



Guerra e pace in età moderna

Annali di storia militare europea

4

## Tra Marte e Astrea

Giustizia e giurisdizione  
militare nell'Europa  
della prima età moderna  
(secc. XVI-XVIII)

*a cura di*  
Davide Maffi

FRANCOANGELI

## *Guerra e pace in età moderna. Annali di storia militare europea*

Gli Annali si pongono l'obiettivo di colmare, in ambito italiano, l'assenza di una sede specificamente dedicata a studi di carattere storico-militare, inteso nel suo senso più ampio, in relazione ai secoli dell'età moderna (XV-XIX). Nelle intenzioni del Comitato scientifico vi è, inoltre, la speranza di coinvolgere stabilmente studiosi italiani e stranieri, in modo tale da creare un terreno di continuo scambio e discussione. Dal confronto infatti del panorama storiografico italiano con quello straniero emerge l'assenza di indagini centrate su prospettive nazionali o regionali comparabili con le ricerche condotte sui casi tedesco, olandese, francese, austriaco, britannico o spagnolo. Esistono certamente molti studi meritevoli di grande attenzione, ma sono mancate le indagini volte a ricostruire la presenza italiana nelle varie guerre europee e la partecipazione dei diversi Stati italiani alle grandi conferenze diplomatiche dell'età moderna.

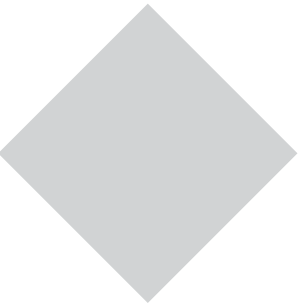
Come indica il titolo, la storia militare sarà intesa anche dal punto di vista politico, economico e sociale, con un taglio cioè di tipo interdisciplinare, accogliendo i contributi di specialisti che si dedicano sia alle tematiche storico-militari sia allo scenario internazionale occupato sempre più spesso dalla costruzione di una pace stabile e duratura.

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# *Introduzione – Tra Marte e Astrea. Giustizia e giurisdizione militare nell’Europa della prima età moderna (secc. XVI-XVIII)*

Davide Maffi\*

All’interno della cospicua produzione di studi dedicati dagli storici del diritto – ma non solo da quelli visto il costante e continuo interesse dei modernisti per tutta una casistica di problemi legati all’amministrazione della giustizia nell’*ancien régime* – al complesso universo delle istituzioni giuridiche della prima età moderna, col funzionamento dei vari apparati di giustizia, dei tribunali e delle forze di polizia, passando attraverso l’analisi dei conflitti di competenze, che sfociavano sovente in contrasti violenti e furibondi, tra i tribunali ordinari e quelli facenti capo agli ordinamenti ecclesiastici e feudali, sino a toccare aspetti diversi dei sistemi penali dell’Europa moderna, un ruolo senza alcun dubbio assai marginale è stato riservato a quei lavori dedicati allo sviluppo di una giurisdizione militare indipendente<sup>1</sup>.

\* Università di Pavia

<sup>1</sup> Non è chiaramente possibile indicare in questa occasione la massa di studi usciti nel corso degli ultimi decenni sui vari aspetti dell’amministrazione della giustizia nell’Europa della prima età moderna. Ci limiteremo a segnalare alcuni tra i più recenti lavori apparsi in Italia a cui si rimanda per un approfondimento, come quelli di G. Alessi, *Il processo penale. Profilo storico*, Roma – Bari, 2001; G. Angelozzi e C. Casanova, *La giustizia criminale in una città di antico regime. Il tribunale del Torrione di Bologna (secc. XVI-XVIII)*, Bologna, 2008; M. Bellabarba, G. Schwerhoff e A. Zorzi (a cura di), *Criminalità e giustizia in Germania e in Italia. Pratiche giudiziarie e linguaggi giuridici tra tardo medioevo ed età moderna*, Bologna, 2001; I. Birocchi, *Alla ricerca dell’ordine: fonti e cultura giuridica nell’età moderna*, Torino, 2002; C. Nubola e A. Würigler (a cura di), *Suppliche e gravamina. Politica, amministrazione, giustizia negli stati italiani e nel Sacro Romano Impero*, Bologna, 2002; I. Fosi, *La giustizia del Papa. Sudditi e tribunali nello Stato pontificio in età moderna*, Roma – Bari, 2007; e K. Härtner e C. Nubola (a cura di), *Grazia e giustizia. Figure della clemenza tra tardo medioevo ed età contemporanea*, Bologna, 2011.



Un interesse esiguo che forse si può in parte spiegare con la mancanza di limiti e frontiere ben definite tra la giustizia militare e quella ordinaria che rendono in alcune occasioni assai complicato stabilire chiaramente dove si esauriscono, terminano, le competenze dell'una o dell'altra parte. I ministri di giustizia incaricati di mantenere l'ordine in una regione o provincia non limitavano la loro attività ai soli civili, ma sovente estendevano la loro autorità anche sul personale delle forze armate, tanto da rendere assai nebuloso il saper distinguere a quale dei due mondi appartenessero di fatto siffatti funzionari, se agli apparati burocratico – amministrativi delle nascenti burocrazie statuali o all'universo militare<sup>2</sup>.

Eppure sin dal basso Medio Evo le monarchie europee iniziarono a sviluppare una giurisdizione autonoma incaricata di perseguire e punire i soldati che in una qualche maniera fossero venuti meno ai loro obblighi istituzionali o avessero infranto il codice disciplinare. Una legislazione che prese a farsi sempre più complessa e ramificata, dando luogo a scontri con le autorità locali volte a definire una volta per tutta la piena indipendenza del *fuero militar* nei confronti delle magistrature ordinarie. Nella seconda metà del XVI secolo la monarchia spagnola poteva già vantare di possedere un sistema assai sofisticato che la pose all'avanguardia rispetto alle altre potenze continentali. Ma soprattutto fu la seconda metà del Seicento a vedere l'avvio di un processo di continue riforme in questo settore: gli stati, infatti, presero a dotarsi di una serie di codici e regolamenti sempre più raffinati svincolando la giustizia militare da quella ordinaria. In Francia a partire dal 1665 venne sancita la superiorità dei consigli di guerra, gli unici incaricati di giudicare gli appartenenti alle forze armate, limitando così pesantemente le competenze non solo dei tribunali civili, ma anche l'autorità degli intendenti<sup>3</sup>. Anche l'imperatore nel 1673 con l'introduzione dei *Kriegsartikel* si dotò di un primo completo codice militare indipendente destinato a restare in vigore sino al 1808<sup>4</sup>. In Inghilterra grazie al *Mutiny Act* del 1689 si gettarono le basi di un sistema giudiziario mi-

<sup>2</sup> Su tutti citiamo il caso dei *sénéchaux* e dei *baillis* ufficiali incaricati di amministrare la giustizia nella provincia francese che per alcuni storici rappresentarono solo ed unicamente una branca dell'amministrazione giudiziaria ordinaria, ma che altri, fra cui Roland Mousnier e William Beik, sono più propensi a metterne in risalto più che altro la vocazione militare rispetto a quella civile. Su questo aspetto rinvio alle pagine di B. Sandberg, *Warrior Pursuits. Noble Culture and Civil Conflict in Early Modern France*, Baltimore, 2010, pp. 134-135.

<sup>3</sup> J. Lynn, *Giant of the Grand Siècle. The French Army 1610-1715*, Cambridge, 1997, pp. 401-405; G. Rowlands, *The Dynastic State and the Army under Louis XIV. Royal Service and Private Interest, 1661-1701*, Cambridge, 2002, pp. 94-96; J. Chagniot, *Justice Militaire*, in *Dictionnaire de l'Ancien Régime*, a cura di L. Bély, Paris, 2003<sup>2</sup>, pp. 711-712.

<sup>4</sup> M. Hochedlinger, *Austria's Wars of Emergence 1683-1797*, London, 2003, pp. 134-136.

litare totalmente estraneo da quello civile, a cui sino allora era stato sottoposto il personale dell'esercito e della marina<sup>5</sup>.

Nel corso degli ultimi decenni, anche grazie alla riscoperta del ruolo del "militare" all'interno delle formazioni statuali della prima età moderna e della sua crescente importanza nelle società del tempo, si è così potuto assistere anche ad un certo rifiorire di studi e ricerche su questo particolare tema<sup>6</sup>. L'insieme dei lavori qui raccolti non pretende sicuramente di dare un quadro esaustivo e completo dei molteplici problemi sollevati durante l'età moderna dal sorgere di questa particolare giurisdizione, ma vuole semmai fornire alcune tracce, spunti, per ulteriori approfondimenti su alcuni aspetti della questione.

Così il lavoro di Christopher Storrs, che apre il volume, rappresenta una sorta di introduzione generale al problema ripercorrendo le varie fasi dello sviluppo di una giustizia militare autonoma nell'Europa moderna tra inizio Cinquecento e fine Settecento. Un ritratto d'ampio respiro che tiene conto dell'evoluzione dei tribunali militari, destinati a trasformarsi ben presto in corti marziali, e dello sviluppo dei vari codici di guerra nei vari paesi, senza dimenticare il ruolo svolto dalla giustizia militare nella repressione dei crimini e le relazioni militari – civili. All'universo germanico è dedicato il successivo saggio di Peter Wilson, che analizza l'evoluzione dei vari sistemi punitivi introdotti nelle forze armate dei vari stati del Sacro Romano Impero Germanico, a partire dalla pubblicazione del codice criminale carolino del 1532 sino alla vigilia della grande rivoluzione. Quello fornito dall'a. si presenta come un quadro complesso in continua evoluzione in cui vengono affrontati di volta in volta le questioni relative allo sviluppo di una legislazione e di una giurisdizione militare, diverse a seconda dei vari stati. All'interno del quale un particolare occhio di riguardo viene sempre dato all'analisi dei ministri di giustizia, delle procedure seguite, sino ai provvedimenti presi per mantenere l'ordine e ristabilire la disciplina.

All'area ispanica sono dedicati i successivi contributi di Alicia Esteban Estríngana e Manuel Lomas Cortés che hanno preso in esame due diversi aspetti della formazione di una struttura giudiziaria militare nei dominî degli Asburgo di Madrid. Nel primo caso Alicia Esteban si è occupata della formazione ed evoluzione della *Superintendencia de la Justicia Militar* all'interno della struttura militare e politica di governo dei Paesi Bassi spagnoli. Un mi-

<sup>5</sup> B. Manning, *An Apprentiship in Arms. The Origins of the British Army 1585-1702*, Oxford, 2006, pp. 266-267, 277, 422.

<sup>6</sup> Citeremo solo i lavori raccolti da J. Byrn, *Naval Courts Martial, 1793-1815*, Farnham, Surrey, 2009; e la monografia di M. Alía Plana, *Historia del Cuerpo Jurídico de la Armada*, Madrid, 2011. Più in generale per una bibliografia dettagliata sullo stato dell'arte rinvio ai saggi di Christopher Storrs e Peter Wilson raccolti in questo volume.

nistero che da temporaneo, straordinario, creato ad hoc per porre fine agli endemici disordini e alla mancanza di disciplina imperante all'interno delle file delle forze armate di sua maestà cattolica e destinato ad essere cassato una volta risolti i problemi, si trasformò un ben presto uno dei pilastri del sistema giudiziario militare della regione. Mentre Manuel Lomas ha seguito da vicino l'evolversi del sistema giudiziario militare sulla flotta di galere mediterranee della corona, in cui ha saputo ricostruirne le strutture di governo, la giurisdizione, non sempre limitata al solo universo militare, l'attività dei giudici e dei vari funzionari regi.

Infine, un ultimo blocco di lavori è stato dedicato alle istituzioni giuridico – militari di due degli antichi stati della penisola italiana. In dettaglio, Giuseppe Vittorio Parigino si è occupato, basandosi su una serie di fonti di prima mano, delle procedure disciplinari vigenti all'interno delle strutture delle milizie stanziali del Granducato di Toscana nella seconda metà del Cinquecento. Il tutto con particolare riferimento all'attività del commissario delle Bande nei confronti di una serie di reati ed infrazioni commessi da parte dei descritti, ovvero le reclute chiamate a far parte delle milizie medicee. Mentre Davide Maffi ha analizzato l'evoluzione delle strutture giudiziario – militari nello Stato di Milano tra il 1535 e il 1700 in relazione ai rapporti con la società civile lombarda e agli scontri sostenuti dall'*auditor general* col Senato e le magistrature locali in difesa del *fuero militar* dalle ingerenze dei tribunali ordinari.

Davide Maffi

# *Military Justice in Early Modern Europe*

Christopher Storrs\*

## **1. Introduction**

Between 1500 and 1800 armies – and navies – and the conduct of war were transformed in Europe. Historians disagree about the pace, scale and timing of the various changes which made up the larger transformation and many also now doubt the applicability of the label ‘The Military Revolution’ coined half a century ago by Michael Roberts to describe developments between the middle of the sixteenth and the middle of the seventeenth century<sup>1</sup>. However, broadly speaking, by the later eighteenth century there were more permanent, or standing, armies (and in some states navies<sup>2</sup>) in Europe, monopolised by the prince or state. These forces were also much larger than in the past. These changes had various consequences, with more than narrowly military implications. Many of those consequences have been amply researched; but many others have not been sufficiently investigated, or have not been explored at all. Among those aspects which need fuller consideration are the criminal, or judicial, or legal, or penal ones. We should not exaggerate the neglect: some aspects of this large

\* University of Dundee. This essay is a revised version of a paper originally published as *Giustizia militare, militari e non militari nell’Europa della prima eta moderna*, in *Militari e societa civile nell’Europa dell’eta moderna (secoli XVI-XVIII)/Militar und Gesellschaft im Europa der Neuzeit (16.-18. Jahrhundert) Atti della XLVII settimana di studio, Trento, 13-17 settembre 2004*, a cura di Claudio Donati e Bernhard R. Kroener, Bologna, 2007, pp. 573-610.

<sup>1</sup> M. Roberts, *The Military Revolution 1560-1660*, in Idem, *Essays in Swedish History*, London, 1967, pp. 195-225; G. Parker, *The Military Revolution 1560-1660 – A Myth?*, in «*Journal of Modern History*», 48 (1976), pp. 195-214; J. Black, *A Military Revolution? Military Change and European Society 1550-1800*, Basingstoke, 1991. These and other contributions to this discussion are reprinted in C. J. Rodgers, ed., *The Military Revolution Debate. Readings on the Military Transformation of Early Modern Europe*, Boulder, 1995.

<sup>2</sup> Cf. M. S. Anderson, *War and Society in Europe of the Old Regime 1618-1789*, London, 1988, pp. 94 ff.

subject have been considered. These include, for example the development of thinking about whether a war was lawful (or just) and about what was lawful (or not) in wartime<sup>3</sup>; the extent to which men were in the armed forces because they were criminals (and more likely once in uniform to offend)<sup>4</sup>; the efforts of governments to prevent, i.e. to punish, both specifically military but also other types of offence on the part of both men and officers<sup>5</sup>; and the often difficult relations between civilians and soldiers. However, by contrast with the massive literature on the law and lawyers, and on crime and punishment in the non-military sphere in early modern Europe, military law, lawyers<sup>6</sup>, and justice have attracted relatively little attention<sup>7</sup>. This is unfortunate, because military justice is a subject of some importance: it has been suggested, for example, that Spain's armies were less effective in the first half of the seventeenth century in part because of the decay of the system of military justice<sup>8</sup>.

What follows focuses on the development of a distinctive system of both policing and courts (i.e. courts-martial) in early modern armies, made necessary by the appearance of large, permanent armies; crime and its punishment in early modern armies, including the punishment of not only obviously 'military' offences (for example, cowardice, desertion, insubordination) – whether committed by the men or their officers (and the most senior commanders) – but also of acts considered criminal in civilian society (for example, blasphemous

<sup>3</sup> Cf. G. Parker, *The Etiquette of Atrocity: The Laws of War in Early Modern Europe*, in Idem, *Empire, War and Faith in Early Modern Europe*, London, 2003, pp. 143-168.

<sup>4</sup> Cf. J. R. Hale, *War and Society in Renaissance Europe 1450-1620*, London, 1985, pp. 84 ff.; S. Conway, "The Great Mischief Complain'd of": Reflections on the Misconduct of British Soldiers in the Revolutionary War, in «William and Mary Quarterly», 47 (1990), pp. 370-390 (p. 374).

<sup>5</sup> For the Savoyard army, cf. C. Storrs, *War, Diplomacy and the Rise of Savoy, 1690-1720*, Cambridge, 1999, pp. 20 ff.

<sup>6</sup> Spanish military lawyers included Juan de Lancina and D. Pedro Ronquillo, the former writing a history of the revolt of Messina (1674-78) and a treatise on politics, the latter becoming a distinguished diplomat. On the former, cf. M.T. Cid Vázquez, *Tacitismo y Razón de Estado en los Comentarios Políticos de Juan Alfonso Lancina*, Madrid, 2002.

<sup>7</sup> This is beginning to change. Whereas G. Parker, *The Army of Flanders and the Spanish Road, 1567-1659*, Cambridge, 1972 and 2004, devoted relatively little space to the policing of that force, recent studies of Habsburg Spain's other major fighting force by D. Maffi, *Il Baluardo della Corona. Guerra, esercito, finanza e società nella Lombardia seicentesca (1630-1660)*, Florence, 2007; and Idem, *La Cittadella in Armi. Esercito, società e finanza nella Lombardia di Carlo II 1660-1700*, Milan, 2010, are much more interested in an issue whose broader implications they fully acknowledge. The recent M. Hochedlinger, *Austria's Wars of Emergence 1683-1797*, Harlow, 2003, also, pp. 134-136, briefly discusses military justice in the Austrian Habsburg army.

<sup>8</sup> F. González de León, *La Administración del Conde Duque de Olivares y la Justicia Militar en el Ejército de Flandes, 1567-1643*, in «Investigaciones Históricas», 13 (1993).

my, murder, theft); the existence of a privileged system of justice for soldiers, in Spanish, the so-called *fuero militar*; the growing criticism of military justice in the eighteenth century and the developing awareness of the distinctions between 'civil society' and 'military society', and in some parts of an anxiety that military was encroaching upon civil justice/jurisdiction<sup>9</sup>.

Unfortunately, throwing light on these issues is not easy, not least because we still know too little about the judicial systems and practices of too many of the armies of early modern Europe. This difficulty is due in part to the lack of sources. Few records survive of general courts-martial, for example<sup>10</sup>, and even fewer of regimental courts-martials<sup>11</sup>, the tribunal which in the many armies, at least in the eighteenth century dealt with most criminal offences committed by the men<sup>12</sup>. However, far more source material certainly exists<sup>13</sup>, both in the public records and in private hands<sup>14</sup>. It should certainly be possible to say something about a subject which increasingly interests those historians who recognise that there is more to the ever larger standing armies of early modern Europe than the merely military<sup>15</sup>; it may also be a means of

<sup>9</sup> This tension was most sharply expressed when the American Declaration of Independence – misleadingly – accused George III of having “affected to render the Military independent of and superior to the civil power”, cf. S.M. Pargellis, review of C.E. Carter, ed., *The correspondence of General Thomas Gage, 1763-1775*, 2 vols., New Haven, 1931-33, in «Journal of Modern History», 7 (1935), pp. 338-339, and J.S. Tiedemann, *Patriots by Default: Queens County, New York, and the British Army, 1776-1783*, in «William and Mary Quarterly», Third Ser., 43 (1986), pp. 35-63; but the anxiety was by no means absent in contemporary Europe.

<sup>10</sup> Cf. H. Bullock, *Court Martial – 1668*, in «Journal of the Society for Army Historical Research» (hereafter JSAHR), 6 (1927), p. 184, for a warrant (order) for a court martial, found in PRO/WO/71; and H. Bullock, *A General Court Martial in 1666*, in JSAHR, 7 (1928), for an account found in PRO/WO/89/1 [General Courts Martial 1666-95].

<sup>11</sup> S. Loriga, *Soldati. L'istituzione militare nel Piemonte del Settecento*, Venice, 1992, p. 139, notes the non-survival of records of trials of the Savoyard (Piedmontese) *Uditorato di Guerra* (see below). Cf. also G.A. Stepler, *British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the later Eighteenth Century*, in «English Historical Review» (hereafter EHR), 102 (1987), p. 860; A.N. Gilbert, *Military and Civilian Justice in XVIII<sup>th</sup> Century England: An Assessment*, in «Journal of British Studies», 17 (1978), p. 63.

<sup>12</sup> Gilbert, *Military and Civilian Justice*, cit., p. 57; M. Urban, *Fusiliers*, London, 2007, p. 78.

<sup>13</sup> Cf. L. van Meerbeeck, *Inventaire des archives des tribunaux militaires*, Gembloux, 1939.

<sup>14</sup> The work of both A.N. Gilbert and G. Stepler depends largely upon the official, War Office records available in the National Archives at Kew (London). Cf. also J. H. Leslie, *A General Court Martial in 1708*, in JSAHR, 4 (1924), pp. 161-166. For the diary of an officer of one of the Brunswick regiments in British service in America during the independence struggle, and what this reveals about military justice, cf. H. Doblin, *The Case of the Musketeer Andreas Hasselman*, in «Military Affairs», 51 (1987), pp. 73-74.

<sup>15</sup> Cf. F. Andújar Castillo, *Poder militar y poder civil en la España del siglo XVIII: Reflexiones para un debate*, in «Melanges de la Casa de Velázquez», 28 (1992).

giving a voice to some of the thousands of ordinary soldiers of that era who are otherwise hardly known to us<sup>16</sup>.

## 2. Military Justice and Courts-Martial

The new, larger armies (and navies) put pressure on older structures of military discipline, as did the inability of governments to pay and supply their expanding forces; frequently the outcome was disorder<sup>17</sup>. The growth of armies between the sixteenth and eighteenth centuries inspired a body of literature, some of it penned by men who had served in the military legal system (below), on the need for armies to be properly controlled and for the prince to punish soldiers who committed excesses<sup>18</sup>. To ensure discipline and good order it was necessary, as in any other (i.e. civilian) system of justice, to have appropriate regulations (often called articles of war), which were frequently re-issued, especially in wartime – and to ensure that those subject to it knew its content<sup>19</sup> – police to investigate and arrest malefactors, and courts and judges to try those accused of breaching those laws. In many states this meant the overhaul and even disappearance of older institutions and the emergence of new ones in their place.

The era therefore witnessed a growing body of orders – articles of war and so on – whose ever greater volume and complexity soon prompted efforts to codify and simplify: in England<sup>20</sup>, Spain (1632), Sweden<sup>21</sup>, Prussia

<sup>16</sup> Cf. E. K. Wirschafter, *From Serf to Russian Soldier*, Princeton, 1990, p. xvii.

<sup>17</sup> Parker, *Army of Flanders*, cit., pp. 185 ff.

<sup>18</sup> A. Espino López, *Guerra y cultura en la Época Moderna*, Madrid, 2001, pp. 289-290, 302.

<sup>19</sup> In October 1720, following a number of cases in which court martials acquitted the accused (deserters), on the grounds that they had been ignorant of the law, Philip V of Spain ordered that officers must read to their men the regulations, J. A. Portugués, *Colección general de las Ordenanzas Militares*, 10 vols., Madrid, 1764-65, vol. II, pp. 530-531. In Dundee in 1651, a court-martial decided that a proclamation forbidding the occupying English troops leaving their quarters without permission should be communicated to the troops by 'beat of drum', G. Davies, *Dundee Court-Martial Records, 1651*, in «Miscellany of the Scottish History Society», Vol. 3, Edinburgh, 1919, p. 45.

<sup>20</sup> The code issued by the earl of Leicester in 1585 before departing for the Low Countries – perhaps the most extensive of Elizabeth's reign – is printed as an appendix in C. G. Cruickshank, *Elizabeth's Army*, Oxford, 1966<sup>2</sup>, pp. 296-303. In 1675 Charles II's illegitimate son, the Duke of Monmouth gave orders for his regiment, which was about to leave England for the Low Countries, to observe the articles of war, Articles to be observed [April 1676], *Calendar of State Papers Domestic, 1675-76*, London, 1907, pp. 91-92. In 1692, William III re-issued James II's Articles of War of 1686, J. Childs, *The British Army of William III 1689-1702*, Manchester, 1987, p. 84.

<sup>21</sup> Gustavus Adolphus issued a code of military law in 1621, L. Boynton, *Martial Law and the Petition of Right*, in EHR, 79 (1964), pp. 255-284, at the p. 284.

(1656)<sup>22</sup>, France (1707)<sup>23</sup> and Piedmont (1711), where a code of military law was drafted in the early decades of the eighteenth century but was not published until 1770<sup>24</sup>. The delay in producing a military code in Piedmont is the more striking because king Victor Amadeus of Sardinia ordered the preparing of civil ‘constitutions’ which did appear, after long gestation, in 1730<sup>25</sup>. But however long it took<sup>26</sup>, the need for a military code was increasingly recognised by sovereigns<sup>27</sup>. Codification and clarification of military law<sup>28</sup>, which to some extent parallels the far better known reform by a number of enlightened eighteenth century monarchs of the civil and criminal law in their states, was often accompanied by a reduction both in the seriousness of some offences and a moderation of penalties. In Spain, for example, Charles III’s regulations of 1768 were less harsh on those recruits who subsequently declared themselves Protestants<sup>29</sup>. Further codification was made necessary by new military legislation in the eighteenth century itself: Colon y Larreategui’s

<sup>22</sup> F. Tallett, *War and Society in Early Modern Europe, 1495-1715*, London and New York, 1992, p. 126.

<sup>23</sup> *Code Militaire, ou Capitulation des reglements et ordonnances de Louis XIV Roi de France et de Navarre, Faites par les Gens de Guerre depuis 1651 jusques a present*, referred to by G. Satterfield, *Princes, Posts and Partisans. The Army of Louis XIV and Partisan Warfare in the Netherlands (1673-1678)*, Leiden, 2003, p. 170.

<sup>24</sup> Loriga, *Soldati*, cit., pp. 14-15.

<sup>25</sup> G. Symcox, *Victor Amadeus II. Absolutism in the Savoyard State 1675-1730*, London, 1983, pp. 193 ff.

<sup>26</sup> For Russia, cf. E. K. Wirschafter, *Military Justice and Social Relations in the Prereform Army, 1796 to 1855*, in «Slavic Review», 44 (1985), pp. 67-82.

<sup>27</sup> In 1725 the English envoy in Turin reported a meeting there of a ‘general council of war’, whose purpose was said to be the framing of military ordinances which should replace the general lack of uniformity between regiments, National Archives, London (Kew) (formerly Public Records Office) [NAL], State Papers [SP], 92/31, Molesworth to Newcastle, 10 Feb. 1725. Cf. also P. Bianchi, *Onore e Mestiere. Le riforme militari nel Piemonte del Settecento*, Torino, 2002, pp. 64 ff.

<sup>28</sup> In 1765, a decree was issued in Portugal clarifying the procedure in court-martials in that country, Thomas Hay to Conway, 21 Sept. 1765, Lisbon, NAL/SP/89/60 For the court-martial of senior officers of (supposedly Swiss) Royaux Etrangers, cf same to same, 9 Oct. 1765, Lisbon, SP 89/60. These developments should be seen in the context of the military reforms implemented in Portugal after the Seven Years War and overseen by the count of Schaumburg-Lippe, cf. C. Banaschik-Ehl, *Scharnhorsts Lehrer: Graf Wilhelm von Schaumburg-Lippe: Die Heeresreform 1761-1777*, Osnabruck, 1974. According to one report, the tribunal was effectively leant on to change an initially less severe collection of penalties, the future marques of Pombal being hostile to the regiment from its establishment in 1763, Hay to Conway, 18 Feb. 1766, and enclosed copy of extract of sentence, pronounced on 24 Oct. 1765, of the council of war, SP 89/62.

<sup>29</sup> F. Colón y Larrategui, *Juzgados militares de España y sus Indias*, Madrid 1797, cit., IV, pp. 281-282.



*Juzgados militares de Espana y sus Indias*, besides including many orders dating from before 1768 also included a great volume of decrees since that date.

As for a police and judicial organisation to enforce these codes, in France, the sixteenth century saw the decline of the *connetablie* and the rise of the provosts<sup>30</sup>. Originally, provosts had functioned as police and magistrates with archers (including the so-called *maréchaussée*) as their support staff (police)<sup>31</sup>. However, by 1600 the *maréchaussée* had largely abandoned its responsibilities in the sphere of military justice, to become responsible for internal order<sup>32</sup>. For John Lynn, developments in this sphere in the seventeenth century reflect the larger triumph of the king, his Secretary for War and the system of intendants. Thus from c. 1643 provosts increasingly functioned as members of a new structure of military courts, or *conseils de guerre*. Before c. 1643, individual officers judged their own men, but this changed under Le Tellier, with the development of the *conseil de guerre* i.e. a formal military court constituted as a board, and responsible to the intendant, who also functioned as a (police) investigator. By 1690, regimental *conseils de guerres* still occurred, but *conseils de guerres* of the whole army were more usual. Field commanders retained an important discretionary power in the application of military justice, i.e. the punishment of offenders, but this too was being eroded by 1700. For Lynn these developments are typical of the way the authority of the king, or the state, was being exerted at the expense of that of the captain and regiment. However, the intendants may have been acquiring too many responsibilities, at the expense of their effectiveness. For that reason, from 1665, their role in the administration of military justice was reduced and that of army officers enhanced<sup>33</sup>.

In England, the medieval office of Constable disappeared early in the reign of Henry VIII<sup>34</sup>. Throughout the sixteenth century, therefore, military policing and justice were the responsibility of the marshal, who investigated the most serious offences (those carrying the death penalty), and his subordinate the provost-marshal, whose office developed considerably in this period<sup>35</sup>. Charles I made abortive efforts to develop a distinctive structure of

<sup>30</sup> L. Boynton, *Tudor Provost Marshal*, in EHR, 77 (1962), pp. 437-455, here pp. 437-438.

<sup>31</sup> Unless otherwise indicated, the following follows J.A. Lynn, *Giant of the Grand Siècle. The French Army 1610-1715*, Cambridge, 1997, pp. 401 ff.

<sup>32</sup> Boynton, *Tudor Provost Marshal*, cit., p. 453.

<sup>33</sup> G. Rowlands, *The Dynastic State and the Army of Louis XIV. Royal Service and Private Interest, 1661-1701*, Cambridge, 2002, pp. 94-96.

<sup>34</sup> L. Boynton, *The Tudor Provost Marshal*, cit., p. 439.

<sup>35</sup> In 1513, Henry VIII's articles of war detailed the provosts' duties, L. Boynton, *The Tudor Provost Marshal*, cit., p. 438; Cruickshank, *Elizabeth's Army*, cit., pp. 47 ff. For the 'Mar-

military law in the 1620s<sup>36</sup>, but by the eighteenth century the English – British after the Union with Scotland (1707) – army had a system comparable to that of the French of general and regimental court-martials – and more informal company court-martials<sup>37</sup> – besides courts of enquiry and other tribunals<sup>38</sup>. By the eighteenth century, and probably well before<sup>39</sup>, the Judge Advocate (General) oversaw the system of military justice: he reviewed cases and sentences, for example, receiving transcripts of all trials<sup>40</sup>, and also presided over courts-martial, acting as prosecutor<sup>41</sup>. It has been suggested that English practice differed from that elsewhere in Europe in that only commissioned officers could serve on courts-martial<sup>42</sup>. The tribunals which functioned in Britain's navy echoed those of the army<sup>43</sup>, although practice necessarily differed. A minimum attendance (of ships captains) was laid down for courts-martial. This was difficult to ensure, ships being dispersed to different duties, and was one reason why general courts-martial were rare in the navy: in 1708, the assembly of a court martial in the West Indies, to try two of the British admiral, Wager's captain, both accused of dereliction of duty in the recent assault on the Spanish treasure convoy, was delayed for this reason<sup>44</sup>. For this reason,

shall General' and 'Provost Marshal' in the Cromwellian army in Scotland in 1651, cf. Davies, *Dundee Courts-Martial*, cit., pp. 21, 59.

<sup>36</sup> Cf. Boynton, *Martial Law*, cit., pp. 278 ff.

<sup>37</sup> Stepler, *British Military Law*, cit., pp. 860, 867, 881. According to Stepler, the extant proceedings of the 1<sup>st</sup> Regiment of Foot provide a record of over 1,000 cases involving NCOs and common soldiers between 1747 and 1800.

<sup>38</sup> For the different types of court [hierarchy] and powers (sentences) – and procedure(s) – in operation during the American Revolution, cf. Online Institute for Advanced Loyalist Studies, <http://www.royalprovincial.com/military/courts/courts.htm>.

<sup>39</sup> Cf. Davies, *Dundee Court-Martial*, cit., p. 21; Bullock, *Court Martial – 1668*, cit.; and Idem, *A General Court Martial in 1666*, cit. In 1668 the office was held by Dr. Samuel Barrow.

<sup>40</sup> Gilbert, *Military and Civilian Justice*, cit., p. 63. In 1728 the Judge Advocate General was asked to write to all colonels that in future where courts-martial were trying more than one man for desertion, the court should say which appeared most guilty (to help decide who was to be executed), *ibid.*, p. 61-2; in 1754 the then Advocate General, General Charles Gould, advised the Secretary for War, Henry Fox, that a recently imposed sentence of 1500 lashes (for mutiny), if inflicted in a single session amounted to a capital sentence, *ibid.*, pp. 52-53.

<sup>41</sup> In 1760, in the absence of the Judge-Avocate, his deputy presided at Sackville's court-martial.

<sup>42</sup> Gilbert, *Military and Civilian Justice*, cit., p. 61.

<sup>43</sup> In general, cf. D. Baugh, *British Naval Administration in the Age of Walpole*, Princeton, 1965, pp. 142-143, and N.A.M. Rodger, *The Wooden World. An Anatomy of the Georgian Navy* London, 1986. For a more specific study, cf. M. Eder, *Crime and Punishment in the Royal Navy of the Seven Years War, 1755-1763*, Aldershot, 2004.

<sup>44</sup> G. M. Trevelyan, *England under Queen Anne*, 3 vols., London, 1930-32, vol. II, *Ramillies and the Union with Scotland*, pp. 405-407; C. R. Phillips, *The Treasure of the San Jose. Death at Sea in the War of the Spanish Succession*, Baltimore, 2007, pp. 172 ff.

too, much justice in the navy was devolved to captains, in effect in breach of the formal rules<sup>45</sup>. Clearly, the *raison d'être* of the armed forces ensured that their legal systems worked in a manner very different from the civilian system.

In Spain, where in 1574 mutineers demanded that no corporal punishment should be imposed without due trial<sup>46</sup>, Charles V had established in each army an auditor general of war to oversee military justice<sup>47</sup>. In 1587 Philip II issued new orders regarding the authority of the Auditor General and his subdelegates<sup>48</sup>; and in 1594 he established the office of Superintendente de Justicia Militar, with jurisdiction over the officials of the high command<sup>49</sup>. Thereafter, each of Spain's armies – of Flanders<sup>50</sup>, Lombardy<sup>51</sup> and Catalonia – and individual garrisons<sup>52</sup> had its own police and judicial officials, a structure headed by the *Superintendente de la Justicia* and Auditor General<sup>53</sup> (who heard appeals from other auditors) and supported by a *proboste general* and his staff<sup>54</sup>. Overseeing all was the Council of War<sup>55</sup>. This system was only modified by

<sup>45</sup> Rodger, *The Wooden World*, cit., pp. 218 ff.

<sup>46</sup> Parker, *Army of Flanders*, cit., pp. 190-191.

<sup>47</sup> Maffi, *Baluardo della Corona*, cit., pp. 267-268.

<sup>48</sup> Cf. Colón y Larrategui, *Juzgados militares de España y sus Indias*, cit., vol. III, pp. 2 ff.; and I. A. A. Thompson, *War and Government in Habsburg Spain 1560-1620*, London, 1976, pp. 115-116.

<sup>49</sup> Espino López, *Guerra y cultura*, cit., p. 330.

<sup>50</sup> Cf. diagram in Parker, *Army of Flanders*, cit. p. 277. Typical of the neglect of this figure, Parker does not list the holders of these two offices in his appendix (D) of senior officers of the Army of Flanders. However, the terms of surrender of a major fortress often made specific mention of the superintendente and auditor: cf. the conditions of the surrender of St. Omer, 1677, Archivo General, Simancas [AGS], seccion de Estado (hereafter E), legajo 2133, Condiciones que Monsieur.....St Omer..., 22 April 1677. For the salary of the superintendente (c. 1691), cf. AGS/E/3887, Tanteo de lo Recivido y distribuido en los nueve meses primeros del Gobierno de SAE..., [July 1693?].

<sup>51</sup> Cf. AGS/E/3415/92, AGS/E/3415/95, provision for 1 provost and 1 auditor (and unspecified number of subordinate staff) in new planta of Army of Lombardy proposed by the marques of Leganes, Governor of Milan, end 1691, (provost, lieutenant, 18 soldiers and 12 *esbirros*).

<sup>52</sup> In seventeenth century Sicily, the men of the Spanish garrison were subject to a military court, presided over by an auditor general, L. Ribot García, *La Revuelta Antiespañola de Mesina. Causas y antecedentes (1591-1674)*, Valladolid, 1982, p. 40.

<sup>53</sup> A. Espino López, *Catalunya durante el Reinado de Carlos II. Política y guerra en la frontera catalana, 1679-1697*, Barcelona, 1999, p. 246.

<sup>54</sup> F. Pozuelo y Espinosa, *Compendio de los esquadrones modernos...*, Madrid, 1690, pp. 136 ff.

<sup>55</sup> In 1594, however, the Council of War, in an attempt to speed the administration of military justice, lost its judicial functions to the *alcaldes de casa y corte*, the magistrates responsible for the policing of Madrid, but recovered them – for the same reason – in 1598, Colón de Larrategui, *Juzgados militares de España y sus Indias*, cit., II, pp. 3-4, cited by F. Andújar Castillo,

Philip IV's ordinance of 1632, which overhauled Spain's military organisation. This system persisted largely unchanged for the rest of the Habsburg era and into that of the Bourbons<sup>56</sup>. Each of the various African and Italian expeditions launched by Philip V between 1717 and 1748, for example, was accompanied by an *auditor general de guerra*. However, Philip did make some changes. In 1701-2, in the so-called *Ordenanzas de Flandes*, he delegated to the regiments of the Army of Flanders the powers of court-martial; this wartime measure survived the end of the War of the Spanish Succession, while the Council of War in Madrid subsequently lost its administrative and political function to become primarily, a court for hearing military cases<sup>57</sup>. These developments were only partially modified by Philip's son, Carlos III in his landmark regulations of 1768 which provided the framework within which Spain's armies functioned for the rest of the ancien regime<sup>58</sup>.

In eighteenth century Piedmont, military Justice was overseen by the *Auditeur Generale des Guerres* (1664, above), aided by a network of local vice-auditors<sup>59</sup>. He was informed, for example, of those failing to respond to the call to serve in the new provincial regiments established from 1713 (and who were therefore to be arrested)<sup>60</sup>. In these and other cases, the provincial governor investigated, and sent his report to the *Auditeur Generale*, both of them subject to the Secretary for War, and through him the king<sup>61</sup>.

*Consejo y Consejeros de Guerra en el siglo XVIII*, Granada, 1996, p. 30. Cf. Thompson, *War and Government*, cit., pp. 40-41.

<sup>56</sup> In 1691 Carlos II confirmed the authority in military court cases of the comisario general, suggesting that the issue had been under discussion, J. J. Giménez Ferrer, *El Ejército de Carlos II*, in E. Balaguer and E. Giménez, eds., *Ejército, Ciencia y Sociedad en la España del Antiguo Régimen*, Alicante, 1995, pp. 69 ff.

<sup>57</sup> Andújar Castillo, *Los Militares*, cit., p. 34; Idem, *Consejo y Consejeros de Guerra*, cit., p. 44 and passim.

<sup>58</sup> F. de Oya y Ozores, *Tratado de las Leyes Penales de la Milicia Española. Procesos y Consejos de Guerra*, Madrid 1732, is almost entirely given over to eighteenth century legislation but includes references to earlier cases of military justice in action. On the 1768 code cf. F. Andújar Castillo, *Los militares en la España del siglo XVIII. Un estudio social*, Granada, 1991, pp. 49 ff.

<sup>59</sup> AST/LP/S, m. 83, [?] to [?] 1 May 1718.

<sup>60</sup> [?] to all Govrs., 27 June 1718, AST/Reg. Seg. di Guerra/Lettere Particolare, Ser. II (1718-20), p. 139.

<sup>61</sup> Cf. AST/Regia Segreteria di Guerra (hereafter RGS)/LP, Ser. II (1718-20), p. 1, [?] to baron de St. Remy, 8 Jan. 1718, on the investigation of the murder of a soldier. In 1717, GB Berta di Cigliano, *aiutante maggiore* in the Vercelli provincial regiment was tried by court-martial, at Vercelli on the king's order, AST/Real Casa/Lettere Duchi e Sovrani, m. 72/1558, Victor Amadeus II to Des Hayes, 22 May 1717, Torino,. In 1730, the king ordered (via the Secretary for War) that the provincial governor should investigate the killing of a peasant [smug-