The Governance of the Military Justice between Lisboa and Rio de Janeiro (1750-1820)[1]

DOI
http://dx.doi.org/10.1590/2236-463320151009

A governança da justiça militar entre Lisboa e o Rio de Janeiro (1750-1820)

Adriana Barreto de Souza
Universidade Federal Rural do Rio de Janeiro, Seropédica - RJ, Brasil
e-mail: adrianaabarreto@gmail.com

Abstract
The purpose of this article is to draw a historical outline of the constitution of the military justice field, centering the analysis in two moments. The first moment is that of the Pombaline Reforms. It is in this moment that the subject of the military justice is put on the agenda by Count Lippe. In 1763, it is possible to locate several charters issued with the intent to establish new authorities and to formalize the first instance of the military justice. In the center of the discussion was the military forum itself. A set of actions that will have continuity in the Marian-Johannine reign, and in this second moment, the priority aims were the second instance of the military justice and the codification of the military criminal legislation.

Resumo
O objetivo desse artigo é traçar um esboço histórico da constituição do campo da justiça militar, centrando a análise em dois momentos. O primeiro deles é o das reformas pombalinas. É nesse momento que o tema da justiça militar é colocado em pauta pelo Conde de Lippe. Em 1763, é possível localizar vários alvarás emitidos com o objetivo de instituir novas autoridades e formalizar a primeira instância da justiça militar. No centro do debate, estava o próprio foro militar. Um conjunto de ações que terá continuidade no reinado mariano-joanino, sendo que, nesse segundo momento, o alvo prioritário foi a segunda instância da justiça militar e a codificação da legislação penal militar.

Palavras-chave
Política lusobrasileira, justiça militar, reforma institucional, código penal militar

Keywords
Lusobrazilian politics, military justice, institutional reform, military penal code

1
This article is a product of the project "O governo da justiça militar: um estudo sobre legislação, ideias e práticas políticas entre Lisboa e Rio de Janeiro (1750-1889)" ("The Govern of the Military Justice: a study on legislation and political practices between Lisbon and Rio de Janeiro (1750-1889)"), sponsored by FAPERJ, which was being developed under a collective project entitled "Dimensões e Fronteiras do Estado brasileiro" ("Dimensions and Frontiers of the Brazilian State")– PRONEX – CNPq/FAPERJ. The general lines of this text were first discussed at a seminar taught by me at the Institute of Social Sciences, University of Lisbon (ICS / UL). The seminar was attended by Professors Nuno Gonçalo Monteiro and Fernando Dores Costa whom I thank for the suggestions, incorporated in this text. I also thank the accurate observations and suggestions of the anonymous peers. In the end, I also counted on the critics of Professor Silvia Hunold Lara, which led me to make a final review in this text.

It is very unfortunate, and may even cause strangeness, that a Portuguese military institution that lasted through the wide space of two centuries (...) waits up to the present time for someone to write its history.

[Luis Henrique Pacheco Simões]

The Portuguese military institution referred to in the epigraph is the Lisbon Council of War, and this assessment was made by Colonel Henry Pacheco Luis Simões - Portuguese officer and military historian - in an article entitled "The War Council (1640-1834): brief subsidies for its history", published in Portugal in the *Revista Militar*. Although written in 1923the assessment made by the colonel remains current. The Council of War has not actually constituted a subject of study in the historiography and even today there is only one academic article about the institution, that analyzes the limits of its power in the context of the Restoration War[2]. It is not the purpose of this article to fulfill this gap by writing - as suggested Pacheco Simões - a story of the Council of Lisbon War. The proposal is to analyze what I consider to be an autonomization of military justice inside the Council by through mapping the history of the institution, with special attention to the period between the late eighteenth century and early nineteenth century.

This lack of studies on the Lisbon Council of Warhas had a specific result: in general it is remembered for its administrative competences but its duties as an organ of the military justice remain forgotten. On this topic, there is no reference in neither the Brazilian nor the Portuguese historiography. When D. João VI settled in 1808 in Rio de Janeiro he created in the new court a congener of the Council of War, the Supreme Council of Military and Justice. From a legislative point of view, the new council was a duplicate of the Lisbon Council of War with an inherited regiment from 1643, and a number of licenses, royal charters, and decrees produced by the Portuguese monarchies. However, the most surprising is that, whilst the Lisbon Council of War was extinguished in 1834, the Supreme Council of Military and Justice subsisted in Brazil until 1893, already under the Republican regime, judging military defendants in a routine ruled by a legislation of the Old Portuguese regime.

This long duration analysis enabled the mapping of important debates such as the definition of the military forum, the structuring of first and second instance military courts and the elaboration of a military penal code[3]. However, all these debates lead us to a more general theme about the establishment of a field of military justice amid a broad constellation of powers already instituted and erected from a pluralistic rationality, which predicted the overlapping of jurisdictional instances with their specific mechanisms of regulation and resolution of conflicts[4].

Within the limits of this article, we intend to draw a historical outline of the constitution of the field of military justice in two specific moments. The first is the period of the Pombaline reforms. Although in general this topic has been well explored in the historiography, it is worth high lighting that there is still a lack of studies on the reforms undertaken by the minister of Don José I in the military field. I believe it isin this moment, following the end of the Seven Years War, that the theme of military justice is brought to attention by the Count of Lippe. During the year of 1763, shortly after the publication of the *Regulamento de Infantaria e Artilharia*[5]

2
I refer to the article: COSTA, Fernando Dores. O Conselho de Guerra como lugar de poder: a delimitação de sua autoridade. *Análise Social*, Lisboa, n.191, 2009. Until then, the subject had gained only brief references in some books. See: HESPANHA, Antonio Manuel de. *Às vésperas do Leviathan*. Instituições e poder político Portugal, século XVII. Coimbra: Livraria Almedina, s/d. p.256 and SUBTIL, José. Os poderes do Centro. In: MATTOSO, José (org.). *História de Portugal:* o Antigo Regime. Lisboa: Editorial Estampa, 1998. p.162.

3
SOUZA, Adriana Barreto de. Conselho Supremo Militar e de Justiça: ideias e práticas de uma cultura jurídica de Antigo Regime (1808-1831). In: CARDOSO, José Luís; MONTEIRO, Nuno Gonçalo; SERRÃO, José Vicente (org.). *Portugal, Brasil e a Europa Napoleônica*. Lisboa: Imprensa de Ciências Sociais, 2011.

4
For a more theoretical discussion on the political and institutional pluralism, see: HESPANHA, Antônio Manuel de. *Cultura jurídica europeia*. Síntese de um milênio. Lisboa: Publicações Europa-América, 2003. On the model of the "royal councils", see: SUBTIL, José. Os desembargadores em Portugal (1640-1820). In: MONTEIRO, Nuno Gonçalo; CARDIM, Pedro; CUNHA, Mafalda Soares da (orgs). *Optima Pars*. Elites Ibero-americanas do Antigo Regime. Lisboa: Imprensa de Ciências Sociais, 2005.

5
N.T. A regulation for infantry and artillery.

and the Articles of War that constitute one of its chapters, it is possible to find several charters issued with the purpose of instituting authorities and regulating procedures to formalize the first instance of military justice. In the center of this debate is the military forum itself. These actions will be continued during the Marian-Johannine reign, and in this second stage the main target is the second instance of this justice, with the establishment of a military court inside the Lisbon Council of Warand the nomination, in March 1802, of a committee encharged of elaborating a military penal code.

I. The Lisbon Council of War and the military justice

The Lisbon Council of War was created on December 11, 1640, during the Restoration War. The intention was to militarily reorganize the Kingdom to support the acclamation of D. João IV and in this sense, the Council was only one of the institutional innovations of the period. To sustain the war against Castela it was also created the Governor of Arms, the *Junta of the Three States*, the *Vedorias* (Treasury Council) and the *Pagadorias militares* (Military payment office)[6]. Integrating the system of royal councils, the Council of War was an innovation - as stated Dores Costa – in consonance with the pattern of government of the time. In other words, it followed the model of collegiate organs, dominated by nobility and literate people, who instructed through legal advice the prince's action[7]. In this case, actions concerning a key area of the Crown administration, the militia.

Three years after its creation the new Council gained a regiment, in December 22, 1643, and only then its composition and duties were regulated. The first noteworthy aspect is its proximity to the Council of State, the highest body of the central administration. The regiment clearly states, in paragraph V that "the State counselors would also be part of the Council of War, supporting it every time they could in order to assist its business."[8] Its composition was therefore flexible. The small group composed by those who were only war counselors attended the ordinary sessions. The number was not defined by the regiment, and could vary depending on the interests of the Crown. However, at critical times, the expanded Council was gathered and the sessions were also attended by the State counselors. The greatest symbol of the preeminence of the Council of War, however, was the fact that it was presided by the king, even when he was not present at the sessions. The empty chair at the head of the table where counselors met flaunted his presence[9].

The primary function of the Council of War was to elaborate, by royal request, legal advice on various matters related to the militias, exposing them to the Crown precisely through the royal consultations. Hence, the Council did not have a deliberative function. The king could contradict its proposals or simply ignore them, as seems to have occurred in the second half of the reign of D. João IV[10]. The Crown could also appreciate the legal advices without obtaining unanimity among the Council members, following apart the justification of the votes contrary.

These would be the most political functions of the Council of War. Besides them there was a long list of functions connected with the administration of military life, ranging from passing military ranks and authorizing licenses when the Governor of Arms could not, to ensuring the maintenance and operation of fortresses, artillery, foundries, manufactories, hospitals, and accommodations. All this was done observing the fulfillment of the obligations of the positions and their regulations, the payment of

6
N.T. The *vedorias* and *pagadorias* were institutions with supervising power over the accounting, finances and expenses with war and the army. See: SILVA, Felipa Ribeira da. *Dutch and Portuguese in Western Africa:* Empires, Merchants and the Atlantic System, 1580-1674. Leiden; Boston: Brill, 2011, p.XXVIII.

7
COSTA, Fernando Dores. *A Guerra de Restauração 1641-1668.* Lisboa: Livros Horizonte, 2004. p.24; Idem. *Insubmissão.* Aversão ao serviço militar no Portugal do século XVIII. Lisboa: Imprensa de Ciências Sociais, 2010.

8
SUPREMO Tribunal Militar. Organização, antecedentes e instalações. Lisboa: [s.n.], 1980. p.30.

9
COSTA, Fernando Dores. A Guerra de Restauração. Op. Cit. p.25.

10
Ibidem, p.26.

the troops and the mail dispatch, updating the ordinary letters and the royal consultations[11].

The least known assignment of the Council of War is linked to the actions of military justice, and here observations are worth being made: first, the Council was not a court, as it was said at the time, of literate judges. In reality, special sessions would take place separately in the afternoon (while sessions of the Council of War took place in the morning), dealing only with matters of justice. In these sessions, the presence of a literate minister was mandatory, and to perform his duties, he received the title of adviser judge of the Council. Preferably, this judge should be the Supreme judge[12] of the imperial Court (*paço imperial*)[13]. Second, he did not participate of political and administrative discussions of the Council of War, being restricted to the matters of justice. When the crime was triedas "mild" (by the definition of the regiment, punishable by up to a degradation of five years maximum), the lay judge should be assisted in his dispatch by two of the oldest counselors. In the case of "serious faults", the regiment required, besides the lay judge, the presence of two literate judges named by the Crown[14].

By establishing a special instance for the causes of military justice, the regiment also establishes, in paragraph XXIII, the privileged forum, organizing instances where military crimes should be tried. This is the moment of creation of the military forum, which appears in the regiment defined as a privilege reserved only for payed troops and the military that served on the borders. This means that the forum did not extend to military of the Ordinances, submitted to their own regiment[15].

The scope of the forum, however, is not clearly defined, and may be extended, as stated in paragraph XXIII of the regiment, to civil cases related to contracts. In other words, the forum was not established from a definition of military crime. It referred, in the first place, to the social condition of the person who committed the crime and, still, not in a complete manner. For cases of civil lawsuits of partition, inheritance, and others similar, the forum was not validated, and the legal processes ran in regular courts[16].

Although the regiment is also not very clear about the organization of such military justice, it can be said that it was divided in two instances. The first one was organized around the auditors and just as the justice sessions of the Lisbon Council of War, the instance did not receive a name that defined it. To avoid "multiplication of competences," the function of the auditor would be exercised - also according to the regiment –by the municipal judge (Juiz de Fora), and in his absence by a corregedor[17] [18]. In the case of "disobedience and military faults" - note that the expression military crime is not used - the auditor would meet with the Captain-General or the Governor of Arms with jurisdiction to arrest and then, summarily determine the punishment. For cases of riots, rebellions, and treason that had not suffered dilation, the procedure would be similar but with the addition of yet another authority, the *provedor* (Treasury officers). The jurisdiction of these authorities, once gathered, was also higher, being ensured until natural death. The only exception accepted would be in the case of defendants who were lords or captains, when the regiment requires them to be sent as prisoners to court, maintaining the specificities of each case[19].

The second instance was the sessions of justice of the Lisbon Council of War. Between the two instances, there was the figure of the general auditor, whose function is not defined in the regiment. Apparently, he was a

11
SUPREMO Tribunal Militar. Op. Cit. p.33-34.

12
N.T. The term "desembargadores do paço" has been translated as the "Ministers of his Majesty's Council" in: BEAWES, Wyndham. *A civil, commercial, political, and literary history of Spain and Portugal.* London : Printed for R. Faulder, 1793.

13
Ibidem. Specially paragraph XXII, p.37.

14
SUPREMO Tribunal Militar. Loc. Cit.

15
This is about the Regiment of Ordinances, of 1564. For justice matters, see specially paragraphs 24, 26 and 45 of the regiment. MENDONÇA, Marcos Carneiro de. *Raízes da Formação Administrativa do Brasil.* Vol.2. Rio de Janeiro: Conselho Federal de Cultura, 1972.

16
SUPREMO Tribunal Militar. Op. Cit. For paragraph XXIII, see p.37.

17
N.T. "An extraordinary or temporary judicial supervisor". In: SILVA, Felipa Ribeira da. Op. Cit., 2011, p.XXII.

18
Ibidem, paragraph XXIV, p.37.

19
Ibidem, paragraph XXV, p.38.

type of mediator, responsible for forwarding the appeals and aggravations to the Lisbon Council of War[20].

This jurisdictional uncertainty would not resist in a context of twenty-seven years of war. Soon after the restoration of the Portuguese autonomy, the Crown put forth a new regiment, intended only to regulate the jurisdictional action of the authorities related to military justice - the Regiment of the Governors of Arms, their Auditors and Advisors, dated of June 1, 1678. In the regiment the Crown states that this document is a response to "the abuse that the calamity of war brought to military discipline, revolving around the administration of justice" and it is recognized, thus, the inexistence in "this Realm of laws or regulations" that establish "with clarity its own jurisdiction."The core of the problem - produced by war, and that the regiment sought to equate - was the "great strifes among the militia corporals, its auditors, and the ministers of the ordinary courts."[21] That is, the disagreements among the highest military authorities, the literate/trained of military justice, and those of the ordinary jurisdictions.

The major change was in the concentration and reinforcement of provincial authorities. The Governors of Arms and the "greater corporals" that were in charge of the government of a province should immediately inform the judge and officials of the Council to make them aware of their jurisdictions. In addition, the regiment required that their ranks were registered in the books of the Councils, of the *Vedoria*, and of the *Contadoria Geral (General Accountancy)*[22]. After that, those military authorities should visit the main local ities of the province surveying the most serious and scandalous crimes that had not yet been tried so the General Auditor could proceed against them. All crimes that would not result in natural or civil death penalty, members mutilation, or more than five years of degradation to Brazil could be sentenced by the Governor of Arms, with the Master-of-Field General, and the general auditor. In the absence of the Field General, the sentences would be pronounced by the governor with the general auditor. All this with no grievance or appeal to the Lisbon Council of War. The only exceptions allowed depended on the quality of the defendant: the sentences of the lords or military officers with ranks no lower than infantry captain would not be executed without being submitted to the Council of War[23].

Thus, the general auditor becomes a central authority in this new design of the military justice. If in the 1643 regiment he seemed to be just a mediator, with function placed in Lisbon, in the new regiment not only the figure of the general auditor is multiplied, being named one for each province of the Kingdom, but also has its authority preserved. In paragraph XXIV, it is determined that, in case of riots or rebellions, when the Governor of Arms should be gathered with the auditor and greater corporals besides the *corregedor* of the county or the *Provedor*, the general should perform the function of judge rapporteur, who after thoroughly describing the case, is the first to vote, taking precedence over the other literate ministers[24]. The general auditors are defined, thus, as private judges of all crimes committed by corporals and paid soldiers, each being judged in his own province. It was also in their prerogatives to carry out the arrests[25], being held in this position for three years, as happened with the *Juiz de Fora*[26].

The privileged forum undergoes a significant change: it is extended, as stated in paragraph XLIX of the regiment, to all officers (up to and including the rank of sergeant) of the auxiliary regiment (*terços or militia units*). It had the same scope, affecting the contracts and civil actions

20
Ibidem, paragraph XXIV, p.37.

21
Regimento dos Governadores das Armas, seus Auditores e Assessores, de 1o de Junho, 1678. All information of this paragraph was taken from the presentation of the regiment. *COLEÇÃO oficial da legislação portuguesa publicada no ano de 1928*. Lisboa: Imprensa Nacional de Lisboa, 1936. Available at: Ius Lusitanae. Fontes Históricas de Direito Português: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=102&tid_obra=63&tpagina=146>. Accessed in: 28 jul. 2014.

22
Ibidem, paragraph I.

23
Ibidem, paragraph II and III.

24
Ibidem, paragraphs V and XXIV.

25
Ibidem, paragraph XXV.

26
Ibidem, paragraph XLII and LX.

celebrated with those soldiers. The intention was to preserve their wages, weapons, and horses committed to the monarchy service[27]. It is worth mentioning that, in this same regiment, it is possible to find the expression "military crime," however used in a very restricted meaning, designating only "riots, rebellions, deserters, and *quebramentos de bandos*."[28] The other crimes are designated in the regiment as "criminal acts".

In this new design of military justice, besides the general auditors, there is still another authority: the private auditor. This position was generally held by the Juiz de Fora, and was directly linked to the provincial localities where there were paid troops. Being close to the troops the private auditor should keep the general auditor aware of the most serious crimes committed and, in case it proceeded, he had to start all the procedures as soon as possible. Following, he would have to report the matter to the general auditor, who would be responsible for, along with the Governor of Arms, pronouncing and sentencing the defendant. Nevertheless, there is an exception: if the authors want to accuse the defendant in the place where the delict occurred, refusing to accuse him elsewhere. In this case, it must be ensured the will of the authors and the auditor pronounces the inquiry and sentences it with the corporal that governs the locality where the offense occurred. This will turn the procedure into a first instance process. Obligatorily, the private auditor and the corporal will give appeal and grievance to the Governor of Arms and his general auditor, transforming it, thus, into second instance.[29]

The last instance, be it a second or third, remained organized around the assessor judge of the Lisbon Council of War. None of them constituted a court, with well defined name and functions. The activities were structured around authorities who, meeting in special session directed to the administration of justice, proceeded and sentenced "criminal acts" of military defendants.

II. The Pombaline reforms: War Councils, regimental auditors, military forum, and police

That model of military justice - organized around authorities (and not the courts), accusations(not processes with production of evidence), and a poorly defined military justice system - remained without significant changes until the second half of the seventeenth century. Only then, almost a hundred years after the Regiment of 1678, through the emergence of a new system of organization and distribution of the royal power, elaborated through the concepts of the Enlightenment, is that new reforms were implemented in the military justice.

This new political matrix began to be implemented in Portugal during the reign of Dom José I, through the reforms by his prime minister, the Pombaline reforms. As António Manuel de Hespanha has highlighted, this new system produced a complete inversion in the course of criminal practice, replacing justice by discipline as the basis of prosecution. The Crown began, thus, to constitute itself as the sole center of power and social ordering and began to investin the emptying of peripheral political centers. If previously, punishment had almost an exclusively symbolic role, prevailing the kindness of the Prince as pastor and father of his subjects, in the end of the Old Regime, it starts to play a practical normative role. When punishing, the Crown begins, actually, to intervene and try to control behaviors[30].

27
Ibidem, paragraph XXVI and XXX.

28
Ibidem, paragraph V. According to the 1720 edition of the Dictionary by Raphael Bluteau, the word *"bando"* has a specific meaning in Portugal, which is of "a cry of war" (declaration of war), "with penalties imposed to the transgressors of a military law". Thus, "*quebramento de bando*" can be understood as infractions of military laws during a war.

29
Ibidem, paragraph XLV.

30
HESPANHA, António Manuel de. *Política e Litigiosidade:* história e prospectiva. Lisboa: Calouste Gulbenkian, 1993. Chapter: "Da *iustia* à disciplina – texto, poder e política penal no Antigo Regime". Silvia Lara also calls attention to the amplification of the power of intervention of the Crown in the end of 18thcentury, but more in colonial spaces. The author pinpoints the investiment of the Crown in the organization of the "military control of the residents." LARA, Silvia Hunold. *Campos de violência.* Escravos e senhores na capitania do Rio de Janeiro, 1750-1808. Rio de Janeiro: Paz e Terra, 1888. See specially chapter I.

Not surprisingly, one of the symptoms of the inversion of that political system was –still according to Hespanha –the justice reform. Criminal law needed to be efficient, to be instituted as an effective instrument of control[31]. This effectiveness was even more necessary in the military field, especially after Portugal entered the Seven Years War.

This confluence between the institution of a political system of active administration, where "State reason" should be imposed on and order society, and the entry of Portugal in a major armed conflict, enhanced the interventionist actions of the Crown in the military field. Part of the instituted reforms at that time have already been analyzed by Fernando Dores Costa[32]. My intention, however, is to examine the reform held in the military justice.

The key year of this reform is 1763. Once the war ended, the Count of Lippe, marshal and chief commander of the Portuguese army, promoted to the condition of Highness, treatment reserved to members of the Portuguese royal family, took several measures to adequate the military justice of the Realm to the European standards in force at time, mainly in France and Prussia[33]. The first measure was the formalization of the first instance of that justice in a court: the war councils. They were instituted by the Regulation of Infantry and Artillery of February 19, 1763. Henceforth these councils would be responsible for prosecuting military crimes using the Articles of War, systematized by Count of Lippe in paragraph XXVI of that same regulation. This is an important point. In addition to creating these small courts, recognized as such, the regulation broke with an old practice, which gave judges the right of free interpretation of the laws. It was, in fact, another criminal system, marked by the systematic non-compliance of the laws, replaced by moderate interpretations, more interested in maintaining the balance and the "rule of peace" than in punishment as a means of orienting behaviors. What was intended, therefore, with the "new regulation" (as the 1763 Regulation would be known), was the elimination of that old justice model and, along with it, the elimination of the hegemony of jurists on matters of the government[34].

In a charter published five months later, on July 15, the Crown announced firmly the "essential need" to observe the Articles of War for the maintenance of the military discipline, prohibiting those articles of being "subject to interpretation, and intelligences, that attribute more severe penalties to some indicted (...) or moderate to others those punishments to which they are submitted" for the crimes committed[35].

This new charter reinforced, thus, the previous one of February 18, which – according to the new document – was being inconveniently violated. The heart of the matter was the claim that the war councils could only admit the trial by "examinating evidence". This idea is unprecedented and fundamental to think about the formalization of military justice field. The charter text is precise: every crime should be proved, and the war articles are not subject to the discretion of judges. And it goes further: in the pronouncement of the sentences, the articles that support them should be copied by the judges literally, such "as they are found written in the 'new regiment, without adding or taking out a word.'" The counterpart of this interdict is the reinforcement of the royal authority: the forgiveness or the moderation of the sentences should be an exclusive attribute of the royal mercy and kindness[36].

War councils replaced the general auditors and *Juízes de For a* who, since the regiment of 1678, were acting as private auditors. Both had their

31 Ibidem, p.321.

32 COSTA, Fernando Dores. Insubmissão. Op. Cit. See specially chapter 7.

33 The reference to the war context and the necessity to match the royal army to the "great European powers" in terms of instruction and discipline is constant in the charters, decrees, and regulations related to military justice between the end of XVIII century and begin of XIX century. Hence the importance that the argument had in this article and the interest in the construction – although brief – of these war contexts.

34 HESPANHA, António Manuel de. Política e Litigiosidade. Op. Cit. Chapter: "justiça e administração entre o Antigo Regime e a Revolução".

35 Charter of July 15, 1763. Presentation. *COLEÇÃO oficial da legislação portuguesa...*, Op. Cit. *Ius Lusitanae*. Fontes Históricas de Direito Português. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=115&id_obra=74&pagina=369>. Accessed in: 28 jul. 2014.

36 COSTA, Fernando Dores. Insubmissão. Op. Cit., p.286.

jurisdictions abolished by charter of October 20, 1763. The central figure of the war councils was now the regimental auditor. The difference to the previous auditors is that he would be linked to a military unit – the Regiment –, receiving his salary, also from the General Treasuries of Troops[37]. This bond became even tighter with the publication of the charter of February 18, 1764, which determined that the regimental auditor was subordinated to the "chiefs of regiments". In other words, to the military authority who commanded the unit. To formalize the subordination, when every auditor began to exercise his activity, he received a military rank – of captain aggregated to that unit –receiving the identical wage to the other captains. He also had to wear the same uniform, enjoying the same honors[38].

These determinations sought to interfere with a delicate problem: conflicts of jurisdiction between auditors and ordinary judges. Only the definition of the boundaries that separated the field of activity of these authorities and, thus, the recognition of these boundaries, could guarantee autonomy to the war councils as a first instance of the military justice. Therefore, still in October 1763, the Crown issued a long charter, with eighteen paragraphs, aiming to give auditors "specific rules and certain limits, to prescribe their jurisdiction" to be exerted in "such delicate matter"[39].

The first determination broke with the tradition of lay judges, stating that the position should always be occupied by a graduate that, besides being instructed in common crimes, had a good knowledge of the Articles of War. The intention was to fill the position with a qualified professional, prevailing the principle of technical competence. Hence the decision of making the auditor stay, during the exercise of his function(a minimum of three years), as a captain aggregated to the regiment. He should know the laws, but also the particularities of the military daily life. Specially because, at that time, the military justice system found itself even more associated with the person than with the type of crime committed. In this charter, for example, the expression that prevails in the text is "crimes of the military", not "military crime". And this is not about preciosity; the topic was widely tackled by the legislation in the second half of the eighteenth century. The relationship is reciprocal: a definition of the limits of jurisdiction depends on a precise delimitation of the scope of the forum, and the reverse also applies. Therefore, if the forum is defined by the type of crime, it means a military defendant must, in case he committed a common crime, be tried by civilian courts. In contrast, if the forum is personal, regardless of the crime committed, the military defendant would always be under the jurisdiction of the regimental auditors and war councils.

The personal forum is, surely, associated with an older political system, which made the forum a personal privilege, a means to qualify and distinguish people. In this sense, the charter of October 1763 introduces some new elements in the discussion, even though in its first paragraphs, to ensure the autonomy of the war councils and their auditors, it endorses the personal principle of definition of the military forum[40]. This endorsement becomes visible in its second paragraph, when the charter states that "to all the aforesaid privileges, it should prevail in cases of crimes prohibited by military law, or civil, without any difference, the jurisdiction of the aforesaid auditors and war advisers." The only exception allowed by the charter is the crime of lese-majesty. In such cases, the document states, defendants should be sent immediately, by the military authorities, to the courts and civil ministers responsible for the judgment of "heinous

37
COLEÇÃO oficial da legislação portuguesa..., Op. Cit. Charter of October 20, 1763. *Ius Lusitanae*. Fontes Históricas de Direito Português. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=115&id_obra=74&tpagina=378>. Accessed in: 28 jul. 2014.

38
Ibidem. Charter of February 18, 1764. *Ius Lusitanae*. Fontes Históricas de Direito Português. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=115&id_obra=74&tpagina=394>. Accessed in: 28 jul. 2014.

39
Ibidem. Charter of October 21, 1763. Fontes Históricas de Direito Português. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=115&id_obra=74&tpagina=380>. Accessed in: 28 jul. 2014.

40
Ibidem. See specifically paragraphs 1, 2 and 3.

criminals". This proposal is completed in the following paragraph, when the charter states that it will be inhibited and abrogated all jurisdictions, of any magistrate and court, that attempt to "take notice" of what "belongs to the military crimes," ensuring the jurisdiction of the war councils and auditors even in case of defendants who are knights of the military orders[41].

However, what endorses the personal forum is clearly the problem of conflicts of jurisdiction, which, at the time of the establishment of a first instance military court, and in a context of great bellicose tension between European powers, it becomes more acute. What in the first paragraphs of the charter is defined as a concern for safeguarding the jurisdiction of the war councils, is soon after characterized as an effort of this new state policy, more specifically interventionist, to "maintain the public peace, and the tranquility of the people." From the fifth paragraph onwards, the predominant theme in the charter is the relation between the "military discipline and the police" and, in this debate, the concern of the crown is turned towards the excesses of the military. Thus, it states: "every military officer who usurp the civil jurisdiction of the ministers, or lands, or localities where it may be, or lodge in those places, will lose for this fact the position he may have."[42]

There is here another institution, almost as new as the war councils, created by the same privilege policies the Marquis of Pombal, whose presence should be highlighted: the General Intendancy of Police. Created shortly before the entry of Portugal in the Seven Years War, in June 25, 1760, the Intenancy of Police occupied a key place in the ordination of the political and social spaces of the realm[43]. Not by chance, the charter of October 1763, when addressing the issue of the conflicts of jurisdiction, makes direct mention of the police. In fact, considering the text of the charter, it was with the police that the line troops military rivaled on the streets of the kingdom. And, at this point in the text, the concern with the demarcation of the boundaries of the military justice system gets a more clearly outlined[44].

If, on the one hand, it was necessary to demarcate and secure the jurisdictional boundaries of each institution, on the other hand, especially in a context of war, these boundaries could not prevent or hinder the performance of the Crown agents in maintaining "public peace". What is clear from the charter is that, in the midst of war, using the principle of personal forum, the authorities responsible for preserving the order, at the moment of the action on the streets, did not get along: military spotted committing offenses resisted police orders and other civil authorities, and these, when caught in criminal acts, did not recognize the authority of military officers. In paragraph 6 of the charter, the determination of the Crown explains very clearly the problem: "All military personnel are competent to arrest, in cases of *flagrante delicto*, all criminals who happen to commit offense (...) and, on the other side, all magistrates and civil officers are respectively competent to arrest all the soldiers and officers of war, in the same cases, without violating, thereby, the military privilege.[45]"

The military forum, understood from the old political matrix, as an inherent privilege to the person who possesses it, made these authorities untouchable. This understanding was compatible with aristocratic values still predominant in society, yet, irreconcilable with a policy that was intended not to be level society, but still one of privileges, based on the principle of the State reason. Some criticism on the jurisdictional struc-

41
Ibidem, paragraph 3 and 4. In this last paragraph, it is defined only that, in the case of defendants who have military orders habits, the war council must incorporate in its composition a number of knights of the referred orders equal to the number of the officials of the ranks that compose the council.

42
Ibidem, paragraph 5.

43
LARA, Silvia Hunold. Campos de violência. Op. Cit., p.31.

44
COLEÇÃO oficial da legislação portuguesa... Op. Cit. Charter of October 21, 1763. About the Stewardship of Police, paragraph 8. The issue of the conflicts of jurisdiction permeates the whole charter, appearing in a more concentrate way, however, from paragraph 6 on.

45
Ibidem, paragraph 6.

ture oriented towards privileges could eventually be found in the judicial literature of the time, but in general, the demand was for clear criteria for allocating the forensic competences.[46]

The charter of October 1763 follows this orientation. Above all it seeks to clarify the criteria for the conflictive jurisdictions. In that sense it advances in two directions: first, it defines the military forum as a prerogative at the trial act. Thus, it determines that as soon as a soldier or officer, arrested for *flagrante delicto* or for wandering in the streets, be handed in to the police superintendent or a minister. The case should be immediately reported to the troop commander to "conduct the offender to military prison."[47] Before that, however, independently of the prerogatives of the forum, the arrested officer was submitted to summary police procedures. The intendant, or his substitute, will verbally attest his guilt, keeping a copy of it in the archives and sending the original, along with the prisoner, to the auditor of his regiment. This process shall instruct the war council recognized as the only instance with jurisdiction to judge a military, being he an officer or a private. Even though the problem of jurisdiction was forwarded, it is important to highlight that the charter strengthens the principle of the personal forum. From the arrest to the trial, the only element taken into account when defining the adopted procedures was if the offender was or not a military.

The debate on the subject-matter of the crime of which the defendant is accused appears in the charter – and this is the second important direction – in a limited way. The dividing line established by the document focuses on civil causes. Thus, in paragraph 12, it is determined that "all military civil causes are alie to the jurisdiction of the auditors and all war councils, and are exclusively within the jurisdiction of the auditors and all war councils and civil magistrates". The objects of the charter were the debts, personal property or real state. The, as we have seen, were already addressed in the 1678 Regiment, and the core of the debate were the execution of charges against the military. There is an understanding that persists in the 1763 charter that the patrimonial assets of a military that is essential for the service of the Crown can not be seized to pay debts[48].

Here, again, the purpose of the charter is to define criteria, fixing in paragraph 13, the assets that are not subject to execution for the payment of debts held by military from the paid troop: "I establish that it cannot be pledged for civil debts the assets of war officials and soldiers such as horses, saddles, and reins; offensive and defensive weapons and their wages, for they should never be in the market, since they are indispensable to the defense of the kingdom"[49].

Similarly, it is also established that no military can be arrested for not paying civil debts. The argument follows the same logic: "it should precede over the interest of creditors the public utility of preserving the bodies for the defense of the Realm"[50].

The scope of these determinations, which reformed the military justice, can be evaluated through the resistance to them, expressed in the number of charters published to reiterate these determinations during the second half of 1763 and also during the following year. On February 17, 1764, when facing difficulties to control the army of the kingdom and its officers, the Count of Lippe asked for a second publishing, in separate, of the sixth and seventh paragraph of the 1763 charter. At the end of the text, speaking on behalf of the Majesty and defending the public peace,

46
HESPANHA, António Manuel de. Política e litigiosidade. Op. Cit., p.401-404.

47
COLEÇÃO oficial da legislação portuguesa... Op. Cit. Charter of October 21, 1763. Paragraph 6. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=115&id_obra=74&pagina=380>. Accessed in: 28 jul. 2014.

48
Ibidem, parágrafo12.

49
Ibidem, parágrafo 13.

50
Ibidem, parágrafo 14.

decorum and military honors, he threatened officers and soldiers with prison, remembering that, taken to the war council due to rebellion, they would be "irretrievably condemned to natural death sentence"[51].

It was only then that the Crown, through a charter symptomatically named "expansion charter", decided to link more closely the auditors to the military, giving them the rank of aggregate captain, thus, adjusting the reform of the military justice[52].

III. The Marian-Johannine reforms: The Council of Justice, the Admiralty Board and the military penal code

When Queen Mary I assumed the throne in 1777, she made no opposition to the Pombaline reforms in the military justice. On the contrary, having assumed the leadership of the empire amid an intensifying mobilization campaign for war against Spain, organized in the peninsula and in America, the queen resumed the reform halted in 1764, when the Count of Lippe left Portugal[53]. Nonetheless, the main target of her government was the second instance of military justice, until then limited to the special sessions of the Lisbon Council of War regulated by the 1643 regiment. In August 1777, when in power for only three months and concerned about the accumulation of war councils, the queen determined the adoption of provisions to ensure the celerity of justice administration. "The delay in the expedition of these councils"–asserted the charter- was seriously compromising the "discipline of the troops"[54].

Queen Mary's first provision to accelerate trials was to ordinate that, from that moment on, "in the Court of my Council of War, if I do not order the contrary, all processes or advices shall be dispatched". She then gave out a second provision to ensure the celerity in the execution of proceedings, defining that, once a week should take place a "council of war intended only for that dispatch, which shall be called Council of Justice"[55].

The unclear use of the term "council of war" in the decree is at first surprising. In the text it appears to designate process, trial or court. However, we believe that such indefinition can be a symptom of the ongoing changes. There is no doubt in the document that at that point it was being formalized a court within the Lisbon Council of War - the Council of Justice.

This new Council should meet once a week and would be composed of three jurist ministers, all Supreme judges of grievances from the House of Supplication. In other words, the decree raised the number and the qualification of the judges that composed the Lisbon Council of War. With the transformation of the old sessions destined to legal business in court, three scholar ministers assumed the function previously performed by a single assistance judge. Before that, it was desirable that the judge should be a Supreme judge from the imperial court, now it was a requisite: all three judges had to be Supreme judges. One of them would report the sessions, while the other two were assistant judges. Three council members (lay judges) and war advisors that wished to follow the sessions also composed the Council of Justice[56].

These weekly sessions that had the status of a court and the title of Council of Justice within the old Lisbon Council of War directed by authorities of the traditional legal career and eventually produced new conflicts of jurisdiction.

In August 1790, D. Maria I revisited this theme to "regulate the Council of War at the higher instance of the Council of Justice". The new

51
Ibidem. Alvará de 17 de fevereiro de 1764.

52
Ibidem. Alvará de 18 de fevereiro de 1764. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=115&tid_ obra=74&tpagina=394>. Accessed in: 28 jul. 2014.

53
For further details on the intensification of the mobilization campaign, see: SELVAGEM, Calos. *Portugal Militar.* Compêndio de história militar e naval de Portugal. Lisboa: Imprensa Nacional, 2006. p.482.

54
COLEÇÃO oficial da legislação portuguesa... Op. Cit. Decreto de 20 de agosto de 1777. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=109&tid_obra=73&tpagina=237>. Accessed in: 28 jul. 2014.

55
COLEÇÃO oficial da legislação portuguesa. Loc. Cit.

56
COLEÇÃO oficial da legislação portuguesa. Loc. Cit.

decree precised the number of war counselors that would have a seat in the Council of Justice and determined that all war councils taken to the higher instance of the Council of Justice should be sentenced by three magistrate judges and three war counselors; it also regulated the procedures to be adopted in case of a tie and distinguishing, in these cases, ordinary from capital crimes[57].

However, this decree was not sufficient. Three months later, on November 13, 1790, the queen produced another legislative piece to clarify "My Royal Decrees ofAugust20, 1777 and August 13, 1790", thus settling the situation. The new decree finally fixed the jurisdiction of the Council of Justice that had "all the will and power to confirm, revoke, change or modify the sentences of the councils of war, both to condemn or to absolve the defendants in the cases where the law allows. It could also reduce the punishment imposed by the military regulation, when it seems just and having the referred decisions of the Council of Justice a prompt execution regulated by the first decree of August 20, 1777"[58].

This organizational experience of a military council of justice in Portugal influenced D. João who, only two years after these redefinitions, in 1792, assumed unofficially the govern of the Kingdom[59]. This influence is clear when we observe how the Prince organized the second instance of the military justice in Brazil. When his court was settled in Rio de Janeiro he created asimilar organ to the former Lisbon Council of War - the Supreme Council of Military and Justice. Nevertheless, this new council was already created with two well-defined sections: the Supreme Council of Military and Justice and the Council of Justice. This one preserved the jurisdiction defined by the reforms accomplished by D. Maria I, functioning as a military court, whereas political and administrative issues, which were also in the scope of the Lisbon Council of War, gained their own sphere, the Supreme Military Council. Together, the two councils formed a single body with clear jurisdictions defined in the charter[60].

Nonetheless, the reform in the second instance of military justice instituted during the Marian-Johannine reign was not limited to the creation of the Council of Justice in Portugal and the Supreme Council of Military and Justice in Rio de Janeiro. In 1795, during the unofficial regency of Prince D. João another council was created - the Admiralty Board. This is an important part of the military justice reforms. The agency gave continuity to a policy of particularizing the debates concerning the Navy, initiated in 1783 by D. Maria I. That year, recognizing that there was no royal regiment to define the proceedings against offenders from the *armada*, the Crown determined the creation of specific war councils for the Navy[61]. Four years after the creation of the Admiralty Board in September 1799, this policy was no longer institutional: the Crown fixed Exclusive Articles of War for the service and discipline of the Royal Navy, separating the navy military from the Articles of War instituted by Count of Lippe[62].

The Admiralty Board followed this policy guideline: it recognized the need for a specific forum for discussion and advice the Crown on matters relating to the Navy. The Council should zeal for the "good administration of the Navy in all its branches of dependence"[63]. However, only in parts it followed the structure of the Council of War amended by D. Maria I. Although some of its sessions were aimed at political and administrative matters, according to its regiment, the Admiralty Board did not have a regular Higher Court. In this instance of the naval justice, its three mag-

57
COLEÇÃO oficial da legislação portuguesa... Op. Cit.. Decreto de 13 de agosto de 1790. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=109&id_obra=73&tpagina=909>. Accessed in: 28 jul. 2014.

58
Ibidem. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=109&id_obra=73&tpagina=237>. Accessed in: 28 jul. 2014.

59
D. Maria I had been considered incapable of ruling in 1792 but D. João only officially assumed the Regency in 1799. In this interim he managed the matters of the Empire signing in his mother's name.

60
Alvará de 1º de abril de 1808. A more detailed analysis of the influence of the debate on D. João VI can be found in: SOUZA, Adriana Barreto de. Conselho Supremo Militar e de Justiça..Op. Cit.

61
COLEÇÃO oficial da legislação portuguesa... Op. Cit. See the Charter from November, 15, 1783 and the paragraph VII of the "Título Terceiro do Regimento do Conselho do Almirantado", published by the Charter of October, 26, 1796. For the creation of the Admiralty Council, see: alvará de 25 de abril de 1795. *Ius Lusitanae.* Fontes Históricas de Direito Português. Available from: <http://www.riidj.org/ius-lusitaniae-fontes-historicas-do-direito-portugues/>. [search by date].

62
For the creation of the Articles of War of the Navy, decree of November, 25, 1799. The articles can be found in: ROQUE, Nuno. A Justiça Penal Militar em Portugal. Linhó: Atena, 2000.

63
COLEÇÃO oficial da legislação portuguesa... Op. Cit. See the Charter of April, 25,1795. The sessions of the Admiralty Council, destined to the adminstrative matters replaced the management until then shared with the Captain General of the Royal Armada and by the Inspector General of the Navy. However it shoud be stressed that these sessions of the Admiralty Council would not discuss certain matters that by this same charter would be destined to the Royal Junta of Navy Finance. This Board was created soon after, by the October, 26, 1796 law, forming the Admiralty Council. About this board, see paragraph 3 of title I of the law. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/index.php>. Accessed in: 28 jul. 2015 [search by date]

istrate judges, also Supreme judges from the House of Supplication, were assisted by at least two counselors in "boards (...) on the day and time in which this [Admiralty Board] determines"[64].

Apparently the Marian-Johannine policy, seen here only in the context of military justice was part of a broader reform project for the Royal Navy[65]. For example, the same law that gave shape to the Admiralty Board in 1796, also created two other institutions: the Board of Navy Finance and the Corps of Engineers and Constructors. The text of the law clearly states the interest of the Portuguese Crown in the expansion of the Navy and the need in that context to centralize its administration and eliminate the "vices" of "hereditary administrations" or based on "a single kind of reasoning". The Crown intended to concentrate "all theoretical, practices, military and administrative reasoning, in such a way that the knowledge of the naval officer will assist the administrators, receiving from them the necessary assistance"[66].

The law refers to the mid of 1795 when, based on the treaty of Basel and the treaty of San Ildefonso, an alliance of defensive and offensive military cooperation between Spain and revolutionary France was established, giving way to a war between Spain and England. The discussions on the position that should be taken by D. João VI were raised in the Portuguese court and its aftermath seven years later would be the transference of the Portuguese court to Rio de Janeiro[67].

As the legislation indicates, it was certainly from there that came the interest of the Crown to expand the Navy and centralize its administration, from the viewpoint of bureaucracy, finances, and military justice. Again, as we have seen in the Pombal government, the reforms in the military and justice were impelled by the entrance or the imminent entrance of Portugal in major armed conflicts. Some of these reforms became ineffective soon after the war ended, which was the case of the Admiralty Board. Neither this Board, nor any counterpart agency was established in Brazil in 1808. After the Atlantic crossing and once defined the position of Portugal in the European disputes in the turn of the eighteenth century, the administrative issues and criminal cases in the Navy were again addressed with the Army by the same organ, the newly created Supreme Council of Military and Justice.

Amid the reforms carried out in this continuous state of war, the Military Penal Code was another matter that attracted much attention. The Navy Articles of War can be thought as the first stage of a larger debate on the codification of military criminal legislation, which would be more systematically instituted in 1802.

The new political matrix of organization and distribution of the Royal power, founded on the philosophical principles of the Enlightenment that was being implemented in Portugal since the reign of King José I, sprouted the first criticism of Articles of War by the Count of Lippe. In the Articles the mechanism of exemplary punishment were predominant. No longer the great scenes of criminal tortures that retained life in suffering, "subdividing it into a thousand deaths" producing exquisite agonies[68]. But an inexorable exercise of power was still sustained, one that created fear and marked the body of the convicted. Besides the death penalty, present in thirteen of the 29 Articles of War (44.8% of sentences), ranging from the simple death penalty to the death sentence by musket, the most frequent punishments were the *carrinho perpétuo*, consisting of iron rings on the legs of the condemned and the *pranchadas*, blows by stricking the bare

64
Ibidem. Paragraphs VII and VIII of the Título Terceiro do Regimento do Conselho do Almirantado, publicado pelo alvará de 26 de outubro de 1796. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=110&id_obra=73&pagina=522>. Accessed in: 28 jul. 2014.

65
Andrée Mansuy-Diniz identifies a Project of reformo of the Navy: SILVA, Andrée Mansuy-Diniz. *Portrait d'un homme d'État:* d. Rodrigo de Souza Coutinho, Comte de Linhares (1755-1812). Paris: Centre Culturel Calouste Gulbenkian, 2006. Capítulo: La réporganisation du Département de la Marine.

66
COLEÇÃO oficial da legislação portuguesa... Op. Cit. Apresentação da lei de 26 de outubro de 1796, que dá forma ao Conselho do Almirantado, cria uma Junta de Fazenda da Marinha e um novo Corpo de Engenheiros Construtores. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte= 110&id_obra=73&pagina=505>. Accessed in: 28 jul. 2015.

67
About this framework of international political relations and the discussions that resulted in the transference of the Portuguese Court, see: SILVA, Ana Rosa Cloclet da. *Inventando a nação.* Intelectuais ilustrados e estadistas luso-brasileiros na crise do Antigo Regime português (1750-1822). São Paulo: Hucitec, 2006.

68
FOULCAULT, Michel. *Vigiar e Punir:* história da violência nas prisões. Petrópolis: Vozes, 1977. p.16.

back with the flat of a sword. Military and legal authorities that considered them derogatory soon criticized these penalties. They also questioned their effectiveness for if the penalties were all applied as the Regulation predicted it would eliminate many of the soldiers and recruitment had always been a challenge for Portugal[69].The critics on the demeaning nature of the penalties did not mobilize many opinions and the *pranchada* as well as the whipping were naturalized in Brazil as a military practice until the early twentieth century. Nonetheless, the second criticism was more carefully listened to.

The debate was not over the death penalty but on the operation of the penal system of the Old Regime itself. António Manuel Hespanha examined the devices for the execution of the criminal order and verified that in a practical manner, especially between the sixteenth and seventeenth centuries, this system massively commuted the harshest penalties, particularly the capital sentence[70] because its underlying logic did not predict an unrestricted application of the law. Instead it obeyed the logic of "to be feared, by threatening" and "to be loved by not applying"[71]. Threat was maintained for its implementation - or not - depending on the concrete assessment of each case, of the grace and compassion arising from the application of the general rule for a particular person. As Hespanha affirmed, it was a partially virtual juridical order directed to promote the King as a dispenser of justice rather than an effective and normative intervention to discipline deviant behaviors. The same hand that threatened with merciless punishment, depending solely on its will could also bestow the graces and pardon or commute the sentences.

In the late eighteenth century, in the military circles, this penal system became unfeasible. If all the Articles of War that predicted the death penalty were as stated in the Regulation, Navy and Army officers would disappear. On the other hand, non-compliance in a war context compromised troop discipline. The maintenance of this penal logic in a moment when the subject was already widely discussed generated jocose criticism. It is told that when King Frederick II of Prussia read the 5th book of the Philippine Ordinances, he was surprised at the number of articles predicting the application of the death penalty, and he would have asked if there were still people alive in Portugal[72].

The central point of the debate was the effectiveness of the criminal justice system. To modify it, besides an institutional reform to solve the problem of multiple jurisdictions and procedural delays, from then on it was necessary to implement a criminal law with modalities of normative social interventions.

The Navy War Articles advanced in this debate although the capital and corporal punishments were not eliminated. However, as above mentioned, this debate was not able to mobilize many opinions in Portugal. Therefore, it did not reflect the emergence of a new sensibility organized within the discourse of criminal humanization. Even so, there were some differences when compared to the Articles of War of the Count of Lippe, which remained operative in the Army.

The first change worth mentioning is the significant increase in the number of articles from 29 to 80. This fact, apparently only a detail, indicates how the naval and juridical authorities dedicated more attention to elaborate the new legislation. It expresses greater concern in differentiating crimes and sentence imputation. For example, the death penalty decreased 12.3% and was present in 26 of the 80 articles. Still, more

69
On the punitive logic of the Ancient Regime and its functioning, see: HESPANHA, António Manuel de. Política e Litigiosidade. Op. Cit; LARA, Silvia Hunold. *Ordenações Filipinas. Livro V.* São Paulo: Companhia das Letras, 1999.

70
HESPANHA, António Manuel de. Política e Litigiosidade. Op. Cit. See especially the item: "O direito penal na monarquia corporativa".

71
Ibidem, p.311.

72
Ibidem, p.299.

important than this reduction is the fact that, in most cases the death penalty was indicated only for repeat offenders. Its immediate application was restricted to crimes that, according to the legislation, "compromise the honor of the nation", such as treason, desertion of post or ship, and unauthorized surrenders in the context of war[73].

Another significant change is the number of items that simply do not predict penalties, indicating that these shall be imputed by the war council which should not only "inflict punishments", but also provide them according to the crimes. This recognition of the first instance of the military justice and of its juridical authority is also worthy of attention[74]. From the legislative viewpoint, it expressed an interest in preserving the institutional responsibilities to avoid arbitrariness, so common in the simultaneous and disordered exercise of the penal practices by legal, military, and police authorities. The articulation between a strengthened first instance, especially after the establishment of the regimental auditor by the 1763 Regulation, together with a more thorough legislation was undoubtedly an advance in the overcoming of the old penal model, replacing law enforcement by moderate interpretations more interested in the "rule of peace" instead of punishment as a means of orienting behaviors.

Finally, we should highlight the proliferation of different types of penalties. In the Navy War Articles, we can find prison sentences with time varying according to the harshness of the crime committed, payment loss also for a variable period, expulsion and labor in the "Royal factories".

It is important to make clear that, by stressing the changes in military penal law, we do not intend to deny or soften its cruel character. In a highly hierarchical society, the military hierarchy mirrored this broader system of social hierarchies[75]. This is why the theme of corporal punishment and even the death penalty, could not mobilize many opinions. Punishment seemed to be the only possible corrective for "souls of brute nature" and, although this perspective did not totally eliminate the debate it set quite clearly its contours.

The conception of a common Military Penal Code for the Army and the Navy was officially thematized with the charter of March 21, 1802, when the then Prince Regent appointed a board to prepare a project for a Military Penal Code. It is not easy to rebuild the composition of this board for it was a prolonged work that changed through time. However, the names we have identified to this point enable us to affirm that an important criterion for its composition was merit. Among the men that composed the board were General officers and superiors with wide and reputable experience in the Royal Army, such as Luis Telles da Silva Caminha e Menezes (Marquis of Alegrete), João de Ordaz e Queirós (baron of Castello Novo), Bernardim Freire de Andrade, Antônio Teixeira Rebelo and João de Souza e Mendonça[76]. In 1804 the board was expanded to prepare a Military Penal code for the Navy, receiving three new members for this task: Vice Admiral Pedro de Mendonça e Moura, the sea and war captain Ignacio da Costa Quintella and the appeal Judge José Antonio de Oliveira Leite de Barros[77].

These initiatives are further evidence of the investment held since the time of Pombal and continued during the Marian-Johannine reign to implement a new political matrix of organization and distribution of the royal power in Portugal. The interest of Maria I went far beyond the limits of a Navy or military reform. The question of the military codes, which was only formally presented by her son, is another result of a greater legislative

73
Artigos de Guerra da Marinha, decreto de 25 de setembro de 1799. These Articles are reproduced in: ROQUE, Nuno. Op. Cit., p.64.

74
ROQUE, Nuno. Loc. Cit.

75
For a more detailed analysis of the military hierarchy in the 18th century, see: SOUZA, Adriana Barreto de. *O Exército na consolidação do Império:* um estudo histórico sobre a política militar conservadora. Rio de Janeiro: Arquivo Nacional, 1999.

76
The decree of creation of the Junta mentions the enclosure of a relation of its components. However, the copies found in this research did not include the referred attachments. The names quoted here were extracted from the document signed by the Prince regent, on a unidentified date and entitled as "Plano para a junta do Código Penal Militar e Melhoramento das Caudelarias do Reino a fim de se regular em conformidade". Arquivo Histórico Militar de Lisboa. Lisboa, Brasil. Cota: PT- AHM-DIV-1-13-09-10.

77
Charter of February, 23, 1804. The data here presented were extracted from: SOARES, Joaquim Pedro Celestino. *Quadros Navaes ou Collecção dos Folhetins Marítimos do Patriota seguidos de uma Epopéia Naval Portuguesa.* Lisboa: Imprensa Nacional, 1863. Tomo III.

project: the recompilation of the ordinances of the Kingdom. This proposal put in effect by the Decree of March 31, 1778, created a Board of Ministers to "examine the many dispersed and extravagant laws" besides those that composed the ordinances. Four months later a new decree suspended the execution of certain Pombaline laws[78]. The reform accompanied the change in the principles underlying the concept of law that, until then had guided the national encodings. Therefore, the Enlightenment postulates, besides producing the first critics to the legal institutions and to the logic of exemplary punishment, also spread the idea that the path to a better-structured society was the systematization and rationalization of law.

The doctrine of natural law in the late eighteenth century, sustained the law as independent of all human or divine power, founded on pure reason, not on will[79]. This movement of encoding inspired by the natural law favored political centralization - as indeed occurred - but certainly the propagation of the motto "submit the king to the law", and no longer the law to the king, undermined the foundations of absolutism. In Portugal, after another Royal intervention, José Pascoal de Melo Freire finalized the criminal and public law codes in 1789. However, when submitted to review as was customary, the public law project produced yet another passionate debate between Melo Freire – a tough representative of the enlightened despotism - and Antônio Ribeiro dos Santos, a theorist aligned with more liberal positions. In the expert opinion, this controversy summarizes the extract of the Portuguese constitutionalist ideas in the same year the French Revolution burst out[80]. Its outcome evidences the tension in the Portuguese intellectual circles: although the official assessments continued to be those by Pascoal de Melo Freire, shaping the university culture of several generations of law bachelors, the public code never came into force.

The debate on the Military Penal Code is part of the same intellectual and political movement. A general code for the Army was claimed based on the assumption that military daily life was regulated by a legislation in parts outdated and in parts confusing, but above all, unenforceable. The main target of criticism at that moment was the regulation of the Count of Lippe, but it was not the only one. The fact that a legislative corpus from the seventeenth century was still in effect also generated dissatisfaction, hence the feeling of confusion. Also, many legislation linked to very specific conjectures, coexisted. They demanded a systematization and rationalization of law and of military justice through laws with universal validity.

This demand was polemic and controversial both in the penal code and public law and required time. The lack of clear rules to punish crimes of desertion in times of peace was a problem of the Articles of War of the Count of Lippe. In 1805, the Prince Regent to cohibit the irregularities, asked the Board of the Military Penal Code to draft a special ordinance on the subject. It should regulate the different types of crimes of desertion and the proportionality of the penalties. Apparently, at that time new people were nominated to join the Board, and among them was none other than the jurist Antônio Ribeiro dos Santos[81].

The Ordinance was supposed to be provisory addressing the problem of desertion until the Military Penal Code was ready, but not even the context of the Napoleonic invasions compelled the code, which seems to have been forgotten. Only in 1816, eleven years later, a new Royal Decree would reawaken the subject.

78
COLEÇÃO oficial da legislação portuguesa... Op. Cit. Decreto de 17 de julho de 1778. Available from: <http://www.iuslusitaniae.fcsh.unl.pt/verlivro.php?id_parte=87&tid_obra=65&tpagina=365>. Accessed in: 28 jul. 2014.

79
In Portugal, this new "law policy", which tends to affirm the supremacy of the law above all other sources of right (the customs, the rights and the doctrine) was initiated with the "law of Good Reazon", from August, 19, 1769. About the debate in Brazil, see: GRINBERG, Keila. *O fiador dos brasileiros*. Cidadania, escravidão e direito civil no tempo de Antonio Pereira Rebouças. Rio de Janeiro: Civilização Brasileira, 2002.

80
HESPANHA, Antonio Manuel de. O Constitucionalismo monárquico português: breve síntese. *Historia Constitucional*, Lisboa, n.13, p.477-526, 2012. Available from: <http://www.historiaconstitucional.com>. Accessed in: 28 jul. 2015.

81
The ordinance of April, 9, 1805, elaborated by the Board of the Military Penal Code, was entirely reproduced in: SAMPAIO, Antônio Manoel da Silveira. *Instruções para o uso dos oficiais do Exército Nacional e Imperial nos processos de conselho de guerra*. Rio de Janeiro: Typographia Nacional, 1824. The information on Antônio Ribeiro dos Santos having entered the Board can be found in the "Carta ao Leitor" written by Cândido Mendes de Almeida for the 14th edition of the Philippine Ordenations, published in Rio de Janeiro, by Typographia do Instituto Philomathico, em 1870.

In general, the narratives about the first Portuguese Military Penal Code tend to stress continuity –in 1816 the Crown would have resumed the 1802 initiative, recreating the old Board responsible for its elaboration. A more thorough assessment, however, reveals a different story. As it seems, the 1816 initiative was a result of the political pressures of the Lisbon Regency that saw a significant growth of an anti-British sentiment in the Kingdom after the Congress of Vienna[82]. With a devastated economy, the self-esteem shaken by the option the King had made for Brazil, and a renewed willingness to public debate, Portugal was a fertile soil for revolts. Even worse was the fact that the most mobilized element was the Army itself, which in 1811 relied on 60,000 armed men that the monarchy decided to maintain even after the peace of 1815. Added to this body, were 52 thousand militia men that compared to the population of Portugal, was one of the largest armies in Europe.

It was a great army but with serious internal fissures. Under the command of the British Marshal William Carr Beresford since 1809, the Portuguese army of 1816had been properly trained in his system of regimental rotation and disciplinary method, gaining more national and professional countours. But this benefit had its cost. The Marshal kept the Kingdom including the Regency Council of Lisbon, under a strict regime and even after the end of the Napoleonic conflicts he preserved the command posts of the Portuguese Army in the hands of British officers. The officers who had engaged their lives in the cause of the Monarchy and had been symbolically held as national heroes, now felt discredited by the policy that blocked their promotion[83].

In this context of internal tension in which a military uprising was articulated against the Regency government and marshal Beresford, the Crown recovered the project of the Military Penal Code. A new Board was formed in May 1816 to elaborate the Code. This Board, however, had nothing of the former. D. João VI intended to strengthen the authority of Marshal William Beresford who, besides being in charge of presiding over the work of the Board, also participated in its composition naming only generals and judges from the Kingdom[84]. The Regency Council mourned the choice of the Crown that concentrated the "full force of the Kingdom in the hands of a foreign general", disauthorizing the government[85].

The initiative was, therefore, the work of a convulsed Portugal. The conspiracy was discovered exactly a year later, in May 1817, and it resulted in the execution of none other than Marshal Gomes Freire de Andrade, reflecting the gravity of the situation. It was not by chance that in the following years Beresford was twice in Brazil. In his second journey, he sought with the Crown the means to face the uprisings and brought with him the Military Penal Code project. But, as customary, before approving it, D. João VI submitted the project to the consideration of the jurist Viscount of Cachoeira, Luiz José de Carvalho Mello[86]. This worried the British marshal, who wrote to the minister of war Thomaz Antonio Villanova Portugal trying to sensitize him on the need for an urgent decision. He feared that the review of the Code by a judge who had "many charges and laborious duties" would considerably prolong it and he recalled that the project had been "thoroughly discussed and very well pondered over by the experience and lights of two of the most credited judges of the Court". He finally stated that, "for not existing other penal code for the discipline of the Army and

82
An important research has been carried out by the Brazilian jurist Mário Tiburcio Gomes Carneiro. The results of his efforts were partially published in the *Revista Arquivo do Direito Militar*, dited in the 1940s by the Imprensa Nacional. For this particular theme see volumes I e III of the publication.

83
RAMOS, Rui. Op. Cit., p.453.

84
The Junta was composed by the General Lieutenants Count of Sampaio and Mathias José Dias Azedo, as lays, by the Supreme judge and rapportaire judge of the Council of Justice, Alexandre José Teixeira Castello, and the Supreme judge and General Auditor of the Army, José Antônio de Oliveira Leite de Barros. The board also nominated its secretary. Decree of May, 28,1816. Apud. CARNEIRO, Mário Tiburcio Gomes. O código penal militar de 1820. *Revista Arquivo do Direito Militar*, Rio de Janeiro, vol.3, p.228, janeiro a abril de 1943.

85
Apud. RAMOS, Rui. Op. Cit., p.452.

86
A reference to this episode is made by Senator José Inácio Borges in the session of September, 2, 1826. Anais do Senado Brasileiro. Available from: <http://www.senado.gov.br/publicacoes/anais/asp/IP_AnaisImperio.asp>. Accessed in: 28 jul. 2015.

the administration the military justice system", the best was to approve it as soon as possible, even if it was left "with small imperfections"[87].

His effort was effective and three months later, in August 7, 1820, D. João VI published a charter approving the new Military Penal Code. Although it was produced in a specific situation, the objectives of the 1820 Code were the same ones of the 1802 decree: to reform and systematize the military criminal laws to maintain the discipline of the troops, avoiding arbitrariness in the judgments and "giving occasion to interpretations and intelligences, which often give greater punishments to mild offences and wrongly reduce the penalty of crimes that demand more severe correction"[88].

Nonetheless, due to the constitutionalist movement and the return of D. João VI to Portugal this Military Penal Code was never applied in Brazil. Brazilian armed forces would still have to wait for over 71 years to have their first military penal code. Still, the new code from 1891 had a peculiarity: it was not properly a military code, but a Navy code, that had, since 1865particularized their fight for the regulation of judging proceedings for the Armada.

IV. The field of Military Justice

From a historical viewpoint we have assessed the establishment of a field particular of the military justice within a broad constellation of constituted powers in a pluralist logic. The notion of field is drawn, within its limits, from the reflections of Pierre Bourdieu. We do not intend to think of the military justice or even of the juridical knowledge as a "know-how" endowed with a theoretically refined formalism, which has reached a high degree of autonomy[89]. Therefore, we have stressed the pluralistic rationality exactly because this work analyses the specific context of the late eighteenth century.

Nevertheless, the concept of field has helped to shape certain disputes, actions and knowledge that were found in this research and which were scattered in a large documental corpus, giving direction to the investigation. From the notion of field we have tried to imprint a unity to these various actions, disputes and knowledge and effectively thinking them as a whole, seeking their articulation and, above all, understanding them as a historically constituted social space, having for that a moment of emergency in the Portuguese legal tradition. This moment should not be thought of as an "origin" that unfolds in an evolutionary and linear manner until it is a strong and almost impenetrable field of law. Instead, we have found pure movement, a constant doing, redoing and undoing, of legislation, authorities and institutions. It expresses interests and experiences that are sometimes converging and sometimes conflicting, often poorly delineated, but always the result of political and social action. Two good examples of this constant movement were the Admiralty Board, which was recreated in Brazil in the nineteenth century, and the debate over the military penal code, which was recovered with the creation of commissions, order and elaboration of texts for two more times in the same period. Probably the term "emergency" is better than "invention".

I believe the invention of the military justice as a juridical field in Portugal - in all its complexity, involving tensions, oppositions, and failures –occurs with the Pombaline reforms. Although the set of these reforms has already been well studied, the actions of the minister of D. José I in the military area still lack research. Shortly after the end of the Seven Years

87 Carta do marquês de Campo Maior ao ministro da guerra datada de 7 de junho de 1820. Apud. *Arquivo de Direito Militar*, Rio de Janeiro, vol.3, janeiro a abril de 1943.

88 Decreto de 7 de agosto de 1820. Available from <http://www2.camara.leg.br/legin/fed/alvara/anterioresa1824/alvara-39026-7-agosto-1820-568465-publicacaooriginal-91786-pl.html>. Accessed in: 28 jul. 2014.

89 For the concepto of field, see: BOURDIEU, Pierre. A gênese dos conceitos de habitus e de campo. In: _____. *O Poder Simbólico*. Lisboa: Difel, 1989.

War, following the approval of the Infantry and Artillery Regiment, the publication of several charters instituting authorities and regulating the proceeding of formalization of the Councils of War, demonstrate how the Crown was interested in the issue of military justice, in regulating social order and power relations in that specific field. At the center of the debate was the dispute for a more precise definition of the military justice system that, until then, was thought of as a privilege to guarantee the judgment in special forums of justice to the line troop military, and from 1763 onwards, also to the auxiliary regiment.

A great innovation amid this institutional reform was the creation of the post of regimental auditor. The difference in regard to the previous auditors is that the regimental auditor was linked to a military unit - the Regiment - and was subordinated to his commander. This subordination was formalized at their entry when, besides receiving the captain rank, the auditor began to receive a captain wage and to wear a uniform.

Unquestionably these changes were the product of the Royalist policy of the Marquis of Pombal. Shortly before the entry of Portugal in the Seven Years War, in this movement of social and political ordering of the spaces of the Kingdom, he had created another important, yet unknown institution: the General Police Intendancy. It was through the intendancy that the military of line troop rivaled in the streets of the Realm. Because of this, its creation redefines the terms of the debate on the limits of the military jurisdiction.

When D. Maria assumed the throne in 1777 she continued the Pombal reform in the military justice especially targeting the second instance of the military justice. After a sequence of interventions by the Lisbon Council of War she created a board that was dedicated solely to matters of military justice - the Council of Justice. Three magistrate judges and three war counselors composed the new board that was completely free to confirm, revoke or modify the sentences (tribunals of first instance), definitively replacing the old justice sessions of the Lisbon Council of War.

The debate on the particularities of the military justice, the context of bellicose tension between European powers, and the internal demands for a specific forum for discussion and counseling of the Crown on matters relating to the Royal Navy led to the creation of yet another Royal council in 1795 - the Admiralty Board. The debate on the codification of the military penal legislation lies within this new series of reforms. In a chronological sequence we would have: in 1763, the approval inside the Infantry and Artillery Regulation of the Articles of War of the Count of Lippe; in 1799, the approval of the Articles of War of the Navy; in 1802, the creation of the first Board to elaborate the Military Penal Code and; in 1820, D. João VI approves the first Military Penal Code of the Luso-Brazilian Empire.

From this research effort, from the exercise of thinking articulately on these measures articulately that are found fully dispersed in a series of decrees, charters, and royal regiments, we can observe the emergence of a new organizational matrix of distribution of royal power erected from Enlightenment ideas. Although, as I have tried to show in this work, some of these procedures were soon after undone, leaving some laws unexecuted or suppressing institutions, their discussion and its approval are enough to demonstrate the interest of the Portuguese Crown to provoke changes in the exercise of the penal practice from this new political matrix, leading to the replacement of justice by discipline as the flagship of the penal action.

The decision to work only with the legislative documentation is certainly open to criticism, precisely because there is no guarantee *if* and *how* this legislation was implemented. Underling this argument we may remember that the laws, even penal laws are never promptly fulfilled and that they do not constitute all the law - especially in Old Regime societies. Finally, we may remember that they do not constitute a mirror of the social reality.

In this regard, the general criticism is fair. However, I would like to defend two counter-arguments. The first argument is more specific to this theme: the lack of academic research on military justice and, consequently, on the basic references about its institutions, authorities, and functioning, legitimates a more thorough examination of legislative sources. This will allows us to outline a field mapping. Within the limits of this research, I believe that the confluence between the circulation and the disputes to establish an active matrix of management policies, in which the "State reason" should be imposed and order society, as well as the entry of Portugal in a major armed conflict enhanced the interventionist action of the Crown. If by this new matrix the penal law needed to be efficient and instituted as an effective instrument of social control, this effectiveness became all the more necessary in the military field.

The second argument is more general and theoretical. I defend the idea that conceptual realities, expressed in various types of texts, including legislative texts go through changes in time. "Justice", "forum", "violence" or even "military" are conceptual realities that come to us through texts, just as the social events of the past. They integrate political and doctrinal logics that, being marked by history, they are also perishable. Hence, there are other types of inquiry that can be addressed to the legislative texts beyond the traditional (and certainly important) concerns about the implementation or not of their proposals. We can also inquire about the problems that are being debated, about the names engaged in different projects, the institutions that are being discussed, the argument mobilized in the creation, abolition or reform of laws and/or institutions, besides the necessary inquiries about the intellectual traditions, ancient or modern, national or foreign, which are constantly underlying debates and decisions.

Translated by Juliana Jardim de O. e Oliveira

Received for publication in August 12, 2014
Approved in February 06, 2015