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THE JURISPRUDENCE OF THE SUPREMO TRIBUNAL FEDERAL IN BRAZIL'S FIRST REPUBLICAN DECADE AND THE STATES OF SIEGE (1889-1898)

A JURISPRUDÊNCIA DO SUPREMO TRIBUNAL FEDERAL NA PRIMEIRA DÉCADA REPUBLICANA BRASILEIRA E OS ESTADOS DE SÍTIO (1889-1898)

Tatiana de Souza Castro
Università degli studi di Macerata

Abstract English: In Brazil's first republican decade (1889-1899) several difficulties were associated with the birth of the Republic and the stabilization of this new form of government. The very construction of a new Judicial Power. The new Republican Judiciary had to face in the early years successive declarations of a state of siege calling on it to act and respond on the issue, since the Judiciary had the role of guardian of the Constitution and protector of individual rights, particularly the newly created Supreme Court. The Judiciary was therefore mobilized, through habeas corpus petitions, to take a position on the suspension of constitutional guarantees, the constitutionality of the state of siege and its effects. We have analyzed three important points: 1) how the Judiciary acted in relation to the other Powers of the State, particularly the Executive; 2) how it did or did not protect individual liberties during the period of exception; and 3) how the Judiciary exercised its role as guardian of the Constitution by curbing abuses of power. In analyzing this decade, we note the existence of a permanent underlying theme: the political and the legal, the conflict between what is political and what is legal, the difficulty of not mixing the issues and imposing limits on each. The new Judiciary thus sought to distance itself from politics and align itself with its role as guardian of the Constitution.

Key words: Jurisprudence, states of siege, individual rights, Supreme Tribunal Federal, Brazilian Judicial Power.

Resumo: Na primeira década republicana do Brasil (1889-1899), várias foram as dificuldades associadas ao nascimento da República e à estabilização dessa nova forma de governo. A própria construção de um novo Poder Judiciário. O novo Poder Judiciário republicano teve que enfrentar, nos primeiros anos, sucessivas declarações de estado de sítio que o convocavam a agir e responder sobre a questão, uma vez que ao Poder Judiciário cabia o papel de guardião da Constituição e protetor dos direitos individuais, em especial ao recém-criado Supremo Tribunal Federal. O Poder Judiciário foi, portanto, mobilizado, por meio de pedidos de habeas corpus, a se posicionar sobre a suspensão das garantias constitucionais, a constitucionalidade do estado de sítio e seus efeitos.

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Analisamos três pontos importantes: 1) como o Judiciário atuou em relação aos demais Poderes do Estado, em especial o Executivo; 2) como protegeu ou não as liberdades individuais durante o período de exceção; e 3) como o Judiciário exerceu seu papel de guardião da Constituição ao coibir os abusos de poder. Ao analisarmos essa década, notamos a existência de um tema de fundo permanente: o político e o jurídico, o conflito entre o que é político e o que é jurídico, a dificuldade de não misturar as questões e impor limites a cada uma delas. O novo Poder Judiciário procurou, assim, distanciar-se da política e alinhar-se com o seu papel de guardião da Constituição.

Palavras-chave: Jurisprudência; estado de sítio; direitos individuais; Supremo Tribunal Federal; Poder Judiciário brasileiro.

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1. Introduction

At the end of the 19th century, the Republic was proclaimed in Brazil[1], putting an end to the imperial period. With the republican political regime, the Brazilian state was made up of three independent branches: the Executive, the Judiciary and the Legislative. As a result, the Moderator branch exercised by the emperor was abolished. These new branches of government would act for the first time without the scrutiny of a fourth branch, but this balance between branches and this newly acquired autonomy would be established over the years.

The period between 1889 and 1930 was known as the First Republic and was marked by strong political instability. The first republican decade and the last of the 19th century – 1889-1899 – is a prime example of the challenges that would be faced until 1930. Brazil's First Republic began with a military coup in 1889 and ended with another military coup in 1930[2].

The first republican decade can be analyzed as a period of transition from the Empire to the Republic, in which new mechanisms and institutions were created and, as part of a transitional period, encountered many challenges in establishing and consolidating themselves. To deal with the strong political instability, the government used several declarations of a state of siege to guarantee public order.

The state of siege was declared by all three presidents who governed in that decade. This practice also recurred more and more in the following years, reaching its peak in the last decade of the First Republic, the 1920s[3].

In this article we will focus on the role of the new republican judiciary. We consider the periods when the state of siege is in force to be a very interesting phenomenological

[1] Napolitano, 2017; Linhares, 2016; Ferreira e Delgado, 2013; Schwarcz, 2012; Holanda, 2005; Costa, 1999; Mattos, 1989; Fausto, 1977.

[2] Revista Estudos Históricos, v.33, n.71, 2020; Oliveira, 1980; Fausto, 1970.

[3] Castro e Pinto, 2019; Castro, 2018.

laboratory for understanding the actions of the Judiciary, specifically the *Supremo Tribunal Federal*[4], in exercising its role as guardian of the Constitution.

We understand the state of siege as a *tempo ascrittivo*[5], as a special condition of law that allows us to understand transformations in the legal space. The period of exception would be a period of impermanence and therefore a very interesting temporal condition for analyzing the legal space.

In addition, we consider the *evenemenziale*[6] character of the exception, that is, the exception as an event that destroys reality and forces it to reorganize itself and acquire a new form. As Canullo argues, the exception establishes a new *a priori*[7], which is fundamental for us to understand the actions of the judiciary when asked to act during a state of siege.

It can be said that the regulations on the functioning of the state of siege, i.e. the definition of what was or was not provided for, were not very well defined. Since the first declaration in 1891, various doubts about the state of siege have been submitted to the Supreme Court through *habeas corpus* petitions[8].

By analyzing these *habeas corpus* requests to the Supreme Court during the state of siege, it is possible to understand how individual rights were protected during this period when the regulations were unclear.

We consider the strong performance of the Federal Supreme Court in judging these requests, producing jurisprudential guidelines that contributed to filling in these gaps about what could and could not be done during the state of siege.

Our aim is therefore to carry out a jurisprudential analysis of the main themes introduced at the STF through the *habeas corpus* cases mentioned in the legal journals of the time.

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[4] From now on also abbreviated as STF.

[5] Meccarelli «(...) un tempo di tipo ascrittivo (…) un tempo che incide sui contenuti che il diritto assume. (…) una speciale condizione del diritto, indica sincronie e fasi all'interno della linea che incide sui contenuti che il diritto assume.» (Meccarelli, 2018, 18)

[6] Canullo: «(...) riteniamo che una filosofia che cerchi il 'perché' (a priori) dell'eccezione (e non soltanto il suo 'che cosa' – a posteriori) al di qua della metafisica finisce con lo scoprirsi alla confluenza di un ambito di effettività in una soglia presso la quale deve fermarsi, cedendo il passo ad altre riflessioni specifiche. È la soglia che proponiamo di individuare nell'*evenemenzialità* dell'eccezione, ossia in quel suo carattere di evento, dove l'a priori per il quale l'a posteriori è, non si dà indipendentemente dall'a posteriori stesso.» (Canullo, 2011, 133)

[7] Canullo: «Se una concezione evenemenziale dell'eccezione è possibile, se è possibile come contraccolpo a posteriore che rece in sé il proprio a priori, l'evento sembra rispettarne un tratto già auspicato – almeno ci sembra – da Schmitt, ossia il sua imprevedibile accadere che costringe – aggiungiamo noi – a 'ordinare' diversamente e non a riconoscerla sulla base del medesimo ordine che le preesiste, invocato per il suo riconoscimento e la sua soluzione.» (Canullo, 2011, 140)

[8] Castro, 2018; Koerner, 2010; Ribeiro, 2010; Galvão Junior, 2005; Koerner, 1999; Rodrigues, 1991; Miranda, 1961.

During the period analyzed, the main legal journal published was *O Direito*[9]. After analyzing the volumes published during the states of siege[10], we identified the five themes that will be analyzed in this study. 1) Whether or not the STF suspends the trial of *habeas corpus* during a state of siege; 2) the constitutionality of the declaration of a state of siege; 3) the jurisdiction competent to try political crimes; 4) the constitutional guarantee of parliamentary immunity; 5) whether or not the effects of a state of siege cease after its conclusion.

We emphasize that the background to this jurisprudential study is the permanent confrontation between the *legal* and the *political*. This clash between these two fields directly touches on the new structure of separation between the Powers recently established with the Republic. We therefore consider it appropriate to use this debate as a lens through which to observe the Supreme Court. And, therefore, how this was reflected in the separation between *political judgments* and *legal judgments*.

In this way, we will analyze which issues have maintained the same jurisprudential orientation throughout that decade and which have undergone changes.

2. Constant jurisprudential guidelines

In 1891, the state of siege was declared for the first time by the President of the Executive, *Marechal Deodoro da Fonseca*, through the decree of November 3, in which Article 1 established the state of siege in the federal capital, then the city of Rio de Janeiro and in the city of Niterói, as well as declaring the suspension of constitutional guarantees for a period of two months[11]. The *habeas corpus* was a constitutional guarantee enshrined in article 72, paragraph 22 of the 1891 Constitution[12].

In Brazil, this English institute had broader characteristics. The Brazilian *habeas corpus* guaranteed the protection of the right of locomotion, but not only that, the instrument could be requested whenever the individual suffered or felt threatened with suffering any violence or coercion due to illegality or abuse of power.

The first jurisprudential guideline found refers to the judgment of *habeas corpus* requests during the state of siege. Despite the fact that the decree instituting the state of siege established the suspension of constitutional guarantees, *habeas corpus* requests continued to be judged. The judges of the Federal Supreme Court presented an interpretation that exemplifies the great importance and

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[9] Petit, 2022; Formiga, 2010;

[10] O Direito, v.56, 1891; v.58, 59, 1892; v.62, 1893; vol. 75,76,77, 1898.

[11] Brasil, Diario official 04/11/1891.

[12] «Art. 72 § 22 - Dar-se-á o *habeas corpus,* sempre que o indivíduo sofrer ou se achar em iminente perigo de sofrer violência ou coação por ilegalidade ou abuso de poder». (Brasil, 1891)

contribution of jurisprudence in understanding what could and could not happen during the state of siege.

In the judgment in *habeas corpus* no. 175[13], the STF judges argued that they understood the provisions of the decree of November 3, 1891, and regarding the suspension of constitutional guarantees, they understood that they would only be suspended when it came to constraints motivated by political issues.

The STF judges understood that the suspension provided for by the decree did not include *habeas corpus* requests for common crimes, but only those from administrative authorities for political reasons. Therefore, the STF would continue to judge *habeas corpus* requests if they did not involve political crimes.

So, we see that, at first, the STF sought to distance itself from what was political, continuing to judge requests relating to ordinary crimes. However, the Court continued to hear *habeas corpus* petitions relating to the state of siege. And we note that over the years, until the end of the First Republic, the STF began to judge these requests, but in fact never granted a *habeas corpus* request to release a political prisoner while the state of siege was in force.

When we analyze legal doctrine, we find some reflections that align with this jurisprudential orientation of the STF. In general, jurists have analyzed which constitutional guarantees are suspended during a state of siege[14].

We would point out that the legal doctrine was produced after the jurisprudential guidelines and generally absorbed the jurisprudence.

We can see from this jurisprudential guidance the importance of the interpretation of the STF judges in understanding the practice of the state of siege. The STF understood that the writ of *habeas corpus* was not completely suspended, because they interpreted that its suspension was linked to the motivation of the constraint, i.e. whether it was for political reasons or not.

The definition of political crime at that time was quite broad and abstract, but some articles of the Constitution can be analyzed for this purpose, as STF judge

[13] «*Habeas-Corpus* – Não se acha a petição de *habeas-corpus* comprehendida nas disposições do Dec. de 3 de novembro de 1891, que suspendeu as garantias constitucionais; e della conhece o Tribunal, por se não tratar de prizão ou ameaça de constrangimento illegal da parte da autoridade administrativa por motivos políticos». (O Direito, v.56, 1891, 611)

[14] Milton, 1895; Barbalho 1902 e 1904; Menezes, 1935; Rocha, 1914; Bastos, 1914; Castro, 1914; Gonçalves, 1917; Castro, 1918; Santos, 1918; Doria, 1926; Leal, 1925. We note that the dominant line of argument reflected the decision in HC 175. The doctrine considered that *habeas corpus* could be granted during the state of siege if it was for common crimes and not for issues related to the state of siege.

José Hygino[15] suggested. In addition, in legal doctrine, João Vieira de Araújo[16] highlighted the influence of the Italian criminal code on the Brazilian criminal code, pointing out that political crime could be defined as addressed in Italian doctrine according to Lombroso Laschi, Carelli and Carrara[17].

We conclude by considering that this was the first jurisprudential guideline established by the STF on the state of siege. This jurisprudential orientation was maintained in future declarations of a state of siege. Thus, we can state that the

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[15] As STF minister José Hygino pointed out: «*A Constituição, art.60, let. I, incluio na competencia da justiça federal o processo dos crimes politicos, e deixou á lei ordinaria o definil-os; definição necessaria, porque o conceito do crime político é controvertido e varia de legislação à legislação. Mas em vez de definir taes crimes por uma formula geral, a lei ordinaria, talvez convencida de que omnis definitio periculosa est, preferio enumerar os crimes qualificados no Cod. Penal que devem ser considerados e tratados como politicos.»* (O Direito, v.75, 1898, 484) No Código penal de 1890, estabelecido através do decreto n.847, seriam interpretados como crimes políticos os descritos entre os art.87 ao 123. Segundo a definição mencionada por ministros do STF em um acórdão de um processo crime por conflito de jurisdição (n.72 de 1898) também seriam considerados os art.47 ao 55 da lei n.35 de 1892. (O Direito, v.75, 1898, 451) We find this same definition in the doctrine, in the study commented on by Oscar Macedo Soares, *Codigo Penal da Republica dos Estados Unidos do Brasil,* 7 ed., 1910. «São crimes políticos incluídos no art.60, letra i da Const. Fed. e referidos no dec.848 de Outubro de 1890, art.15, letra i, cujo processo compete ao juiz seccional e julgamento ao tribunal de jury federal, nos termos da lei n.221 de 20 de setembro de 1894, art.12 §§ 1 e 20 n.1; e dos quaes tem se occupado o Supr. Trib. Fed. decidindo: 1 que são crimes politicos da competencia dos juizes e tribunaes federaes (Const. Fed., art.60, i; dec.848 de 1890, art.15, i) os que se acham previstos nos art.87 a 123 do Cod. Pen., e arts. 47 a 55 da lei n.35 de 26 de janeiro de 1892; (...)» (Soares, 1910,204)

[16] Araújo, 1901.

[17] «todo atentado violento contra o misoneismo politico, religioso, social, etc., da maioria contra o sistema de governo que delle resulta e as pessoas que são seus representantes officiaes.» Araujo ressalta ainda que esses crimes podem se reduzir em três figuras fundamentais: a traição, crime de lesa nação ou contra a pátria e as agressões contra a Constituição ou poderes políticos do Estado. Destaca que Carelli criticou a impropriedade dos termos «crimes contra a patria» porque esses poderiam ser cometidos também por estrangeiros e que de fato o código penal brasileiro é lacunoso em suas disposições. No entanto, Majno (1890-99) teria observado que as expressões «crimes contra a patria» tomadas no sentido objetivo como no código italiano são exatas. E conclui que o código e o projeto de 1896 evitaram outros projetos de 1893 e 1897, seguindo como exemplo o código italiano, como notam Carrara (1839) e outros. Pois: «Com a definição do cod. Italiano que seguimos, si os actos preparatórios não poder ser punidos, entretanto basta qualquer acto do executivo para caracterizar o crime, sem necessidade de exigir que elle tenha chegado á phase da tentativa ou do crime frustrado.» (1901, 28-29) We can thus notice the mobilization of the Italian penal code of 1889 in Araújo's references to interpret the Brazilian penal code of 1890. Araújo always emphasizes that the Italian penal code was the source of our Brazilian one. (Araújo, 1901,31)

legal orientation of not judging *habeas corpus* requests relating to political issues during a state of siege began with the judgment in *habeas corpus* no. 175 in 1891.

According to Article 80[18] of the 1891 Constitution, a state of siege could be declared in any part of the Union's territory to guarantee the security of the Republic, suspending constitutional guarantees for a set period when foreign aggression or internal commotion occurred. Also, according to the Constitution, the National Congress – Art. 34, 21[19] – and the Executive – Art. 48, 15[20] – were responsible for decreeing a state of siege. However, the Executive's power to declare a siege was restricted to the condition that Congress was not in session at the time of the emergency and, consequently, this declaration had to be approved by Congress when it met. Therefore, it was up to Congress to declare the siege and approve or suspend it when declared by the Executive.

The second jurisprudential guideline we analyzed refers to the STF's lack of competence to judge the constitutionality of the state of siege. In *habeas corpus* petition No. 300[21], requested by lawyer Ruy Barbosa, the STF judges were asked to rule on the constitutionality of the 1892[22] declaration of a state of siege, among other issues. This *habeas corpus* and its ruling were a landmark in jurisprudence regarding the actions of the Supreme Court during the state of siege. The great repercussions of this *habeas corpus* were seen in the publications of the legal journals of the time, in the newspapers and even in the publication of a book afterwards by the petitioning lawyer, Ruy Barbosa[23].

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[18] «Art 80 - Poder-se-á declarar em estado de sítio qualquer parte do território da União, suspendendo-se aí as garantias constitucionais por tempo determinado quando a segurança da República o exigir, em caso de agressão estrangeira, ou comoção intestina (art. 34, nº 21).§ 1º - Não se achando reunido o Congresso e correndo a Pátria iminente perigo, exercerá essa atribuição o Poder Executivo federal (art. 48, nº 15). § 2º - Este, porém, durante o estado de sítio, restringir-se-á às medidas de repressão contra as pessoas a impor: 1º) a detenção em lugar não destinado aos réus de crimes comuns; 2º) o desterro para outros sítios do território nacional. § 3º - Logo que se reunir o Congresso, o Presidente da República lhe relatará, motivando-as, as medidas de exceção que houverem sido tomadas. § 4º - As autoridades que tenham ordenado tais medidas são responsáveis pelos abusos cometidos». (Brasil, 1891)

[19] «Art. 34 - Compete privativamente ao Congresso Nacional: 21º) declarar em estado de sítio um ou mais pontos do território nacional, na emergência de agressão por forças estrangeiras ou de comoção interna, e aprovar ou suspender o sítio que houver sido declarado pelo Poder Executivo, ou seus agentes responsáveis, na ausência do Congresso»; (Brasil, 1891)

[20] «Art. 48 Compete privativamente ao Presidente da República: 15º) declarar por si, ou seus agentes responsáveis, o estado de sítio em qualquer ponto do território nacional nos casos, de agressão estrangeira, ou grave comoção intestina (art. 6º, nº 3; art. 34, nº [21] e art. 80)». (Brasil, 1891)

[21] Revista O Direito, v. 58, 59, 1892.

[22] On the declaration of a state of siege in 1892 see: Naud, 1965.

[23] Jornal O Paiz; Revista O Direito, v. 58, 59, 1892; Barbosa, 1892.

According to Ruy Barbosa, the Judiciary had to take a stand on a series of "mistakes" that were being made by the Executive with the state of siege, including the declaration of the state of siege itself, which was unconstitutional because there had been no intestinal commotion to motivate it, as provided for in article 80 of the 1891 Constitution. Barbosa concluded that there were three conditions for the constitutionality of the siege: «Commoção intestina; Perigo imminente, determinado pela commoção, ou pelas causas que a produzires; Extensão tal desse perigo, que possa pôr em risco a pátria, a segurança da Republica;»[24]

In this way, the lawyer highlighted mistakes made by the Executive and understood that the STF was the competent court to protect the country from the abuses committed by the Executive during the period of exception[25]. However, in the judgment in *habeas corpus* no. 300, we identified the STF's stance in reaffirming even more emphatically its distance from the political issue. The Court declared itself incompetent to judge the constitutionality of the declaration of a state of siege.

According to Petersen, this was the first time that the Supreme Court was asked to exercise control over constitutionality. For the author, Barbosa tried to introduce a new language into Brazilian constitutional law[26].

In the judgment issued by the STF judges, they emphasized the separation of the three branches of government and the role of each of them in relation to the state of siege under the 1891 Constitution. They considered art. 80 § 3 and art. 34 § 21 of the Constitution to maintain that it was up to Congress, «privativamente», to approve or disapprove the declaration of siege by the President of the Republic, as well as his exceptional measures. Thus, based on the Constitution, the STF judges affirmed that it was up to the legislature to oversee the executive and not the judiciary. Furthermore, the judges argued that judging the constitutionality of the declaration of a state of siege was a «juízo político» admissible to Congress, a judgment that would not be part of the judiciary because it was a «questão política»[27]. Once again we see the debate between the political and the legal

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[24] O Direito, v.58, 1892, 278.

[25] «*Primeira:* O estado de sitio não observou as condições essenciaes de constitucionalidade; pelo que, são juridicamente invalidas as medidas de repressão adoptadas no seo decurso; *Segunda:* Dessa inconstitucionalidade o Supremo Tribunal Federal é o competente para conhecer; (...)».(O Direito, v.58, 1892, 262).

[26] Petersen, 2020, 50-51.

[27] «Considerando, portanto, que, antes do juízo político do Congresso, não pode o poder judicial apreciar o uso que fez o presidente da Republica daquella attribuição constitucional, e que, também, *não é da índole do Supremo Tribunal Federal envolver-se nas funcções políticas do poder executivo ou legislativo*; Considerando que, *ainda quando na situação creada pelo estado de sítio, estejão ou possão estar envolvidos alguns direitos individuaes, esta circumstancia não habilita o poder judicial a intervir para nullificar as medidas de segurança decretadas pelo presidente da Republica*, visto *ser impossivel isolar*

and, as in the judgment in *habeas corpus* no. 175, the STF reaffirmed its distance from the political issue. The STF maintained its jurisprudential orientation of recognizing itself as incompetent to judge the constitutionality of the declaration of a state of siege throughout the First Republic.

Legal science[28], produced after the first republican decade, received the jurisprudential guidance produced by the Court[29]. According to the doctrine, the competence to judge the constitutionality of the decree of a state of siege would lie with Congress and the Judiciary would be responsible for judging any abuses practiced by the competent authorities during the state of siege.

We can conclude that in the judgment in *habeas corpus* no. 300, the STF reaffirmed its position of distancing itself from anything political. The Court chose not to judge the political, the political functions or the political issue itself. The Court exempted itself from controlling this constitutionality because it was a political judgment and not a legal one, which is the competence of the legislature.

We can see the reaffirmation of this jurisprudential orientation in the judgment of *habeas corpus* n.512 of 1894[30]. The STF denied the request, referring the decision in *habeas corpus* no. 300 in which it was defined that only Congress was responsible for approving or not approving a state of siege. Thus, the judgment in HC[31] 512[32], which came two years after HC 300, demonstrates the importance of the jurisprudence produced in 1892. We have identified the consolidation of the jurisprudence produced with HC 300, which was mobilized in other judgments in which the Court followed the same stance.

The third jurisprudential guideline established in this decade, which also occurred in subsequent years, concerned the competence of the federal courts to judge political crimes. Several states of siege were marked by the presence of military uprisings, often the presidents of the Executive were military, so the conflict over the competent jurisdiction to judge these soldiers was a matter of debate.

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esses direitos da questão politica, que os envolve e comprehende, salvo si unicamente tratar-se de punir os abusos dos agentes subalternos na execução das mesmas medidas, porque a esses agentes não se estende a necessidade do voto político do Congresso.» (grifos meus) (O Direito, v.58, 1892, 303)

[28] Milton, 1898; Barbalho, 1902 ; Ayres Rocha, 1914 ; Castro,1914 ; Sampaio Doria, 1926.

[29] As Sampaio Doria rightly pointed out, this political judgment would fall to Congress: «E'pois o Congresso o juiz dos actos politicos praticados pelo governo durante o sitio, e em virtude delle. O congresso póde approvar, como pode responsabilizar o Presidente da Republica pelos actos que tenha praticado. Mas, o Congresso julga antes da utilidade, que da legalidade de taes actos.» (Sampaio Doria, 1926, 262)

[30] «*Habeas-corpus* – E' negado ao paciente cuja legalidade da prisão depende da approvação ou não do estado de sitio cuja decisão só ao Congresso compete dar.» (O Direito, v.65, 1894, 219)

[31] From now on *habeas corpus* will be abbreviated as HC.

[32] HC is the abbreviation of *habeas corpus.*

In 1893, the state of siege was declared again and we found *habeas corpus* requests for political prisoners detained on that occasion who claimed to be under military jurisdiction even though they were civilians accused of a political crime.

We found two *habeas corpus* petitions concerning civilians detained for political crimes and being tried by a military court. In the first case, the *habeas corpus* in defense of Luiz Moreaux was denied[33]. The STF argued that it was a political crime and therefore would not be granted. However, some ministers voted against it, such as Hyginio and Almeida, who argued that the civilian patient could not be subject to military jurisdiction. The judge Amphilophio also supported this argument, claiming that if a civilian were to be tried by the military, it would be an exception jurisdiction, which could not be extended under Article 77 of the Constitution, and that not even a state of siege allowed military jurisdiction over civilians[34].

In another *habeas corpus* petition requested by a bachelor who had been arrested for a political crime, we identified a position of the STF regarding military jurisdiction over political crimes, which indicates a certain confluence with the votes of the judges in the *habeas corpus* previously analyzed.

The Supremo Tribunal Federal produced a new jurisprudential guideline in the judgment of this *habeas corpus* stating that the military jurisdiction was incompetent to prosecute a civilian indicted for a political crime[35]. The jurisdiction competent to try political crimes would be the federal jurisdiction while the military jurisdiction was a special jurisdiction that was instituted for a certain class and therefore restricted and non-extendable[36].

The justification given by the judges in their ruling was wide-ranging. They cited decrees and laws of the Empire to argue that the Court could not allow such an extension of jurisdiction to the military forum, since this was not a war. They also argued that civilians could only be subject to military jurisdiction when the crime committed was of a military nature.

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[33] «*Habeas-corpus* – Não se concede ao paciente preso por motivo politico e por ficar esta medida suspensa durante o estado de sitio.» (O Direito, v.65, 1894, 71)

34 According to Judge Amphilophio: «(...) como confirma o texto do art. 77 da Constituição, quamdo exige como condições da competencia e funccionamento de uma tal jurisdicção: 1, a qualidade de militar no agente do delicto; 2, a natureza de militar do proprio acto ou omissão delictuosa. Nem a circumstancia do estado de sitio póde alterar os termos jurídicos da questão, já que a prorogação da jurisdicção militar a paizanos não é nem se confunde com qualquer das duas únicas medidas coercirtivas que o sitio póde autorisar, no tocante as pessoas, segundo o disposto no art. 80 da Constituição.» (O Direito, v. 65, 1894, 71-72)

[35] «*Habeas Corpus* – Sua concessão a preso político. Incompetencia do fôro militar para processar um civil indiciado em crime politico (conspiração). Intelligencia do Dec. 61 de 23 de outubro de 1838 e lei n.163 de 18 de janeiro de 1851.» (O Direito, v.65, 1894, 217)

[36] O Direito, v.65, 1894, 218.

In addition, the judges pointed out that the measures provided for during the state of siege were detention and banishment, but not the deprivation of being tried by the competent court. So this *habeas corpus* petition was granted in September 1894 when the state of siege was no longer in force, while the *habeas corpus* previously analyzed was decided during the state of siege. We think that the fact that the second *habeas corpus* was judged after the end of the state of siege may have contributed to its being granted.

We believe it is relevant to highlight the importance of this jurisprudential guidance on the jurisdiction to try political crimes, as it shows a new stance by the Court in placing limits on the measures practiced during the state of siege, or even in curbing certain abuses of political prisoners during and or after the state of siege. The conflict of jurisdiction was a crucial point for the STF to speak out in defense of the powers of the federal courts.

According to Decree No. 848 of 1890[37], which organized the federal judiciary before the promulgation of the 1891 Constitution[38], the competence of federal judges to try political crimes was defined - Art. 15, letter i. The 1891 Constitution also established the competence of federal judges and courts to try political crimes - Art. 60, letter i. As well as in the STF's internal regulations of 1891 – Art.15 §2 a) n.9[39] – which defined the STF's competence to try political crimes.

The STF's competence to judge political crimes was only changed in 1926 with the constitutional revision[40]. With this reform, the jurisdiction of federal judges and courts was altered and they were forbidden to hear any type of appeal against intervention in the states, the declaration of siege and the verification of powers, among other matters, according to the ninth text of art. 60 § 5[41].

The doctrine[42] also recognized the competence of the federal jurisdiction for political crimes and of the military jurisdiction for military crimes, following the jurisprudential orientation presented in the STF sentences. The judge Pedro Lessa also defended the federal court's jurisdiction to prosecute not only political crimes but also common crimes related to political crimes[43].

We conclude that in the first decade of the republic, a number of jurisprudential guidelines were established that would continue throughout the First Republic.

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[37] Available at: https://www.planalto.gov.br/ccivil_03/decreto/1851-1899/d848.htm Accessed on:20/06/2024.

[38] Available at:http://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm Accessed on:20/06/2024.

[39] Available at: https://portal.stf.jus.br/textos/verTexto.asp?servico=bibliotecaConsultaProdutoBibliotecaRI&pagina=regimentointerno1891principal Accessed on:20/06/2024.

[40] Castro e Santos, 2021; Castro e Santos, 2022 e Castro, 2023.

[41] Available at: https://www2.camara.leg.br/legin/fed/emecon_sn/1920-1929/emenda-constitucional-37426-3-setembro-1926-564078-publicacaooriginal-88097-pl.html Accessed on:20/06/2024.

[42] Milton, 1898.

[43] Lessa, 1915, 247.

Two of them clearly demonstrate the position of the Federal Supreme Court in distancing itself from the political issue: a) not judging *habeas corpus* petitions motivated by political issues during the state of siege and, b) not judging the constitutionality of the declaration of a state of siege as it would be a political judgment for Congress to make. On the other hand, the issue of the conflict of jurisdiction regarding the military forum showed the STF's position on the limits of exceptional measures with regard to the expansion of military jurisdiction to try political crimes. The Court established the jurisprudential guideline of recognizing its competence to judge political crimes by granting the *habeas corpus* so that the civilian accused of a political crime could be tried by the competent court and not by the military court.

We thus see points where the STF completely distanced itself from the political question – as it became known a posteriori as "a doutrina da questão política"[44] – and also, in an innovative way, some first indications that the Court would not allow the conflict of jurisdiction during the state of siege for the trial of political crimes.

It is now up to us to analyze the jurisprudential guidelines that changed during that decade and how this oscillation highlighted a point of contact between legal and political issues on the part of the Supreme Court.

3. Fluctuating case law guidelines

The clash between the political and the legal permeated all the decisions made by the Supreme Court during the state of siege. Throughout the first decade of the republic, the Court was frequently asked by *habeas corpus* petitions to take a position on the constitutionality of the state of siege and the effects of its measures. As we have seen, the Court upheld the constitutional guarantee of *habeas corpus*, even though constitutional guarantees were suspended during a state of siege. For the Court, *habeas corpus* could only not be used when it was politically motivated. As we will see below, at the end of the 1890s the Court began to take a stance on the abuses committed by the Executive and to impose limits on the exceptional measures applied. We maintain that it was precisely the effects of the state of siege that were the point of intersection between the political judgment and the legal judgment from which the Court initially tried to distance itself.

Therefore, despite the suspension of constitutional guarantees during a state of siege[45], the STF maintained the guarantee of *habeas corpus* and after much

[44] According to Peixoto, the political question doctrine was the most controversial issue in the Supreme Court's jurisprudence during that period, with which the Court maintained that the judgment on the legitimacy of the state of siege and its measures was a political judgment - by the Senate - which prevented a legal judgment - by the Supreme Court. (Peixoto, 2017,1095) (Teixeira, 2005).

[45] Art. 80 da Constituição de 1891. (Brasil, 1891)

debate, changed its position on the suspension of the constitutional guarantee of parliamentary immunity, concluding that it should be maintained even during a state of siege.

Parliamentary immunity[46] was a constitutional guarantee that granted deputies and senators immunity from arrest and prosecution without prior permission from the Chamber, except for flagrancy in a non-bailable crime. During the state of siege, several deputies and senators were arrested for political reasons and appealed to the Supreme Court through a *habeas corpus* petition claiming that they had parliamentary immunity and should therefore be released.

In *habeas corpus* no. 300, Ruy Barbosa claimed the constitutional guarantee of parliamentary immunity to protect deputy Dr. José Seabra, deputy Colonel Menna Barreto and admiral and senator Eduardo Wandenkolk. Barbosa argued that members of the legislature could not be detained due to parliamentary immunity, but the Supreme Court did not grant the request on other grounds and did not take a specific position on parliamentary immunity.

Six years later, in 1898, in *habeas corpus* case no. 1.073[47], the Supreme Court ruled that parliamentary immunity was guaranteed during a state of siege. This writ of *habeas corpus* was requested for senators and deputies for the same reason as the previous writs. This ruling can be considered as important as *habeas corpus* 300 in terms of jurisprudence on the state of siege. It can be said that in 1898 the judgment in *habeas corpus* no. 1.073 changed several jurisprudential guidelines that had been adopted since 1892 with the judgment in *habeas corpus* no. 300.

The STF judges stated that the declaration of a state of siege did not suspend the constitutional guarantee of parliamentary immunity and that this was inherent to the function of legislating and was extremely important for the autonomy and independence of the Legislative Branch. The judges were emphatic in stating that if the Executive branch exercised this power over members of the legislature, senators and deputies would be at the mercy of the Executive branch's discretion,

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[46] Art. 20 da Constituição de 1891: «Os Deputados e Senadores, desde que tiverem recebido diploma até a nova eleição, não poderão ser presos nem processados criminalmente, sem prévia licença de sua Câmara, salvo caso de flagrância em crime inafiançável. Neste caso, levado o processo até pronúncia exclusiva, a autoridade processante remeterá os autos à Câmara respectiva para resolver sobre a procedência da acusação, se o acusado não optar pelo julgamento imediato.» (Brasil, 1891)

[47] «As immunidades parlamentares não se suspendem com o estado de sitio. Com a cessação do estado de sitio, cessam todas as medidas de repressão durante elle tomadas pelo Poder Executivo. A competencia do Judiciario para conhecer de taes medidas, findo o sitio, não é excluida pela do Congresso para o julgamento politico dos agentes do Executivo. O desterro de que trata o art. 80 § 2º n.2 da Constituição não pode ser para logar do territorio nacional destinado a reos de crimes comuns» (O Direito, v.76, 1898, 413).

which would nullify the independence between the branches of government as laid down in the Constitution[48].

So, there was a change in the STF's jurisprudence compared to 1892. According to legal doctrine, the constitutional guarantees that could be suspended during a state of siege were those relating to individual rights and not constitutional provisions relating to public power, as was the case with parliamentary immunity[49].

We must emphasize that the doctrine produced on the issue of parliamentary immunity took place after the jurisprudential change of 1898, so legal doctrine once again received the jurisprudential guidance produced by the STF. In general terms, the legal doctrine presented a uniform understanding on the subject, considering that this constitutional guarantee should be maintained because it was not a personal guarantee, but a functional privilege[50].

Nevertheless, the jurisprudential issue that reverberated the most during that decade was the end of exceptional measures with the end of the state of siege. This issue was introduced to the STF with *habeas corpus* no. 300, when Ruy Barbosa stated that the end of the state of siege implied the end of its effects, including those related to the repression measures adopted. Barbosa argued that the President of the Republic did not have the power of a judge and therefore could not classify a crime and convict the guilty parties[51]. The lawyer explained the difference between repressive measures and punishments, pointing out that during a state of siege, the president could only execute detention in a place not intended for common prisoners and banishment to other places in the national territory. He also argued that no one could be sentenced except by the competent

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[48] «Considerando que a immunidade, inherente a funçao de legislar, importa essencialmente a autonomia e independencia do poder legislativo, de sorte que nao pode estar incluida entre as garantias constitucionaes que o estado de sitio suspende, nos termos do art.80 da Constituiçao, pois, de outro modo, se ao Poder Executivo fosse lícito arredar de suas cadeiras deputados e senadores, ficaria à mercê do seu arbitrio, e, por isso, anulada a independencia desse outro poder politico, órgão, como ele, de soberania nacional (Const. Art.15), e ao estado de sitio , cujo fim é defender a autoridade e livre funccionamento dos poderes constiuidos, converter-se-hia em meio de oppressao sinao de destruiçao de um delles (...)» (O Direito, v.76, 1898, 413-414)

49 Milton, 1898; Cavalcanti, 1902; Anjos, 1912; Bastos, 1914; Castro, 1914; Braga Junior, 1917; Diniz, 1917; Santos, 1918; Doria, 1926.

[50] «(...) a doutrina juridica responde peremptoriamente a pergunta pela negativa. A imunidade parlamentar não é uma garantia pessoal, é um privilegio funcional, destinado a assegurar o livre exercicio de um dos órgãos da soberania nacional. (...) A imunidade parlamentar observa com alguma rudeza o Dr. João Barbalho, é da mesma natureza que cerca o Presidente da Republica, e os ministros do Supremo Tribunal Federal no exercicio das respectivas funções; e, em sentido lato, são também garantias constitucionais e representação, a divisão dos poderes, a periodicidade presidência, etc.» (1914, 479-480)

[51] O Direito, v.58, 1892, 287.

authority, by previous law and in the manner regulated by it, according to the 1891 Constitution[52].

Nonetheless, at that first moment, the STF judges reaffirmed that the exceptional measures were not punishable, but that the Constitution entrusted the responsibility for such measures to the prudence of the President. Therefore, he would be responsible for any abuses that occurred, and the STF judges concluded that they had no responsibility for the exceptional measures. This stance in the ruling reaffirms a move away from politics and away from judging abuses committed by another branch of government.

In its ruling, the Supreme Court was emphatic in stating that it would get involved in the political functions of the executive and legislative branches, even if the situation created by the state of siege involved individual rights:

> Considerando, portanto, que, antes do juízo político do Congresso, não pode o poder judicial apreciar o uso que fez o presidente da Republica daquella attribuição constitucional, e que, também, *não é da índole do Supremo Tribunal Federal envolver-se nas funcções políticas do poder executivo ou legislativo;*
> Considerando que, *ainda quando na situação creada pelo estado de sítio, estejão ou possão estar envolvidos alguns direitos individuaes*, esta circumstancia *não habilita o poder judicial a intervir para nullificar as medidas de segurança decretadas pelo presidente da Republica, visto ser impossivel isolar esses direitos da questão politica,* que os envolve e comprehende, salvo si unicamente tratar-se de punir os abusos dos agentes subalternos na execução das mesmas medidas, porque a esses agentes não se estende a necessidade do voto político do Congresso[53]; (emphasis mine)

We note in this ruling that the Supreme Court made it clear that it would not get involved in anything related to the measures decreed by the President of the Republic. The Court held that it could not intervene on behalf of individual rights because it was impossible to separate them from the political issue and therefore they would not be judged. The STF indicated that the competence of this political judgment would lie with Congress and not the Judiciary. This stance brings us back to *habeas corpus* no. 175, in which the STF judges decided not to rule on the request because it was not politically motivated, signaling the Court's stance not to rule on any coercion carried out for political ends.

Therefore, individual rights would not be protected by the STF if they were threatened by a political issue. According to the STF, the end of the state of siege

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[52] «Qual a lei que regulou o processo dos sujeitos a prizão e desterro por sentenças do poder executivo? Tal jurisdicção nunca se conheceu: seria nova. Tal processo nunca existiu: era mister constituil-o. O poder judiciário não julga, senão mediante formas preestabelecidas. A Constituição não lh'o permite. Estaria isento o poder executivo da mesma limitação tutellar, nas causas que julgasse? Porque distincção? Onde está ella? Tal distincção fôra insensata.» (O Direito, v.58, 1892, 290-291)

[53] O Direito, v.58, 1892, 303.

did not imply the end of the exceptional measures, as they would remain in force until they were submitted to the competent court, Congress.

After the ruling, Ruy Barbosa expressed his opposition to the Court's decision and wrote a text that was published in newspapers and in a legal magazine in which he expressed his discontent. According to Barbosa, the STF's decision that the measures of exception did not cease with the end of the state of siege was diametrically opposed to that of the USA, because «em vez de se reivindicarem os direitos da autoridade judicial mesmo durante a suspensão de garantais, suspendem-se, ainda após a restauração dellas, os direitos dessa autoridade[54].» In the same sense, another request for *habeas corpus*, No. 512[55], was also denied by the STF, which upheld the jurisprudence of *habeas corpus* No. 300. The STF reaffirmed that Congress should judge the case.

Years later, in 1898, Ruy Barbosa requested a new writ of *habeas corpus* from the Supreme Court – No. 1.063 – with issues very similar to those in writ of *habeas corpus* No. 300. In fact, the lawyer stressed that the STF should change the jurisprudence adopted in the judgment of that 1892 petition[56], which had been a «erro judiciário»[57]. However, the Court did not change its jurisprudence.

The STF judges reaffirmed the competence of Congress to make political judgments on exceptional measures taken by the Executive, concluding that the STF could only make legal judgments[58]. They emphasized that this was the only

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[54] O Direito, v.58, 1892, 446.

[55] «*Habeas-corpus* – E' negado ao paciente cuja legalidade da prisão depende da approvação ou não do estado de sitio cuja decisão só ao Congresso compete dar.» (O Direito, v.65, 1894, 219)

[56] «(...) essa medida de excepção por decreto do governo, terminou em 23 de fevereiro proximo passado; que, sem embargo, continuaram os pacientes a permanecer no logar destinado para o seu desterro; mas que *os effeitos do estado de sitio não se podem estender além da sua cessação,* e que, portanto, os pacientes estão soffrendo constrangimento illegal em suas liberdades; que *a jurisprudencia adoptada pelo Supremo Tribunal, quanto as consequencias dos actos praticados em estado de sitio, não pode continuar a vigorar;* que o accordam de 27 de abril de 1892 que a consagrou, toldando a transparencia do direito, *foi um erro judiciario*, e que assim deveria ser concedida aos pacientes a soltura impetrada.» (O Direito, v.76, 1898, 406) (grifos meus)

[57] O Direito, v.76, 1898, 406.

[58] «(...) claro está, que não cabe ao Poder Judiciário, sem violencia ao sentido natural dessas palavras, apreciar semelhantes actos, até que o Congresso tenha sobre elle manifestado o seu juízo politico. *E nem a circumstancia de achem-se vinculados direitos individuaes ás medidas que empregou o chefe do Poder Executivo* para salvar o prestigio da lei e garantir a ordem publica, *habilita o Poder Judiciario a intervir, por ser impossivel separar esses direitos da questão política. Esta é a única interpretação que se adapta ao nosso direito constitucional, que não permite ao Poder Judiciario dilatar a esphera da sua jurisdicção para se immiuscuir nas funcções políticas do Presidente da Republica*». (O Direito, v.76, 1898, 407) (grifos meus)

interpretation of constitutional law that did not allow the judiciary to extend its jurisdiction to verify the political functions of the executive. Therefore, the extinction of exceptional measures would only occur after the political judgment of Congress and only then would a legal judgment by the STF be possible. The judges argued that this doctrine[59] was also part of the legislation of many countries such as France, Ecuador and the United States[60].

However, the major change in jurisprudence occurred between the rulings of *habeas corpus* 1.063 and 1.073, which were only twenty days apart. Both were requested for the same prisoners[61], with the same motivation, that when the state of siege ended, so did its measures. The first was requested by Ruy Barbosa and was denied, while the second, requested by former STF minister Costa Barradas[62] and other lawyers: José Candido de Albuquerque Mello Mattos and João Damasceno Pinto de Mendonça, was granted.

In the *habeas corpus* ruling No. 1.073, new jurisprudential guidelines were presented:

> As immunidades parlamentares não se suspendem com o estado de sitio.
> *Com a cessação do estado de sitio, cessam todas as medidas de repressão durante elle tomadas pelo Poder Executivo.*
> *A competencia do Judiciario para conhecer de taes medidas, findo o sitio, não é excluida pela do Congresso para o julgamento politico dos agentes do Executivo.*
> O desterro de que trata o art. 80 § 2º n.2 da Constituição não pode ser para logar do territorio nacional destinado a reos de crimes communs[63]. (emphasis mine)

This ruling can be considered a jurisprudential milestone of that decade. Several jurisprudential guidelines that were produced with the ruling in *habeas corpus* no. 300 were significantly altered in the ruling in *habeas corpus* no. 1.073. With regard to the end of the measures applied during the state of siege with the

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[59] «(...) Assim, firmado este principio, segue-se o seu consectario de que *os effeitos do estado de sitio não se extinguem , com relação as pessoas que por elle foram attingidas, sinão depois que o Congresso conhecer dos actos praticados* pelo chefe do Poder Executivo. E esta *doutrina de que os effeitos do estado de sitio não desapparecem com a sua terminação,* (...)». (O Direito, v.76, 1898, 407)

60 O Direito, v.76, 1898, 407-408.

[61] It was always a collective request for senators, deputies, military personnel and civilians, with the difference being that the first one involved everyone in this group and the second only politicians and military personnel. Writ of *habeas corpus* 1.063 was filed by lawyer Ruy Barbosa for: senator João Cordeiro, deputies Alcindo Guanabara and Alexandre José Barbosa Lima, Major Thomaz Cavalcanti de Albuquerque, Federico de Sant'Anna Nery and José de Albuquerque Maranhão. HC 1.073 was requested only for the first four names.

[62] Costa Barradas retired as a STF minister in October 1893 and was the rapporteur of the HC 300 ruling in 1892, in which he was against Ruy Barbosa's thesis.

[63] O Direito, v.76, 1898, 413.

conclusion of the period of exception, the Court adopts an unprecedented position: it states that the measures of exception cease with the end of the state of siege. The STF took control of the protection of individual rights with the end of the state of siege, considering that although Congress had the competence to judge the measures taken by the Executive, this did not exclude the competence of the Judiciary to protect and re-establish individual rights. The new interpretation adopted by the STF is that the exclusion of the Judiciary over measures taken by the Executive would only be for a political judgment, but not for the protection of individual rights.

The STF held that individual guarantees must be re-established after the end of the state of siege, since they can only be suspended during the period of exception.

The judgment on individual rights became the key to this ruling issued by the STF. The judges assumed the competence to judge these rights as a legal competence. The big change was that they no longer associated the judgment of the effects of the state of siege on individual rights after its conclusion with a political judgment of Congress' competence.

The STF emphasized that Congress could not judge the freedom of the individual, as it is the STF's competence to do so. The Court claimed that if Congress were to judge individual rights, it would do so without any form of process and as a privileged forum that was not known to the Constitution.

We noticed a new stance on the part of the STF judges in defending the fact that exceptional measures would only work during a state of siege because they are a repressive high police measure that can only last for a certain period, according to Article 80 of the Constitution. The Court stated that it was absurd to maintain repressive measures that had been authorized by the requirements of national security when those requirements had already been ended by the end of the intestinal commotion or the foreign threat.

The doctrine of Ruy Barbosa regarding *habeas corpus* No. 300 was cited by the STF judges who agreed with Barbosa that it was absurd that the duration of transitional repression measures could be maintained indefinitely, leaving them to the discretion of the executive branch.

The judges also mobilized the Constitution of the Empire - art. 179 § 35[64] and other subsequent laws - to maintain that since the Empire the suspension of repressive measures had been provided for when the threat to the security of the state was concluded.

The *Regimento Interno do Supremo Tribunal Federal* was also cited by the judges to enshrine the decision in *habeas corpus* no. 1.073: «(...) quando dispõe que o Tribunal se declarará incompetente para conceder a ordem de *habeas corpus* se se tratar de medida de repressão autorizada pelo art.80 da Constituição,

[64] Constituição de 1824. (Brasil, 1824)

enquanto perdurar o estado de sítio[65];». Therefore, once the state of siege is over, the STF once again has jurisdiction.

Regarding the legal doctrine produced on this subject, we found some opinions that, despite some disagreements[66], supported the jurisprudence produced in *habeas corpus* no. 1.073[67].

The conflict of jurisdiction over the powers of Congress and the Judiciary in relation to political and legal judgments was clarified by the Supreme Court. As we saw earlier, at first the Court argued that Congress was competent to judge exceptional measures after they had been concluded, even if they affected individual rights, because it was a political judgment of the measures taken by the Executive. Therefore, the STF claimed that only after the political judgment of Congress could the Court take a position.

However, this interpretation was radically altered. The STF interpreted the Constitution - Articles 34(21) and 80(3) - to mean that Congress' competence to approve or suspend a state of siege when declared by the Executive did not exclude the Judiciary's competence except for political judgment, but not to protect and restore violated individual rights. With this new interpretation, the Judiciary should not wait for a political judgment from Congress while individual rights continue to be violated without the state of siege being in force.

In addition, the judges also claimed that all constitutional guarantees would be re-established after the end of the state of siege. In this way, they signaled that individual freedoms could not remain suspended indefinitely after the end of

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[65] O Direito, v.76, 1898, 415.

[66] For Aristidis Milton, the measures would not stop with the end of the siege. Milton defended the jurisprudence of HC 300. For Milton, Congress should judge the executive's exceptional measures and not the judiciary: «Esta é a única interpretação que se adapta ao nosso direito constitucional que não permite ao Poder Judiciario dilatar a esphera da jurisdição para se immiuscuir na função governamental da politica do presidente da Republica. Assim estabelecido este principio, segue-se o seu consectário jurídico de que *os effeitos do estado de sitio não se extinguem com relação as pessoas que por elle forem atingidas, senão depois que o Congresso conhecer dessas medidas, puramente preventivas, de que usou o chefe do Poder Executivo.* (grifos meus) (1898,473) Carlos Maximiliano, on the other hand, presents a slightly different interpretation on some points, according to him, for example, prisoners would remain in detention during a state of siege: «Levantado o sitio, voltam as cousas ao estado em que se achavam antes da declaração. Readquirem-se todos as garantias constitucionaes, que tornam a ser asseguradas pelo Poder Judiciario. Continuam, entretanto, detidos os indiciados em crimes inafiançáveis, inclusive o de conspiração, desde que estejam processados pelos tribunaes ordinários, com ordem legal de prisão preventiva e nota de culpa». (Santos, 1918, 386)

[67] João Barbalho, (Cavalcanti, 1902, 122); Sampaio Doria (Doria, 1926, 259-260); Aureliano Leal (Leal,1925, 694).

the state of siege while awaiting the political judgment of Congress[68]. This issue had already been pointed out by Ruy Barbosa in *habeas corpus* no. 300, when he emphasized that political prisoners could not have their individual rights violated after the state of siege while awaiting judgment from Congress, if the protection of these rights fell within the competence of the judiciary.

The jurisprudence formed with *habeas corpus* no. 1.073 became a reference, as we can see in later judgments. Writ of *habeas corpus* no. 1.076[69] was granted by the Supreme Court, which referred to the decision in writ of *habeas corpus* no. 1.073 to confirm that the end of the state of siege put an end to the repressive measures applied by the Executive.

This change in case law is very significant because it indicates a more active stance by the judiciary in placing limits on the effects of the state of siege to defend individual rights. This new case law demonstrates a new position adopted by the Judiciary vis-à-vis the Executive. For Petersen, this change in jurisprudence occurred for two reasons: the participation of judges Lucio de Mendonça and Americo Lobo, and the change in the position adopted by Bernardino Ferreira[70].

In addition, another factor pointed out by the author to understand this change in jurisprudence from 1892 to 1898 was the influence of imperial remnants on the new republican institutions in the early republican years[71]. We believe that the presence of the imperial mentality permeated the early republican years, not only in the new institutions but also in the republican immigration. What's

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[68] «Considerando que, se a garantia do *habeas-corpus* houvesse de ficar suspensa emquanto o estado de sítio não passasse pelo julgamento politico do Congresso, e de tal julgamento ficasse dependendo o restabelecimento do direito individual offendido pelas medidas de repressão empregas pelo Governo no decurso daquelle periodo de suspensão de garantias, indefesa ficaria por indeterminado tempo a proprio liberdade individual e mutilada a mais nobre funcção tutelar do poder judiciario, além de que se abriria abundante fonte de conflictos entre elle e o Congresso Nacional, vindo a ser este, em ultima analyse, quem *julgaria* os individuos attingidos pela repressão politica do sitio, e os julgaria sem fórma de processo e em fôro privilegiado não conhecido pela Constituição e pelas leis;» (O Direito, v.76, 1898, 416) (grifos originais)

[69] «Cessando com o estado de sitio as medidas de repressao durante elle tomadas, e so podendo, em regra, a policia prender em flagrante delicto, é illegal a prisao feita fora desta circumstancia, e, uma vez efectuada, so pode ser legalisada por mandado de prisão preventiva, expedido pelo juiz da culpa, ou por subsequente pronuncia ou sentenca condemnatoria.» (O Direito, v.77, 1898, 85)

[70] Petersen, 2020.

[71] «(...), a prática imperial teimava em subsistir, ainda que em outro cenário, com outra finalidade. As novíssimas instituições republicanas compunham uma estrutura jurídico-formal, que poderia operar de diversas maneiras. O vazio dos primeiros anos – a ausência de uma prática jurídica própria da república – era preenchido pelo modo de agir do regime imperial, de índole francesa. Exaltava-se o modelo norte-americano, a *Supreme Court,* mas essa exaltação permaneceu no mais das vezes no plano simbólico.» (Petersen, 2020, 120)

more, the composition of the Federal Supreme Court in the early years included several imperial judges, which was reflected in the judgments handed down. It is necessary to consider this first republican decade as a period of transition not only in the political sphere, but also of a legal transition.

4. Conclusion

The first republican decade – 1889-1899 – was marked by political instability, declarations of a state of siege, the creation and structuring of new institutions, requests for *habeas corpus*, continuities and ruptures inherent to a period of transition between the Empire and the Republic.

The new division of the three branches of government is fundamental to understanding the new challenges faced in maintaining this balance between them. To understand the Judiciary, it is very important to analyze how its new republican functions were built and consolidated: that of guardian of the Constitution and of individual rights. The republican judiciary was divided into the state and federal spheres and had an autonomy as a branch of state that it had never had during the Empire.

From the first Republican years, the judiciary, specifically the Supreme Court, received several *habeas corpus* petitions challenging the declaration of a state of siege and the measures applied. Through these requests, the Federal Supreme Court was inserted into the political-legal debate surrounding the state of siege. And through the judgment of these *habeas corpus*, the STF produced jurisprudential guidelines that were fundamental in outlining the universe of the state of siege.

We believe that it was through these periods of state of siege that the judiciary found a ground for practicing its new republican functions. We believe that it was during the period of the state of siege that the Judiciary built itself up as an independent state power through the autonomy exercised through jurisprudential practice. It was through the production of jurisprudence that the Judiciary confronted the conflict between the political and the legal. It was through jurisprudential guidelines that the judiciary was able to delineate what was "allowed" and what the limits of the state of siege were, this no man's land that did not have an organizational structure with well-defined rules, but rather a void characteristic of periods of exception. A jurisprudential study is therefore very important for understanding periods marked by exception.

As we mentioned earlier, the background to this whole period was the clash between the legal and political spheres. Through this lens we looked at the jurisprudential guidelines produced in that decade. They were divided into two groups: the constant jurisprudential guidelines and the oscillating jurisprudential guidelines. By analyzing these dynamics, we can see the moments when the legal and political spheres tried to remain separate and the moments when they experienced a kind of intersection.

Thanks to the phenomenological condition of the exception understood as a *tempo ascrittivo*[72], we can see how the Judiciary has confronted and positioned itself in the face of the demands inserted by the state of siege.

We can say that initially the Judiciary chose to stay away from judgments that referred to: the state of siege, the declaration of the exception, the effects of the exceptional measures, exempting itself from any judgment regarding what was established by the Executive because it argued that it was up to Congress to exercise this judgment understood by the STF as a political judgment.

In this way, the STF maintained some jurisprudential guidelines, such as guaranteeing the use of *habeas corpus* as long as they were not politically motivated, not judging the constitutionality of the state of siege, as this was a political judgment that fell within the competence of Congress, and finally, recognizing itself as competent to judge political crimes, as this was a judgment that fell within the competence of the federal courts and not the military courts.

The STF's initial stance was to affirm its competence for legal trials. However, the state of siege always mixes these two universes. The encounter between the legal and the political during the state of exception is almost a condition sine qua non, or a condition from which the more one tries to distance oneself, the closer one gets, mainly due to the violation of individual rights during the period of exception.

What we realized in our study is that it was precisely on the issue of the protection of individual rights that these two universes touched, and it was at this moment of intersection that the STF changed its stance. The jurisprudential guidelines that oscillated during that decade were: the one referring to the constitutional guarantee of parliamentary immunity and the one referring to the end of exceptional measures after the end of the state of siege.

When the Supreme Court decided to guarantee the validity of parliamentary immunity during a state of siege, it demonstrated the importance of this guarantee to protect members of the Legislative branch from measures taken by the Executive. Therefore, the Court demarcated that the Legislative should be protected from the abuses of the Executive, and we thus see an action by the Judiciary to protect the balance between the Powers and curb the abuses committed by the Executive during the state of exception.

As for the cessation of the state of siege measures after the end of the exception, we note the change in the STF's stance on the protection of individual rights after the end of the state of siege. At first, as we saw in 1892 in the judgment of *habeas corpus* no. 300, political prisoners continued to suffer the coercion of the state of siege after the end of the state of siege, because their individual rights were not protected by the judiciary. The STF argued that these political prisoners should first be judged by Congress for a political judgment on the measures of exception applied by the Executive and only after this judgment by Congress could the STF legally judge the protection of these individual rights.

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[72] Meccarelli, 2020.

The major problem with the STF's stance was the indeterminacy of the time for this political judgment by Congress. Because of this indeterminacy, individual rights continued to be violated without the motivation of an exception. Furthermore, these citizens found themselves within a regime of normality, but without their individual rights guaranteed.

It was precisely on the basis of guaranteeing the protection of individual rights after the end of the state of siege that the STF changed its jurisprudence in 1898 in the *habeas corpus* ruling n.1.073, stating that the measures of the exception end with the end of the exception and that they should not await the political judgment of Congress because individual rights could not continue to be coerced without the exception being in force. Therefore, we understand that it was precisely the protection of individual rights that was the strongest point of intersection that led the Judiciary to take a legal stance on what had previously been seen as something political.

This change in the STF's jurisprudence from the beginning to the end of the 1890s exemplifies the strong influence of the transition period between the Empire and the Republic. As we mentioned earlier, there were several new features to be implemented in a land permeated with vestiges of the previous system.

Therefore, it is important to note that the change in jurisprudence took place at the end of the decade, after several experiences of a state of siege. We can hypothesize that the changes in the ranks of the STF's judges during those years was fundamental to the departure of imperial judges. In addition, we must also consider the construction and consolidation of the autonomy of the Judiciary as an independent Power of State. As well as the understanding and practice of its new republican functions as the guardian of the constitution and individual rights.

From our study, we can see how important the continuous invitation to the Supreme Court to address issues relating to the state of siege was. Analysis of the judgments handed down by the STF allows us to verify the leading role played by these judges through their jurisprudential output. These judges' actions contributed to the formation and consolidation of the new Republican Judiciary.

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