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The Sash and the Parchment:
Identification and distinction of military law (Brazil, 1870-1941)

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I giorni erano corsi via uno dopo l'altro; soldati, che potevano essere nemici, erano comparsi un mattino ai bordi della pianura straniera, poi si erano ritirati dopo innocue operazioni confinarie. La pace regnava sul mondo, le sentinelle non davano l'allarme, nulla lasciava presagire che l'esistenza sarebbe potuta cambiare.
Dino Buzzati. Il deserto dei Tartari, p. 83

Abstract

I analyzed the development of military law in Brazil to understand the relationship between Brazilian society and the armed forces. To pursue this objective, I paid attention to two phenomena: identification and distinction. By identification, I understand the process by which military law gained coherence, acquired shared principles and was unified across the Army and the Navy. By distinction, I understand the degree of difference between the legal regimes of soldiers and of civilians. I concentrated on three aspects of military law: scholarship, that is, teaching of law in military schools and writings on the discipline; military social security; and military penal law. I concentrated on the two latter aspects because they have strict correspondents on general law, allowing comparison. I concentrated my analysis on the main laws and decrees on the subject enacted on the period, debates on the military, legal and general press, parliamentary discussions, conceptions on the military in legal journals, conceptions on law in military journals. Concerning scholarship of military law, I collected works published by professors, did a prosopography of their social category and ideas contained in books and articles published by them. Concerning social security, I analyzed the debates on the main laws and justifications for the existence of a separate system. Concerning military penal law, I analyzed judicial review of military decisions, military codification, military reformism, reception of positivism in military law, among other topics. I concluded that the field went through a three-fold transformation. Between 1870 and 1889, military law was little more than an agglomerate of separated statutes, with different legal regimes for the Army and the Navy and with many differences from civilians. Between 1889 and 1920, the legal regime of soldiers was approximated to that of civilians, teaching of the subject developed and the regimes of the Navy and the Army was mostly unified. Between 1920 and 1940, society got militarized, leading to further approximation between military and general law. This militarization was caused by conscription, the ideology of the armed nation and for preparation for war in the context of interwar reforms; the approximation between military and civilian words was put to discussion due to doubts on what should be the role of the Army in this new environment.

Riassunto

Ho analizzato lo sviluppo del diritto militare in Brasile per comprendere il rapporto tra la società brasiliana e le forze armate. Per compiere questo obiettivo, ho esaminato due fenomeni: l'identificazione e la differenziazione. Per identificazione intendo il processo attraverso il quale il diritto militare ha acquisito coerenza, si è unificato atorno a principi comuni ed è stato omogeneizzato fra Esercito e Marina militare. Per differenziazione intendo il grado di differenza tra il regime giuridico dei soldati e quello dei civili. Mi sono concentrato su tre aspetti del diritto militare: la scienza giuridica, cioè l'insegnamento del diritto nelle scuole militari e gli scritti su questa branca; la previdenza sociale militare; il diritto penale militare. Mi sono concentrato su questi ultimi due aspetti perché hanno stretti corrispettivi nel diritto generale, consentendo una comparazione fra di loro. Ho concentrato la mia analisi sulle principali leggi e decreti in materia emanati nel periodo, sui dibattiti in materia giuridico-militare, sulla stampa giuridica, militare e generale, sulle discussioni parlamentari, sulle concezioni sul militare nelle riviste giuridiche, sulle concezioni sul diritto nelle riviste militari. Per quanto riguarda la scienza giuridico-militare, ho raccolto le opere pubblicate dai professori, ho fatto una prosopografia della loro categoria sociale e delle idee contenute nei libri e negli articoli da loro pubblicati. Per quanto riguarda la previdenza sociale, ho analizzato i dibattiti sulle principali leggi e le giustificazioni per l'esistenza di un sistema separato di protezione. Per quanto riguarda il diritto penale militare, ho analizzato il sindacato giudiziario delle decisioni militari, la codificazione militare, il riformismo delle forze armate, la ricezione del positivismo nel diritto militare, fra altri argomenti. Ho concluso che il campo ha subito una triplice trasformazione. Tra il 1870 e il 1889, il diritto militare era poco più di un agglomerato di legge e decreti separati, con regimi giuridici diversi per l'esercito e la marina e con molte differenze rispetto ai civili. Tra il 1889 e il 1920, il regime giuridico si avvicinò a quello dei civili, si sviluppò l'insegnamento della materia e i regimi della Marina e dell'Esercito furono per lo più unificati. Tra il 1920 e il 1940, la società si militarizzò, portando a ulteriori avvicinamenti fra civili a militari, ma ora questo processo ha subito contrasti. Questo avvicinamento è stato causato della leva, dell'ideologia della nazione armata e della preparazione alla guerra nel contesto delle riforme interbelliche; l'avvicinamento tra i mondi militare e civile fu messo in discussione a causa dei dubbi su quale dovesse essere il ruolo dell'esercito in questo nuovo ambiente.

Resumo

Analisei o desenvolvimento do direito militar no Brasil para entender a relação entre a sociedade brasileira e as forças armadas. Para cumprir esse objetivo, examinei dois fenômenos: a identificação e a diferenciação. Por identificação entendo o processo pelo qual o direito militar adquiriu coerência, se unificou em torno a princípios e foi homogeneizado entre Exército e Marinha. Por diferenciação entendo o grau de diferença entre o regime jurídico dos soldados e o dos civis. Concentrei-me em três aspectos do direito militar: a ciência jurídica, ou seja, o ensino do direito nas escolas militares e os escritos sobre este ramo do direito; a previdência social militar; e o direito penal militar. Eu me concentrei nos dois últimos aspectos porque eles têm contrapartidas diretas no direito comum, permitindo uma comparação entre eles. Concentrei minha análise nas principais leis e decretos sobre o assunto emitidos durante o período, nos debates sobre questões jurídico-militares, na imprensa jurídica, militar e geral, nos debates parlamentares, nas concepções sobre os militares em revistas jurídicas e nas concepções sobre o direito em revistas militares. Com relação à ciência jurídico-militar, coletei os trabalhos publicados pelos professores, fiz uma prosopografia de sua categoria social e as ideias contidas nos livros e artigos publicados por eles. Com relação à previdência social, analisei os debates sobre as principais leis e as justificativas para a existência de um sistema separado de proteção. Em relação ao direito penal militar, analisei o controle judicial das decisões militares, a codificação militar, o reformismo nas forças armadas e a recepção do positivismo no direito militar, entre outros tópicos. Concluí que o campo foi submetido a uma tripla transformação. Entre 1870 e 1889, o direito militar foi pouco mais que uma aglomeração de leis e decretos isolados entre si, com regimes jurídicos diferentes para o exército e a marinha, e com muitas diferenças com relação aos civis. Entre 1889 e 1920, o regime jurídico se aproximou daquele dos civis, o ensino do assunto se desenvolveu e os regimes da marinha e do exército foram em sua maioria unificados. Entre 1920 e 1940, a sociedade se militarizou, levando a uma maior aproximação entre os civis e os militares, mas, agora, com resistência. Esta aproximação foi causada pelo serviço militar obrigatório, pela ideologia da nação armada e pela preparação para a guerra no contexto das reformas interbélicas; a aproximação entre o mundo militar e civil foi questionada por causa de dúvidas sobre qual deveria ser o papel do exército neste novo ambiente.

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Soldiers beyond wars and politics: introduction

Gazing upon the empty plain under the scorching sun of stillness: this was the destiny of Giovanni Drogo, officer of an unknown army in the novel *Il deserto dei tartari*, published by Dino Buzzati in 1940. After anxious studies in the military academy, the young Drogo is sent to the *Fortezza Bastiani*, a bulwark against the Tartar enemies in the outskirts of the dream-like kingdom in which the plot is set. An invasion is awaited, and Drogo is eager to employ all his knowledge to protect the fatherland; and he waits, and he patrols, and he files papers and he trains for days, months and years in the endless wait for an apotheosis that never comes. After thirty years, while occupying the post of vice-commander of *Bastiani*, he falls ill and is discharged. Just days before the Tartars finally came around.

The inexorable passage of time, the main theme of the novel, is universal. But the monotonous routine of some assignments is distinctively military. Just as Drogo, the Brazilian Army stayed put for decades awaiting invasions that did not come, attacks that failed to materialize, threats left unfulfilled. But, unlike Drogo, Brazilian soldiers by no means led uneventful lives. They only had to find purposes other than war.

The clashing of arms has never been too far away from the palaces of law ad government for most of Brazilian history. Officers and enlisted personnel frequently went outside of the barracks to impose their will, take part in momentous debates, or, more generally, to participate in civil society. Political participation of soldiers: this has been for a long time a classical theme of Brazilian historiography. The experience with military dictatorship between 1964 and 1985 stimulated many brilliant studies trying to explain how and why so many events of Brazilian political life have been determined by people with military experience. This is, obviously, a most worthy endeavor. But it is not enough. Intervention necessarily spawns from a culture, and cultures are framed by institutions. This thesis will move away from the attention-grabbing coups, riots and wars and focus on normalcy[1]. On the many *Fortezze Bastiani* making most of the lives of soldiers and seamen. There, we will find the instruments we need to understand how military institutions were built in Brazil and formed a particular environment, where practices could be reproduced and, more importantly, a mentality could be born and develop. The particular observatory I choose to observe military institutions was law.

[1] This choice naturally echoes the so-called new military history, a trend that has been building up in Brazil for the last thirty years and proposes to focus on the Army as an institution and on the lives of soldiers, rather than only on battles and strategy. Cf. Celso Castro *et al.* (2003).

Law, as a cultural artifact, consolidates ways of conceiving society and provides the framework within which common practices can crystalize, consolidate and reproduce themselves. Institutional and legal history are, therefore, deeply entangled. A legal outlook can therefore be most fruitful to understand the structure of the Army and the mentality under which soldiers operated. Yet, military law has been mostly neglected by historians. Considering the 19th and 20th centuries, there are some studies touching this subject in Portugal[2], Brazil[3], Italy[4], Germany[5], France[6], Argentina[7], Belgium[8] and beyond. But, apart from a few exceptions[9], they are often restricted to the field of criminal law, and frequently even strictly narrowed down to military criminal justice. They tend to concentrate in dramatic moments, such as wars[10], or, in Brazil, the military dictadorships[11]. These works frequently seek to understand how the repressive apparatus of the armed forces was used to tame soldiers, or how it could at times be strayed to tackle deviant behavior among political opponents. Military law, from this point of view, is drama and pathology.

Though these research paths can prove to be most fruitful, and though I will be touching upon some of them, they do not suffice. The Army is also about everyday life and normalcy, about patrols and paper. And law knows nothing better than paper. Law can be all the more useful to decipher the professional culture of soldiers, their values, their ways of reasoning. How to translate the sacred sacrifice of life in war into an efficient pension regime? How to sustain the intricate pyramid of hierarchy with an efficient system of judicial review of military decisions? How not to burden with administrative tasks officers trained to handle mighty battleships while not letting efficiency and centralized control slip away? This intersection between the heights of principle and the crudeness of practical solution is the daily bread of law and the field ration of any motivated Army. My thesis intends to provide this most needed meal to outline a fuller picture of the history of the armed forces. One where intervention, clash and conflict are not regarded as a pathology to be rooted away, but as the result of a mentality that must be understood.

[2] Namely, the Master dissertation of João Andrade Nunes (2018).
[3] Mostly, the works of Adriana Barreto de Souza and her students that I will mention and discuss throughout the thesis.
[4] For pre-Unitary Two Sicilies, Giacomo Pace Garavina (2015). For liberal Italy, Carlotta Latini (2010).
[5] For the 19th century, Sylvia Kesper-Birmann (2016). For the 20th century,
[6] Only for the first decades after the revolution, cf. Da Passano (2000).
[7] The complete synthesis of Ezequiel Abásolo (2002) and other works, e. g. Jonathan D. Ablard (2020).
[8] Cf. Eric Bastin (2012)
[9] Mostly, Patrick Oliver Heinemann (2017).
[10] For instance, Jean-Marc Berlière (2013) and William Laport (2016)
[11] Especially the 1964 dictatorship; Ângela Moreira Dominges da Silva (2011) discussed the Superior Military Tribunal, and Otávio Valério (2006), the Supreme Military Tribunal. Antony Pereira (2005) worked with some aspects of military justice to debate the rule of law in Brazil and other Latin American Countries.

How can we find normalcy?

It is hard to be normal under a green uniform. Some manage to do it, for some time. This thesis will develop along three different fields: the writing and teaching of military law; military disciplinary law; and military social security. Nothing more regular than teaching and learning; in the schools of the Army, the very identity of soldiers is formed. And, with it, a particular war of relating with law. Where military law was taught? By whom? How? How was it debated in journals and books? Exploring these issues, we will be able to better understand how military law developed as a hybrid field: one pressed between the humanistic reasoning of lawyers and the natural-sciences perspective of military officers. A clash of paper and artillery – in which the guns were frequently operated by agents not trained to use them. After analyzing military law as an academic discipline, I will discuss military law as a complex of rules. But which rules? One could write about infinite aspects of the life of the barracks, from the day a soldier entered there – recruitment – to the development of the very specific career unfolding there – promotions – until the very end of military life. I will not. I chose only two: pensions and penal law. These apparently unrelated fields share the aspiration of normalcy: they are the only ones that have strict, direct correspondents in the civilian world. Military disciplinary law is the twin of both the discipline of civil servants and of penal law *tout-court*; military social security is easily comparable with the social securities of public servants and with that of workers in general. Normalcy by comparison. By looking at these two fields, one can spot more easily the differences between soldiers and civilians. More interestingly: those very differences need to be justified. Why do soldiers deserve special pensions? How can one warrant the existence of a whole branch of the judiciary just for the Army and Navy? In such discussions, it will be easier to grasp the different conceptions of the armed forces, their political role, their function within society. Moderating political power? Caste of illuminated intellectuals? High priests of civic religion? With each answer, a different Army is born.

Yet, "law" is too large a phenomenon. What will I be observing, more precisely? One cannot tackle all statutes, all decisions, all articles and books written in a country about military law over more than 70 years. I will select my sources, from both law and adjoining fields, with two processes in mind: identification and distinction.

By identification, I mean the process by which military law acquired a precise identity. By this, I do not intend to "discover" the first laws dealing with an Army. Such a path could lead me down to perilous roads: even the Digest of Justinian had its own chapter *De Re Militare*. Brazilian jurists turned back to it *ad nauseam*. Nor I would like to look to the formation of a

"Brazilian", opposed to a Portuguese army. Such transitions are often seamless and, frankly, of little interest. This is not about origins. By identification, I mean the process by which the frequently chaotic decrees, decisions, ministerial letters gradually became more organized and coalesced around some principles, some standards, some expectations. How administrative practices became law; how mere bureaucracy turned into "science". Not that this process has been thorough: many fields of military law remained for too long mere empiricism, and its law, the mere description of the gray reality of public departments; its principles, quite loose to this very day, can barely hold the field together. But the mere fact that military law could be taught in military and law schools, and be debated in newspapers or journals, signal that, from a certain point in the past onwards, it became more than casuistry. More than a guide to sclerotic bureaucrats. I intend to describe how this happened, and what it can say about the relationship between the armed forces and society at large.

The second process guiding my analysis will be distinction. Under this title, I understand the degree by which military law is different from other fields of law and from central tenets of the rules applied over civil society. Attention to this phenomenon was brought to me by the work of Mannori and Sordi (2013) on the history of Administrative Law: in fact, disciplines that branch out of other fields of knowledge must grapple with the question of how do they relate or differentiate from their mother discipline. Yet today, specialty is a main debate in military law (FIANDACA, 2008). But these processes are complex: the distance between the two fields might grow larger or shrink according to different social and political pressures. And military law is a hybrid: it brings together some elements of military and administrative law - and, more complicating, some authors would even throw on the basket civil law (military testaments and military easement), international law of the armed conflicts and beyond. One cannot simply state that the law of the barracks derived from administrative law, as for tax or health law. It would then tricky, or even impossible to write the history of military law as a simple derivation and differentiation from administrative, or criminal law. Distinction, as I intend to outline here, is slightly different. It is about the different rules adopted to regulate the lives of soldiers, how they are applied and eventually justified. It is ultimately about the degree of insulation of the armed forces from society.

Identification and distinction as indexes of the relationship between the Armed Forces and Brazilian society: this is the central problem of this thesis. One about diversity.

Military law, as a matter of fact, is nothing short of a breach in the fortress of equality, the bastion upon which modern Western law has been built. If Medieval and Early Modern law distinguish between persons to ascribe rights, Modern law distinguish between rights of a single

person – the abstract subject of law, the main product of the French revolution (MECCARELLI, 2016, p. 262-263). Military law does not. Equality is a dreaded danger, personality the distant echo of an incomplete dream. The law of the barracks does not condone equality, but upholds hierarchy; it does not focus on the person, but on one institution, one all-encompassing institution to which a very particular group of individuals are subject. This unrepentant citizen of a lost world must be admitted within the walls of modern law, but this fundamental tensions between personality and institution, between equality and hierarchy, remains. Forever. Tension that produces change, always: if military law can never be reduced to the strict parameters of contemporary law, accommodation will never be peaceful. And this change appears as – precisely – as identification and distinction: constant modifications on how specific military law can be, or must be to pursue the objectives of the Army in different historical periods.

My hypothesis is that, throughout the 19th and 20th century, as different models of Army and ideologies of its role *vis-à-vis* society and politics were adopted, military law changed. Army, the repository of the scums of society? Military law, the rubber-stamp of inequality. The Army, the forefront of patriotism? Military law, the standard-bearer of a new sense of civism. The Army, the defender of the nation? Military law, the source of expanding militarism. To each ideology, a new law. For this uncommon, restless body of law could not simply reproduce the logics of a legal theory that crushed its soul. It obeyed another master. One that bore ranks.

To ascertain this hypothesis, which sources are needed?

As I am interested in *legal* history, the most important sources will be legal sources in context. By legal sources, I will mostly mean parliament acts and decrees, as military law replicates the legalistic character of its two parent disciplines, administrative and criminal law. Why *in context*? By this expression, I indicate that I will not simply describe legal documents and the doctrines espoused by them. I will rather show how legal interventions, being produced by a discursive community, are always the product of (legal and political) debates, and their meaning, far from granted, is also determined by discussion among several actors struggling for the ultimate interpretation of legal documents. Debates, final text, reception: this triad enshrines the three steps of the making of any legal document that must be analyzed to most efficiently understand law historically.

But law is more than legislative documents. Learned law, above all, is mostly about debates and the arguments supported by each party. I will concentrate on these debates both in official settings, such as the Brazilian parliament, and in the press. The structure of laws is determined at parliament, but its reception depends on the outlook of external actors, which converge to the press to create public opinion. And, for the constitutional theory of liberalism,

the public opinion is paramount to keep government in check[12]. I will pay attention then to both strictly legal venues of discussion, such as books and law journals, and to non-legal ones, such as newspapers.

For the legal history of state institutions, it is indispensable to understand the administrative framework and practices that will receive and apply laws. Accordingly, I devoted much attention to official sources that could give a general view of the state of the military and its administration. First and foremost, I am referring to the Reports of the Ministries of the War and Navy, documents send annually by the ministers to the emperor/president from the 1820s to the 1930s. Varying from a handful to almost a thousand pages, they provide precious observations, sub-reports from other agents, statistical analysis, raw data and descriptions of almost all departments of the Brazilian Army and Navy. Information on individuals were mostly retrieved from the *Almanaque do Exército* and the *Almanak* Laemmert. Less importantly, but still relevant, I will constantly refer to semi-official journals widely read by the officialdom: the *Revista do Exército/Revista Militar Brasileira*, in the Army, and the *Revista Marítima Brasileira*, from the Navy. From the 1920s onwards, I will also pay much attention to the *Defesa Nacional*, which represented an important dissenting view on the role of the Army: more professional, less involved in party politics, more prepared for external wars. All three journals exist to this day. With all these sources combined, it will be possible to reconstruct the state of the Brazilian Army and Navy through time. The institutions, practices, and, most importantly, calls for reform will be scrutinized to show how they reflected the changing adaptation of the armed forces to trends affecting Brazilian society at large.

Finally, to grasp the piecemeal construction of Brazilian military law, I will reconstruct the teaching of this discipline in the military schools of both the Army and Navy. Structure, agents, output: I will concentrate on these three elements. First, I will analyze the regulations establishing and reforming the schools and concerning the teaching of military law specifically. Second, I will investigate who were the professors of military law, their biographies and their opinions on political and legal issues of the day. Third, I will analyze the books written on the discipline and texts published on journals. Teaching and writing: the two pillars of scholarship

The thesis will be organized chronologically in three parts. Covering between 1870 and 1889, the first part discusses the state of military law in late imperial Brazil and the several pushes for reform therein developed. We will follow how the Brazilian military, parliament, and public opinion dealt with the challenging legal inheritance stemming from the colonial past

[12] On the role of public opinion in the political theory of Brazilian liberalism, cf. Judá Lobo and Luís Fernando Lopes Pereira (2014).

and attempted – not always successfully – to update the legal system according to more fashionable principles. In the second part, which deals with years between 1889 and 1920, we will follow the rise in political activity of the military, which brought frequent instability to the political system. Those three decades also watched the first successful reforms in the field of military law since the early empire, albeit they were severely limited and quite ambiguous. The third part, from 1920 to 1941, will highlight the apex of political power of the army, which translated in a consequential campaign of professionalization: military justice was frequently reformed, preparation for war was put on the forefront of military administration and the army searched for a new role in Brazilian society. Each part will be preceded by an introduction giving an overview of the history of the army and its relations with Brazilian politics – especially to situate readers not thoroughly familiarized with Brazilian history.

Three parts, three themes. The thesis will unveil according to an ideally nine-fold grill. Military law teaching and writing, military criminal law, military social security multiplied by 1870-1889, 1889-1920 and 1920-1940. My humanistic reality, however, will be les precise than this mathematical plan. Military law was not born in 1870. The first part, the exordium, will feature two chapters contextualizing the state of military law and administration at the beginning of my period of analysis. And in the third part, I found insufficient information on the military schools to write an independent chapter.

The barracks and gunpowder, the laws and decrees, all of these elements ordered according to the architecture I have just outlined will allow us to patiently build our own *Fortezza Bastiani*: the ordinary ways of everyday military law in Brazil between 1870 and 1941. Years that mark the extremes of normalcy: the north and south of our fortress. In 1870, the largest armed conflict ever fought in South American soil, the Paraguay War, finally ended, liberating soldiers to turn their attention away from conflict. In the early 1940s, several changes in Brazilian military culture were imposed: in 1938, a new code of military justice was enacted, in 1941, the Air Force was created, in 1942, the statute of soldiers (*estatuto dos militares*) was published and the new Military Penal Code was about to turn into law in 1944. Among these many changes, Brazil declared war against the axis, getting directly involved for the last time in a foreign war in 1944 and 1945. Between 1870 and 1941, then, we can observe the Brazilian army and navy in their everyday routine, inside the barracks, far away from swamps and battlefields. It is an axial period to understand how the armed forces reformed their Portuguese, colonial structure and turned into professional forces. These seven decades were also the birthing ground of the problematic involvement of the armed forces with party politics. Different connections with politics, different conceptions of professionalism and different

visions for the role of the army within the state and for soldiers within society were tested and put into practice throughout the long arc of time we will analyze.

Inside our office, in front of piles and piles of paper, we will look into the past. Just like a soldier.

PART I

Separated and not equal

1870-1889

An ever-growing rift: Introduction

Few things are as national as an Army: confined inside the territory and securing the monopoly of legitime violence, soldiers are the champions of the State. Nothing would be more logical, then, than beginning this history with the Brazilian independence. But the vice of origins is a deceitful enemy, for it attracts the historian to an ever-enduring fall into the night of times. No: a better point of departure must be chosen. And, for the 19th century Brazilian Armed forces, the crucial turning point is 1850 (SOUZA, 2018). Why?

The Brazilian Army was not the only military force on the land: since the law of 18 August 1831, it was sided by the National Guard, modelled after a French force. A few months earlier, the first Brazilian emperor, Pedro I, had resigned and went back to Portugal, but he left many allies in Brazil, including several Portuguese generals in the Army. The heir to the throne, Pedro II, was a five-year-old boy, and while he did not come of age, a regency was appointed. Mostly liberal, the regents were weary of the land forces, and created the National Guard to counterbalance the perceived threat of the military. In the next years, however, Brazil would face an ever-growing number of revolts, some of them with separatist intentions: *cabanagem, balaiada, sabinada, Malês* revolt, the liberal insurrections of 1842 and the most important of all, the *Farroupilha*, that created an independent republic in the southern state of Rio Grande do Sul for ten years with the military help of Italian revolutionary Giuseppe Garibaldi. Meanwhile, the Brazilian Army suffered with chronicle underfunding and lack of recruits.

Precisely in 1842, a place coup made emperor Pedro II be crowned four years before reaching majority; in the following years, the conservative party would gain political prominence and become the dominating force in Brazilian politics at least until the early 1860s – the so-called *tempo Saquarema* (MATTOS, 2017). The defining issue of the conservatives was administrative centralization[13], a rallying flag that was turned into legal reality through several laws, among which the most important was the interpretative law of the additional act to the constitution (1840), which reversed several decentralizing measures of the regencies, and the law of judicial reform of 1841. If the gears of the administrative machinery were now pointing to the center of Rio de Janeiro, the imperial court needed an attractive force able to guarantee that the country would not disintegrate. The Army was the most obvious answer[14]. And this brings us 1850.

[13] On the debates on administrative centralization, considering particularly the trajectory of the Viscount of Uruguai, cf. Ivo Coser (2008).

[14] On the conservative program of reforms of the Army, cf. the work of Adriana Barreto de Souza (1999), which is the most important base of the following pages.

The Brazilian Army was not at that point a professional body with all the characteristics that distinguished its European counterparts. Most officers entered the career as *cadets*, that is, a special enlisted position that granted preferential access to officialdom to the sons of noblemen, military officers and civil servants. Being an officer meant to take part on a national institution, like the judiciary or the central bureaucracy[15], and higher-ranking members of the land forces frequently occupied political positions. The requirements for promotions were unclear and, therefore, personal and political connections within the Ministry of War determined who would advance through the ranks and who would remain serving in distant barracks in inhospitable lands. Against that system, the Brazilian Parliament enacted the law nº 585 of 6 September 1850[16], which came to be known in the historiography as the law of promotions.

This legal document established strict criteria for the career advancement of Army officers. Most positions would now be filled by seniority and some by merit. A minimum age and time of service were established as requirements for those wishing to become officers, which curbed the old practice of enlisting children of powerful noble families; a minimum time between promotions assured that well-connected men would not be able to be promoted to high positions still in young age. But, most importantly, the law gave preference in promotions to the graduates of the imperial Military Academy, and only those coming from that school could serve in the "scientific arms" – artillery, engineering and general staff. The historiography generally recognizes that this law spawned that the general process of professionalization that would turn the Brazilian Army into a modern force. But, at the same time, it would enclose the limits of the institution. Now that the sons of the most powerful men could no longer pursue meteoric trajectories in the military, they would prefer to study law and try to succeed in legal positions, such as judges, lawyers and, later, as deputies and other members of the central bureaucracy[17]. The Army, with its often-slow promotions, would become a preferential option for the lower middle classes; professionalization also stimulated an inward regard. Both factors, on the longer run, would foster the perception among some that the Army was an insulated institution, with different origins, practices and social circles than those of "civilians" – that is, the political class. John Schultz (1994), in a classical study, would consider this the prime factor that would drive the later interventions of the military in Brazilian. Though perhaps

[15] On soldiers as part of the imperial bureaucracy, cf. José Murilo de Carvalho (2008, pp. 182-193).
[16] On the debates that led to the law of 1850, cf. Daniela Marques da Silva (2020)
[17] This was seen as particularly central for the history of the Army by John Schulz (2016).

exaggerated, this thesis shows how momentous the changes made in 1850 in the path towards a modern, professional Army.

The law of promotions was not a single measure, but was part of a broader context of changes. In the 1840s, the Ministers of War created register books where information on recruitment, payment and other administrative tasks could be registered; this allowed for more detailed annual administrative reports and, therefore, permitted the central government to better control the Army (SOUZA, 1999, p. 109-113). The force created by the conservatives was grounded on a concept of nation that highlighted the idea of unity and centralization and left aside the popular element (SOUZA, 1999, pp. 39-40).

By the late 1840s, with internal conflicts under control, Brazil could look to the outside world – namely, to the Plata River. Between 1851 and 1852, the South American empire took part in the Platine Wars, a series of conflicts between Argentina, on the one side, and, on the other, Uruguay, Paraguay and Brazil. Rosas, the governor of Buenos Aires, wanted to rebuild the vice-kingdom of the River Plate, what meant to conquest the states of Paraguay, Uruguay and part of the empire. The Brazilian Army engaged decisively in the war, assuring that its two neighbors would remain independent and Argentina split *de facto* in two countries, the Province of Buenos Aires and the Argentine confederation, which would remain in dispute for almost 10 years. The region would remain unstable for decades, spawning the Uruguay War of 1864-1865, in which Brazil intervened heavily, and, finally, the Paraguay War (1865-1870).

Contrasting with these turbulent developments, Brazil had assured the work of centralization that would foster economic development. The 1850s were a sort of golden age of the empire, when the first railways were developed, a new commercial code was enacted, several economic reforms were considered and the state created economic infrastructure in several coastal cities. This new, more stable environment in Brazil, however, created spaces for dissenting opinions to develop and alternative projects to be proposed within the armed forces. In the early 1850s, a group of Army officers created a newspaper called *O Militar*, coalescing the opinions of the new groups of soldiers and fomented a new self-understanding of the armed forces[18]. They thought of themselves as part of a new collective marked by the value of honor and, most of all, science. The Military School was the only place in Brazil where mathematics and engineering were studied until 1874[19], when the civilian Polytechnical School was separated from its military counterpart; the military youth, therefore, regarded themselves as

[18] On the military press in the second empire, cf. Fernanda de Santos Nascimento (2016).
[19] On the role of soldiers as engineers and their projects of modernization for Brazil, cf. Ana Paula Almeida Lima (2013).

the flagbearers of progress[20]; they criticized clientelist practices – especially nepotism – which they thought were a staple at the higher level of the administration, dominated by law graduates. They thought to be entitled to manage the nation, especially as the state often sent them to take part on the new infrastructure projects of the distant heartlands of the country in mission-like journeys.

Everything had to be put on hold after December of 1864. Brazil had been engaging in the Uruguay civil war against the express requests of Paraguay and its dictator, marshal Francisco Solano López. When the president of the province of Mato Grosso was sailing up the Paraguay River, he was imprisoned by López. The following months, the Paraguayan forces invaded the province of Mato Grosso, dragging Brazil into a full-scale war. They aimed to invade Rio Grande do Sul, one of the most important Brazilian provinces, and acquire territory. But to do so, they had to cross a section of Argentinian territory; Buenos Aires, officially neutral, denied this request. Paraguay went through the province of Corrientes regardless, provoking the other major Platine force to declare war; Argentina entered into the *Tríplice Aliança* with Uruguay and Brazil and engaged in warfare against the forces of López. The war would be the greatest conflict in the history of South America, with almost 150000 deaths on the allied side and 300000 among Paraguayan soldiers and civilians. The skirmishes extended until early 1870 and include the killing of López. The heavy war indemnities and the territorial losses would suffocate the Paraguayan economy. But the costs of the war would also bear a toll on the Brazilian budget[21].

After the war, Brazil had overcome most external problems and war was not an immediate threat. Returning victorious from the wetlands of the Paraná Basin, the Brazilian Army cold forge a strong self-image: officials thought they were worth the gratitude of the imperial government and the political classes for the services rendered in battle. This, however, was not what the successive governments had planned. Brazilian finances had been battered by the war and could not keep up with the expectations of military leaders, and therefore the military budget remained stagnant in the last two decades of the empire; as the overall budget increased, the proportion of spending with the land and sea forces decreased, creating the impression that civilian elites were hostile against the armed forces. Between 1852 and 1887, soldiers did not get a single pay raise, reinforcing the impression that politicians did not fully appreciate the bloody contribution given in the Paraguay wetlands.

[20] On the public debate promoted by engineers and the participation of soldiers in it, cf. Ana Paula Almeida Lima (2013).
[21] The best work on the geopolitical buildup to the War and the actual combat is still Francisco Doratioto (2002).

The Army during the last phase of the Brazilian empire was not a single, unified block[22]. The law of promotions of 1850 would obviously produce most effects on officers graduated after its enactment; therefore, in the post-war Army, many officers still did not have formal academic training. They ascended in the two combatant arms, cavalry and infantry, which came to be devalued: in the military academy, there was a single course, with the first two years being the infantry and cavalry curriculum, and the next ones being the artillery, engineering and general staff curriculums, putting the two former arms as formally inferior to the other ones. From this, arose a difference within the Army between *tarimbeiros* and scientific officers (CASTRO, 1995, p. 50-51). The name of the former was derived from the *tarimba*, the rustic bed of the barracks, implying that those uneducated officers lived mostly in the same way as enlisted personnel, learning their *métier* in practice and not preserving a healthy distance between officers and their subordinates. The *científicos*, conversely, were those that had pursued their studies thoroughly and had additional prestige. Conversely, they were less committed to the military career.

This particular point deserves further development. The Army tended to be the preferential option for those sons of the lower middle class and small servants wishing to achieve financial stability. Scions of wealthier families tended to go to law schools, from which they could envision a future in politics and the bureaucracy, or to medical schools, that would open the door to a very prestigious profession that could yield a significant income. The Naval School, differently, required candidates to pay for uniforms a significant price, barring less privileged boys and fostering a more elitist corps of officers. There was no university in Brazil, meaning that those professional careers were the sole ones providing higher education in the empire. The military academy, conversely, could pay a small income to the students after some time, provide uniforms and accommodations: a very attractive option for those coming from a middle, urban background and fairly educated, but lacking capital or connections to ascend in other institutions. This attracted to the army many men without a particular penchant for the military career; many officers were simply seeking a way to survive and, perhaps, an opportunity to pursue their passion for studying. In a culturally meager empire, the Military School was the only place where it was possible to engage with pure mathematics, for instance. The "scientific officers" mostly belonged to this particular group that was not vocationed for war, but for the books, accentuating even more the divisions within the land forces (CASTRO, 1996, 9. 44-48).

[22] As stressed by Adriana Barreto de Souza (2018, p. 255).

William Dudley (1975) reports of yet another important division in the Brazilian Army in the late 1880s: a generational rift. According to him, there were important differences in positioning, military experience, education and political will between three classes of officers at the time of the Proclamation of the Republic, called the pre-war, war and post-war generations. The pre-war generation had grown in the traditional army structure, with many officers without formal education, and had engaged both in the Paraguay War and the Platine conflicts of the 1850s and 1860s. They were generals by the end of the empire and were deeply loyal to the monarchy. The war generation, conversely, had entered the Army when Brazilians were descending to the Paraguayan fields, and had that war as their only experience with conflagration; they had received little impulse in their careers from the war effort and were the most affected by the lack of pay increases between 1852 and 1887. Finally, the post war generation suffered the most from the reduction of the army after the war, which closed many positions for officers and, therefore, slowed down promotions. As there was no compulsory retirement for officers due to age, many remained in the Army way into their seventies, barring the professional development of many younger men. This fueled a deep unsatisfaction from lower-ranking officers.

In the 1880s, the military press developed further and calls for reforms increased. One of the central themes was recruitment[23]: many commanders thought that the Army only attracted the worst echelons of Brazilian society. This was not so far removed from the truth. Most privates had been captured on the streets and enlisted by force on the Army; such a way of finding new recruits was based on a "moral economy" that criminals, deviants, vagabonds and those that, in general, were perceived as not contributing to society were to be sent to the ranks (MENDES, 1998). This turned the Army into some sort of penal institution and service was coterminous with punishment. This could only be regarded with horror by more reform-minded officers. Moreover, slaves frequently entered the army to escape from their masters. All in all, society perceived the lower layers of military corporation as filled with the worst of Brazilian society: uneducated and frequently illiterate man that could hardly foster the civilizational mission of Brazil. In 1874, the government tried to change this situation with a new recruitment law that enacted the draw of all men in due age. This endeavor, however, failed miserably: military service was permanently tainted with the mark of punishment, and in a slave society, taking orders and being whipped by superiors seemed much like the institution from which everyone tried to escape (MENDES, 1999).

[23] On recruitment in imperial Brazil, cf Hendrik Kraay (1999).

Slavery indeed was perhaps the most pivotal political issue of those years. Since 1871, Brazil had been enacting restrictive laws against captive labor until the complete abolishment of the practice in 13 May 1888. In the two last decades of the empire, abolitionism became a dominating topic of the public conversation and spawned a growing social movement that saw the creation of political associations to advance the cause, people buying the freedom of slaves and harboring fugitives etc. Soldiers increasingly took part in this debate. At the same time, republicanism was turning into a political force, though far from a predominant one. Since the 1871 law of the free womb had freed all the offspring of slaves, some powerful landowners had started to turn against the monarchy, a movement that would reach its climax after the final abolition in 1888. Lower ranking officers also got associated with this movement, mostly because French positivism was spreading among some sections of the middle classes.

But the defining issue of the clashes between the Army and the political classes was the so-called "military question", a series of public confrontations between prominent soldiers and the hierarchy that can be defined in different ways[24], but, in its strictest sense, happened in 1886-1887[25]. In early 1886, colonel Cunha Matos, who was connected to the liberal party, registered some administrative irregularities of the commander of infantry of Piauí, who had ties with the conservatives. Retaliating, a conservative deputy accused Cunha Mattos of malpractice during the Paraguay War. He reacted furiously in the press, and the minister of War, based on an 1859 ministerial letter (*aviso*) that forbade soldiers to write in the press without prior authorization, sent him to prison. The senator Viscount of Pelotas, a friend of Cunha Matos and a general of the Army, spoke in the senate arguing that soldiers could defend their honor in the newspapers – the ministerial letter only prevented debates on internal matters of the army. The dispute grew much and was turned into a fight for the social standing of officers. The same month, another senator remembered a similar incident with lieutenant-colonel Sena Madureira and defended the broader interpretation of the ministerial letter. Sena Madureira responded in the press and was punished too in a tortuous administrative decision-making process that saw the minister of war bypassing the president of Rio Grande do Sul marshal Deodoro da Fonseca. Other imperial politicians got involved, students at the Military School protested and the fuss grew. After much civic manifestations, the Ministry of War said it could cancel the reproaches towards Cunha Matos and Sena Madureira, provided that they requested the government to do so. The two soldiers, however, refused to pursue such course of action, saying that the Ministry should recognize its own error and cancel *ex officio* the notes.

[24] For a marxist interpretation of the military question, cf. Carla Silva Nascimento (2009).
[25] The following narrative is mostly taken from Celso Castro (1995, pp. 85-95).

The issue was only resolved after almost a year, when the Senate voted a motion inviting the government to cancel the punishments.

This issue catalyzed the rivalry between some groups of officers and the political class. Formed by law graduates that were seen as looking down on the Army, the administrators and members of government were deemed to be ignoring the relevant services rendered by soldiers on the battlefield. After the Military Question, soldiers created the Military Club, an institution that still exists today and, for most of the 20th century, would articulate the political interventions of the armed forces. The first dramatic achievement of this new political dynamics was the *coup* that overthrew the monarchy in favor of the republic. But these developments belong to the next part of this thesis, as they are crucial to explain the last decade of 19th century Brazil.

This small narrative provides the contextual basis necessary to understand the developments discussed and analyzed in the first part of the thesis. The historiographic view I have shown, mostly based on the central works of Adriana Barreto de Souza (1999) and Celso Castro (1995) diverges from more traditional readings, such as that of Nelson Werneck Sodré (2010), that saw in the Army a progressist force against the more elitist National Guard, or the traditional view represented by Edmundo Coelho (1976) that saw in the whole second reign a "politics of eradication" of the army promoted by the civilians. But, most importantly, it does show that there was no such thing as a "military class": different fractions of the army had their own pressing issues and their own agendas, grounded on divergent ideological targets.

Why did the Brazilian military play such an important role in late 19th century, ultimately changing the very political regime of the country? In major European states, soldiers were an important part of the elite, such as in Italy (LORENZINI, 2017); in Prussia, most of the ruling class was formed in a military environment. Why were Brazilian officers emboldened to take political action, while their European counterparts were more comfortable working within the system? Much research must still be done in this field, with mine being a small drop in the ocean. But an initial step is to understand the economic and demographic size of the Brazilian Army in context, shedding light on which kind of force we are dealing with. The website *Our Word in Data* provides comparative historical data on key demographic indexes[26], and has information on Armies of many countries drawn from the dataset of *Correlates of War*, a project from the University of Michigan that collects data on variables of interest for warfare since 1963[27]. The next graphic compares Brazilan military expenditures in late 19th century with

[26] https://ourworldindata.org/
[27] https://correlatesofwar.org/history

those from the countries that were taken as example by the Rio de Janeiro cultural establishment:

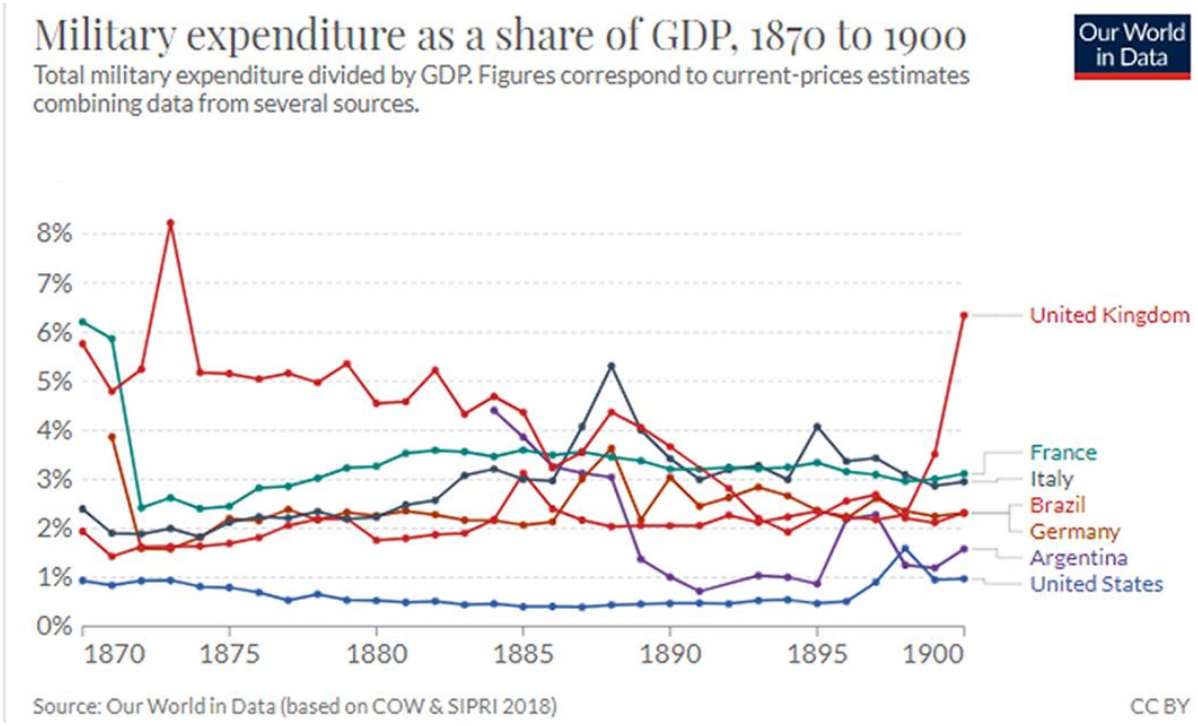

Figure 1Military expenditure as a share of the GDP in selected American and European nations, 1870-1890. Source: https://ourworldindata.org/grapher/military-expenditure-as-a-share-of-gdp?time=1870..1900&country=USA~GBR~ITA~DEU~FRA~ARG~BRA

Even though Brazil did not face any direct external threat, its military budget was the highest when compared with its GDP in the 1870s and early 1880s, contrary to the tendency of other American nations as Argentina and the USA, which had much lighter budgets *vis-à-vis* the major European powers. This budget, however, dwindled into something nearer the European trend. Did this wealth translate in more men at arms?

Figure 2 Number of members of the armed forces in selectd American and European nations, 1870-1900. Source: https://ourworldindata.org/grapher/military-personnel?tab=chart&time=1870..1900&country=USA~ITA~DEU~GBR~FRA~BRA~ARG

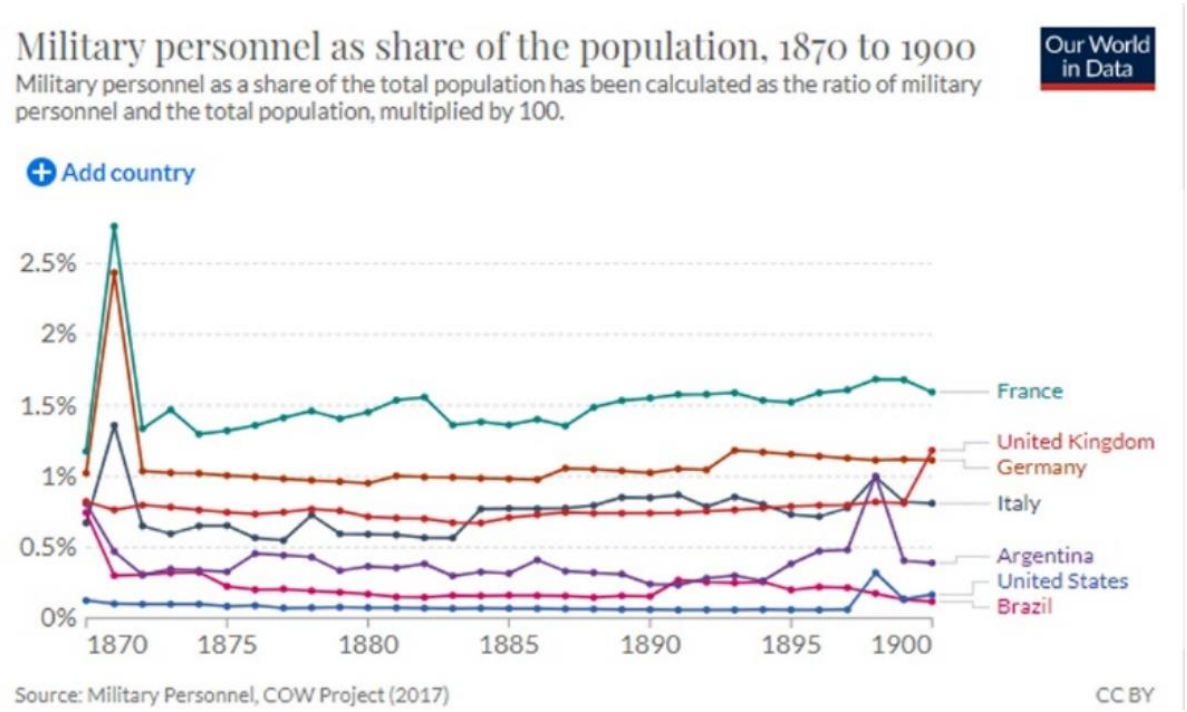

Figure 3 Share of the population of selected American and European nations that were members of the armed forces. Source: https://ourworldindata.org/grapher/military-personnel-relative-to-total-population?time=1870..1900&country=USA~GBR~ITA~DEU~FRA~ARG~BRA

American armies were decisively smaller than its European counterparts in the *Belle Époque*. The Italian forces, for instance, were more than twelve times larger than the Brazilian Army and Navy combined; the whole of the imperial forces after the Paraguay war could barely

compare to a single standard European division, let alone with an entire Army. And this did not result from major differences in population: as a share of the total number of inhabitants, Brazil's armed forces were dreadfully small. Such a situation provided for an explosive mixture. On the one side, officers could look at their European counterparts and fairly argue that the imperial Army was in comparison little more than an afterthought; how could it patrol a country the size of the whole old continent while having a military effective that was less than half that of the small Belgian Army? On the other hand, Brazilian politicians could look at their beleaguered budget and say that such a poor nation could not pay for anything better and that in such a sparsely populated land, young man would be of better use working in agriculture or industry rather than the barracks. Both were right; neither side was disposed to admit the opponent's point. But, after winning a costly war, officers would not keep silent.

The period covered by the first part of the thesis (1870-1889) was crucial for the political participation of the armed forces. The reforms of the 1850 were bearing fruits and the Army was now mostly a professional body. The experience in Paraguay and the perceived mistreatments from the political classes were forging a common identity that was fostered by an ever-growing specialized press. In this context, antagonisms with the political class had a fertile ground to flourish. Part I will show how this new, emboldened Army was governed through an antiquated law, and how far projects of modernization could go. Governance by old models fostered tensions that put the higher echelons of military hierarchy at odds with both young, reformist-minded officers and the troops. Such contradictions provided ground for change, and they had consequences well beyond the worlds of either law or the military.

This first part groups five chapters. The first one will give a general introduction to the state of military law in the empire: which were its sources, where it was produced and, most important of all, the circumstances in which it was taught. With this, we will be able to understand what was the image of legal matters received by soldiers in the military academy and which they used to throughout their careers. The second chapter deals with reformist impulses in the Army and the Navy in the second half of the 19th century: the law of promotions was not the only major reform pursued in the armed forces, but there was a general perception that many changes were needed to bring the land and sea forces in line with the general features of modern law and current warfare. The third chapter charters the "social activity" of the Army, that is, practices that today would be understood as concerning "social rights", such as education, health and social security, that will help us to understand how the administrative network of the forces were organized between the stricter objectives of pursuing military fight. It also gives a budgetary perspective for the more political and theoretical debates of the next

chapter. The fourth chapter traces the history of social security in the army: the most important laws, the main debates and the legal aspects of pensions and retirement are analyzed. Finally, the fifth chapter discusses military and disciplinary law, and, most important, the botched quest for codification.

The Army and the Navy are not simply machines of War: they are integral part of the administrative network of the State, and, therefore, must reckon with law. In Brazil, 19th century was mostly about state-building, and the military and its law were no different: the absence of codes, the weakness of social security, the lack of a full-blown educational structure mark those years. Yet, they are profoundly stimulating for their stunning mixture between old and new, aspiration and actions: combinations laying the grounds of the troubled relationship between soldiers and civilians.

Chapter 1
A child of estranged parents: the formation of Brazilian military law

He must have been terrified. Or, at least, nervous. After all, it would be a bold statement, that could cost him the good will of his colleagues. But there were some misunderstandings lying around that must be addressed, and he could not watch silently the reigning. We cannot know if he hesitated, gasped or displayed any sort of anxiety. What we know for sure is that he proceeded.

It was march 15 of 1883 when Thomáz Alves Júnior., professor of military law and military administration at the Military School (*Escola Militar*) of Rio de Janeiro delivered his chair's yearly opening speech. Yes: an apparently innocuous venue – sometimes, it can even be a bureaucratic one. But Thomaz Alves had a characteristic particularizing him among his colleagues; something hanging between a curse and a distinction: he was a jurist in a school full of scientific-minded military officers. As such, many of the ideas he defended were regarded as a product of a bygone past – outdated modes that must be crushed by the new lights of scientific reasoning, positive knowledge and experimental data-gathering.

Thomaz Alves was a metaphysic. That was the pejorative sentence imposed upon him, but the old professor did not feel ashamed by it – as a matter of fact, he counter-attacked in his speech. He reached for the heart: August Comte, the much-loved founder of positivism, the wholeheartedly-admired defender of the faith in reason, the adored French philosopher regarded by many in Brazil as the flag-bearer of the spirit of the century: he was the target of our bold Brazilian professor.

In his speech, Thomas Alvez (1883, p. 127) warned against the "systematic hate towards metaphysics" nurtured by Comte, which rendered his philosophy "a novel science without any real and true base". Bold, as I said. But Alvez Júnior gave a nod to his colleagues: Comte was on the right side when he was speaking about "natural and exact sciences" (ALVES JÚNIOR, 1883, p. 128). It was his treatment of social sciences that failed: men could not be reduced to their minor "physical nature" – no, they were more than that. By belittling the true heart of human nature, Comte, in "search for a religion, could find only the one of no-being" (ALVEZ JÚNIOR, 1883, p. 127).

There was more than a drop of irony in Alves Júnior's discourse. "We do not mean to condemn you *a priori* or *a posteriori* for defending Comte's doctrines. I give you the fullest

liberty to think, as long as you, through your study and application, know how to defend the doctrines that you have embraced". He suggested that many scions of positivistic thought charged against certain ideas only because the head of their school displayed similar antagonisms towards philosophical-minded scholars. In a covert attack to his colleagues, the lawyer implied that many positivists forgot the specificities of social sciences; their attacks were actually a product of herd thinking.

This was no trivial statement. Positivism was king in the army by the end of the Brazilian empire[28]. The law, on the other side, was dominated by *Bacharelismo*[29], that is to say, a tendency that overvalued the scholastic diplomas and whose sociological foundations lied mostly on rhetorical expertise and abstract reasoning[30]. That was the very world the positivists were willing to overcome. This set them on a colliding path that defined most of the public position of the Army – or, at least, some parts of it – in the last years of the empire, and ultimately set the soldiers formed under positivism to overthrow the Empire of *bacharéis*.

We will get to this story in due time. For now, it suffices to remark that military law, as the meeting ground between two opposite worldviews, was a field of clash and misunderstand. The shades of conflict shaped what and how professors of military law wrote in the frontiers of estrangement between law and the military. Since officers held a less-than-flattering opinion of lawyers, they disregarded law itself; since the Army was seen as a dangerous force that could destroy the liberal regime and bring instability – a frequent sight the small, banana republics in the vicinity of Brazil - lawyers also failed to pay that much attention to military law.

This section tells a story of alienation and sometimes open hostility. Thomaz Alves modest speech sets the tone: one peppered with passive-aggressive stints and ill-disguised attacks. As one of only two professors of military law in the country, he was among the very few people that simultaneously belonged to those two worlds. And he felt the pain of the rift.

The answer to his article? Silence.

Published in the Review of the Brazilian Army (*Revista do Exército Brasileiro*), it got no reply. In fact, the table of contents of this journal hardly displays works concerning law. The conflict was coveted, and only the few mandated by their *métier* to live in the intercession between law and war dared to navigate its troubled waters.

Into this story we now venture. A story of confusion, silent dialogues, clash of worldviews and its fair share of misunderstandings. I will show in the next few pages how the

[28] For more on that, especially on the role of positivistic ideas in the army and how it shaped the proclamation of the Brazilian republic in 1889, see Celso Castro (1995). On the history of positivism in Brazil, see Ivan Lins (1964)
[29] For the notion of *bacharelismo* in Brazilian history, cf. Alberto Venâncio Filho (2011).
[30] There were, however, some dissidence since the 1870's: the so-called *School of Recife*.

military law was (dis)organized in the late imperial period, how lawyers, officers and administrators dealt with the intricated Portuguese heritage, how military law was produced, transmitted and understood and, above and foremost, how it reflects the broader relationship of two fundamental social categories of the last two decades of the empire: lawyers and soldiers.

1.1 – To find order in the chaos: compilations of military law

The Brazilian transition from a United Kingdom with Portugal towards an Independent empire, though a rather radical rupture in political terms, can be considered quite smoothly under a legal point of view. Many institutions transposed from Portugal to Rio de Janeiro in 1808 continued to function normally, and laws passed prior to 25 April 1821 held their value in the new legal order of the independent tropical empire by force of the law of 20 October 1823. But a smooth transition does not automatically entail an organized outcome.

Mayhem: this was the state of military law in the dawn of independent Brazil. Several provisions from the 18th century were still in full force[31]; Particularly, the Articles of War of the Count of Lippe, which were settled in 1863 for the Portuguese army, but were also applied to the newly independent Brazilian public forces. As Cunha Mattos (1834, p. XII) wrote, "it is not rare to find Laws and Orders on the same subject contradicting each other". This untenable situation eventually got to the ears of politicians charged by the first Brazilian emperor, D. Pedro I, of writing the imperial constitution, which would be promulgated by the monarch in 1824. Art. 150 of the political charter stated that "a special ordinance will regulate the Organization of the Brazilian army, its promotions, its wages and discipline, as well as of the Naval Force"[32]. This promise is part of a wider effort of modernization of Brazilian law: art. 179, which established Brazil's bill of rights, determined, in paragraph 18, that the legislative branch must organize as fast as possible a civil and a criminal codes founded upon the basis of justice and fairness[33]. The penal attempt was successful: 6 years later, in 1830, Brazil got its first systematic set of punitive laws. The civil enterprise, on the other side, was less fortunate, as the first civil code only came to force in 1917. Military law mirrored itself more on the second example.

[31] For the specific situation of the Brazilian Navy, cf. Álvaro Pereira do Nascimento (1999).
[32] "Art. 150. Uma Ordenança especial regulará a Organização do Exercito do Brazil, suas Promoções, Soldos e Disciplina, assim como da Força Naval".
[33] "Art. 179, XVIII. XVIII. Organizar–se-ha quanto antes um Codigo Civil, e Criminal, fundado nas solidas bases da Justiça, e Equidade".

There were some official attempts to organize the structure of the Army; for instance, one can remember decrees 30 and 31, on the structure and positions of the Army[34], or the decisive law of promotions nº 585 of September 6, 1850. But no single law would ever be organized. The compressive, far-reaching "ordinance", that would consolidate the bulk of military provisions, was destined to forever remain a mirage. The Military Penal Code, for instance, would only be promulgated in 1890, after the end of the empire. The law of the armed forces, therefore, remained messy. Quite messy.

Official inaction did not prevent, of course, private citizens to step in and try to organize at least a little the official sources. In the imperial times, at least four compilations of military law were published, in an attempt to give some sort of order to the chaotic situation that plagued the Army's and Navy's legislation. Let's take a look at them.

The first compilation to emerge came to light in 1834, only 10 years after the independence. Its author is Raimundo José da Cunha Mattos, one of the most prominent personages of the first years of independent Brazil[35]. He entered military service in 1790 in the Portuguese army and served in Europe, Africa and Brazil. Afterwards, he was made chief of the Army in the Province of Goiás – where he was later able to get elected as deputy. He authored several books in topics as diverse as chorography, history and military strategy. Finally, he was pivotal in the foundation of the Brazilian Historical and Geographical Institute (*Instituto Histórico e Geográphico Brazileiro - IHGB*) in 1838, which still operates to this day.

His vast compilation spans three volumes and more than a thousand pages. He claims to have referenced more that 3700 new orders and legislative dispositions, and 12 thousand in total. How true those impressive numbers are must be left to further research. He claims to have written his book "only to young officers of the Army and Navy" (CUNHA MATTOS, 1834, p. XIII), since the several works that already existed were both hard to find and prohibitively costly to those trying to overcome the many hurdles of the beginning of their careers. Many of those books were Portuguese, and notwithstanding the fact that many regulations were still in force in Brazil, a more updated work was needed.

Cunha Matto's compilation does not fully transcribe the laws that he references. Actually, he organizes the legal information in alphabetical order; each entry introduces a small explanation either the meaning of the word or of the acts that related to the heading. The author

[34] https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-30-22-fevereiro-1839-536478-publicacaooriginal-27044-pe.html; https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-31-28-fevereiro-1839-536479-publicacaooriginal-27045-pe.html

[35] On Cunha Mattos, cf. Bianca Martins de Queiroz (2009).

intended readers to use the book as a reference from which readers could identify the most relevant information and the sources where they could extract a fuller picture of the issue.

The second collection was written by Ladislao dos Santos Titara, an officer from the state of Bahia and a man of letters who also took part in IHGB. He whrote between 1845 and 1855 three editions of *Auditor Brasileiro*, which organized military legislation in descriptive articles attempting to give some order to the chaotic material received from Portugal. In the 1850s, two new books attempted to complement the previous *Auditor* with new acts and laws.

Embedded in similar ideas, but with a different kind of organization was the Indicator of the Military Legislation (*Indicador da Legislação Militar*), published by then Lieutenant-Colonel Antônio José do Amaral, a Military School professor. He held high positions in the Ministry of War and was awarded with several of the most important Brazilian honorific orders, such as the orders of the Rose, Christ and Saint Bento of Avis (BLAKE, 1872, v. 2, pp. 209-210). His book apparently was highly regarded, as it had two editions – the first one from 1863 and the second one from 1872. Its three volumes comprised the impressive amount of 2194 pages, according to Sacramento Blake.

As Amaral (1872, p. XIV) himself states, his objective was the "codification of our law relating to rights and duties and military administration". Beyond simply amassing them into a book, he tried to give them a "method" in the first volume; the second one displayed the most important laws and was intended for the military personal that could not afford the whole printed legislation; and the third one was an index of the contents of the whole work. The collection has more intellectual breath then Cunha Matto's one: the author organizes the material under a systematic logic by topics and sub-topics. Indeed, the book's index could be easily used to build a code of military law. Within each topic, Amaral gives a brief legal definition of the issue under debate and describe its function; then, he proceeds by presenting in chronological order the laws, *alvarás*, *avisos*, instructions etc. pertaining to the theme, with a brief abstract of what each one of those diplomas is dealing with. He calls his work a *codificação* (codification) that can support the development of the future *ordenança* of the armed forces called by the constitution (AMARAL, 1872, p. XV). In historiographical terms, this book is more of a compilation, as it does not introduce new law – and frequently only give abstracts of the norms, rather than the real text; but it also proposes a systematic organization that could bridge the rocky path between individual acts and outright codification[36].

[36] On the historiographical concepts of codification and consolidation, and the history of codification in Europe, cf. Paolo Cappellini (2002).

The book was really appreciated by the public, and Amaral was not shy to show this off. He published in the first pages of the second edition some of the letters of appraisal that he had received from prominent figures both in the military and the legal world – which meant as well, of course, people with obvious political prominence. The two single most important correspondents that got their letters published were the Marquess of Caxias, Commander of the Brazilian forces in the Paraguay War, patron of the Brazilian Army and the Viscount of Uruguay, conservative leader, prominent senator and the main administrative law scholar of 19th century Brazil. Nothing bad for this "codification" aimed at army officers.

The Indicator was almost contemporaneous to another compilation: the Synopsis of the Brazilian Legislation Whose Knowledge Interests the Most to the Employees of the Ministry of War (*Synopsis da Legislação Brasileira Cujo Conhecimento Mais Interessa aos Empregados do Ministério da Guerra*). Its first edition was published in 1874-1875, and a second one saw light in 1879. Other volumes were later published with the new provisions until a sixth and final volume came to light in 1896. The structure of this fourth compilation greatly resemble the pioneer work of Cunha Mattos: the topics came in alphabetical order and they mostly make short references to the relevant legal document and a quick overview of the pertinent law. Each one of its three volumes grow to just short of than 500 pages.

There is no sort of introduction or explanation of the objectives of this compilation. Its author, Manoel Joaquim do Nascimento Silva, worked as a civil servant at the Ministry of War; he began his career in the lower echelons of bureaucracy (*amanuense*) and steadily climbed its posts towards chief of section. He also got a few honors, such as officer of the Imperial Order of the Rose, knight of the Order of Christ and was granted the honorary position of lieutenant-colonel. He authored some compilations of decisions from the Council of State pertaining to the Ministry of War and the Ministry of the Navy as well (BLAKE, 1900, v. 6, p. 122). This position probably explains some characteristics of the work: an eminently bureaucratic compilation, without much comments. No justification for the writing is provided, let alone something that could be called a method. The title gives away the addressees of the book: the employees of the Ministry. They must have appreciated it, as suggested by the repeated updatings of the book into republican times.

The four works testify both to the chaotic state of the Brazilian Military law and the need to give it order. The constitutional promise of an ordinance organizing every single piece of legislation was never fulfilled. Sure, such a project was deeply ambitious: other countries never not codify the whole of military law, and administrative law remains scantly ordered to this day. But the aspiration of a code was not folly: some countries had codified at least penal

and disciplinary law, and Portugal had published a project code of punitive military law already in 1820, as we shall discuss in due time. This demonstrates that military law was particularly hard to codify, but order was not impossible to be achieved. Particular – though not unique – Brazilian conditions explain the state of military law by the middle of the 19th century.

This movement of consolidation and rationalization was not a prerogative of the armed forces. In fact, just as the absence of the general ordinance compelled the military bureaucracy to organize its legislation, a similar lack of codes in the civilian world prompted bureaucrats and private citizens to consolidate the civil laws. The history of the 19th century Brazilian code that did not happened stimulated passionate discussions, and is one of the paramount topics of Brazilian legal historiography; it would be futile to try to summarize it here[37]. It is sufficient to say that, in the absence of a systematic statutory document, there were similar efforts to organize the existing order, that was even more complex[38] than the military one: it comprised Brazilian law, the Portuguese ordinations, codes of "civilized nations" and even roman law[39], which could all operate at once in a single case[40]. One of the first attempts to give some order to this havoc was the *Consolidação das Leis Civis* of Augusto Teixeira de Freitas (1858), which condensed in clear articles with their normative references the previously chaotic laws. Later, Cândido Mendes de Almeida organized his *Código Filipino* (1870-1878), which comprised the Portuguese ordinations with several annotations and other relevant legislation. And other branches of law followed a similar path: the same Cândido Mendes arranged a consolidation of ecclesiastical law (1866), and João Vieira de Araújo initiated a new edition of the criminal code that would exclude its revoked dispositions[41].

In just a few words: the quest for simplicity had conquered hearts and minds everywhere in the Brazilian legal landscape of the 19th century. The Army was not immune to this movement.

But this thesis is not about the myriad declensions of codification; let's turn back to the green barracks and the gray offices.

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[37] For na introduction to the history of private law considering the Brazilia experience, cf. Giordano Bruno Soares Roberto (2011); for a history of imperial Brazilian civil law, cf. Giordano Bruno Soares Roberto (2016). For codification of civil law and a convincing discussion of the absence of a civil code in imperial Brazil, cf. Renato Sedano Onofri (2020).

[38] On the complexity of Brazilian civil law, cf. Antônio Manuel Hespanha (2010) and Samuel Rodrigues Barbosa (2008).

[39] On the uses of Roman Law in the work of Teixeira de Freiras, cf. Edson Kiyoshi Nacata Junior (2017); on roman law and slavery in Brazil, cf. Eduardo Spiller Penna (2005).

[40] As was the case of the law of property. Cf. Laura Beck Varella (2005).

[41] Cf. Ricardo Sontag (2013; 2014, p. 127-172).

A simple prosopography of the authors of the military compilations presented in the previous few pages can yield some important hints about who was interested in military law. All of the four compilators had some sort of connection with the Army. Three of them belonged to the ranks themselves, and the third one, Nascimento Silva, was part of the civil apparatus that controlled the army - though he got an honorary patent. The works are designed for officers and civil servants that have an immediate need to apply the law to particular situations; there is no aspiration to a deep, legal reflection on the statutes. The works are ultimately bureaucratic, not scholarly. They carry the same shade of olive green that was stamped in the army uniforms. This is a testimony to the relative absence of interest in military law by jurists, and also the lack of collaboration of the two worlds in the crafting of this double creature that, in theory, must have belonged to both of those social groups.

1.2 – An unexpected union: law in military education and its textbooks

Lawyers can disregard military law – at least to a certain extent. Soldiers cannot enjoy the same privilege. As they must live under the shade of the rules of the organization to which they belong – and the civil authorities aspired to submit them to the constitution and to civilian control –,military personal must engage in some sort of contact with the complex of rules that regulated their relations with the state. This is why the military schools had chairs on legal studies.

However, it took a while before this necessity was felt by Brazilian legislators. For instance, the reg. 39 of 22 February 1839 of the Military School of Rio de Janeiro did not establish any discipline of military law or legislation in its 5-year program. There was only a chair of Military History in the 2nd year. Later, in 1851, a second military school was established in Porto Alegre[42]; it, however, only provided courses for the cavalry and infantry, which simply comprised the first and last years of the Rio de Janeiro school. Law was still absent.

Ironically, when military courses were reduced from five to two years, the first chairs of law were introduced. In 1st March 1858, decree 2116 established that the second chair of the first year of the Military School would be dedicated to "military administration, legislation and history; notions of *direito das gentes* (*ius gentium*) applied to the uses of war" (art. 16). Since the *curriculum* of the school of Porto Alegre simply blended the first years of the Military School and the Central School (the one where civil engineers would study), the southern school

[42] Decree nº 634 of 20 September 1851.

was also affected and received a law chair. The political forces behind this reform intended to enhance the military nature of the school; in 1856, the Army performed for the first time extensive military exercises, and the discipline was made stricter to conform with traditional military patterns (CASTRO, 1995, p. 142-149). However, militarization was not thorough. The last two years of instruction were taught at the Central School, which was responsible to instruct civil engineers; this allowed soldiers and civilians to socialize, which was not seen well by the champions of military discipline. This would change in 1874.

In 28 April 1863, the decree 3083 reorganized the schools of the Army and the Navy; in its art. 39, the studies program of the Military School was established, with an additional year, and greater independence for legal studies. Military history, along with strategy and fortifications, become a separated chair, and at the 2nd chair of the 2nd year, it was taught "*Direito das gentes* (*ius gentium*) with applications to the uses of war, preceded by the indispensable notions of natural and public law. Military Legislation".

The final form of the curriculum came by the dec. 5529, in 17 January 1874[43]. There were some small, though important name changes in the 2nd chair of the 2nd year: it was now called "International law applied to war relations, preceded by notions of natural and public law; military law, preceded by a general analysis of the Constitution of the empire" (art. 36). And legal studies got a new chair in the newly-created 4th year. The 2nd chair of the penultimate year was named "military administration, preceded by notions of political economy and administrative law".

Not everybody had to attend all chairs; they were grouped in different courses according to which specialization (*arma*) cadets intended to work in after graduation. Infantry and cavalry courses only comprised the first two years; artillery comprised the first three; the general staff of 1st class comprised the first four years; and military engineering was made of all five years. The organization clearly arranged the arms in a hierarchical order, differently from today, when all of them have the same length and are regarded as equivalent specializations. The Military School of Rio Grande do Sul (seated in Porto Alegre) offered only the infantry and cavalry courses. Therefore, all officers of the Brazilian Army would get one year of legal education, and those meant for higher positions must study in a second year administration and administrative law.

[43] The Military School of Rio Grande do Sul got some modifications that did not affect military law with the decree 6783 of 29 December 1877. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-6783-29-dezembro-1877-549448-publicacaooriginal-64912-pe.html

In the Navy, law was absent in the 1858 regulation[44]. It truly appeared only in 1871[45], in the last of four years of the sailor's training, under the name "notions of international maritime law" (art. 2). But the fourth was no ordinary year: at the twilight of their curriculum, future seamen would not study on land, but were supposed to carry their books to the sea and couple the office with practical exercises in an instruction vessel of the Brazilian Navy. Therefore, the teaching was not divided in chairs, but was scattered among ten different topics, called *aulas* (lessons). One must wonder that the attention towards those disciplines would be harmed as the future officers needed to learn how to live in the Atlantic and how to operate a warship. Actually, at some point, the instruction on board was a target of some dispute: seen by some as a necessary mean for the future naval officer to get in touch with maritime life, it was dismissed by others as an unnecessary burden to the naval youth. Anyway, it is not hard to imagine that the divided attention would divert student's efforts, especially from disciplines not directly connected to the everyday *métier* of seamen. Moreover, it would be hard for international law to conquer the hearts of the young while needing to fight for it with pieces of artillery, any sorts of guns, the vibrant wildlife at sea and the dazzling landscapes with which one is constantly faced at the Atlantic coast. It was only in 1886[46] that the curriculum was again reformed, and military law attained the rank of chair. Two, actually: the 3rd chair of the 1st year, called "elements of public and constitutional law and military law" and the 3rd chair of the 2nd year, called "elements of international and commercial maritime law".

Regardless from the amount of dedication that it could draw from soldiers, between 1858 and 1886, military law was consolidated as a discipline in the instruction of future officers. From simply "military legislation" that had to dispute space with history and strategy, it grew into five "spaces of teaching": one in Rio Grande do Sul; a full chair of military law and one of military administration and administrative law in the Military School of Rio de Janeiro; and a more specific teaching of maritime international law in the Naval School.

But what was veiled under the expression "military law"?

As it is always the case when it comes to education, there is a difference between what was taught in the schools and what can be called a "scholarly definition" – one that jurists could work with, built in the realms of "science". The best example of the latter approach is a text published by Wenceslau Freire de Carvalho (1881, p. 3), a colonel, in the newspaper *Tribuna*

[44] Decree n. 2163 of 1st May 1858. On this specific regulation, cf. Luana de Amorim Donin (2016).
[45] Decree n. 4720 of 22 April 1871. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-4720-22-abril-1871-552122-publicacaooriginal-69133-pe.html
[46] Decree 9611 od 26 June 1886. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-9611-26-junho-1886-543374-publicacaooriginal-53625-pe.html

Militar (Military Tribune). The text, on *notions on the military art*, has a chapter dealing with the four the topics that, according to him, would comprise military law - which he called military legislation: first, recruitment; second, gratifications and pensions (which include medals and honors); third, the "code of military justice" (which includes "punishments against faults and penalties against crimes"); and the law on the "military status", which meant ranks and wages.

Those normative complexes mostly fall within the field of administrative law. The first and the last topics described above would be considered, in contemporary Brazilian law, as civil servant law (*direito dos servidores públicos*); the second one would be seen as an amalgamation of civil servant law and social security (*direito previdenciário*); the third one would be regarded as a fusion between disciplinary administrative law and military criminal law.

Was this the curriculum taught in the schools? As a matter of fact, as the future officers would not have had much of a previous legal education, courses had to provide them many basic notions that a law student, for example, would acquire on the first year. After the 1874 regulation for the military forces was published, the annual report of the Ministry of War of 1874 published a 56-page long collection of the programs of all its disciplines (MINISTÉRIO DA GUERRA, 1874, Anexo G, pp. 1-56). For law, there were five teaching units: natural law, public law, international law, constitutional law and military law. The first consisted of topics that would be seen today as legal philosophy or introduction to legal studies, such as sources of law, the division in personal rights and property rights and so on. Public law mostly comprises the field called today State Theory (*Teoria do Estado*). International law concentrated much on the law of war. Military Law, on its turn, dealt with the place of the army among the other armed forces (Navy, Police, National Guard); administrative structure of the army and the military justice; and law of public servants. The 2nd chair of the 4th year, on its turn, handed students basic notions of political economy and administrative law. What it called "military administration" was mostly an analysis of the internal structure of the Ministry of War and provisions that must be given by the public administration to the military personal, such as the wages, food (called *ração* informally and *etapa* legally), horses, uniforms etc.

It is interesting that even being so close of the administrative law, "military legislation" would be taught along with international and public law, and separated from administrative law. Probably because those first two fields were more developed and offered a more basic overview of legal studies, with a tradition of studies stretching back several centuries. Administrative

law, on the other hand, had a "scientific" tradition that only got back to the 1810s in France[47], and its first Brazilian chair would be created only in 1854[48]. The first Brazilian books on the subject were published only in the late 1850s and 1860s[49], which mean that many of its fundamental concepts were really recent and were just starting to settle in the Brazilian legal culture. Therefore, many topics that today would be certainly labelled "military law", such as the structure of the Ministry of war, or that seem so obviously part of the law of public servants, as military wages and benefits, were treated as "military administration".

Not only that: they were discussed right after considerations on the differences between administrative law and the science of administration. This probably means that such topics were deemed as something of low legal value – that is, something so practical, so immediate that law was more of a cover, a formalization. There was not much to examine on military wages from a legal point of view, while a wealth of logistical, organizational or practical problems could arise from such issues. Moreover, the 4th year chair was taught only to students meant to serve at the general staff and the engineers corps: both were charged with solving administrative issues and leading the concrete organization of the army. This also might explain why they needed a deeper understanding of administrative law.

Who taught those courses?

This information can be obtained at the *Almanaque Militar* and the *Almanaque Laemmert.* The former was created in 1857 and published the names and several information (time of service, promotions, scientific habilitations, commissions etc) of every single officer in the Army. The later was a commercial enterprise launched by the German brothers Laemmert in 1844 and was published until 1940. It featured information on every industry, commerce, association and relevant economic and social activities in the city of Rio de Janeiro, each edition running through one or two thousand pages.

The professors of military law in the Military School were Casimiro José de Morais Sarmento (01/05/1858[50]-1860); Justiniano José da Rocha (Auxiliary teacher: 1841-1858;

[47] Thought administrative law proper went back to 1790, when a separated administrative jurisdiction was created. Before that, Early Modern states had bodies of norms regulating what we would call today administrative activities, but such rules were not understood to form a separated, closed field. On the beginnings of administrative law and the issue of "administrative law before administrative law, cf. Mannori; Sordi (2013, pp. 5-17)

[48] By a reform of the law schools through decree 1386 of 28 April 1854.

[49] On the books of administrative law published during the empire, cf. Walter Guandalini Júnior. (2019).

[50] QUARTEL GENERAL DO EXÉRCITO. *Almanak Militar para o ano de 1859*. Rio de Janeiro: Typographia Universal de Laemmert, 1859. P. 21

Acting full professor: 16/02/1860[51]; permanent: 16/02/1861[52]-1862) and Thomaz Alves Júnior (11/07/1862[53] onwards[54]).

At the Naval School, the sole professor of both chairs was José Antônio Pedreira de Magalhães Castro (1887-1889).

At Rio Grande do Sul[55], there were 8 professors, namely: Lieutenant Júlio Anacleto Falcão da Frota[56] (Acting: 21/03/1861-1863); Reformed Captain Manoel Corrêa da Silveira Netto (1875); Major Engineer Antônio Augusto de Arruda (1876-80); Captain of Artillery Francisco Clementino de Santiago Dantas (1880-1881); Captain of 1st Class General Staff José Félix Barbosa de Oliveira (Acting, 1881); Vicente Antônio do Espírito Santo Júnior (Acting: 1882-1883); Major Engineer Luiz Celestino de Castro (1884; Acting 1885-1887); Captain Engineer Francisco Alberto Guillon (1888-1889).

There are some obvious differences between the schools in Rio de Janeiro and its counterpart in Rio Grande do Sul. First, both in the Naval School and the Military school, every professor is a civilian; some of them received honorary ranks, such as Thomaz Alves Júnior (Major) and Magalhães Castro (*Capitão de Fragata*), but those were only titles – they were still legally civilians. They were also law graduates. In Rio Grande do Sul, on the other hand, professors generally had a military background and no legal education. The second main difference was that in Rio de Janeiro, the professors held their positions for a longer time: though the first two taught for three years, and Thomaz Alves held his chair for 28 years. Magalhães Castro only held his chair for three years in the empire, but he came from a consistent career in law, and would continue for decades in the republic – we will see him again on the second part of the thesis. On the other hand, the mean time professors occupied the chair

[51] QUARTEL GENERAL DO EXÉRCITO. *Almanak Militar para o ano de 1860*. Rio de Janeiro: Typographia Universal de Laemmert, 1860. P. 19.
[52] QUARTEL GENERAL DO EXÉRCITO. *Almanak Militar para o ano de 1862*. Rio de Janeiro: Typographia Universal de Laemmert, 1862. P. 18.
[53] QUARTEL GENERAL DO EXÉRCITO. *Almanak Militar para o ano de 1863*. Rio de Janeiro: Typographia Universal de Laemmert, 1863. P. 18.
[54] He was still occupying the chair in 1889, the last year of the empire. In 1890, a decree would reorganize the military schools and change the structure of the chairs. LAEMMERT. *Almanak administrativo, mercantil e industrial do Império do Brasil para 1889*. 46º ano: corte. Rio de Janeiro: Laemmert & C., 1889., p. 220
[55] Until 1865, I used the Almanak Militar; later, I used the Almanak Laemmert. The school was closed in the following years due to the Paraguayan War; in 1864 and 1865, the *Almanak* do not show professors in the school anymore, but simply the administrative servants. It would only reopen in 1874, named as Course of Infantry and Cavalry of the Province of Rio Grande do Sul (*Curso de Infantaria e Cavalaria da Província do Rio Grande do Sul*). It would only regain the name Military School in 1877, with the decree 6783 of 29 December. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-6783-29-dezembro-1877-549448-publicacaooriginal-64912-pe.html. In 1881, the decree 8205 of 30 July exchanged the chairs of the 1st year with the ones of the 2nd year. From then on, the chair of military law was the 2nd of the 1st year. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-8205-30-julho-1881-546449-publicacaooriginal-60469-pe.html
[56] He was not a full professor (*lente*), but simply an auxiliary (*repetidor*).

in Rio Grande do Sul was only 2,25 years, if we take into consideration only full years: a rather volatile figure.

This being said, it is interesting to take a look in the biographies of the four professors from the *carioca* schools.

Casimiro José de Moraes Sarmento graduated from the law school of Olinda and was awarded the imperial order of the rose. He was president of the province of Rio Grande do Norte. He wrote a book on physical education and translated works of theology, poetry and the *Elements de Droit Politique* of Louis-Antoine Macarel. He died in 1860, two years after becoming the first professor of military law in Brazil to hold a chair (BLAKE, 1900, v, 2, p. 97).

Justiniano José da Rocha was a household name of the *carioca* cultural elite. He was first educated in France, and later returned to Brazil and got a law degree from the São Paulo law school. In 1841, he became auxiliary teacher of *direito das gentes* (international law). Over the next decades, he would rise to be one of the most important players of the Brazilian press. He created and directed at least seven newspapers, wrote three biographies and several books on history and politics. When it comes to law, he authored a book on the jury and another one on the penitentiary system. He also translated some books, including *Le Comte de Monte-Cristo* and *Les Misérables* (BLAKE, 1900, v. 5, pp. 269-273). After the chair of military law was created in 1858, he apparently left the school only to return to it two years later, when its first occupant died. Curiously, he remained in this professorship for near two additional years before passing away in 1862.

This two-year curse was broken by the next professor, Thomaz Alves Júnior, who remained in the chair until 1889 and died only in 1895. He graduated both in letters from the Imperial College *Pedro II* and law from the São Paulo law school. He acted as a private lawyer and worked for a bank. He was awarded several honors, such as the titles of councilor (*conselheiro*) and honorary major, officer of the Order of the Rose and commander of the Order of Christ. He worked as a prosecutor for a small amount of time[57]. He authored books on law, philosophy and biography (BLAKE, 1900, v.7, pp.275-276). Finally, for a brief period, he was president of the province of Sergipe.

Finally, there was José Antônio Pedreira de Magalhães Castro, the only professor at the Naval School. He was born in 1857 and graduated at the Pernambuco law school. In 1890, he was appointed by the president Marechal Deodoro to take part in the commission that wrote the

[57] Sacramento Blake (1900, v. 7, p. 275) references that he worked on the famous case *Villa Nova do Minho*. On this particular issue, cf. Costa Lima Neto (2017).

project of the first Brazilian republican constitution[58]. He was not an officer, but came from a military family. His father was José Antônio de Magalhães Castro[59], who worked as an auditor of war (*Auditor de Guerra* – the civil judge that presided over 1st level military courts) and from 1864 to 1881 was a judge at the Supreme Military and Justice Council, the highest military court in Brazil[60]; he later became justice of the supreme court and authored several law books (BLAKE, 1900, v. 4, pp. 298-300). The father of Magalhães Castro senior, Antônio Joaquim de Magalhães Castro, was an Army major (LAEMMERT, 1847, p. 166). He was probably[61] a brother or cousin of colonel Luiz Pedreira de Magalhães Castro, which taught chemistry at the Naval College at the same time as him.

Except for Magalhães Castro, no professor working in the Rio de Janeiro military schools had a strong connection with the world of the armed forces. They were mostly jurists that only happened to find their way to a position in which they taught law to future soldiers. In this, they differed from their Rio Grande do Sul fellows, who were professionals of the arms teaching cadets that would serve in the branches less needing the theorical speculations of legal professionals: infantry and cavalry.

Those differences are encapsulated in the two books of military law published during the empire: those of Thomas Alves Júnior and Antônio Augusto de Arruda.

Our first companion in this journey, Alves Júnior wrote his own book in 1866, just a few years after he acceded to the chairs of military law at the Military School of Rio de Janeiro. He wrote the text from the notes that he used to prepare before his classes. He took the opportunity to write by the middle-1860s since the eruption of the Paraguay War had prompted the government to close the military school and send all cadets to the field, freeing some of tye time of professors (ALVES JÚNIOR, 1866, p. IV). The art of bloodshed was definitely the task of every soldier, but as the author himself stressed, "it is already time to stop thinking of courage and bravery as the sole distinctions of the military" (ALVES JÚNIOR, 1866, p. IV); better instruction was also needed – to know the political organization of the country, to understand the administrative engines of the state, to get in touch with tactics and strategy: all of these undertakings would enable officers to acquire a wider and deeper view of their profession. Alves Júnior brought this external view with him: a jurist, that implicit cast himself as the

[58] Decree 29 of 3 December 1889. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-29-3-dezembro-1889-517853-publicacaooriginal-1-pe.html
[59] http://www.cbg.org.br/wp-content/uploads/2012/07/externato-aquino-II.pdf, p. 21
[60] stf.jus.br/portal/ministro/verMinistro.asp?periodo=stj&id=332.
[61] I could not find direct evidence of this link, but both share exactly the same name

flagbearer of different values that must be added up to the old, traditional ones diffused in the Army.

According to him, his teachings revolved around two nuclei: international law and military law. Their antechambers were respectively natural and public law – two disciplines that would be presented to the students to prepare them to receive a more consistent legal education. The analysis of Alves Júnior values reflection and philosophy over the military traditions more geared towards experimentalism or math. As an example, he tries to extract some principles of family and contract law from ethereal considerations of natural law – a sort of reasoning based on abstract thinking that hardly harmonized with the practical considerations that were more prevailing in the military world.

Arruda, the author of the second book, followed a different trajectory. And held different beliefs. Apparently, he died in 1881[62]. He belonged to the engineers corps and held the title of bachelor in mathematics – that is, was a graduate of the full course of the Military School. He served in the army since 1841 and his last promotion was in 1877, to lieutenant-colonel; all of his promotions were by seniority, which suggests that he was not well connected to the political world. His only medals were knight of the Order of São Bento de Avis – the lower level of a rather bureaucratic honor awarded for length of service – and a medal for taking part in the Paraguayan war[63]. In brief: he was a bureaucrat with a long administrative career within the Army and a scientific background. His book was a rather improvised work. He originally had suggested the School to adopt the compendium of Alves Júnior as the official textbook of military law in Rio Grande do Sul, but this proposition was rejected for the work did not follow strictly the program approved by the government. He then wrote notes for the class, and later published them. And, in some parts, he explicitly copied other authors, including Alves Júnior[64]. Crude plagiarism. Though the ideas expressed in the books of Arruda and Alves Júnior did not differ very much, the way they were produced, and what this tells of the expertise of the authors, is quite dissimilar. Alves Júnior, a lawyer, tried to insert his ideas into the broader legal scholarship, while Arruda was mostly assembling ideas from others to produce a practical companion to his lessons.

Though slightly different, those two books can be easily contrasted, for instance, with its French counterparts. Alves Júnior (1866, p. II) explicitly states that he wrote his book because he had deemed the two most important French handbooks, adopted by the *École*

[62] This is the last year he appeared both on the *Almanak Laemmert* and on the *Almanak* of the Ministry of War.
[63] MINISTÉRIO DA GUERRA. *Almanak do ministério da guerra de 1881*. Rio de Janeiro: Typographia Nacional, 1881, 3rd part, p. 12.
[64] For instance, compare Arruda, volume 2, p. 224 and ff., with Thomas Alvez, volume two, p. 130 and ff.

Militaire de Saint-Cyr – E. F. Achille Broutta and Étienne Richard - to be unfit for his teaching. And it is not hard to understand why. Alves Júnior had written a book divided in two parts of roughly the same size, one on military law and the other, and introduction to law, comprising natural, constitutional and international law. Each part spanned more or less 150 pages. Broutta (1838) was much more focused: of the 18 lessons in which his compendium was divided, four concerned international law and thirteen discussed military law. Richard (1862a; 1862b) was even more radical: the first 140 of its pages introduced officers to constitutional, international, natural and administrative law, and the following more than 1100 pages discussed military law, from philosophical foundations to the most boring technicalities of military accounting. In short, French authors introduced officers to information fit for the daily administration of the Army[65]; Brazilian books, on the other hand, mostly gave officers general culture on law. An overview, not practical information.

Twelve professors, five chairs, three schools and an unresolved partnership: military law was not an irrelevant matter at all. It regulated the works of two ministries and governed a formidable source of national proud: the workers of the glorious battlefields of the Paraguay war. Still, it gave rise to a conundrum: despite the relevance of the social group that military law regulated, the academic discipline studying it was not highly regarded.

There are some possible explanations for this. On the one hand, the law of the armed forces is mostly a development of administrative law. But this branch of the legal sciences could offer no safe conceptual bases to build upon a solid scholarly discipline: it was in the very early years of development; its first Brazilian chairs had been created in only four years before those of military law and its first books were only published after 1861. In the absence of a solid intellectual environment, the law of the armed forces could be little more than an orderly presentation of the existing legislation. This has a clear consequence: military law was developed mainly in association with teaching. Books were meant to aid students; military law was little debated outside the restricted world of the military schools and it seldom appeared even in military journals and newspapers.

But not even in teaching it was possible to see a unified community. In Rio de Janeiro, professors were usually drawn from the legal community, only loosely associated with the military environment. In Rio Grande do Sul, on the contrary, professors were military bureaucrats that frequently lacked law degrees. The sociological abyss between the two groups

[65] Much still needs to be done to fully understand the teaching and writing of military law in Europe in general and France in particular. As Audrén, Halpérin and Chambost (2020, p. 206) puts, "Tout ce qui concerne l'enseignement juridique en dehors des facultés de droit (écoles municipales, écoles de commerce, écoles d'ingénieurs, écoles militaires, universités populaires) est encore a explorer".

prevented the creation of even a small space for debate and circulation of ideas that could set the bases of a scientific community deserving of the name. This environment could not be expected from law schools, which did not employ professors of military law.

Caught in between the army and the state, teaching and reflection, law and administration, Rio de Janeiro and Rio Grande do Sul, military law was engulfed by mutual ignorance and perhaps some level of disdain of lawyers and officers. Nevertheless, in comparison with other fields of law, it could quite early carve out a permanent position in the sometimes-dire scenario of the Brazilian formal education of the 19th century.

1.2.1 – Legal knowledge in the armed forces: the libraries of the Army and the Navy

Both officers and enlisted personnel studied at the Military School, where they must have gotten acquainted with the cryptic world of law. But this knowledge would die out if soldiers could not follow through with their studies. As a historian, unfortunately, I cannot know if officers read law books, or how often they did. What I can discover, on the other hand, are the contents of the shelves available to them. In this section, I will analyze the catalogues of the libraries of the Army and of the Navy in search for the law books they displayed and what was the place of military law within it. I cannot know if those books were actually read, but the simple presence of them in a military institution demonstrates the place of legal knowledge in the order of priorities of the high commands.

The military libraries were created as part of an effort to better educate the troops. And - a widespread reasoning in the army used to claim - education was a part of the discipline (ESPÍRITO SANTO JÚNIOR, 1887, p. 5; CARVALHO; ENGENHEIROS, 1862, p. 209), and discipline is the very cornerstone of any military organization. Nonetheless, the inferior ranks of the armed forces were plagued with illiteracy, what must have restricted their use of the books. Araújo Correa (1884, p. 147), for example, protested that many *cabos* (corporal) finished the corps' schools without even knowing how to read.

The library of the Navy was created in 1846 and published a few catalogues; I used the third one, of 1879. The one of the Army was born in 1881, and I used its first book row, from 1885. Their criteria to organize their shelves were different, and the discrepancies are rather relevant when it comes to law. The Navy seems to consider law in a higher standing; the top-level division of its catalogue groups the broadest fields of knowledge: history; letters; sciences and arts; theology; and jurisprudence. Law, then, is one of only five of the most important

divisions, and comes before even the military sciences. In the Army, the situation is quite different. The five higher-level divisions are groups of sciences: military sciences; natural sciences; historical and geographical sciences; philosophical and political sciences; linguistics and philology. Law is scattered in two different places: as a part of political sciences and of military sciences; in both of them, it is a third-level division and it is called "legislation", and not law or jurisprudence.

In the following table, we can see how many books there are in each library and the proportion of legal scholarship:

Table 1 Law and military law books in the libraries of the Army and the Navy

Library	Nº of books	Law Books	% of law books	Military law books	% of law books dealing with military law
Navy	6289	422	6,71%	123	29,15%
Army	2155	130	6,03%	93	71,54%

For the Library of the Navy, I considered also as part of "military law" the section "maritime and commercial law" since this was the title of the second legal chair in the Naval School. For Library of the Army, I considered both the sections "legislation" and "administration" as part of military law; despite the many attempts to differentiate military administration from military law – as a particular case of the classic distinction between the science of administration and administrative law -, in the former section, most of the books are collections of legislation or practical instructions on how to apply the legislation.

Such libraries were in no way a given. The library of the Rio de Janeiro Medical School, one of only two in Brazil, had in 1892 no more than 31 books on law proper (COSTA, 1892, p. 555-556), and only 214 volumes on legal medicine (COSTA, 1892, p. 403-415), out of 9117 total books – more than the Army and Navy libraries combined.

The proportion of law (or legislation/administration) in both libraries is almost exactly equal. On the other hand, the topics covered by those books differ slightly. Despite the overinclusive definition of military law for the navy, it has a smaller proportion of military law books then the army. I could offer two explanations for that. First, the more scientific-oriented organization in the Army probably led to a more objective criterium for the selection of the books; less bended towards metaphysical speculation, the administration of the Army selected works more aligned with the immediate needs of the profession, which meant a higher proportion of strictly military themes.

Anyway, law was not irrelevant. The libraries of the armed forces - which were open not only to the military, but also to civilians - featured a considerable amount of law books. Of course, as the military studies were focused on physics, chemistry, geology and such, the most prominent places in the book shelves would not be trusted to jurisprudence. But legislation played a role in everyday life within military organizations, and received its fair share of attention. Moreover, beyond its role as a formative discipline for future officers, law was part of a set of disciplines that enlarged the vision of soldiers beyond the strict world of the barracks; as such, it was sided by theology, literature, military history and so on. Fields that surely interested some officers seeking cultural enrichment in the dire Brazilian intellectual landscape.

One important question is to understand if and how the law of the armed forces differed substantially from the overall trends of 19th century jurisprudence. One way to measure it is the analysis of the legal cultures more present in the libraries. To understand this, I identified in which country each law book in both libraries was published , and divided them in works of military law and those that are not of military law. From the data I obtained, I could build the following graphic:

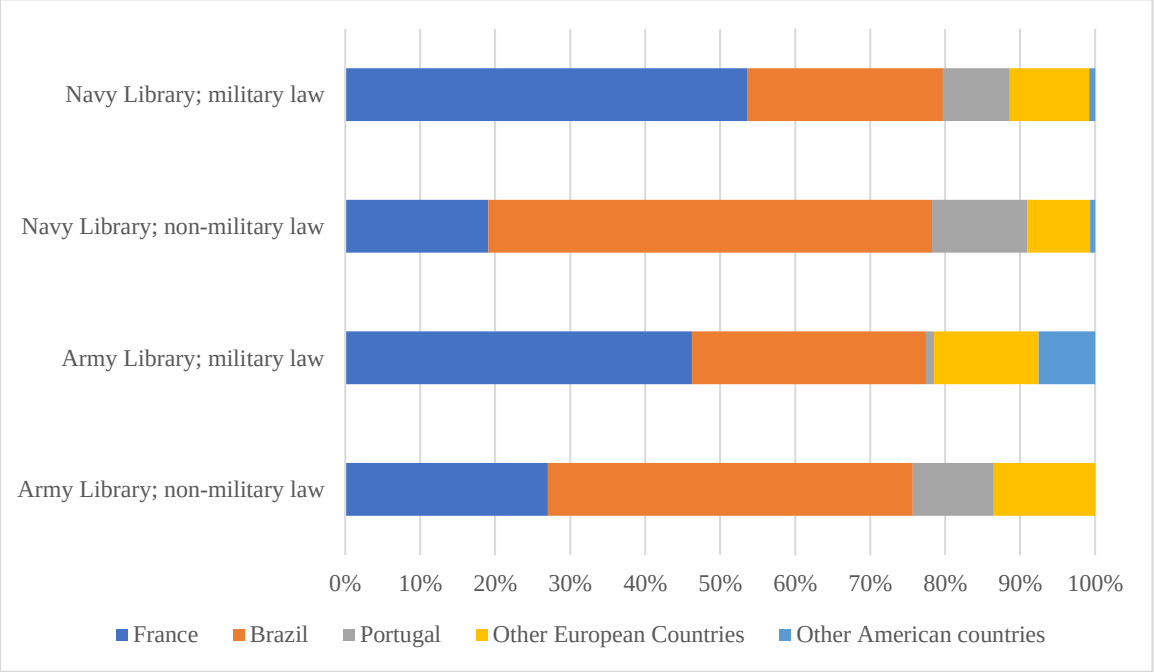

Figure 4Nationalities of origin of the authors of law books found in the libraries of the Army and the Navy

Both in the Army and the Navy, French legal culture is clearly more prominent in military law than in legal studies at large. This is quite surprising, as we consider that the relations with France were already quite significant in Brazilian law beyond the barracks. Moreover, much of other books were conveyed to Brazilian in French translations; most of the

entry “other European countries” comprise Belgium, Germany and Switzerland, and all those books were frequently either written in French, or found their way to Brazil were French translations. Probably, librarians tended to acquire more introductory general books dealing with Brazilian law, and tended to diversify only on the topics that touched the most the professional needs of soldiers.

Anyhow, officers would not find themselves in great trouble to read those books. Candidates for the officialdom must study both English and French in the preparatory school that they took before entering the Military School[66] and in the Naval School[67]. It was widely recognized that most textbooks used in the military schools were in French; Araújo Correia (1884, p. 34), though, complains that the study of English was perfunctory, and mostly abandoned after the exams: it would be better to substitute it by German, the language of a nation where “the science of war is studied by all points of view”. As the previous figure shows, this germanophilia was nothing more than an aspiration.

This small glimpse on the cultural world of the military shows which was the place of law in this frequently isolated universe. Legal studies appear as a discrete, though firm field; officers eager to learn more about the legal order could expect to find a quite satisfactory set of books in many sub-disciplines of legal sciences. Moreover, they should find a wide range of works of reference from different countries, such as France, Portugal, Belgium, England, the United States, Argentine, Ecuador, Italy and others. Brazilian soldiers, despite all limits, could find in Rio de Janeiro a valuable cultural world within the reach of their hands.

1.3 – The lawyer and the scientist: how the military saw the jurists

Lawyers and soldiers are – and were – different. They studied different subjects. They had different careers. They pursued different lives and cherished different values. As such, they lived in worlds that were sometimes apart from each other. In this section, I will try to define some of the main intellectual influences both over jurists and the military personnel by the end of the empire. Then, I will establish how the armed forces saw both the law and their professionals. Finally, I will identify what was the general attitude of jurists towards the military forces, especially when they engaged with constitutional law – that is, when they were discussing the fundamental role of the military *vis-à-vis* social organization.

[66] Decree nº 5.529 of 17 January 1874, art. 16.
[67] Decree nº 4.720 of 22 April 1871, art. 3º.

Celso Castro (1995) discussed the impact of positivism and scientific thinking on the educated officers from the scientific corps of the army (artillery, general staff and engineers). Their spirits were dominated by a sense of modernization, by the need of progress, and they felt marginalized in the imperial order (CASTRO, 1995, p. 20), which was dominated by law graduates – the *bachareis*[68]. This estrangement led to the downfall of the empire and the birth of the republic on the hands of the military youth. But I shall not trespass topics meant for part II of the thesis. By now, it suffices to stress the importance of Auguste Comte's positivism in military education. Now, let us see how an exemplary jurist and two typical soldiers from different branches of thought imagined military law; then, we will be able to better understand the rifts between the social groups: soldiers and lawyers.

Once more, I will call to our stage Thomaz Alves Júnior. A contrast between him and some colleagues in the military scholarly world can illuminate the differences between the mentality of jurists and the worldview of their companions from the military world. We have already discussed most of Alves Jurior's criticism of positivism: that it belittled humanity, did not fully grasp social reality and was designed for natural sciences, but could explain little of the social world. Conceiving the world with the aid of rigid social laws, positivism ultimately and unintendedly annihilated human responsibility, Alves Júnior thought.

But Alves Júnior (1883, pp. 124-125) was not simply a denier, a critic: he also had some thoughts on why military law should be taught, and they were not apart from the views nurtured within the Army. He disagreed with some people believing that educated soldiers would lose their discipline and subordination. For Alves Júnior, there were two types of members of armed forces: the soldier-machine and the soldier citizen. The former was kept in ignorance and could only be contained by force and punishment, until the point that he was so brutalized that would go down the path of rebellion; the latter, through true education, habit and cultivation would develop a love for order. Inscribed in the heart of soldiers, this propensity would not die out or need to be enforced by violence, and was therefore much more efficient. This way of thinking, valuing education over punishment, could easily be harbored in many circles of the Military School; but, as we shall remember, the condemnation of positivism was the most crucial move that singled Thomaz Alves out of the herd of professors in the school.

A believer in the positive methods that would probably agree with Alves Jurior's views on military education was Vicente Antônio do Espírito Santo Júnior – not by chance, a professor of military law in the Rio Grande do Sul school. He published a few papers in the Review of

[68] For a panorama of the imperial elite and the relations of its different component groups, cf. José Murilo de Carvalho (2011).

the Brazilian Army (*Revista do Exército Brasileiro*) on the subject "military jurisdiction" (*jurisdicção militar*) that deserve a closer analysis for expressing some relevant creeds – and, perhaps more interestingly, a few tensions, and even contradictions.

There was a problem in the curriculum of the Military School. This was the most privileged education institution in the whole country: it was the sole one where all sciences – physics, chemistry, mathematics – were taught. The *tabernacle of science*, as one nicknamed went by (CASTRO, 1995). And not any kind of science: positivism postulated evolutionism and an order of superiority of sciences, which started with the most basic one – mathematics – and grew in complexity through astronomy, physics, chemistry, biology and finally to the most intricate of them all: sociology. Almost all of them were present in the curriculum – but not the most important: sociology and psychology. Law was taught as if it was independent from the social world to which it belonged (ESPÍRITO SANTO JÚNIOR, 1886, p. 215).

A fissure had developed within the school. Most of the professors adopted the "positive method". But there was one section that kept making references to the old metaphysic ways: "social physics", as Espírito called them with the positivistic epithet. He was obviously referencing Alves Júnior, the only professor of military law in Rio de Janeiro by then.

The clash between positivism and metaphysics could not be clearer in the mind of those two professors. Espírito Santo Júnior, then, tried to offer a new basis for the studies. Where did he start? Natural law. To the modern ear, it seems a little bit odd to associate positivism and natural law. A name does not always refer to the same concept.

"Law is the moral power of the man to take actions tending to his preservation and to the enhancement of social status" (ESPÍRITO SANTO JÚNIOR, 1886, p. 217). As he is a rational creature, the consequence is that the main natural right of man is liberty – the freedom to choose the better means to his preservation and enhancement. The sole difference between morals and law was that the first one deal with the man by himself and his duties, and the second one analyses man in society. Perhaps surprisingly, Espírito Santo Júnior connects morals and law: as the basis of society is the individual, the basis of law was morality, and "the object of law constitutes a particular section of the object of morality" (ESPÍRITO SANTO JÚNIOR, 1885, p. 220).

It looks like metaphysics. The soldier-professor tries to say and to show in every opportunity that what he is doing is new, original. For example, in a discussion on the limits of the right of self-defense, Espírito Santo Júnior states: "With what amount of energy or intensity of action the fair defense ends and where does it transforms itself into an unjust attack? The principle regulating the intensity of action of a defense is the following principle of mechanics:

reaction is equal and contrary to the action" (ESPIRITO SANTO JÚNIOR, 1887, p. 63). The vocabulary changed from Thomaz Alves, but the reasoning is almost the same; a reference to physic laws here and there, Scientific vocabulary peppered all over the text, but, in the end, the distance between Espírito Santo and Alvez Júnior was more aesthetic than substantial. Espirito Santo Júnior (1887, p. 85) says he is different also because, for him, property is a real, and not a personal right. But those small changes do not truly modify how law was taught: they concern more form than contents, final conclusions than reasoning and methods.

Am I being anachronistic for implying that those two men that said they belonged to different traditions are, on the contrary, quite similar? When you insert their discussions in a wider picture, it is possible to discover important similarities between them. And there are sources that follow this understanding. We shall now contrast soldier with soldier.

Araújo Corrêa, a captain of artillery, wrote in 1883 against "a long-lasting vice of the military schools: the exclusive importance that is given to theory and the disdain for practical issues" (ARAÚJO CORRÊA, 1883, p. 35). The officer must for sure "understand the complex issues of war" (ARAÚJO CORRÊA, 1883, p. 33), and he must learn less physics and chemistry – no mention at all of law or sociology. They must instead learn how to use guns and the challenges of fighting a war: "the barracks should be a perpetuation of the school, the passage from theory to practices, the natural transition from abstract to concrete" (ARAÚJO CORRÊA, 1883, p. 36). I would add that neither the metaphysic lawyers nor the positive scientists could fit in Araújo Correia's ideal military education. In fact, he criticizes that the title given to those that finished the five years of the Military School was *bachelor of physical and mathematical sciences*, and not *bachelor of military sciences*.

Both Araújo Correa[69] and Vicente Antônio do Espírito Santo Júnior[70] were captains of the artillery; but the former had studied only the three years of the artillery course, while the latter had spent the full five years of the engineer course. Two years that meant a significant difference. They were as apart between each other as they were from Thomaz Alves. Perhaps, even more.

As Celso Castro (1995, p. 48) shows and I have discussed, the Military School was an oasis of social rise in the exclusionary Brazilian society for boys of modest background; as the institution paid a small salary to its best students, the school presented a unique opportunity for those that could not afford the law, medicine or even naval schools. As a consequence, among soldiers, prevailed the mentality that in the military world, merit ruled, while in the Law

[69] http://memoria.bn.br/DocReader/829510/554
[70] http://memoria.bn.br/DocReader/829510/128

Schools, dominated the *patronato* and the protections of the political world; latter, those law students would become the governing class, in the so-called *bacharelismo*. The positivistic military "scientists" despised them. Their school was the only place where mathematics was taught; they learned physics, chemistry and deciphered the engines of the world: they saw themselves as the carriers of modernity, in opposition to the obscurantists and traditionalist lawyers.

But all of this also meant that they did not suit quite well the military career. They were in the barracks most for the opportunity to study, but felt no calling for the marches and physical exercises that were an extensive fixture of the practice-oriented army (CASTRO, 1995, p. 50-51). The black uniform was a burden for them. As such, the scientists, as Espírito Santo Júnior, were not well regarded by the more career-oriented officers, represented here by Araújo Corrêa. After all, positivists and jurists shared the same title: bachelor; the difference was whether it was in math and physics or law.

We have then three models: the "professional soldier", the "soldier-scientist" and the jurist-philosopher. Araújo Corrêa stand for a traditional view of the military world. Espírito Santo Júnior represented the positivistic orientation, which dominated only in education, but was somewhat marginalized in the armed forces. Jurists, then, were on the fringes of an already marginal world: metaphysics in a world of physics, scholars in an institution of practicians. Thomaz Alves must have felt lonely among his colleagues.

In fact, the traditional role of a lawyer differed widely from those two categories. It did not share with the military world an appreciation of hierarchy, discipline and practical action. First, In the military, orders are almost sacrosanct and even if illegalities are involved, soldiers are instructed to obey first and discuss later; in law, everything is subject to discussion, and respectful disagreement is frequently praised. In the barracks, conflict is suppressed and public disagreements are deemed to undermine the authority of superiors, while in law, actors are (theoretically) equal, differing only in their roles. The military can be described as a hierarchy in its traditional sense, that is, an order of command and obedience; law, conversely, bears only metaphorical hierarchies, that is, in the sense of a harmonious, though unequal order[71]. Second, Military work is also deeply practical: their function is to operate weapons, build bridges, patrol the wilderness; the lawyer's craft is restricted to words..

[71] For a short and enlightening history of the notion of hierarchy, cf. Paolo Cappellini (2010b), particularly pp. 152-154, 160 for hierarchy as division between commanders and obedient, and pp.154-158 for hierarchy as order of unequals.

Justininano José da Rocha, the second professor of military law at the Rio de Janeiro School, for instance, is a great example of what was thought at the time as being the characteristics of a lawyer; namely, the "rhetorical paradigm"[72]: the idea that legal professionals should focus in convincing their audience and to intervene in the public arena. Their preferred art should be the rhetoric, and not the logical, strict thinking. Their studies must be directed towards an encyclopedic[73] command of literature, history and the arts that would enhance their spoken performance and allow the use of enticing examples[74]. Their word was not meant to demonstrate through logic, but to seduce through their aesthetic stupor. Justiniano, accordingly, was a journalist, a translator of Victor Hugo, a professor of history: he moved in the fields of the arts and politics, and not in the world of science.

Science *versus* art. Logics *versus* rhetoric. Demonstration *versus* seduction. Army *versus* law. Jurists came from a very different background than their military colleagues, and played a minor role in the community they shared. They were citizens of another world, cast as foreigners in their own schools. Military law was born out of the friction of those clashing forces.

1.4 –Fear of force: publicists discussing the armed forces

The first three decades of Brazilian independence were not peaceful. The independence conflicts in Bahia, the dissolution of the first constitutional convention in 1823, the resignation of the emperor, several riots during the regency and separatism in the south: this bloodshed left a lasting impression on jurists. The first emperor, Pedro I, was known as the "soldier king" (*o rei-soldado*) for his role in Portugal's liberal wars. Military organization was a priority in the first years of the empire, and the writers of the constitution did not forget to give it the fair share of attention. The 1824 charter had six articles on the "military force" (*forca militar*); they were mostly vague, but carried important principles that would be latter developed in administrative and constitutional law books.

The fear of military uprisings conditioned how legal thinkers treated the military forces, and this is visible in the books of constitutional law. A good example is Pimenta Bueno, the most important Brazilian publicist of the 19th century. In his *magnum opus* on Brazilian public law, he does not discuss the military on a specific, separated chapter: he examines the public

[72] An idea developed by Pasquale Beneduce and Carlos Petit (2000) and adapted to Brazil by Ricardo Marcelo Fonseca (2006).
[73] What Mariana de Morais Silveira (2016) has called the *bacharel polígrafo pluripotente*.
[74] The educational role of such activities has been discussed by Alberto Venâncio Filho (2011).

forces while commenting on the legislative power to establish the number of recruited combatants (PIMENTA BUENO, 1857, pp. 91-96). And he was not alone: Nicolau Rodriges do Santos França e Leite (1872, p, 103) chose the same theme to talk about the military forces in his own book. In fact, large armed forces were seen by him as a threat to liberty, and an unscrupulous government would be tempted to use it to undermine the constitutional order. For França e Leite, "in France, Prussia, Austria, France and Italy, liberty could not be established and it never will while the system of big armies prevail".

The single most important article on civil control of the military on the constitution was art. 147, which stated that "the military force is essentially obedient; it can never gather without an order form the legitimate authority". This should guarantee that the force would be "purely passive" and could "not deliberate" (PIMENTA BUENO, 1857, p. 95). The armed forces must be as thoroughly submitted to the civilian powers as possible. Some got even further, and tried to isolate the forces from the emperor, who could try to use them as an instrument to foster his own glories with unbearable costs for the State (FURTADO DE MENDONÇA, 1865, p. 63).

Beyond this constitutional statement, which had important implications, there were several other points that stressed the control of civilians over the public forces. The annual vote of the General Assembly to decide the size of the Army and the Navy was perhaps one of the most consequential of them. This procedure should be taken every year because the defense needs varied widely in time, as well as the financial meansof the empire (OLIVEIRA, 1884, p. 118): the magnitude of the armed forces should be a product of both factors. Moreover, this obligation could prevent a government from entering a war for the simple sake of its own glory; it would also compel the legislative power to constantly asses the current state of the armed forces, making it tough for the powers of the day to neglect the Army of the Navy (PIMENTA BUENO, 1857, p. 93).

This last remark points out to a second aspect: not only jurists were eager to submit the military to civilian authority while avoiding pernicious collusions with the executive, but also wished to find ways to shield the armed forces from interventions coming from other actors. Article 149, for instance, established that officers could not be stripped of their ranks except through judicial sentences. The executive, again, is the risk. But now, it is regarded as a potential source of tampering. The interpretations jurists gave to this point once more raise the perspective that the Army and the Navy were submitted to some sort of especial regime: according to Silvestre Pinhihro-Ferreira (1835, p. 214), this rule was valid for all public servants, but it needed to be made explicit for the military personnel due to the "doctrine that exclude military officers from the law common to all other employees". Or, as Furtado de

Mendonça (1865, p. 35) writes, the law usually distinguishes between "the soldier and the citizen".

A detached corp. A dreadful risk. But also, an unavoidable necessity. Armies should not exist, as they "steal from more useful works the sanest part of the population" and "keeps Christian nations armed, as enemies" (SOUZA, 1870, p. 244); but, since the world was still regretfully committed to the arms, the State could not avoid to dedicate itself to military enterprises. The solution was and obedient military force (SOUZA, 1870, p. 248; PIMENTA BUENO, 1857, p. 92), closed submitted to the civilian authorities and to the constitution. All of this put together, and we can better understand how the jurists saw the military: a potential source of danger. The distance felt by soldiers toward lawyers, that we saw in the previous sections, was fiercely reciprocated.

1.5 – The sash of the officer and the bachelor's parchment: final remarks

1883. For some time by then, there were looming discussions on the reorganization of the army[75]. Lieutenant-colonel Sena Madureira (1883) took his pen and wrote against what he saw as an immoral attempt to enlarge the number of the higher positions in the army. The heart of the reform was to reorganize the number of regiments and battalions; the number of regiments would increase and each one of those units would now be composed by ca. 1000 men. Sena Madureira explained that this sort of organization was odd: usually, in Europe, units with this size were called mere battalions, and not fancy, fully-fledged regiments. Units with fewer soldiers were inconvenient and rejected by the armies of the old continent because, during combat, after a little time and not much casualties, they would lose a number of soldiers sufficient to disturb their structure and tamper their action. This was what happened in the Paraguay War in Brazil, and early in the fight, the commanders had to combine unities to retain their operability: an inconvenient procedure, as after combinations, soldiers did not know their new commanders and had not yet developed a trustful relation with the men flanking them in the path towards possible death.

The only possible advantage of this organization was to open more positions for ambitious officers: at the top of a regiment, there was a colonel, while battalions were guided by majors. This theory was also confirmed by the creation of a position of lieutenant-colonel in the new regiments: this rank, in the new structure, would be simply a deputy of the colonel,

[75] Published by the minister of war Franklin Dória in the report of 1881-2.

with no real responsibility of his own; he would be faced with the choice of either taking no initiative or invading the prerogatives of the colonel or the majors. In short: this reform would open new positions for the junior officers that were in dire need of promotions, as since the war there had been little room for professional growth in the army. This, at the expense of rationality and efficiency.

The details of this discussion, though quite interesting, do not need to be taken into account, as they can be highly technical. I want to stress not what Sena Madureira said, but what he ignored: law and jurisprudence. In fact, this sort of organization depended on a new statute to be passed on the legislative branch; there were several regulations on the promotions of officers; there were even a few professors of military law working and writing in Brazil, as we saw in the previous sections. Structure of the state, law of public servants, all at play. Yet, no part of this structure was called into action. If Madureira was writing today, he would have surely dropped two or three principles of law, referenced some law book or cited more states. Does anyone doubt that morality, efficiency, the constitution or even an international convention would make a cameo on Sena Madureira's text? In the 1880s, they did not.

Yes, those issues could be better linked to what was then called "military administration". But military administration and military law were twin brothers, as we have already discussed; in Rio de Janeiro, they even shared the same professor, Thomaz Alves Júnior. Law could have been better treated in the text. Why was it forgotten? Actually, the expressions "military administration" or "science of administration", which were closely connected to law, were not even written down on the text. Sena Madureira, a graduate in physics and mathematics[76] which we will meet again in the future, had studied in Europe and had published a book on the organization of the armies of the Old Continent: he could have written more about comparative law, or confronted different legal systems. His silence, therefore, is not trivial, but a meaningful - though probably involuntary – signal. It implies that legal reasoning, though available in several books of constitutional, administrative and military law, was not the preferred method within the military to define and solve organizational problems.

Names. Sometimes, they can be quite revealing. For much time, legal studies were called in the military schools not *direito* (law), but simply *legislação* (legislation). The former term can have marked connotations: deep reflection, complex texts, a structured way of thinking, perhaps even a science – though frequently an obnoxious and posh one. Legislation, no. This word evokes a banal gathering of documents, usually lacking life and breath. A list,

[76] http://memoria.bn.br/DocReader/829676/6126

instead of a body; words, instead of ideas. No intellectual depth: legislation is for sure the product of politics, the changing instrument of a slippery political power, but no art for the knowledge-craving minds populating the vibrant intellectual circles of the Military School. The student of law can aspire to the titles of scientist or philosopher; the student of legislation is, at best, a bureaucrat. Nothing more

Beyond law itself, several writers called this field *military legislation*, and not law. Wenceslau Freire de Carvalho (1881) discussed military *legislation*; the compilation of Antônio Amaral was the Indicator of Military Legislation. Officers might have not perceived it, but this name had a derogatory nature. Not by chance, Thomaz Alves Júnior (1883), who graduated from law school, indeed speaks of military legislation, but when he had to give a title to his book, it went to the presses as "military law", despite the official name of the discipline being legislation.

The relationship between officers and lawyers was turbulent. Mistrust flourished in that rather unwelcoming field: the former had a formidable brute power and, since the Paraguayan War, an undisputable moral ascendancy and gravitas; the latter dominated politics and were the guardians of the wisdom of the State. The scientist and the politician were the two main figures that represented their worldviews. The differences between Thomaz Alves Júnior and Vicente Antônio do Espírito Santo Júnior could not be more illustrative: they led different intellectual lives from the political capital of the nation, Rio de Janeiro, and from Porto Alegre, the military and positivistic bastion of the empire. They implicitly criticized each other from their different bases – and different minds. Not by chance, after the republic was installed in the court, Alves Júnior was pensioned and Espírito Santo Júnior would take his chair: the new toppled the old.

Military law could not thrive under this environment. It could boast of a number of chairs that several other important disciplines only dreamed of – administrative law, for instance, had only one chair on each of the two Brazilian law schools, introduced only four years before military law was installed in the academies of the Army and the Navy. Yet, administrative lawyers were able to write and publish more than a dozen books in imperial Brazil, while the cultivators of military law could yield no more than two. The sociological background of the different groups behind each of those intellectual enterprises made for an aborted encounter, which prepared a sterile soil where little could grow.

Chapter 2
Against the old order: reforms and modernization of the armed forces

The slow, though restless burning of the candle provided the sole, waning light for the eyes of captain Pitaluga as his hands anxiously went through the pages of his dusty law books. The serene night of Goiás's *sertão* reigned outside the barracks of his battalion; all soldiers were asleep. One could hear nothing more than the occasional owl or cricket, flying and crawling across the giant emptiness of the Brazilian hinterlands. It did not matter. Pitaluga had an objective, and he would not give up. He checked the index hunting for a missed *aviso* (ministerial letter), explored the pages in a desperate quest for a hidden act that might have passed, inspected every single line longing for the next decision of the Council of State: not a single document could be left unchecked, not a single comma could be missed. Small notes were left in every relevant page as he thought about the possible reasonings of his request and weighted the most prestigious interpretations alone in that empty, lost room. Then, he saw it. The text appeared as a clear, straight path in his mind, just like the lane the soldiers had to open the day before in the woods. He started writing.

But law was a merciless field, just like the Brazilian *cerrado.* How was he supposed to extract reason from such contradictory regulations on buttons? Pitaluga hesitated. He looked again in the *Cunha Mattos*. Yes, three or four circular letters would suffice. He grabbed the quill, wet it in the ink and turned again to the paper: the Army was being robbed by using those synthetic buttons to manufacture the uniforms of soldiers. They were low-quality products and undermined the honor of the Brazilian forces; the ministry of war should consider the change to the much more modern metal buttons. Amazingly, he had his 18th century *alvará* regulating the uniforms of the Army at hand, ready to be used. But this was not all: he could prove with decrees and laws no one else still remembered that the secretary of the army was responsible for such a decision, which suppliers could be used and why the current prices of synthetic buttons were unlawful. Yes, buttons. For many people, this was a frivolous issue. Not for him. He cited decrees from the last five kings and emperors that reigned over Brazil and Portugal longing for something else.

The next day, he sent his petition to the ministry of the war. The answer would arrive a few months later as he contemplated his own condition. Thirty-seven years in the Army and he was still a captain. No powerful friends or uncles could protect him when the powerful weaved

their commands and decided in Rio de Janeiro who should be promoted. Distant from the prosperous littoral or the adventurous borders, he could only rotten in the vast interiors where the infinite blue sky watched over a never-ending emptiness where nothing happened. His hands were tied. No general, minister or councilor would ever notice his worth. Pitaluga: the Brazilian Giovanni Drogo. That petition was the only way to be heard and seen in the capital.

Then, a letter arrived. Pitaluga's petition raised an interesting point, and the administration was eager to consider the momentous issues he had brought to their attention. As the months passed, the engines of law and administration were put into motion: the request from the forgotten captain were heard by one, two and three sections of the ministry; the general helper of the minister even took a look at it and considered the letter worth of the most dedicated attention. Pitaluga was delighted: he finally mattered. The Council of State was brought into play and decided that the synthetic buttons of the uniforms must be changed. After reaching the highest pinnacles of the administration, the idea went down to the Army's warehouses, and the request of the captain became truth. He could only hope that now, after eighteen painstaking years waiting, his promotion to major would arrive. He was wrong.

Pitaluga never existed, though. He is a character created by the Viscount of Taunay for his book "Military Narratives" (*Narrativas Militares*, 1878)[77]. Taunay was a polimath: military engineer and major, senator, exponent of romantic literature, he was also an accomplished soldier, having fought in the Paraguayan War with valor and bravery. The short stories assembled in his book are a precious testimony to everyday life in the Brazilian Army in the last decades of the empire. Though not a traditional historic document, literature can give flesh and blood to the sometimes ethereal, abstract men and women that history analyzes under the microscopic; it can be a precious source for the more mundane – and also, more real – routines of soldiers and officers.

Capitan Pitaluga is a frustrated man, and law is the origin of his torments: the few positions in the Brazilian army condemned most superior officers to a tedious, melancholic life, where they waited for excruciatingly long years before someone died, retired or left the Army and a new position was opened. This is why the best friend of Pitaluga was the "military almanack", a yearbook with curriculums from all officials of the army who established the order of seniority between them. But only half the positions were filled by this criterium. The other one was "merit", which frequently translated into good relations and protection in the court; Pitaluga had neither. He dwelled in law books to learn the most he could to compensate for the

[77] For a literary analysis of this book, cf. Patrícia Munhoz (2008).

lack of formal education that prevented him from climbing further in the hierarchy. His only objective was to get the much-awaited promotion and right after, ask for his reform. Paraguay jeopardized his plans. He was sent to the province of Mato Grosso, far removed from the battlefield, and had to watch several younger officers being promoted before him for bravery. By the end, a change in the way that seniority was counted favored officers promoted in Paraguay: Pitaluga had no chance of achieving his must desired promotion, and asked for his reform, still languishing as a frustrated capitain.

This tale of inequity and resentment testifies to the urgency of some changes in the Army in the last decades of the empire; the restructuring of military organizations that we discussed in the previous chapter is just one part of them. The system of promotions was deeply reorganized in 1850, but showed clear signals of disfunctions. The recruitment system was a dramatic problem in the social organization of Brazil, and got several complaints throughout the years until it was completely remodeled in 1874; yet, the complete failure of the new law left room for many debates and instability. This chapter recounts those two changes in the organic structure the Army and a few other modifications that were made to its institutional structure. But, beyond the narrow scope of individual reforms, I want to show that a reformist spirit, a conscience eager for change pervaded the Army. This chapter highlights the deep need of change in the armed forces in the whole 19th century and the failures of the State, the high commands and the parliament to carefully pursue and effectuate those innovations. As a consequence, many people, ignored by the powerful patros, were left to scramble for a dignified life. And many, just like Pitaluga, were left behind.

2.1 – The dawn of modernity: the promotions act of 6 September 1850

For an important part of historiography, a watershed divides the Brazilian Army before and after 1850. This year, an apparently trivial act was approved by the Brazilian parliament: the nº 585 act of 6 September, which would later prove to be a crucial step in the professionalization of the armed forces. We must briefly understand the functioning of the land forces in order to fully grasp the significance of this law.

As John Schutz (1994, pp. 22-33) states, until the fourth decade of the 19th century, the Brazilian Army was an heir to the Portuguese military traditions and organization. This had a very concrete consequence: privilege reigned. In the *Ancien Régime*, the military career offered an important professional path for the sons of the highest families of the kingdom; we must remember that the core of the very idea of nobility was deeply embedded with military values,

and even a military justification – at least in theory. This call to the arms within felt by the scions of wealthy families was accompanied by a red carpet rolled out by the crown: the promotions of officials did not follow rigid criteria, leaving much power to the king. And monarchs favored skyrocket careers based on privilege. Barely pubescent nobles entered the Army and were soon given positions of command; still young, these officials could ascend to superior officials, and become generals in their early 40s. Most of them did not pursue any kind of education in military academies, or had even worked at inferior ranks. Deprived of knowledge or experiences, those generals and officers did not have a true inclination for the military life, but simply used the barracks to ascend socially. They were out of touch.

The consequences were enormous. First and foremost, the loyalties of these men were not placed on the armed forces (SCHULTZ, 1994, p. 28-29). Their ascent must be credited to their social connections in the administration; their education, life and worldview was akin to the *ethos* of the political elite that had sponsored them. The Army, conversely, was just the place where they developed their bureaucratic careers. Second, the precedence of elite officers prevented people with true experience in the Army, which had actually fought wars, commanded troops, went tenaciously through the most boring and life-draining paperwork, from ascending to the highest positions within the hierarchy.

Not a flattering picture for a nation eager to match up to the "civilized" world - be it a real or an imaginary one. By the 1840s, the conservative party came to power aiming for centralization and stability. Bureaucracy was conceived as the foremost tool of nation-building and the consolidation of the still young imperial state – and the Army must be integrated into this project. A national institution – and a powerful one –, the land force must be turned into a bureaucracy of itself, under the guidance of conservative principles (SOUZA, 1999). The solution would come as a radical change in the way in which officers could ascend through the hierarchy.

The act 585 of 6 September 1850, regulated by decree 722 of 31 March 1851, established the professionalization of the Brazilian Army officers. Now, there would be rigid rules determining a minimum of time for the progressions in the career and irresistible requisites. Inferior officials could only be promoted by seniority; superior officials, half by seniority and half by "merit"; and generals, only by merit. There was a minimum time one must spent in each position before promotion – a criterium that could only be disregarded in wartime. Now, every single officer would have to slowly ascend in the hierarchy under strictly regulated criteria: the soaring nobles were left to the past, as anyone, regardless of social connections, must wait.

More importantly, positions in the scientific corps – engineers, general staff and artillery – could only be filled by people holding the specific scientific courses offered by the Military School. The uneducated officers were to be housed in the less prestigious cavalry and infantry. The only privilege remaining were the positions of cadets and private soldiers; yet, even those would only provide a quicker route to the unenvied positions of sergeant and lieutenant. By all means, the military had turned into a true bureaucracy operating under a particular logic. The magic touch of political wands could only work so far from now on.

The consequences were overarching. Deprived of a golden route to the top positions, the sons of the elite grew disinterested on the military career (SCHUTZ, 1994, 29). Law degrees provided a more powerful passport for interesting positions in the administration, where personal connections could be deployed by powerful families and yield promotions for their sons. The armed forces, instead, become a path for the lower middle classes to ascend socially. And they grabbed it: as Schutz (1994, pp. 205) shows, after the 1850 law was enacted, the social origins of generals slowly become more democratic and the time they took to be promoted grew longer. Though being a desirable effect in the beginning that testifies the end of governmental protection of rich officers, these longer career paths would later become a pathology.

Decade after decade, the lack of positions for superior officers meant that many people took an excruciatingly long time to be promoted. Rotting in middle ranks, they begun to harbor resentment: from major onwards, the "merit" was one of the criteria for promotions. And, as the history of captain Pitaluga shows, what was written as merit in the law was treated as social connections in the reality of the administration. Those with important friends or family could be seen or heard in Rio de Janeiro; the others must wait to be promoted on the grounds of seniority. In the absence of compulsory retirement, many officers in prominent positions refused to leave service; their positions remained filled and blocking the path for younger soldiers. They could only wait in the most distant hinterlands of the empire, expecting a lingering opportunity that might as well not come.

The promotions act of 1850 was a paramount step in the modernization of the Brazilian army. As the political interference ceased to be the key factor in boosting careers, the land forces could turn to themselves and start to build an autonomous bureaucracy. Nevertheless, law still concealed flaws and sheltered a window for the indiscreet eyes of political interference. From the middle of the 19th century, we can truly see a modern Army, though an imperfect one. The modernization set the ground for the autonomous development of the military life; the flaws prepared the very demised of the Brazilian empire. But this debate must be left for another opportunity.

2.2 – A botched change: the recruitment act of 26 September 1874

The manhunt[78] of military recruits was a constitutive aspect of 19th century Brazilian society: candidates used it to affect the outcome of elections (CD, 1869, 3, 152), mothers were scared for their sons, bosses were anxious about the possible loss of their employees. That dreadful name recalled the process of recruitment of new soldiers for the Brazilian armed forces. In this section, I will discuss how people were brought – or dragged – to military service, the law of 1874 that aimed to change how recruitment policy was pursued, and the reactions to that act. As there is a vast amount of historiography on the issue[79], I will only stress some general aspects, the main ideas behind the reformist spirit and how it was received by the population. With this, I hope to better highlight the relation between legal reformist ideals and the limits to their application in Brazilian society, a valuable topic to any legal research – and particularly to mine, which stresses the differences between lawyerly ideals and practice-minded soldiers.

Less than two months before independence, the Brazilian government issued the 10 July 1822 instructions, which would guide the recruitment for most of the 19th century. The main aspect we must stress from those instructions are the large number of exemptions from military service. The main one was for married men, but several other people could escape recruitment. Some examples are the workers in small stores, brothers of orphans, sons of widows, sailors, students, among others. This comparatively high number of exemptions gave rise to a *moral economy* of recruitment; that is, the law implied that only those who did not work or did not have family would enter the Army. Society slowly incorporated this idea and through the decades it built an assumption within Brazilian society that law-abiding citizens should not be obliged to pay military service. Working in the Army as enlisted personnel was seen as demeaning: only the least of the least in society would follow – or be forced into - that path. Punishment: instead of prison, the barracks.

As Hendrik Kraay (1999) describes, violence was one of the main aspects of the process of getting people to work in the Army. Whenever the number of volunteers was too low – and, with such gentle methods, it frequently was – the Army would launch the forced recruitment: it would go into the streets catching anyone it found fit for the job. This way of proceeding

[78] "verdadeira e vergonhosa caçada de homens (...), e instrumento de perseguições políticas, de vinditas e paixões particulares dos poderosos e das autoridades contra os míseros habitantes do país" (CD, 1869, 1, 141).
[79] For a detailed history of recruitment in late 19th and early 20th century Brazil, cf. Peter Beattie (2001).

placed an enormous amount of power on the hands of commanders of local corps and low-level personnel, which could arbitrary decide who was going to be enlisted. But those choices operated according to precise logics.

The exemptions meant that most of the workforce would not have to face the dismayed work in the barracks, as I have just stressed. But, more importantly, there were networks of protection between clients and patrons designed to prevent the low middle classes from performing military service, as stressed out by Kraay (1999). The powerful locals of each county could enforce their connections to avoid the draft of the small agriculturists, low-skilled artisans and other man that gravitated around their sphere of power. By the end, the recruitment usually affected only specific categories: vagrants, hobos and vagabonds. Deviants. Those at the very margins of society were targeted for not cultivating one single, most important habit: work. Recruitment functioned as a stimulus for an orderly, working life, and its constant threat was employed in times of peace as a – flawed – instrument for enforcing social order (KRAAY, 1999). Other goals were also pursued; the interference in elections, by means, for example, of the recruitment of political adversaries is just one of them. But the most important remark that must be kept in mind is the steady presence of a moral basis for the recruitment that went way beyond the strict legal obligations. Specific interests of the military were not necessarily the foremost drive of recruitment.

Everything was meant to come to ruins with the recruitment law of 1874[80]. To understand that, we must follow the project in the General Assembly, to better grasp the reasonings behind the law[81].

The bill had an intricate history, which was reconstructed by deputy Pereira da Silva. The first draft was presented by the Commission of Examination of the Legislation of the Army – an organization we will discuss later - in1865. In the same year, deputy Silveira de Souza filed a similar, though shorter project – apparently, the pressing needs of the war raised the awareness of the shortcomings of Brazilian military legislation. Notwithstanding the war needs,

[80] Legislative path. second discussion at the Chamber of Deputies – 29 May 1869; election of evaluating commission: 31 May 1869; presentation of the opinion of the commission: 21 June 1869; return of the second discussion at the Chamber: 6 and 9 June, 13, 15, 16, 17, 19, 20 and 21 July 1869; presentation of two substitutive projects at the Chamber: 7 August 1869; 3rd discussion at the Chamber: 11, 12, 13, 16, 17, 18, 20 and 23 August 1869; definitive draft at the Chamber: 26 August 1869; arrival of the project at the Senate: 3 September 1869; 1st discussion at the Senate: 8, 16, 18 August 1869; opinion of the commissions of Navy and War and Legislation: 8 April 1873; request of urgency: 20 August 1873; second discussion at the Senate: 18, 20, 21, 22, 23, 29 May, 1, 2, 3, 5, 6, 8, 9, 10, 12, 17, 22, 25 June, 3, 4, 6, 7, 8 July 1874; third discussion at the Senate: 18, 21, 22, 25, 28, 30, 31 July, 3, 4, 6, 7, 13, 17, 19, 20, 21, 25, 26, 27 and 29 August 1874. For a contextualization on the 1869 debates, see: GUARESE, Maicon Fernando. Caçando os desvalidos da pátria: a reforma do recrutamento na Câmara dos Deputados de 1869. Trabalho de Conclusão de Curso (Licenciatura em História). Universidade Federal da Fronteira Sul. Chapecó: 2017.

[81] For an account of the debates in parliament, cf. Vinicius Tadeu Vieira Campelo dos Santos (2020).

the Chamber of Deputies would take two years to nominate a commission to evaluate both projects; the resulting opinion proposed a third project in 1868. This project was approved in the first discussion – but the bureaucratic obstacles persisted. Pereira da Silva suggested a new commission should be created – a project supported by the presidency of the Chamber, elected in May. By the end of June, the collegiate filed a fourth project, combining the projects of the previous commission and the one from the Commission of Examination of the Legislation of the Army. This new document would wander through the legislative bureaucracy for a few years until it was enacted into law.

The European experience constantly lingered above the parliamentary rooms as the debates took place; be it for praise or reprisals, both deputies and senators compared the bill over the table with the law of European nations. The most common attitude was to draw a stark contrast between the conditions of the old and the new world. As deputy Araújo Lima stated, the Europeans were "the sons of war, breathe war (…); Europe is divided in nationalities, true armed camps eager to shatter each other (…) [for their] concentrated resentments, their irreconcilable interests, their unstoppable ambitions, their implacable skirmishes" (CD, 1869, 3, 129). Bred in such a hostile environment, Europeans needed mighty, enormous armies, and a strong recruitment system. Brazil, on the other hand, laid on the other side of the Atlantic, surrounded by "weak republics" and thus protected from the dangers of the interminable wars that plagued both continents. Pereira da Silva made a similar point, stating that the need of massive armies was not a part of the very nature of civilization, conversely deriving from current European politics of an "armed peace" (CD, 1869, 3, 98). Brazil, therefore, must not mirror the mammoth armies of France and Prussia; the arms taken for the armed forces would hinder the much-needed population growth and the development of agriculture.

Yet, most of the basic discussions revolved around which foreign system of recruitment must be adopted: the English, Prussian or French one. The first one was simply the voluntary enlistment, championed by many, but deemed impractical by several others. The second one was based on short periods of service for the most part of the masculine population. The third and last one was the conscription system, adopted by France; it consisted on a lottery between men in due age that would have to serve for a longer period. This system had been extended to Belgium, Italy, Portugal and other nations. There was only one method of recruitment that must be avoided at all costs: the forced one, which was employed only by "nations of retarded

civilization, such as Russia[82], Turkey and Spain" (CD, 1869, 3, 105). All of them European. Both for praise and criticism, Brazilian congressmen had their eyes relentlessly placed on Europe. This even provided for a telling altercation between senator Silveira Lobo and the Minister of War Junqueira; in 1874, the minister said that "from 1789 onwards, conscription has doubtless been accepted by the civilized powers". He was duly answered: "this has to do with those Europeans, but we are Americans" (SI, 1874, 1, 170). Junqueira retorted that conscription was a matter of political liberty, and what was true for those matters in Europe must also be so in Brazil, as the "rights of man" (*direitos do homem*) must be the same everywhere. Yet, we can see that the excessive Europeanization of the debate was prompting discomfort[83] and calls for a higher awareness of the specific Brazilian conditions[84].

One of the capital problems of the project was to define which exemptions should made their way to the law. The previous system was pervaded by "aristocratic privileges" (CD, 1869, 3, 105) from the "colonial regime and absolutism" (CD, 1869, 3, 145) that were not aligned with the liberal constitution in force; the new provisions must honor the institutions and wishes of the nation. The exemptions must be restricted, aligned with the "conservation of the family" (CD, 1869, 3, 140) and to nothing more. Deputies had in mind deplorable images, such as the husbands running away to avoid recruitment (CD, 1869, 3, 102), premature marriages to avoid conscription (CD, 1869, 3, 140) and the risk of infidelity during the long years of military service (CD, 1869, 3, 160). But the main topic of discussion were the substitutions: the possibility of being exempted from military service in exchange for money or by presenting a volunteer to take the position (personal substitution). The project was quite liberal, as most countries accepted only one of the two mechanisms of substitution, and the proposed bill allowed both[85]. A clever blessing: only rich people could pay to be substituted or find someone

[82] Senator Heráclito Graça: "seja honrada a árdua e gloriosa carreira militar, como sucede em todos os países civilizados, ao revés do que se dá na Rússia, onde grande parte do exército recruta-se por meio de condenações por sentença" (CD, 1869, 3, 140).

[83] For instance: "Sem exposição de motivos por parte do governo, sem relatorios e pareceres das nossas commissões, saem das camaras as leis de modo que os juizes não sabem o espirito que as motivou, nem as razões de varias de suas disposições. O que succede geralmente, é que ninguem se dá mais ao trabalho de procurar nos annaes parlamentares os elementos de nossas leis. Vae-se á fonte limpa, aos expositores francezes, porque comprehendemos logo que a lei foi traduzida do francez, e ás vezes quando já em França está ella revogada ou modificada" (SI, 1870, 3, 87).

[84] "Em matéria de recrutamento, com especialidade, é mister que se tome o país tal qual ele é, com os seus hábitos, com as suas tradições, com os seus prejuízos, com os seus vícios e suas virtudes" (CD, 1869, 3, 100).

[85] "Note a câmara ainda que tão moderado e suave é o projeto, que em França não se permite senão a substituição pessoal e não a de dinheiro; que na Bélgica e na Suíça o mesmo princípio se adotou; que na Áustria admite-se a isenção por dinheiro mas não a substituição pessoal; que, enfim, na Itália nem uma nem outra isenção se aceita; o sorteado há de assentar praça. São os países da conscrição! E nós admitimos ambos os meios" (CD, 1869, 3, 108).

to go to the barracks in their place. Privileges still lingered aroung, though the number of exemptions decreased. Married man, for instance, could now be taken to the army[86].

Many people opposed the project for it did not target the real shortcomings of the recruitment in Brazil; being made in the heat of the Paraguayan war, the bill aimed merely at the military needs, but left deeper problems unaddressed (SI, 1870, 3, 86). Military life should instead be bettered for people to be attracted to it without the need to be stimulated by bayonets (CD, 1869, 4, 98). Until that point, the army had not be seen as an honorable career, but as a sort of conviction; being so, no one could expect volunteers to spontaneously appear to be recruited (CD, 1869, 3, 97; SI, 1874, 1, 59). Who would volunteer to what was effectively prison, where even flogging was allowed? Moreover, military wages were low and disregarded; the previous year, officers and other public servants had gotten pay increases, but enlisted personnel were left outside the benefit package (SI, 1874, 1, 182). Senators themselves thought that the promises of preference for ex-military personnel in government hiring were empty (SI, 1870, 3, 89). In short: systemic problems were being tackled by a narrow approach aimed only at consequences, and not at causes.

There were other debates, especially on the administrative nature of the recruitment process. For some people, such as senator Otaviano, this issue could not be controlled only by government officials: judges must also get involved. The argument employed on the other side stated that the matter was administrative. As Otaviano puts it, "administrative in this country! With this invading curse word, all principles of law and legal sciences are subverted" (SI, 1870, 3, 89). The opposition also feared that the government could use the fines against those protecting people fleeing recruitment to persecute political enemies (SI, 1870, 3, 94). This administrative structure, complex and distant as it was, enhanced inequalities. All decisions could be appealed to the president of province or the minister of war; however, those procedures were costly, especially if we consider the long distances that must be traveled. And, as senator Saraiva pointed out, "this project must be a guarantee for the poor, because (…) the rich will not suffer with it" (SI, 1870, 3, 97).

Several of the former exemptions – most importantly, that of married men – were curbed, but the law still retained many privileges. A comparative view with some reference countries might be enlightening; I considered only exemptions in peace, for the *Belle Époque* was generally free from military conflict both in Europe and South America:

	Brazil	Italy	France	Prussia

[86] Some people though that could discourage under-thirty-year-old man from marrying, for fear of a looming conscription (CD, 1869, 3, 103).

Law	Lei nº 2.556 de 26 de setembro de 1874	Regio Decreto 26 luglio 1876, n. 3260	Loi du 10 mars 1818	Loi du 27 juillet 1872	Gesetz vom 9. November 1867.
Exemptions due to profession	Students and graduates of higher education institutes and seminaries; priests; police officers; part of crew of national ship; fishermen; owner or administrator of farms with more than 10 workers; only son of farmers; machinist of railway, ship or factory; worker of telegraph; post officer; one cowboy of farms with more that 50 calves born yearly; one salesmen of each shop with capital of more than 10 *contos* (art. 1)		Seminarists; students of *Ecole Normale*, language, polytechnical, Christian, public service and military schools; teachers (art. 15)[87]	Students of polytechnical or forestry schools (art. 19); teachers, students of the *École Normale Superieure*, schools of *chartres* or languages, professors of institutes of deaf and blinds; members of religious institutes; seminarists (art. 20)	
Exemptions due to Family duties	Those supporting minor orphaned siblings or widowed or single sistes; only son living with mother or invalid father, or the grandson in absence of sons; widowed father (art. 1)	Only son; son of father with more than 70 years; only or first son of widowed mother; first or only grandson of grandfather without sons; first or only grandson of widowed grandmother without sons; oldest among orphaned siblings (art. 86)	First son of orphaned siblings; First or only son or, in the absence of grandsons, of widows, blind men or men with more than 70 years (art. 14)	First son of orphaned siblings; First or only son or, in the absence of grandsons, of widows, blind men or men with more than 70 years (art. 16); men indispensable to support their families	
Service from other people	Brother of someone already serving or who died or got invalid in service (art. 1)	Brother of someone born in the same year (art. 86); brother of someone who died or was wounded due to the service (art. 88)	Brother of someone born in the same year; brother of someone who died or was wounded due to the service (art. 14)	Brother of someone born in the same year; brother of someone who died or was wounded due to the service; brother of someone already serving in the army (art. 16)	
Substitution	Financial or personal (art. 1)		Personal (art. 18)		

[87] Technically, they were not exempted, but were deemed to have already fulfilled their service. They were placed in the same article of those that had already voluntarily served in the army.

Others		Residents in other countries (art. 81); residents living more than 600km away from the seat of the military district (art. 81)	Winners of royal prizes	Winners of royal prizes (ar. 20)	Members of ruling or mediatized houses (art. 1)

Table 2 Exemptions in recruitment laws from selected countries.

Some important countries are missing for they did not have draft systems, as England; the United States only implemented such systems in times of war, as in the world conflicts; Argentina only adopted such a system in 1902, though debates on possible changes started much earlier (AVELLANEDA, 2017). I have not included either exemptions for medical reasons or convictions, for their justification was not favor of the servicemen, but of the Army. Anyhow, the Brazilian system was mostly a blend between the tradition enshrined in the previous 1822 provision and the French system – which was among the most open in Europe. Two classes of exemption were particularly wide in Brazil: those concerning professions and substitutions. Italy and Prussia had no provisions on either, while France had adopted some; but the professions exempted were mostly professors, students and clerics; substitution was only personal. Brazil, differently, allowed workers and many administrators in both urban and rural professions to be relieved from their duty to serve in the Army, keeping with the traditional view that only vagabonds and marginals should be conscripted. Moreover, if Frenchmen could only present a substitute in person, in Brazil it was also possible to buy your way out of the barracks, meaning that sons and protégées of rich men could count on the financial power of their patriarchs to free them from the claws of the draft. Brazil, in the end, tried to produce a synthesis between old, ingrained traditions and modern liberal sensibilities.

After all those discussions, all ponderation, after several years and the interventions of dozens of deputies, the law was finally published in 26 September 1874. And failed.

The population did not accept well the attack on the old order of values and rebelled in several opportunities. The recent memory of the Paraguay war and the devastation it raged on families instilled the fear that the recruitment would send many more men to the arms of death (SOUZA, 2014). In several Brazilian counties, the people rioted and attacked the enlistment commissions, tearing apart the lists they were compiling (MENDES, 1999). Local priests were mandated to participate in the commissions, which led to several problems: as a consequence of the “religious question”, some factions within the church had a wary attitude towards the state, and did not collaborate with the recruitment efforts. These revolts happened at the same time of other popular unrests against modernization; more famously, the changes promoted by the imperial state towards the metric system in 1874 were met with the fiercest resistance.

The law was considered illegitimate for ignoring the whole order of (pre-modern) values that was on the very moral foundations of the 1822 system of recruitment. As one deputy put it, the new system treated equally the unequals, as it could target both vagabonds and hard-working people with the same harshness (CD, 1869, 3, 131). Chance, as the cardinal principle of recruitment, was the denial of all justice; a "moral void" (CD, 1869, 3, 99), a blindness, a lack of consideration for all circumstances that had given meaning to recruitment until then[88]. The entrance into the Army was seen as a punishment, and not as a mode of service to the fatherland; being so, those who carried a moral, productive life felt they could not be equated with people living outside the standards of socially acceptable life. Though the law still incorporated some pre-modern values – such as the substitution for money, that allowed for "productive" members of society to escape recruitment (SI, 1870, 3, 91) -, its very core was significantly dethatched from values reinforced for a long time in Brazilian society. Its aim was to produce a modern, professional Army in which every citizen could be a soldier and the profession of the arms would be honorable; this aim, pursued by state intervention, clashed violently with a pre-modern mentality retaining that to be a soldier was a disgrace akin to penal convictions.

The recruitment law was perhaps the most eagerly awaited military reform in Brazil, possibly being equaled only by the penal code. The project enacted by the parliament after almost 10 years of discussion, fighting and discord that spanned through the whole Paraguay War was a bastion of modern values; equality was to be defended and made effective through lottery; the old manhunt was supposed to never happened again. Though not eliminated, the unequal character of the exemptions was restricted. But modernization was only a dream. The Brazilian society, entrenched in deeply rooted privileges, did not accept the new recruitment: the enlistment was actually be performed only in few counties, and the lottery that was supposed to be based on it never happened. In the conflict between a changing law and traditional values, the winner was a blow to the European-minded congressmen.

2.3 – Gatekeepers of the future: The Commission of Examination of the Legislation of the Army (*Comissão de Exame da Legislação do Exército*)

[88] "A lei não pode considerar na mesma plana o homem casado, com família, e o que a não tem; aquele que exerce a útil e pequena indústria, como a nossa marinha mercante, como as indústrias fabris, as profissões que se prendem aos interesses materiais e morais do país, e os vagabundos que perturbam a tranquilidade, e para os quais o mais eficaz meio de repressão é o recrutamento" (CD, 1869, 3, 157).

40 years had passed since the constitution had promised an ordinance for the armed forces, yet the general assembly had not legislated on this issue. In 1864, the Paraguayan War had started, putting in evidence the shortcomings of Brazilian military legislation. To organize the laws of the Army, the government formed in 18 December 1865 the Commission of Examination of the Legislation of the Army. With 27 members under the presidency of the Count D'Eu, commander in chief of the land forces, the commission was divided in six sections, each one responsible to discuss and draft a bill on specific areas of the Army administration. After the projects were written down and discussed in each section, they were sent to the full commission, where they were further debated. After that, they were finally sent to the parliament to be discussed and eventually enacted into law. The Count D'Eu wrote three reports on the functioning of the commission, which were published in the reports of the Ministry of war of 1871-2, 1874 and 1876; they were the main sources of this section.

The sections, their responsibilities and results were the following:

Section	Area	Military members	Total nº of members	Output - projects of law
1st	Disciplinary law	1	4	Penal Code – 01/05/1867 Code of Penal Procedure – 26/12/1873 Disciplinary code – 08/02/1875
2nd	Health corps	0	2	Project of reorganization of the health corps – 12/02/1872 Regulation of the services of the health corps – 28/08/1872
3rd	Administration and pensions	2	4	Half basic pay – 01/05/1867 Military salaries – 25/04/1872 Reorganization of the ecclesiastical corps - 25/04/1872
4th	Artillery	4	4	-
5th	Infantry and cavalry	6	6	Internal services of Army corps – 31/10/1876
6th	Recruitment and cadets	3	4	Recruitment - 08/08/1865

Table 3 Sections of the Commission of Examination of the Legislation of the Army and the bills they filed. Source: Report of the Ministry of War, 1876.

The ten projects the commission drafted covered most areas of Army life; as we can see, the commission was part of an overarching reformist impulse. Nevertheless, only a handful of those bills would eventually turn into law; for instance, the disciplinary code, the recruitment act of 1874 and the regulation of the internal service of the corps[89]. However, most provisions

[89] Decree 6373 of 15 November 1876. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-6373-15-novembro-1876-549704-publicacaooriginal-65217-pe.html "the military spirit is acquired by the education of the soldier within the family, by the education in the domestic home. This home are the barracks, and this education

failed to be approved by the General Assembly, such as the penal codes or the half basic pay law. Some debates apparently did not end up yielding bills, as they were supposed to do. For instance, the 3rd section was ordered to organize a logistics bill, and the 4th section was demanded by the Count D'Eu to draft a project of regulation of fortresses (MINISTÉRIO DA GUERRA, 1871b, p. 5), but there is no evidence that these projects ever came into being.

The first priority advanced by the Count D'Eu was precisely the law of recruitment, which was apparently seen as the most pressing problem regarding military reform by the early 1870s (MINISTÉRIO DA GUERRA, 1871b, p. 2). The next priority was disciplinary law, comprising the penal code, the penal procedure code and the disciplinary code, as crime must be punished, but not with "humiliating punishments, neither with much rigorous ones, that irritate rather than correct" (MINISTÉRIO DA GUERRA, 1871b, p. 2). Yet, Brazilian military justice was still based on "arbitrium, custom or old rules", most of them from the times when the Count of Lippe was the chief of the Portuguese army. Some examples were the internal service of the army, penal law and the regulations of forts.

The commission drafted the most important bills in its first years, such as the recruitment or discipline one; but, as the war in Paraguay became more serious, the works were halted in 1868, and only returned in 1871, after the end of the conflict. The projects were usually sent to the Ministry of War, where they were printed and taken to deputies and senators.

The commission had to overcome some important challenges during its existence. Many sections could not operate for long periods of time due to illnesses of its members, and sometimes their deaths (MINISTÉRIO DA GUERRA, 1874, p. 74). In 1876, Marshal José Maria da Silva Bittencourt, its very first vice president, passed away. By 1874, all members of the 5th section working in the future bill for the internal service of the army had died, retarding the legislative process of this draft.

Overall, we can credit the Commission with mixed results. Some of the most important reforms in the Army legislation in the late empire spawned from its works, and their members produced a great number of projects. However, important bills were unsuccessful. The draft on the half basic pay, which could have reorganized a deeply chaotic field, did not reach the books of the *coleção das leis do Império do Brazil*. And, most importantly, the penal and the penal process codes were received by only a pallid debate on the parliament. Those two, together with the disciplinary code – this, a successful project from the commission – were supposed to make the "code of military justice, the basis of the Ordinance promised by the constitution"

can only be obtained through a well-organized regulation of internal service" (MINISTÉRIO DA GUERRA, 1874, p. 76).

(MINISTÉRIO DA GUERRA, 1876, p.72). One that would exist only in the minds of the commission, but not in the law codes.

Though fundamental, the commission was only able to do an incomplete job.

2.4 – Between old and new: *cadetes* and private soldiers (*soldados particulares*)

Privilege thrived in the liberal empire, and the military was no exception. One of the most clamorous proofs of such intriguing situation were the positions of cadet (*cadetes*) and private soldier (*soldados particulares*). Those were young enlisted personnel that, due to their family origins, had a few privileges: according to Raymundo Everard (1862, p. 142), they could use a more honorable uniform, they could not suffer corporal punishment, be sent to patrol dirty places or ordered to do cleaning work; in other words, they were treated as if they were officials. But, more importantly, they had several privileges regarding promotions: they were preferred in the promotions to sergeants (ALVES JÚNIOR, 1866, p. 106) and on the access to the position of lieutenant, they came after only the best students from the military schools (*alferes-alunos*) (ALVES JÚNIOR, 1866, p. 99). How could one acquire those many prerogatives?

Birth. Surprisingly as it may seem, this was how a person could become a cadet. To better understand how those rights were seized, we must look back at the mostly colonial legislation regulating them. The very notion of "cadets" was created in 1757, by the *alvará* of 16 March 1757; to be recognized as such, one had to prove to be a *fidalgo* (nobleman) of the Imperial house, to be a son of an officer with the patent of at least major, or that all his grandfathers and grandmothers were of noble rank. Though being issued during the enlightenment by an illustrated government, this rule clearly reinforced the old notions of privilege: a well-born person could not serve in the same low functions as a commoner. Originally, only three cadets would be admitted in each corps, but this limit was lifted by the 18 May 1797 *alvará*. But the most crucial change was made in 4 February 1820. at the eve of independence, two new categories were created: 2nd cadets, for the sons of lieutenants, captains and people bestowed with honorific orders; and private soldiers, for the sons of people "with any civic consideration, be it for their patrimony or work". As time passed by, this was interpreted in a way that included all sons of doctors in law and medicine (SEIDL, 2010, p. 78).

Cadets and private soldiers enshrined the distinctions and privileges lying on the very foundations of Brazilian society; as the legal order changed and the Army went through a process of modernization, those institutions guaranteed an anomalous exception for powerful families (SEIDL, 2010, p. 79). The very official language on them was reminiscent of the

Ancien Régime world, constantly speaking of "honors and privileges" (MINISTÉRIO DA GUERRA, 1884, p. 303) or "nobility" (MINISTÉRIO DA GUERRA, 1881, p. 137). And this when most other privileges of nobility had been abolished (FONSECA, 2021). Such strange oddity would not be left unchallenged, though.

The starkest criticism came from Vicente Piragibe (1862, p. 89), for whom the distinction of cadet was simply a salvation granted for those that did not want to do the petty works that were reserved for soldiers, but were fundamental for the everyday needs of any military organization. Towards the end of the empire, criticism became clearer; a text published by the newspaper "Military Tribune", for instance, saw no sense at all in treating differently those with the "occasional privilege" of "being born to a patent or decorated officer"[90]. Thomaz Alves Júnior (1866, p. 124) criticized this privilege "founded not on virtue or personal merit, but on blood" for being against the constitution itself. To revoke the institutions of cadets and private soldiers was important to "bring to the army the principle of equality".

Some of the other, earlier critics, also insisted on the abnormality of the "most ancient law" created in "times much different from current ones" (VIEIRA, 1862, p. 48) that created the cadets. For Carvalho and Engenheiros (1862, p. 112), for instance, the problem with those categories was not their privileged origins; instead, they decried cadets and private soldiers for occupying all officer positions, excluding former soldiers and caporals from ascending to positions of command. For them, the presence of former enlisted personnel in higher offices would bring important knowledge on everyday soldierly life to commanders. Antônio de Castro Viana (1862, p. 50) aimed to "rehabilitate the old and noble class of cadets". For him, the problem lied on the many enlargements of the categories, which had admitted people that did not deserve to be part of it: much of them were undisciplined and did not receive sufficient education. His suggestion was to demand from the candidates to those positions proofs of morality and instruction, and not just nobility.

Only Raymundo Everard (1862, p. 143) saw on the distinctions mere signs of an "original nobility that impairs no one".

Despite their anomalous nature, their probable unconstitutionality[91] and the many calls for their extinction, the legal categories of cadets and private soldiers continued to exist until years after the proclamation of the republic. They represented a bastion of privilege on the very

[90] *Tribuna militar*, 8 de setembro de 1881. http://memoria.bn.br/docreader/393673/77

[91] One can only wonder how it would be possible to reconcile both institutions with the constitution, art. 179, XII and XVI: " XIII. A Lei será igual para todos, quer proteja, quer castigue, o recompensará em proporção dos merecimentos de cada um"; "XVI. Ficam abolidos todos os Privilegios, que não forem essencial, e inteiramente ligados aos Cargos, por utilidade publica".

heart of the system of officer recruitment. The failed attempt to remove them is a blatant testimony of the botched reforms in the armed forces, and of how pervasive old logics were in Brazilian administration well into the 19th century.

2.5 – Royal *alvarás* and imperial charts: final remarks

The Brazilian Army had to change. Substantially. And many people within the state and in the barracks understood this urge. The absence of a systematic organization, the debt with the ancient regime, arbitrium, corporal punishment, lack of certainty, acceptance of privileges and many other anomalies prompted constant calls for reform of the armed forces.

The crucial step towards modernization was taken in 1850, with the promotions act. Study, competence and professionalism would be the new criteria of an enclosed, self-sufficient career, insulated from most influences of politics. In 1865, while war raged the provinces of Rio Grande do Sul and Mato Grosso, the government launched an overarching project aiming to strip the Army of most influences of the *Ancien Régime* and, after more than 40 years, deliver the Ordinance promised by the constitution. The Commission of Examination of the Legislation of the Army was created as a consequence to be the conveyor of much awaited change. Evenly divided between civilians and soldiers, under the presidency of the consort of the heiress to the throne, this organ proposed almost a dozen projects throughout its more than 10 years of existence. The restless work brought some fruits – though not the most desired ones.

Each on their own way, the two most desired reforms – the Code of Military Justice and the Recruitment Law – achieved only a partial success, at best. Of the three parts of the former, only the disciplinary code was enacted; the bills of penal and penal procedure codes had an erratic path in the General Assembly, and after painfully long years, were abandoned in the dark and dusty drawers of the parliament. The recruitment law could not claim a much better destiny. Sure, after nine years awaiting, of passing through several commissions, receiving numerous opinions and sustaining turbulent debates, it was finally turned into law. But its words remained powerlessly confined to paper, paralyzed as the many commissions were unable to enlist the citizens and perform the prescribed lotteries.

The empire was unable even to abolish the categories of cadets and private soldiers – explicit and outrageous privileges for nobles.

Most reforms carried an impulse for modernization while keeping strong pre-modern characteristics. The 1874 law is a paramount example: it abolished corporal punishment, but enshrined privilege when it permitted substitutions in recruitment for money or for another

person. In chapter four, we will understand how a similar phenomenon happened with military penal law. The spirit of *Ancien Regime* lived in the new imperial legislation. In other situations, actual royal charters of the colonial period were coupled with imperial laws to regulate a single matter, as was the case with penal law and the recruitment of cadets. Such confusion empowered the highest military officers with unmatched capacity to control their subordinates and decide the destinies of the Army. As we saw for the promotions, those who suffered the most, and might have pushed for changes, were middle officers, without the connections and influence needed to promote deep reforms. Also, the political class looked warily towards the possible "militarization" of Brazil, as constantly expressed in the debates of the recruitment act – Europe was frequently used as the counter-example of how big armies could be detrimental for both the democratic fabric and the budget of nation. They slowly defunded the Army, as we will see in chapter 3.1; less money was only a reflection of a wider attitude disregarding the armed forces. Deputies and Senators would not promote reforms of the Army as they understood that the primary worry they should address was how to put the public force under control.

The lack of political will of those able to promote change met the lack of power of those needing reforms the most. The consequence was that many desperately needed changes with which almost everyone agreed – at least on paper – had to wait decades before being turned into law.

Chapter 3

Taking care: the "social activity" of the Army and the Navy

It was not easy to get old in the 19th century. Or ill. There was no such amenity as universal public health, or asylums to take care of those who could not work anymore. And the Brazilian government, on the periphery of the international economic system, did not enjoy a comfortable financial situation that would allow a higher level of intervention.

The timid role of the empire in health and education was palpable in the 1824 constitution, which only vaguely treated the topic. Art. 179, dedicated to the rights of Brazilian citizens, declared on its paragraphs 31-33: "xxi. The constitution also guarantees the public aids, xxxii. Primary instruction, free for all citizens, xxxiii. Colleges and Universities for the teaching of elements of sciences, letters and arts". Publicists, while explaining the meaning of those lines, also showed how limited this assistance was. Pimenta Bueno (1857, p. 439), for instance, states that "the government, under ordinary circumstances, is not obliged to support private citizens". They could get the help inscribed in the constitution only if something exceptional happened, such as a famine, a drought or other "public calamities". An "enlightened government" could provide "mediate aids", such as hospitals or asylums. But, as the adjective proclaims, this was not an obligation, but a positive attitude that was up to the officials to follow or not. Souza (1870, p. 481), for example, talks only of the "help for miserable people".

Education was in an even worse situation. The constitution determined that only primary education would be free: the simple and plain literacy, the four basic operations and fundaments of morals (PIMENTA BUENO, 1857, p. 440). Anything beyond that, especially scientific education, was meant for "no ordinary minds, with means of subsistence independent from daily work" (SOUZA, 1870, p. 482). We will not enter in the muddy terrain of the real reach of the system of primary instruction; it suffices to say that the gigantic size of the country and the lack of means were responsible for a consistent violation of the constitution. Health and education, in general, were regarded as a gift from the state, a sign of good government that, nonetheless, could be withheld without violating the legal order

The military was sort of an exception. Soldiers fought for the country, had sacrificed the most vibrant years of their lives for the empire, and in many cases, had contracted terrible diseases or lost limbs for the sake of national security. The state was in no position to neglect them. The army, therefore, had developed what I will be calling "social activity".

I take this concept from Bernardo Sordi (2017), who, by his turn, draws it from some late 19th century Italian publicists, such as Carlo Francesco Ferraris and Vittorio Emmanuele Orlando. The *attività sociale* would be the way jurists conceptualized the services rendered by the State in late-19th century – a legal image still different from the early 20th century concept of *service publique*. Differently from public services, which were regarded as a prestation of the public power towards the collectivity, the social activity was understood mostly in a blend of *Ancien Régime* charity and liberal order understanding of the relation between state and citizen as one of superiority and authority. I would also add that social activity still cannot be coupled with the idea of "social rights", which would only appear a few decades latter[92]. And there are two main reasons for that. The first one, that I have just mentioned, is that those activities of the military - and, in some cases, of the State in general[93] - were not regarded as a right derived from the very human nature of the individual and recognized by the legal order: they were seen as a reward for the services previously made on the behalf of the empire. The second difference was that many of the services rendered by the public power were also on the very own interest of the public administration. For instance, during a war, it is a maximum priority to keep the soldiers safe and to return them to work as fast as possible, not only for the sake of their own health, but for the defense of the fatherland which pays them. The educational institutions of the army provided much-needed instruction for a nation of illiterates, but the formation of more knowledgeable soldiers was a fundamental part in the modernization of the Army and the Navy.

Social rights need to be thought as something that the individual can demand from the state, since they belong to him and are a consequence of his human nature/dignity[94], and such a conception was still not available in the legal thought. Only between 1893 and 1913 the French state moved away from notions of collective charity and started to treat social assistance as a public service; still, most jurists defended that beneficiaries had no right to their payments, but were only the receivers of a public duty (BIGOT; YOUNCOURT, 2014, p. 312-315); those were still incomplete steps towards a full "juridicisation of the social" (GAXIE, 2011). The "social activity" is a self-interested prestation that can be a reward for previous services. It is also embedded in the idea of charity – but this particular aspect will be discussed later. For now, it suffices to say that this ambiguity is the nucleus of the concept, as it brings to the center stage the hesitancy of the state's attitudes in the liberal mindset of the 19th century. Self-interest,

[92] On the specificity of social rights, cf. Pietro Costa (2010).
[93] For exemple, social security and pensions for civil servants (*montepio geral dos servidores do Estado*).
[94] On the history of social rights, and developing the considerations I am using here, cf. Pietro Costa (2010).

charity and rights mix in a stimulating way in the administration of the Army and the Navy. For instance, as I have mentioned, a hospital established during war to take care of the wounded is simply a part of the war effort, and warrants no further explanation. But why did the Army keep hospitals in times of absolute peace? If the health structure had been conceived only in self-interest, there would be no point in taking care of soldiers after the war effort ended; after the times of crisis, they could be left to be treated by ordinary health institutions, as happened to any other worker wounded in service[95]. But things proceeded differently.

Education also got a peculiar treatment. Many education initiatives of the Army and the Navy, such as the regimental schools in the land forces and the schools of apprentice seamen in the sea forces, were also ambiguous, as their declared objectives were both to recruit future soldiers and to assist orphans and children in situations of social vulnerability. This tension, though, was not that much present in the Military School. Differently from health, which becomes a dramatic affair mostly in times of war, the training of new officers is always in the immediate need of the Army. As I stated in chapter one, the Military School was for lots of people the only way to get a decent education without financial sacrifice; but this was not its declared objective. As such, I excluded that institution from this chapter: the higher education establishments performed some social services, but their main objective was to train officers for the internal benefice of the armed forces.

Born out of the tension between self-interest and rights, most of the health and education services of the Army seems to anticipate the social rights that are so familiar to us today. However, they operate in a distinctive logic and are a product of the particular mentality in which they thrived. My aspiration in this chapter is to understand how common values as solidarity and charity, when confronted with the particular mental universe of the liberal state, could produce a unique sort of activity in the singular world of the military.

3.1 – A small contribution: social activity in the national budget

To understand the true meaning of the social activity of the military ministries, it is paramount to discover how much was spent by the government on them. It is not trivial to state that those services consumed much of the budgets or that they were simple, marginal additions; in any case, the concrete, economic circumstances faced by the state constrain – though not determine – the paths taken by the legal imagination. In this section, I will present a few figures

[95] On the history of compensation for work accidents in Brazil considering the international context, cf. Arley Fernandes Teixeira (2020).

analyzing the monetary significance of the social activity of the military in general and of pensions particularly.

The first figure presents the social spending of the two military ministries – War and Navy – as a percentual of their own budgets. I worked here with the real spending, and not the one predicted by the national budget act (*lei do orçamento*) at the beginning of the year; all my information from now on comes from the reports of the ministers of the Army and Navy, except for where I say otherwise. In a few years[96] there were was no information on the real spending, I worked with the predictions the ministers presented on their reports.

The budgets did not have an item for "social activity", so I had to add up the ones I found to pertain to this concept; the number of items in general grew from 1869-1870, when the Army had 15 items and the Navy had 21, to 1889, when the former was bestowed with 28 items and the latter got 29. The items that I selected as part of the "social activity" in the Army were: "inactive classes" (*classes inativas* – pensioned veterans), "hospitals and nurseries" and "health corps" (physicians and nurses). For the navy, I choose: reformed (*reformados* – pensioned veterans); company of invalids; hospitals.

This was the result:

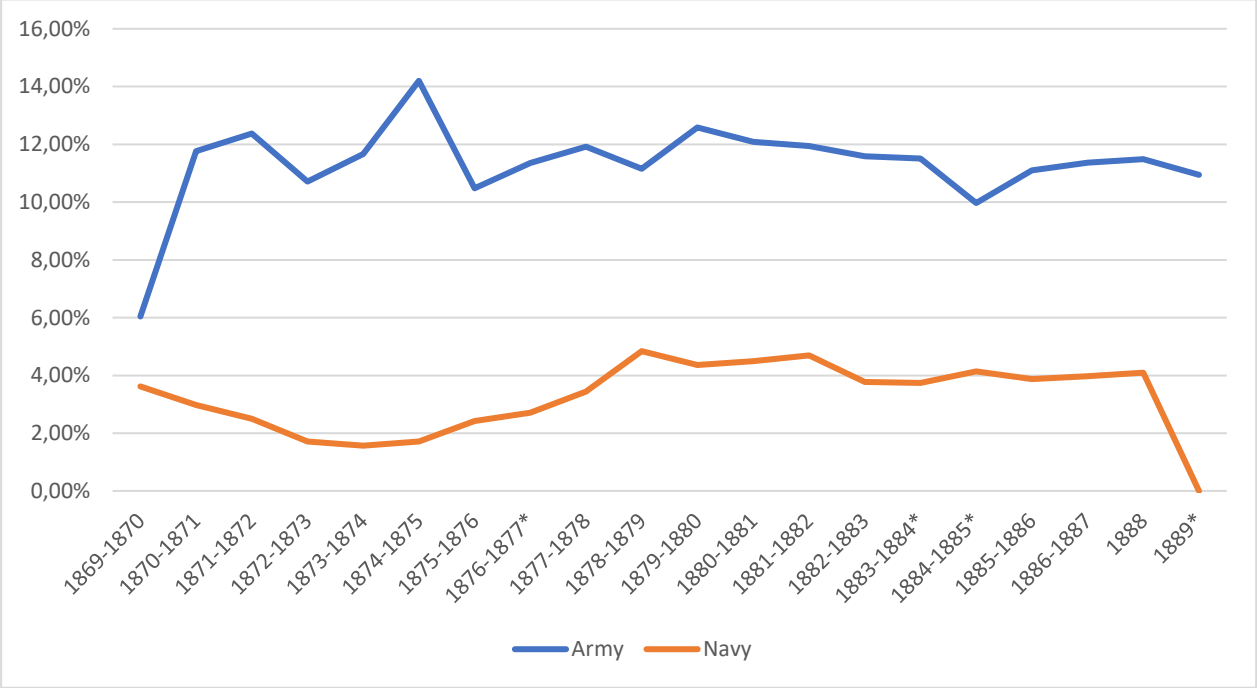

Figure 5 Percentual of spending with "social activity" (pensions+hospitals+asylums) in the army and the navy as a proportion of their respective budgets

[96] For the Army: 1876-1877, 1883-1884, 1884-1885 and 1889. For the Navy: 1879-1880. I could find no data for the Navy in 1881-1882, and the Army in 1874-1875, so I used the value in the budgetary law; since the values do not differ much from the previous and following ones, I imagine that this small methodological turn do not affect the conclusions.

The participation of the social spending in the war budget decreased only slightly during this period of time. In the first half of the 1870s, it was around 12%, and by the end of the 1880s, it came to around 11%. The Navy had a different trajectory: from less than 2% by the middle 1870s to around 4% by the end of the relevant period. The Navy spends consistently less; but we should understand that the naval force had a budget only slightly smaller than the army while maintaining nearly a fifth of the personnel that worked in land. Its spending went mostly to buying and maintaining expensive warships, meaning they had to divest less funding to personnel.

But to understand how much money the social activity was drilling, we must look also to absolute numbers: namely, to the nominal evolution of the national budget and the sum of the budgets of the military ministries (war and navy). To make the next figure, I did not look at the real spending, but at the budgets as approved by parliament. They are quicker and more trustworthy that the other variable, which would demand a look into several reports that might not use the same criteria. Moreover, the budget accounts for the direct value the parliament placed in the different ministries, as it does not depend on exceptional events that might trigger the concession of extra credit throughout the year. They reveal what the government and the legislative are willing to give to each sector in ordinary circumstances.

For the military, this willingness decreased.

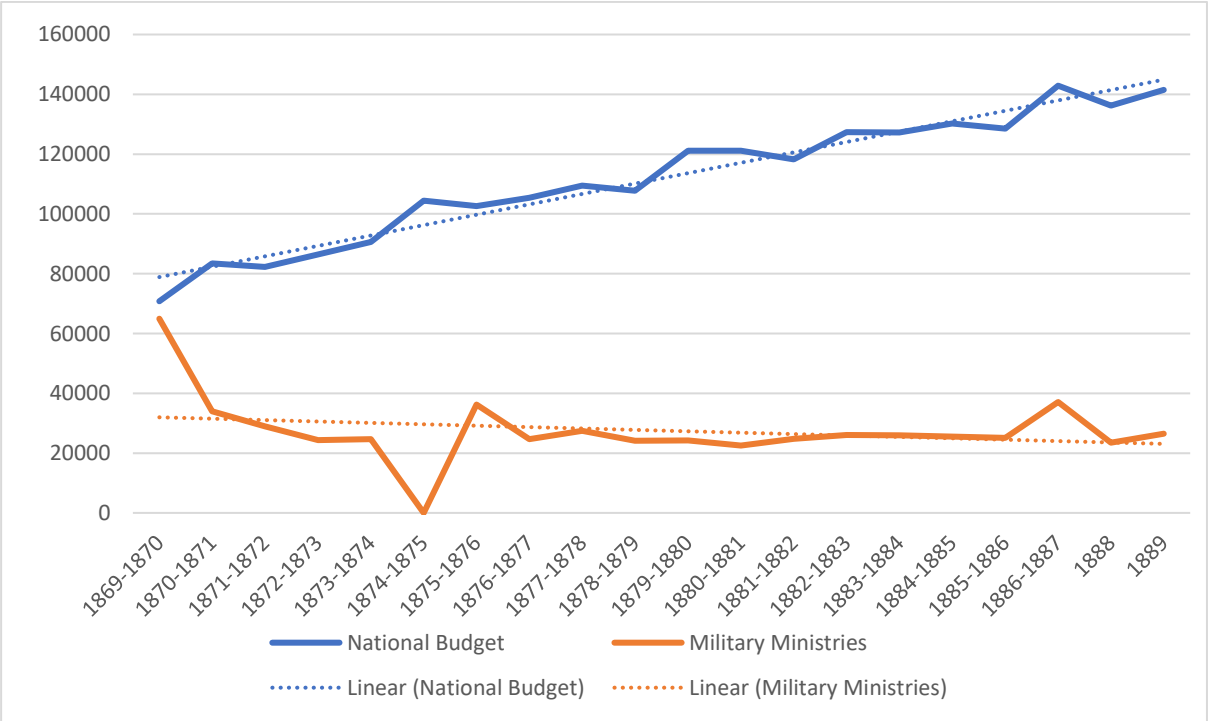

Figure 6 National budget and the budgets of the ministries of war and navy in contos de réis (one conto de réis is equal to one million réis/reais)

The national budget steadily grew from approximately 80 thousand *contos de réis*[97] by the end of the Paraguay war to more than 140 *contos* almost 20 years later. At the same time, the war and naval budget stalled at around 25 to 30 thousand *contos* and never went much up or down from that order of magnitude. After the costly war effort, both the Army and the Navy were forgotten, which can explain many of the complains made by officers on their salaries and working conditions. But what was the specific place of pensions in this financial universe?

In the next figure, we can see the participation of pensions in the budgets of each of the war ministries and in the Ministry of Treasure (*secretaria da fazenda*), which administered payments to civil servants.

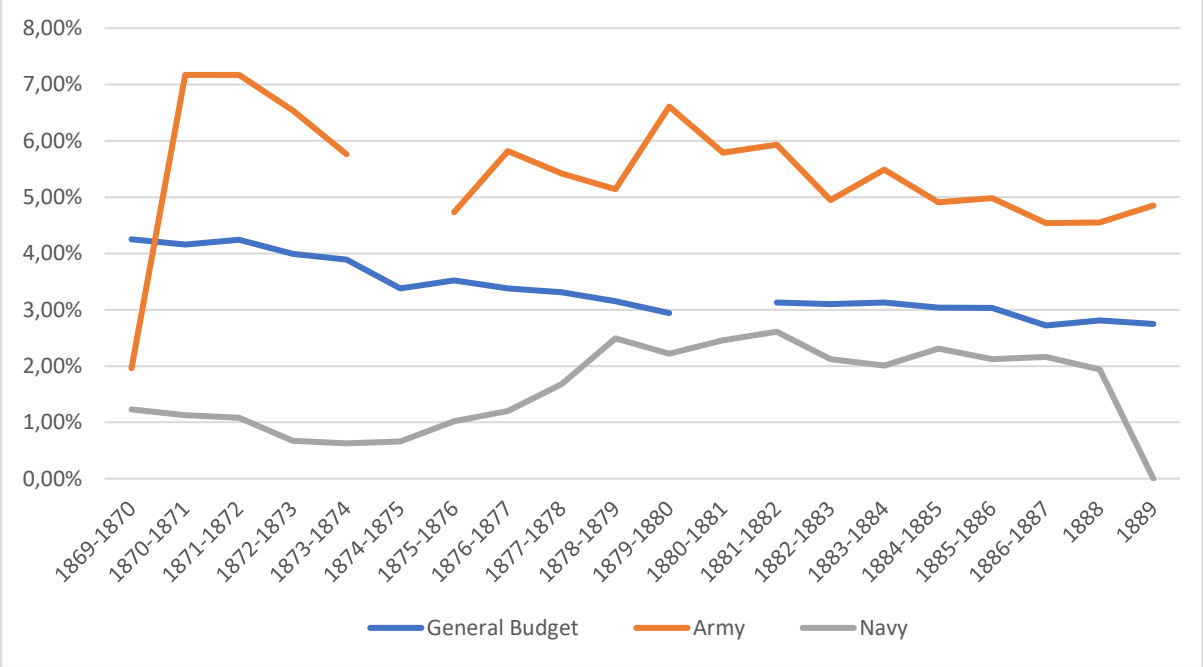

Figure 7 Spending with pensions as a percentage of the budget in the national budget and in the ministries of war and navy.

Except for the Navy in the first ten years, in all three ministries the participation of pensions in the budget decreased. The highest value in the Army can be explained by the Paraguay war: right after the conflagration, many ex-combatants had to be assisted as a result of diseases or wounds contracted in the Chaco battlefields, and a few even got reward pensions – a matter for the next chapter. As time passed by, those who received those values would die out without a comparable increase of new veterans, as Brazil would not engage in a new war-mongering thar could handicap more soldiers.

The decrease in civil pensions is noticeable, from 4% to 3%; but the sharp rise of the national budget could explain this dip, meaning that the attention towards social security did

[97] Equivalent to one million *réis/reais*, the Brazilian currency until the 1940s. To better grasp what these numbers meant in a comparative perspective, cf Heitor Moura Filho (2006) for the exchange rates between the *mil-reis* and the dollar and the pound sterling.

not diminish. This is what the next figure, on the nominal value of the expending on pensions, tells.

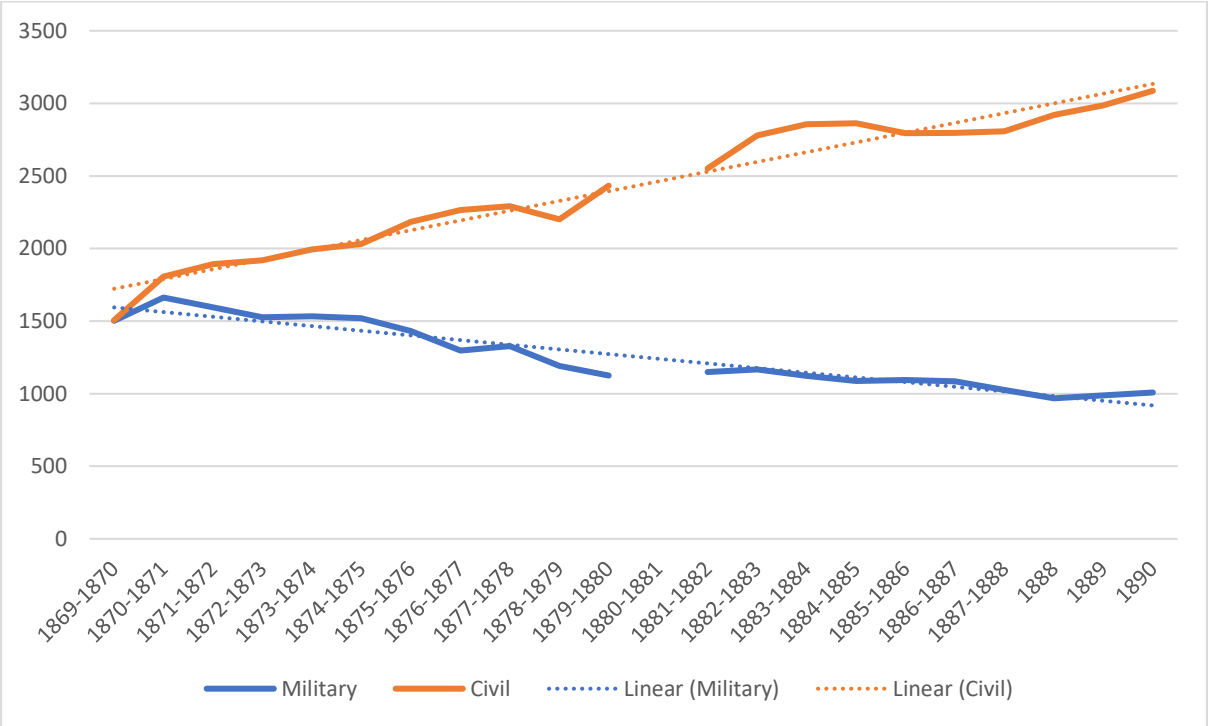

Figure 8 Spending with civilian and military pensions in contos de réis (one conto de réis is equal to one million réis/reais)

From a very similar beginning, military and civil spending with pensions followed quite different paths. Spending in the war and navy ministries decreased within a stable budget, while in the treasury the investment grew, though at a minor pace compared with the fast-expanding national budget. As a result, the proportion of military pensions in the total spending with

retirees decreased from almost 50% by the end of the Paraguay War to little more that 25% when the empire fell, as we can see in the following figure:

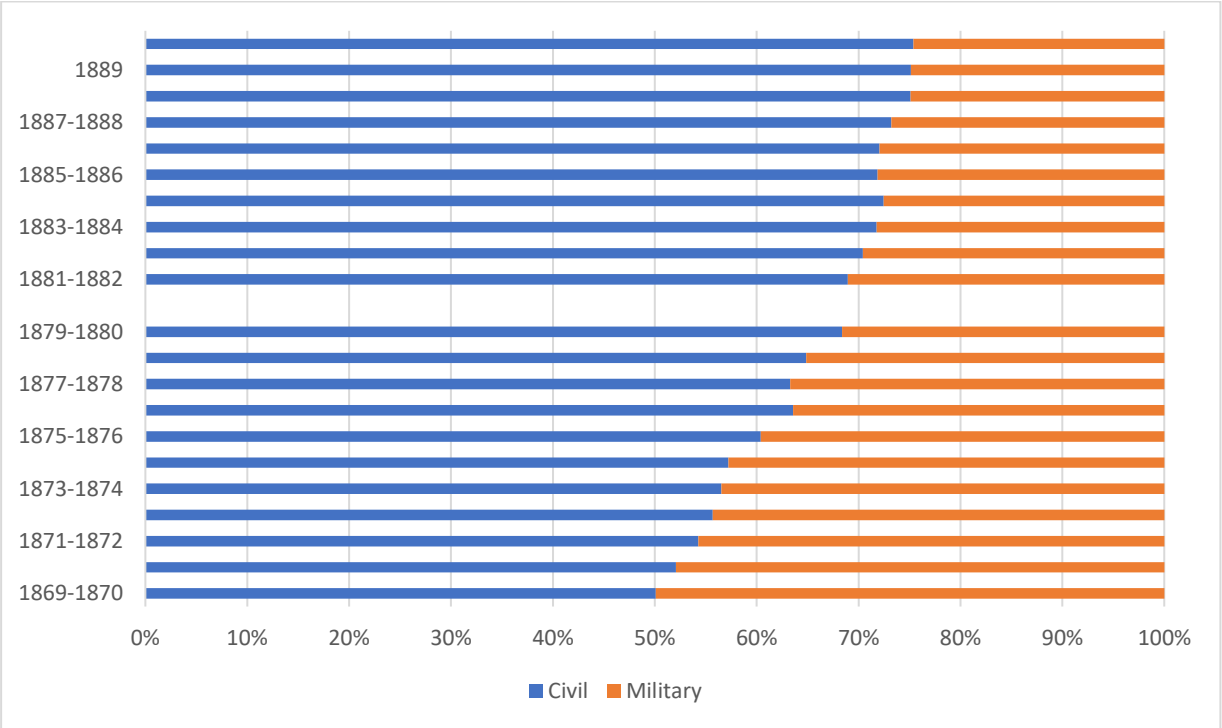

Figure 9 Proportion of civil and military pensions paid by the central imperial government

Did the military expend much on its social activities? The short answer is no. As a percentage of the budget, the amount of money put in those sectors remained at ca. 12% in the army and 4% in the navy – a fairly modest figure. But as the spending with pensions decreased in the 20 years that followed the Paraguayan War, it had to be compensated by an increase in hospitals, nurseries and health professionals. The military ministries had to watch a boosting national budget while dealing with a stagnant amount of cash handed to them by the general assembly. The amount of money spent by the whole imperial government with pensions is also modest: only 3-4%.

In a few words: though important, we are not talking about a huge amount of money that could define the spending of the military. The "social activity" was simply a side activity: not regarded as a preeminent enterprise of the armed classes.

3.2 – The sacrifice of our own blood: military hospitals and the invalid's asylum (*asilo dos inválidos*)

Wounded, disabled, impaired. How to cope with the massive number of soldiers coming out of the war with some sort of handicap? Lost limbs, acquired diseases, abandoned families.

How to care for the employees that were stricken everyday by the harsh working conditions in the military? Cholera, gunshots, malaria. What were the responsibilities of the Army and the Navy, both in war and peace?

These questions are not trivial, and the Brazilian armed forces put a lot of effort to tackle those issues. There was a specific branch of service, called the health corps (*corpo de saúde*)[98], undertaking this task. Its specific regulation[99], from 1857, created 117 positions for doctors and surgeons and 163 for nurses that would embody the duty of care in the military. Doctors would be officers, with a system of patents starting at second lieutenant (*alferes*) and ending in colonel – which would only be bestowed upon the chief surgeon (*cirurgião mor*) of the Army. Nurses would belong to the enlisted ranks, from privates to first sergeants. The burden could not be light and the financial compensation was modest. As a result, the ministers of war frequently grumbled in their reports of the many unoccupied positions. In 1874, for instance, 40 posts remained open (MINISTÉRIO DA GUERRA, 1874, p. 8-9) – more than one third of the available jobs. As a result, the ministry hired many civilians to take care of the ailing soldiers. The only solution available had unwanted consequences, as noncombatant doctors certainly were not familiarized with the particular needs of the military world.

Hospitals were the main center of activity of the health corps; the absence of a war meant that the services could be stably delivered in fixed facilities. The main one was the Military Hospital of the Court. There were others, such as a provisory institution in Santa Catarina that helped to cope with the extraordinary numbers of wounded in the war. Bahia and Pernambuco had their own hospitals until 1878, when they were converted in nurseries in a wide reform that helped to save large amounts of money for the ministry (MINISTÉRIO DA GUERRA, 1878, p. 36). The other provinces had nurseries as well.

To fully grasp the meaning of this sizeable structure, it is important to know how many people got treated in the health institutions of the armed forces every year. The following figure consolidate these data:

[98] On the health corpus during the Paraguay War, cf. Carlos Leonardo Bahiense da Silva (2012), among others. There are works of the health corps during the war and the first republic, but the exact period I am working with here still lacks analysis.
[99] Decree 1900 of 7 March 1857. https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-1900-7-marco-1857-557890-publicacaooriginal-78632-pe.html

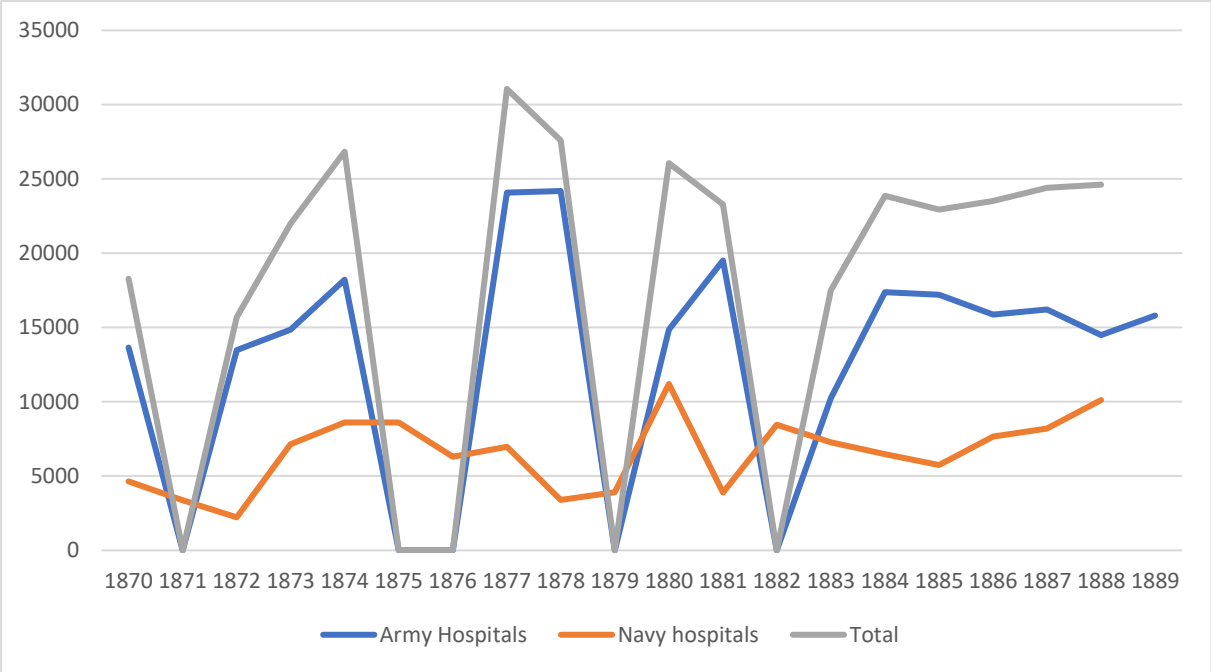

Figure 10 Number of people treated in the hospitals of the army and the navy. Source: reports of the ministries of war and navy.

Regrettably, the information on a few years is lost, but we can nonetheless visualize significant trends. First, there is an upward tendency in the Navy hospital, from around 5 thousand patients in the early 1870s to near 10 thousand in the late 1880s. In the Army, we both begin and end with ca. 15 thousand inmates, but we have an apex of almost 25 thousand by 1877 and 1878.

Those deluging numbers are of little use if seen by themselves. But there is a way to give them meaning: to compare them with the number of soldiers and sailors in service. From the same reports, we can find that the manpower of the Army never rose much above 18 thousand, and the quantity of sailors was restricted to just under 4 thousand in the Navy – at least for the twenty years that we are contemplating. In other words: hospitalizations surpassed the number of soldiers and sailors – sometimes, almost by a factor of two. Though not quite well-funded, military hospitals played a crucial role within the social dynamics of the military: the specific harshness and pains of military life led to more yearly hospitalizations than patients, suggesting that many visited health institutions more than once in a single year.

Another face of the social assistance in the armed forces were the invalids' asylums. The Army's one, the most significant by far, was created in 1868 among the dreadful turmoil of the Paraguay War[100]. The lasting image of a flood of incapacitated soldiers who had caught diseases or lost limbs convinced the authorities to create an institution in the Bom Jesus Island,

[100] On the Invalid's Asylum, the most important work was written by Marcelo Augusto Morais Gomes (2006).

in Rio de Janeiro, to provide care for the former defenders of the fatherland in their distressing days of retirement. Some of them were officers, but the overwhelming majority came from the enlisted rankings. As we can see in the following figure, they formed a significant body in the aftermath of the war, but their numbers dropped significantly in the following years:

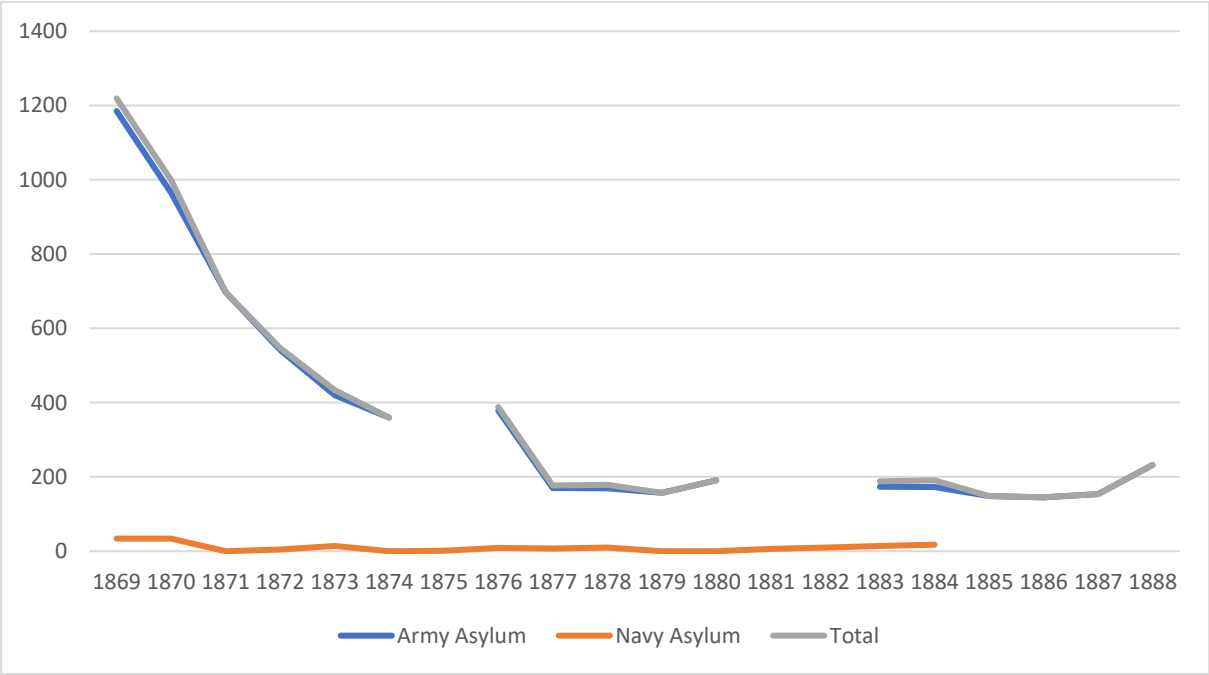

Figure 11 Soldiers in the invalid asylums. Source: reports of the ministries of war and navy.

Not all of the invalids lived inside the institution. They could request a permission to return to their provinces of origin, while keeping their wages and the *etapas*[101], and many chose this option (MINISTÉRIO DA GUERRA, 1870, p. 45). If the former soldiers had a family, they could come to the institution and would be fed by the asylum[102].

This organization stimulated the charitable sentiments of many, including the emperor Pedro II himself; some businessman in Rio de Janeiro even created an association to financially support the asylum[103], and they even bought the terrain in which the buildings that would house the institution were constructed (MINISTÉRIO DA GUERRA, 1879). To curb the high rates of illiteracy among the interns, an elementary school was attached to the facilities, but it would be quickly closed, for soldiers were deemed too old to learn how to read (MINISTÉRIO DA GUERRA, 1880, p. 27). The mistrust in the former heroes of the nation was palpable, as the ministry waged an effort to close all taverns within the limits of the island, for they provided a vicious distraction for the invalids, which were not particularly known for their discipline (MINISTÉRIO DA GUERRA, 1875, p. 52). This regarding the Army; the Navy asylum was

[101] Food allowances, as I will clarify later.
[102] All those details are in the instructions for the asylum of 21 April 1867.
[103] Its statutes were approved by the decree 3904 of 3 July 1867.

rather small and was housed in other institutions, lacking a comparable complex and nuanced journey.

I will not extend myself in this complex tale of disregard and rejection of the former fighters, as the adversities of the asylum and its manifold relation with the society have already been chronicled (GOMES, 2006). The fundamental message I would like to deliver is that a complex network of institutions existed within the Army and the Navy providing health care and was constantly present in the everyday life of the soldiers but did not consume much of the budget of the military ministries.

3.3 – A path for the youth: companies and schools of apprentices, regimental schools and the role of the armed forces in the education of poor juveniles

Not only the old and the suffering got the attention of the armed forces: on the opposite end of life, the youth also captured the interest of military leaders. The imperiled younger generation had few alternatives to escape the ordeals of poverty; but both the Army and the Navy, aware of this situation, developed a complex network of institutions destined to provide education for the most marginalized children and adolescents – and, of course, a disciplined workforce for the military.

Throughout the 19th century, a multilayered system of youth institutions developed with multiple functions. Since 1818, the Army accepted in its arsenals children between 8 and 12 years with underprivileged background that could be educated at the costs of the Army and would learn a profession by crafting guns, gunpowder and other war equipment for the Army. They were fed, received wages and got much better live perspectives than it would otherwise be possible if they stayed with their families. The main regulation governing those institutions was the decree 133 of 3 January 1842, which established that arsenals would receive abandoned and indigent orphans, or the children whose parents were not able to take care of them. They were meant to later join the Companies of Military Workers (*companhias de operários militares*) after their coming of age; for those unable to pursue such a career, the army established the Deposit of Apprentice Gunners (*depósito de aprendizes artilheiros*), responsible to prepare future soldiers and sergeants for the artillery of the Army. In 1885, its name was changed to School of Apprentice Gunners, and it received a new regulation[104]; pupils received military instructions and studied reading and writing, math and religious doctrine.

[104] Decree nº 9.367 of 31 January 1885.

In 1876[105], even provinces that did not have an army arsenal could create companies of minor apprentices, and two were erected in Minas Gerais[106] and Goiás. They would harbor not only orphans, but also the sons of enlisted soldiers. Infants learned how to read and count, investigated history, music and gymnastics, and were groomed into the military world. They had a nursery at their disposal and proper accommodations. Quite a change of destiny for those whose perspectives were barely to survive in the absence of opportunities, or even of family.

As Adler Homero Fonseca de Castro (2016) proposes, those institutions show that the military administration had developed a kind of social preoccupation. Despite the obvious interest of military administrators in instructing youngsters in the crafts of the arms, the minor apprentices they educated entailed high costs that could be not simply justified by plain economic rationality. There must be more: the Army and the Navy must have been attentive to the needs of some of the most marginalized groups in society, and intended to save them from idleness (MINISTÉRIO DA GUERRA, 1872, pp. 37-38). But a smaller correlation with the more stringent goals of the armed forces meant that in challenging times, this sort of activity would be among the first to suffer. This is visible in the next figure, which depicts the number of youngsters trusted to the social-educational institutions of the Army and the Navy:

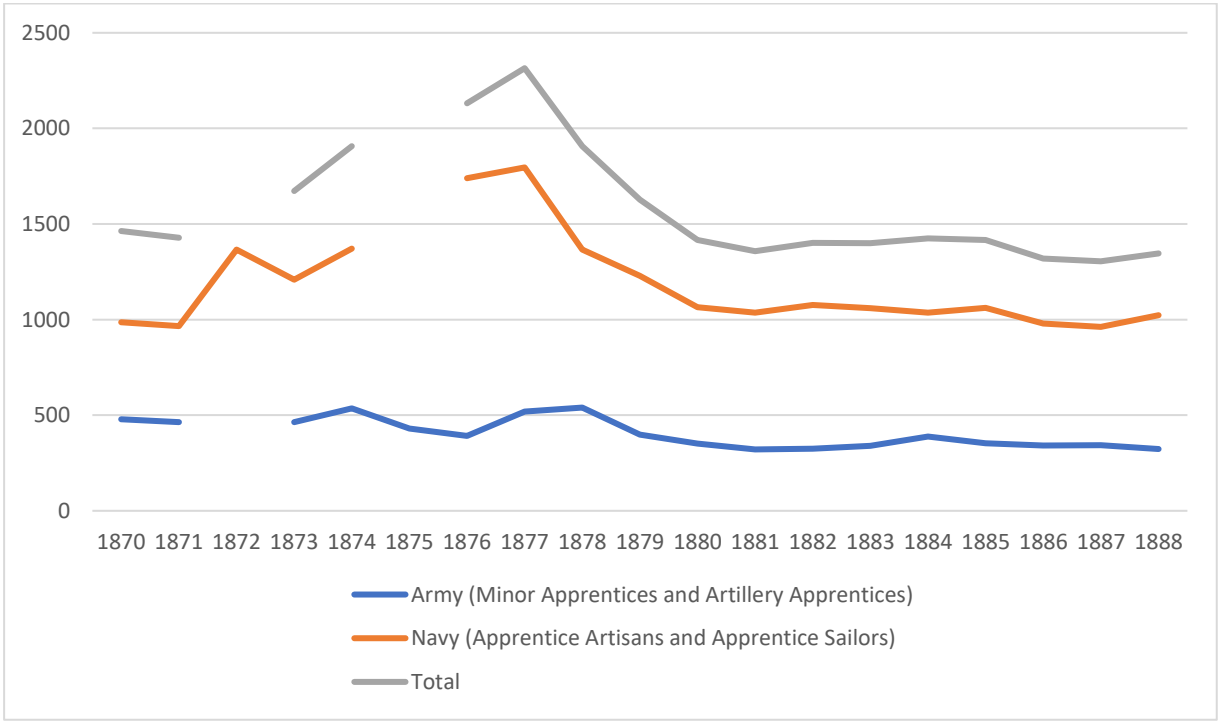

Figure 12 Number of youngsters assisted in the socio-educational institutions of the army and the navy.

[105] Decree nº 6.304 of 12 September 1876.
[106] This company was studied by Felipe Osvaldo Guimarães (2014).

The figures steadily increase until 1878, when all ministries had to cut their budgets due to economic hardships. The apprentices were hit hard, and in three years their numbers dip by almost a third. The ministry even suggested that this sort of institution would be functioning better if it was transferred to civilian administrators (MINISTÉRIO DA GUERRA, 1878, p. 24).

Nevertheless, the apprentices were much appreciated. For a minister of war, they could provide a safe harbor for the children recently freed by the free womb law (MINISTÉRIO DA GUERRA, 1874, p. 6); this was even one of the reasons why companies of apprentices were established in provinces that did not have any army arsenals (MINISTÉRIO DA GUERRA, 1877, p. 21-22). And the Army got its rewards from these initiatives too. In addition to the many enlisted personnel that came out of the Deposit of Apprentice Gunners, more than 40 officers had been delivered by them in 1882 (MINISTÉRIO DA GUERRA, 1882, p. 23); by 1888, 45 had even reached the Military Schools, and two had become engineers – a tantalizing achievement for former members of the lowest layers of society. Confronted with these results, the Army became aware that deposits served a double purpose, as both an institution of "social purposes" and an "incubator of enlisted personnel" (MINISTÉRIO DA GUERRA, 1887, p. 17).

Ambivalence was the tone in the Army; less so in the Navy. Sure, the Companies of Apprentice Sailors[107] also granted some social care: they were "the incubators of the imperial sailors, satisfyingly substitutes of the recruited seamen, and asylum and school of the underprivileged infancy (…). Humanity will honor with its development the educational institutions or establishment of professional education in which orphans forgotten by fortune find a decent and honest occupation" (MINISTÉRIO DA MARINHA, 1871, p. 15)[108]. But the specific necessities of the recruitment were much more pressing in the Navy than in the Army. Unlike the land, the sea is not a familiar companion of most youngsters: future sailors must be accustomed to the harsh environment onboard and taught in every detail on how to manage a ship. Any man walking on the street can be put in a barrack and be quickly taught how to handle a gun and patrol a building, but only those with previous experience working aboard a vessel can be satisfyingly deployed in a battleship and perform the required duties. The merchant Navy should provide the recruits for the warships, but the commercial fleet was underdeveloped in

[107] There are many studies on each of the individual companies scattered over the Brazilian coast. For a general overview, cf. Wagner Luis Bueno dos Santos (2014).

[108] "Essas companhias [de aprendizes marinheiros] são o viveiro do corpo de imperiais marinheiros, que substituem com vantagem a maruja recrutada, e o asilo e escola da infância desvalida (...). A humanidade receberá seu preito de homenagem com o desenvolvimento de instituições de ensino, ou de estabelecimentos de educação profissional, em que os órfãos e menores, desamparados da fortuna, encontrem abrigo e ocupação decente e honrosa".

Brazil: the apprentice sailors were the only group of people giving true hope to the Brazilian naval ambitions (MINISTÉRIO DA MARINHA, 1873, p. 8). As a valued asset, the government maintained 18 companies in 1879, which provided most of the future workforce of the Navy; the number of apprentices hovered around one thousand, nearly one third of the total numbers of sailors in active service.

A ruthless life waited the young sailors on the sea, though. Therefore, many parents hesitated before giving their sons to the Navy (MINISTÉRIO DA MARINHA, 1875, p. 18). By the end of the 1870s, there were less than two thousand apprentices on duty, while the law authorized three thousand. Many companies operated under their capacity, elevating their costs; this prompted some ministers to suggest that some of them should be fused to cut costs (MINISTÉRIO DA MARINHA, 1878, p. 19). A reform was in order, since they were not even giving the number of sailors needed by the navy (MINISTÉRIO DA MARINHA, 1880, p. 11), and their decadence was conspicuous. Hoping for a better administration, the number of companies was reduced to 12 in 1884[109]. Probably an ill-fated idea, as only three years later the minister of the Navy attributed to this suppression the difficulties to find more sailors (MINISTÉRIO DA MARINHA, 1887, p. 16).

The complex ways the Army and the Navy had to found to get better trained personnel opened an alternative for the underprivileged in imperial Brazil. Dominated by prejudice and slavery, this society could give a merciless treatment to many of its members; the life of war could be an interesting opportunity for those who did not have much choice. Aware of this situation, the two forces tried to attract the impoverished through social assistance. A fragile one, as we saw. But a remarkable initiative.

3.4 – A greedy treasury faces vast suffering: final remarks

An original experiment in a singular laboratory: the trajectory of the "social activity" in the armed forces must be linked to the unique position of the Army and the Navy within the Brazilian administrative system of the 19th century. Being one of the few institutions covering the bulk of the imperial territory, the public force was able to get to the vicinity of the underprivileged. Its social activity, especially in the Deposits, schools and other institutions for apprentices could provide a special path for those who had a narrow set of options in life.

[109] Decree 9371 of 14 February 1885.

The two forces diverged in their approach, however. The Army was less elitist– and more vast, too. For future officers, it provided financial security in the military schools; for the enlisted ranks, the Deposit of Apprentice Gunners and the Companies of Military Apprentices were able to teach a profession for the most imperiled children. The Navy established an implicitly higher financial threshold for those willing to join the Naval School, and the system of apprentice sailors was pressed by a different logic, as recruitment was more reliant on them rather than on the civil society at large, as was the case with the army. Anyhow, both forces erected a stable system that remarkably and intriguingly combined self-interest and social assistance. This is what I had called the "social activity" of the public forces – a group of services crucial to a number of people plagued by hardship in a landscape that did not already know such things as social rights. I did not intent to explore the daily functioning of those institutions – otherwise, I would be writing an administrative history of the military ministries, which is not my intention. I intended to highlight the social significance of certain activities of the Army and what they could say about the prevailing mentality in the general society on the meaning of social assistance and the place of the Army and the Navy in the national community. The building of a complex, though sometimes modest protective network can give crucial insights of what the army *meant* for society beyond the brutal infighting of the battlefield.

Finally, we must avoid the temptation of seeing in such practices *social rights*. Most of them are still linked to the idea of charity, a religious virtue, and are therefore seen as a gratuitous grant. Moreover, they are frequently entangled with self-serving ends: the state financed the companies of minor apprentices not only to save the orphaned youth, but also to prepare a workforce that would be useful for the Navy in the future: we do not talk of rights of citizens, but of a very convenient charity from the state. However, these practices, and especially their expansion point to paths that would be taken in the future: they are forms of *collective public* charity, contrasting with the premises of liberal society, that favored private charity (BIGOT, YONCOURT, 2014, p. 312-315).

Significant as they may be from a historical point of view, those activities always remained a secondary dimension of the public forces and, as a consequence, its budgetary significance was not one of the highest. The – relative - underfinancing of the armed forces in the aftermath of the Paraguayan War meant that the administrators did not have much room to invest in activities that did not provide much advantage to the soldiers – and, especially, to the officers. Small wages prompted constant complaints both in the press and within the engines of the administrative structure.

Officers in the Army and the Navy worried about their financial present, and mostly, about their futures. The protection of the days to come, which law names as social security, is the theme of the next chapter.

Chapter 4

The dignity of widows and the miseries of heroes: creation and reform of military social security (*previdência social*)

She had never been so far away from home. Yet, even in the midst of a war, there are a few habits that cannot be lost. No, not habits: duties. Habits are made of inconscient repetition, but she was very sure of what she was doing. It was 2 July, and more than 3 thousand kilometers away, in her hometown of Cachoeira, people were celebrating. In fact, the whole state of Bahia was rejoicing in that very moment. Brazilians often forget that a war was fought to secure its independence, but in Bahia, where the fiercest battles claimed their fair share of lives in 1822 and 1823, the people could not be neglectful. No matter wherever they were, they must celebrate. Just as Anna Nery was about to do in Corrientes, Argentina – remembering a victory while fighting a war.

Nationalist celebrations cancel time and bring the glorious past back into a possibly infamous present: the power of memory, that to turn every single 2 July into that 2 July of 1823 full of delight and honor. But this was no ordinary July in 1868; Anna Nery could not ignore that her loved Bahian coasts had been substituted by the less dazzling Paraguayan and Argentinian *Chaco*. Yet, her mind, just like those of fellow celebrants, was not focused on the landscape, or even of past victories, but on the future ones: less than 100 kilometers up the rivers Paraná and Paraguay, one of the fiercest battles of the Paraguayan War was being fought: the siege of Humaitá. Anna Nery had followed two of her sons and her brother João Maurício to the *front*: the widow of a naval officer, she understood her duties as part of the military family. Now, she was about to host a party in her Argentinian house; after all, boosting morale is one of the most critical tasks of a leader.

The night had come and everything was in order. The imperial coat of arms was illuminated; an abundance of flowers in the house gave the must needed glimpse of a world where the horrors of war have no place. The portrait of the emperor, sided by blue satin, set the tone: more than fun, this was about duty and service to the nation. At 11 p.m., the national anthem played to the stiff eyes of everyone there and to their silent mouths – nobody could sing the lyrics that would be composed decades latter. Afterwards, the dance begun. After three hours, the guests came to the table for the banquet. There was wine, there was food, there were speeches. A lot of them. From Brazilians and Argentinians, both saluting each other, looking

forward for their alliance and despising the Paraguayan enemy. Even Emilio Mitre, a general and brother of the Argentinian president, was there, saluting the emperor.

Anna Nery must have been exhausted the following day. She was also a nurse, and was working hard on the *front* to take care of the many wounded. A party could be a blessing that would put her mind away from the war, but for a woman 54 years old, any physical effort could be distressing. But there would be more. On 4 July, she offered another banquet to general Mitre. On the 9th, anniversary of the swearing of the constitution, a *te-deum* was organized. Corrientes suffered no shortage of parties[110].

Humaitá would surrender a few weeks later, on 25 July, but Anna Nery would get no rest: the warfare continued until the beginning of 1870. A nurse and an entertainer, she was in much better position than most of the soldiers entrenched in the South-American *chaco*. But an ageing woman as she was must have been longing for some rest. She had no right to receive a pension. But few had. Many soldiers were receiving rewards for their services. Could she, even being a woman, secure something for her and her family?

Social security was just a dream for most people in the late 19th century: while the first systems of social protection were being born in Europe[111], Brazil would have to wait until de 1930s to get true pensions systems; most people could only get their help from private associations of mutual help[112]. In certain circumstances, not even war heroes would get pensions. But the unique characteristics of the military meant that the state developed a supporting structure that was supposed to take care of them in advanced age or in challenging times. After all, the empire could not forget its heroes – or, at least, it could not let the public opinion think that it was doing so.

As we shall see, "military personnel" is too generic a category to explain adequately who could get the military social security and why. Many other social positions must be called into action to help us understand the intricate structure of Brazilian social aid. Officers, enlisted ranks and generals; wounded in the war, reformed by age and the rest; soldier and his family; mothers and wives: sometimes unimaginable separations are made in the baroque system that was supposed to help soldiers after their physical vigor had fallen to the past. Gender and race also added their share of complexity to an already sophisticated figure. And, nevertheless, we will also deal with a comparably tricky wage system. In this chapter, we will understand how

[110] Must of the facts here described come from: *Jornal do Commércio*, 25 de julho de 1868. http://memoria.bn.br/DocReader/364568_05/14093

[111] On the history of social law, particularly in Germany, cf. Michael Stolleis (2014).

[112] On a general introduction to the debates on mutualism in early 19th and late 20th century Brazil, cf. Cláudio Batalha (2010).

social security was structure for military employees of the state long before traditional pensions systems were born, and how they bounced between "right" and "social activity". In this changing environment state support was never a given. It never came by easily.

No wonder that Anna Nery was worried.

4.1 – The labyrinth of laws: military salaries (*vencimentos*)

It would be an oversimplification to merely call "salary" the intricate complex of monetary parcels that military personnel received as compensation for their services. And yet, this is the word I will be using. It is not easy to translate 19th-century-Portuguese terms that do not exist anymore and refer only to administrative realities of that very specific time and place. So, I will couple the English translation[113] with the Portuguese original, for the sake of precision[114]. In this section, we will be not only dealing with words, but with the complex administrative realities they conveyed: how and why soldiers were paid. Boring? Maybe. But this seemingly dull exercise is indispensable: if we do not understand the myriad of names by which each part of the salary was called, we cannot grasp how much money soldiers received and the significance of their salaries respective to the Brazilian reality. But, most important for the sake of this specific chapter, we would not be able to understand whether widows were well endowed or suffered financially in their last years.

And we start with salaries (*vencimentos*).

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[113] My translations are roughly based on the contemporary terminology of the US Army, available at https://www.goarmy.com/benefits/money.html. They could provide an approximative translation, though the words used unfortunately lose the archaic, mysterious air they retain in Portuguese, as most of them are not employed anymore in the everyday language with those meanings. I also took some liberty, especially when dealing with concepts that do not exist in the contemporary US army – and, eventually, not even in the Brazilian army. For instance, there are no more payments to help buying horses and mules, Moreover, the categories in with both armies divided the types of payment are quite different. The US army has, beyond the basic pay, the allowances, which cover some general costs of the everyday life of the employee (housing, clothing etc) and the special pays, which reward certain skills of the soldiers (languages, special duty, flight abilities etc). The Brazilian army, otherwise, beyond the basic pay, divided the special payments (*vantagens*) into general and special advantages. The former had the same value for everyone with the same patent; the latter varied according to the function given to the office. Since the criterium for grouping the type of payment was different, I decided also to use different words to translate the Brazilian concept: instead of special payments, I use advantages, which do not have this exact meaning in English, but is a literal translation of the Portuguese word. Anyhow, *vantagem* also do not evoke this exact meaning in current Portuguese; this is one of those words that have a special legal meaning apart from the general use. Therefore, the unusual employment of the English word helps to convey the sense of estrangement that is clear in Portuguese.

[114] The translations I chose are: Basic pay (*soldo*). Food allowance (*etapa*). Additional pay (*gratificação adicional*). One-third of the basic pay in campaign (*terça parte do soldo em campanha*). Comission pay (*comissões ou gratificações correspondentes ao exercício de funções privativas*). Horse food allowance (*forragem de cavalgadura*). Searvant allowance (*gratificação para aluguel de criado*). Horse buying allowance (*compra e remonta de cavalgaduras*). Travel reinbursement (*ajuda de custo*).

The whole of what a soldier or an officer received for his work was named as *vencimentos*. But they were not determined by a single measure, one criterium and much less by a unique value; they were made by many parcels, each one with a particular meaning – and, of course, with its due number of regulations. But, for the sake of simplicity, the body of normative regulations of the salaries was compiled into a single document, the instructions of 8 January 1887[115]. Or "simplicity" only to the point that a 48-page long document can be called simple. Anyhow, the wages were made of up to nine parts, that could be grouped in four types. The most important was the basic pay (*soldo*), which was the actual salary that the employee received just for being a part of the military. There were also the general advantages (*vantagens gerais*), roughly tied to the patent held by the employee, and the special advantages (*vantagens especiais*), approximately linked to the function the officer or soldier had.

We will analyze some of them. First, we shall begin by the basic pay (*soldo*).

Most parts of the salary were entangled in almost esoteric technicalities, accessible only to lawyers. Not the basic pay. The main part of the military salary was seen as the channel through which the nation showed how well it valued the services of the Army and the Navy. In other words, this was a highly political issue. From the early 1850s, there had not been any adjustments in their values, but right after the Paraguay war, in 1873, the General Assembly begun to discuss what would later become the legislative decree 2105 of 8 February 1873[116], the last payment increase in the empire. The increase would only be implemented in 1888, though. Anyhow, in the parliamentary debates, important issues were discussed: the reasons of a pay increase, the role of the veterans and finally, the actual values of the basic pay of both soldiers and officers. A brief look into those discussions will help us to better understand the mentality lying on the basis of military salaries.

Soldiers were poorly paid – most deputies and senators that spoke agreed on that. They "receive meager salaries that do not correspond to the true needs of those much-sacrificed classes" (CD, 1873, 2, 124); soldiers received a "petty" (*mesquinho*) pay (SI, 1873, 1, 146). But what should be the base of the new payments?

For the Duke of Caxias, the new basic pay must be mostly a reward for services, especially after the Paraguayan War. There was a "debt of honor" (SI, 1873, 1, 144) in play.

[115] Approved by the decree 9697 of the same date.

[116] Legislative path: 1st discussion at the Chamber of Deputies: 28 December 1872; 2nd discussion at the CD: 31 December 1872; printing for the 3rd discussion: 7 January 1873; 3rd discussion at CD: 11 January 1873; voting at the CD: 13 January 1873; arrival at the Imperial Senate: 16 January 1873; opinion of the committees of Navy and War and Economy: 17 January 1873; 2nd discussion in the senate 21 and 22 January 1873; 3rd discussion in the Senate: 23 and 24 January 1873; discussion of amendment: 25 January 1873; sending of amendments to the CD: 27 January 1873; approval by the CD: 21 January 1873.

For this reason, the adjustment should be extended to the veterans, since they were the most involved in combat. They were more fragilized by the harshness of advanced age, and should receive more attention from the fatherland. The Viscount of Niterói had a similar approach: the reform of a veteran could only come when he was incapacitated and therefore vulnerable; to deny the much-needed aid for men in such a condition would be ultimate cruelty (SI, 1873, 1, 148). This interpretation cannot be seen with surprise, since Caxias was an army officer himself and acted as commander-in-chief of the allied forces during the war – in a certain sense, he was ultimately talking about himself.

Others provided different explanations. The Baron of Cotegipe, for instance, thought that the salaries should be devised for the future, and not for the past. The rewards should be "paid through other means, such as pensions or the safe-locker of the graces" (SI, 1873, 1, 147). It was Cotegipe himself that proposed that the pay increase should not be allowed for the veterans before being in force for two years for the regular army. Some on his side even thought that such an increase could stimulate the retirement of many officers, something that could wreak havoc on the imperial finances. The Viscount of Paranaguá disagreed, as he thought that the income of veterans was much smaller than the one of active officers, since their salaries were made only of the basic pay (SI, 1873, 1, 146).

This sort of disagreement reflected overall attitudes towards the military classes, that were condensed in an altercation between Caxias and Cotegipe themselves. The baron revealed to have a wary attitude towards the armed forces: for him, the military class was "fearful [*temível*], I say, because it is not in the same position of every other citizen", since it controlled the force. In a bite of irony, he even stated that "I, gentlemen, do greatly enjoy to discuss with those not carrying a sword; with swords, I do not know how to argue" (SI, 1873, 1, 147). The not-so-subtle insinuation certainly instilled anger in the sensitive pride of an officer like Caxias; he walked over to the tribune to answer: the military class could only be "fearful for the enemies of the fatherland" (SI, 1873, 1, 147). The Army could rest, as it had a trustworthy defender in the Assembly.

Not everyone was engaged in such principled but gruesome quarrels. The much more pragmatic senator Saraiva preferred to insist in the legislative context. The debate on the new salaries should be coupled with the one on the much-awaited recruitment law, which was under discussion at the exact same time. This other reform was being prepared to create a fresh Army, not reliant on the forced recruitment. The new soldiers must not be impelled to the barracks by the swords of their future colleagues, but generously attracted by the promises of better salaries. This would be the only way to foster this new model, which relied mostly on voluntary service

and only if needed on the military lottery. But it would be hard to achieve those ambitious intentions with the "insignificant" wages of 120 *réis* a day that were under discussion; the same was valid for the "demeaning punishments" that were still in place (SI, 1873, 1, 109). We shall speak latter of the physical penalties in the army; for now, it suffices to understand that Saraiva claimed for wide changing in the Army: "to consider the situation only through the lenses of salaries, without pondering how those salaries should be established to attract volunteers, seems to me like an omission" (SI, 1873, 1, 110). There must be a difference in pay in order to make recruits and officers want to progress through the career, this was sure; but the situation of enlisted soldiers must be enhanced; something the project had foregone (SI, 1873, 1, 110).

Both deputies and senators kept revolving a lot around those issues. The complaints on the meagerness of salaries kept raging; officers should also receive better pays, as they must have means to maintain their "social positions" (CD, 1873, 1, 229). As the Viscount of Paranaguá said, "the military class acquiesces with its natural position, which is honorable poverty; what we must not tolerate is to thrust into misery those who sacrificed their own blood for the fatherland" (SI, 1873, 1, 150).

Drama apart, the General Assembly approved a modest, though important increase in the basic pay of all patents. They were distributed as follows:

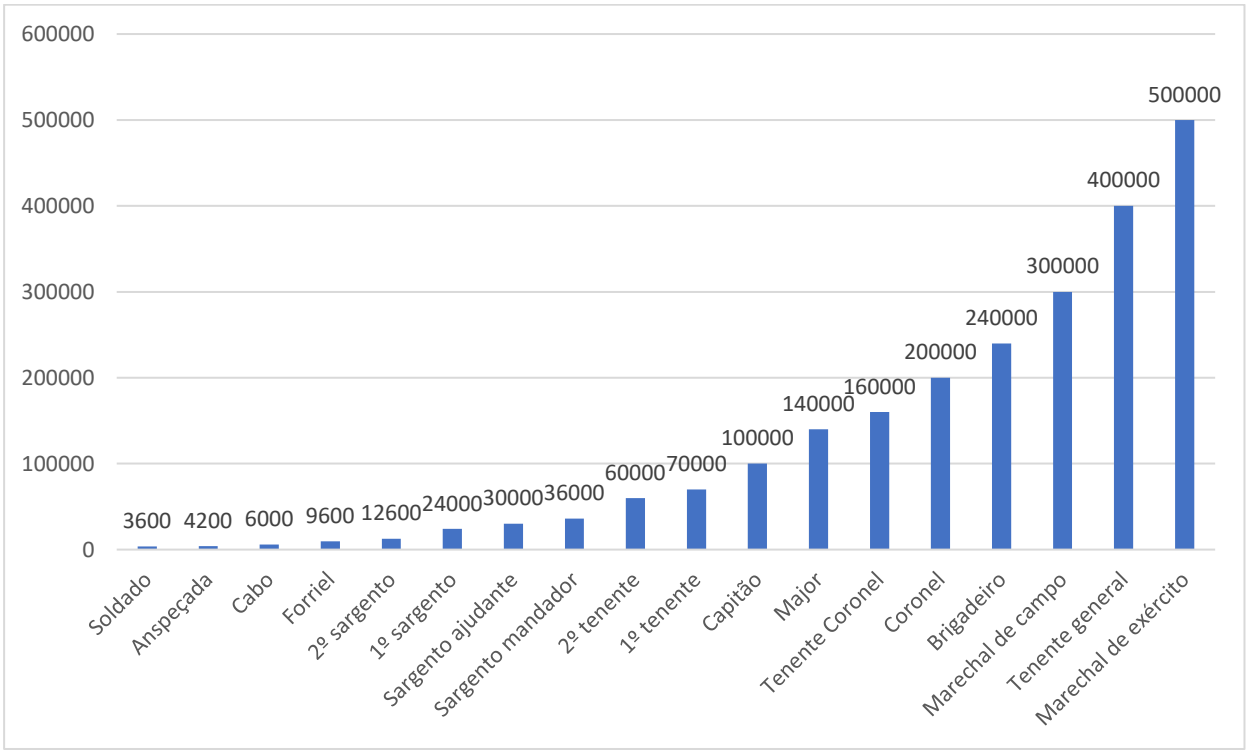

*Figure 13 Monthly basic pay (*Soldo*) according to each patent in the legislative decree f 8 February 1873*[117].

[117] When more than one position with similar responsibilities has the same pay, I omitted it. When the different arms had different salaries, I used the values of the artillery. In the law, the payments are monthly for the officers

The basic pay was the most important part of the salary, but not the sole one.

The first of the "general advantages" (*vantagens gerais*) was the "additional pay", whose value ranged from 10$000 for a lieutenant to 50$000 of a marshal; enlisted rankings did not have right to it. It was due to those on the service on the Army. Another role played by this second parcel was to stimulate officers to render their services in distant provinces: those deployed to Mato Grosso or Amazonas would receive the additional in double (art. 17 of the 8 January 1887 instructions). The newspaper Military Tribune (*Tribuna Militar*) published an article[118] in 1881 claiming that this payment was envisioned by the Duke of Caxias to compensate for the small values of the salaries, which remained in an unsatisfactorily level after the 1873 increase. But the additional pay did not make much sense, as it rewarded the service of the Army, which was already being compensated by the commission pay. They suggested that it should be incorporated into the food allowance (*etapa*), a move that would simplify the payments.

Speaking of which, the food allowance (*etapa*) was precisely the third kind of payment made by the army to its employees. It was due every to officer according not only to his patent, but also to the military commission he was invested into. Its value ranged from 1$000 to 8$600 – but for those who were not generals, the values would not pass 2$600.

The commission pay (in the law, *gratificação de exercício*, but informally *comissões*) was the compensation for the specific job performed by the officer or soldier: the fortress he commanded, the department he directed, the responsibilities he had. If the basic pay retributed being, that is, the fact that the soldier was a soldier, the commission pay retributed doing: if a soldier had no position, he would receive only his basic pay, but if he was actually employed in the Army, he would receive a commission pay proportional to the importance of his function. As such, this parcel was governed by a long table comprising a complex range of values corresponding to the several positions within the Army and the ranks that could occupy them. The commission pay was much important in the composition of the salary, probably second only to the basic pay. Being such, the government and the superiors could manipulate how much someone earned by moving him up or down the different positions his patent allowed. For instance, a lieutenant could received from 10$000 for being a simple secretary, up to 100$000, if he took part in an engineer commission; his basic pay was 60$000. A colonel could

and daily for the enlisted ranks; I therefore multiplied the values of soldier's salaries by 30. The law does not explicit mention this, but I could deduce it from the following citation: Quando se considera o soldo de 110 rs. e de 120 rs. diarios para o soldado e de 60$ por mez para o alferes, 70$ para o tenente e assim por diante até o marechal do exercito" (SI, 1873, 1, 150).

[118] *Tribuna militar*, 4 de agosto de 1881. http://memoria.bn.br/docreader/393673/35.

receive from 40$000 to a 130$000: a variation of 90$000, almost half of his basic pay of 200$000. Friends could be rewarded and inconvenient colleagues could be punished by clever commanders with a good understanding of the tables governing pay.

The other parts of the salary are less important, but still worth mention. The fifth one was the horse allowances (*forragem*), meant to provide the means necessary to support a horse. Values varied according to the commission and patent. A lieutenant could receive as less as $800 a day, but the army commander would receive 9$800 – more than the basic pay of a colonel. His horses must have been quite special. The sixth part, called horse buying allowance (*cavalgadura*), as the name said, compensated for the buying of horses and mules. The seventh part was the servant allowance, due to every officer. It could amount to 20$000 or 25$000 in the capital and 15$000 or 20$000 in the provinces. This means that the lowest-positioned lieutenant could hire a servant that would receive more than a 2nd sergeant; the army, in the end, only reproduced social hierarchies. The eight fraction of payment was the travel reimbursements (*ajudas de custo*), which is quite self-explanatory[119].

The overview I have just sketched provides the general picture; I spared the reader of the sometimes-exasperating details the regulations often go through. The focus should stay in other aspects. First, we can see that the military salary was a complex issue, made of many different parts; which ones you choose as reference could mean the difference between a sizeable amount of money and a neglectable quantity. Second, salaries of officers were much more substantial than those of enlisted personnel. The latter were hardly granted anything beyond their basic pay and food allowances; the former, on the other hand, sometimes received allowances or commission pays higher than the full salaries of soldiers. Third, the remarkable differences between the various commission pays and the existence of the additional pay meant that there was much room for the salaries of officers to be manipulated, as the distance between a well-regarded commission and a less beloved one could mean sizable differences in the final salary– let alone the situation of officers completely out of commissions.

Those details meant a lot for the livelihood of officers. But they were also crucial after their deaths: this is a part of the history of military pensions – precisely the theme of the next pages.

[119] The article 2 of the instructions mention a nineth portion of the salary: the one-third of the basic pay in campaign (*terça parte do soldo em campanha*). This one, however, did not receive an autonomous chapter in the regulation.

4.2 – Pious widows and faithful sons: the law of half-basic payment (*lei do meio-soldo*) of 6 November 1827

Death lurks behind every step of the military life. From the direct confrontation of the enemy to the inherent risks of manipulating gunpowder, soldiers must constantly face the possibility of passing away. This would be a problem by itself for a single man; the drama, however, could increase exponentially for those married and with offspring. This is why the Brazilian General Assembly voted a law in the very beginning of the Brazilian parliamentary activities: the law of the half basic pay (*lei do meio-soldo*) of 6 November 1827[120]. Just a year after a functional legislative branch began to work in Brazil, less than three months after the first law schools were founded, both deputies and senators were contemplating the destinies of widows and orphans of soldiers[121]. Three issues dominated the deliberations: the nature of the law (justice or grace), the relationship between the half basic pay and the *montepio* and finally who should receive the payments. The last topic will be dealt only tentatively here, as I will treat it more thoroughly in a future section.

The name of the law suggests its aim: it left half of the basic pay of officers to their heirs after their death. Two crucial pieces of information, then: first, at stake, was the income of former wives of officers, and not of enlisted personnel. Second: the calculus would be made with the basic pay as basis, and not with the whole salary, which means that the half-basic pay would be a fraction of what amount to effectively less than half of the wages officers received in life; the pensions going to widows, therefore, amounted at best to less thana quarter of what her husband received originally.

Why pay people that do not work for the state? This cold-blooded, even heartless question was not out of the radar in the early 19th century. The concept of social rights made such a question senseless for us today: we surely would answer with human dignity (*dignidade da pessoa humana*), the principle of solidarity or any other constitutional concept. But almost 200 years ago, more than one path could be chosen and the justifications that seem so obvious

[120] Legislative path: presentation of the first version of the project by the sections of war and economy at the Chamber of Deputies: 5 July 1826; 1st discussion at the CD: 11 July 1826; 2nd discussion at the CD: 21 July, 9, 14 and 18 August 1826; reading of the definitive version of the project at the CD: 4 September 1826; 3rd discussion at the CD: 15 may 1827; approval of the final writing and sending to the Senate: 19 June 1827; arrival at the Senate and reading: 23 June 1827; 2nd discussion at the Senate: 3 and 4 August 1827; 3rd discussion at the Senate: 3 and 4 September 1827; sending of the project with amendments to the CD: 24 September 1827; discussion at the Chamber of the Senate's amendments: 1st October 1827; sending of the project for the sanction od the emperor: 8 October 1827.

[121] Marconni Cordeiro Marotta (2019, p. 86-117) has discussed the parliamentary debates of the law, though in a much more descriptive way.

to us today were not granted. Why put into motion the social activity for people that did not and could not serve the state directly?

We shall start with the distinction between *montepio* and the half basic pay. This is not a mere innovative choice of mine, but this is exactly where the debates started in the Chamber of Deputies: in that distant 5 July 1826, the committees of War and Economy presented the project of the future law of 6 November 1827, and suggested that it should only be in force until a *montepio* was created. What was the difference? The *montepio* was an association managing an estate built through the contributions of the associates throughout the years; when one of them died, their families could receive a pension. The half basic pay, on the other side, would be a payment made to the widows and daughters independently of previous contribution. Or, as the Chamber described, "the earning of the *montepio's* aids is not due to a *mercê* or grace, it is founded upon the justice of a contract to which the statute only gives authenticity and public authority" (CD, 1826, 3, pp. 49). Since 1790, the Navy had a *montepio* of its own, but the Army officers lacked a similar privilege. The creation of such an institution for the land forces, however, would not solve all problems, as the already deceased officers did not contribute to any institution, and their families would not be entitled to any sort of payment. Many of those forgotten women were already petitioning to the general assembly for a gracious half payment; but a systematic issue must not be dealt in a case-by-case fashion: a single, strong law must be formed to ensure that everyone would be treated equally.

The possible justifications for the project seemed endless. For the commission that wrote the project, it was a matter of "national honor" (CD, 1826, 3, pp. 48-49). Many claimed this discussion was ultimately about justice: if the "nation needs soldiers, it must as a matter of justice" support its officers "and their wives and daughters in helplessness"; this would be even more true as one remembered that the military personnel were frequently "forced to embrace this lifestyle" after being submitted to a "violent recruitment" (CD, 1826, 3, pp. 49). Others associated the half basic pay with a gracious concession of the government. Lino Coutinho, for instance, disagreed with Cunha Mattos, who said the project was the due payment of the services of the military; according to Coutinho, "in this issue of *montepio*, as it has been until today, the government losses everything and the military wins it all", as the income was far below the expenditures (CD, 1826, 3, pp. 133). Some suggested pragmatic approaches. One that was frequently employed and was remembered by deputy Almeida e Albuquerque retained that such payments were meant to stimulate the military to fight more bravely, as their hearts would be serene with a death in battle if they knew their families would be assisted after they were gone (CD, 1826, 4, pp. 92).

This long list of justifications is a strong signal of instability lack of consensus – or perhaps, coherence - in the cultural landscape of the Brazilian political elite. And it could hardly be otherwise. The *Ancien Regime* that was being left behind was based on the logic of graces, in the *economia das mercês*[122]; that is to say, there was no economic bond between the State and the citizens: every service was regarded as a generous offer to the crown, destined to reinforce the bond with the sovereign. As prestation and reward were not submitted to an economic logic, they must not be of equal nature, and the king, regarded as a magnanimous father, would give premiums to his subjects in order not only to reward service, but also to stimulate more offers. Liberalism intended to tear this structure down. The king would be submitted to the constitution and every aspect of the state life must strictly follow the law. Labor followed strict compensation: no room was left for personal bonds between citizen and sovereign. Since the 1824 constitution, this was the path chosen by Brazil.

Changes do not happen instantly, though. There was sometimes chasm, and sometimes entanglement between the two understandings, seeing pensions as grace and as law/justice. And the Chamber of Deputies was well aware of what was at stake. Deputies said, for instance, that "even though the duty to justice is great reason", the project should be considered under a particular reason of "national convenience": "in the old, despotic government from which we departed, the concession of the half basic pay to particular widows was the object of grace and mere convenience" that did not help everyone in need, but reached only some. Now, under the constitutional regime "where the government cannot manage in such a way the national money due to our representative system, no one gets aid" (CD, 1826, 3, pp. 49): such a distortion would induce people to think that the previous regime was better than the new one. Therefore, order should be put to the pensions systems in those difficult times of transition to not make Brazil look like an administrative mess incapable of looking after its citizens.

As it is usual in any transition, a curious mix of both positions emerged. Cunha Mattos, an officer we have already encountered, called the law as "a grace that is being made" (CD, 1826, 3, pp. 132), but, at the same time, said such a concession "concern no favor or grace; but is a strict obligation" (CD, 1826, 3, pp. 133). Deputy Marcos Antônio said the pillars of the project were both "humanity and justice", and hinted at the old mentality by stressing that the half basic pay was a reward to those who served "the motherland and the throne" (CD, 1826, 3, pp. 132). Under the *ancient régime*, compensations were not directed at the person who rendered the service, but to his whole family – for instance, a title of nobility was not given

[122] On grace and the political logics of the *Ancien Régime*, cf. Antônio Manuel Hespanha (2010).

only to a valuable vassal, but also for his descendance. This logic could easily explain the payments for widows of officers, but the notions of merit typical of liberalism could hardly make a good substitute in explaining this practice. In the absence of stronger theorizations of solidarity and social rights, the Brazilian political class was left with a weak mix of ancient and new ideas that were eclectically combined between them despite some clear incompatibilities to justify measures that could not be relinquished.

This led to important disputes over the ideas of alms (*esmola*), charity and generosity, which were alternatively regarded positively or negatively, depending on the moment and inclinations of the speaker. Payments due to the widows could be linked to this mental universe of Christian virtue or not. For Souza França, for instance, "under the absolute government, everything was gifts (*mercês*), and law or justice were nowhere to be found; now that we have a representative government, no gifts, and if we follow justice, there is no need for alms (…). Alms should be provided by each individual using his own goods, and not those of the nation" (CD, 1826, 4, pp. 92-93). Such devaluation of the word alms was also present in Holanda Cavalcanti's speeches.

Custódio Dias tried to bring both positions together using a more sober representation of the logic of the *ancient regime:* "I think this law belongs to charity and not to rigorous justice (…). But, being so, I also say that charity also have its own rules: it shall not be made unconditionally, but be done whenever is possible (CD, 1826, 4, pp. 148). And finally, Cunha Matos claimed that the "nation should be generous just as the military personnel must be intrepid and honorable"; the nation must "contemplate the sacrifices" of the Army and "prevent the dearest objects of their souls, deserving all their tenderness" – their families – from being crushed under the "disgraces and the plague of misery" (CD, 1826, 3, pp. 272). Emotions were high, as one deputy claimed to "get tears in the eyes as I contemplate the misery of those disgraced (widows)" (CD, 1826, 3, pp. 50).

Forty years later, the most vivacious confrontations had already settled, and jurists could see things more clearly. Thomaz Alves Júnior (1866, 116 ss.), for instance, fully accepted that the 1866 law was a reward. It was "a national tribute paid to those that shed their blood for the nation, covering their wives, mothers and daughters with the mantle of paternity, and saving them from misery and hardship". In 1827, however, this reasoning was just one among others.

Old and new, justice and charity, reward and gift: what was the nature of the 1827 law of the half basic pay? Both and neither. Since the law was being made precisely in a moment of transition, it had unstable pillars and could claim loyalty to both past and future. But one solid conclusion can be taken: the language of rights is mostly absent. Neither the widows, nor

the soldiers had a natural right to the payments that was being merely recognized by the state: they were merely the beneficiaries of the generosity of parliament. Senators and deputies take this as an assumption, and from that point on they only aim to clarify if justice or grace were the main concepts at play. This attitude is the reflex of a broader mentality on working and advanced age. To understand it, we must take a look in what was retirement in those times before finishing this section.

Those searching for definitions first go to dictionaries and the historian is no exception. We must take a look at the three most important Portuguese dictionaries of late 18th and early 19th century[123] to understand what was at stake in the payments for former workers of the state. I suggest to consider three words as relevant for our discussion: retirement (*aposentadoria*), reform (*reforma*) and jubilation (*jubilação*)[124]. The former indicates the general category, while the two others refer to the retirement of military personnel and of professors, respectively. The definition of retirement (*aposentadoria*) by Antônio Moraes e Silva (1789, p. 157) is crucial: "TO RETIRE SOMEONE ELSE (…). To give another person an honest mission, to discharge the person from his duties, keeping the salary or part of it"[125]. Both Raphael Bluteau (1728, p. 434-435)[126] and Luiz Maria da Silva Pinto (1832)[127] echoes the idea of releasing someone from his duties. Few words, deep meanings. First of all, retirement is not though as a right of citizens, but as a prerogative of the sovereign. The word "right" (*direito*) does not appear at all: the notions of grace and concession are the main players here. Second, the emphasis is not on the institution (retirement/*aposentadoria*), but on the action (to retire other person/*aposentar*) – and an active one: to retire is not to leave one's job and receive a pension, but to retire someone else and give him a pension. The subject is not the employee, but the employer – or, shall I say, master? Third: retirement is a prerogative of the state; private employees do not receive such a privilege. As Bluteau (1728, p. 434) writes, a retiree is "anyone in the service of arms, letters or any other *service of the Republic* (…) [that] do not exercise his ministry anymore; but retains

[123] Raphael Bluteau (1728), Luiz Maria da Silva Pinto (1832) and Antonio de Moraes Silva (1789), all of them avaliable online at: http://dicionarios.bbm.usp.br/pt-br/dicionario/2/reforma

[124] The translation of *reforma* and *jubilação* is tricky. There are no corresponding words in English, as every retirement is named equally. In Portuguese, *jubilação* is used only in Portugal, but *reforma* still is a technical word in Brazilian law. Both of them have a current meaning and the legal one, which have nothing to do with each other. In the translation, I chose to keep the corresponding words of the common meaning, namely the change of something and rejoicement. I lost in precision, but I was able to stress that those are three different words in Portuguese, and I also conveyed the same sense of estrangement that a Portuguese reader familiarized with 19th century social security law gets by reading those words.

[125] "APOSENTAR (...). *Aposentar alguém*; dar-lhe missão honesta, desobrigá-lo de servir o seu ofício, conservando-lhe a paga, ou parte dela"

[126] "APOSENTAR, desobrigar. Aposentar alguém dos seus ofícios"

[127] "Aposentar, v. a. Dar aposento. Dispensar do exercício de seu cargo".

the title, privileges, preeminence and pay"[128]. Only those working for the republic can be retired. The sovereign: the sole source of *aposentadorias*, just as he was the only source of graces, the true *fons honorum*. But I will come to this discussion latter. For now, it suffices to understand that the prevailing mentality in the debates on the 1826 law was based on the old conception of retirement, though there were some tensions in it pointing to later changes.

The cornerstone of the military pensions system throughout the 19th century, the 1827 law was pervaded by an old mentality, as the idea of reform was understood according to the notion of release from service[129]. This principle pervaded the whole history of the application of the law, regardless of the theoretical framework used to explain the law – rendering of justice or gracious concession.

The "generous gift" – the half basic pay - therefore, was the consequence not of a right to retirement, but of the generosity of parliament. Not mind that this generosity was not unprompted, but was earned on the battlefield. Yet, no gift is unlimited: to remain precious, they must be rare. Only a small group of people was given the privilege to receive compensation for services rendered by a family member: widows, single daughters and sons with less than 18 years. The less, the better: if pensions were exceptional – one could even say extraordinary – they should be reserved only for particular circumstances. This restrictive mentality, however, would not last long. The history of the constant erosion of those restrictions is the object of the next section.

4.3 – Widening the number of beneficiaries: reforms of military pensions between 1847 and 1875

The 1827 law was restrictive. Harsh, some would say. Just a few family members would be entitled to the payments: first of all, the widows; then, single daughters and minor sons; finally, widowed mothers. But the avarice of the government could be truly seen in the base used for the calculus of the payments: benefices would be defined not only according simply to the basic pay (*soldo*) – the reference was the basic pay the officer would receive if he was reformed (retired). The rules had been set long before in Lisbon: the *alvará* of 16 December

[128] "APOSENTADO. Ministro aposentado. É aquele que, no exercício das armas, ou das letras e em qualquer ofício da república, ou sem culpa, ou por culpa, por achaques, ou por velhice, não exercita mais o seu ministério, mas fica logrando o mesmo título com os mesmos privilégios e preeminências, e com o mesmo ordenado"

[129] Antônio Moraes e Silva (1789, p. 579) defines reform as "to keep the positions without the duties with the basic pay or the half basic pay"; "conservar os postos sem exercício com o soldo por inteiro ou com meio soldo". For Silva Pinto (1832), "To reform. (...). To keep the position etc with the basic pay without the responsibilities"; "Reformar. (...). Conservar no posto etc com o soldo sem exercício".

1790 established the rules for the payment, honors and reforms in the Portuguese Army, but, since they were never repealed, they were still in force on the other side of the Atlantic. They were quite restrictive: only officers with more than twenty-five years of service could receive the full basic pay as pension; those with less than 20 years could get nothing, except if they were killed in action or got a disease in service. Otherwise, their widows would receive nothing.

Austere rules as those made quite an impression on the military class. As time passed by, the economy developed and the armed forces engaged in several conflicts, guaranteeing the safety, integrity and very existence of the empire. More generosity was in order. Step by step, officers and their supporters in parliament were able to win some victories at the National Assembly and include a few other categories on the list of possible beneficiaries of the half basic pay. In this section, we will follow some of those changes.

A gap in the law was responsible for the first legislative intervention regarding the half basic pay: when the statute referenced "single daughters", it intended that those who latter remarried would lose the pension, or they only needed to be single at the moment their father had died? In 1st July 1847, the General Assembly did not take much effort to answer, as it made reference to a previous decision of the Council of State[130]. Its economic section (*seção da fazenda*) allowed later remarried daughters to keep their pensions; the councilors said that those payments would function as a dowry, and their absence would lead the young orphans to either celibacy or to become concubines, since if those young women did not have some source of financial instability, they would not be able to attract suitable husbands (BRASIL, 1870, p. 227). At the same time, councilors noticed and denounced that such arrangement would impose a financial burden upon the Brazilian state, complaining that the State would be obliged to "support an Army of alive people and other of survivors" (BRASIL, 1870, p. 227). Expansion of military pensions was born together with the inseparable twin of monetary tension.

Almost 20 years later, the march towards a more comprehensive system of pensions was resumed. In 20 April 1864[131], the *montepio* of the Navy was extended to the sons of officials, reproducing a provision similar to one already in force for the Army's half basic pay.

[130] BRASIL. Resolução 126 de 3 de junho de 1847: sobre a dúvida suscitada acerca do direito que tem ao meio soldo as filhas dos militares que se casam depois da morte de seus pais. In: BRASIL. *Imperiais resoluções do Conselho de Estado na seção de fazenda desde o ano em que começou a funcionar o mesmo conselho até o de 1865:* coligidas por ordem do governo. Volume II: anos de 1845 a 1849. Rio de Janeiro: Typographia Nacional, 1870.

[131] Legislative path: presentation at the Chamber of Deputies: 7 May 1864; it was originally approved as an amendment to the budget of 1865, and later converted in a separated project at the CD. 1st discussion at the Senate and sending to the committee of War and Navy: 5 September 1864; presentation of the opinion: 30 June 1865; 3rd discussion at the Senate: 9 March 1866.

This new provision was approved almost without discussion as an amendment to the budged of 1864 (CD, 1864, 3a, 141), and only received an opinion from the Committee of War and Navy.

In 1866, the law establishing the size of the land forces was the vessel in which parliamentarians stroke another modification on the legal regime of military pensions. Ten years earlier, the annual law establishing the size of the land forces for 1856 had extended the right to reform to all those who got crippled while in service; however, if soldiers who did not get wounded in war could be reformed regardless of the amount of time that had served in the Army, their widows would not necessarily receive a pension; the half basic pay was left untouched by the 1856 rule and was still based on the rules of 1790. This anomaly was noticed and criticized in the specialized press (PIRAGIBE, 1862). Precisely in 1866, the law establishing the soze of the forces changed the reference of the half basic pay from the 1790 *alvará* to the law of 1854 (SI, 1866, 3, 38).

A least peaceful situation developed two years later, when the decree 1307 of 22 June 1866[132] established that even married daughters could receive pensions – and both for the Army and Navy. As deputy Martinho de Campos said, "when I asked urgency for this project, I could barely imagine the interesting discussion it would entail" (CD, 1858, 4, 78). As Campos noticed, important disputes rose in parliament, as deputies and senators spoke out in favor and against the project. Some who thought that it was justified to extend the right to pensions to married daughters said that the "legislator recognized that the military personnel, usually poor, could not bequeath to their widows, daughters etc a patrimony that would secure an honest subsistence" (CD, 1858, 4, 76). For others, it was important to remind that marriage was not always a safe path towards financial security, and some young woman might still need financial support[133]; also, there were no more *tenças*[134] - rewards for military services with origins in the Portuguese colonial past - something that had hardened the situation of the military family. Rodrigues Lopes got even further and spoke of the half basic pay in so modern terms that his

[132] Legislative path: Project on the *montepio* of the daughters was presented at the Chamber of Deputies in 14 August 1856; first and second discussions at the CD: 19 July 1858; presentation of a second project on the same topic at the CD: 7 May 1864; substitutive at the CD: 9 August 1858; approval in 3rd discussion at the CD: 3 April 1866; arrival of the project at the Senate: 30 April 1866; 1st discussion in the Senate in 12 and 14 May 1866; 2nd at the Senate: 14 May 1866; 3rd discussion at the Senate: 14 and 19 May 1866; approval at the Senate: 21 May 1866; 3rd discussion of the amendment of sen. Paranhos making subsidiary the rights of married daughters: 22 May 1866; approval of the amendment by the CD: 11 June 1866.

[133] "não se diga que o casar é sempre uma felicidade; eu vejo muitas filhas de militares dessas casadas em vida deles passarem uma vida cheia de necessidades, de privações e de misérias, serem obrigadas a coser roupas para o arsenal, e mesmo a fazerem outros trabalhos pesados e de um lucro mesquinho afim de proverem honestamente a sua subsistência" (CD, 1858, 4, 78)

[134] Pensions for general and high officers with more than 28 years of duty (ALVES JÚNIOR, 1866, p. 118), established in Portugal in 28 March 1792 and recognized by the Brazilian parliament in 23 June 1841, but that had not been awarded since.

words bore little semblance with the logic of grace: "the half basic pay and the *montepio* must be considered as properties of those servants of a state they had served so well" (CD, 1858, 4, 77); being so, they must be bequeathed to the legitimate heirs of officers as any other good. But the most reasonable argument appeared in the Senate: senator Paranhos claimed that, if the *montepio* law authorized the payments for single daughters that later married, it was absolutely unjustifiable to deny an equal privilege to those whose weddings predated the passing away of their fathers (SI, 1866, 3, 38). And the 1847 extension was invoked to justify another furthering of the concessions to the military. Slippery slope?

Not every congressman felt compelled by this kind of reasoning. For deputy Ferreira de Aguiar, for example, the half basic pay should not be directed just to support single daughters, but especially to stimulate them to marry; therefore, it would be irrational to give this benefit to those already with a husband (CD, 1858, 4, 77). But the strongest objections were advanced by the Baron of Muritiba. He noted that each beneficiary would not receive a full pension, but all of them must share the already small half basic pay. Therefore, if the state extended this right to married daughters, the pensions of their single sisters would certainly shrink. If they received less money, it would certainly be harder for them to marry: precisely the opposite of the objectives envisioned by the creators of the law.

The objective of the law was to provide subsistence for those unable to achieve stability on their own. Married daughters, conversely, could count on their husbands; if this was not the case, they could petition the parliament for aid, and they could get some sort of pension by "special grace" (*mercê especial*) (SI, 1866, 3, 80). Not by law. Statutes were meant to cover what "generally happens", and not exceptions: the rule, according to Muritiba, was precisely that single daughters were in need, but married ones were not. He also mentioned the legislation of several other nations[135] to prove that Brazil was following a general trend when it restrained military pensions to unmarried daughters (SI, 1866, 3, 81).

Finally, a compromise could be found. Senator Paranhos proposed that married daughters could only receive the half basic pay if they had no single sisters or minor sons (SI, 1866, 3, 80). As it was said a few years earlier, "the widow lives much less protected and is much more vulnerable than those who have a protector in the society [married women]" (CD, 1858, 4, 76). After this, the bill could pass and be enacted into law.

[135] England (Navy regulation of 1º January1844 § 5º ns. 6 e 7), USA (digest of Gordon), Belgium (law of 24 May 1838, arts. 9º e 11) and France (law of 25 June 1861 and 26 April 1865).

Changes kept happening in the following years. After a complicated case[136] was sent to the Council of State, the 1866 law was extended to those daughters whose fathers had died before its enactment; the precise legal instrument was the legislative decree 2575 of 12 June 1875[137]. In the same year, the legislative decree 2619 of 8 September 1875[138] lifted the 5-year statute of limitation for the requests of the half basic pay; the argument used to justify the measure was that the General Assembly was lifting such statutes in so many individual cases at request of those interested that it would be convenient to cancel the rule altogether - it had been "implicitly revoked" (SI, 1875, 3, 147) by repeated deactivation. Finally, legislative decree 2618 of 8 September 1875 extended the right of half basic payment to the families of those who had died of diseases caught in the Paraguay War, even if outside the fight.

We can draw important conclusions form the history of military pensions after 1827. First, there was a trend to add ever more categories entitled to the half basic pay or the *montepio*: single daughters who married, then already married daughters and so on. Second, legislators tried to diminish the asymmetries between the *montepio* of the Navy and the half basic pay of the Army: equality was a keyword by then, and there was no point in differentiating the two forces. Third, the main reason for the choice of the beneficiaries of the half basic pay was originally lost: originally, it was meant to protect women in dire need, such as those unmarried or widows, but, by the end of the 1870s, it was tantamount to inheritance to all women in the family of an officer.

4.4 – An incomplete reform: the failed project of 1866

[136] The specific case was the pension of the daughter of the gen. Pardal's daughter. This officer had died years before, leaving a single daughter and a widow, who began to receive the half basic pay. While the mother was still alive, the daughter got married; the mother, however, died, and the daughter asked the government to receive the half basic pay from her father. There was, however, a problem in the interpretation of the legislative decree of 22 June 1866: it stated that only those daughters who were single at the time of their parent's death were entitled to the half basic pay; the government was not sure whether if by this last word we should understand only the military father, or also include the mother. The case was sent to the Council of State, which sided with the petitioner; even so, the Minister of Finance sent the case to parliament for a decision. In this context, an amendment was proposed which sought to retroact the effects of the law of 1866 to the families of the deceased officers before the law was promulgated (CD, 1875, SE, 262). It should be noted that the daughter was married to another military officer, so she was not miserable; but this was not used as an argument against her intentions (CD, 1875, 1, 45).

[137] Legislative path: 1st discussion at the Chamber of Deputies, without debate: 23 April 1875; 2nd discussion at the CD: 23 April 1875; 3rd discussion at the CD, with approval of a substitutive amendment: 11 May 1875; arrival of the project at the Senate: 18 May 1875; favorable opinion of the committee of War and Navy: 29 May 1875; 2nd discussion at the senate, apparently without debate: 31 May, 2 and 3 June 1875; 3rd discussion at the Senate: 8 and 9 June 1875.

[138] Legislative path: presentation of the project to the Senate by the Committee of Economy (*Comissão de Fazenda*): 11 June 1875; 1st discussion at the Senate: 9 July 1875; 2nd discussion at the Senate: 16 July 1875; 3rd discussion at the Senate: 22 July 1875; approval and sending to the Chamber of Deputies: 23 July 1875.

The disarray of many regulations spread across several different laws, decrees, resolutions etc. hindered the care parliament intended to provide for widows. Many people craved for a clear, ordinated act, and the best opportunity to achieve it came when the government created the Commission of Examination of the Army Legislation (*Comissão de Exame da Legislação do Exército*). We have already discussed in chapter 2 the aims and works of this organ, but, on this section, we will take a closer look on the project of a new law of the half basic pay (BRASIL, 1866) proposed by the collegiate body.

Most of the time of the sub-commission was spent discussing whether it was more convenient to adopt a *montepio* or simply to reform the existing half basic pay. As the members of the commission stated, the half basic pay was meant to be a provisory solution for those families that had not contributed to the *montepio* and, therefore, would have no claim to the pensions it provided. This is why the 6 November 1827 act was originally so restrictive. But as time passed by, the successive widenings of the number of beneficiaries consolidated the *status quo*, and what should be transitional became permanent. The commission accepted this situation, and suggested that the new half basic pay should have only minor differences from the 1827 one.

The commission would prefer to create a *montepio*, though. The half basic pay was a simple favor from the government that could be restricted at any time, provided that the wrong political forces rose to power; a *montepio,* on the other hand, was a right deriving from a contract, and would therefore better protect the interests of officers. But it would also be more costly. The financial constraints Brazil was facing in the very beginning of the Paraguay War suggested that it was not recommended to create new sources of public spending. A *montepio* modelled after the Navy's one would entitle the families of soldiers to better payment than they received under the half basic pay law, leaving deputies and senators with two options: either charge the national treasury with the difference, burdening an already stressed budget, or tax the salaries of officers, which were already low. To avoid any of those unsettling possibilities, the commissioners chose to avoid change.

The commission, then, made five suggestions. Firs, abolish the *tenças*, since they were low and had not been awarded constantly for a while. Second, to extend the half basic pay to the families of military surgeons, to the sisters of all officers and to the sons that, though not minors anymore, had physical or mental disabilities. Third, retroactively apply the law changing the reference for the calculus of the half basic pay. Fourth, to exclude from benefices widows of marriages made at the deathbed, except when they had produced previous offspring. Fifth,

to transfer the authority to handle the processes of habilitation to receive the half basic pay from the ministry of the treasury to the ministry of war.

The idea of the commission was mostly to rationalize the several, scattered regulations, turning them into a true system. The inclusion of military surgeons, sisters and disabled sons would protect the whole family, as expected from a permanent law, and not only a few family members, as could happen only in a temporary law. The prohibition of marriages just before the passing away of officers would prevent frauds, even though it could empower public officials to perform potentially dangerous investigations of household life[139] (BRASIL, 1866, p. 12).

The final project added that widows and daughters that remarried would lose the benefit. When the draft passed from the section the full commission, the absence of enthusiasm was palpable. Perhaps, the many restrictions to benefices and the modesty of changes were not the best seeds to produce fervor in the officers. Why the fuss if so little modifications were being done, and with so many restrictions? General Bittencourt, for instance, said there were "no sensitive betterment" for officers (BRASIL, 1866, p. 42). Some members proposed measures that could appease the members of the land forces, but all of them were barred precisely for lack of adequate funding.

The project was finished, printed, sent to the general assembly and – apparently - buried. There were so few changes that not even the most interested people –officers themselves – bothered to vote such a bill in the midst of a war.

Complex as they may be, the half basic pay or the *montepio* were still governed by strict rules under the legalistic system of 19th century law. This was not the case with pensions (*pensões*), dominated by the discretion of parliament. Our task in the next section is to find order in those unwritten rules.

4.5 – Does tragedy make us alike or tear us apart? Pensions in Brazilian law and the Paraguayan War

Pension (*pensão*) is a tricky word. In 19th century Brazilian law, it can have multiple meanings: in some usages, it designates a periodical payment deriving from a previous title (the

[139] "A Secção do Fazenda do Conselho de Estado consultou que, não tendo a lei olhado ao tempo do casamento, nem entrado no exame da moralidade dos casados em relação a estes mesmos, e não sendo permitido penetrar no sanctuario domestico, devião ser as referidas viuvas comprehendidas na regra geral para se lhes pagar o beneficio, e assim foi resolvido. É certo que a - moral publica ganha mais, conforme ponderou a Secção de Fazenda, não perscrutando os arcanos da familia, porém o Estado pode ser illudido em suas vistas humanitarias".

pensões from *montepios*); in other opportunities, it means an independent payment, given by parliament independently of any previous law. This is the sense in which this word will be employed in this section. But one thing is clear: pensions and retirement are distinct, though entangled realities. And both belong to a fluid logic that combines elements from the past and present in an unparalleled way. We shall now understand the differences and the similarities between those payments, and what they say about the logics of 19th century social security.

In most early Brazilian dictionaries, the word *pensão* cannot be found, especially in the legal ones[140]; in general dictionaries, when there is an entry[141], *pensão* refers only to ecclesiastical payments[142]. We have to wait until the final decades of the 19th century to find true definitions of the word[143] and, more important, a satisfying one: "perpetual or temporary rent the sovereign, the state or a private citizen obliges himself to pay yearly or monthly as a reward for works or services or as simple liberality" (DICCIONARIO CONTEMPORÂNEO, 1881, p. 1324). Even by the end of the 19th century, we still see strong continuities with the *Ancien Régime* way of thinking; especially, pensions were not seen as rights held by a person: they were thought as a concession from the state, a gift, a reward that could come even from the arbitrium of the sovereign. Differently from retirement, "pension" did not imply the release from service, but could come from any reason convenient to the state, at any moment.

Secluded from the curious eyes of jurists and dictionary-writers, pensions made a covert appearance with a pseudonym in the main stage of Brazilian law: the 1824 constitution. Within the attributions of the executive branch, legislators established in the paragraph XI: "To bestow titles, honors, military orders and distinctions as a reward for services rendered to the state; the pecuniary graces [*mercês pecuniárias*] are conditioned on approval by the assembly when they are not already established by statutory law"[144]. Pecuniary graces: in other words, pensions. To the modern reader, it seems quite bizarre to compare a pension with a title of nobility or an honorific order; yet, this is precisely the logics behind the distribution of those payments in imperial Brazil.

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[140] This is the case for José Joaquim Caetano Pereira e Souza (1825), José Ferreira Borges (1856) and Augusto Teixeira de Freitas (1882).

[141] In some, there is not, such as in Antônio de Moraes Silva (1789).

[142] This is the case for Raphael Bluteau (1728), Luiz Maria da Silva Pinto (1832), Rubim (1853) and Beaurepaire-Rohan (1889).

[143] "Pensão. S.F. Ordenado, estipêndio, renda; foro; encargo; trabalho" (CARVALHO; DEUS, 1895, p. 677). "PENSÃO, s. f. (Do latim *pensionem*). Renda anual, que se paga perpétua ou temporariamente por qualquer coisa" (GRANDE DICCIONÁRIO PORTUGUÊS, 173, v. 4, p. 740).

[144] "XI. Conceder Titulos, Honras, Ordens Militares, e Distincções em recompensa de serviços feitos ao Estado; dependendo as Mercês pecuniarias da approvação da Assembléa, quando não estiverem já designadas, e taxadas por Lei".

What did publicists think of those "pecuniary graces"? Actually, they were not treated separately: their logic was explained together with that of titles and honors. The main preoccupation of constitutionalists was to stress the logic of reward that explained and governed how those graces were granted; Joaquim Rodrigues de Souza (1870, p. 191-192) summarizes it perfectly: "to not be hideous, [graces] must come less from the liberality [of the sovereign] and desire to honor, and more from the justice in recognizing the merit and personal qualities". Pimenta Bueno (1857, p. 256) talks about the "payment of a national debt" to the grantees. Vicente Pereira do Rego (1860, p. 228) is the only jurist that enunciates the types of pecuniary graces: *tenças*, pensions, reforms, retirement and *jubilação*[145]. And he speaks in a manner that recalls the *ancien regime* when he says the concession of *tenças* was governed by the "reasonable arbitrium of the executive branch". What is even more curios is that, according to late 19th century Brazilian administrative law, such pensions would be a typical case of gracious administration (*administração graciosa*). Legal thought, following French guidelines, separated between gracious and contentious administration; the first concerned fulfilling interests – that is, usefulness for the individual – that did not clash with the law or public interests – while the second concerned the protection of rights – that is, interests protected by law (RIBAS, 1866, p. 135-138; URUGUAY, 1862, p. 79-90). Though belonging to the roll of executive competences, the constitution subjected the granting of pecuniary graces to the parliament probably because it entailed financial costs, something that must be controlled by the legislative branch. But, as we shall see, the legislative branch actually frequently discussed the requests on the merits of the applicants. The legislative was therefore exercising a jurisdictional function of the administration, blurring the lines between the three branches of government.

Just as with retirements, individual pensions were imagined by the political class and the legal thinkers as a complex blend of modern-style merit and the old-fashioned concepts of grace and arbitrium. To better understand how they worked, it is important to analyze how those payments were granted in practice. And this practice took place at the Brazilian parliament.

For a contemporary jurist, it would be quite strange to give the legislative branch the power to award pensions; for us, it is almost obvious that granting such payments is a matter for the public administration, since parliament – at least in theory - must enact abstract and general laws, leaving the analysis of particular, concrete situations to the executive branch. But

[145] This list was probably incomplete, as Ribas (1866, p. 133) mentions as possible reason for pecuniary graces "ou dos serviços extraordinarios feitos á humanidade por occasião de epidemias, incendios, inundações ou naufragios (Decr. n. 1579 de 14 de Março de 1855, art. 4o)".

things worked differently in the 19th century. We must remember a frequently forgotten activity of senates and chambers of deputies, one that is frequently bypassed nowadays, conspicuously sidelined by jurists, but that played a major role in 19th century law: the overview of the executive branch. If one looks at the acts of parliament, they would easily perceive that laws in the strict, formal sense, that is, collections of abstract norms meant to regulate an indefinite number of situations, were much less common then today[146]. What one could find in their place? What could senators and deputies be possibly doing, if not crafting the engines of the mighty machinery of law? The answer – the attentive reader might have already guessed by now - was that members of parliament devoted much of their work to concretely evaluate, and potentially criticize, government performance. Pensions, inscriptions in public colleges and other acts aimed at individuals consumed an important part of the time spent by the representatives of the people in Rio de Janeiro. As one can see in the following figure, almost 29,33% of all acts of parliament between 1870 and 1889 were awards or modifications on awards of pensions, *montepios*, retirements etc., granted to specific individuals.

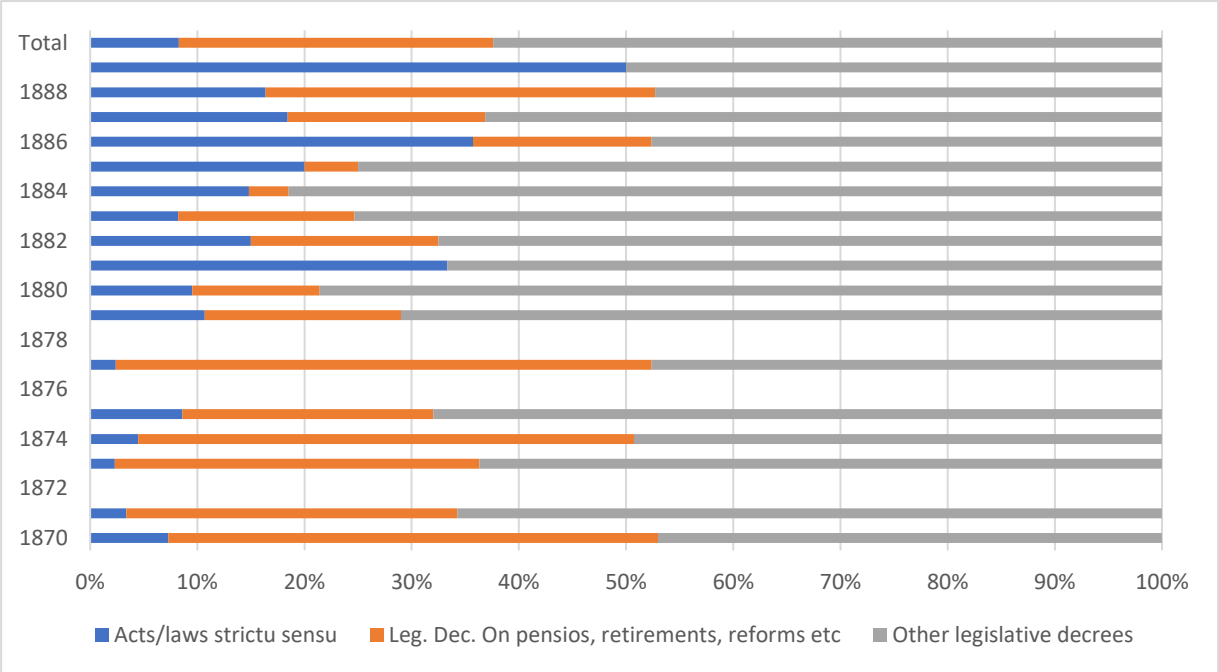

Figure 14 Participation of legislative decrees on pensions on the total of acts of parliament, 1870-1889. Source: Coleção das leis do Império do Brasil.

Pensions were, therefore, an unavoidable part of the legislative work, but they were not alone. Those payments were created, analyzed, modulated by the legislative branch precisely because there was no general legal provision regulating how they should work. But not only. If most potential grantees sook rewards not provided by law, others were simply trying to be

[146] For a quantification considering the whole empire, cf. Lílian França Silva and Luiz Fernando Saraiva (2011).

relieved from penalties explicitly imposed by law; for instance, it is frequent to see people who missed deadlines asking not to be affected by statutes of limitation. In those cases, the decision was naturally due to the General Assembly, since citizens were asking for the law not to apply in a singular case. Just like an amnesty.

For this section, I built a database including decrees giving military pensions or other military payments from 1870 to 1889 and the debates that led to them. I then selected a sample for analyze, trying to understand the main characteristics of pension-granting in late 19th century Brazil. And to those data we now proceed.

I could find 308 decrees in the 20 years between 1870 and 1890 which granted military pensions to a total of 1093 persons. I registered the nature of the benefice (pension, *montepio*, reform, half basic pay or retirement), the name of the first beneficiary, the reason of the pension (the beneficiary was an officer/enlisted peronnel; or widow/mother/child etc of a soldier[147]), the value of the pension and other observations I found important. Obviously, some characteristics were more present than others, so I defined what was a "typical case" of pension and the "atypical cases". The most common kind of pay discussed in parliament, which I called typical, were a) pensions given to a women member of family (widow, sister, daughter, mother) of a dead officer or b) to an enlisted person (*praça*) wounded and incapacitated for work due to combat. I excluded as atypical cases any situations that could be classified in the previous two categories, but that had one of the following characteristics: pensions to generals; pensions to officers; pensions to a relative of an enlisted person; pensions directly rewarding services; pensions given to women on their own right; pensions given to sons; pardons of debts; lifting of a statute of limitation and payments that were not pensions (reforms, *montepios*, half basic pay and retirements). Defined as such, 80,05% (875) of the beneficiaries were given "typical" benefices, while 19,95% (218) got "atypical" ones.

I chose to analyze in depth only a sample, since a complete look into them would be repetitive and yield next to none additional results. Yet, choosing which cases to work with is not an easy task. The first difficulty is to define what a "case" is. It could be fruitless to define each decree as a single "case", as they sometimes include several people completely unrelated with each other, especially during the Paraguayan War. To choose each "pension" as a case would also not be interesting: each one of those decrees concerning several people would then comprise many cases, accounting for the majority of my sample, but usually those decrees are not discussed by the parliament, meaning that the most part of my sample would not yield any

[147] I excluded civil employees of the ministries of War and Navy.

results. I, therefore, used the "entries" of the table I constructed. Each entry gathers the beneficiaries with the same characteristics (rank, gender, reason of pension etc) in the same decree; in other words, I mixed the two criteria in a way that would put together people with the same characteristics I found relevant and that would potentially be discussed in the same terms. Therefore, I could secure both representativity of the true flow of requests and diversity of situations, allowing me to perform satisfyingly a quantitative and a qualitative analysis. After defining the criteria, I drew randomly 10% of the entries of typical cases, getting 42 of at 409 possible cases. For the "atypical" ones, I chose a different procedure: I looked at the characteristics of each case and conscientiously chose 16 of the 134 entries which I deemed more "interesting", that is, those that went the farthest from the typical cases. In doing so, I tried to select cases belonging to each one of the "oddities" that I found.

After this admittedly long, though necessary, methodological introduction, we can now proceed to the data.

The most striking aspect of typical cases of pensions is that they are almost not discussed in parliament. Most of the cases I looked at[148] did not compel the General Assembly to pursue a thorough analysis. When something appeared on the parliamentary records, it was generally the opinion of the committee on War and Navy authorizing the deputies and senators to grant the pension. This seems to be confirmed by the way in which José Rodrigues de Souza (1870, p. 192) writes on the issue: for him, after the executive had given a pension, "the grantee copies the decree and petitions the approval to the assembly". There is no reference at all to evaluations; the process seems to be a rather bureaucratic rubber and stamp on decisions already taken by the executive. Legislative overview becomes a distant and disinterested gaze.

[148] José Luiz dos Santos; Floriano Rodrigues – dec. 1762 de 1870; Bento Antunes de Andrade; Inocêncio Martins de Macedo; José Maria de Campos Sobrinho – dec. 1774 de 1870; Joaquim José de Serpa - dec. 1778 de 1870; Leandro Dias Duram – dec. 1783 de 1870; Manoel Antônio de Oliveira – dec. 1798 de 1870; Hermenegilda Beatriz de Oliveira – dec. 1806 de 1870; Constança Maria de Freitas Albuquerque – dec. 1824 de 1870; Meneris de Campos Souza – dec. 1826 de 1870; Ângela Maria do Sacramento Moraes – dec. 1914 de 1871; Virgolino José de Sampaio – dec. 1932 de 1871; Pedro Antônio de Freitas – dec. 1939 de 1871; Ellen Harfield – dec. 1942 de 1871; Mamede Antônio de Amorim – dec. 1944 de 1871; Leopoldina Lopes dos Reis – Dec. 1960 de 1871; Ephigênia Joaquina de Souza e Mello – dec. 1963 de 1871; Emiliana e Jesuína da Costa Fragoso – dec. 1974 de 1871; Francisca Felícia de Souza Costa, Anna Francisca das Dores Gouveia e Maria Felina dos Santos - dec. 2103 de 1873; Manoel Tristão de Miranda – dec. 2045 de 1871; Anna Alexandrina de Jesus – dec. 2118 de 1871; Justina Maria dos Santos – dec. 2229 de 1873; Maria Pereira de Barros – dec. 2230 de 1873; Júlia Augusta Botelho de Mello – dec. 2239 de 1873; Francisca Jacintha Cesar Loureiro – dec. 2265 de 1873; Izabel Noya da Conceição Barbosa – dec. 2284 de 1873; Maria Cândida Guillobel – dec. 2288 de 1873; Flávio de Abreu Fialho – dec. 2319 de 1873; Maria Faustina Freire Lopes – dec. 2320 de 1873; Belmira Carolina de Oliveira – dec. 2503 de 1874; Bernardina de Senna – dec. 2551 de 1874; Emília Loureiro de Mello e outros – dec. 2586 de 1875; Maria Narcisa Ribeiro de Navarro – dec. 2588 de 1875; Felippe Antônio Gonçalves – dec. 2690 de 1877; Adélia Augusta Bezerra – dec. 2796 de 1877; Maria Generosa de Loreto Seixas – dec. 2798 de 1877; Bueno Keydel – dec. 2800 de 1877; Olympia Ermelinda da Conceição Silva Pinheiro – dec. 2801 de 1877; Joaquina Rosa do Nascimento Andrade – dec. 2874 de 1879; Maria Corina e Honorina Augusta da Silva – dec. 2894 de 1879; Salustiano Francisco Duarte – dec. 3115 de 1882.

When the opinion given by the commission discusses the requests of pensions, the more frequent references are to the services rendered by fallen officers. One good example is the pension given to the family of João Dias Cardoso de Mello (legislative decree 2588 of 1875): the text describes at length the audacious fights and the heroism this captain presented before his death on the battlefields of Paraguay (SI, 1875, 3, 24). The opinion even reports the visions of some generals on Mello, which called him "distinct". But many other opinions simply cite the "good and relevant services" (SI, 1879, 5, 135) of the fallen officers, without elaborating any further. Anyway, the idea that pensions were a reward for exceptional actions in duty, just like an honorific medal, persisted.

This can be clearly seen in the discussions of the Section of War and Navy of the Council of State, which was responsible to help the government decide to award pensions or not. Using those documents, we can understand that the simple presence in the war was considered ordinary duty and, therefore, did not deserve the national gratitude in the form of financial compensation. The most instructive example comes from resolution 21 of 3 December 1873. Feliciana Rosa do Vale e Silva asked for a pension due to the services rendered by his husband, a military surgeon that died almost 5 years before in Humaitá. Testimony presented to the Council of State said that he disappeared at some point in the Paraguayan wilderness to never be found again. He suffered from mental perturbations and was "alienated (*alienado*)", and "perhaps had interned himself in the hinterland of the republic, or was murdered, drowned in some waters, or even was devoured by some beast" (SILVA, 1887, v. 3, p. 82). He was at war. The mental troubles he endured most certainly were related to the horrors he had testified in the overcrowded hospitals. And yet, the request from his wife was declined. The section argued that he had been in the force for only three years and no "extraordinary service" could be found in his records. Moreover, "it is not possible to assign to the campaign service or to the climate the responsibility of the disease that caused his disappearance and eventual death". Feliciana's husband might have gotten an unsettled mind in the war, but if his despair was brought to an end by the services of a wild beast, his relatives could claim no responsibility from the Army. This represents the narrow reasoning that presided the decision-making process within the war bureaucracy, and more examples could follow. In the consult 23 of 2 August 1873, the section stated that when a soldier was not wounded and incapacitated at the battlefield, he would only get pensions for "relevant services" and should have had "distinguished himself very particularly" (SILVA, 1887, v. 3, p. 40). One must be a hero or an invalid to retire: regular servants must literally work to their deaths.

As I said before, there were two types of "typical" pensions: those awarded to women members of the family of officers and those of enlisted ranks (*praças*). They obeyed to different logics, as the grantees were in very dissimilar social positions. For instance, Adélia Augusta Bezerra received in 1877 a pension amounting to the value of the half basic pay that would be due to her husband had he not passed away in the very day he was due to be reformed (SI, 1877, 9, 2). This was the logic of most values of pensions of relatives of decease officers: to substitute a half basic pay that could not be awarded, or constitute a full basic pay when coupled with the half that was already being paid. For enlisted soldiers, which did not have a permanent link with the military, the logic was to award them a pay if disease or wound received in the battlefield invalidated them and hindered their search for labor after the war (SI, 1882, 7, 23).

Atypical cases[149] sometimes confirmed, sometimes changed those logics.

For instance, the widow of a general got a pension rewarding the services rendered by her husband in Paraguay. After its value was added to that of the half basic pay she already received, the total value she would receive would be equal to that of the basic pay, allowing her to "keep the position corresponding to her state" (SI, 1874, 3, 149). Pensions, therefore, were meant to ratify the social stratification and protect women of higher class from poverty. Not by chance, this revealing phrase was said in one of the few cases involving families of generals. Actually, it was quite common to give pensions to generals for their "relevant services", even if they were not injured in the battlefield – a privilege not seen for lower-ranking officers, let alone enlisted personnel. In 1874, 14 officers received such pensions, resulting in a spending of more than 27 *contos de reis*[150] (MINISTÉRIO DA GUERRA, 1874, p. 127).

Many awards were intended to lift some kind of prohibition or to change the application of the law. In one case, an officer got a "reform improvement" (*melhoramento de reforma*) because he had acquired a disease on the battlefield, so the General Assembly intended to grant him the full basic pay instead of only half of it (SI, 1875, 3, 87). In other case, Francisca Martins Furtado received a pension for being the daughter of a deceased senator, which would prevent her from getting the half basic pay of her husband[151]; but the Assembly lifted the prohibition

[149] The ones I chose are: Pedro Orlandini e os mestres de esgrima (1874); Anna Justina Ferreira Nery – dec. 1868 de 1870; Joaquina Rosa de Jesus – dec. 2288 de 1873; Francisco Gonçalves dos Reis – dec. 2288 de 1873; Maria Henriqueta do Prado Caldwel – dec. 2391 de 1873; Isabel Maria Brandão – dec. 2548 de 1874; Henrique Carneiro de Almeida – dec. 2592 de 1875; Maria Augusta da Fonscea Freitas – dec. 2558 de 1874; Henrique Fernandes de Oliveira – dec. 1697 de 1877; Maria Pinto Braga Torres e 3 filhos – dec. 2739 de 1877; Alipia Neomesia Lyra – dec. 2743 de 1877; Sebastiana Carolina do Amaral Fontoura – dec. 2854 de 1879; Francisca Martins Furtado – dec. 2888 de 1879; Maria Luiza de Brito Sanches – dec. 2965 de 1879; Antonio Paes de Sá Barreto – dec. 3292 de 1886; José Custódio da Silva – dec. 3172 de 1883; Rita de Campos Maciel – dec. 3146 de 1888.
[150] For the sake of comparison, the whole budget for military pensions was ca. 1370 *contos*.
[151] Act of 6 November 1827, art. 4, § 1.

for her case only (SI, 1879, 6, 162). Rita de Campos Maciel had received unrightfully a half basic pay from her deceased son, but she was relieved from compensation because this had been the fault of the ministry, not hers (decree 3146/1888). Finally, Francisco Gonçalves dos Reis got a pension from his deceased son for being blind and invalid, despite the complete absence of legal reference for pensions to men other than the minor sons (SI, 1873, 4, 86).

Extraordinary situations might call for a flexibilization of the law, one might argue. For instance, Sebastiana Fontoura requested a relive to receive a pension in 1879 for being the daughter of a soldier; her mother should have asked the pension first and, now that she had died, Sebastiana theoretically could not inherit; the General Assembly granted the pension graciously, but used laws to decide from when Sebastiana would receive her pension (death of her father or date of the request)[152]. In other instructive case, Maria Luisa de Brito Sanchez wanted to receive both the half basic pay of the Army and the *montepio* of the Navy, as her father had served in both; she was getting neither because she was married. But when the 1866 law extended the half basic pay to married daughters, she was relieved from the statute of limitation, and received the pension from when her father died, as the senators considered the previous restriction to be unfair[153].

This complex syntheses of rule and exception was best summarized by senator Jaguaribe: "the true justice is not always the one founded over strict law (*direito estricto*), but the one that, without ignoring the principles (*preceitos*) of this law, combines itself with fairness (*equidade*), which is one of the sources of jurisprudence" (SI, 1880, 4, 153). Let us take a look in one last case that mixture fear of going beyond the strict law and disposition towards equity, and I will finish this section.

The fencing instructor of the Naval School Pedro Orlandini wanted to retire in 1874. Moody but honor-minded, Orlandini was offended by a student a few months early; living in an environment that evoked the romantic atmosphere of duels, his sense of honor demanded that he invited the offender to combat. And so he did. The heads of the school did nothing to

[152] "Tendo, porém, fallecido a mãi da peticionaria a 13 de Setembro de 1871, estava esta dentro do prazo do art. 20 do decreto n. 41 de 20 de Fevereiro de 1840 para reclamar o meio soldo; mas, deixando de o fazer, e não tendo-se habilitado até o presente, só póde ser atendida nos termos do decreto n. 2619 de 8 de Setembro de 1875, em virtude do qual póde agora habilitar-se para perceber o meio soldo do seu fallecido pai, não do tempo do fallecimento deste, mas da data da habilitação». Case of Sebastiana Carolina do Amaral Fontoura – dec. 2854 de 1879

[153] "pensou ao mesmo tempo a commissão de fazenda que era de equidade conceder o monte-pio da marinha desde a data do fallecimento do pai da dita senhora. Em rigor de direito ella não póde gozar do montepio da marinha, assim como não gozou do meio soldo, senão desde a data de 22 de Junho de 1866, porque foi a lei de então que permittiu ás filhas casadas antes da morte de seus pais o meio soldo ou o montepio da armada (...) o principio da lei de 22 de Junho de 1866, com quanto estabelecesse direito novo, todavia fundou-se em razões de muita equidade: era uma restricção não muito razoavel que existia, tanto na lei de 6 de Novembro de 1827, como no plano do montepio da marinha" (SI, 1880, 3, 142).

address this issue; the professor, however, expected the student to be properly punished. In protest, he stopped going to the educational institution. At some point, he got fired. The altercation, that was first verbal and then turned physical, was about to develop into a legal challenge as Orlandini requested to be retired by the General Assembly. The Viscount of Abaeté and the Baron of Cotegipe deliberated on the matter in 2 July 1874; they thought a person with such a temper did not deserve such a grace as retirement. Moreover, the regulations[154] did not grant fencing instructors the right to retire; however, masters of equipment and maneuver, that worked on the same places with similar functions, were. This unjustified difference could not be fair, but the Senate decided not to award what Orlandini was asking for, saying that such a law would interfere in the functions of the executive and would have a personal (*personalíssimo*) nature – never mind the cases cited above. Anyhow, the solution was to propose an interpretative act saying that the fencing instructors could retire (SI, 1874, 2, 22).

Beyond this peculiar combination of specific and general, of grace and right, the senators also discussed some important issues for the very idea of social security. Senator Vieira da Silva, for example, stated that only those that could no longer work should be retired, but with the current state of the law, many people got their pensions and started to work again, just accumulating the benefits. The problem was that our administrative law was unstable, with each new position, each new reality being regulated by a new law whose principles nobody bothered to harmonize with the previous order[155].

Abaeté thought differenty. "Retirements should diminish if not stop completely. The principle I accept is that public employees should work until they die. This principle follows the Bible's ones. Work was the first law God imposed on men, making him work until death" (SI, 1874, 2, 338).

The award of pensions was subject to many rules. But loose ones. Justice and fairness were always taken into consideration as the parliament worked as an administrative body, sometimes just accepting what had decided by the government, and sometimes taking an active stance. The number of pension requests, however, decreased after the 1875 law that authorized

[154] Decree 2163 of 1 May 1858 and 3088 of 28 April 1863.

[155] "Se já tivessemos um direito administrativo nosso, e no qual se achasse consignado como principio que só os empregados vitalícios tinham direito á aposentadoria e não os de commissão, comprehendo; mas nós nada temos de fixo e assentado; á proporção que se vão creando os empregos e reformando as repartições, vamos estabelecendo novas regras, novos principios e assim é que, em vez de uma lei geral, temos para cada classe de empregados regras diversas para a aposentadoria. Não sei porque devam uns empregados ser vitalicios, não se tratando de garantir a independencia dos poderes, como acontece em relação á magistratura, sendo outros empregados de commissão sem direito á aposentadoria. Para que esta differença a respeito de empregados administrativos, quando parecia melhor que se adoptasse como regra geral que o empregado publico, que não cumpra o seu dever deve responder pelas suas faltas perante o poder, judiciario, não devendo ser demitido antes de sentença condemnatoria e esgotados os recursos legaes?" (SI, 1874, 2, 340).

their award to those who caught diseases in the Paraguay war: the main source of requests was now inscribed in law and did not need to be addressed by the parliament. But other cases still appeared on the annals until 1888, since many categories of public servants were still not entitled to retire. The progressive change of the logics of social security and the establishment of a firmer foothold for legality was a long, hard process. Everything was in play: nothing was absurd. Even the very existence of retirement.

4.6 – Not all women are equal – and neither are men: social security in the military and gender

Social security is a gendered issue. This conclusion is even truer for a society as 19th century Brazil, where the ideal model of family implied a husband working and a wife taking care of the offspring. This model obviously was not always followed – and we will see hints of those dissonances. But working with the military eases many methodological problems concerning such an analysis: all personnel must be men, and the relatives he supported will almost always be women. Any occurrence deviating from this pattern would cause estrangement, as we previously saw when the father of an officer wanted to get a pension from his deceased son. The mentality behind the conception of military pensions imagines a men provider and a women recipient, and the vast majority of cases upheld this assumption. Debates on it naturally let to suggestive discussions on the relations between genders, the role of women – and, sometimes, of men – and the role of the State in the relations between family members. The politics of care and the reinforcement of public morals were critical elements of the role social security played in 19th century Brazilian society.

The feminine role was complex and multilayered; to better grasp it, we will work in two main steps. First, we will understand how social representations on gender roles were put into effect in discussions on specific laws – primarily, in the 1827 law on the half basic pay. This will also be instructive on the different roles women play– as wives, daughters, mothers etc, each one differently valued and with different consequences. Then, we will overturn this simpler system by analyzing concrete cases of unusual gender positioning that came before parliament: namely, the three women that got pensions in the Paraguay war on their own right, and not as a reward for services rendered by a male relative. The tensions between expectations of passivity and social control of behaviors on one side, and social action, on the other, yielded an intricate and significative picture that helps us better understand the role of gender in Brazilian society through the lenses of the military.

Honesty.

This vague and frequently demanding concept was central for 19th century society to define the good behavior of a women; as such, the 6 November 1827 law on the half basic pay made implicit references to it: widows would only get their pensions if they lived with their husbands or were not separated from them by their own fault, and daughters must not conduct themselves in "bad behavior"[156] if they wanted to receive state benefices. But when the law was under discussion in parliament, the references to honesty were even more explicit.

Deputy Marco Antônio suggested that "honesty" (*honestidade*) must be a condition for women to receive the half basic pay. For him, the nation only supported a military widow when "contemplates on her as [the officer's] companion in the fatigues of the laborious and tribulate military life" (CD, 1826, 3, pp. P. 269). Outside this model, there was no point in supporting wives of deceased officers. As he said, there were many women that rejected the "inconveniences of marriage" when their husbands "did not have the resources to satisfy their caprices and uncontrolled spending", an even more dramatic vice as military salaries were so low (CD, 1826, 3, pp. P. 269). Marco Antônio felt compelled to protect the state against those women that "run away from their husbands and avoid their companies, do not want to work to help their husbands, do not resignate themselves to the poor live [of soldiers], do not subject themselves to serving their husbands, to clean their clothes, raise their children etc"[157]. The military life was made of sacrifices, so military pensions must be based upon stringent virtues. Men must fight and suffer in the battlefields to earn wages; women must clean underwear to get pensions. As Marco Antônio said, to act differently and give benefices to dishonest women would mean to finance crime and sin. The very meaning of the law was to support widows in a pure and virtuous life; there was no sense in giving money to those who had already perished before lustfulness. And, as Cruz Ferreira said, "those who do not live honestly do not need help: they live in abundance, while the virtuous and honorable starve to death" (CD, 1826, 3, p. 273).

What is "honest", though? In law, everything comes down to evidence: something that cannot be proven might as well not exist. And many congressmen wondered how this "honesty" could be presented in court. Deputy Vasconcelos, for instance, said it was not only hard to prove

[156] "Art 4º São excluidas do beneficio desta lei: (...). 2º as viuvas, que o tempo do fallecimento de seus maridos se achavam delles divorciadas por sentença condemnatoria, a que ellas tiverem dado causa, ou por sua má conducta separadas; e as orphãs, que viviam apartadas de seus pais, e por causa do seu máo procedimento não eram por elles alimentadas".

[157] "Torno a dizer : ha muitas mulheres que, sem terem outros motivos mais do que o horror ao trabalho e o desejo de sobresahir ás da sua igualha, fogem de seus maridos e evitão a sua companhia. Não querem trabalhar para ajudar aos seus maridos, não se resignão com a vida pobre, não se sujei tão a servira pessoa de seu conjuge, a lavar-lhe a roupa, a crear os filhos. etc" (CD, 1826, 3, pp. P. 269).

such requisite, but to demand evidence on honesty before a judge would amount to birthing "a new inquisition, wanting, finally, to disrupt family tranquility and quietness" (CD, 1826, 3, pp. 267). The preoccupation with interferences in the family was shared by other people in parliament[158]. Marco Antônio responded that "everybody knows who is honest or not", and the local priest could give a "certificate of honesty". Souza França was less trustful: widows could be mistresses of priests and handily get misleading certificates. Weather this is a sign of paranoid wondering or of the unsuspiciously adventurous lives of military widows - and priests -, we cannot know.

Anyhow, the main conclusion, as Lino Coutinho stressed, is that "public morals is one of the objects most worthy of attention from a government" (CD, 1826, 3, pp. 271). I would add that this moral evaluation, most interestingly, do regard only women. Minor sons of soldiers are not asked for a comparably dignified behavior; officers themselves do not got their personal lives scrutinized. The objective is only to prevent women living "relaxed and scandalous lives" from getting benefices, as Cunha Matos said.

Not all women were equal. This do not only concern honesty: gender roles vary according to the relationship between the officer and the women, which lead to an important question: which women should get pensions? The financial constraints dictated the level of State generosity. After all, "we cannot make so much favors with the rights of the nation, nor the state of our finances allows for such liberality (…) we must (…) help only those in more need and with a stronger right to be fed by the nation" (CD, 1826, 3, pp. 268). The major problem were sisters and mothers. Should they be supported? Did they have a true right to pensions, or would such benefits be a simple generosity – or even prodigality - of the state? For Vasconcellos, including even all widows was a sign of "extraordinary generosity", (CD, 1826, 3, pp. 268), as in most places, only former wives of those actually fallen on the battlefield received financial support. Widows of officers from other Armies who died in peace had to get around with their own resources. To help even sisters would be an exaggerated gift: equivalent to alms, and therefore, something that could not justifiably be done with public money, as said by Souza França (CD, 1826, 3, pp. 270). The state must assume the moral place of deceased officer as they were positioned right before deaths death and fulfill their obligations towards family members; but such obligations regarded only his immediate family – wife and daughters.

[158] As Cunha Matos, "que por modo nenhum pretendo que se entre na indagação das virtudes moraes destas viúvas e orphãs; basta que umas e outras estejão em companhia de seus maridos e pais; se se abrir a porta a inquirições de vita et moribus, talvez muitas bem dignas de ologios entrem na classe das prevaricadoras" (CD, 1826, 3, p. 272).

If he supported other people, such as mothers or sisters, this would be a "beneficence", a generosity that must not be continued by the state (CD, 1826, 3, pp. 270).

The debate I have referenced on previous sections on the nature of the project - grace or reward – proceeded. Some said that the project was a reward both for the services rendered by officers and for the virtues of women: "the aid (*socorros*) (…) as part of the reward of services rendered by the officers (…). It is not a grace won on humiliations or on caprice (….), it is not a payment for gallantry or prostitution; it is indeed the prize of virtue" (CD, 1826, 3, pp. 274). Others pointed out that, if the cause for the benefices were military services, their value should be defined according to the quality of the contribution of each officer. On the contrary, Batista Pereira defended that if the half basic pay was a reward for the services made by the wives for their husbands, there must be no proof of honesty; after all, debts were not conditioned to the virtues of the creditor (CD, 1826, 4, pp. 184). And senator Barroso said that, if the services being rewarded were the officer's ones, there must be no difference between his daughters and sons; as such, he included minor sons on the project (SI, 1827, 2, pp. 112). As one can see, nobody agreed on whose services were being rewarded, but all possible answers were used to justify policies included in the law, some of them incompatible with each other. After all, legislators are not known for being amazingly coherent.

Widows most certainly should get payments; for sisters, however, the answer was not so straightforward. What about mothers? The first women in most men lives, mothers were such a dominating figure, charged with deep emotions, that the debates on their rights proved to be full of drama and fervor.

To compare mother and wife was the main strategy pursued by congressmen. To the thrill of psychoanalysts: Deputy Lino Coutinho asked: "as much reason, or even more, has the mother of the officer then his wife. Why would the latter have more rights than the former? Because she cleans his clothes, made his food and was a companion in his works?". The mother did no different: "how much time did the mother rendered similar *services*; how much did she spend on his education, how many troubles had she on his education" (CD, 1826, 4, pp. 146). Now, finally there was talk on the services rendered by women to men, and not only by officers to the State. But there was more. The military family was not the regular, nuclear one with husband, wife and offspring. As Costa Aguiar said, "most officers are single", and their mothers and sisters followed them in campaign (CD, 1826, 4, pp. 146). Or, as Odorico Mendes stated, "if the officer was not married and lived with his mother and sisters, those are the true ones preferred by his love. How many did not marry only to help them?" (CD, 1826, 4, pp. 148). Nobody said that, but if there were multiple types of families, pensions should not be subject

to a single, reductive model. Moreover, Lino Coutinho stressed that there were many conditions for mothers and sisters to receive the half basic pay: "they must be poor, honest and not enjoy any other pension", they must show that they lived under the protection of the deceased officer, and he must not have left a living widow or daughters. The project did not demand the half basic pay be given to anyone: "it demands [the benefit] to be given to those deserving" (CD, 1826, 4, pp. 148).

Debates took an emotional turn when Queiroz Carreira talked about motherhood. "Those who know that their parents need their support do not marry": an ailing parent is the equivalent of a consort. The officer's affections were the main criterium to be used for the awarding of pensions, and the mother was no ordinary person. "My mother, gentlemen, is a part of my whole (...). Those who do not share those feelings shows that they have never known the tenderness (*carinhos*) of a mother, for suffering the disgrace of being put at the foundling wheel (*roda dos enjeitados*)"[159]. It is hard to conceive a way to render the discussion more personal: there was no "my idea *versus* your idea", but "my mother *versus* your lack of love". To be left in the foundling wheel meant to have no family; to have no family was the lack of belonging and therefore, of honor. Those who opposed Carreiras' ideas where automatically cast as dishonorable orphans whose lack of senses derived from the lack of motherly love. Immediately after the speech, the chamber heard many *apoiados* (support for the speech). Deputy Vergueiro conceded that "those who are not good sons cannot be good citizens", but warned that the congressmen should not "consult the feelings in our hearts" (CD, 1826, 4, pp. 149). An appeal that rendered no fruits. The inclusion of mothers and the exclusion of sisters was approved on the same day. How could it be different after such passionate proclamations?

This episode reveals a model of motherhood: warmth, affection, service and sacrifice were the values advanced in the rooms of parliament, and rewarding them was most certainly a small financial sacrifice from the state that could only be seen as fair. But, behind it, there was also an ideal of sonship. To the unconditional sacrifices of the mother, the son must respond with absolute devotion; the defense of a mother was at the very core of the honor of a son, both as a family member and as a citizen. The emotional reaction to the discussion on the mother's rights can only be explained if we understand that gender roles were at play at the parliament - and not only concerning women, but also men.

Not all women – and men - were equal. Only legitimate and legitimized sons could get pensions, as the orphans must present the marriage certificates of their parents to get

[159] "minha mãe, senhores, é parte do meu todo (...) quem não tem esses sentimentos mostra que nunca conheceu os carinhos de uma mãe, por ter tido a desgraça de ser exposto na roda dos enjeitados" (CD, 1826, 4, pp. 148).

pensions[160]. Though the nuclear family was not the single model recognized, it was still valued and stimulated. This gets clearer on the discussions about remarriage of officer's widows. Many suggested that the wives of deceased officers should not be allowed to remarry[161], but the Viscount of Cairú disagreed: in a nation so sparsely populated, there must be great incentives to marriage, in order to enlarge the population. As he said, "there is no nation discouraging marriage, as we need vigorous and well-educated subjects", but "we need men born out of legitimate matrimonies, because only God knows how the other ones are educated" (SI, 1827, 2, pp. 119). According to the Marquess of Maricá, the half basic pay should be considered as a dowry that would help to boost the chances of those women in their quest for a husband.

Not all women are equal. Some might have not noticed, but until now, I was speaking only of officers; what about enlisted personnel? Deputy Holanda Cavalcanti suggested that only the wives of those who died at war should get the half basic pay; to a 21st century sensibility, this seems unfair and restrictive. For the 19th century, it was the progressive position that was rejected. Some said that the relatives of soldiers did not rely on their earnings to live; as a matter of fact, the salaries of enlisted personnel "is limited only to the strictly necessary, and does not cover even it: actually, it is even a matter of discipline that soldiers do not have sufficient salaries to abandon themselves to drunkenness and other vices"; instead of giving them money to support themselves, the state directly gave to soldiers "housing, hospitals, uniforms, shoes etc. The wives of soldiers live from their own work; and if they do so while married, they must keep working as widows" (CD, 1826, 3, pp. 268). No motherly tenderness here. Perhaps love was different among lower social classes.

Cunha Matos mentioned that there was not enough money for pensions for the wives of enlisted personnel; but, more importantly, the ethics of labor were different. As he said, "certain laws of decorum prevent the widow and the daughter of a military officer from hard works" (CD, 1826, 3, pp. 272). To break those rules could only result in scandal in the community: "what would we say, what would foreigners say if they saw the widows or daughters of generals and other officers" doing laundry or prostituting themselves to get enough money"? (CD, 1826, 3, pp. 272-273). Apparently, prostitution was only hideous if practiced by richer ladies. Cunha Matos was not so cynical to say that explicitly, but the spirit of the idea could not be hidden

[160] When this point was being discussed, Lino Coutinho suggested that daughters should not need their parents' marriage certificate because their baptism certificate would already give the declaration that they are legitimate daughters. In other words, legitimacy remained an important criterion (CD, 1826, 4, pp. 182).

[161] Senator Borges said that the objective of the law was to aid women in need, and not to stimulate marriage. The Marquess of Jacarepaguá answered that this was not true; for instance, if the widow or a daughter received an inheritance and stopped to be in need, she would not lose her right to the half basic pay (SI, 1827, 2, pp. 120).

when he proclaimed: "widows and orphans of inferior officers and soldiers can find subsistence more easily than the orphans and widows of officers; the force of custom forgives for the former what it censor for the latter" (CD, 1826, 3, pp. 273). A higher moral standard should result in a higher pay for women in higher classes; but this would also mean more social esteem. The rules were different for the two group of women: for the poorest ones, the work was nothing but a natural path; for the richer, it would mean utterly humiliation. The state simply ratified this difference with pensions. No, definitely women were not equal at all.

Differences that can be seen in three exceptional women that overcome prejudice and isolation to earn on their own right pensions from their services during the Paraguayan War. Among the hundreds of pensions awarded in the campaign, only three were justified not by the efforts and sacrifices of men, but by tenacious services rendered directly by women to the Brazilian state. Those three women had very different trajectories, but in all cases, their exceptional positions prompted heated discussions in parliament. Now, we will dive into the lives of Isabel Maria Brandão, Joana Maria da Conceição and – once more – Anna Justina Ferreira Nery[162].

The painfully slow request of Isabel Brandão arrived at the legislative chambers in 8 January 1867, at the height of the War, but she would not get any reward before peacetime. She did not fight - at least, not with guns in her hands. She convinced 30 people to volunteer to the Army, prepared them, sent nephews and a son-in-law to the south and housed their families while they fought for the Empire in the *Chaco* at the cost of "a little fortune". But there was no registry of those valuable services beyond private declarations. After the requests sank in the legislative drawers for six long years, the Assembly finally issued a request for the presidency of the province of Pernambuco for some information. But senators raised doubts on the merits of Isabel Brandão. They stated her son-in-law's widow had already gotten a pension for his services in Paraguay: there would be no sense in twice rewarding the same actions. Also, the *pernambucanas* authorities must clarify "the number and names of the nephews that marched to the war due to her persuasion and not spontaneously, or under *the more natural influence of the paternal auctority*"[163] (SI, 1873, 8, 269-270). Her actions seem to be absorbed by men

[162] Anna Nery has been subjected to a consistent historiography, as we shall see; the other two apparently did not come to the attention of other scholas. Among two important books on women in the Paraguay war, Maria Teresa Garritano Dourado (2005) and Hilda Agnes Hübner Flores (2010), only Ana Nery is mentioned (FLORES, 2010, p. 53-56).

[163] "As informações, que o governo exigiu do presidente da provincia de Pernambuco, prescrevendo-lhe o modo como devia proceder, devem ser completas, e só por ellas poderá verificar-se o numero, e nomes dos sobrinhos da peticionaria, que marcharam para a guerra por instancias, e persuasões suas, e não espontaneamente, ou pela *influencia mais natural da auctoridade paterna*, e bem assim quaes eram os bens que a peticionaria possuia, e quaes as despesas que fez em preparar para a guerra taes voluntários" (SI, 1873, 8, 269-270).

around her: the son-in-law, the nephews or their fathers, all seem to be more natural creditors of state gratitude then her.

Conscious of her situation, she had provided for certifications of honesty from a police officer (*subdelegado*)[164] and a respected citizen of her village[165]. The commander of the Army (*comandante de armas*) in Pernambuco confirmed that she had indeed worked tirelessly to convince many people to march towards Paraguay[166]. But also stressed that she was poor and in need: an image not by chance comparable to the one of widows.

When the senate was finally set in 1874 to decide whether she was entitled to a pension or not, two issues were considered worth debating: first, if it was possible to give pensions for services rendered due to the war, but not in it; second, if there were precedents of women receiving pensions on their own right. It is quite telling that senators felt compelled to search for precedents of women getting rewards; it seems that the services rendered by the subject were not the only relevant matter after all, and gender equality was still a distant dream. Anyhow, by that point there were two precedents, as Anna Nery and Joana Conceição had received their own pensions, so Isabel Brandão easily won this argumentative battle (SI, 1873, 4, 125). On the other side of the front, prospects were murkier. Senators pointed out that when services had not been directly performed at the battlefield, common practice dictated the state to give honors and titles, but not pensions. Senator Saraiva, for instance, insisted that many officers wounded in the war were not receiving financial aid from the government because they were still were able to work[167]; the Baron of Camaragi, for instance, received a medical opinion that he could still find an occupation even if a bullet was permanently installed at his lungs[168]. It would be therefore unfair to give a financial reward for someone who did not even go to the front. The Minister of War disagreed, however. According to him, the government was giving pensions to everyone that could theoretically find a job, but would have to surmount

[164] "Attestado do subdelegado da freguesia da Boa-Vista, declarando que a peticionaria é viuva, tem a seu cargo familia, *vive honestamente*, e nada lhe consta contra a sua conducta" (SI, 1873, 4, 123)
[165] A certain M. Buarque de Macedo saying "que a peticionaria é de maioridade, pobre, *de bom procedimento*, e unico arrimo de sua família" (SI, 1873, 4, 123).
[166] "ella persuadiu a seu genro e sobrinhos a que se alistassem como voluntarios, e marchassem para a campanha do Paraguay, e bem assim esforçou-se que outros fizessem o mesmo, sendo certo que seu genro falleceu em combate; que este serviço foi importante naquella época; e que a circumstancia de ser ella viuva, pobre e onerada de familia, lhe dava jus á pensão que pedia" (SI, 1873, 4, 124).
[167] "O governo tem negado o soldo a officiaes feridos em combate com o fundamento de que esses officiaes não se acham inutilisados para o trabalho; e dá agora pensões á pessoas que não estiveram na guerra, e somente por terem angariado voluntários" (SI, 1873, 4, 163).
[168] "Os medicos disseram o que não podiam deixar de dizer, isto é, que o official tinha a bala nos pulmões; mas accrescentaram que a bala estava tão bem accommodada (risadas) que o official podia viver com ella, e trabalhar para ganhar a vida" (SI, 1873, 4, 163).

unspeakable hardships in such an endeavor[169]; he also favored the request of Isabel Brandão, as she had lost the son-in-law that provided for her. After those observations, the complains mostly revolved around the lack of official documents and her reliance on private declarations, the absence of an evaluation of how much she had spent[170] and fear of setting a potentially costly precedent[171]. But governmental agreement proved to be an unsurmountable blessing, and the request was approved.

A more remarkable story could probably emerge from the journey of Joanna Maria da Conceição had we more information on her. She followed her husband, caporal Manoel Theodoro Pereira, to the front, and apparently fought in the Army. She got her vision impaired after being wounded by a bomb in 15 April 1867 – an event clearly worthy of a more traditional soldier. As such, after she requested her pension, she was submitted to the "same process of the soldiers of the Army who, as a consequence of wounds acquired in service, cannot keep serving or find means for their own subsistence" (SI, 1869, 5, 403). She was also compared to Maria Quitéria de Jesus Medeiros[172], a woman who fought in the independence war in Bahia disguised as a man and later was recognized and received a pension. Joanna da Conceição was the only one of the three woman whose behavior most closely resembled masculine patterns and who directly fought in the war.

And now, we can once again encounter D. Anna Justina Ferreira Nery, the first character of our chapter. Born in the Bahian city of Cachoeira, she came from a military family and had married an officer. By the time the altercations in Paraguay broke out, she was already widowed, though. Two of her brothers were lieutenant-colonels, she had a lieutenant for a son and two others were army doctors: a family exodus to the Paraguayan wetlands was predictable; Anna Nery decided to follow her relatives to the front and act as a nurse. Her destiny was inextricably linked to that of her family. Marching.

The image of Anna Nery never resembled that of a soldier: as a nurse, she could embody less confrontational virtues and be seen as a family women. This is very clear from the wording of most descriptions of her in the newspapers. The *Jornal do Commercio* reported the party

[169] "o governo tem sido sempre sollicito em conceder pensões aos officiaes que se inutilisaram na guerra do Paraguay, e não só aos que se inutilisaram completamente como aquelles que dificilmente podem ganhar os meios de subsistencia. Tem sido este o critério para a concessão das pensões. O senado compreende facilmente que não é possivel deixar de haver uma regra para semelhantes pensões" (SI, 1873, 4, 163)

[170] Senator Dias Corrêa: "não ha um documento que mostre que esta senhora antes de ter angariado esses voluntarios para o serviço da patria, possuía taes e taes bens, que os consumiu nesse serviço, porque com effeito isto seria uma circumstancia muito attendivel. Por ora, o que ha é zelo, patriotismo, esforço individual, mas não está provada essa circumstancia" (SI, 1873, 4, 165).

[171] Senator Dias Corrêa: "tem os precedentes entre nós tal força que todos começam a invocal-os, e se não são hoje attendidos sel-o-hão amanhã" (SI, 1873, 4, 165).

[172] For a biography of Mariq Quitéria, cf. Pereira Reis Júnior (1953).

she offered in Argentina in quite an effusive manner, and stressed: "for some, she is a true mother, for others, a sister, and for most, a true daughter of Saint Vicente of Paulo"[173]. Her virtues are deeply intertwined with family life, and journalists said that the "family of d. Anna"[174] rendered more services than any other one during the war.

Family was entangled with religious virtue. Not by chance, she is often compared with a religious sister (*irmã de caridade*). In 1869, the *Jornal do Commercio* published a description of Humaitá, and one of the main attractions of the city was precisely the house of Anna Nery, which was searched "naturally" by those who arrived there with the curiosity of tourists, chasing "one of the most popular and respected names of the Army" – apparently, she was seen as part of the armed forces despite not being even able to be legally enlisted. She was compared with a religious sister, in a fusion of both charity and energy[175] that perfectly embodied the tensions that inevitably accompanied a woman in the military[176]. As such, she is both described as a "saint" and a "hero": a unique fusion of traditionally feminine and military virtues[177].

Her Christian virtues receive the most attention, in an informal canonization that most certainly counted with the blessings of nationalist intellectuals. She was described as "charitable" (*caridosa*), "selfless" (*abnegada*) and "humble" (*humilde*): the "venerable Anna Nery"[178]. A "tutor angel" whose memory stimulated "tears of tenderness" in the stiffest officers[179]. When she died, a poem compared her hands with those of Jesus[180]. She was therefore the epitome of a model of femininity based upon care, that shone the brightest in the horrors of war, embodied by the Paraguayan president. The comparison established clear ideas of what was a good woman and a degenerate man: "Solano Lopez and D. Anna Nery are in perfect contrast. The former is a monster more ferocious than the beasts themselves; the latter, the type of a good religious sister, is a true glory without noise or ostentation. Modesty highlights the virtues". She is also portraited as physically fragile[181] and suffering from the deaths of her sons: a behavior that suits more a widow than a soldier[182].

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[173] *Jornal do Commércio*, 25 de julho de 1868. http://memoria.bn.br/DocReader/364568_05/14093
[174] *Diário do Rio de Janeiro*, 25 de abril de 1870. http://memoria.bn.br/DocReader/094170_02/25770
[175] "senhora tipo de caridade, de energia sempre em ação, verdadeira mãe dos feridos".
[176] *Jornal do Commércio*, 28 de abril de 1869. http://memoria.bn.br/DocReader/364568_05/15401
[177] *Diário do Rio de Janeiro*, 15 de maio de 1870. http://memoria.bn.br/DocReader/094170_02/25845
[178] *Diário do Rio de Janeiro*, 13 de dezembro de 1869. http://memoria.bn.br/DocReader/094170_02/25253
[179] *Diário do Rio de Janeiro*, 21 de dezembro de 1869. http://memoria.bn.br/DocReader/094170_02/25283
[180] *Jornal do Commércio*, 30 de maio de 1880. http://memoria.bn.br/DocReader/364568_07/887
[181] "D. Anna Nery é uma senhora de pequena estatura, cujo corpo débil, menos pela edade do que pelas enfermidades, encerra uma grande alma e um coração nobre e cheio de puros sentimentos patrióticos. Ella reúne á intelligencia uma educação cultivada".
[182] *Diário do Rio de Janeiro*, 13 de dezembro de 1869. http://memoria.bn.br/DocReader/094170_02/25251

The legend of Anna Nery grew throughout the years. She was widely celebrated still in her lifetime: she was personally received by the emperor[183] more than once[184], earned awards from private associations[185] for her nursing activities, official appraisals from the Legislative Assembly of Bahia[186], and got a street in Rio de Janeiro named after her[187]. Her legend thrived even more after her death in 1880: in 1923, the first modern Nursing School in Brazil was named after her[188]; the Brazilian Nursing Council considers her the patroness of nursing in Brazil and give awards in her name[189], and a biographical 45-minute film was made about her life in which she is interpreted by a celebrated Brazilian actress[190].

A painting. The most grandiloquent homage that D. Anna received was perhaps the most useful to understand how she was seen. The municipal chamber of Salvador wanted an image of D. Anna to decorate its building[191], and hired for the task Victor Meirelles[192], a famous artist remembered today, among others, for his work *A Primeira Missa no Brasil* (the first mass in Brasil).

[183] *Diário do Rio de Janeiro*, 30 de maio de 1870. http://memoria.bn.br/DocReader/094170_02/25905
[184] *Diário do Rio de Janeiro*, 8 de maio de 1871. http://memoria.bn.br/DocReader/094170_02/27265?pesq=%22Anna%20nery%22; *Diário do Rio de Janeiro*, 13 de maio de 1872. http://memoria.bn.br/DocReader/094170_02/28732?pesq=%22Anna%20nery%22
[185] *Diário do Rio de Janeiro*, 8 de junho de 1870. http://memoria.bn.br/DocReader/094170_02/25943
[186] *Diário do Rio de Janeiro*, 15 de junho de 1870. http://memoria.bn.br/DocReader/094170_02/25969?pesq=%22Anna%20nery%22
[187] *Diário do Rio de Janeiro*, 21 de junho de 1875. http://memoria.bn.br/DocReader/094170_02/33228?pesq=%22Anna%20nery%22
[188] The School today is part of the Federal University of Rio de Janeiro, and retains the name of d. Anna. https://eean.ufrj.br/
[189] http://www.cofen.gov.br/premio-anna-nery-reconhecimento-ao-profissionalismo-da-enfermagem_67494.html
[190] https://www.youtube.com/watch?v=nQJD-SjwPBc
[191] *Diário do Rio de Janeiro*, 24 de setembro de 1873. http://memoria.bn.br/DocReader/094170_02/30710
[192] *Diário do Rio de Janeiro*, 13 de novembro de 1870. http://memoria.bn.br/DocReader/094170_02/26573

Figure 15 MEIRELLES, Victor. Retrato de Ana Justina Nery. 1870?. Óleo sobre tela, Memorial da Câmara Municipal de Salvador - Pinacoteca do Paço Municipal. Disponível em: https://commons.wikimedia.org/wiki/File:Victor_Meirelles_-_Ana_Justina_Nery.jpg.

She looks less like a military nurse and more like a widow. Black clothes and purse: severity and austerity in the midst of a war. In the background, what appears to be a church ratifies the aura of sanctity that Anna Nery had conquered in Paraguay. The depiction is not of an active woman, fighting to save lives: she echoes a specter, an ideal presence guaranteeing the fragile tranquility the soldiers around her emulate. All the other human figures in the canvas appear in natural positions, either resting or carrying a wounded. Anna Nery is different. She stands still, undaunted, almost like a statue; perhaps, even a revenant from the beyond. As Porto and Oguisso (2011) noticed, she carries a military medal[193] and a laurel wreath: the most visible signs of her military enterprises. But the former is quite small and the latter fades in the scene for being black: neither attracts the attention of the observer. Without the information of who is portraited, one could hardly guess that Meirelles was painting a heroine of the Paraguay War. The semantic field being evoked is completely different: it is one associated the sober virtues of a widow. Discreet, severe, righteous. And saint: above all, an ethereal saint, that barely seems to set her foots on earth while standing on the shadows of the church.

[193] Probably the Imperial Order of the Southern Cross, which she received from the emperor for her services.

In 1870, Anna Justina Ferreira Nery got a yearly pension of 1:200$000 *réis*, equivalent to the basic pay of a colonel (decree 1868/1870). The caritative actions of some people was compensated by the government. No surprise for someone that threw parties for Argentine generals and the most important commanders of the allied armies. Her petition for the pension was even accompanied by a letter from the Count d'Eu, the commander-in-chief of the allied armies that succeeded Caxias and husband of the heiress to the Brazilian throne, Princess Isabel. D. Anna was praised in the official justification of her pension for her services, for treating the wounded in the hospitals and her own house and educating several girls that accompanied relatives in the war or were orphaned by the fight[194].

Gender is no easy concept. Military pensions and social security were heavily influenced by gendered roles and expected behaviors related to them. But it would be easy to simply reduce "gender" to "woman issues"[195]. First, men were also submitted to certain expectations. And they might challenge some of our expectations: as we saw in the 1827 law, the role of (male) sons implied a passionate defense of the mother's honors; this led to a debate in parliament dominated by emotional arguments that, under other circumstances, might be considered as unmanly or even feminine. Second, there were multiple types of women. Expectations – and rewards – were deeply different for widows, daughters, sisters, and mothers. And above all, class was a defining issue: there were massive differences between families of officers and enlisted personnel; not by chance, the pension of Joanna da Conceição was of 15$000 *reis* a month, 13 times less than the value of Anna Nery.

Social security is deeply shaped by gender. But this means much more than a binary division between man and women: the number of roles involved was almost as complex as society itself.

4.7 – A black mark in a "colorblind" army: The Volunteers of the Fatherland, D. Obá II and race

There should be no surprise in saying that race played an important role in the military pensions in a slave society such as Brazil. Nevertheless, there are deep methodological obstacles for a proper address of this issue, as matters of race are profoundly intertwined with

[194] "Serviços prestados desde o principio da guerra contra o governo do Paraguay, quer ajudando o curativo dos doentes nos hospitais militares, quer tratando em sua própria casa e grande número de officiaes feridos ou enfermos, quer educando em sua companhia as meninas que pelos acontecimentos da guerra ficavam orphãs" (SI, 1870, 4, 170).
[195] Cf. Gisela Bock (1898, especially p. 17-20) and Joan Scott (1986).

class. The hindrances run even deeper as there were active attempts to erase race registries in the Brazilian army in the early 1840s as part of an effort to build a "colorblind" force: as Hendrik Kraay (2012, p. 129) points out, the last segregated unities in the armed forces were extinguished in 1837, and since then, the military registries (*fé-de-ofício*) did not even have a space to write the soldier's color[196]. This could explain why the first Brazilian census, held in 1872, did not collect data on the racial composition on the Army. Therefore, I cannot properly discover the racial breakdown of the military world. But there is significant indirect evidence suggesting non-whites comprised an important portion of the Brazilian army. I choose to contextualize the participation of non-white populations in the armed forces and especially on the volunteers of the fatherland (*voluntários da pátria*). Then, I analyzed the writings of Dom Obá II (Cândido da Fonseca Galvão), an honorary *alferez* (lieutenant) and black man with an extraordinary story that spoke out extensively on the mistreatments of black, impoverished former soldiers.

The 19th century is the age of nationalism; the idea of a besieged fatherland in need of defense proved to be a powerful tool catalyzing the will of many men to march to the Paraguayan wetlands. To take advantage of chauvinistic sentiments, the Brazilian government created in 1865 the corps of volunteers of the fatherland (*Corpos de Voluntários da Pátria*). Those military unities were made of men without any military training that were nevertheless integrated into the war effort; frequently, not even their commanders were career officers, and they had to receive military rankings only for the time of war. Those corps were regulated by the decree 3371 of 7 January 1875[197], which was – as we shall understand later -, a "mythological law"[198]. To boost the number of volunteers, the government made several promises to the future warriors: they would receive a prize of 300$000 after the service ended, would be entitled to a piece of land in military colonies (art. 2º) and would be preferred for hiring in public positions (art. 9º), their families would get pensions if they died (art. 10), among other privileges. Thousands of people flocked from their homes in several provinces to the court in Rio de Janeiro, where they were integrated into the Army, and later sent to Paraguay.

Many black people shared the military burden. As Kraay (2012) highlighted, a long tradition starting in colonial times had seen several black warriors defending the Portuguese kings, and got to an apex in the independence wars in Bahia. Alive four decades later, this spirit

[196] For more information on racial policy in the Brazilian armed forces in the first decades after independence, see Kraay (2011).

[197] https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-3371-7-janeiro-1865-554492-publicacaooriginal-73111-pe.html

[198] *O Soldado*, 29 de março de 1881. http://memoria.bn.br/DOCREADER/235270/18

led to the creation of the *Zuavos* companies, made exclusively of black soldiers. This effort, however, got an ambiguous answer by the government, as the development of a racialized identity was discouraged, and after little time those companies were dissolved and their effective was integrated in other unities.

Historiography has already discussed the participation of former slaves (*libertos*) in the Army: manumissions were an important source of men for the warfare, especially in the last years of the war. As Vitor Izeksohn (2015, p. 115) suggests, more than 6000 soldiers entered the army that way, most of them coming from national properties or religious orders. In other words, almost 5% of the Brazilian Army was made of former captives. This fact was taken by the Paraguay propaganda as an opportunity to portray the Brazilian forces in a racist fashion: Brazilians were depicted in the press as *macacos* (monkeys), and labeled as such by Paraguayan soldiers in the field. A famous Paraguayan cartoon even depicted some Brazilian commanders and the emperor himself as monkeys (TORAL, 1995, p. 288); the image of the Brazilian Army and Pedro II as primates was frequent in the Paraguayan press (PAULA, 2011).

After they returned from the war, volunteers had to face severe hardships. The promises of the 1865 decree were forgotten as the enthusiasm for the war's glories faded away, and neither the legislative or the executive branches installed the payments due to the law of 1865. There are several accounts of the difficulties of veterans to find their way in the bureaucracy to get the much-needed rewards (SOUZA, 2016): usually, they did not even receive the basic pay that could support them in the hardships of civil life after several years in the Paraguayan wetlands. In the 1880s there were still accounts of the hardships the former volunteers had to endure, and theater shows were organized to raise funds for their support[199]. The humiliations deepened even further when the electoral reform of 1881 raised the rent threshold to become an elector, effectively excluding many of the impoverished former soldiers. The military press of this year offers abundant complaints from former volunteers who lived in slums (*cortiços*) and had lost their political rights[200]; they usually claimed "the soldier is a citizen"[201], but was not being treated as such.

The promises of 1865 were only meant to "delude the sight and the heart". The most important provision was contained in art. 12: the government should request to the legislative branch authorization to give pensions equivalent to the basic pay to the volunteers: a benefice akin to the reform that was due to regular officers. But this article never left the list of broken

[199] *O Soldado*, 12 de abril de 1881. http://memoria.bn.br/DOCREADER/235270/37
[200] *O Soldado*, 5 de abril de 1881. http://memoria.bn.br/DOCREADER/235270/26
[201] *O Soldado*, 22 de março de 1881. http://memoria.bn.br/DOCREADER/235270/12

promises[202] - at least in the 19th century, as we shall see later. The preference in the public jobs was an illusion, as the "volunteers must compete with protegees, the *validos* of government providence, and those have preference in everything. As high as the abilities might be in this country, they fall before the patronship (*patronato*), the sole judge of the distribution of positions". Many people were hit by illnesses and could not even be received by the ministers to report their torments[203]. The legislators were "generous in the crafting of laws, and sloppy in their application"[204].

Cândido da Fonseca Galvão was one of the former volunteers troubled by government inaction. The son of a former slave, he served as a *zuavo* and returned from the war as an honorary *alferez*: a position that gave him social prestige, but no payment. Instead of being engulfed by the despairing situation, however, he fought for his rights and those of his fellow volunteers. He assumed the name of D. Obá II, as he said he was a descendent of an African king. As such, he frequently attended ceremonies in the court of D. Pedro II and supported the monarchy. He frequently wrote to the press in Rio de Janeiro on a variety of issues[205], exposing the hardships the black population had to endure in a slave society[206]. Many of those manifestations complained about the mistreatments faced by the volunteers of the fatherland.

Outrage. This must be the feeling he faced the most. Dom Obá wrote dozens of articles[207] on the press denouncing the neglect of the black former volunteers, claiming their rights. As Dom Obá II said, "it is hard for soldiers who defended the fatherland to live without basic pay, that some without means have died, and others with fortunes are about to become poor"[208]. The reason for this was not hard to understand: "jobs fit for my rank they do not give to me. They say right away: I did not give it because you are black"[209]. He claimed for him his black identity, stating that he earned even more the rights than he would from the 1865 decree, "even more myself, because I am black, as this is the most useful color"[210]. He insisted in the

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[202] *Tribuna militar*, 13 de outubro de 1881. http://memoria.bn.br/docreader/393673/117
[203] *O Soldado*, 25 de março de 1881. http://memoria.bn.br/DOCREADER/235270/14
[204] *O Soldado*, 29 de março de 1881. http://memoria.bn.br/DOCREADER/235270/18
[205] On his strategic use of the press, see Lílian do Rocio Borba (2016).
[206] Dom Obá is the subject of one published biography (SILVA, 1997).
[207] Other parts of the text: 25 August 1881, http://memoria.bn.br/docreader/393673/62; *Tribuna militar*, 4 September 1881.http://memoria.bn.br/docreader/393673/74; *Tribuna militar*, 8 September 1881. http://memoria.bn.br/docreader/393673/78; *Tribuna militar*, 18 September 1881. http://memoria.bn.br/docreader/393673/90; *Tribuna militar*, 25 September 1881. http://memoria.bn.br/docreader/393673/97; *Tribuna militar*, 29 September 1881. http://memoria.bn.br/docreader/393673/102; *Tribuna militar*, 2 October 1881. http://memoria.bn.br/docreader/393673/106; *Tribuna militar*, 6 October 1881. http://memoria.bn.br/docreader/393673/110
[208] *Tribuna militar*, 10 de junho de 1881. http://memoria.bn.br/docreader/393673/10.
[209] *Tribuna militar*, 24 de julho de 1881. http://memoria.bn.br/docreader/393673/26.
[210] *Tribuna militar*, 14 de junho de 1881. http://memoria.bn.br/docreader/393673/14.

value of the "black who defended it [the Brazilian flag]"[211]. Nonetheless, they must endure bigotry: "who do not see that the Brazilian blacks, even though they all do good to the fatherland, are by some depreciated [?]"[212].

One topic in which he frequently insisted was fidelity to the Brazilian crown, in opposition to "those who drink the blood of the soldiers and the rights of the humiliated people"[213]. In opposition to the "detractors of the Brazilian crown, everybody know I am faithful to the Brazilian crown as the black that I am"[214]: his black identity is tied to the monarchy. As such, he must insist "those evil acts do not come from the nation's sovereign, but from those who want to twist the rights in the law to eat the famine and the misery of soldiers"[215], from the evil, "fake monarchists" [216].

Ironically, Dom Obá insisted that the black people in Brazil only got their rights due to Soláno López, the Paraguayan dictator: if there was no war, "no black man would have today the value of having a royal chart saying: honor, respect and esteem due to his [the holder of the chart] courage"[217]. This honor should be translated in fight for their own rights: "just as we were not ashamed of defending as soldiers the fatherland, we cannot be ashamed of chasing the rights that belongs to us as soldiers"; this must be accompanied by a fight for the "rights of slaves" to be freed[218].

The writings of this extraordinary, unique man highlight the precarious conditions of the volunteers. Even though they could come from all races, black men were plagued by a particular experience – and this could not be different in the last western society that still maintained the legal institution of slavery. Prejudice and racism unfortunately still ran deep in the armed forces. This is best illustrated by an article published by the journal *Tribuna Militar* in 1881 against some reforms suggested by the ministry to stimulate more people to volunteer for the Army. One of the ideas was to compensate masters that freed slaves to work in the land forces. The *Tribuna Militar* editors suggested that this could not be good, as some military virtues, as "humanity", "generosity", "firmness" and other qualities were denied to slaves by law. What could be a criticism of the treatment of captives quickly turned into blunt racism: "the black race is lazy, voluptuous, without energy by education and heritage"[219]. The only way

[211] *Tribuna militar*, 1º de setembro de 1881. http://memoria.bn.br/docreader/393673/70
[212] *Tribuna militar*, 11 de setembro de 1881. http://memoria.bn.br/docreader/393673/82
[213] *Tribuna militar*, 21 de julho de 1881. http://memoria.bn.br/docreader/393673/22.
[214] *Tribuna militar*, 24 de julho de 1881. http://memoria.bn.br/docreader/393673/26.
[215] *Tribuna militar*, 24 de julho de 1881. http://memoria.bn.br/docreader/393673/26.
[216] *Tribuna militar*, 28 de agosto de 1881. http://memoria.bn.br/docreader/393673/66
[217] *Tribuna militar*, 11 de setembro de 1881. http://memoria.bn.br/docreader/393673/82
[218] *Tribuna militar*, 15 de setembro de 1881. http://memoria.bn.br/docreader/393673/86
[219] *Tribuna militar*, 1º de janeiro de 1882. http://memoria.bn.br/docreader/393673/208

to stimulate them would be through the use of the whip, but it had been abolished by the 1874 recruitment law.

Who could blame Dom Obá for his resentment?

4.8 – Before privilege: final remarks

Privilege. In contemporary Brazil, military pensions evoke in the public opinion's imagination an absurd system that supported for years the daughters of officers that could easily work – and sometimes did. Societal attitudes towards the work of women have changed in the last two centuries while military law struggled to keep in pace with these modifications: only in 2000 the benefices for daughters of soldiers were extinguished, and only for the families of those entering the land forces after that date. This might give the impression that military social security developed in a straight line of continuity; nothing would be more wrong, though. As we could see in the previous pages, most of the pensions were actually pretty modest – only a tiny fraction of what soldiers received when they were serving the Army went to the pockets of their families. The social order in which this mentality developed could hardly conceive people receiving money for not working: those who could no longer perform a productive activity must be supported by their own savings or their families, and no one else. Social security was the family and the immediate community; if the state – feared and contained in the liberal order – acted, it was only out of its own benevolence – its intervention would never generate rights.

This way of thinking offered hardships to those occupying the most fragile positions in society. The example of the former volunteers of the fatherland was quite telling: even if a legislative decree authorized the government to give pensions to those who sacrificed their best years for the sake of the empire, the executive power postponed indefinitely the fair compensation of soldiers. Government officials preferred to made their decisions on an individual basis: instead of a *montepio* or a half basic pay which were established by law, pensions must be decided on an individual basis, reliant on individual, often subjective evaluations of the merits of the officer or the enlisted personnel. The party in power, then, could have a powerful tool to wield in the system of *patronato*: the exchange of a favor within the state for electoral fidelity.

Women suffered the most from the precarious structure of social security, as they were almost all of the receivers of the funds. The controls originally envisioned by the Brazilian state to guarantee the good use of pensions were frequently – but not always – derived from the model nuclear family, but they mostly reinforced traditional values of feminine honor: a single

woman must be virtuous, simple and in constant search of a husband – her money, therefore, would primarily be meant for her dowry and should prevent her from working. But this was meant only for the middle and upper classes: wives of enlisted personnel were left on their own to figure out how they could find their way to survive. The "military family" - a concept not uttered back in early 19th Brazil, as it is today, but nevertheless useful for historiographical analysis - was no single entity: most of the time, when we talk about military social security, we are referencing a system that only reached officers. Enlisted personnel were entitled only to pensions that demanded approval from the parliament.

Most important, the previous pages demonstrate the emergence of a specific normative complex regarding the military. The civil servants had their own structure of social security (the *Montepio Geral dos Servidores do Estado*); the armed forces, instead, were awarded by the parliament with not one, but two different institutions: the *montepio* of the Navy and the half basic pay of the Army. This suggests that despite the chronic underfunding of the military after the Paraguayan War, the imperial state had developed a conscience of the specific situation of the professionals of the war in Brazil. Soldiers and especially officers had a unique salary structure that, developing from the hierarchy principle, accepted and enhanced inequalities; those differences remained after the deaths of military personnel: their widows would receive the half basic pay and eventually pensions theoretically according to the services rendered by their deceased husband. But those services were valued according to principles deeply entangled with rank and social privilege.

Through a singular combination of *ancien régime* and liberalism, right and privilege, service to the crown and modern bureaucracy, Brazilian law was able to forge a legal niche for the military profession and recognize much of its specificities – from the most general ones, as the sacrifice of their own lives, to the most ordinary, as the need of a horse. Social security did not escape this process of differentiation.

Chapter 5

Teaching service: criminal and administrative discipline of the Armed Forces

He thought he was free.

José de Castro Favacho proved before the draft committee (*junta de alistamento*) that he was exempt from military service in September 1873. Relieved, he returned to his work as sacristan at the small town of Vigia in northeastern Pará, at the shores of the Atlantic Ocean, near the mouth of the Amazon River. The young 22-year-old was happy to go back to his duties at the peaceful service of God. Not so peaceful in the past few days, though. He was clashing with canon Siqueira Martins, a powerful man with high connections in the capital, Belém; the priest had been responsible for the botched attempt of recruitment in September, but now, 12 February 1874, months had passed and the law stated that Favacho could not be bothered again.

Then, they came. Favacho was arrested by a group of soldiers and dragged out of his home. He probably did not understand what was happening; they explained. He might have tried to argue, to say that the recruitment act forbade them to arrest him after he had proved he was exempted. Only in vain. The government had recently appointed a new president of the province of Pará, but the new official had not arrived at the capital yet: the command fell in the hands of the vice-president, an old friend of Siqueira Martins. Too bad for Favacho. He was taken to Belém: two nights passed as they navigated though waters no one could tell if they belonged to the river or the ocean, with only the forest watching them from land and the moon glaring in the distant skies, both magnificently ignoring his sufferings from their distant enormities. He despaired only to think on the many years he would lose serving in the Army, marching to distant provinces, obeying the most despicable, obnoxious officers, being nullified by a draconian and backward-oriented legislation, preyed by the mighty generals as he would be by the forest or the sea, if he dared to escape. He would turn into one of those soldiers, both an instrument and a victim of the tyranny of the powerful men of Pará. And then, he remembered. There still were judges in Brazil, and he had the privilege of knowing how to write. Those strange words might help him. *Habeas-corpus*.

When he arrived in Belém, Favacho started writing. The 14 May 1874, at 10:00, his petition was sent to the judge. João Meira Florentino de Vasconcelos, the responsible magistrate, was scandalized by what he read, and notified the military authorities he had accepted the lawsuit; the official arrived at the barracks to which Favacho had been brought at

17:00. He heard he could do nothing: Favacho had been officially conscripted by the authorities in the Army (*assentou praça*) at 13:00. He was now a soldier, and there was nothing the judiciary could do about it: the act 2033 of 20 September 1871 prescribed in the art. 18 that the judge could not accept a *habeas corpus* on behalf of men enlisted in the armed forces. But was Favacho in the Army? He was a civilian when the petition left his hands, and was enlisted when the answer arrived at his superiors' desks: the law gave no straight answer to his plight. Judge Vasconcelos responded boldly: he voided the conscription and ordered Favacho to be set free. And this was when the his problems begun.

The commander of the barracks in which Favacho was interned refused to let him go. The judicial officials communicated the facts to Judge Vasconcelos, and he established the course of actions for the following day: he sent a letter to the commander of arms of the province, the highest military authority in Pará; at the same time, the officials would return to the barracks and demand the release of Favacho, threatening to arrest whoever opposed the judicial order. Each one proceeded with their tasks, but the Army officers would not prove to be docile.

The following day, the officer of the general staff responsible for the barracks refused again to release Favacho and threatened to imprison the judicial officials themselves. They insisted in their menaces. The commander of the barracks, colonel Morais Rego, arrived and backed the officer of the general staff. The war of threats ended when the judicial officials leaved the barracks. But they soon returned with an order to imprison Morais Rego. Meanwhile, the commander of arms of Pará received the letter from the judge; he did not know that Favacho was inscribed in the Army, so he sent a helper ordering Morais Rego to present Favacho before the judge. The military hierarchy defused the tensions. But for little time.

Morais Rego sent Favacho to the judge escorted by a sergeant and a few soldiers. After they left, the commander of arms arrived and discovered that Favacho was not a civilian; at least, in the interpretation of the Army. He sent a letter informing the president of the province of what was happening.

The escort with Favacho found the judge at the forum and presented to him the newest soldier of the Brazilian army. They let him into the audience room, where Judge Vasconcelos communicated that Favacho should be released and was to be legally considered as a civilian. The soldiers, however, stormed into the room and tried to take Favacho away, stating that their orders were simply to present the man to the judge.

What would a reasonable person do? Judge Vasconcelos ordered some policemen to arrest the soldiers for disobedience. A decision that seems even more interesting as one

remembers that the prison was located precisely inside the barracks of the Army. The day was already closing to an end, but the confusion was definitively spiraling out of control. At around 20:00, the police arrived with the recently jailed soldiers at their barracks. But their fellow soldiers were outraged by the scene they were testifying: how could men be incarcerated simply for following orders? Colonel Morais Rego had to intervene along the chief detective; they agreed to free the soldiers and let the police go away.

Such altercations would not end smoothly. In 17 February, the president of the province had arrived to the capital city and the judge ordered him to imprison himself in the barracks he commanded. Meanwhile, the commander of arms published an order of the day stating that no military authority should follow any orders from civil servants that were not transmitted through him. This case was taken to the highest spheres of the military administration: the *habeas corpus* was considered lawful in a decision from the Court of Appeals (*Tribunal da Relação*) of Pará, and the Council of State had to hear and discuss the case.

Favacho got his freedom. But the process was painful[220].

Beyond human drama and political acrobatics, this case testifies to the clamorous power struggles between the military and the civilian world. Generals seek to isolate their subordinates out from external scrutiny; by doing so, they would be able to better discipline and govern their men. The same way Favacho was recruited against his will and the determinations of the law, generals eager to control their troops could punish any transgression of military regulations. A *habeas corpus* could jeopardize their abilities to instill fear in the troops and promote indiscipline. And a controlled behavior is precisely the very foundation of a good military corporation.

Therefore, we can only fully understand military law with reference to the cardinal virtue of discipline. This different foundation particularized the barracks from the civil world and created a different legal field, one that cannot be mistaken from the civil world. Here, the differentiation between penal and administrative law, which is a central tenet of modern criminal law, is not so crucial. Sure, almost everybody stated that "disciplinary" and penal codes were different, so much that each of the two fields must be covered by a different code. But they operated under the same logics, which made military administrative law more akin to military penal law than to civilian administrative law. Not by chance, the writers of the main Brazilian project of penal military code of the empire stated that the union of the military penal

[220] This story was based on the proceedings of the joint reunion of 25 February 1874 of the sections of Justice and War and Navy of the Council of state (SILVA, 1887, pp. 91-108) and on the appeal on habeas corpus of 7 March 1874 of the Court of Appeals of Pará (TJPA, 1874). This case was discussed by Andrade (2013).

and disciplinary codes was to be called the "code of military justice" (PROJECTO, 1863, p. 6): a single reality. And, frequently, it was a terrifying one.

It must be granted that some people thought differently. Espírito Santo Júnior (1887, p. 4), for instance, insisted that the military organization must be as similar as possible to civil institutions, while Brazil "exaggerated the particular nature of the military organization (…) through laws based on arbitrium". The very existence of a military justice derived from this situation: as legislators thought soldiers were "entirely ignorant men, complete corrupts whose regeneration was almost impossible", they devised a particular justice with harsher penalties. But this was, according to him, the wrong choice, as the correct attitude should be to elevate the moral level of the military so soldiers would spontaneously comply with law. The military seemed to forget the principle of equality to embrace the idea that only superiors could ever be right[221].

But most of those complaints were left unheard. Military justice thrived in 19th century Brazil.

However, military justice only covered penal laws, which were only a small part of military discipline. And discipline was understood as part of military instruction, as the aim of education was to "teach soldiers the peculiar rights and duties of their condition" (ESPÍRITO SANTO JÚNIOR, 1887, p. 5) – though the part concerning rights was frequently forgotten[222]. Military discipline was supposed to instill a sense of community, of corps: "the commander is the chief of a big family"; his duty was to "turn these disformed masses - the soldiers – into the form of a true soldier, in the same way as visual artist do" (PIRAGIBE, 1862, p. 54).

The military artist was not supposed to suffer interferences from anyone. Especially from judges.

This chapter is about this painful process by which military leaders tried to turn regular men into true soldiers. A process Favacho testified for a few days and tried to get away from as

[221] "Ja foi proclamada o principio de igualdade do cidadão perante a lei. Entretanto, parece que ele é desconhecido na classe, militar, onde a praxe e mesmo a lei suppõe estabelecido o principio de quo só o superior tem razão" (ESPÍRITO SANTO JÚNIOR, 1887, p. 42). The soldier, "apesar de obediente e subordinado, deve ser conservado em condições de exercer a sua espontaneidade individual, que devemos considerar a fonte principal do verdadeiro mérito. Sem a iniciativa individual, seria impossível ao militar dar provas de sua aptidão e valor" (ESPÍRITO SANTO JÚNIOR, 1887, p. 101). "Pretender que o militar obedeça cegamente a uma ordem, a título de que assim é preciso, importa um abuso de poder, violando as leis naturais. E se a autoridade é a primeira a oferecer aos olhos do militar o mau exemplo de desobediência às leis naturais, expõe-se por isso mesmo a serem violadas as leis positivas" (ESPÍRITO SANTO JÚNIOR, 1887, p. 105).

[222] Vicente Piragibe (1862, p. 52), for instance, stated that "the disciplined soldier has only one thought – to materialize the ideas of his superior". Though he thought this as the only condition for a civilized war: "quando os exércitos, que a fazem [a guerra], estão no conveniente pé de disciplina, a guerra é (releve-se-nos a expressão) civilisada; restringe-se ao preceito altamente humanitário, e político de paralysar o mais que fôr possível os meios de acção do inimigo pelo modo que fôr o menos possível prejudicial á humanidade" (PIRAGIBE, 1862, p. 52).

quick as he could. If he had stayed there, he would be trapped into a web from which he would hardly be able to escape.

In the following pages, we will understand how an amorphous mass of norms slowly consolidated into a single body of rules able to control the mighty of the Brazilian Army – frequently, by empowering its commanders and subjugating their troops.

5.1 – Rebellious: crime and punishment in the Army and the Navy

Crime and social origin are deeply entangled. People with different backgrounds tend to commit different crimes. In the military organization of 19th century Brazil, officers and enlisted personnel greatly differed between them regarding forms of recruitment, education, level of income and social perspectives. Their transgressions, therefore, must also be differentiated and studied in their own terms. This section gives a statistical overview of the transgressions of military penal law and their process in the military system of justice. Fortunately, the reports of the ministers of War and Navy provide a wealth of useful information regarding both. Almost every year, the minister of war published tables describing how many soldiers and officers had been accused of each crime possible, the results of the lawsuits in both the Councils of War (first level court) and the Supreme Military and Justice Council and the origin of the accused. They discriminate if the defendant was an officer or enlisted, and if he was part of the Army, Navy or was attached to the Ministry of Justice. Those falling under the last case probably belonged to the police or national guard; I choose to not analyze those cases, as they pertain to a world that, though related to the one covered by this thesis, is nevertheless different and obey other logics. I will only be dealing with soldiers and seamen that have fallen to the underground world of indiscipline, wrongdoing and incarceration.

How prevalent was crime in military organizations? The first interpretative step I must pursue is precisely to address the size of the problem, which can explain the urge or comfort with which the high military administration dealt with criminality. The following figure describes the incidence of crimes of any type that reached the justice system in the last two decades of the empire.

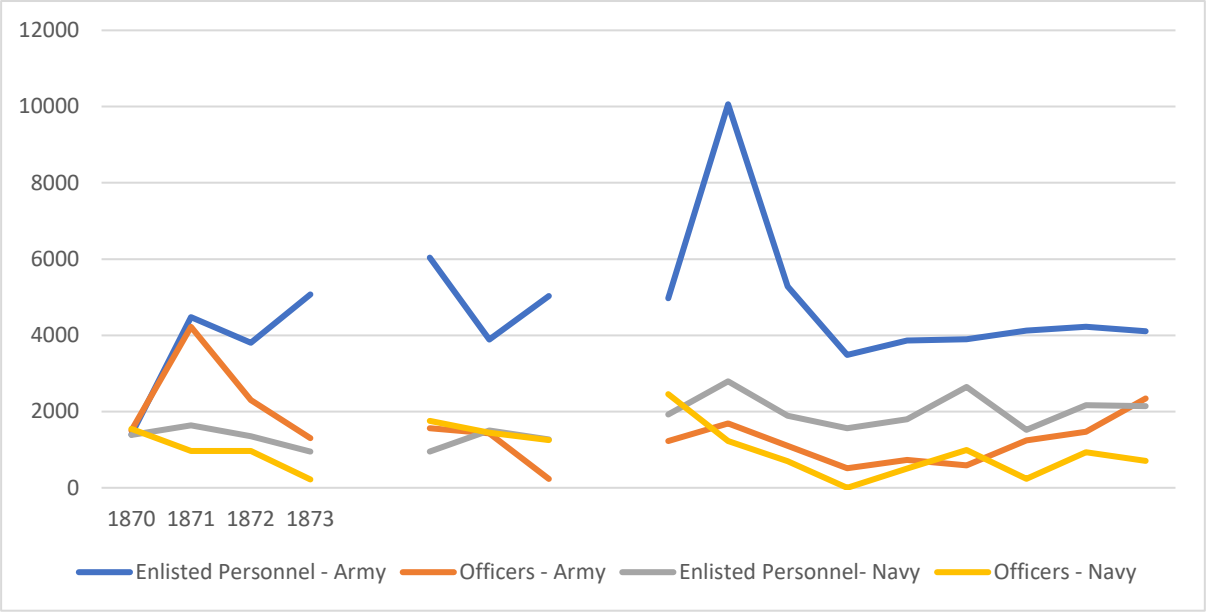

Figure 16 Criminality indexes per 100.000 persons in the army and navy (1870-1888). Source: Reports of the Ministry of War

Crime rates remained pretty steady for most of the period under consideration, except for enlisted personnel of the Army, which varied more. Enlisted soldiers had a lower criminality rate then officers for most of the time, and those who served in the Navy committed less crimes than those working for the Army.

To put the data in more perspective, the next figure shows the data for homicides. Keep in mind that current global Brazilian rates are ca. 30 per inhabitant:

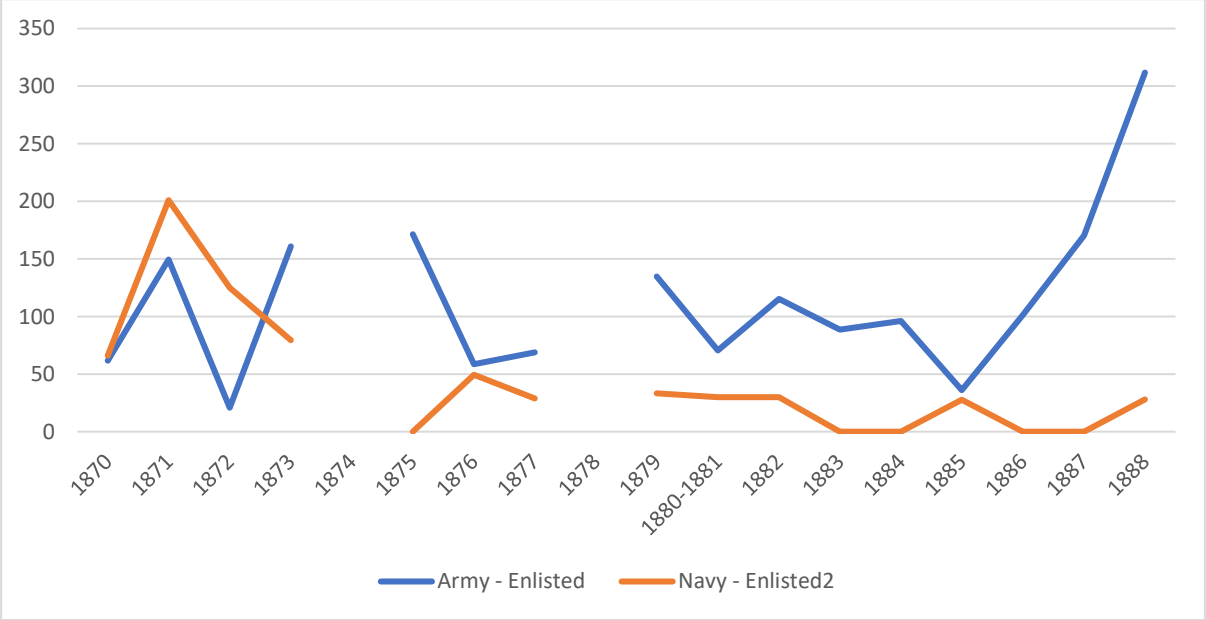

Figure 17 Homicide rates in the Army and the Navy (1870-1888). Source: Reports of the Ministry of War

The results for the Army are also consistently higher than those of the Navy, especially from 1873 onwards. None of this, though, must be interpreted as resulting from a possibly more pacific nature of sailors. From 1874 onwards, as we shall see, the Army had abolished physical

punishment, while the Navy retained it. Also, most sailors worked aboard ships for days or weeks, being therefore under closer control from their superiors. Criminal behavior was handled onboard and, therefore, deviance would be better curbed, frequently by actions on the margins of formal justice. And, as Pierre Castro (2013, p. 237) stressed, only those seamen with a very undisciplined history went on to face Councils of Wars, while the vast majority of transgressions were punished administratively. Since it was hard to get recruits for the Navy, officers restrained themselves from taking men out of the deck and sending them to cells. As I am working here with legal history and not the history of crime, I will only highlight the difference between the two forces, leaving t future researchers the task of investigating the detains of the sociological engines of crime in the military.

Criminality indexes seem to have been quite high, but this might not (only) be related to the intrinsic violence of military institutions. As soldiers live in restricted environments where constant vigilance is in the order of the day, it is probably much easier to spot crimes. The control was tight and they faced a special judiciary apparatus singled out from the main judicial branch precisely to maintain order. Therefore, there is a distinct possibility that the big number of crimes actually reflects a smaller distance between offences being committed and those being spotted and punished.

There is though one attribute shared by criminality on both forces: as we can see on the following figure, both delinquent soldiers and sailors were mostly accused of the crimes of insubmission (*insubmissão*) and desertion (*deserção*).

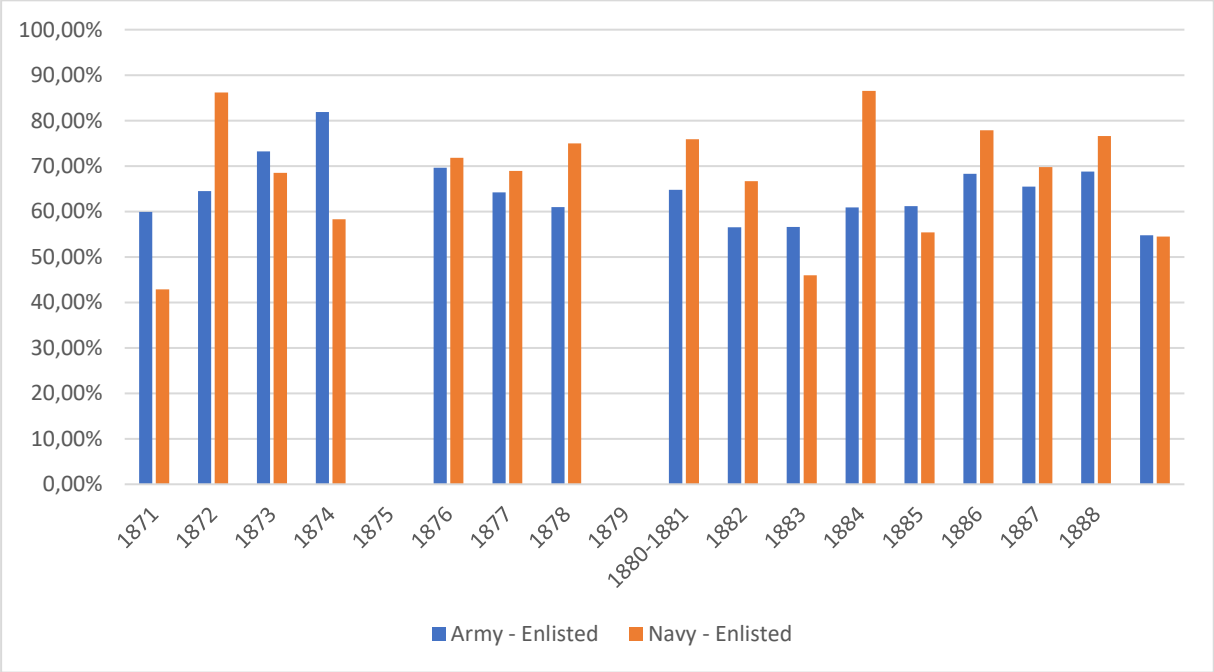

Figure 18 Percentage of crimes of insubmission and desertion committed by enlisted personnel of both forces in proportion of the total of crimes

This is not really surprising, as desertion is regarded as the utmost military crime, being the very rejection of belonging to the military structure. There are no relevant differences between the forces or with the passage for time: with few exceptions, between 50% and 70% of crimes committed in the Army and the Navy fell into one of those two categories.

What was the difference between accusation and conviction? Very short, as suggested by the following figure.

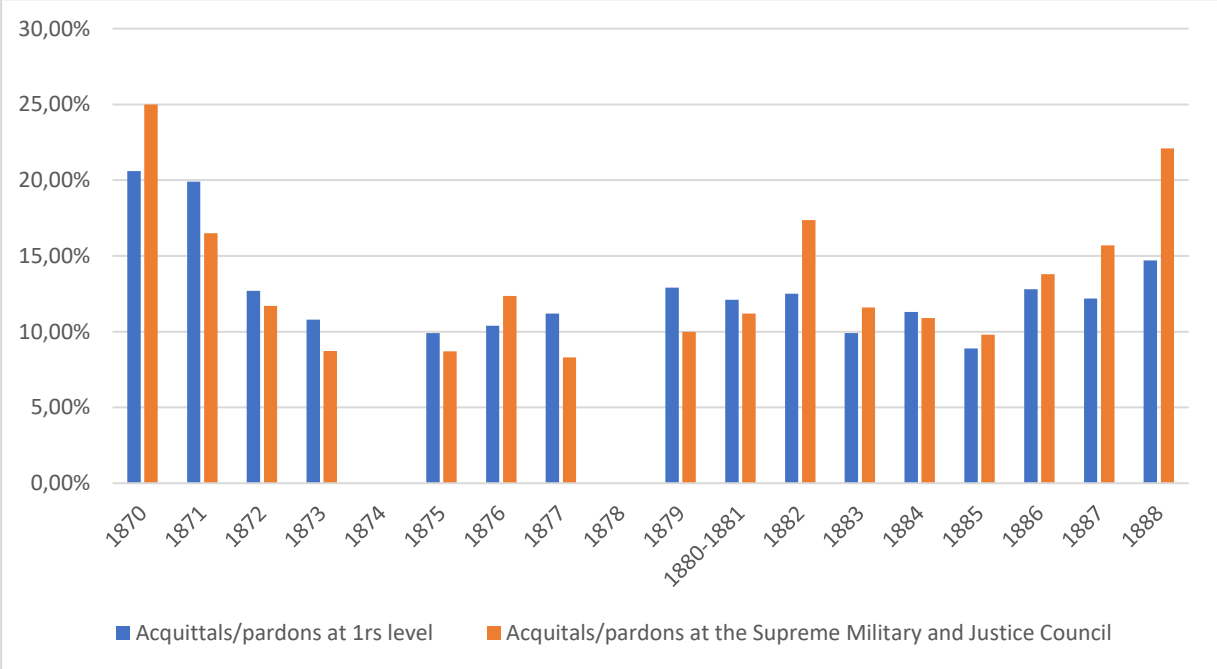

*Figure 19 Percentage of acquitals (recorgnitions of innocence + end of process due to procedural technicalities + pardons (*indultos*)) on 1st level courts and at the Supreme Military and Justice Council. Source: Reports of the Ministry of War*

The reports of the Ministry of the War do not differentiate between the results of accusations in the Army and the Navy, so, they are presented here as consolidated data. Few men would emerge happily from a lawsuit: usually, only around 10% of those who entered the engines of military justice would emerge in freedom at the other side. The highest court in the system, the Supreme Military and Justice Council, could void lawsuits due to incompetence, manifest injustice and other procedural technicalities, or recognize a pardon (*indulto*) given by the government; both situations were grouped as acquittals in the previous figure. Until 1881, the Council seems to be a tougher judge: its acquittal rate is lower by a fewer percentage points from that of the Councils of War, except for years with high numbers of pardons, such as 1876 and 1870. From 1882 onwards, the relation is inverted and the first level judges seem to assume a more severe attitude towards crime.

Conviction was not only frequent, but also harsh: death sentences always lingered on the courtrooms. As we can see on the following, last figure of this section, between four and eight percentage points of all convictions were capital sentences – at least in the first level.

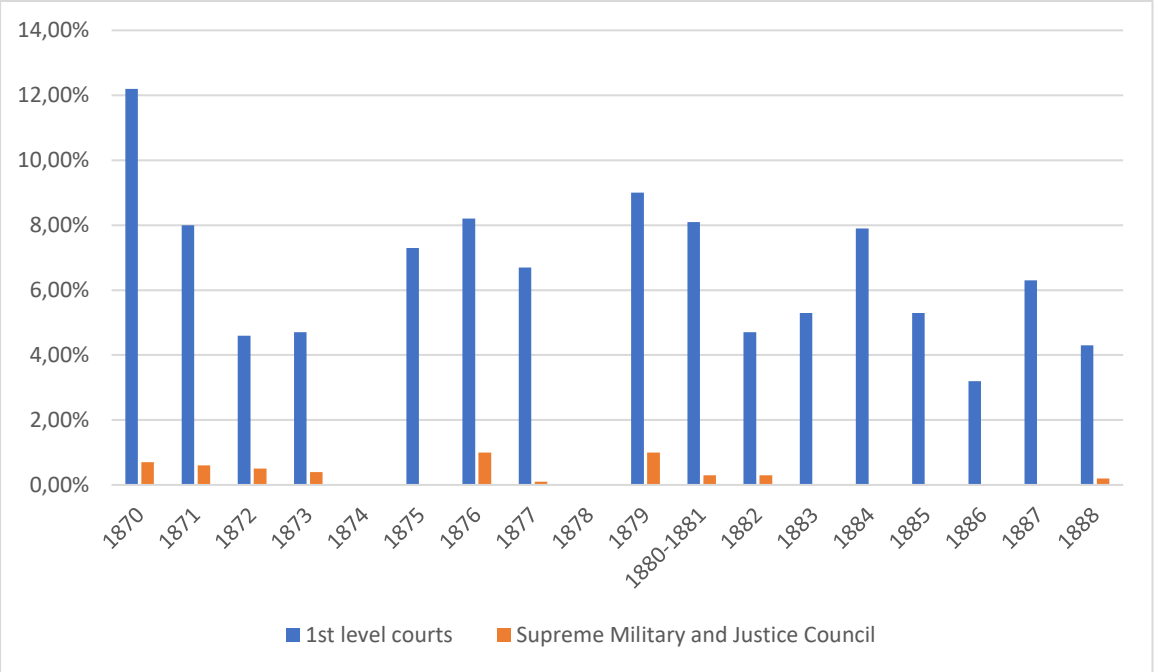

Figure 20 Percentage of capital convictions on total convictions at 1st level courts and at the Supreme Military and Justice Council (1870-1888). Source: Reports of the Ministry of the War.

The situation changed dramatically after appeals: no more than one percent of sentences at the Supreme Military and Justice Council ordered the defendant to be hanged. In several years, no man was sent to the gallows by the highest military court of the nation. As a matter of fact, from 1879 onwards, the level of convictions at first level jurisdictions declines from around 9% to little more that 4%; from 1882 onwards, only one person was convicted to death at the Supreme Council. This is no sign of mercy at the military jurisdiction, and rather reflects broader debates in Brazilian society and legal thought. Death sentences gradually begun to be seen as less legitimate. From 1876 onwards (RIBEIRO, 2005, p. 306-308), the emperor started to pardon[223] every single capital conviction from the common justice system, what prompted reactions in the slaving-owning classes[224] that the captive population was getting out of control. Despite this, the "practical abolition"[225] of capital sentences persisted. Yet, the military jurisdiction kept distributing capital sentences at considerable rates. Why?

Military criminality, though high, regarded mostly disciplinary wrongs of enlisted personnel – people that usually did not even have a permanent connection to the Army or Navy, but were supposed to serve for a few years and then leave. It should not entail such a harsh institutional reaction. Military penal law, though, was submitted to an old logic, that came to be at odds with the very principles of the constitutional state, prompting fierce reactions,

[223] On pardon in 19th century Brazil, cf. Arthur Barrêtto de Almeida Costa (2019)
[224] Cf. Ricardo Pirola (2015) and João Luís Ribeiro (2005).
[225] Similar to what happened in late 19th century Italy (STRONATI, 2009) and Belgium (DE BROUWER, 2009).

constant complains and, mostly, a tenacious will for change. The history of this strange body within 19th century Brazil law is the object of the next section.

5.2 – A wrecked ruin (I): The Articles of War of the Count of Lippe and the transition to a modern criminal law

The shadow of the past never left the Brazilian military law in the 19th century. Though much wanted, the Code of Military Penal Law would only be enacted in 1891; before that, rules from the *ancien regime* were still in force – namely, the articles of war of 1763. The main Brazilian tribunal for military affairs, the Supreme Military and Justice Council (*Conselho Supremo Militar e de Justiça*) was modelled after the Portuguese Council of War (*Conselho de Guerra*). Many parts of the legislation either directly came from the Portuguese past or bore a logical continuity with Early Modern practices. We must understand this model of justice to better gasp the nature of Brazilian military law, and what was at stake in its fight against the past.

The Portuguese Council of War was created in 1640. Crucial timing. Precisely that year, Portugal recovered its independence from Spain, the Bragança dynasty reclaimed the throne from the Spanish Habsburgs and reestablished Portugal as an independent power. The structuring of a new Army was one of the most pressing urges of the newly independent nation clashing with its much larger neighbor. The new justice system was modelled after the criminal law of the corporative monarchies. For early modern monarchies (especially Iberian ones), the central concept behind punishment was not discipline – as today – but justice. In such a regime, efficiency was not the paramount goal, and other procedures guided actors. Before the 18th century, the monarch was still considered as the source of all justice, meaning that every legal relation – especially in criminal law – had the sovereign prince at its apex: any penalty was seen and conceived as a direct reprimand from the king. But the monarch was also subject to structuring constraints: he must pursue with utmost sincerity Cristian virtues – meaning that simple and plain revenge was not an option in the crafting of criminal law. There were two principles that must be paradoxically fulfilled: the king should be at the same time feared, emulating the divine figure of the mighty God, but also loved, copying the benevolent inclination of the Lord. Fear would be attained through harsh sentences and grim penalties - the supplies and tortures inhabiting the stereotypes of the pre-modern monarchies are a consequence of this idea. Love would come by the suspension of the penalty by pardon and

clemency. The king made himself feared with the menace of terrible sufferings, and sook love by not fulfilling the impending threats contained in legal books[226].

By the late 18th century, new ideas had prompted a reformist attitude towards all aspects of social life in what came to be known as Enlightenment, and law was one of the most affected areas. As Adriana Barreto de Souza describes (2016), the Army was one of the main targets of the reformist furor of the Marquis of Pombal, prime minister of Dom José I. In a context of great military tension between the European powers, Portugal must act: finding itself in the rear eras of the European locomotive of history, the small Iberian kingdom tried to catch up with the recent developments of major centers. In the early 1760s, the king hired as Army commander the count of Lippe[227], a German officer and nobleman that introduced major reforms, spanning from military exercises to administration. Law was not forgotten.

The 19 February 1763 regulation of the infantry and artillery established in paragraph 26 the feared and famous Articles of War. Dreadful provisions. Of the 26 articles punishing crimes, 12 established death sentences. The drafting techniques are profoundly shaped by the pre-modern mentality[228], with justifications of the provisions (art. 3, "it is better to die in the position then to disobey orders") and recommendations (art. 29, "every soldier must behave according to the rules of virtue"). Some articles do not set specific penalties (art. 10, "the soldier (…) will be rigorously punished") or no penalty at all (art. 26 "no soldier shall lend money to a colleague or a superior"). The logics behind these articles is not that of classic early modern criminal law, though: as Adriana Barreto de Souza (2016) stresses out, the project pursued by the articles of war was conservative modernization. The monarch must get as much power as possible, depriving judges from their traditional influence. This can be seen in the *alvará* of 15 July 1763, which expressly stated that the judges must only use their arbitrium[229] to appreciate evidence, but not to establish penalties. Jurist must simply apply strictly the letter of the articles of war; the softening of the penalties and pardon must remain the sole and exclusive prerogative of the crown's mercy.

Those articles are deeply embedded in the legal culture of the *ancien regime*. Nevertheless, they signal important transformations towards the control of the judges and a legality that reinforced central powers[230], which evoke future, modern developments. By the

[226] For an enlightening account of the *Ancien Régime* system of justice, cf.Antônio Manuel Hespanha (1993).
[227] There is a vast literature on the reforms of the Count of Lippe. A good overview is provided by António Pedro da Costa Mesquita Brito (2011).
[228] The legislator had to convince the citizen that the new law was reasonable, resulting on completely different drafting techniques. Cf. Thomas Simon (2008).
[229] On the concept of *Arbitrium* in *Ancién Regime* law, cf. Massimo Meccarelli (1998).
[230] On this process, cf. Pietro Costa (2007).

end of the day, the project contained in the reforms of the Count of Lippe was Enlightened Absolutism. Accordingly, the articles display a sometimes-distressing amalgamation of elements that recall at the same time the spectacular penalties of the 17th century and the diffidence against jurists found in the 18th. This unique, strange combination was the main heritage left from Portuguese Enlightenment to the Brazilian Army.

It did not must be that way. In the first two decades of the 19th century, Portugal reformulated many of its military institutions; two commissions were formed in 1802 and 1816 to discuss a project of penal military code (SOUZA, 2016, pp. 403 ss.; SOUZA, 2018) that was approved in 1820; however, due to the turmoil of liberal revolutions and independence, the new code was valid only for Portugal and not for Brazil. The Portuguese Council of war was extinguished in the 1830s; the Brazilian Supreme Military and Justice Council, on the other hand, persisted until 1891. As Adriana Barreto de Souza (2014) suggests, the council perpetuated part of an *ancient régime* culture in 19th century Brazil. This obviously caused some discomfort on the political elites, and the 19th century was marked by a deep desire to change military penal law. For decades, many people proposed that the Supreme Military Justice Council should be suppressed or deeply restructured (SOUZA, 2012). And, as we shall see later, the creation of a code of penal military law was a driving force behind ministers and a factor in discussions at the parliament.

One thing must remain in our minds: old and new clashed in 19th century Brazil criminal law. Judges embedded in a modern, legalistic legal culture, intellectual descendants of Beccaria and of 18th century reforms, must face norms with spectacular punishments that could terrify even the bravest of soldiers. This tension never settled during the empire.

5.3 – A wrecked ruin (II): corporal punishment in the Army and Navy

Prison seems to be the very antithesis of liberty. Yet, the liberal society that emerged from late 19th century revolutions bet on jails to structure the criminal system of the new liberal order: departing from the illuminist model that penalties must mirror crimes and be diversified, most criminalists defended imprisonment as the paradigmatic form of punishment. Throughout the century, codes relinquished other kinds of penalties and prescribed the restriction of liberty as the utmost retribution for crimes, in what has been called *carcerocentrismo*[231]. The memorable penalties of the early modern criminal order were to be gradually removed from the

[231] On the centrality of the penalty of imprisonment in 19th century Brazil, cf. Ricardo Sontag (2016).

law: the 1824 constitution, in its art. 179, XIX, explicitly stated that it "shall be immediately abolished whipping, torture, the iron mark and all other cruel penalties". The humanitarian principles had firmly set foot in Brazil, promoting deep reforms that included the enactment of a modern, liberal code of criminal law in 1830 and had modernized the way punishment was administered in the South American empire. Slaves still could suffer physical punishment, and penalties such as banishment were reduced to the fringes, starting a process that would see by the end of the century criminal law brought in line with modern principles.

Except for military law.

Widely despised, corporal punishment was maintained for decades in the Brazilian Army and Navy: a situation met with energic criticism in the most varied social circles, including jurists, ministers and officers. Thomaz Alves Júnior (1866, p. 143-144), already a habitué of the pages of this thesis, condemned corporal punishment, for it would drive people away from the Army and undermine the efforts to reform recruitment. The government aimed to spare enlisted personnel from humiliation: in 1831, the ministerial letter of 16 July 1831[232] forbade the use of the whip in the Army. Quite a strange procedure: the execution of a penalty being defined by a communication of the minister[233]. As if the constitution did not exist. Anyhow, the whip was deeply associated with slavery, and could not be employed in soldiers of the Brazilian armed forces. The situation of enlisted personnel, though, remained in an awkward middle-term, as corporal punishment was not supposed lashed over free people; soldiers, therefore, occupied an intermediary position between free men and slaves, being nominally free, but suffering punishment meant for captives.

Shame remained nevertheless a preeminent element of penalty. The ministerial letter of 13 September 1861 – valid only for the Navy – established procedures for corporal punishment. Only commanders of ships and corps of the Navy could inflict penalties on the bodies of enlisted personnel, and when the punishment must exceed 25 lashes, the whole crew was supposed to watch the suffering of the transgressor. As Ricardo Sontag (2016) explains using Foucault, modern criminal law developed a preference for hidden punishment, enclosed within the walls of penitentiaries, as opposed to the public executions common during the Early Modernity; the logics was that the suffering of the convicted might entail pity in the public and cause unnecessary humiliation. Military law thought in other terms. In Brazilian battleships, every single sailor must be aware of lashings, beatings and any other response to deviance. Intimidation was the rule. For the undisciplined populations that ended up in the navy, officers

[232] BRASIL. Aviso nº 180 de 16 de julho de 1831: proíbe o castigo das chibatadas no exército.
[233] On the normative type of *aviso* (ministerial letter), cf. Fernando Nagib Marcos Coelho (2016).

aspired for the tightest control possible. And the ministerial letter implied more: it said that in cases of more than 25 lashes, the commander must explain the crime of the sailor before the public. For less than 25 whips, nothing was said of the procedure. And those commands did not remain in the letter of the law: as Pierre Castro (2013) showed in a case study of the corvette *Trajano* in the 1870s, corporal punishment was frequently used and was particularly intense when new commanders arrived, as they relied in inflicting physical pain to assert their authority over seamen. Lost in the distant seas, sailors served at the absolute mercy of their superiors.

In the dark of the ships and quarters, law was frequently afraid to act. The legislation and literature abound with examples proving that the solemn prohibitions of the government were frequently ignored by officers. For example, despite the 1831 abolition of the lash, the minister of war had to send a circular letter in 21 September 1855[234] stressing once more that this sort of punishment was not allowed. He pointed out that the regulations of 1763 must be followed; by having to say so, he implies that disobedience was actually the rule. Four years later, the ministerial letter of 13 April 1859[235] set rules for corporal punishment in the Army, with the explicit aim of combating the "unreasonable way in which such arbitrium is being understood". From that day on, physical penalties must be applied only after a council had decided to do so, and following the regulations. This is evidence that previously, officers were doing neither of those. This low-regulated universe can be seen in the book *divertimentos militares* (LEAL, 1837, p. 21); in one of the chapters, the author transcribes the instructions he had written for his company when he was a sergeant in Rio Grande do Sul. Soldiers must be brought to him "to be punished in the form of the law, or, in the absence of it, to arbiter proper punishment". If the breach was repeated, the delinquent must be taken to the commander "to determine the punishment he seems fit". The constraints of law were loose at best: for most of the time, the officer in charge is almost an absolute lord of his subordinates.

I brought abundant evidence of the widespread presence of corporal punishment in the barracks and the weakness of law. But one decision of the ministry of justice (MINISTÉRIO DA JUSTIÇA, 1879) captures this with paramount clarity. Referring to the penitentiary of Fernando de Noronha, the minister *recommended* officers to refrain from corporal punishment, "for it is contrary to the legislation in force". Recommendation: this is what the law was. And, mostly, a solemnly ignored one.

[234] BRASIL. Circular nº 271 de 21 de setembro de 1855: declara que os regulamentos de 18 de fevereiro de 1763 e 21 de agosto de 1764 estabeleceram regra acerca dos castigos corporais; e que os desertores de 3ª deserção devem ser excluídos do Exército, embora tenham sido condenados a prisão por tempo menor de seis anos.
[235] BRASIL. Aviso nº 77 de 13 de abril de 1859: dando providências sobre o modo de fazer-se o castigo com pancadas de espada às praças do exército.

Such frequent use of physical pain prompted even medical concern. Carvalho and Engenheiros (1962, p. 99), for instance, complained that after the "rejection of the humiliating whip, the paddler used by the most robust soldiers started to fill infirmaries with enlisted personnel affected by lung damage". Not by chance, the 7 March 1857 regulation mandated in its art. 16 that military surgeons assessed if the soldier to be punished was in good enough physical shape to suffer physical punishment. The Imperial Academy of Medicine debated several times throughout the years the limits of physical punishment in the Armed Forces (CARVALHO, 1862a). In 1862, this medical institution even formed a commission to discuss this pressing issue and recommend that corporal punishment should be wiped out from law altogether. However, some thought such an initiative would fail, as such a reform must be accompanied by a new military penal code able to prevent crime in a rational fashion (CARVALHO, 1862b).

In the ministerial report, corporal punishment is sometimes mentioned, but the attitudes displayed by ministers are frequently delusional. Of course, we must not expect that a government minister will heavily criticize his own dicastery and, automatically, his own job. But the writing of the War and Navy ministries seems to deny that any problems persist in their forces. For instance, in 1877, the Navy report stated that "the Imperial Marine Corps do not fail to show good order and discipline, what, I rejoice to say, has contributed to the reduction of corporal punishment" (MINISTÉRIO DA MARINHA, 1877, p. 16). The following year, the minister again declared that both crimes and punishment were diminishing, "what counts in favor of discipline and morality" (MINISTÉRIO DA MARINHA, 1878, p. 16), an observation that was repeated in 1879 (MINISTÉRIO DA MARINHA, 1879, p. 15). The last report of the empire insists that there are few crimes, meaning that corporal punishment tended to disappear; moreover, "most crimes are desertions and one or other [consists in] drunkenness" (MINISTÉRIO DA MARINHA, 1889, p. 31). If we look at the criminal statistics I presented at the previous sections, we will be able to find out that the level of general criminality was not particularly low in the late 1870s – except for homicide rates. The minister seemed to be covering the brutal scenes of maritime life with an idyllic veil of harmony and good behavior. This might be true only in comparison: criminality rates of the enlisted personnel at the Army were double the ones prevailing in the Navy, but this by no means suggests they were low, or even diminishing. The reports of the Army themselves only mention that the day when corporal punishment was abolished was a "brilliant date" (MINISTÉRIO DA GUERRA, 1875, p. 8); after that, it recoils from mentions of any sort of abuse. It is quite telling that the Navy must

insist in commenting that corporal punishment was seldom used, as if it was *almost* unnecessary.

The discomfort with the existence of corporal punishment is obvious, but the constant mention that such penalties were a minor problem contributes to naturalize them, to incorporate them in everyday life as if it was impossible to definitely extinguish them, as if the only imaginable target was to keep them at a low, tolerable level. As a matter of fact, the reports of the Navy insist that corporal punishment must persist; the problem of a more humane treatment of seamen lied elsewhere. After all, if the armed forces received as recruits the lowest strata of society, if they harbored people accustomed with the most brute of lives, they could not discipline their members with a soft hand.

Arbitrium: once more, this element was the irritating factor in the legal reflection. Paragraph 80 of the naval articles of war from 1800 was the functioning engine of an uncertain punishment system. It established that all offences not explicitly mentioned in its paragraphs were submitted to the "prudent arbitrium of the superior" – authorized to inflict even corporal punishment on seamen. To have someone physically battered due to such a vague provision seemed intolerable to many, though the report of the Navy of 1872 insisted that "our officials do not abuse it, as they are dominated by superior principles of justice, habits of education" (MINISTÉRIO DA MARINHA, 1872, p. 9) – the events of 1910, which we will discuss later, suggest this statement might have been slightly naïve. For the minister, corporal punishment must be retained only for "gross immorality". But, as a following reported insisted, all navies in the world still applied such penalties, proving they were a valuable instrument of discipline (MINISTÉRIO DA MARINHA, 1874, p. 7-8). They must only be explicitly prescribed by law, restraining the arbitrium from officers. This probably was a one-sided view; at least in law books, flogging had been abolished by the US Navy in 1850 (GLENN, 1983) and the Italian military as a whole in 1859 (ROVINELLO, 2012, p. 60). Nevertheless, most armed forces still retained forms of corporal punishment: by the late 19th century, the armies of Russia, Prussia, Austria, Spain, Britain and the Ottoman empire still flogged their soldiers[236] – and armies tend to be gentler punishers than Navies, since disorder can quickly spiral out of control in the absolute isolation of the high seas. Probably, the minister had in mind the experience of the paramount naval power of the world: the British Royal Navy, queen of the seven seas. The United Kingdom maritime forces only scrapped flogging away from legal codes in 1881; yet, corporal punishment was still applied to children up to the 20th century and to African colonial

[236] Cf. Marco Rovinello (2012), bibliography at note 14.

forces even during World War II (KILLINGRAY, 1994) – not to mention other forms of physical disciplining of regular seamen (SELIGMANN, 2018, p. 138-165).

Not by chance, the statute of imperial mariners[237], art. 66, extended paragraph 80 of the articles of war to crimes of desertion, the most common in the Navy[238]. This means corporal punishment was widespread, no matter how much the ministerial reports of the Navy insisted in denying that they were relevant.

Physical pain was condemned by jurists and philosophers as an inhuman and dreadful form of punishment by late 18th century. It must be eliminated. But the military world could not renounce its useful deterrent effects: soldiers were frequently undisciplined persons from underprivileged backgrounds or even former slaves (KRAAY, 1996), living in isolated areas – or in high seas – after being in most cases forcefully recruited. They were hardly enthusiasts of their jobs. They must be controlled; otherwise, the unsettling mix of violence and resentment could unleash explosive forces. Corporal punishment was therefore accommodated in the new criminal law: the "hideous exception" (FONSECA, 1881) was retained. The war waged by military reformers elected arbitrium as its major enemy. But the timid initiatives to curb corporal punishment had only a gradual, slow success: physical pain was to be inflicted inside barracks and especially battleships for years to come. The general, intellectual commitment to liberal punishment could not overcome the fears of rebellions. It was too risky. Inertia kept an *ancien regime* nest in the very heart of the armed forces while the lowest subordinates suffered the most in their own flesh.

5.4 – An elusive border: disciplinary regulations and the limits between penal and administrative law

Corporal punishment was extinguished in the Army in 1875 – at least, from a strictly legal point of view. In 8 March, decree 5884 established the new disciplinary regulation of the land forces, and excluded physical pain from its list of punishments. This new norm replaced the previous unsystematic dispositions that varied from cops to corps and created a unified body of law punishing administrative transgressions in the whole land forces[239]. But, if military

[237] BRASIL. Decreto nº 411-A de 5 de junho de 1845: derroga o decreto nº 304 de 2 de junho de 1843 e manda por em execução o Regulamento para o Corpo dos Imperiais Marinheiros.
[238] For more on the criminal punishment in the Navy and its systematic violence, see Arias Neto (2001).
[239] "Para a punição das trangressõos da disciplina nâo classificadas como crimes,nenhumas disposições especiaes lemos, formando um corpo de doctrina (...). Os chefes (...) a bem de manterem a ordem, e a bôa execução do serviço entre seus subordinados, estabelecem preceitos, que não podem ter o caracter de generalidade e permanência, por isso que variam de guarnição para guarnição (...)" (PIRAGIBE, 1862, p. 325).

criminal law was so similar to administrative law, with its loose regulations, what was the place of such decree in the Brazilian legal order?

The main objective of the 8 March 1875 decree was to limit the arbitrium of superiors, though it did not confront the overall logics of administrative punishment: there was still a wide space for discretion at the hands of officers. Chapter four was explicitly dedicated to the "rules and limits that must be observed in the imposition of disciplinary punishment". Each type of penalty had its limits defined – for instance, art. 17 established that imprisonment should not last more than 25 days, and detention, no more than 30. Other rules were set: the punishment of "carrying guns" (*carga de armas*) should not last more than two hours (art. 19); "cleaning" (*faxina*) was defined (art. 21) and some other limitations were set. But loose ones. For example, solitary confinement could be applied for the whole time of imprisonment, and the diminishing of food "must take into account the physical state" of the convicted – a concept that was never clarified. In short, superiors sill had much power, regardless of the intentions of the legislator.

One important innovation was the precise definition of which authorities were entitled to punished, and which penalties they were authorized to apply. However, most limitations regarded demotion of rank (*baixa de posto*); all authorities, for instance, could impose the penalties of imprisonment and detention (art. 31). And if the limits of the decree were respected, the only guidance keeping the harshness of punishment at bay should be the unfathomable "arbitrium" (art. 31) of the superior.

The 8 March 1875 decree, at the end, was firmly based in the system that recognized fundamental differences between officers and enlisted personnel: nothing more coherent than to give the former almost unlimited powers to supervise the disciplinary integrity of the Army. The abyss between officers and enlisted personnel was legally recognized in the very decree when it determined that the lists of punishments that could be applied to each group were different: the highest in the hierarchy the person was, the more restricted the penalties menacing them. Officers, *cadets* and private soldiers were subject only to reprehension, admonition, prison and detention. Soldiers and other enlisted personnel were conversely subject to a much wider array of penalties: they could be obliged to perform twice their duties; they could be temporarily or permanently demoted; they could be set to disciplinary deposits; and, finally, were subjected to accessory penalties (arts. 11 and 13). These punishments concern mostly physical forms of humiliation: cleaning; lowering of food supplies; carrying of guns; prohibition of otherwise tolerated vices. The places where prison or detention could be executed were also different: officers under detention could be obliged to stay in their own houses or in

the room of the general staff, a privilege that was never made available to enlisted personnel (arts. 14 and 15).

Disciplinary law explicitly ratified the almost abyssal hierarchy dividing officers from enlisted personnel. However, the 1875 regulation was met with joy, as it restricted the previously even wider powers of superiors. In the discussion of the future decree in the Section of War and Navy of the Council of State, the majority declared that "until now, disciplinary transgressions were punished by the military chiefs of our Army at their arbitrium, and in the punishments, there were sometimes such abuses of authority that could compromise the health and even life of the transgressors" (SILVA, 1885, p. 8). In other words, limits must be imposed through a greater regulation of disciplinary dispositions. But the debates of the project show that the draft also violated a few rules, and tensioned legality.

The majority opinion of the Council of State sustained that the project of decree had mostly written down the practices already in force in the Army. The Viscount of Abaeté, writing the minority opinion on the project of decree, stated that a simple consolidation of the existing practices was not sufficient to correct the anomalies that could be observed in military punishment: this administrative compilation would probably be fruitless if it had to share space with a military penal law still in a state of confusion. Moreover, the consolidation presented before the council had some dispositions exceeding the limits of the law, meaning that it would need approval from the National Assembly (SILVA, 1885, p. 9). For instance, the decree interpreted admonition as a penalty, contrary to the existing law; established the new penalties of "deprivation of tolerated vices" and "isolation in a special cell"; and restricted a few penalties authorized by the ordinance of 9 April 1805[240]. As we can see, the elimination of corporal punishment was compensated by the creation of new penalties, and by the conservation of the general logics underlying the system of administrative punishment in the Army. Anyhow, Abaeté was ignored by the emperor and the regulation was approved as a decree by the executive with recommendation by the Council of State in the form of the Resolution nº 4 of 11 June 1873, bypassing any form of legislative control. The need to reform the Army spoke louder than technicalities.

[240] Not by chance, only two years later, the Ministry of War had to clarify a conflict between the 1805 ordinance and the 1875 decree. The doubt concerned the regulation of prison, that was considered as an administrative punishment by the imperial regulation and as a penal one by the colonial ordinance. In the latter case, the application of such punishment would prevent the soldier from having the time spent in jail as part of his time of service. The ministry, curiously, decided that the imperial decree had abrogated the ordinance (MINISTÉRIO DA GUERRA, 1877).

Administrative and criminal punishment were deeply entangled. Penal military law could impose harsher penalties (up to death), but was subject to stricter control: its penalties must be imposed at the first level by a council of officials through a sentence and were subject to revision by the Supreme Military and Justice Council. However, both branches pursued the same aims, as can be seen in the regulation of the utmost military transgression: the refuse to service, that would be punished in the administrative sphere as absence (*ausentar-se do serviço*) and in the penal sphere as desertion, depending on the amount of days spent outside the barracks. Vicente Ferreira da Costa Piragibe (1862a, pp. 323-324), for instance, treated both areas as part of "military discipline", which was made of "proper crimes and faults not classified as crimes". He defended that superiors should be entrusted with a wide margin of discretion, as they needed "moral energy" to command military corps. The ideas on how command should work closely followed the logics of *ancient regime* criminal law: "the chief of a corps, just like an artist, must model into the cast of a true soldier these unformed masses (militarily speaking) at his care (…). The commander is the chief of a great family" (PIRAGIBE, 1862b, p. 54). This is why he must cultivate a "paternal friendship" with his inferiors, earning not only the "official respect", but also the "esteem and veneration from affectionate sons and friends"[241].

The connection between criminal and administrative law can be seen in the consult nº 70 of the Council of State of 17 October 1870 (SILVA, 1885, p. 332 ss.). Colonel Gabriel Alves Fernandes received 7:300$000 from the treasury to pay his subordinates, but being audited two years later, he did not provide the due clarifications on how he had spent the money; he was therefore sent to prison. He argued that the then sergeant Vitorino José Rodrigues, his main aide, had forged his signatures and then deserted. Cel. Fernandes was acquitted in the criminal investigation, but the national treasury wanted to know if he could remain incarcerated until he paid the value he was accused of deviating. The crown prosecutor suggested that criminal acquittals did not have any repercussions in fiscal matters, meaning that Fernandes still must pay the debt. In short, administrative and criminal responsibilities were separated.

The Section of War and Navy decided otherwise. For the councilors, "as extreme as the independence of administrative jurisdiction might be, it cannot void the judicial branch, nullifying its decisions and leading to the absurd - *simul esse et non esse* -, that is, the defendant being simultaneously guilty and innocent" (SILVA, 1885, p. 332). In support of this position,

[241] "Um commandante de corpo devo ter o necessário tino para fazer amenisar a gravidade de seu caracter official por meio de certa familiaridade respeitosa, sem descer do sua elevada posição; a austeridade do cargo pela lhaneza, sem desistir das conveniências de jerarchia; a severidade pela benevolência, sem -quebra da força moral da autoridade; a justiça pela equidade, sem acoroçoar a impunidade das transgressões disciplinares" (PIRAGIBE, 1862b, p. 54).

they cited regulations[242] stating that administrative imprisonment was converted into a criminal one after the beginning of the process, and therefore should end with it; and the law of 3 December 1841, which determined that matters of fact should be considered as settled after they were discussed in the criminal forum. The destiny of poor colonel Fernandes teaches us that administrative and criminal issues were intertwined in 19th century Brazil; prison, particularly, was regulated by both branches of law, rendering their division much more difficult.

Discretion. Low level of juridification. Entanglement with criminal law. Disciplinary law in late 19th century Brazil was still a complex system that retained much of the logics of the *ancient regime*. The 1875 decree was a very timid step towards modernization: the constraints imposed by it were discreet and the officials had a mostly unchecked power over the destinies of soldiers.

5.5 – Prudent arbitrium *versus* certainty: the quest for a Code of Military Penal Law

Military discipline, however, had another branch: military penal law. The spirit of the 19th century, the "age of the code"[243], urged Brazilian jurists to establish a modern and organized system of military criminal justice. Such aspiration can be strongly felt in Brazilian legal culture.

The Ministry of War, for instance, stated that "the administration of justice, the truth and authority of the law are connected with the rules of military duty"; and in the "rightful, certain, quick, moderated but firm repression of the slightest infraction it is pledged the obedience or discipline, and the whole force of the Army" (MINISTÉRIO DA GUERRA, 1882, p. 32). But to secure discipline, a fundamental step was to went further in the legislative path with the projects of code of Military Penal Law and Penal Procedure, "basis of the ordinance promised in the constitution of the empire" (MINISTÉRIO DA GUERRA, 1875, p. 4). The ministers rejected the regulations of the Count of Lippe for being "ambiguous and even inapplicable" (MINISTÉRIO DA GUERRA, 1876, pp. 3-4), "reflecting the rigors of the barbarous penal system" of the "most severe Prussian discipline" (MINISTÉRIO DA GUERRA, 1882, p. 31). Brazil had several military laws, but the penal code was the "most essential, the completion of everything" (ALVES JÚNIOR, 1883, p. 123).

[242] Art. 6º of the dec. 657 of 1849.
[243] An expression taken from Paolo Grossi (2009).

For Vicente Ferreira da Costa Piragibe (1862), there were three laws fundamental for any army: the penal code, the law of recruitment and the law of promotions. Brazil had only the latter: a cruel testament to the backwardness of our institutions. The code was even more urgent for it would be able to "govern the absolutism" of the legislation in force. The new rules must be written according to the "philosophy (…) of the civilized and free peoples" (PIRAGIBE, 1862, p. 348).

This was no easy task. But the sharp desire for change prompted a corresponding movement for military codification. And the first gesture would come from a military judge: José Antônio de Magalhães Castro.

In 1st January 1860, Magalhães Castro published a project of Penal Military Code which aimed to organize the penal dispositions applicable to the armed forces. This, he believed, was a fundamental step to turning the military career into a more interesting path for prospective recruits: for Castro, the absence of a clearer and more humane military penal law could be credited for the "sensible repugnance inspired by military life" and the "panic and terror" (PROJECTO, 1866, p. 107) provoked by the experience in the barracks. Moreover, the mayhem in which the legislation was at the time rendered more difficult to identify which crimes were of purely military nature. And, above all, the dispositions were ruthless. As a matter of fact, so severe that they disabled their own power: before them, "the judge felt compelled to not punish [offenders] in order to not be or seem cruel, denying value to the clearest of evidences" (PROJECTO, 1866, p. 109). And when this was not possible, when the convictions must proceed with unstoppable brutality, pardon would be relentlessly used by the emperor to avoid the grim unfairness that would otherwise take place. Such a procedure, however, would banalize the royal prerogative. The solution? The new military laws must be based on a system of aggravating and attenuating circumstances able to guide the judge and to adapt the penalties to each single circumstance (PROJECTO, 1866, p. 112); the commutation of penalties would find its place in absolutely unpredictable circumstances for which "only the paternal heart of the nation's supreme chief can find a solution" (PROJECTO, 1866, p. 114).

Castro did not find the most receptive of ears for his claims. The government nominated in 12 April 1860 a commission[244] to evaluate Magalhães Castro's work; the organ said the project could not be approved in the way it was presented. Nevertheless, if the debate was only starting out in South America, a better environment could be found beyond the Atlantic: in Portugal, a new project of military penal code was also being discussed – and it was also drafted

[244] Its members were the Viscount of Uruguay, Manoel Felizardo de Souza e Mello and João Paulo dos Santos Barreto.

by a military judge. Castro could not let the opportunity pass, and in 1863, he wrote a 50-page evaluation of the Portuguese project, explicitly aiming at the Brazilian legislator. And to do so, he extensively criticized the Portuguese draft, implicitly lauding his own work. Two were the main problems he found in the text under discussion in Lisbon: its legislative technique, based on a case-by-case description (*casuísmo*), and the excessive harshness of penalties.

Rough punishment was not only a problem in itself: such practices revealed a wrong underlying conception of how military life must be managed. The force and discipline of the armies did not spawn from the rigor of penalties, Magalhães Castro (1863, p. VI) claimed: its true sources were "its organization, it comes from the love of the fatherland (...) their courage comes from morality; comes from religion, which inspires the soldiers to fulfill their duties and is the only one preventing superiors, especially the lower ones, from abusing their powers". Penalties were meant to constrain the weak, but could do little to truly control an Army. The dark memories of the *Ancien Régime* atrocities and the French Revolution excesses were heart-felt: "the world was nothing better when the gallows were more frequent; and Republican France, despairing from the violent means, embraced the most clement crown against the most unfixable damages of the bloody guillotine" (CASTRO, 1863, p. V).

The measure of penalties was not the only problem: there was a fundamental misconception on how they were assigned to each crime. The project tried to discriminate each and every circumstance in which a crime might be committed, and rigidly determine the penalty that must be imposed on the defendant. The clearest example was art. 80, regarding corporal offences. Trying to reach every single aspect this crime might assume, the legislator ended by establishing rigid penalties for situations that might take place under widely different circumstances; for example, physical offences against hierarchical superiors would be always harshly punished regardless of being committed during a war or in time of peace, in normal circumstances or abusing the trust of the superior, of being a grave or weak offence (CASTRO, 1863, p. 24). In such circumstances, confusion reigned: what was not supposed to be a military crime was treated as such (CASTRO, 1863, p. 29). The solution was to create a systematic architecture for the code, establishing aggravating and attenuating circumstances and justifications for all crimes. The code must be simple so it could be read in front of the troops, making discipline rein through the power of the word (CASTRO, 1863, p. 3-4). This project, conversely, was a labyrinth (CASTRO, 1863, p. 64).

Magalhães Castro's argumentative effort paid off. In 18 December 1865, the government nominated a commission to debate a project of military penal code and procedural code to be presented at the Chamber of Deputies. This group of people was organized as a

section of the wider Commission of Examination of the Legislation of the Army, which we have already discussed in previous parts of this thesis. The section was mostly made of jurists, and its reporter (*relator*) might come as little surprise for the reader: Thomaz Alves Júnior. The other jurists were Magalhães Castro himself and José Maria da Silva Paranhos (Viscount of Rio Branco), a future prime minister. There was one single military voce; originally, the Brigadier Poliodoro Quintanilha, but he left in the middle of the works and was substituted by colonel Antônio Pedro de Alencastro. The commission was ordered by the government to base its works on Magalhães Castro's project and on the Portuguese project of 1820. The latter was actually a project enacted by Dom João VI while he was king of both Portugal and Brazil, but a few weeks after the code was promulgated, the liberal *Vintista* revolution broke out in Porto, and the king was forced to return to Portugal. The code was never applied neither in Portugal, nor in Brazil. Anyhow, the 1820 and Magalhães Castro's project both were deemed as insufficient structures for the codification, though they could inspire the drafters. For instance, the Portuguese code, just like the 1857 French one, united criminal procedure and substantive law, more akin to the *ancien régime* ordinances than to modern criminal codes[245]. The commission chose to write its own project from the scratch – a decision that would prove contentious. Though a preeminent jurist – or, perhaps, precisely for it – Magalhães Castro had a bad temper: he ended up voting against the final project, and writing a separate vote criticizing the final results of the work. We must now understand the two positions and the central sources of tension between them.

The commission's project went further from the will of the government and also drew from the French military penal code. However, instead of just adapting an existing code, they decided to write one of their own. The Portuguese code of 1820 did not separate satisfyingly crime from the "light intention" (*culpa leve*), process and substantial penal law were not duly distinguished, and many institutions reflected the *Ancien Régime* environment in which the code was designed (PROJECTO, 1863, p. 6). To avoid the prolixity of the Portuguese model, the project proposed by the commission was short, with only 139 articles. Therefore, it could be studied by each soldier and even read before the troops, "according to the style of good discipline" (PROJECTO, 1863, p. 11).

The commission aimed to not deviate much from general criminal law: "though the military judiciary must be characterized by its specialty and principles and application, there are general or fundamental principles creating the institutions of a people. The laws of exception cannot go against them" (PROJECTO, 1863, p. 4). Therefore, they justified the maintenance of

[245] On the Portuguese code, cf. Maria da Graça Trigo (2013) and Isabel Graes (1920).

death penalty for it was still present in the general penal code, though the project used the capital sentence much less frequently than the French and Portuguese codes (PROJECTO, 1863, p. 14). The crimes of conspiracy and rebellion were regulated in a similar way to their counterparts in the common code, as those offences, being political ones, should be equally treated when committed by soldiers and by non-military personnel, as both categories enjoyed the same political rights (PROJECTO, 1863, p. 23). A similar desire for nearing both branches of criminal law appeared in the "crimes against the nation" (PROJECTO, 1863, p. 22) and in the use of general definitions in the first chapter (PROJECTO, 1863, p. 11).

This discourse suggests that military law and common penal law should not differ much, and that might have been true – at least for the theory of crime. But for the theory of penalties, the project deeply departed from the 1830 criminal code. The commission's project used 10 different types of penalty, less than the 15 of the Portuguese and the 12 of the French military ones. But the very philosophical foundations of punishment differed: "the military legislation is not always about punishing a man with the aim of regenerating him for society, but to do so for the benefit of discipline" (PROJECTO, 1863, pp. 13-14). Prison with labor (*prisão com trabalhos*), for instance, drove men out of service in the Army, and therefore must be used only for mixed crimes. Under the same logics, many crimes spawned different penalties for officers and enlisted personnel[246]: when the officers were to be punished by dismissal, enlisted personnel would be imprisoned. Probably because for many soldiers, dismissal was a blessing, and not a penalty[247].

But the center of the project, the part that both set it apart from common criminal law and from the Magalhães Castro draft was the idea of *arbitrium*[248]. The commission's project valued the concept of *arbitrium* and empowered the judge to decide the amount of penalty to

[246] This was the case for the crimes established in the arts. 45, 53, 58, 75, 76, 77, 93, 94, 100.

[247] The criminal differentiation between officers and soldiers, was complex in the project, however. The proposed code would both widen and narrow this difference, depending on the point of view. In the previous regulations, the amount of time necessary for an absence to turn into the crime of desertion was different for both categories; in the project, they would be equalized (PROJECTO, 1863, p. 28). Also, they established the crime of abuse of power, which was deemed as the symmetric completion of insubmission: one punished the soldiers unlawfully transgressing orders, while the other would punish the officers giving unlawful orders. The commission said it could be accused of attacking hierarchy, but, if the Code of the Count of Lippe established this same crime, they could not ignore it: ""Mas, assim procedendo, talvez se diga que temos quebrado os élos dessa cadêa que constitue a ordem e a disciplina do exercito, a obediencia passiva elo inferior ao superior, sob cujo alicerce construimos no capitulo da insubordinação, porque desde que incriminarmos o executor de ordem ilegal, temos-lhe dado o direito de resistir ou desobedecer, e o direito de resistir ou desobedecer, dado à baioneta, é a dissolução do exercito, a anarquia na sociedade" (PROJECTO, 1863, p. 30). On the other side, they also graduated differently the punishments for offences made by enlisted personnel against officers, as the superior must always be dominating: "Deveis tombem notar que mereceu o nosso serio cuidado a violencía de qualquer especie praticada pelo inferior no superior, elemento sempre dominante, e que consideramos do proprío delicto" (PROJECTO, 1863, p. 26).

[248] On arbitrium, cf. Massimo Meccarelli (1998).

be imposed upon defendants. As there were no aggravating and attenuating circumstances on the draft, the magistrates would be entitled to decide the relevant circumstances of criminal actions and adjust the punishment according to them. To compensate for such liberty, the penalties established in the project were rigid: many crimes got one single penalty, leaving the judge completely powerless; others only established three different types of punishment from which the judge was mandated to choose the one to be imposed on the defendant. Moreover, this arbitrium was a "prudent" one, and not the free arbitrium from the old regime[249]. The difference lies in art. 131 of the project, which prevented judges from imposing penalties that had not been established in the code for one specific crime[250]. Such organization was in line with what other people defended at the time, such as Justiniano José da Rocha, the first professor of military law at the Military School of Rio de Janeiro (PIRAGIBE, 1862).

The project of Magalhães Castro was founded on very different premises – a "distorted and fake one", if we believe in the commission's words (PROJECTO, 1863, p. 8). For them, the system of aggravating and attenuating circumstances, coupled with the justifications of crimes, all established generally for all crimes, was the "true expression of science for common penal law" (PROJECTO, 1863, p. 8). However, applied for a special branch such as the military one, this was a "dangerous system, as it brings anarchy and mayhem to the army ranks".

What did Magalhães Castro think himself?

Fortunately, he wrote both a defense of his own project and a rebuttal of the commission's one. He noticed that the only circumstances the project recognized were reoffending and minority; but they got different treatments. If the former was present in a given offence, it would prompt the penalty to automatically be at the maximum, while for the latter, the project did not determine the consequences. "In all other cases, [the conscience of the judge] is free, and proceeds almost without rules, punishing as it sees fit: there cannot be a system with more flaws" (PROJECTO, 1863, p. 74). On the one side, the absence of circumstances left judges almost unrestrained; on the other hand, the rigid penalties provoked glaring injustices. For instance, the light physical offence perpetrated in the house of the victim inevitably lead to capital punishment, while the murder of a superior during war could lead to prison with work

[249] "Não é o arbítrio condemnavel da legislação antiga, que ainda hoje tem todo o imperio, onde a maior parte das vezes não só a qualidade, como a duração da pena fica entregue á suprema vontade do julgador. A razão nào conhece regra que justifique esse proceder. A theoria do prudente arbítrio dado aos julgadores por uma regra geral, ou dentro de limites conhecidos, arbitrio logico, racional e justo, foi seguido" por todos códigos, com a exceção de Magalhães Castro, que "nada mais é do que a theoria aliás filha do Codigo Commum e transplantada para uma lei ele excepção" (PROJECTO, 1863, p. 20).

[250] Art. 131: "Os Tribunaes Militares não poderão aplicar aos crimes previstos neste Codigo, outras penas que não sejão as que nelle se acham estabelecidas".

for 20 years (PROJECTO, 1863, p. 74). By denying the use of aggravating and attenuating circumstances, the commission adopted the "cruel and fake system of the [1857] French [military] code"[251] with "unchecked arbitrium" (PROJECTO, 1863, p. 74).

The French military code, indeed, made only generic references to aggravating and attenuating circumstances on the special part; when they were present, there would be a maximum and a minimum for the penalty, but the judge could freely choose the exact amount of punishment (FRANCE, 1908). Those debates are utterly consequential. Excluding judicial arbitrium was, in fact, one of the central preoccupations of 19th century criminal law: it should be substituted by discretion (COLAO, 2016). Not by chance, the French military code does not use the word *discretion*, though, as Magalhães Castro pointed out, its system actually harbored such power. The Portuguese project of 1820, on its turn, was explicitly aimed at curbing judicial arbitrium; when the regent prince Dom João VI appointed the 1802 commission that would write the project, one of its explicitly objectives was to "end arbitrium" (*acabar com o arbítrio*) (GRAES, 2020, no pages). But neither did this project establish aggravating and attenuating circumstances explicitly limiting the power of the judge. It is quite interesting that the two codes that inspired the commission rebutted the language of arbitrium while maintaining the practice; the Brazilian commission at least was more hones, admitting it was using arbitrium, though a limited and prudent one[252].

The other problem with the commission project were the harsh penalties it established for soldiers. For Magalhães Castro, the commission had forgotten that the general principles of law also applied in the military world (PROJECTO, 1863, p. 71), and the members of the Army did not lose their "rights of men and citizens" for entering the barracks (PROJECTO, 1863, p. 69). The law must punish vigorously, but would not be respected if it was not also "generous"[253], which were especially dear to the "gentleness of the Brazilian character"[254].

Obviously, this fierce criticism could not be left unanswered. Magalhães Castro even said that the project of the commission "could barely receive the name Project of Penal Code" since it was not satisfyingly systematic (PROJECTO, 1863, p. 69). Late 19th century was the

[251] "Não tenho duvida de afirmar que a França, tão generosa e grande, merecia leis melhores para a repressão dos crimes militares" (PROJECTO, 1863, p. 77).
[252] In common criminal law, the enlightenment criticism of arbitrium soon had to give space to some compromises, as Adriano Cavanna (2007, p. 213) shows for projects in Napoleonic Italy.
[253] "Deve ser forte a lei repressora pelo em prego de penas efficazes e proporcionadas aos grandes crimes (...); deve ser genrosa para que ninguem tenha o direito de ataca-la, maldizendo-a por injusta, quando atormentar o innocente" (PROJECTO, 1863, p. 76).
[254] "A Ilustre Seção castiga muitas vezes, contra a boa razão, quase a belprazer, sem atender a indole da Sociedade, e condições do Imperio, e como se não soubesse da brandura natural dos Brasileiros, que sempre reagem visivelmente, mais humanos contra todos os excessos e desacatos". (PROJECTO, 1863, p. 80).

heyday of systematic thinking: our author was uttering no light statement. Magalhães Castro generally appears to use *system* as opposed to "casuistry"; playing with the old Leibnizian distinction, we could say that he favors not a merely classificatory "system", but a dynamic one, that is, statements that could logically follow from each other. Predictive axioms. Relational truths. In a word, science, as determined by late 19th century legal theory[255], was what Castro craved – and the code lacked. Yet, not all agreed. The commission wrote a proper response and sent the project to be assessed by the full Commission of Examination of the Legislation of the Army. It took eight sessions between 23 October 1866 and 17 January 1867 to discuss the project and for the other members to present amendments, which would be finally incorporated into the project. Two important discussions still took place – both connected with the troubled relation between officers and enlisted personnel: crimes committed following unlawful orders[256] and whether officers should suffer the punishment of prison with labor[257].

This last debate shows the troubled relation between modern and *ancien régime* criminal laws in 19th century Brazil. On the one side, Magalhães Castro champions several bastions of illuminist criminal thinking: application of all principles for everyone, milder penalties, more certain convictions that would render pardon less useful. He also attacked arbitrium, which was mostly defended by the commission's project. On the other hand, Castro defended a deeply pre-modern reasoning which differentiated punishments applied to officers from those applied to enlisted personnel. In this last case, the full commission championed more modern values, such as equality and punishment according to the crime, and not the defendant. Therefore, we can say that the assimilation of modern criminal legal culture was still a work in progress in the 1860s. Brazil obviously was not the sole nation undergoing such a process: the tensions in the

[255] On the history of "system" in legal thought, including the contribution of Leibnitz, cf. Paolo Cappellini (2010a).
[256] The first issue was art. 89. The original writing stated that anyone obeying an unlawful order should be punished as accomplice, unless he communicated the unduly order "with all due respect and decency" to the superiors. In the full commission, Councilor Meireles decried the article's attack on the "passive obedience, which is such a vital and important condition [of the discipline of the Army]" (PROJECTO, 1863, p. 169). This article had already been attacked by Magalhães Castro, who said the provision seemed a part of the "works of the Count of Lippe badly applied. The count did not go so low" (PROJECTO, 1863, p. 102). Thomáz Alves Júnior answered that the obedience of the soldier should "not go further to take away from the man his nature as a free thinking being" (PROJECTO, 1863, p. 102). He lost, though. The final project established that those following orders did not commit any crime if they did not collude with the superior.
[257] The second and last debate pondered whether the penalty of prison with labor was fit for officers, especially generals. Magalhães Castro stated that such punishment imposed upon generals scandalized the reason and humanity (PROJECTO, 1863, p. 81), and many civilized nations had followed this way of thinking. The French code, for instance, only applied those penalties to officers convicted for theft and robbery; the Portuguese code and the 1763 "Code" of The Count of Lippe reserved them only for enlisted personnel. The section, on the other hand, stated that a general committing such heinous crimes against his own nation did not deserve a mild treatment – he had lost any sort of true military dignity . In the full commission, councilor Paranhos complained that such a distinction between offenders would have created a "aristocracy of crime": officer's ranks were created to provide discipline for the Army, but if those holding them had committed crimes, they should be punished not according to "his class", but according to the crime (PROJECTO, 1863, p. 179).

debates at the South American empire simply reflect how problematic it was to adapt the modern ideas of criminal law to the military. This can also be observed in the 1859 Italian military code (ROVINELLO, 212, p. 61); the 1857 French code ratified the difference between officers and troops and retained degrading punishment; as we have already discussed, most armies in Europe and beyond practiced corporal punishment. Enlightenment took longer to illuminate the barracks.

Against the energic protests of Magalhães Castro, the Project was sent to the chamber of deputies in 1876, where it received a favorable opinion. Until 1878, the project would be lengthily and slowly debated at the chamber. Finally, it would reach the third discussion (SOUZA, 2012, p. 71 ss.) – and stall, forgotten in the dusty drawers of deputies. Only at the beginning of the republic a different project would finally attain the honor of becoming the first Brazilian code of Military Penal Law.

In the following figure, it is possible to visualize the path followed by the projects of codes along the years:

Table Legislative path of the project of military penal code.

01/01/1860	Publication of the Project of Magalhães Castro
12/04/1860	Special commission gives a negative opinion for the project of Magalhães Castro
18/12/1865	Call of the Commission of Examination of the Legislation of the Amry
10/09/1866	Presentation of the project of the section of Penal Military Law of the Comission
10/08/1866	Separated vote of Magalhães Castro against the project
23/10/1866	Answer of the majority of the section against the vote from Magalhães Castro
23/10/1866 – 17/01/1867	Discussions of the project at the full commission
10/02/1867	Presentation of the final project
27/05/1867	Sending of the project to the Chamber of Deputies
18/08/1869	Nomination of the Chamber's commission to evaluate the project. There was no opinion
01/06/1875	Proposition of an amend approving the military codes to that year's law fixating the land forces
09-10-11-15/06/1875	Discussion of the amend
15/06/1875	Transformation of the amend into an autonomous project
22/06/1875	Nomination of a commission for the analysis of the project
01/09/1875	Positive opinion of the commission
1878	Last debates of the project

By 1882, the project was considered outdated by the minister of war because it had been crafted before the publication of the new Italian (1869), Belgian (1870) and Portuguese (1875) codes (MINISTÉRIO DA GUERRA, 1882a). The political will to proceed with the military

codification faded away and would only be rekindled in 1887, and yield a code in 1890. But this story belongs to part II.

5.6 – Fighting the past: final remarks

The eternal skirmish between old and new stormed frequently in the past few pages. As the ancient way of pursuing discipline was being slowly defeated, the new way gradually gained foothold. Yet, the transition was difficult. We could identify five different processes that were simultaneously occurring and signal that new foundations were being developed for disciplinary law: codification; the separation between penal and administrative law; rejection of arbitrium; rejection of corporal punishment; and more equality between officers and enlisted personnel.

Codification. Throughout the 19th century, several members of the Brazilian legal community called for the writing and systematization of both the administrative and the penal law of military affairs. Administrative disciplinary rules were unwritten and unchecked; officers could tyrannize their subordinates mostly unopposed, frequently going to the point of blatant tyranny. As for penal law, the brutal Articles of War in force were established in 1763 in a much different context; they mandated cruel penalties and imposed death sentences for the majority of offences. Moreover, they were a loose, short text that did not provide for much control of the judges. Codification would bring both branches of law to a path more coherent with the 19th century mania for clarity, and for this was ardently pursued by jurists and administrators. However, the penal code remained only a dream until 1891 – relatively late, but not so much out of tune with the international experience. Except for Two Sicilies in 1819 Sardinia in 1840, Tuscany in 1856 and France in 1857, most nations took long to enact a proper code of military law. Most Spanish speaking countries mirrored their Portuguese counterparts and retained the 1768 ordinances[258] on the Army[259]; they were no less brutal than the Portuguese – robbery was punished with the gallows, for instance – though they were much more detailed, with 121 paragraphs against only 21 of the Portuguese Articles of War. The ordinances repelled in Chile for new ordinances (not a code) in 1839; other countries took much longer[260], as Venezuela (1873), Uruguay (1884), México (1894), Argentina (1895) (ABÁSOLO, 2002, p. 347-350). Spain proper would only gain its code in 1884. Between 1869 and 1875, Italy got a new code,

[258] On those ordinances, cf. Maria del Carmen Bolaño Mejias (1996).
[259] Criminal law was regulated in Book VIII, title XI.
[260] On the application of the Spanish ordinances in 19th century Latin America, cf. Lucas Codesido (2013) regarding Argentina and Óscar Cruz Barney (2003) for Mexico.

and Belgium, Portugal and Germany got their first ones (ABÁSOLO, 2002; p. 347-348). Therefore, Brazilian was only a relative latecomer, placed between European nations, which tended to codify earlier, and Latin American countries, which generally retained the late-18th century ordinances of their colonial powers until the 1880s and 1890s.

Separation between administrative and penal law. There was not so much clarity on the distinctions between both branches of law: penalties were frequently shared between them. With the writing down of the disciplinary regulation of the Army, the limits of penalties that officers might impose upon their subordinates were more identifiable. However, both branches were always understood as a single reality, responsible for maintaining order in the barracks.

Rejection of arbitrium. Early modern criminal law placed almost unlimited trust in the conscience of the judge: entitled with arbitrium, magistrates would be able to decide which punishment fit better the crimes committed, regardless of the penalties established in the legal texts. Modern legal culture, however, mistrusted judges and rebuffed arbitrium. The project of penal code of the Commission of Examination of the Legislation of the Army proposed to substitute it for the "prudent arbitrium": this meant to establish inflexible penalties, taking away from the judge the power to decide which one was the most convenient. Magalhães Castro, however, proposed a different path to overcome arbitrium. In his project, each crime would be assigned a range of penalties from which the judge should decide – but not freely. The general part of the code would establish aggravating and attenuating circumstances that would guide the decision, overcoming arbitrium. This way of thinking, however, was not adopted, and his projected was rejected. In the end, even the commission's project was forgotten and the Regulations of the Count of Lippe persisted. Arbitrium were still applied daily. And the higher in the judicial structure, the more it was deployed: the Supreme Military and Justice Council frequently reformed harsher sentences, and imperial pardon often intervened. As for military law, the past won the fight – at least for now. In the republic, a new code would move slightly away from the past Portuguese tradition and even of the practices of the major European powers. But this is a matter for the next chapter.

Rejection of corporal punishment. The constitution itself outlawed cruel punishments, especially whipping. Inhumane penalties were one of the main targets of Enlightenment and its projects of criminal law reform: more certain and milder penalties were the cornerstones of the more rational criminal system the men of the Republic of Letters proposed. Moreover, the 1824 Constitution, art. 179, XIX had abolished the lash and cruel punishment – whipping was

authorized by the 1830 Criminal Code only for slaves, and this was revoked in 1885[261]. However, the government had to insist several times throughout the century that such sufferings were not allowed, and only in 1875 all kinds of corporal punishment were abolished from the disciplinary regulations of the land forces. Nevertheless, the Navy retained those techniques, and it was not only until the 20th century that they were erased from Brazilian ships. The most strikingly backwardness, the most glaring cruelty, therefore, was the one that took the longest to strip away from military practice.

Equivalence between officers and enlisted personnel. The regulations of the Count of Lippe established clear distinctions between officers and enlisted personnel. Also, in both projects of penal military code, several penalties differed according to the condition of the offender. In many cases, this derived from the involuntary nature of recruitment: dismissal would be received more as prize than as punishment by soldiers unwillingly dragged into the Army, meaning they had to be controlled with different, more powerful legal weapons. The disciplinary regulation of the Army also sharply differentiated between the two categories of military personnel: there were certain penalties meant only for enlisted personnel – naturally, the roughest ones. The projects of penal codes mitigated this situation, but it would persist well into the 20th century. Not that it was a Brazilian particularity: for instance, France[262], Italy[263], Argentina[264], Spain[265] and Portugal[266] differentiate between the two categories in their penal codes, especially for desertion. Brazil was only one example in a wider trend.

Regarding punishment, military law provided a unique amalgamation of *ancient régime* techniques and the new, liberal discourse. The bitterness of military punishments was widely recognized, and the need to reform was undeniable. However, most of the changes took a long time to take place, and when they finally gained entrance in the golden realm of law, they were found to be insufficient. To change and to regulate disciplinary law meant to control power, a project never welcomed with a whole heart by those entitled to authority. Moreover, the armed forces were somehow neglected by the political classes in the late imperial period, meaning that it would be hard to find suitable champions of the causes of the soldiers in the rooms of the General Assembly. And those with most power in the Army and the Navy, those with most

[261] On the legal history of whipping (*açoites*) in imperial Brazil, cf. Ricardo Sontag (2020c).
[262] Cf, for instance, the 1857 Military Justice Code, arts. 235-237, on desertion to other countries.
[263] Cf. the 1869 Code for the Army, arts. 146-151, which establish a special regime for desertions practiced by officers.
[264] Cf., for instance, the 1895 code, art. 162, which establishes different penalties for officers and troops that abandon sinking vessels.
[265] Cf. the 1884 Code for the Army, arts. 151-154, which establish a special regime for desertions practiced by officers.
[266] Cf. the 1875 Code, art. 11, which establishes different penalties for officers and troops.

capacity to push for those regulations to be approved were precisely those who could profit the most from vague regulations: officers. Most punishment were applied by officers to soldiers, were valuable instruments of social control, and therefore, were hard to relinquish. Moreover, the disciplinary regulation already gave some level of certainty to punishments – at least, the amount necessary to appease the conscience of modern-oriented, though brutal officers who had to reconcile their will for a modern Army with the dire reality of recruitment in Brazil. Finally, the Regulations of the Count of Lippe were frequently softened in practice by the emperor and the Supreme Military and Justice Council through pardon and reformation of sentences, though this process was governed by a logic most jurists felt was wrong and backwards. Modernization took hesitant steps, not always in the right direction, and frequently supported by the most questionable of partners: its reform was far removed from the golden ideal of progress.

Disciplinary law changed. But slowly. Painfully slowly.

Tales of distance and resentment: Final Remarks

Law books, complex pensions, special crimes. The reader can most certainly be forgiven for being at least slightly puzzled. What could possibly connect the tortuous deeds of warrior widows in Paraguay to a tug of war between judges and military authorities in Belém? Why did I put in a single thesis such different arguments as law chairs in Rio de Janeiro, dozens of laws on pensions and a seemingly endless list of ordeals suffered by soldiers and sailors before councils of wars and the seemingly limitless administrative power of their superiors?

Yet, red threads unite those three fields of military law. Behind the continuous mass of facts, decrees, requests, shootings, wars, judgements, sentences, promotions, commissions, two processes were underway: first, the individualization of military law as a field; second, a distancing between civilians and soldiers. The two processes were deeply consequential, as soldiers were deeply becoming aware of their own standing in Brazilian society and of their increasing distance from it. Not that I am suggesting here, of course, that law, in and by itself, prompted the rift between the military class and the civilian world that would ultimately lead to the end of the Brazilian monarchy. I do not claim from law more that it can give: instead of seeking to explain immediate facts, no matter how consequential they were, I am interested in seeing mentalities. For law is one of the best repository of the worldview of societies; through the mirror of the legal world, we can better grasp the subterranean movements and constants that determined how civilians and soldiers thought about and understood their places in the world. Weather law caused or was caused by these phenomena is another matter; I am interested in seeing them. Shaw we now dissect how both movements - individualization military law and distancing between soldiers and civilians – can be perceived in the branches of military law we are analyzing.

Teaching and writing military law.

Brazil was formed as an independent nation already with the idea that the laws concerning the Army and the Navy formed a separated – though not necessarily homogenous – body of norms. In the first part of the nineteenth century, some compilations of those norms were published, normally under the patronage of soldiers themselves. In the last decades of the empire, the works finding their way to the presses became more refined, as exemplified by the Military Indicator, until finally a book bluntly called Military Law went out of the presses under the auspices of Thomaz Alves Júnior. Military law was gaining pace as an individualized branch of law, though still an incipient one: there were only two books on the subject, one of which was rifled with plagiarism; laws were still not systematic and little was published on the subject.

Distancing between soldiers and civilians is also easy to spot. The sociology of the professors is the most glaring example of this phenomenon: the most important chair in Brazil, that of the Military School in Rio de Janeiro, was occupied exclusively by jurists, rendering them almost a foreign body in the realm of military education. Frequently, the teachings on the subject were called "military legislation" instead of military law, signaling that the field was not welcomed as a fully-fledged area of study. Finally, the two groups were highly wary of each other. Soldiers saw jurists as representatives of the governing classes, a group who progressed in their career on the basis of patrimonialism and governed the country on their own interest. Later, the growing force of positivism induced many to see in jurists the backwards-looking bastions of metaphysical thinking, the capital enemies of progress and future, the most important force holding the Army back from its historical function. Going to the other side of the divide, sentiments were no better. Jurists saw the Army as a mighty risk, as a powerful force capable to upend the political system and undermine stability in the same way that so frequently could be observed in the Hispanic-American republics.

Military social security.

From the beginning, soldiers had their own institutions of social security: the Navy from 1790, and the Army from 1827, both of them separated from the *Montepio Geral dos Servidores do Estado*, for all public servants and created only in 1835[267]. However, individualization was still hindered for the legal regimes of the land and sea forces were still completely apart: there was no military servant, but only soldiers and sailors. Yet, the very category of public servant was still a bit fuzzy and low-regulated, meaning that there was not still a general, abstract category from which that of "soldier" could differentiate. Each ministry had their employees, and each category was regulated in different statutes. Individualization, therefore, was still a work-in-progress, not only for soldiers, but also for civil servants.

Though their salaries were not much envied, soldiers and seamen enjoyed clear privileges. While most of the Brazilian population could not retire, they had their own system of social security. Health and educational institutions were at their disposal. But, more importantly, there was a series of characteristics deemed to be displayed by soldiers which justified their benefices and set them apart from the civilian world. First, they were honorable, sacrificing their life for the nation; second, they were abnegated, resigning themselves to their live of service in exchange for low wages. Those qualities should be compensated by social benefices that were not available to the whole population. Finally, they had served Brazil in the

[267] On this institution, cf. Luiz Fernando Saraiva and Rita de Cássia da Silva Almico (2019).

difficult times of the Paraguay War, and should receive in financial terms the laurels of victory they had paid with their own lives.

Military penal and administrative law.

Perhaps this is the field in which the individualization of military law and, along with it, of a legal image of the soldier is the clearest. Councils of War existed since 1640, and Articles of War had been issued for the Army in 1763 and the Navy in 1800 – not to mention the botched project of military penal code of 1820. Several disciplinary regulations were in place and were unified in 1874. Probably this clear and early cut from the outside world proves that discipline is truly the cornerstone of the military law and is paramount to distinguish the world of the barracks from beyond its walls. Yet, once again, Navy and Army are apart, and "the soldier" has not yet appeared.

Distinction can also be spot straightforwardly. Soldiers had to face corporal punishments that since 1824 the Constitution had left only for slaves. Other penalties they had to face were absolutely unique: demotion of rank, administrative imprisonment, reduction of food allowance are but a few of the sanctions the military world did not share with civilians. Administrative and criminal law were not duly separated and were in continuous with each other. Rafael Mafei Rabelo de Queiroz (2008, p. 348-358) suggested that "contemporary criminal law" is mostly made of four elements: legality; separation between procedural and substantive law; clear differentiation of penal sanctions from civil and administrative ones; and clear placement of penal law within public, and nor private law. Military law fulfilled only the last criterium. And, while Brazil had enacted a liberal criminal code in 1830 (which did not completely fulfill the four criteria), the military did not receive a corresponding regulation while the emperor reigned in Rio de Janeiro. Sure, there were some attempts to codify, and members of the commissions stated more than once that they intended to reduce the distance between military and common penal law. But all attempts failed. And even the projects at the table proposed normative architectures far removed from what was deemed to be mainstream in general law: they did not number attenuating and aggravating circumstances and valued the arbitrium of judges, though reinterpreting the power of magistrates.

To what extent did Brazilian military law follow tendencies from foreign powers? As we saw in the debates of the 1874 law, Brazilians measured themselves against European developments, but they harbored no innocent attitudes towards their colleagues from the other side of the Atlantic. Congressmen discussed which "model" to adopt – and they chose one. But when the law went on to be applied in Brazil, words were effectively emptied. The military draw enshrined in the law books failed and the traditional recruitment kept going on in Brazil:

the brutal catching of deviants in the streets. Disciplinary law reflected this radically different functions: if most European nations – Portugal, Spain, France, Italy, Germany and Austria - had already codified military penal law, at least pretending to enforce liberal principles, Brazil still used the outdated "code" of the Count of Lippe. In the empire, a brutal military code controlled deviants, while in Europe, (supposedly) liberal norms were meant to control citizens. Army administrators reproached both the way recruitment was done and the mayhem of military penal law, considered to be backwards, but little could be done. In Europe, after the Franco-Prussian war, gargantuan armies kept guard of the armed peace; in South America, distances were bigger and populations were smaller, meaning that it was really hard for the beleaguered American nations to afford comparable military mighty. If in 1884 Italy land forces comprised 160.000 men (LUCCHINI, 1884, p. 53-54) for a population of 30 million people, in post-Paraguay war Brazil, little more than 15.000 soldiers protected a population of ca. 10 million.

The Army was concentrated only in Rio Grande do Sul – protecting from a potential attack from Argentina – and the capital city of Rio de Janeiro. The uniforms did not hold so much numeric influence over Brazilian social life as they did in Europe. One example is enlightening. Carlotta Latini (2010) shows how military tribunals were constantly used in Europe to cub political dissent. In France, the Revolution had created military commissions that would judge anyone, civilians and soldiers that had fought the republic; later, laws in 1811 and 1849 established that during states of siege, military courts would be competent to judge political crimes (LATINI, 2010, p. 116-119). Prussia had a similar mechanism; the use of military courts to fight political dissent was a European phenomenon (LATINI, 2010, p. 121-123). In Italy, both before[268] and after unification, uses of the *stato d'assedio* to transfer certain crimes to military jurisdiction was a staple. For instance, in 1863-1865, the famous *legge Pica* put all crimes of *Brigantaggio* under the responsibility of military justice (LATINI, 2010, p. 155). Not to mention that the very institute of fictitious *stato d'assedio*, that is, not responding to an actual siege, was not established in the *Statuto Albertino*, but was used as a customary practice and criticized by doctrine (LATINI, 2010, p. 273). Brazil did not watch anything similar, at least after 1870[269]. Sure, law 632 of 1851 had established military crimes for those deserting to the enemy or seducing soldiers to do so or to rise against the government. But only in times of external war; in peace, civilians committing such crimes would be judged by civilian courts.

[268] Considering the Kingdom of Two Sicilies, cf. Giacomo Pace Gravina (2015).
[269] From the 1820s to the 1840s, Vivian Chieregati Costa (2020) has discussed the uses of military commissions in the repression of regional revolts against the central power.

Brazilian – and Latin American - problems were much different that European ones, and the uses of the Army differed too. And, similarly, Argentina lacked conscription until 1900 and military service was used to social control (MARZORATTI, 2019). Not by chance, the Platine neighbors also got their first military codes in 1890. Hispanic American in general also retained the 1768 *Carolinas* ordinations from Spain, the equivalent of the Portuguese Articles of War. In Europe, political dissent was rifle, especially considering the perilous context of Italian Unification; military courts were used as an instrument to deliver expedite and harsh justice. Constant wars – of independence, of unification, of conquest, of defense – throughout the whole continent provided several opportunities for states of siege to be declared and exceptional measures to be taken on a regular basis. A widespread industrial base provided for much higher population densities, allowing for an exceeding number of citizens that could be sent to the armed forces without imperiling the economy. In Latin America, the urgencies were other. After the 1840s, the national state was mostly stabilized and the wars happened mostly on the territories of other countries, and when they affected Brazilian territory, they were restricted to few provinces. In South America, war was less of an issue. Particularly in Brazil, with national independence and territorial integrity achieved early, the most momentous problems in Brazil were the abolition of slavery and the substitution of slave labor by regular workers. Instead of military courts, recruitment was used to stimulate the lower classes to work and to curb regular criminality. Small armies were a menace used to drive populations to work, while in Europe, huge armies were a burden taking people away from work. It could hardly be different in the old continent: nations that did otherwise would probably be wiped out by the canons of neighbors. Military codes, therefore, had to deal not only with those deemed as "vagabonds" in need of correction, people without knowledge or patrons that could defend them, but with members of the workforce being trained to defend the motherland. Not that Europeans were perfect citizens treated with respect; but, in the end of the day, they were useful for their warrior nation, and could potentially go back to the workforce; Brazilian soldiers, conversely, were, in the eyes of their officers, "worthless": they were in the Army precisely for not being productive for society, and, for civilians, the Army itself was barely used.

Brazilian military law might seem to be backwards, but it was mostly an answer to a specific context. Latin American armies were bureaucratic devices performing social functions that might well get into politics. European armies were gigantic machines of war. And, if in Europe civil rights at the penal process were lessened by constant states of siege, in Brazil they were taken away from those already in the Army by simply ignoring the law. It is hard to say that the methods adopted by one or the other margin of the Atlantic was less liberal: they simply

found different ways to declare mighty general principles while making pointed exceptions from them. They simply had different needs, war-torn Europe and slavery-supporting Brazil.

One last reflection. Was Brazilian military law still trapped in the *ancien régime*? This could be a fair conclusion. Military Social Security was deeply embedded in a paternalistic conception: retirement was not seen as a right, but as a gift from the sovereign, as a release from service while payments would still be due. Charity and compassion dominated the way this branch of law was thought while social rights were still a distant, absolutely unconceivable idea. Meanwhile, military law literally preserved a set of regulations enacted in the 18th century under a clearly *Ancien Régime* logics; death was one of the most important instruments of discipline and the arbitrium of officers was frequent in both administrative and criminal punishments. Are we seeing a backwards-looking fragment of the past persisting in the century of progress?

Superficially, it is fair to assume so. But we must dig deeper. One important criterium to grasp different temporalities is to understand what the actors from the past themselves thought. And their evaluations varied according to the branch of military law considered. Sure, for military punitive law, most jurists and soldiers were quick to say that change must come as soon as possible. The many initiatives of transformation that we discussed in chapter five demonstrates this: the projects of codes of 1820, 1866 and the Magalhães Castro Project explicitly attempted to bring military punishments in line with the liberal spirit of the century. By hopes were different when it comes to social security. The idea of retirement as a right is not a child of the 19th century, but was born later; not only in social security, but in constitutional law and other fields the Brazilian legal thought was comfortable in seeing the emperor through paternalistic lenses. Social security developed in an organic way, though the path was sometimes rough and frequently questionable; curbing with the past was not an issue.

Notwithstanding different temporalities, the desire for change ran high. Many sectors both of the legal and military communities craved modernization: the Commission of Examination of the Legislation of the Army was the most important, but one, example. In the 1860s the calls for changes were uttered loudly and were later reinforced by the successes in Paraguay. But they frequently met unreceptive years. Time passed and the tensions accumulated, concentrating mighty and frequently dreadful forces. Once released, they would change Brazilian Army and society forever.

Which brings us to part II.

Part II
Soldiers are also citizens
1889-1920

Civilizing the military world: introduction

In the 1880s, we left the armed forces in turmoil. The military question had strained the relations between soldiers and the governing class, while the recently-established military club provided a venue where officers could organize and intervene in the political arena. In 1888, Brazil became the last country in the western hemisphere to abolish slavery. This was a sensitive issue to many in the Army and had catalyzed political action within the ranks; from that point on, the political energies would be centered around the next major project of reform: abolishing the monarchy.

The last important social group actively sustaining the imperial regime, coffee farmers, was alienated precisely by the compensation-less end of slavery; however, few groups were inclined to take concrete action to attack and overcome the battered regime, especially due to the personal popularity of the emperor. The republican party was a minor force, with important inroads only in the southern province of Rio Grande do Sul and now in São Paulo, where coffee producers held sway over the economic and political establishment. The Navy, a much aristocratic corporation, was at the side of the regime. Within the Amry, most of the higher-ranking officers were monarchists. However, an unfortunate combination of forces would momentarily put together disparaged forces that would be able to overthrow the imperial family and prevent the third reign. First, many of the *tarimbeiro*[270] officers had been deeply offended by the military question and felt the honor of the Army had been attacked by the political elites. Second, and most important, students at the military academy were growing more interested in changing the course of the political life of the nation – and this would prove crucial.

Celso Castro (1995) wrote the most important work on the so-called military youth (*mocidade militar*) - the young students of the Military School, mostly engaged on the scientific arms (artillery, engineering and general staff), and inferior officers of those parts of the Army. Most of them had entered the military in the hope of climbing the social ladder, carrying more interest in studying mathematics than in fighting (CASTRO, 1995, pp. 44-48). French positivist ideas gained traction among those soldiers, spreading ideologies of progress and, significantly, a preference for republicanism over monarchies (CASTRO, 1995, p. 53, 67). This intellectual environment was met in the late 1880s by deep unsatisfaction of young officers with the government, which had been withholding promotions, and a perceived lack of opportunity to

[270] A derogatory term used to refer to uneducated officers. They were deemed to sleep in *tarimbas*, the uncomfortable beds used by the troops; usually they came to the less prestigious and less technical arms, infantry and cavalry.

rise through the ranks by merit (CASTRO, 1995, p. 148). The military youth saw the government as corrupt and prone to nepotism; those without friends in the court would hardly be able to get promotions.

In 15 November 1889, both sides joined forces to depose the cabinet that was governing the empire. The chain of events is nebulous: we know that the enlisted personnel did not know what they were doing, and even the leader of the revolt and future first president of Brazil, marshall Deodoro da Fonseca, was not sure that he would dethrone Pedro II until well into the afternoon of that day. The republic was made more by the vast number of those that did not react or defended the monarchy than by the few – many of which hesitant – that took arms to send the last Braganza back to Europe. Regardless of how the *coup* was conducted, 15 November was the first time in decades that the Army had intervened actively in Brazilian politics. It would not be the last.

The immediate aftermath of the *coup* would bring many professional and political opportunities for soldiers – but those of the Army. The land forces were reorganizing, creating many more unities without enlarging the number of soldiers, opening higher positions to be filled by officers loyal to the regime. Military social security was reformed and salaries were raised (CASTRO, 1995, p. 195). Many officers were elected to the new constituent assembly (CARVALHO, 2019, p. 84-86) and both the first president and his vice – Deodoro da Fonseca and Floriano Peixoto – were generals.

Changes, however, were deep, and did not only interest the military: the institutional framework of the country was thoroughly modified, with relevant consequences for the law. The penchant for centralization of the empire was exchanged for an exaggerated federalism, much in line with the American model, with an eye in the Argentinian experience. The France-based administrative jurisdiction and the Council of State were abolished. Conversely, a new, federal judiciary was created. The previous Supreme Court of Justice (*Supremo Tribunal de Justiça*), with only powers of cassation, was substituted by a Supreme Federal Court (*Supremo Tribunal Federal*), modelled after the American Supreme Court and with the power of judicial review of laws. Later, in 1917, the first Brazilian civil code would be enacted, doing away with the 1603 Philippine Ordinations.

The differences between the late imperial and the early republican periods would not be restricted to the substitution of a French-based judicial organization by an American one: they can be contrasted also for stability was substituted by turmoil. The first decade of the republic was marked by a chaotic dispute between several projects. The main contenders for the organization of the new government were the liberal regime and the positivist dictatorship

(MATTOS, 2011, p. 93). And the two first administrations, led by soldiers, tended towards the latter option. After he was officially elected president after the constitution was enacted, marshal Deodoro intervened in several states and, after being reprimanded, tried to close the National Congress. After a strong backlash, he resigned, paving the way for the presidency of his vice-president, Floriano Peixoto. However, since he ascended to the power more than two years before the end of the mandate, new elections should be held; they never happened, and a shadow of unconstitutionality lingered over the administration. The Army was deeply divided in factions aligned with each officer, and the differences between *tarimbeiros* and scientific officers reemerged (CASTRO, 1995, pp. 197 ss.).

Facing clear political abuse from those claiming to be saving the country, several revolts broke out throughout the country –most of which featured soldiers actively confronting the established order. In 1891 and 1893, the Navy rioted under the leadership of several admirals. The maritime forces felt excluded from the power grab performed by the Army. It did not help that many sea officers were associated with the monarchy. After a swift repression, the defeat was near complete, and most Brazilian ships were distrusted; Brazil would only rebuild sea forces worth the name more than ten years later (CARVALHO, 2019, p. 82-83). Meanwhile, in Rio Grande do Sul, local dynamics prompted the Federalist Revolution between 1893 and 1895, a civil war with deep regional consequences. Since this state harbored the largest military effective outside the capital, several members of the Army got involved. The federal government of Floriano Peixoto received support from the states to fight the rebellion and, in exchange, accepted the election of a civilian oligarch, Prudente de Moraes, for the presidency (MATTOS, 2011, pp. 94-99). Notwithstanding the accord and the subsequent death of Floriano Peixoto, the political forces coalescing around him would for what was called "jacobinism", anti-oligarchic political positions inspired by positivism with a popular element. In late 1890s Rio de Janeiro, riots and manifestations were frequent. And one of the most important social components of Jacobinism could be found in the Military School. In 1895, the new commander of the school was an anti-florianist and faced strong opposition from students. They rioted and, to counter the rebellion, the command expelled several students. Agitation continued to the point that the classes had to be dismissed (MCCAIN, 2009, p. 60-61). New rebellions happened in 1897. Finally, in 1904, one of the central events of first republic Brazil took place: the Revolt of the Vaccine. After scientism and hygienist ideals, a group of doctors convinced the government to impose a mandatory vaccination order over the population of Rio de Janeiro. Wary of the invasions of their houses and privacy, the people rioted for more than a week. In the middle of the unrest, a group of Army officers put in motion a plan of *coup d'État*: some

units of the Army in the capital were incited to disobey the government, and hundreds of students of the Military School rebelled and marched towards the presidential palace. In the middle of the night, a small battle was fought and the cadets were defeated. After so many episodes of indiscipline, the Militar School was closed. Its doors would only be reopened again nearly ten years later.

Riots and revolts were rife in the first years of the republic. But the most consequential confront between Army and citizens would not take place in the capital city of Rio de Janeiro. Almost 2.000 kilometers away, in the *sertão* of Bahia, the military would massacre thousands in the War of *Canudos*.

In the early years of the 1890s, Antônio Conselheiro, a popular preacher in the *sertão* (hinterland) of Bahia founded a town in the lost semi-arid of the state of Bahia. He started a millenarist movement aligned with popular Catholicism, and was able to attract more than 20 thousand followers to the new town, running away desperately from poverty and droughts towards hope. The powerful of the region grew fearful; after the end of slavery, landowners needed workers to serve in their lands and substitute captives, and the growing village was deviating those much-needed arms away from subordinate labor. And, since Conselheiro was an avowed monarchist, many in the capital considered him a disturber. The police of Bahia sent some hundred police officers to disband the movement in early 1896, but they were humiliatingly defeated. In the following months, two more expeditions were sent by the Brazilian Army, the last of which was composed by 1300 soldiers; both were defeated, and the two commanders of the last one, both colonels of the Army, were killed. In Rio de Janeiro, rumors began to circulate that the people of Canudos intended to march over the city and restore the monarchy; the public opinion demanded action. A last expedition, headed by the minister of war himself, was sent with between five and ten thousand soldiers, more than half of the whole manpower of the Brazilian Army at the time. It would take them three and a half months to win the war and completely destroy the village. The deaths of *sertanejos* are estimated at ca. 20 thousand, and a few thousand soldiers perished. One of the most important books of Brazilian literature, *Os Sertões*, was a reportage of the war written by Euclides da Cunha, an Army officer from the corps of engineers.

A humiliating victory. The mighty Brazilian Army took months to defeat an horde of uneducated and untrained peasants. On top of incompetence, cruelty: for many, the brutal bloodshed had definitely tainted the image of the military. And things would get worse. In 5 November 1897, president Prudente de Moraes went to the War Warehouse (*Arsenal da Guerra*) to receive the troops returning from Canudos; in the middle of the reception, a corporal

of the Army, Marcellino Bispo de Mello tried to murder the president. He failed, but during the attack he managed to kill the minister of war. Mello was imprisoned and prosecuted, but committed suicide in prison. The crime was never solved, but many at the time suspected that the vice president himself, Manuel Vittorino, had hired the botched killer.

All in all, "the army entered the [1900s] decade in collapse" (MCCAIN, 2009, p. 101). Small and humiliated, weakened by party infighting, the armed forces had lost much of the influence they had gained since the end of the monarchy. The first decade of the twentieth century were then an introspective time when much awaited changes were put forward. A new minister of war, not associated with Canudos, was chosen (MCCAIN, 2009, p. 106). Instruction received more attention, and the Military School, considered to deliver an excessively theoretical curriculum, was closed in favor of isolated professional schools for each arm. The small units dispersed throughout the country prevented political articulation between colleagues, but also and did not allow generals to train commanding larger bodies of soldiers; to counter this problem, in 1905, Hermes da Fonseca conducted the first large military exercises in years (MCCAIN, 2009, p. 139). The Navy presented in 1904 the so-called the Naval program, that would finally restructure the sea forces after the havoc of the early republic. Among the several ships ordered by the force, there would be two dreadnaughts, the last word in military technology. The arrive of the menacing battleships in the Guanabara Bay would prompt an arms race with Chile and Argentina.

At the same time, societies of shooting were popping throughout the country, associated with nationalist sentiments and a heightened interest in national defense (MCCAIN, 2009, p. 140 ss.). Newspapers engaged in such discussions, defending that Brazil lacked civic culture: for most of its history, slavery had prevented large masses from participating in public life, and the large number of immigrants were not yet strongly attached to the land. The Army could help to foment this culture through military service and, at the same time, provide education for those drawn to the service, countering the alarmingly high rates of illiteracy (FERREIRA, 2014, p. 63-64). Meanwhile, soldiers were all too aware that the enlisted personnel needed more training, as the misadventures of Canudos constantly reminded. In 1906 and the following years, poet Olavo Bilac initiated a civic campaign that would result in the law of military service of 1908; the 1874 law, that had never been applied, was finally dead. However, the new act would not have a better fortune in its first years. In 1916, Bilac founded the League of National Defense, and after a national campaign under the fear of World War I, the first military draw was made (FERREIRA, 2014, pp. 66-69). The Army would finally grow substantially: if between 1870 and 1910 the manpower of the land forces mostly hovered between 13 thousand

and 20 thousand, it would reach more than 42 thousand after 1917, after Brazil declared war to the central powers (CARVALHO, 2019, pp. 52-53; MCCAIN, 2009, p. 217).

After the first 10 years of the republic, the Brazilian political system was being accommodated in a way to exclude instability spawning both from military rule and popular unrest. The resulting arrangement would come to be known as "politics of the governors" (*política dos governadores*). The president would govern together with the governors of the most important states – Minas Gerais and São Paulo – and, to a lesser extent, of the medium states. Most economic policies, especially foreign exchange, guarantees of buying and others, would align with the interests of coffee producers, which controlled the parties of the two major states. In exchange, governors would support the president and help to curb dissent (MATTOS, 2011, p. 103-104). Since voting was not secret and elections fell under state authority, local potentates were used to intimidate electors and shepherd them towards pre-decided candidates. Fraud was rife, and the ballots simply formalized results agreed in advance. This arrangement would be seen as corrupt by most of the urban middle classes, including military officers, since the accord provided for a perpetual alternation between the same oligarchies in the first office of the nation. The only times when the hidden contract failed would provide for crisis, competitive elections and, at the last time, in 1930, to the end of the first republic. And in all three times, soldiers were at the forefront of the events; only the first one, however, will interest us in the second part of the thesis.

This was the presidential campaign of 1910. Minas Gerais and São Paulo disagreed over the next presidential candidate; the latter nominated Liberal champion and lawyer Ruy Barbosa, while the former nominated minister of war and nephew of Deodoro, marshal Hermes da Fonseca. This was the first competitive election in Brazil, and Barbosa launched the so-called *campanha civilista*, denouncing the risk of militarism. Though both candidates were in fact proxies of state oligarchies, both of them nodded to new, urban sectors: Barbosa, to the liberal middle classes, and Fonseca, to soldiers (MATTOS, 2011, p. 101). Fonseca was mostly supported by longtime *gaucho* kingmaker Pinheiro Machado, which shows that, at the third decade of republic, oligarchies were willing to make alliances with soldiers, and the Army was not perceived as the looming threat of the 1890s. Though Fonseca won the election, his four-year government was not governed by soldiers. The only particular phenomenon were the "salvations", state-level conflicts in which soldiers – many of them related to Hermes - tried to topple local oligarchies, with modest results (CARVALHO, 2019, p. 73-76).

In general, it is easy to agree with José Murilo de Carvalho (2019) that the armed forces were a destabilizing power in first republic Brazil. However, there were different interpretations

on the meanings of those interventions. Once again, “soldiers” cannot work as a single, unifying category: members of the Army and of the Navy, officers and enlisted personnel, young and old, all had different agendas. From the seamen fighting in the revolt of the whip in 1910 to the *Armada* revolt of 1893, little in common could connect each of those groups. Perhaps the unifying factor behind all of them is agency: every one of those groups were major historical actors pushing Brazilian society towards new, previously unexplored paths.

How did they appear before the law? If the Army was a major player in Brazilian politics, it is not hard to think that they had acted consistently in favor of their own interests. Governments might have tried to appease them. But, more importantly for my interest ina specifically *legal* history, how did the very idea of a “soldier” and of military lawappear in Brazilian law at those times? In the forty years between the two military coups that limit the First Republic, the Navy and the Army grew more similar and more powerful; the military polices emerged as strong forces in Brazilian security; the military draw was finally implemented. All of this had impacts on how the “soldier” was imagined in law.

The three chapters that make this part will try to address those problems. The first one will deal with the teaching of military law. Gradually, more and more soldiers had also a legal education and were appointed to chairs of military law, creating a curious mix between the two different cultures. At the same time, lawyers were deemed the most clear representatives of the political ruling class; through the opinions on law from soldiers, we can therefore understand how they imagined their role before the civilians. The second chapter will deal with military social security. Gradually, the systems of the Navy and the Army were made more similar to each other, demonstrating that a clearer idea of “soldier”, at least at the level of statutory law, was emerging. At the same time, discussing social security clarifies the role of the military family and highlights the potentially preferential treatment that soldiers might get for their sacrifices. Finally, the third chapter will deal with military penal law. After much expectative, Brazil finally got a modern military code; however, it still retained important differences from the common regime and stresses the specific characteristics of soldiers.

After 1889, not only the political regime changed. A new actor went to the forefront of Brazilian politics: from the next century, Brazilians would always have to cope with an increasingly interventionist Army willing to impose its solutions for the economic and social problems of the nation. From the privileged observatory of law, we will be able to follow the first steps of this crucial history.

Chapter 6

Unity in diversity: teaching and writing military law

The salty smell of the sea slowly gained the room and stubbornly filled the air between the many officers, all in uniform. That mild night of April blessed Rio de Janeiro with an unusually comfortable temperature – one that would ease the wait for the professor in that packed room full of people in heavy clothing. As captains, professors and admirals waited in the second floor, José Antônio de Magalhães Castro arrived at Rua Dom Manuel, number 15. He walked into the building with a confidence that few can have but a professor who has being teaching at the same place for decades. The school had changed, but the building remained the same. He remained the same. Even though he was now an honorary Captain of Sea and War, he insisted to use his regular black suit. As he walked up the stairs, he knew that he would face a tough crowd – especially in those challenging times. But he has no beginner. In the way from his home to work, he glimpsed into the Fiscal Island in the Bay of Guanabara: the last sign of the Brazil from where he came. Where the empire had ended. The last day when everything was in order.

It did not matter. He walked into the room in the second floor and saluted his students and fellow professors. The lesson was about to begin.

Law and War. What a demanding theme that would be for any inaugural lesson! And these were no ordinary times. Behind the stillness of the dark night, those who pay attention might feel the dread sensation of death and thunder hidden behind the clouds. It was 1915 and war was ravaging Europe. Thousands of kilometers away, a whole worldview had been shattered. What was law worth for, if the forebearers of civilization could not bother to respect gentlemanly agreed principles? How to discuss treaties and conferences, arbitration and protectorates, civilization and process when the cultured Germans and the intellectual Frenchmen clashed in the fields of western Europe, when neutral Belgium had been razed against all sense and moral, when the lights of hope seemed to go off and an entire world seemed to crumble in just a few months? “What am I doing here? Can I say anything useful?” The firm voice of Magalhães Castro echoed among the attentive officers in that autumn night.

Yet, faith in law had not succumbed – at least for Magalhães Castro. Arguments and adjectives piled up as he made the case that not everything was lost. The “martyrdom” of Belgium was not in vain, neither was this the first or the final setback of civilization. Since the ancient Greeks, Magalhães Castro claimed, the laws of war had been advanced, and no defeat

had tainted those eternal principles. In fact, we must go back to past wisdom to retrieve truths that had been lost; science, the same science that had entailed such progress, the same science that marveled peoples throughout the seven seas, that same science had dwelled too deep into a materialistic approach that could not explain and grasp human reality. War cannot be grasped by science. Science deals only with facts, and war is more than a fact: war is about relations – and relations, ultimately, are about law. The very same, the very real and ideal world that many positivistic warriors were willing to trash without an afterthought. Yet, only by bringing together the facts of force and the ideas of the mind could lawyers and soldiers unite to check war and provide the ground for progress to florish.

As Magalhães Castro finished his lesson, the applauses filled the room. Soon, he was surrounded by a group of curious 30-something officers. At the back of the room, with half smiles, some chatted about the words just uttered by the gray-haired professor. What an amazing speech! How grandiloquent was the point that he made! Yet, how outdated those ideas were. The clashes in Europe were the slow, shattering chronicle of the demise of law. The new century could not rely on the power of words, those officers dressed in white carefully whispered. Yet, it might be interesting to follow the eight-lessons program this professor was offering. It would be at least curious. The swan song of yearned hopes! And, after all, commerce, navigation and protocol still subsisted and could be taught by international law. And, one day, the war would be over and they would have to learn how to sail in calmer seas. Peace would arrive. Or would it?[271]

This chapters tells of the clash between those officers and that professor. Or between those two ways of seeing the world: a technical, scientific perspective, and a rule-abiding understanding of both international and internal law. Two different social groups, two different educations, two different world views. Yet, fortunately, this chapter is also about the bridges filling the abyss. We will also watch convergences and encounters, discuss how different sciences, different knowledges and different perceptions come to live side by side and frequently intermingle into an enriching mix that provided for both curious and stimulating new knowledge. And conflict. And the birth of the new.

This chapter tells of how military law came to be written and taught in Firs Republic Brazil, of the age when soldiers held the power and the youth of the barracks frequently came to the streets to destabilize governments. What were they taught about duty and discipline? Of

[271] This piece was based on the text of the 1915 conference of Magalhães Castro (1924, pp. 25-38) and on the 1915 regulation of the Naval School. https://www2.camara.leg.br/legin/fed/decret/1910-1919/decreto-11517-10-marco-1915-574641-republicacao-97750-pe.html. And, obviously, in a grain of salt of educated guesses and controlled imagination.

war and wages? Of politics and possibility? How did they see law and its venomous arts? We will start assessing military education in Brazil and how law could fit into its project. As positivism and scientism gained the front scene of Military Schools, legal studies had to readapt and to rethink their meaning. The consequences were far-fetched, from utter change to mighty implosion. Later, we will survey the professors that taught law to future officers, their origins and ideas, their ambitions and deeds, their clashes and alliances that made military schools a fertile ground for discussion. Then, we will lay eyes on the classrooms of early 20th century military schools through the books those professors wrote, to understand what was taught to the *créme de la créme* of the military youth and how. Finally, by dwelling into military reviews, we will be able to understand how officers get in touch with – or ignored - law after they graduated and how that knowledge was conceived at a more theoretical level. From curricula to journal articles, I will arrange several fragments of information into a (hopefully) coherent picture that might give some sense to the curious relationship between the world of Magalhães Castro and that of his students, a world that thrived both in courtrooms and battleships.

Military penal law was also taught in regular Brazilian Law schools; however, I choose to exclude this field for two reasons. First, most books of military penal law were made by lawyers for future lawyers, while my objective in this thesis is to grasp the relations between soldiers and civilians, to spot when different worlds intermingled. Second, military problems occupied only a small part of the teachings in regular law schools. If we take the Law School of Minas Gerais in the late 1920s as an example, penal law was taught in two chairs; the first one does not mention the barracks, while the second one only discusses the military code in half of the program[272]. Therefore, this specific teaching seems to belong to a slightly different dynamic from the one I want to discuss here.

Now, shall we lay guns on the ground and leave the barracks; with books under our arms, it is time to transpose the walls of the Military School of *Praia Vermelha* and the Naval School at *Rua Dom Manuel*.

6.1 – A metaphysic intruder in a positivistic body? The chairs of military law

A troubled history governed teaching in the system of military education in Brazil throughout the First Republic. As students took part in many of the movements that destabilized

[272] DRUMMOND, José de Magalhães. Faculdade de Direito de Minas Gerais. *Programa de direito penal* (2ª cadeira do 4º ano). Belo Horizonte: Imprensa Oficial, 1925. BRANT, Francisco. Faculdade de Direito de Minas Gerais. *Programa de ensino da 2ª cadeira do 3º ano*: direito penal. Belo Horizonte: imprensa Oficial de Minas, 1925.

the recently created government, the schools where they were educated turned to be a source of worry for the military and civil leaders and a target for change. The Army and the Navy followed different, though frequently converging paths; we will map both out. Surprisingly enough, law was constantly taught in those years, though not always in the same fashion. In the 12 decrees, 9 regulations and two armed forces that, in more than 40 years passed knowledge of law to future officers, we can find a reflex of the wide instability that affected Brazil and signed the tricky relationship between soldiers and the civil powers in the newly-erected South American republic.

We shall begin with the Army.

The first regulation governing the education system of the largest armed force was enacted in 12 April 1890. The ideological craft of this document was presided by scientific, Comtistic positivism, which was widespread in the military circles that had proclaimed the Brazilian Republic; the very preamble of decree 330 shows it clearly. The education of future officers should conciliate the "extensive improvements in the art of war" with the "highly civilizational mission, eminently moral and humanitarian that is destined in the future for the armies in the South American continent". The soldier should not be anymore an "element of force", but the "armed citizen", highly knowledgeable and ready to interfere in the destinies of the country. For a professional with such a wide mission, an equally broad curriculum was due: he should be educated not only on military skills, but also on the social duties awaiting him – and mainly on the latter. To achieve such a purpose, the positivistic conception of science was in order: that is, the future officers should be submitted to an "integral education" establishing the relations between different sciences.

The regulation established two education systems that would remain more or less separated in the future. The first was the educational system of minors that should prepare them for the properly military education; its main component were the Military High Schools, though other institutions appeared and disappeared in the next decades. The second system is the most stimulating for our interests here: it concerns the strictly military education, and comprised: the regimental schools, responsible to educate and alphabetize the uncultivated mass of enlisted personnel; the practical schools, that trained soldiers in physical skills; the military schools, that trained young civilians into military officers in the undergraduate programs of infantry and cavalry; and the Superior School of War (*Escola Superior de Guerra*), which taught the more advanced undergraduate programs of artillery, general staff and engineering. Those two last schools are the ones that interest us the most.

There should be three military schools in Rio de Janeiro, Porto Alegre and Fortaleza; this last one would only offer the preparatory program, meaning that *cearenses* could not become officers only studying in their state; this school shut down a few years later, regardless, and will not interest us here. The other two schools would provide a 4-year general course and a one-year course of the three arms (cavalry, infantry). The positivist influence is quite straightforward and the curriculum is highly theoretical; of the eight chairs of the general course, three concern pure mathematics (geometry, differential and integral calculus, mechanics) and the other five are sciences from all areas, arranged precisely in the list and order advocated by August Comte: astronomy, physics, chemistry, biology and moral sociology. The shy one-year course of the three arms had only three chairs: one on forts and artillery, other in tactics and strategy, and the final one on law. That is, only two out of eleven disciplines were directly meant for practical application. Truly, the chairs were not the only component of the curriculum: there were sixteen classes (*aulas*) with more mundane issues, ranging from drawing to hippology and military hygiene, including repetitions of chairs from previous semesters. But this very division implies a hierarchy that favored intellectual aspirations over military needs.

At the Superior School of War, two-year courses turned officers with basic knowledge into professionals of the more specialized arms: artillery, general staff and military engineering. These additional two years were clearly more specialized and took more seriously the specific skills needed to work in those branches of the Army; however, the positivist influx remained. For instance, all three courses had a chair on "botanic and zoology". Engineers and the general staff also studied political economy. And, falling more strictly within the realm of our interests, the general staff students had to take a chair on "administrative law in general and specially the part concerning military administration" on their second year.

The education aimed to carve an intellectual out of the brute material of military students. Those who were fully approved (that is, grade 6/10 at least) in the general course would receive the title of bachelor of sciences (art. 35). The military offices, then, would be granted the same status, that of *bacharel*, as doctors, lawyers and engineers. This is important. Since Brazil did not have a university, there were no faculties of science and letters, but only professional schools. Soldiers were therefore for now on the only ones holding titles *in science*. This fits well the tradition of *bacharelismo*, that is, a habit of Brazilian society to overvalue titles and certificates[273]; officers aspired to get the same treatment as those graduating with the

[273] We have already discussed this model, which entered in a period of crisis in the last decades of the first republic. Cf. Ricardo Sontag (2020).

imperial professions[274], the university graduates holding cultural power and prestige. Now in power, they were able to match their titles with their self-perception.

In 1898, this model changed. In 1894, Floriano Peixoto, the last president of the *republic of the sword*, the military-dominated politics, left office, and with him, the military class left the first magistrature of the republic. And, in November 1897, the highly humiliating War of Canudos ended. Less than six months after the fight ended, a new regulation of the schools of the Army was enacted to tackle the glaring need of reform.

The decree 2881 of 18 April 1898 suppressed the schools of Porto Alegre and Ceará and unified the Military School of Rio de Janeiro and the Superior School of War to create a single Military School of Brazil (*Escola Militar do Brazil*) at the capital city. The new curriculum was much more technical and aimed to train officers for war, not politics. The chairs of biology, botanic, sociology and astronomy, for instance, were extinguished. The duration of courses was also shortened: there would be a three-year general course followed by a two-year special course. Traditional disciplines got a more practical tone: chemistry was coupled with metallurgy, for instance. New, highly mundane disciplines were introduced: the first chair of the 3rd year covered several topics on artillery and the 2nd dealt with forts and mines. Those eager to become bachelors would no longer receive this title at the Military School of Brazil: officers were meant to practice the art of war, not to become scientists.

But this was not enough to quell the inflammatory penchant of the military youth. In 1904, another central episode of Brazilian political life was entangled with the disturbances within the Army: the Vaccine Revolt. mayor Pereira Passos had been for over a year been subject the capital city of Rio de Janeiro to a wide renewal project of urban structure: avenues were being opened, buildings were being tore apart and a renovated metropolis in line with European aspirations of hygiene was being built. However, the exclusionary nature of this remodeling was building discontentment within the popular classes. Any simple fire could light the fuse. And the government provided a sparkling ignition. Planes were published in the press of a campaign to forcefully vaccinate the inhabitants of Rio de Janeiro; people would only be authorized to enroll in schools, get married or travel if they were inoculated. The visionary Brazilian doctors and *sanitaristas* aimed to quash the yellow fever and the bubonic plague; the confrontational approach, however, stimulated people to riot. The capital was barricaded and

[274] That is, the three main professions from the imperial period: engineering, law and medicine. Cf. Edmundo Campos Coelho (1999).

testified a number of manifestations for almost a week; a state of siege was declared by the government; the vaccine campaign was suspended and hundreds of rioters were imprisoned[275].

In this very week, in the 15th anniversary of the republic, positivist soldiers took advantage of the kerfuffle and attempted a coup to restore military rule in Brazil; hundreds of students of the Military School of Brazil took part of the botched upheaval. In the night of 14 November, general Olympio da Silveira rallied the military youth to rebel: they destroyed the public lighting and marched to the presidential palace to demand the dismissal of the minister of justice. The uproar was controlled by the police and two days later the Military School was closed. According to the report of the Ministry of the War of 1905 (MINISTÉRIO DA GUERRA, 1905, anexo F), 275 students were expelled and ten were spared from this destiny for being in hospital. Only 110 future officers did not take part in the troubles. After such a disastrous incident, military education must be deeply reconsidered.

The Minister of War, marshal Francisco de Paula Argello, wrote a report in December on the causes and solutions of such a disastrous event. For him, the "delicate conditions" of the military resulted from its dive into the "party infighting" (MINISTÉRIO DA GUERRA, 1905, p. 3) and from shortcomings of military education. Slavery had insidiously instilled in the spirit of the nation a pernicious association between submission and obedience to the condition of slave, meaning that liberty was "extravagantly conceived" in a way that excluded the "most difficult art of obeying" (MINISTÉRIO DA GUERRA, 1905, p. 5). Brazilians thought that all orders from superiors must be in line with the law, but since each statute could be interpreted in different ways, every officer followed his own view, often diverging from his superiors (MINISTÉRIO DA GUERRA, 1905, p. 4). Military education had done nothing about this troublesome habit. The military schools did not instill the "spirit of the true soldier", but promoted a "theoretical and non-submissive spirit" (MINISTÉRIO DA GUERRA, 1905, p. 4) that was often explored by unscrupulous politicians posing as saviors of the offended and oppressed class of the arms (MINISTÉRIO DA GUERRA, 1905, p. 5-7).

And precisely the students of the Military School were those that ceded the most before the seductive and dangerous rhetoric of people with political ambitions (MINISTÉRIO DA GUERRA, 1905, p. 9). Troops and officers had united in "unqualifiable promiscuity" (MINISTÉRIO DA GUERRA, 1905, p. 10): the military youth was imperiling the very foundations of military discipline and order. To counter such hazardous tendencies, a reform of

[275] On the revolt, cf. Jaime Benchimol (2003) and José Murilo de Carvalho (1999).

military education was in order, and the report of the minister of war was accompanied by an annex with a project of new regulation for the educational institutions of the Army.

Drastic changes came in 2 October 1905, when a new decree regulated military education in Brazil. The Military School was completely suppressed. Now, military instruction started far away from the political turmoil of the capital city of Rio de Janeiro: in the hinterlands of Rio Grande do Sul, the city of Rio Pardo hosted the Application School of Cavalry and Infantry, the first step in the career of future officers. After a 10-month course with a completely practical curriculum made of disciplines as hippology, fencing, shooting, telegraphy etc., students could enroll in the new School of War, in Porto Alegre, Rio Grande do Sul. The curriculum spanned only two years and included once again only practice-oriented courses, such as the "the practical study of the arms in use by the Army", "topography with military applications" etc. Importantly, the positions were no longer called "chairs" (*cadeiras*), but "classes" (*aulas*), hinting at the non-academic nature of the new institution. It was at this School that reformers placed a class on "notions of international law applied to the war (…) military legislation and administration". Those who graduated could follow a two-year course of the superior arms at the School of Artillery and Engineering, located at the distant neighborhood of Realengo, in Rio de Janeiro.

Scattered across three different cities and deprived of its traditionally theoretical character, the very nature of military studies changed. The military youth could no longer organize and destabilize the government from the distant backlands where they now studied and trained. In the report of 1906, the minister marshal Francisco de Paula Argollo solemnly declared: "the student only has to be prepared in what is necessary to the exercise of the functions that he should exercise" (MINISTÉRIO DA GUERRA, 1906, p. 4). The state would only offer in its schools the knowledge needed to became an Army officer; those craving a more illustrated spirit must pursue their interests on their own. A dreadful prospect for law – not the most esteemed discipline in the hard-science-oriented barracks.

This draconian crackdown on knowledge could not thrive in the new century, when the technologies of war demanded deep and attentive studies. In 30 April 1913, the decree 10.198 widely restructured the superior schools of the Army once again. Now, the education of future officers would be ministered at the new Military School, the Practical School of the Army and the School of General Staff. Though the structure was more inclined towards the theoretical tradition than the 1905 reform, we must not fool ourselves: this change meant no reprisal of the intellectualist tradition that governed the military studies between the end of the empire and the first years of the republic. Article 4 of the decree sets the tone with paramount clarity: "there

shall be no purely theoretical teaching: all of it must be either theoretical-practical or only practical; the expression theoretical-practical means that the theory must be reduced to the indispensable, be chosen for a useful goal, and whenever possible, be followed by practical examples".

Studies started with a two-year general course at the Military School; at the first year, they followed a class of "essential knowledges of constitutional, administrative and international law; Brazilian military legislation". Not only the expression "class" was consolidated over the university-like term "chair", but some of the teachings had their titles preceded by the expression "essential knowledges of", implying that the teacher should not dwell much deeper into the meanders of that discipline. Law was assumed to be worthy of first-year students, but only in its most essential form.

After the general course, future officers must choose their arm and proceed further in classrooms: one year for infantry or cavalry and two for artillery or engineering. Article 6 once again highlighted what the government expected from the studies: "the teaching must be organized in such a way to avoid the excess of theory, the useless speculations and premature generalizations", and teachers must always organize their course "according to the natural procedure of the human spirit, that is, from the concrete to the abstract". For instance, mathematics should be taught "avoiding anything without practical application or worth". If in general the decree excessively describes and regulates most disciplines and warns of the dangers of abstract adventures, when it comes to law, wording is concise and the text only describes which parts of the legal science must be taught. Apparently, excessive theory was not a plague threatening law at that point. Probably, even teachers did not pay that much attention to law. And the class must cover many disciplines (international, constitutional, administrative and military law), meaning that there was not much time left for "dangerous speculations". Military administrators did not even bother to reproach the law teaching at the Military School, demonstrating that it was only of secondary importance. Almost an afterthought.

After graduating, officers spent one year at the Practical School of the Army, studying very concrete aspects of their future professional lives, such as the arms they should use, maneuvers and formations of the infantry and cavalry, topography, shooting etc. Finally, the School of General Staff provided a two-year course for lieutenants and captains of the traditional arms, allowing them to enter the general staff, that is, the central administration of the Army. Teachings were concentrated on skills useful to command: military geography, tactics, strategy, military communications, military administration etc., mostly concentrated on South American Armies – that is, of the potential enemies of a possible Brazilian war. The

second year featured a chair on international law, especially the law of war and political economy. After this 1913 reform, therefore, law was present in the first and the last years of military studies.

This situation was left almost unchanged by the reform of 1924[276], which only affected the Military School. But the courses of the arms were all reduced to one single year, reinforcing the emphasis on practical training.

The trajectory of the chairs (or classes) of military law in the First Republic can be summarized in the following table:

Decree	**Chairs**	**Year**	**Section**	**School**
Decree 330, 12 April 1890	Sociologia e moral (Sociology and morals)	4th year, 2nd chair	3rd	Military School (RJ and RS)
	Direito publico, direito internacional, diplomacia, direito militar. Constituição brazileira. Noções de direito administrativo e de economia politica (Public law, international law, diplomacy, military law. Brazilian constitution. Notions of administrative law and political economy)	1st period, 2nd chair	3rd	Military School (RJ and RS)
	Direito administrativo em geral e especialmente a parte relativa á administração militar. Legislação militar (Administrative law in general and especially the part relating to military administration. Military legislation)	2nd year, 1st semester, 2nd chair, course of general staff	-	Superior School of War
Decree 2.881, 18 April 1898	Direito internacional, com applicação ás relações de guerra, precedendo noções de direito publico; Constituição da Republica; Direito militar; Justiça militar (International law, with application to war relations, preceding notions of public law; Constitution of the Republic; Military law; Military justice)	3rd year, 3rd chair, general course	4ª[277]	Military School of Brazil
	Administração militar, precedida de noções de economia politica e direito administrativo (Military administration, preceded by notions of political economy and administrative law)	3rd chair, 2nd year, special course	4ª	Military School of Brazil

[276] https://www2.camara.leg.br/legin/fed/decret/1920-1929/decreto-16394-27-fevereiro-1924-525538-publicacaooriginal-1-pe.html

[277] The 4th section comprised, beyond these two chairs, the 2nd chair of the first year of the special course: "preparation of the Army for war in what concerns the mission of the general staff (*Preparação do Exercito para a guerra, no que concerne á missão do estado-maior*)

Decree 5.698, 2 October 1905	Noções de direito internacional applicado á guerra, precedido dos conhecimentos indispensaveis ao seu estudo. Legislação e administração militares, precedidas do estudo da Constituição brasileira (Notions of international law applied to war, preceded by the knowledge indispensable to its study. Military legislation and administration, preceded by the study of the Brazilian Constitution)	2nd class, 2nd year	-	School of War
	Direito militar. Direito internacional applicado ás relações de guerra. Noções de economia politica (Military law. International law applied to war relations. Notions of political economy)	3rd class, 2nd semester	-	School of General Staff
Decree 10.198, 30 April 1913	Direito internacional, especialmente a parte aplicada à guerra; conhecimentos especiais de economia política (International law, especially the part applied to war; special knowledge of political economy)	3rd class, 2nd year	-	School of General Staff
	Conhecimentos essenciais de direito constitucional, administrativo e internacional; legislação militar brasileira (Essential knowledge of constitutional, administrative and international law; Brazilian military legislation)	2nd class, 1st year, fundamental course	2ª[278]	Military School
Decree 16.394, 27 February 1924	Noções de direito. Legislação militar, Administração militar[279] (Notions of law. Military law, military administration)	4th class, 2nd year, fundamental course. 6th chair	5ª	Military School

Table 4 Chairs of Military law taught in schools of the Army in Brazil in the First Republic (1889-1930)

The Navy also faced its troubles. However, the maritime forces were much less politically active than the Army, for both its reduced size and the attachment of some officers to the monarchy, which excluded them from political machinations. They were therefore less shaken by the several political upheavals that convulsed Brazil in those difficult years.

[278] Together with the disciplines of organization of the different Arms and tactics.

[279] Syllabus (art. 6º): "noções sobre a vida social e as suas normas, noções e fundamentos do direito e sua divisão. Noção do Estado; organização constitucional do Brasil. Noção sobre os tres poderes constitucionaes, sobre o estatuto politco do nacional e do estrangeiro, sobre as garantias constitucionaes e restrições á liberdade do individuo, do commercio e da propriedade de particular, quer pelo direito publico, quer privado; tratados e convencões assignados pelo Brasil e em vigor, concernentes á guerra terrestre e maritima. Explicará as leis e regulamentos de recrutamento da tropa e dos quadros, de organização do alto comando, os de promoção, reforma e montepio, e o Codigo de Justiça Militar; os direitos dos officiaes e praças relativamente á percepção de vencimentos, etapas e outras vantagens".

Precisely in 1891, decree 1256 of 10 January 1891, from the provisory government – meaning it was not yet governed by the constitution – established the first reform of maritime teaching in Brazil. The studies of future naval officers would take three or four years, depending on their previous education. They were heavily concentrated in mathematics, breaking away from the positivistic model that swept the Army curriculum. Nevertheless, the Naval School offered a deeply practical opportunity: students must take at least three months "instruction trips" (*viagens de instrução*) onboard of military ships to get the salty taste of the life among the waves. Law would be taught in the fourth year, and the curriculum comprised "notions of public law, international maritime law and diplomacy of the sea". This choice set the tone for the future syllabi of legal teaching in the Navy: that is, domestic law played a minor role, as officers were mostly stimulated to learn international law. As ships inhabit the wide and limitless oceans, the future seamen had to frequently travel abroad to visit foreign coasts and take part in exercises with friendly nations, such as Argentina and some European partners; law taught them how to behave in those particular circumstances that strike those that carry guns outside of their own waters.

Nevertheless, teaching was not deemed practical enough. Already in the following year, the minister of the Navy, rear admiral José Custódio de Mello, complained that "our students leave the Naval School overwhelmed by theory, but almost empty of practice, for there, the teaching of properly military sciences is much incomplete" (MINISTÉRIO DA MARINHA, 1892, p. 8). He decried the tepid period spent at the sea: German and English officers, for instance, spent more time onboard than landed. Life at the ocean, hard and hazardous, did not hypnotized the Brazilian youth; most youngsters entering the Naval School were attracted by the social position provided by the force and by its generous pensions. For admiral Mello, the truly patriotic sentiments must be fomented, countering the ominous tendencies that plagued the Navy in the first years of the Republic.

He did not have to wait more than two years for his fears to materialize. In 1893, the Revolt of the Navy (*Revolta da Armada*), which we will discuss later, was unleashed: the highest ranks of the force threatened to bombard the capital city Rio de Janeiro, fighting the despotic government of the Army marshals. As a result, the Naval School was closed between 13 December 1893 and 27 December 1894. However, the reforms were slow to came, and retained the framework of 1891, simply changing the executive decree regulating the school. In 1898, the curriculum was unified in a 5-year course, with law being taught at the fourth year. The next change came in 1914; until then, there were two completely different educations for the combatant officers – those meant to command ships and fight at sea – and machinery

officers – those dedicated to the mechanical minutiae of the war vessels. As a result, the curriculum got much more technical, the instruction trips grew more frequent, and law was erased from the course of studies. The voice of the sea claimed other arts.

Yet, this setback did not represent the end of the line for our scholarly discipline. In the same day, the government created the Naval School of War (*Escola Naval de Guerra*), an institution aimed at middle and superior officers - from *capitães tenentes* (lieutenant captain) to *capitães de mar e Guerra* (captain) - with a distinguished history of service who wanted to be prepared for higher command. The school, was meant to produce the highest brains that would rule the Brazilian Navy. The seven-month studies course comprised mostly theoretical teachings that clearly were not aimed to control machines, but to instruct higher officers in geopolitics, economics and diplomacy; those graduating the school should not guide ships, but rule the Navy. They must study administration of the Navy, oceanography, maritime geography and history, naval policy etc. Out of nine disciplines, two concerned law: "international maritime law" and "military criminal law"; the latter must be taught by a doctor or bachelor in law. Legal studies were deemed less important for the now technicized officers of the Navy, but for those aiming to transpose the decks of the vessels and enter planning rooms, the law books were an indispensable aid.

Yet, the incessant reforms continued.

As it had happened earlier with the Army, officials in the Navy realized that the curricula had gone too far in the technical path: officers needed more than scientific instruction and technical knowledge to manage the troves of people that inhabited a ship. In 1918, the Naval School once again was reformed. Future officers should now go through a five-year course; each of the first four years would comprise eight months in the school and two aboard, while the last year should be spent in its entirety aboard a vessel. The Navy was less scathed by theory, and the first article of the regulation declared that the Naval School would provide both "theoretical and practical education"; the curriculum even retained the more solemn name "chairs" for the teachings – not by chance, the Navy was considered more aristocratic than the Army. And, in this very same year of 1918, law reentered the Naval School curriculum – though it walked into the classroom though a backdoor: in the fourth and last year, students should take a class (*aula*), and not a chair, of "notions of constitutional law, followed by the study of the Federal Constitution", that would be ministered by an instructor (*instrutor*), and not by a professor. Better than nothing; still, this was not the most privileged of positions. Finally, three years later, the curriculum of the Naval School of War was modified too and the two legal courses were retained in a now expanded curriculum with 15 disciplines. Now, both of them

were required to be taught by bachelor or doctors in law. The next reform of the Navy curriculum would only come in the 1930s. The only other reform worth mentioning in the meanwhile came with the decree 16.141, of 6 September 1923, article 6, which determined that the professors of the Naval School of War must be officers of the Navy.

For the First Republic, the teaching of military law at the Navy was structured as such:

Decree	Chairs	Year	Section	Escola
Decree 1.256, 10 January1891	Noções de direito publico, direito internacional maritimo e diplomacia do mar (Notions of public international law, international maritime law and diplomacy of the sea)	3rd chair, 4th year	-	Naval School
Decree 2.799, 19 January 1898	Direito publico e internacional, especialmente marítimo (International and public law, specially maritime)	4th chair, 4th year	4ª	Naval School
Decree 10.788, 25 February 1914	No legal chairs	-	-	Naval School
Decree 10.787, 25 February 1914	Direito marítimo internacional – diplomacia do mar (International maritime law – diplomacy of the sea)	7th discipline	-	Naval School of War
	Direito penal militar e maritimo. Pratica sobre o regulamento processual e formulario do processo (Military and maritime criminal law. Practice of the procedural regulation and formules of procedure)	8th discipline	-	Naval School of War
Decree 12.965, 17 April 1918	Noções de direito constitucional, seguido do estudo da Constituição Federal (responsabilidade de mero instrutor) (Notions of constitutional law, followed by the study of the federal constitution)	4th class, 4th year	--	Naval School
Decree 15.234, 31 December 1921[280]	Direito internacional marítimo (International maritime law)	E	-	Naval School of War
	Direito penal militar (Penal military law)	h	-	Naval School of War

Table 5 Chairs of Military law taught in schools of the Navy in Brazil in the First Republic (1889-1930)

Though following different paths, the trajectories of law teaching at the Navy and the Army were submitted to similar movements. In the early 1890s, the constant upheavals facing the country politics and its relations with the military impacted and destabilized teaching.

[280] From the decree 16.141 of 6 September 1923 onwards, the new professor must be officers of the Navy.

Originally, both schools fell to a theoretical penchant, which stimulated officers to engage more with politics and less with military administration. This tense situation precipitated riots in both forces; however, the Revolt of the Navy was led by higher officers, while the 1904 disturbances caused by the Army were essentially carried out by military students. Both schools were closed for almost a year in 1893 and 1904, respectively, but only the Military School would remain closed for almost a decade. In the 1910s, both the Navy and the Army had realized they had gone too far into the realm of a practice-oriented education and promoted changes; both created new superior schools to train their superior officers for higher command. However, both of them still preferred practice over theory, all too aware of the dangers they had experienced in the 1890s.

Law played a minor role in both schools. In the Army, the chair/classes were meant to offer a general introduction to several fields of public law, which left teachers with little time to spare and obliged to provide only a shallow incursion into the realm of legal studies. Important: if the constitution and administration were studied by "law" (*direito*), the military was only worthy of a "legislation", that is, an amass of statutes or regulations. One word cannot tell everything, but this choice surely echoes the worries of marshal Mello, who in 1892 feared how inferior officers relied in their own, individualistic interpretation of "the law" to devalue legitimate orders from their superiors. Law invites interpretation, whilst legislation only commands obedience; the latter suited best the purposes of the Army. The Navy, differently, had a more targeted and practical orientation towards law, aiming at international regulation and not the internal legal order.

Though discreet, those teachings had an impact on the future officers and gives clues on the attitudes of the higher command and on the relations between civil and military powers. But cold chairs draw their life from the people who occupy them. Who taught military law in early 20th century Brazil?

6.2 – Lawyers and officers? Prosopography of the professors of military law

Chairs are meant to seat people.

The social profile of professors can be an interesting way to understand why they thought and wrote the way they did; and, for military law, this problem is even more pressing. Its teachers could be either lawyers or officers, changing drastically the kind of knowledge they produced, held and transmitted. Did professors belong to one or to the other? Or both? Were they mediators? We obviously cannot access the classrooms of early 20th century Brazil where

the law of the armed forces was taught; due to this reason, our knowledge of this specific pedagogical practice will be allways imperfect. However, we can expand the knowledge we normally extract of the writings of those agents with a sociology of their profession and a comparative biography of their lives. In the next pages, I will discuss the professional trajectories and some private life data on the 16 people that taught military law and its variants in the superior schools of the Army and the Navy in first republic Brazil. Prosopography is how history scholarship calls the analysis of biographical data of collective groups[281]; such approach will help us connect the texts we will be reading with the people who were writing them, or at least using them to teach soldiers. These professors were the face of law for future officers; we must know them to understand how law looked like for the future leaders of the armed forces.

It is not easy to reconstruct the trajectory of these men. Most were rather unremarkable and their lives did not stimulate the writing of any biographies. The many memorialistic initiatives of the military schools, or the army in general, focus on combatant officers, leaving professors aside. To gather information for this section, I used the *Hemeroteca Digital*, the Brazilian database of more than 3 thousand newspapers from the 19th and 20th century. I inserted the names of professors on the search engine and read the positive results. I search for information on the family, studies, public and private positions, career and death of professors.

The professors of military law were:

Table 6 Professors of military law at the Brazilian armed forces, where and when they taught

<table>
<tr><th></th><th colspan="3">ARMY</th><th colspan="3">NAVY</th></tr>
<tr><th></th><th colspan="2">Escola Militar - RJ</th><th>Escola Superior de Guerra</th><th>Escola Militar - RS</th><th colspan="2">Escola Naval[282]</th></tr>
<tr><td>1891</td><td rowspan="7">Licínio Athanazio Cardoso</td><td rowspan="3">Vicente Antônio do Espírito Santo</td><td>-</td><td rowspan="7">Francisco Alberto Guillon</td><td rowspan="7">José Antônio Pedreira de Magalhães Castro</td><td rowspan="7">Tarquínio Bráulio de Souza Amarante [Filho]</td></tr>
<tr><td>1892</td><td></td></tr>
<tr><td>1893</td><td rowspan="2">Jayme Benévolo</td></tr>
<tr><td>1894</td><td rowspan="2">Lauro Severiano Müller</td></tr>
<tr><td>1895</td></tr>
<tr><td>1896</td><td rowspan="3">Vicente Antônio do Espírito Santo</td><td rowspan="3">Jayme Benévolo</td></tr>
<tr><td>1897</td></tr>
<tr><td>1898</td></tr>
<tr><td>1899</td><td colspan="2">Escola Militar do Brasil - RJ</td><td>Extinct</td><td>Extinct</td><td colspan="2"></td></tr>
</table>

[281] For a good review of prosopography studies in legal history, particularly Early Modern jurists, cf. Antônio Manuel Hespanha (2019).

[282] Closed by decree of 13 December 1893 and reopened by the decree 1926 of 27 December 1894.

	3ª cad., 2º ano, curso especial	*3ª cad., 3º ano, curso geral*						
	Jayme Benévolo	Vicente Antônio do Espírito Santo						
1900								
1901								
1902								
1903								
1904								
1905	**Extinct**							
	Escola de Guerra	**Escola de Estado-Maior**						
	?	?						
1906								
1907								
1908								
1909						Olavo Luiz Vianna[283] (substitute)		
1910	Francisco Sérgio de Oliveira	José Joaquim Firmino						
1911								
1912	Azor Brasileiro de Almeida							
1913								
	Escola Militar				Chair extinguished, but the school persists		**Escola Naval de Guerra**	
							Direito marítimo internacional	*Direito penal militar e marítimo*
1914	Azor Brasileiro de Almeida						José Antônio Pedreira de Magalhães Castro[284]	Francisco Vicente Bulcão Vianna
1915								
1916								
1917		?						
1918					Olavo Luiz Vianna (substituto)			
1919								
1920								Galdino Pimentel Duarte
1921								
1922								
1923								
1924								
1925							?	Arnaldo Pinheiro Bittencourt[285]
1926								?
1927	Carlos Auleiro de Almeida							?

[283] After Amarantho died and Vianna was appointed, the chair was demoted to class (*Relatório do Ministério da Marinha*, 1909, p. 76, http://memoria.bn.br/DocReader/873888/9757).
[284] In 1929, he appears as "*lente sem função*", that is, unassigned lecturer.
[285] *O País*, 9 de março de 1923, http://memoria.bn.br/DocReader/178691_05/12504

1928	Azor Brasileiro de Almeida							Galdino Pimentel Duarte
1929					*Direito Constitucional e penal militar*	*Direito marítimo, comercial e internacional*	-	-
					Cândido Albernaz Alves	Olavo Luiz Vianna		
1930	?					?		

A few themes are central to characterize this heterogenous group of people. The most important certainly is their professional affiliation: soldiers or lawyers? The answer is much more complicated than the direct linkages we saw in the empire. If earlier a clear border divided professionals of law (mostly in Rio de Janeiro) from career soldiers (mostly in Porto Alegre), the lines begin to blur after the downfall of the empire and, especially, after the Rio Grande do Sul Military School was extinguished. José Antônio de Magalhães Castro, the professor with the most long-spanning career, was purely a jurist, just Like Tarquínio Bráulio de Souza Amarante/Amarantho; however, as we shall see in due time, he belonged to a tradition deeply rooted in the empire, and, as such, his formative years had provided him with a worldview increasingly out of tune with the military *milieu* of his time. On the other pole, we can find professors with an exclusively military formation, such as Licínio Athanázio Cardoso, Lauro Severiano Müller, Jayme Benévolo, Francisco Alberto Guillon and Francisco Sérgio de Oliveira. But most of those teachers did not leave a lasting impression on the discipline. Müller and Oliveira, for instance, were acting professors for two academic years before a professor with legal background assumed the chair effectively. And Guillon worked at the Porto Alegre School until it closed; he therefore belonged to the imperial tradition of military teachers in Rio Grande do Sul. Only Benévolo and Cardoso had a more lasting career. Both of them also graduated in engineering. Benévolo, moreover, worked as General Inspector of Lighting of the Capital from 1893[286] to 1905[287] and was for a few years member of the *Intendência* council[288] (the city council of Rio de Janeiro). As such, he must have had a wide experience in the administrative praxis, and therefore could provide to the students a view that, if was not "juridical", could not be simply called military either.

[286] *Almanak Laemmert*, 1893, http://memoria.bn.br/DocReader/313394/5271
[287] *Almanak Laemmert*, 1905, http://memoria.bn.br/docreader/313394/26638
[288] *Almanak Laemmert*, 1892, http://memoria.bn.br/DocReader/313394/3006

Both strains of professors belonged to an earlier generation: they all entered the service in the 1890s or earlier, meaning they had been hired under imperial rules, or right after the upheavals of the early republic. As a more stable environment formed, a new profile emerged and defined the next generation: double education. Almost all professors who started teaching from the 1900s onwards graduated both from military and law schools[289]. Many of them started their careers as military officers and later joined the law school; some, as Galdino Duarte, probably did so out of intellectual curiosity, but remained soldiers at heart; others, such as Azor de Almeida, were probably fonder of books then of rifles and pistols and leaned much clearer towards a legal rather than military culture. Anyhow, they were probably singled out by the Army and Navy to teach those chairs for being acquainted with two fields that did not communicate very often. It was probably easier to find professionals with a double formation after the early 1890s, when two law schools were founded in Rio de Janeiro. The capital city was also home of the largest military garrison in the republic: now, officers could work in the armed forces and study law at the same city. All professors with both titles studied either at the *Faculdade Livre de Direito do Rio de Janeiro* or at the *Faculdade Livre de Sciencias Jurídicas e Sociaes do Rio de Janeiro*[290], except for Espírito Santo Júnior, who studied in Recife, but entered the service earlier and belong to a prior generation. Law was no more seen as a simple body of legislation that could be taught by random people educated in other field that had followed only one or two chairs on the subject. It was more than administrative praxis. However, no group of professors seems to have been fully incorporated into the wider legal community, since had spent their formative years in the banks of the military school, and only went to law schools later in life – perhaps even as a hobby, if I might conjecture.

But their lives were not restricted to the classrooms of military academies. Some of these professors experimented with political and entrepreneurial activities, with varying degrees of success. The only professor with a fully successful political trajectory was Lauro Severiano Müller: he was a federal deputy for 8 years, a senator for 17 years, twice minister of state and governor of the state of Santa Catarina three times. However, being only acting professor for two years, he had probably long forgotten about military law while he was in power. But others made their way into federal parliament: Francisco Alberto Guillon[291], Francisco Vicente Bulcão

[289] This is the case for Vicente Antônio do Espírito Santo Júnior., Azor Brasileiro de Almeida, Olavo Luiz Vianna, Galdino Pimentel Duarte, Cândido de Albernaz Alves and Arnaldo Pinheiro Bittencourt.
[290] In 1920, They fused to form what is now the *Faculdade Nacional de Direito* of the *Universidade Federal do Rio de Janeiro*.
[291] *Annaes da Câmara dos Deputados,* 1900, http://memoria.bn.br/DocReader/060917_02/25

Vianna[292] and Vicente Antônio do Espírito Santo Júnior[293] were all deputies – Espírito Santo also ended up his career in scandal, something that we will discuss later. Others tried: José Antônio Pedreira de Magalhães Castro[294], Francisco Sérgio de Oliveira[295], Azor Brazileiro de Almeida[296], Jayme Benévolo[297] and Arnaldo Pinheiro Bittencourt[298] run for deputy, but lost. Bittencourt was mayor of Nova Friburgo, one of the largest cities of the state of Rio de Janeiro[299]. All added up, 9 out of 16 professors conducted or tried to start a political career. This probably means that they could build a strong social network from their chairs. Dwelling in the capital city of Brazil, working at the Army or the Navy, two crucial institutions of the political order of the first republic, professors teaching military law were seemingly well positioned to aspire for higher political or administrative positions.

Some professors tried their chances in the economic world too. José Antônio Pedreira de Magalhães Castro was a director at 6 different companies[300]. Many of them attempted to earn some money as lawyers and are listed in the legal pages of the *Almanack Laemmert*: Magalhães Castro[301], Espírito Santo Júnior [302], Souza Amarantho[303], Azor de Almeida[304], Bulcão Viana[305] and Galdino Duarte[306]; sometimes, it is even possible to find those officers defending other soldiers before military courts. Other legal professions are represented as well:

[292] *Almanal Laemmert*, 1904, http://memoria.bn.br/DocReader/313394/24697
[293] *Diário de Notícias*, 12 de agosto de 1890, http://memoria.bn.br/DocReader/369365/7691
[294] A Patria : Folha da Provincia do Rio de Janeiro, 2 de outubro de 1881. http://memoria.bn.br/DocReader/830330/12566
[295] *A Federação: Orgam do Partido Republicano*, 9 de maio de 1891, http://memoria.bn.br/DocReader/388653/6236
[296] *A Batalha*, 29 de abril de 1933, http://memoria.bn.br/DocReader/175102/7526
[297] *Jornal do Commercio*, 6 de setembro de 1890, http://memoria.bn.br/DocReader/364568_08/1835
[298] *Jornal do Commercio*, 7 de outubro de 1934, http://memoria.bn.br/DocReader/364568_12/32466
[299] *Jornal do Commercio*, 20 de outubro de 1929, http://memoria.bn.br/DocReader/364568_11/38345
[300] Brasileira de Fosfato e Cal; Zoosterina; Colonizadora e Industrial do Paraná; Banco Regional do Pará e Amazonas; Banco Mútuo. He was president of the Companhia das Docas da Bahia.
[301] *Almanak Laemert*, 1891. http://memoria.bn.br/DocReader/313394/528, 1894, http://memoria.bn.br/DocReader/313394/7589, 1895, http://memoria.bn.br/DocReader/313394/9848, 1896, http://memoria.bn.br/DocReader/313394/12277, 1898, http://memoria.bn.br/DocReader/313394/15677, 1899, http://memoria.bn.br/DocReader/313394/17097, 1900, http://memoria.bn.br/DocReader/313394/19900, 1903, http://memoria.bn.br/DocReader/313394/23045, 1904 http://memoria.bn.br/DocReader/313394/24890, 1905, http://memoria.bn.br/DocReader/313394/26770, 1913, http://memoria.bn.br/DocReader/313394/49593, 1914, http://memoria.bn.br/DocReader/313394/54417, 1918, http://memoria.bn.br/DocReader/313394/69850, 1926, http://memoria.bn.br/DocReader/313394/93714
[302] *A Federação: Órgão do Partido Republicano*, 1º de abril de 1905, http://memoria.bn.br/DocReader/388653/16411
[303] *Correio da Manhã*, 19 de fevereiro de 1904, http://memoria.bn.br/DocReader/089842_01/5580
[304] *Jornal do Commercio*, 22 de outubro de 1919, http://memoria.bn.br/DocReader/364568_10/48932
[305] *Almanak Laemmert*, 1909, http://memoria.bn.br/DocReader/313394/37877
[306] *Almanak Laemmert*, 1922, http://memoria.bn.br/DocReader/313394/83482

Souza Amarantho was a prosecutor[307], Bulcão Vianna was a judge[308], Bittencourt was both a prosecutor[309] and sheriff[310] (*delegado*).

Three of them were politically appointed to positions in the civilian bureaucracy. Espírito Santo Júnior was director of public works at the state of Pernambuco[311] and chief of police of Rio de Janeiro[312]. Francisco Guillon was chief of police of Rio Grande do Sul[313] and chief of the telegraphic service of the same state[314]. Azor de Almeida was superintendent of the Company of Coat of Rio Grande do Sul[315].

Finally, seven among them worked as teachers outside the military schools. Magalhães Castro taught at the commercial institute[316] and at primary schools[317]. Licínio Atanázio Cardoso[318] and Azor de Almeida[319] taught at high schools. Souza Amarantho[320] and Atanázio Cardoso[321] were professors at the Engineering school. Espírito Santo Júnior worked as a private teacher[322]. Galdino Duarte taught at the school of the merchant navy[323]. Souza Amarantho[324] and Bittencourt[325] were also professors at law schools, respectively of Rio de Janeiro and the University of Petrópolis (political economy).

Though professors could come with different personalities and life trajectories – as we saw – it is possible to classify them in categories, in ideal types that condense the most usual paths followed by those who taught military law in Brazil in the First Republic. I identified five

[307] *Jornal do Commercio*, 30 de abril de 1908, http://memoria.bn.br/DocReader/364568_09/14154
[308] *O Paiz*, 18 de dezembro de 1918, http://memoria.bn.br/DocReader/178691_04/41295
[309] *Almanak Laemmert*, 1930, http://memoria.bn.br/DocReader/313394/107244
[310] *O País*, 20 de junho de 1926, http://memoria.bn.br/DocReader/178691_05/25725
[311] *Diario de Pernambuco*, 21 de março de 1883, http://memoria.bn.br/DocReader/029033_06/7731
[312] *A Federação: Órgão do Partido Republicano*, 24 de novembro de 1889, http://memoria.bn.br/DocReader/388653/5104
[313] *A Federação: Orgam do Partido Republicano*, 14 de maio de 1890, http://memoria.bn.br/DocReader/388653/5655
[314] *Jornal do Brasil*, 3 de março de 1895, http://memoria.bn.br/DocReader/030015_01/4105
[315] *A Federação: Orgam do Partido Republicano*, 3 de fevereiro de 1925, http://memoria.bn.br/DocReader/388653/55337
[316] *Relatório do Ministério do Império*, 1881. http://memoria.bn.br/DocReader/720968/16060
[317] *Jornal do Comércio*, 25 de novembro de 1890. http://memoria.bn.br/DocReader/364568_08/2517
[318] *Jornal do Commercio*, 11 de janeiro de 1882, http://memoria.bn.br/DocReader/364568_07/4768.
[319] *Gazeta de Notícias*, 2 de maio de 1907, http://memoria.bn.br/DocReader/103730_04/14730
[320] *Jornal do Commercio*, 30 de abril de 1908, http://memoria.bn.br/DocReader/364568_09/14154
[321] *Jornal do Commercio*, 3 de julho de 1887, http://memoria.bn.br/DocReader/364568_07/18145
[322] *Jornal do Recife*, 8 de maio de 1883, http://memoria.bn.br/DocReader/705110/20195
[323] *O Paiz*, 5 de dezembro de 1920, http://memoria.bn.br/DocReader/178691_05/4117
[324] *Jornal do Brasil*, 19 de maio de 1903, http://memoria.bn.br/DocReader/030015_02/6806
[325] *Jornal do Commercio*, 19 de abril de 1935, http://memoria.bn.br/DocReader/364568_12/35954

types: the military bureaucrat[326], the occasional politician[327], the strict jurist[328], the relentless teacher[329] and the bold entrepreneur[330]. Each character can belong to more than one category at once, for life is convoluted and frequently change course. Others do not fit particularly well into any of the categories, yet they are more akin to one or other ideal-type. In the next pages, I will summarize the biographies of one professor for each ideal type, for we to better grasp the life and work of military lawyers in Brazil: José Antônio Pedreira de Magalhães Castro (bold entrepreneur); Azor Brasileiro de Almeida (relentless teacher); Vicente Antônio do Espírito Santo Júnior (occasional politician); Tarquínio Bráulio de Souza Amarantho (strict jurist). For the military bureaucrat, I chose two representatives instead of one (Olavo Luís Vianna and Galdino Pimentel Duarte), for this category is particularly important, and for those two characters illustrate two different trajectories within the military: the former was a true bureaucrat with a modest career, while the latter was a combatant office that climbed high in the hierarchy.

Let us meet our characters, then.

José Antônio Pedreira de Magalhães Castro was peculiar. With deep links to the imperial high society, he played important roles in the early republican period, and circulated between the legal and economic worlds with ease. He was probably born in 1858[331] and studied in Rio de Janeiro, at Pedro II high school (*Colégio Pedro II*), the most prestigious institution of secondary education in the empire[332]. He was probably a good student, as he won the first prizes in his 3rd and 5th years[333]. Unsurprisingly, he entered the Law School of São Paulo and graduated in 1879[334], and in the same year he enrolled to defend his doctoral dissertation[335]. In the next year, he became a doctor[336].

[326] Francisco Alberto Guillon; José Joaquim Firmino; *Olavo Luiz Vianna*; *Galdino Pimentel Duarte*; Cândido Albernaz Alves; Arnaldo Pinheiro Bittencourt
[327] Lauro Severiano Müller; Jayme Benévolo; *Vicente Antônio do Espírito Santo (Júnior.)*; Francisco Vicente Bulcão Vianna
[328] José Antônio Pedreira de Magalhães Castro; Vicente Antônio do Espírito Santo (Júnior.); *Tarquínio Bráulio de Souza Amarante/Amarantho [Filho]*; Francisco Vicente Bulcão Vianna
[329] Licínio Athanazio Cardoso; Francisco Sérgio de Oliveira; *Azor Brasileiro de Almeida*
[330] *José Antônio Pedreira de Magalhães Castro*
[331] *A Noite*, 27 de novembro de 1939. http://memoria.bn.br/DocReader/348970_03/68712
[332] *Jornal do Commercio*, 26 de novembro de 1871. http://memoria.bn.br/DocReader/364568_06/3707
[333] *Relatório do Ministério do Império*, 1872. http://memoria.bn.br/DocReader/720968/10366
[334] *Relatório do Ministério do Império*, 1876. http://memoria.bn.br/DocReader/720968/14481
[335] *Relatório do Ministério do Império*, 1879. http://memoria.bn.br/DocReader/720968/15760
[336] MAIA, Júlio Joaquim Gonçalves. Lista geral dos bacharéis e doutores formados pela Faculdade de Direito de S. Paulo e dos lentes e diretores effectivos até 1900. *Revista da Faculdade de Direito de São Paulo*, nº 8, pp. 209-291, 1900, p. 286

The 1880s were times of stable, though slow ascension. In 1881, he was appointed to teach economy at the Commercial Institute[337], and in the same year he begun to work at the law firm of senator João da Silva Carrão[338]. Magalhães Castro run and failed to get elected as federal deputy[339] and councilman of Rio de Janeiro[340]. Still, he was knighted (*fidalgo da casa imperial)*[341]. He signed up for the examination for the chair of Political Economy and Administrative Law at the Polytechnical School, in a dispute that included relatively famous men of letters as Aarão Leal de Carvalho Reis, the engineer responsible for the Planning of Belo Horizonte, and Antônio Herculano de Souza Bandeira Filho[342], author of a few relevant studies on constitutional law and criminology; he only got the fifth place[343]. In 1887, he was acting professor at the Naval School[344], and two years later, he joined the IAB (Institute of Brazilian Lawyers)[345]. All added up, he was not thriving, but enjoyed a relatively comfortable position.

Then, something changed.

After the republican coup, Magalhães Castro was invited to enter the commission of five that wrote the first project that would become the Brazilian constitution of 1891. In the very early days of the republic, he joined the administration of several companies and demonstrated a strong network that connected him with many high-ranking officers in the Army. For instance, in 1890 he became director of the Brazilian Company of Phosphate and Lime, alongside a lieutenant colonel[346], and integrated an electoral list for deputy at the side of the admiral Wandenkolk and general Severiano da Fonseca[347], though he was again left outside of parliament. The following year, he was elected member of the council of the *Mútuo* Bank, the process being presided by Thomaz Alves Júnior, a character we have already met in the rooms the Military School[348]. He was even considered for minister of justice[349] and was nominated teacher of the primary schools[350]. He directed the Colonizing Company[351] and the

[337] *Relatório do Ministério do Império*, 1881. http://memoria.bn.br/DocReader/720968/16060
[338] *Gazeta de Notícias*, 28 de março de 1881, http://memoria.bn.br/DocReader/103730_02/1857
[339] A Patria : Folha da Provincia do Rio de Janeiro, 2 de outubro de 1881. http://memoria.bn.br/DocReader/830330/12566
[340] *Jornal do Commercio*, 4 de agosto de 1882, http://memoria.bn.br/DocReader/364568_07/6137
[341] *A reforma*, 16 de setembro de 1877. http://memoria.bn.br/DocReader/226440/9731
[342] *Gazeta de Notícias*, 7 de agosto de 1880. http://memoria.bn.br/DocReader/103730_02/1063
[343] *Relatório do Ministério do Império*, 1881 http://memoria.bn.br/DocReader/720968/16309
[344] *Jornal do Commercio*, 9 de fevereiro de 1887, http://memoria.bn.br/DocReader/364568_07/17184
[345] *Diário de Notícias*, 9 de junho de 1889. http://memoria.bn.br/DocReader/369365/5886
[346] *Jornal do Commercio*. 29 de abril de 1890. http://memoria.bn.br/DocReader/364568_08/804
[347] *Jornal do* Comércio, 6 de setembro de 1890. http://memoria.bn.br/DocReader/364568_08/1835
[348] *Jornal do Brazil*, 1º de outubro de 1891. http://memoria.bn.br/DocReader/030015_01/822
[349] *O Brazil: Folha Diária*, 28 de outubro de 1890, http://memoria.bn.br/DocReader/363626/670
[350] *Jornal do Comércio*, 25 de novembro de 1890. http://memoria.bn.br/DocReader/364568_08/2517
[351] *Jornal do* Commercio, 24 de maio de 1891. http://memoria.bn.br/DocReader/364568_08/4160

Regional Bank of Pará and Amazonas[352]. He wrote the project of the constitution of Rio de Janeiro and received a luxury copy of the document from the hands of the governor of the state himself[353]. Not by chance, it was in this auspicious moment, precisely in 1891, that Magalhães Castro was appointed as permanent professor at the Naval School[354]. How could a relatively unknown lawyer with few achievements go from acting teacher to potential minister of justice in just two years?

His father. José Antônio de Magalhães Castro was the son of José Antônio de Magalhães Castro, a judge of the *Supremo Tribunal de Justiça* (STF), the supreme court, until 1889. And he had deep connections with the military: Magalhães Castro senior worked as a military judge (*auditor da guerra*) between 1854 and 1864, and was appointed to the Supreme Military Council, the highest military court of Brazil, in 1865, and stayed there until 1881[355]. As we saw in the first part of this thesis, he participated in the Commission of Examination of the Legislation of the Army and wrote a project of Military Criminal Code. Throughout the years, he probably developed a wide network with powerful officers, and in the early years of the republic, when the Army captured the political power, he was probably able to speak on the behalf of his son to those in power.

The public career of Magalhães Castro Júnior, however, remained nothing more than a promise. After the first half of the 1890s, he was no longer called for higher office, neither tried to pursuit a political path. I do not know if this spanned out of his own lack of interest, or if the ascension of civilians into power rendered the social capital of his father useless. Castro did not return to mediocrity, though. His economic endeavors continued to thrive: in the 1900s, he presided an assembly of stockholders of the Railway Vitória a Minas[356] and presided the Company of the Port (*Companhia das Docas*) of Bahia[357]. He even founded a bank in 1905[358]. Until 1926, he also worked as a lawyer[359]. His political connections did not completely wane:

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[352] *Jornal do Brasil*, 8 de junho de 1891. http://memoria.bn.br/DocReader/313394/29362
[353] *Jornal do commercio*, 26 de fevereiro de 1891. http://memoria.bn.br/DocReader/364568_08/3395
[354] *Jornal do Commercio*, 12 de janeiro de 1891. http://memoria.bn.br/DocReader/364568_08/2928
[355] http://www.stf.jus.br/portal/ministro/verMinistro.asp?periodo=stj&id=332
[356] *Gazeta de Notíciais*, 30 de setembro de 1905, http://memoria.bn.br/DocReader/103730_04/10628
[357] *Almanak Laemmert*, 1909. http://memoria.bn.br/DocReader/313394/38767
[358] *Correio da Manhã*, 22 de julho de 1902. http://memoria.bn.br/DocReader/089842_01/2172
[359] *Almanak Laemmert*, 1891. http://memoria.bn.br/DocReader/313394/528, 1894, http://memoria.bn.br/DocReader/313394/7589, 1895, http://memoria.bn.br/DocReader/313394/9848, 1896, http://memoria.bn.br/DocReader/313394/12277, 1898, http://memoria.bn.br/DocReader/313394/15677, 1899, http://memoria.bn.br/DocReader/313394/17097, 1900, http://memoria.bn.br/DocReader/313394/19900, 1903, http://memoria.bn.br/DocReader/313394/23045, 1904 http://memoria.bn.br/DocReader/313394/24890, 1905, http://memoria.bn.br/DocReader/313394/26770, 1913, http://memoria.bn.br/DocReader/313394/49593, 1914, http://memoria.bn.br/DocReader/313394/54417, 1918, http://memoria.bn.br/DocReader/313394/69850, 1926, http://memoria.bn.br/DocReader/313394/93714

in 1916, he became legal director of the journal of the STF (*Supremo Tribunal Federal*)[360] (*Revista do STF*). To sum it up: he was rich. In 1893, he asked the national congress for a license from work for health issues; the congressmen granted the request without pay, for he was "affluent, a man with a fortune who do not need aid from the treasury"[361].

His final years were peaceful, and might have brought to him some nostalgia from the empire. In 1930, the nationalistic League of National Defense commemorated the republican constitution with Magalhães Castro, by then, being the only living member of the "commission of five" that wrote the original project; he was remembered for writing the article that forbade Brazil to engage in wars of conquest and obliged the country to use arbitration to solve international conflicts[362]. Castro told the league that he got these ideas from D. Pedro II, who once went to one of his classes at the Naval School and asked him to teach that "wars of conquest are illegitimate" and "arbitration should always be used"[363]. An expected compliment to the "venerable memory of the unforgettable monarch"[364] from the child of an imperial judge who wrote the republican constitution. He would die nine years later, in 25 November 1939[365].

If the chair seemed only a platform for the economic adventures of Magalhães Castro, our next professor seemed to have been born for the classroom: Azor Brazileiro de Almeida represents the ideal type "relentless professor".

In the first years of the republic, the promising youngster Azor Brazileiro de Almeida studied law at São Paulo and taught at the Rio-Clarense high school. But what seemed the peaceful beginning of an obvious path would soon be shaken: when the Navy rioted in 1893, Almeida volunteered to fight alongside the government[366]; a few years later, he was a soldier at the campaign of Canudos[367]. This bright young man seemingly fell in love with the military career, and in 1898, graduated from the Military School of Rio de Janeiro[368], and turned into a military engineer[369]. He even married into a military family: his father and several brothers-in-law were officers[370].

But the flames of teaching and law were still burning in his heart. In 1908, he got a law degree from the *Faculdade Livre de Direito do Rio de Janeiro*, and from them on, he pursued

[360] *Almanak Laemmert*, 1916. http://memoria.bn.br/DocReader/313394/63598
[361] *Annaes da Câmara dos Deputados*, 1893. http://memoria.bn.br/DocReader/060917_01/11217
[362] *Jornal do Commercio*, 25 de fevereiro de 1930. http://memoria.bn.br/DocReader/364568_12/1025
[363] *O Paiz*, 10 de abril de 1930. http://memoria.bn.br/DocReader/178691_06/922
[364] *O Paiz*, 10 de abril de 1930. http://memoria.bn.br/DocReader/178691_06/922
[365] *Correio da Manhã*, 26 de novembro de 1939. http://memoria.bn.br/DocReader/089842_04/55149
[366] *Diário de Notícias*, 22 de setembro de 1893, http://memoria.bn.br/DocReader/369365/12587
[367] *O Cruzeiro do Sul*, 8 de abril de 1945, http://memoria.bn.br/DocReader/735965/101
[368] *O Imparcial*, 9 de fevereiro de 1918, http://memoria.bn.br/DocReader/107670_01/19014
[369] *Jornal do Brasil*, 25 de janeiro de 1908, http://memoria.bn.br/DocReader/030015_02/25256
[370] *Gazeta de Notícias*, 25 de agosto de 1918, http://memoria.bn.br/DocReader/103730_04/44910

a teaching career in and outside the Army[371]. After finishing the law school, he acted as a professor in several military institutions: the School of Artillery and Engineering[372], the Military School (1912[373]-1935[374]), the Professional School of the Military Police of Rio de Janeiro (1921[375]-1934[376]), the School of Administration of the Army[377], the School of *Intendência* (ca. 1930) and he also gave some conferences at the School of General Staff (*Escola de Estado-Maior*)[378]. But his mighty teaching trajectory was developed also outside the barracks: he taught at Sílvio Leite high school[379], the National Gymnasium[380] and the School of Engineering[381]. Finally, between 1937[382] and 1941[383], he taught private classes for those wishing to take the admission exams to the superior schools of the republic.

Azor was a public man: he was a lawyer[384], run for federal deputy in 1933[385], was a director at a social security company[386] and was part of the administration of the Military Club[387], the main association of soldiers in Brazil. But, first and foremost, he was a man of letters. He wrote for the literary magazine *Jumbo-Jumbo*[388] and to the law journal *Gazeta dos Tribunais*[389]. He even was vice-president of the Institute of Military Teachers between 1922[390] and 1927[391], and he returned to its administration in 1941[392].

After this seemingly peaceful and respectful life, Azor died in 1962[393]. He was also the grandfather of one of the most famous Brazilian musicians, Tom Jobim, and reportedly transmitted to him a deep fondness of literature[394].

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[371] *Correio da Manhã*, 18 de dezembro de 1908, http://memoria.bn.br/DocReader/089842_01/18487
[372] *Almanak Laemmert*, 1910, p. 543, http://memoria.bn.br/DocReader/313394/41246
[373] *O Paiz*, 5 de março de 1912, http://memoria.bn.br/DocReader/178691_04/10800
[374] *Jornal do Brasi*, 5 de outubro de 1935, http://memoria.bn.br/DocReader/030015_05/57852
[375] *O País*, 26 de dezembro de 1921, http://memoria.bn.br/DocReader/178691_05/8274
[376] *A Batalha*, 17 de maio de 1933, http://memoria.bn.br/DocReader/175102/7671
[377] *Gazeta de Notícias*, 4 de dezembro de 1921, http://memoria.bn.br/DocReader/103730_05/5126
[378] *Correio da Manhã*, 26 de março de 1930, http://memoria.bn.br/DocReader/089842_04/1219
[379] *Jornal do Brasil*, 28 de setembro de 1933, http://memoria.bn.br/DocReader/030015_05/36707
[380] *Gazeta de Notícias*, 2 de maio de 1907, http://memoria.bn.br/DocReader/103730_04/14730
[381] *O Pais*, 10 de abril de 1908, http://memoria.bn.br/DocReader/178691_03/15861
[382] *Jornal do Brasil*, 29 de julho de 1937, http://memoria.bn.br/DocReader/030015_05/76917
[383] *Jornal do Brasil*, 21 de fevereiro de 1941, http://memoria.bn.br/DocReader/030015_06/8245
[384] *Jornal do Commercio*, 22 de outubro de 1919, http://memoria.bn.br/DocReader/364568_10/48932
[385] *Jornal do Brasil*, 1º de julho de 1933, http://memoria.bn.br/DocReader/030015_05/34231
[386] *A Noite*, 22 de março de 1913, http://memoria.bn.br/DocReader/348970_01/2375
[387] *Correio da Manhã*, 31 de maio de 1918, http://memoria.bn.br/DocReader/089842_02/35458
[388] *O País*, 26 de julho de 1925, http://memoria.bn.br/DocReader/178691_05/21954
[389] *A Noite*, 26 de dezembro de 1920, http://memoria.bn.br/DocReader/348970_02/2102
[390] *Almanak Laemmert*, 1922, http://memoria.bn.br/DocReader/313394/79847
[391] *Almanak Laemmert*, 1927, http://memoria.bn.br/DocReader/313394/97467
[392] *Diário de Notícias*, 22 de junho de 1941, http://memoria.bn.br/DocReader/093718_02/5986
[393] *Correio da Manhã*, 31 de novembro de 1962, http://memoria.bn.br/DocReader/089842_07/34420
[394] https://imagesvisions.blogspot.com/2020/12/tom-jobim-passeando-com-o-avo.html; https://jornalggn.com.br/memoria/os-90-anos-de-tom-jobim-o-maestro-soberano/?__cf_chl_jschl_tk__=859912bda09d30da9e041a1a48130ce7a733f8fa-1616072930-0-AWACR2m-g5AuBuwmHBYm_Bn5tclaNrMdRQu9rCbZRfZMe5R4OqiMkDH0G7jfiKLZU3xy44JookNsOJMmPiHAMUv

If Azor de Almeida conducted a smooth and decent life, the same cannot be said of Vicente Antônio do Espírito Santo Júnior, who will represent the ideal-type "relentless politician". He is relevant for a second reason: he wrote the most important book on general military law of the First Republic, which we will discuss later. Born in 1850[395], Espírito Santo Júnior came from a family invested both in law and in the arms: his father was a captain of the Army[396], his grandfather was a lieutenant-colonel[397] and his brother, Hermínio do Espírito Santo, was a judge at the *Supremo Tribunal Federal*[398].

Espírito Santo Júnior graduated from the Military School in 1876[399] and soon worked at some functions in the Army in the 1880s throughout Brazil: the military school of Porto Alegre[400], the Arsenal of Pará[401], the office of the general helper of the Army[402] in Rio de Janeiro and the Gunpowder Factory of *Estrela*[403].

Though he seemed to be pursuing a promising career in a discipline-oriented institution such as the Army, Espírito Santo Júnior showed some early signs of indiscipline – a trait of personality that would come back later to haunt him. And others. In 1871, he was at the third year of the law school of Recife when he was suspended for two years for offending the director[404]; he would only graduate in 1885[405]. In 1889, he was jailed for a different offense[406]. But his fortunes changed at the end of the year.

With the republican coup, Espírito Santo Júnior gained prominence. In the very first day of the republic, 15 November 1889, in the context of the uprising[407], he was appointed chief of police by the president of the province of Rio de Janeiro[408], a strategic position. Less than a

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x6OkMJ9gbtuoPPi0ptwdHMNWKZnZ4HYLd_PEM1YzTrYfDSPX4I-p-gwTvslvsr2s2cqnDDLvmYKdIhCF6yOA6Z_Auws0DwulxI0um_vWC-l3_GkJmF4hT418Xx02Ce39878XTWPDySGvWjAw-7FldxOk74o1avzCpt0oonagwYFNUHBBLmVksqlPsj-860B7Osw75P1n38I6xVTeFkxyaxUDvmjg5J2-wkkMuGFAV5OVt1J3lJJNvy9lzG01cTpcIyo8Nh3dzJaafk8H3ZBQbWvmzAL_8QnBhqyYa3404TaXgs1S3RO1OJJzBSugRlys

[395] *Diário do Rio de Janeiro*, 23 de julho de 1876, http://memoria.bn.br/DocReader/094170_02/34776
[396] *Jornal do Recife*, 7 de setembro de 1889, http://memoria.bn.br/DocReader/705110/27454
[397] *A Federação: Órgão do Partido Republicano*, 19 de abril de 1886, http://memoria.bn.br/DocReader/388653/2600
[398] *Jornal de Recife*, 12 de novembro de 1924, http://memoria.bn.br/DocReader/705110/92304
[399] *Almanak do Ministério da Guerra*, 1884, p. 60, http://memoria.bn.br/DocReader/829676/5755; *Almanak do Ministério da Guerra*, 1885, p. 60, http://memoria.bn.br/DocReader/829676/6167
[400] *Almanak do Ministério da Guerra*, 1881, http://memoria.bn.br/DocReader/829676/4912
[401] *Almanak do Ministério da Guerra*, 1882, http://memoria.bn.br/DocReader/829676/5285
[402] *Gazeta de Notícias*, 13 de julho de 1886, http://memoria.bn.br/DocReader/103730_02/10575
[403] *Gazeta de Notícias*, 24 de fevereiro de 1889, http://memoria.bn.br/DocReader/103730_02/15228
[404] *Relatório do Ministério do Império*, 1871, p. 149, http://memoria.bn.br/DocReader/720968/9240
[405] *Diário de* Pernambuco, 6 de dezembro de 1886, http://memoria.bn.br/DocReader/029033_06/16069
[406] *O Cearense*, 1º de março de 1889, http://memoria.bn.br/DocReader/709506/21224
[407] *Jornal do Commercio*, 16 de novembro de 1889, http://memoria.bn.br/DocReader/364568_07/24006
[408] *A Federação: Órgão do Partido Republicano*, 24 de novembro de 1889, http://memoria.bn.br/DocReader/388653/5104

month later, he was appointed as acting teacher of military law at the Military School[409], and he got the chair the following year[410]. From this platform, Espírito Santo Júnior managed to be elected for the constitutional assembly of 1891 and later to for a mandate at the Chamber of Deputies until 1893[411]. As a lawyer, soldier and legislator, he was an obvious choice for the commission that evaluated the Code of Military Procedure[412]. But soon an ominous shadow would be casted upon this promising career.

In 1888, Espirito Santo Júnior was a young officer face wide-open life options; as a married man and a respectable member of the Army, he should start a family and manage a household. To help to fulfill this task, he relied on a traditional practice of some middle-class Brazilian families at the time: he went to São Paulo and hired a domestic servant, called Maria Joaquina da Rosa. She came from an underprivileged family, was around 14 years old and might have been mentally challenged: this job looked like a good opportunity for her. And she worked for some years in the house of the then federal deputy. But, as Maria Joaquina grew and puberty arrived, Espírito Santo Júnior looked at her differently: he started to rape her and after a few months she got pregnant. Such a scandal could easily dishonor the name of the parliamentarian, so he and his wife devised a plan: the then major hired a man to marry Maria Joaquina and take her away; Espírito Santo and his wife told the little girl that she could no longer stay in their house after the arranged wedding. The wife of Espírito Santo Júnior, Rosa do Espírito Santo, even made her a dress and, a few days later, took her to the wedding place. Meanwhile, the deputy went outside of town, to avoid possible altercations. Maria Joaquina did not want to marry her groom, complaining that she did not know him, but D. Rosa told her that she must stay quiet or would be arrested. The ceremony was performed and the two women went back to their house; the now husband was never seen again by Maria Joaquina. After a few days, she was expelled from the house of her employers and was installed in a pension. After seven days, devoid of any money, she was once again put on the street. After hours crying, she was found by a man, who took her to other pension and later to the police office. She told her story, which made the way to the newspapers[413]. Two months later, the prosecutor opened an investigation against Espírito Santo Júnior for deflowerment (articles 219 and 220 of the criminal code)[414].

[409] *A Federação: Órgão do Partido Republicano*, 12 de dezembro de 1889, http://memoria.bn.br/DocReader/388653/5167
[410] *A Federação: Órgão do Partido Republicano*, 10 de abril de 1890, http://memoria.bn.br/DocReader/388653/5552
[411] *Diário de Notícias*, 12 de agosto de 1890, http://memoria.bn.br/DocReader/369365/7691
[412] *Diario do Commercio*, 15 de janeiro de 1890, http://memoria.bn.br/DocReader/248070/1657
[413] *Gazeta de Notícias*, 21 de maio de 1891, http://memoria.bn.br/DocReader/103730_03/3426
[414] *Jornal do Commercio*, 18 de julho de 1891, http://memoria.bn.br/DocReader/364568_08/4662.

But, since he was a member of parliament, the investigations could only proceed after an authorization from the Chamber of Deputies[415]. The Commission of Constitution and Justice gave a favorable opinion for the request from the prosecutor, but the floor of the chamber rejected it[416] by 59 to 44 votes[417]. The press described this decision as "immoral and revolting"[418]. The scandal was huge and could not be ignored; Espírito Santo Júnior published at least five articles defending himself and calling the minor a liar[419]. The case was publicized even at his home state of Pernambuco[420]. The complete depositions were published in newspapers at Rio de Janeiro[421]: every single citizen discovered the truth. Finally, the report of the police investigation concluded that the deputy was guilty, but nothing could be done if the Chamber of Deputies did not authorize further actions[422].

Espírito Santo Júnior was not satisfied with just one altercation. When the national congress was dissolved by the president Floriano Peixoto, he signed a manifesto criticizing the authoritarian penchant of the first magistrate of the republic[423]; the major was imprisoned for this outspoken manifestation[424]. After this troubled mandate, the political career of Espírito Santo Júnior hit a dead end in 1893, from which it would never recover.

He returned to the Military School. However, the following year[425] he was accused of desertion[426] and removed from his chair for two years while the lawsuit proceeded[427]. He was acquitted[428]. After all these troubles, his military career stalled too. He would only get one more promotion, to colonel. In 1904, he published his book on military law, that we will discuss later.

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[415] *Diario do Commercio*, 20 de setembro de 1891, http://memoria.bn.br/DocReader/248070/4613
[416] *O Tempo*, 30 de setembro de 1891, http://memoria.bn.br/DocReader/218731/526
[417] *O Apóstolo*, 2 de outubro de 1891, http://memoria.bn.br/DocReader/343951/13110
[418] *O Brasil*, 9 de outubro de 1891, http://memoria.bn.br/DocReader/363626/1790
[419] *Gazeta de Notícias*, 4 de junho de 1891, http://memoria.bn.br/DocReader/103730_03/3518; *Gazeta de Notícias*, 5 de junho de 1891, http://memoria.bn.br/DocReader/103730_03/3524; *Gazeta de Notícias*, 12 de junho de 1891, http://memoria.bn.br/DocReader/103730_03/3570; *Gazeta de Notícias*, 15 de junho de 1891, http://memoria.bn.br/DocReader/103730_03/3592; *Gazeta de Notícias*.20 de junho de 1891, http://memoria.bn.br/DocReader/103730_03/3624
[420] *A Província*, 9 de agosto de 1891, http://memoria.bn.br/DocReader/128066_01/7878
[421] *O Brasil*, 22 de maio de 1891, http://memoria.bn.br/DocReader/363626/1338; *O Brasil*, 25 e 26 de maio de 1891, http://memoria.bn.br/DocReader/363626/1350; *O Brasil*, 27 de maio de 1891, http://memoria.bn.br/DocReader/363626/1354; *Diário de Notícias*, 30 de maio de 1891, http://memoria.bn.br/DocReader/369365/9169
[422] *O Tempo*, 5 de julho de 1891, http://memoria.bn.br/DocReader/218731/181
[423] *A Federação: Órgão do Partido Republicano*, 7 de dezembro de 1891, http://memoria.bn.br/DocReader/388653/6926
[424] *O Democrata*, 19 de dezembro de 1893, http://memoria.bn.br/DocReader/186171/4390
[425] *A Federação: Órgão do Partido Republicano*, 26 de junho de 1894, http://memoria.bn.br/DocReader/388653/9349
[426] *Jornal do Commercio*, 9 de maio de 1894, http://memoria.bn.br/DocReader/364568_08/13662.
[427] *Gazeta de Notícias*, 24 de novembro de 1895, http://memoria.bn.br/DocReader/103730_03/13112.
[428] *O Paiz*, 21 de outubro de 1894, http://memoria.bn.br/DocReader/178691_02/11026

In 1895, he became vice-director of the Arsenal of Rio de Janeiro[429] and in 1907, received a mission to inspect the military installations of the north[430]. In 1905, he defended for Lauro Sodré and others in the criminal processes for taking part in the Revolt of the Vaccine[431].

He was pensioned in 1907[432] and died young on the same year.

The choices of the republicans for the two chairs of military law were deeply controversial. But, if with Magalhães Castro, we saw the son of a prominent man achieving a prestigious position on the basis of for his familiar connections and using it to expand his network and gain influence, with Espírito Santo Júnior, the republic elevated an undisciplined revolutionary and future rapist. The former was among the five that wrote the 1891 Constitution, while the latter was among those that approved and signed the document. Military lawyers were influential on the first years of the republic, but this not necessarily speaks well of the discipline.

Jurists and bureaucrats, unsurprisingly, led less thrilling lives.

Tarquínio Bráulo de Souza Amarante (or Amarantho, according to some sources), our representative of the "strict jurist", was no exception. Born in 1859 in Recife[433], he was the son of the homonymous professor of the Pernambuco Law School[434]. Through his father, he was part of one of the most prolific law families of northern Brazil: Tarquínio Amarante senior and two of his brothers were all professors at the law school and espoused traditionalist Catholic values. José Soriano de Souza was a renowned philosopher[435], and Brás Florentino Henriques de Souza was one of the most important public law scholars of the empire[436]. His cousin Thomaz Soriano de Souza was a second level judge (*desembargador*). His son, Octávio Tarquínio de Souza Amarantho, would be appointed in the 1930s as judge at the Federal Fiscal Court (*Tribunal de Contas da União*)[437].

Souza Amarantho graduated from the law school of Recife and went to Maceió, Alagoas to work as a public prosecutor. After a short span of time, he went to Rio de Janeiro, where, in the last months of the empire, he was appointed to the chair at the Naval School[438]. Two years

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[429] *A Federação*, 10 de setembro de 1895, http://memoria.bn.br/DocReader/388653/10323
[430] *O Paiz*, 20 de janeiro de 1907, http://memoria.bn.br/DocReader/178691_03/13234
[431] *A Federação: Órgão do Partido Republicano*, 1º de abril de 1905, http://memoria.bn.br/DocReader/388653/16411
[432] *A Federação: Órgão do Partido Republicano*, 28 de fevereiro de 1907, http://memoria.bn.br/DocReader/388653/18739
[433] *Jornal do Commercio*, 30 de abril de 1908, http://memoria.bn.br/DocReader/364568_09/14154
[434] Tarquínio Bráulio de Souza Amarante. https://www.ufpe.br/memoriafdr/biografias
[435] José Soriano de Souza. https://www.ufpe.br/memoriafdr/biografias
[436] Brás Florentino Henriques de Souza. https://www.ufpe.br/memoriafdr/biografias
[437] https://portal.tcu.gov.br/centro-cultural-tcu/museu-do-tribunal-de-contas-da-uniao/tcu-a-evolucao-do-controle/min-octavio-tarquinio-de-sousa-amarantho-1932-1943.htm
[438] *Revista Marítima Brasileira*, 908, ed. 52, p. 1184, http://memoria.bn.br/DocReader/008567/18154

later, he also became acting teacher of political economy at the Polytechnical School and was appointed to hold the chair in 1891[439]. This appointment, however, was contested, for regulations determined that professors could only be installed after a competitive examination, and Amarantho had done none. This time, differently from what happened with other professors in the early republican years, family connections did not suffice, and the faculty council, the congregation, rejected him[440]. The government retracted the appointment[441]. Five years later, Amarantho taught administrative law for a few months[442] until an acting teacher was chosen[443].

The admirals and officers that studied with Amarantho at the Naval School remembered in 1940 that he struggled with rhetoric in the first years, but overcome his challenges and grew to be a good orator, and was fondly regarded as "patient and good"[444]. Perhaps as Amarantho evolved in the profession, he became more interested in teaching: he was one of the founders of the *Faculdade Livre de Ciências Jurídicas e Sociais do Rio de Janeiro*[445], where he was initially trusted with the discipline of civil law. He later moved to the chair of public and constitutional law, where he stayed until his death[446]. He was also a lawyer[447]. In 1900, the Naval School granted him the title of doctor in legal and social sciences[448].

He followed the steps of his father: in 1907, he appears as one of the organizers of the 2nd Catholic Congress[449]. After a mostly uneventful life, dedicated to teaching law, Souza Amarantho died in 30 January[450] 1908[451].

Our fifth and penultimate professor also led a long career in teaching, but came from a strictly military life; for this, Olavo Luís Vianna represents the utmost "military bureaucrat". His father was also a professor at the Naval School[452]. Vianna entered the Navy in 1895[453], and in 1902, as a second lieutenant, was working at the School of Apprentice Seamen of Rio de

[439] *Jornal do Brasil*, 25 de abril de 1891, http://memoria.bn.br/DocReader/030015_01/76
[440] *Jornal do Brasil*, 25 de abril de 1891, http://memoria.bn.br/DocReader/030015_01/76
[441] *Jornal do Brasil*, 9 de agosto de 1891, http://memoria.bn.br/DocReader/030015_01/563
[442] *Jornal do Commercio*, 21 de julho de 1896, *http://memoria.bn.br/DocReader/364568_08/21877*
[443] *A Notícia*, 18 de outubro de 1896, http://memoria.bn.br/DocReader/830380/2056
[444] ALMEIDA, Teófilo Nolasco de. Evocações. *Revista Marítima Brasileira*, nº 140, pp. 2047-2059, 1940, p. 2054. http://memoria.bn.br/DocReader/008567/70005
[445] *Jornal do Brasil*, 19 de maio de 1903, http://memoria.bn.br/DocReader/030015_02/6806
[446] *Jornal do Brasil*, 20 de agosto de 1900, http://memoria.bn.br/DocReader/030015_02/8752
[447] *Correio da Manhã*, 19 de fevereiro de 1904, http://memoria.bn.br/DocReader/089842_01/5580
[448] *A Imprensa*, 21 de outubro de 1900, http://memoria.bn.br/DocReader/245038/2660
[449] *O Paiz*, 30 de maio de 1907, http://memoria.bn.br/DocReader/178691_03/14145
[450] *Revista Marítima Brasileira*, 908, ed. 52, p. 1184, http://memoria.bn.br/DocReader/008567/18154
[451] *Diário de Pernambuco*, http://memoria.bn.br/DocReader/029033_08/9287
[452] *O País*, 17 de outubro de 1916, http://memoria.bn.br/DocReader/178691_04/33224
[453] *Gazeta de Notícias*, 2 de maio de 1895, http://memoria.bn.br/DocReader/103730_03/11808

Janeiro[454]. Later, he worked as preparator[455] and instructor[456] at the Naval School. He took more bureaucratic positions at the Navy Arsenal[457] and at the course of machinery[458]. He directed the Schools of Apprentice Seamen of Pará[459] and Bahia[460]. At the end of his career, as captain and sea and war, he was appointed as the government fiscal of the School of the Merchant Navy[461].

He taught at the Naval School between 1909 and 1913, and again between 1918 and 1929. The minister of the Navy was responsible for this gap: in 1914, Vianna and other 11 tenured professors were dismissed by their superior[462]; in the case of Vianna, his chair had been eliminated and the political authorities found no more use for his teaching services[463]. He filed an *Habeas Corpus* at the *Supremo Tribunal Federal*, but was unsuccessful[464]; only in 1917 the 11 professors won back their seats[465].

His marriage might have helped him to achieve and sustain a prestigious social position: his wife, Cecília Guimarães, was a daughter of the *baiano* deputy and general Paula Guimarães[466].

In 1912, the minister of the Navy granted him a prize to travel to Europe to study the Naval Schools in the Old Continent[467]. Tragically, on their way to the other side of the Atlantic, Dagmar, the daughter of Vianna, died[468].

In 1909, he was enrolled at the Rio de Janeiro law school[469], but I do not know if he graduated. Anyhow, between 1924[470] and 1929, he headed the department of History, Law and Languages of the Naval School[471]. Around the same time, in 1921, he was elected 2nd vice-president of Flamengo, one of the main football clubs in Brazil[472].

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[454] *Almanak Laemmert*, 1902, http://memoria.bn.br/DocReader/313394/21545
[455] *Almanak Laemmert*, 1907, http://memoria.bn.br/DocReader/313394/31453
[456] *O Século*, 13 de fevereiro de 1908, http://memoria.bn.br/DocReader/224782/1842
[457] *Almanak Laemmert*, 1909, http://memoria.bn.br/DocReader/313394/38869
[458] *A Imprensa*, 3 de março de 1914, http://memoria.bn.br/DocReader/245038/19418
[459] *Almanak Laemmert*, 1916, http://memoria.bn.br/DocReader/313394/63320
[460] *Almanak Laemmert*, 1915, http://memoria.bn.br/DocReader/313394/60173
[461] *Jornal do Brasil*, 20 de dezembro de 1930, http://memoria.bn.br/DocReader/030015_05/9469
[462] *O Imparcial*, 26 de fevereiro de 1914, http://memoria.bn.br/DocReader/107670_01/5771
[463] *Correio da Manhã*, 31 de março de 1917, http://memoria.bn.br/DocReader/089842_02/31761
[464] *O Imparcial*, 13 de maio de 1914, http://memoria.bn.br/DocReader/107670_01/6369
[465] *A Época*, 15 de fevereiro de 1917, http://memoria.bn.br/DocReader/720100/13393
[466] *O País*, 27 de junho de 1901, http://memoria.bn.br/DocReader/178691_03/2750
[467] *A Imprensa*, 18 de julho de 1912 http://memoria.bn.br/DocReader/245038/16122
[468] *Correio da Manhã*, 25 de novembro de 1913, http://memoria.bn.br/DocReader/089842_02/17030
[469] *O Pais*, 4 de agosto de 1909, http://memoria.bn.br/DocReader/178691_03/20338
[470] *O Jornal*, 29 de maio de 1924, http://memoria.bn.br/DocReader/110523_02/16553
[471] *O Pais*, 1º de maio de 1929, http://memoria.bn.br/DocReader/178691_05/38155
[472] *Jornal do Brasil*, 30 de dezembro de 1921, http://memoria.bn.br/DocReader/030015_04/12847

After retiring, Vianna helped to administer examinations for the Naval School and taught at the School of the Merchant Navy. After 1940, I lost trace of him[473].

Our final character was also a military bureaucrat, but of a very different strain: more politically charged, more well connected, more ambitious. Galdino Pimentel Duarte taught military penal law at the Naval School between 1919 and 1924, which came to be only one single step in a wide career. He graduated from the Naval School in 1903[474] and rose continuously through the ranks until he reached the position of captain of sea and war in 1934. In those thirty years, he occupied some deeply bureaucratic positions at the general staff[475] and the library of the Navy[476]. But differently from the other teachers, who only held positions in quiet offices, he also was a combatant officer and headed seeveral battleships: in the early 1910s, he commanded the *Canhoneira Juruá*[477] and the *vapor Comandante Freitas*[478] at the Amazon flotilla. In 1923[479] and 1930[480], he commanded two different destroyers, and in the middle 1930s, he lead the dreadnaughts Floriano[481] and Minas Gerais[482], this last one being one of the crown jewels of the Brazilian Navy. In 1938, he headed the whole flotilla of destroyers[483].

His rise, however, was not well regarded by everyone. In 1931, the newspaper *A batalha* said that his promotion to *capitão de fragata* (commander) could be explained only by his personal relations, and not by true merit. He had been working on land for a long time and pursued a career as a lawyer: he did not have the necessary experience in the life at the sea o be lifted to such position[484].

True or false, Duarte got some smooth positions in the 1930s. He was a naval attaché at the Brazilian embassies in Italy[485] and London[486], and two years later, in 1934[487], worked as the *liaison* between the ministries of the Navy and Foreign affairs. In 1938, he headed the

[473] The last signt of him I found was: *O Imparcial*, 2 de julho de 1940, http://memoria.bn.br/DocReader/107670_04/2261
[474] *Almanak Laemmert*, 1903, http://memoria.bn.br/DocReader/313394/22960
[475] *Almanak Laemmert*, 1918, http://memoria.bn.br/DocReader/313394/69651
[476] *Almanak Laemmert*, 1927, http://memoria.bn.br/DocReader/313394/97381
[477] *Gazeta de Notícias*, 17 de agosto de 1911, http://memoria.bn.br/DocReader/103730_04/27660
[478] *Jornal do Commercio*, 23 de abril de 1911, http://memoria.bn.br/DocReader/364568_10/5395
[479] *Gazeta de Notícias*, 7 de abril de 1923, http://memoria.bn.br/DocReader/103730_05/8428
[480] *Almanak Laemmert*¸1930, http://memoria.bn.br/DocReader/313394/103940
[481] *Jornal do Brasil*, 3 de dezembro de 1931, http://memoria.bn.br/DocReader/030015_05/18622
[482] *Jornal do Brasil*, 14 de março de 1936, http://memoria.bn.br/DocReader/030015_05/62594
[483] *Jornal do Brasil*, 12 de março de 1938, http://memoria.bn.br/DocReader/030015_05/83116
[484] *A Batalha*, 27 de janeiro de 1931, http://memoria.bn.br/DocReader/175102/2600
[485] *Correio da Manhã*, 29 de novembro de 1930, http://memoria.bn.br/DocReader/089842_04/4785
[486] *Diário de Notícias*, 24 de janeiro de 1931, http://memoria.bn.br/DocReader/093718_01/3576
[487] *Almanak Laemmert*, 1934, http://memoria.bn.br/DocReader/313394/112446

commission of *tombamento* (property register) of the Navy[488]. He had even studied in Europe as early as 1908[489].

He also developed a sprawling law career. He studied and graduated at the Rio de Janeiro law school between 1913[490] and 1916[491], after incomplete studies at the Polytechnical school[492]. In 1922, he entered the *Instituto dos Advogados Brasileiros* (Institute of Brazilian Lawyers) [493], and began to practice[494]. He lectured commercial and international law at the School of the Merchant Navy in 1920[495] and penal law at the Naval School of War[496]. He represented the Navy at the commission of reorganization of military justice[497] and at the Legal Congress to Commemorate the Centenary of the Independence[498]. He took part in the commissions of revision of the Codes of Military Criminal Law[499] and Military Procedure[500]. Finally, he published two books, both on law: *curso de direito público internacional e diplomacia do mar* (1925) and *conferências de direito penal militar* (1924).

He also wrote constantly for the general magazine *Ilustração Brasileira*[501] and sometimes for newspapers[502].

After retiring in 1941[503], he peacefully enjoyed his last years until he died as *contra almirante* (vice admiral) in 1957[504].

The six professors we discussed have led different lives, but from their diverse biographies, we can draw a few conclusions on what meant to be a teacher of military law in early 20th century Brazil. Most of them came from families with a legal or military traditions. Those entering the career earlier tended to belong to one or the other world - the books or the arms. However, from the first decade of the 20th century onwards, most of the new intake was

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488 *Correio da Manhã*, 29 de julho de 1938, http://memoria.bn.br/DocReader/089842_04/47474
489 *O Século*, 14 de abril de 1909, http://memoria.bn.br/DocReader/224782/3265
490 *O Imparcial*, 19 de dezembro de 1913, http://memoria.bn.br/DocReader/107670_01/4935
491 *O Século*, 14 de abril de 1909, http://memoria.bn.br/DocReader/224782/3265
492 *Correio da Manhã*, 10 de dezembro de 1908, http://memoria.bn.br/DocReader/089842_01/18416
493 *Almanak Laemmert*, 1922, http://memoria.bn.br/DocReader/313394/79767
494 *Almanak Laemmert*, 1922, http://memoria.bn.br/DocReader/313394/83482
495 *O Paiz*, 5 de dezembro de 1920, http://memoria.bn.br/DocReader/178691_05/4117
496 *Almanak Laemmert*, 1922, http://memoria.bn.br/DocReader/313394/79770
497 *Correio da Manhã*, 26 de setembro de 1919, http://memoria.bn.br/DocReader/089842_02/40938
498 *Correio da Manhã*, 13 de julho de 1922, http://memoria.bn.br/DocReader/089842_03/11127
499 *Diário de Notícias*, 22 de maio de 1934, http://memoria.bn.br/DocReader/093718_01/19037
500 *Correio da Manhã*, 16 de fevereiro de 1938, http://memoria.bn.br/DocReader/089842_04/44925
501 *Ilustração Brasileira*, http://memoria.bn.br/DocReader/008567/58858
502 http://memoria.bn.br/DocReader/008567/58858; *Ilustração Brasileira*, *http://memoria.bn.br/DocReader/107468/15040*; *Ilustração Brasileira*, http://memoria.bn.br/DocReader/107468/15140; *Ilustração Brasileira*, http://memoria.bn.br/DocReader/107468/15233; *Ilustração Brasileira*, http://memoria.bn.br/DocReader/107468/28091; *Ilustração Brasileira*, http://memoria.bn.br/DocReader/107468/28540.
503 *Correio da Manhã*, 3 de janeiro de 1941, http://memoria.bn.br/DocReader/089842_05/4634
504 *Revista Marítima Brasileira*, 1957, http://memoria.bn.br/DocReader/008567/146683

made of professors with both degrees. This was made possible by the two law faculties created in Rio de Janeiro, allowing officers to work in the central bureaucracy of the armed forces while taking classes at the same city. And this city – the capital city – offered other tempting possibilities. Professors with a stable career seemed to always be lurking around power, and they frequently faced the possibility of running for political office. For some, the chair was only a secondary activity, an antechamber of higher ambitions, as Magalhães Castro or Galdino Duarte; others, as Azor de Almeida, were professors taking adventures at fields that were not their own.

No matter how, power was always around. Military law professors acted, or tried to act on the rooms of power, be it the grand politics of parliament or the internal politics of the Army and Navy bureaucracy. The military schools were just pieces in a much wider board. Professors were not only scholars, but federal agents on the capital city. They were pieces called into play in the grand board of statecraft.

6.3 – Why teach military law? Military values and respect for the law

Though backed by a long-standing tradition, the simple fact of teaching law in a Military School was not an obvious choice, and had to be justified. Tarquínio de Souza, the professor of the Naval School we have discussed earlier, even wrote an article for the Brazilian Maritime Review discussing "the teaching of law at the Naval School", which was later . How did this jurist in a military world justified his science – which ultimately meant to justify his own position? Souza used four arguments to defend that law should be taught in the schools of the Navy: scientific, civic, comparative and professional reasons made legal studies deserve a position at the curriculum of future officers.

His scientific argument concerns the unity of all sciences. Both moral and natural sciences describe a single world, governed by similar laws, meaning that a global knowledge cannot leave aside any branch of scientific knowledge (SOUZA, 1902, p. 1376); being law the ultimate "moral and social science", it undeniably must be transmitted to those pursuing higher education at a school that mostly concentrated on the natural sciences (SOUZA, 1902, p. 1376).

The civic argument had less to do with particularities of the institution where Souza taught. According to him, every citizen should be duly informed about the institutions that governed his society and the laws ruling his people; in the United States, for instance, notions of public law, under the name of civic studies, were taught at primary and high schools. Brazil

did not offer an equivalent practice, and, therefore, this absence must be compensated at college level (SOUZA, 1902, p. 1392).

With the comparative argument, he defended that law was widely considered an essential part of the education of technical institutions throughout the world, and of military schools, in particular. Tarquínio de Souza (1902, p. 1393) explicitly mentions that the Italian technical institutes, where industry, commerce and agriculture administrators studied, had law in their curriculum, as well as the French *École de Ponts et Chausses* – this, not to mention several French engineering and agriculture schools. All French military schools offered a thorough law course, and international law had a place at the curricula of the naval academies of England, Germany, Austria, Denmark, Holland, Russia, Greece, Portugal and the United States (SOUZA, 1902, p. 1394). If so many among the major powers retained law in *curricula* associated with technical studies, why should Brazil follow a different path?

Finally, the professional argument was the only one dealing with the particular condition of officers. For Souza, members of the military must comply with the professional duty of guarding the interests of their motherland; being so, they must know the institutions they were defending and to which they were submitted (SOUZA, 1902, p. 1382). Servant should understand the master to better serve. Moreover, studying the statutes and regulations governing social life could be an important way to develop "the legal sense and the sentiment of duty", which was important to all professionals, and even more for the military, which is firmly grounded on discipline and hierarchy (SOUZA, 1902, p. 1396). Finally, the primordial relation between the military and war was fundamentally governed by law. The causes and ways of war were always developed in a legal environment and discussed in legal terms. And law should govern the fight: "the peoples that do not know how to comply with the civilizer discipline of law always cede to the brutal discipline of force" (SOUZA, 1902, p. 1397). To instill the love of law in the officers was the best way to civilize war.

The text concentrates its argumentative arsenal mostly on the utility of law to all citizens: the particular needs of officers and their specific profession are seldom discussed. Though Souza frequently mentions that the teaching of law must consider the "specific needs of officers", he never specifies what these particular circumstances could be (SOUZA, 1902, p. 1395). Lieutenants, captains and admirals should learn law first as citizens, and only then as members of the military. The soldier and the citizen were being entangled at this time, and we can see this process at the other side of the divide too. When Moreira Guimarães, an author we will discuss on the next section, justifies why military law should be taught to law students, he states that, after the law of military service, all citizens are potential soldiers, all male Brazilians

are subject to the regulations of the military draw and, therefore, military law could be applied to anyone. If soldiers were ever more citizens and citizens were ever more soldiers, military law was growing more relevant every day: the *law*, to soldiers, and the *military*, to citizens.

This perspective, however, was mostly cultivated in moderated circles with some sort of commitment to law; not all soldiers revered the legal order. Though perhaps only a detail, the uses of adjectives can also be revealing, especially when they form patterns. Lieutenant Augusto Vinhaes (1913), a former member of the constituent assembly, in a text on the "military spirit of the Navy", discusses how important duty is to the seaman: "in the military career, all must focus on the highest degree of the spirit of duty, that is, the conscience of their moral obligations" (VINHAES, 1913, p. 519). *Moral*: not *moral* and *legal* duties. He could have stressed that officers should bow before the law: later in the text, Vinhaes (1913, p. 522) stresses that, especially in times of peace, the conscience is not enough to teach the duties to soldiers, but "all officers must know the law, though it is very complex". Nevertheless, both in his text and on the other discussions in military journals pursued by officers, almost all the emphasis is put on the moral dimension of duties. Joint respect of legality and the law is seldom mentioned. An afterthought: for many, law was an afterthought.

6.4 – Writing and teaching military law in the Army: towards science and sociology

Two general books on military law were published in the First Republic: *Direito Militar* (1924), from general José Maria Moreira Guimarães, and *Compêndio para a Cadeira de Direito da Escola Militar* (1902), from the already known Vicente Antônio do Espírito Santo Júnior. They are very different works, with different intentions, but they share one fundamental trait: they need to develop a middle ground between the law and military life. In this section, I will discuss some characteristics of both books and describe some of the central theories they espoused to understand how they conceived the relationship between law and the military world. The details on how they discussed some particular aspects of the Brazilian legal order will be left for the next chapters.

We shall begin with Moreira Guimarães. He was a general, and not a jurist – and this condition is made clear in each page of his book. He says in the foreword that he had not dedicated himself to the legal studies since the old days when he was a young student at the Military School following lessons given by Thomáz Alves Júnior, but in recent years, one friend – who he does not name – had invited him to give a few lectures on military law at the Law School of Rio de Janeiro. This book, then, utters a message from a soldier to (future) lawyers:

it cannot be read as an internal communication of the military, but results from the interaction between the sword and the parchment. But the very structure of the chapters show that this word was thought by a soldier, and not by a scholar acquainted with the inner machinery of the legal mind. Moreira Guimarães does not follow the classificatory obsession that is a staple of lawyers: his book mixes constitutional, administrative and military law in shocking promiscuity – shocking at least for those who sat for five years in the banks of law schools.

In chapter eight of his book, for instance, *the citizen and the military*, Guimarães discusses citizenship (constitutional law), pensions, social security and ranks (administrative law), military service, and even the guns that regular citizens should be acquainted with (public policy). This chapter is therefore organized around a sociological problem, that is, the particular rights that comprise the *status* of soldier and how this bundle of prerogatives and obligations distances those in uniform from regular citizens. There is no legal principle linking all the issues discussed there. Chapter three, on *peace and war*, follows a similar logic: it compares the central administration in times of bonanza with its organization during the fight, and finishes discussing relationships between states: he mixes administrative and international law to dwell into the political problem of how States reacts to war.

Not the whole organization of the book is governed by these "sociological" principles, however. In several chapters, he discusses highly "legal" issues of criminal law, though from a more philosophical point of view – which is quite understandable, as a general discussing technical issues with law students would be annoyingly akin to one trying to teach the priest how to say mass. He must present a fresh perspective, new criteria, or he would be simple offering the same law professors could do, only worse. Nevertheless, Moreira Guimarães even discussed Savigny and Teixeira de Freitas when he treats the concept of rights (*direitos subjetivos*) in the chapter on civil and political rights of soldiers. Though not a jurist, he was in no way ill-informed on the craft. How did he acquire such knowledge?

His biography clarifies how he could have such knowledge even though he had not sacrificed five years of his life at the civic altar of law schools.

José Maria Moreira Guimarães (Laranjeiras (SE), 04/11/1864[505] – Rio de Janeiro, 10/02/1940[506]) studied at the Military School of Rio de Janeiro[507], finishing the course of cavalry in 1887[508] and receiving the title of bachelor in 1897[509]. He was probably a good

[505] *Gazeta de Notícias*, 5 de novembro de 1899, http://memoria.bn.br/DocReader/103730_03/20843
[506] *Boletim da Sociedade de Geografia do Rio de Janeiro*, 1940, http://memoria.bn.br/DocReader/181897/6773
[507] *Tribuna Militar*, 9 de fevereiro de 1882, http://memoria.bn.br/DocReader/393673/254
[508] *Almanak do Ministério da Guerra*, 1887, http://memoria.bn.br/DocReader/829510/790
[509] *O Paiz*, 17 de janeiro de 1897, http://memoria.bn.br/DocReader/178691_02/17380

student, as he received the title of lieutenant-student (*alferez-aluno*), an honor for the best students that came with a small stipend. He was involved in the intellectual effervescence that would lead to the proclamation of the republic: he took part in a literary society[510], published several texts in the press[511] defending mecanicist ideas[512] and some poetry[513]. Being in the victorious circle, he benefitted from the early republic promotions[514].

From the 1890s to the 1920s, he steadily rose through the bureaucracy of the Army. He was a member of a battalion of engineers[515], was the responsible of material and human resources of the Army in Sergipe[516], was an instructor at the Practical[517] and the Military High School[518] and worked at the general directorate of artillery[519], the War Arsenal[520], the Conceição Fort[521] and the General Staff[522]. In 1904, he was even appointed military attaché of Brazil in Japan. He occupied several other positions until he became head of the Military School and retired in 1918 as colonel[523].

Though Moreira Guimarães led a consistent military career, his most interesting achievements spawned from his cultural endeavors. In the early 20th century, he directed the newspaper *O Brasil Militar*[524], and in 1932, he directed the review of the Military Club[525]. He presided the charity *Sociedade Beneficente Sergipana*[526]. In 1902, he gave a conference on "military discipline and human freedom" at the Military Club[527]. He was a member of the Historical and Geographical Institutes of São Paulo[528] and Brazil[529], the Geography Society of Rio de Janeiro[530] and Freemasonry[531]. He presided over the Brazilian Congress of the History

[510] *O Pais*, 11 de janeiro de 1885, http://memoria.bn.br/DocReader/178691_01/411
[511] *Almanak Literário e Estatístico do Rio Grande do Sul*, 1889, 1, http://memoria.bn.br/DocReader/829447/68; *Almanak do Jornal do Agricultor*, 1889, 1, http://memoria.bn.br/DocReader/706353/592; *Revista da Família Acadêmica*, 1888, 11, http://memoria.bn.br/DocReader/338915/662
[512] *Revista da Família Acadêmica*, 1887, nº 1, http://memoria.bn.br/DocReader/338915/331; *Revista da Família Acadêmica*, 1888, 6, http://memoria.bn.br/DocReader/338915/475
[513] *Revista da Família Acadêmica*, 1889, 3, http://memoria.bn.br/DocReader/338915/762
[514] *Gazeta de Notícias*, 8 de janeiro de 1890, http://memoria.bn.br/DocReader/103730_03/34
[515] *Almanak Laemmert*, 1881, http://memoria.bn.br/DocReader/313394/289
[516] *Almanak Laemmert*, 1881, http://memoria.bn.br/DocReader/313394/297
[517] *Almanak Laemmert*, 1892, http://memoria.bn.br/DocReader/313394/2811
[518] *Almanak Laemmert*, 1899, http://memoria.bn.br/DocReader/313394/16916
[519] *Almanak Laemmert*, 1899, http://memoria.bn.br/DocReader/313394/18116
[520] *Almanak Laemmert*, 1900, http://memoria.bn.br/DocReader/313394/18297
[521] *Almanak Laemmert*, 1902, http://memoria.bn.br/DocReader/313394/22571
[522] *Almanak Laemmert*, 1904, http://memoria.bn.br/DocReader/313394/24721
[523] *Boletim da Sociedade de Geografia do Rio de Janeiro*, 1940, http://memoria.bn.br/DocReader/181897/6783
[524] *Almanak Laemmert*, 1897, http://memoria.bn.br/DocReader/313394/14423
[525] *A Noite*, 27 de janeiro de 1932, http://memoria.bn.br/DocReader/348970_03/7250
[526] *O Paiz*, 25 de março de 1901, http://memoria.bn.br/DocReader/178691_03/2285
[527] *Gazeta de Notícias*, 6 de março de 1902, http://memoria.bn.br/DocReader/103730_04/3675
[528] *O Paiz*, 9 de julho de 1909, http://memoria.bn.br/DocReader/178691_03/20076
[529] *Almanak Laemmert*, 1929, http://memoria.bn.br/DocReader/313394/101328
[530] *Almanak Laemmert*, 1910, http://memoria.bn.br/DocReader/313394/41729
[531] *Boletim da Sociedade de Geografia do Rio de Janeiro*, 1940, http://memoria.bn.br/DocReader/181897/6773

of the Americas[532], the Circle of Retired Officers[533], the Brazilian Congress of Geography[534] and the Brazilian Society of Philosophy[535].

After 1922, he taught history of religions at the School of Philosophy and Letters of Rio de Janeiro[536]. He studied the first five years of medicine[537]. Finally, he run for federal deputy in 1896[538] and 1903[539] and finally got elected in 1912[540].

In the last three decades of his life, Moreira Guimarães was at the forefront of Brazilian intellectual life. A book on military law was but one stimulating intellectual achievement for a man who had written or taught about engineering, philosophy, geography, religion and history. If his book is sometimes confusing, we can still admire it for bringing a greenish flavor for the frequently pallid bread of lawyers.

We are already acquainted with Vicente Antônio do Espírito Santo Júnior – perhaps even more than we would like to be. Therefore, I will concentrate only on his book and presuppose that the reader is familiarized with his biography. The *Compêndio* was meant to summarize the most important information needed by future officers studying at the Military School, and therefore should "contain only a synthesis" of the most important topics and be "as succinct as possible" (ESPÍRITO SANTO JÚNIOR, 1902, p. VI), as the author himself writes. However, the book spanned over two volumes with more than 500 pages each, making it hard to believe that Espírito Santo Júnior had only truly selected what was most important for his students. According to him, the most striking challenge of his duty was to teach law to students that had a background in physics and chemistry, bud had not studied biology or sociology, meaning that he had to provide elementary knowledge of both sciences before introducing the youngsters to the intricate ways of the law (ESPÍRITO SANTO JÚNIOR, 1902, p. VII). He was, therefore, some sort of mediator between the realm of norms and prescriptions, on one hand, and the newcomers accustomed with the arts of guns and numbers, on the other. We shall remember that Espírito Santo Júnior himself graduated from the Military School and later faced legal studies, meaning that he went through the same transition in a much deeper way.

Both books, therefore, aimed to bridge two worlds, though they were written from different margins of this borderland river: Moreira Guimarães was a soldier speaking to

[532] *O Paiz*, 12 de setembro de 1922, http://memoria.bn.br/DocReader/178691_05/10791
[533] *Almanak Laemmert*, 1930, http://memoria.bn.br/DocReader/313394/104106
[534] *Boletim da Sociedade de Geografia do Rio de Janeiro*, 1940, http://memoria.bn.br/DocReader/181897/6777
[535] *Boletim da Sociedade de Geografia do Rio de Janeiro*, 1940, http://memoria.bn.br/DocReader/181897/6786
[536] *Almanak Laemmert*, 1922, http://memoria.bn.br/DocReader/313394/79768
[537] *Boletim da Sociedade de Geografia do Rio de Janeiro*, 1940, http://memoria.bn.br/DocReader/181897/6785
[538] *A Notícia*, 26 de dezembro de 1896, http://memoria.bn.br/DocReader/830380/2292
[539] *Correio da Manhã*, 9 de fevereiro de 1903, http://memoria.bn.br/DocReader/089842_01/3260
[540] *Annais da Câmara dos Deputados*, 1912, 9, http://memoria.bn.br/DocReader/060917_03/21630

lawyers, and Espírito Santo Júnior was a soldier-lawyer presenting law to soldiers. Can we find specificities on the law they presented?

Both of them tried – frequently hard – to reconcile the organicist and scientificist principles they learned in their times as students with the Brazilian legal order. For Espírito Santo Júnior who published his book more than 20 years earlier than Moreira Guimarães, this challenge was even more important, as positivism was rife in 1905 military circles in was that it was not in 1924. The first section of his book, for instance, called "natural law" (*direito natural*), is divided in three chapters: biology, moral and sociology. He thinks that natural law, arising from the necessities inherent to the human condition, do not have an ultimately metaphysical ground, but rise directly from material conditions that man face in the world. Espírito Santo Júnior therefore, aims to deduce the fundamental idea of law from natural phenomena, particularly, from the fundamental functions of the brain: sensibility, intelligence and will. From there, he discusses moral and sociology to finally arrive at law, which is for him the part of sociology aiming to establish harmony between the different parts of society (ESPÍRITO SANTO JÚNIOR, 1902, p. 45). From this, is not hard to foresee that our soldier-lawyer thought that social and natural laws were essentially phenomena of the same order (ESPÍRITO SANTO JÚNIOR, 1902, p. 48-49). It looks like metaphysics, but he calls it science.

Espírito Santo Júnior is – or tries to be - the master of a difficult synthesis. He positions himself in line with the philosophical tradition of natural law, on the one hand; he defends, for instance, that at the center of law lied natural rights, which were related to what he calls the fundamental right, liberty (ESPÍRITO SANTO JÚNIOR, 1902a, p. 55). He also hints that natural law could prevail over positive law when it comes to international treaties: those contracts between states would only be valid if "their ends are in harmony with the principles of truth, justice and good" (ESPÍRITO SANTO JÚNIOR, 1902b, p. 47). On the other hand, his thought is deeply rooted in a deterministic perspective that could easily come at odds with the fundamental legal principle of free will.

Moreira Guimarães craves to follow the same path. His conciliatory attempt is much more naïve, but perhaps precisely for being gullible, it better demonstrates the true basis upon which lied this curious marriage between philosophical positivism and natural law. For him, law and punishment are the reaction of the order against the chaos unleashed by those violating social rules; this would simply be the sociological consequence of the third law of Newton, that to each action corresponds a reaction with the same intensity with the opposite direction (MOREIRA GUIMARÃES, 1924, p. 15). It is not hard to predict that he also justifies criminal law with the third law of Newton (MOREIRA GUIMARÃES, 1924, p. 71), deems custom and

habits a consequence of the law of conservation, that is, the law of Kepler (MOREIRA GUIMARÃES, 1924, p. 15), describes law as the function of four variables, subject, object, relation and coercion (MOREIRA GUIMARÃES, 1924, p. 19) and states that the idea of *force* as used in the expression public force, or armed force, is the same as the concept of force in mechanics (MOREIRA GUIMARÃES, 1924, p. 25). Law is deemed by both Moreira Guimarães and Espírito Santo Júnior as simply a particular way to enforce within society the same principles governing the natural world. As a consequence, similar words with radically different meanings are approximated as if a crime and the fall of a rock were ruled by the very same movement.

The mix of doctrines employed by both authors comprise evolutionist and organicist stances. Moreira Guimarães (1924, p. 28), for instance, defends that the role of the military in society evolves from an offensive, dominating force among barbarians towards a strictly defensive might in constitutional societies. Obviously, such a narrative necessarily enshrines their own society as the ultimate apex of human evolution. For Espírito Santo Júnior (1902b, p. 57), wars between civilized nations are simply "a fight, between organized armies, to solve an issue of public law". Soldiers seem to be nothing more than jurists debating with guns.

The examples could follow, but I believe I made my point. I would only add that those books do not simply reflect the opinion of two authors, but were generously accepted in intellectual circles - or, at least, the military ones. Espírito Santo Júnior received a prize of 5 *contos de réis*, a few years of salary, for publishing his book[541]. The reviews of the *Compêndio* published in the press were mostly positive: one praised the author for studying law "from a strictly positive point of view"[542] and the other exalted the book for being a good example of the "positive sciences" and for giving good notions of biology and sociology, which the reviewer deemed indispensable to understand law[543]. The sole negative reception came – quite ironically - from Moreira Guimarães himself, who criticized Espírito Santo Júnior for not distinguishing very clearly law from sociology, as he would have had described legal phenomena as a mere reflex of sociological realities[544]. A point that could easily be made of Guimarães' own book 22 years later – but he did not know back then what would be his own shortcomings two decades later. The seemingly innocent naturalistic inroads of our two authors were therefore accepted in early 20th century as fine science.

[541] *A Notícia*, 29 de julho de 1904, http://memoria.bn.br/DocReader/830380/10924
[542] *A Província*, 14 de março de 1903, http://memoria.bn.br/DocReader/128066_01/13179
[543] *Jornal do Brasil*, 2 de junho de 1902, http://memoria.bn.br/DocReader/030015_02/4619
[544] *Correio da Manhã*, 14 de abril de 1906, http://memoria.bn.br/DocReader/089842_01/3653

This sort of naturalistic thinking was not exclusive of soldiers, but since the late years of the empire, it was gaining leeway in the legal world, as thoroughly discussed by José Reinado de Lima Lopes (2016) especially for the philosophy of law. The main difference was that, if legal philosophers relied mostly in Spencer and evolutionism[545], soldiers were more attached to Auguste Comte. And if most legal naturalists parted way with debates on justice and good, at least Espírito Santo Júnior embraced them. But both strains of positivism attempted to derive general, universal laws from observations of the biological world, which was conflated with the social sphere; for this, they could be paradoxically called jusnaturalistic positivists, provided that one keeps in mind that their jusnaturalism is neither theological nor rationalist, as were the medieval and early modern ones, but biological and sociological – something already discussed by José Pedro Galvão de Souza (1977, p. 23 ss.) concerning other authors – namely, Spencer and Pedro Lessa.

In short, the military law taught and written in Brazil touched the classical issues of the purely legal studies, trying to combine them with the new positivistic tendencies. Though interesting, these conciliations frequently produced, to put it kindly, less than optimal results. Education was mostly concentrated in constitutional and criminal law, and administrative military law was left at a secondary position.

6.5 – A place for international law at the Naval School

The law taught at the schools of the Navy was much more specific than the one circulating within the Army: the chair for sailors concerned only international law and diplomacy of the sea. An opportunity to dive into legal technicalities or another path for law to be colonized by military sciences? If we cannot enter the classrooms of early 20th century Rio de Janeiro to find out what professors were transmitting to their students, we can access the books they wrote; and they present important clues on the nature and ends of the law taught at the Naval School and at the Naval School of War.

Both Galdino Pimentel Duarte and José Antônio Pedreira de Magalhães Castro, the professors of this discipline, published books on the subject. As we have met both of them earlier in this chapter, we do not need to describe in depth their biographies; I will only recall their education: Duarte was a Navy officer that later graduated in law and practiced as a lawyer,

[545] As we will see in chapter 8, Mário Gameiro and Hélio Lobo, two lawyers writing about military law, used Spencer heavily.

while Magalhães Castro was a traditional lawyer from an influent family from the empire. I will now discuss the ideas one could find in their books.

The book of Duarte transcribes the course he gave at the Naval School in 1918, later revised in 1922. The lessons were divided in fourteen parts and published at the *Revista Marítima Brasileira* (Brazilian Maritime Review), a mostly technical journal destined to Navy officers. At the side of those legal speculations, the reader could find political debates, news on the most recent guns and types of ships, ballistic calculations and navigation charts. Among the eclectic professional interests of seamen, law could find a place: international law, more precisely, was immediately and clearly useful for those constantly sailing through deep-blue oceans, going from port to port, nation to nation in a journey that was frequently alien for officers in the Army. Later, in 1925, the fascicles printed at the review were assembled and published as a book on its own, the *Curso de direito público internacional e diplomacia do mar*.

Though written by an officer, the book featured often highly technical touching specific legal technicalities; the two lessons on consuls are a good example of how specific Duarte could be with his students. The "international relations" of the title appear only incidentally, and the central problems under discussion dwell on the house of international law. But those wishing to conclude from this and the fact that Duarte was a seaman that positivism was constantly present in the book would be blatantly wrong. Though the author believes that law is a science, as was fashionable at the time, he also endorses natural law, which is, for him, "the complex of principles deriving from natural reason, being authored by the Creator of man and sanctioned by conscience, by the public esteem and despise, and, finally, by the judgement of God" (DUARTE, 1922, p. 651).

Natural law and rational principles appear frequently on the pages of these conferences. International law, for instance, derives from the "law of natural sociability" between nations (DUARTE, 1922, p. 654). He discusses the classical problem of freedom of the sea in highly technical terms, dissecting problems of property law – but according to natural, and not positive law. To advance his positions, he considers the ideas of Hugo Grotius, John Selden, Roman Law and even the biblical book of Jeremiah (DUARTE, 1922, p. 375-386).

Yet, the book is deeply attentive to the practical needs of its target readers. For example, when Duarte discusses sovereignty in waters in the vicinity of the coast, he dissects the nature of several particular waterways as he mentions the relevant treaties (DUARTE, 1922, p. 625 ss.). The tenth lesson exposes several details of maritime protocol, its history, how much ceremonial shots should be given and by whom in several formal occasions, how to handle flags

etc. One fifth of the lessons cover the law of war, giving him the opportunity to discuss how the maritime fight differs from terrestrial conflicts (DUARTE, 1922, p. 1193 ss.). Therefore, the book insightfully combine highly specific legal debates with information that certainly would be useful for those navigating Brazilian battleships around the globe.

If Duarte's course was general, Magalhães Castro's book was specific.

The *Cadeira de direito internacional e diplomacia do mar* collected the speeches Castro gave at the inaugural lessons of his course in each year between 1914 and 1923, plus a chapter answering a question from one of his students[546]. Formal lectures as those are aimed to inspire. The chapters therefore discuss specific issues to provoke and tackle the pressing issues defying international law. Only one chapter discusses a technical topic of international law – the 1923 lesson on "international persons". Most of the time, Castro debated the Great War in Europe, its consequences and potentially catastrophic consequences of the peace sealed at Versailles. The book, thus, communicate quite well with officers, as its debates concern more geopolitics than law, more current affairs than eternal truths.

One of the texts retains particular interest to elucidate the legal positions of Magalhães Castro: the inaugural lesson of 1915, called "law and war". In this lecture, he recognizes that the times are particularly ominous for debates on conflicts, and recalls several opportunities in which supposedly civilized nations had engaged in wars of conquest or violated principles of international law: the conquest of Transvaal, the Russian-Japanese war, the creation of Panama (MAGALHÃES CASTRO, 1925, p. 27). Yet, differently from what many people thought, law and war were not opposite arts, and misconceptions about both of them were liable for the lack of faith on the civilized rules.

For him, war is neither the realm of pure force, nor law is a mere idea. The pernicious positivism had defended that law was nothing more than an ideal, and, therefore, did not exist in the world. But, for Castro (1925, p. 34), not only the realities of the natural world exist, but also the ideas of the intellectual spirit, meaning that law enjoys ontological dignity. War, on the other hand, was not simply a limitless fight, but had a double nature: it consists at the same time of the material fact of the combat and of duties related to it. This fundamental fact derives the

[546] The titles of the chapters are: 1914 – Previsão da grande guerra. Belicismo e pacifismo. Impossibilidade da paz perpétua entre as nações; 1915 – O direito e a guerra; 1916 – A civilização e a guerra; 1917 – Previsões que se realizam. Guerra de orgulho. Ilusões que se dissipam; 1918 – O mundo ainda não pode ter paz. Paz russa. Paz alemã. Paz d'Entente ou paz americana. Manchas no sol; 1919 – A paz no mundo e a liga das nações; 1920 – O problema do mal. A guerra, mal supremo entre as Nações. O Tratado de Versailles e a paz do mundo; 1921 – O que é o direito. Concepção teológica, metafísica e positiva. Nosso ponto de vista; 1922 – O materialismo no Direito Internacional e nos processos diplomáticos; 1923 – Pessoas internacionais; Pergunta de um aluno – O que é o homem?

nature of war itself: not a conflict waged between people, but between abstract entities - nations (MAGALHÃES CASTRO, 1924, p. 35). Soldiers do not fight as private citizens, but as representatives of their nations.

Castro aims to fight both extremist positions: the "humanist exaggeration that do not know the empire of necessity" and the "militarist exaggeration" that is acquainted only with that same empire; the middle ground between them could produce the "conciliation between legal idealism and military realism" (MAGALHÃES CASTRO, 1924, p. 35). His explicit aim is to bring lawyers and soldiers together in an equilibrated faith on the power of international law to promote civilization, even amidst the dreads and despairs of war.

Dreads of war. The European fight had cast a dark shadow upon both books, but the writing of Magalhães Castro better demonstrated the consequences of the shattered faith in European culture. He ironically referred in 1920 that the world was called by Greeks and Romans *cosmos* and *mundos*, meaning order and harmony; yet, their contemporary world offered only a diametrically opposed view (MAGALHÃES CASTRO, 1924, p. 120), convulsed by "revolutions and cataclysms" (MAGALHÃES CASTRO, 1924, p. 127). The ideal of international solidarity had failed on the battlefields of France and Belgium (MAGALHÃES CASTRO, 1924, p. 127-128).

The last characteristics of the book I would like to highlight is its anti-positivistic stance. Rejecting metaphysics and ideas, the very founder of philosophical positivism had advocated in his positivistic catechism that the word "law" should be banished from the realm of philosophy (COMTE, 1874, p. 237-238). But even his latter followers had recognized that such a radical stance could not be sustained. According to Magalhães Castro (1925, pp. 164-166), many Brazil followers of positivism had tried to reduce law to a mere consequence of sociology. Yet, quite ironically, Magalhães Castro adopts Comte's law of the three states (theological, metaphysical[547] and positive) and discusses the idea of law in each of them. He rejects all of them for each deems law to be either a fact or an idea, but, for him, the normative world is constituted by both dimensions (MAGALHÃES CASTRO, 1924, p. 177).

Despite some dissimilarities, the books of Galdino Duarte and Magalhães Castro share similar traits. They come from a primarily legal stance, but try (and are successful) to communicate with the maritime world. Both authors share catholic presuppositions (stronger in Magalhães Castro), putting them at odds with the positivist environment that still held some foot within the military world. Magalhães Castro himself, though rejecting the basis of

[547] Said by Magalhães Castro to have been founded by Hugo Grotius. He refers probably to Early Modern natural law.

positivism, uses some ideas from this philosophical trend to develop his discussions. And both works are rooted in varying degrees in natural law. They try to instill in the seamen the faith in the "legal religion" as a way not to end war, but to transform it into an endeavor as civilized as possible.

6.6 – A hybrid science and a practical knowledge? Law in military journals

The quality of law is not the most enticing subject; even more so for soldiers and seamen, accustomed to enter jungles and deserts, used to sail the seven seas and discover the world in the air, water and lands, to shoot and to build, to fire and to travel. Not to read and to debate. This is clearly visible in military reviews, such as the *Revista Marítima Brasileira* (Brazilian Maritime Review). Most of the articles published there focus on natural sciences: they teach ballistics, how to repair a ship, notify officers of the most recent technological developments on guns, firearms, artillery etc. These periodicals are used to publish news on foreign navies and even discuss some administrative reforms – after all, a military is not a bunch of ships and guns assembled together, but is made first and foremost of people. Yet, law found its way into the pages of those reviews – though not always in the most direct way.

Yet, as we discussed earlier, the Navy got interested in international law by the end of the 19th century, entailing some space for discussions related with this field on the pages of military journals. Frederico Villar (1906), for instance, published a short text on "law and war", and Tarquínio de Souza published his already mentioned "the teaching of law at the Naval School".

Yet, on this field, the most remarkable texts were the articles of Japanese officers and international lawyers translated into Portuguese in the first years of the 20th century and published at the *Revista Marítima Brasileira*. Three of them were published on the journal, and deserve careful analysis.

Between 1898 and 1900, the review published in eight parts the book *the Sino-Japanese war from the point of view of international law*, published two years earlier by Nagao Aruga, professor of international law at the Army Academy of Tokyo. The text is blatantly Japanese-friendly and borderline racist; it says the Chinese are barbarians akin to the Turks, Arabians and North-American Indians, yet the Japanese decided to treat them with the same civilizational degree they would display in a conflict against the English or French (ARUGA, 1898, p. 386). Aruga even bragged that, as councilor to the prime-minister of Japan, he helped to write a decree preserving the property of Chinese people in the empire of the sun (ARUGA, 1898, p. 481).

Later, he make the effort to justify why the Japanese government did not allow the Red Cross to act in the frontline – the society was not established in China and there were not enough resources to support its activity (ARUGA, 1898, p. 241). To summarize, the work starkly defends the Japanese war effort as a deliberate civilized endeavor against barbarian offenders.

A text with precisely the same tone was published in 1901. Written by Sakuyé Takahashi, the *applications of international law in the Sino-Japanese War* aims once again to defend Japanese attitudes. The author, professor of international law at the Naval School of Tokyo, stresses that Japan had proceeded "generously with China", even though Beijing had not signed neither the convention of Geneva, nor the declaration of Paris (TAKAHASHI, 1901, p. 1095). Japan, on the contrary, was the only oriental subscribing to both international declarations, out of a "love of law" (TAKAHASHI, 1901, p. 1093), that was stimulated by the "European civilization introduced a few years ago", both grounded in authentically Japanese roots (TAKAHASHI, 1901, p. 1095-1096). Quite interestingly, he combines a colonial praise for European ideas with nativist exaltation of Japanese values: Europe had scattered the sound seed of civilization over the fertile ground of Japanese civilization. Future blossomed for Japan – though the Chinese might have felt these recent crops as damning weeds.

Four years later, the last text of this series was published by the review: the *incidents of the Russian-Japanese war from the viewpoint of international law*, by N. Okoshi, a former ambassador of Japan to Brazil and Argentina. As the previous two, it is most focused in defending the posture of Japan in the war.

Where did all this interest in Japan came from?

The answer is Napoleão Reys, the translator of all three texts. He had a surprising, dynamic career: he studied for one year at the Military School, then quit the service in 1891 to became an administrative worker at the post office; 1899, he became an amanuensis at the Ministry of Foreign Affairs in Rio de Janeiro and rose through the administrative ranks until he went offshore and served in Europe, Japan and China[548]. In 1898, he wrote an article on "international law in Japan" (REYS, 1898), praising the oriental empire for its development since adopting European institutions nearly thirty years earlier, including a Criminal code and the practice of international law. He entirely accepts Ariga's narrative that Japan had followed the civilized principles in the war waged against China, following the book that the Japanese professor would have written "sincerely and impartially" (REYS, 1898, p. 377). He praises

[548] MINISTÉRIO DAS RELAÇÕES EXTERIORES. *Funcionários do Ministério das Relações Exteriores em 15 de novembro de 1916*. Rio de Janeiro: Imprensa Nacional, 1916. http://www.funag.gov.br/chdd/images/Anuario_Funcionarios_MRE/Anuario1916.pdf

Ariga extensively for being the first Japanese to write on international law, for his membership of the Society of the Red Cross and for his actions as member of the Japanese cabinet. Three years later, when he presents Takahashi, Reys calls him the naval equivalent of what Ariga was for the land forces: the maximum authority on international law in Japan.

This flow of texts, however, does not spawn simply from the solipsistic curiosity of one idiosyncratic man. The Japanese victories in the wars against Russia and China had raised the profile of the oriental empire; for example, in 1911, Antônio Júlio de Oliveira Sampaio gave a speech at the Rio de Janeiro Association of Commerce Employees discussing the naval military education in Japan[549]. The Japanese Navy started do be cited in some comparisons Brazil and foreign navies in the reports of the Ministry of the Navy. And, in 1908, the first ship of Japanese immigrants would arrive in Brazil, in a significant process of migration that resulted in the South American country becoming in the next decades the home of the largest Japanese community outside Japan in the whole world. Not by chance, Reys mentions that he received a letter from Ariga by the hands of Teikichi Tanaka, a Japanese official that had come to Brazil to discuss the future immigration (REYS, 1898, p. 379).

The cultural exchanges between Brazil and Japan were also mediated by Europe; Reys mentions that Nagao Ariga had been the representative of Japan in the international conferences in Europe. Takahashi's article, for instance, was originally a conference delivered at the Japan Society of London and published in English in its *Transactions*. Ariga's book had been published originally in French in 1896; everything suggests that Reys did not read Japanese, but only translated texts from European languages into Portuguese. Notwithstanding his lack of acquaintance with the Japanese language, he appears in 1901 as a corresponding member of the Japan Society of London (TAKAHASHI, 1901, p. 1122), and translated in 1902 another article from Ariga, this time, on "the red cross on the far east" (ARIGA, 1902). Though the bridge built between Brazil and Japan was tenuous, mostly based in the defense of Japan's attitudes in the war and on the immediate perspective of immigration, the mere fact that Brazilians and Japanese lawyers were in touch opens our eyes for unexpected cultural corridors running through the particular world of early 20th century international law.

Apart from this exciting east-west exchange, one can also find some texts on military penal law throughout the Brazilian Maritime Review. Oscar de Macedo Soares (1910; 1911), for instance published two separate commentaries respectively on articles 97 and 98 of the Military Penal Code; both of them seem to be part of his book commenting the code and aim

[549] https://www.ihgb.org.br/pesquisa/biblioteca/item/15009-instruc%C3%A7%C3%A3o-militar-naval-no-jap%C3%A3o-e-bases-de-opera%C3%A7%C3%B5es-antonio-julio-de-oliveira-sampaio.html

to give to readers a taste of his more complete work. On the same field, we can also find some reports written by Galdino Pimentel Duarte, the notorious professor and seaman we have already met. In his capacity as representative of the Navy, he took part in the Penal and Penitentiary Brazilian Conference (DUARTE, 1930) and in the Legal Congress Commemorative of the Brazilian Independence (DUARTE, 1922); the reports of both congregations concerning military law were published in the review. Finally, the review published between 1922 and 1924 the Course of International Public Law and Diplomacy of the Sea of Galdino Duarte in 13 parts, as I have already mentioned.

Though law is not absent from the review, as we have just saw, it is however quite striking how it does not appear when it could. The maritime review published some texts on the recently-flourishing discipline of administrative science, even considering the specific needs of the main navies of the world; yet, those texts completely exclude law (TAVARES, 1911; BELL, 1922; VINHAES, 1925). The works of Tavares, Bell and Vinhaes parted away with the tradition followed by most Brazilian books of administrative law in early 20th century, which always provided for whole sections discussing the relations between administrative sciences and administrative law. Discipline could also be another field where authors could have ventured into legal discussions; yet, they mostly refrained from engaging in legal debates when addressing such topics (for instance, THOMPSON, 1913). Sure, there are some debates touching legal issues, such as Joaquim Marques Baptista de Leão's (1911) libel against physical punishment in the Navy, which even discusses laws and statutes; yet, those debates often concentrates on the political aspects of the controversy: they are understood as administrative, and not legal changes. A telling symptom appears in the wording of articles: when writers utter their praises of military discipline, they emphasize how soldiers need to respect statutes and regulations (LIMA, 1916, p. 307; VIDAL DE OLIVEIRA, 1899, p. 264; VINHAES, 1922, p. 1159); the word "law", once again, is left outside of the conversation. When the organization and reform of the general staff were discussed, the debate only picked administrative aspects to reflect upon, while law was left in the shadows (CUNHA, 1916; GAMA, 1915).

The story of law in military reviews is mostly a chronicle of an absence precisely for the anti-abstract attitude that was rife in the military. And the more granular evidence from the review corroborates the general impression left by the ministerial reports. Arthur Jaceguay (1897, p. 139), for instance, claimed that the "maritime profession depends more on physical education" rather than "scientific or literary preparation". Officers should refrain from concentrating too much into "navigation, mechanics and physics" and take more time to learn how to actually guide a ship, an art that simple pilots could do perfectly with the help of mere

observation. If even the natural sciences were wearily regarded by some, imagine how law was seen. Aurélio Falcão (1912) went down the same path, claiming that a natural officer would not be born out of books: soldiers did not need to turn into a "hydrographer, chemist, astronomer or mathematician" to learn the arts of the sea; on the contrary, actual experience onboard at vessels was what should be demanded from students. Orlando Ferreira (1905) complained about how much theory and little practice could be found in the syllabi of the Naval School.

The environment was potentially hostile for law: more directly useful sciences, such as physics and math, were not always held in good esteem by the higher administration of the military. This weary regard would fall much more dramatically upon law, which was associated with the wordy and babbling political elite. However, if the metaphysical excesses were curtailed, law could be useful for the administrative engines of the Navy. Its study, therefore, could claim a proper, though limited space. Developments with more breath and scope were restrained to individual initiatives from a few brave actors, such as Galdino Duarte representing the Navy in legal congresses or publishing his book, ore the bizarre and thrilling gestures towards Japan from Napoleão Reys, this *avant-la-lettre* legal otaku.

Though constantly uncultivated and sometimes actively suffocated, law could flourish in the harsh military environment. Sometimes, even thrive.

6.7 – Between two worlds: final remarks

The charm of encounters is no art for novices. It is a difficult trick, made in the heat of alleys, built upon misunderstandings, toppled by chance – but, in the end, it pays off. The scientific discipline of military law is an instructing example. As the political and social conditions that had obliterated the empire gradually faded away, the military and the legal worlds grew closer to each other. Hidden affinities were revealed, shared interests surfaced and even a few bridges could be built. But they still belonged to different planets; rifts were not erased and altercations were always a possibility.

The very profile of professors teaching military law to officers is the most glaring proof of this gradual approximation. The generation that entered service right after the proclamation of the First Republic was made by citizens of either country, either lawyers or jurists; after the turn of the 20th century, a new strain of scholars gained the rooms of military academies, bearing in their experiences the sign of both instructions: soldiers *and* lawyers. Concrete facts must be referenced to explain this movement: new law schools throughout the country eased the studies for workers challenged by the need to reconcile work and education. But this process brought

a more spiritual development. A shared culture now could develop, one that would not only account for engines and bullets or books and bulletins, but one that would bring together the administrative structure of the armed forces and the spiritual movement that only law can instill in norms.

This purported world, however, was still a veil breezing through crossing winds. The story of the justifications of why the chair of military law should exist demonstrates that soldiers were deemed less the representatives of a strange new world and more as one special class of Brazilians. Citizen-soldiers. As citizens, they must know law; this law should be adapted to their particular circumstances – but only slightly so. Most of this instruction would be akin to the instruction that must be offered to any other members of the national communion in the perilous path towards full citizenship.

Soldiers and lawyers. But not only. Water and earth, sea and land also encounter their alchemic mixtures and repulsions. The legal culture fostered at the Naval School was one of much more political profile, concentrated at international law and aiming to give to naval officers not only information about political structures, but a vision pf the world. Aristocratic and enclosed, its genealogy paid tribute to the empire, and its professors were the bastions of a jusnaturalism that frequently could touch theological heights. The Army called for other crafts. Its legal culture felt a kindred drive for naturalism and scientificism, ideologies that guided both pure lawyers and pure soldiers. Positivism seduced military lawyers with its firm hand and lustful promises. But as those working at military academies remained faithful to the spirit of the older lovers of French positivism, traditional philosophers of law ceded before the promises of evolutionism. But both saw biology and sociology as the way and life of their science – and *science*, that was a word they craved with all their hearts.

Conditions had changed, yet prejudices did not submerge. They transformed. Old ways die hard. The Army did not see the world of politics, the true arena of lawyers, as the mighty foe to be defeated. Hostility dwindled. The real enemy was a much more commanding adversary: theory. Yes, theory, any form of abstraction. Reforms in the *curricula* clearly shows that more practice, more shots, more exercises were in order; books should find their adequate place, and it was not the most honorable one. Law, engineering and mathematics were brothers and sisters bullied in bulk. They had a place. But a tiny one.

Vitality of teaching, experimentations from professors, a restricted place. A bittersweet flavor is left in those tasting the trajectory of military law in early 20th century. It could not be much different. The parable of law in general in those decades is melancholic, one of high hopes and sweet achievements crumbled to the ground. Vicente Antonio do Espírito Santo Júnior and

the like had faith in law, they believed that rules obeying science and nature could change the world and foster unimaginable progress. Another tone is set by Magalhães Castro Law, one rattled by the war; conferences, promises, treaties were humiliated, jurists were put to their knees and gloomy questions flourished. Yet, he still went on teaching, talking of the future and of natural law. Faiths might be challenged, but when they survive, they grow more mature, less innocent and, perhaps, even stronger. If Europe was blowing itself up, Brazil could not give up to despair. There was still much more history to happen. Both with lawyers and soldiers.

Chapter 7
From privilege to right? Military social security

Soldiers are workers. We do not generally remember that very often, but it is true. Obviously, belonging to the Navy or to the Army is also a matter of. But, for those going every day to the barracks, passing through papers, stamps, signatures, patrolling entrances and shooting targets, the Army is – voluntarily or forced – a job. And early 20th century, in Brazil just as in many other places of the world, is the age of the social question.

The great strike of 1917 in São Paulo[550]. The law on work accidents[551]. The law on the repression of anarchism – an amenity coming with the Italian immigration[552]. Law Eloy Chaves[553], the first step of social security for non-state workers. Social turmoil faced Brazil as the first steps of urbanization were being taken – a process that would gain traction between the 1930s and the 1980s, but was already arriving at some of the most industrialized centers of Brazil. Some of the "workers" of the armed forces were also questioning their place, not only within the armed forces, but also in Brazilian society at large. *Tenentismo*. Revolt of the Whip. Military Jacobinism.

Yet, some of those workers became presidents. Deodoro da Fonseca, Floriano Peixoto, Hermes da Fonseca. It is easier to fight for better conditions when you are your own boss. This particular situation was gifted to soldiers – or, at least to Army officers – in more than one opportunity between 1889 and 1930. And, when they were not sitting at the *Palácio do Catete*, they had enough influence to get to the ears of who was in office. Their influence varied in those forty years, but be it consequential or simply tenuous, it never ceased to act.

We will first understand how that influence could be felt. And nothing better for this quest than to follow the legislation and decrees enacted by the presidents. In the first three sections of this chapter, we will try to understand the changes made to the system of social security of the military, ideas on the role of the military family and the budgetary impact of benefices. If lack of money was a frequently uttered argument to hinder new benefits, on the fourth section we will take a deeper look on the financial impact of social security and its significance when compared with the civilian system. On the fifth section, we will dwell on the

[550] On the legal history of strike in early 20th century Brazil, cf. Gustavo Silveira Siqueira (2017).
[551] On the legislation on work accidents on the First Republic, cf. Arley Fernandes Teixeira (2020).
[552] On the repression of anarchism in Brazil and its connections with Italian immigration, cf. Diego Nunes (2013, p. 44-59) and Arno dal Ri Júnior ().
[553] Which concerned railway workers, but is pointed as a step towards a public system of social security. On the law Eloy Chaves, cf. Fabiano Fernandes Segura (2017).

remnants of individual pensions, those alternatives left by parliament to those forgotten by statutory law. Finally, on the sixth and seventh parts, we will take on individual debates advanced in legal and military reviews which clarify the limits of the category "soldiers" and the everlasting centrality of family in social security – namely, the discussions on whether police officers would be submitted to the same legal regime as the Army, and on whether non-legitimate sons and daughters could receive military pensions.

7.1 – Privilege and rationalization: expansion of benefits and unification between the social securities of the Army and the Navy (1890-1902)

The luring enticement of power is tantalizing. Almost irresistible. After years cast outside of mainstream decisional processes, not being heard as it was believed to be fair and seeing time flow without any change, it would be hard to resist the temptation of promoting one's own interests once in power. Soldiers could not. Between 1890 and 1902, Brazil witnessed a flow of reforms on the system of military social security: at least sixteen different laws and decrees changed several aspects of social law, from minor details to major structures. Two capital processes were occurring: first, a rationalization of the chaotic provisions inherited from the empire; second, a convergence between the Navy and the Army systems, towards what would later become a somewhat single system that went beyond the mere sum of two different bodies of law. But, unsurprisingly, benefits also kept expanding in this decade, when soldiers held sway over Brazilian politics.

The most blatant proof of how messy military social security was the very lack of uniformity. As the most attentive readers shall remember, the Army gave its former members and their families the half basic pay (*meio-soldo*), which was very similar to a retirement pension; meanwhile, former seamen received a *montepio*, that is, after they contributed throughout their careers to a common fund, they would get a payment from the money amassed between former officers. The two systems had quite different legal natures: the first one, created in 1827, was a concession from the State, while the second, originating from a 1795 Portuguese law, was essentially mandatory private insurance administered by the state. Facing this glaring inequality, the Brazilian dictator/president, marshal Deodoro issued the decree 475, of 11 June 1890, giving a half-basic pay to former Navy officers. It claimed to give the "fair reward" to the "relevant services and glorious achievements" of members of the Navy, at the same time that it ensured "equality before the law", as the 1827 law gave a benefit to widows and orphans

of Army officers while it left their sea counterparts without equivalent compensation. At the same time, article 7 of the decree ensured that the *montepio* would remain untouched.

Less than two months later, the next step would be taken: in 28 August 1890, the decree 695 created a *montepio* for Army officers, "recognizing that it is all too equitable (*toda equidade*) to put the families of Army officers in analogous conditions to those in which currently are the officers of the Navy", which received both a *montepio* and a half-basic pay. The pension of the *montepio* was equivalent to the half-basic pay (article 19), meaning that the families of officers from both land and sea forces would now get pensions equivalent to a full basic pay. The move is not particularly strange: members of a certain overlooked category, when they get to political office, enlarge a benefice for their category. But, if the Republic was brought to be mostly under the arms of the Army, while many in the Navy still were monarchists, why did the sea force get its benefit first?

The answer is, at the same time, logical and quite convenient. The most obvious alternative route to the path that has been adopted would be to extinguish the *montepio* of the Navy and create a half basic pay for them. But the money already accumulated in its coffers did not belong to the State; it would be challenging to give it a satisfactory destination. The other option, to cut the half basic pay of the Army and create a *montepio* for them, would be politically costly, for substituting an unpaid with a paid benefit would certainly not be met with cozy reactions. The most obvious solution was to give the half basic pay to the Navy, which was in a worst position than the Army. However, after this new pension had been enacted, the families of Army officers were put in a disadvantageous position: the government was compelled to grant the land force the same benefits of the sea officers. By the end, political considerations prompted a curious solution: instead of having a single payment to military officers, each force had two different institutions – the half basic pay and the *montepio* – making for different pensions in an increasingly complex system of social security. Four institutions: two *montepios* and two half basic pays. The pensions of military families doubled and everyone got happy. It did not hurt that the president and the vice-president would both benefit personally from these reforms.

In the next few years, successive changes would add new bricks to this increasingly byzantine system. In May 1890, a new decree extended the right to the *montepio* to the minor sons of soldiers and those with more than 18 years unable to support themselves. In 1892, the habilitation process to receive both the half basic pay and the *montepio* was simplified with the

express aim of bringing them close together[554], after an earlier simplification in 1891[555]. In October, the age in which the sons of Army officers lost their pensions was raised from 18 to 21 years[556]; to avoid animosity between unequal branches of the armed forces, this provision was extended to the Navy less than two years later[557]. Yet, the half basic pay of the Navy and the Army still had different terminal ages for sons; in April 1893, a new decree extended the limit of 21 years from the Army to the Navy[558]. Each reform in one type of pension seemed to need three successive reforms to yield equitable results.

To avoid – at least to a certain point - this mad festival of partial reforms, congress enacted the law 288 of 6 August 1895 which determined that the *montepio* of the Navy would from then on be regulated by the decree governing the *montepio* of the Army. Yet, this law also rose from a particular case. Collatino Marques de Souza was the curator of his granddaughter, and believed that she deserved support from the state. The granddaughter of Collatino had been fathered by an Army officer, but after her mother died, her father remarried. When he himself died, the widow had refused to raise her orphaned stepdaughter, and left her to Collatino. What only would be recklessness became what the senators described as "cruelty" (SF, 1894, 4, 75): the 1795 provisions regulating the *montepio* determined that the widow would get the pension, but said nothing about the offspring of previous unions (SF, 1894, 4, 47-48). As senators themselves described, the law did not even consider this possibility, as the legislator imagined that the widows would take care of those already living in their households, and would not leave them to be raised by ailing grandfathers. As one senator put it, officers left pensions mostly with their sons and daughters in mind, since their wives were already adults and could work on their own behalf (SF, 1894, 4, 76). The senate, then, determined that pensions from the *montepio* should be divided in two parts, one for the widow and the other half, to the offspring of the late official. When the bill went to the Chamber of Deputies after being approved by the Senate, deputes amended it to extend the regulations of the *montepio* of the Army to the one of the Navy, hoping to organize at least partially the chaotic law of social security. The law was finally enacted in 6 August 1895[559]. This tortuous trajectory demonstrates that, even when some

[554] Decree 1054 of 20 September 1892.
[555] Decree 471 of 1 August 1891.
[556] Decree 901 of 18 October 1890.
[557] Decree 1034 of 1 September 1892.
[558] Decree 1082 of 27 April 1893.
[559] Legislative trajectory: presentation of the bill at the Commission of Navy and War of the Senate: 24 September 1894. 3rd discussion at the Senate: 2 October 1894. Approval of the Project at the Senate: 4 October 1894. Project sent to the Commission of Navy and War of the Chamber: 16 October 1894. Opinion of the Commission: 22 November 1894. 2nd discussion at the Chamber: 6 December 1894. Sent to the Drafting Commission of the Chamber: 7 December 1894. 3rd Discussion at the Chamber: 3, 4 and 6 June 1895. Opinion of the Commission of

system was sought, even when the government tried to give some ordering to the pensions system, casuistry and chance lied at the heart of the very engines of law. Changes did not result from plans and systematic thinking, but from occasional political pressure, requests of pensioners and short-term circumstances.

This was overtly proved only four years later, when the provision dividing the pension between the widow and the offspring was repealed by law 632 of 6 November 1899. The project presented at the Chamber of Deputies pointed out several problems in the existing regulations. First and foremost, the division of the pension established by the 1895 law had severely impoverished widows, and frequently in favor of married daughters that could be and were supported by their wealthy husbands. We shall remember that the basic pay corresponded to around half the ordinary salary of an officer, meaning that the divided half basic pay would give to widows only 1/8 of the income their households originally collected when their husbands were alive. This could put some of them in dreadful conditions, especially those whose husbands had died at the beginning of their careers. But the law did not fail only at this point: orphaned grandchildren of officers had no place in the order of succession, and it did not even clarify if, upon the death of the widow, the pension should revert to the next person in the line of succession or be extinguished altogether (CD, 1897, 4, 568). After two years on the parliamentary shelfs[560], the law was approved with some minor changes.

Casuistry was a staple when the republic had to deal with the fallout of the many revolts convulsing Brazil. In 1897, a decree gave the right to the half basic pay to the families of officers killed at the Campaign of Canudos, even if they had not completed the required times of service to receive the benefit[561]. But, more striking than those laws for single cases, we can find once more general rules that were born out of particular circumstances. Less than two months after the Revolt of the Navy, in 4 November 1893, the government gave to the families of the enlisted personnel who died defending the republic a pension corresponding to the full basic pay of the fallen soldier[562], and three days later gave to the troops wounded in combat the right to be interned in the Asylum of the Invalids of the Fatherland[563]. In 29 July 1895, the law 282[564]

Navy and War of the Senate accepting the Chamber amendments: 18 June 1895. Sole discussion of the amendments of the Chamber at the Senate: 25 July 1895.

[560] Legislative trajectory: presentation of the project: 30 August 1897. 3rd discussion at the chamber: 4 July 1898. Voting of amendments at the Chamber: 15 July 1898. Approval of the final draft and sending to the Senate: 19 July 1898. Presentation of the opinions of the Commissions of Navy and War and Finance of the Senate: 20 October 1899. 2nd discussion at the Senate: 25 October 1899. 3rd discussion at the Senate: 26 October 1899.

[561] Decree 2473 of 12 March 1897.

[562] Decree 1594A of 4 November 1893.

[563] Decree 1594C of 7 November 1893.

[564] Legislative trajectory: 2nd discussions of the amendments at the Senate: 1st and 8 June 1895. 3rd discussion at the Senate: 8 and 10 June 1895. Final draft at the Senate: 12 June 1895. I did not find the other debates.

eased the process for heirs to be habilitated to receive the half basic pay and the *montepio*: now, the death of the officer could be proved by witnesses or, if there were not enough of them, death would be presumed after six months the soldier had stopped receiving his wages. The bill was originally presented by the Baron of Ladário to ease the process to get the half basic pay for families of the "soldiers of sea and land that lost their lives with the shootings decreed by the authorities of the republic in Santa Catarina, Paraná and other States" (SF, 1894, 6, 271), probably a reference to the Federalist Revolution in southern Brazil.

The last gasp of those times of bonanza for soldiers came with the legislative decree 846 of 10 January 1902. The law equated single and married daughters of officers; significantly, it did not explicitly refer to the Navy or the Army, meaning that the social security regimes of both forces had finally been unified. But this piece of legislation is most significant for demonstrating that the winds were changing. In the debates on the bill, Deputy Germano Hasslocher defended that the modification was not needed, as the benefits being granted amounted to a privilege for soldiers; according to him, if the "Empire had been really miserable with soldiers, the Republic has fallen to the opposite extreme" by treating the *montepio* as inheritance, as an asset to which the family was entitled, and not according to its true nature, that is, help to those in need (CD, 1901, 4, 291). He feared that the project could turn the treasury into the teat to which the successive heir to soldiers would cling" (CD, 1901, 4, 292).

Obviously, some deputies hurried to defend the bill. The original project aimed to curb inequalities between daughters (CD, 1901, 4, 292); moreover, deputy Olívio Abranches remembered that married daughters could at any moment be widowed and fall into need again (CD, 1901, 4, 293). Moreover, Rodolfo Paixão pointed out that pensions of the *montepio* derived from payments made by soldiers themselves, meaning that the treasury actually lost nothing when benefits were expanded (CD, 1901, 4, 294).

The argument that children should be treated equally was responded by saying that, following the same reasoning, one would arrive to the conclusion that male offspring would also have the right to be supported by the treasury, what was deemed by deputies as an evident absurdity (CD, 1901, 4, 295). The project nevertheless was approved[565]. However, it marked the last movement of the constant expansion of military social rights in the first republican decade. After 1902, with the country facing frequent economic headwinds, the Army and the Navy enjoying a privileged financial position and soldiers now out of power, it would be hard to make a convincing case for further increases of social security benefits.

[565] Legislative trajectory: final presentation at the Chamber: 25 May 1901. 3rd discussion at the Chamber: 30 May 1901. Approval of the final draft: 7 June 1901. I did not find the debates at the Senate.

7.2 – An overdue debt is finally paid: the benefit of the Volunteers of the Fatherland and the law of 1907

Some promises take long to be fulfilled. Too long. Excruciatingly long. Yet, after months, years, even decades of waiting, when hope wanes and the weight of the years is being felt without ease, when memory might fail and trust is eroded, then a lightning might strike from the skies and illuminate the broken oaths. The pensions promised by the imperial government in the 7 January 1865 are of such kind. They dusted in the forgotten drawers of the past regime for long years of shameless inertia, while former volunteers waited unabashedly. Then, after more than forty years, the decree 1.687 of 13 August 1907[566] finally made justice to the crumbling promises of the forgetful nation. Why 1907? The answer is not straightforward, but some clues indicate that the political context, catalyzed by strong political mobilization, finally moved the mountains of indifference and prompted the government to enacted the much-awaited benefit. Yet, one name encapsulates the forces that coalesced around the objective of approving the law.

Marcolino Moura. This federal deputy from Bahia had been serving in congress since the proclamation of the republic and had himself been a volunteer of the fatherland in the Paraguay War (NASCIMENTO, 2021). In the early months of 1905, Moura presented the project that would become the 1907 law together with several public manifestations claiming that giving pensions for the former volunteers was a much-needed act of justice. Several of those petitions presented before the Chamber of Deputies came from former volunteers themselves (CD, 1905, 4, 65), one came from the Historical and Geographical Institute of São Paulo (CD, 1894, 4, 323), and a plea came from an individual volunteer from São Paulo that had lost the functions of one arm at the war and for it could not find a job (CD, 1894, 4, 325);

[566] Legislative trajectory: sending to the Commission of Finances of the Chamber of Deputies: 19 August 1905. Printing of the opinion of the Financial Commission of the Chamber: 7 October 1905. 1st discussion at the Chamber: 10 and 16 October 1905. 2nd discussion at the Chamber: 17 October 1905. Opinion on the amendments presented at the 2nd discussion: 4 November 1905. Discussion of the amendments: 9 November 1905. 3rd discussion at the Chamber: 14 November 1905. Debate on the amendments presented at the 3rd discussion: 18 November 1905. Approval of the project: 23 November 1905. Sending of the project to the Senate: 24 November 1905. Opinion of the Commission of Navy and War of the Senate: 9 July 1906. Discussion of the opinion of the Commission: 23 July 1906. Opinion of the Finance Commission of the Senate: 14 September and 11 December 1906. 2nd discussion at the Senate: 18 September and 13 November 1906. 3rd discussion at the Senate: 23 December 1906. Joint opinion of the Finance Commission and the Commission of Navy and War on the amendments presented at the 3rd discussion at the Senate: 26 July 1907. Continuation of the 3rd discussion at the Senate: 28 June 1907. Discussion at the Chamber on the amendment of the Senate: 22 July 1907. Approval of the Senate's substitutive project: 23 July 1907. Printing of the final draft: 30 July 1907. Approval of the final draft: 31 July 1907. Sending to be signed by the president: 31 July 1907.

a certain Adriano Guedes da Veiga also sent his support as a former volunteer (CD, 1894, 4, 327).

One specific letter from volunteers from Bahia addressed to congress claimed that in the empire, the small Army did not have enough personnel to fill every bureaucratic position, and therefore they were called to fill in those positions; now that the armed forces had grown, this source of income had dried out, and they, all officers, were impoverished. It is probably no coincidence that this letter came from the state of Moura himself (CD, 1894, 4, 326-327); he was the one who requested the letter from the São Paulo institute, and he presided the Club of Volunteers of the Fatherland of São Paulo (CD, 1894, 4, 327).

A great social movement, led by Moura, was building up.

A commemorative aspect was also seized as an opportunity to call attention for the sufferings of the defenders of the nation in the newspapers. One article by Joaquim Pimentel, called "forty years ago" was published in 7 January 1905 in the *Jornal do Brasil*, calling into attention in the anniversary of the creation of the Corps of Volunteers of the Fatherland how these soldiers had been forgotten, even though many of them had become congressmen and could have fought for the fortune of their former colleagues[567]. In 1907, in the 40th anniversary of the Battle of Tuiutí, some volunteers also published a manifesto in the press[568]. When the Navy commemorated the forty years of the battle of Riachuelo, the same was done, with former soldiers decrying they had been victims of ingratitude[569].

One can easily see that there was wide popular support for the project; however, it would take some years before it became law. If little more than three months were needed to approve the bill in the Chamber, the Senate would take nearly two years to enact the project. Perhaps, without Marcolino Moura lurking around, the higher chamber felt less pressed to transform the old promise in legal reality.

Three main themes dominated the discussions regarding the law, both in and outside parliament: if the heirs of deceased volunteers of the fatherland should receive pensions; which would be the value to be paid; which volunteers should benefit.

Concerning widows, many people criticized that the project did not provide for the families of soldiers who passed away after the war, notwithstanding their services being just as

[567] "Há quarenta anos", *Jornal do Brasil*, 7 de janeiro de 1905, *http://memoria.bn.br/DocReader/030015_02/15601*
[568] "Voluntários da Pátria", *Jornal do Brasil*, 25 de maio de 1907, http://memoria.bn.br/docreader/030015_02/22811
[569] "Os Voluntários da Pátria", *Jornal do Brasil*, 12 de junho de 1907, http://memoria.bn.br/docreader/030015_02/22975

valuable as those rendered by their living counterparts[570] (SF, 1906, 4, 117); Argentina, for instance, had given a pension to the widows of its soldiers[571]. Frequently, widows needed an income even more than former soldiers (SF, 1906, 4, 117). Yet, the original project did not even give pensions to those that had fallen in combat: only in the Senate this was added (SF, 1906, 3, 69). Some argued that those pensions must be requested directly to the parliament, but others thought that it was better to enshrine this right in law (SF, 1906, 4, 633), preventing possible debates on whether such pensions were subject to a statute of limitation or not (SF, 1907, 2, 283).

Concerning the values to be paid, the original project determined that pensions should be calculated according to the wages at the times of the war. However, inflation had greatly diminished purchasing power: some argued that conserving the nominal value of salaries was nothing short of was a "mockery" (SF, 1906, 3, 192). Even the salaries of privates, the most underprivileged of military categories, had risen dramatically since those times, from 90 to 360 daily *réis* (CD, 1905, 6, 265); why not favor veterans? To compensate the major delay in the concession of pensions, some even argued they must be paid retroactively (CD, 1907, 3, 611; SF, 1906, 4, 366).

Concerning who should receive the benefits, the problem was the definition of which categories could count as *Volunteers of the Fatherland* and if everyone who fought in Paraguay was on equal footing. Some felt that people that suffered for five years in Paraguay should not be treated in the same way as those who had spent just a few months in the marshy lands where the war was fought; the Commission of Navy and War of the Chamber introduced a substitutive project making payment proportional to the number of years one had served in the Army (SF, 1906, 3, 69). Moreover, the concept of volunteers of the fatherland originally comprised only combatant soldiers, but it was argued that doctors had also risked their lives in Paraguay, and deserved an equal treatment as those who held guns in their hands. Joaquim Pimentel answered in an article[572] that doctors had stable occupations and did not need to be supported by the state, and were not actually volunteers from a strictly legal point of view. An anonymous article[573]

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570 "Os voluntários da pátria – ao exmo. Sr. Presidente da República, *O Paiz*, 11 de julho de 1907, http://memoria.bn.br/DocReader/178691_03/14529 ; *O Paiz*, 12 de julho de 1907, http://memoria.bn.br/DocReader/178691_03/14529 ; *O Paiz*, 16 de julho de 1907, http://memoria.bn.br/DocReader/178691_03/14579

571 "Os Voluntários da Pátria", *Jornal do Brasil*, 30 de agosto de 1906, http://memoria.bn.br/DocReader/030015_02/20479

572 "Voluntários da Pátria – V", *Jornal Do Brasil*, 28 de agosto de 1906, http://memoria.bn.br/DocReader/030015_02/20462

573 "Os Voluntários da Pátria", *Jornal do Brasil*, 30 de agosto de 1906, http://memoria.bn.br/DocReader/030015_02/20479

responded that the term "volunteer" should be understood literally and broadly, as anyone who had offered himself to face the enemy in the name of the fatherland and not according to the restrict framework of law. During the debates at the Chamber of Deputies, an amendment was proposed establishing pensions for the families of deceased volunteers and extending the payment for doctors and students of medicine, but only the part concerning the latter measure was approved (CD, 1905, 7, 250).

In the end, two factors seemed to be behind the passing of the law at this precise moment: nationalism and a strong public opinion.

Reading the debates and the three major issues I have just describe, one sense the discussants exalting the Brazilian nation and its "sacred promises" (CD, 1905, 4 164). Behind this, one can find the renewed nationalism of the first decade of the 20th century that would plant the seeds of the future 1908 recruitment law, and a fear of a new war. Some deputies argued that Brazil lived an age of "waning patriotism", and rewarding our forgotten heroes would help to prompt a renewed love for the country (CD, 1905, 6, 265): this would be a "lesson of civism" (CD, 1905, 6, 265). If the law did not come, the "youth" would think that the "fatherland did not compensate the sacrifices" made in its name (SF, 1906, 4, 89), and would hardly offer to fight for such an indifferent country (CD, 1905, 6, 265). A 1906 article in a newspaper[574] by Carlos de Laert called the volunteers "the armed nation", reproducing a term developed in the early 20th century to describe what had happened 40 years before in Paraguay, projecting upon the decades-old South American war the aspirations of pre-World War I military thought.

The second factor that prompted the approval of the law was strong support by public opinion. I have already discussed how many categories sent petitions to parliament in favor for the law when it was proposed. Later, even the head of the National Guard joined the growing chorus of supporters behind the battered volunteers (SF, 1907, 1, 150). But it was in the press that most of the discussions took place. The presentation of the project at the Chamber was reported in 1905, though discreetly[575]. After the bill started to move in the legislative process, many manifestoes were published, including one[576] urging the President to revoke the ministerial letter 188 of the Ministry of War, that prevented Volunteers that had not been

[574] "Voluntários da Pátria", *Jornal do Brasil*, 27 de setembro de 1906, http://memoria.bn.br/DocReader/030015_02/20719
[575] "Voluntários da Pátria", *Jornal do Brasil*, 28 de julho de 1905, http://memoria.bn.br/DocReader/030015_02/17172
[576] "Voluntários da Pátria", *Jornal do Brasil*, 24 de novembro de 1906, http://memoria.bn.br/DocReader/030015_02/21213

wounded to enter the Asylum of the Invalids of the Fatherland; other to president Rodrigues Alves asking the law to be approved[577]. Many steps of the legislative procedure were published in the press and attentively followed by the public, including its first approval[578], the reunions[579] and opinions[580] of the Commission of Navy and War[581], the debates at the Senate[582], dissenting votes[583] and discussions at the Chamber of Deputies[584] etc. Senator Francisco Glicério reports that at one session of the Senate, at least forty widows of former Volunteers were present (SF, 1907, 2, 283), what demonstrates how momentous this topic had become. In 1906, when the Senate had slowed down the pace of the project, the newspaper *Correio da Manhã* even published an editorial[585] urging senators to proceed with the legislative procedure. This not to mention the several letters and answers in the press discussing specific topics that I have mentioned in the previous pages. Not by chance, after the bill was finally enacted into law, Joaquim Pimentel, one of the first men to go to the press to raise the profile of the issue, thanked the "press of the capital" for helping with the fight to approve the project[586]; a delegation of Volunteers visited senator Pinheiro Machado and thanked him for helping to approve the law[587].

In the following years, the newspapers remained vigilant: the *Jornal do Brazil* published a list of all officers entitled to the benefits of the 1907 law[588]; the same outlet later reported that the bureaucracy was putting too much obstacles for potential beneficiaries[589] and urged the

[577] *O Paiz*, 25 de maio de 1906, http://memoria.bn.br/DocReader/178691_03/11579
[578] "Voluntários da Pátria", *O Paiz*, 18 de outubro de 1905, http://memoria.bn.br/DocReader/178691_03/10270
[579] "Voluntários da Pátria", *Jornal do Brasil*, 5 de junho de 1907, http://memoria.bn.br/docreader/030015_02/22913; "Voluntários da Pátria", *Jornal do Brasil*, 15 de junho de 1907, http://memoria.bn.br/docreader/030015_02/23001; *O Paiz*, 5 de junho de 1907, http://memoria.bn.br/DocReader/178691_03/14200; *O Paiz*, 15 de junho de 1907, http://memoria.bn.br/DocReader/178691_03/14290; "Voluntários da Pátria", *O Paiz*, 21 de junho de 1907, http://memoria.bn.br/DocReader/178691_03/14342; *Correio da Manhã*, 5 de junho de 1907, http://memoria.bn.br/DocReader/089842_01/13546
[580] "Voluntários da Pátria", *Jornal do Brasil*, 24 de novembro de 1906, http://memoria.bn.br/DocReader/030015_02/21213
[581] "Voluntários da Pátria", *Correio da Manhã*, 27 de junho de 1907, http://memoria.bn.br/DocReader/089842_01/13746
[582] "Voluntários da Pátria", *Jornal do Brasil*, 29 de julho de 1907, http://memoria.bn.br/docreader/030015_02/23123
[583] *O Paiz*, 27 de junho de 1907, http://memoria.bn.br/DocReader/178691_03/14392
[584] *Correio da Manhã*, 10 de junho de 1906, http://memoria.bn.br/DocReader/089842_01/11045
[585] "Voluntários da Pátria", *Correio da Manhã*, 26 de junho de 1906, http://memoria.bn.br/DocReader/089842_01/10925
[586] "Voluntários da Pátria", *Jornal do Brasil, 10 de julho de 1907, http://memoria.bn.br/DocReader/030015_02/23361*
[587] "Voluntários da Pátria", *O Paiz*, 25 de agosto de 1907, http://memoria.bn.br/DocReader/178691_03/14924
[588] "Voluntários da Pátria", *Jornal do Brasil*, 22 de agosto de 1908, http://memoria.bn.br/docreader/030015_02/28124
[589] "Voluntários da Pátria", *Jornal do Brasil*, 11 de janeiro de 1908, http://memoria.bn.br/docreader/030015_02/25050

authorities to take measures[590]. The *Centro Mineiro do Rio de Janeiro* offered to help volunteers with the bureaucracy to get their benefits[591].

The 1907 law was differently framed as a victory of the republic over the empire, or as a failure of both. One manifesto of volunteers argued that the law represented a victory of the new regime against the old one[592]. However, in 1906, Carlos de Laert[593] pointed out that both had their fair share of guilty: from the end of the war to the downfall of the monarchy, 19 years had passed, while 17 years had elapsed since the proclamation of the republic when he wrote and the law had not been enacted yet. Moreover, emperor Pedro II had always showed favor towards the volunteers and employed them in public positions; Laert even mentioned that the former monarch had once overlooked Quintino Bocaiúva for a position in favor of a volunteer, and this prompted that men to become a powerful republican. This is not the first time we encountered some sort of hagiographies of Pedro II in this thesis.

Anyhow, the republic expanded in the next years some provisions of the pensions system for volunteers of the fatherland. First, after the legislative decree 2881 of 28 November 1910, doctors and pharmacists that served in campaign hospitals in Paraguay were granted pensions, while the law 2290 of 13 December 1910, which raised the pay of soldiers in active duty also extended its own effects to retired ones. These two laws were just an example of how the pensions for volunteers of the fatherland surpassed any expectations; many had argued in favor of the law for they believed very few soldiers still lived, meaning that the national treasury would not be excessively pressed under the weight of excessive financial obligations – the very original proposition of the bill brought up this argument (CD, 1905, 4, 165). The Commission of Navy and War of the Senate guessed that no more than 200 or 300 officers would be entitled to the benefits; senator Coelho Lisboa suggested that no more than 80 were still alive (SF, 1906, 4, 71).

After the law was published, the government habilitated beneficiaries in classes until at least 1918 (MINISTÉRIO DA GUERRA, 1918, p. 170). In these eleven years, a surge of applications flooded the government: 892 officers entered the national payroll, together with 1814 enlisted personnel: more than three thousand soldiers were now being paid by the republic. The benefits for late pensions alone were worth more than 5.300 *contos de reis* in the eleven

[590] *Jornal do Brasil*, 5 de maio de 1908, http://memoria.bn.br/docreader/030015_02/26424
[591] "Centro Mineiro", *Correio da Manhã*, 27 de setembro de 1907, http://memoria.bn.br/DocReader/089842_01/14510
[592] "Voluntários da Pátria", *Jornal do Brasil*, 16 de agosto de 1907, http://memoria.bn.br/docreader/030015_02/23562
[593] "Voluntários da Pátria", *Jornal do Brasil*, 27 de setembro de 1906, http://memoria.bn.br/DocReader/030015_02/20719

years between 1908 and 1918; regular pensions amounted to 19.100 *contos* between 1909 and 1919, an average of more than 1.730 yearly *contos*. Much higher than foreseen by proponents of the 1907 law, this amounts to an average of ca. 2218 yearly *contos*, meaning ca. 19,81% of the more than 11.200 *contos* spent with military pensions in 1918. Nonetheless, this was one of the few significant increases in military pensions in early 20th century.

Nationalism and the growing sense of an impending war were married with guilt for the 40 years-anniversary of an unfulfilled promise to fuel an impressive social mobilization that united colonels and soldiers under the leadership of one deputy and former volunteer of the fatherland. In this context, curious appropriations of the past were made: either the empire was the forebearer of broken promises or the well-intentioned patron of former soldiers, depending on the interpreter. Anyhow, the Volunteers were the perfect archetype of the nation in arms, and were appropriated as a model when the law of mandatory military service was put on the table in the next year.

7.3 – Always behind: inconstant reforms and salary increases (1910-1930)

In the second half of the Brazilian First Republic, the military was still an enormously influential social force, but the grip of individual soldiers upon political power had waned. Except for the period between 1910 and 1914, when marshal Hermes da Fonseca occupied the presidential chair, civilians were at the forefront of government; however, the gray olive uniforms could still be seen in the backstage. This ambiguous situation that always comes with the status of *éminence grise* provided for some tensions: while the rhythm of reforms slowed down, the still confusing structure of military social security was still being adjusted and updated. If the frantic pace of the 1890s had been definitively abandoned, the barracks could fulfill some of their interests.

The first movement in this new, slightly more challenging order was a pay raise, that would be given to soldiers with the law 2290 of 13 December 1910, proposed as a bill when Hermes da Fonseca was president-elect and signed into law less than two months into his presidency[594]. Three themes dominated the debates: fiscal responsibility; equal treatment of military and civil employees; and simplification of the salary parcels.

[594] Legislative trajectory: presentation of the opinions from the commissions of Navy and War and Finance: 29 August 1910. 2nd discussion and presentation of amendments at the Chamber: 1st September 1910. Opinion of the Finance Commission of the Chamber on the amendments: 14 September 1910. Discussion of the amendments: 21, 22 and 23 September 1910. Printing of the final draft of the Chamber for discussion: 29 September 1910. Proposition of new amendments: 3 October 1910. Opinion of the commissions of Finances and Navy and War on

The first topic is a relative novelty. Before then, the State seemed to have infinite resources to wash upon its brave solders; now, fiscal constraint prompted more restraint from the treasury. The initial opinion of the Commission of Navy and War of the Chamber of Deputies stressed this preoccupation when it praised the bill that had been just presented to them for taking into account the interests of the national coffers; after all, the fiscal year of 1910 would end with a deficit of 16 thousand *contos de réis* (CD 1910, 2, 643). Money must be spent carefully in times of scarcity. Public spending was a sensitive topic and was taken in account even by those favoring the raise, which suggests that this worry was widespread and considered undeniable. Deputy Hugo Gurgel made a passionate defense against what seemed to be general racist attacks: "I am not saying that we, Latin peoples, are affectionate to the point of establishing limitless helps and charities". For him, paying veterans was a "sacred debt" of the country, and "not only Latin peoples understand it that way; the United States and Germany pay those that served defending the national integrity" (CD, 1910, 4, 306). A racist pattern was operating in the shadows here, a pattern that survived in changed forms for many decades, from Margaret Thatcher refusing to join the Euro for "Italians will continue not to pay taxes"[595] to frequent outbursts of International Monetary Fund bureaucrats against social security systems, a pattern assuming that Latin peoples cannot handle money while the sober Germanic peoples can rationally decide their spending. However, in the early 20th century, the racist undertones were more "over" than "under", and seemed to have touched a nerve in Gurgel.

The second aspect central to the reform was the leveling between the conditions of civil and military personnel. The Commission of Navy and War stressed that one important point of the bill would be to bring military and civilian salaries much closer (CD 1910, 2, 643). The initial opinion of the Commission of Finances proposed a new division of the wages between only the half basic pay and commissions, which would much simplify how soldiers were paid and was closer to the model followed for the salaries of civil servants (CD 1910, 2, 660). The deputies even pointed out that, as many civil servants had received progressive increases in their salaries, the troops of the Navy "had been completely forgotten" and received the same salaries as 20 years before (CD,1910, 5, 47). What was a sad remark at the time receive ominous tones under the light of later events: these phrases were said in 3 October 1910, slightly more than a month before the Revolt of the Whip.

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the new amendments at the Chamber: 24 October 1910. Discussion of the opinions of the commissions: 23, 28 and 30 November 1910. Approval of the final draft of the Chamber: 2 December 1910. Sending of the project to the Senate: 3 December 1910.

595 https://www.theguardian.com/politics/2020/dec/27/margaret-thatcher-said-plan-for-the-euro-was-a-rush-of-blood-archives-reveal

Yet, some sense that soldiers were entitled to benefits still lingered. Deputy Justiniano de Serpa pointed out that all favors, all benefits, all privileges given to soldiers, much more abundant than what most citizens could dream of, were given only considering the special services offered by the military: sacrifice, devotion, and even their own blood. However, even when serving in civil positions, such as political office, soldiers received their regular military benefits: Serpa though that in these cases, the special treatment should be cut (CD, 1910, 5, 81). Soldiers should not receive income from two different sources, a prohibition also imposed upon civil servants. Notwithstanding those compelling points, other deputies remember art. 74 of the constitution, which enshrined that the half basic pay was intrinsically derived from the rank and, therefore, could not be cut by means of a law. Despite going nowhere, this particular altercation shows how congressmen were slightly less reverent towards the military when compared with the near-religious adoration displayed by some during the first republican decade.

The third aspect of the 1910 law was the simplification of the salary parcels. According to deputy Justiniano Serpa, "military payments came from obsolete tables, divided and fragmented into a great number of parcels under the most antiquated headings", and only a small parcel, the half basic pay, would serve to calculate the future retirement of officers (CD, 1910, 5, 71). As the structure of payments got simpler, it also grew more similar to the one governing how civil servants were paid, and, as the same Serpa pointed out, it was more according to the republican principles to equate the payment of different state employees.

Though granting rights to soldiers, the act 2290 of 1910 gives the impression that military employees were seen less as a special category. As we shall see, for some, they could not even be called public employees for their peculiar duties. Yet, in the debates we have just discussed, they are confronted with a rather mundane set of problems: budgetary restraints, privileges and rights, equalization with other employees. Soldiers were no longer regarded under an aura of suffering saviors sacrificing themselves for the good of the country – at least as far as social security is concerned.

In the following year, a new law would bring a much-needed reform that, rather than raise benefits, would decrease bureaucracy: the legislative decree 2484 of 14 November 1911, that had been proposed as a bill in 1906, but would only be enacted more than five years later[596].

[596] Legislative trajectory: sending to the Commission of Navy and War: 9 August 1906. Opinions of the commissions of Navy and War and Finance: 8 July 1907. 1st discussion at the Chamber of Deputies: 11 July 1907. Approval at the 1st discussion: 12 July 1907. 2nd discussion at the Chamber 16 July 1907. Opinions on the amendments: 2 September 1907. Voting at the 2nd discussion: 1st, 2 and 7 October 1907. 3rd discussion at the Chamber: 28 October 1907. Approval at the 3rd discussion: 21 November 1907. Sending to the Senate: 29

As the deputies themselves said, the national treasury put many hurdles in the way of families seeking to receive the pensions of their later chiefs. Those aiming to receive a *montepio* had to face harsh obstacles: the treasury demanded heirs to obtain certificates that the late soldier had deposited the due monthly values in each one of the pay offices (*pagadorias*) corresponding to the states where he had served; for those whose father or husband had worked in many different places, as was common among early career officers, this exigency meant that they must peregrinate through several different places before being able to gather the full documentation needed to prove their right – not to mention dramatic situations, such as if the documents had been destroyed in fires or floods (CD, 1907, 3, 208).

To solve this problem, the law determined that a provisory pay corresponding to three quarters of the half basic pay should be due to the family until they could fully prove their rights. To do so, the treasury should send a specific certificate that the officer had made his due payments, and, according to the decree 471 of 1st August 1891, the officer himself should have written a document declaring who were his heirs. If this declaration had not been filed, the military captain of the district where the soldier had served could produce a certificate declaring the identity of those entitled to receive the pension.

This system was rather complicated, but it could accelerate tremendously the habilitation process. Deputy Rodolfo Paixão recalled that some families could take five or six years before proving that they were entitled to a pension their late relative had paid for (CD, 1907, 3, 314). He went even further: the half basic pay was so meager that it should be provisionally paid in full, and in a parcel corresponding to three quarters of the original value. The Commission of Navy and War agreed with this point (CD, 1907, 5, 10), but said it was better not to give such a benefit to prove wrong those who thought that "soldier[s] have it all and want it all from the nation" (CD, 1907, 5, 14). Once again: the public image of officers was not all that flattering.

The original project determined that the provisory payment would be due only to soldiers, but Rodolfo Paixão (CD, 1907, 3, 315) and Neiva (CD, 1907, 3, 405) suggested that the same benefit should be extended to the heirs to civil servants of the military ministries, since they could face the same hardships as their military counterparts. The Finance Commission agreed and approved an amendment enacting this provision (CD, 1907, 5, 18). Therefore, at least some civilians got a similar treatment as soldiers; the debates stressed how important it

November 1907. Opinion of the Commission of Finances of the Senate: 21 December 1907. Sent by the senate to be enacted: 13 November 1911.

was “not to create a special situation regarding soldiers” (CD, 1907, 3, 315): privileges were out of fashion.

As political instability, conversely, was still trendy in Brazil, the laws giving benefits to victims of particular tragedies were still enthusiastically being enacted. The legislative decree 2542 of 3 January 1912 is an amusing example[597]. The original project, signed by more than 30 deputies, ordered to pay twice the half basic pay to the heirs of officers killed at the Revolt of the Whip; the project was sent to the Chamber in 19 December 1910, less than a month after the turmoil had exploded (CD, 1910, 11, 351). Later, an amendment sook to extend the benefit to the heirs of the victims of a completely unrelated drama: the tragedy of the *Aquidabã*, a battleship that inexplicably exploded back in 1906, killing two hundred men, including two admirals and the son of the minister of the Navy, who watched the events from a nearby ship. The Senate rejected the amendment, but the Chamber insisted, and the law was approved in the larger format. Nearly 6 years later, in 1918, the legislative decree 3505, of 29 January 1918[598], extended the befits of the 1912 decree to the heirs of sergeants who died in the *Aquidabã* tragedy and during the Revolt of the Whip; later, a clause was added enlarging the project to include the heirs of those who died at the tragedy of the tugboat *Guarani*, that also sank. Once again, the project started from a request from a single widow (CD, 1912, 12, 780): old habits die hard, and casuistry in social security was no different.

Finally, in 1922, the legislative decree 4653 of 17 January 1923, authorized the reform of both officers and enlisted personnel wounded in the revolt of 5 and 6 July 1922, known as Revolt of the 18 from the Fort of *Copacabana*, the starting point of *tenentismo*, and gave pensions to those who died. The decree was particularly generous: those reformed would receive a pension equivalent to their full salaries, and not only the half basic pay, and the heirs

[597] Legislative trajectory: opinion of the Finance Commission of the Chamber: 19 December 1910. 1st discussion at the Chamber: 27 December 1910. 2nd discussion at the Chamber: 28 December 191. Opinion from the Finance Commission on the amendment offered during the 2nd discussion: 21 August 1911. Discussion of the opinion of the Finance Commission: 24 August 1911. Approval of the substitutive bill from the Finance Commission: 25 August 1911. 3rd discussion at the Chamber: 19 September 1991. Opinion from the Finance Commission on the amendments offered during the 3rd discussion: 21 October 1911. Approval of the final draft and sending to the Senate: 27 October 1911. Opinion from the Finance Commission of the Senate: 6 December 1911. 2nd discussion at the Senate: 11 December 1911. Receiving of the amended project by the Chamber: 19 December 1911. Opinion from the Finance Commission on the amendment from the Senate and rejection of the amendment: 27 December 1911. 3rd discussion at the Senate: 28 December 1911. Sending from the Senate for the project to be enacted: 31 December 1911.

[598] Legislative trajectory: presentation of the project at the Chamber of Deputies: 30 October 1912. 2nd discussion at the Chamber: 17 October 1913. Presentation of the project extending the pensions to the families of victims of the sinking of the tugboat *Guarani*: 10 December 1913. Discussion of the substitutive project from the Finance Commission: 24 December 1913. 3rd discussion at the Chamber: 30 December 1913. Opinion from the Finance Commission of the Senate: 7 November 1917. Discussion at the Chamber of the substitutive Project from the Senate: 31 December 1917.

of dead officers would get a similar pension that could be accumulated with the half basic pay or the *montepio* they might be entitled to. The original project only referred to those who took part at the first *tenentista* revolt, but the Finance Commission of the Chamber extended it to the heirs of officers killed during the First World War (CD, 02/09/1922, 3205); they would get only two thirds of the wages of their relatives. This particular law repeats the casuistic penchant of previous legislative acts, particularly repeating the pattern of amendments benefiting the victims of tragedies not related with each other. However, it has some particularities that made it significant: it was approved very quickly, in only two months[599]; it was originally proposed in a message from the President, what certainly placed political weight upon the bill; and, for the first time, the benefits were being calculated from the full wages, and not from the half basic pay.

7.4 – Fighting the crisis: impact of social security on the Brazilian budget

Just as I did in the first part of this thesis, we shall contextualize the debates on social security with the national budget. After all, pensions, retirement and the like are a matter of ideas, but also a matter of money. Much money. And despite legal debates and political deeds being important - all too important - agents will always move within the constraints of silver. Defining "social activity" as has been discussed for the empire (pensions+hospitals+ asylums), the following graphic gives us a picture of how much the worries of personal tragedy and the prospective of old age impacted the spending of the Navy and the Army:

[599] Legislative trajectory: presentation at the Chamber of deputies with a substitutive project from the Finance Commission: 2 September 1922. 2nd discussion at the Chamber: 28 September 1922. 3rd discussion at the Chamber: 3 October 1922. Discussion of amendments: 31 October 1922. Approval of the project at the Chamber: 20 November 1922.

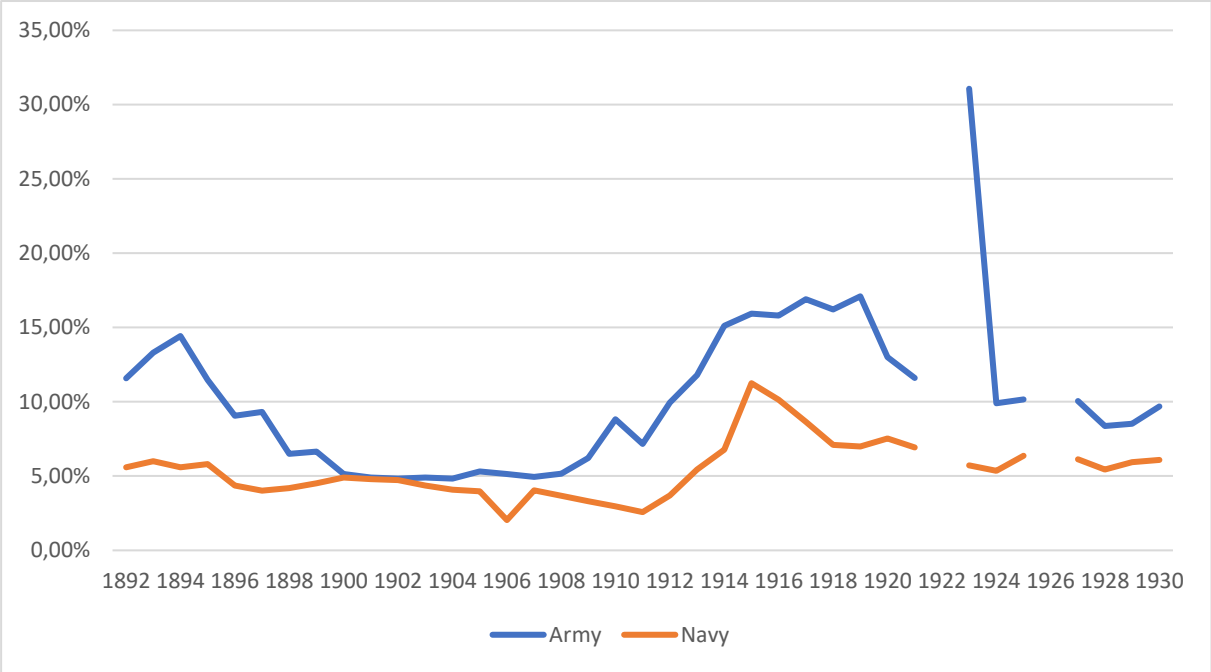

Figure 21 Percentual of spending with "social activity" (pensions+hospitals+asylums) in the army and the navy as a proportion of their respective budgets

The Army always spends more money than the Navy. This is not an unexpected outcome: the land force would be certainly more solicited to fight the insurgencies that ravaged the country in the forty years of the First Republic; the Navy could hardly go into the jungles of the *Contestado* or to the semi-arid dry earth of *Canudos*, both hundreds of kilometers away from any sea. After 1908, the percentages uptick until they cover almost 15% of the spending of the Army, a proportion that remains more or less constant until at least 1919. This is probably due to the new law on the Volunteers of Fatherland, as we can see on the next graphic:

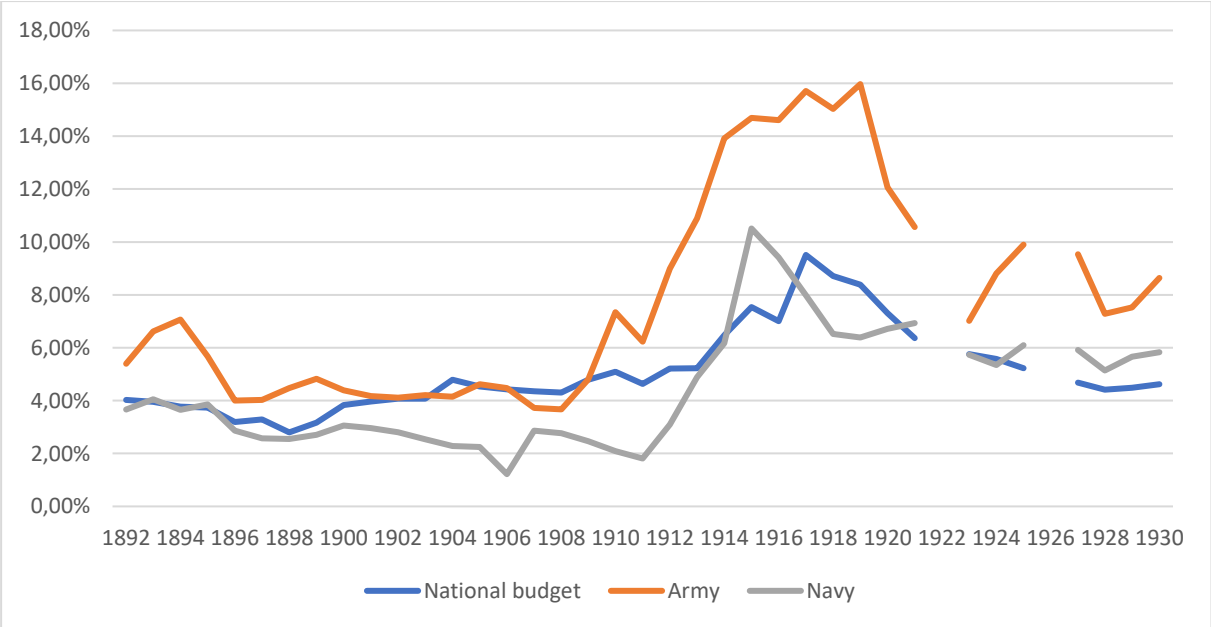

Figure 22 Spending with pensions as a percentage of the budget in the national budget and in the ministries of war and navy.

Considering only pensions, we can observe a galloping growth of retirement expenses concentrated on both military ministries; though civilian pensions also grow, they do not come even close of matching the huge increase of military benefits observed between 1908 and 1914. After 1919, the trend reverses, but this can be attributed to other parts of the budget increasing more strongly, and not to less money being spent with pensions, as the next two graphic illustrates:

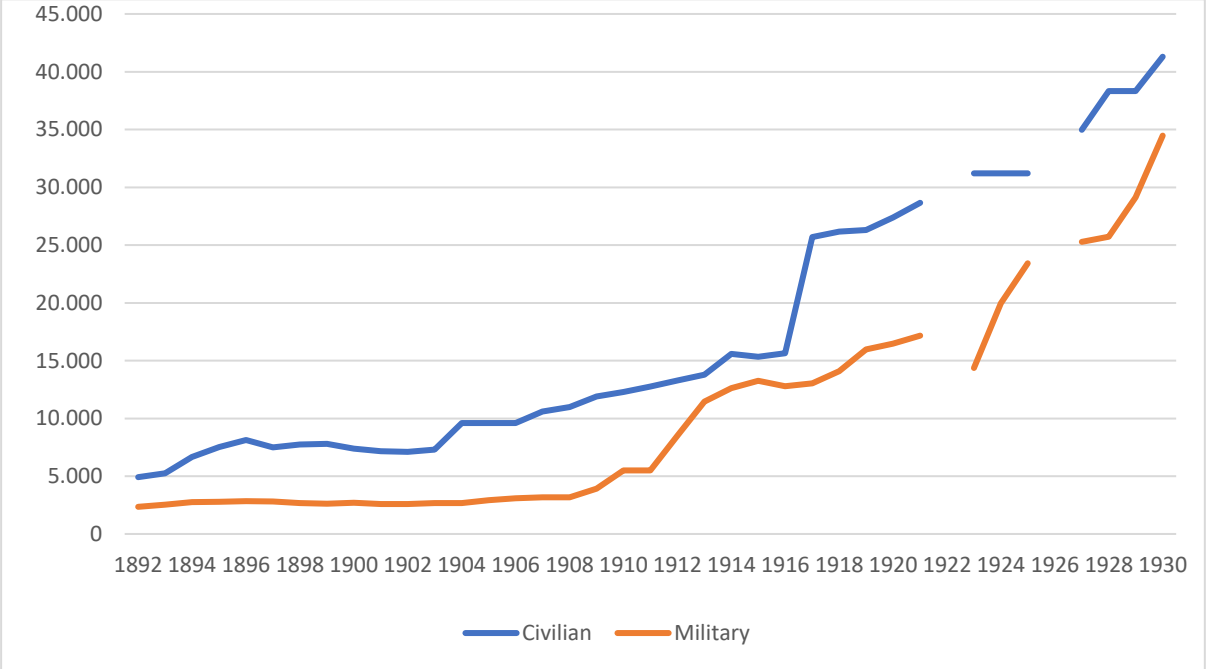

Figure 23 Spending with civilian and military pensions in contos de réis (one conto de réis is equal to one million réis/reais)

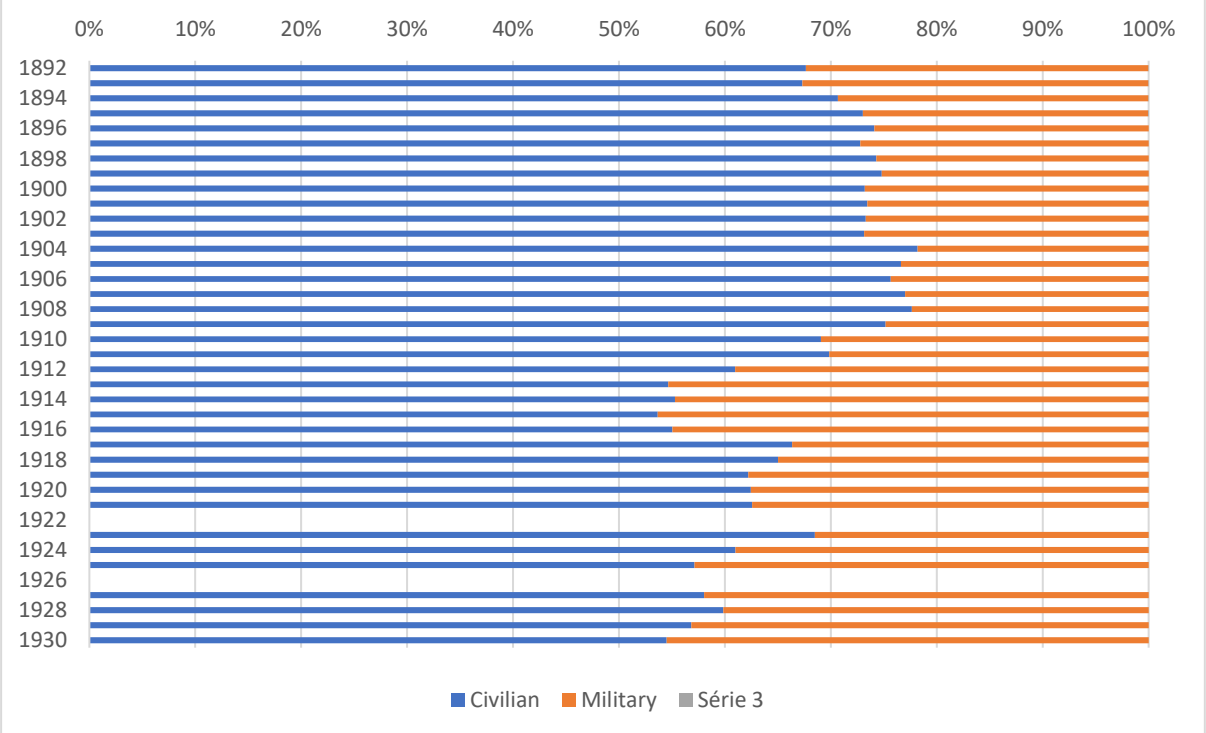

Figure 24 Proportion of civil and military pensions in the total of pensions paid by the federal government

The value spent with pensions is always growing, though the pace of this movement is much firmer in the decade between 1908 and 1918. The peak of the impact of the 1907 law occurred between 1911 and 1913, when the budgetary expenses with regular pensions amounted to 2500 *contos* and late pensions costed ca. 600 *contos* to the federal government (MINISTÉRIO DA GUERRA, 1918, p. 171). In 1911, this means that 72% of the spending with pensions in the Army (3357 out of 4638 *contos*) were due to the 1907 law. In 1917, however, as the former veterans of the Paraguay started to die away while the 50th anniversary of the war approached and passed, this proportion diminished significantly: in 1917, only 11,9% of the money spent with pensions by the Army could be ascribed to the Volunteers of the Fatherland (1200 out of 10095 *contos*). The amount of wealth used to pay for pensions continued to grow, nevertheless. However, they were mostly following a general tendency of the budget, as the next and last graphic shows:

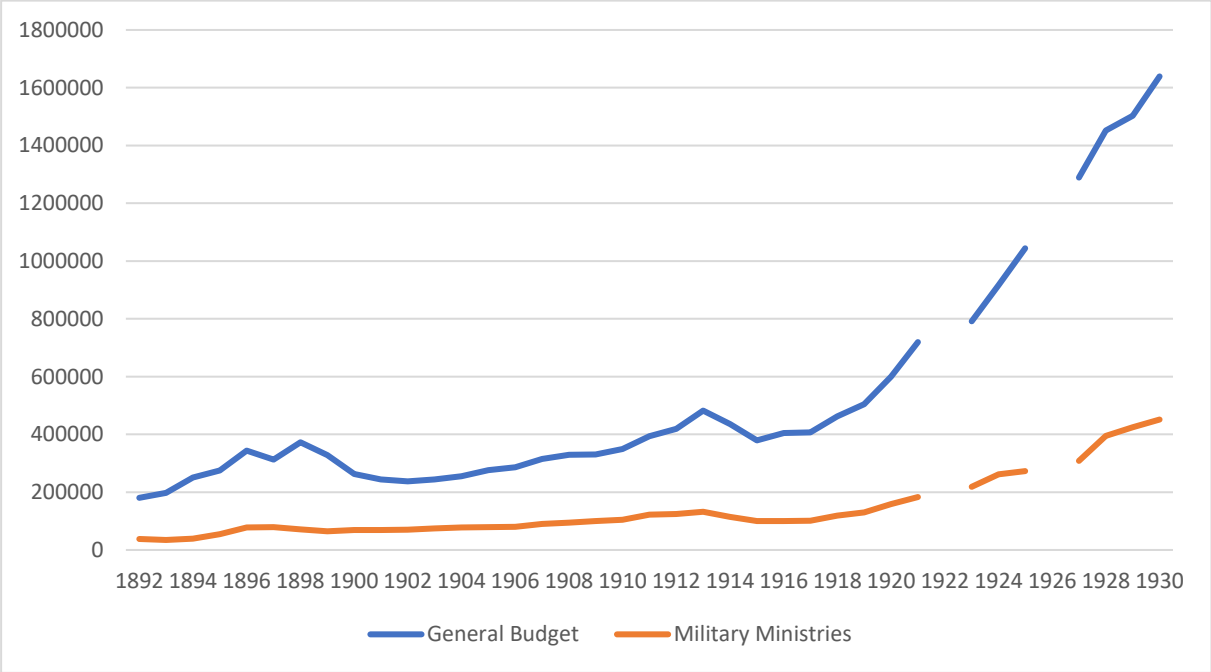

Figure 25 National budget and the budgets of the ministries of war and navy in contos de réis (one conto de réis is equal to one million réis/reais)

From 1918 onwards, the general budget and the budget of the military ministries strongly increased. The spending with the Navy and the Army was in the 1920s always hovering around 25% of all the wealth used by the Brazilian government.

In short, we can say that, despite the initial shocks of the First Republic, soldiers and seamen were able to secure for themselves a good share of the Brazilian budget. The spending with pensions was not much strong, steady floating at 4% for the Army and 2-3% for the Navy in the 1890s and 1900s. These percentages were subsequently shocked and severely increased by the 1907 law for around a decade, during which most of the money destined for former

soldiers and their families was meant to pay veterans of Paraguay; the impact of pensions in the budget peaked at 16% for the Army and 10,5% for the Navy. As the former participants died out during the 1910s, the situation stabilized at a point in which pensions represented ca. 8% of the budget of the Army and 6% of the Navy.

7.5 – The last breath of an old habit: individual pensions in the parliament

Despite the frequent talks of budgetary constraint and the supposed liberal tendencies of the government, Brazil continued to grant individual pensions well into the 20th century, under various justifications. However, the number of concessions is significantly smaller when compared with the empire; now, many laws had extended the grounds for pensions, diminishing the need for singular concessions. And when *Canudos*, the *Aquidabã* and the *Tenentismo* revolts took place, the parliament soon legislated to grant special privileges to all people that had experienced those particular circumstances: there was no need for the wounded and the widows to go to Rio de Janeiro pledging for a special law that accounted for their singular cases. Moreover, the legal grounds for special pensions were severely restrained. In 1926, a reform changed the constitution – the single time this happened during the First Republic – and seemed to imply that this practice had been outlawed: according to the new paragraph 29 of art. 34, which established the competences of the national congress, the parliament was responsible to "legislate on licenses, retirements and reforms, not being able to grant or alter them by individualist laws"[600].

Until 1927, 101 pensions were granted to at least[601] 114 heirs, with the following temporal trajectory:

[600] 29. "legislar sobre licenças, aposentadorias e reformas, não as podendo conceder, nem alterar, por leis especiaes".
[601] Some laws nominate those that will receive the pensions, while others simply say "and heirs", or "and sons", preventing me from quantifying the precise number of beneficiaries.

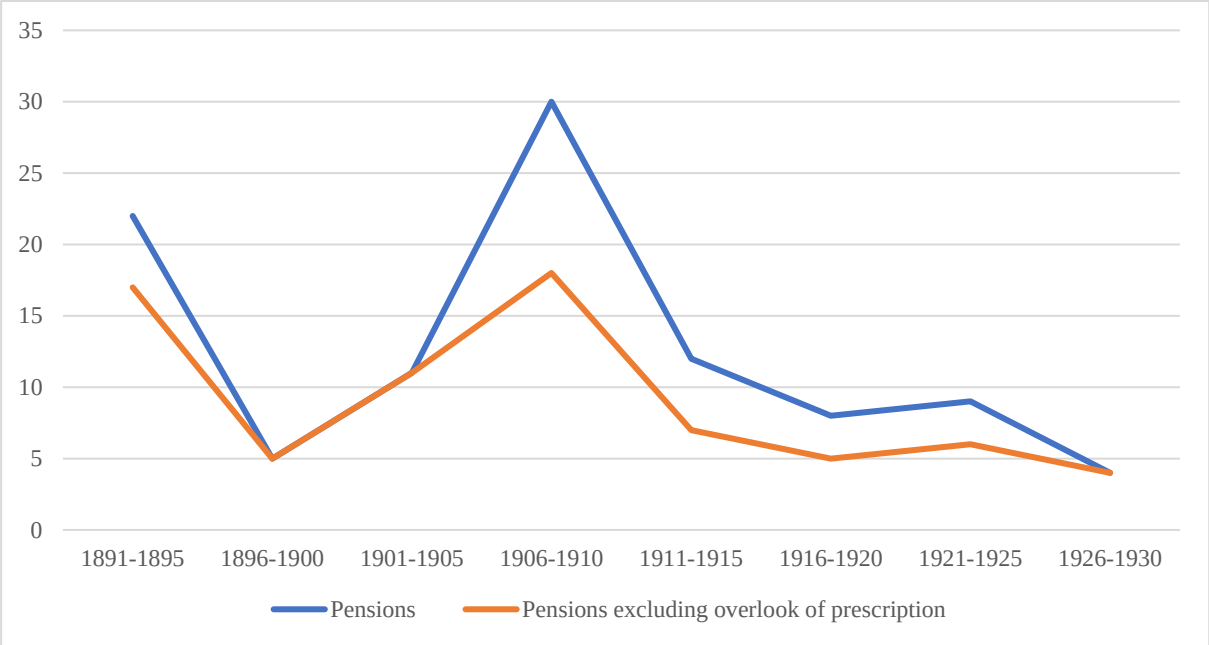

Figure 26 Military pensions given by the Brazilian parliament every five years.

On the first figure, we can see that the number of pensions was relatively high until 1910, after which the figures gradually wane until the parliament gives in average less than one pension each year. This tendency becomes even more clear if we exclude the 30 cases of lifting of statutes of limitation (*relevação de prescrição*), almost half of which are concentrated between 1906 and 1910.

The next figures describe the legal nature of pensions:

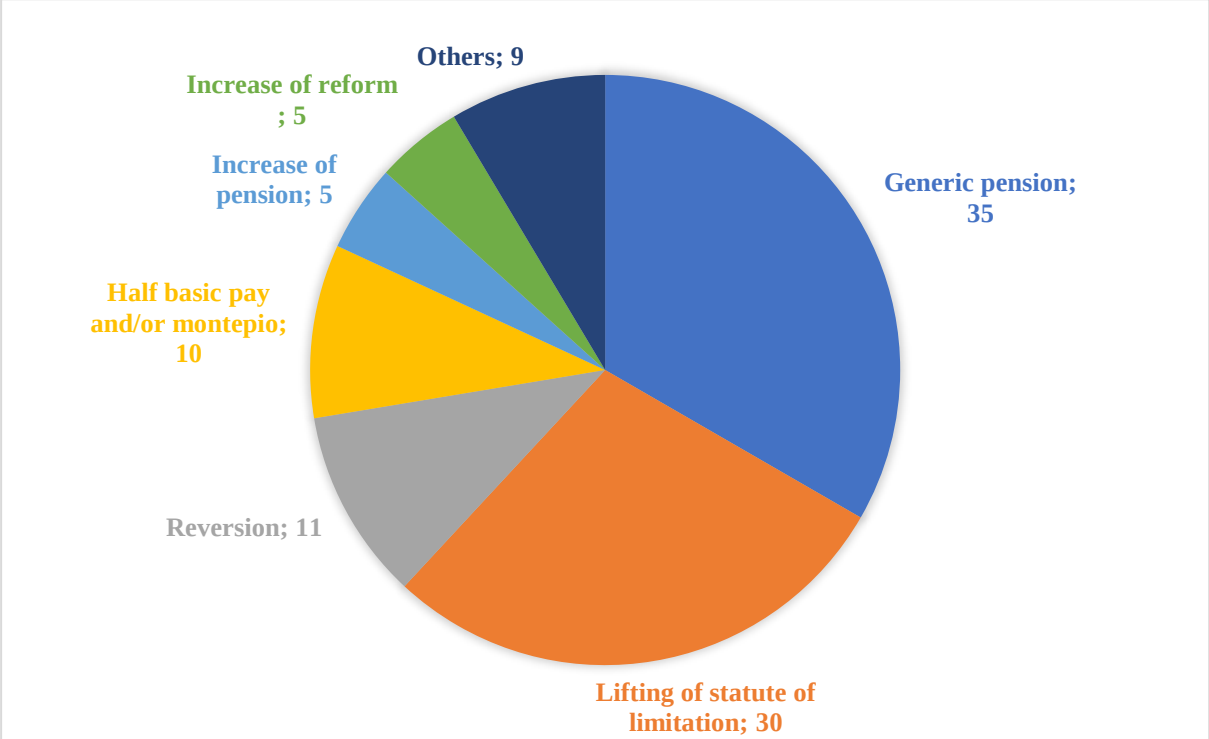

Figure 27 Legal nature of pensions given by the Brazilian parliament between 1889 and 1930.

Here, we can see that almost half of the decisions on pensions were mostly bureaucratic ones, that is, lifting of statutes of limitation (when parliament cancels the effects of a statute of limitation mandated by law) and reversion (when the first beneficiary dies and his pension or portion of pension passes to the next person entitled to it). Only a third of pensions are truly self-standing grants that do not increase or complement a previous one.

The next two figures trace the sociological profiles of beneficiaries:

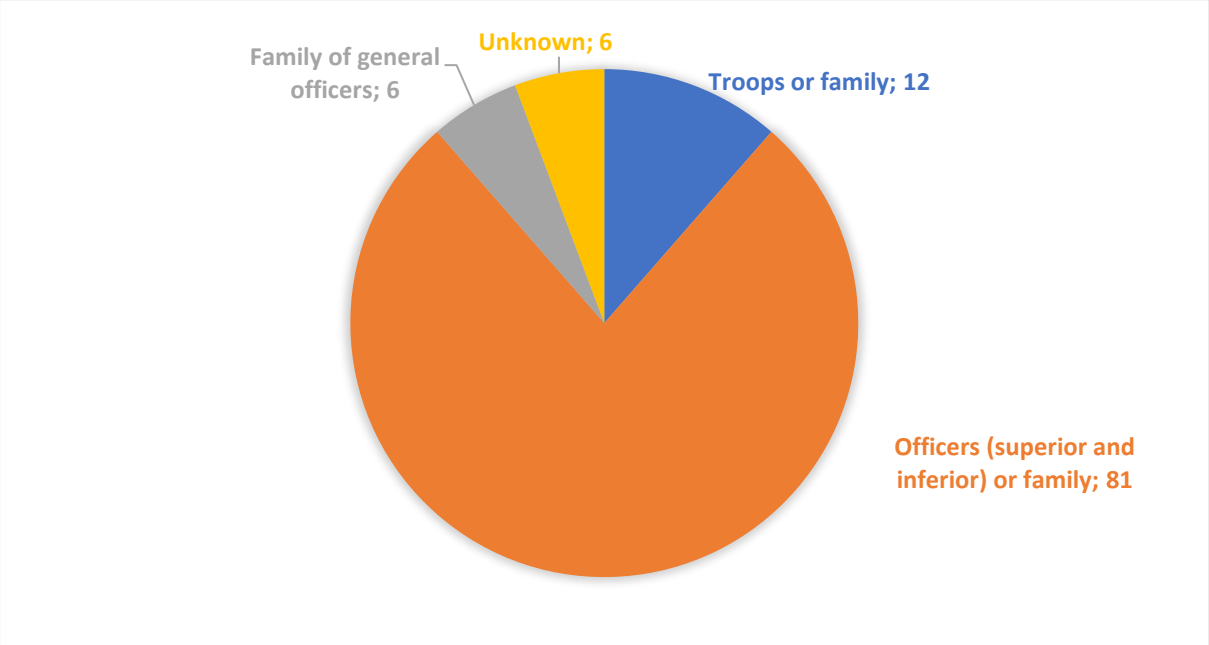

Figure 28 Proportion of pensions according to the hierarchical position of their beneficiaries.

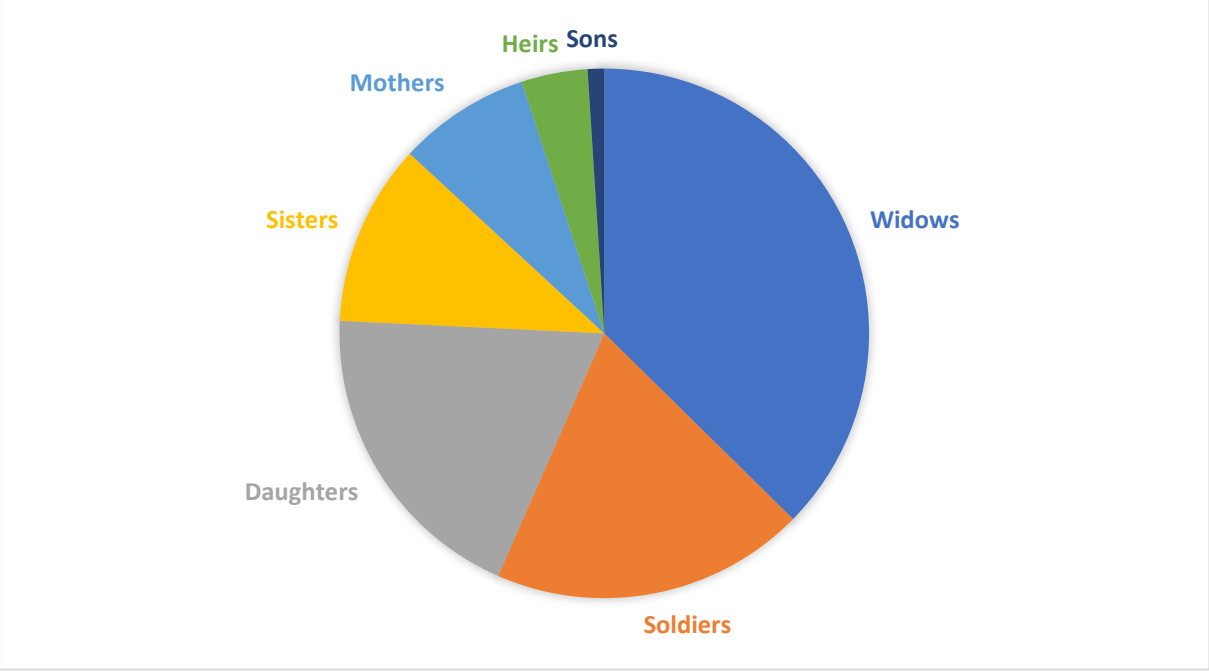

Figure 29 Proportion of pensions according to the relation between the beneficiary and the soldier that gave cause to the pension.

In the first graphic, we can see that most beneficiaries are family members of inferior or superior officers (lieutenants to colonels). Only a handful are families of generals, though more than we would expect if we took into account the small number of soldiers occupying these very high positions. Finally, on the second graphic, we can see that the first category in the order of reception of pensions are widows, as it is expected, since they are listed first as beneficiaries in the laws governing military social security. However, they account for only slightly less than half of beneficiaries when one excludes soldiers themselves. This can probably be ascribed to high numbers of inferior officers that die young and are neither married nor fathers; this could explain why almost a quarter of heirs are sisters or mothers of soldiers.

Since it was impossible to duly analyze all these pensions individually, I divided the cases in typical and atypical ones, just as I did in the first part of the thesis, to sample some of them to have the debates concerning them on parliament read and analyzed. I considered "typical" the cases of pensions for the families of soldiers (80 cases) and as atypical those where the pensions went to the former soldiers themselves (22 cases). I used a website to randomly choose 20% of the cases (that is, 16) and looked for them in the parliamentary records; from the atypical ones, I choose seven that seemed to me, according to their characteristics, to be the most outliers and to represent different deviations from the normal cases.

I have found some types of pensions and issues that were discussed frequently. Concerning types, I have found honor pensions, update of pensions and lifting of statute of limitation. Concerning debates, I have found remarks on the lack of financial resources and discussions on the nature of pensions, whether a right or a grace. We shall now discuss the results.

Updates of pensions[602]. Social security benefits were not attached to the wages of active servants, meaning that, if nothing was done, retired personnel would receive exactly the same amount of money until they died. However, as some inflationary spirals had corroded the purchasing power of former soldiers, the immobility of pensions could provide the conditions for future injustice. Some requests for pensions at the parliament tried to remedy precisely this risk, and many of them concerned pensions given at the time of the Paraguay War. One particularly striking example is that of Antônio Paes de Sá Barreto; he came from the war poor and blind, and asked for the first time for his pension to be increased in 1890. The Chamber of Deputies, however, denied the request, for there was already a bill under consideration at the

[602] Examples of those discussions that I have analyzed: Marfiza Rodrigues Cabral (CD, 1892, 3, 151); Antônio Paes de Sá Barreto (CD, 1891, 2, 114); Martina Gomensoro Wandenkolk; Camilo de Lellis e Silva (CD, 1894, 6, 311-312).

parliament that would update the pensions of veterans from the Paraguay campaign according to the most recent wages (CD, 1891, 2, 114). Anyhow, Barreto received the half basic pay for the period between 1877 and 1885, to which he was entitled, but was not habilitated at the time (CD, 1892, 5, 103). The said law, however, did not came, and in 1894, a bill granting him a pension was filed at the Chamber of Deputies (CD, 1894, 5, 342), but was only voted in 1899 (CD, 1899, 3, 325). The Senate put some obstacles for the concession, arguing that what the former soldier alleged had not been proved by documents; he only got his pension in 1901 (CD, 1901, 5, 390). This proves how hard could it be to get those benefits. Marfiza Rodrigues Cabral, a daughter of a Paraguay veteran, similarly took from 1892 (CD, 1892, 3, 151) to 1902 (CD, 1902, 10, 420) to get her pension raise. Her case illustrates the wide impact that those raises could have: she initially earned 360$000 (CD, 1893, 4, 731) a year, but after the raise, she got 848$000 (CD, 1902, 10, 420) for the same period. Those updates could really make a difference in the livelihood of widows and single daughters.

Lifting of statute of limitation[603]. For many reasons, families of deceased soldiers could miss the deadline to request their pensions, and would theoretically lose their rights. However, those benefits were usually small and the families were mostly poor; since the law did not explicitly authorize distracted beneficiaries to justify why their requests had arrived late, the parliament would need to hear their motives and consider reasons of fairness, and not strict legality, to enact particular laws. A good example comes from Laurinda Ercília Adelaide da Rocha, who lived in Goiás and had a soldier brother who died in Fortaleza, more than 2500 km away. She received a provisory pay of a quarter of his basic pay, but she took long to sort all documents and lost her right to receive the other quarter between when she started receiving the payment, in 1894, and when she completed the process, in 1906 (CD, 1906, 5, 217). Since she was poor and the distance, so wide, congress lifted the statute of limitation of her pension (CD, 1906, 8, 847-848). Maria Paula da Cunha, differently, argued that the process of habilitation took too long and most of the fault was due to her lawyer (CD, 1905, 7, 757). The daughters of Delminda Maria do Valle Caldas said that their deadline had passed only because the treasury took too long to analyze their request, with no fault of their own. Maria da Penha Oliveira alleged "extreme poverty" (SI, 1895, 3, 98). The opinions of the Commissions that analyze the petitions frequently remark that many similar cases as the one under analyses had received a positive answer, what suggests that the lifting of the statute of limitation was business

[603] Cases I have analyzed: Laudinda Ercília Adelaide da Rocha: (CD, 1906, 5, 217); Maria Paula da Cunha (CD, 1904, 6, 220); Florinda da Conceição Gil (CD, 1911, 2, 506); daughters of Delminda Maria do Valle Caldas (CD, 16/12/1926, 5358); Maria dos Santos Lucas (CD, 1893, 4, 86); Maria da Penha Oliveira (CD, 1894, 7, 484).

as usual, part of an administrative case-law of the parliament – if the reader allows me this quite paradoxical expression. At one point, Congress granted a request made in 1892 for a pension of a soldier who had died in 1853 (CD, 16/12/1926, 5358): with the right arguments, delays of almost forty years could be ignored.

Budgetary restrictions. Many congressmen were worried that the frequent concessions of pensions could undermine the already fragile fiscal situation of Brazil. To better illustrate that, I will not collect sparse sayings of several cases, but I will concentrate on a single pension that encapsulate the preoccupations at stake. Ludovina Alves Portocarrero, the widow of marshal Hermenegildo Portocarrero, baron of Forte Coimbra, requested a pension for herself. She argued that, with the difficult economic situation in Brazil and the small pension from her husband, she was struggling to stay afloat (CD, 1894, 6, 84); the Commission of Pensions of the Chamber of Deputies recommended that she should receive a pension due to the excellent services rendered by her husband during the Paraguay War (CD, 1894, 6, 509). When the bill giving the pension was being discussed at the Chamber, though, other preoccupations surfaced. Deputy Coelho Cintra highlighted that the national Treasury was in a precarious situation, while several bills giving pensions were under consideration; he suggested that not only the Commission of Pensions should have a say on these requests, but that the Budgetary Commission should also opine on the concession of benefits (CD, 1895, 7, 288). Deputy Gaspar Drummond, the president of the commission, countered that, though the request under consideration came from the widow of a marshal, most of the petitioners belonged to lower ranks and were in dire need (CD, 1895, 7, 289). It was sounder to enact a general law establishing for all under what conditions widows and orphans could receive financial benefits from the state (CD, 1895, 7, 289). This case shows to us that the casuistry, combined with the financial toll imposed by pensions on the budged had started to worry some deputies, though it would take some time before practices could change significantly.

Finally, after discussing some practical aspects of the concession of pensions, we can move to a more theoretical discussion: why were those pensions given? They could be on the grounds of justice or fairness, but usually the stress on the second element, for the more regular issues of justice would be solved by the law in general, and pensions were measures aimed at a single, particular case. To better understand the interplay between social security, casuistry and justice, it is useful to analyze the case of Luiz de Paula Mascarenhas.

Former lieutenant Mascarenhas had fought at the Paraguay War and asked that the benefits received by veterans should also be granted to him, since he fought for almost 6 years and now, aged 65, was facing financial trouble (CD, 1908, 1, 504). The Financial Commission

initially thought that he should pursue the recently approved pension for the Volunteers of the Fatherland (CD, 1908, 2, 150), but later discovered that Mascarenhas had enlisted in the army shortly before the 7 January 1865 decree that had created the corps of Volunteers – he, therefore, was not eligible for the benefit created in 1907 (CD, 1908, 2, 485). The Financial Commission still denied the request, fearing that a flood of similar petitions could follow such a pension and put the treasury under stress. Some months later, however, the Commission of Navy and War countered this conclusion, claiming that Mascarenhas was a volunteer in the original sense of the word, not the legal one, and to deny support to someone who had fought for the country on the grounds of a technicality would be "inequitable" (CD, 1908, 12, 574). The Financial Commission, however, stood by its position: "however, are so pressing the conditions of the National Treasury" that it was impossible to establish new spending without assuring that they could be paid for (CD, 1908, 12, 576). In the discussion at the floor of the Chamber, deputy Eduardo Sócrates used the example of the 1907 law: when the project was filed at the Chamber, it was estimated that the costs prompted by it would not surpass 800 *contos de réis*, but they have reached 2 thousand so far and some feared they could go as up as 4 thousand (CD, 1909, 9, 156). If he would consider only the "feelings of humanity" (*sentimentos de humanidade*), he would grant the request without even blinking, but the nation was in no position to display such generosity (CD, 1909, 9, 156). It was not the moment to "vote projects that translate in true gifts that, though are given to people deserving them, will however enhance the already heavy expenses of the public treasury" (CD, 1909, 9, 156). Merit and gift are entangled, as though the individual might have a moral claim for a pension, it has no legal value, and any concession from the state shall be seen as a liberal grant. Some deputies also argued that the President had even agreed with the commissions that any request for pensions should be denied, and that he would veto any of those that came before him (CD, 1909, 9, 156). Anyhow, the project was approved. When it arrived at the Senate, some even made the case that its provisions should be extended to those in similar situations (SF, 1909, 4, 55).

Pensions are always walking on a think line, where right and concession meet. Though soldiers might have undeniable merit, the state was under no obligation to be the financial benefactor of this moral claim. Other cases illustrate this paradoxical equilibrium. Firmino Álvares de Souza, for instance, was not an officer, but a sergeant who had served for eight years voluntarily, after which he acquired a paralysis in the optical nerve and went to live with his wife at the Asylum of the Invalids of the Fatherland. They only received the food allowance (*etapas*), which were not enough to support the couple; he then asked for a pension. The parliament answered that the request "was not a matter of right; he asks for a benefit, asks for

a grace similar to other ones already granted or authorized by the National Congress" (CD, 1904, 3, 62); he received the pension after three years (CD, 1907, 2, 687).

Firmino Souza, however, was a former soldier. The line between right and merit could be even more blurred when the beneficiary was a member of the family of the person who originally belonged to the armed forces. In such cases, the service of the late father or husband was frequently raised when it was being decided if daughters and widows would receive the financial benefits. Maria José and Aureliana Maria de Oliveira, for instance, got their petition partially for the merits of their brother in the fight at Canudos (CD, 1921, 6, 135); Rosa da Cunha e Silva was favored for her husband had succumbed fighting for the country during the revolt of the Navy (CD, 1895, 5, 178). The case of the heirs of the 2nd lieutenant Eduardo de Abreu Botelho is exemplary. The officer had died while building telegraphic lines in the Amazon at the commission of marshal Cândido Rondon, as the canoe he was sailing capsized in the river Sepotuba. Though he did not die in combat, he was called a "hero" (CD, 1917, 7, 326), and his family was granted a pension (CD, 1917, 7, 327) after a 7-page long eulogy written in the annals of parliament. But, most interesting, the Commission of Navy and War stressed that "the wages of officers of the Army are an integral part of the patrimony of their own families", and the kin of deceased soldiers should be compensated for the loss of those pecuniary interests, especially considering that they would mostly certainly be promoted after serving in those meritorious commissions if it was not for their death (CD, 1917, 9, 104-105).

In short, though not necessary, the rhetoric of merit from the officer could appear, and eventually could be coupled with a rhetoric of the family's right. But neither of those factors were always present, for under a legal point of view, pensions were always a grace, and could be seen as a right only in a moral framework. Those two perspectives were frequently entangled, but sometimes this was not the case.

Only in two cases the focus of the discussion lied in the particular merits and situations of the widows themselves, and not on the actions of their soldiers. The first was Marianna Cecília Meirelles da Fonseca, the widow of Deodoro da Fonseca, the first president of Brazil. Some deputies proposed a pension for her, which was framed both as a reward for the marshal and the dignity with which the widow of the president should live (CD, 1893, 2, 474). Deputy Hollanda Lima treated the pension in the same way as alimony: that it should be proportional at the same time to the merits and the needs of the one receiving the benefit (CD, 1893, 3, 217). However, some deputies stressed not only the service of the marshal, but the one rendered by his wife herself (CD, 1893, 3, 217). The second and most glaring case is that of Ludovina Portocarrero. Deputy Clóvis Beviláqua, the future "father" of the 1916 civil code, stressed that

she was with her husband at the *Coimbra* Fort when it was attacked during the Paraguay War, and helped to take care of the wounded and to organize the ammunition (CD, 1895, 7, 291). She was among the "true female heroes that presented themselves in the battlefields, facing the same risks of the combatants and paying services no less relevant that those of the ones who used arms" (CD, 1895, 7, 291). Tellingly, however, this information was only presented at the end of the discussion: the service of women, even when they had been rendered under the heat of the battlefield, was subordinated to that of their husbands.

Individual pensions were an odd practice in the republic; their original aim was to compensate relevant services and to enhance the standing of the chief of state, much in the same way as honors. However, just as titles of nobility - and for some time, orders of merit – had disappeared, they too must theoretically go away with the republic. As social security expanded, became more certain and foresaw exceptions to the rules to provide for fairness, the intervention of parliament became less and less needed. Most of the cases we have looked at are true exceptions: inflation-eroded pensions; people wounded in accidents etc. Many of those problems were still inheritances of the Paraguay War and the laws of pensions aimed to solve issues born while the premises of the pensions system were much needed – and little systematic, for what is worth. Their individual nature also enhanced the financial problems associated with social benefits: it was never easy to foresee how many pensions would be asked after a new provision had been enacted, and therefore, what would be their impact over the national budget. Finally, they had an ambiguous legal nature: at once, they were a grace and a half-right. When the parliament moved to a more systematic approach based on general laws, many of these issues were resolved: the budget became more predictable, and pensions could definitely be seen as a right. But the details of this process belong to another story.

7.6 – Part of a larger body: soldiers as public employees, social security of the police and the challenges of an expanding state

In this section and the next two, I will discuss some of the main debates concerning military social security. They will help us to better understand the relationship between soldiers and society and soldiers and the State. In this particular section, I will be discussing how, from the debates on social security, we can grasp a growing conscience of who was the soldier (*militar*). And in two senses: first, to which category it belonged, and second, which sub-categories were part of it. Concretely. This was pursued with two different debates: if soldiers were public employees, and if policemen were soldiers. To these discussions we now turn.

In the first decade of the 20th century, Vice admiral João Gonçalves Duarte appealed against his mandatory retirement, arguing that the law which established a limit age for service was unconstitutional. Art. 75 of the 1891 constitution determined that public employees could only be retired for invalidity at the service of the Nation[604]. The Supreme Federal Court (1908) argued, however, that retirement (*aposentadoria*) did not apply to soldiers, who were reformed (*reformados*). A dissenting opinion by judge Manoel Murtinho pointed out that those were simply different names referring to the same institution; similarly, teachers received *jubilação*, but the legal regime that it referred was the very same as the one of retirement. This last position, however, was not adopted by the court. However, more interestingly for our objectives here, the judges also argued that in common language, the expression "public employees/public servants" (*funcionários públicos*) was not usually applied to members of the armed forces. Therefore, the rule of article 75 was considered to not apply to soldiers, and the appeal of vice admiral Duarte was denied. This decision provides an interesting information for us: though working for the state and receiving wages from the public power, members of the military were deemed to be of a particular nature, different from that of regular civil servants. Why was that?

Though the laconic reasoning of the supreme court does not yield any answers, the contemporary doctrine on military law developed an interesting opinion on this subject. Espírito Santo Júnior (1902b, p. 101) defines that national security is guaranteed by an organ called public force (*força pública*), made of the police and the military. The former must maintain the internal order and do not fight wars, and for it they are public employees. The military force, meanwhile, has a different nature: since they are mandated to combat the enemy, they offer their own life to defend the fatherland. For it, they are not public employees; to think that they were would mean that their wages (*soldo*) would be a compensation for the life they offered. Yet, life has no price, and to say otherwise would entail a "vile, depressing and absurd market: the exchange of life for money" (ESPÍRITO SANTO JÚNIOR, 1902b, p. 102); this would dishonor soldiers, whose glory came precisely from the gratuity of their sacrifice, differently from the mercenaries that served under anyone willing to pay. Soldiers, therefore, are the "guarantors of national security; are the martyrs spontaneously dedicated to the cause of freedom and independence of the motherland" (ESPÍRITO SANTO JÚNIOR, 1902b, p. 102). The wage, therefore, is "an indispensable resource for those in the career of arms", but it is not "compensation, for it pays a service, and the soldier, risking his life in defense of the fatherland, does not do a service, but a sacrifice" (ESPÍRITO SANTO JÚNIOR, 1902b, p. 102). Though

[604] "Art 75 - A aposentadoria só poderá ser dada aos funcionários públicos em caso de invalidez no serviço da Nação".

in a much shorter fashion, Moreira Guimarães (1924, p. 33) offers a much similar account, pledging that "the soldier is no public employee, but the figure of a selfless one, a martyr, with the duty of fighting to the death for his fatherland".

This account, however, is much skewed towards military ideology, claiming some sort of a special nature for them. When jurists were writing on the same subject, visions were more nuanced. Viveiros de Castro (1914, p. 571), for instance, seems to treat civilians and soldiers as if they were in equal footing; he mentioned that art. 73 of the constitution said that "civil or military public positions are open to all Brazilians", implying they shared the same legal status. But Alcides Cruz (1914, p. 85-86) was the one that discussed this topic explicitly and in more depth. He reported the case of vice admiral Duarte along with several decisions from different courts, which decided either way: case-law did not provide for a certain answer. He then offered his own response: officers are public servants, "for as such it is understood anyone voluntarily and permanently serving the State in exchange for compensation" (CRUZ, 1914, p. 86). Enlisted personnel, differently, served only temporarily and under the obligation of mandatory military service. Therefore, they could not be considered public servants.

Therefore, in the early 20th century, there was still no precise consensus regarding the status of soldiers. The law of military social security was in its final stages of formation and some lines of force were still blurred. The law of public employment also was not still consolidated, and fundamental issues was still up for debate. Nevertheless, we can already see the more important positions and arguments formed and being confronted: we were in the last stages of dispute before a more stable legal regime could be formed.

And what about the police? Alcides Cruz (1914, p. 86) hints that the issue was unresolved. Yet, for most of the security corps, this did not matter much, since each state controlled their own forces and therefore were entitled to legislate on their specific management. With one exception: the police of the capital city, Rio de Janeiro, was subject to the control of the federal government, and had been legislatively entangled with the armed forces for much time. Since at least 28 September 1853, officers of this municipal police and their families were entitled to the same pensions system as officers and troops of the regular Army. Yet, not always the laws were so clear, giving space to discussion.

The law 2290 of 1910, art. 19, extended its effects concerning a pay rise to the police and firefighters of Rio de Janeiro. In 1915, the budgetary law, art. 111, suspended for a year the mandatory retirements, probably to save money; in the next year, the new budgetary law, art. 111 restored the mandatory retirement. Those laws combined authorized the federal government to reform servants at the two municipal forces? The government tried repeatedly

to issue mandatory retirement to both policemen and firefighters without success: the *Supremo Tribunal Federal* always curbed such attempts when lawsuits brought such acts to be considered before the supreme court (STF, 1927a; 1927b; 1927c; 1922; JUÍZO DA 2ª VARA FEDERAL, 1927). Against the will of the government, the judiciary decided that, though the two municipal corps were generally equated to the Army and the Navy, the constitution had explicitly established a particular legal regime to the federal forces. Only to them article 75, conditioning retirement to invalidity, would not apply; if any law had equated policemen and soldiers, mandating the former to retire at a certain age regardless of being able to work or not, this law shall be considered unconstitutional and could not bear any effects.

Though the issue of the status of police appeared on the debates on social security, it was clearly a minor aspect on the development of this branch of legislation in the First Republic. We will see later that this debate was much more pressing when it referred to military penal law. Anyhow, we can already notice that the relationship between Army and the police forces was somewhat muddy. In due time, we will discuss why.

The legal status of the soldier was odd and uncertain, oscillating between uniqueness and integration in other categories. They could be deemed public employees or not; the military quality could belong only to the Army and Navy or also to other military-like institutions – all of this at the same time, depending on who was deciding or the purposes of this decision. This reflects the complicated political and social status of the military, which also oscillated between the uniqueness of a mission to save the country from the evil oligarchies and an integration between the soldier and citizen aiming to extend the civic religion of nationalism to the whole country.

7.7 – Limits of the family: which sons and daughters could receive pensions?

Not all sons and daughters were equal. While today any offspring is supposed to be treated in the same way by law, in pre-1916-code Brazil, a complex landscape of legal categories of descendants unfolded before the legal thought: legitime, legitimated, natural and spurious daughters and sons could each be attributed different rights. This was a particular problem for the *montepio*: could only legitimate and legitimated descendants inherit? What was the nature of the pensions to be passed? Complex debates unfolded in early 20th century Brazil, showing us how the family was conceived, and what was the position of the *montepio* in the complex ecology of pensions.

As Alcides Cruz (1914, pp. 107-109) reports, originally, the Fiscal Court (*Tribunal de Contas*) favored the request of non-legitimate daughters and sons, until it changed its course in 1908. Meanwhile, the Ministry of the Treasury (*Ministério da Fazenda*), always opposed similar requests, as the ministerial letter 33, of 28 October 1894, which decided a particular case, proves. The "liberal" case law (CRUZ, 1914, p. 108) considered that the *montepio* had the legal nature of child support or alimony (*alimentos*), and therefore could not be denied. This interpretation was based on the 1603 Philippine Ordinances, still in force in Brazil. In book 4, title 99, § 1, the legislator defined that the only obligation of the father towards his spurious offspring would be precisely child support. Nuno Pinheiro de Andrade (1912), however, published an opinion countering this argument. After using the seventeenth century compilation and defining child support with the help of the BGB (the German *bürgeliches Gesetzbuch*) and the Swiss Civil Codes[605], Andrade claims that civil law could not apply to the *montepio*, for it was a special institution, created administratively by government regulations. Civil law had no part in it. Just like with life insurances, the general provisions of the ordinances could not govern what was to be done with that very particular institution (ANDRADE, 1912, p. 50). Moreover, the *montepio* aimed to protect the family, and spurious offspring did not belong to the family.

Despite disagreeing with the legal position of the Fiscal Court, Nuno Andrade thought that, from a political and moral point of view, it was the most correct one: spurious descendants bore no fault for their condition and should not be penalized by the mistakes of their fathers. The interpretation of the president of the Fiscal Court had been the "first scream claiming the rights for the illegitimate descendance" (ANDRADE, 1912, p. 54). But such modifications must be made by the legislator, and not by the courts. Alcides Cruz seems to hold a very similar position when he praises the "liberal" nature of the position favoring illegitimate sons and daughters.

Yet, for some years, the legal interpretation upheld the position contrary to the interests of illegitimate offspring. Araripe Júnior (1908), the attorney general, published an opinion that goes precisely in this direction. For him, the laws on *montepio* talked about legitimate and legitimated sons and daughters, widows, mothers etc. Whoever had not been explicitly included by the law should be deemed excluded, according to the principles of hermeneutics. Moreover, the laws had excluded some people aiming to protect the national treasury, which had so many financial burdens to carry; to expand the right to pensions seemed therefore to oppose the aims

[605] Both could be used as law for being codes of "the civilized countries", as determined by the 1769 Law of Good Reason (*Lei da Boa Razão*), which defined the sources of civil law in Brazil. Therefore, a 17th century Portuguese law was interpreted by a 19th century German law by force of an 18th century Portuguese law to solve a 20th century Brazilian issue.

of the law. A few years later a decision from a federal judge followed the same direction (JUÍZO FEDERAL DA PRIMEIRA VARA DO DISTRITO FEDERAL, 1911). Eduardo Rosa Pitta, the adulterous son of a Captain of Sea and War, filed a suit claiming a part of the *montepio* of his late father. In this case, the Fiscal Court rejected that this pension amounted to child support, and determined that the laws that had created the *montepio* spoke exclusively of legitimate and legitimated sons, meaning that other categories were automatically excluded from the benefices.

The situation changed somewhat after the Civil Code of 1917, as we can see in two opinions issued by Clóvis Beviláqua and Lacerda de Almeida (1929). The case concerned the niece of a late soldier that had been adopted by her uncle and, for this reason, claimed to be entitled to his *montepio*. Clóvis Beviláqua suggested that, since the law 288 of 8 August 1895 spoke of "offspring entitled to succession" (*filhos sucessíveis*), this concept should be applied, and not the one of legitimate and legitimated offspring. And the new code, art. 1605 had equated spurious and natural sons and daughters with legitimate ones for the effects of inheritance law, meaning that they would now be entitled to the *montepio*. Meanwhile, Lacerda de Almeida adopted a slightly different reasoning. For him, the institute could not be neither child support (for child support varied according to the needs of the child and the possibilities of the parent, and the pensions were invariable), nor dowry or, differently from Beviláqua, inheritance (for it did not follow the rules of succession). *Montepio* had then a *sui generis* legal nature: it was a protection of the family. But not family for the simple sake of kinship; it protected those that received most affection from the soldier (BEVILÁQUA; LACERDA DE ALMEIDA, 1929, p. 155). And the adopted daughters were part of this circle of "real affections, not simply presumable by consanguinity" (BEVILÁQUA; LACERDA DE ALMEIDA, 1929, p. 157).

These debates highlight the odd position of the *montepio*, an anomalous institution in expansion that could hardly fit into previous categories. But, also interestingly, these debates I have cited considered not only soldiers, but also civilians. The decisions of the Fiscal Court and the General Attorney, for instance, revolved around cases of the *Montepio* of the Servants of the State, that could admit military members, but was primarily aimed at civilians. It must be granted, however, that some trends resisted this movement. For example, a decision from the Ministry of the Treasure (MINISTÉRIO DA FAZENDA, 1929) explicitly rebuked a plaintiff that argued that decisions concerning the civil *montepio* should apply to some aspects of the military one; the government argued that judicial rulings concerning one could be not extended to the other. An opinion from the attorney general denied the request of a widow of a soldier that had remarried a firefighter; the decree of 28 August 1890, article 22 determined that

widows remarrying non-soldiers should lose their pensions, but she argued that firefighters were equated with members of the Army. The attorney general disagreed (ALBUQUERQUE, 1920). Anyhow, when a new legal trend emerges, it is expected that those losing from it might offer some reaction.

In general, if the *montepio* retains an odd nature, the distance between soldiers and non-soldiers shrinks, though it was not annulled. Along with it, the *montepio* shows the limits and nature of the "military family", that peculiar institution used to justify the very existence of a specific social security of soldiers.

7.8 – Between privilege and right: reverting reforms and the ranks of officers

How much control did soldiers have over the end of their careers?

The question might seem rather dull, but it can clarify how far retirement – or reforms, to be more technical – was seen as a right of soldiers or as an administrative tool at the disposal of the public administration. This issue was discussed in a small, though interesting group of decisions.

Fernando Vieira Ferreira was a former officer of the police of Rio de Janeiro pleading before the Federal Judiciary to have the reform that he himself had asked a few years before annulled. He alleged that the former commander of the police force had relentlessly persecuted him and imposed unfair penalties which had even been voided by the Ministry of Justice precisely for their vexatious nature. His original request for reform had been the only way he had envisaged to escape from such an unbearable situation. Now that the command of the police had changed, he sook to return; he alleged that there was a vice of consent in his initial request, for he had been implicitly coerced into that dramatic attitude. The federal government, differently, alleged that coercion could only happen whenever an imminent and irresistible threat to the physical integrity of the soldier took place. More interestingly, the government suggested that in such a situation, the officer should have either resisted the persecution, reporting it through the chain of command, or simply accepted the situation and worked with it: a member of the Army should work with "fearlessness and energy", qualities incompatible with calling threats as coercion (JUÍZO DA 2ª VARA FEDERAL, 1929). A similar reasoning was at the grounds of an earlier decision, which even said that "American case law adopts the moralizing principle that it is not licit for someone that has asked for an act to be issued to latter ask for its voiding for being illegal or unconstitutional" (STF, 1921).

The position of the government was glaringly favored. One last example comes from 1927: Luiz Argolo Menezes, a former lieutenant doctor of the Army, had retired before the minimum time of service of 25 years for being wounded at service during the *Contestado* War. He argued that the Law 648 of 18 August 1852 authorized him to receive the full reform pension, and not half of it, for its medical condition had been acquired at war. However, the government argued that the law determined that this benefit *could* be given, but it was not automatic[606]; the general attorney wrote an opinion favoring the official position.

These three few cases show to us that retirement was generally understood in light of the financial interests of the country. The few cases where reforms were reverted concerned blatant violations of the law. Particularly, the decree 108-A of 30 December 1889, which regulated reforms at the Navy, determined that after the reform was requested, the officer should be subject to two health inspections separated by a one-year interval, to verify if the underlying problem was truly permanent, while he waited in the reserve. Captain-lieutenant Luiz Carlos de Carvalho had requested his reform and was put at the reserve, but was called into action during the Revolt of the Navy; after it, he was subjected to a new inspection, which identified health problems, but he did not ask to return to inactivity. After three years, however, he was reformed. The STF (1915) voided this decision for not been solicited. Other case arguing irregularities during the one-year reserve period, however, was seen differently by the attorney general (BARRETO, 1922). At other case, it decided that the whole procedure was unconstitutional for violating article 75 of the Constitution, which only authorized reforms for invalidity (STF, 1906).

In short, it is possible to conclude that the case law was inconsistent, but tended to favor the control of the government over the moment when officers should be reformed. Administrative interest prevailed.

7.9 – Rise and fall of a privileged category: final remarks

[606] Law 648 of 18 August 1912: "Art. 9º Fica extincta a terceira Classe do Exercito, e supprimida a denominação de quarta dada á dos Officiaes reformados, observando-se as disposições dos seguintes §§.
1º Os actuaes Officiaes da terceira Classe, assim como os da primeira e segunda, que por lesões ou molestias incuraveis se inhabilitarem de continuar a servir, serão reformados segundo o Alvará de dezaseis de Dezembro de mil setecentos e noventa, se tiverem vinte e cinco ou mais annos de serviço, e com a vigesima quinta parte do respectivo soldo por cada anno de serviço, se não tiverem vinte e cinco annos completos. Se as lesões ou molestias incuraveis procederem de feridas ou contusões recebidas na guerra ou em qualquer acção de serviço, a reforma com menos de vinte e cinco annos poderá ser concedida com o soldo por inteiro". https://legis.senado.leg.br/norma/542193/publicacao/15632804

Order: not only for soldiers, but also for their families. In the First Republic, military pensions went on to become more regulated by general norms, against the casuistry that pervaded military benefits in the empire. Do not take me the wrong way: legislation for specific cases was still being enacted. But deputies and senators tried to restrict it as much as possible; and whenever an exceptional tragedy took place – and mayhem sustained this terrible and constant habit of happening in Brazil -, National Congress legislated for those affected by that fact, instead of waiting each family to ask for an exception.

Yet, soldiers were not fanatics of system. The most consequential result of their stints in the presidency was an increase of the benefits their received: more money, more institutions, more family members, more exceptions. Not every time in the same way, though. One could see three different periods in which the history of military social security could be divided.

First, between 1889 and 1902, soldiers and seamen gained ever more benefits and their institutions were more rationalized; this coincides more or less with the two military governments, when power was yielded with an iron fist by the marshals in power and the several officers in congress, and the first civilian government, when military power was still a fresh memory. The second period followed, between 1902 and 1910. In those years, the previous ascending trajectory was interrupted and a single issue became a matter of discussion: the long-delayed pension for the volunteers of the fatherland. Soldiers were out of power, but the nationalistic campaign was fostering national pride and took the cause of veterans of Paraguay as its own; being a much costly endeavor, the new law absorbed all efforts from parliamentarians fighting for military social security benefits. Finally, the third, more balanced period, between 1910 and 1930. It started when a new marshal became president and ended when a military coup changed the political regime in Brazil. New pensions were created for those involved in the fight against the abundant riots taking place throughout Brazil. For regular soldiers, benefits were already (more or less) organized, meaning the priorities lied elsewhere: on two consecutive pay raises.

This history can be summarized in the following table:

Date	**Rule**	**Modification**	**Force**
1st age – state generosity and bureaucratic organization			
24/05/1890	Decree 426	Extends the right to *montepio* to minor sons and uncapable sons with more than 18 years	Navy
11/06/1890	Decree 475	Grants Half-basic pay to families of officers of the Navy	Navy
28/08/1890	Decree 695	Creates a *montepio* for the Army	Army
18/10/1890	Decree 901	Increases the coming of age for sons of Army officers to 21 years for the *montepio*	Army

01/08/1891	Decree 471	Regulates the habilitation process for both *montepios* and half basic pays	Both
01/09/1892	Decree 1034	Increases the coming of age for sons of Navy officers to 21 years for the *montepio*	Navy
20/09/1892	Decree 1054	Regulates the habilitation process of the half basic pay and *montepio* of the Army	Army
27/04/1893	Decree 1382	Increases the coming of age for sons of Navy officers to 21 years for the half basic pay	Navy
04/11/1893	Decree 1594a	Gives to families of enlisted troops fallen fighting the revolt of the Navy a pension of a full basic pay	Both
07/11/1893	Decree 1594c	Gives to enlisted troops wounded fighting the revolt of the Navy the right to live at the Asylum of the Invalid of the Fatherland	Both
29/07/1895	Law 282	Regulates the habilitation process to receive the half basic pay and the *montepio*	Both
06/08/1895	Law 288	Extend the regulations of the *montepio* of the Army to that of the Navy	Navy
12/03/1897	Decree 2473	Extend the half basic pay to those fallen in *Canudos*	Army
06/11/1899	Law 632	Orders pensions to be paid in full to widows	Both
10/01/1902	Decree 846	Gives married daughters the same rights as single or widowed ones to receive the half basic pay or *montepio*	Both
2nd age – interregnum and justice			
13/08/1907	Decree 1687	Grants the half basic pay to the Volunteers of the Fatherland and others	Both
3rd age – progressive benefits and specific interventions			
13/10/1910	Law 2290	Pay raise	Both
14/11/1911	Decree 2484	Created the provisory pay for widows and regulated the habilitation process	Both
03/11/1912	Decree 2542	Granted a double basic pay to the heirs of officers who died at the tragedy of *Aquidaban* and the Revolt of the Navy	Navy
17/01/1923	Decree 4653	Authorized the reform of officers and enlisted personnel who died at the riot of the 18 of the *Copacabana* fort	Both
12/01/1927	Law 5167a	Pay raise	Both

Figure 30 Normative acts regulating military social security benefits divided according to period.

For the first time, one could truly speak of a *military* system, and not of the simple grouping of the Army and Navy systems. Sure, their institutions were still not common to both forces – but now, the tow systems were in parallel, each force mirroring the benefits of the other, and most new laws were meant to regulated both systems. By the 1920s, a new institute of social security for the servants of the state opened the door for a more thorough integration between soldiers and civilians. Yet, the borders between the two categories could still be blurred. Police officers and members of the National Guards did not fit well the requisites to be considered part of the military legal world, but they were clearly not mere civilians. This problem would remain in order for a while.

Family still appeared. After all, social security is first and foremost about family, affection and care. But if social security in the empire was signed by widows, the first republic brought the problem of sons and daughters more vivaciously. Coming of age of sons was postponed to 21 years and the situation of non-legitimate offspring was thoroughly discussed. The relations between the fruits of first marriages with their stepmothers also illustrated how well-intentioned legislative interventions can have much questionable consequences. All of these debates open an important window into the small houses of officers.

These were the last years when pensions were the privilege of workers of the state. From the 1920s to the 1930s, labor law would finally develop, and benefits would definitely become rights. The world of grace was finally being left behind. But soldiers could not complain: they ended up the First Republic much better as their started it.

Give power to a man and you will know who he truly is; through military social security, we can know officers a little better.

Chapter 8

A similar body with a different soul: military punitive law

"Monstrosity" (GUSMÃO, 1915, p. 321). "Iniquity" (OLIVEIRA, 1916, p. 30). "Handicapped" (GUSMÃO, 1915, p. 36). "Lawless" (PEREIRA, 1909, p. 45). "Mayhem" (REICHARDT, 1914, p. 31). "Monstrous anarchy (…) full of anachronical forms" (ACD, 13/09/1905, p. 1086).

All of these expressions were used to describe military justice and military penal law in early republican Brazil. Soldiers, lawyers, politicians: few seemed to hold this branch of legal science in high esteem. Strange. As the reader might recall, intellectuals in the late empire painstakingly called for codification as for a balm that would renew every practice, revolutionize every rule. And codification arrived in the 1890s. Codes, projects, commissions, discussion: all that had ever been called for was delivered. And yet, it was not enough. Was all this backlash justified?

This chapter will outline the development of the legal instruments aiming to control soldiers. The Brazilian First Republic was precisely when the first Military Penal Code (1891) and the first Procedural Code for the armed forces (1895) were issued: the first national and authentic basis of a truly modern military criminal law were finally being laid down. The influx of Italian criminal positivism was being felt strongly, stimulating a vigorous scholarship on military law: never before the barracks had attracted so much attention from jurists. The thirty years between 1889 and 1920 provided a fertile landscape from where the future of Brazilian military law could blossom.

The first five sections of this chapter outlines the legislative base of penal military law: the codes, the debates around them, the justifications for a separated military justice and the definition of military crime are the themes that will be discussed in the next pages. The sixth section describes a transition between legislative action and administrative implementation: how the momentous Revolt of the Whip highlighted the abuses that were a staple in the Navy and paved the way for change with the bloodied bricks of political action. Then, the next section discuss the relations between civilian and military justices from the lenses of *habeas corpus*, showing how this instrument could authorize interventions of common tribunals over the Army or shield the special judiciary, promoting or curbing the rights of soldiers. Then, science: the eigth sections describe the booming literature on military criminal law and its relations with

Italian criminal positivism. Finally, the last section treats the frequently difficult relationship between military justice and political turmoil.

Though apparently different, these various topics share a constant *fil rouge*: the standing of military law *vis-à-vis* common penal law and how the changing magnitude of this distance tells us of the complex relationship between soldiers and civilians and of the political activism of the armed forces.

8.1 – Towards system, against the constitution: The Code of Penal Law of the Navy (and the Army) of 1890 and military codification in the 1890s

New ruler, new rules. After the duet in uniform Deodoro da Fonseca and Floriano Peixoto ascended to the Brazilian highest office, change should be expected in the political system. Quickly. As we have abundantly discussed in the first half of this thesis, military criminal law, even more than other fields of legal studies, was in a state of absolute chaos: laws, decreesand ministerial recommendations from the 17th to the 19th century fought each other to regulate the criminal prosecution of Brazilian soldiers. *Arbitrium*, both in the old and the modern sense, was a staple. Pursuing an old request of the class he came from, president Marshall Deodoro was quickly to initiate the changes – perhaps too quick. In the early days of the Brazilian republic, military codification was on the way. But the path towards a more modern criminal law would be ravaged by turmoil, conflict and debate.

It did not seem that it would be so dramatic in the first moments of the republic. In 5 November 1890, less than a year after the new regime had been proclaimed in the streets of Rio de Janeiro, marshal Deodoro issued decree 949 of 5 November 1890: the Criminal Code for the Navy. The heading of the decree highlighted that the new rules aimed to counter the "exaggerated and even absurd penalties" that the previous legislation imposed upon deviant soldiers; those old laws were deemed "sparse and incomplete", but now these "rigors" would be opposed by the "influence of modern customs". By then, Brazil still had not written a new constitution to substitute the old 1824 charter; therefore, few thought it strange that the new code had been enacted by decree. This was about to change.

Spotting a few missteps in the code, the president issued a new decree in 14 February 1891 authorizing the minister of the Navy to draft a new version of the code erasing all errors. As it was said, it was done: decree nº 18 of 7 March 1891 gave force of law to a new code that updated a few aspects of the 1890 version while retaining the wording of most articles. A different context, however, had emerged: in 24 February, deputies and senators had finally

enacted the new Brazilian constitution – and, as it should be expected, only the National Congress could legislate on federal criminal law (art. 34, nº 22). What had been deemed a few months earlies an ordinary act of a provisory government organizing the country had now been turned into a violent usurpation of the constitutional prerogatives of the legislative branch. A heated debate quickly gained the pages of the press of the capital city of Rio de Janeiro as the organization of military justice was turning into a blatantly political issue[607].

The newspaper *Diário de Notícias* [News Diary] did not wait more than eight days to inaugurate the backlash against the federal government. An article published in 16 April 1891[608] strongly criticized the new law, exhorting the authorities not to apply the code, for it dishonored the Navy and violated the most basic rules of common sense. It was inadmissible that a code could be published simply with the signature of the minister of the Navy, bypassing parliament and ignoring the constitution. In the next 10 days, six more articles were published in the same outlet heavily criticizing the code from several points of view. For instance, the second article[609] called into attention that several provisions of the code established the penalty of loss of rank, and the penalties of degradation, destitution and dismissal also had as consequence that the soldier would lose his position. However, the 1891 constitution, art. 76 explicitly stated that officers could only lose their rank if convicted for more than two years of imprisonment: one more unconstitutionality for an already battered code.

But the sins of the code were not restricted to violating the constitution. The article dated 20 April[610] emphasized that the new law established the death penalty with the abysmal frequency of 26 times, and often associated with the penalty of degradation. Not only was the latter cruel, but its combination with the capital sentence violated the article 8 of the 1789 declaration of rights of man and citizen, which stated that punishment should only be deployed when necessary. What was the need to humiliate a soldier and strip him of all his honors when he had already been already sentenced to die? This was no more than a servile copy of the bloody 1857 French code.

[607] On the political context of the early organization of the military justice in the first republic, cf. Renato Luis do Couto Neto e Lemos (2012).
[608] *Diário de Noitícias*, 16 April 1891, "Código Penal da Armada" http://memoria.bn.br/DocReader/369365/8975
[609] *Diário de Noitícias*, 17 April 1891, "Código Penal da Armada" http://memoria.bn.br/DocReader/369365/8981
[610] *Diário de Notícias*, 10 April 1891, "Código Penal para a Armada", http://memoria.bn.br/DocReader/369365/8995

Other articles dwelled in more specific parts of the code, such as article 54, which opened room for judicial arbitrium[611], the article on the crime of insubmission[612] and even minor wording flaws[613]. All in all, as Aristides Lobo put it, "this code is simply a horror […] there is no Count of Lippe comparable to the monster that was given to our Navy"[614]. He ironically praised article 1 of the code, which stated that a crime only exists if it is previously defined by law, but, since the code was a decree, it violated itself.

So harsh a criticism prompted the drafters of the code to answer. The very commission that wrote the law, made of Elisiário José Barbosa, Júlio César Noronha and João Batista Pereira published an official rebuke against the articles from *Diário de Notícias*. They seemed especially hurt by the accusations of cruelty: against that, they bragged that their code established attenuating circumstances, when many others, such as the French or the Italian ones, did not display similar devices (BARBOSA; NORONHA; PEREIRA, 1920, p. 290). If others alleged that the penalty of degradation was cruel, the three drafters thought that it could hardly be so when most "cultured nations", such as France, Switzerland, Belgium and Italy retained that form of punishment (BARBOSA; NORONHA; PEREIRA, 1920, p. 291). Other, more specific discussions featured in the pages of the rebuke, such as the legal treatment of drunkenness and the crime of illegal orders, but it is not necessary to dig into those technicalities. It suffices to remark that the mere existence of this document is a telling signal: the code was so ill received that those who wrote it felt they needed to defend their work – and, most importantly, in their official capacity, and not as private citizens.

The press can whine as much as it wants. No matter how powerful newspapers can be, how much they can influence careers, destroy reputations and undermine policies, their power lies in words – they need someone else to take action. Someone, or some institution. The Supreme Federal Tribunal filled this position in the much famous case of the steamboat *Júpiter* in 1893. Tensions were rising everywhere in the first years of the republic, and Rio Grande do Sul – as always – was one of the places where the heat could be felt most intensely. Political conflicts put at odds two factions, the *Castilhistas*, or republicans, associated with the governor Júlio de Castilhos, and the Federalists, the opposition headed by Gaspar de Oliveira Martins. Divergences concerning executive power led to a civil war between 1893 and 1895, which

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611 *Diário de Notícias*, 21 April 1891, "Código Penal para a Armada", http://memoria.bn.br/DocReader/369365/9001

612 *Diário de Notícias*, 25 April 1891, "Código Penal para a Armada" http://memoria.bn.br/DocReader/369365/9017

613 *Diário de Notícias*, 26 April 1891, "Código Penal para a Armada" http://memoria.bn.br/DocReader/369365/9021

614 *Diário de Notícias*, 22 April 1891, "Código Penal da Armada" http://memoria.bn.br/DocReader/369365/9005

remained nevertheless confined to the south. After a frustrated attempt to enter the war, senator admiral Eduardo Wandenkolk embarked the steamboat *Júpiter* in Rio Grande do Sul to retreat from the theater of operations; he was captured in Santa Catarina and, along with the ship crew, was transferred to military fortresses, and they remained incommunicable. Then senator Ruy Barbosa, one of the most prominent early 20th century Brazilian lawyers and champion of liberalism, filed three different petitions of *habeas corpus*, each one concerning different groups of prisoners. I will discuss them in more depth latter, but what interest the most for this section is *habeas corpus* 410 (STF, 1893a), in favor of Mário Aurélio da Silveira, the immediate of the *Júpiter*. He was accused of committing military crimes under the 1890 code, but the Supreme Federal Court ruled that the decree of 7 March 1891 was unconstitutional, since the executive could not legislate on criminal law; some argued that the decree of 14 February, which authorized the new edition of the code, had been published according to the law at the time, but the judges considered that, according to article 83 of the new constitution, only legislation in line with the new political charter could be received as valid under the Brazilian legal order, which was not the case. However, the decree of 14 February itself had suspended the original edition of the code, meaning that neither of them was valid. For the STF, therefore, the imperial (and colonial) legislation had regained validity and should be enforced. The definition of military crime should be sought in the law 631 of 18 September 1851 and the provision of 20 October 1834 of the Supreme Military and Justice Council. Neither authorized a civilian to be judged at military courts in times of peace: Silveira could walk free.

This case is a landmark, being considered the first time the Brazilian supreme court declared a law – or, specifically, a decree – to be unconstitutional and, therefore, unapplicable (CRUZ, 2013). However, in the turbulent 1890s, a ruling of the highest court of the land was not enough to settle the debate, and the discussions continued. Evaristo de Moraes (1898, p. 24) agreed that the code violated the constitution, and Hélio Lobo (1907, p.32) said the Penal Code of the Navy was "one of the biggest deformities of our live as a free people". However, João Vieira de Araújo (1898, p. 7), author of the first Brazilian book fully dedicated to Criminal Military Law, did not follow the reasoning of his colleagues: for him, first, the 1891 decree merely edited minor aspects of the text, meaning that the code was the same as in 1890, and second, the decree authorizing the modification had force of law and, therefore, was valid. Notwithstanding deeming it valid, Araújo remarked that the document had "major defects", many of which reproduced fails of the common criminal code, as both had been written by the same author – João Batista Pereira. This remark, however is not so innocent: Araújo was a

congressman and for some years had been trying to replace Pereira's common code with his own project – an endeavor destined to fail[615].

Jurists were not constant, but neither was the STF. After deciding that the second edition of the conde was unconstitutional, problems did not end; it was necessary to determine which law to apply. Some judges of the supreme court believed that the first edition of the code was to be deemed valid. Others defended that the articles of were had been repristinated, since the second edition of the code had voided the first. Finally, there was a group that upheld the government reasoning did not even accept that the code was unconstitutional. As a result, depending on the composition of the court on each day, any one of those laws could be applied (CARNEIRO, 1994).

The Navy received its paramount repressive document under the strangest of circumstances; the Army would not be left behind. In 14 January 1890, the minister of war, Benjamin Constant, called a commission to write the so-called code of criminal justice of the Army, a much-needed counter of the regime of the Count of Lippe, that only persisted so far due to the "criminal indifference" of the monarchy. The ambitious commission was entrusted with the task of proposing codes of criminal law, criminal procedure and disciplinary law, completely reshaping the punitive structure of the Army. The commission was made of two soldiers, two jurists[616] and one man with both degrees – our old acquaintance Vicente Antônio do Espírito Santo Júnior (BRASIL, 1890, V). Writing proceeded much fast: less than six months after the works begun, Carlos de Carvalho presented his first draft in 12 July, and the following months were spent discussing these bases. In 15 August, the project was ultimated. The text had been "influenced by the positive school", as general Viscount of Beaurepaire-Rohan stated in the debates of the commission (BRASIL, 1890, p. VII), but was not the product of a single school – something he justifies citing Ferri, giving once again a hint of where his loyalties lied. The commission was said to be inspired by the military codes of Belgium and Germany, the army codes of Portugal, Spain, France and England, and the new common codes of Germany, Portugal and Italy (BRASIL, 1890, p. VIII).

All of this for nothing. The project was sent to parliament and, according to João Vieira de Araújo (1897, p. p. 10) was still waiting to be voted in 1897. As far as the land forces were concerned, the 1763 legislation was still applied, with its stark penalties hanging over the heads of soldiers. In 1898, Evaristo de Moraes even wrote a book called *Contra os Artigos de Guerra*

[615] On the codification of common criminal law in the 1890s and the trajectory of João Vieira de Araújo, cf. Ricardo Sontag (2013).
[616] Respectively lieutenant-general Viscount of Beaurepaire-Rohan, colonel João Manoel de Lima e Silva, military judge Agostinho de Carvalho Dias Lima and lawyer Carlos Augusto de Carvalho.

(against the Articles of War), in which he took aim at the "bruteness of such criminal dictates […] and the anachronism of the terrible legislation of the Count of Lippe" (MORAES, 1898, p. 3). He also reports that the Code of the Navy had been applied to the Army alongside the Articles of War, furthering the already confusing state of the legislation (MORAES, 1898, p. 37-39). Finally, several provisions of the Articles were unconstitutional: death sentences in times of peace, which had been outlawed by the 1891 charter; crimes without preestablished penalties, which went against the principle of legality; and the penalty of infamy, rejected in several instances of the constituent assembly (MORAES, 1898, p. 31-36).

The absence of limits to some penalties was particularly problematic, since this practice was directly at odds with the principle of legality, that was – and still is – central to military penal law and was enshrined in the very first article of the Penal Code of the Navy. Yet, the code itself, article 54, determined that no penalty superior or inferior to the limits established by law could be imposed, "except when the judge is granted arbitrium". This shows that in the early 1890s, the principle of legality was still taken lightly, even in the supposedly rigid architecture of a code. This, however, was not so much a Brazilian particularity. Both the French code for the Army of 1857, the and Italian code of 1859 and the German Code of 1872 did not talk of attenuating and aggravating circumstances on the general part, but mentioned some of them in the special one. The Portuguese (1875) and Spanish (1884) codes had a slightly different approach. The Portuguese code, art. 29 determined a mechanism on how to modify penalties if attenuating circumstances were present, but did not nominate them; it only mentioned that premeditation was an aggravating circumstance (art. 29, § 2). The Spanish Code, conversely, explicitly states that "the courts shall consider attenuating or aggravating circumstances regarding the crimes comprised in this law, those they deem as such, and shall impose the penalty assigned to the delict in the amount they estimate to be fair" (art. 9). In the end, the Brazilian Code was the only one that explicitly stated which were the attenuating and aggravating circumstances, and, for this, imposed much more limits to the judges than its European counterparts. This, despite being the only one still employing the language of "arbitrium". Later in 1895, the Argentinian code would complete the process by also establishing aggravating and attenuating circumstances (arts. 8 and 9), but doing away with the language of arbitrium.

This appreciation for legality would come to get even more strong in the following decades, as shown in some Brazilian judicial decisions from the second and third decades of the 20th century which would deal with the legislation of the Count of Lippe and its lack of legality. For instance, Criminal Revision 1656 (STF, 1919b), decided in 1919, concerned

second lieutenant Pedro Soares Pinto, who, in 1896, had been convicted for breaching article 7 of war, which ordered inferiors to respect superiors. When the process came before the Supreme Federal Tribunal, the judges overruled the conviction, considering that, since the previously cited article did not establish a defined penalty, it violated the rule *nullum crimen nulla poena sine lege* and, therefore, the constitution. In a case decided a few years later, the Supreme Military Tribunal had convicted captain Edgard de Mattos Lima for failing to fulfill orders, according to the article 29 of war. But this provision did not establish any penalty, and once again the *Supremo Tribunal Federal* overruled the conviction for breaking the principle of legality. In both cases, the decisions taken in the 1890s had applied 18th-century dispositions that left an enormous amount of arbitrium to the judge, but, 20 years later, those same guilty verdicts were overturned precisely for the provisions in which they were based lacked the certainty that must guide criminal law. Brazilian legal culture changed.

The project of code for the land forces remained in the drawers of parliament, but the Brazilian Army could not afford to enter the 20th century applying an outdated and brute legislation. In 20 September 1899, the National Congress approved law 612, which extended the code of the Navy to the Army in four laconic lines. In the same law, parliament recognized the Penal Code for the Navy, ending all remaining debates on its constitutionality.

But military law was not complete yet: if crimes and penalties had been established, procedure was still submitted to the confusing and contradictory regulations from the empire. The National Congress, aware of this situation, issued decree 149 of 18 July 1893, which transformed the old Supreme Military and Justice Council into the new Supreme Military Tribunal [*Supremo Tribunal Militar*]. Many features of the old institution were retained in the new organ, especially the administrative functions that brought it close to an *ancien régime* model of mixed court. For instance, art. 5, § 5º established that the court must to give opinions on questions concerning the armed forces filed by the President of the Republic, and § 6º put under the responsibility of the court to issue patents recognizing the ranks of reformed and honorary officers. But the most interesting one came with paragraph 1st: "to establish the military procedural form, while it is not regulated by law". Based on this authorization, the Supreme Military Tribunal issued in 16 July 1895 the Criminal Military Procedural Regulation [*Regulamento Processual Criminal Militar*], destined to govern military procedures for more than two and a half decades.

The procedure established by the Regulation was not only intricate but, at some times, flagrantly unfair. Investigations must be conducted by a Council of Investigation, made of three officers. There was no state attorney office, since military commanders were responsible for

calling the councils. The sessions of this body were secret; after initial proceedings, defendants could provide their version of facts, but they were forbidden from being accompanied by lawyers. The Council then recommended indictment or absolution; military commanders could ignore the decision and indict suspects anyway. Upon this decision, defendants would be imprisoned. Then, a Council of War would be called, in which six officers and a single civilian judge would decide on the fate of the suspect. After a convolute process, a mandatory appellation must be filed before the Supreme Military Tribunal – all while the battered defendant languished in prison. Sessions of both Councils of War and STM could be declared to be secret.

It is not hard to understand why jurists frequently derided this procedure.

On top of that, it was quite doubtful whether Congress had lawfully by delegating power to the court. Article 34, 23 established that it belonged *privately* (*privativamente*) to the Congress to legislate on criminal law; many argued that this wording excluded any form of delegation from congress[617]. Esmeraldino Bandeira (1915, p. 403), the most important scholar of military criminal law in the First Republic, put it bluntly: "if until the date of this regulation, the military legislation was confused, lacunose and incoherent, from then on it was visibly and flagrantly unconstitutional". This harsh judgement was shared by many others, such as Canabarro Reichardt (1914, p. 43-44), Eugênio de Sá Pereira (1909, p. 45), Dunshee de Abranches (1945, p. 305).

Two unconstitutional codes issued by decree – one from the president, the other from a military court – and a botched project: that was the state of military law at the turn of the twentieth century. Sure: after Congress extended the code of the Navy to the Army, a hint of legality was recovered. Be it as it may, military criminal legislation was, under the eyes of jurists, tainted with the dark mark of authoritarianism. The bloody Articles of War had been substituted in an unconstitutional fashion, as if it was necessary to show that, when dealing with the armed forces, mainstream democratic means would never suffice. The following decades might have never watched a similar level of blatant disregard for the constitution, especially concerning formalities, but the first years of the 20th century would not be a fertile seeding ground where debate and lawful actions could blossom.

[617] Legislative delegation has long being tense in Brazilian legal history, being theoretically disapproved on one hand, and concretely practice. Since the liberal state reforms of the 1990s, when the regulatory agencies with normative power were created, this debate became even more important. However in the middle 20th century, when state intervention on the economy was rising, legislative delegation was also widely discussed. For a legal history of these problems, with interesting links to current debates, cf. Jean-Paul Veiga da Rocha (2016) and Maurício Costa Mesurini (2016).

8.2 – Towards clearer definitions: military crimes and where to judge them from the empire to the republic

What counts as a military crime? This question is, at the first sight, naïve: in our common imaginary, soldiers belong to the otherworldly and distant planet of the barracks, isolated from the civilian community and obeying a particular, incomprehensible logic. Wrong. Civilians can commit military offenses and soldiers can violate the laws of civilians. Even worse, the nature of the crime does not determine necessarily the jurisdiction where lawsuits will be heard: military crimes can be processed in civilian tribunals and vice-verse. The meanders of those intricate relationships can set traps for lawyers and administrators alike; all the more in the Brazilian empire, where no code could help to identify the nature of a given offense. In this section, we will discuss the criteria used to define military crimes and where to judge them from the empire to the republic.

The first provision on the matter cited by the 1872 *Indicador da Legislação Militar* is the *alvará* of 21 October 1763, which intended to avoid conflicts between the civilian and military jurisdictions. The regulations established there, however, do not provide clear definitions; they mostly concern the bureaucratic relationships between the two different systems. However, they do not mention *military crimes*, but rather the *crimes prohibited by the military laws* (§ 2). Apparently, some suits of civilian nature against soldiers were to be judged by the military justice (§ 12), as was the case for inventories of soldiers that died during campaigns (§§ 15, 16). The liberal order, however, with its aversion for special jurisdictions, would change the way in which the justices related with each other. The constitution of 1824, art. 179, XVII, determined that there should not be privileges of jurisdiction, except for suits that, by their nature, should belong to "particular jurisdictions" [*juízos particulares*]: the emphasis was changed from the person being judged to the lawsuit being brought. The Criminal Code of 1830, art. 308, § 2nd completed the reasoning declaring that the "purely military" crimes were not included in the document and were to be punished according to particular laws. A conundrum arose: the laws to be applied were conceived according to the first mentality - that military crimes were those so declared by military laws, to be applied to a group of citizens enjoying the privilege of jurisdiction -, but they should be applied in the second environment, which prescribed that the nature of the crime would determine where the offense must be judged. The law 631 of 18 September 1851, dealing with crimes committed at war, as espionage and seduction of troops to desert, are an important legislative example of this change of

approach. Those crimes should be considered of military nature, and even when committed by civilians during war, they should be processed by the military justice; at the same time, art. 1, § 5 of the law declared that the crimes defined in the Criminal Code, arts. 70, 71, 72, 73 e 76, when committed by soldiers, should be counted as military crimes. Now, military crimes were not necessarily neither those committed by soldiers, nor those declared by military laws. The blunt world of early modern military justice was growing increasingly complex with the geometric interventions of the liberal empire.

In this new, complex environment, how do we reconcile the modern, open and abstract concept of military crime with the old laws, which were closed and simple? A new concept of military offenses, equally abstract, needed to be created. One would expect this definition to come by law, or perhaps by a decree of the executive; yet, the baroque structure of Brazilian military governance in the 19th century would not disappoint us, and the definition of military crime was conveyed in a provision [*provisão*] of the Supreme Military and Justice Council. A tribunal belonging to the executive, and not the judiciary, legislated on how Portuguese laws of the 18th century should apply in liberal Brazil, therefore. Brazilian military law can be called anything but predictable. The provision of 20 October 1834 defined four hypotheses of military crimes: 1) those "violating the sanctity and religious following of the oath sworn by" soldiers; 2) "those offending the subordination and good discipline of the Army and Navy"; 3) "those altering the order, police and economy of military service"; 4) "the excess or abuse of authority in the occasion of service, or influence of military offices". Not the most clarifying list. Thomaz Alves Júnior (1866, p. 134-135) suggested his own enumeration, claiming to have derived it from a careful analysis of the Brazilian legislation. For him, military crimes were those 1) committed by soldiers against soldiers, even when the offence was established at the civilian legislation; 2) any crime established in the military legislation and committed by a soldier; 3) any crime established in the common legislation committed by a soldier, when the legislation explicitly declares it must be judged at the military justice.

Two ministerial letters (*avisos*) discussed the problem of military jurisdiction during the empire: the ministerial letter 128 of 27 March 1867 and the ministerial letter 56 of 28 August 1884. Those seeking clarity would be left in wanting, as both documents give obscure answers. The former concerns the case of seaman João Júlio Mariano, who had killed his fellow Francisco José de Azevedo outside the barracks and for this faced trial at a civilian court. The opinion of the Council of State that generated the ministerial letter stated that soldiers in service must be judged by the military justice even for crimes committed on civilian ground, provided that the offense affected military discipline – as was the case, presumably, if one member of

the Armed Forces killed the other. The councilors remarked that "the military jurisdiction is mostly based on the quality of persons and only by exception on the circumstances of place or of the nature of the delict". Two decades later, the council of state once again had to decide on a homicide between enlisted personnel, but in the case of 28 August 1884, Benvindo Quintino do Espírito Santo had only aided Conceição Maria Izabel to kill the soldier Romualdo Ramos de Oliveira. The session decided that to avoid contradictory rulings, both offenders should face the civilian justice, regardless of Bemvindo being a soldier. However, they also stated that the case did not fell under the conditions determined by the provision of 20 October 1834. Worse: he cited the ministerial letter of 1867, saying that the old document stated that "for the crime to be of military nature and be considered as such, it is needed the simultaneous concourse of two conditions – the offender is a soldier and the crime is military for its nature or a special circumstance". Really different from what the ministerial letter of 1867 had decided – it had precisely determined that a soldier killing other soldier, even outside the barracks, risked disturbing the military discipline and his case must be processed at the military justice. Ministerial letters were read quite literally and their wording was frequently - though not always - taken at face-value, regardless of the circumstances of the cases that had originated them; those documents were sometimes treated as statutes, and not in the same fashion that judicial rulings would be approached in a common law context, risking literal interpretations that could betray the original decision. Esmeraldino Bandeira (1915, p. 22), writing a few decades later, would notice that both ministerial letters actually went into different directions.

Until 1899, cacophony would still rein in the definition of military crimes. But three republican documents, if did not reduce the confusion, at least narrowed the doubts and framed the debates in a more tangible way. First, the 1891 constitution, art. 77, determined that "soldiers of land and sea will have a special jurisdiction in military crimes", and art. 72, 23, read: "except for the lawsuits that, for their nature, belong to special jurisdictions, there shall be no privileged forum". Second, the Penal Code of the Navy, art. 3, established the persons to which it was supposed to be applied: first, all soldiers or equivalents serving the Navy; second, all soldiers or equivalents that committed crimes outside Brazil; and third, all people not belonging to the Navy that committed offenses under certain circumstances. The former comprised, for instance, crimes committed in military premises, espionage, prompt troops to insurrect etc. The list[618] was mostly empirical and did not provide any sort of general criteria;

[618] "Art. 3º As disposições deste Codigo são applicaveis:
1º, A todo individuo, militar ou seu assemelhado, ao serviço da marinha de guerra;
2º, A todo individuo, nas mesmas condições, que commetter em paiz estrangeiro os crimes nelle previstos, quando voltar ao Brazil, ou for entregue por extradicção, e não houver sido punido no logar onde delinquiu;

they had to be developed by the doctrine. The third and last document was the Military Penal Procedure Regulation, art. 32. It established three classes of military crimes, the first two of which coincided with the substantial code. However, the third one established the cases in which civilians should be judged in military courts: they were all offenses committed "in time of war". And an important doubt rose from the confront of the three documents: could civilians face military courts in times of peace, or should they face the penalties of the Military Penal Code in civilian courts? But more general questions were also being asked: what was a military crime? What are the legitimate criteria to define when a soldier can be entitled to the special jurisdiction? Upon the silence of the legislator, the intellectual laboratory of jurists eagerly begun to craft its conceptual arts.

Jurists spilled much ink trying to define what a military crime was, frequently using comparative law. Most of them began with a curious point of departure: The Digest of Justinian; more particularly, D. 49, 16, 2, *de re militare*, cited at least by João Vieira de Araújo (1898, p.44), Helvécio Gusmão (1914, p. 4) and Esmeraldino Bandeira (1915, p. 18). This fragment from *Merenius* states that "offences committed by soldiers are either special or common to other persons, therefore their prosecution is either special or general. A purely military offence is one which a man commits as a soldier" (*Militum delicta sive admissa aut propria sunt aut cum ceteris communia: unde et persecutio aut propria aut communis est. Proprium militare est delictum, quod quis uti miles admittit*). Not the most helpful definition. Brazilian jurists, then, had to study legislation – both internal and international – to define what constituted a military crime. But, being already complex, this project had a further difficulty: there was more than one type of military crime.

Brazilian legislation in general talked of *purely* or *merely* military crimes; those terms were explicitly cited by the Penal Code for the Navy and by the provision of 20 October 1834,

3º, A todo individuo estranho ao serviço da marinha de guerra que:

a) Commetter crime em territorio ou aguas submettidas a bloqueio, ou militarmente occupadas; a bordo de navios da Armada ou embarcações sujeitas ao mesmo regimen; nas fortalezas, quarteis e estabelecimentos navaes;

b) Servir como espião, ou der asylo a espiões e emissarios inimigos, conhecidos como taes;

c) Seduzir, em tempo de guerra, as praças para desertarem ou der asylo ou transporte a desertores, ou insubmissos; ou

d) Seduzil-as para se levantarem contra o Governo ou seus superiores;

e) Atacar sentinellas, ou penetrar nas fortalezas, quarteis, estabelecimentos navaes, navios ou embarcações da Armada por logares defesos;

f) Comprar, em tempo de guerra, ás praças, ou receber dellas, em penhor, peças do seu equipamento, armamento e fardamento, ou cousas pertencentes á Fazenda Nacional.

Paragrapho unico. Além dos casos em que este Codigo applica pena especial a individuo estranho ao serviço da marinha de guerra, aquelle que commetter, ou concorrer com individuo da marinha para commetter crime militar maritimo, ficará sujeito ás penas estabelecidas neste Codigo, si o crime não for previsto pelo codigo penal commum, ou si for commettido em tempo de guerra e tiver de ser julgado por tribunal militar maritimo."

both referring to the same class of crimes that were fully military – be it what it might have meant. João Vieira de Araújo (1898, p. 76), conversely, created two new terms to refer to two classes of offenses, those *exclusively* and those *cumulatively* military. Those two words corresponded to the terminology that would finally become mainstream in Brazilian legal thought, that of *properly* and *improperly* military crimes (MORAES, 1898, p. 7). Yet, the classification would require some time before it could stabilize: in 1911, Clóvis Beviláqua (1911, p. 58) was still proposing a complex partition in three types – *essentially* military crimes; military crimes *by normal understanding of the military function*; and *accidentally* military crimes, a partition that failed to catch on. Two types of crimes, properly and improperly, was how the doctrine classified the offenses of the barracks. But what did they mean?

Esmeraldino Bandeira (1915, p. 17 ss.) authored the clearest paragraphs on this subject, and for this, I will follow his reasoning. For him, two criteria originally existed to classify military crimes: *ratione materiae* and *ratione personae*. The first came from Roman law and the second, from German law, for in the former, the citizen prevailed over the soldier, while in the latter, society was fully organized around the sword. After some time, two further criteria were added: *ratione loci* and *ratione temporis*. From an intellectual point of view, these four ways were the possible paths any given country could follow to determine what a military crime was; it was up to the legislation to choose the option to be pursued by a given people. The purely military crime was born when the *ratione materiae* and *ratione personae* criteria were combined, that is, when a soldier – or equivalent – committed a crime that, by its nature, was military. Bandeira (1915, p. 18) deems this the case enshrined in the *Corpus Iuris Civilis*: the crime committed by soldiers as such. Some authors discussed what were the crimes that, by their own nature, were intrinsically military, but they agreed that there were few of them: cowardice, desertion, insubordination, abuse of military authority etc. (BANDEIRA, 1915, p. 27). Those could never be committed by civilians.

Improperly military offenses, conversely, were those of mix character: they either were common crimes committed by soldiers, or military offenses committed by civilians. They are common crimes that, by choice of legislators, are selected to fall under the legal regime of the military code, either for they are committed by a soldier, or under especial circumstances of time or space, and "damage the economy, service or discipline of the armed forces" (BANDEIRA, 1915, p. 24-25). When the crime was military by its nature, no other condition was needed for it to fall under the regime of the code; this as the case of seducing troops for desertion, for instance. When *ratione loci* was used, the nature of the crime must be considered; for instance, robbery committed in the barracks. Finally, when *ratione personae* was used, the

nature of the crime or its place must be taken into consideration; for instance, homicide practiced by a soldier on a fellow committed in the barracks. These distinctions are highly technical, and cannot always be clearly derived from the legislation; Bandeira (1915, p. 27) himself states that "great is the distance, for this issue, between doctrine and the statutes". However, those concepts were always on the minds of jurists and lawyers, and must be taken into consideration when we are discussing the functioning of military justice. Moreover, they testify to the heights of refinement that doctrine could reach in such a specialized field.

The definition and typification of military crime, though fundamental, excited the intelligences of Brazilian jurists more for its intellectual interest than for political polemic. Conversely, the submission of civilians to military courts better attracted the penchant for quarrel of the men of the law. For Esmeraldino Bandeira (1915, p. 43), the "Code of the Navy (…) treats the issue [of civilians being judged by military courts] without unity of system, and breaking with the traditions of Brazilian law", that is, only submitting non-soldiers to the special justice in times of war. The Military Penal Procedural Regulation, on the other hand, "harbors in its provisions the modern legal doctrine, which is also the liberal and true doctrine" (BANDEIRA, 1915, p. 47). Conflating the two rules, one could not help but notice the "anarchical and incongruent situation of the Brazilian military legislation". Fighting against chaos, Bandeira suggests his own interpretation. For him, the 1891 constitution precluded civilians from being judged by special tribunals in times of peace: only in war could they face military judges (BANDEIRA, 1915, p. 50). This obviously means that he was interpretating the "causes that, for their nature, belong to special jurisdictions" of the 1891 constitution, art. 72, § 23 as not comprising military crimes committed by civilians in times of peace, which is by no means self-evident. However, in the various cases in which the Military Penal Code, art. 3rd, 3 determined that its provisions covered civilians in times of peace, the trial should happen before a civilian court which would apply military law. Being so, Esmeraldino Bandeira believed to have harmonized both contradictory laws and to have saved the coherence of the Brazilian legal system. He would rather have a symmetrical system in which military crimes would be tried in the military justice and civil crimes, in the civilian one (BANDEIRA, 1915, p. 50), but, given law as it was, this was the better that could be done: military law applying to civilians, but only at civilian courts.

The definition of military crimes is an all too technical issue; general historians might even ask themselves if this topic is worth discussing. Yet, through the arid windows of legal debates, we can envisage worthy historical developments. In the empire, legal definitions were mostly vague, but they implied a straightforward relationship between military and civilian

justices: military crimes were mostly offenses committed by soldiers against discipline. They should be judged before military courts; civilian issues belonged to a different realm. Not by chance, the Articles of War of 1763 were part of the Regulation of the Infantry and Cavalry of the Portuguese Army; that is, they were understood as part of the general structure of the Army. They are not thought to belong to a separated justice, or to be a special part of criminal law, but are conceived as a small fragment of the mechanisms controlling the behavior of soldiers – from the time they should go to sleep to the crimes for which they could be sentenced to death. After the penal Code of the Navy went into force, important changes took place. Military crimes were clearly stated, and structured theories could be built around them; notwithstanding these clarifications, the provisions of the code in itself were sometimes uncertain, and, for many, unacceptable. Therefore, the debates did not ease or diminished; they simply changed and became more focused on refining the concepts proposed by positive law. Though the rules now in force rendered it easier to foresee where a case would be judged, they could entail complex results, such as a civilian being sued in a civilian tribunal according to the military code.

If in the empire, military law was a distinctive justice apart from the larger outside world, now, there were much more opportunities for the two kingdoms to entangle. The law of soldiers, then, persisted as a complex feature of the Brazilian legal landscape.

8.3 – Feasting on the codes: the boom of literature on penal military law

Military law went from the relative oblivion of the empire, in which criminal matters were mostly a chapter in books on military law in general, to the shining spotlight of several publications in the republican era. Between 1898 and 1920, at least 17 different books were published on the subject – not counting legislative propositions – and two of them gained more than one edition. Together with the political army, the editorial fortunes of military law ascended. If the field did not move to the absolute forefront of legal science, it at least was able to put the justice of the barracks on the map of legal reasoning.

Twelve of the books were published in the years between 1913 and 1919 – we will soon understand why. I classified them in four types according to the objectives their authors had in mind when writing them: public intervention, overview, academic monography and others. This can be seen on the following table.

Author	Title	Year	Type
MORAES, Evaristo de.	Contra os artigos de guerra! Estudo de direito criminal	1898	Intervention

ARAÚJO, João Vieira.	Direito penal do exército e da armada	1898	Overview
LOBO, Helio.	Sabres e togas: a autonomia judicante militar.	1906	Intervention
PEREIRA, Eugênio de Sá. Brasileiros	Justiça Militar: discurso e parecer apresentados no Instituto da Ordem dos Advogados	1909	Intervention
PARÁ, Thomás Francisco de Madureira.	Estatística penal militar.	1913	Others
REICHARDT, Herbert Canabarro.	A justiça militar no Brasil e o problema da reforma.	1914	Academic monography
GUSMÃO, Helvécio Carlos da Silva.	Da dualidade penal substantiva e da Justiça Militar autônoma.	1914	Academic monography
CARPENTER, Luiz.	O direito penal militar brasileiro e o direito penal militar de outros povos cultos	1914	Academic monography
VIANNA, Francisco Vicente Bulcão.	Dos crimes militares: estudo teórico e crítico	1914	Academic monography
GUSMÃO, Chrysolito.	A competência dos tribunais militares: estudo histórico-jurídico e de legislação comparada	1914	Academic monography
CARPENTER, Luiz Frederico Sauerbronn.	O velho direito penal militar clássico e as ideias modernas da sociologia criminal	1914	Academic monography
GUSMÃO, Chrysolito de	Direito penal militar	1915	Overview
BANDEIRA, Esmeraldino Olímpio Torres.	Curso de direito penal militar (2ª Ed: Direito, Justiça e processo militar)	1915; 1919[2]	Overview
OLIVEIRA, Samuel de.	Justiça militar: conferência no Clube militar	1916	Intervention
GAMEIRO, Mario.	Da especialização do direito penal militar perante a filosofia evolucionistica	1917	Academic monography
CARNEIRO, Mario Tibúrcio Gomes.	Direito e processo criminal militar	1919	Others
SOARES, Oscar de Macedo.	Código penal militar da República dos Estados Unidos do Brasil	1903[1], 1920[2]	Overview

Figure 31 Books of military penal law published between 1889 and 1920

Public intervention. Those four books each aimed to discuss a pressing issue under public scrutiny at the time of publication. The degree of attachment to the fugacious circumstances of everyday debates, however, varied. The first text to be published in this group was Against the Articles of War (*Contra os Artigos de Guerra*), from militant lawyer Evaristo de Moraes. The title is actually very revealing: the author had recently defended a soldier on the bench and, shocked by the anachronism and rigor of the Articles of War, he wrote this critical book. The debate would soon be closed: in 1899, the colonial instructions were finally repelled by the extension of the Penal Code of the Navy to the Army. The other three texts are somewhat connected; all of them either discuss or dialogue with the reforms of military justice being projected and discussed in the 1900s and 1910s. The first is Sabers and Robes (*Sabres e Togas*), by Hélio Lobo. In this book, which we will better discuss on the next section, Lobo puts forward the most fundamental question of military tribunals: are they worth it? The movement for the reform of the military bench had been put in motion the previous year when deputy Estêvão Lobo – a cousin of Hélio – had proposed a bill in parliament appointing a commission to discuss a new code of military penal law. The subject would be up for debate for the next years, and Lobo took the opportunity to propose a definitive solution for the problem. Others would follow suit – though in a less radical way. The books of Sá Pereira and Samuel de Oliveira are conferences held respectively on the Bar Association and on the Military club discussing bills in discussion in parliament.

Overviews. Those books are syntheses of the whole field of military law, more or less based on the codes, that provide an overview, either for students or for soldiers. The authors in this category often complained about the lack of literature on military law. João Vieira de Araújo and Oscar de Macedo Soares had written books of common military law prior to their works on the law of the barracks and Esmeraldino Bandeira taught the discipline at the Rio de Janeiro Law School, testifying of the connection between the special and general law, especially when a more systematic endeavor must be put to paper. Dilettantism can only take one so far. The books falling under this category also normally threat penal military law as a whole, not separating between substantive law and procedure. The exception is Macedo Soares, who only deals with substantive law. He wrote a commentary of the code, elaborating on each article and paragraph individually. The other three authors, conversely, selected a few topics they considered to be more relevant and elaborated on them. But all authors supposed on the reader some degree of knowledge of military law in general; Macedo Soares, for instance, always compares each article with the corresponding regulation of the general code. Gusmão and

Bandeira only discuss properly military crimes, encouraging readers to study other crimes in textbooks of criminal law *tout court*.

Academic monographies. These books, varying in length from 20 to 120 pages, were written by jurists interested in taking part in examinations for teaching positions. As a such, authors try frequently to demonstrate mastery of military law, deploying - frequently unnecessary and long – citations of foreign authors, comparisons with the laws of other nations etc. Mario Gameiro wrote his 50-page book to become *livre-docente* (independent lecturer) of military law. Apart from him, all five books falling under this category were composed for a competitive examination held in 1914 for the recently-created chair of military penal law at the Naval School of War. Most of these works were generic; they lacked a clearly-defined thesis on the modern sense, apart perhaps from Chrysolito and Helvécio Gusmão. Most of the dissertations discussed, at least in passing, if military justice should exist, and Hélio Lobo was mentioned by Bulcão Vianna (1914, p. 5, 16) and Luiz Carpenter (1914, p. 96). Later, Mario Gameiro's whole essay would be conceived as a positivistic-evolutionistic perspective inverting the conclusions of Lobo. Overall, these academic monographies lacked in originality; as Bulcão Vianna (1914, p. 65-66) aptly rendered in few words: "I did not expose new ideas, and it would be difficult or impossible to do so in a subject discussed by so many great masters".

The books in general referred to each other; João Vieira de Araújo was the most frequently mentioned author – perhaps because he was the first jurist to systematically deal with military law, not simply describing the sources. He was latter supplanted by Esmeraldino Bandeira, whose work, by its sheer size, was imposing. Chrysolito Gusmão apparently used the thesis for the examination to the Naval School as the basis for his future textbook; he even recycled some paragraphs of the first work in the later text.

The literature on military law grew vertiginously in the second and third decades of the first republic, accompanying the debates raging on the parliament and public opinion. The mass of texts was able to generate some discussions and canonical arguments that can be said to constitute the common patrimony that a person knowledgeable on military law must know by them – justifications for the existence of military law; the need to approximate the law of the barracks of general penal law, among others. We will see in the next sections in more detail how those debates played out and how did they relate with developments in parliament, the press and other venues. However, we will also see that the literature we have just described did not touch every legal problem of the Army and Navy. Disciplinary law was mostly left unaddressed, even though it was even more relevant than criminal law for the everyday control

of the barracks; criminal law was generally treated completely separated from administrative law; some problems, such as the use of *Habeas Corpus* were quite ignored.

A beginning. Much work was still to be done in the field of military legal thought.

8.4 – Military justice: undeniable need or blatant anachronism?

Complex world, that of military law. Special courts, specific codes, particular logics, unique strategies, different judges. Was it all worth it? Should military justice even exist? In 19th century Brazil, the existence of a particular system of courts meant for soldiers was consider as a given, as something not up for discussion. After the republic and its misdeeds made its appearance, what was previously considered obvious was now thrown into the battlefield of academic altercations. In 1906, the debates reached their apex when Hélio Lobo, a future member of the Brazilian Academy of Letters, published *Sabres e Togas* (sabers and robes), which aimed to discuss the "*autonomia judicante militar*" (military autonomous jurisdiction). The whole book intended to debunk the idea that it was necessary or even useful to have separate courts judging soldiers. Drawing from positivist and evolutionist ideas, Hélio Lobo crafted an enticing and convincing work that elevated the level of the discussion. I will follow his reasoning in the next few paragraphs, comparing Lobo's ideas with arguments developed more generally in other works on military law.

Hélio Lobo listed five arguments that were usually employed to defend the need of military justice, and then responded to all of them. Those arguments were: the justice of the barracks had existed in many civilizations, since time immemorial; military crimes had a special nature and, therefore, needed to be judged by particular institutions; military punishments needed to be particularly stark to uphold military discipline; the armed forces needed a speedier justice; and soldiers should be judged by other soldiers.

Military justice was old. Hélio Lobo (1906, p. 22) countered this "banal habit, that of collecting in the Roman forum instructions of pure law addressed to the 20th century". Brazilian jurists frequently started their comparative remarks on military law describing how the Digest of Justinian addressed the issue; it was claimed that the Roman Army, at the forefront of the expansion of one of the mightiest civilizations in history, was backed by a corresponding advanced law. Military law united, therefore, the two greatest achievements of the Roman Empire, violent might and intellectual civilization. If the greatest Army on Earth had a particular law, it was assumed that a separated system of military justice was essential to foster an equally advanced force in the present. But Lobo (2015, p. 25) saw things differently. He claimed that,

for the better part of Roman history, armies were only subject to a particular jurisdiction in times of war, meaning that the people of the *Corpus Iuris* could not be called to legitimize the Brazilian military justice.

Military crimes were special. According to the "dominant school", military crime was a violation of the military interest, which was different from the general interest – which, on its turn, was protected by the common criminal code. Lobo (1906, p. 50-51), however, considers almost impossible to identify what such a military interest would be. More importantly, the simple fact that some crimes can only be committed by soldiers could not be used, according to him, to justify a separated code; if one would follow this reasoning to its ultimate consequences, different codes should be drafted for doctors, lawyers and any other professional categories (LOBO, 1906, p. 52-53). A military code was so superfluous that most of the crimes it established could also be committed by civilians: true military crimes were few, like desertion, insubordination, cowardice etc. - so few, as a matter of fact, that a whole code could not be based on them (LOBO, 1906, p. 56). Improperly military crimes were considered to be so only by force of the will of the legislator, who chose some personal, temporal or spatial circumstances that transformed a genuinely common offense into an issue for the barracks. No scientific criterium cold be called to explain such choices, but only political decisions: nothing could prove more dramatically the senselessness of a military code (LOBO, 1906, pp. 57-58).

Military penalties should be heavier to enforce the strict discipline of the barracks. Against this argument, Lobo uses the modern ideas of positive science. "Criminal sociology" taught that stronger penalties did not exert any effect on most criminals, since the threat of punishment was always distant, and the vices wait closer at every corner. All the more in the barracks: since soldiers were accustomed to kill and die, death sentences had a limited effect on them, let alone other penalties (LOBO, 1906, pp. 85-88). Moreover, true discipline can only spawn from patriotism and education, not from terror and intimidation; "and, to education, more rationality is needed, and less humiliation" (LOBO, 1906, p. 94).

Military justice is speedier. To this, Lobo simply answered that, in times of peace – the normal situation in Brazil for quite some time – the special jurisdiction of the barracks proceeded quite like its civilian counterpart. The argument was simply factually incorrect (LOBO, 1904, p. 104-105).

Soldiers should be judged by other soldiers. Lobo (1906, p. 111 ss.) responded that penalties applied by military tribunals were the same as those imposed by civilian authorities: there was no significant difference in their natures that precluded people without uniform from judging their colleagues inside the barracks. Moreover, law was a particular kind of knowledge

mastered by a singular class. Those knowledgeable in law should apply it, not other people. This was so true that even councils of war were always composed by at least one lawyer. Contrary to what some supposed, the chairs of military law in military schools did not educate soldiers to judge; they simply taught them (and engineers, whose course also featured in a legal chair) "the form of government that rules them, to known the cadre of public powers, to define the law, to know the penal code in force"; but they were not schooled in the "legal technique, competence in doctrine, a spirit accustomed to the correct application of the text". In short, "the idea of civilization is too civilian to be military" and "the idea of law is too legal to belong to warriors": "the uniform must cede before the robe" (LOBO, 1906, pp. 115-116). One could hardly find a more articulated reasoning on the separation between soldiers and lawyers in republican Brazilian legal thought. All in all, Lobo's argument described military justice in the same way as a "civil institution that today is rotting completely": the jury (LOBO, 1906, p. 140). The people judging the people, soldiers judging soldiers: both doomed enterprises that separated lawyers from law and set justice in the wrong path of passion and error.

So far, Lobo followed a negative program: he investigated why the arguments in favor of military justice do not hold up to a thorough scrutiny. But he had a positive program too. For him, some of the reasons why the military justice was not acceptable were: its subordination to the executive; it violated the principle of equality; it went against the most recent trends of society. First, a justice system connected with the executive undermined the separation of powers (LOBO, 1906, p. 125-126); moreover, since future judges were always colleagues or superiors of the defendant, they wound certainly be connected by networks of friendship, rivalry, by previous opinions of the defendants they certainly knew etc.: true impartiality was impossible. Second, military justice was more of a personal privilege than a function of the profession. The simple fact that civilians could be judged by military courts "loudly testifies that the Army and the Navy do not want to restrict themselves to the mission of war that is entrusted to them: they aim the supremacy in the direction of public affairs, preponderance among the powers of the State" (LOBO, 1906, p. 144). Third, Lobo explores the evolutionist ideas of Spencer to conclude that all social institutions have their destinies submitted to the forces that control them; since civilian and military penal justices were governed by the same forces, they were destined to reunite someday (LOBO, 1906, p. 150).

In short, Lobo thought that military crimes should be regulated in the common penal code. "It is necessary to stop seeing in the soldier the privilege and starting to see only a public servant" (LOBO, 1906, p. 80). Military crimes should only be those committed by soldiers as

such; common offenses committed in the barracks should be dealt with by common justice, without any sort of privileged jurisdiction.

Though eloquent, Lobo was a singular voice. No Brazilian went as far as him to completely condemn the military jurisdiction. However, his attack was a telling symptom of deeper contestations against a separate judiciary for the barracks. Most other Brazilian jurists that wrote about military law, however, noticed that most contemporary legal systems tended to shrink the distance between the law of civilians and that of soldiers. João Vieira de Araújo (1898, p. 5-6) noticed that, if one compared Roman law with contemporary legislations, it would be obvious that military law was growing nearer to the ways of the civilian jurisdiction; the movement kept going on even in the 19th century, as, according to him, the French code of 1857 still separated the two categories sharply, but the more recent documents, as the Spanish, Italian and Brazilian codes, had been putting civilians and soldiers in more equal footing. This tendency, particularly considering France, was noticed by Esmeraldino Bandeira (1915, p. 517). Evaristo de Moraes (1898, p. 26) was blunter: "this the tendency of the modern spirit: to reduce the arbitrium and bruteness of the military legislation, nearing it to the civilian one". Argentinian commentators also remarked that the Italian and French militaries had been decreasing the distance between the penal regimes of soldiers and civilians; they remarked that Argentina was going against such tendency (AVELLANEDA, 2021, p. 94-95).

Though recognizing this movement as positive, Evaristo de Moraes still thought that a particular jurisdiction for soldiers was needed. For him, in modern times, there were two classes that, by the ancient nature of their costumes and the particularity of their disciplines, could be called *closed* [*cerradas ou fechadas*]: the clergy and soldiers. Churches and convents looked like barracks and fortresses, and both were required to pay passive obedience, follow curfews and eat frugally (MORAES, 1898, p. 26). Both, then, are not "independent and free citizens"; they are not equal to those living outside the barracks; therefore, their crimes are different; being of a particular nature, they must be regulated by a special law; being special their statutes, they must be applied by separate courts. This special nature derived from the "closed nature" of this particular community and from the needs of discipline; whenever neither of those two factors were at play, the influence of civilian law should be received, but when this was not the case, it was justified to keep military law apart.

Esmeraldino Bandeira fell in an intermediate position between the blunt rejection of Hélio Lobo and the limited acceptance of Moraes. He said that, as "civilization develops", the special jurisdictions become more restricted, which, by itself ,would prove that they are at odds with the principles of "civil liberty and social equality" (BANDEIRA, 1915, p. 31). But, when

he looked up to that "civilization", he saw mixed signals. On one side, some of the central nations used as a point of reference by Brazilians were restricting the jurisdiction of military courts: France was considering a bill that would suppress the military jurisdiction in times of peace, and the Italian Chamber of Deputies had even voted to suppress military courts altogether – a movement that, however, did not proceeded further (BANDEIRA, 1915, p. 33). This last piece of information was actually a slight misrepresentation from Bandeira. The Italian Chamber of Deputies had voted an *ordine del giorno* inviting the government to present a *disegno di legge* extinguishing military justice. The government did not act (LATINI, 2010, p. 212). Anyhow, Bandeira pointed out that at the same time that those restrictive measures were being put in motion, all "civilized" nations retained a separate jurisdiction for their armed classes, and the continuous militarization of the armed peace of pre-World War I Europe was fueling the growth of even more military structures. The bets of the times lied in gunpowder. Esmeraldino Bandeira was uncomfortable with military jurisdiction, but he knew that it was not going away anytime soon. But of one thing he was sure: that "beginning with the name, there is no greater aberration than Councils of War in *times of peace*" (BANDEIRA, 1915, p. 34). If special courts could be accepted, they should not be retained when no one was waging war.

The only, so to say, "radical" defense of the specialization of military law came from Mário Gameiro – who, curiously, departed from the same theories as Hélio Lobo: Spencer and evolutionism. He believed in the direct equation between evolution, quality and specialization. The more specialized a body, a people, an institution, the best. And, if evolution meant bettering by differentiation, equality was a problem (GAMEIRO, 1917, p. 27). He therefore condemns the unification of private law (that is, equality between civil and commercial law) and, similarly, defends the existence of military law as a separate jurisdiction.

All in all, military justice was mostly accepted, though grudgingly. If some were ready to reject the justice of the barracks, even those that accepted it thought that restricting this special jurisdiction amounted to a civilizational gain. This inherent tension reflects two different tendencies that were growing in early 20th century legal, military and political thought: on the one side, the ideology of progress promoted peace, international conferences, international law, regulation of war etc.; on the other hand, the armed peace led to ever more numerous Armies, more powerful arms and a general atmosphere of danger that would lead to the First World War. After 1919, this tendency would only grow, with, on the one side, the birth of the League of Nations, and, on the other, the political instability, blossoming of paramilitary groups and arms race that would once again lead to warmongering. Brazilian jurists shared the values of the scientific and progressive ideologies that spoused peace and looked warily at the Armed

Forces; at the same time, they saw other nations arming themselves to their teeth. Brazil could not stand by defenseless. This clash of tendencies, which is expressed more dramatically in the discussions on the opportunity of military justice, encapsulates what is perhaps a universal tendency of the modern jurist: at once, the crafter of concepts and artist of the practice, uniting abstract notions and concrete deeds, theory and realization, books and action, dreams and facts, ought and be.

8.5 – Failed proposes to reform military justice between 1895 and 1920

Some might think that military justice was not needed, but, regardless of what jurists were discussing, the special jurisdiction of the barracks was a reality. And a changing one: between the proclamation of the republic in 1889 and the 1930 coup, three (or four) codes of military procedure followed one another, modifying the structure of Military Justice and some of its practices. We have already discussed the questionable origins of the 1895 Regulation, which was enacted though a decree of the Supreme Military Tribunal. This decree more or less organized the previous practices and much old traditions of Brazilian military procedure – it was a compilation, aiming for systematization but not for deep change - meaning that this law was born already outdated. It was meant to be a temporary step in the road to full codification. The 1890 Penal Code of the Navy was unconstitutional and felt by most to be anachronistic. The Code of the Army drafted in 1891 was not even enacted. Discontent: this feeling was widespread among Brazilian jurists discussing military law. A feeling that would be duly channeled to reformistic debates in parliament, the press and legal journals. This quest materialized in an astounding number of projects of reform to be presented to the National Congress and are more or less summarized in the next figure:

Main author	Nature	Authorship	Year Presented	Initiative	Result
Beaurepaire Rohan	Penal of the Army	Commission	1890	Ministry of War	Stalled
João Vieira de Araújo	?	Commission	1891	Parliament	Not even the text was presented
Antônio Augusto Cardoso de Castro	Penal of the Army	Individual	1895	Private, presented at the Senate	Not discussed
Alexandre José Barbosa Lima	Procedure	Commission	1900	Parliament	Not even the text was presented

Dunshee de Abranches	Procedure	Individual	1907	Parliament	Project substituted
Cândido Motta	Procedure	Commission	1911	Parliament	Approved in the Chamber, stalled at the Senate
Clóvis Beviláqua	Penal of the Navy	Individual	1911	Ministry of the Navy	Not discussed
Admiral Marques Leão	Penal of the Navy	Individual	1911	Ministry of the Navy	Not discussed
João Mangabeira	Penal	Individual	1916	Parliament	Not discussed
Dunshee de Abranches	Penal	Individual	1916	Parliament	Stalled
Cunha Pedrosa	Penal of the Navy	Individual	1917	Parliament	Stalled at the Senate
Vicente Saraiva de Carvalho	Procedure	Individual	1920	Ministry of War	Not discussed

Figure 32 Initiatives of codification of military penal and procedural law presented at the Brazilian parliament between 1889 and 1920

10 projects and one unproductive commission aimed to change the face of military law in Brazil. For thirty years, all of them failed. Why and how?

In the first decade and a half of the republic, efforts to change the *status quo* were scattered. In the same year of 1891 in which the project drafted by the Commission Beaurepaire Rohan failed, the first echo of the reformist pulsion was felt – though it was less than whispering. A Commission under the presidency of then deputy João Vieira de Araújo was appointed to reform both the common and the military penal code. In 1891, a project of general part was presented for general criminal law, followed by a promise that the commission would later turn its attention to the Army (CARNEIRO, 1944, p. 270). It Never did. After Araújo left parliament, the effort slowed down, though the text was approved and was sent to the senate. There, however, efforts stalled. Not even the common code was published. Military law would have to wait until 1895, when senator João Neiva presented to the high chamber of parliament a project of military penal code (ACD, 27/10/1895, p. 2446; ACD, 28/10/1895, p. 2469). This text had originally been written by Antônio Augusto Cardoso de Castro, a civilian judge at the Supreme Military Court, as a substitute of the Articles of War specifically for the Army. The initiative, however, found little support, and the bill was not further discussed. In 1900, deputy Alexandre José de Barbosa Lima requested the presidency of the Chamber of Deputies to appoint a commission responsible for drafting a new code; the collegiate body was constituted, but the parliamentarians were incapable of even writing a project (CARNEIRO, 1944, p. 297).

With the Articles of War recently abrogated by the 1899 law that extended the Penal Code of the Navy to the Army, military justice reform felt less urgent.

Until it was. In November 1904, the Revolt of the Vaccine was at the forefront of newspapers, and many headlines referred to the coup attempted by several soldiers. With the involvement of dozens of students of the Military School, no less. On the following year, however, as many of the insurrects were dragged through the excoriating bureaucratic machine of military justice, public opinion started to sympathized with their ordeal. In the same proportion, calls for changes in the justice of the barracks were consistently advanced; a mark in this trajectory was the speech given by Senator Ruy Barbosa in 1905 when he proposed a bill granting amnesty to those involved in the events of the previous year (ABRANCHES, 1945, p. 305). After a scathing description of the judicial apparatus, the prominent statesman called for change. Later that year, opinion turned into action. Deputy Estevam Lobo gave in September a landmark speech describing all the main characteristics of military law and its central flaws, requesting, in the end, that a new commission be appointed to design and submit a bill on the unavoidable reform of military penal law and procedure (ACD, 13/09/1905, p. 1086-1092). Though this initiative did not immediately produce a new project, it inspired several independent initiatives that would in the next decade find their way into the parliament.

In 1907, as deputies and senators discussed the bill that would turn into the law of military draw, an otherwise unremarkable deputy, Dunshee de Abranches, presented an amendment urging the government to reform military justice, with a sketch of law that should be used as a starting point for future work. The proposal was considered worth of debate by the chamber, but the effort was deemed too great to be restricted to an afterthought in a major reform; the articles were then dethatched (*destaque*) from the original bill and turned into a bill of their own – one that would live a long life through the byzantine procedures of lawmaking (ABRANCHES, 1945, 295).

In 23 December 1907, the Dunshee the Abranches project was sent to the Commission of Navy and War, from which it would emerge almost a year later with opinions from three different commissions. They all concluded that the effort represented by the project was laudable, but the text was still a work-in-progress: with a meager number of 42 articles, it was insufficient to tackle the gargantuan mission of reforming military justice (ACD, 13/12/1908, p. 3700-3701). The issue was more or less forgotten for two years, until, in 24 November 1910, deputy Thomaz Cavalcanti requested the creation of a new, special commission to evaluate and develop the project. After the members were appointed, results would emerge in a year. Deputy Augusto de Freitas, the president of the commission, presented a substitutive bill, which was,

however, rejected by the collegiate body; the reporter, Cândido Motta, presented a counter proposal, which was accepted (ACD, 11/11/1911, p. 2186-2190). The project would henceforward be known as the "substitutive Motta". The change of name did not bring a change of fortune. The project went to the second discussion and was approved in 24 July 1912; the third discussion took place between 17 September and 6 December 1912. The text went on to the Senate, where it received a positive opinion from the Commission of Legislation and Justice in 11 June 1913, and of the Financial Commission in 9 October 1913. The evolution was notable: if Dunshee de Abranches had filed a slim project with little less than 50 articles, the final version of Candido Motta's substitutive in the Senate could boast a full 314 articles covering the whole of procedural law. Regardless of the enthusiastic reception, however, the new code would not be approved this soon, and the project died in the drawers of the Senate[619].

Parliament was acting on procedural law, but the military penal code was also in dire need of reform. Dunshee de Abranches, not crippled by the discouraging fate of his project on military procedure, presented a bill of military penal code to the senate in 1916. Immediately after that – unsurprisingly - a new commission was appointed. And its trajectory would also be convoluted. Parallel to these efforts, the ministry of the Navy requested new projects of code specifically for the sea forces. Two were written in 1911: one by Adminiral Marques Leão, and other by Clóvis Beviláqua, one of the foremost Brazilian jurists of the time, and the main author of the 1916 Civil Code. These two projects were used as a base for a new substitutive drafted by Senator Cunha Pedrosa and presented to the Senate as a substitutive for the second project Dunshee de Abranches. Neither the original project, nor the new text would find their way into law books.

Clearly, not only the legislative had turned its attention to the issue. The executive was getting more and more involved in the reform of military justice; the Minister of War, in 1913, complained that military lawsuits dragged an excessive number of officers – three for Councils of Investigation and six for Councils of War –, meaning that much needed manpower would be diverted from the core functions of the Army (MINISTÉRIO DA GUERRA, 1913, p. 20). The next year, the Minister insisted that the military justice was in a state of anarchy, governed by many useless laws and engulfed by excessive and formalistic principles (MINISTÉRIO DA GUERRA, 1914, p. 10-12). Despite being constantly urged, Congress refused to take effective action (MINISTÉRIO DA GUERRA, 1914, p. 10-12).

[619] *Jornal do Commercio*, 9 May 1926, "Projecto do Código da Justiça Militar", http://memoria.bn.br/DocReader/364568_11/16180

Other projects would be presented in the following years, such as the one written by a commission called by the Ministry of War and presided by Vicente Saraiva de Carvalho Neiva in 1920; or the project of law of judiciary organization drafted by Epitácio Pessoa. Apparently, neither executive sponsorship, nor authorship from a former president of the republic could guarantee the success of a bill. In the same year of 1920, a new code of military procedure would be created *ex-nihilo*, without relation to the drafts carefully developed on the previous decade. Anger followed suit. But this is a matter for a future section.

What was this myriad of projects trying to do?

The drafts of codes of penal law gradually changed from encompassing regulations of all of penal law to restrict laws aiming to approximate the law of the barracks to the punitive law of civilians. The first projects, such as the one from the 1891 Beaurepaire Rohan commission and the 1895 draft from Cardoso de Castro, were quite traditional codes, with a general part and descriptions of dozens of crimes. However, by the 1910s, the main debate was whether improper military crimes should or should not be included in future codifications. The project Beviláqua, for instance, described only properly military crimes. He, as many others, believed that military justice existed to punish violations of military duties, meaning that it could not persecute improperly military crimes – which were violations of general social duties made more serious by their circumstances – neither civilians in times of peace – for they could not, by definition, violate military duties they were not sworn to comply with (BEVILÁQUA, 1911, p. 59-60). Not only Beviláqua followed this reasoning[620]. Similarly, an opinion of the Brazilian Institute of Lawyers criticized the second project of Dunshee de Abranches precisely for including an extensive list of improperly military crimes (CARVALHO, 1945, p. 469). This was actually the doctrine defended by the authors of the two foremost books on military law published during the republic: Esmeraldino Bandeira and Chrysolito de Gusmão. Whose books, by the way, went to the presses in 1915 – precisely when those disputes were raging.

The projects of Beviláqua and Cunha Pedrosa went even further: they completely did away with the general part, preferring to let military law be regulated by the general code. This decision eloquently recognized that soldiers did not live a life completely apart from that of civilians, but shared their condition of citizens with the special declination demanded by the circumstances of the barracks. Parliamentary debates tended to recognize that discipline – and only discipline – could justify a special law of the military. Evaluating the Cunha Pedrosa

[620] Samuel de Oliveira (1916, p. 54-55), a soldier writing about military law, shared the same opinion while evaluating the second project Dunshee de Abranches. Bulcão Vianna (1914, p. 48) criticized the 1891 code for including improperly military crimes, except for those few that directly violated discipline, such as violence against superiors (VIANNA, 1914, p. 57-58).

substitutive in the Senate, senator Rego Monteiro (1945), for instance, went so far as to defend that the aggression of superiors against inferiors should not be considered a military crime: since such actions were mere abuse of power, they did invert the natural order of discipline in which superiors prevailed over superiors. It must therefore be persecuted before the common jurisdiction. This small, but significant step demonstrates that the debates were moving towards a more coherent and systematic way of thinking about military criminal law. Having jurists more involved with military problems might have helped to better clarify views around the issue, but soldiers also frequently defended a more restricted justice of the barracks. In the end, the goal was to render military punishment more akin to the civilian one[621].

Trends regarding the projects of procedural code were at the same time more constant and more complex.

From the very first publication of the Procedural Regulation of 1895, its problems were quite obvious for almost all critics: the existence of the Councils of Investigation; excessive amount of formalities in the Councils of War; unreasonable ascendancy of the military administration over the procedure of military justice.

The members of the commission that wrote the project Candido Motta of 1911, for instance, recognized they would rather have the preliminary investigation be done by a single judge with a law degree; this would avoid unnecessary friction between judges in a delicate phase of the procedure and would also relieve soldiers, who did not possess strong legal credentials, from performing difficult legal duties in one of the most difficult parts of the procedure. Nevertheless, the constitution, art. 77, § 1 demanded implicitly that instruction be conducted by a collegiate body, and the commission accordingly conserved the Councils of Investigation (ACD, 11/11/1911). Doctrine at the time also tended to lambast the Councils of Investigation (CARPENTER, 1914, p. 118).

Some bills aimed to curb the extensive powers still held by military commanders over the judicial apparatus. They were responsible for calling both Councils of Investigation and War, and were not bind by their decisions. The first project Dunshee de Abranches was praised for creating a Public Ministry responsible for prosecution, a measure that would take the power of initiating proceedings from the military apparatus (BRASIL, 1945, p. 292). The project Neiva followed the same path (NEIVA, 1945, p. 217, 220-221).

[621] An eloquent statement on this regard: "Assim, pois, se a classe militar não é um corpo estranho encrustado no organismo social, se ela é apenas uma parte que completa o todo, contribuindo eficazmente para a sua coesão, é natural que em seu código penal só figurem os delitos especiais, porque os comuns já se achavam previstos na legislação penal ordinária" (REGO, 1945, p. 150.

The 1905 speech of Estevão Lobo point some of the many problems of the Councils of War. All witness hearings made before the Councils of Investigation had to be repeated before the former collegiate, since the latter were secret – including for the defendant. A useless preparatory session took much time. A time-consuming procedure was required for calling *ad hoc* councils made of six officers (and one fix *auditor*). On top of it all, deadlines were twice as lengthy before Councils of War than regular civilian tribunals – and, since any crime could allow preventive arrests, soldiers frequently faced excruciatingly long spans in jail before being sentenced (ACD, 13/09/1905, p. 1091-1092). The projects tried to counter these shortcomings. Sometimes, with far-fetching proposals. Cândido Motta, for instance, thought that officers hardly had enough legal knowledge to opine on momentous legal matters; since appeals to the STM were automatic, they did not have to do so. He curiously established in his draft that the Councils of War should rule only on matters of fact, leafing matters of law to the STM. How these two realms could be separated remains a mystery.

Either in substantive or procedural law, the many projects presented in the first decades of the republic aimed to fight the idiosyncrasies of military law. A more civilian justice; citizens first and soldiers later; freedom for soldiers must be equal to the freedom for civilians[622]. Those were the rally cries of the battles fought for a more humane military justice. Probably, they did not please every single stakeholder. A more humane justice meant for most of the aspiring reformers less secrecy in hearings, less powers to commanders, less arbitrium. All measures that might be at odds with the interests of the most powerful man in the Army and Navy. They would be eventually vanquished in the 1920s, though. With a heavy price: the debates around the military or "civilistic" nature of military justice would continue to rage in the following decades. But this, we shall discuss in a future chapter.

8.6 – The endurance of evil: corporal punishment in the Navy and the revolt of the whip

When marshal Deodoro da Fonseca first seated at his desk as president of the republic in 15 November 1889, many aspects of the Brazilian legal system might seem backwards and calling for reform. But, as a man of arms, the chaotic state of military legislation was certainly very near to his heart. Yet, among the multitude of antiques, anachronisms and hideousness that

[622] "A natureza do processo criminal militar é a mesma do processo criminal comum; a liberdade do indivíduo aí tem direito às mesmas garantias e ao mesmo respeito (...). O modo de encarar o crime, de apurar a responsabilidade não deve afastar-se do modo geral e ordinário" (REICHART, 1914, p. 48).

might have passed in his mind, one certainly stood out: the lash. Different from most European countries at the moment, and contradicting the most basic aspects of Brazilian constitutional law, the officers of the Navy still fustigate the backs of seaman with the much-hated instrument. This heinous practice stood in sharp contrast with the highest ideals of civilization to which Brazil aspired, to the place its elites desired for the newly-erected republic in the concert of nations as a fully-fledged participant of the global balance of power.

One day: it took one day and three documents for the provisory government to issue decree n. 3 of 16 November 1889, that, in its art. 2nd, abolished flogging in the Brazilian Navy. The awaited end of a heinous punishment?

In fact, this provision was nothing more than the first step of an extenuating fight for rights that would develop over the course of the next 20 years. Yet, this provision was prematurely commemorated in an article published by the *Revista Marítima Brasileira* (Brazilian Maritime Review) already in 1890, showing how even officers were aware that the lash was a backwards practice. The author, Vidal de Oliveira (1890, p. 41) interestingly wrote that this abolishment was "a badge of honor to which the national seamen has been earning [*tem feito jus*] with the exemplarity of his behavior". This legal change was not the consequence of a right or of the constitution, but was a meritorious outcome that had to be earned. The seamen had to be better trained for the ships not to turn into effective jails receiving the most marginalized segments of society; with better instruction, the Penal Code would not be used to punish transgressors, but to prevent offenses from happening on the very first place. Yet, Vidal de Oliveira did not delegitimize the whip in itself: it, conversely, characterized that type of punishment as a dreadful method that might be needed under certain circumstances. This attitude speaks volumes of a deeper intellectual trait of the Brazilian sea forces.

As we have already seen, the whip had been banished in the Army in the somewhat distant 1875 and was nothing but a distant memory, while in the Navy, the skins of sailors were frequently cut but the much-feared punishment. In the Brazilian society, in which slavery had only been recently abolished, the lash echoed violent practices that until little before had structured the violent relationship between slaves and masters[623]. The interactions between officers and the troops frequently reproduced the previous model of domination, and the mostly white[624] commanders were used to employ violence to control and rule the mostly black and brown seamen.

[623] On racism against seamen in First Republic Brazil, cf. Álvaro Pereira do Nascimento (2016).
[624] For a case study on the racial composition of officers of the Brazilian Navy in the first republic using data from the Identification Cabinet of the institution, cf. Moacir Silva do Nascimento (2019).

In the very early republic, the lobby of the naval elite exercised its effects and yet in 1890, the practice of the whip was reinstated. The decree 328 of 12 April 1890, art. 8, "c" created the correctional company, a special institution within the structure of the Navy to which seamen could be sent to endure punishment. In the next years, a few other provisions would legitimate and enlarge the scope of corporal punishment in the Navy. Decree 4323 of 15 January 1902[625] regulated the medical corps of the Navy, and, in its art. 40[626], determined that, before any corporal punishment could be applied, a Navy doctor must examine the defendant and rule if he was in physical conditions to be whipped. Finally, decree 509 of 21 June 1890, which enacted the disciplinary code of the Navy, mentioned, in its art. 5, observation XIII, the "exceptional regime" of the correctional company, though it did not mention what kind of treatment this exceptionality entailed. We can guess, though.

The maltreatment, the authoritarianism, the abuse. The situation in the Navy become untenable: at the subterranean rooms of ships, at night, at the docks, conspiracy started to mount. In the 1910s, one revolt would forever mark the Brazilian collective imagination.

After the revolt of the Navy in 1893, the Brazilian sea forces were in tatters, the officiality, divided and the ships, in absolutely decay. After more than 10 years of crisis in the Navy, Brazil launched the well-known 1904 Naval Program: a series of ship acquisitions that would catapult the Navy to a prominent position in the world. The new vessels included some scouts and destroyers, but the jewels of the crown were two battleships of the new class called *dreadnoughts*, built in Great Britain, that had revolutionized sea warfare with a much bigger tonnage, a particularly powerful assemblage of guns, and steam power. The two ships that were commissioned and delivered to Brazil, *São Paulo* and *Minas Gerais* were effectively, for a few months, the most powerful battleships in the whole world. This move would sparkle an arms race in South America between Brazil, Argentina and Chile, where each country tried to outgun each other to scare them out of any potential threat. The minister of the Navy proudly reported in 1910 that, before the Naval program was installed, the Brazilian Navy had a total tonnage of 14 thousand, against 21500 of the Chilean and 43600 of the Argentinean sea forces. After the program, Argentina had reached 101 thousand tones, Brazil, 93 thousand, and Chile, 27 thousand (MINISTÉRIO DA MARINHA, 1910, p. 14).

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625 https://www2.camara.leg.br/legin/fed/decret/1900-1909/decreto-4323-15-janeiro-1902-504346-publicacaooriginal-1-pe.html

626 "Art. 40. Sempre que se houver de applicar qualquer castigo corporal a alguma das praças da companhia correccional, creada pelo decreto n. 328, de 12 de abril de 1890, o medico, que tiver de assistir a esse castigo, examinará si o estado do individuo o admitte. No caso contrario, o declarará, emtitindo seu juizo por escripto".

To bring the two juggernauts home and learn how to use them, the Brazilian government sent a few hundred seamen to Europe, where they eventually mingled with British comrades; some suspect they might have gotten in touch with anarchist ideals. The delegation was composed also of the Brazilian president-elect general Hermes da Fonseca. In the trip back to Brazil, he was received in Lisbon by King Manuel; while the Brazilians were still at the Tagus, a revolution brought down the Portuguese monarchy, with the help of naval workers.

After they returned to Brazil, the state-of-the-art ships were mostly out of league for the beleaguered Brazilian resources; some references hint that, instead of the more than 900 sailors needed to man the vessels, little more than 300 were assigned to each of the battleships. The long working hours and the mistreatments perpetrated by officers mounted up in the week of the inauguration of Hermes da Fonseca, especially after a seaman was flogged. The talks of rebellion that had been circulating on the previous weeks were about turn into reality.

The night of 22 November 1910 was mostly calm in the mighty battleships stationed at the Guanabara Bay, with mild temperatures and a blue sky towering over Rio de Janeiro[627]. Commander João Batista Neves, the captain of the *Minas Gerais*, and his immediate attended a dinner at the Portuguese ship *Adamastor*, that had come to Rio for the inauguration of Hermes da Fonseca just a week earlier. After the meal, both men withdrew before 10 p.m. to go back to their vessel. Neves arrived at the deck, saluted lieutenant Álvaro da Mota e Silva and went to his cabin. After this seemingly calm chain of events, Silva was attacked by a group of seamen chanting "down with the lash" and "long live to liberty". Commander Neves went to the deck to try to understand what was happening, but his presence had no effect on the rioters. After some conflict, Neves was shot and died; the few remaining officers and some loyalist seamen took a launch and fled the ship. Other ships, including the *São Paulo*, started their own rebellions and, overnight, the troops managed to take charge of most of the ships of the Brazilian Navy stationed in the capital, including its two most prized assets. The leaders of the insurrection, including its most famous participant, João Cândido Felisberto, sent a message to the federal government with their demands: better staffed ships; more reasonable officers; better training for the seamen; an amnesty for those participating in the revolt; and, most important of all, abolishment of the whip. The finely written letter made references to the "slavery" to which the seamen were submitted. If their requests were not met, they threatened to bomb Rio de Janeiro.

[627] The following chain of events mostly follows the account rendered by Joseph L. Love (2012).

In the next hours, the government would contemplate a possible challenge to the highjacked ships. But this option quickly showed its downsides: the military fortresses on land would have much difficulty to challenge the mighty dreadnaughts; the government risked losing the two highly expensive ships and the recently developed Navy; Britain was exercising diplomatic pression against this option, trying to save some English citizens that remained trapped in the ships. The vessels kept sailing in and out of the Guanabara Bay for four days while the two sides struggled to reach common ground. After a rushed debate, an amnesty was approved by congress in a matter of days, ending the revolt. The government recognized that the leadership of the revolt had treated the crew and the material with much honor, avoiding further bloodshed and preserving order. The international press reported the events and, together with Brazilian newspapers, praised the skills of the seamen that had piloted the ships. We must remember that most of them were illiterate.

The next months, however, would be tormenting. In a few weeks, the Navy discharged hundreds of seamen deemed unreliable for service and gave them tickets to return to their states of origin. This was allowed by decree 8400 of 28 November 1910, which bypassed the traditional requirement for a Council of Investigation before discharge of enlisted personnel. Less than a month later, another rebellion broke out at the marine corps (*Batalhão Naval*). The seamen remained loyal and the riot was quickly controlled, but the heavy atmosphere in the Navy stimulated a harsh response from the administration. A state of siege was proclaimed and some of the participants of the previous revolt were held in custody. Almost twenty men were put into a cell with quicklime at *Ilha das Cobras* and died of asphyxiation on Christmas day. In the first months of 1911, hundreds of former seamen were dispatched to the Amazon to work on the Madeira-Mamoré railway, which was to be constructed as part of a treaty with Bolivia in exchange for the territory of Acre.

The occurrences of 1910 - the *Revolta da Chibata* as it is widely known - became one of those events that entered the collectively memory and are part of national identity. It also sparkled a major process of reckoning within the Navy that effectively terminated the use of corporal punishment.

The minister of the Navy, Joaquim Marques Baptista de Leão thoroughly reevaluated the legislation of the Navy and the recruitment of seamen both in the report of the ministry (MINISTÉRIO DA MARINHA, 1911) and in a text published in the Brazilian Maritime Review (*Revista Marítima Brasileira*) (LEÃO, 1911); his sorrowful tone is quite telling of the effects the revolt had had even on the highest circles of Brazilian bureaucracy. Leão does not blame the indiscipline on the seamen themselves, but on the very institutional structure that

surrounded them: most were recruited at jails and on the lowest classes of society - even those that went to the School of Apprentices (MINISTÉRIO DA MARINHA, 1911, p. 20). But, most importantly, the disciplinary system to which they were subject was anachronistic and inadequate, educating them not on the best principles of free respect, but on submission and violence (MINISTÉRIO DA MARINHA, 1911, p. 23). This perilous ground could give rise to terrible consequences when the seafarers went to Europe to learn how to handle the new battleships and got in touch with anarchism.

But one of the central problems discussed by Leão was precisely the legislation. He remembered that the constitution of 1824 had abolished any form of cruel punishment, including explicitly the whip, and the 1890 constitution had retained such prohibition; nevertheless, these beneficial measures had been solemnly ignored. The decree 3 of 1889 had also abolished flogging in the Navy and had never been revoked, but this amounted to nothing, as the practice continued. Many subsequent laws and decrees had either mentioned the lash or implicitly recognized it, against the constitution and the ordinary legislation. No one, however, had attempted to revoke the unconstitutional provisions, as it should have been done[628]. The use of the leash and the corresponding violation of the constitution were to blame for the indiscipline. After all, how could officers ask seamen to respect the order while using a resource proscribed by the very constitution?

Therefore, he saw no sense in simply abrogating corporal punishment: technically, this penal technique was not even allowed under a fair reading of Brazilian law. He defended that the system of punishment should be rebuild from scratch. Though the old laws did not officially

[628] Though extensive it is worth to quote at least part of his exposition: "Com efeito, se a indisciplina da armada resulta da existência de castigos corporais; se estes castigos foram abolidos por um decreto que se diz não revogado; se os preceitos constitucionais adotados em 1824 já haviam abolido os açoites, as marcas de ferro quente e todas as mais penas cruéis; se estes preceitos ainda foram mais amplamente definidos na Constituição de 24 de fevereiro; não será pela decretação de mais uma lei abolindo os castigos corporais que conseguiremos remediar males não removidos ante tão numerosas disposições legislativas (...). Tanto no Império como na república, determinações emanadas dos poderes competentes sob a aparente forma de legalidade, mais perniciosa que o franco arbítrio, radicalmente falsearam a pureza dos princípios constitucionais. O Código Criminal, mandado executar pela carta de lei de 16 de dezembro de 1830, estabelecendo a pena de açoites em seu art. 160; o art. 80 dos de guerra da Armada, aprovado pela alvará com força de lei de 26 de abril de 1800, em vigor até a proclamação da República e ainda regulamentado pelo decreto 8898 de 3 de março de 1883, estabelecendo a pena de açoite com o máximo de 25 chibatadas; o art. 8º, letra c das instruções que baixaram com o decreto 328 de 12 de abril de 1890 (que criou a Companhia Correcional), consignando a mesma pena máxima de 25 chibatadas do art. 80 dos de guerra da armada; a 13ª observação do art. 5º do Código Disciplinar da Armada, aprovado pelo decreto 509 de 21 de junho de 1890, declarando que as praças incluídas na Companhia Correcional ficariam sujeitas ao regime excepciona estabelecido pelo decreto 328 de 12 de abril de 1890; o art. 40 do regulamento aprovado pelo decreto 4323 de 15 de janeiro de 1902, obrigando os médicos da armada a pronunciarem-se sobre o estado de saúde das praças da companhia correcional que tiverem de sofrer castigo corporal; finalmente, o art. 2º do recente regulamento do Corpo de Marinheiros Nacionais, aprovado pelo decreto 7124 de 24 de setembro de 1908, consagrando, como diversos outros regulamentos, a existência da Companhia Correcional criada em abri de 1890". This position was not the most common during the empire, as can be see in the work of Ricardo Sontag (2020, pp. 398-399).

permit the lash, it was under that legal system that the practice of the whip had blossomed and abused so many men; those very laws carried unnumerable anachronisms and should not be allowed to bear effects anymore. A new, "harmonious system" of punishment should be created, taking seriously the liberal regime and republican principles (LEÃO, 1991, p. 1360).

Brazil had become accustomed with a "system of appearances" (LEÃO, 1911, p. 1358), that is, to accept beautiful and liberal doctrines without enacting all of their logical consequences into law. This resulted in an incoherent body of statutes and provisions that reinforced no principles and retained several anachronisms. For the minister, one of the major problems in the Navy was that the procedural rules were outdated and slowed down punishments; this stimulated further indiscipline, which called for more responses from officers, escalating the situation to an unbearable point. Leão defended quick, milder and fair punishment (MINISTÉRIO DA MARINHA, 1911, p. 30).

In the end, the minister also agrees with many of the requests from the seamen. He defends that it should be established a draw for the Navy, just like the one recently enacted for the Army, to compel a wider group of people to serve and turn the force into a truly national body (MINISTÉRIO DA MARINHA, 1911, p. 34). Salaries should be raised and the conditions of work, especially on the armories, should be improved (MINISTÉRIO DA MARINHA, 1911, p. 40-41, 60-63). In the end of the report, Leão defended that more space should be given to younger people to renew the Navy, and he would set the tone: after delivering the report, he would request his own retirement.

What was supposed to be the start of a momentous renewal became a great humiliation for the Brazilian Navy: all the abuses, shortcomings, incompetence and malpractices of the officers were exposed for the whole world. To fight the perceived unreliable corps of seamen, the Navy dismissed almost half of its servants: according to the report of the ministry of the Navy, 1216 men were let go in the months following the revolt (MINISTÉRIO DA MARINHA, 1911, p. 21). But the leash apparently was finally turned into water under the bridge. In 1926, the Brazilian Maritime Review would write that "in good time it was abolished the corporal punishment in the Navy, for the moral elevation of a race and the worldwide prestige of a nationality" (REVISTA MARÍTIMA BRASILEIRA, 1926). But this episode demonstrates many important features of punishment. It highlights how frequently racism can pervade punishing practices, and the cleavage between white and non-white can be reproduced – at least partially – on the difference between officers and the troops. But the Revolt of the Whip is also a testimony of the fights for rights and the growing agency of the popular masses precisely at the moment when the right to vote was being extended to the whole adult population in the

Western World and the so-called "social question" was entering the political agenda. Once again, we can here see that military issues are not the concern of a particular corporation, but are of deep interest for society as a whole. The seamen, fighting for citizenship, aimed to get the same rights that were granted to the general population, potentially since the constitution of 1824. For the ranks, gaining rights was a matter of shrinking the distance between the "soldier" and the "citizen". And, in 1911, they finally reached this objective – at least in one aspect.

8.7 – How can soldiers protect their civil rights against the military administration? Discipline of soldiers elected as officials (and a small remark on the right of free speech)

Soldiers were subject to a strict discipline: as those responsible to protect the nation, they were held under the most strict and efficient control by the government. But, as the influence of the armed forces over politics was high in the Brazilian First Republic, another trend threatened to undermine the intentions of the federal administration: many officers were elected to political office. As representatives of the people, they were entitled to certain protections that aimed to guarantee their independence from external forces – an independence that would enable them to better represent their electorate. But how was it possible to reconcile this political self-determination with military discipline, which was based on obedience and subordination? Two different situations were considered by judges: when soldiers were elected to federal or state office, on one hand, and when they were elevated to municipal office, on the other.

The bone of contention for town councilors was the law 26 of 30 December 1891, art. 7, § 1st, n. 6[629], which stated that soldiers elected to the federal and state congresses would be considered "*em disponibilidade*", that is, they still belonged to the Army or Navy, but were released from their duties. But nothing was said of those serving at municipal legislative chambers. This was thoroughly discussed in the *habeas corpus* of Galdino Santiago (STF, 1908b; 1909a), a surgeon of the Navy elected as town councilor of Itaqui, Rio Grande do Sul. He asked the Minister of the Navy for a license to assume his new position, but his request was denied; he was seated regardless, but the Navy summoned him to the service. When he failed to attend, the military authorities imprisoned him; he then filed a petition against the act of the minister at the STF. In its decision, the court argued that Santiago had the right to run for the

[629] "6º Os officiaes que forem membros do Congresso Federal, assim como dos Congressos estadoaes, serão no intervallo das sessões considerados em disponibilidade, com os vencimentos do art. 55 das instrucções, salvos os casos de exercicio permittidos pelo art. 23 da Constituição".

seat and be elected, but enjoyed no corresponding right to a license. The judges reasoned that if soldiers were authorized to be appointed to any positions in the administration without previously receiving a positive answer from the government, the Army and the Navy would never be sure of how many officers they would have at their disposal. Santiago argued that other officers had been authorized to be seated at town councils, but the court argued that this was "a favor or condescendence, or mere arbitrium from the minister of state". Finally, and most importantly, the 1891 law said nothing about municipal officials, and, therefore, the government was not obliged to authorize its soldiers to work in such positions. Pedro Lessa also argued that it was not possible to file *habeas corpus* against disciplinary measures (LESSA, 1909).

A second decision of the STF (1908c) went in the same direction: Frigate Captain João Francisco Lopes Rodrigues had been elected to the town council of the same city of Itaqui, and asked a preventive *habeas corpus* to be able to be seated in the council. His request was denied, and the case of Santiago was even cited as precedent. However, judge Epitácio Pessoa, a future President of the Republic and judge at the Permanent Court of International Justice in the Hage, issued an interesting dissenting vote. He argued that, if the constitution granted political rights to soldiers and did not consider the condition of soldier as incompatible with political office, it was implicitly authorizing them to get licenses to take their positions. To say otherwise meant to authorize the military ministers to "bypass the constitution" and effectively make impossible something that the 1891 charter authorized; it would be a "mockery a representative system in which the exercise of political mandate was subject to the 'favor, condescendence or mere arbitrium' (words of the majority opinion) of a secretary of the president!". Epitácio Pessoa, however, was defeated. The same restrictive interpretation of the 1891 law would be applied again to a major elected to the town council of Florianópolis (STF, 1923a) and a lieutenant elected mayor in Paraíba (STF, 1907c).

Different problems might occur when soldiers were members of parliament at the state or federal level. One illustrative such case concerns captain Francisco José Patrício (STF, 1915g; 1919c; 1920b). He was imprisoned at the Fortress of Santa Cruz due to a disciplinary offense by order of the ministry of war; however, he was later elected as state deputy. Art. 14 of the Bahian constitution determined that no member of its assembly could be prosecuted without previous authorization from the state congress; this was the provision used as the grounds for the *habeas corpus* petition he filed before the *Supremo Tribunal Federal*. In their decision, the judges reasoned that there could be no appeal against disciplinary penalties. However, the federal constitution ordered that at the state level, there should be three

independent branches of government; a logical consequence of this principle was parliamentarian immunity. Therefore, state legislation preventing prosecution of deputies should prevail over the federal one concerning military discipline. The 1891 law was only sparsely mentioned.

Finally, one last example of the grip the Ministry of War tried to maintain over soldiers. Lieutenant João de Albuquerque Serêjo was also a deputy at the assembly of the state of Amazonas; he asked this political body for an authorization to travel to Europe to get a health treatment, and after he got it, he travelled to the old continent. Nevertheless, when the news arrived at the Ministry of War, Serêjo was called back to service; he presented himself at the Brazilian consulate in Genoa to explain himself. The General Helper of the Army, however, called a Council of Investigation to rule if the lieutenant had deserted; when this later body decided that no crime had been committed, the General Helper ordered the defendant to be jailed and called a Council of War. Once again, Serêjo was found to be innocent. The decision was appealed to the *Supremo Tribunal Militar*, who decided that the fact that Serejo had asked the Amazonas assembly for a license clearly proved that he never intended to escape the country and, therefore, could not be convicted. This ruling was the last step of this clear case of persecution. The relentlessness of the General Helper of the Army, regardless, is striking.

We can see that, even when soldiers were working outside the Army or the Navy and, therefore, were submitted to a completely different discipline, the administrative structure of the military ministries tried their best to hold their grip over their employees, opening opportunity of control and, sometimes, political persecution. The judiciary, both federal and military, sometimes intervened in favor of soldiers, but judges mostly defended an expansive interpretation of what military discipline was. One last example, that do not regard the conflict between political office and military employment, but regardless illustrate the attitude of Magistrates. Major Godofredo Franco de Faria was given a 60-day long disciplinary sentence for publishing an article against the economic policies of the president in *O Jornal*. He argued in his *habeas corpus* (STF, 1929a) that he was subject to two disciplines: one as a soldier, in the acts relating to his profession, and the other as a citizen, concerning the rest of his life. "Much like a manual worker [*operário*], subject to the discipline of the house where he works during service hours, and on the rest he only responds before the keepers of public order". He maintained that he would only be responsible before the Army if he had criticized the president for his acts regarding the military administration. The judges, however, disagreed. They deemed quite offensive the words used by Faria: grave errors (*erros grosseiros*). But, the most interesting part for my argument here came from minister Pedro dos Santos: he wrote that

"soldiers, like judges, being eminently conservative elements of society, must keep an attitude of impartiality and discipline (…), their situation prevents them from taking part in the fights created by politics".

This point was the key of the general attitude of the government. Whenever a soldier engaged in politics, the administrative authorities saw a risk that must be curbed.

8.8 – Science and the social body of soldiers: inroads of criminal positivism in military law

Italian positivism was well read and appreciated in early 20th century Brazil. This is widely known through an extensive historiography[630]. But the proper role of military law on the overall narrative on the successes of Lombroso and company is yet to be fully appreciated. Considering the particular Brazilian context, such an approach has enormous potential, since the authors of the first and the best Brazilian books of military penal law – respectively, João Vieira de Araújo and Esmeraldino Bandeira – were at the forefront of Brazilian positivism. Both had their works extensively analyzed[631], but their military writings still lie unexplored. This section aims to fill this gap – which is more relevant than might be assumed.

At least three Brazilian texts explicitly aimed to build bridges between Italian positivism and the law of the barracks. The first was *Criminologia Militar* ("military criminology"), an article published by João Vieira de Araújo at *Jornal do Commercio*[632], one of the most important newspapers of the Brazilian capital. Contrary to what the aridity of the theme might suggest, the text was published as the first article of the first page of the outlet: this topic was somehow deemed of utmost interest in 1894 not only for jurists, but for the general public. The second text was a discreet article published by Hélio Lobo – the future adversary of Military Justice – at *Revista Forense*, a more technical law journal. The last and most extensive work was *O velho direito penal militar clássico e as ideias modernas da sociologia criminal* ("The old classic military penal law and the modern ideas of criminal sociology"), published by Luiz Frederico Sauerbronn Carpenter, future founder and first dean of the State University of Rio de Janeiro (UERJ). To this text we now turn.

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[630] For the best overview on the issue, cf. Ricardo Sontag (2020). For a more extensive survey, cf. Rebecca Fernandes Dias (2017).

[631] Respectively by Ricardo Sontag (2014) and Rebecca Fernandes Dias (2017, pp. 324-333).

[632] *Jornal do Commercio*, 24 December 1894, "Criminologia militar", http://memoria.bn.br/DocReader/364568_08/15892

This book was the thesis presented by the author before the Naval School of War for the second examination for the professorship of law. For the first examination, which had been annulled, Carpenter had presented the thesis "Brazilian military law and the military law of other cultured peoples" (*o direito penal militar brasileiro e o direito penal militar de outros povos cultos*). The Book comprises little over than a hundred pages and, according to the author himself, was written under the pressure of time in only a week (CARPENTER, 1914, p. 38). It shows. Supposedly to better inform the reader, when he presents a historical overview of criminal law, Carpenter transcribes one by one all the titles of chapters from the Portuguese Ordinations and from *Dei delitti e delle pene*, from Beccaria. Later, he says that the chapter on military discipline from the book *A Reforma do Exército*, by Liberato Bittencourt, was so good that he would transcribe the text in full (CARPENTER, 1914, p. 77-96). All in all, more than a fifth of the work is (declaredly) a copy from previous writings. Not to mention the extensive introduction that adds little to the debates. Despite all its flaws, the work brings some interesting information for our discussion.

The book is explicitly naturalist and proposes some naïve analogies between chemical and social rules[633]; as one could expect, Carpenter declares to be a follower of the positive school, which would have brought observational methods into law. He claims that the new ways would have solved one of the most classic problems of military law: the difference between properly and improperly military crimes. Natural crimes were those that prompted a reaction from individuals alongside the social reaction from the state; therefore, improperly military crimes were the natural ones, while properly military crimes were the ones that only prompted a social reaction, since they were merely disciplinary infractions that harmed the moral sense of no one (CARPENTER, 1914, p. 57-61). Military crimes, therefore, would be either offenses to professional duties or political crimes; since the former did not reveal any intrinsic biological anomaly, the positive school actually defended that military penalties should be milder than common ones (CARPENTER, 1914, pp. 63). Finally, since criminal positivism was more focused on prevention than on repression, he suggests a series of reforms he calls "penal substitutes" – a term borrowed by positivist flagbearer Enrico Ferri -, which have little to do with punishment and concern more administrative policies[634]. He suggests some reforms of the

[633] "E como nas ciências naturais se verifica a lei da super-saturação química, pela qual, aumentando a temperatura da água, já estar consegue dissolver maior quantidade de sal, também na sociologia se verifica a lei da super-saturação criminal, porque, elevando-se, por assim dizer, a temperatura social, por efeito, v.g., de uma agitação popular, o ponto de saturação é já em nível mais alto" (CARPENTER, 1914, p. 49).

[634] Namely: Fighting alcoholism; fighting syphilis; promote foods as bread with meat and others that stimulate the use of coffee, which on its turn discourages the use of alcohol; promotion of habits of temperance; stimulate masters of professions that teach soldiers; stimulate clubs with healthy hobbies for soldiers; stimulate marriage for

military process quite similar to those defended by non-positivists; the only proposal specific to positivistic principles was to instruct judges on the principles of biological sciences. Finally, he differentiates the two schools and makes three final suggestions (CARPENTER, 1914, p. 97-104). None of them are specific to military law.

This point is important. What Carpenter simply implied, the other two - Araújo and Lobo – have explicitly said. João Vieira wrote that it was an error to imagine that military law was simply normal law made harsher; actually, the contemporary tendency was to render the two systems more akin to each other. Military law should still exist, but submitted to the constitution and keeping the public force as near as possible to society at large[635]. Helio Lobo, meanwhile, writes that there was not a criminal class "the soldier"; criminals could be divided only in the five categories created by Ferri[636], and none other (LOBO, 1906, p. 258). However, the specific circumstances of military life could stimulate certain types of crimes – sexual perversions, for instance (LOBO, 1906, p. 345). Moreover, many factors particular to the barracks could foster crimes. First, since many people with different origins and inclinations were forced to live under the same roof, conflict would most certainly emerge (LOBO, 1906, p. 348-349); second, many people sharing a restricted space, as were the barracks, would tend to imitate one another, quickly replicating crime as the law of imitation of Tarde suggested (LOBO, 1906, p. 351); third, since violence was the method used to rein in soldiers, violence was also the answer that they learned to give when they had problems, a violence that turned into crime (LOBO, 1906, p. 343). But fifth, and most important, military life had turned in modern times into something radically different from normal life. In the past, all people trained for the battle; now that war was the profession of only a few, the life of a soldier had become something quite unique, and those that struggle to adapt to its torments were in high risk of offending (LOBO, 1906, p. 364).

It seems contradictory: if, on the one side, military crimes are not special and soldiers that offend are exactly the same as regular offenders, on the other side, military life had some particularities that rendered it special. A tension, if you may. But one more puzzling assertion from João Vieira de Araújo got me thinking: "no other branch of law is better suited to the orientation of the modern school [the positive school] than the military one; on the other side,

enlisted personnel; found military discipline upon the trust between commanders and subordinates, and not on intimidation (CARPENTER, 1914, p. 73-77). Apparently, fighting alcohol was the ultimate panacea. If doctors only knew it was so easy!

635 *Jornal do Commercio*, 24 December 1894, "Criminologia militar", http://memoria.bn.br/DocReader/364568_08/15892

636 Born, insane, passional, occasional and habitual.

the clinical, or, better, anthropological observations are easier to make for the normal natural conditions of the Army to which Lombroso alludes"[637]. Why did João Vieira think that military law was the ultimate field of experimentation for the Italian school? To answer this question, we must leave Rio de Janeiro and travel to Napoli.

Salvatore Misdea was a Calabrian soldier serving the Italian Army at the barracks of *Pizzofalconi* in Napoli. In 13 April 1884, he overheard some colleagues from northern Italy claiming soldiers from the south were inferior. He tried to vindicate his honor with his own hands, but was prevented by a caporal from attacking his fellows. Enraged, Misdea returned to his room, took a rifle and, from the second floor of the barracks, started to shoot at anyone walking on the ground. Seven soldiers had their lives claimed and thirteen were wounded before other soldiers were able to restrict Misdea. He was later prosecuted, and the so-called *Strage di Pizzofalcone* would quickly made its way into the pages of newspapers, shaking the public opinion and sparking a lively debate. In less than three months, Misdea would be tried and convicted to the firing squad. The case raised several sensible questions for post-unification Italy: the abolishment of death penalty, military criminality, the southern question and criminal responsibility. Could the young soldier be saved? The defense claimed that Misdea was an epileptic and had committed his terrible crime only after an access, meaning he could not be tried. They claimed several members of his family had mental disorders; Misdea himself had displayed several signs of irascibility.

The doctor behind that report? A certain Cesare Lombroso.

Misdea's case was so widely reported to the point that military crimes came to be known in late-19th century as *misdeismo*. Thirty years after the successes of *Pizzofalcone*, the case was still being extensively discussed in Brazil: it was reported at least by Hélio Lobo (1906b, p. 261; 1906a, p. 33), João Vieira de Araújo (1898, p. 67) and Esmeraldino Bandeira (1915, p. 458-465). Curiously enough, in 1884 itself, only a handful newspapers had reported the execution of the *calabrese* soldier[638], all in very short and discreetly positioned reports, suggesting that the case only entered Brazilian conversations due to the positive school.

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[637] "Nenhum ramo de direito se presta melhor à orientação dos estudos modernos [ou seja, escola positiva] do que o militar; por outro lado, as observações clínicas ou antes antropológicas são mais fáceis e eficazes pelas condições naturais normais do exército a que alude Lombroso". *Jornal do Commercio*, 24 December 1894, "Criminologia militar", http://memoria.bn.br/DocReader/364568_08/15892

[638] *Jornal do Recife*, 2 August 1884, "notícias no exterior", http://memoria.bn.br/DocReader/705110/21728; *A Federação: Orgam do Partido Republicano*, "fuzilamentos na Itália", 23 August 1884, http://memoria.bn.br/DocReader/388653/585; *Diário de Pernambuco*, "os dramas do quartel na Itália", http://memoria.bn.br/DocReader/029033_06/11167.

With Misdea, a whole window is opened to a connection between militarism and the positive school that so far has received few analysis[639]. After the soldier was shot to death, droves of books were published commenting on what had happened – but, most interestingly, they reproduced the fault lines between the different tendencies of Italian criminal law. In 1884, Lombroso and Bianchi published their assessment of the case, called *Misdea e la nuova scuola penale*; the founder of criminal positivism defended that Misdea was an epileptic and this probably caused his dreadful behavior. But military life had also played a role in stimulating rage and violence (LOMBROSO; BIANCHI, 1884, p. 95). The same year, another book was published by Luigi Lucchini, the prominent defender of the so-called "classical school". In *Soldati delinquent: giudici carnefici*, he describes the *Strage di Pizzofalcone* and the following process alongside the stories of other two soldiers executed around the same time. He lambasts the Army for imposing an artificial lifestyle that could stimulate crimes (LUCCHINI, 1884, p. 86) and defends that military justice should only exist in times of war (LUCCHINI, 1884, p. 108 ss.). But the objective of the book was, after all, to attack the death penalty. The two schools took the case as an opportunity to advance the arguments they were defending in the previous years[640].

This, however, was not the first time the positive school had toured military life. In chapter 15 of *L'Uomo delinquente*, dedicated to professions, the only group singled out by Lombroso (1897, p. 169-171) for in-depth analysis are soldiers. In the late 1890s, studies on military criminality flourished in Italy: Piero Brancaleone-Ribaudo (1897) published an anthropological study of the criminal soldier with a foreword from Lombroso himself, and around the same time, Cogneti de Martiis (1895) published a study of the epileptic sailor and military deviancy. Doctors had been identifying criminal tendencies with epilepsy for some time, with much data coming from soldiers (ROTONDO, 2013). Lombroso himself was not a novice in military matters when he first encountered Misdea: he had acted as a military doctor right after he graduated from medical school in the unification wars of 1859 and 1866 (BERZERO; GABARINI, 2010, p. 22-23) and in the repression of *brigantaggio* – which, we

[639] The emphasis of what exists in the literature concerns the relation between positivism and military *medicine*, and not military law. Most of the existing studies concentrate on the relationship between Lombroso and the Army, and not in further positivists (ROTONDO, 2013; SILVANO, 2017; MILAZZO, 2018). Law is left to a secondary position. Studies on military law, on the other side, mention only slightly the connections between positivism and the army, preferring to emphasize the medical insights of the Italian School (LATINI, 2012; ROTONDO, 2013). For instance, a recent dossier (MASFERRER, 2020) with 15 papers on the positive school has only one paper mentioning that the Argentinian delegation to international penal congresses had people that worked in the military. Other than then, the barracks are absent. The recent book of Michele Pifferi (2016) on comparative history of criminology also do not discuss the military world.

[640] For more on the discussion of military deviance in late 19th century Italy, cf. Carlota Latini (2012).

shall remember, was fought in military courts after the 1863 *Legge Pica*. The Italian doctor himself stated that he obtained the first skeletons and brains that would later form his Criminal Museum at the Army; in his earlier career, therefore, he studied first and foremost soldiers and experienced military discipline. At a personal level, the positive school was intertwined with the military; the sheer number of studies on criminal soldiers only shows that personal inclinations were meeting a very convenient social ground.

This shall come as no surprise. Late 19th century European armies acquired gargantuan sizes since military service was expanding and the arms race that would lead to the First World War was taking hold. In 1854, conscription was installed in the Kingdom of Sardinia, and with unification in 1859, it was extended to the whole of Italy; in the 1860s, the final steps of the unification wars were taking place, pushing the numbers of soldiers way up. Precisely when Lombroso was serving, the size of Italian Forces were ticking up heavily, and the whole male population could potentially be called to service. The following graphic shows how extensively the number of soldiers grew in Italy (and, for comparison, France) in the 1860s. If the Army was now everywhere, it was also easier to study soldiers.

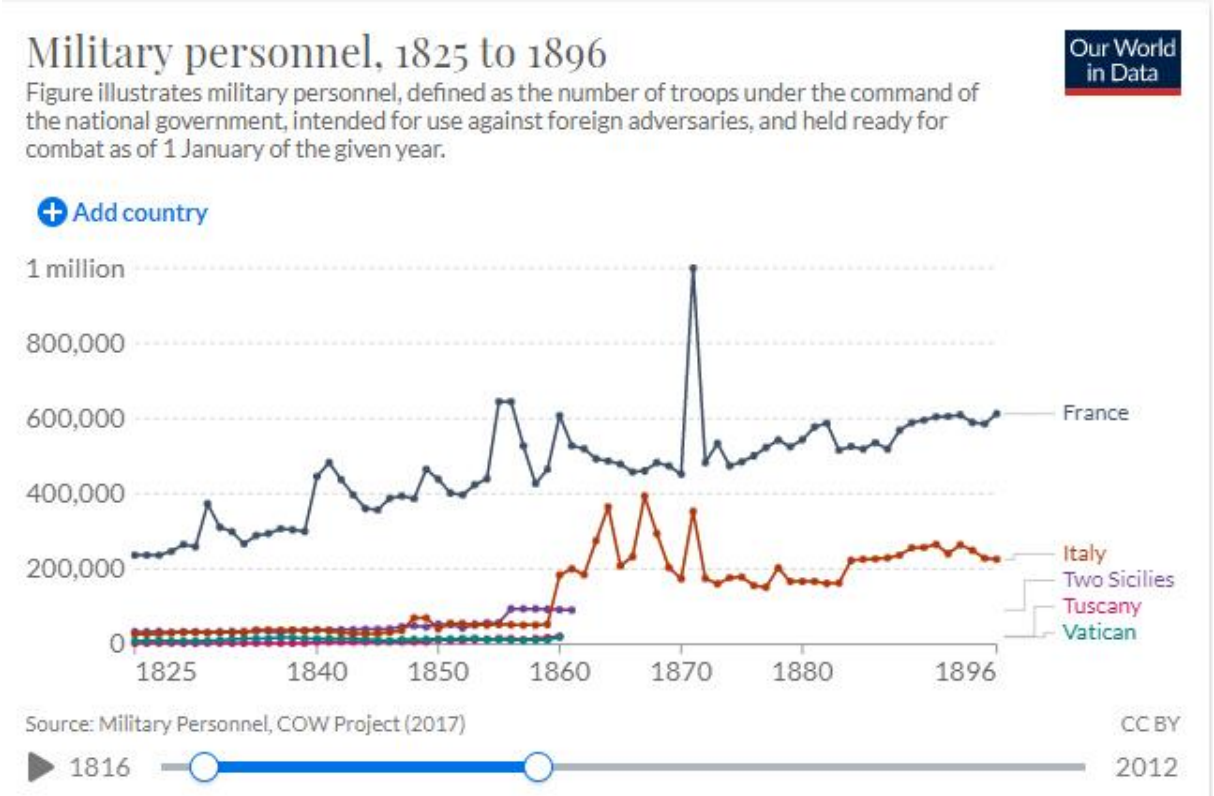

Figure 33 Number of soldiers in Italy and France throughout the 19th century. Source: https://ourworldindata.org/grapher/military-personnel?tab=chart&time=1825..1896&country=ITA~FRA~OWID_SIC~OWID_TUS~VAT

The Army was constantly at the public conversation, to the point that a liberal as Luigi Lucchini (1884, p. 67) wrote that the magistrature and the Army were the most important

institutions of the state – and the latter was the best funded among them. This constant contact with the barracks probably left an impression. What did this impression entail? When João Vieira de Araújo mentioned that military law was the better suited field for positive studies, he had in mind the book *L'esercito e la sua criminalità*, by Augusto Setti. The author analyzes several statistics concerning crimes at the Army and, at some point, states: "the penal code for the Army has, for this aspect, predated in many years the theories of the new [positive] school, and has understood the need to purge the military society of those individuals that have little or no possibility of adaptation, and to change the environment in which one has demonstrated defects of special social attitudes"[641] (SETTI, 1886, p. 166). Deviant soldiers were sent to disciplinary companies, just as deviant citizens should be sent to correctional facilities: to cure them from their bad behavior by inserting them in a new environment, if possible, or to eliminate them from the special military society, by imprisoning them until their service is over. This is how we should understand Araújo: for him, the Army was a model, a small society from which society at large could take insight. And he was well informed of the debates on military law in Italy: in both his 1894 article and 1898 book, he cites no less than nine Italian authors[642]. At the Army, it would be easier to find and prosecute criminals, to retrieve information on their past lives, not to mention that there was a whole structure of military doctors always examining, treating and collecting data on their warrior patients. Just as in prisons and insane asylums, the other two institutions most frequently associated with the "Italian School". Positivism was, in a sense, born also in the barracks.

But I would go further. Could we not say that some of the most capital ideas of positivism bear a striking military tone? Social *defense*, for instance. And defense, frequently, against an *enemy*. And there were precedents to this: as Carlota Latini (2010) has extensively shown, in 19th century Italy, when a state of siege (*stato d'assedio*) was declared, processes for political offenses were moved to military justice. In 1863, the Legge Pica[643], one of the most glaring laws of exception in late 19th century Italy, transferred the competence to rule on crimes of *Brigantaggio* to military courts. In short: Italian legal culture was accustomed to fight "the enemy", be it internal or external, using military tribunals. Surely, positivists were weary of military modes of punishment, of their harshness, of their old ways. They criticized the special

[641] Original: "come si vede, il còdice penale per l'esercito há sotto questo aspetto precorso di molti anni le teoriche della nuova scuola, e ha intuita la necessità assoluta di epurare la società militare da quegli individui, che hanno poca o nessuna probabilità di adattamento, e di mutare l'ambiente in cui uno ha addimostrato il difetto di speciali attitudini sociali".
[642] Oscar Pio, Isidoro Mel, Pietro Delogu, Mario de Mauro, Augusto Setti, Cognetti, Cesare Lombroso, Arturo Brutti and Carcani.
[643] To better understand the law, cf. Mario Sbbricoli (2009, p. 491 ss.).

nature of military jurisdiction, but the model of justice they proposed for society at large was inadvertently quite similar to a certain way of *discipline*, of constant control and evaluation by doctors that recall a barrack. If they claimed military justice should be more like regular justice, the penal law they defended was, under the surface, somewhat similar to military jurisdiction. Such language was not restricted to positivists; but I would argue that, nevertheless, they are no innocent metaphors: they rise from the increased militarization of European societies after conscription was introduced during the late nineteenth century and the contemporary "armed peace" that led to the thirty years of "European civil war" between 1914 and 1945. Positivism seized this aspect - military service - that was now looming ominously over the life of every young European male, and took insights from it and used it as a privileged work field.

The central trait of criminal positivism is the medicalization of penalties. Not by chance, it was founded by a doctor. But a *military* doctor.

8.9 – From political shield to bureaucratic justice: military law and political conflicts

As soldiers entered more and more in the world of politics, it should be expected that military justice would get more politicized too. Most of the momentous events that marked the First Republic and still define the common sense on early 20th century Brazil were stared by soldiers, meaning that lawsuits brought upon them could very easily end up in the special justice. Yet, the history of the relation between military jurisdiction and political matters is not so simple.

In 1894, the Brazilian republic was under stress: at the capital Rio de Janeiro, the consequences of the Revolt of the Navy were still being felt, while in Rio Grande do Sul, the Federalist Revolution was gaining pace. To curb both movements, the decree 1.681 of 28 February 1894 equated the rebellions to the state of war, and extended to them the effects of the 18 September 1851 law on crimes at times of war. Less than a week later, the decree 1.685 of 5 March 1894 declared that all crimes against military law would be punished as if the rebellions were wars. The first decree brought as a justification that those measures could help to punish more quickly and "with the maximum rigor" the crimes affecting the republic[644], seeming to suggest that military justice could better combat the political uprisings ravaging the

[644] "Considerando que nas circumstancias em que actualmente se acha o paiz não é licito ao Poder Publico deixar de punir immediatamente, e com o maximo rigor, os graves crimes que attentam contra a consolidação da republica, o restabelecimento da paz e a sustentação do principio da autoridade;".

country. This followed the line of action adopted by marshal Deodoro in the early months of the Republic, when he created Military Commissions to judge crimes of sedition (SILVA, 2013, p. 2), following a European model[645].

Curiously, though, neither decree got much repercussion. They were discretely reported in a few newspapers, and I found a single article criticizing the measures. According to the author, Arthur Orlando[646], the decree would be unconstitutional, because only the National Congress could legislate on criminal law and criminal procedure; moreover, the provisions of the decree determined that a new jurisdiction would apply to past facts once again breaking the constitution: the fundamental law of Brazil did not admit retroactive effect of laws.

Still in the turbulent 1890s, another central moment of Brazilian politics would signal a slight change of approach regarding the relations between military justice and political crimes. In 5 November 1898, president Prudente de Moraes was receiving two battalions of the Army returning from the War of Canudos when he was attacked by the *anspeçada* Marcelino Bispo de Mello. His rifle failed to shoot, but he invested against the president with a knife. The attacker was contained by the marshal Carlos Machado Bittencourt and by the chief of the Military House of the president, colonel Luiz Mendes de Morais, but, in the process, the former died and the latter was wounded. Mello was quickly imprisoned and a few months later, while awaiting trial, was found hanging in his cell. A thoughtless act from Mello? No. The press quickly started to conjecture that the actions witnessed at the War Arsenal spawned from a larger political conspiracy that would have involved the highest circles of the Republic, including the vice-president Manuel Vitorino Pereira. He and fellow suspects were investigated, but at the end, were not indicted, sparkling a wide political outcry[647]. Notwithstanding the wide interest of those events, I shall stress just one: while the civilians were being processed at the common justice, Mello was jailed at the request of the military justice[648] until his death. Now, the political conspirations were being solved at separated forums according to the personal status of each one.

8.10 – The hard conquest of specialty: final remarks

[645] On military comissions in Europe, cf. Carlotta Latini (2010, p. 18 ss.).
[646] *Diário de Notícias*, 17 July 1894, "Decreto de 28 de fevereiro de 1894", http://memoria.bn.br/DocReader/369365/13761
[647] On the process relating to the assassination attempt of Prudente de Moraes and the uses of the concept of political crime, cf. Raquel Sirotti (2021).
[648] CANECA. *Atentado de cinco de novembro:* artigos de Caneca publicados na "gazeta de notícias" sobe o "despacho" do juiz Affonso de Miranda. Rio de Janeiro: Imprensa Nacional, 1898, P. 10.

Military penal law entered the First Republic in a very different shape than the one in which it emerged from that period. In 1889, chaos was king and central aspects of punishment in the barracks were still governed by *ancien régime* rules; there was no code, either for substantial or procedural criminal law; the leash still fustigated seamen; the Councils of War resembled much more administrative than judicial structures and their baroque procedures were frequently at odds with 19th century law – let alone with the nearing 20th century. But, after nearly thirty years the first republican period closed in quite a different tone. A criminal code was born, one procedural codes had seen the light of the day and more projects were coming, the whipping had been abolished, the Supreme Military and Justice Council had been substituted by a Supreme Military Tribunal, the modern theories of Italian positivism were been discussed. The justice of the barracks was no longer an odd ship adrift in foreign waters, but was harbored in the new debates of Brazilian law.

These changes were not painless. All codes were enacted by decrees; abuses were frequent, including insults, whipping and even death; some aspects of military law did not seem to fully comply with the constitution. Since most of the political turmoil that happened in Brazil between 1889 and 1920 – and it was not little – happened in a military context or had felt the touch of soldiers, military law was also called to face the deepest challenges and most consequential threats to the new regime. We can say that after the republican government took hold, Brazilian military penal law finally entered its modern phase in full– though a few of its aspects would still recall previous periods.

Apart from this change - which is a fundamental axis of the history of military law in Brazil – for the purposes of this thesis, a fundamental process was taking place: the penal treatment of soldiers was getting near to the one of civilians. This movement faced backlash: the debates on the nature of military crimes and the conflicts of jurisdictions between the military and civilian judicial systems still permeated the collections of case law published in Brazil[649], sometimes with conflicting decisions between courts[650]. But Brazilian legal thought sedimented more and more the position that the military jurisdiction was not a personal privilege, but an instrument to foster military discipline. For instance, it was decided that a crime against the public administration, even if committed by a soldier against the Army, would not be judged by the military justice if the military code did not establish that specific offence[651]. The challenge that jurists faced was then how to define the borders between military and civilian

[649] Example: STF, 1929c; 1924b; STM, 1927b..
[650] For example, the STM (STM, 1929b) deciding that a homicide practiced by a soldier against another is a military crime, even if committed outside military buildings, while the STF (1929b) decided the exact opposite.
[651] In the case, *estelionato* (embezzlement) (STF, 1929d).

law without setting the justice of the barracks as a completely separated reality. A small text written by José Novaes de Souza Carvalho in 1900 show how in the early first republic military law could still be seen as a closed reality apart from the outside world. Antônio Augusto Cardoso de Castro, a civilian judge at the Supreme Military Tribunal, had consulted the Ministry of Justice, arguing that his salary could not be reduced according to the Constitution, art. 57, § 1st, that had granted that privilege to federal judges. The ministry, however, issued the ministerial letter (*aviso*) of 10 November 1899 arguing that the military justice was a separated system not linked to any of the three branches of government, that, consequently, did not enjoy the same privileges of other magistrates. Carvalho wrote to counter that ministerial letter, arguing that military judges were simply a species of the genre "federal judges"; the law 221 of 1894, organizing the federal judiciary regulated appeals of decisions of the STM to the STF, implicitly recognizing that the former integrated the federal bench; among other arguments. Apart from the details of this specific article, what is important to grasp here is that one of two different processes were under way: the nature of the military justice was in discussion, meaning that it was acquiring a separated and consolidated identity.

The debate on whether the newly establish institutes of *sursis* and parole applied to the military procedure or not shows a second process: the delimited identity of military law was nearing that of the civilian jurisdiction. Those two institutions had been instituted by the common criminal code of 1890 and regulated in 1922, in the context of a conservative modernization of Brazilian criminal law, that gave to the state more control over convicted men even beyond the walls of the prisons[652]. At first, both the STF and the STM defended that soldiers were not covered by those two institutes. A decision from the military court (STM, 1927a), for instance, stated that the military justice was a separated constitutional system, submitted to a different complex of norms; therefore, norms enacted for the civilian branch would only apply to soldiers if explicitly stated. The STF, following a similar reasoning, decided that all the articles of the decree16.588 of 6 September 1924 used terms that applied to civilian correctional facilities, buy did not include military institutions. Moreover, the objective of the *sursis* was to avoid potential contact with other criminals that might corrupt the detainee, something that was not a problem for soldiers: they served their sentences in fortresses or barracks, the very same places where they worked. However, on the next year, the STM changed its position (STM, 1928b). It declared that the objective of parole was to reward the recovery of the convicted, a sound target that was applicable both to civilians and soldiers. A

[652] On this process, cf. Rafael Mafei Rabelo de Queiroz (2006).

few dissenting votes insisted that military justice was part of a special system and, therefore, could not be automatically ruled by parameters developed bot the general judiciary. Nevertheless, the expansive interpretation prevailed. This shows the tendency to integrate military law on the wider system of justice.

This chapter has been a tale of those two parallel processes: on the one side, one can see ever more clearly what military penal law is and to whom it can be applied; on the other, the rules and principles governing military tribunals and their laws grew nearer to the civilian ones, the differences being gradually stripped to its bare minimum.

Regarding the individualization of military penal law, the most important process, doubtlessly, was codification. The previous mass of laws, colonial rules, imperial ministerial letters, decisions, circulars and interpretations rendered the borders between the justice of the barracks and that of the external world much grayer and ever-changing than it could be. In the 1890s, both the first codes of penal military law and military procedure were enacted, easing the task of those trying to understand those branches of law. This task was completed when the idea of making two different codes, one for the Navy and the other for the Army, was abandoned: now, there was a more distinguishable notion of *soldier*, and not simply of a member of each of the two of the armed forces. At the legal level, the process was completed; however, law does not end at the letter of statutes: case-law is paramount to determine how law will impact the lives of everyday people. And the 1920s were when clearer definitions were issued by the courts. Around 1922, the tribunals changed their precedent and began to hear cases of *habeas corpus* from soldiers, even though in a restricted manner. The codes of procedural military penal law of 1922 and especially 1926 brought clearer definitions of which were the categories submitted to their jurisdictions; this meant, for instance, excluding members of the military polices of the states from military tribunals, a momentous change when the political role of those institutions was increasing dramatically. Finally, political conflicts that were typically brought to military courts in the 1890s, such as the Revolt of the Navy, were now handled by the federal judiciary, consolidating the concept that military tribunals were meant to cope with internal matters of discipline.

The second process, is the nearing military and civilian laws. In the first decade of the republic, mostly as a consequence of codification, many of the outdated practices that set the legal treatment of soldiers apart from that of civilians were revoked: the Articles of War; the harsh system of penalties, with lavish use of death sentences; the absence of attenuating and aggravating circumstances; lack of legality; among others. Military process, though remaining quite peculiar, also suffered relevant changes: the Councils of War were renamed Councils of

Military Justice; the proportion of civilians increased; the Supreme Military and Justice Council was transformed in a tribunal that, differently from its imperial counterpart, was described in the Constitution itself. In the 1900s, the debate on whether a separated military jurisdiction should even exist took hold; even though the discussions had little institutional consequences, they show that the need of those institutions was no longer obvious. In 1910, the whipping was abolished in the Navy: a gruesome heirloom from slavery and the brutal military discipline of the colony was done away, setting one more step in the tortuous path towards citizenship for soldiers. True, the troops still could not vote, but the most glaring signs of their difference were no longer in place.

The two processes seem to be at odds with each other, but this is nothing more than an appearance. On one side, the lines separating military law from the outside world became clear, the law was consolidated and the subjects of the law of the barracks were defined. On the other hand, the distance between those two realities, their fundamental changes, shrank. One process happened at the frontiers between the two normative complexes, while the other took place at their interior. Like two neighbor countries that were growing, occupying their borderlands and, for this, needed to send commissions and specialists to demarcate their unclear borders; but, as they did so, they interacted, mingled and ultimately their societies became much more akin than before.

On citizens and soldiers: final remarks

The song of privilege can be uttered in more than one timbre. In the Brazilian First Republic, both the Army and the Navy were in constant movement, waging coups, repressing riots, prompting turmoil fighting privilege, fighting for privilege. The destabilizing power. The defining power. In power or behind it, soldiers did never leave the stage of politics in the Brazilian first republican era. Law is a seismographer tracing the pace of such movements. And they were intense. The two processes I am tracing with this thesis kept on their way, though their directions changed slightly. First, the distance between officers and civilians was greatly reduced in the 1890s and, to a minor extent, in the 1900s; after that moment, the distance between the two categories more or less stabilized, though some perturbations could be felt in the 1920s. Second, the individualization of military law proceeded further.

Reduction of the distance between officers and citizens. In the 1890s, the Brazilian Republic walked under the sign of the swords and was frequently governed by men in uniform. Direct interventions from higher office transformed the military and its law. But not everything comes down to direct intervention: the Army and the Navy were a constant presence in the many riots taking place in the last moments of the nineteenth century, either repressing them or taking part on disturbances – and, frequently, engaging in both, as the fault lines of Brazilian society could run inside the military itself. The Navy and even more, the Army, were at the forefront of the public conversation. Military and civilian worlds intermingled at a political level – and, after the 1908 law on military draw, also at a social one.

Approximation came from both sides. Soldiers became more alike citizens, but also citizens were meant to be more like soldiers. The prototype was the teaching of military law. If professors before the republic came mostly from different backgrounds and reflected their origins on their writings, now, it was ever more common for those holding legal chairs at the schools of the Army and the Navy to be educated in both worlds. Sure, the tones still diverged, as the likes of one Magalhães Castro were not the same of an Espírito Santo Júnior. But if coming from different positions, those professors, especially those from a younger generation, now shared a common culture, a single space of debate, a common framework of mind. And the very justifications for why law should be taught to soldiers are very telling: most of those writing on this topic talked of the civic duties of soldiers - something that they shared with civilians -, while the specific conditions of the men of arms were frequently only an afterthought.

But the approximation of soldiers to civilians spanned also other fields. After 1890, the Army got a *montepio* of its own, reproducing the situation that could be found both with the Navy and with civil servants. Another fundamental step was the 1890 Penal Code for the Navy. So much of the very architecture of criminal law changed: arbitrium was reduced (though not completely done away with), aggravating and attenuating circumstances were introduced, death penalty was severely curtailed, the principle of legality went to the center of the system, the outdated Articles of War were abolished. Modifications that had affected the civilian legislation 60 years earlier. A procedural code was enacted in 1895, 63 years after civilians received theirs. After the two first presidencies of soldiers ended, political crimes, even when committed by soldiers, were to be treated in the same way as those committed by regular citizens: dissent was dissent, regardless of where it came from.

The pace of change was somewhat reduced in the 1900s, but the modifications were not less important. In this decade, the debates on the possible end of Military Justice gained traction. After the military outbursts somewhat cooled between 1904 and 1922, jurists began to wonder whether the whole structure aimed at judging soldiers was worth its cost. And, of course, in 1910, the whip finally ended in practice, after reppeatedly being stripped away from law books without leaving the decks of ships. Finally, one of the most momentous legislative interventions of the first decades of the 20th century in Brazil took place: the 1908 law of military draw. Created after a significative political campaign, the law aimed to turn every Brazilian man into a potential soldier and militarize the country – a project much in line with the military organization of European nations on the years leading up to World War Two. After that law was implemented, in the middle 1910s, the barracks were supposed to become houses of civic education for the whole Brazilian male population, transferring the knowledge and habits of Army officers to regular citizens and turning members of the regular Army into "professors of civism".

But, if those three facts the differences between soldiers and civilians were diminishing, other distances remained - and even grew. The half basic pay persisted even if the armed forces had now their own *montepios*. In 1910, in more than one opportunity, congress legislated to create special pensions for soldiers that fell victim to singular tragedies, such as the explosion of the battleship *Aquidabã* or the officers fallen at the Revolt of the Whip. And, finally, the 1926 code established much more clearly the categories to which it would apply, effectively canceling the blurred spaces that signaled the borderlands between soldiers and civilians for criminal law – a realm mostly occupied by police officers.

In parallel to these movements, run the second capital process we are following: the identification of military law - accompanied by the emergence of the legal figure of the soldier. And the first republic harbored consequential developments. Concerning social security, for the first time, the systems of the Army and the Navy were more or less equivalent, though administered by different institutions. A similar change happened in criminal law: in the early 1890s, it prevailed an orientation to create separated codes for the Army and the Navy, but in 1899, the congress ruled that the hardly-fought code that had been given to the sea forces would also govern the land forces. And, with police officers mostly excluded from both the social security and criminal law of the military, it was becoming clearer what a soldier was from a legal point of view. Finally, the image of the soldier started to appear before jurists, particularly in the form of a structured reflection on military criminal law. A discourse that was not anymore restricted to those teaching at the military academies, but also involved traditional jurists either teaching at traditional law schools or working in one of the traditional legal professions. Never before so many books had been written on this hermetic branch of repressive law – and with such an intense connection with the most up-to-date contemporary debates on criminal anthropology and the Italian positive school. From the little book of João Vieira de Araújo onwards, criminal lawyers could not ignore the debates on crimes at the barracks.

In short, in the first republic, the military held as much power as never before. Most of the reforms called for since the times of the monarchy were finally transformed in law: the criminal code, the procedural code, the *montepio* of the Army, the substitution of the Supreme Military and Justice Council, the separation between military justice and the Army and Navy commands, the law of military draw etc. The list could go on and on. The bottom line is that Brazil had finally created a completely modern system of criminal law. Yes, frequently authoritarian and often dysfunctional. But modernity certainly is not a synonym of success. Soldiers were citizens – though, in the exclusionary Brazilian society, citizenship could be highly limited. And they were very active citizens, working both in the administration and on movements challenging the established order.

Political participation, political intervention: the Brazilian military had definitely entered the turbulent 20th century.

Part III
Citizens are also soldiers
1920-1941

Militarizing Society: Introduction

Early 20th century politics was a cacophony of discordant voices. In the absence of an unifying force as the emperor, regional forces took hold of power; the interests of the most important states dictated the direction of the nation as a whole, heightening fears of secession. Lack of unity meant weakness. Soldiers were wary of these arrangements, and in the 1920s and 1930s, different factions within the Army would associate with civilians and among themselves to build a centralist force, able to coagulate the several elements of society around a common project. One that, in the 1930s, would be increasingly related with debates on national defense.

Yet, in the 1920s, this were little more than aspiration. And the decade started under the helm of oligarchical authoritarianism. In 1922, the two major states nominated Artur Bernardes to run for the presidency; the medium powers, such as Rio de Janeiro, Bahia and Rio Grande do Sul, formed the so-called Republican Reaction (Reação Republicana) and nominated former president Nilo Peçanha (MATTOS, 2011, p. 124). After years of self-imposed exile in Europe, Hermes da Fonseca returned to Brazil, and some officers were willing him to take a more prominent role in fighting the dominant oligarchies; the then-president, Epitácio Pessoa, was overtly anti-militaristic and, for the first time in decades, had appointed a civilian to head the ministry of war (FORJAZ, 1976, p. 62-63). In this tense environment, and in the middle of the campaign, the newspaper *Correio da Manhã* published some secret letters attributed to then-candidate Artur Bernardes, offending Hermes da Fonseca and calling him a "sergeant without equilibrium" ("sargentão sem compostura"). Military circles obvious took much offense, and though Bernardes claimed the text had been forged, the Military Club formed a commission to assess its authenticity. The ruling was positive, and the Club published a note asking the nation not to elect Bernardes (FORJAZ, 1976, pp. 66). He won nonetheless. Tensions rose to the point that political rivals clashed violently in Pernambuco. The federal government sent troops under the pretext of bringing peace, but they were clearly favoring Bernardes. Fonseca sent telegrams to officers asking them to disobey the government; he was imprisoned and the Military Club was closed – a humiliating outcome (FORJAZ, 1976, p. 67-67).

This would sparkle one fundamental transformative force of Brazilian politics: tenentism – named in reference to its main components, Army lieutenants. They shared a diffuse ideology with ambiguous tendencies. On the one side, they were hostile to the oligarchies and claimed immorality and corruption were rifle in Brazil due to the concentration of power in few hands; on the other side, they shared an elitist belief that change should come from above – mostly, from the Army itself, that would be able to morally regenerate the hostage nation.

Tenentism was traditionally interpreted as expressing the desires of the middle class (SANTA ROSA, 1933), but more recent research claims that the middle classes were not sufficiently organized and, though they shared much ideological ground with the young officers, the true sense of tenentism must be found in the internal dynamics of the Army[653].

The lieutenants took arms to fight for their ideals. First in 1922, they conspired to prevent the inauguration of Artur Bernardes; the plans, however, mostly failed, and only a unity in Mato Grosso and a fort in Rio de Janeiro rebelled. The fort of Copacabana fought for less than a day, but 18 people – among them, some future prominent politicians - heroically marched against the government. Two years later, a new rebellion broke in São Paulo – this time, much more articulated. Under the command of an Army general, hundreds of soldiers and civilians took the most important Brazilian city and expelled the government for more than three weeks, demanding the overthrow of president Artur Bernardes. Unsuccessful, they abandoned the city and travelled hundreds of kilometers to Paraná to meet with fellow revolutionaries that were on their way from Rio Grande do Sul. When they met, they formed a parallel Army of more than a thousand members under the command of Army officers. The so-called *Coluna Prestes*, named in honor of its leader Luis Carlos Prestes, an Army captain and avowed communist, would march through more than 13 thousand kilometers and three years, fighting a guerrilla-type war against the government on the hope of overthrowing the government. After the Bernardes government ended in 1926, the remnants of the combatants went to Bolivia and the *coluna* was disbanded. Its members would play a central role in the political events of 1930 and on the political life of Brazil from the 1930s onwards.

The 1920s were much agitated in Brazil: the social question was on the order of the day after industrialization began to gain pace, prompting more state intervention. Strong European migration had brought the much-feared threat of anarchism. The government reacted violently: for the whole mandate of Artur Bernardes, Brazil was under an official state of siege. Interventions on the states were frequent[654]. But the internal conflicts between the oligarchies were increasing, as the very existence of the republican reaction demonstrates. In this context, the Army had to reimagine its role before the political life; tenentism was but one – though consequential - among several trends that emerged in those years. How was intervention imagined?

[653] On the interpretations of tenentism in Brazilian historiography, cf. Mario Cléber Martins Lanna Júnior (2018). For a good summary of the movement, cf. Boris Fausto (1997).

[654] For studies on specific interventions, see Laila Maia Galvão (2013) and Bruno Rodrigues de Lima (2017). On the legal history of the state of siege in First Republic Brazil, cf Antônio Gasparetto Júnior (2019) and Priscila Pivatto (2010, p. 207-251).

Three trends emerged especially after World War one. The first was the ideology of the citizen-soldier, championed mostly by Olavo Bilac. First developed after the military question, this ideology aimed to transform citizens in soldiers and soldiers in citizens; the individual should be able to participate as such in the political life of the nation, since officers were not machines (CARVALHO, 2019, p. 62-63). But the Army as an institution should refrain from any interference in politics. Its main function would be to offer military service, and, by it, it would educate the popular masses for the civic life, the love of the fatherland and more basic instruction. In an impoverished country, this ideology imagined the officer as a teacher helping to fight illiteracy, lack of hygiene and other much basic problems (MCCANN, 2009, p. 218-219).

The second ideology was the so-called the soldier-corporation. This position was championed by the editors of the review *A Defesa Nacional*, known as "young Turks" (*jovens turcos*), for they had made and internship in the German Army in the 1900s, just like young Ottoman officers. They saw a political role for the Army as a corporation, and not for individual officers; the land forces should refrain from party politics, but should guarantee the morality and honesty of the political system as a whole. The general staff of the Army would be one of the most important organs of the whole country, and should be responsible for deciding its destiny (CARVALHO, 2019, p. 67-69). The Turks had a wide program of internal administrative reforms, meaning that, from their point of view, the Army should fulfill both political and civic ends (MCCANN, 2009, p. 2016-217). This view was a minority, but after tenentism and, especially, the 1930 coup, this perspective would give birth to the moderating perspective, that the Army is the true heir to the moderating power and can act even against the law and the established powers to protect the constitution and the fatherland (COELHO, 1976, p. 69).

The third and last perspective is the ideology of the professional soldier, championed by Leitão de Carvalho and Alberto Torres. They defended that the Army should concentrate on its internal problems and the professionalization process, leaving politics to the politicians. They considered that the Army educated soldiers, and not citizens; the obedience demanded from the professionals of the arms would even be harmful for the civic culture and independence that a citizen should display (MCCANN, 2009, p. 221-223). This perspective was favored by the political circumstances: in the 1910s, the First World War was calling attention to the issue of national defense, and it was not hard to think that a strong, professional Army was seen as a necessity in those troubled times. Moreover, the political stability before tenentism suggested

that the political world did not need direct guidance from the armed forces (CARVALHO, 2019, p. 63).

The disputes between the three ideologies would become quite consequential as the Army rose to even more prominence in the 1930s. In 1930 presidential election, a powerful challenge candidature was fielded against the official successor of president Washinton Luís: Getúlio Vargas, president of Rio Grande do Sul state, with the support of Minas Gerais and some minor states. The ticket failed to win, but after vice-presidential candidate João Pessoa was assassinated under murky circumstances, the defeated field organized a coup with the support of some *tenentes*. The insurrection was eventually successful, and Vargas would go to the *Palácio do Catete* to become the longest-serving president in Brazilian history.

For the following 15 years, the power of Vargas rested on an alliance with the Army; he became the first civilian authority able to work as an efficient mediator between officers and civilian politicians with profit (MCCANN, 2009, p. 306). Yet, the 1930 coup in itself posed a challenge to the hierarchical structure of the armed forces: since many of the supporters of the overthrowing of the previous government were *tenentes*, these low-ranking officers gained an outsized influence that was out of pace with their position in the army. The potential for breaks in hierarchy would be a constant threat until 1932.

For the first two years of government, Vargas rule outside of the legal framework of the 1891 constitution. In early 1932, he promised to enact a new constitution and called elections to form a constituent assembly. The government of the state of São Paulo, however, resented the increasing centralism and, after federal repression of protests calling for the constitution resulted in the deaths of students, it started an insurrection against Rio de Janeiro. Military polices had been growing steadily for years, and the São Paulo force, the most prepared among them, was compared by many to a small army. In keeping with the metaphor, the São Paulo government waged a two-month war with the federal Brazilian government with the objective of deposing Vargas. However, hopes of support from other states failed to materialized, and São Paulo, isolated, resisted for less than three months before capitulating.

This internal war proved to be an opportunity for the Brazilian Army. First, since many of the insurrectionists were prestigious officers in the federal barracks, Vargas was able to reform them and open many positions in the hierarchy. These posts would be filled by the former *tenentes*, matching their power with their position within the organization (MCCANN, 2009, p. 425). Second, the difficulties faced in the battlefield showed to the whole public opinion how badly organized the army was; this provided a powerful argument in favor of more

funding and sweeping reforms – something that reinforced the tendencies calling for more professionalism.

Between 1933 and 1934, a new constitution would be enacted. Two major tendencies were crystalized in that document: corporativism and mass democracy. Women were allowed to vote, and one, Carlota Pereira de Queiróz even managed to be elected to take part in the assembly. The constitution determined that some of the deputies elected would represent classes, like agriculture, industry etc.

The political environment of the 1930s was definitely hostile to classical liberalism. One can found many examples of articles criticizing this form of government in the *Defesa Nacional*, including several editorials. These opinions generally claimed that the liberal state was weak and incoherent. The frequent consultations that civilian leaders must hold with their supporters take long time and undermine their authority; in the Army, conversely, orders are meant to be followed without questioning, provided that they do not violate the law. Political theories were held to mean nothing: "in the liberal democracy, fiction reigns (…) the maximum authority is the myth of popular sovereignty, which, in theory, is all powerful, but in practice can only vote and elect representatives which are trusted with true power" (A DEFESA NACIONAL, 1934, p. 289). Liberal states were "moral and economic agnostics", without true principles and, therefore, detached from the nation (MOURÃO FILHO, 1935). Being dependent on legislative assemblies, made of men holding widely different visions, from different perspectives, they lacked coherence, and could provide no true guidance for the state (CORREA LIMA, 1938, p. 385).

This anti-liberalism left the army prone to ideologies of masses. One, of right-wing authoritarianism, was *integralismo*, a conservative movement compared by many with fascism. From the left, one could find communism, which attracted many soldiers, especially from the ranks. This latter threat was made real in 1935, when an attempted coup, led by former army Capitan Luis Carlos Prestes, erupted in several barracks. The insurrection, named *intentona comunista*, failed to yield any results, but provided the basis for a fear of communism in the army that would lead to several purges over the following decades.

Around the same time, two men that would define the army for quite some time rose to power: generals Pedro Aurélio Goes Monteiro and Eurico Dutra. Especially Goes was politically active, being a former deputy in the constituent assembly of 1934. Both would head the General Staff of the Army and the Ministry of War almost always until 1945, and Dutra would be elected president in 1945. Goes is credited with having united different factions of the army to create a single voice of the institution politically (BRETAS, 2008). Particularly the

control given to Vargas by the promotions over several years and the purges in 1932 and 1935 had extirpated the forces from any meaningful dissent (CARVALHO, 2006, p. 85-87). Now, the ideology of the preparation for war could take hold.

In the second half of the 1930s, the international political climate was deteriorating rapidly. European powers were arming themselves in preparation for the impending world war. Meanwhile, in South America, the Paraguayan war had been grated reinforced after the end of the Chaco war, and, without economic opportunities in the country, many military strategists feared that an invasion over the *Pantanal* could happened quickly (MCCANN, 2009, p. 441-445). Brazil started for the first time to build an intelligence infrastructure; this also raised the conscience of political actors on how better armed Argentina was, meaning that another threat from the southern border started to be taken into account at top decision levels (MCCANN, 2009, p. 445-447).

These needs of external defense grew markedly, but were tremendously out of pace with the action powers of the Brazilian state. The fiscal situation had deteriorated markedly in the wake of the great depression, as international economic agents were demanding less coffee, which was the most important Brazilian export product. Sensing that he would not be able to govern without more powers to reorganize the economy and reform the army, Vargas planned and executed a self-coup. General Olímpio Mourão Filho secretly penned the *Cohen Plan*, a forged plan supposedly written by international communists to seize power in Brazil with the support of the Soviet Union, which was said to have been mysteriously discovered by the government. The conspiracy played with fears spanning from the 1935 attempted coup and with antisemitism. Vargas interrupted the electoral process that was under way, appointed himself president and proclaimed a brand-new constitution. Though some generals probably knew that the document was false, they mostly backed Vargas, and got prominent positions in the new regime, christened *Estado Novo*. Frank Mccann (2009, p. 526; 549) suggests that it was precisely the demanding policies of national defense that had brought Vargas in more friendly terms with Goés Monteiro, and this alliance that cemented the proclamation of the *Estado Novo*. The policy – and politics – of the army were paramount to reorder the constitutional structure of Brazil.

In the following years, several reforms would be enacted. New laws on military instruction, promotions, disciplinary regulations, a code of military justice etc. aimed to reform the army and prepare the nation for the eventuality of war (MINISTÉRIO DA GUERRA, 1939). This effort is aligned with the general intention of Vargas to reform Brazilian law as a whole, and not only the military: new codes of civil and penal procedure, a penal code, a new law of

expropriations, among others, were enacted with the hope of revamping the Brazilian state into a more social and authoritarian model.

The reforms geared towards professionalism mostly followed two ideologies aiming to reform and explain the role of the army *vis-a-vis* society in general: the *armed nation* and *total war*.

The idea of the armed nation earned wide recognition after the 1908 recruitment law, but gained more traction after the draft was effectively implemented by the late 1910s. It posited that the whole male population should be prepared to defend the fatherland in case of war. To achieve this goal, every man must do some time of military service; instead of a small group of professional soldiers remaining for years in the ranks, the army must train for short periods of time as many personnel as it could, so that huge amounts of manpower could be mobilized if the national territory was attacked. This proposition gave a huge role for the armed nations: every year, thousands of men should go through military institutions, interiorize military practices and ideologies, and learn to admire their commanders and the objectives of the institution. Many envisioned that the Army could offer a venue where illiterate men could learn how to read, and the foreign populations – mostly Italians and Germans – inhabiting Southern Brazil could be taught the national language and how to love the fatherland.

The idea of *total war* was mostly an expansion of the ideology of the *armed nation*[655]. This way of reasoning proposed that, with the profoundly destructive weapons now available and the long duration of modern combat, the whole economy of a country was now part of the war effort. Industrial capacity to build new tanks, agricultural lands to produce food, control of civilian populations to prevent riots and provide defenses from aerial attacks: all of this was now deemed to be as important, or even more relevant than the size of armies or tactics in the battlefield. This meant that new crimes must be inscribed in the legal codes, the definition of "times of war" must be expanded and, in the case of war, the armed forces must receive a much larger role in government. The first insights stemming out of this point of view were developed after World War I, when the collapse of industrial capacity led to the defeat of Germany and almost to revolution. However, these considerations would only grow more dramatic after World War II and the second post-war, with the nuclear age and the Cold War.

An expanded army, with heightened political influence got constantly in touch with these two ideologies. Over the next two chapters, we will discuss how the Brazilian Army faced

[655] For an overview of both, but with particular emphasis on total war, cf. Márcio Tibúrcio Gomes Carneiro (1949).

its new political position, how its position in society changed, and how military law was reformed to prepare the armed forces to war.

Chapter 9

Controlling a politicized army: military penal law and discipline

The season of waters was rapidly approaching to its end on the same Paraguay River that had watched so many victories of the Brazilian Army and Navy more than fifty years earlier. In that 27 March 1925, the sun was taking its toll on the river and on the city of Corumbá, Mato Grosso, a distant town deep in the marshlands of Pantanal at the Bolivian border where the Brazilian army had installed the 17th Battalion of chasseurs [*caçadores*]. But the river was not the only entity on the move.

The soldiers working at the city were under enormous pressure and under the close watch of the government. In the previous months, signs of insurrection had been spotted throughout the ranks; some had even joined the famous Prestes Columns that had been journeying the country preparing the ground for a socialist uprising. To counter this menace, the government had sent a new captain, Luiz de Oliveira Pinto, to keep the warriors in line. At a cost. Though the troops were not settled in the barracks, their food allowances (*etapas*) were being discounted as if they were in the military buildings and receiving food from the administration; meanwhile, they had to effectively buy their meals in the common market. Injustice. Money was running short and the merchants were growing ever more hesitant to lend to the dissatisfied soldiers. Tensions were rising. But captain Pinto bragged that no one could organize a rebellion against him: he would immediately crush anyone daring to challenge his authority. Before the rain stopped, he would have to live up to his promise.

In that 27 March, dozens of soldiers went early in the morning to sergeant Antônio Carlos de Aquino, a 23-year veteran servant of the Brazilian Army respected both among the ranks and the officers: the situation could no longer be sustained. Sergeant Aquino was urged to step in and intervene; he hesitated, his disciplined history softly speaking at his ears. But they insisted. And he ceded, for injustice should not be tolerated. Aquino went to the frontline of the pack of soldiers and guided them to the barracks, to the very heart of their problems. They demanded change and stated they would not leave with empty hands. They came and they conquered. Captain Pinto, once so confident and arrogant, got what was his due: he was imprisoned and the barracks were overwhelmed and controlled by the seditious soldiers. Some exasperated privates claimed that the only way forward was to deprive captain Pinto of his head; sergeant Aquino, however, suggested a gentler approach. In the end, the commander was spared and was left in a cell.

The successes evolved quickly. When lieutenant Eudoro Correa heard of the facts, he assembled a group of soldiers and went to the seat of the Army at that distant frontier town; at the sight of official resistance, the whole revolt was crushed in a matter of hours. It was still morning when the imprisoned officers regained their freedom.

Pinto, however, had not be sent by the Bernardes government to watch impassively such acts of indiscipline. At noon, he called a meeting of the eight officers of the battalion to convene his decision on how to react. The incredulous room gasped when he told them his disturbing verdict: that same day, he intended to execute sergeant Aquino and his deputy, sergeant Granja.

At 4:30 p.m., he assembled a company of soldiers and had both sergeants brought to the courtyard of the barracks. After informing both of their impending fate, he said that they could talk one last time with their families. Sergeant Granja, however, had one modest request: he told Pinto that he found it disgraceful to be killed in the uniform of the Brazilian Army, and asked to change clothes. The commander much gently granted him this small whish; yet, while Granja was in the changing room, he managed to escape and flew towards the river. He run and run fast through the field, dodging bullets and went into the water and up to the margin, and after no one reached him he faded away in the wilderness. Far away. His fellow soldiers would only hear from him much later. Apparently, he did not stop running until he reached the state of São Paulo.

Deeply enraged and humiliated, captain Pinto refocused his attention on the only subordinate at his hand: Aquino. He would now pay for two. The sergeant pleaded for his life; him, a married man and father of two sons, asked for the same treatment he had dispensed to Pinto just a few hours earlier. To no avail. Captain Pinto formed the company and ordered them to shoot. They hesitated. After the first order, not a single bullet was able to find Aquino. Pinto sacked his own gun and threatened to kill any soldier who disobeyed his command. He once again called for the bullets. And this time, they reached their target: more than fifty years after the last lawful execution in Brazil and thirty years after the death penalty had been abolished for times of peace, a public employee was executed without even a mock trial. He was buried before his family could even see him[656].

The events that followed those shameful facts demonstrate the troubling effects of political interference on military justice and the hardships faced by soldiers in distant locations,

[656] *Correio da Manhã*, 28 January 1927, "Um fuzilamento na cidade de Corumbá", http://memoria.bn.br/DocReader/089842_03/29311; *O Jornal*, 23 March 1927, "O fuzilamento do sargento Aquino". http://memoria.bn.br/DocReader/110523_02/31069; *Diário da Noite*, 29 August 1927, "o fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/093351/1697; *Diário da Noite*, 10 November 1927, "O fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/093351/2223

where their superiors could easily act as if they were above the law. And of morals, for what it still counted.

Captain Pinto proudly sent a telegram to his superior with a recollection of the repression. Considering that he had acted to curb turmoil, the commander of the military region of Mato Grosso promoted Pinto to major[657]. The press gave only sparse news of what had happened: according to the opposition, the President, Artur Bernardes, had praised Pinto for controlling a potential insurrection at the border and the government-aligned press almost did not report the successes of Corumbá[658]. The population, however, strongly called for measures, the newspapers claimed. The military administration quickly sent auditor Francisco Anselmo Chagas to investigate the news. He started by speaking with sergeant Pecora, who had witnessed everything. Chagas, however, told Pecora that it would be better to say nothing, and ordered him to sign a prepared statement claiming that Aquino had died in combat[659]. Chagas concluded that the investigation should be archived and Pecora asked to leave the Army.

This disturbing history might have been entirely forgotten, but more developments would follow. After Bernardes left the presidency, a few newspapers revived the issue of the "execution of sergeant Aquino" and called for a thorough investigation. The new government came in support of this claim and sent Auditor Guedes Filho to investigate what had happened[660]; Chagas, the previous auditor, had been licensed because he was under investigation for the murder of a certain Conrado Niemeyer. One more good man in this story. Guedes reported that the auditor and the prosecutor had used art. 26, § 6 of the Military Penal Code to dismiss the investigation – the provision stated that commanders could use violent means to curb revolts. Guedes, however, wrote that this evaluation could only be made by a council of war, and called the 1925 events as a plain homicide[661]. The Supreme Military Tribunal ordered the first level military justice to hold a trial[662].

What happened in the following years was a succession of bizarre twists. Pinto, again promoted – now to lieutenant colonel – was unanimously acquitted by the Council of Military

[657] *Correio da Manhã*, 29 January 1927, s. t., http://memoria.bn.br/DocReader/089842_03/29326
[658] "*Diário Nacional*", "Os crimes do Bernardismo", 8 December 1927, http://memoria.bn.br/DocReader/213829/1049
[659] *A Federação*, 19 December 1929, "O fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/388653/68153
[660] *Correio da Manhã*, 6 de dezembro de 1927, "Um dos crimes mais covardes do Bernardismo". http://memoria.bn.br/DocReader/089842_03/32978
[661] *O Jornal*, 6 December 1927, "Ecos da revolução", http://memoria.bn.br/DocReader/110523_02/35377
[662] *O Jornal*, 18 July 1929, "Ecos da revolução em Mato Grosso", http://memoria.bn.br/DocReader/110523_02/44340; *Revista Criminal*, July 1928, "O fuzilamento do sargento Aquino", http://memoria.bn.br/docreader/340774/1294

Justice[663]. Capitan Honório Hermeto Bezerra Cavalcanti, who was functioning as lawyer for the widow of Aquino, distributed some pamphlets criticizing the verdict and calling the prosecutor to appeal. His commander considered that those actions threatened military discipline and ordered him to be imprisoned for 30 days[664]; only after almost three months he was freed, by force of a *habeas corpus* filed at the *Supremo Tribunal Militar* (STM) – and by the slight margin of 3-2. Meanwhile, the prosecutor had a duty to appeal the verdict, by force of the Code of Military Justice, art. 104, j[665]. He did not[666]. The STM opened an investigation and, in 1930, it would rule on the case[667]. The superior court decided that the lawsuit had been closed [*transitado em julgado*] and lieutenant-colonel Pinto could not be prosecuted again. But both the attitudes of the prosecutors and the judges were found to break the law, and they were convicted[668]. The penalty? Suspension for 30 days. The only consolation was that Aquino was posthumously promoted to lieutenant[669].

The successions of abuses, political maneuvers, threats and plots plainly demonstrate the political tensions of Brazil in the First Republic. The Army was at the center of several political movements: the 1922 and 1924 *tenentista* riots, the 1930 and 1937 coups, the 1932 internal war and several others. The dance between discipline and its breaches was certainly one of the most momentous topics on the public conversation regarding the Army. The powerful force, the guardian of the guns, must be kept in order to avoid further turmoil in an already embittered nation.

Control, however, not always meant civilian oversight of the Armed Forces. Most of the time, this word was uttered more on the sense of control of inferiors by superiors. The case of sergeant Aquino is but one of many possible examples – though probably no one is just as

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663 *O Jornal*, 13 December 1929, "O fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/110523_02/46813
Correio da Manhã, 19 December 1929, "O fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/089842_03/43590

664 *O Jornal*, 7 December 1930, "O caso do fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/110523_03/91; *O Jornal*, 8 December 1930, "Justiça militar", http://memoria.bn.br/DocReader/110523_03/108

665 "Art. 21. Não são criminosos: (...) § 6º Os que, no exercicio de commando de navio, embarcação da Armada, ou praça de guerra, e na imminencia de perigo ou grave calamidade, empregarem meios violentos para compellir os subalternos a executar serviços e manobras urgentes, a que sejam obrigados por dever habitual, para salvar o navio ou vidas, ou para evitar o desanimo, o terror, a desordem, a sedição, a revolta ou o saque".

666 *Revista Criminal*, fevereiro de 1928, "O fuzilamento do Sargento Aquino: parecer do Auditor da Guerra Guedes Filho, http://memoria.bn.br/docreader/340774/901

667 *Correio da Manhã*, 8 January 1930, "Ainda bem", http://memoria.bn.br/DocReader/089842_04/102

668 *O Jornal*, 5 April 1930, "o caso do fuzilamento do sargento Aquino", http://memoria.bn.br/DocReader/110523_03/1420

669 *Correio da Manhã*, 11 July 1931, "A promoção do sargento Aquino", http://memoria.bn.br/DocReader/089842_04/7697

dramatic and extreme as that extrajudicial execution at the wastelands along the Bolivian border.

But some other cases, instead of falling decisively on the realm of tragedy as that of Aquino, lie at the very border between drama and comedy. For instance, private José Pedro dos Santos was accused of insubordination and arrested by lieutenant Norbertino; they got into a fist-fight, and Santos was prosecuted for aggression. However, when the medical exam was performed on Norbertino, there was only one physical wound caused by Santos: the former had a broken middle finger. When an officer fractured his finger for throwing a punch, his subordinate was the one to be punished for aggression. Sure, in this case, a much obvious acquittal was issued (STM, 1915a). Sometimes, in other cases, officers were punished for assaulting subordinates (STF, 1922i) – but those were the exception. Most of the time, enlisted personnel suffered. They suffered all too much.

In this chapter, we will trace how the Brazilian government tried to discipline its soldiers in an increasingly toxic international environment that would soon lead to World War II. The 1920s and 1930s watched the rise of a new politically active class of soldiers, the already discussed *tenentes*. If they brought much-needed modernization to the armed forces, they also provoked instability. Getúlio Vargas colluded with them in 1930 to gain power, and for the next fifteen years, civilian and military power would be strictly intertwined. The barracks seized their newly acquired ascendancy to pressure for more resources for the Army. Vargas was playing with fire. And, especially from 1935 onwards, the fear of communist infiltrations among the troops stimulated more strict disciplining. A tendency that could only grow with the menace of war in the 1940s.

The story of soldiers from rebels to hidden eminences, in the unstoppable ascension of the political Army, will be the center of this chapte. The first four sections of this chapter will mostly deal with questions arising in the 1920s. Reform of military justice, in the form of new codes and other legislative interventions, will be a central aspect of these discussions. The other seven sections will mostly dwell on the debates of the 1930s, though some references to the 1930s will still be made. If reforms of the military justice were still carried out, other issues rose to the forefront: namely, the political criminality of military officers and military justice in times of war. These debates signal the struggles in the Brazilian Army to achieve higher degrees of professionalism. Throughout the chapter, the issue of discipline will be central: how to keep soldiers in line with the help of the judiciary, both in the dramatic contexts of wars and revolutions and on the banalities of everyday life. But the mere fact that the issues of reform

and backwardness were no more seen as indispensable signal that the armed forces had entered a new era.

Abuses were not eliminated, though: they were hidden. Sergeant Aquino knows. Yet, they were in fact precisely that: abuses, against the law. And this makes a difference.

9.1 - Modernization and authoritarianism: The codes of military procedure

Insistence eventually turned out to be fruitful. The law 3991 of 5 January 1920, art. 24, authorized the President of the Republic to enact by decree a new Code of Judiciary Organization and Military Procedure – though it would have to be latter submitted to parliament and officially approved. In 30 October of the same year, the decree nº 14450 put in effect what was perhaps the most sweeping reform of military tribunals ever since. With this code, the judiciary of soldiers turned from a body closely linked to the executive to an institution of clearly jurisdictional nature. Among the most important changes, we can point out that soldiers that served in Councils would no longer be chosen by their commanders, but selected by a draw, avoiding interferences of the hierarchy in judgements; second, a Public Ministry was created, meaning that judges would no long also accuse defendants. Other minor changes were also significative; for instance, the old Councils of War would from now on be named Councils of Military Justice; the number of judges of the Supreme Military Tribunal was reduced to 12 by the retirement of three military judges[670]; and some positions of auditor of war were extinguished[671]. The code was praised by the Ministry of War for reinforcing public order and guaranteeing the rights of defendants (MINISTÉRIO DA GUERRA, 1921, p. 73).

The crucial changes sparked some debates in the press and in legal circles, suggesting that military justice, more than merely technical, was considered relevant for public opinion.

A few days after the 1920 code was published, the newspaper *A Noite* published as its first new an evaluation of the new law[672], with an interview with Esmeraldino Bandeira. The issued seemed to be so important that even a picture of Bandeira was printed. *A Noite* bluntly stated that "nobody is satisfied with the reform". One point of criticism was the authorization for auditors of war to advocate in civil causes; the newspaper insinuated that this provision and others pointed out the true scope of the reform: to open up new job positions at the public

[670] *O país*, 26 November 1920, "Decretos Assignados", http://memoria.bn.br/DocReader/178691_05/3999
[671] *O país*, 11 January 1921, "Desligamento de auditores de guerra", http://memoria.bn.br/DocReader/178691_05/4547
[672] *A Noite*, 16 November 1920, "Na balança da Justiça Militar", http://memoria.bn.br/DocReader/348970_02/1812

administration for political protegees. Esmeraldino Bandeira, conversely, praised the code. He highlighted art. 46, which separated the military justice from the military command, in contrast with art. 28 of the 1895 Regulation. Moreover, the new composition of the court, with 9 members, was more equilibrated between civilian and military judges. Moreover, it extinguished the councils of investigation and changed the name of the councils of war to councils of Military Justice. It created the Public Ministry [*Ministério Público*] and the corps of lawyers to defend soldiers before the councils of justice. Competence was much more clearly defined in arts. 95 and 96. Bandeira singled out many other particular dispositions to be praised concerning procedural technicalities, but the most important changes were "those that freed auditors from the triple and contradictory role as judge, secretary and part, all at the same time". Two days later, the *Jornal do Commercio* pointedly remarked that, while the headline and introduction from *A Noite* was contrary to the reform, the whole interview praised the new code lavishly – and they agreed[673].

Some questioned if the code was constitutional. Judge Acydino Magalhães stressed that the constitution, art. 77 spoke of councils, in the plural, while the code had extinguished the council of investigation, leaving only the council of justice responsible to indict and judge. But this opinion seems to have not been accepted[674].

One of the main debates spawned by the 1920 code was discussed at the Juridical Congress Commemorative of the Independence, thesis 3[675]: the abolition of the Councils of Justification. Following a long-standing tradition, the Military Judiciary Procedural Regulation of 1895, art. 29 authorized any soldier that had been accused of committing a fault, be it a crime or not, to call a special Council to justify himself. The 1920 code, however, considered that this practice was contrary to the "judiciary nature" of the new military procedure, and in art. 352, those councils were finally extinguished. The congress, however, discussed whether this extinction attacked the right to defense in military life and if such councils were truly compatible with the "judiciary nature" of the new Code.

According to the discussants, this prerogative had been granted to soldiers only by the Brazilian legislation, and followed the logic embedded in previous statutory law. Since Councils of Investigation were made exclusively of soldiers, they would function as a "tribunal of honor", where the accused could restore his prestige before his peers[676]. However, since this

[673] *Jornal do Commercio*, 18 April 1920, "As pincuinhas da 'A Noite'", http://memoria.bn.br/DocReader/364568_11/50477
[674] *Jornal do Commercio*, 6 June 1921, "Justiça Militar", http://memoria.bn.br/DocReader/364568_11/2830
[675] Revista Marítima Brazileira, 1922, p. 869. http://memoria.bn.br/DocReader/008567/43672
[676] Revista Marítima Brazileira, 1922, p. 871. http://memoria.bn.br/DocReader/008567/43672

"moral court" did not fit well in the new structure of military justice, the commission that had draft the project of the 1920 code had reserved a special place for it, different from the ones reserved for the councils of Investigation and of War[677]. Apparently, though, this institution did not make it to the final version of the Code, and the old Councils of Justification were extinguished. The discussants, however, opposed this decision, for if someone was reproached in an order of the day, for instance, it would be almost impossible to counter the accusations. The superiors frequently considered that backing off from a previous reprimand would undermine the discipline, meaning that unfair evaluations would be carried forever by people unfairly accused and could probably undermine future promotions[678]. The commission concluded that the best course of action would be to reestablish the Councils of Justification outside the traditional system of Military Justice – and this was precisely what was proposed by a bill filed by deputy Prudente de Moraes Filho.

Not only the press and the Juridical Congress discussed the code of 1920. As already mentioned, the law that delegated the power to enact the code to the president provided that the result must be passed through the National Congress. And when deputies and senators were given the opportunity to review the text, they did a thorough job. The opinion of the reporter [*relator*] had to discuss 55 amendments suggested by deputies and proposed 38 new ones, and responded to a letter from the general staff of the Army[679]. The long opinion was published in the press, demonstrating the public interest on the subject[680]. His only major criticism was that members of the Prosecutor Office (*Ministério Público*) could be dismissed at pleasure by the government, for they were no longer representatives of the crown, but were the defender of society and the law.

Not everyone was satisfied with the new code: the chief of staff of the Navy complained that the new organization went against "the most traditional uses and customs of military justice"[681] and could impair the good administration of the law. But this must not surprise us, since the code diminished the grip of the military command over justice administration. To stay with a single example, the soldiers functioning as judges in Councils of Justice would no longer be chosen by their superiors, but rather drawn by chance (WEAVER, 1922, p. 129). This could easily be interpreted as a challenge to the authority of the old barons of the Army and the Navy.

[677] Revista Marítima Brazileira, 1922, p. 879-880. http://memoria.bn.br/DocReader/008567/43672
[678] Revista Marítima Brazileira, 1922, p. 882-884. http://memoria.bn.br/DocReader/008567/43672
[679] *A Noite*, 20 December 1920, "A Câmara das compensações", http://memoria.bn.br/DocReader/348970_02/4435
[680] *Jornal do Comércio*, 19 December 1920, "Justiça Militar", http://memoria.bn.br/DocReader/364568_11/51174
[681] *A Noite*, 26 April 1922, "Faltou à verdade e faltou à justiça para afrontar o congresso", http://memoria.bn.br/DocReader/348970_02/5630

All in all, the code of 1920 made relevant changes in the judiciary that went beyond detail and broke with the logics inherited from the past. However, some incongruencies of the new text prompted the government to alter the code, once again by presidential decree subject to later approval by congress (*ad referendum*).It was issued by decree 15.635 of 26 August 1922, under the name of Code of Judicial Organization and Military Procedure. Curiously, the document did not point which parts of the 1920 code would be altered, but reedited the whole law with the changes as if it was a new code. The Brazilian legal culture, however, received these changes as rather a new edition of the old norms. The *Jornal do Commercio* talks of the 1922 decree as a simple "modification advised by the experience", implying that the code is still the same. It was deemed to have "assimilated the military justice to the civilian one"[682].

Appetite for change did not wane. Four years later, a new code would be enacted, once again by a presidential decree *ad referendum* of parliament. The Code of Military Justice of 1926 entered the Brazilian legal system through decree nº 17.231-A of 26 February. The project that would originate the code was written by jurist Adolpho Rezende[683]. He admittedly based the new regulation on the 1920 Code, for the task of the legislator, according to him, is to "conserve, bettering" [*conservar melhorando*], that is, only what absolutely cannot be used should be thrown away, but whenever the past could be improved, it must be considered and used. He says the 1920 code was based on the 1907 project of deputy Dunshee de Abranches, filed in the context of the discussions of the future 1908 law on recruitment. One of the problems of the 1920-1922 Code was that procedures took a long time because the auditors of war were frequently absent, judging *in situ* in each garrison, frequently cases of desertion and insubmission. To solve this, he suggested that the government could call extraordinary councils to handle these issues[684]. Moreover, Rezende pointed that the previous law had let some soldiers waiting for their trial in freedom, while the discipline asked them to expect their fate in jail. The project also increased the number of judges at STM to 10, equating the amount of civilian and military judges. It also established that the court would be competent to hear writs of *habeas corpus* from soldiers; the decree 848 of 11 October 1890, which organized the Federal Justice, forbade in its art. 47 those tribunals to receive petitions of *habeas corpus* from members of the armed forces; however, the constitution granted the right to *habeas corpus* to everyone, making

[682] *Jornal do Commercio*, 16 November 1922, "Justiça Militar", http://memoria.bn.br/DocReader/364568_11/45002
[683] *Jornal do Commercio*, 9 May 1926, "Projecto do Código da Justiça Militar", http://memoria.bn.br/DocReader/364568_11/16180
[684] *Jornal do Commercio*, 12 May 1926, "Projeto de Código de Justiça Militar: exposição de motivos", http://memoria.bn.br/DocReader/364568_11/16620

no exception for soldiers. So far, this incongruency was solved by the STF hearing those writs, but the 1926 project finally transferred this competence to the STM, to which it should always have been bestowed[685].

Perhaps the most polemic part of the 1926 code was attributing the grant of *habeas corpus* of soldiers and those subject to the military draw to the Supreme Military Tribunal instead of the Supreme Federal TRIBUNAL. After the 1926 Code entered in force, for instance, the STM had to adapt its by-laws, and the *habeas corpus* was precisely the most discussed issue[686]. Critics argued that officers from higher ranks would hardly be merciful towards inferiors, and especially those subject to the military draw that did not show up for the service[687]. Civilians would be more independent from the military mentality and mental structure, being therefore better positioned to properly rule on *habeas corpus.*

This competence for the STM to hear *habeas corpus* cases provided the ground for a clash between jurisdictions. The code of 1926, art. 261 mentioned that those suffering illegal coercion could file a petition of *habes corpus* before the STM, which was interpreted by the military tribunal as meaning that the STF could not decide those matters. The STM said that if its decisions could be appealed to the STF, the latter would be superior to the former, what was unthinkable. However, in *habeas corpus* n° 22.750, the STF decide precisely that it could hear any cases of *habeas corpus*, since the Constitution, art. 61, "a" determined that the decisions of tribunals would end lawsuits except precisely in cases of *habeas corpus*; moreover, the supreme court much daringly declared that, if it could hear appeals from second degree courts, it would have even more reason to hear appeals from the Supreme Military Tribunal, "whose function is much less important"[688]. Not the most gentle of *obiter dicta*. But drama could come from the other side too: general João Nepomuceno da Costa at some point refused to abide by a *habeas corpus* from the STF because he thought only the STM should rule on such cases; he was later even prosecuted according to art. 135 of the criminal code (refusal to obey to orders from authorities).

A second altercation regarding the code as a whole developed in the press between a soldier – Captain Faustino Filho – and a jurist – the author of the code, Adolpho Rezende, regarding the composition of the court. In early 1926, the newspaper *O Jornal*[689] published with

[685] *A Noite,* 14 April 1926, "O Código da Justiça Militar", http://memoria.bn.br/DocReader/348970_02/17085
[686] *Gazeta de Notícias*, 7 May 1926, "O 'habeas corpus' no foro militar", http://memoria.bn.br/DocReader/103730_05/18932
[687] *A Noite*, 5 March 1926, "o direito e o foro", http://memoria.bn.br/DocReader/110523_02/24810
[688] *Revista Criminal*, "os 'habeas-corpus' aos militares", pp. 29-30, http://memoria.bn.br/DocReader/340774/879
[689] *O Jornal*, 11 January 1926, "O Código de Justiça Militar", http://memoria.bn.br/DocReader/110523_02/26082

prominence an article accusing the new code of being unconstitutional for equated the number of military and civilian judges in the *Supremo Tribunal Militar*. Captain José Faustino Filho, interviewed by the newspaper, pointed out that the constitution ordered the special tribunal to be of military nature, and that the constituent assembly records implied that the congressmen at the time thought that in the court should prevail the "military element". Astolpho Rezende, author of the draft of the code, wrote an answer a few months later[690]. His first remark was that a statute could only be declared unconstitutional if it went manifestly against the constitution; "it is not possible to declare an unconstitutionality by mere inference". Since the constitution, art. 77 did not say a single word about the origin and profession of the judges of the court, the legislator was free to decide as he pleased. This was a matter of opportunity, and not of constitutionality. Regarding the historical arguments, "this element of interpretation (…) is today greatly devalued". The parliamentary records should only be used to clarify obscure fragments of the law, but not to apprehend the meaning of texts with a straightforward wording. And, finally, all amendments to art. 77 attempting to define the composition of the *Supremo Tribunal Militar* proposed in the constitutional assembly were rejected: the historical method itself deauthorized Faustino Filho. The members of the assembly had different opinions and the constitution remained silent: "it is not possible to extract any argument to define the supposed will of the legislator". Faustino Filho, nevertheless, responded[691]. For him, the plain text already hinted at the conclusion: it made no sense to have a Supreme *Military* Tribunal made of a majority of civilians. In a second text[692], he pointed out seven unconstitutionalities of the new code, including the duty to issue opinions upon request of the president, the fact that some decisions of councils in times of war could not be appealed etc.

Just like its predecessors, the decree that enacted the 1926 Code was supposed to be later filed before the National Congress to be approved. Three different commissions of the Chamber of Deputies gave their opinions on the text[693]; they were mostly positive and somewhat short, indicating that this project was much less controversial than the 1920 Code had been. This quick analysis by deputies, however, was seen by *O Jornal* as carelessness[694]. Meanwhile, in the judiciary, some argued that the Code was unconstitutional for the legislative delegations were not authorized by constitutional law. Conversely, the *Supremo Tribunal*

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690 *Jornal do Commercio*, 20 June 1926, "O elemento civil no Supremo Tribunal Militar", http://memoria.bn.br/DocReader/364568_11/17140

691 *O Jornal*, 27 June, 1926, "O Código da Justiça Militar", http://memoria.bn.br/DocReader/110523_02/26298

692 *O Jornal*, 22 July 1926, "O Código da Justiça Militar", http://memoria.bn.br/docreader/110523_02/26617

693 *Jornal do Commercio*, 22 November 1926, "Código de Justiça Militar", http://memoria.bn.br/docreader/364568_11/20952

694 *O Jornal*, 6 October 1926, "Justiça Militar", http://memoria.bn.br/docreader/110523_02/28731

Federal decided that, if the text did not forbid such practice, it was implicitly authorized[695]. All in all, at least in parliament, the 1926 code was much less scrutinized than the 1920 one, probably because it simply continued in the same line of its predecessor.

Military procedure changed a lot in the last years of the first republic. In the first thirty years of the new regime, soldiers were judged according to an ancient system, submitted to the executive power – and, most important, to the military commanders – with judges appointed *ad hoc*, emphasizing discipline above all under the rule of soldiers with little space for jurists. Judges still accused the defendant. The seat was gamed in favor of convictions. But after the roaring twenties arrived, thorough modifications were made. The proportion of jurists in the second-degree court increased from three in fifteen to five in ten; *habeas corpus* began to be heard at the military justice; the councils of investigation were extinguished; the Public Ministry and the corpus of military lawyers were created. To summarize, we moved from an administrative to a jurisdictional justice. No more an appendix of the Army, the system became a fully-fledged branch of the Brazilian legal system, based on codes, prompting vibrant discussions and fully integrated into the legal culture of the young republic.

And the very existence of a separated code of military justice is remarkable. The Italian Code of 1859 dealt with both criminal law and criminal procedure – this last one occupied 287 of the 595 articles of the single code. The Portuguese Code of 1875 followed this trend of having two parts of almost equal size dealing with substantial law and procedure. The French Code of 1857 emphasized procedure even more: three of its four books concerned procedural aspects and jurisdiction, while a single book dealt with theory of crimes, penalties and all specific crimes. Conversely, the more recent the Spanish Code of 1884, the German Code of 1872 and the Belgian Code of 1870 dealt only with substantial law and left procedure to another statute. Therefore, half of the six codes used by the Brazilian Commission of 1890 as a source of inspiration still treated procedure and penalties as a single reality – and one, the French, even gave more prominence to procedure.

But not everything was progress. All changes were made by the executive through decrees while the National Congress acted for the most part as a rubber-stamp. The Supreme Military Court was still responsible to give opinions to the President, something odd within the Brazilian system of separation of powers. Death sentences could be executed in times of war without appeal (art. 355). There was still much room for future reforms towards the "liberal" aims of Brazilian jurists.

[695] *O Paíz*, 25 July 1926, "Jurisprudência", http://memoria.bn.br/DocReader/178691_05/26161

9.2 – Clashing jurisdictions: how far can the judiciary interfere in the military administration?

The Brazilian constitution of 1891 greatly innovated on the separation of powers by introducing American-style judicial review of statutes; the language of (un)constitutionality entered the Brazilian legal culture with an intensity never seen before[696]. At the same time, calls for a strong executive power, responsible to guide the State and set the directions for the other agents, were still a staple in the constitutional and administrative thought. An empowered judiciary could easily enter in collision course with this already mighty executive. The limits of judicial action regarding the executive were even more dramatic considering the military field, in which discipline and subordination are central values, and any external interference – especially from judges – can be seen as undesired intrusion. In this section, I will discuss first the debate on whether *habeas corpus*[697] could be granted to soldiers, and second, other instances where the judiciary was asked to review decisions from the executive regarding the armed forces.

The new republican regime mostly continued with the same approach of the monarchy to *habeas corpus* for soldiers. Law 2.033 of 20 September 1871, art. 18 ordered that soldiers would be the sole category deprived of the right to use that writ before the courts; the Republican regime similarly enacted the decree 848 of 11 October 1890, organizing the Federal Justice, which, in its art. 47[698], also mandated *habeas corpus* filed by soldiers not to be heard by the new judiciary system. However, the new 1891 constitution, art. 72, § 22, which granted the right of *habeas corpus*[699], did not differentiate between soldiers and civilians. Nevertheless, the courts in general did not grant the writ to either officers or troops, arguing that no law authorized judges accept *habeas corpus* petitions from them[700]. This interpretation was mostly taken for granted by the doctrine: Carlos Maximiliano (1915, p. 740) simply say that soldiers are not entitle to *habeas corpus*, without more justification; Tavares Bastos (1911, p. 542)

[696] For a short and clarifying history of judicial review in Brazil, cf. Marcelo Casseb Continentino (2020).
[697] On *Habeas Corpus* during the First Brazilian republic, cf. Andrei Koerner (1998).
[698] "Art. 47. O Supremo Tribunal Federal e os juizes de secção farão, dentro dos limites de sua jurisdicção respectiva, passar de prompto a ordem de habeas-corpus solicitada, nos casos em que a lei o permitta, seja qual for a autoridade que haja decretado o constrangimento ou ameaça de o fazer, exceptuada, todavia, a autoridade militar, nos casos de jurisdicção restricta e quando o constrangimento ou ameaça for exercido contra individuos da mesma classe ou de classe differente, mas sujeitos a regimento militar".
[699] "§ 22 - Dar-se-á o habeas corpus , sempre que o indivíduo sofrer ou se achar em iminente perigo de sofrer violência ou coação por ilegalidade ou abuso de poder".
[700] On examples of sentences denying *habeas corpus* for this reason, cf. *Jornal do Commercio*, 23 May 1926, "habeas corpus a militares", http://memoria.bn.br/docreader/364568_11/16399

reports that reformed officers also do not enjoy this prerogative. Pedro Lessa (1915, p. 274-275) reaches the same conclusion. The examples could go on indefinitely.

Some attitudes that strike the 21st century reader as absurd would never be voided by the judiciary, provided that the victim was a soldier. For instance, in *habeas corpus* 8262 (STF, 1922), an officer alleged that he had been transferred from a position in the Amazon because his superior did not want him to take part in a Council of War; he asked this act to be voided, but the court grant the request. Another officer was given less than the statutorily-mandated 30 days-notice before being transferred, and asked for the measure to be voided; the STF (1922; *habeas corpus* 8826), however, considered that in cases of urgency, the government could disregard the 30 day-period, and did not even need to declare this urgency, let alone justify it. Other officers in *habeas corpus* 8529 had been drawn to participate in a Council of War but had then been transferred, something against the law; the government alleged that they had been accused to participate in a *tenentista* conspiracy, and their transfer aimed to disrupt the sedition. The tribunal agreed that they should not have been informed of the reasons of their transfer even though they did not appoint any law to justify their position. The bottom line always was that soldiers could not enjoy the same protection that *habeas corpus* rendered to regular citizens. And this unequal restriction was elevated to legal doctrine. The government could expect the courts to turn a blind eye to even the strangest or even most blatantly illegal acts from the executive, even as many dissenting votes were piling up. To little or no avail.

These judicial interpretations, however, began to change in 1922. As Astolpho Rezende[701] reports, in *habeas corpus* 8525 (STF, 1922; 1924), the judges of the supreme court changed their interpretation on the subject in the slightest of margins and overruled the previous case law. We must therefore discuss this case in more detail to understanding the relations between judiciary and the military administration.

In 13 May 1922, major Alípio Bandeira published a small article called *Pequena Theoria da Punição, vulgarmente chamada castigo*[702] ("small theory of punishment"), in which he writes in abstract that punishment only attains its objectives whenever the penalty inflicted is deserved and the one inflicting such pain enjoys moral authority. Whenever the superior authority is corrupt, the punishment is more a sign of merit rather than a source of distress. Bandeira never mentioned any names or concrete circumstances. The article, however, was no academic endeavor: a few days earlier, the major had been transferred from the city of Itu, in

[701] *Jornal do Commercio*, 23 May 1926, "habeas corpus a militares", http://memoria.bn.br/docreader/364568_11/16399

[702] *Correio da Manhã*, 13 de maio de 1922, "Pequena Theoria da Punição, Vulgarmente Chamada Castigo", http://memoria.bn.br/DocReader/089842_03/10413

the rich state of São Paulo, to the distant hinterlands of Rio Grande do Sul as a reproach for his political opinions. The "corrupt authorities" were implicitly recognized as being the minister of war, João Pandiá Calógeras, and the president of the Republic himself, Athur Bernardes. Calógeras ordered Bandeira to be imprisoned for 30 days for his small article, based on decree 4085 of 3 March 1920 (disciplinary regulation of the Army), art. 420, a, 12. The minister had consulted with the president himself before deciding his course of action, demonstrating how important the matter was and the political stakes behind the legal discussions. Bandeira, then, filed a petition of *habeas corpus*.

Alípio Bandeira believed to have not committed any fault, since the article did not talk about anyone in particular, even though Calógeras had felt offended. Moreover, if there was an offence, it was accompanied by at least one attenuating circumstance - meritorious career - and no aggravating circumstances, meaning that, by force of the disciplinary regulation, he could not be imprisoned for more than 10 days. But the most important discussion concerned whether a soldier could receive *habeas corpus*. Bandeira's lawyer, Guilherme Estelita, argued that the court should grant the writ for clearly illegal decisions of the military administration, since soldiers were citizens like any other ones. For instance, if the military authority issued death sentences in times of peace, or retained a soldier in prison for more than the due time, it would be absurd to ask the aggravated citizen to bow before clearly illegal orders because the highest court of the country could not act on the behalf of soldiers. At the same time, after the new law of military service was enacted, all Brazilians were potential soldiers, meaning that denying *habeas corpus* for that particular class amounted to the obliteration of that fundamental right for every single Brazilian (STF, 1922).

Some ministers argued that the constitution had established a special jurisdiction for soldiers in art. 77, meaning that general rules did apply for the members of the armed forces. Moreover, to void any order from superiors would undermine military discipline and imperil the organization of the Army and the Navy. But many judges disagreed. The central argument was precisely that the constitution granted the right to *habeas corpus* to everyone, and did not explicitly distinguish between civilians and soldiers; if the highest law of the land did not separate between those two categories, ordinary laws could not do so. And, as judge Guimarães Nadal said, "arbitrium and violence are the ones that produce anarchy, and not the respect for legal prescriptions, either of soldiers or others". He explicitly recognized that the court should change its case law: "I must today punish myself for the interpretative error that led me [before] to deny to soldiers the right of *habeas corpus*, applying laws older than the constitution and incompatible with it". In the end, an equal number of ministers voted for and against the petition

being heard, meaning that the request would be analyzed [*conhecida*]: from then on, members of the Army and Navy could plea for protection before the courts. On the merit, however, the petition was denied.

Bandeira remained in prison, but he emerged victorious from the altercation. The case was so momentous that the decision was fully published in the first page of one of the most important newspapers from Rio de Janeiro, *Correio da Manhã*[703]. After he served his sentence, the social reaction to the whole imbroglio was strong: a group of officers offered a banquet celebrating him[704], and others printed and distributed postcards with the text that originated the punishment[705]. Bandeira published a text saying he did not fear his transference, for he would leave the most politically backwards state of Brazil for "the most advanced in Brazil and the world"[706]. After Calógeras left the ministry, Bandeira wrote a text criticizing his former boss and said that he had knowingly imposed an illegal prison because he believed it would be upheld, for, "among the three so-called harmonious and independent powers, none is harmonious and the sole independent is the executive"[707].

The new trend would establish itself in the Brazilian legal culture and guide the new case law: the decree 848 of 1890, art. 47 would be definitely considered unconstitutional. Those looking for it still be able to find several examples of *habeas corpus* granted to soldiers after 1922[708]. This, however, do not mean that the courts inaugurated a new era of intervention over military administration. In the *revisão criminal* (criminal appeal) 1909, for instance, the Supreme Federal Court (STF, 1930) decided it could not erase disciplinary penalties from the register of soldiers. The Supreme Military Tribunal (1922) kept deciding that there was no appeal against disciplinary imprisonment. In the 1920s, some seamen (STF, 1925g) filed *habeas corpus* against dismissals without due process; the STF (1925; 1925; 1928) repeatedly decided that the troops (but not officers) could be fired whenever the government saw it fit and that there was no legal recourse against such decisions.

One case, *habeas corpus* n. 8915 (STF, 1923), shows the limits that soldiers still faced before the courts. A group of students from the Military School had been expelled from the

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[703] *Correio da Manhã*, 1º de junho de 1922, "A Prisão do Major Alípio Bandeira", http://memoria.bn.br/DocReader/089842_03/10634

[704] *O Combate*, 28 de junho de 1922, "O almoço no 6º de infantaria", http://memoria.bn.br/DocReader/830453/5674

[705] *O Combate*, 14 de outubro de 1922,"A 'Pequena Theoria da Punição'", http://memoria.bn.br/DocReader/830453/6012

[706] *O Combate*, 21 de junho de 1922, "Uma Explicação", http://memoria.bn.br/DocReader/830453/5648

[707] *O Combate*, 25 de novembro de 1922, "A Pequena Theoria da punição e o sr. João Calógeras", http://memoria.bn.br/DocReader/830453/6144

[708] Ex: *Gazeta de Notícias*, 26 May 1926, "habeas corpus a militares", http://memoria.bn.br/docreader/103730_05/19060 ; *habeas corpus* 11244 (STF, 1924).

institution due to their participation in the *tenentista* movements in the early 1920s; disagreeing with the measure, they filed a petition of *habeas corpus* asking to be reintegrated into the school. The Attorney General (*Procurador Geral da República*) stated that he believed *habeas corpus* from soldiers could not be heard by the court, but he would refrain from discussing it, for the matter had already been definitely settled by the court (STF, 1923, p. 296). Nevertheless, some judges insisted in rediscussing the issue. Alfredo Pinto, for instance, said that art. 72, § 22 of the constitution, concerning the right of *habeas corpus*, had a generical wording, and therefore did not contradict decree 848 of 1890, art. 47. Judge Pedro dos Santos argued that the same art. 72, § 22 could not be seen as comprising soldiers, for "the laws, the constitutions and the regulations cannot be understood in an isolated expression; it is imperative to look at their whole". Both of them reproduce the traditional, 19th century mentality of reading the constitution from the framework of non-constitutional legislation, contrary to the new perspective, in line of judicial review, of reading the whole legal order with the eyes of the constitution. Pinto even argued that the by-laws of the STF, art. 16, § 2, a, determined that *habeas corpus* from soldiers cannot be heard, and "it would be absurd to think that the court would write in its internal laws an unconstitutional provision": even a simple internal regulation could overcome the constitution.

Notwithstanding the debates, the majority decided that the petition could be heard. However, the judges argued that *habeas corpus* could only be granted to counter restrictions against the liberty of movement. If the Military School was a boarding institution, being expelled from it would increase, and not diminish that same liberty. And, if students could be legally considered as public employees - something that was in no way a given – they could not file *habeas corpus* against their dismissal, but should use an ordinary writ (*ação ordinária*). In this case, they could at most receive compensation for the money they might have lost, but the court could not order the executive to reintegrate them into their former positions. Finally, judge Geminiano da Franca argued that, by force of the Constitution, art. 48, the executive was the head of the military; for him, this meant that the president and the executive authorities were the only ones able to impose disciplinary penalties. The judiciary, therefore, could not void them. The petition, therefore, was rejected.

From all the cases I have named, we can see that, though softened through time, the judiciary adopted a very restrained attitude towards intervention on the executive. The STF was extremely weary of voiding any executive act and was mostly deferent towards the decisions of military authorities. Nevertheless, the subtleties of this attitude changed. Before 1922, soldiers were deemed different from civilians, and they could not file petitions of *habeas*

corpus; judges retained that to do otherwise could endanger military discipline and lessen the respect of inferiors towards superiors. After that year, the supreme court asserted its own authority over the executive: soldiers could not be deemed a class completely different from civilians, because they were just as much citizens as anybody else[709]. Judicial review of the 848 decree was asserted. However, the authority of the judiciary over the executive was much more theoretical then practical, for judicial review of administrative acts was much rare. The bar to define that the administrative authority had violated the law was exceedingly high, and if a particular norm had not been clearly circumvented, the administrative act would hardly be voided. But this was more or less the same attitude that civilians faced: soldiers were being treated (almost) in the same way as civil servants.

9.3 – Protection against the fatherland? *Habeas corpus*, recruitment and the relations between military and civilian justices

As we have repeatedly seen, the military draw had long been a dramatic problem; this is why the 1908 law was so important, spawning from a huge civic campaign aiming to shape the patriotic culture of the nation. However, this was also one of the points were the disputes between soldiers and civilians could be all the more dramatic and consequential: after all, those contesting the legality of their own draft could be deemed as civilians, since they might have been illegally submitted to the military regime, or considered as soldiers, since, before a judicial decision, they were effectively submitted to the laws of the armed forces. These problems were extensively discussed in the 1920s, when the initial enthusiasm for the military draw was fading away and ceding space to the problems that plagued bureaucracy.

In 1926, Three man were drawn to military service, but contested their enlistment before the Federal Justice of Rio de Janeiro by means of *habeas corpus*; the 1926 Code, however, determined that *habeas corpus* against enlistment must be judged by the Supreme Military Court. This imbroglio ended up in the To understand what was at stake, we must look at the opinion of the General Attorney (*Procurador Geral da República*), that gave a better context of the problems surrounding *habeas corpus* against the military draw.

According to the opinion[710], between 1908 and 1917, the supreme court did not hear cases of *habeas corpus* against the draw established by the 1908 law; the judges considered that

[709] Tatiana Castro (2018, p. 169-236) has already explored habeas corpus as a way for soldiers to plea for and further their citizenship rights.

[710] O Paiz, 22 July 1926 http://memoria.bn.br/DocReader/178691_05/26116 - os sorteados militares na justiça – parecer; O Paiz, 23 July 1926, http://memoria.bn.br/docreader/178691_05/26130; O Paiz, 24 July 1926,

the appeal established by the law against the enlistment *junta*, which usually went to the minister of war, was enough to counter any violations that might occur. But in 1917, the tribunal started to decide differently: whenever one had used all legal appeals within the military administration, but illegalities persisted, it would be possible to file an *habeas corpus* before the supreme court. This happened because, after the initial enthusiasm, the draw was being conducted with less care, some calls were not issued and it was ever more difficult even to file appeals before the military administration; after news of those abuses arrived at the press and, naturally, to the ears of the STF, the tribunal changed its case-law. In the next months, dozens of writs came before the judges, a flow that only grew to the point that hundreds of new lawsuits arrived each year. According to the attorney general, the tribunal had to create a special session on Mondays only to deal with *habeas corpus*. But not even this was enough: at some point, in a single session, more than 300 appeals were judged; STF "risked becoming a review commission of the military draw"[711]. In 1921, to help diminish the flux of *habeas corpus*, the necessary appeal against decisions of federal judges was scrapped[712]. Yet, in that same year, the National Congress did not enact the traditional law establishing the authorized size of the Army, and a deluge of *habeas corpus* arrived arguing that this meant that no draw could be pursued. The Ministry of War even published a menacing circular letter arguing that those filing these petitions before the STF that did not present themselves before the military authority when the order was overturned would be considered deserters[713]. But these measures were not enough. It was precisely to counter this tendency that the new 1926 Code of Military Justice had transferred the competence to hear *habeas corpus* against military draws to the STM. In the end, the STF decided that it could hear appeals against decisions of the STM. This case, however, had many repercussions, and stimulated a vivid debate on the press. The many *habeas corpus* against the draw were not considered simply a matter of the internal organization of the Brazilian supreme court, but were deemed a grim menace to the very effectivity of the mandatory military service. The attorney general, when addressing the judges, explicitly said that he was "appealing to the patriotism of the judges, for the concession of *habeas corpus en masse*, as has been done, prompts the complete failure of the military law and, as a matter of consequence, the military reserves of the country"[714]. He even pointed out that secretly the

http://memoria.bn.br/docreader/178691_05/26146; O Paiz, 24 July 1926, http://memoria.bn.br/docreader/178691_05/26161

[711] O Paiz, 24 July 1926, http://memoria.bn.br/docreader/178691_05/26146

[712] By decree 4381 of 5 December 1921, art. 12.

[713] O Paiz, 13 September 1921, http://memoria.bn.br/DocReader/178691_05/7208 - cuidado, srs. sorteados

[714] O Jornal, 1 June 1926, http://memoria.bn.br/DocReader/110523_02/25956 - os habeas corpus para sorteados militares.

defendants were actually trying to destroy the military service, because they had previously argued that the 1908 law was unconstitutional. An article called "the industry of *habeas corpus*" called the writ "an instrument of destruction of our armed defense and a drawback to the administration of justice"[715].

The legal debates[716] mostly ignored this issue, concentrating on whether the 1926 Code violated the constitution, even though it had been promulgated by a legislative delegation; but the tone of the Attorney General clearly highlighted what was at stake. Some public commentators remained unsatisfied with the decision, as an article[717] published two months later proves: called "a momentous national problem", the piece explicitly states that "the military service in Brazil currently suffers the damaging consequences of the excess of liberalism in the national judiciary organization". Sadly, "selfish" citizens without patriotism or civic education had been abusing the *habeas corpus* and exploring loopholes in the 1908 law to avoid serving in the military. The Army, that should prepare all citizens to defend the fatherland in times of need, would not be able to perform its own mission if this trend persisted. The very drafter of the 1926 Code, Astolpho Rezende, wrote a series of articles to the press, defending that the military justice was the most adequate place to rule on *habeas corpus*. From a legal point of view, those drawn to military service were already considered soldiers, and therefore must be subject to military jurisdiction[718]. But, more importantly, those wary of the military justice being involved in the draw erroneously argued that the generals sitting on the bench would most probably resent those trying to escape military service, and therefore could not wield a fair ruling. Rezende[719] argued that this was a "false liberalism" grounded on prejudice; moreover, the five judges with civilian backgrounds could counter any negative influence from their military counterparts, and an appeal to the STF would assure that any mistakes would be easily corrected. The problem was to stimulate dangerous disputes between federal judges of first level and the military justice.

These debates are much interesting for showing how political disputes could lie behind the most arid legal arguments, including technicalities such as matters of competence. Formally,

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[715] *Jornal do Commercio*, 1 June 1926, "A indústria do habeas corpus", http://memoria.bn.br/docreader/364568_11/17402

[716] Gazeta de Notícias, 1 June 1926, http://memoria.bn.br/DocReader/103730_05/19154 - habeas corpus a sorteados; Gazeta de Notícias, 23 May 1926, http://memoria.bn.br/DocReader/103730_05/19098 - "habeas-corpus" a militares e sorteados

[717] O Paiz, 15 September 1926, http://memoria.bn.br/DocReader/178691_05/26805 - um grave problema nacional

[718] Jornal do Commercio, 6 June 1926, http://memoria.bn.br/DocReader/364568_11/16800 - "habeas corpus a militares: a situação dos sorteados".

[719] Jornal do Commercio, 13 June 1926, http://memoria.bn.br/DocReader/364568_11/16972 - habeas corpus a militares.

both sides argued whether the 1926 Code of military justice was constitutional and on what was the legal nature of *habeas corpus*. Astolpho Rezende, the drafter of the code, argued simply that the military justice was the most convenient forum to debate military issues; moreover, the overload of cases of *habeas corpus* before the STF was brought as an argument to transfer the competence to rule on that writ to the STM. But apart from the most formal arenas, another disputed unfolded: on the one side, defenders of military service argued that excessive liberalism from federal justice was destroying the military draw, while defenders of an expanded right of *habeas corpus* argued that the "militarism" of military justice could destroy the liberties enshrined in the constitution. Military justice was politically charged in those years, and the courts had to navigate a potentially perilous environment.

Those problems also surfaced in other arenas. Many problems concerning enlistment happened either because the soldier was a minor when he entered the Army (STF, 1916d), or the administration had not released him from his duty after the due time of service had ended (STF, 1925e). But these much technical debates could also sparkle political disputes. In 1914, Mário Coelho Floro filed a *habeas corpus* to be released from military service because he was a minor at the time when he entered the service of the Army; the first level judge granted the request. But bureaucracy and institutional protocol got in the way of justice. Since 1893, the civilian judges never directly ordered a citizen subject to military discipline to be freed: instead, they informed the minister of war of their decision and waited for him to execute the sentence. However, this time, the head of the ministry did not follow the traditional course of action that was expected from him. He alleged that private Floro had been disciplinarily imprisoned and, therefore, a *habeas corpus* could not be granted. Administrative decisions after all, were not subject to the writ. The case was taken to the STF, where the judges reproached the minister for trying to rule on the case, instead of simply fulfilling the order that had been given to him – especially considering the nature of the case, which was completely irrelevant. Some judges got even further and suggested that the Attorney General should be informed to prosecute the minister for obstruction of justice.

The military draft of 1908 was a momentous piece of Brazilian history that boosted the national standing of the military; this, coupled with the already high political value of the Army and the Navy meant that the relationship between the civilian and military justices were not politically void, but had a strong charge. The military system tried to struggle power away from the federal judiciary – and was sometimes able to define the course of lawsuits – but the STF was always able to control the exchange between the two systems and secure civilian control of the military judges.

9.4 – Another type of soldier? The application of military law to police, National Guard officers and reformed soldiers

What is a soldier? We have a single, obvious image of what that word entails – green uniforms, arms, discipline, ranks etc. – but this is only an easy illusion that jurists cannot afford. Beyond the core social groups that clearly constitute what we call soldiers, one can find several categories that may or may be not considered as such: retired officers, civil servants of the ministries of war and navy, reservists, policemen etc. Each legislation might choose some among them to be targeted by the Military Criminal Code. But the legislator is not so mindful of interpreters as to explicitly write his will, and case law has to give answers – and they frequently change, contributing to render much more confuse the already chaotic gray zones of military legislation. In this section, we will discuss how different groups at the fringes of military life were classified as soldiers or not. But first, we will concentrate on the members of the military polices of the states. Those forces were obviously of "military" nature from a sociological point of view – beginning with their names – but did law recognize this situation? Both the Supreme Federal Tribunal and the Supreme Military Tribunal had to face this hard question.

The issue was discussed thoroughly by the STM (1915) in the process of *foguista* (mechanical worker) José Faustino da Silva, who worked for the Army and had committed a crime against a member of the police of the capital city of Rio de Janeiro and was being prosecuted according to the Military Penal Code. According to the military judges, it was usually recognized that this kind of crime was not of military nature, for it did not undermine the internal discipline of military institutions; since the people involved in the offense were not from the same *corpus*, their altercation did not affect the internal order of either of the two institutions. This principle had been recognized by the STM in 1900, when it declared that one crime practiced by a member of the Army against a policeman would only be processed in the military justice because it had happened in the headquarters of the Army: "military jurisdiction is mostly founded upon the quality of persons, and only exceptionally on circumstances of place or nature of the crime". This, however, changed in 1911, when the federal decree 9262 of 28 December, art. 1090 declared explicitly that the Penal Code of the Navy should apply to the police of Rio de Janeiro. This was precisely the provision being applied in the case under consideration. The STM, however, pointed out that only the National Congress could legislate on criminal law; similarly, the STF had ruled a few years earlier that the law 59 of 5 December

1907, of the State of Paraná, extending the Military Penal Code to its own police, was unconstitutional for precisely this same reason. Meanwhile, the ministerial letter (*aviso*) of the Ministry of Justice of 8 November 1899 said that the military justice could not rule on the constitutionality of any provision, for this power lied solely on the federal judiciary. The STM, however, decided that military justice was part of the federal judiciary and declared the article 1090 to be unconstitutional. From then on, the jurisdiction of the barracks would be empowered to evaluate the several laws being issued not only by the federal government, but also by the several states, adding several layers of complexity to an already confusing scenario.

This issue was rediscussed in a small article by Augusto Meira (1916) in the following year. Against what some people had been arguing, he did not believe that the Military Criminal Code could apply to the polices but not the procedural rules. For him, since art. 77 of the constitution had established the special jurisdiction for soldiers, whenever the special military legislation applied, the procedural rules must be in effect too. But second, and most important, the Constitution implicitly prevented members of state polices from being considered as soldiers [*militares*] from the legal point of view. Article 14[720] of the supreme law defined the "forces of land and sea" as being "national" and "permanent" institutions. The polices, on the other hand, were restricted to specific states and could be dissolved at any moment by governors. Moreover, the 1908 recruitment law, article 32[721], implicitly recognized that the polices would only be submitted to the regulations and laws of the Army when incorporated into the federal land forces for specifical reasons – that is, mostly in time of war. States could only legislate on disciplinary measures to keep their troops in line; criminal law was a matter solely for federal lawmakers. Finally, Meira (1916, p. 269) added that, if many considered absurd to apply a special body of law even to the Army in times of peace, to do so to the police corpora was nothing short of "monstruous".

Though the judiciary was gradually moving towards clearly definitions, Brazilian law in general had not yet developed a firm conceptual framework for the growing police corps. The next year, legislative decree 3351 of 1917 determined that properly military crimes of polices should be processed in the military justice. Five years later, the legislative decree 4.527

[720] "Art 14 - As forças de terra e mar são instituições nacionais permanentes, destinadas à defesa da Pátria no exterior e à manutenção das leis no interior.
A força armada é essencialmente obediente, dentro dos limites da lei, aos seus superiores hierárquicos e obrigada a sustentar as instituições constitucionais.".

[721] Lei 1860 de 4 de janeiro de 1908, art. 32: "Auxiliarão as forças de 3ª linha os corpos estaduaes organizados militarmente, quando postos á disposição do Governo Federal pelos presidentes ou governadores dos respectivos Estados. Uma vez sob as ordens do Governo Federal, esses corpos serão submettidos ás leis e regulamentos militares da União".

of 26 January 1922 mandated the Military Penal Code to be applied to the military polices of the states[722]; now, at stake was not anymore only a clash between state and federal laws, but the very constitutionality of federal law. This decree was better discussed by Octávio Murgel de Rezende (TJBA; REZENDE, 1928; TJMG; REZENDE, 1928), who wrote two articles in the *Revista de Crítica Judicial*, a journal that published commented case law. In the first case, sergeant N. B. D. dos R. of the police of Bahia had received money to pay his subordinates but lost track of it and was convicted under art. 154 of the Penal Code of the Navy. He filed a *habeas corpus* at the Tribunal of Justice of Bahia (TJBA) arguing that he was not a soldier and therefore the conviction was null and void. The court denied the petition, arguing with the 1922 decree and mentioning a contract[723] between the state and the federal government that had turned the Bahian police into an auxiliary force of the Army. The second case come from Minas Gerais; caporal J. of the *mineira* police had robbed a coat from a fellow soldier and had been prosecuted according to military law. The state court voided the sentence, considering that the 1922 decree was unconstitutional for the polices were not "permanent and national institutions".

Two cases, two courts, two solutions: as Octávio Rezende said (TJMG; REZENDE, 1928), "regarding military crimes and forum, nothing is definitely decided in case-law". Commenting the Bahian case, he remarked that the Supreme Federal Tribunal had been declaring the 1922 decree to be constitutional, but "dubiously and contradictorily, as, by the way, it is almost always the case for military legislation". Rezende defended that, in times of peace, military law could not apply outside military buildings; the Supreme Federal Tribunal, however, decided differently: the court had followed this very same reasoning in the conflict of jurisdiction (*conflito de jurisdição*) nº 716 of 22 September 1927, but decided differently in the conflict of jurisdiction nº 587 of 25 September 1922. Everything was possible.

Both before and after the 1917 and the 1922 decrees, in several tribunals throughout the country, police officers were being processed in both jurisdictions. Most of the cases that arrived at law journals concerned soldiers prosecuted before the military jurisdiction, but had their processes voided due to incompetency of the jurisdiction. State laws affirming the jurisdiction of military justice were considered unconstitutional in São Paulo (STF, 1922g) and Paraná (STF, 1911a). The argument usually employed was that police forces were not national

[722] "Art. 1º Os oficiaes e praças das polícias militarizadas da União ou dos Estados que, de accôrdo com a legislação vigente, constituirem forças auxiliares do Exercito Nacional, quando praticarem qualquer crime dos previstos no Codigo Penal Militar, terão fôro especial nos termos do art. 77 da Constituição Federal e serão punidos com as penas estabelecidas no dito Codigo.".

[723] Enacted by the state decree 1.739 of 31 October 1917 and the ministerial communication (*aviso*) of the Ministry of War 818 of 25 October 1917.

institutions and, therefore, could not be considered armed forces according to the constitutional concept, meaning that they could not have a special jurisdiction (STF, 1924a). Others said that norms of exception, like the constitutional provision creating a special military justice, should be interpreted restrictively (TJSP, 1898). Quite frequently, sentences did not discuss the issue very much, but simply consider a given that police soldiers cannot be judged by the military justice (STF, 1924d; 1924m; 1921a). Before 1917, some decisions nullify processes before the military justice because no general law authorized the Penal Code of the Navy to be applied to state polices (STF, 1924h; STF, 1915b). Conversely, between 1917 and 1922, when the decree 3351 determined that only properly military crimes would enjoy a special jurisdiction, several cases were annulled because improperly military crimes had been processed before the special judiciary; this implicitly recognized that the decree was valid (STM, 1921a). However, in some states, the discussion was not even on the military nature of police forces, but whether or not their employees could be considered public servants and, therefore, be subject to responsibility processes (TJSC, 1929). And finally, sometimes the courts discussed the special circumstances of the crimes to decide whether it was military or not, implicitly recognizing that police officers, under certain circumstances, could be treated as soldiers (STF, 1927h).

One police, however, must be considered particularly: that of the federal district of Rio de Janeiro. For its particular position, this corporation was held under more tight supervision and kept under a legal regime more similar to that of the Army. Accordingly, its officers were submitted to the Penal Code of the Navy and were judged by a special auditor, from which cases could be appealed to the Supreme Military Tribunal. However, this special jurisdiction had not been mentioned in the 1926 Code of Military Justice, prompting the STM to rule that it would no longer accept appeals concerning the military police of Rio de Janeiro – something reported in the press as a reversal of a "long-standing case law"[724].

No other category come even near to the same level of debates as the military polices. Yet, they were not the only ones lying at the disputed border between soldiers and civilians. Some decisions on the military nature of particular categories concerned honorary officers (not considered soldiers) (STF, 1920a), members of the National Guard (considered soldiers) (STF, 1923d) and reformed officers (considered soldiers in the famous case of the *vapor Júpiter*) (STF, 189) but those are more a matter of detail and lost significance after the 1926 Code of

[724] *O Jornal*, 30 April 1926, "No Supremo Tribunal Militar: Anulando uma Longa Jurisprudência", http://memoria.bn.br/docreader/110523_02/25541.

Military Procedure explicitly defined the categories to which it would apply[725]. From a practical point of view, these categories were a mere matter of detail – differently from the polices.

Military polices were increasing and developing in Brazil at the time and expressed the huge power attributed to states in the centrifuge Brazilian federalism in the First republic. The São Paulo police bought airplanes even before the Brazilian Army and was trained by a French military mission even before its federal counterpart; state governors frequently had more menpower at their disposal than the president of the Republic. This situation fed fears among some that states could rebel – which came true in 1932 during the Constitutionalist Revolution, in which São Paulo fought against federal forces[726]. More on that later.

What is important to notice here is that at the beginning of the First Republic, it was hard to define a soldier: retired officers and policemen, members of the national guard and civilian workers of the military ministries could all be considered as subject to the military justice or not, depending on who judged them. As time passed by, several legislative interventions had refined the legal definitions and reduced uncertainty: the codes of military procedure gradually settled some concepts and the 1917 and 1922 decrees tried to stabilize the situation of military polices. The notion of "military" and "soldier" was becoming clearer. Meanwhile, it was becoming ever more obvious that polices had some sort of military character and theoretically could be judged at the military justice; the only difficulty was the constitution. But this particular issue would not be solved soon; we must expect a few years before this problem could be duly addressed.

[725] "Art. 89. O fôro militar é competente para processar e julgar nos crimes dessa natureza:
a) os militares do Exercito activo e da Armada, dos differentes quadros e serviços;
b) os officiaes reformados do Exercito e da Armada, quando em serviço ou em commissão de natureza militar;
c) os officiaes da reserva de 2ª classe do Exercito de 1ª linha, nos termos do art. 17 do decreto legislativo n. 3.352, de 3 de outubro de 1917;
d) os officiaes da reserva da Armada, nas mesmas condições dos da 2ª classe do Exercito de 1ª linha;
e) os officiaes e praças do Exercito de 2ª linha, nos termos do art. 6º do decreto n. 13.040, de 29 de maio de 1918;
f) os reservistas do Exercito de 1ª linha e os da Armada, quando mobilizados, em manobras ou em desempenho de funcções militares;
g) os sorteados insuhmissos;
h) os assemelhados de Exercito e da Armada.
Art. 90. São assemelhados os individuos que, não pertencendo á classe militar dos combatentes, exercem funções de caracter civil ou militar especificadas em leis ou regulamentos a bordo de navios de guerra ou embarcações a estes equiparadas, nos arsenaes, fortalezas, quarteis, acampamentos, repartições, logares e estabelecimentos de natureza e jurisdicção militar e sujeitos por isso a preceito de subordinação e disciplina. (Decreto n. 4. 998, de 8 de janeiro de 1926, art. 2º).".

[726] For more on the history of police forces in First Republic Brazil, taking particular consideration for the São Paulo force, cf. Heloísa Rodrigues Fernanes (2006).

9.5 – Palliative care: debates and reform of the Military Justice between 1930 and 1934

The reform of the 1926 code of military justice was long in the making. Though initially slowly, the push to restructure this branch of criminal law was starting to be felt right after the 1930 revolution. Initially through calls for change published in the military press, and later with executive action, soldiers and their supporters were able to discreetly change some aspects of military procedure in preparation for a future, broad reform.

The first indications of change appeared in *A Defesa Nacional*, the militaristic and technical-oriented journal born as the main venue of the "joung turks" (*jovens turcos*). Their first piece of opinion came with the first editorial published by the magazine. Militarization of the military justice: this was the banner raised by soldiers (A DEFESA NACIONAL, 1930, p. 127). Why? Essentially, interventions from political power had gone too far in defacing the inner mechanism of military justice; the only conceivable solution was to return this body to its original roots. Military Justice was the guarantor of discipline, and discipline itself was the pillar upon which any Army must be built. There was no way around: military judges were fundamental for the security of the nation. Yet, favoritism plagued the system at every corner: many sergeants were sidestepped in favor of young law graduates that had never seen the inside of any barracks. According to the writer, the qualities needed for satisfactory judicial rulings could not be acquired on university banks, but on those of military courts, because law alone was not enough to deliver satisfying rulings on military cases. "They cannot only rest on the principles of moral, but they depend also on the imperative dictate of discipline" (A DEFESA NACIONAL, 1930, p. 129). Moral *versus* discipline: the soul of military justice could not rest on the one-sided vision of regular justice-making. The solution? The author suggests to do away with political appointments of judges in favor of competitive examinations; in them, officers with law degrees should be preferred.

Three years later, *A Defesa Nacional* was still calling for changes. Not only personnel, but also structure: they thought that military codes should also be renovated. The solution, however, was the same: more soldiers, less civilians. The commission to be appointed to change the basic laws of military justice must be composed of a majority of graduates from military schools (A DEFESA NACIONAL, 1933). A small reform enacted the previous year had been penned by a single jurist. Anathema: "there is no intelligence fair enough, not a culture solid enough to compensate the lack of precise knowledge of the needs of the profession, acquired through daily work" (A DEFESA NACIONAL, 1933, p. 52). The same problem had plagued

the 1926 code: a document for soldiers had been written by jurists. After all, civilians, accustomed with civilian discipline, could not duly understand the rigorous demands of military discipline, which was meant to "create a homogenous whole with a collective, vibrant and impersonal soul, as that of the soldier" (A DEFESA NACIONAL, 1933, p. 52).

Góis Monteiro, the minister of war and foremost advisor of president Vargas, had a similar opinion. In a book written in 1934 on the *Revolution of 1930 and the political ends of the army*, he explicitly declared that the military justice "must be militarized, with its judges being drawn from the Army and Navy themselves" (MONTEIRO, 1934, p. 170).

These calls were not left unheard. First, in 1932, a decree reformed witness hearing[727]. Not enough. In 1934, the ministry of the war nominated a commission[728] to draft a new code. The result[729]? Not enough. According to the Minister of War in his 1934 report, the problem was the same that one could find in the 1926 code: a civilian mentality. According to him, the "eminent citizens specialists in [law]" that had drafted the 1926 code did not give to it "the characteristics of a special justice capable of satisfying the needs of discipline. It "attempted to be liberal, approaching far too much the norms followed at the civilian jurisdiction" (MINISTÉRIO DA GUERRA, 1934, p. 132). A true sin. But the worse was, above all, the parity in number of military and civilian soldiers in the STM bench. A capital sin no less. And the 1934 commission had fallen to the same temptation. The draft resulting from its works was fully scrapped. Instead of a new code, the Minister of War proposed a partial reform. Not enough, of course. But better than nothing. In 14 July 1934, the decree 24.803 was published and became law.

The *consideranda* of the 1934 decree acknowledged that neither the 1926 Code, nor the work of the 1934 commission were suited for the disciplinary needs of the Army. The situation called for a partial reform, a stitch that would hold order in place until a rightful reform could

[727] Decreto nº 21.392, de 11 de Maio de 1932. Avaliable at: https://www2.camara.leg.br/legin/fed/decret/1930-1939/decreto-21392-11-maio-1932-517565-publicacaooriginal-1-pe.html

[728] Members: Marechal Caetano de Faria (presidente of STM); Cardoso de Castro (Judge of STM, appearently civilian); Washington Vaz e Mello (general prosecutor); Cel Renato Paquet e major José Faustino da Silva (General Staff of the Army); Sylvestre Péricles de Góes Monteiro e Elias Leite (military judges); Commanders Galdino Pimentel Duarte e Attila Monteiro Achê (General Staff of the Navy). *Correio da Manhã*, 18 May 1934, "o projeto de reforma da Justiça Militar", http://memoria.bn.br/DocReader/089842_04/22046

[729] Main characteristics of the proposal: STM composed of 13 ministers; retirement of the ministers; extinction of the audit office in Ceará and creation of another audit office in SP; military judges of the Justice Councils chosen from among combatant officers; appointment to positions in the JM only by access; life tenure for judges; stability for members of the Public Prosecutor's Office and other officials; military graduation for judges and other officials; right of representation to the military authority by any interested party; summary process in cases of clear self-defense; formation of guilt by the auditor; abolition of default; Habeas Corpus for military personnel, except in disciplinary cases; summary process for insubordination and desertion; special process in times of war; new correctional service; new salaries. *Correio da Manhã*, 18 May 1934, "o projeto de reforma da Justiça Militar", http://memoria.bn.br/DocReader/089842_04/22046

come into place. The march towards a militarized military justice would start at this juncture. The decree reduced the number of civilian judges in the STM from five to four, while their military counterparts would gain an extra seat, reaching the quantity of six: the direction of military rulings and rules would be under the helm of soldiers.

Not that they were always eager to seize this high opportunity. The Report of the Minister of War of 1934 deplore the aversion that many officers felt of their responsibilities to work in the administration of justice: many among their number considered the matters of court to be merely a drain of their energies away from what was their true vocation, to train future soldiers – a responsibility that only increased with the ever-growing number of recruits. No problem for the decree: officers were now obligated to take part in the so-called "Council of Corps", that would sentence the simplest cases of desertion and insubmission. Justice was a privilege. But not an optional one.

The reform was even before its start considered to be insufficient. A new code would naturally come into place, especially in the context of the sweeping reforms promoted by Vargas. But this march would not be smooth: it would get entangled with the rapturing rumble of war.

9.6 – Politics and the Army? The 1934 constitution and the troubled relationship between the right to vote and military discipline

The 1934 constitution is usually remembered as the founding document of the Brazilian Social State and of mass democracy. It was also born at a critical juncture for the Brazilian military, when the political power of the Armed Forces was reaching its heyday. Opportunity and threat: this situation put the Army and Navy on an awkward position that could at the same time enable them to get better financial resources, but also make them responsible for the mistakes of the powerful. This was a perfect recipe for infighting; as a matter of fact, one of the central debates of the 1933-1934 constituent assembly regarding the military concerned the role of politics inside the armed forces. Discipline and political action were at odds? This was the question that soldiers and politicians tried to answer – and the *leitmotif* of this section.

A Defesa Nacional naturally got involved in the national debate. In a 1933 editorial, it at once connected and detached the military from politics: "the armed forces are essentially political organs for they are instruments of Politics (with an uppercase P) and National Sovereignty" (A DEFESA NACIONAL, 1933a, p. 574); this meant that they could not be affected by everyday party politics. In contemporary terms, he would probably have written

that the armed forces were an instrument of State, and not of political factions. The only way to avoid political debates from entering the barracks would be to prevent soldiers from voting and affiliating themselves with political parties. But this did not mean that the barracks should remain silent before national problems. On the contrary, as an article from Sérgio Marinho (1935) contended: though political parties were detrimental for the Army, there was a strong political role that must be occupied by the men in arms. The Army should not be seen as the "great mute", as it was in France and more generally, by the bourgeois conception. There was an alternative model being developed, where the Army assumed the role of protagonist, where politics and policy passed through the analysis of generals, where the barracks protected and guaranteed the unity of the nation by making true their role at the public sphere: that was the case of the Armies of the communist Soviet Union, Fascist Italy and Nazi Germany. This was mostly the model that *A Defesa Nacional* – or, at least, Sérgio Marinho – believed that Brazil should follow.

The Army tried to seize this more active role, though less emphatically than would happen a year later with the discussion on the raise of military salaries. Generals were apparently fond of exercising political pressures through interviews in newspapers. In 27 January 1934, three months into the work of the constituent assembly, congressman Gileno Amado read an interview with Góis Monteiro, who had been appointed Minister of War just a week earlier. Monteiro claimed that the Army was a political, though non-party institution, and that, therefore, the Minister of War was at the center of the Brazilian political life (AC-1934, 6, 531). The interventions of the Army, according to him, had always had a positive influence into Brazilian life, and were even pedagogical, organizing the "moral and economic confusion" Brazil frequently faced (AC-1934, 6, 532), stepping in when politics failed (AC-1934, 6, 533). Little more than a month later, a much more incendiary interview was commented at the assembly. General Manuel Rabelo claimed that the Constituent Assembly as a whole represented nobody, since it had been elected using the same methods employed by the First Republic (AC, 9, 107). The Assembly not only voted to repudiate this intervention, but would also keep debating the topic. Deputy Argemiro Dornelles, a coronel, felt the need to declare that "the Army do not follow the work of the Constituent Assembly with tutelar intents" (AC, 9, 168). This defense sounds as a nervous admission of guilt.

Though the role of the Army *vis-à-vis* politics was controversial, one thing was a matter of fact: soldier politicians were a frequent fixture of legislative assemblies. It was reported that officers elected to the Assembly had agreed to act as a single block; deputy Rui Santiago, for instance, declared at some point that he would not take place in a debate because the voting had

been already decided by the other military deputies (AC, 16, 300). The group was even talking of consulting all captains of battalions, asking them to send suggestions; this proposal was seen by *A Defesa Nacional* as a communist-style break of hierarchy. Anyway, politics was pervasive in the military forces, and the Constituent Assembly was a catalyst in posing questions to soldiers.

The first issue to be discussed in the constituent Assembly was the political affiliation of soldiers. In 18 December 1933, a group of 15 deputies, including Goes Monteiro, filed an amendment suggesting that soldiers should be able to take part in political parties. They argued that the new parliament was made of representatives of factions – Catholics, women, workers etc. -, and there was no sense in excluding the military from this sort of representation. This remark was much in line with the corporatist intellectual climate in vogue in Brazil at the time. Not by chance, the supporters of the amendments mentioned that the Italian electorate had recently elevated 10 officers to their parliament. The only backstop proposed by them against political meddling into the Army was a provision putting elected officers in the reserve. The amendment, however, do not seem to have passed.

The capital discussion in the Constituent Assembly, however, was if soldiers in the ranks should be authorized to vote or not. Privates, no. Nobody ever thought that they were capable of exercising their political rights. Sergeants and students at the military schools were the only ones that got a chance of gaining their right to vote.

The case for lower-ranking members of the armed forces was made by deputy Negreiros Falcão, of the Social Democratic Party (*Partido Social Democrático*). He argued that sergeants were trusted with a position of responsibility, like intermediate officers, and were subordinated to them just as much as intermediate officers were subordinated to generals. If lieutenants and captains voted, sergeants must be allowed to vote too. Moreover, sergeants could marry without authorization from their officers, differently from privates, denoting how much Brazilian law put faith in them. But this situation could also create conflict at home. If sergeants could marry, and women had recently been granted the right to vote, there could arise situations in which the man of the house was devoid of political power, but the wife could go to the polls. Absurd – Negreiros thought (AC, 8, 17). And this was not the only group before which sergeants would be humiliated. The other two categories denied political rights by the 1891 constitution – monks and beggars – would also be called to participate in the electoral process after 1934 (AC, 8, 20). Finally, the sergeants of 1934 had little to do with their colleagues from 1891. The First Republican constitution had been drafted before the military draw had been instituted, while soldiers were recruited among the lowest in society, people that had little condition – the

reasoning went – of voting. Now, every single man could potentially become a sergeant; there was even a course imposing studies on prospective sergeants that should be taken before promotion. Little – but some – education should warrant voting rights[730]. Education – not violence – that was at the base of modern military discipline (AC, 8, 22).

Goes Monteiro disagreed. He was the main adversary of Negreiros Lima on the debates regarding vote for lower ranking soldiers. He argued that many sergeants could not read and write: they should not vote (AC, 14, 12-13). Students from military schools, on their turn, had been granted the right to vote by the Constituent Assembly of 1891 only because they had been instrumental for the proclamation of the republic; by strict reasoning, they should be excluded from the political process. And, if military discipline and subordination was equal for all, why not give voting rights to privates too?

This was the same argument picked up by Zoroastro Gouveia, from the Brazilian Socialist Party (PSB) right after Góes Monteiro spoke. But, instead of treating this idea as an obvious absurd, he actually defended that even privates should be allowed to go to the polls. He gave a bruising statement, remarking that "there was some political pharisaism in those among us denying the right to vote to sergeants, but openly giving officers the right to intervene in politics" (AC, 14, 19). Góes Monteiro was probably not exulting after hearing this remark. Moreover, Gouveia pointed that giving the right to vote would not open space for political intrusions in the barracks, since political and religious discussions were already prohibited in military premises; actually, doing so would channel the opinion and energies of sergeants into the polls. Energies that, if left unexpressed, could most certainly explode in riots and coups – as had already happened in Brazil.

In the end, art. 108, b of the 1934 constitution finally enshrined voting rights to sergeants and students of the military schools. *A Defesa Nacional* was clearly not happy with the result. Together with the authorization for soldiers to take part in political manifestations, the concession would imperil discipline and put a stain in an otherwise perfectly reasonable constitution. In lambasting the Assembly for its decision, the editorial left quite an interesting profession of faith in anti-liberalism that deserves to be read in full: "this is the result of decisions made by a majority of votes, not taking into account the expertise of voters in the issue, and the consequence of works in which cooperate uneven and contradictory spirits, whose results are fatally meager" (A DEFESA NACIONAL, 1934, p. 283).

[730] This was the same reasoning given in another discussion in 3 May by Rui Santiago to the vote of sergeants (AC, 16, 301).

9.7 – Finally ready? Debates on reforms of military procedure and the Code of Military Justice of 1938

Late arrival. The Code of Military Justice of 1938 was little more than a systematization of the work already done in 1934. It was received less than effusively. But, in the climate created by the general reforms sweeping Brazilian law, no one had the courage to say that a new Code was superfluous.

There was a vague impression that the procedure established in the code was too complicated, too formalistic, too time-consuming (MADUREIRA, 1938, p. 332). This was not the first time such critique was levelled against military law. Nor would it be the last one. And this was not even necessarily what the future reformers of the Code intended to change. For instance, the First Brazilian Congress of Procedural Law, which gathered in 1937, was more worried with harmonizing the Code with the 1937 constitution. Márcio Tibúrcio Gomes Carneiro, a capital actor in Military Law in the 1940s and 1950s, brought to the congressmen more formal issues, such as whether the Military Justice should be regulated in the same law as the regular justice system, or whether the Army and the Navy should get different court systems. His proposals, however, were not debated as the congress closed before discussions should take place. This lack of interest could be seen as a metaphor of the lukewarmness with which the reform of the Code would be pursued.

And yet, reformed the Code was. In January 1936, the first notices of intention towards a reform were seen in the press; its main motive was to harmonize the 1934 law with the whole system of Military Justice[731]. In December, Raul Machado, president of the Tribunal of National Security, gave a project of code he had drafted to Pedro de Frontin, president of the Superior Military Tribunal; this project would form the basis for discussion for the new law[732]. After some suggestions from Frontin[733], a new commission was formed to adjust the text, made of two judges from the Superior Military Tribunal, two military judges [*auditores*], two officers and the General Prosecutor of the Military Justice[734]. Between May 1937 and February 1938, the project was discussed, and some of the reunions were transcribed by the press. The debates

[731] *Correio Paulistano*, 8 January 1936, "reforma do código de justiça militar", http://memoria.bn.br/DocReader/090972_08/10822; *Diário de Notícias*, 19 January 1936, "vae passar por uma reforma o Código de Justiça Militar", http://memoria.bn.br/DocReader/093718_01/25578

[732] *Diário Carioca*, 9 December 1936, "entregues os originais do ante-projeto do Código da Justiça Militar.", http://memoria.bn.br/DocReader/093092_02/27802

[733] *Gazeta de Notícias*, 18 January 1937, "projecto de reforma do código de justiça militar", http://memoria.bn.br/DocReader/103730_06/7565

[734] *O Jornal*, 7 April 1937, "a reforma da justiça militar", http://memoria.bn.br/DocReader/110523_03/37049

were very much oriented toward detail, with little political or wider implications[735], perhaps for the thornier questions had already been sorted out in 1934. The work was later sent to the Minister of War[736], who added some suggestions[737] and forwarded the result to Minister of the Navy[738]

The result, according to the Minister of War, was satisfactory (MINISTÉRIO DA GUERRA, 1932, p. 82). In the 1938 report, he highlighted that lawsuits were being processed in a speedier way, mostly due to a single change: switching the responsibility for indictment (*recebimento da denúncia*) from the Council of Justice to the auditor. Now there was no need for a time-consuming procedure that called to draw several officers and convened them to decide whether a fact should be prosecuted as a crime: the single, law graduate judge (*auditor*) would decide. After all, he was always available at the court and had legal knowledge that could be immediately deployed, freeing time both for the justice system and the defendant. Also, some appeals were slightly curbed. Beyond the regular administration of justice, an important step was accomplished in the path towards more modern public careers: instead of being appointed, judges and prosecutors would gain access to their positions through competitive examinations.

This enthusiasm did not seem to have been shared by everybody: in the following three years, the code would be reformed more than once (MORAIS, 1972). Two minor reforms

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[735] *Diário de Notícias*, 20 May 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/31355; *Diário de Notícias*, 14 July 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/32106; *Diário de Notícias*, 14 July 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/32106; *Diário de Notícias*, 14 July 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/32106; *Diário de Notícias*, 21 July 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/32206; *Diário de Notícias*, 25 August 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/32640; *Diário de Notícias*, 1 September 1937, "esteve reunida a Commissão de Revisão do CJM", http://memoria.bn.br/DocReader/093718_01/32720; *Diário de Notícias*, 24 September 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/33063; *Diário de Notícias*, 1 December 1937, "esteve reunida a Commissão de Revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/33987; *Diário de Notícias*, 28 January 1938, "competência para julgamento dos crimes praticados nos recintos das auditorias: uma sugestão do auditor Gomes Carneiro", http://memoria.bn.br/DocReader/093718_01/34633; *Diário de Notícias*, 16 February 1938, "a revisão do código da Justiça Militar", http://memoria.bn.br/DocReader/093718_01/34856; *O Jornal*, 15 October 1937, "concluída a revisão do Código da Justiça Militar", http://memoria.bn.br/DocReader/110523_03/41031; *O Imparcial*, 15 February 1938, "no Supremo Tribunal Militar", http://memoria.bn.br/DocReader/107670_03/11606

[736] *O Jornal*, 24 Februrary 1938, "revisão do Código de Justiça Militar", http://memoria.bn.br/DocReader/110523_03/43454

[737] *Gazeta de Notícias*, 13 Abril 1938, "reforma do código da justiça militar" http://memoria.bn.br/DocReader/103730_06/16368

[738] *O Jornal*, 15 April 1937, "para a reforma do Código de Justiça Militar", http://memoria.bn.br/DocReader/110523_03/37217; *A Batalha*, 9 April 1937, "para a revisão do Código de Justiça Militar", http://memoria.bn.br/DocReader/175102/12753

affected bureaucratic appointments[739] and wording of the code[740]. In 1940, a new decree[741] reformed the Justification Council (*Conselho de Justificação*), completely revamping the text and putting the final decision on the hand of the Minister of War. Hardly a surprise in the years of the authoritarian *Estado Novo*.

9.8 – Ready for war: Military Justice in wartime during the 1932 revolution and the preparation for World War II

Brazil is a deeply peaceful country – except when it is not. The country has a complex relationship with violence: instead of concentrating violent acts in the form of army, police, State power, the Brazilian society often accommodates them into everyday life, into the heart of social relations and the social structures that distribute wealth and control among social groups. Organized violence is often restricted in space and time. We do not fight wars in Brazil – at least, not external ones. Out of this, a self-image rose: one that cast Brazilians as peaceful, non-violent, mild. And it could hardly be different: while war ravaged Europe and the Old Continent armies could only grow larger, the Brazilian Armed forces lagged behind in both size and frequency of engagement. Except in the 1930s and 1940s. In the republic of soldiers, all the traditional techniques of military rule being used in Europe were transposed to the New Continent: declaration of war, mobilization to clash internal riots, institution of a Military Justice for the times of war, all building up the ultimate apotheosis of Brazilian militarism: the entering of the green and yellow army in the second world war at the side of the allies, with the corresponding creation of a Brazilian Military Justice in Italian territory (LAPORT, 2016) and the mobilization of droves of Brazilian men into the last war fought by Brazil.

But this is widely known. I will deal with the less glamorous preparation for the dramatic intrusion of Brazilian arms into the Italian Apennine. In 1932, to respond to the São Paulo constitutionalist revolution, Brazil instituted a special military justice perhaps for the first time since the Paraguay War; later, the debates regarding the preparation for *the War* acquired increasingly militaristic and harsh overtones. We must now follow them.

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[739] Decreto-lei 3581, de 3 de setembro de 1941; avaliable at: https://www2.camara.leg.br/legin/fed/declei/1940-1949/decreto-lei-3581-3-setembro-1941-413562-publicacaooriginal-1-pe.html

[740] Decreto-lei 4023, de 15 de janeiro de 1942; avaliable at: https://www2.camara.leg.br/legin/fed/declei/1940-1949/decreto-lei-3581-3-setembro-1941-413562-publicacaooriginal-1-pe.html

[741] Decreto-Lei nº 2.746, de 5 de Novembro de 1940; avaliable at: https://www2.camara.leg.br/legin/fed/declei/1940-1949/decreto-lei-2746-5-novembro-1940-412668-publicacaooriginal-1-pe.html

In 29 September 1932, the decree 21886 created the Military Justice for times of war in the operation zones of the conflagration against the state of São Paulo. The decree was rather economic: the 1926 Code of Military Justice regulated between art. 349 and 359 how a hypothetical wartime judiciary must work, meaning that the new document had only to set in motion an already established framework. The regulations of the code were short and blunt – just as the lawsuits must be: almost all deadlines for procedural acts, such as presenting of defenses or appeals, were of meagre 48 hours. The 1932 decree rendered the Code slightly milder: the death penalty determined by the 1891 code should be always converted, when applied, to 30 years of forced labor. But this gentle concession must not be interpreted as some sort of general softening from the president: art. 3rd of the decree also determined that any soldier or civilian committing crimes described by the old penal code of the Navy in the zone of war should be tried by the military justice. The overarching arms of military justice would constrain all sorts of civilians in a prosecutorial hug: any homicide, and robbery would be prosecuted at the barracks.

The experience - more than unique, less than paradigmatic – would even spawn a book, written by Silvestre Péricles de Góes Monteiro. Brother of Pedro Aurélio, the more famous Minister of War, Silvestre Péricles was a law graduate from the Recife Law School and worked for a long time as military judge. The preface was written by Pontes de Miranda, one of the leading Brazilian jurists of the time. The contents are sixteen judicial decisions delivered by Góes Monteiro while he served as Chief of the Justice Service of the Federal Forces in Operations at the São Paulo insurrection. Monteiro also claimed in the book that, through his connections with Vargas stretching back to the 1930 "revolution" and his prominent political brothers, he had been the actual drafter of the 21886 decree. He also claimed that the ideas espoused by the decree had been received by the constitution, since the fragments of the main document concerning military justice had been revised by Silvestre Péricles at the request of their author, deputy Manuel César de Góes Monteiro – whom Silvestre Péricles failed to identify as another prominent brother of him in the book.

In the following years, Brazil would be affected by events that widely transcended the shores of South America. The political climate that would lead to the second world war was getting increasingly toxic as the pressure to ramp up military spending increased constantly; calls for an ever-greater militarization of society were similarly appearing at every corner of the public debate. Brazil was no exception. Several texts, above all in *A Defesa Nacional*, suggests an inflection of the military thought towards a more bellicose tone, resting upon an already discussed lukewarmness – or even open hostility – towards liberal democracy.

Philosophy graduate and professor of religion Alba Cañizares Nascimento (1936), one of the few women to write for the review, for instance, declared to be a pacifist, but frequently highlighted that she was willing to sacrifice peace for justice. Defense and honor should trump pacifism. Doubtlessly: otherwise, pacifism would turn into a "degrading cosmopolitism" (NASCIMENTO, 1936, p. 656). In other texts, the opposition between rights and force got even more stark: João Pereira de Oliveira (1938), for instance, defended passionately that international treaties were little more than paper. It was ridiculous for him to think that weak nations could survive in the international stage by alleging their rights; the "rape of Belgium" was the unrefusable proof that brought a shock of realism to those still attached to the old, legal ways of reasoning on geopolitical matters. Those still insisting on such forms of reasoning, dubbed by him "*tratatistas*", that is, "treatysists", were enemies of patriotism; we might add that they were simply jurists. For Oliveira, they were not worst only than disarmamentists – those that humiliated the country by trying to strip it away from its instruments of "virility" and "defense".

One step further could be accomplished: apology of war. Asking an excuse from the reader to cite a long fragment published in 1935 at *A Defesa Nacional*: "war is one of those wide, though harsh paths by which a people can more easily reach splendor and prosperity (…). It is the one that creates and reinforces the idea of motherland and give to the peoples a conscience of their rights. It is the one that purifies the character, exalts the will, raises the energy of the peoples softened by a long period of peace and tranquility. It is through it that the healthy and long-living races can eliminate inferior and demoralized races (…). It is in it, finally, that true patriots can more brilliantly and uncontestably reveal themselves" (PEREIRA, 1935, p. 458).

International law was a waste of time; criminal law, however, could not receive the same treatment. An efficient judicial system was indispensable for what was becoming a central issue in the Brazilian military thought: the preparation for war. The best discussion of this problem was written by Márcio Tibúrcio Gomes Carneiro (1938, 1943) – a habit he would acquire in the following two or three decades, that of writing good articles on military law.

In a conference delivered in 1938 at the School of General Staff of the Army, Gomes Carneiro set out his view for the military justice in times of war, from judicial organization to substantive military law in itself. His assessment is deeply critical of the preparedness of military law for the eventuality of war. Lacking a system[742], the military codes were little more

[742] "A justiça militar não tem recebido entre nós nenhuma orientação científica, reduzida a uma coleção de disposições de lei, de legalidade precária, às vezes; mal redigidas, sempre; a que tem faltado técnica jurídica e

than a patch of discredited reforms. And, when they were made, the problem of war actually occupied a modest portion of the drafters' time. As a consequence, several time-consuming provisions that could be applied in times of peace were reproduced in the regulations of war, leading to potential catastrophe. For instance, several kinds of military unities created in wartime were simply ignored by the code; the Navy authority responsible for handling warships was different from the one responsible for appointing embarked judges; if a colonel was prosecuted, all three generals in his brigade would have to be attached to the general staff to fill positions in court, leaving military units headless (CARNEIRO, 1938, p. 96-98). The code, moreover, did not contain provisions for the "interior zones", only for operations and rear zones; in the 1932 revolution, since most officers went to the operation zones, the military courts in capitals unaffected by the conflagration became understaffed and effectively ceased to function.

The only change between war and peace, as far as the military process was concerned, was the halving of deadlines. Everything else remained the same as the military process in times of peace – which was practically equal, according to Carneiro, to the civilian process of the Federal District. In his view, this was a consequence of reforms brought in Europe in the aftermath of World War I: the vanquished powers had reformed their backward-looking military legal systems, incorporating several liberal principles; but in Brazil, where liberalism was already a part of military procedure, similar movements had effectively erased the healthy distinctions between military and civilian law; if they should both work under the "same legal logic", the former, however, should be adapted to the needs of discipline and warfare (CARNEIRO, 1938, p. 99). For instance, in the military justice, the indictment procedure (*formação da culpa*) simply repeated the police investigation (*inquérito*), being therefore a waste of time. There were provisions on service of process by public notice (*citação por edital*), while all soldiers had a known residence address: the barracks. Other minor problems in specifically military processes, such as those of desertion and insubmission, were pointed out (CARNEIRO, 1938, p. 101).

The code was older than its date of enactment. With a general part – Carneiro claimed – inspired by the Italian Civilian Code of 1889 and the special part inspired by the French Military Code of 1857, the Military Penal Code was obviously outdated. It had been built upon the premises of 19th century conflicts, but had to face modern warfare: the result was a disaster, according to Carneiro (1938, p. 103-104). The *total war* that claimed hegemony as a principle

técnica militar, porque, quando não desatendem aos preceitos fundamentais do direito constitucional, do direito judiciário e do direito penal, não obedecem às regras da organização da força armada, cuja finalidade parece desconhecerem" (CARNEIRO, 1938, p. 93).

of mobilization after 1914 required an expanding range of actions to be criminalized: those taking place during the period of diplomatic tensions before war; economic and social actions hampering mobilization; attacks against civilian goods that could be used for the war economy etc. Finally, the distinction between combatants and non-combatants should be thrown into the trash can of history: everyone now was a potential enemy. Military strategy and the experience acquired during war should guide the choice of what actions should be deemed crimes, instead of long-outdated history books and abstract moral principles (CARNEIRO, 1938, p. 104). The 1891 Code, conversely, "only reach small crimes, and none of the new forms of military criminality" (CARNEIRO, 1938, p. 105).

In 1937, the new Brazilian constitution determined in art. 172, § 1º that an ordinary law could declare the application of military laws in areas affected by riots, and art. 173 determined that the military justice should rule on crimes against the institutions, security and structure of the state. Several laws on the next years defined new crimes in the realms Carneiro asked to be covered: crimes against the security of the state[743], against the national economic organization[744], against political parties and militias[745]. They clearly prepared the terrain for the authoritarian power grab of Getúlio Vargas and the grip over the social fabric that allowed the repression of war-time enemies – and political dissenters. The 1936-established[746] *Tribunal de Segurança Nacional* (Court of National Security) had been tasked with the responsibility of ruling on those crimes; it was initially created as an organ of the military justice, with its cases being appealed to the Superior Military Tribunal; however, after 1937[747], the tribunal gained a further instance and was in practice disconnected from the military justice[748]. Nevertheless, of its six judges, two were officers and one was a military judge.

In an article on the Military Justice in times of war, Gomes Carneiro (1943) argued that, with the declaration of war against Italy and Germany, the TSN had lost its original competence

[743] Lei nº 38 de 4 de abril de 1935 - https://www2.camara.leg.br/legin/fed/lei/1930-1939/lei-38-4-abril-1935-397878-publicacaooriginal-1-pl.html; Lei 136 de 14 de dezembro de 1935 - https://www2.camara.leg.br/legin/fed/lei/1930-1939/lei-136-14-dezembro-1935-398009-publicacaooriginal-1-pl.html; Decreto-Lei nº 431, de 18 de Maio de 1938 - https://www2.camara.leg.br/legin/fed/declei/1930-1939/decreto-lei-431-18-maio-1938-350768-publicacaooriginal-1-pe.html

[744] Decreto-lei 869 de 18 de novembro de 1938 - https://www2.camara.leg.br/legin/fed/declei/1930-1939/decreto-lei-869-18-novembro-1938-350746-publicacaooriginal-1-pe.html

[745] Decreto-lei 137 de 2 de dezembro de 1937 - https://www2.camara.leg.br/legin/fed/declei/1930-1939/decreto-lei-37-2-dezembro-1937-354175-publicacaooriginal-1-pe.html

[746] Law 244, of 11 September 1936, https://www2.camara.leg.br/legin/fed/lei/1930-1939/lei-244-11-setembro-1936-503407-publicacaooriginal-1-pl.html

[747] Decree-law 88 of 20 December 1937, https://www2.camara.leg.br/legin/fed/declei/1930-1939/decreto-lei-88-20-dezembro-1937-350832-publicacaooriginal-1-pe.html

[748] This in practice meant that the appeals against decisions would be decided by colleagues of the judge who had heard the lawsuit, rendering reversals of verdicts much more difficult (BALZ, 2009, p. 140).

to rule on crimes against national security and the structure of the state. Since these matters were now a military issue, they should be detached from the special court[749]. However, this was not what had happened in practice: the TSN kept judging soldiers, in what Carneiro (1943, p. 73-74) deemed an abusive practice. He claimed that "military justice in time of peace ensures the conservation of discipline: military justice in time of war defends the existence of the nation: therefore, its jurisdiction is exercised over all individuals" (CARNEIRO, 1943, p. 48). This maximalist, view, however, was not endorsed by the government: in 1st October 1942[750], a new decree defined crimes against State security, mostly focused on wartime. The competence to process them, however, was divided between the military justice and the Tribunal of National Security. This is a sign that the Vargas government was willing to collaborate with soldiers, but was wary of putting too much power in the hands of uniformed officers.

The problem of wartime justice, therefore, was increasingly gaining importance in the landscape of Brazilian law. Marginal in 1932, it only grew as a militaristic atmosphere engulphed the Brazilian public debate in the build-up to the second world war. It would be too simple, however, to see this trajectory as a simple upward rise of the military justice: after a sweeping increase of competence with the creation of the TSN in 1936, the *Estado Novo* made sure that the new powers it acquired with the criminalization of acts directed at the *modern war* would be divided between military and civilian authorities.

9.9 – Did the constitution allow a Military Justice of the states? Debates in and around 1937

For years, the military nature of state polices had been a problem – our reader shall remember the debates during the First Republic on what a "military force" might mean under Brazilian law. In the 1891 Constitution, the core of the discussion spawned from art. 14, which defined the forces as "national institutions". From 1934 onwards, however, the situation had changed drastically: the 1934 constitution had no comparable definition, and art. 84 simply stated that "soldiers and similar people shall enjoy a special jurisdiction for military crimes"[751]. The tricky wording was no more. Further, art. 5, XIX, L of the constitution determined that the Federal Government had exclusive competence to legislate on the "organization, instruction,

[749] Proponents made large efforts to distinguish between special courts and courts of exception. Cf. Christian Baltz (2009, p. 100-101).
[750] Decreto-lei 4766 de 1º de outubro de 1942 - http://www.planalto.gov.br/ccivil_03/decreto-lei/1937-1946/del4766.htm
[751] "Art 84 - Os militares e as pessoas que lhes são assemelhadas terão foro especial nos delitos militares".

justice and guarantees of the State police forces and general conditions of their use in case of mobilization of war". Authorities were quick to put once again in discussion the issue of the military justice of the states.

This debate, however, shall not be considered as a movement towards an ever-deeper federalism. No. The federal government was ever more worried about the power amassed by the major states, represented in the 1932 rebellion from São Paulo and based upon the state polices, which were turning into small armies. Internal security was paramount to assure the capability of the army to perform external defense; to guarantee tranquility in the home front, the federal government issued in 17 January 1936 the law 192. This law elaborated on the constitutional dictate that the polices were auxiliary forces of the Army: the text, for instance, limited the size of unities in the polices to the same dimensions practiced in the national force; determined how promotions should work; mandated that commanders of police forces should follow courses provided by the national Army; barred polices from having aviation, war tanks and artillery; among other restrictions. Art. 19 of the law determined that all states must organize a military justice for their polices, which would be responsible to process officers and enlisted personnel that committed military crimes.

The creation of the military justice of the states, at least in its original conception, must be seen within the federal program of grabbing control of state forces. A military justice regulated by the federal government through a single, national code of procedure and the military penal code would probably be more able to avoid separatist outbursts. Or coups. The identities of states in general were being ever more being engulfed by the powerful national government; in 27 November 1937, as a matter of fact, the President of the Republic held a ceremony of burning all flags of states, cementing his iron rule over the unified nation after the recent proclamation of the *Estado Novo*.

This program faced some resistance from jurists used to the traditional view of the military as a Federal Force. In São Paulo, for instance, which since 1897 had a legal basis in state law for a military justice[752], lawsuits contesting the constitutionality of a special judiciary for police officers were still being filed as late as 1936 (AZEVEDO, 1936). In the next pages, we will carefully study the debates on the creation of the Military Justice of the State of Rio de Janeiro (which, we must remember, did not include the homonymous capital city); they were thankfully compiled in a single book by military judge Isimbardo Peixoto in 1937, who would later become a second-level judge in the state court. The many parliamentary clashes, press

[752] State decree 427 of 20 March 1897.

polemics, judicial disagreements and legal meanders are an interesting venue where we can find arguments in favor and against the new branch of the Judiciary. We must now search them at the shores of Niteroi.

The idea was not new. In 31 December 1932, the commander of the Rio de Janeiro police had been authorized to pursue studies to propose the creation of the new branch of justice; if anything came out of this endeavor, we do not currently know. A few months after the federal law had been enacted, in 19 May 1936, the state assembly of Rio de Janeiro proposed a bill regulating in detail the new justice system (PEIXOTO, 1939, p. 9-11). In the next six months, the project was debated at the legislative assembly of Rio de Janeiro, until it was enacted in 5 October 1936 as state law 100. There was not much resistance worth of the name; the opinion of the reporter, deputy Ruy de Almeida, added to the debate observing that the stated could do anything not prohibited to them by the federal constitution, which would include the prerogative to militarize their polices. In the debates, the protagonism was assumed by Oscar Przewodowski, a lawyer and history professor of Polish ascent that proposed a substitutive project that would be turned into the final form of the bill. The actual author of the law, he was also highly critical of the classical military justice, which he criticized for establishing really long deadlines and denying the right of defense to defendants (PEIXOTO, 1939, p. 17). He and the reporter had also insisted that, since the polices had been turned into auxiliary forces of the army in the new regime, they must be necessarily submitted to the same regulations of the national forces.

The real debate would happen in state courts.

Before Rio de Janeiro, a precedent started to form in Minas Gerais, one of the major states of Brazil. Police lieutenant Antônio Sia was convicted to two years in prison for aggression. He was sent to the common penitentiary of Ouro Preto, a decision he challenged in court, arguing that, being a soldier, he could only serve his sentence in a military establishment. The lawsuit found its way up to the Supreme Federal Court. The justices used the law 192 to argue that officers of police forces had received the same rights of their colleagues from the Army and the Navy, including the right for special prison. Judge Costa Manso argued that an officer should be imprisoned in fortresses or barracks, and not in a common facility, otherwise, he would definitely lose his standing before soldiers (PEIXOTO, 1937, p. 29-30). The "prestige" of officers, the immediate obedience of orders was the all-too precious value that could never be lost.

A few months later, another case was set into motion by lieutenant Walter Zulmiro Pereira da Costa. This officer would go further than lieutenant Sia, and his case would be more

consequential. He argued that his conviction by a state military court was null and void because the court itself should be non-existent: the competence to legislate on state polices belonged to the union; art. 3, § 1st of the same document stated that no branch of government could delegate their powers; since Costa argued that state law 191 had effectively delegated the power to legislate on military justice to the states, the only conclusion that could be taken was that the law itself violated the constitution and, therefore, that state law 100, that was based on it, could have no legal standing (PEIXOTO, 1937, p. 34). No process in the military state justice could exist.

The process caught the attention of the press: between February and September 1937 1937, the newspaper *O Estado* published at least 10 articles discussing the constitutionality of the military justice of states, in a debate that would involve courts, deputies and journalists in a period of supreme political instability for Brazil. The core of the argument was set by Isimbardo Peixoto himself, who was not only the author of the book describing the events, but also the judge processing the case of Costa. He used the case of Antônio Sia as precedent: if the Supreme Federal Tribunal had applied the law 192 in a case, it had implicitly recognized that it was valid law, even though the issue of unconstitutionality had not been explicitly discussed by the court. In the articles published by *O Estado*, the law was defended relentlessly by several actors of the political and legal worlds. They included Przewodowski, the author of the law (PEIXOTO, 1937, p. 38), Clóvis Beviláqua e Alfredo Bernardes da Silva[753]. The only dissenting voice came from professor Almacho Diniz from Bahia. Perhaps, the newspaper wanted to give an impression of impartiality.

Despite what seemed to be an overwhelming majority in favor of the law, the state Court of Appeals declared the law to be unconstitutional in April 1937. The judges accepted that the law 192 amounted to a prohibited delegation of power. They argued, moreover, that one of the main causes of demoralization for the legislative power under the empire had been precisely that it abdicated from legislating in detail, leaving most technicalities for other authorities: the same could not hold true for the republican legislation, which would do better being prolix rather than incomplete, as argued judge Pontes de Miranda (PEIXOTO, 1937, p. 52).

The article would sow confusion in more than one branch of government. Oscar Przewodowski used the tribune of the state assembly to decry the decision, mentioning that São Paulo, Minas Gerais and Pernambuco had created their own state military justices, with no comparable issues arising (PEIXOTO, 1937, p. 54). The state Financial Court gave

[753] Articles published in 7 and 9 March 1937.

contradictory decisions a week apart in May 1937: it had no problem registering a secretary of the court, but a few days later, the judges voted unanimously to struck down the appointment of a state military prosecutor, arguing that military justice in itself had being declared unconstitutional (PEIXOTO, 1937, p. 63). Przewodowski kept lambasting the decision, for the constitution had defined that any declaration of unconstitutionality would only have *erga omnes* valued if upheld by the STF and registered by the senate. And all this mayhem was happening without the decision from the court of appeals being even published: unconstitutionality by hearsay.

This same thesis was brought forward in a lawsuit by a military prosecutor curiously named Fernando Przewodowski Nogueira. The odd name make it tempting to suggest that he was related to the combative deputy, and that his appointment had been somehow part of a political exchange of favors in the creation of the military justice. But I will refrain from such mellifluous speculations.

Only in September, after more than four months, the decision was published in the official journal of the *Fluminense* government. But the late publicity was by now of little use: in 2 September, the Supreme federal Tribunal had declared that the creation of state military courts was lawful (PEIXOTO, 1937, p. 72).

All this havoc to end precisely where we started: with an authoritarian law under the guise of democracy.

9.10 – Defining military crimes

In the absence of a clear disposition of positive law to demarcate the limits between the common and the Military Justice, conflicts between the two jurisdictions continued for most of the 1930s. Two problems were most important: political crimes, and criminal acts committed by a soldier against a fellow companion of the barracks.

At the final decades of the First Republic, the jurisdiction of political crimes would be mostly determined by decree 848 of 11 October 1890, art. 15, "i". This decree organized the Federal judiciary, and the specific provision put under the jurisdiction of federal judges the "political crimes defined by the Penal Code"[754] and was truly applied (STF, 1914a). The most critical period in the determination of the jurisdiction of political crimes of soldiers were the early 1920s, when most of the *tenentistas* revolts took place. This, however, would give

[754] "i) os crimes politicos classificados pelo Codigo Penal, no livro 2º, titulo 1º e seus capitulos, e titulo 2º, capitulo 1º".

opportunity for conflicts between the Supreme Federal Tribunal - STF and the Supreme Military Tribunal - STM.

An exemplary decision in this sense was issued by the STM in 1924. The court decided (STM, 1924a) on the jurisdiction on the crime of "seducing troops to raise against the government or superiors", committed by lieutenants Belizário Moura and others. The defendants alleged that the lawsuit should be pursued before the military justice, for the crime in question was political in its nature and in its objectives. So had the STF previously decided in a *habeas corpus* filed on behalf of marshal Hermes da Fonseca a few years before. Moreover, the crime allegedly committed by the lieutenants, defined by art. 80 of the Military Penal Code, was a reproduction of the common code, art. 93 – which fell precisely in the chapter of political crimes, which was defined by decree 848 of 1890 as falling under federal jurisdiction. However, the STM argued that when the legislator wrote of "federal justice", it was establishing an opposition with the judiciary systems of the states, meaning that the military judiciary was part of the "federal justice" referred by the decree 848. Moreover, the seduction of troops affected not only the political order, but, when practiced by other soldiers, it also affected the discipline and subordination. The request of the defendants was therefore rejected.

However, the STF would show a different approach when faced with similar questions. For example, Capitain Gustavo Cordeiro de Faria was indicted by the crime of conspiracy (common Criminal Code, art. 115, § 2nd) at the federal justice, but, for the same facts, was denounced by the military prosecutor pursuing the Military Penal Code, art. 80 (seducing troops…). Being prosecuted at two courts, Captain Gustavo had no other option but to present a writ of conflict of jurisdictions (*conflito de jurisdição*). The STF (1925a) decided in favor of the Federal Justice on two grounds: first, several other decisions[755] of the courts had established that in those situations, the military justice could claim no jurisdiction; second, that soldiers could only be prosecuted at their special tribunals for crimes committed in their capacity as members of the armed forces.

Conflict did not settle immediately. The following year, Mário Gameiro (1926) reports that some of his clients were being prosecuted by the federal justice in São Paulo and by the military justice in Rio de Janeiro for taking part in the *tenentista* rebellions of 1924. He reports that the STM had been contradicting the STF on the grounds that both courts had "supreme" in their names and, therefore, were equal and independent in their own respective jurisdictions,

[755] Namely, *habeas corpus* ns. 8779 and 8801, and conflicts of jurisdiction 602, 604 and 677.

civilian and military. Therefore, the military court did not have to follow precedents from its civilian counterpart when they disagreed with each other.

This defying approach would nevertheless be quickly be overcome. In the following years, the STF would decide that, when defendants had military crimes only as a means to pursue an action that was ultimately a political crime, the lawsuit should be processed by the civilian jurisdiction (STF, 1923b). Conversely, when soldiers attempted to commit a political crime, but were barred before achieving their aim, they would be judged by the military justice if the preparatory acts were military crimes in their own right (STM, 1929a). Therefore, a complex, but clear border between the realms of military and civilian tribunals emerged. When the lawsuits concerning the botched *tenentista* rebellion of 1924 arrived at the courts, the situation was mostly defined; the complex procedures, that indicted 19 heads, 100 co-conspirators and cleared 569 suspects (STF, 1927b), was processed at the civilian jurisdiction (JUSTIÇA FEDERAL DE SÃO PAULO, 1925) without much room for doubt.

This process is symbolized by the decree 4269 of 17 January 1921[756], which aimed to "regulate the repression of anarchism". In art. 3, the decree established specific penalties for stimulating soldiers to subvert the social order. These crimes would be processed at the federal justice, and not the military one: progressively, the most glaring political questions of the country were being taking away from the military jurisdiction in favor of a political justice. A few examples from the courts show that such incitements of soldiers were actually prosecuted at the civilian system (STM, 1922b).

The role of political acts in the system of military justice, therefore, changed greatly throughout the First Republic. Two periods were the most relevant for the political activity of the Armed Forces and, not surprisingly, were the most prolific in the production of court rulings: the 1890s and the 1920s. In the 1890s, when most of the time the presidents were soldiers, the strategy was to let military justice rule at the expense of the federal justice, even though partially; this happened due to the belief that the military justice would fight political uprisings more quickly. In the 1920s, conversely, after an initial struggle in which the military system tried to rule on political crimes committed by soldiers, most of the political misdeeds of the members of the armed forces were put under the gazing eyes of the civilian justice. European states were following a much dissimilar path. European powers strategically used military justice to fight political dissent, as we have already discussed in part I. During first world war, and against to what would be lawful, Italy extended military jurisdiction to political crimes in

[756] https://www2.camara.leg.br/legin/fed/decret/1920-1929/decreto-4269-17-janeiro-1921-776402-publicacaooriginal-140313-pl.html

all of its territory, and not only on the "warzones" (LATINI, 2006). Two differences single Brazilian out from the European experience: first, no war was waged in South American territory, meaning that there was less of an excuse to install exception. However, contrary to the imperial experience, the state of siege was a constant presence in the Brazilian First Republic[757] – why these declarations did not entail the transfer of jurisdiction over political crimes from ordinary to military justice, as happened in Europe? The answer is the second difference: Brazil, now a federation, had also a federal justice system. If it wanted to tighten control over political dissent and provide a separate system of justice, it did not have to turn its eyes to the justice of the barracks, as the federal system was in order and functioning. If in Europe, political crimes danced the dance of exception and normality between ordinary and military justices, in Brazil, after the first turbulent years of the republic, political offenses were firmly grounded on a special justice system which maintained, however, its civilian nature[758].

These compromises, however, could be broken when troops and not officers were involved. In 1916, a group of *praças* (enlisted personnel) filed a *habeas corpus* (STF, 1916a) against a process they had been going through for insubordination. They alleged that their act had been political and, therefore, they must be processed at the federal justice. The STF did not even hear the request, arguing that to agree with this reasoning would mean to "recognize to the troops the right to revolt against their superiors under the pretext that those are political acts". Officers were entitled to act politically, but the troops, no. They did not even have the right to vote.

Moving to the 1930s, tensions between political repression and military justice continued. Nevertheless, the two realms remained separated for most of the time, though with new forms of intercession between them. The newly created *Tribunal de Segurança Nacional* was between 1936 and 1937 subordinated to the Supreme Military Tribunal, but the two systems were later separated, and the laws on national security were careful to separate the competence between the two realms of state repression, as we have already discussed in the section on military justice during wartime. The attitudes of the judicial system towards the political involvement of soldiers varied according to the perceived threat posed by the rebellious actors, giving rise to a range of possible responses that always excluded the Military Justice from deliberating on the most politically risky issues.

As happened during the 1920s, whenever a strong political clash involved soldiers, the issue was processed in the common jurisdiction as a political crime, as was the case for those

[757] Cf. introduction to part III.
[758] On the repression of political crimes in Brazil, cf. Diego Nunes (2014).

involved in the 1935 *intentona comunista* (communist riot). If less sensitive forces were at play, the military justice could be called to act. For instance, in 1938, the STF ruled on the case of Sergeant Deocleciano Fraga, who had prepared a protest with some colleagues against a decision of the Minister of War regarding military contracts. After the unrest had been discovered, there were some discussions on who had jurisdiction on the case; the supreme court decided that there was no evidence of "ideological drive" behind the actions, and therefore the Tribunal of National Security had no authority on the controversy (SUPREMO TRIBUNAL FEDERAL, 1938). In other matters, the justice might fail to act altogether. In 1936, two sergeants, four caporals and four privates went in uniform to a rally of the left-wing organization *Aliança Nacional Libertadora*, and for that were punished based on the disciplinary regulations of the Army[759]. They argued in a *Mandado de Segurança* that taking part on a political manifestation was a consequence of their newly acquire right to vote; and the regulations of the Army barred them for walking the streets without uniform. The Supreme Federal Tribunal did not even discuss the case: the 1934 Constitution, art. 113, n. 23 proscribed *habeas corpus* against disciplinary punishments; the court decided that, by analogy, any *mandado de segurança* against disciplinary actions was devoid of scope (SUPREMO TRIBUNAL FEDERAL, 1936; MAXIMILIANO, 1935).

The repressive system then tended to reserve the political lawsuits to higher ranking officers involved in party politics. When the troops found themselves in political fights – most certainly if they established ties with the most-feared communists – they could face the wrath of political courts; but, on most aspects of low-intensity daily contestation, it was probably that the military justice or the military administration would be called into action. This contributes to characterize the military justice as a bureaucratic apparatus, working closely with the military administration.

In the 1930s, a second issue was added to the problem of defining military crimes: offences committed between soldiers outside a context of service. Canabarro Reichart (1943, p. 70-71), in his history of Brazilian military law, reported that the Supreme Military Tribunal and the Supreme Federal Tribunal had different understandings until 1936 concerning this issue. The STM believed that the simple wording of the Military Penal Code sufficed, and whenever two soldiers were involved in a fistfight or a homicide in opposing sides, they should be tried by the military justice; the STF thought that outside service hours, conflicts between

[759] Regulamento Interno e dos Seviços Gerais dos Corpos de Tropa – decree nº 19040, of 19 December 1929, art. 338, nº 51.

colleagues did not pose a threat to the military discipline, and, therefore, the civilians must rule on them.

Actually, since the early 1930s – and even before – the STF had been dealing with this issue, always keen to restrict the competence of the military justice[760]. The theory most frequently used was that, for the criminal act to fall under military jurisdiction, the person breaching the law must not only be a servant of the armed forces, but must commit that act as a result of their service, as an act deriving – though unlawfully - from their authority. This was rendered in Portuguese as a word game: *em seviço, e não ao serviço* of the Army or of the Navy. The consequence was that, for the Supreme Federal Tribunal, soldiers fighting in a bar outside the hours of service[761] were to be processed by the common jurisdiction, even if the altercation resulted in death[762]. But if the crime had taken place in a context where discipline was at stake, even if outside locations traditionally under military authority, the STF was willing to grant jurisdiction to military courts. A case from 1934 helps to illustrate the criteria used by the court. Caporal Bruno Krau from the Army was patrolling the streets of São Paulo with some colleagues when he found fellow soldiers drinking alcohol in a bar; he tried to take them to the barracks, but the bohemian privates were unwilling to leave their cups unaccompanied. A clash followed and a gun was fired, killing caporal Krau. In the ensuing process, the doubt rose of which jurisdiction should apply; the STF argued that a patrol of the Army, guided by the caporal, was wielding public authority, or, to use the exact wording of the ruling, the caporal was exercising public functions (*exercendo as funções*), and therefore the crime must be taken by the military jurisdiction[763]. Whenever military discipline was at stake, the specific court system of the barracks must intervene to uphold subordination.

This, however, was too little for the Supreme Military Tribunal. In the criminal appeal n. 878, the court ruled on the case of private Eulálio Pedreira Lopes, for having committed bodly harm (*lesões corporais*, art. 152 of the Military Penal Code) against a colleague outside a traditional military location[764]. The court argued that this was a unproperly military crime, and that it must be therefore judged by a military authority. They used historical interpretation to prove their point: in 1925, a proposed amendment to the constitution intended to define that

[760] This is also noted by Raul Pereira Lins (1927, p. 64-67).
[761] *Jornal do Commercio*, 6 February 1930, Conflicto de Jurisdicção n. 818, http://memoria.bn.br/docreader/364568_12/697
[762] *Jornal do Commercio*, 2-4 January 1938, Conflicto de Jurisdicção n. 1.208, http://memoria.bn.br/docreader/364568_12/52235
[763] *Jornal do Commercio*, 20 April 1935, Conflicto de Jurisdicção n. 1.018, http://memoria.bn.br/docreader/364568_12/35970
[764] *Jornal do Commercio*, 14 February 1935, Acórdãos e Sentenças: Supremo Tribunal Militar: Recurso nº 878 http://memoria.bn.br/DocReader/103730_06/3751

only properly military crimes could fall under the jurisdiction of military courts; this proposition, however, had failed, meaning that its justifications had been rejected by parliament. The 1934 Constitution, art. 84, also declared that soldiers and officers had the right to a special jurisdiction in military crimes, not distinguishing properly and unproperly offenses. For the court, this meant that any crimes described by the Military Code must be prosecuted before the military courts, independently of any other circumstance. And art. 152 of the code punished "any individual at the service of the navy who physically offends a fellow, producing any pain or lesion in his body", without specifying any circumstance of place or time.

The divergence persisted until 1938.

The new code of military justice, article 88, listed 12 categories of persons that would be subject to military jurisdiction, ending almost half a century of legal uncertainty. Item "m", the last one, defined that military courts would be responsible to rule of cases concerning "active soldiers in crimes against other active soldiers, even though they are committed neither in military locations, nor due to military service or function". The expansive interpretation of the Supreme Military Court was anointed by the blessing of positive law: jurists could no longer debate the issue. This new, positivist thrust was readily picked up by Honório Prates (1939), the most respected commentator of the 1938 Code. He stated that, though the doctrine and the courts discussed at great length the criteria to be used in the definition of military crimes – *personae*, *loci*, *temporis*, *materiae* – the actual configuration of positive law was pretty straightforward, and a single criterium was valid: *ratione legis* (PRATES, 1939, p. 77-82). Jurists could debate whether a particular crime was of military nature due to a legal decision or due to its very ontology – but only for love of knowledge, for such discussions could not alter the jurisdiction, which was subject to the sole authority of statutory law and statutory law only.

The code also clarified some other gray areas on the limits of military jurisdiction. For instance, the article submitted to military jurisdiction the civilians in crimes against the external security of the country or military institutions, as defined by law; soldiers of military polices, when incorporated to the Army; and people "similar" (*assemelhados*) to soldiers. More importantly, it defined what the concept of "similar" meant: civilians or reformed soldiers working in military establishments and subject by their regulations to military discipline.

The 1930s and 1940s flirted for some time with an ever-expanding military justice system: political crimes committed by civilians, crimes by soldiers outside service hours, all these hypotheses were deemed by some authors to be subject to military courts. By some were later excised from the legal list of military responsibilities. In the end, it would to be better to describe the trajectory of the concept of military crime in these years as one of greater certainty

made possible by statutory law. Neither expansive, nor reduced military justice: but one at the same time prominent and limited, in preparation for the greater consolidation of military law to be performed by the 1944 Military Code.

9.11 – Commentaries and collections: the literature on military penal law

Legal sciences, to be worth of the name, must create concepts, go beyond the letter of the law, think critically about their object of study and aspire to a synthesis capable of helping students, practitioners and thinkers to contemplate law beyond each single case or source. Military Law in the 1930s was none of these. Only eleven books on the subject were produced, most of them with little ambition. They can be grouped in three categories: collections of legal acts, commentaries of codes, and compilations.

Collections of legal acts. The books in this category simply reproduce legal acts written by the author for actual lawsuits and latter gathered together for the book. Two of them collect sentences (LIMA, 1934; MONTEIRO, 1935) and the other collected defenses written by a lawyer (CARNEIRO, 1933). Dario Bezerril Correa Lima, author one of these compilations, gave to his book a title that more or less reflects the spirit of this kind of literature: "*applied* military penal law". The number of texts published in the books vary between 8 and 16 and generally do not share any kind of thematic affinity between them other than the fact that they deal with military law. Only Dario Lima searched some sort of theme uniting his texts: he claimed that, since military law is not casuistic, it could hardly adapt to many cases; he had, therefore, to be creative to decide some cases concerning new facts that had not been envisaged by the legal text, using frequently common criminal law against the military code to decide on more humane grounds (LIMA, 1934, p. 4). But it could hardly be said that he developed deeply his view, or advocated constantly for this theoretical framework in the actual decisions. Gomes Carneiro, conversely, had some polemics in mind when he crafted his book: two chapters reproduce an altercation that saw his license to practice law being suspended due to insults against a judge. This part of the book can be seen as a public defense, exposing witness accounts and explanations, but the other chapters are fairly technical. The third and final book, Military Justice in Times of War (GOES MONTEIRO, 1935) was supposed to publicize the rulings from Goes Monteiro – brother of the minister of war – as a military judge during the constitutionalist revolution in 1932 in São Paulo, where he processed cases against the federal forces. It was meant to initiate a reflection on the need to prepare the Brazilian military justice system for times of war. The collections of sources, in the end, are difficult to categorize, because they can

hardly offer material for lawyers or judges in search of case law to argue in their daily practice, nor can they provide deeper reflections in a scientific debate. They are better seen as individual endeavors where practitioners can elevate some of their best professional texts into the pantheon of printing press. I am almost tempted to call them vanity projects, but this might be one step too far.

Commentaries of codes. Five texts fall into this category. They are commentaries to legal texts; normally, the Military Penal Code. But not only. Homero Prates (1939), for instance, was the first commentator of the 1938 Code of Military Justice; Gomes Carneiro (1934) commented all legal texts that he deemed most important to the state military polices: the Military Penal and Procedural Codes, the Disciplinary regulations and a formulary. One characteristic they have in common is that, by "commentary", one should not expect deep reflection, but mostly an aid – if much – to the application of the law. Orlando Carlos da Silva (1930, p. 3), for instance, expressly stated that his was a "work of simple compilation", in which he reproduced case law and, when interpretation was pacific, simply stated what the courts considered to be the right what to read a section of the code. Salgado Martins (1937) commented the code almost only with little fragments of case law of 4-10 lines each, mentioning up to 30 to a single article of law[765]. Gomes Carneiro (1930) went the same way, though he cited fragments more abundantly. Homero Prates (1939) frequently skipped commenting particular articles, and emphasized more fragments of case law than actual elaboration on the article – though this was also not entirely lacking. Only Virgílio Antonino de Carvalho (1940) aspired to more[766]. He was the only one to actually comment any code article by article, and he strived to compare each dispositive with Roman Law. Though the results were frequently clumsy, he can at least be credited with honoring the name he christened his book with.

Compilations. A group of three heterogeneous books finish the rather meager list of works of military penal law literature. Simões Pires (1939), as already discussed, wrote a book organizing the legislation on military pensions; the book is made of paragraphs reproducing or rephrasing fragments of law concerning the subject of the pug, organized in a more or less logic order. But it can hardly be said that the author gave some intellectual input to the material. The second book, by Isimbardo Peixoto (1937), chronicled and gathered sources on the implementation of the State Military Justice in Rio de Janeiro. He transcribed the bill that would

[765] He stated in the preface that the code was too influenced by the previous school, and therefore, that it was needed to be open to the facts in order to correctly apply the text; but the body of his work seems to do little to help attain this aim.

[766] Correspondingly, his book was the only one of which I could find a review, which was written by Raul Lima (1940).

become the law instituting the special state justice, its previous versions and some of the parliamentary debates. Then, he collected articles printed in the press discussing the process that would declare that law to be unconstitutional, and some documents related to the processes themselves. Though one can find a little comment from the author, the documents are the real protagonists of the book. Márcio Tibúrcio Gomes Carneiro (1933) wrote a book on the debates on the reform of military justice in the 1920s and the 1930s. Though the book bears the work "critical" in its title, it is a compilation of sources, including opinions of bureaucratic actions and press articles. Carneiro reproduces some texts he had published before criticizing the reforms, but they do not effectively add together to form a continuous work.

This rather technical literature was produced by a rather technical body of authors. Of the nine men that wrote the books we just discussed, six were military judges (*auditores militares*)[767] when they wrote their works. Mário Tibúrcio Gomes Carneiro, who wrote three books, was a lawyer frequently practicing at the military jurisdiction, but he had been for some time a military judge, and would serve in the 1950s as a Judge at the Supreme Military Tribunal. Simões Pires, conversely, was an officer in the Brazilian army and had only bureaucratic aspirations; I could not verify who Orlando Carlos da Silva Was. But it can be said that Military Law attracted next to no interest from outside the restricted circle of practitioners. The literature existing provided the bare minimum necessary to provide for the needs of those working in the system of military justice. Books published in the 1920s and 1930s did little more to bring doctrine up to date with legislative changes, but the more robust works were still those from the first decades of the 20th century.

Or not even them. In specialized journals, articles dealing with the topic were sparse at best. The *Revista Militar Brasileira* mostly silenced about law. It published many practice-oriented works, such as a synopsis of the Brazilian military legislation, which gave short descriptions of the contents of decrees and laws (REVISTA MILITAR BRASILEIRA, 1931, 1933), or a practical guide on how to obtain a *montepio* (BRANCO, 1933). Apart from that, we can find only works that treat military law as a curiosity, such as an article on the Count of Lippe (BARROS, 1930), or a translation of the Polish military penal code (CARNEIRO, 1937). Between lack and excess of practicity, there was little space for a true debate on legal issues, let alone a true legal thought to emerge. *A Defesa Nacional* provided a complicating factor. From 1939, its call for contributions directed authors to deal only with strictly technical topics; it stated that the editor would not accept "articles or notes criticizing or approving acts emanated

[767] Dario Bezerril Correa Lima, Silvestre Péricles de Góes Monteiro, Salgado Martins, Isimbardo Peixoto, Homero Prates and Virgílio Antonino de Carvalho

from authorities" (A DEFESA NACIONAL, 1939, p. 8). This excluded law as a topic in one of the main venues of the military press.

Salgado Martins, on the preface to his commentary to the Military Penal Code, gave a harsh judgment to the literature of military law. There was no series publishing the rulings of the Supreme Military Court, and there were few comments to the code; the best ones, from Esmeraldino Bandeira, Crisólito de Gusmão and Raul Machado, were not exactly recent. It was hard to find the book of João Vieira de Araújo; the one of Macedo Soares passed over practical issues, and the dissertations of Thomas Alves and Magalhães Castro were not up to date (MARTINS, 1939, p. 3-5). We can say that the 1930s did little to lift the overall level of the literature.

9.12 - Conclusions

In the early 1920s, military criminal law had been mostly modernized. Though clearly different options were taken regarding criminalization and certain acts, the central tenets of law were now shared with the special branch of the barracks. Nevertheless, relevant conflicts rose up in the 1920s and 1930s.

Military procedure and justice were hot topics. Three codes (1920, 1926 and 1938) and two major reforms (1922 and 1934) were enacted in a mere eighteen years, indicating that the prosecution of soldiers was a sensitive topic. The central conflict concerned how much militarized military justice should be. This had at least two meanings: how much different this special branch of the judiciary should be from others, and what should be the proportion of soldiers in military tribunals. The 1920 code of military justice installed deep reforms, such as separating accusation and judging in military justice, that were read as a de-militarization of the justice system. The 1926 code went a step too far in that direction according to many offices, especially in equating the number of soldiers and civilians in the Supreme Military Tribunal. The 1938 was then seen as providing a much-needed equilibrium between the two tendencies.

The 1930s and 1940s especially were the fulfillment of long-harbored dreams of professionalization of the army. Following the ideologies of total war and the armed nation, the armed forces were now seen as mostly instruments for waging war. And, in 1932 and 1944, the Brazilian Army entered for the last time in its history in true wars. In the constitutionalist revolution in São Paulo, for the first time since the 1842 liberal revolutions, military tribunals were regularly created to judge crimes committed during a civil war – the early 1890s change of jurisdiction to the military branch to prosecute people involved in the Federalist Revolution

have been blatant violations of the constitution. In 1944, for the first time, a special judiciary system was created in foreign territories to prosecute crimes committed in an external war since the Paraguay conflagration. One could then say that the Brazilian military judiciary had finally been tested in what was supposed to be its foremost task: to assist the Army just outside the battlefield.

This professionalization of the judiciary was constantly menaced by the foremost issue of criminal repression at the time: political criminality. Since most of the political contestation came from within the barracks, at many times the courts were faced with the decision on whether a particular offense should be prosecuted before the military bench or not. Throughout the 1920s, the courts and the judiciary mostly took the option of trusting repressive responsibilities to the federal bench. However, after the military-endorsed 1930s coup, the two possibilities were to some extent merged. Between 1936 and 1937, the newly created Tribunal of National Security was submitted to the appellate jurisdiction of the Supreme Military Tribunal; after 1937, this bond was severed, but two of the six members of the new court were still soldiers. If political repression was carried out separated from the military judiciary, it was nevertheless pursued according to some sort of "military mentality", by military agents.

By the middle of the 1940s, military justice was a modern branch of the Brazilian judiciary. Its central logics had nothing more to do with the *Ancien Régime*; nevertheless, some of its practices, such as *ad hoc* tribunals, still did not fit well within the general framework of 20th century Brazilian law. But those aspects were hard to be completely relinquished, and resigning them would probably erase any specificity of military law. Accordingly, the issue of reform and modernization was moved to the margins of debates. Now – and for most of the second half of the 20th century – the central problems of military justice would be national security and political criminality.

Chapter 10
Military pensions and salaries: social security politicized

Social security was a relevant component of the political conversation in the 1920s and 1930s. The "social question" grew more important as the urbanization process advanced in Brazil. Though still a largely rural country, some cities – especially on the coast –boasted increasingly larger populations. A large influx of immigrants also fostered political turmoil. To cope with these complex challenges, the government started to develop a social net.

In the 1920s, most of the social protection came out of Retirements and Pensions Funds (*Caixas de Aposentadorias e Pensões*), small groupings of workers that paid contributions in exchange for the promise of receiving pensions in cases of invalidity, or of leaving them to the next of kin in cases of death. These institutions were mostly attached to a single company and were administered by workers themselves. In the 1930s, the government started to get involved in the workers movement in general, and tried to better structure its pensions policy.[768] Then rose the Institutes of Retirement and pensions, national institutions responsible for providing for workers in a more stable fashion.

Soldiers, nevertheless, were little involved in these movements. The expansion of social security was related to a new way to conceive political participation: the idea of *regulated citizenship*, as defined by Wanderley Guilherme dos Santos (1979, p. 74-79). Citizenship was defined by work, and work was regulated gradually in different professions, which had their own state-sanctioned unions, that provided health services. To be a citizen was to be a part of a regulated profession. Soldiers - or, more precisely, officers - were part of the citizenry for a long time, with pensions, health services and other social servicers guaranteed since long time

[768] On social security during the Vargas Era, cf. Leonardo dos Santos (2022) and Gilberto Hochmann and Cristina Fonseca (1999).

before. The legal framework of their pensions – the *montepio* and the half-basic pay – was generally maintained in the years we are about to discuss. Some old problems were left behind – such as the differences between the legal regimes of the Army and the Navy[769] - but the everlasting question of the complexity of the legal regime of military pensions was never addressed in these years. This lack of discussion was not only a political matter, but can also be found in the legal thought; military social law (and military administrative law, more generally) stimulated next to no profound debates, ideas, concepts.

One issue, however, stimulated much discussion: military wages and pay raises. Most of this chapter will be concerned with the thorny debates that parliament had to face in deciding whether soldiers should be given larger salaries. This issue was raised in 1927 and 1935. By studying the events that lead to laws increasing the salaries of soldiers, we will be able to understand how the military had become a mighty political actor not only as the bearer of force, but as a potent advocacy group, capable of fending for its own interests. The pay raises also faced some resistance, and these rebukes will show to us how different social groups conceived the role of the military within the Brazilian state in times of unprecedent expansion.

10.1 – Privilege in the first republic: the pay raise of 1927

The last great movement in the social security net of soldiers in the First Republic would come in 1927, with a pay raise enacted with the law 5167-a of 12 January 1927[770]. After sixteen years, inflation had corroded the purchasing power of both officers and enlisted personnel, the opinion of the Financial Commission claimed. This must be compensated by higher wages. Curiously, particular measure was justified with extensive appeals to the moral sensibilities of senators and deputies: the proponents of the bill that would become the pay law raised many arguments intending to justify why soldiers deserved a raise in general, and not only considering the particular circumstances Brazil was living at that moment. The commission that proposed the project got to the point of claiming that "fairness demands that officers of the Army and the Navy should get from the nation better wages than other", for soldiers, either officers or troops, were constantly transferred, what increased their expenses (SF, 1926, 12, 233-234). Moreover, soldiers paid a tribute of blood, much more demanding than the services offered by civilians;

[769] For an exception, see Alberto da Silva (1933).
[770] Legislative trajectory: opinion of the finance commission of the Senate: 13 December 1926. 2nd discussion at the Senate: 15 December 1926. Arrival of the project at the Chamber: 25 December 1926. 2nd discussion at the Chamber: 27 December 1926. 3rd discussion at the Chamber: 28 December 1926. I could not retrieve the rest of the debates.

the unequal harshness of their duties meant that their compensations should also differ (SF, 1926, 12, 251).

Other problems, peculiar to particular categories within the armed forces, were pointed out. For instance, in the Senate, it was stressed that "in a land with 80% of illiteracy", those teaching at the Schools of Apprentice Seamen should be fairly paid for their particularly laudable work (SF, 1926, 12, 248). Officers had to study to receive bachelor degrees just as much as engineers, lawyers and doctors, while they had to face a much harsher life; yet, their salaries were smaller (SF, 1926, 12, 251). Finally, non-commissioned officers had the capital duty to train the troops, and after serving for their best years in the Army, had to go back to the civilian life untrained for other *métiers* and having to face the "nefarious legend that in the Army and the Navy people do not work" (SF, 1926, 12, 240). In short, the debates on this particular law stressed the specificities of military life which justified larger wages.

The pay raise was granted without major resistance. Other minor laws concerning social security followed, such as the legislative decree 5465 of 1928, regulating the provisory pay of pensions of *montepio* and half basic pay[771] and the law 5631 of 31 December 1928, which regulated inactivity at the armed forces. But the main lines of force had already being sketched. The new reforms did not give lavish benefits, as some of those enacted in the early years of the republic; the government now were mostly trying to make up for lost ground, to compensate for inflation and for years of overlook from civilian governments. It is no surprise that the government of Hermes da Fonseca enacted or presented the projects of many of the bills discussed here: when soldiers occupied the presidency, paths for change were more easily opened. But, differently from the 1890s, it was harder for the military to make a case for improvements in their social security under a beleaguered economy and when they did not have as much representatives in congress.

Moreover, the differences between the military and civilian systems of social security were shrinking as the system of civil servants was getting more unified – replicating the process that earlier in the 1890s saw the Navy and Army systems getting close together. The decree 5128 of 31 December 1926, which reorganized the *montepio* of civil servants, provided that soldiers could take part on it, and not only at the military institutions. This was organized within a new Institute of Welfare of Federal Employees (*Instituto de Previdência dos Funcionários*

[771] Legislative trajectory: presentation at the Chamber of Deputies: 28 August 1926. 2nd discussion at the Chamber: 11 October 1926. Opinion of the Finance Commission of the Chamber: 28 July 1927. Approval at 2nd discussion: 29 July 1927. 3rd discussion at the Chamber: 4 August 1927. Approval of the final draft: 16 August 1927.

Públicos da União), which was a part of a much larger movement that was gradually unifying the legal regimes of public employees and extending social security benefits.

10.2 – An interventionist army: the pay raise and political crisis in the Vargas Era (1932-1935)

The 1929 economic crash had deep effects over the following years and throughout the world. Brazil was no exception. The heavily import-driven economy, based mostly on the coffee industry, took a big blow with the market mayhem. Yet, the increasingly urban and complex society was demanding ever more from the State – the social question did not end with the First Republic, but only grew more dramatic with the increasing influence of the authoritarian ideologies – communism and fascism – which vied for the hearts of the citizens in the public arena during the Vargas Era. Soldiers were among the many categories that, after some years feeling the toll of the rising cost of living, demanded higher salaries. They had to confront resistance from many sectors of society, and even from within the Army itself. This section will discuss the debates that led to a pay raise for the Brazilian military class in 1935, just after the new 1934 constitution was enacted. This proposal spawned clashes both in the press and inside parliament; the arguments each side used give us an interesting view on the different lights in which soldiers were cast, the role they were expected to play in society – and the political ambitions of some. For the Army was riven by politics. For some, ambition trumped patriotic selflessness, leading to moves that threatened both the stability of the country and the standing of the armed forces.

The salary structure of the armed forces was being questioned in the aftermath of the new Brazilian constitutional government. An article published by late 1934[772] claimed that the many gratifications that government paid made soldiers in equal positions receive widely different wages. Frequently, they did not even align with military interests: service in the barracks was less compensated than bureaucratic works. At the same time, the rank of captain was an administrative purgatory in which many valuable careers agonized; some former instructors suffered the humiliation of being paid the same as their students[773]: the solution was to scale remuneration according to the time of service. The situation in the Navy was no better. In the 1932 report, the minister claimed that the fleet was dying by old age, and with it, the

[772] O Jornal, 27 december 1934, "remunerações especiais no exército", http://memoria.bn.br/DocReader/110523_03/22057

[773] *A Nação*, 1 March 1935, "reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/120200/7829

opportunity for sailors to sail. No more trips to the Ocean: Navy "personnel gets bureaucratized and develops only civilian interests and habits" (MINISTÉRIO DA MARINHA, 1932, p. 9). Not only the amount, but also the structure of pay provided all the wrong incentives. Something had to change.

In 2 August 1934, the Minister of War, General Góis Monteiro, submitted a report to parliament defending pay rises for officers. He argued that military life was supposed to be a priestly office in which duty was fulfilled for its own sake; yet, the low salaries had stimulated many soldiers to seek political office for the sake of stipends. Góes also mentioned that though soldiers had received a raise in 1927, civil servants had gotten a 100% increase in 1928. Some might call this jealousy, but Monteiro probably had another name for it. In 3 September, Paulo Ramos, from the Directorship of Public Spending, at the Ministry of the Treasure, gave a detailed response to the report, stating that the public coffers could not sustain such a heavy burden, as they were already under stress (ACD, 23/04/1935, p. 2939). But the efforts from Monteiro would not end there.

In the first days of January 1934, the public signs of the new debate began to emerge. The Minister of War signaled his support for a rise[774]. Private associations, such as the Circle of Reformed Officers, began to act[775]. But not all of them in the same direction. In the very first day of the year, the media tycoon and journalist Assis Chateaubriand recognized in a text that the calls for a raise heard from the barracks were nothing but fair, but the global crisis meant that Brazil could not even pay its own debt, let alone pledge more spending[776]. The warning was to no avail. On 10 January, the President appointed a commission made of 5 officers from the Navy and the Army to study the pay rise[777]. Interestingly, they had only 8 days to give their opinion: either they were accounting geniuses, or they knew beforehand the conclusions they should reach. Even more interesting: the commission was to gather at the premises of the Military Club[778], a private association of officers; this not only reinforces a suspect about the proposal that was about to be filed, but also highlights the political and administrative role the Club played in Brazil. As the commission worked, a parallel and informal group of officers

[774] *O Radical*, 2 January 1935, "o reajustamento dos vencimentos militares e a palavra serena do general Goes Monteiro", http://memoria.bn.br/DocReader/830399/7024
[775] *O Jornal*, 28 december 1934, "vencimentos militares dos oficiais reformados e da reserva", http://memoria.bn.br/DocReader/110523_03/22073
[776] *O Jornal*, 1st January 1935, "despesas militares", http://memoria.bn.br/DocReader/110523_03/22109
[777] *Diário Carioca*, 11 January 1935, "o reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/093092_02/17699
[778] *O Radical*, 12 January 1935, "o reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/830399/6888

gathered at the Naval Club[779] and proposed a wholesale project of raise and corresponding measures to increase state income. It comprised lowering taxes and printing money[780]. Perhaps not all soldiers were financial geniuses.

After the commission finished its works, the results were put at the table of the Minister of War, Góes Monteiro. The political maneuvering was about to begin. Monteiro went in 12 February 1935 to his counterpart at the Navy to try to negotiate a common front in favor of the measure[781]. To no avail, apparently[782]. While the political offices worked, the press speculated. An anonymous article published at the Newspaper *A Nação* highlighted once more the need to favor the brave soldiers with higher wages[783]. But it made two observations that help us better capture the new mentality which framed the project that was about to go to the parliament rooms. First, the ranks should not receive excessive increases in their salaries: if they were too graciously paid, they might feel enticed to remain in the Army, while a healthy armed force should be renovated constantly. Soldiers cannot be old. Second: soldiers are workers just like anybody else. They must be compensated accordingly. Back in the day, people thought that soldiers were not regular laborers. They were merely subsidized: compensated for their sacrifice, one that was so high that could not be bought with money. We know this discourse: Moreira Guimarães reproduced it a few years before. The 1934 constitution begged to differ. Soldiers were now understood to be public servants; they received salaries. No more priests of public religion: they must now see the green paper to work. This new conception of military salaries was about to be implicitly defended at the Chamber of Deputies. And confronted.

After a week, in 27 February, the presidential report with the proposal arrived at the Congress. Curiously, Getúlio Vargas did not ask parliament to approve the ideas that were put before their eyes: he simply brought it to the attention of the representatives of the people. The first citizen simply stated that congressmen would know how to reconcile the proposition with the financial conditions of the country. Some eyebrows were raised after this chilling approach[784]. General Guedes da Fontoura, president of the commission of the Ministry of War, got a reunion with the president of the Chamber of Deputies, Antônio Carlos Ribeiro de

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[779] *Diário carioca*, 22 January 1935, "reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/093092_02/17840

[780] *Diário Carioca*, 18 de janeiro de 1935, "finanças militares", http://memoria.bn.br/DocReader/093092_02/17781

[781] *Diário Carioca*, 12 February 1935, "a importante reunião de ontem no gabinete do ministro da marinha", http://memoria.bn.br/DocReader/093092_02/18078

[782] *Diário de Notícias*, 14 February 1935, "estiveram no Ministério da Marinha o ministro da Guerra e a comissão do reajustamento", http://memoria.bn.br/DocReader/093718_01/22031

[783] *A Nação*, 19 February 1935, "o reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/120200/7703

[784] *A Noite*, 28 February 1935, "os vencimentos dos militares", http://memoria.bn.br/DocReader/348970_03/21869

Andrada, to explain his reasoning[785]. The head of the legislative wanted to give a raise to civil servants too. Yet, if the government was not even seduced by the prospect of spending more with soldiers, the possibilities of favoring Andrada's ambitions were slim.

The proposal had two different reports attached: one from the Minister of War, and the other from the Minister of the Navy[786]. The former was way more complete – implying, some might suggest, hidden ambitions from its author. In his report, Góis Monteiro claimed that his proposal should not be compared with current military salaries, defined in 1927, but with those from the table of 1910 – the last one before the "European War", and, therefore, when prices were still stable (ACD, 01/03/1935). Any 25-year gap in prices would yield an appalling comparison, but Góis Monteiro was little interested in economic theory. He yearned for effect. He claimed that soldiers had "representative responsibilities", that is, they were the face of the state just as much as diplomats, politicians and judges. These men incarnating stateness must not be hidden: they must be visible for all to see the glory of the institution they represented. In the form of wealth, of course. Góis was not so crude in his report, but, in essence, this is more or less what he meant: more prestige, more money. But he also kept returning to the prices and their overbearing effect over soldiers. To remedy this situation, he proposed readjustments slightly different from those that could be seen in the table of the original commission. The initial group had proposed to change salaries in different proportions for each rank: some would get as low as 16% raises, while others might reach a whopping 110% increase. Monteiro, the champion of fairness and equality above all, suggested that everybody should get the same increase. He did not mention that, in his proposal, this would amount to 150%.

The next day, the Minister of the Navy filed a much less interesting report. He did little more than complaining that reformed officers would not get a raise.

The following weeks saw little movement; most of the action happened in the Financial and National Security[787] Commissions, which must give reports on the proposals. The most heated debate concerned one slightly inconvenient question that frequently manages to bring trouble to ambitious social reformers: where would the money come from? The 1934 Constitution, art. 183, forbid the creation of any spending without pointing the origin of the resources. And no origin whatsoever had been named. Some suspected that the law might be

[785] *Correio da Manhã*, 3 March 1935, o aumento do vencimento dos militares, na Câmara", http://memoria.bn.br/DocReader/089842_04/26619

[786] *A Nação*, 1 March 1935, "reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/120200/7829

[787] O Jornal, 14 de março de 1935, "ainda não chegou à câmara o pedido do tribunal regional do distrito para processar a senhora Bertha Lutz", http://memoria.bn.br/DocReader/110523_03/23161

thrown by the president in the garbage can of unconstitutionality. Fábio Sodré, conversely, argued that the Chamber was simply voting an authorization: the president would decide whether or not to use it, and where to find resources to cover for the corresponding expenses. The proposal passed anyway, and by early April, it got to the Chamber floor.

Generally, March was a peaceful month. The same cannot be said of April.

In 5 Abril, the Chamber was greeted by chilling information from the ministry of Finance[788]: the national budget had started the year with a deficit of more than 500.000 *contos de réis*, almost a quarter of the 2.176 *contos* in the whole budget. On top of that, the pay raise, if proceeded as proposed, would add 245.846:800$ of extra spending (ACD, 06/04/1935). It is hard to argue with raw numbers. Or is it?

In the next few weeks, all sorts of rumors start to spread, many reaching the press. Some conjectured that taxes on liquor, cigars and perfumes would be raised to pay for the increased salaries of soldiers – a fitting moralistic answer[789]. But more ominous signs would reach the press in the following weeks. Whispers of military coups spread and were published frequently, to the point that military leaders had to reaffirm the commitment of the Armed Forces to democracy constantly from 11 April onwards[790]. This climate was most certainly fostered by Góes Monteiro, who public threatened to leave the Ministry if the raise did not pass[791]. In 12 April, he negotiated with Waldemar Falcão, the reporter of the bill, on how to proceed[792]. In the 16, Falcão finally presented his opinion, suggesting that taxes should be raised, that the project should be discussed with urgency and a slightly slimmed down raise should be approved[793] (ACD, 16/04/1935). Meanwhile, deputy Henrique Dodsworth tried to include civil servants at large in the raise bill, making the stakes much higher[794]. The Army got institutionally behind the project: on the same day, a commission of 19 generals met Góis Monteiro, who informed them that the president sympathized with the project and would throw his political

[788] *A Noite*, 5 April 1935, "o reajustamento de vencimentos militares", http://memoria.bn.br/DocReader/348970_03/22323
[789] *O Radical*, "vae ser apresentado à comissão de finanças o parecer sobre o reajustamento dos vencimentos militares", 10 April 1935, http://memoria.bn.br/DocReader/830399/7461
[790] *A Nação*, 11 April 1935, "o reajustamento dos vencimentos militares", http://memoria.bn.br/DocReader/120200/8303
[791] *Diário Carioca*, 12 April 1935, "se não for aprovado o reajustamento dos vencimentos militares, deixarei a pasta da guerra, diz o general Goes Monteiro", http://memoria.bn.br/DocReader/093092_02/18844
[792] *A Noite*, 12 April 1935, "tudo resolvido", http://memoria.bn.br/DocReader/348970_03/22422
[793] *A Noite*, 15 April 1935, "as bases do reajustamento dos militares", http://memoria.bn.br/DocReader/348970_03/22460
[794] *A Noite*, 16 April 1935, "o reajustamento do funcionalismo civil", http://memoria.bn.br/DocReader/348970_03/22478

weight behind the legislative measure[795]. The reunions between politicians and military ministers continued the following days, and they made it to the front pages of newspapers[796].

But the temperatures would get even higher.

In 19 April, a group of officers from Rio Grande do Sul sent a damning message to Góis Monteiro[797]. They were displeased by how the issue of salaries had been appropriated as a political tool by some in the Army. Personal ambition had been disguised as moral interest: the officers did not believe that the nation must be pressured – or, if I might add, blackmailed – by the Army, as if a moral principle was at stake in the discussion of military wages. Congress should debate freely: this was the only way for it to be morally and politically responsible for its own decisions before the country, the *gaúchos* contended. Góis was under pressure. General Pargas Monteiro, commander of the Rio Grande do Sul forces, declared to the press that there was nothing wrong with the letter from his subordinates. Góes begged to differ: he opened an investigation against the restless southern soldiers[798]. At the same time, he had to give declarations to the press countering letters from two generals that seemed to imply that there might be a coup if the raise was not enacted[799]. The situation seemed to be slowly slipping out of control. Góis tried to control the troops: in April 21, he put all the troops in the 1st region – the capital city – on high alert[800]; on the 23, General Pargas Monteiro changed his mind and condemned the message from his subordinates[801]. Meanwhile, an infantry regiment in São Paulo tried to rebel, and there were rumors that others might follow suit in the capital[802]. The Minister of Justice, Vicente Ráo, declared to the press that there was nothing strange going on. Góis Monteiro too said that everything was normal[803]. There are few better indicators of trouble than two ministers saying that all is right.

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[795] O Jornal, 16 de abril de 1935, "dezenove generais conferenciam com o ministro da guerra", http://memoria.bn.br/DocReader/110523_03/23650

[796] *A Noite*, 17 April 1935, "Adiada para amanhã a decisão da comissão de finanças", http://memoria.bn.br/DocReader/348970_03/22500

[797] O Jornal, 19 de abril de 1935, "a oficialidade da 3ª região manifesta-se contrária ao aumento dos vencimentos militares", http://memoria.bn.br/DocReader/110523_03/23694

[798] *Correio Paulistano*, 23 April 1935, "o General Goes Monteiro desmente qualquer tentativa de subversão da ordem", http://memoria.bn.br/docreader/090972_08/7468

[799] *O Radical*, 20 April 1935, "o Exército e a Nação", http://memoria.bn.br/DocReader/830399/7525

[800] *Correio Paulistano* , 21 April 1935, "continuam de prontidão as forças da capital federal", http://memoria.bn.br/docreader/090972_08/7450

[801] *Correio Paulistano*, 23 April 1935, "o General Goes Monteiro desmente qualquer tentativa de subversão da ordem", http://memoria.bn.br/docreader/090972_08/7468

[802] *Correio Paulistano*, 23 April 1935, "o general Goes Monteiro desmente qualquer tentativa de subversão da ordem", http://memoria.bn.br/docreader/090972_08/7466

[803] *Correio Paulistano*, 23 April 1935, "o General Goes Monteiro desmente qualquer tentativa de subversão da ordem", http://memoria.bn.br/docreader/090972_08/7468

It would be under this less than inviting environment that the pay rise of the Army would be debated in the following week by parliament, and closely[804] scrutinized by the press[805].

In 19 April, Waldemar Falcão, the reporter, came before the floor to justify his absence on the previous day. A relative had died, and he therefore was in no conditions to follow through with his duties. But the task could not be left undone: in less than a week, the legislature would end and the new deputies and senators would take their seats, meaning that all bills would elapse. All work would go to waste. To avoid such a dreadful result, he gave up his responsibility, and the president of the Chamber appointed Evaldo Lodi to fill in the position. This deputy assumed his duties with a proviso: being a representative of the commercial class, he was by principle against tax raises. Precisely the cornerstone of Waldemar Falcão's plan. Current and former reporter pitched against each other: the drama only grew stronger.

Vying for the middle ground, on the next day, Lodi proposed to raise only the salaries of soldiers, inviting only minor increases in taxation. This was not possible. On the 23 April, the project was printed with the report and a separate vote from Waldemar Falcão. They are worth reading. And invited backlash.

Lodi argued that for so big a territory, Brazil spent almost nothing on its army: its military policy amounted to virtual disarmament. He proposed, then, to give a raise to soldiers, but, to contain spending, pensioners would be left out of the measure. Waldemar Falcão went even further. For him, the army was the "bedrock of unity". And there was a pragmatic case to be made for pay raises: regardless of the financial hardships of the treasury, a salary increase was commendable "for the seeds of disaggregation and disorder not to grow, as they always find a favorable climate to develop and grow in the malaise and difficulties of the classes responsible for safety and public order" (ACD, 23/04/1934, p. 2869). Crudely speaking: a raise was the best way to avoid riots and potentially a coup. He then proposed several changes to the current budget – which, being the first enacted after the new constitution and harshly drafted, was deemed by Falcão to be incomplete. New taxes should be created. And Falcão was not economic: he proposed sweeping changes to the seal, income and consumption taxes,

[804] Many of the news on the debate made it to the first page. Ex.: O Jornal, 20 de abril de 1935, "O reajustamento dos vencimentos dos militares", http://memoria.bn.br/DocReader/110523_03/23708; *O Radical*, 21 April 1935, "o reajustamento dos militares e o maquiavelismo dos políticos", http://memoria.bn.br/DocReader/830399/7532; O Jornal, 26 de abril de 1935, "a sessão noturna da Câmara", http://memoria.bn.br/DocReader/110523_03/23798

[805] O Jornal, 23 de abril de 1935, "o reajustamento dos vencimentos dos militares e civis", http://memoria.bn.br/DocReader/110523_03/23754; O Jornal, 23 de abril de 1935, "o exército não desmentirá as suas tradições de ordem e disciplina", http://memoria.bn.br/DocReader/110523_03/23757; *Diário Carioca*, 26 April 1935, "aprovado em segundo turno o projeto de aumento de vencimentos", http://memoria.bn.br/DocReader/093092_02/19047

amounting to more than 10 pages of new regulations. All of this to finance a raise that would increase by 37% the spending with military personnel in the national budget.

After months of pressuring and threatening, some were falling short on patience. Deputy Fábio Sodré filed a separate vote expressing those sentiments. He lamented how politicized the question had become – something that was glaringly evident from the commentaries about "keeping order" from the reporter. If parliament did not resist inroads from outside pressure, it would make itself vulnerable to renewed military intervention in the future. And, apart from the appalling political situation, the arguments for a raise did not stand honest tests. First, cost of living was an evil suffered by all Brazilians; it had actually decreased since 1927 due to the financial crisis; and soldiers were no less well-off than liberal professionals. Second, he thought preposterous the arguments about an imbalance between civilian and military salaries. In the modern era of military service, all Brazilians were called to defend the motherland in arms; soldiers could no longer claim special compensation for their "tribute of blood" (ACD, 23/04/1934, p. 2882). Soldiers were not so different from civilians. To prove so, he demolished several arguments from the report of the original commission and from Goes Monteiro's opinion. Soldiers had said they were fundamental because they guaranteed public order. Wrong: this is a police responsibility – countered Sodré. In the modern world of total war, the work of officers was no more fundamental to national defense than that of engineers that built infrastructure, doctors that guaranteed health and judges that upheld public order. Soldiers argued that many officers failed to attend gala parties for lack of proper uniforms; Falcão argued that the same humiliation plagued many civilians, and furthermore, "there is evidently a bit of egocentrism when the illustrious soldiers consider themselves 'the center' of society, with a representation only comparable to that of the diplomatic corps - 'the princes of the republic' [the expression comes straight out of the report]". Slightly self-delusional images about the military career were being left in tatters.

Sodré did not hold a romanticized view of the Army. Brazil faced not even the slightest risk of war; being a young country, money was to be better invested in health, education, infrastructure, and not the Army. Yet, according to him, as a proportion of its budget, Brazil investment in the armed forces was second only to Poland. Our 24,9% of the budget of military spending put us well ahead of the 20% of Italy and 14,6% of England countries on the brink of war. "The worst thing, however, is that we are militaristic, we are the most militaristic people in the world, but only in the budget. The Army we have is not any prime, rather the bare minimum, and the Navy is positively insufficient. But they are by many times the most expensive Army and Navy in the world (…). The amount of Brazilian military expenses

constitute a horrible certificate of the weakness, ineptitude and unconsciousness of our men of government" (ACD, 23/04/1934, 2888). This single phrase encapsulates the thorny drama of Brazilian military investment from the late 19th century to well into the 20th: we spent at the same time too much and too little. A nation the size of Europe had less than 20 thousand soldiers that had faced unspeakable humiliation in Canudos; yet, this ridiculously small and unprepared force took a slice of the budget larger than that of European nations preparing for World War II. In the end, it seemed that the Brazilian economy was simply incapable of affording to protect our borders. True; but this observation begs the question: protect from whom?

Deputy Alípio Costallat, also presented a critical report, which might help us unveil the mysterious case of the astonishingly pricy, yet positively inefficient Brazilian Army. The number of officers had been steadily growing: from 4176 in 1930 to 5889 in 1935 – and this excluding the almost 3 thousand reformed officers, which costed to the treasury more than all of the soldiers in the ranks. There was an excess of officers in the Brazilian military, and this had been recognized for a long time. Many of them worked in "true sinecures" in the military bureaucracy, according to Costallat (ACD, 23/04/1934, 2903).

In 24 April, the bill went to the floor. Many deputies sent to the chair written declarations contrary to the project. The request of urgency was approved: there were four days left before the legislature elapsed, and with it, the bill. Deputy Cincinato Braga gave a long speech detailing how the Brazilian finances could not support the raise; the military was responsible and, if the financial situation was duly exposed to the soldiers, they would no longer ask for more money. Deputy Fernandes Távora countered that some people tried to contact the garrison of Paraná state to explain the situation, but they were not even received by the soldiers (ACD, 23/04/1934, 2989). Outside Parliament, General Monteiro gave a statement to the press claiming the issue of the raise would be "firmly dealt" with[806], instilling fear into the government. In the Chamber, more or less 25 amendments arrived, most of them dealing with rises for civil servants.

The following day – the 25 – both the Security and the Finance Commissions presented substitutive bills. But debates were not held: many deputies stand in the coffee room to prevent the parliament from reaching the quorum[807]. The clock was ticking.

[806] *Diário de Notícias*, 25 April 1935, "reação ao medo", http://memoria.bn.br/DocReader/093718_01/22731
[807] *Correio da Manhã*, 25 de abril de 1935, "ainda ontem não foi votado em 2ª discussão o projeto de reajustamento dos vencimentos dos militares e civis", http://memoria.bn.br/DocReader/089842_04/27428

On the 26, the debates were at last reinitiated. More than 300 amendments arrived[808], and some felt that the project was being hushed into enactment. The bill was approved in the 2nd discussion, but to guarantee its timely approval, the president called an extra night session of the Chamber. After the twilight, deputy João Sampaio heavily criticized the government for hiding the financial situation of the country and exploring the military for political gain. He claimed that honorable soldiers had gone to the press to chastise this situation and refuse the raise (ACD, 26/04/1934, p. 3130).

The press published that an unidentified "high officer" had declared that the Army was too honorable "to rebel for pecuniary reasons"[809]. Along with the moon, the veiled threat of military intervention loomed over parliament.

On the 27, the substitutive from the financial commission was read and approved by 104 votes to 22. Now, few but crucial modifications were in order. The raise would not be permanent, but would only last for a year. A new commission would be created to study the financial situation of the country and make proposals for reform. After a few hours of discussion, a new night session was called, and the deputies had the debatable pleasure to concentrate on hundreds of amendments through the night. None of them was approved.

On the 28, the final adjustments were made. At least six written declarations of vote were sent, representing 19 out of 144 deputies that voted, both in favor and against. This was obviously a hot topic. In the end, the raise passed just in time before the new legislature was installed. Yet, a few days later, Vargas would veto the raise for the civil servants, leaving only soldiers with larger purses[810]; the veto would be upheld by parliament[811]. In 14 May, the Law would finally be enacted.

In the end, soldiers got (most) of what they aspired for. And they saw they could yield power against the government to extract concessions. Information in the press on the proceedings of some actors gives us a glimpse into the adroit political maneuvering that was taking place. It was said that the reporter from the Chamber of Deputies, Waldemar Falcão, had been called by the president into the palace to discuss his opinion[812]. Some speculated that Falcão had attached the raise to the tax increases just to politically sink its possibilities of

[808] O Jornal, 26 de abril de 1935, "a sessão noturna da Câmara", http://memoria.bn.br/DocReader/110523_03/23798
[809] O Jornal, 26 April 1935, "a sessão noturna da Câmara", http://memoria.bn.br/DocReader/110523_03/23798
[810] *O Estado*, 27 May 1935, "o reajustamento dos civis", http://memoria.bn.br/DocReader/098027_03/9210
[811] *Correio da Manhã*, 23 July 1935 - http://memoria.bn.br/docreader/090972_08/8512
[812] *Diário de Notícias*, 25 April 1935, "reação ao medo", http://memoria.bn.br/DocReader/093718_01/22731

approval[813] – something that clearly did not work. Actually, a few months after the events described above, Waldemar Falcão, now a senator, when discussing the presidential veto, lamented only that it had been partial and not total[814]. These evidences, coupled with the lukewarm response to the project from Getúlio Vargas, suggests that the government tried to avoid as much as possible to give in to the demands of Góis Monteiro and compromise even more the already perilous state of government finances. This most probably pitched government against its Minister of war; in fact, Góis Monteiro would leave the government less than two weeks later, citing the muddy dealings with the pay rise as one of the reasons for departing the cabinet[815].

Some of the people involved in these events would make a career out of them. The president of the first commission that analyzed the raise would run for president of the Military Club weeks after the increase in salaries was enacted[816]. Góis Monteiro would a few years later be appointed Chief of the Army General Staff and later would return to head the Ministry of War.

The Army was definitely a crucial political actor. But, by diving into the perilous marshlands of politics, it also lost its untouchable aura. Soldiers were not seen by everybody as the unbreakable defenders of the nations; rather as privileged bureaucrats. Priestly function or civil service: the conception of officialdom was definitely moving towards the latter.

10.3 – Power consolidated: incorporation of the provisory pay raise (1935-1936)

Provisory: the pay raise was not supposed to endure forever. In Portuguese, it was simply called an *abono*. For how long? Nobody knew. The law said that it was provisory, but did not set a timeline for its end. After 1936, there was no budget line for the pay raise. Understandably, the Minister of the Treasury was in disquiet. He reasonably asked parliament for money to meet his financial obligations with the military[817]. The raise, conceived in just a few days, was bringing lasting headaches for deputies and senators. Cast between swords and accountants in 1935, they had simply chosen to defer the problem to the next legislature. Now,

[813] *O Radical*, 21 April 1935, "o reajustamento dos militares e o maquiavelismo dos políticos", http://memoria.bn.br/DocReader/830399/7532
[814] *Correio da Manhã*, 5 June 1935, "os senadores e o veto", http://memoria.bn.br/DocReader/089842_04/28099
[815] *Diário Carioca*, 10 May 1935, "a transmissão da pasta da guerra ao general João Gomes", http://memoria.bn.br/DocReader/093092_02/19240
[816] *Diário Carioca*, 16 May 1935, "o club militar e a importante assemblea de hoje", http://memoria.bn.br/DocReader/093092_02/19333
[817] *O Jornal*, 21 December 1935, "em prol da verdade orçamentária", http://memoria.bn.br/DocReader/110523_03/27554

they would have to find a definitive solution. Displeasing the Army was not an option. But who spoke for soldiers?

The government tried to take notice of the financial strain bearing on the public coffers. In 29 May 1935, following through with the previous Law's demands, the government installed the pompously-named "Mix Commission of Economic-Financial Reform"[818]. Its 10 members, headed by the Minister of the Treasury, received four tasks from the Law: reform the tax system; review the salaries of all public servants; reduce public spending; and broadly reorganizing the National Economy. Not the most modest undertaking. How they would harmonize increased salaries with reduced spending was anyone's guess. Anyhow, by January 1936, the body had created quite an impressive output. Its three sub-commissions, on "tax-administrative reform", "economic reconstruction" and "pay raises" had produced respectively thirteen, eight and one project. They included a full new law on income tax and a brand-new Water Code[819]. What was lacking was a proposal on military salaries: the one filed so far dealt only with civilians. Major Jaime Raulino Guimarães, then, individually proposed a bill, bypassing the sub-commission; it was sent by the full commission to the Chamber of Deputies.

Nine months passed until the President of the Republic sent another project to the Chamber backed by a report from the Minister of War, João Gomes[820]. His reasoning tried to favor both the military administration and the families of soldiers. He stretched back to the old argument that soldiers can only work well if they know that their families will be taken care of; since military pensions were not the most generous, many officers way past their physical prime kept working in the barracks to maintain their salaries. The service suffered. If the pay raise was incorporated into the basic pay, officers would get better pensions and, therefore, would feel free to retire. Their families would be happy and the bureaucracy would become more efficient. It was a no-brainer for deputies. Moreover, the modern military life had gotten so complex, demanding so much time, that soldiers did not have any time left to search for other sources of income in their free time; the solution had to be given by the government. Let us see if the deputies agreed.

The value to be incorporated in the budget was 162.453:704$500 (CD, 18/09/1936); not insignificant, but the national deficit was already hovering near the mark of a thousand

[818] The internal workings of the Commission was regulated by the decree 159 fo 14 May 1935 - https://www2.camara.leg.br/legin/fed/decret/1930-1939/decreto-159-14-maio-1935-515272-publicacaooriginal-1-pe.html

[819] *Jornal do Brasil*, 14 January 1936, "comissão mixta de reforma econômico-financeira", http://memoria.bn.br/DocReader/030015_05/60902

[820] *O Jornal* , 5 September 1936, "a incorporação do abono aos militares no orçamento da república", http://memoria.bn.br/DocReader/110523_03/32626

contos[821]. Regardless, the press got much less interested in the debates than in 1934[822] – this time, no threats came from the barracks.

This did not mean that they stopped fighting for their interests. In 25 September 1936, the project went to the floor, being received by several amendments. Deputy Genaro Ponte de Souza presented an amendment mandating not only to incorporate the raises into the basic pay of soldiers, but actually increasing it on the top of the new parcel. The parliamentarian revealed that his proposal actually came from deputy Diniz Júnior, who, being himself a soldier, considered it inconvenient to sign the proposition. The comparison with the civilians was the main theme: if non soldiers had recently received a pay raise, it was unfair to leave soldiers with what the deputy classified as a "random plan" (ACD, 02/10/1936, p. 18402-18403). This plan, however, was rejected by the reporter, João Simplício, when the project went to the reading, between 17 and 22 October. He used the dire financial situation of the country to justify his actions; however, this did not bar him from accepting an amendment incorporating the raise into the income of pensioners. As a matter of fact, most of the speeches did not bother to reckon with finances. Luiz Tirelli, for instance, mentioned that the civilians had gotten a 30.000 *contos* increase, while Diniz Júnior's amendment would have meant 19.000 *contos* in the pockets of soldiers. The comparison is actually fair: law authorized Brazil to have more than 70 thousand soldiers[823], while civil servants amounted to little more than 57 thousand men (ACD, 17/10/1936, p. 19350[824]). The Paraná congressional delegation alleged that the 19 thousand *contos* were nothing before a 3 million *contos* budget. And Diniz Júnior contended that "we can no longer claim, as before, that soldiers live in dignified idleness. Not anymore (…). We live in a state of war" (ACD, 02/10/1936, p. 19472). Duty: according to him, "without a raise, it is impossible for them to live with the dignity we demand from them" (ACD, 02/10/1936, p. 19472). Duty and demand were the two inseparable sides of this discourse: society demanded from soldiers do dress well and to sacrifice their lives for the sake of the motherland; soldiers did their duty. It was only fair that the State compensated them. There was also a subtle rebuke of accusations that soldiers did nothing: even the official discourse acknowledged some dissent.

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[821] *O Jornal*, 15 October 1936, "é preciso reduzir o déficit orçamentário" http://memoria.bn.br/DocReader/110523_03/33471

[822] Though newspapers covered the legislative path of the bill, they printed the news around the fifth page, instead of the headlines that were common in the reporting of the 1935 law. Cf. *O Jornal*, 17 october 1936, "as emendas ao reajustamento", http://memoria.bn.br/DocReader/110523_03/33511; *O Jornal*, 21 October 1936, "para que todos os governadores se manifestem sobre a liberal democracia", http://memoria.bn.br/DocReader/110523_03/33601

[823] Lei n. 131 de 9 de dezembro de 1935 - fixa as forças de terra e mar para os exercícios de 1936, 1937 e 1938. http://www.planalto.gov.br/ccivil_03/leis/1930-1949/L0131.htm

[824] Avaliable at: http://www.planalto.gov.br/ccivil_03/leis/1930-1949/L0131.htm

The pushback against soldiers did not work. In 22 October, the final form of the bill was approved with only the incorporation of the pay raise.

10.4 – What about the police and firefighters? The law 427 of 1937

By 1937, the polices were a formidable force in the Brazilian security landscape. After the 1932 uprisings in São Paulo, it had become clear that they should in a way or the other be brought under the control of the federal government; the 1934 Constitution had already made them reserve forces of the national military. This attachment had momentous consequences for the legal status of police officers: were they armed civilians, as it had been traditionally considered, or would they be deemed soldiers under the meaning of the law? This was one of the themes of the law 429 of 1937[825], which gave police officers and Firefighters of the Federal District and the Acre Territory the right to the *montepio* of the Army.

The issue at stake was art. 167 of the soon-to-be-old constitution of 1934: "military polices are considered to be reserves of the Army, and they will receive the same advantages given to it, when under mobilization or at the service of the Union". How far did the equalization go? And what did "at the service of the Union mean"? Deputy Arruda Câmara, a proponent of the project, reasoned that the polices were potentially at the will of the federal government at any given time, and, therefore, their members should receive exactly the same advantages as those serving under the national banner. He contended that, since 1853, almost all of social security – pensions and half-basic pay – was shared between the police and firefighters of the Federal District and the Army; the only exception was the *montepio* (ACD, 23/12/1936). Policemen had so far been served by the Civilian *montepio*, which seemed odd. But also, quite strangely fitting, to receive part of their post-retirement income from a civilian entity and the other part from a military one, reflecting their dubious placement.

The only squabbling – and a minor one – came from the Budget and Financial Commission. No one has the right to be surprised by that, I would say. In 31 March 1937, Barbosa Lima Sobrinho, the reporter at the Commission, issued an opinion alerting the Chamber to the perilous situation of the government's balance sheets. This meant, Lima Sobrinho said, that benefits should only be given to those strictly within the limits of their rights. The military *montepio*, just as like as its civilian counterpart, was regulated in an unsound

[825] 2nd discussion at the Chamber of Deputies: 17 December 1936. Debate at the National Security Commission: 17 December. Sending to the Budget and Finance Commission: 18 December. Declaration of urgency: 23 December. 3rd discussion: 1st January 1937. Debate at the Commission of Constitution and Justice: 12 and 26 January. Debate at the Finance and Budget Commission. Debate of the final project: 14 April.

fashion: the many beneficiaries and the generous pensions were not proportional to the limited pensions that were asked from employees (ACD, 31/02/1937, 29340). A similar situation had prompted a reform of the civilian *montepio* within 10 years of its first enactment; the military version of the institution was heading on the same direction. But, amazingly, after this apparently sensible reasoning, Lima Sobrinho contended that the Constitution, art. 167 left him with little choice but to give the benefit to police officers. Firefighters, conversely, were not explicitly mentioned by the constitution, said the deputy. But he analyzed several laws that equaled them with the police to conclude that also these securities professionals should be included in the bill (ACD, 31/02/1937, 29340). Quite interesting, this legislative technique: claim the need of financial austerity on one second only to pivot on the next one, using tenuous legal arguments to extend benefits to (almost) all categories alleging to be entitled to them.

In 29 April, the bill was enacted into law. Instead of creating a special *montepio* for officers, parliament bowed to the original idea and included them in the Army *montepio*. For congressmen, there was little doubt: police officers were fully-fledged soldiers. At least from the point of view of social security law.

10.5 – Using and interpreting the *Montepio* in the new, social state

In the 1930s, the *montepio* suffer some legislative changes. At that point, the benefits it paid were much more interesting than they had been in the past, and, as we have discussed in the previous sections, could be construed as privileged by some. They were intricate, for sure. But if anyone tried to harmonize them, to systematize and rationalize the plethora of conflicting provisions, it would be necessary to open a whole discussion about military benefits - one that could be risky for both sides. Civilians would probably have to face again the bitter taste of military menaces. When political forces are arranged in that way, inertia exercises its powerful force, and next to nothing happens. But, after the *Estado Novo* government was installed, deadlock could be broken by authoritarianism.

In 22 January 1938, the government issued the decree-law 196, which reformed in the short amount of 15 articles the military *montepio* – no more divided between the Navy and the Army. Now, even sub-officers and sergeants were entitled to the benefit. The *consideranda* used by the government also argued that the higher salaries of working soldiers were getting too dissimilar to the stagnant income of military pensions. Under the justification of equality, once more, the pay raise of one category (active soldiers) spawned a cascading effect that led to increases in the wages of other beneficiaries of social security. But it was not enough to

modify the law: it should also be organized. In 6 February 1939, the government consolidated the dispositions regarding the *montepio* by means of decree 3695, which systematized in 78 articles and three annexes all regulations on the *montepio* and the half-basic pay.

Quite striking is the indifference with which these two measures were received. In the three reports of the minister of war covering the early years of the *Estado Novo*, one cannot find references to these reforms. The report of 1940 referred to the sweeping reforms made in the organization of the Army in 1939, and referenced the seven "fundamental laws" of the Army enacted between 1938 and 1939: the law of general organization of the army (16 February 1938), the law of cadres ad effective (12 July 1938), recruitment (4 April 1939), promotions (1st December 1939), inactivity (22 January 1939), Code of Salaries (*Vencimentos e Vantagens* – 24 July 1939), military instruction (3 November 1939). Not a single reference to the changes on military pensions.

When the state is not willing to act, private individuals seized the moment. The problem, that the labyrinthine legislation of the *montepio* was tacked by lieutenant colonel Simões Pires, who published a book systematizing the whole legislation on military pensions in 129 pages. The text is organized in paragraphs directly reproducing articles from law and decrees, followed by the references from where they were transcribed. Troves of footnotes cite administrative decisions and other decrees that did not find their way into the main text. The work is divided in five parts: military *montepio* of the Army, basic half-pay, special pensions or due to work incidents, habilitation procedures and tables of pensions.

It was not the mostly intellectually stimulating book. But Simões Pires did not intent to achieve jurist stardom. He declared in the foreword that he intended to help those bearing the "functional duty" (SIMÕES PIRES, 1939, p. 5) of frequently using the legislation. It was a "sparse and confusing" legislation, as Pires (1939, p. 5) put it himself. He was on to something: the first law he cited on the section on the half-basic pay was art. 1st of the 6 November 1827 law. My reader must at this point be tired of hearing references to this law for more than 100 years. But it still had full force of law.

The compilation got some sort of official endorsement. After its first edition, Simões Pires published two annexes (*apostilas*) in the following years updating the work with the most recently issued regulations, in 1943 and 1944. The first bore an opinion from the General Staff of the Army authorizing its publication and praising its utility; Simões Pires also reproduced an article from the Director of War Logistics praising the book. But another, fundamental function of the book was highlighted by a review published at the *Revista de Administração Militar* and printed along with the book. According to this text, the "administrative lawyering around

military pensions was until a little ago one of the saddest aspects of our public administration": heirs of soldiers had been constantly explored by less than scrupulous lawyers extracting money because the military family frequently did not had sufficiently knowledge to pledge their cases before the military administration. The situation had changed, according to the reviewers, due to the recent creation of the provisory habilitation and the institution of the Service of Army Funds. The work of Simões Pires Would be instrumental in "doing away with such unscrupulous lawyering". The problem of caring for the military family was a constant in the bureaucratic literature[826], and it must never be forgotten when dealing with pensions.

The laws on the *montepio* were then organized. Not perfectly, but better than nothing. But, on this renewed context, did the way in which pensions were treated change?

Caring for the military family could come at an odd with the other main theme of military social security in the 1930s: financial constraints. This can be seen in a judicial case published in 1933 at the *Jornal do Commercio*[827]. Julieta Lima de Barros received a half-basic pay from his deceased father when his husband, a civil servant of the Ministry of the Navy, passed away. The pensions could not be cumulated, so Barros' daughters petitioned to inherit them. Tellingly, the Ministry of the Navy said they could inherit the pension from their mother before her death, while the Ministry of the Treasury disagreed. Treasurers will always root for austerity. The case was brought before court, and the judge proposed a reasoning that linked economic considerations to legal hermeneutics. He defended that beneficiaries of the *montepio* paid very little in comparison to the benefits they received; therefore, this institution could only be regarded as a favor or a benefit, not a fully-fledged right. In fact, the state had been for some time limiting new beneficiaries and trying to expand the income of the *montepio*. Therefore, its provisions could only be interpreted restrictively. The request was denied.

What is interesting in this case is that policy was used to guide judicial interpretation. Not that policy objectives were directly incorporated into judicial reasoning, in some sort of "teleological interpretation", or economic analysis of law. Rather, state actions were used as evidence of what should be the "true meaning" of the law. It happened that, in the age of the social state, public actions meant nothing less than policy. I would also add that in the interpretation of *montepio* as benefit, not right, there are two levels at work. First, in a

[826] Ex, dealing with habilitation procedures: *Gazeta de Notícias*, 21 February 1939, rápido o andamento relativo aos papeis das pensões militares", http://memoria.bn.br/DocReader/103730_06/20550; *O Jornal*, 17 February 1939, "para apressar os processos de habilitação a pensões militares", http://memoria.bn.br/DocReader/110523_03/49551/ ; *O Dia*, 26 February 1939, "o sargento faleceu há seis anos", http://memoria.bn.br/DocReader/092932/38163

[827] *Jornal do Commércio*, 13 October 1933, "3ª vara federal", http://memoria.bn.br/DocReader/364568_12/25356

positivistic sense, it is obvious that there is a right to the benefit: there is a law granting the pension, so beneficiaries are entitled to it. But, on the other level, this state concession is merely a favor, and not a *moral* right recognized by the state and covered by the law. This is why the judge moved to interpret it in favor of state interest, and not on private interest. This discussion, as the reader must by now be familiarized with, come a long way in Brazilian history; but, by now, it got entangled with the theoretical framework of the interventionist state. State-favoring and policy-driven hermeneutics: military pensions had been updated to the new times – all within a consolidated legislative framework.

By the late 1930s, military pensions had become an element of state policy. Organized in a seemingly technical fashion, with the political scrutiny reduced by the authoritarian *Estado Novo*, pensions could be better organized and structure. The price to be paid was that legal and moral considerations went to the background, and the system was to be governed by state policy – mostly, the relentless issue of lack of money.

10.6 – Politicized salaries: conclusions

In the 1920s and, especially in the 1930s, soldiers became central political actors. Their social law also got intertwined with this increasing political participation. Threats of coups, pressures from outside institutions, direct clashes between ministers, presidents, commanders and soldiers became recurrent fixtures whenever military wages were brought to the parliament to be discussed. In no other occasion this was more visible than in the debates on the pay raise of 1934, when some factions of the Army seemed to threaten a coup – possibly with the minister of war himself involved – while other officers tried to distance themselves from the conflicts of political pressure.

Being drawn into the spotlight, soldiers lost the somewhat special legal and political status they had enjoyed for so long. During the debates on the 1934-1935 pay raise, as we discussed, some rejected the theory that soldiers did not received salaries, because what they had to offer could not be paid with money: the professionals of the arms were now fully recognized as a category of the workers at the service of the state. This can be clearly seen on how the debates we discussed in this section were pursued: always, military salaries were compared with those of civilians, and both were discussed together. The 1927 pay raise predated that of civilians by only a year, and the 1935 raise was part of bill that originally increased the stipends of civil servants. Soldiers and public workers were now a single unity, to be debated together as the physical arm of the state. In 1936, parliament installed a commission to discuss

a revision of both the military and civilian *montepios*[828]. A state that was growing exponentially as it acquired ever more social responsibilities. The military had a special place in the political, legal and organizational order of the late First Republic and of Vargas government; a special, but not a separated place.

Politically charged and special. Nevertheless, social security of soldiers was less discussed than one could expect from their prominent social position. The 20 years covered by this chapter were the foundational time of Brazilian social security at large: new institutions, societies, medical services and pensions were instituted to care for an ever-larger group of workers, until a properly system of social security could be recognized by the early 1940s. Soldiers were not so involved in these discussions – mostly, because they did not need to. They already had a complex system of pensions that had been developing for more than 120 years, with an intricate array of provisions for soldiers, spouses, descendants to cover for incapacity, death, old age and medical necessity. This system sometimes even bordered on privilege. To discuss it was perhaps to risk some of its less equality-oriented aspects.

In general, for the social security of the military, the 1920s and 1930s were times of conservation and small gains.

[828] Diário de Pernambuco, 18 de agosto de 1936, "uma comissão especial encarregada de rever a legislação do montepio", http://memoria.bn.br/DocReader/029033_11/20586

Military law expanding: conclusions

The armed forces between 1920 and 1940 were signed by the defining incorporation of the ideology of the *armed nation* and, especially from the 1930s onwards, of *total war*. This conditioned how military law was structured and how soldiers related to politics.

If every single male Brazilian citizen was, from 1916 onwards, a potential soldier, military penal and disciplinary law could no longer be exceptional, utterly harsh, mightily frightening – more importantly, it did not need to be so. From the 1920 code of military justice, the military justice system got much more in line with principles of general law and criminal procedure. But intermingling civilian and military lives came with its own problems. In the 1920s, debaters frequently feared that military law had become either too much embedded in civilian principles or had not gone far enough in incorporating civilian practices. Each reform of the codes of military justice from 1926 onwards had to grapple with this clash, signaling that the division between military and civilian realities was an unstable topic, up for debate.

In the 1930s, the rise of fascism and international communism was leading the world towards authoritarianism, away from liberalism and, ultimately, towards an age-defining war. This unstable environment featured several menaces even in South America, which were consolidated in some German attacks against Brazilian war ships and – some real, some imagined – interferences from international communism in national politics. This led to a heightened preparation for war, meaning administrative reforms in the armed forces and also the creation of a legal framework for military justice in times of war, which would be put to use in the Italian campaign of 1944-1945. More immediate menaces had also induced similar developments at home, namely the military judiciary for the fight against the 1932 São Paulo insurrection.

This army, with a much more prominent role in society, had to face the question of how it should put itself forward politically. To foresee a total war is to put the whole nation into high alert, to reorder the whole economy, to set in motion structures capable of reordering the whole political life within the blink of an eye. This demanded that the army convinced political actors that sweeping, decisive action was needed. The model of state developed during the First Republic was not fit for this purpose: power was fragmented among several regional oligarchies, action was paralyzed by the needs of both federalism and liberal democracy. To summarize, it was hard to decide. And deciding is what officers are best prepared to do: hence their exasperation. In the 1920s, a new generation of young officers put forward demands of

reform, both economic and political. They were frequently repressed, but were ultimately successful in being part of the coalition that seized the state in 1930.

Military law was not involved in the repression of the political criminality of the *tenentes* in the 1920s. They were, after all, officers, with higher education, that were to be prosecuted before political courts. Enlisted personnel, conversely, were the target of pointed repression, and, until 1934, sergeants could not even vote. Most of the problems involving lower-ranking soldiers were dealt with by disciplinary measures, including dismissals, or the mere non-renewal of contracts. But political turmoil deepened even further in the 1930s. The debates on military wages show how the Army could act as a political actor. But, as many generals defended under the guide of Góis Monteiro, this political task must be undertaken by bringing the interests of the Army to the attention of the public opinion, not by allowing party politics to enter the barracks. The role of soldiers was widely discussed in the arguments about the pay rise in the late 1920s and early 1930s. These spats demonstrated that soldiers were seen as public servants just like many others, though they had some peculiarities. Their image was no more that of absolute heroism, of utmost sacrifice that justified a completely different treatment. As a matter of fact, most of the debates concerned budget, and not the needs of soldiers: a proof that the discussion was mostly pragmatic, and that the arguments claiming that soldiers were of some sort of a special nature were little more than rhetoric.

The Brazilian armed forces arrived at the gates of World War II with a military law much more similar to civilian law than seventy – or even 20 - years before. This was a result not only of the Army becoming more similar to other structures within the state, but also of a project of militarization of the whole society. A project that was limited, both by will and by budget – but one with real effects, politically consequential and, at some times, defining of whole periods of Brazilian history.

Which identity for military law? Conclusions

Between 1870 and 1942, military law went through nothing sort of a revolution. What was little more than aspiration by the end of the Paraguay War had turned into routine. Taken for granted. Codes, chairs in military schools, a sprawling literature: several elements of a fully-fledged discipline that were lacking for almost the whole 19th century were now safe conquests at the dawn of World War II. This momentous transformation proceeded in three different phases, as we have explored throughout this thesis, as the two twin processes of identification and distinction unfolded step by step, through several parts of military law and science, to finally yield a – mostly – modern body of law.

Between 1870 and 1889, military law was little more than a bundle of acts, decrees and practices far removed from civilian life, in desperate yearning of reform.

Regarding its identity, the law of the barracks was mostly a mirror of the administrative structure of the Army and the Navy. Since there was not a code, little room was left for logical reasoning and legal method to identify general principles capable of explaining and governing most aspects of the discipline. The academic world could hardly provide a harbor capable of sheltering and nurturing the fray vessel of military law. Chairs were few and most manpower was devoted to describing, rather than explaining and rationalizing, each provision. A few topics were eventually picked up for debate in military reviews, but they were mostly framed within the needs of the military administration, with few inputs from a strictly legal point of view. Policy was almost everything. And it could hardly be different. Military law was little more than a combination of hard power channeled to fulfill the needs of organized violence tempered by the always limited power of statutory law. The 1763 Articles of war were deeply laconic, leaving a lot of room for the *arbitrium* of judges; military pensions were mostly granted through an *ad hoc* procedure by parliament: these practices show how flare, context, political connections and the whim of the moment were paramount to define rights in the military realm.

Nothing of this was aided by the differences between the Navy and the Army. Different articles of war, different disciplinary regulations, different pensions, different ministries: the regulations of each force hardly communicated between themselves, leaving military law broken in two pieces – at least. Officers and enlisted personnel were also separated by a seldom-travelled abyss, with different expectations and penalties governing their disciplinary law, and few social security protections been shared between themselves.

Regarding distinction, military law remained mostly apart from regulations applying to civilians – though this never developed into a radical, absolute fracture. The lack of a code played a determinant role in keeping military legal practices separated from the currents sweeping general law, as some logics of *Ancién Regime* punishments would be perpetuated. Punishment was also harsher in the barracks: death penalty, whipping, administrative imprisonment continued to be applied to soldiers long after civilians could not even hear about them. However, as far as social security is concerned, the distance between military and general law was smaller. The half-basic pay and some parcels of military wages were a particularity of the forces, but other types of pensions reproduced experiences that were taking place among civil servants. *Montepios* had also been created for workers in other ministries, and individual pensions were frequently granted by parliament to judges, priests and others.

Military law was akin to a group of loosely connected islands on the outskirts of the sprawling but diffused archipelago comprising the Brazilian public service. Many categories of servants were also subject to queer regulations applying to themselves; soldiers could by no means claim that they were the only ones facing casuistry. The only aspect uniting them among themselves and separating their destinies from those of their colleagues was the specificities of discipline, needed to keep them in line before fighting.

From 1890 to 1920, however, military law would be more deeply aligned with contemporary law as its boundaries became clearer. Bridges were built between the islands of this particular sub-set of our archipelago, while the straits separating them from their neighbors were enlarged and better signaled.

These early decades of the First Republic watched the most momentous turn in the identification of military law. Both substantive and procedure law got their respective codes, meaning that anyone wishing to clearly understand principles, specificities and practices of military law had at least a clear starting point to work with. Which, obviously, do not mean that answers were straightforward. Doctrine could help to bring light to the shadows, and indeed the legal literature of military penal law flourished in an unprecedent way: several books were published commenting the code, starting polemics, giving guidance to soldiers, organizing bureaucracy. If both soldiers and lawyers frequently remained oblivious to the debates of the law governing military matters, at least some of them carved out a space where legal matters of the Army and of the Navy could be discussed.

Against a carefully considered proposal, the system of criminal law of the Navy and the Army were unified. Disciplinary law and social security law were not transformed into one, but

they also converged. For social law, both forces converged after some reforms in the 1890s replicated the specificities of one force into the legal system of the other.

The role of casuistry shrank. With the code in place, there was less space for idiosyncratic decisions from judges; individual pensions were granted less frequently by parliament until the practice died out almost completely. Yet, some special laws made to cope with specific emergencies, such as the disaster of the *Aquidabã* in social law or the Federalist Revolution for criminal law, kept being enacted. Though less frequently, improvisation remained as a challenge to the full constitution of military law as a system.

Regarding distinction, military law converged decisively towards civilian law. The 1890 Code cast away many rules that did not bode well with a modern legal system. Capital punishment was scrapped for times of peace, political jurisdiction for military courts was rejected and corporal punishment was finally curbed in the docs of the Brazilian Navy. Perhaps there is no better setting to see this process than the military law chairs: professors were now at once officers and law school graduates, and some general trends, such as criminal positivism, were thoroughly debated withing military law. Military and legal reasonings were frequently fused – though results were clearly uneven, with some being outright unsatisfying. Yet, one could hardy say that the law of the barracks relinquished its specificities: prosecution and judging continued to be responsibility of a single officer; officers and enlisted personnel kept being treated with clear differences.

Between 1920 and 1942, military law turned into a mature discipline. So much that progress sometimes stalled. Apart from military procedure, imagination was frequently lacking. At the same time, political and ideological changes in the armed forces impacted legal regulations, and had to be translated into legal practices.

Central organizational drives of this period were the ideologies of the *armed nation* and of *total war*. While the former posited that every single male citizen had to be trained in the military arts through the draft to defend the fatherland against foreign attacks, the latter proposed that, during war, every single economic element of a territory and its whole population must be channeled to support the conflict. Male citizens were now all potential soldiers, and, at the same time, civilian activities such as industry and agriculture could acquire a military meaning during a conflagration. This expanded the concept of security and led to the criminalization of a wider variety of acts. Most important of all, the relationship between army and society was now considered to be much closer, with more porous borders and a more active role for the armed forces.

The two ideologies of the armed nation and total war found an easy home in the law of the barracks and led military law to be more clearly identified. Military penal law expanded to tackle political crimes, though the relationship between military law and national security remained problematic until the last decades of the 20th century. New crimes were devised for times of war, guaranteeing a quicker and more efficient mobilization of national resources. Nevertheless, other changes were befalling military realms beyond the reception of the ideologies of the armed nation and total war. The 1938 code of military justice for the first time defined clearly the reach of military jurisdictions, settling with authority several long-standing conflicts. The border between soldiers and civilians was also better defined with a more thorough regulation of military polices, which got their own systems of military jurisdiction regulated by federal law.

Military law got, in a sense, more similar to civilian law. The 1920 code of military justice, in particular, separated the roles of prosecuting and judging, and extinguished the council of justification, bringing military justice more in line with civilian procedure. The codes of procedure and its reforms between 1922 and 1938 also gradually granted more power to civilian judges (*auditores*), simplifying the procedure and, at the same time, letting legal knowledge and reasoning play a larger role *vis-à-vis* the military ones. This movement was identified by agents at the time, and a few soldiers criticized this "demilitarization of military justice". Nevertheless, this process was pursued not only in one direction: as military law got more civilian, society at large got more militarized. The army grew in size and budget, and more and more young men were submitted to the draft or practiced their military skills in *tiros-de-guerra* (centers of instruction of the Army reserve).

Military law, then, followed a three-fold path during the seventy years covered by this thesis. First, it constituted a group of laws and administrative practices with little internal coherence, but highly distinct from common law. This situation was regarded with perplexity by many, and since the 1824 constitution, many governments took failed initiatives to reform the law of the barracks. From 1890 onwards, military law coalesced around some loosely defined central characteristics; they were, however, gradually approximated to those of general law: military law was civilized. From the 1910s onwards, however, this tendency was coupled with a second one, of militarization of civil society, that compatibilized even more military law with the life of the average man.

Most new branches of law develop their identity differentiating themselves from a parent branch, with which it shares some principles, but latter develops some differences – this was the trajectory of administrative law, for instance. Military law was different. From the start,

there existed a rather unique set of regulations, and identity developed as rules and interpretations more similar to those of general law were piece by piece incorporated into the system. This procedure also reflected a gradual juridicisation of administrative practices, which relied less and less on arbitrium and, at least ideally, attempted to draw their logics from established rules.

Gradually, the single most important idea underlining most of military law was identified with *hierarchy*. Military justice, particularly, is mostly founded upon the need to uphold this principle that grants coherence of action and unity of discipline to the armed forces. One of the greatest challenges in the modernization of the law of the barracks was to confront and harmonize this principle with democracy: how far could an enlisted soldier ask for clarifications from a superior? What should be the difference of treatment between officers and enlisted personnel, and how could this cut resemble too much the aristocratic organization of society? This set of questions guided the transition away from the imperial army – which had preserved, willingly or not, many elements from the Portuguese colonial administration – into a force in line with the needs of liberalism. But, as this transition was completed, another one was in order: one from the disorganized, politicized Army that overthrew the monarchy into a force able to face the multiple threats of 20th century affairs. With this second movement, new questions rose: if civilians are key to build up a war economy and can undermine dearly the war effort, how far can they be subject to military rules?

Soldiers are inevitably insulated from society at large. Physically, in the barracks. But also legally, with a different justice system with different social security, with a unique system of recruitment and promotion. Difference that can assume changing meanings with time. If in the early 19th century, the system of social security of the military was a meager repay of the sacrifices taken for the sake of the nation, with time, more and more rights accumulated, until military pensions were seen more and more as a privilege. This shows a tension that will ever be faced by military law: that between difference and equality between soldiers and civilians. If the highly specific lifestyle of soldiers will always demand a special legal system, it will always be hard to define when and how it shall be applied. As so, it also encapsulates a fundamental tension within the whole of modern law: how to treat diversity fairly. 19th century legal thought imposed the abstract subject of rights as the norm; military law never complied. The needs of war were higher than principles. In the 21st century, when diversity is gaining the forefront of the legal debate, the highly specific position of military law might look less striking. But we should not confuse ourselves. Pre-modern diversity was about carving away specific fields of society and granting them autonomy; military law existed before the 19th century under

this regime. But, to survive the new environment of liberalism, it was reinvented as a functional need of discipline. 21st century diversity is normally understood under the light of fundamental rights, of identity and of the protection of specific interests. Military law is not about that. It is about the protection of an institution, its efficiency, its coherence, frequently against persons and their fundamental rights. Military law and its diversity is neither a permanence of the past, nor an anticipation of the future: it is a second nature, a different order, obeying to unique logics.

Military law matured throughout the 19th and 20th centuries so to be able to tackle these two major issues: how to uphold hierarchy, and how far should military law differ from general law. The different conceptions of hierarchy, from a more aristocratic to a more functional one, and the different ideas on the relationship between army and society, from insulation to militarization of society, produced in their particular combinations, different types of military law.

Yet, discipline struggled to maintain unity. Though fundamental, the idea of hierarchy is a loose one, and better applied to disciplinary issued. Coherently, military penal law developed more than administrative military law. The former constantly received influxes from general penal law that provided inspiration for debates and methods which created a virtuous cycle of discussions that frequently led to reforms been pursued at the same time for both branches. Conversely, administrative law frequently lacked the degree of formalization of penal law to provide a coherent discourse able to deliver an independent discipline. If until the 1920s "military law" was taught as a single discipline, in the last one hundred years, most texts discuss only military penal law and procedure. The task of identification – as I have called it - is, therefore, still open to some degree.

In Brazil, the military was never too far removed from politics. Coups, pressuring, threats were frequently deployed to assure that the interests of the military would be upheld by politicians. These interferences reflected the different conceptions of the army, that could also be found in military law: from a disciplinary force maintaining social order during the empire to the positivistic vanguard of the turn of the 20th century to the professional force responsible to fight wars during the Vargas era. It might be surprising, however, to notice that military justice was seldom used to curb political dissent between 1840 and 1936. This is all the odder in comparative perspective, as many foreign jurisdictions used courts martial to fight insurgents. But Brazil chose to follow a different path. A special judicial system could be found since 1890 in the federal jurisdiction, which was used to process political crimes. And, whenever dramatic fights emerged, repression could come at the administrative level, or in the informal unleash of uncontrolled violence. *Canudos* comes to mind.

Military law consolidated and enforced different and evolving conceptions of the army, of soldiers and of the relationship between the armed forces and society. The quest for the right distance was and is a challenge always facing military and civilian administrators. Less difference between military law and civilian law frequently meant a more well-defined identity for this discipline. But it frequently also meant a more troubled and challenging relationship between society and its Army. It is never easy to regulate the organized use of force – especially against those exercising the true monopoly of legitimate violence.

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MINISTÉRIO DA GUERRA. Resolve dúvidas sobre casos de deserção de substitutos de praças do Exército. *O Direito: revista mensal de legislação, doutrina e jurisprudência*, Rio de Janeiro, ano 2, v. 6, pp. 514-515, 1875.

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MINISTÉRIO DA GUERRA. Resolve sobre castigos que podem ser dados aos inferiores quando rebaixados provisoriamente. *O Direito: revista mensal de legislação, doutrina e jurisprudência*, Rio de Janeiro, ano 10, v. 27, pp. 312-313, 1882.

MINISTÉRIO DA JUSTIÇA. Declara que a disposição do art. 41 do Cod. Crim. É inaplicável às penas impostas por tribunais militares a indivíduos condenados por crimes militares. O *Direito: revista mensal de legislação, doutrina e jurisprudência*, Rio de Janeiro, ano 5, v. 17, pp. 181, 1878.

MINISTÉRIO DA JUSTIÇA. Recomenda que não se apliquem castigos corporais aos sentenciados em cumprimento de pena no Presídio de Fernando de Noronha. O *Direito: revista mensal de legislação, doutrina e jurisprudência*, Rio de Janeiro, ano 6, v. 19, pp. 393, 1879.

MINISTÉRIO DA JUSTIÇA. Resolve dúvidas sobre a concessão de *habeas* corpus a Guardas Nacionais. O *Direito: revista mensal de legislação, doutrina e jurisprudência*, Rio de Janeiro, ano 2, v. 7, pp. 447, 1875.

MINISTÉRIO DA MARINHA. Manda observar na armada os avisos do Ministério da Guerra sobre publicações feitas por militares na imprensa. *O Direito: revista mensal de legislação, doutrina e jurisprudência*, Rio de Janeiro, ano 14, v. 37, pp. 334, 1886.

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I found ABNT's citation mode to be insufficient and costly to quickly inform the location of the parliamentary debates. This is because the date of publication is not the same as the date on which the debates took place, which, coupled with the existence of many volumes for each year, can create serious confusion. I preferred to create a new way of referencing for the annals of the House of Representatives, the Senate and the Constituent Assemblies, which would meet the needs of this type of work. The annals of the House that I used can be found on

the House's website at bd.camara.leg.br/bd/handle/bdcamara/2 and at Hemeroteca Digital Brasileira, from http://memoria.bn.br/DocReader/132489/1. For the Senate, the information obtained is at www.senado.gov.br/publicacoes/anais/asp/PQ_Pesquisar.asp.

The citation mode I have developed consists of four items, all located in parentheses, as in the following example: (CD, 1829, 5, 99). The first item corresponds to the institution to which the proceedings are linked; the second is the year in which the debates took place; the third is the volume in which the quoted passage is found; and the fourth is the page. The institutions are abbreviated as follows: CD - Chamber of Deputies; SI - Imperial Senate; SF - Senator of the Republic; AC - Constituent Assembly, followed by the two digits corresponding to the year in which the assembly took place. As of the 1920s, when the chamber makes the diaries available, I replaced the indication of the volume with the date of the discussion.

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