


# Torments Through Time: Pardon in Brazilian Military Penal Law between Early Modern Rules and Liberal Justice (Council of State, 1842-1889)


*O tempo e suas tormentas: recurso de graça no direito penal militar brasileiro entre regras de Antigo Regime e justiça liberal (Conselho de Estado, 1842-1889)*

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**ABSTRACT:** Military criminal law in 19<sup>th</sup> century Brazil was governed mostly by the Articles of War (1763), which retained many characteristics from Early Modern punitive practices. Did pardon of soldier offenders too retained its older features, completing the logic of *Ancien Régime* punishment, based on the duality fear/love? To answer this, I analyzed the opinions of the Council of State, Section of Navy and War on pardon petitions. Contextualizing these data with criminal statistics from the armed forces, we can see that the death penalty was lavishly imposed, but capital sentences tended to be reduced going up in the judicial structure. This, coupled with the institutional design favoring a quick trial in military procedural law shows that the system was designed to instill fear, especially during the Paraguayan War. Pardons were frequently given to counter the harshness of the Articles of War, just like in the *Ancien Régime*, but new functions were added, like the correction of procedural errors. I concluded that pardon retained much of its older logic, yet military law was not “transitional”, but a natural complement

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to the violent way of recruitment pursued by the armed forces.

**KEYWORDS:** Pardon; Military law; Military procedure; Council of State; Ancien Régime criminal law.

**RESUMO:** O direito penal militar brasileiro oitocentista era regulado principalmente pelos artigos de guerra (1763), que mantinham muitas características do direito penal de antigo regime. A graça de militares também retinha características anteriores, completando a lógica penal do antigo regime, baseada na dualidade amor/temor? Para responder a essa pergunta, analisei pareceres do Conselho de Estado, Seção da Guerra e Marinha sobre petições de graça. Contextualizando esses dados com estatísticas criminais das forças armadas, vemos que a pena de morte era imposta com frequência, mas tendia a ser minorada em instâncias superiores. Isso, juntamente com o desenho institucional que favorecia julgamentos rápidos no processo militar mostra que o sistema era projetado para provocar medo, especialmente durante a Guerra do Paraguai. Graças eram concedidas com frequência para suavizar a dureza dos Artigos de Guerra, como no Antigo Regime, mas novas funções foram adicionadas, como a correção de falhas processuais. Concluí que a graça reteve muito de sua lógica antiga, mas que o direito militar não estava “em transição”, mas oferecia uma resposta natural ao modo violento com que se dava o recrutamento de militares.

**PALAVRAS-CHAVE:** Direito de graça; Direito militar; Processo militar; Conselho de Estado; Direito penal de Antigo Regime.

**SUMMARY:** 1. “This grace hath brought me safe thus far / And grace will lead me home”: Introduction; 2. Antipodes of the future: military procedure and the place of pardon in imperial Brazil; 3. Towards waters of hope: an overview of Pardon in the Section of War and Navy of the Council of State; 4. Ominous storms and auspicious winds: reasons to decide in opinions on pardon from the Section of War and Navy of the Council of State; 5. “Was grace that taught my heart to fear / And grace my fears relieved”: pardon and the harshness of military law; 6. The horizons of time: final remarks; References

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*O tempo, como o Mundo, tem dois hemisférios: um superior e visível, que é o passado, outro inferior e invisível, que é o futuro. No meio de um e outro hemisfério ficam os horizontes do tempo, que são estes*

*instantes do presente que imos vivendo, onde o passado se termina e o futuro começa. Desde este ponto toma seu princípio a nossa História, a qual nos irá descobrindo as novas regiões e os novos habitantes deste segundo hemisfério do tempo, que são os antípodas do passado*<sup>2</sup>.

Pe. Antônio Vieira

História do Futuro, p. 4

## 1. “THIS GRACE HATH BROUGHT ME SAFE THUS FAR / AND GRACE WILL LEAD ME HOME”<sup>3</sup>: INTRODUCTION

If we are to follow through with the metaphor proposed by father Antônio Vieira, pardon would very much look like one of those Portuguese caravels that sailed the Atlantic from Portugal to the Bay of *Todos os Santos* or to the *Guanabara*: a small but defiant vessel cutting waters and linking two very different lands. But just as a decisively Portuguese ship, pardon could be said to belong to the first hemisphere of the globe of time, the antipodes of the future, to stay with the metaphor from our beloved Portuguese preacher.

Pardon, or, in Portuguese, *recurso de graça*, is the prerogative given to the monarch to forego or diminish the punishment imposed upon a convicted – frequently, capital punishment. In the *Ancien Régime*, this power was part of a very particular way to understand the role of the king, the *economia das mercês*. The monarch was seen as the benevolent father of his subjects, responsible to grant gifts to them as a response to the services they had rendered to the crown. This exchange, however, was not understood as a contract, by which similar values should be given as compensation one of the other; rather differently, both are considered to

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<sup>2</sup> Translation: “Time, like the world, has two hemispheres: one superior and visible, which is the past, and other, inferior and invisible, which is the future. Between one and the other lies the horizons of time, that are these instants of the present that we go by living, where the past ends and the future begins. From this point begins our History, which will discover to us the new regions and the new inhabitants of this second hemisphere of time, that are the antipodes of the past”.

<sup>3</sup> Cf. the 18<sup>th</sup>-century English hymn “Amazing Grace”.

be freely given, thus creating a bond of gratitude between those involved in the relation – the anthropological theories of Marcel Mauss (2003) are currently used by the historiography as a model to reflect on this situation. In the context of the absolutist state, pardon, as a political prerogative, concentrates on the hands of the single sovereign. Criminal law was frequently be affected by this logic. The king, modelled after God himself, should both dispense justice harshly and fairly, on the one side, but must also be kind and generous, forgiving offenses. Fear and love, justice and goodness, punishment and pardon were the two entangled faces of Early Modern criminal law (HESPANHA, 1993).

Perhaps surprisingly, pardon was not dropped from the constitutions of most states after liberalism and constitutionalism made their triumphal entrance in the world of law. Presidents, governors, kings and emperors all over the world still pardoned. But now, the logics of the constitutional state would affect how penalties were forgiven by the state – though only to some extent. Historiography has already explored the contradictory and stimulating paths taken by pardon throughout the 19<sup>th</sup> century: Italy (STRONATI, 2009), France (DE BOER, 2008), Finland (KOTKAS, 2007), Germany (KESPER-BIRMANN, 2011), Argentina (CORVA, 2016) and the United States (STRANGE, 2011) are only some of the polities on which papers and books have been written discussing the undertakings of such a puzzling legal institution. In the last few years, Brazilians have also started to pay attention to royal clemency: some ink has been put on paper to discuss the role of the concept in the dynamics of the criminal persecution of slaves (RIBEIRO, 2005; PIROLA, 2015), on how dispossessed prisoners wrote their petitions (PIROLA, 2017; CÉSAR, 2021), pardoning practices on the second Council of State (COSTA, 2019a), legal justifications of the institute (COSTA, 2019b) and its debate in public opinion and administrative uses (COSTA, 2017). Some incursions in pardoning practices in colonial Brazil have also been made (MASSUCHETTO; LOPES, 2020). Igor Juliano Mendonça de Andrade (2017) even explored pardon petitions of soldiers to the Council of State, though he focused more on administrative rather than legal aspects. Though not complete – it can never be, after all – the literature on this subject now provides a lively picture on the legal practice of clemency in Brazil.

Yet, this canvas still has some white spots left. Just as pardon seems to come from the first hemisphere of time, another, related body of law also shares waters with the septentrional flow of years, with the boreal pace of the world: military law. My proposal is to join together these two dishes spiced with flavors of the past to better grasp how the underground movement of the currents beneath the horizons of time provide for a complex synthesis between past and future, experience and expectation that constitutes any given legal order. My article, then, aims to understand the pardoning practices of the Section of War and Navy of the Brazilian Council of State, the advisory board that assisted the emperor to use the prerogative of art. 101, § 8 of the Brazilian constitution on his subjects serving in the Army and the Navy. My object is simple – almost naïve – but my interest is not restricted to the administrative practice of a single body of advisors. It rather lies in the doldrums, that area near the equator where winds from north and south converge and where the fears of all seamen materialize; that is, on how different temporalities and sets of norms interplay and interact to form a – more or less – coherent legal order applicable to concrete people.

Why was military law a deed of the past? It is not simply a matter of the age of its regulations; some laws can be old and up to date at the same time. No: the chasm between military regulations and 19<sup>th</sup> century law ran deeper. Until the 1890s, the criminal law of the armed forces was governed by the Articles of War, two separated bodies of regulations, one produced for the Army in 1763, and the other for the Navy in 1799. These two regulations were enacted within the context of the Pombaline reforms in Portugal that brought the Iberian kingdom in line with the illuminist ideals of administrative rationality and enlightened despotism. Particularly on military administration, the reforms<sup>4</sup> were carried under the leadership of the Count of Lippe<sup>5</sup>, a German noble that brought the Portuguese Army in line with Prussian discipline<sup>6</sup> – not famous for its forgiveness. Humanism was mostly absent: most of the logic of early

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<sup>4</sup> Particularly on the reforms concerning military justice, cf. Adriana Barreto de Souza (2016).

<sup>5</sup> On the passage of the Count of Lippe in Portugal, cf. Fernando Does Costa (2012).

<sup>6</sup> On the logics of government behind the reforms, cf. Fernando Does Costa (1998).

modern criminal law remained. For instance, the Articles of war of the Army determined the death penalty of many offences, while the precise punishment for others was trusted to the not particularly mild discretion of judges. The article 80 of war of de Navy determined that whenever an offense was not explicitly established in the document, but the responsible officer judged worth of punishment, he could inflict a penalty on the offender: the *arbitrium*, this power to go beyond the letter of the law, a fundamental feature of the theory of criminal jurisdiction in the *Ancien Régime* (MECCARELLI, 1998), still held sway over legislative practice. Moreover, the tribunals that applied military law were subordinated to the executive, and most of their members were appointed *ad hoc* for each trial. One could hardly find any trace of the separation of powers and the distinction between administration and jurisdiction so cherished by 18<sup>th</sup> and 19<sup>th</sup> century philosophers. The Supreme Military and Justice Council, the apex organ of military justice, was both a tribunal and political council, created in 1808 in Brazil using the statutes of its Portuguese counterpart from 1643. Finally, military law was not a specialized field, as one would expect, but an umbrella bringing together regulations with different natures. Administrative and criminal punishment are not very clearly separated, and procedural and substantial law are treated in a blurred *continuum*. Therefore, whenever I talk about “military law”, procedure will always be comprised, caught in a complex mixture with substantial law.

It is not hard to understand why the historiography has described this normative babel as a “Lusitanian legal legacy” (NASCIMENTO, 1999), an “inheritance from the Portuguese Old Regime” (SILVA, 2007), a “gothic building among modern institutions” (SOUZA, 2012). The antique scent of military law is even more pronounced when compared with common criminal law, codified in 1830, and common criminal procedure, codified in 1832. Yet, only one side of the coin has been so far minted in the officers of historians. Early modern Criminal law is based in fear and love: if the scholarship on the bleak punishments is strong – one could only remember the 1910 revolt of the whip – little has been done to clarify the more graceful side of pardon. This is the gap my article aims to fulfill. Pardon and military law: the combination of these two northern winds could bring the seeds from which strangeness could blossom – and a stimulating historiographical debate can flourish.

Yet, how should we describe this intriguing composite, a law of the past existing in a completely new context, arguably incompatible with it? Pietro Costa (2019) has discussed the uses and frequent abuses of the notion of “transition” in historiography. For the Italian historian, transition can only mean more than a metaphor when it describes not a simple passage – since all of history is about a flow of change between the infinitely distant past and the infinitely ungraspable future. Transition must mean a period of experimentation and uncertainty between two logical coherent structures. It describes the realm of tension, the middle land between two clearly identifiable stages. Was Brazilian 19<sup>th</sup> century military law and its procedure “transitional”? Or was it “anachronical”: a “dischronical” example of a past temporality intruding into a new context<sup>8</sup>?

But before answering what military regulations and procedure meant for the larger body of Brazilian law, we must understand what it was and how it worked. We shall now map the norther and southern currents transporting this ship between both sides of the horizons of time.

## **2. ANTIPODES OF THE FUTURE: MILITARY PROCEDURE AND THE PLACE OF PARDON IN IMPERIAL BRAZIL**

The flotillas of Portuguese legislation found a safe harbor in Brazilian military law, a true shelter that would protect them from the raging winds of liberalism. Military procedure, caught between the judicial form and its location within the executive branch, mostly preserved the ancient features of the Portuguese tradition – at least from the late 18<sup>th</sup> century reforms that brought the Army in line with the quest for efficiency, while insulating Portuguese soldiers from the novelties shaking the criminal law of the civilian world, such as abolition of death penalty, accusatory system, mild penalties based on rational calculus, etc.

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<sup>7</sup> For an enlighten discussion on the historiographical concept of transition, cf. Pietro Costa (2019).

<sup>8</sup> For an initial, but clarifying discussion on the multiplicity of times in history, cf. Didier-Huberman (2003).

Military procedure<sup>9</sup> in 19<sup>th</sup> century Brazil was made of three major phases: preparatory, the Council of War and the Supreme Military and Justice Council, respectively responsible for indicting soldiers or not, judging them on the first level court and hearing appeals from decisions. Brazilian legislation established four different types of preparatory councils: Council of Discipline, which investigated crimes of desertion of enlisted personnel; Council of Investigation, first type, to rule on crimes in general; Council of Investigation, second type, to rule on desertions of officers; Council of Investigation, third type, to rule on desertion of troops in times of war. Each one of these six councils – that worked as courts – were governed by a complex set of rules, though the process in each one was rather quick and informal. I will spare my reader from the excruciatingly technical details of the procedure, but will only highlight the major characteristics that unite all these institutions.

The first aspect that should be noticed about them is that most seats in their banks were meant to be occupied by soldiers: Councils of Investigation and of Discipline would have three or five members, all soldiers, while the Councils of War were made of six soldiers and a single civilian; the Supreme Military and Justice Council had nine generals and six civilians. The second characteristic was that the Councils of Investigation, Discipline and War were not permanent: officers were appointed to them *ad hoc* for each process. Third, the legislation regulating these institutions was complex and blended documents from colonial times and independent Brazil. Councils of War, for instance, were regulated by the *alvará* of 21 February 1816, concerning the Portuguese Army, and was given force of law by a provision of the Supreme Military and Justice Council. The Council of Investigation of the first type – the most important one – was governed by a mix of sparse documents, as Thomaz Alves Jr (1866b, p. 150 ss.) shows: the regulation of 8 May 1843, that determined the powers of the

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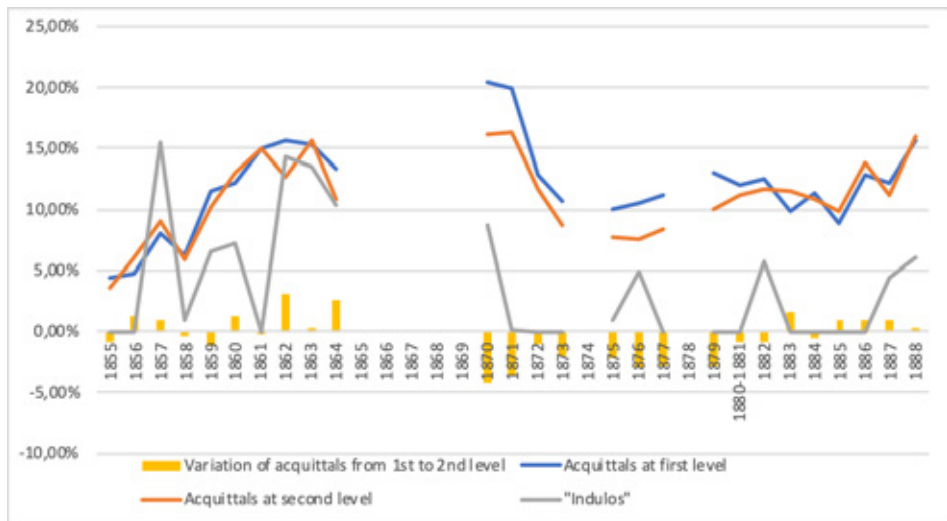
<sup>9</sup> The following description follows the work of Thomaz Alves Jr (1866, p. 146-171) and the compilation of Antônio José do Amaral (1872, p. 322-394). I also consulted the work of Augusto de Arruda (1878, p. 250-268), but it mostly copied Thomaz Alves Jr, with slight modifications of the wording of some phrases.



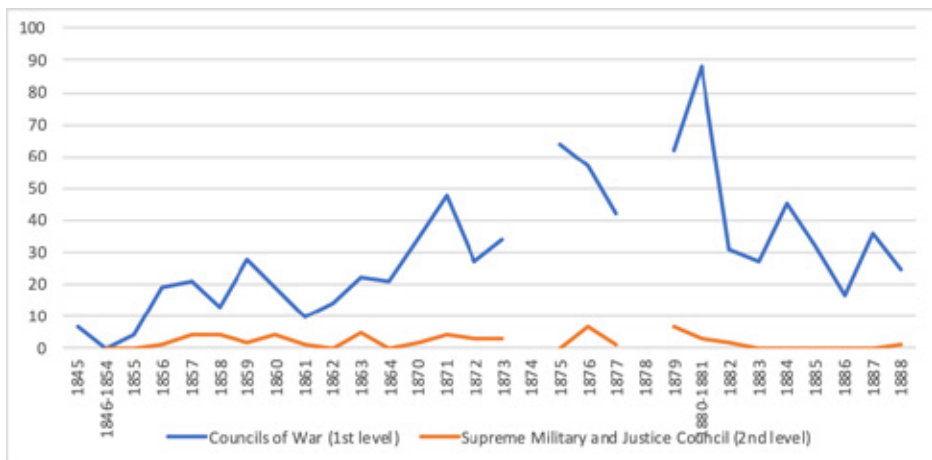
commanders of arms, some provisions of the civilian Code of Criminal Procedure of 1832 used by analogy etc. Apparently, there was not a single, systematic document containing a general framework within which this institution should operate or organizing the different sets of norms. The Indicator of the Military Legislation (*Indicador da Legislação Militar*), a private compilation of sources of military law, lists two laws and one decree with articles dealing with Councils of Investigation and one provision, six ministerial communications (*avisos*), one order of the day and one imperial resolution regulating specific aspects of those organs (AMARAL, 1872, p. 327-337). No document treated it in a systematic way; only one decree (1680 of 24 November 1855) went somewhat further: it approved the *formulário* of military procedures, that is, the models of bureaucratic documents, from which is possible to infer how the deeds of military justice must work. But this is indirect rather than solid evidence. From a legal point of view, the procedure was quite fluid and resulted from the confluence of different documents of different levels, many of which did not even exist in Brazil after the independence, such as *alvarás*, for instance.

Once the Council was appointed by the commander of the corps in which the offense had been committed, the lawsuit was supposed to go through all stages. Even when the Council of Investigation (or Discipline) did not indict the defendant, a Council of War should be formed – something criticized by Thomaz Alves Jr. (1866b, p. 157) for being against the modern perspectives of criminal law and its procedure. Either convicting or acquitting, the Council of War would be followed by a necessary appeal to the Supreme Military and Justice Council. And, if the defendant was finally sentenced to death after all this drama, his documents would be immediately sent to the emperor to value whether the case merited his imperial clemency, as the law of 11 September 1826 mandated. When a lesser penalty was imposed, the prisoner could choose if, when and how he would write a pardon petition.

How did this system work in practice? The next two graphics provide an overview of the sentencing practices of the system of military justice.



Graphic 1 Acquittals in sentences of the Military Justice and the variation between first and second level acquittals (1855-1888). Source: elaborated by the author from the Reports of the Ministry of War.



Graphic 2 Death sentences in the 1st (councils of war) and 2nd level (Supreme Military and Justice Council) of the Military Justice. Source: elaborated by the author from the Reports of the Ministry of War.

The first graphic shows that being indicted was not the best of businesses for a soldier: the indexes of acquittal hovered between the high single digits and 20% percent. The number of people accused helps to put some perspective to the menacing environment that could affect the Army: each year, ca. 600-800 people were convicted of some crime; considering that, apart from when Brazil was at war, the Army was made of a maximum of 14-16 thousand troops and no more than 2000 officers<sup>10</sup>, we can conclude that, in a typical year, at least three percent of the members of the Army received a criminal conviction. Not the best work environment.

Surprisingly, though, the Supreme Military and Justice Council was mostly a source of hope for the convicted. The first graphic shows that in the 1850s and the 1860s, the government frequently issued *indultos*, that is, general pardons for those accused of desertion; this privilege was usually recognized precisely at the second level and could affect up to 15% of all soldiers convicted in a given year. Only in the 1870s the Council consistently convicted more than the Councils of War. Yet, the second graphic is the most glaring glimpse into the mild hand of the councilors: they seldom upheld the death sentences issued by their colleagues at the lower level. While the Council never issued more than seven capital convictions in a given year, the Councils of War sentenced more than 20 men to death most of the years in my sample.

The system of military justice could be confusing and frightening, especially for the troops that lacked education – many of them could barely read – and lived under a constant threat of violence and intimidation. However, once in the system, the soldier should expect to face progressively softer treatment as he went higher in the decision levels. From the almost despotic power of officers all the way up to the judges and generals in Rio de Janeiro, the glooming ladder of justice would sparingly administer drops of compassion. Sparingly, though: the specter of death always haunted those walking in the corridors of Military Justice.

Yet, one last hope persisted: imperial clemency.

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<sup>10</sup> Information constructed by me analyzing the yearly reports of the ministry of war.

### 3. TOWARDS WATERS OF HOPE: AN OVERVIEW OF PARDON IN THE SECTION OF WAR AND NAVY OF THE COUNCIL OF STATE

Why were people pardoned, and how often?

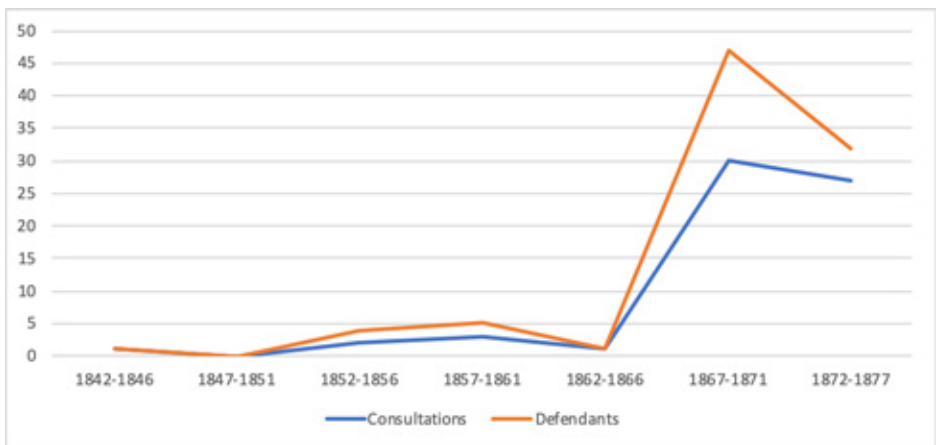
We can only imagine the dreadful anticipation of an impending death sentence, the gloomy thought of life imprisonment, the dreadful image of one's suffering before a military council. Historiography has already shown the strategies and emotions dropped in the papers destined to become pardon petitions (PIROLA, 2017; CESAR, 2021), and how ink draw the images of despair to appeal to the emperor's heart and clemency. I will concentrate on the other side of this relationship forged with anguish. I cannot discover what was hidden in the heart of the emperor, but I can analyze what his councilors wrote. This can be found in the *Consultations to the council of state regarding matters of the Ministry of War*, published between 1872 and 1890 by order of the Imperial Government by Manoel Joaquim do Nascimento e Silva, except for the first volume, compiled by Cândido Pereira Monteiro. Since both men were head of section at the Ministry of War and the compilation was composed by order of the government, we can say that it had some sort of "official" nature and was representative of the practice of the Council. I consulted the four volumes that cover the period between 1842 and 1877. Though not complete, this work yields a satisfying picture of the Council of State and its opinions in the empire.

I found 63 consultations referring to 89 people. As the Council of State performed a merely advisory role before the emperor, its opinions were merely a suggestion, since the power to pardon and commute sentences was invested solely on the monarch as the embodiment of the moderating power. Extensive intellectual prestige, however, instilled moral authority into the oracles of the Council: the towering figures of Brazilian law and politics seated in its sessions and its decisions were considered as reference for the Brazilian courts and law. Intellectual authority prompted the emperor to defer most of the time – though not always – to the Council.

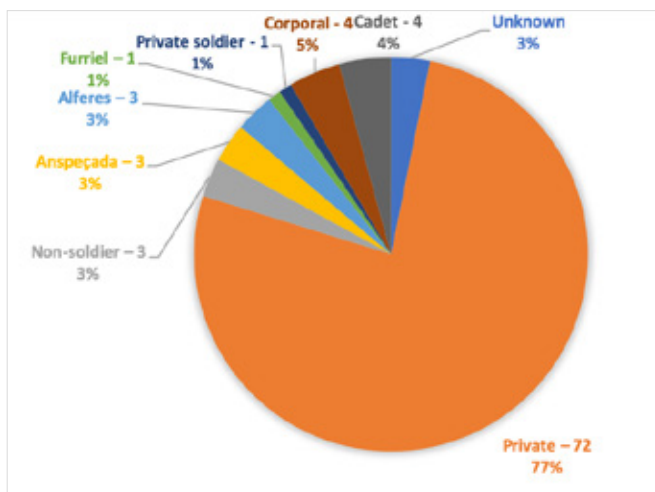
The compilation I used do not contain all the decisions from the emperor nor the complete series of opinions, but I believe they

cover most of the ground. Andrade (2017, p. 81), for instance, found in the National Archives in Rio de Janeiro only 50 consultations on pardon petitions written by the Section of War and Navy, 13 less than can be find in the compilations: this is one of the few cases when published collections are more complete than the administrative records retrieved from the very belly of the bureaucratic beast. Moreover, a simple estimative proves that my sample is representative: graphic 2 shows that, for the 30 years between 1845 and 1877 for which we have data, an average of 2,41 death penalties were imposed each year; extrapolating this number, we should expect to find ca. 85 capital sentences between 1842 and 1877. Graphic 5 will show that Nascimento e Silva and Monteiro have collected opinions on 62 death sentences. At least for capital punishment, my sample is solid and probably the best evidence available, though not complete. My conclusions, therefore, are consistent – or at least I think so.

Who flocked the council with their pleas for freedom? The next two graphics provide an initial figure:



*Graphic 3 Consultations on pardon from the Section of War and Navy of the Council of State and number of defendants they refer to by periods of five years.*

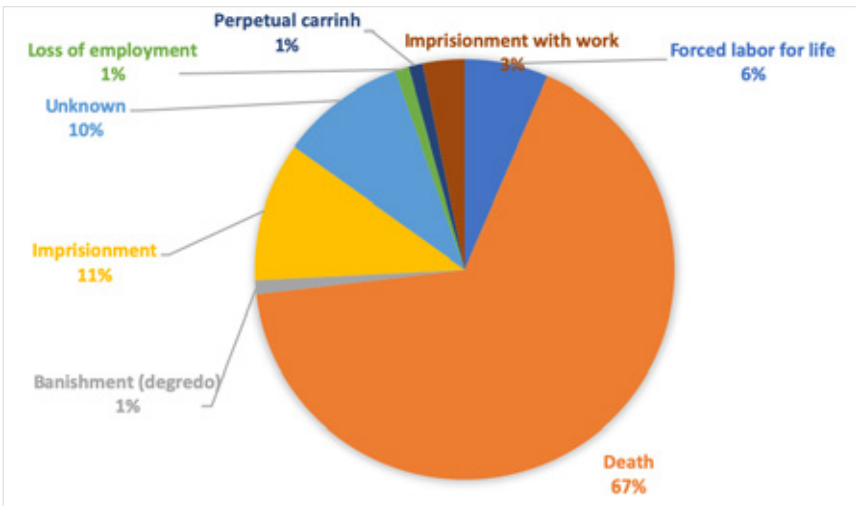


*Graphic 4 Ranks of soldiers whose pardon petitions were analyzed by the Council of State and included in the Compilation by Nascimento e Silva (1842-1877).*

Between 1865 and 1870, Brazil was involved in the most destructive war to ever struck South America, the Paraguay War; this might explain the increase in published consultations observed in the two last periods of graphic three. If desertion was already a dreadful crime under the rule of military honor, it grew even more heinous when it happened during war, before the enemy, out of cowardice. And many more crimes were added to the list of military offences in times of war by the law 631 of 1851, most of them punished by death. To stay with a single example, in the provinces where the operations of war were taking place or in territories occupied by the Army, it was a crime to “enter into fortresses by places other than doors and other ordinary entrances” (art. 1º, 5). Punishable by death. Under such a harsh regime which aimed to maintain soldiers in line, it is not hard to imagine injustices taking place – or, in some cases, as for the provision I have just cited, it is uneasy to fathom justice happening. Providing information for soldiers and their lawyers in pardon cases would be of ultimate use at a time when the death penalty was always lingering – the government compilations were providential for soldiers trying to save their lives, or for their lawyers.

All the more when the preferential clientele of justice was of limited means, as graphic 4 shows. Almost 80% of the convicted that claimed mercy before the emperor in my sample were mere privates, the very first step in the military career, a position filled mostly by recruits from outside the army. Untrained. Illiterate. Uneducated. Few of them could properly defend themselves before court. Many would be little experienced in the meanders of military justice and in the particular language of law. Only 3% of the sample are officers, and even those belong to the very first rank – that of *alferes*<sup>11</sup>. Besides this small group, 5% of defendants were cadets or private soldiers – categories meant for the sons of noble, military or bourgeois families before they become officers, meaning that they were presumably educated. All in all, those that had to request pardon were mostly citizens of the lowest categories of the Army: impoverished, destitute, punished.

What were their crimes? How were they punished?



Graphic 5 Penalties given to soldiers whose pardon petitions were analyzed by the Council of State and included in the Compilation by Nascimento e Silva (1842-1877)<sup>12</sup>.

<sup>11</sup> Corresponding to the contemporary second lieutenant.

<sup>12</sup> Values: perpetual *Galés*: 6; death: 62; banishment (*degredo*): 1; imprisonment: 10; unknown: 9; loss of employment: 1; perpetual *carrinho*: 1; imprisonment with work: 3.

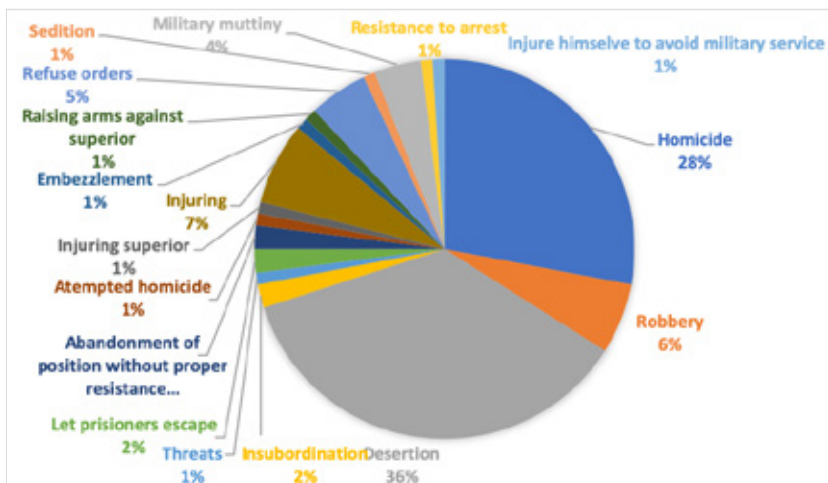


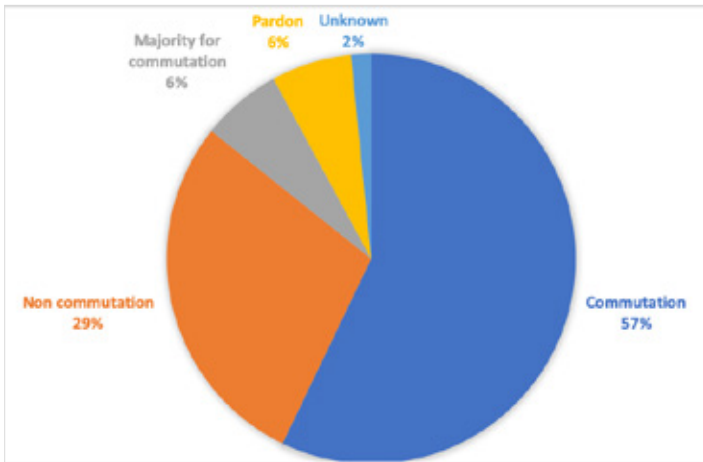
Gráfico 12 Crimes committed by soldiers whose pardon petitions were analyzed by the Council of State and included in the Compilation by Nascimento e Silva (1842-1877)<sup>13</sup>.

Harshly. That is how those soldiers were punished. Almost two thirds of them got death sentences, as graphic 5 shows. The quest for intimidation pursued by the government had appalling consequences. And only slightly more than a quarter of the convicted had committed homicide; the others were meant to die for lesser offences. Personal injury, threats, insubordination, mutiny: those are some of the crimes from which one could be sentenced to death in the 19<sup>th</sup> century Brazilian Army. But the major source of inmates for the death row was desertion: the fear of all commanders, the bleeding wound of armies, the final denial of military duty, and - as lawyers put it today - the ultimate military crime. There were at least three different types of desertion for the troops and five types for officers, each one carrying a special penalty and particular dishonor. Diversity of crimes, monotony of punishment: when one goes from legal regulation to judiciary practice, death is the most common consequence to be faced by soldiers running from the line of duty.

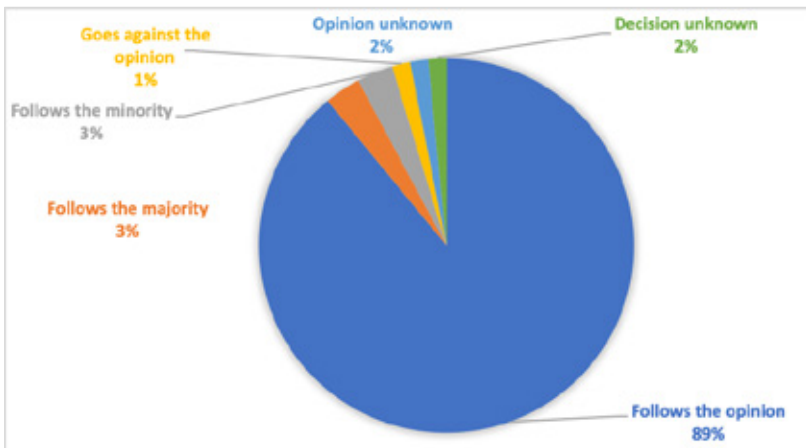
<sup>13</sup> Values: homicide: 28; robbery: 6; desertion: 36; insubordination: 2; threats: 1; let prisoners escape: 2; abandonment of position without proper resistance: 2; attempted homicide: 1; injury to superior: 1; injury: 7; embezzlement: 1; raise arms against superior: 1; refuse orders: 5; sedition: 1; military mutiny: 4; resistance to prison: 1; injure himself to avoid military service: 1.



Was hope futile? To find if the convicted soldiers were indeed doomed, one has to look at the outcomes of pardon requests.



Graphic 6 Opinions from the Section of Navy and War of the Council of State concerning pardon appeals compiled by Nascimento e Silva<sup>1</sup>.



Graphic 7 Decision of the Emperor regarding the opinions from the Section of Navy and War from the Council of State on pardon petitions published in the compilation by Nascimento e Silva<sup>14</sup>.

<sup>14</sup> Numeric values: follows the opinion: 57; follows the majority: 2; follows the minority:2;goes against the opinion: 1; decision unknown: 1; opinion unknown: 1.

The balm of imperial clemency, as some called it, was not an empty promise. In almost 70% of the cases, at least the majority of the Section of War and Navy recommended at least the commutation of the penalty, and sometimes suggested even a full pardon. The emperor was thoroughly deferential towards the authority of the councilors: he bowed before their legal wisdom almost 90% of the times.

Clemency was not uncommon. But what did a defendant had to do to deserve mercy?

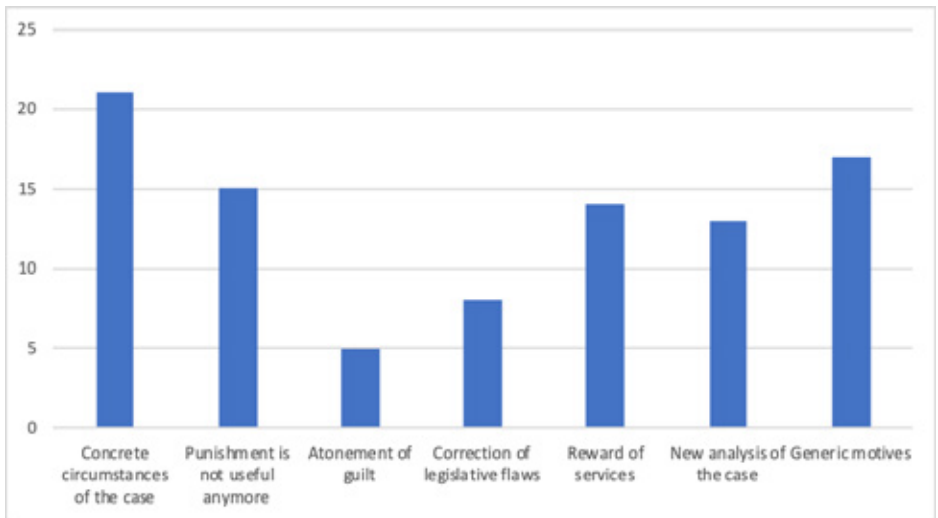
#### **4. OMINOUS STORMS AND AUSPICIOUS WINDS: REASONS TO DECIDE IN OPINIONS ON PARDON FROM THE SECTION OF WAR AND NAVY OF THE COUNCIL OF STATE**

Mercy streams out of the heart of the emperor. In less poetic and more legal terms, this means that there were no legal regulations determining why the monarch should pardon or commute penalties. No reference, no list of motives enshrined in law, but only the laconic art. 101, § 8<sup>th</sup> of the 1824 constitution. Unsurprisingly. Mercy belongs to the moderating power, that is, the special branch of government imagined by Benjamin Constant and written into the Brazilian political chart. The fourth branch, the special power of the monarch, was meant to restrain the excesses of other branches of government and, therefore, was not supposed to be limited by ordinary laws. Yet, jurists are avid fillers of voids: whenever a law is silent, a lawyer will try to speak on its behalf. Pardon was no different.

Brazilian constitutional thought singled four different justifications for the right of pardon (COSTA, 2019b, p. 265-275): 1) reconcile the abstract law with the justice in concrete cases; 2) recognize that the defendant had atoned for his guilt; 3) correct limits of the legislation (for instance, counter too harsh a law or correct judicial errors that lack an ordinary legal remedy); 4) reward services for the State. This last justification was not present in most authors of Brazilian constitutional law, but was discussed in parliament and referred to in case law (COSTA, 2019b, p. 274-275). In short, mercy was supposed to account for unpredictable circumstances: to consider the personal qualities whenever the law was too impersonal, to relinquish a punishment that had become socially useless

after it was rendered, to take into account evidence that had surfaced after no appeal could be filled anymore. And, of course, the emperor could pardon simply out of the goodness of his heart<sup>15</sup>. Pardon was meant to capture the chancy and tricky nature of the human condition and assure that the errors committed by the convicted would not be overpassed by the cruelty of the State. Through the gates of clemency, compassion could heat the cold realm of law.

Did the state councilors follow the guidance of lawyers? In the next graphic, we can find the reasons the Section of War and Navy used to justify its decisions, whether pardoning or not:



*Graphic 8 Reasons used by councilors to decide on pardon petitions presented before the Section of War and Navy of the Council of State (1842-1877).*

Concrete circumstances of the case (21 cases). These reasons shows that the Council of State was looking deeper into the actions of the defendant to understand if he deserved or not a milder treatment.

<sup>15</sup> In the second Council of State, for instance, it was common for the emperor to single out some prisoners to be pardoned to commemorate the passion of Christ (COSTA, 2019a, p. 2358-2359).

Under this label, we find: attenuating circumstances (19), self-defense (1), aggravating circumstances (1). Military laws were rather vague and usually did not provide for attenuating circumstances. Most defendants could expect death as a probable outcome of their lawsuits. Pardon granted under these circumstances allowed the State to dwell deeper into the reasons of the crime, possible contributions from other actors and factors and, in short, to grasp the full context of the offense. This can, therefore, be understood as falling under the first theoretical justification of pardon: conciliation between the rigors of the law and the justice of the single case. One clamorous example regards one of the few officers in our sample, *alferes* Luiz Gabriel de Paiva (NASCIMENTO E SILVA, 1885, p. 101-105). Commanding a small corps in the Paraguay War, he was given the responsibility to defend a terrain in front a swamp against an advance from Paraguayan forces. After being under attack for 15 minutes, he withdrew to a safer position, meeting other officers from the allied Army, and they were able to repeal the enemy. For this, he was sentenced to death based on the article 3 of War – retreat without proper resistance. After this dreadful outcome, he alleged in his pardon petition that several circumstances induced him to act as he did: the position was dangerous, so much that the Army never occupied that place again; the horses his soldiers were using were weak and ill-fed; his subordinates were inexperienced and some of them were mere children, that would be unreliable in combat; and, on the top of it all, they were outnumbered by the Paraguay forces. The Council weighted how difficult and worthless it was to keep that position and added that Paiva was an unexperienced officer at the very beginning of his career: a commutation was in order. The emperor resolved that Paiva deserved the milder and gentler penalty of forced labor for life.

Punishment is not useful for the state (15). Criminal policy is the governing principle here, though this expression did not exist at the time – not explicitly. Under this label, we find: long time between conviction and the execution (10); the crime had been committed out of the empire (2); the defendant could still be useful for the empire (1); the family of the defendant needed him (1); other defendants convicted for the same crime had had their penalties commuted (1). These cases belong to the same brand of reasoning as the previous category: that of

fairness [*equidade*], that is, concrete justice, but applied to a different time. If on the previous category, the Council aimed to treat fairly the convicted for what they did, here they look at what happened to them; that is, in the first case, the crime is the object of analysis, while in the second, imprisonment and life outside of it are the *leitmotiv*. Past and future, crime and punishment, offense and usefulness. Here, if an offense had been committed long ago or far away, it could be pardoned or at least commuted, for the punishment would not intimidate the people, but only stimulate compassion for this victim of the rage of a State that could not forget an ancient felony. But what counted as long time is much different than we would imagine today. Military procedure was designed to be really quick and to produce an immediate impression over soldiers: before the crime faded away from their memories, they were supposed to witness its dreadful consequences. Private Targino José de Lima, for instance, won a commutation of a death sentence for he spent more than a year without being executed (NASCIMENTO E SILVA, 1885, p. 126). We can only imagine what the Brazilian Council of State would think of nowadays prisoners that await years before facing court! In the barracks, procedure is quick and merciless: both the Council of Investigation and the Council of War seemed to be supposed to last no more than a single day; military discipline could wait no more to curb the smell of riot after a mutiny or insubordination had happened. Discipline was queen and example was her most beloved valet.

Atonement of guilt (5). This comprises one of the most important theoretical justifications of pardon, though judicial practice seemed to have not used it very often. When the offender had regretted his actions, he should be released, for punishment had already accomplished its goal. In 3 occasions the councilors cited good behavior to release the convict. However, the reasoning could go the other way around: bad behavior was once cited as reason to keep the petitioner behind bars. Finally, in one opportunity, the Section of War and Navy remarked that the convicted had been serving his sentence for too little time: he had not yet had enough time to atone for his guilt and, therefore, should wait more before asking to step outside of prison. Usually, to prove they had expiated their guilt and repented, inmates sent an opinion of the director of their penitentiary attesting good behavior; it was presumed that, since they

had been regenerated, the punishment was no longer needed. This was the case in the consultations of 17 July 1872 (NASCIMENTO E SILVA, 1885, p. 523) and 26 July 1871 (NASCIMENTO E SILVA, 1885, p. 439).

Correction of legislative errors (8). At least 8 cases mention how harsh the articles of war were. Faced with petty offenders that did not pose any danger, judges frequently had to impose rigorous legal responses, for the 18<sup>th</sup> century legislation did not leave much room for compassion. The only possible exit for this conundrum was precisely royal mercy.

Reward of services (14). Pardon was used as a way to compensate faithful subjects that had worked on the behalf of the empire, but latter failed to comply with their duties before the law. Just as a medal recognized extraordinary services, pardon could honor dignified actions. Those grounds were remembered both to grant pardons (12) as well as not to grant clemency when the defended had rendered bad services in his previous career (2). Once more, we can cite *alferes* Luiz Gabriel de Paiva. After his sentence was downgraded to life in prison, his mother sent another petition that was signed by 2 thousand inhabitants of the cities of Rio Grande and Pelotas. She asked for a complete pardon, since she was 70-years old and needed his son to take care of her. The procurator of the crown sent an opinion, agreeing with all the circumstances that the defense had alleged, and adding that all the commanders that had worked with Paiva praised his service. After that, the emperor agreed that Paiva deserved to be released from prison (NASCIMENTO E SILVA, 1885, p. 437-440).

New analysis of the case (13). Now, we are leaving the safe terrain of the traditional justifications of the right to pardon and to commute sentences and entering into the shady world of the modern uses given to the institute. In almost all opinions, the Council of State remarks whether the lawsuit had or had not complied with all procedural formalities. This indicates that pardon was not simply the traditional royal power that it was meant to be, but had been transformed into an appeal and was incorporated into the traditional pace of Brazilian military procedure, as the books of military law imply (ALVES JR, 1866, p. 168-171). Curiously, this went against what the Section of War and Navy preconized itself: in the consultation of 21 January 1871, it declared that reassessing evidence amounted to unconstitutionally taking the place

of the judiciary (NASCIMENTO E SILVA, 1885, p. 385). It is sometimes hard to be coherent. This category includes: procedural irregularities (5); errors in defining which crime has been committed (4); lack of sufficient evidence (2); different decisions between first and second level judges (1). As we can see in the last two types of reasoning, the Council of State also re-evaluated legal evidence and considered whether the judges had correctly ruled according to the facts. An exemplary case of procedural rules being discussed was debated by the Section of Navy and War in 26 August 1844 (NASCIMENTO E SILVA, 1884, p. 49-50). Manoel Bernardes de Alcântara was convicted to 10 years of exile in the island of Fernando de Noronha for embezzlement: he had appropriated money of the battalion for himself and fellow soldiers. Alcântara, however, was a “contracted musician”, that is, a civilian that wore military clothes and worked in the battalion, but was not a soldier. He had been acquitted by the civilian justice, but the Council of War that convicted the two soldiers that worked with him had sentenced him. The Council of State suggested that a commutation should be used to counter the procedural error of judging the case in the wrong judicial system. However, they did not go as far as suggesting a fully-fledged pardon, for they considered that the evidence implied that Alcântara had committed a crime indeed and “he well deserved punishment” (NASCIMENTO E SILVA, 1884, p. 50). Not only fairness was considered: documents, testimonies and procedural rules could also be discussed. From exception to routine, from political to legal, from compassion to technicalities, pardon underwent a path with such reasonings that turned it into a more mainstream feature of Brazilian military law and procedure: not only a providential help from the sovereign, but a routine aspect of the administration of justice.

Generic motives (17). Sometimes, it is challenging to find grounds for pardon in a case, be it for apathy from the councilors or plainness of the facts under consideration. This happened frequently in the Council of State, and the (lack of) reasons of the opinions show it: lack of motives to grant pardon (8); the allegations of the defendant were not proved (7); seriousness of the crime (2).

Pardon could therefore be seen as a blend of Early Modern ideals of goodness and clemency as they were received by the Brazilian constitutional thought, on the one side, and, on the other, new usages,

especially the practice of pardon as if it was an appeal of last resort. Generally, one could say that the four motives of pardon prescribed by the Brazilian doctrine of constitutional law were followed to a certain extent, though not always. Yet, the Council of State was not simply following the lead of other writers; being the highest administrative body of the country, it gradually developed a certain degree of self-awareness that amounted to the building of case-law and precedent (*jurisprudência*). I shall explain myself.

In 29 August 1868, the Section of War and Navy was discussing the cases of private Manoel das Mercês e Silva and *anspeçada* Francisco de Sant'Anna Lima, both sentenced to death for homicide. Both of them had their disagreements with superiors and had injured their officers, which shortly after died (NASCIMENTO E SILVA, 1885, p. 119). Both alleged to have committed their crimes under a state of hallucination for fear of an impending physical punishment they were meant to suffer. However, instead of simply discussing whether or not such reason was worth a commutation, the Viscount of Abaeté, Antônio Paulino Limpo de Abreu, discussed theories on the reasons that should authorize the monarch to wield his pardoning power<sup>16</sup>. After dismissing the theory of Dalloz that pardon was a matter of sentiment, he makes reference to a Belgian scholar and politician called Jean-François Tielemans, author of a work called *Repertoire de L'administration et du Droit Administratif de la Belgique* (NASCIMENTO E SILVA, 1885, p. 123). Tielemans suggests three hypotheses that should authorize the granting of commutations: judicial errors; reason of State or humanity; when someone was convicted on the grounds of a law later revoked. Abaeté also adds that, since one of the very bases of military law are quick rulings, whenever a harsh penalty took too long to be implemented, the defendant should be pardoned.

In the following years, this list would be consolidated by repeated use by the Council of State, and particularly by Abaeté himself. In a consultation of 17 November 1872, the Viscount mentioned that, beyond the three hypotheses suggested by Tielemans, the Section of War and

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<sup>16</sup> On the trajectory of Abaeté at the Council of State, cf. Magalhães (1939, p. 287-294)



Navy had been granting commutations in only three exceptional cases: when the convicted was a minor and the crime was committed with other attenuating circumstances; when the convicted had rendered valuable services to the Nation; when so much time had elapsed that the memory of the crime had faded and an example was not needed anymore. Abaeté even drew a table of nine cases decided in the previous three years by the Section that fell under those hypothesis (NASCIMENTO E SILVA, 1885, p. 527). Some sort of case law was slowly emerging, and the three criteria of Tielermans, augmented by the Council of State, would be cited again to guide decisions of the Section; for example, in the resolutions of 2 January 1870 (NASCIMENTO E SILVA, 1885, p. 244-249) and 21 January 1871 (NASCIMENTO E SILVA, 1885, p. 384).

The six justifications conveyed by Abaeté are more specific than the ones traditionally raised by Brazilian constitutionalism, and are not discussed from a theoretical point of view: they are simply mentioned as self-evident. The mere authority of the Council of State and of an early Belgian administrative lawyer seemed to suffice to Abaeté. Nevertheless, for the historian to understand pardon and how it functioned as it did, they are not enough, and do not explain the practice of the Council of State: they do not account for the re-evaluation of evidence, complaints about the harshness of military law or atonement of guilt. However, the two lists, that of Abaeté and the one of the Brazilian constitutionalists, overlap at some points; neither of them could fully explain the sometimes-erratic practices of a Council under the pressure of external war, but both are indispensable to understand how (partial) patterns slowly emerged out of the kaleidoscopic frantiness of individual cases, both in practice and in theory.

## **5. “WAS GRACE THAT TAUGHT MY HEART TO FEAR / AND GRACE MY FEARS RELIEVED”: PARDON AND THE HARSHNESS OF MILITARY LAW**

The crimes committed by soldiers were not unexplainable deeds spanning out of individual evil. They shared some common traits and can be better grasped when referred to the conflictive environment of the barracks. Actions, convictions and procedures can be better understood when coupled with a context marred with violence, control

and conflict. This section will then briefly discuss the types of crimes committed by soldiers and the situations that prompted them, to provide an initial sociological sketch of military deviance in the 19<sup>th</sup> century Brazilian context.

A major source of conflicts was precisely punishment. Officers could punish the troops without much external oversight, and physical penalties was a staple of military discipline. This dangerous combination could easily explode when unsecure officers found less docile soldiers. An example comes from the case of private Eduardo Bernadino de Souza, discussed in the resolution of 12 August 1868 (NASCIMENTO E SILVA, 1885, p. 112 ss.). He was supposed to be punished with *pranchadas*, that is, be beaten up with a sword. He was being conducted to the place where he should receive his penalty when he was called by the *alferes* João Machado da Silva to his tent; while he was there, he was called back to be punished, and as he grew anger, he took a carabin and shoot the *alferes*, who died a few hours later. Souza took a knife and resisted being arrested. After a long time, he was dominated and could be flogged. While he was being punished, he managed to take a saber and attack the commander of the battalion. Later, when facing trial, he alleged that he was under mental distress and hallucinating due to the perspective of being physically punished. Souza was later convicted and executed.

He was not the only one. Targino José Silva, which we have already encountered, used the same line of defense. As unsuccessfully as Souza: both were sentenced to death, though Silva managed to get a commutation on different grounds. The case of private João Francisco Costa shows how these violent conflicts arose. He was sentenced to death for trying to kill the director of the Arsenal of War, who intended to impose 25 *pranchadas* upon him, and for hurting with a knife the two privates that were taking him to the place where he would be punished. The Council of State considered that the director had contributed to the conflict, for he would have to have called a *Peremptório* Council to impose physical punishment, but he ordered the flogging out of his own will. Balancing the two factors, the Section recommended the much soft penalty of life in prison (NASCIMENTO E SILVA, 1885, p. 107-108).

The moment of heightened tensions, when the soldier was being carried to the place where he would be punished, offered a perfect occasion

for violence to sparkle. Knives were pulled, swords were stolen, people went into hiding and attacked their superiors, increasing the tension of an already uncomfortable moment. Honor. These soldiers, as they said themselves, did not fear the whip, but being humiliated. Traditional stances of image and of standing before the group are central to military life, centered around the pursuit of glory, respect for superiors etc. Being beaten in front of all colleagues and superiors is a frontal contradiction of this chart of values. One that is worth fighting for.

The providential remedy to defuse tensions in this highly explosive environment? Death. When the *alferes* Júlio César dos Reis Falcão was drunk and refused to obey his captain, saying that would kick him (NASCIMENTO E SILVA, 1887, p. 86), what was his conviction? Death. When privates Rogério Galião and Bernabé de Oliveira went out of their dorm rooms after curfew, saying that they would “take the scoundrels [*canalhas*]”, to what were they convicted (NASCIMENTO E SILVA, 1887, p. 461)? Death. When private Manoel Alves Pereira said to his superior that he would not go to jail (NASCIMENTO E SILVA, 1887, p. 501), what was the legal answer? Death.

Truth be told, in the first and last cases I have just cited, the Councils of War had committed errors. The first article of war determined that “the one who refuses, by words or speeches, to obey the orders of his superiors regarding service, will be sentenced to work in the fort; however, if he opposes his superior using arms or threats, he will be arquebused [*arcabuzado*]”; both Pereira and Falcão had used words and not threats. But their sentences went through at least two different courts, the Councils of War and the Supreme Military and Justice Council before being overturned: it is telling that those twelve judges made the same mistake at least twice. The system was made to intimidate. And though Falcão got his conviction commuted, one cannot say that life in prison is exactly a proportionate punishment for threatening to kick someone.

Dissatisfaction ran high in the barracks, meaning that indiscipline could erupt at any moment. The resolution of 6 March 1875 discussed the case of five soldiers of the garrison of the town of Ipú, Ceará, one of the few military posts in the state. Major Honorato Cândido Ferreira Caldas had ordered them to watch the flogging of private Firmino Numésio, but at the place where the punishment was supposed to occur, the fellow

soldiers rioted and prevented the sentence to be executed. They pursued the major until he locked himself in a house and shoot in his direction. The turmoil only settled when some members of the National Guard arrived at the spot (NASCIMENTO E SILVA, 1887, p. 213). Needless to say, all five soldiers were sentenced to death. The emperor only commuted the sentence because just like what had happened with private Costa, private Firmino was flogged without the previous procedural formalities. The five, however, would still have to spent their lives in prison.

Soldiers were the target of constant violence and abuses; their procedural rights were hardly observed; their judges were their superiors; the laws they must comply with loved death as their most dear instrument. On the other side, officers lived under the aegis of fear: fear of a riot, fear of disrespect, fear of being attacked by their subordinates in the distant places where they worked, far away from any help. And fear is the worst advisor, especially for those with authority.

This whole system would disintegrate if soldiers could simply walk away from the Army, but the writers of military law had not left this issue unaddressed: the article 14 of war stated that “everyone who shall desert or conspire to desert, or knowing of it fail to denounce it, if in time of war will be hanged; and those who leave their regiment without license (...) will be punished with death”. Only if the consequences of escaping were gloomier than the routine in the barracks could soldiers be kept in line, especially during war, when the enemy was always roaring behind the hills and the perspective of death lurked at every corner.

Death sentences for deserters during the Paraguay War were not uncommon, as the data of the previous section suggests; we can find illuminating examples in the consultations to the Section of War and Navy<sup>17</sup>. Yet, the government itself recognized that the Articles of War were probably exaggerated. In the consultation of 16 November 1867, the Section of War and Navy discussed pardon petitions from five soldiers sentenced to death for running away from their positions. The councilors

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<sup>17</sup> For instance, consultations of 4 November 1868 (NASCIMENTO E SILVA, 1885, p. 139 ss.), 6 November 1867 (NASCIMENTO E SILVA, 1885, p. 51 ss.) and 13 November 1867 (NASCIMENTO E SILVA, 1885, p. 54 ss.), among others

considered that “the death penalty (...) should only be made effective for crimes with maximum gravity that compromise discipline and the very existence of the Army”, such as desertion. But under two circumstances: when the soldier defects to the enemy and when his example stimulates the fugitive impulses of fellow combatants (NASCIMENTO E SILVA, 1885, p. 51). Neither had happened in the case under discussion. Simply evading the lines required a milder response; the article 51 of war of the Navy (25 September 1799) for instance, was more in line with fairness, prescribing a penalty of 5 years of forced labor (*galés*). The councilors even remarked that “the difference of the times in which these articles [of Aar of the Navy] and those of the Army were proclaimed explains the difference in penalties; the rational principles of penal gradation justify the distinction of punishment under different circumstances, but were ignored in the law of the Army”<sup>18</sup> (NASCIMENTO E SILVA, 1885, p. 51). The councilors felt a clear scent of old fragrances from the text they should apply, one that clashed frontally with the modern principles of criminal law. A few days before, in the consultation of 13 November 1867, the same councilors had remarked in a similar case of desertion that “in similar cases, Your Imperial Majesty had the honor to manifest yourself on the absolute severity of the penalty of article 14 of war when the desertion does not happen to the enemy” (NASCIMENTO E SILVA, 1885, p. 54).

It was commonplace to assume that the Articles of War were outdated and sometimes unfair, even in the highest circles of the imperial bureaucracy. Yet, they were law. More: they filled a precise function for military discipline. Criminal punishment was the final, most blatant tip of a much wider system that granted almost unchecked power to officers and superiors to control the lives or subordinates using physical punishment as a staple. Soldiers committed more spectacular crimes in two situations: when they were supposed to receive administrative punishment (called *penas disciplinares* – disciplinary penalties), and when they tried to escape the Army. Both of them were, in the end, acts

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<sup>18</sup> Not by chance, the Navy articles belong to a second phase of the reforms of the armed forces, when a military penal code began to be drafted. Cf. Adriana Barreto de Souza (2018).

of insubmission that challenged the very integrity of the armed forces. Military Justice, therefore, was used to guarantee that less radical forms of punishment would be respected alongside the authority of officers, and that enlisted personnel would not try to escape service. If soldiers countered each pillar of military discipline, they could easily face death. They were cornered in the barracks, between a bleak interior of constant violence and an exterior forbidden and guarded with the utmost care.

Those men were supposed to patriotically defend the country.

## 6. THE HORIZONS OF TIME: FINAL REMARKS

The temptation to simply say that the royal clemency of soldiers is a mere reproduction of *Ancien Régime* practices is enormous. The laws are the same. The use of pardon is (almost) the same. Yet, the context is different: this must account for something. Is pardon part of a transition?

The answer rests on the eyes of those who look. Or, better saying, in the hands of those who write. If I was writing a history of Brazilian law at large, sure: pardoning practices were affected by those extensive changes that brought law to the so-called modernity, a part of the broader process of codification<sup>19</sup>: military law was still uncodified; statutory law was not so central, as important swaths of legal reasoning operated over decrees and ministerial communications [*avisos*]; everyday practice was of paramount importance; the executive branch was unchecked by external authorities. Yet, if I change my perspective to a history of Brazilian military law, the answer is still affirmative?

“Transition” means not simply change – it would be meaningless if it stated only such an obvious true – but the passage from a somewhat coherent asset of principles towards a different organization, mediated by a time of uncertainty and change” (COSTA, 2019, p. 32-33). It is marked by a “reconceptualization” of previous practices and identities (LACCHÈ, 2018, p. 193). Could we call the 140 years in which the Articles of War applied in Brazil as a “transition”? Hardly so. A central element

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<sup>19</sup> One “legal revolution”, according to Halperin (2014). On codification, cf. Sordi, Cappellini (2000).

of transitions is the self-awareness of historical actors that a change is happening (POMBENI, 2013, p. 35-36), and this cannot be seen in those applying military law. Sure, congressmen and lawyers decried the confusion of military law and several reforms were attempted; projects of military codes were always looming from the 1810s to the 1890s almost uninterruptedly. But there was not an idea that military law specifically was changing towards a “more rational” model. After all, the previous period did not have a coherently formulated military law: the 19<sup>th</sup> century could not therefore be seen as a passage between the 18<sup>th</sup> and the 20<sup>th</sup>, as it could be said from the point of view of law in general. For military law, the small changes that happened in the 1800s simply continued a process of constant alterations that had already been underway. Much different, for example, than civil law, that could be seen as in transition from the Early Modern paradigm, organized around the Philippine Ordinations, roman law and their associated textual tradition towards a more systematic, codified model. Military law and procedure were coherent and solid – though odd and blatantly unfair.

How then could this law, so kindred to the Early Modern one, fit into a modern environment – though not very comfortably? First, the Articles of War were in themselves part of enlightened reforms: they brought regulations of the Army towards a more centralized organization and established the specificity of the military profession. With them, the Portuguese Army was modernized. But, for this changed had happened in the early years of the *Sattelzeit*<sup>20</sup>, they retained a distinctively old flavor. Much like, for instance, the *Lei da Boa Razão*, that reformed the system of legal sources in Portugal and Brazil, that rendered it palatable to the 19<sup>th</sup> century sensibility, though retaining much of the old legal logics. Both of them signal, from the point of view of legal history in general, that the transition towards modern law<sup>21</sup> was somehow incomplete in 19<sup>th</sup> century Brazil, that it had stopped without finishing. Military law and procedure, therefore, have been affected by the “legal revolution”<sup>22</sup>, by

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<sup>20</sup> A concept proposed by Koselleck covering the period between 1750 and 1850.

<sup>21</sup> Cf. Pietro Costa (2014) to better discuss what “modern law” is.

<sup>22</sup> On this expression, cf. Jean-Louis Hapérin (2014).

the capital changes that signed the end of the 18<sup>th</sup> century<sup>23</sup>: the Articles of War are part of those changes, no matter how incompletely, and do not oppose to them.

Why did practices bearing a striking resemblance with the old regime survived in Brazil? Well, it could hardly be different. The Army was one of the least well-paid, less valued occupations in the country; new privates were usually recruited by force and the 1874 law that tried to reform recruitment remained famously and completely unapplied<sup>24</sup>. If people were brought into the Army by force, they could hardly be kept inside the institution by more subtle methods. Since most of the population and the recruits, by consequence, was made of illiterate people raised in a hierarchical society, the culture of civism, of rational obedience and the reconciliation between equality and discipline could hardly be brought into the Army. Brazilian society was still much afar from the liberal ideals enshrined in its laws, and the state still needed to “guide the invisible hand” (HESPANHA, 2004) before the liberal ideals could be implemented. A deferred *sattelzeit*: that is how Christian Lynch (2020) conceptualizes the longer time it took for liberal principles to go beyond the discourse and change societal practices in Latin America. Moreover, between the 1840s and the 1860, the military was submitted to a conservative modernization (SOUZA, 1999); that is, it was part of the conservative reforms that aimed to promote centralization based on the idea of *order* against the threats of fragmentation of the empire (MATTOS, 2017). After the 1850 promotions law, the Army turned into a more professional body (SILVA, 2018) integrated into the bureaucratic structures of the empire (CARVALHO, 2008). Therefore, the Army was less of a force aimed to attack foreign powers, and more an instrument to guarantee the internal social configuration without ruptures with the previous clientelistic networks. Continuity was in order, and penal law was no different. The norms inherited from the Ancient Regime helped to keep the recruited men in line and guarantee integrity for this

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<sup>23</sup> On those changes in a broad historical context, cf. Dipper (2013).

<sup>24</sup> For all the vast literature on the 1874 recruitment law, I would refer to Fábio Mendes (1999). On recruitment in imperial Brazil more generally, cf. Hendrik Kraay (1999).



part of state bureaucracy responsible to keep social order that were the Brazilian land forces.

Fear was indispensable: the Army could not exist in any other way. The fear/love model and its accompanying institutional structure, with harsh penalties and lavish distribution of pardon, was a useful model to accomplish the ends of nation building. After all, a rebel army was at the roots of the much-feared instability of the Latin American republics: few things were more important for the civilian elites than keeping the troops under control. But as the 19<sup>th</sup> century proceeded, new meanings were attached to the old structure of military criminal law and its procedure. Pardon now could also work as almost an ordinary appeal: minuscule procedural errors were constantly scrutinized when the Council of State opined on pardon petitions, almost like a judge ruling on procedural stunts. This was all the more pressing considering that pardon was the last step of a baroque process, in which several different councils superimposed, non-professional judges were appointed and rulings could be issued within days. The emperor was one last political agent bringing considerations of both administrative convenience and fairness to an already overcrowded system that gave opportunity to military considerations, executive administration and other non-legal issues to be balanced with strictly juridical reasoning. Sovereignty, opportunity, law: all of them had a place in the complex system of military procedure.

If royal clemency in the 18<sup>th</sup> century reflected the magnanimity of the monarch, in the 19<sup>th</sup>, it also helped to cope with the new societal sensibilities that welcomed humanist punitive practices and rejected the death penalty. In the last decades of the 19<sup>th</sup> century, the Supreme Military and Justice Council greatly reduced the number of capital sentences until it reached zero: the old engines of military law were slowly catching new winds. When they did not do so, pardon could made effective this aversion to executions.

The hails to the monarch were still there. The rhetoric of the Christian virtues of the benevolent emperor were never scrapped off. The pattern of harsh punishment mediated by clemency always was at the heart of the system. But this complex of old fragments was enlarged with new, more modern pieces, in a process that saw new features of the law accommodating rather than substituting the previous one, that preferred

to manage uncomfortable matches rather than search for new pairings and that produced at the end a complex picture that defies categorizations. Just like one of those buildings that goes through several additions and end up with many parts from different styles, and yet, against all expectations, still manages to make sense.

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