THE FEDERAL MILITARY JUSTICE IN THE BRAZILIAN CONSTITUTION OF 1988

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The Supreme Military Court, as referred in Brazilian history, originally named Supreme Military and Justice Council[1], was instituted on April first 1808 through a royal binding ordinance by the Prince Regent D. João VI. Circa 1891, the Supreme Military Court was instituted, having the same competencies as the Supreme Military and Justice Council and, after the advent of the Constitution of 1946, was officially named as it is currently known: the Supreme Military Court.

Over the years, the composition of the Military Court in Brazil was altered several times until it reached its current number of fifteen members among civilians and military. Despite the numerical changes in its quorum[2], the mixed composition has always been a feature. Indeed, the institution of escabinato, as it is named in Portuguese, was affirmed in the Military Justice, in view of the peculiarities of military life from which stems the need to combine the experience of commanders with judicial knowledge of judges[3].

Consubstantiating 200 years of history, the Military Court was integrated into the Judiciary in the Constitution of 1934 according to the sovereign will of the Constitutional National Assembly.

As a specialized branch of justice, it encompasses a special category of agents, propelling the enforcement of military laws against the armed forces - the Navy, the Army and the Air Force – and judges only military crimes defined by law, which is a tenet deriving from article 124 of the Federal Constitution.

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[1] The Supreme Military and Justice Council aimed to maintain the order and the discipline within the military ambience. "This institution had two functions: the first was administrative, supporting the government in requisitions, letter pattents, promotions, wages, compulsory retirement, nominations, the use of emblems, for which they counseled; the second was only judicial. As the Supreme Court of Military Justice, the Supreme Council judged, as a last resort, the criminal processes of defendants subjected to military forum.
The Supreme Military Council was composed of the Admiral and War Councils and of some other high rank officers who were occasionally nominated, having most of them gone on to covet a position as War Counselors.
The Supreme Council of Justice has the same formation, featuring, however, three judges, one of whom to report the processes". **Superior Tribunal Militar. 173 Anos de História.** Written by Paulo César Bastos, Brasília, 1981, p. 21.

[2] The composition of the Federal Military justice has varied throughout Brazilian history. It was originally composed of 13 magistrates, according to the royal binding ordinance institutes on April 1st, 1808. In 1850, the number of magistrates rose to 15, which was maintained with the Republic by Decree n. 149, on July 18th, 1893. Afterwards, Decree n. 17.231-A, on February 26th, 1926, would reduce this number to 10 and later increased to 11 by the Constitution of 1934, which also brought the Military Justice to the Judiciary's structure. With the promulgation of law AI-2, on November 5th, 1965, the High Military Court featured again 15 long-life members. This composition was kept by the Constitutions of 1967/69 and the current Constitution of 1988. Throughout Brazilian history, the Military Justice was presided by remarkable figures such as Marshals Deodoro da Fonseca and Floriano Peixoto.

[3] As Astor Nina de Carvalho Junior states: *"the good military magistrate is not the one who knows his juridical system perfectly well, but one who knows the military law, the functioning and the everyday life of a barrack very well, as the judge, even being impartial, can not be distant from the wishes and social values, at the risk of misjudging and not translating duly the noble ideal of justice".*

The Constitution establishes two sorts of Military Justice: the federal and the state-members', *ex vi* from articles 122 to 124 and 125 §§ 3, 4, 5, respectively, listed in Title II, Chapter III, of the Judiciary - Section VII – of the Military Courts and Judges. As for the federal scope, according to article 122 of the Brazilian Constitution, the Federal Military Justice is comprised of the Superior Military Tribunal, the Audits[4] and Tribunals are institutions created by law. The constitutional provision is regulated by Law 8.457, created on September 4th 1994, which organized the Federal Military Justice and regulates the operative structure of its auxiliary services.

Retaining absolute jurisdiction over the national territory, the Supreme Military Court is on the top of the hierarchical structure of the Military Judiciary and is composed of 15 tenured Ministries among whom three Naval Generals, four Army Generals and three Air Force Generals, all active military and in the highest rank in the career; and five civilians – three lawyers of outstanding judicial knowledge and immaculate conduct, working effectively as lawyers for more than ten years; one assigned among auditing judges and another chosen among members of the Military Justice of Public Defenders. All judges are nominated by the President of the Republic of Brazil after the assent of the Federal Senate.

The current Constitution has maintained the institution of "escabinato", by which military and civilian judges integrate into the same Court of Judgment. It was maintained as it allowed to combine the experience of top-ranked commanders, amassing over forty years of military life experience, with the indisputable judicial knowledge of civilian ministers[5]. By and large, the Military Justice ensures "fair and human enforcement of the military law".

Regarding the competence, it is the audit's and Supreme Military Court's duty to prosecute and judge the military crimes defined by the law, under the aegis of article 124 of the Federal Constitution[6]. The aforementioned law, invoked in the light of the *Lex Magna*, is the Military Penal Code promulgated in 1969, whose articles 9 and 10 define military crimes in wartime and peacetime.[7] It is therefore a sort of justice designed to judge

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[4] The Audits are composed of four military ad hoc judges and a civilian gowned judge.

[5] *In*: **The Federal Military Justice**. Conference held for Generals and High Rank Officers of the Armed Forces of the Republic of Angola, on July 19th, 2006, by the Justice Lieutenant-General of the Air Force Henrique Mariani de Souza.

[6] It is worth remembering the words of João Barbalho on the Military justice, whose institution is competent to prosecute and judge military crimes and not crimes committed by the military: *"(...) the special forum is for the soldier, ut miles, in the words of the roman jurist (...).*
For crimes established by the military law, a special jurisdiction must exist, not as a privilege of individuals who commit them, but focused on the nature of these crimes and on the need to a prompt and firm punishment, with summary ways.
The existence of military forces is linked to the existence of the nation as a guarantee of its independence and security and without an exact and constant discipline; they can not fulfill their role. There is no subordination or security without discipline; it is the life and the force of the armies, and without their own, private and also military jurisdiction, this discipline would be impossible.
There is no better judgment for military infringements than that made by the military themselves; they are know how to understand the gravity of a situation as well as the circumstances to change it, therefore, the special forum is a condition for the good administration of justice. BARBALHO, João. **Constituição Federal Brasileira – Comentários.** 2ª ed., 1924.Rio de Janeiro: Briguiet e Cia. Editores. P. 466.

[7] Military Crimes are transgressions that undermine the basic and specific foundations of the order and military discipline, which erode, as they develop, the obligations and duties of the military. This reasoning is exposed by Célio Lobão when he states that "*military crime is the penal infringement established by the penal*

exclusively military crimes committed not only by the military but also by military-like individuals [8] and civilians.

Considering the Supreme Military Court, this Court acts as the original and appellation forum. As a Court of Appeal, it is its duty to analyze the lawsuits brought to it against decisions *a quo*. Its sentences are categorical; however there is the possibility of using extraordinary petition, in the Federal High Court, when it refers to constitutional matters - article 102, III, "a", "b", "c" of the Federal Constitution – and ordinary petition in *habeas corpus* or in writ of injunction, when it is a denial sentence – article 102, II, "a".

Originally, it is the Supreme Military Court's responsibility to prosecute and try the Generals of the armed forces who have been indicted on penal actions – article. 6º, I, Law nº 8.457/92 -, as well as to judge injunctions against its own acts, against those of the High Courts' President and the act of other authorities of the military justice. It is also its duty to analyze and decide on the representations to declare an officer's indignity or his incompatibility with the armed forces – art. 142, § 3º, VI, of the Federal Constitution - and the lawsuits of the Justification Councils – art. 142, § 3º, VII of the Federal Constitution.

The low court is composed of twelve Judicial Military Circuits (JMC) and in each one there is an audit, except at the 1st JMC located in Rio de Janeiro, which has four; at the 2nd, located in São Paulo, which has two; and at the 3rd JMC, located in Porto Alegre, which has three. The territorial areas of the JMC are equivalent to the Military Regions that have most of the contingents of the Brazilian Army. There is also a Disciplinary Audit Unit [9] located in Brasilia, competent to carry out overall proceedings or procedural mistakes in the process of the judgment *a quo* in order to correct them, as well to communicate the President of the Supreme Military Court a fact demanding prompt solution and to make writs and audit registers uniform.

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military law and such a violation harms the property and interests linked to the constitutional purpose of military institutions, to its legal attribution, to its functioning, to its own existence, in its particular aspect of discipline, hierarchy, protection to military authority and military service". LOBÃO, Célio. **Direito Penal Militar**. 3. ed. Brasília: Brasília Jurídica, 2006, p. 56.

It is important to highlight that the doctrine and jurisprudence stress the difference between military crimes, dividing them into typical and untypical military crimes. According to Esmeraldino Bandeira, the classification of a crime as typically military is understood as being committed exclusively by a soldier, inasmuch as it relates to military life when this is considered within the functional attitude of the perpetrator, the type of violation and the peculiar nature of the object damaged, *i.e*. the service, the discipline, the administration or the military economy. Esmeraldino Bandeira. Direito, Justiça e Processo Militar. 1º. Vol. Francisco Alves, Rio de Janeiro, 1919, p. 26. As for the untypical military crimes, Celso Lobão states that *"(...) it is the penal violation established by the Military Penal Code and, in not being 'specific or functional of a soldier's profession', it damages military property or interests related to the constitutional and legal purpose of military institutions.*" LOBÃO, Celso. *Op*. Cit. p. 98.

[8] "*Military-like is the individual who, not being military, is subjected to subordination, discipline and military jurisdiction since he performs a specific function regulated by law (medicine, dentistry, engineering) in the armed forces as well as individuals who work on ships, barracks, forts, and equate with civilians on the condition that they are submitted to military discipline."* BASTOS, Celso Ribeiro, *op. cit*, p. 496.

[9] Law n. 8457/92 defines Disciplinary Audit Unit, its composition and competence. *Litteris:*

"Article 12. *The Disciplinary Audit Unit is headed by the Administrative Judge Advocate, who exercises jurisdiction throughout the national territory.*

Article 13. *The Disciplinary Audit Unit, a legal-administrative enforcement and guidance body, is composed of the Administrative Judge Advocate, the Secretariat Director, and the staff assistants provider for by law."*

The Councils of Justice, which function within the Audits, can be of two types: permanent and especial.

The Permanent Councils of Justice try the low rank military of their respective forces – soldiers, corporals, sergeants and sergeant majors, and also civilians involved in military crimes defined by law. Hence, there are Permanent Councils of Justice for the Navy, the Army and the Air Force. They are composed of four military judges, one of them being a high rank officer who preside it and another one a gowned judge - the auditing judge. The military judges serve the Council for a three month stint and, as a rule, they are not entitled to a subsequent term. They are designated by draw among the officers located in the jurisdiction areas of each Military Judicial Circuit.

The Special Councils of Justice, in turn, judge the high rank officers – from lieutenants to colonels indicted for committing military crimes - and work in the same way as the Permanent Councils. In such Councils, the positions and ranks of the military judges must be higher than the officer accused and Councils last as long as the military trial requires, not being renovated for a further three-month period.

It is important to inform that in each audit there are two auditing judges, one having tenure and the other a substitute, entering the career by means of civil service examinations and diploma contest, and performing the same judicial functions.[10] It is the Military High Court's duty to nominate and promote them and, in case of a promotion to tenure positions, the substitute auditing judges make their decision taking into account seniority criteria and merit, alternatively, according to the wording of art. 36 of Law nº 8.457/92. The Court can only reject the most senior judge by two-thirds of its members' votes, repeating the voting until the judge is finally appointed. In the event of a simultaneous investiture, the promotion by time will be firstly conferred on whom had the best position in the civil service examination. On the other hand, it is compulsory the promotion of a judge who have been considered three consecutive times or five alternately on a list of merit, as long as he has been working effectively for two years and is included in the first one-fifth part of the list. Promotion by merit complies with the criteria of prompting and safety in the exercise of law, as well as assiduousness and the judge's performance at improvement courses, which are assessed while he holds that position.

Among the incompatibilities, the diploma aforementioned states that judges, public defenders and lawyers who are consorts, next-of-kin or any other direct relatives, being apart in up to three generations or having adoption bonds can not serve jointly.

Such incompatibilities are to be solved as follows: before investiture, against the last nominated or against the least old, if the nominations are on the same date and, after investiture, against who has given him cause and against the youngest, if the

[10] As Celso Ribeiro Bastos highlights: "*The first investiture in the Military Justice career is in the position of a substitute auditing judge, through civil service examinations and diploma disputes managed by the Supreme Military Court. The participation of the Brazilian Bar Associationr (art. 33, Law n. 8.457/92)is required in all phases. Candidates must be Brazilian, be between 25 years old and 40 years old (except if they already hold a public function), be exercising their political rights plainly, be graduated in law, have practiced, for at least three years in the last decade, law, magistracy or any other activity that provides forensic practice, be morally capable and be physically healthy. The examination will be valid for two years from the legal confirmation, extendable for only two more years. (art. 34, Law n 8.457/92)".In*: BASTOS, CELSO Ribeiro e MARTINS, Ives Gandra. **Comentários à Constituição Brasileira (promulgada em 5 de outubro de 1988)**, 4º Volume, Tomo III- Arts. 92 a 126. São Paulo:Saraiva, 2ª edição, atualizada, 2000, p.484.

incompatibility is imputed to both. Ultimately, if the incompatibility befalls the lawyer, he must be substituted.

Military Public Defenders who act in causes as *custus legis* or *dominus litis,* lawyers and public defenders or magistrate-appointed defenders work together with the first instance, as well as with the Supreme Military Court.

It must be emphasized that the penal action is public, initializing with the indictment by the Military Public Defenders. There is no cost for the process. The indictment is usually premised on a record of prison *in flagrante delicto*, on a provisional proceeding of desertion or on a military judicial inquiry.

In brief, this is how the Military Justice works in peacetime, however acting differently in wartime[11].

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[11] Articles 9 and 10 of the Military Penal Code define military crimes in wartime and in peacetime. *Verbis:*
Art. 9 – In peacetime, Military crimes are considered:

I – crimes addressed in this code, when diversely defined in the common penal law, or not established by it, whoever the perpetrator is, except if there is a special law for it.

II – crimes addressed in this code, although they are equally defined by the common penal law, when they are perpetrated:

a) by a military or military-like individual on duty against another military or military-like individual in the same situation;

b) by a military or military-like individual on duty, in places subjected to military administration, against retired military or a military-like individual or civilian;

c) by a military individual on duty or acting in this function, commissioned in military activity, standing in line, even if he is in a place of non-military administration, against a retired military individual or civilian;

d) by a military individual during maneuvers or exercises, against retired military, military-like individuals or civilians;

e) by military or military-like individual on duty, against military property or the military administrative order;

III - crimes perpetrated by retired military or civilian against military institutions, considering military institutions not only those listed in section I but also in section II, in the following cases:

a) against military-administered property or against military administrative order;

b) at places subjected to military administration against a military or military-like individual or against the Military Ministry's or Military Justice's staff, when exercising his function;

c) against military individual standing in line or during the period of duty, surveillance, observation, exploration, exercise, camping, cantonment or maneuvers;

d) at non military-administered places against a military individual exercising his function or when in vigilance, guaranteeing and preserving public order, administrative or judicial, when he is legally required for that purpose, or in obedience to a superior legal order.

Willful Crimes

Sole Paragraph – crimes addressed in this article, when willfully perpetrated against life and civilians, must be judged by the common justice.

Art. 10. In wartime, military crimes are considered:

I – those specially established by this code in wartime;

II - those specially established by this code in peacetime;

III – crimes established in this Code, although they are also established by the common or special penal laws, when perpetrated, whoever the perpetrator is;

a) in the national or foreign territory, when militarily occupied.

b) at any other place, if they compromise or possibly compromise preparation, efficiency or military operations or, in any other way, attempt on the country's external security or expose security to danger;

IV – crimes defined by the common or special penal law, although they are not established by this Code, when perpetrated in zones of effective military operations or foreign territory, when militarily occupied;

It is like that because the legislator instituted a double system of organizing the Military Justice in peacetime or wartime. Within this context, the Military Penal Code typifies the crimes committed in wartime or peacetime. It can be undoubtedly affirmed that military law is the only type of norm which is partially efficacious once its enforcement is conditioned to the situation the country is in.

Justice Marcos Augusto Leal de Azevedo observes that "in wartime, the auditing judges, the Councils of Military Justice and the High Councils of Military Justice (art. 89 of Law nº. 8.457/92), together with the operational forces, compose the Military Justice. These institutions prosecute and judge crimes perpetrated in theatres of war or in foreign territories militarily occupied by Brazilian forces, except for what has been agreed in covenants or in international treaties of which the country is signatory. It is up to the gowned judge to preside the criminal proceedings at which low rank military, civilians or officers up to the rank of commander or colonel are defendants, as well as trying civilians and low rank military.

The Council of Justice is composed of an auditing judge or a substitute auditing judge, both graduated in Law, and two officers who are longer in the rank than the convicted person. Like the Special Councils (in peacetime), the Council of Justice is composed for each prosecution and dissolved shortly after the trial. It is also responsible for judging officers, excepting generals.

The High Council of Justice is the institution of second appeal, composed of two generals, in active service or retired, and a auditing judge, all appointed by the President of the Republic. The presidency is exercised by the most senior military judge. In brief, it is this Council's responsibility to prosecute and try generals as well as assessing appeals issued by the Councils of Justice.

An attorney and a public defender work together with the council, who are also appointed by the President of the Republic among the members of the Military Public Defenders and the Federal Public Defenders respectively.

Broadly speaking, these are the characteristics of the Military justice in wartime.[12]

THE FEDERAL MILITARY JUSTICE AND THE CONSTITUTIONAL AMENDMENT Nº 45/ 2004

Art. 125, §§ 3º, 4º e 5º of the Federal Constitution states that state-members of the Brazilian federation are entitled to institute the state military justice to judge military crimes defined by law, which are committed by members of the auxiliary forces (policemen and firemen), and judicial actions against disciplinary military acts.[13] Contrary to how the

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[12] *In:* **The Chain of Command and how it interacts with the Brazilian Military Justice**. Lecture given by Justice Fleet Admiral Marcos Augusto Leal de Azevedo at the Human Rights International Seminar and the Administration of Justice by Military Tribunals, held by the UN High Commissioner for Human Rights, the Brazilian Ministry of Foreign Affairs and the Brazilian Supreme Military Court in Brasilia, Distrito Federal, on November 28, 2007.

[13] "*The state-members' Military Justice was not created recently. Since 1892 the state of São Paulo had the Audit of Public Force, composed of an Auditor and Councils of Justice. Decisions of this institution were revised by the state's President, who is currently known as the State Governor of São Paulo. This situation lasted until 1936. With the advent of federal law n. 192, on January 17, 1936, the Military Justice was created in all states of the federation. In São Paulo, the government of the state-member created the* ***Military Justice Tribunal****, through* ***State Law n 2.856, on January 8, 1937****, thenceforth called High Military Justice Tribunal.*

Federal Military Justice operates, it is not the state-member military justice's duty to prosecute and try civilians, but the military. However, likewise the Federal Justice, it is a specialized branch of the Judiciary, being experienced and having knowledge to handle military-like conflicts, whose pillars are hierarchy and discipline.

The state-member's Military Justice, however, was substantially modified by constitutional amendment nº45/2004. For instance, the district judge was included as an institution of the Military Justice, the presidency of Councils was transferred to a gowned judge, whose competence was extended to judge acts of punitive-disciplinary nature and the judgment of deliberate crimes committed by the military against a civilian's life was transferred to the court jury. However, prosecuting and judging deliberate crimes committed by the military against a civilian's life still lies within the competence of the Military Court.

As a matter of fact, the derived legislator limited his action to the federal state-member's sphere, thereby not altering the constitutional devices regarding the federal scope. As a result, there was an asymmetry with reference to the competencies of the court

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It is presently called Military Justice Tribunal of the state government of São Paulo, and since amendment n.2 added to the state Constitution, the tribunal is composed of 5 judges, being three civilians and two military individuals.

In Rio Grande do Sul, federal law n. 3.351 of October 3, 1917, authorized the trial of high rank and low rank policemen for typically military crimes. Based on this same law, the ***state Military Justice*** *was created by* ***decree n. 2.347-A, on May 28, 1918****, which established the* ***Councils of Discipline****, extraordinarily organized, the* ***Military Council****, for the first hearing and as a reviewing instance, and the* ***Council of Appeal****, composed of five members: the General-commander of the Brigade (who should preside it), three military officers summoned by the latter and a gowned judge, designated by the Governor of the State of Rio Grande do Sul.*

Federal Law n. 192, of January 17, 1937, sought to systematize the subject matter, explicitly authorizing state-members to institute the sate Military Justice. For that reason, ***Decree n47, of November 19, 1940****, established the Law of the Military Justice for the State Government of Rio Grande do Sul, converting the Council of Appeal into a Court of Appeal and finally granting its member the privilege given to magistrates such as lifetime job and irreducibility of wages. The Court is still composed of five members, however, all of them were designated by the Governor of the State. In the first degree court, two Councils were instituted: the Special, to judge high rank military officers, and the Permanent, to judge low rank military. Law n. 6.156/70, maintained the Court of Appeal with five members, being one a civilian. The* ***Organizing Judicial Code of the State of Rio Grande do Sul*** *(state law n. 7.356/80), of February 1, 1980, fixed the composition of the Military Justice Tribunal of the State of Rio Grande do Sul in seven judges, four of them being military and three civilian, all designated by the Governor, being that the current composition.*

In ***Minas Gerais****, the military Justice was created by* ***Law n. 226, on November 9, 1937****. At that time, it was composed of only one auditor and special or permanent Councils of Justice. In case there was no second degree court, jurisdiction was exercised by the Crime Chamber of the Court of Appeal, which is currently known as the Tribunal of Justice.*

In 1946, it was revamped by the Law of the Judicial Organization of the State and the Regiment of Costs (Decree-law n 1.630, 01/15/46) by the creation of the High Court of Military Justice, located in the Capital as an institution of second degree of jurisdiction, composed of one civilian judge and two military judges. Law n. 1.098, on June 22, 1954, increased the number of judge members of the Military Justice Tribunal by five, being three military and two civilian. Resolution n. 61, of December 8, 1975, of the Tribunal of Justice, kept the same number of judges as yet." *In:* Lecture given on 09/28/2006, at the Juridical Seminar **ESPMU/MPM- Paraná and Rio Grande do Sul.**

Performing in a court of appeal, there are three State Military Tribunals in São Paulo, Rio Grande do Sul and Minas Gerais, instituted according to paragraph 3, of art. 125 of the Federal Constitution, to wit; the respective states count on more than twenty thousand military members. In the other federal states, policemen and firemen are tried by Military Audits, with appeals to the State Tribunals of Justice.

inasmuch as, according to art. 124 of the Federal Constitution, the Federal Military Justice does not assess the military disciplinary punishment in the scope of the armed forces

In order to correct that omission, the constitutional amendment proposal 358/2005 is being analyzed by the National Congress, with a view to maintaining the reform of the Judiciary.

The text proposed modifies the composition of the Supreme Military Court and extends its competence, allowing it to judge disciplinary punishment meted out to members of the armed forces[14].

Extending the Federal Military Justice to exercise the judicial control over the disciplinary punishment meted out to members of the armed forces[15] will undoubtedly have the merit of solving conflicts presented to the Federal Justice that, according to art. 109 of the Federal Constitution, must judge them as the military is functionally linked to the Federal Government[16]. As yet, as chief judge Marga Tessler affirms[17], the fragmentation of

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[14] As Jéssica da Silva Rodrigues observes: "*the same normative document, specially that which is the foundation of otherFederal Constitution laws, should not encompass this disparity of competences, in which the same subject matter can be analyzed by the special or common justice, being contingent on the party involved: whether he is a member of the armed forces and of the auxiliary forces. Doubtlessl, if the constitutional amendment bill n 358/2005 is approved, several adjustments will be needed such as the exigency of prepayment of costs, once this jurisdiction will not be gratis, bringing the need to an immediate adaptation of the Law of the Judicial Military Organization. Moreover, the Military Public Attorney will no longer play its categorical penal role in order to act in its many attributions constitutionally enshrined in art. 127*." *In*: **The judicial control of the military disciplinary act within the armed forces**. Monograph presented at the Law Faculty of Brasilia University, 2008, p.71.

[15] Law n. 6.880/80 – the Statute of the Military – defines the legal concept of discipline in art. 14, paragraph 2. Disciplinary punishment is applicable when military obligations and duties are violated. Within the scope of each armed force, the military administration classified and specified in its Disciplinary Regulation the circumstances under which the said punishment can be executed, *vg:* Decree n 88.545, on 07/26/1983 (Navy's Disciplinary Regulation), art. 6; Decree n 4.346, of 08/26/2002 (Army's Disciplinary Regulation), art. 14 and Decree n 76.322, of 09/22/1975 (Air Force's Disciplinary Regulation), art. 8. The punishment listed in the Military Disciplinary Regulation for transgressions are as follow, though slightly distinct: admonition, reprehension, detention, imprisonment, leave and exclusion for the sake of discipline. Despite its peculiarities,disciplinary sanctions are types of administrative sanctions, which aim to safeguard the values that conduct public Administration as a whole.

[16] About the discussion, High Federal Court's decision, reported by Justice Ricardo Lewandowski:

Emendation: appeal in *habeas corpus*. Penal Processing.

Disciplinary transgression. Punishment meted out to an armed forces' member. Constriction of liberty. Habeas corpus against the act.

Judgement by Federal Military Justice. Impossibility. Incompetence. Subject matter related to the Common Federal Justice's jurisdiction. Interpretation of articles 109, VII, e 124, § 2º.

I – It is the Federal Military Justice's responsibility to only prosecute and judge military crimes defined by law, not including actions against punishment with respect to infringements against disciplinary regulations (art.124, § 2º, Federal Constitution) in its jurisdiction .

II – The legal imposition of a constricting punishment of liberty, in a military administrative proceeding, can be discussed by means of habeas corpus. Precedents.

III- If the act is not subjected to military jurisdiction, the Federal Justice is entitled to judge the action which seeks to undo it (art. 109, VII, Federal Constitution).

IV – Penalty, however, entirely carried out.

V - HC hindered." 1st Team. RHC nº 88543. DJ de 27.4.07.

[17] TESSLER, Marga Inge Barth. The competence of the Federal Military Justice after the possible approval of Constitutional Amendment Bill N. 358/2005. **Revista Direito Militar**, nº 62, novembro/dezembro, 2006, p. 16-18.

competences has weakened the Judiciary, insofar as it compromises the efficiency and the juridical security by destandarsing jurisprudence. The standardization of decisions stemming from special justice, more undeniably prepared to deal with cases involving its members, enhances the exercise of jurisdiction.

Indeed, being a specialized type of Justice, just like the Labor and Electoral, the Military Justice has expertise in assuring the integrity of judicial decisions and protecting penal law, as well as in assessing the legality of the exercise of disciplinary military power.

In addition to this, the judicial expedition of the Military Justice is paramount to preserve hierarchy and discipline in barracks.

In fact, the longer justice takes to be served, the less likely it is to succeed. As to Military Penal Law, the want of judicial expedition could be detrimental to the integrity of the armed forces, permanent national institutions, as the constitution informs. They are the only forces responsible for the defence of the country, which is a more elevated value than life itself, inasmuch as under certain circumstances the military are duty bound to kill or to die. Very special values correspond to very special rules that must be strictly observed, at the risk of compromising the Democratic Rule of Law State itself.

Moreover, mobility, which is another inherent characteristic of Military Justice, is imponderable when it comes to the Common Federal Justice. Unacceptable in wartime, the moving of Federal Justice to theatres of war, where the military disciplinary power is more important, because, firstly, the commander can not exercise it in an abusive nor illegal way and, secondly, because crimes committed in such a dramatic situation require a prompt, active and expedite judicial structure that allows the investigation of criminal acts and the punishment of the guilty individuals as soon as possible.

THE CHALLEGES TO THE FEDERAL MILITARY JUSTICE

Lastly, the Military Justice, the oldest justice in Brazil, still has challenges and perspectives to face.

The first challenge is overcoming the stigma to being a “corporate justice”. The statistics about the Federal Military Justice reveal the severity of its military penal law enforcement, not admitting the impunity of the accused when the responsibility and the offense are effectively proven. Hence, the judicial scope aims to protect the military institution and the principles that conduct it: hierarchy and discipline. And it could not be any different from this. The military, unlike the civilians, hold the arms of the nation; its contingent is estimated at 310.000 individuals – 220.000 in the Army, 55.000 in the Air Force and 55.000 in the Navy. Democracy is at risk when the rigid paradigms of conduct are not observed and the armed forces are disorganized, thus rendering them impotent to fulfill its constitutional duty to defend the state sovereignty and the stability of the political regime. It refers to unique values and for that reason being protected by the Constitution and the legislator as judicial property to be safeguarded by law and social order. That is the reason why Military Justice is so important as a specialized type of justice.

Although the Supreme Military Court is relevant and bicentennial, society and, more gravely, law operators know little about its competence and performance. Usually mixed up with the state-members’ military justice, one generally supposes that the Federal Military Justice is responsible for trying the auxiliary forces (policemen and firemen), together with the members of the armed forces. Furthermore, it is common to label it as a military tribunal submitted to a political regime, specially under dictatorial regimes

experienced in Brazil. Nothing is further from the truth. Brazilian history register the impartiality of the military justice system in memorable rulings such as the one made by the Supreme Military Court when it reformed the sentence given to João Mangabeira, the leader of the Socialist Party, by the National Security Tribunal during Getúlio Vargas' authoritarian political regime, granting him the *habeas corpus* – HC nº. 8.417, June 21, 1937, or even when it conferred a temporary restraining order under this constitutional writ, being the first court to do so, establishing a precedent for the Federal Supreme Court - HC nº 41.296, November 14, 1964.[18]

Unfortunately, such a lack of knowledge caused the Constitutional Amendment nº45/2004 to omit the seat to which the Federal Military Justice is entitled in the National Council of Justice. That mistake is intended to be repaired by the Constitutional Amendment bill 358/2005. Indisputably, the inclusion of the Federal Military Justice in the National Council of Justice is a way of repairing the unconstitutional treatment that goes against the unity of justice and against the Judiciary as an institution of the State.

The importance of the military penal jurisdiction is imperative to preserve the military authority in the observance and submission to orders within the corporation. After all, as Chief Justice Carlos Alberto Marques Soares states "discipline is the force and life of military institutions, together with the preservation of the hierarchical principles." Such values need their own legislation or specialized jurisdiction that can assure its maintenance. This special forum is the condition of a good administration of Justice.[19]

Another important measure in the enlargement of the competence of military jurisdiction, which is decisive for the unification of thematically pertinent subject matters, such as crime and military transgressions, especially because not only crime but also the violation of military discipline are an offence to hierarchy and discipline.

Facing the said challenges meets the needs of a Brazil that experiences moments of "institutional redefinitions and judicial reconstruction in search of new paradigms, which sustain Justice as a social value, accountability as the mark of state institutions' role, expedition, prompting, efficacy (…) of the judicial action and the very enforcement of law as collective construction."[20]

In this sense, Magistracy has played a crucial role as it contributes decisively to value the principles of citizenship and the dignity of human life, renewing also its judicial

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[18] Other examples could be mentioned to illustrate the distinguished course of the Federal Military Justice. The case of the prohibition of communication between lawyers and prisoners during the first 30 days of imprisonment, under the military regime established in 1964, must be recalled, insofar as it was a correct and precursor solution provided by the historical decision of Representation n. 985, in which the principles of the right of defense and due process were observed. Likewise, the Supreme Military Court decided in the 1970s that a strike pursuing a wage improvement, even when it is deemed illegal by the Executive power, would not translate into crime against national security, according to RC n. 5385-6. in RC n. 38.628, the Military Court affirmed that the mere offense to authorities, though it could be characterized by offensive language, was no longer typified as a crime against the security of state.
The decisions referred in this paper, among many others, provided undoubted solutions and the exact juridical dimension on themes that have constantly admitted dubious interpretations. Doubtlessly, it is a distinguished jurisdiction that, in resisting political pressure, has left an important legacy to future generations and to the democratism of the Judiciary. Ultimately, it is important to highlight that Federal public defender's first performance was in the Federal Military Court.

[19] *In:* **Federal Military Justice – 200 years**. *Op. cit.*

[20] ALARCÓN, Pietro de Jesús Lora. Reform of the Judiciary and the Effectiveness of Juridical Service. *In***: Commented and Analized Reform of the Judiciary.** Coordenators: André Ramos Tavares, Pedro Lenza e Pietro de Jesús Lora Alarcón.São Paulo:Editora Método, 2005, p.28.

role, neutralized by several scourges that compromise its conceptual and axiological identity.

The legitimacy of public power, in all areas, involves fundamentally all its judicial institutions. Elevating its role means valuing cohesion, congruence and the identity of the constitutional system, taking into consideration what Lassale called "the real factors of power".

Within this context, the bicentennial existence of the Federal Military Justice, whose institutional development amalgamates Brazilian history, projects the State's affirmation as the *ethos* and the permanent commitment of the Judiciary to the development of legitimacy and democracy.

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