

Military Courts in Transition: The Latin American Case

Maria Celina D'Araujo

Pontifical Catholic University of Rio de Janeiro (PUC-Rio), Rio de Janeiro, Brazil

The paper explores a theme not well analyzed in Latin America: The military has to govern itself with autonomy by the unique justice and mechanisms of control, even if international law is not obeyed. We explain why all over the democratic world the trends are to limit the autonomy of military justice and to transfer this function to civilian courts. In doing so, we demonstrate the difference between Latin America and democratic countries in Europe, as well as the USA. Autonomous justice means power and special protection for a traditional organization, like the armed forces, which have weapons, political pre-eminence, and social legitimacy. The article intends to draw attention to internal processes to produce order and discipline in barracks, using conventional methods at a time when most armies are not made up of regular or permanent soldiers. Lately, armies look like major enterprises, but military codes have not had sufficient changes to cope with new challenges, such as human rights, gender inclusion, and new demands for more rights and justice. At the same time, terrorism makes the world more dangerous and greater demands are placed on the armed forces, such as rapid decisions sometimes of an unorthodox character. This makes things more difficult for international organizations concerned with justice, especially the rights of civilians not to be tried by military courts.

Keywords: military justice, human rights, armed forces, Latin America

Why Military Justice?

Military justice is related to two fundamental aspects of military organizations around the world. On the one hand, it is expressed by an internal disciplinary code, based on its own regulations, defining what an infraction is. Discipline is, alongside hierarchy and obedience, one of the fundamental pillars of life in the barracks. On the other hand, when we refer to military justice, we are also talking about systems of investigation and legal prosecution of crimes defined by law. In both cases, the independence, impartiality, and competence of commanders (in the first case) and military courts (in the second) are necessary conditions emphasized by human rights bodies around the world. That is to say, the armed forces generally have codes or disciplinary regulations that relate to the set of duties and obligations inherent to their internal administrative routine. They also have specific criminal codes that deal with crimes that threaten the integrity or security of the institution. They are two very distinct levels, and both are constantly under review.

According to Dahl (2014, pp. 1-2), possibly most countries have systems for dealing with minor disciplinary offences via summary punishments. These systems may be more or less seamlessly connected to the respective penal military justice system, or be separated from it, for instance, by having legal provisions defining which offences are to be handled by penal procedure, and which by summary punishment.

Maria Celina D'Araujo, Ph.D., professor, Social Science Department, Pontifical Catholic University of Rio de Janeiro (PUC-Rio), Rio de Janeiro, Brazil.

The military is, therefore, a peculiar organization in society. It watches and controls the behavior of its own members following a separate body of rules specified in codes and regulations and tried by commanders, courts, or special commissions. This goes beyond, for example, the power of a medical society or association of lawyers to discipline or expel its members, associates, and employees. Penalties for military offenses and crimes range from small sanctions to prison, or even the death penalty.

Vashakmadze (2010) coordinated an important study on institutional models of military justice practiced around the world. The work is based on the assumption that the main reason for having military justice would be the unique character of the armed forces, for which principles, such as organization, discipline, hierarchy, and obedience are of extreme importance, particularly in times of war when speedy decisions have to be made and specific needs met. In times of peace, these values would also be substantially more important for the military than for the civilian population (p. 10). Although this is not a dominant opinion today, exclusive military courts were created in most countries. Their scope and necessity, however, have been revised, especially with regard to the trial of civilians.

As is known, the military personality is produced during initial training, which emphasizes depersonalization, isolation, and mental reorganization.

It becomes clear immediately to those who go through this basic training that the sloppy, the arrogant, and the independent are out of place in the service. The investment required on the part of the civilian inductee to this new life is difficult, but his alternatives are limited. He cannot strike, desert, quit his job, or mutiny. If uncooperative and brought to trial, he knows that he has no right to jury trial or bail and that, in general, he is part of a highly undemocratic organization. (Ulmer, 1970, p. 4)¹

Defining which methods or rules should be used to impose loyalty and discipline among the military is a great discussion. There is no consensus on what should be controlled or what behavior should be punished. Moreover, each society, with its particular culture, will define in its own way what is expected of a good professional of the armed forces and what sanctions should be applied in case they do not do their duty. This margin of maneuver that each country creates for itself is not exempt from international controls regarding respect for life and human rights, a discussion that is becoming more frequent among jurists and international human rights organizations.

Because success in military operations of any kind requires resources, order, and organization as well as the subordination of individual preferences to a larger set of common objectives; rules of conduct unique to the armed forces were inevitable and military justice remains a place for them. (Fidell, 2016, p. 27)

In parallel to the demands for more rights for the defendants, there are problems that do not yet have clear answers, especially for troops that act in diverse conflicts worldwide (like US troops). Not by chance, this is the country most studied when it comes to military justice. On the other hand, the US armed forces are increasingly turning to temporary civilian cadres even in combat situations. In these cases, although they are not military, they must submit to penal codes that are geared to men and women in uniform.

Like all traditional and solid institutions, the armed forces react to change, although reform in the military justice system is becoming more and more current as a result of diversified uses of forces, gender issues, new types of conflict, or humanitarian interventions. The leaders of these organizations tend to be conservative, and

¹ Ulmer (1970) studied how the commander's justice in the USA has been replaced by controls and by scheduled cuts in new regiments and rights.

resistance to change is defended on the basis that any innovation may jeopardize national security at a dangerous time or neighborhood. Besides this, “there are also likely to be some changes that are the polar opposite of progress, such as efforts to broaden the scope of military justice to sweep in civilians under the banner of fighting terrorism” (Fidell, 2016, p. 95).

Courts, Commissions, and Commanders

The literature usually addresses the military justice theme on two levels. One that deals with “commander’s justice” refers to the judgment of administrative disciplinary infractions; the other that deals with criminal and criminal matters is tried by courts. In such cases, we may or may not have a military jurisdiction separate from the ordinary justice system. In Latin America, as we shall see, most countries have maintained an autonomous military jurisdiction in contrast to what has been happening in several European countries. The same occurs in Asian countries and even in situations considered failing states. According to Fidell (2016), the military is a hierarchical and pervasively regulated society in which individuals can exert tremendous influence over subordinates. What is more, military codes in the United States and elsewhere give commanders tremendous discretionary power. “Command influence” or “commander-centric” situations occur whenever a superior influences the action of some other participant in the military justice process (Fidell, 2016, p. 49).

In the British tradition, commanders decided what could be identified as a crime, and each one, in his command, applied the sanction at his discretion. In the United States, following the classical model of military justice handed down from the United Kingdom, commanders still play a powerful role.

Under the Uniform Code of Military Justice, commanders can not only dispense justice directly for minor disciplinary offenses through non-judicial punishment but can also decide—as “convening authority”—whether to convene ad hoc courts-martial, and determine such critical matters as who shall be prosecuted on what charges and at what potential level of severity, what resources the defense will have to prepare for trial, whether there will be a pretrial agreement or grants of immunity, who will serve on the jury, and even, in some cases, whether the findings and sentence should be approved or modified before appellate review. (Fidell, 2016, p. 10)

In general, military crimes are those that affect the armed forces in their capacity for defense, resistance, and combat. In addition, military crimes include a refusal to serve the armed forces, to be absent without justification, to defect, to betray the institution or a colleague, to assassinate a colleague, to surrender to the enemy, and to disrespect the rights of those who surrendered.

On the other hand, disciplinary infractions refer to behavioral failures in formal relations with superiors and colleagues, inadequate conduct in general, internal discussions, excessive alcohol consumption, and insubordination. In all cases, the debate converges to suggest reforms in military justice that imply more transparency, more rights of defense, and more respect for human rights, for civilian and the military. This is the theme of the book by Ogilvie and Norton (2014), that is, safeguarding the human rights of the military, especially in cases of homophobia, sexual and moral harassment, and rape. To this end, they propose the production of more detailed reports and the creation of ombudsmen, suggesting that all British citizens should have the same rights.

Gilbert (2014) recalled that before we came to the debate on rights, for centuries, what was called military justice was practically the will of commanders. In the 17th century in England, martial law was still wholly arbitrary. To serve an army was to renounce the rights that one might have as an English citizen. The law was, in fact, less important than order and discipline.

Nowadays, one of the main concerns has to do with gender-based violence and harassment. The Law Library of Congress (2013), which examines the treatment of the subject in the armed forces of Australia, Canada, Germany, Israel, and the United Kingdom, developed an important study on sexual offenses. In all these countries, the prosecution of sexual offenses among military personnel is being directed to the civilian justice system. Another example comes from the United States, with Senate Bill 1752, better known as the 2013 Military Justice Improvement Act (MJIA). It is a norm to give more importance to crimes of sexual harassment committed against men and women in order to ensure they have fair trials without perpetrators participating as judges. Reports from the United States Department of Defense show that in 2012 alone, 26,000 military personnel were victims of sexual harassment, with 14,000 men and 12,000 women. In 2014, considering only harassment accompanied by violence, the figure was 20,000. In this case, women were in the majority.

Types of Military Justice and the Era of Reforms

Military justice has undergone two major trends: first, limiting the scope of its jurisdiction by transferring jurisdiction to civilian courts; and second, preventing civilians from being tried by military courts. Examining how military justice is structured in several countries, Vashakmadze (2010) suggested the existence of a typology, as far as its organization is concerned. This classification tends to range from the absolute predominance of civilian justice in military matters to the extreme opposite, in which military courts are independent in judging their criminal and administrative issues.

The author also presents two intermediate models. One is a structurally hybrid model which has military chambers within civilian justice in countries, like Italy, Portugal, and The Netherlands. In the second intermediate model, two jurisdictional systems coexist (civilian and military) and cases of military crimes can be directed to one or the other. This is the case of Belgium, France, the United Kingdom, and the United States, for example. In both intermediate cases, higher civilian courts can be appealed to (p. 12).

Dahl (2008), a scholar of military justice and war crimes, pointed out that a military justice system can be spread along an axis from full martial courts to full control by civilian justice. Its typology, in turn, fits into an ideological continuum that, according to him, follows five definitions related to the advance of democracy. In the first case, we have martial courts convened for individual cases; in the second, permanent military courts; in the third, civilian courts specializing in military matters; in the fourth, civilian courts in peacetime; and lastly, civilian courts in times of peace and of war. Recent changes towards the civilianization of military justice have to do with the way wars are being treated and the end of compulsory military service, but mainly with aspects, such as the subordination of the armed forces to the control of civilians and democratic governments. For the author, a Norwegian military man and scholar, reducing the competence of military justice, or abolishing it, is a requirement to fulfill human rights demands. He reminds us that his country abolished peacetime standing military courts in 1921.

In his research about military justice models, Dahl (2014) stated:

My first simplification is to divide military justice systems into two groups. The 2001 survey made by the International Society for Military Law and the Law of War showed that the systems in 35 respondent states could be divided into “Anglo-American” systems based on courts-martial convened for the individual case, and “European continental” systems based on standing courts. (p. 4)

This leads the author to distribute the various military justice systems along an axis with the traditional fully military court-martial system on one end, and the fully “civilianized” system on the other, as we can see below (Dahl, 2014, p. 4).

Court-martial convened for the individual case	Standing military courts	Specialized civilian courts	General civilian courts in peacetime	General civilian courts in peace and war
--	--------------------------	-----------------------------	--------------------------------------	--

In his eyes, this is the general trend that has been taking place in military justice, influenced by the expansion of human rights values.

Nowadays, the administration of justice includes an increasingly important focus on human rights. The military justice systems of the United Kingdom and Canada, as well as those of several other countries in Europe, have experienced particular change because of concerns over human rights, including judicial independence and strong claims of military jurisdiction.

As pointed out, when it comes to military justice, the word reform is a constant. Several factors contributed to this. War crimes in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon, and later in Iraq and Syria, have raised the need to discuss more closely the flagrant crimes that violate national and international criminal laws. Moreover, intense technological changes and the access of women and homosexuals to the armed forces in several countries have brought about new reflections on the limits of repressive action among people in uniform. This debate has become more heated owing to the so-called war on terror, following the attack on the Twin Towers in New York in September 2011 (and the subsequent controversy surrounding the Guantanamo prison) and, more recently, to the offensive against the Islamic State.

International arrangements also endorsed demands for military justice reform to in Europe. These include the European Convention on Human Rights and Fundamental Freedoms (1950, revised in 2010), the International Covenant on Civil and Political Rights (1966), and the jurisprudence of the European Court of Human Rights (created in 1959 and in permanent activity since 1998).

In addition, internal factors in armed forces also forged the demand for reforms. These include technological changes, an increase in the number of civilians employed by military institutions, participation in peace-keeping operations, involvement in undeclared wars, and protection from terrorist attacks. All these internal changes in the corporation, along with changes in gender issues, required a more flexible system for dealing with discipline and administering military justice within the judicial framework of each country (Kremmydiotis, 2016, p. 313).

One of the most important collaborations on military justice reform and its challenges in the 21st century is the book edited by Duxbury and Groves (2016). It brings together a set of works on different countries and different themes related to this field of justice. There is, for example, a chapter dealing with the civilianization practiced in Australia, and another examines the countries of South Asia (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka), a region that brings together about a quarter of the world’s population and inherited from its colonizers a retrograde military justice system that has been little modified. The British military justice there had in mind an army of mercenaries, a situation now changed even though military codes have remained. India, for example, since 2007, has been trying to redefine its military justice; the subject is still under debate, especially regarding the right of the military to try civilians. On the other hand, Bangladesh and Pakistan follow militarized political structures, making it difficult to modernize military justice codes. South Asia brings together countries where the death penalty is still prevalent in the armed forces and where less

respect for human rights is available to men and women in uniform (McLaughlin, 2016).

As in South Asia, in Latin America, military justice precedes the existence of independent states and the armed forces had been understood as the main founders of these new countries (Rial, 2010). In this context, military justice is seen an indispensable instrument to guarantee discipline and obedience and is conceived of as a way of highlighting the authority and legitimacy of the chain of command. Besides a specific justice for the military, those new countries also founded systems of health, welfare, education, and leisure, which, overall, demonstrated a history of autonomy in relation to society.

Civilianization as a Crucial Part of Military Reform

According to Fidell (2016), especially since World War II, military justice has increasingly approximated to civilian and criminal justice. Civilianization has occurred on multiple levels. Where once the rules of evidence in a military court were unique to that system, today they are typically almost a copy of the rules followed in civilian criminal trials. Some countries have gone in the civilianization direction, especially in peacetime. “Germany and, more recently, France, are examples of this, with criminal cases against military personnel simply being handled by civilian prosecutors and courts. Others have enacted variations on this theme” (Fidell, 2016, p. 26).

Also, Gutiérrez and Cantú (2010) reminded us that since World War II, there has been an accelerating trend toward the merging of military and civilian legal systems, although the trend has been resisted by some old-timers. The trend in international judicial bodies is, therefore, to establish the right for every person to be tried by competent, independent, and impartial courts pre-established by law, with the right to an effective appeal. In other words, the principle of legality and the right to an effective and fair trial:

That is the purpose behind Article 14 of the International Covenant on Civil and Political Rights (ICCPR), the declarations of which “apply to all courts and tribunals within the scope of that article, whether ordinary or specialized, civilian or military”. (Gutiérrez & Cantú, 2010, p. 75)

Following these instructions, the jurisdiction of military courts should be limited to military offenses specifically committed by the military, thus excluding human rights violations, which are the responsibility of ordinary national courts. In the case of serious crimes under international law, the trial may be conducted by an international or internationalized criminal court.

Giorgio Agamben (2007) stated in his book *Estado de Excepción* that since the Second World War, “the voluntary creation of a permanent state of emergency (although possibly not declared in a technical sense) has become one of the essential practices of contemporary states, even those that call themselves democratic” (p. 25). Indeed, the increasing exceptionalization of law, reflected in the work of the armed forces in various parts of the world, generates a parallel system of justice in which arbitrariness rewards arbitrariness in the use of force and punishes the legitimate demand for respect and recognition of the human rights of hundreds of civilian victims of such abuses, as well as entire societies exposed to a situation of possible vulnerability to the excesses of power.

There are, therefore, multiple trends regarding the shift from military to civilian jurisdiction, particularly in peacetime, by reducing the competence of military courts, abolishing military courts, or abolishing military prosecution.

Military Justice in Latin America, Notes on the Recent Past

Leaving aside the case of Cuba, where the authoritarian military structure expresses the authoritarianism of the government and the absence of human rights, other countries occupy the news on issues of military justice. At present, in Latin America, this discussion is particularly strong in Colombia, where the armed forces carry out national defense and internal security functions. In the period following the end of the internal conflict with Fuerzas Armadas Revolucionarias de Colombia (FARC), the question of whether military and National Police soldiers should continue to be tried by military courts in case of terrorists' deaths was discussed (Moreno González, 2018). This may be the country in Latin America with the strongest liability for guerrilla-motivated military crimes.

The country has ruled that police and military officers that kill guerrillas should be tried by ordinary courts. This raised a serious confidence problem vis-à-vis counting the dead. The figure of the "false positives", i.e., dead civilians falsely presented as guerrillas killed in combat. This happens because many military and police personnel think that ordinary justice would be stricter than military courts.

The Economist (2002) noted that "according to an investigation by *El Tiempo*, a newspaper, published in May 2012, more than 12,000 military personnel were then involved in legal proceedings, with 4,990 cases in the attorney-general's office, of which 1,700 concern alleged 'false positives'". It makes most offences committed by soldiers subject to courts-martial, but reserves crimes against humanity, extrajudicial executions and the like for civilian courts" (*The Economist*, 2002).

Involvement with armed groups is also strong in Mexico. On October 2010, President Calderón "sent a proposal to Congress to allow civilian courts to try soldiers charged with rape, torture and organising 'disappearances' against civilians". Mexican human-rights organizations reacted arguing that "the only way to stop abuses would be to remove military jurisdiction from all alleged crimes against civilians" (*The Economist*, 2010).

In Venezuela, the political crisis of the 2010s is also a big military issue. According to Penal Reform, a group that assists prisoners, military courts jailed hundreds of people since protests against *chavismo* began. "Néstor Reverol, the interior minister, who has been indicted on drug-trafficking charges in the United States, tweeted that 'military courts will be in charge of all investigations that are necessary of these terrorists hired by the right'" (*The Economist*, 2016). In its 2013 annual report, the Inter-American Commission on Human Rights (IACHR) said that in Venezuela,

civilians must be tried by their natural judges, governed by common law and ordinary justice. Therefore, they should not be subject to the jurisdiction of military courts which have limited jurisdiction over the prosecution of members of the Armed Forces in active military service, for the offenses or crimes of function.

In 2018, the Inter-American Commission reiterated this recommendation and urged "urgently and emphatically to the State of Venezuela to stop the prosecution of civilians in military jurisdiction" (Comisión Internacional de Juristas [CIJ], 2018, pp. 115-116).

During the military dictatorships on the continent, the Inter-American Commission on Human Rights (IACHR) has denounced serious violations of human rights practiced by military justice systems in several countries. In Argentina,

a high percentage of detainees for subversive activities have been tried and sentenced by military courts, with sentences of up to 25 years in prison. The defendants have been denied the free choice of defense lawyers or had to accept military defenders who are not lawyers. (CIJ, 2018, p. 107)

After the Garcia Mesa Military Coup in 1980 in Bolivia, the IACHR undertook several observation missions in the country. The Military Government Junta assumed the powers of the executive, legislative, and judicial branches, attributing to itself also the exercise of constituent powers. The IACHR warned that one of the consequences of the militarization of the country would be to “put the Military Codes in force against civilians and transfer the competence of ordinary judges to military judges” (CIJ, 2018, p. 109).

For the IACHR’s first report on the human rights situation in Chile, in 1974, one of the most seriously problematic issues was the functioning of military justice and, more especially, “the extension of the powers conferred on the Military Courts as a consequence of the declaration, by decree-law, of the ‘state of war’” (CIJ, 2018, p. 110).

In its 1999 annual report, the IACHR found that during the state of emergency decreed that year in Ecuador, numerous civilians were prosecuted by military courts. “The IACHR considered that the guarantee of the natural judge was violated, since most of the detainees were subjected to military justice during the protests, without the guarantees of due process” (CIJ, 2018, p. 111).

In Guatemala, in 1983, the IACHR analyzed the Courts of Special Jurisdiction and found that they had functioned in accordance with secret military rules, regulations, and slogans (CIJ, 2018, p. 111).

In Haiti, in 1979, the IACHR found that although Article 18 of the Constitution did not allow any civilian to be subject to the justice of a military court, many civilians were prosecuted and condemned by the State Security Court. This special court had jurisdiction to hear crimes against the internal and external security of the state, as well as “infractions that the objective or instance circumstances record with a political character” (CIJ, 2018, p. 122). The same happened in Nicaragua in 1979, through the suspension of constitutional guarantees. The Martial Law granted to military courts the power to hear crimes against the internal and external security of the state and against public order (CIJ, 2018, p. 113).

In its 1989 report on Panama, the IACHR found the existence of a police jurisdiction that judged civilians: the *Corregidores Sistema*. It was a special group of police officers, with jurisdiction over a wide range of crimes.

IACHR also examined the changes introduced in Peru after the self-coup led by President Alberto Fujimori in 1990. This government issued sophisticated antiterrorist legislation establishing a system of “faceless judges” both civilian and military, and several crimes were submitted to military jurisdiction. Trials of civilians by military courts were common (CIJ, 2018, p. 114; Comisión Colombiana de Juristas, 2011).

Following the breakdown of institutional order in Uruguay in 1972, military courts acquired jurisdiction over civilians for a large number of crimes: against the nation, against the security of the state, and so on. The defendants’ judicial guarantees were drastically reduced, and even suspended. Military courts acquired exclusive and retroactive jurisdiction to hear the “crimes of the Nation” (CIJ, 2018, p. 115; Andreu-Guzman, 2004).

With the end of military dictatorships, most countries in Latin America have been revisiting their military codes.

Military Reform in Latin America

According to the political organs of the United Nations, the subordination of military forces to civilian power is the *sine qua non* condition for the validity of human rights and the rule of law. The Security Council, the General Assembly, and the Human Rights Council of the United Nations have on various occasions urged

the armed forces of several countries to respect civilian authority and supervision, as well as the rule of law, and to ensure the subordination of military forces to civilian authorities.

Although there is no express norm in any international treaty that prohibits the trial of civilians by military courts, there is an international consensus that these courts should respect human rights treaties. The abovementioned entities also reiterate that military tribunals must have the same characteristics of independence, impartiality, and competence inherent to any court of justice. Along these lines, the General Assembly of the United Nations has urged the authorities of several countries to reform military justice in accordance with the provisions of the International Covenant on Civil and Political Rights (United Nations document E/CN.4/1995/61, 4 December 1994, paragraph 93).

Historically, the prosecution of civilians by military justice has been revealed as a practice frequently used by authoritarian or military regimes, or by colonial powers, as an instrument of political repression. The Inter-American Democratic Charter, *Carta de Lima*, 2001, an Organization of American States (OAS) document², prescribes that the constitutional subordination of all state institutions to legally constituted civilian authority and respect for the rule of law of all entities and sectors of society are equally fundamental to democracy.

With few exceptions, these demands are not very welcome in Latin America. In almost every country, local tradition attributes great legitimacy to the military corporation, which in turn has resisted change. In some cases, as in Brazil, rules on military justice are untouchable.

In the region, the justice system is older than the independent nation-states. Military institutions, including judicial ones, came to the region together with colonial powers, especially Spain and Portugal. At that time, the military represented a superior political establishment at the king's service. Here, the role of military justice, especially in the second half of the 20th century, went beyond corporate issues.

In Peru, for example, in the 1980s and 1990s, it was used to defend military personnel accused of human and financial abuses in the fight against terrorism, and to try guerrilla sympathizers, sometimes summarily. During the Brazilian dictatorship, military justice acted in three dimensions: as corporate justice, playing its traditional role; as the government's political justice, trying those accused of conspiring against the government and national security; and as an intra-corporation political justice, trying military personnel suspected of political activity contrary to the regime (Garcia, 2016). During this period, a variety of uses of military justice was a constant in almost all Latin American countries (Rial, 2010).

With the return of democracy and the advent of the Inter-American Convention on Forced Disappearance of Persons (1994), the issue of human rights in the continent has become more relevant, as one might expect, and this has affected military courts. In any case, the range of situations that can be considered military crimes is still extensive (Bermeo, Castañeda García, & Castro, 2010, pp. 56-61).

Drawing on a large bibliography, Garcia (2016) summarized the military justice system in Latin America as defined by two characteristics: on the one hand, disciplinary codes, criminal norms, and laws applicable to the military; and on the other hand, a large body of judges, prosecutors, lawyers, and technicians responsible for compliance in this legal apparatus. At the same time, there are two subsystems in the region: a military criminal subsystem for military crimes and an administrative one for disciplinary offenses.

² OAS. Inter-American Commission on Human Rights (IACHR) Annual Reports, <http://www.oas.org/en/iachr/reports/annual.asp>.

Taking into account only the criminal system, the diversity existing in the region is large and does not indicate a linear trend of change (Bermeo et al., 2010). Latin American countries have taken initiatives to revise their military justice framework either through legislative initiatives (Mexico and Chile), internal initiatives of the Ministry of Defense (Chile and Uruguay), or through constitutional reforms (Nicaragua and Bolivia) (Garcia, 2016, p. 217). In all cases, the political factors are striking and the debate is still incipient when compared to Europe (Rial, 2010, p. 13). Guatemala, in Central America, maintains intact an autonomous military justice system dating from 1881. Peru, Bolivia, and Nicaragua introduced some changes, but only Argentina and Ecuador have made structural reforms. In 2008, Argentina ended military justice and began directing all military legal problems to the civilian justice system (Bermeo et al., 2010, p. 98; Chillier & Santos, 2010).

One issue that dominates the debate is the trial of civilians by military courts. Brazil is one of the few countries in Latin America that continues to apply this procedure (Bermeo et al., 2010, p. 64).

The region is awakening to the debate on reform, albeit slowly. Basically, two aspects stand out: (1) adaptation of the codes to the new international contexts and to internal democracy; and (2) elimination of military justice by submitting to civilian justice crimes and offenses previously referred to military justice. In this region, one of the countries that give most power to military justice is Brazil.

We have a table demonstrating the organization of military justice in most countries in Latin America and their capacity to judge civilian or not in the 2010s. In comparison with dictatorial times, the changes are notable. But the persistence of standing military justice in peacetime still seems like an anachronism.

Table 1

Military Jurisdiction and Permanent Military Courts in Times of Peace—Latin America

Country	Permanent military courts in peacetime	Trial of civilians by military courts in peacetime
Argentina	No	No
Bolivia	Yes	No
Brazil	Yes	Yes
Chile	Yes	No
Cuba	Yes	Yes
Colombia	Yes	No
Costa Rica	No	No
El Salvador	Yes	No
Ecuador	No	No
Guatemala	Yes	No
Haiti	No	No
Honduras	Yes	No
Mexico	Yes	No
Nicaragua	Yes	No
Panama	No	No
Paraguay	Yes	No
Peru	Yes	No
Dominican Republic	Yes	No
Uruguay	No	No
Venezuela	Yes	Yes

Note. Sources: Constitutions and official government websites of each country.

Brazil, together Cuba and Venezuela, is the only countries in the region where military justice has permanent courts allowed to try civilians in peacetime.³ Brazil is neither a one-party state, like Cuba, nor an electoral dictatorship like Venezuela. For this reason, Brazil deserves special mention.

Military Justice in Brazil

There are two systems of military justice in Brazil: one for the military police at state level, whose function is to provide public safety on the streets; and the other, the Military Justice of the Union for the armed forces, responsible for national defense. The state military justice is a corporate justice system for the military police of the states of the federation. In the first degree, it consists of judges (auditing judges) and courts of justice composed of officers of the corporation. In the second instance, it is made up of the Court of Justice (ordinary justice) or a state Military Court of Justice in the units of the federation in which the force numbers more than 20,000 members. There are state military courts of justice only in two states: São Paulo and Minas Gerais. Since 1996, however, malicious crimes committed by police officers against civilians are tried only by ordinary justice, regardless of whether there is a military court in the state (D'Araujo, 2010).

The Military Justice of the Union has been part of the judiciary since the Constitution of 1934. The Brazilian Constitution of 1988, as well as the reform of the judiciary, approved in 2004, did not alter this court in its design and structure. The same pattern introduced during the military administrations (1964-1985), now without its political attributions, continues. However, the Military Criminal Code (CPM), in force, dates from October of 1969, the harshest period of the dictatorship in its fight against the political opposition. With the 1988 democratic Constitution, the armed forces do not have the role, for the first time since the proclamation of the republic, of guardians of the Constitution, but continue to have internal security functions. Article 142 allows for military intervention to “guarantee law and order” (GLO) if there is a formal request from one of the three branches of the republic. Since then, the armed forces have participated in 135 such operations.⁴

According to the Military Penal Code of 1969, civilians may be tried by the Military Justice of the Union if they commit crimes against military property or administration, if they hinder military personnel in the exercise of their functions, or commit crimes in a place subject to military administration. This proposition, since 2017, is also valid for cases in which the armed forces are performing police functions identified as GLO. Attempts to redefine the functions of the institution to act in times of democracy have not been well received. As in other solidified organizations, resistance to change is immense, being in this case a corporate institution that holds not only the monopoly of force but also high levels of political and social prestige.

Structure and Functioning of the Military Justice of the Union in Brazil and Commander's Justice

Since 1992, the Military Justice of the Union has been organized on four levels: court, audits, councils, and judges. At the same time, it remains a form of commander's justice, i.e., commanders' power to try and to

³ Our findings differ from those reached by Kyle and Reiter (2011), due two major reasons. First, the article was first published in 2011, and since then there have been some changes. Second, they adopt a correlation between strength of civilian reformers, strength of military autonomy and take into account the level of military/violence conflict in each country and claims about human rights. In my opinion, all those aspects are very difficult to measure, so I opted to remain with legal reforms in Constitutions and laws.

⁴ Defense Minister, Fernando Azevedo e Silva, article in *O Estado de S. Paulo*. April, 20, 2019. The article is titled “Forças Armadas, sempre pelo Brasil”.

deliver decisions on disciplinary matters.⁵

The Superior Military Court, based in Brasília, is an appeals court, made up since 1969 (the most repressive period of the dictatorship) of 15 judges (called ministers) with lifetime appointments. They are appointed by the President of the Republic, after being heard and approved by the Federal Senate. Three come from the Navy, four from the army and three from the air force, all in active duty and from the highest rank of the career, plus five civilians. These are also chosen by the president of the republic with the following criteria: three from among lawyers of renowned legal knowledge and unblemished conduct, with more than 10 years of professional activity, and two by the same criteria from among auditing judges and members of the Military Public Prosecutor's Office.⁶ Its organization and competence are provided for in Articles 122, 123, and 124 of the Federal Constitution of 1988. The Military Justice of the Union is divided into 12 military judicial circumscriptions (CJM), which in turn host military audits, the bodies of first instance.

Military justice in Brazil, as we have said, tries military crimes and not infractions of a disciplinary and administrative nature. In these cases, "commander's justice" is applied, that is, the superior in the chain of command decides the penalty to be applied to the military offender. The accused, if he considers himself wronged by the penalty imposed by his superior, may appeal to the ordinary courts, but he will not be entitled to habeas corpus (Article 142, the second paragraph). This is one of the main factors that explain the sense of injustice within the barracks (Arruda, 2007).

A constitutional amendment (PEC 358/2005) has been ready to be voted on by Congress since 2010. It would introduce changes in the country's judicial system on issues, such as nepotism and the makeup of the STM, among others. The main factor to paralyze the proposal, still today in 2019, is the change to what is stated in Article 124 of the 1988 Constitution: "Military Justice is responsible for prosecuting and trying military crimes as defined by the law", that is, as defined by the 1969 Penal Code.

According to the current proposal, the article would read: "Military Justice is responsible for prosecuting and judging military crimes as defined by the law, *as well as exercising judicial control over the disciplinary punishments applied to members of the Armed Forces*" (emphasis added). The PEC also suggests a reduction in the number of judges from 15 to 11.

During interviews conducted by us with several ministers and former ministers of the STM, it became clear that the issue is controversial and divides opinions inside the institution. The arguments against and in favor evoke sensitive corporate issues for both the armed forces and the STM. One is that the role of the higher military tribunal in the disciplinary area could collide with so-called "commander's justice", and prove to be contrary to military cohesion. It would be possible for ministers to appraise decisions by their military peers in the barracks and to question or review their positions. Another aspect concerns the increased workload that this would mean for the court. For some, this new assignment would give more legitimacy to the existence of STM; for others, it would deviate from its functions. The divergence between ministers and the top brass has paralyzed the issue in Congress, which remains unable to vote on any matter that conflicts with the interests of the military.

In contrast to what happens across the world, and even on the continent, by the decision of the Supreme Court, the prerogative of STM to try civilians in accordance with the provisions of the Military Criminal Code

⁵ Law 8.457, October 4, 1992.

⁶ See <http://www.stm.jus.br>.

was reaffirmed in 2013. Also, in late 2017, Brazilian President Michel Temer sanctioned a modification of the Military Penal Code, approved by the National Congress, allowing common crimes (such as homicide) perpetrated by the military against civilians in the context of internal security operations (GLO) to be referred to Military Justice. Immediately, after this decision, the Office for South America of the United Nations High Commissioner for Human Rights (OHCHR) and the Inter-American Commission on Human Rights (IACHR) issued a joint statement expressing deep concern about this legal reform: “We urge that the bill be fully rejected, as it is incompatible with the international human rights standards ratified by Brazil” (Lovatón Palacios, 2017).

A survey carried out by *Metrópoles* newspaper (published on February 27, 2018), using the database of the Superior Military Court for the years 2010-2015, found that at least 68 civilians were subjected to military audits in Rio de Janeiro for situations of contempt or disobedience during GLO operations. The cases analyzed took into account the operations of the armed forces in three favelas: Alemão, Penha, and Maré complex. Of the 68 cases, only one did not result in conviction. Crimes of contempt and disobedience committed by civilians against military institutions, even in times of peace, are provided for in articles 299 and 300 of the Military Penal Code (CPM). In Common Court, these suits follow a detailed document drawn up at a police station, and the defendant responds in freedom. In Military Court, the crimes result in arrest. This is what has been happening when GLO is in force.

The Centro de Estudos Judiciários da Justiça Militar (STM) currently has 15 ministers for a clientele of about 660,000 people, members of the armed forces, active, reserve, retired, and pensioners. The Federal Supreme Court, the country’s highest court, has 11 ministers for a potential clientele of about 210 million Brazilians, in addition to safeguarding the Constitution (D’Araujo, 2016).

Research by the Center for Judicial Studies of Military Justice in 2013 shows that in 2012, the military court tried 1,777 military crimes. Of these, 33.6% concerned the desertion of conscripts; 11%, possession or use of illicit drugs; 7.48%, robbery; and 6.1%, embezzlement. The survey also shows that possession or use of illicit drugs was the fastest growing crime between 2008 and 2012, going from 5% to 11% of cases (STM, 2013). In other words, almost 60% of the work of the military court, a permanent military tribunal in peacetime, concerns typically juvenile crimes or crimes current in society at large. For this reason, it is worth reflecting on the need—or lack thereof—for a court so expensive for taxpayers in a country with so many social needs and with a system of justice that is still so precarious for ordinary citizens.

Final Notes

This study has sought to show the extent to which the issue of military justice is gaining relevance worldwide and the main reasons for this. It has also pointed out that changes are more intense in countries with greater democratic development, in which the autonomy of the armed forces is not the rule.

Military justice refers to a crucial issue, namely, the quality of the courts and their role. Special justice tends to lead to less robust rights of defense. Certainly, there will be different codes for specific activities, among them military codes. All this refers to the notion of the universalization of the rights of defense in democratic environments. It has also been found that little attention has been given to the issue of justice inside barracks. Commander’s justice may be an immediate tool for enforcing discipline, but it has great potential to produce discontent, feelings of injustice and desire for revolts. To the extent that the commander is also a judge, one may ask: Who tries the judge? In these cases, as well as in the astonishing cases of arbitrariness of military

courts against civilians, one tends to conclude that the *esprit de corps* that preserves the military “bubbles” will prevail. For all these reasons, brute force, weapons, justice, and discipline are a difficult but not impossible combination. Such studies become even more necessary when the military establishment in question is endowed with special prerogatives.

References

- Agabem, G. (2007). *Estado de excepción*. Buenos Aires: Adriana Hidalgo.
- Andreu-Guzman, F. (2004). Military jurisdiction and international law (Vol. 1). *International Commission of Jurists*. Retrieved from <https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf>
- Arruda, J. R. (2007). *O uso político das Forças Armadas*. Rio de Janeiro: Maud.
- Bermeo, L., Castañeda García, I., & Castro, G. F. (2010). Radiografía del sistema de justicia militar en América Latina. In J. Rial (Ed.), *La justicia militar: Entre la reforma y la permanencia*. Buenos Aires: RESDAL.
- Centro de Estudos Judiciários da Justiça Militar (STM). (2013). *Projeto de pesquisa institucional sobre condutas criminosas de maior incidência para a Justiça Militar da União*. Brasília: Relatório.
- Chillier, G., & Santos, L. (2010). Derechos Humanos y Justicia Militar en Argentina. In J. Rial (Ed.), *La justicia militar: Entre la reforma y la permanencia*. Buenos Aires: RESDAL.
- Comisión Colombiana de Juristas. (2011). Tribunales militares y graves violaciones de derechos humanos. Retrieved from <http://www.coljuristas.org>
- Comisión Internacional de Juristas (CIJ). (2018). *Fuero militar y Derecho internacional: Los civiles ante los tribunales militares* (Vol. II). Retrieved from <https://www.icj.org/wp-content/uploads/2018/05/Universal-Tribunales-Militares-Vol-II-Publications-Reports-Thematic-reports-2018-SPA.pdf>
- D'Araujo, M. C. (2010). *Militares, democracia e desenvolvimento: Brasil e América do Sul*. Rio de Janeiro: FGV.
- D'Araujo, M. C. (2016). A persistente primazia política da corporação militar. *RBED*, 3(2).
- Dahl, A. W. (2008). *International trends in military justice*. Presentation at the *SJA/LOS Conference*, Garmisch, Germany.
- Dahl, A. W. (2014). Independence, impartiality and competence of the judiciary, including military courts. Presentation at expert consultation organized by the *Office of the UN High Commissioner for Human Rights*. Retrieved from <https://www.ohchr.org/Documents/Publications/training9chapter4en.pdf>
- Duxbury, A., & Groves, M. (Eds.). (2016). *Military justice in the modern age*. Cambridge: Cambridge University Press.
- Fidell, E. R. (2016). *Military justice: A very short introduction*. New York: Oxford University Press.
- Fidell, E. R., & Sullivan, D. H. (Eds.). (2002). *Evolving military justice*. Annapolis, MD: Naval Institute Press.
- García, I. C. (2016). Military justice in Latin America: A comparative analysis. In A. Duxbury and M. Groves (Eds.), *Military justice in the modern age*. Cambridge: Cambridge University Press.
- Gilbert, A. N. (2014). Military and civilian justice in eighteenth century England: An assessment. *Journal of British Studies*, 17(2), 41-65.
- Gutiérrez, J. C., & Cantú, S. A. (2010). A restrição à jurisdição militar nos sistemas internacionais de proteção dos direitos humanos. *Sur-Revista Internacional de Direitos Humanos*, 7(13), 75-97.
- Kremmydiotis, P. (2016). The influence of human rights law on the reform of military justice. In A. Duxbury and M. Groves (Eds.), *Military justice in the modern age*. Cambridge: Cambridge University Press.
- Kyle, B. J., & Reiter, A. G. (2011). Dictating justice: Human rights and military courts in Latin America. *Armed Forces and Society*, 38(1), 27-48
- Kyle, B. J., & Reiter, A. G. (2013). Militarized justice in new democracies: Explaining the process of military court reform in Latin America. *Law and Society Review*, 47(2), 375-407.
- Lovatón Palacios, D. (2017). Recente Reforma à Justiça Militar no Brasil: Voltar a julgar delitos comuns contra civis é um sério retrocesso para a democracia na América Latina. *Justicia en las Américas*. Retrieved from <https://dplfblog.com/2017/10/19/recente-reforma-a-justica-militar-no-brasil-voltar-a-julgar-delitos-comuns-contra-civic-e-um-serio-retrocesso-para-a-democracia-na-america-latina/>
- Lurie, J. (2013). *The supreme court and military justice*. Washington, DC: CQ Press.
- McLaughlin, R. J. (2016). The impact of the “civilianisation” of military administrative law on the “command power”. In A. Duxbury and M. Groves (Eds.), *Military justice in the modern age*. Cambridge: Cambridge University Press.

- Meier, M. W., & Hill, J. T. (2018). Targeting, the law of war, and the uniform code of military justice. *Vanderbilt Journal of Transnational Law*, 51, 787-806.
- Moreno González, F. A. (2018). Eliminación de la justicia penal militar en la Policía Nacional de Colombia en el posconflicto. *IUSTA*, 2(49), 145-167.
- Ogilvie, S., & Norton, E. (2014). *Military justice: Proposals for a fair military justice system*. United Kingdom: The National Council for Civil Liberties.
- Poydashef, R. S. (1976). Military justice: A reinforcer of discipline. *Naval War College Review*, 29(1).
- Rial, J. (Ed.). (2010). *La justicia militar: Entre la reforma y la permanencia*. Buenos Aires: RESDAL.
- The Economist*. (2002). Who should try the soldiers? A controversial reform of the military courts. Retrieved from <https://www.economist.com/the-americas/2012/12/15/who-should-try-the-soldiers>
- The Economist*. (2010). Impunity in Mexico: Getting soldiers in the dock. Retrieved from <https://www.economist.com/americas-view/2010/10/20/getting-soldiers-in-the-dock>
- The Economist*. (2016). An unlikely heroine, the rebellion of Venezuela's top prosecutor: Luisa Ortega Díaz poses a threat to the regime. Retrieved from <https://www.economist.com/the-americas/2017/06/20/the-rebellion-of-venezuelas-top-prosecutor>
- Ulmer, S. (1970). *Military justice and the right to counsel*. Lexington: University Press of Kentucky.
- Vashakmadze, M. (2010). Legislating for the security sector guidebook *Understanding Military Justice*. Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF).