy (*ni lugares malsanos*). The decree of April 12th, however, under the influence of a fixed idea, which attributes to the government a character incompatible with its nature, that of judge and punisher, makes an ostentatious display of needless cruelty. It selects places of banishment, whose climate is death to

southerners, lowlands that are periodically covered with alluvial deposits full of malarial poison, wilds inhabited only by the garrisons of the penal stations and by savages of the forest, in remote regions, like that of Cucuhy, which it takes a month to reach after a journey through unhealthy districts, and which is 500 leagues beyond the capital of Pará.

This is a violation of law, blackened with the gall of rancor.

Personal pettifogging cannot be hidden in this excess of unpitying harshness, which is as antagonistic to the Constitution, as it is to humanity. The decree of April 10th had already drawn the curtain from the dark and foul recesses of sinister intentions. There we find explicitly declared, as one of the causes of the official act, the fact of there "being among the authors and promoters of sedition members of the national Congress entitled to immunities." It is no uncommon thing to find in malice imprudent betrayal of its purposes! The government is caught on one of the horns of this dilemma: either there was an internal disturbance jeopardizing the Republic, and the Executive had no other ground to allege for its measure, since the law only admits this and acknowledges no other; or, if this ground, duly characterized, did not actually exist, it was not lawful for the government to suspend guarantees on some other pretext. In either of the two cases the involving of members of Congress in the matter is an irrelevant circumstance, which neither justifies, nor condemns the action of the government. If there were no internal disturbances, this circumstance is insufficient; if there really were internal disturbances, this circumstance is superfluous. Why, then, should it be mentioned in the decree, unless it is one of those involuntary confessions, which conscience sometimes extorts, shedding an instantaneous ray of light on the injustice that has been committed? Why does it there appear, save as an unconscious acknowledgement of the necessity felt by the government for dismembering Congress, in order to turn the scale of votes in its favor?

The petitioner, gentlemen, believes that he has more than demonstrated that the political authority of the government over the prisoners disappeared with the cessation of martial law, and that they are now demanded by the courts of justice in order that they may either prove their innocence, or be convicted of their crime.

Remove, then, the illegitimate obstacle, that separates the prisoners from their constitutional judges. Restore them by a writ of *habeas corpus* to the community of freemen.

Resting on this basis, your decision might avoid the constitutional question discussed in the two preceding parts of this petition. For to enquire, gentlemen, whether the effects of the repressive measures, adopted during the existence of martial law, cease with its cessation, or extend beyond, it is not necessary to enter into the question for the purpose of learning whether those measures were legitimate or illegitimate and consequently whether the acts committed under cover thereof are valid, or not. Even if the suspension of guarantees were constitutional, this question, no matter how it may be settled, does not exclude that of examining whether the persons arrested by the government during the existence of martial law are thereby converted into its penal slaves.

But, gentlemen, the petitioner has the right to hope that you will not recoil before the other question: the constitutional question. If the abuses resulting from the faculty of the Executive "may readily lead to an intolerable despotism," in the words of one of the most earnest advocates of this institution [1], it is evident that *habeas corpus* and the competence of the courts to investigate the constitutional question are absolutely indispensable.

The very authors that deny this competence are forced to acknowledge it in the hypothesis (which is that we are now considering) of abuses committed by the Executive, *such as that of imposing penalties.*

This is the case with Alcorta, who devoted a third of his work (more than 130 large pages) to defending martial law. He peremptorily maintains that, "when martial law is declared, the citizen has no resource against the measures adopted under the cover thereof." [2] But what if the measures adopted are not such as have been authorized? The Argentine publicist considers this possibility. "It may happen," he says, "that the Executive, adopting measures *not authorized, may condemn and impose penalties.*" [3] (Note well "condemn and impose penalties." This is exactly what is done by decree of April 12th and what the government,

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1 ALCORTA : *Op. cit.*, p. 266.

2 Ibid : p. 280.

3 Ibid : p. 279.

in the *Diario Official* of the 16th, declares that it has a right to do). In such a case can the courts interfere, or can they not ?

In such a case, answers Alcorta himself, [1] "the citizen has to find some way of immediately vindicating his rights, and *it seems logical that the courts of justice should protect him. Y entonces parece logico sean los tribunales de justicia los que deben ampararle.*"

And he adds :

"El poder administrador hará ó non effectiva la resolucion judicial ; *peró entonces su responsabilidad será mas que nunca evidente, y quedarán reservados al particular los medios de conseguirla en el momiento oportuno.*" [2]

Certainly, gentlemen, you will not forget that the power, with which you are dignified, of refusing to sanction infractions of the Federal charter, "is a duty rather than a power." [3]

The great American judge, Story, one of the pillars of American jurisprudence, wrote the following words which at every meeting of this court should be read as its gospel:

"Fortunately for the people, the function of the judiciary, in deciding on constitutional questions, is not one, which it is at liberty to decline. While it is bound not to take jurisdiction, if it should not, it is equally true that it must take jurisdiction, if it should. It cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. It cannot pass it by, because it is doubtful. With whatever doubt, with whatever difficulties a case may be attended, it must decide it, when it arises in judgment. *It has no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.*" [4]

To surround the present government with an aureola of irresponsibility it is now the fashion to preach the doctrine, offensive to the Republic and at utter variance with the Constitution, that the Executive has been clothed by Congress, through a vote of unlimited confidence, with indefinite powers for good or evil. You well know, gentle-

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1 Ibid : p 280.

2 Ibid : And he quotes TORRES CAICEDO, *Mis edéas y mis principios*, tom. 1, p. 51.

3 BRYCE : *American Commomwealths*, V. I, p. 337.

4 STORY : *Commentaries*, V. II, p. 385, § 1576.

men that this manner of interpreting the action of Congress is a slander on that body. You well know that, even if such a statement were true, it is your mission to veto such aberrations, when they occur. You well know that our constitutional system is as much opposed to a legislative as to an administrative dictatorship. You well know that it is an essential principle of our system, that there is no emergency, that can justify the assumption of powers not granted by the federal charter. [1] You well know that the legislature has not the faculty of changing the Constitution and that consequently it cannot delegate that faculty to the Executive. You well know that "all delegations are prohibited in republican government." [2] And certainly, if sophisms like these should pass the threshold of this court, they would wreck on the impassibleness, with which you guard the supreme law of the Republic, confided to the vigilance of this court as a protection from the encroachments of governments and the complacency of assemblies.

But, if you deprive yourself of the guarantee of *habeas corpus* against the excesses of martial law, against its attacks on constitutional rights, there can be no doubt, in view of the heroic audacity with which the Executive has made the present memorable experiment, that dictatorship, now masked under the appearance of state policy, will become the ordinary system of administration among us. And this will naturally occur, because with the suspension of guarantees, as was said by Cavour, there is no one, that is not able to govern.

With this false key to every difficulty in the hands of the Executive, the republican government would be a most solemn confirmation of this old truth: *Corruptio optimi pessima.* Those who are the most interested in preserving the country from the acclimation of this vice of Spanish republics, are the conservative elements, of the nation,—property, labor and justice. Those who in the name of these element applaud the usurpation, when it makes a pretext of disorder, to tread the law under foot, forget that between anarchy in the streets and anarchy in the system of social rights and duties, between the surprises of revolt and the victories of dictator-

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1 CHARLES A KENT: *Constitutional Development of the United States as influenced by the Decisions of the Supreme Court since* 1865.

2 ALCORTA: Op. cit., p. 255

ship, there is no difference save that between servile indiscipline and resigned servitude. If the principal ambition of the pacific and producing classes, of industry and of wealth, of intelligence and of labor, is confidence in the stability of the future, there is nothing more incompatible with the possession of this treasure than the spectacle of a society that abdicates in favor of violence, and, governing itself by exceptional measures, confesses that its institutions do not offer means of self-preservation under normal circumstances.

Judges of the Federal Supreme Court.

Eleven members of the National Congress, unconstitutionally torn from the seats in which the People and the States had placed them in the Legislative Chambers, practically expelled from the posts confided to them by the voice of their constituents, represent the virtual abolition of the Republican Constitution by the Executive.

The granting of *habeas corpus*, to which they and their companions in misfortune are entitled, will be the revival of dejected and discouraged Brazilian society.

Gentlemen, replace the rule of violence by that of law, and you will have pointed out to the country the path of safety, which is that of constitutional legality under the protection of the courts.

It is for this, gentlemen, that your petitioner asks, when he applies for *habeas corpus*; and he assures you on his word of honor that all that he alleges is true.

Rio de Janeiro, April 18, 1892.

RUY BARBOSA.