



Perdoar e Punir em tempos de Transição: O Recurso de Graça no Conselho de Estado do Brasil (1828-1834)

Pardoning and Punishing in Times of Transition: The Pardon Appeal (Recurso de Graça) on the Brazilian Council of State (1828-1834)

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Resumo

O objetivo desse trabalho é discutir os principais aspectos relacionados ao modo como o recurso de graça era tratado no segundo Conselho de Estado brasileiro. Foram analisados cerca de 160 casos presentes nas atas do conselho. Vimos que a maioria das decisões do imperador seguem a opinião do conselho; os casos se relacionam principalmente a criminalidade militar e escrava; o uso do instituto diverge do que a doutrina prescrevia, mas contribuiu para controlar focos de instabilidade em um período turbulento.

Palavras-chave: Conselho de Estado; Graça; Legalidade.

Abstract

The aim of this paper is to discuss the main aspects related to the way which pardon was treated in the Brazilian second State Council. I analyzed some 160 cases from the council's records. I saw that most of the emperor's decisions follow the opinion of the Council; the cases related mostly to military and slave criminality; the use of pardon is different from the suggestions from legal literature, but contributed to control focuses of instability in a turbulent period.

Keywords: State Council; Pardon; Legality.



1 – Introduction

Certainty and legality are some of the fundamental bases of contemporary criminal law. Even though those command words resonate since a long time ago, there is still a lot of room for doubt in the realm of punishment. And this is especially true for times of transition, when changes and reforms make the application of penalties even more doubtful. One of those eras is the main focus of this paper.

1830 is the year of promulgation of the first Brazilian criminal code¹. A target for many expectations, it is the landmark in overcoming the widely feared book V of the 1603 Philippine Ordinations, which, with its draconian dispositions², partially regulated Brazilian criminal law up to then. The urgency of this reform is inscribed in the Brazilian Constitution of 1824 itself. In its article 179, responsible for the establishment of the rights of Brazilian citizens, it commands, in its paragraph 18: “There shall be organized as soon as possible a Civil Code³, and a Criminal one, founded on the solid bases of Justice and Equity”⁴. It is, therefore, a moment for the affirmation of a properly Brazilian legal order, which, despite with small steps, was distancing itself from the Portuguese one.

This research aims to clarify how some elements of the Brazilian legal culture of those times reacted to this change. To fulfill this task, I chose as focal institution the Council of State, one of the most important elements of the Brazilian administrative structure during imperial times⁵. As a tool in understanding how the institution reacted to the changes in criminal law through the combination of old and new elements, I will deal with pardon. This institute allows a public authority (in the imperial Brazil case, the Emperor) to reduce, change or even forgive a penalty imposed on a certain defendant. It is an instrument for the flexibilization of law that, as it will be later discussed, is deeply imbedded in the logics of the Ancien Régime but managed to survive through modern times.

¹ For a more detailed account of the processing and the meanings of the Criminal Code of 1830 when it was published, one can see the work of Vivian Costa (2013).

² This harshness does not concern the daily practice of *Ancien Régime* criminal law, but its wording. For a detailed account of the distances between theory and practice of early modern punishment, and of its historical meaning, see Antonio Manuel Hespanha (1993).

³ For matters regarding the civil codification, see, among others: Ricardo Fonseca (2006), Keila Grinberg (2008) and Samuel Barbosa (2008).

⁴ Portuguese original: “Organizar-se-ha quanto antes um Codigo Civil, e Criminal, fundado nas solidas bases da Justiça, e Equidade”

⁵ For more information regarding the Council of State, see the work of José Reinaldo de Lima Lopes (2010).



Brazilian law in the 19th century was not crafted only in the courtrooms. It was also built in administrative institutions, and the Emperor and the Council of State were fundamental on its creation. Criminal law was no exception. Therefore, the main sources for this paper were the records of the second Council of State. Whenever necessary, the interpretations proposed were helped by the use of legal writings of those times. This helps to enlarge the perspectives on where law can be found, and the multiple institutional voices from which it emerges.

Furthermore, it is also useful to understand the multiple ways in which law reacts to change. This paper talks about transition and the uncertainties it brings. When this sort of things happens, past and present became intermingles in sometimes surprising ways. Stefano Solimano (2010) showed us how this worked in the application of the Austrian criminal code of 1787 by the perspective of judges. Now, we can see, in a different context, how the transition between Ancien Régime and the codifications could produce mixed situations from the point of view of administrative institutions.

2 – Pardon: from Ancien Régime to modernity

What room is left to mercy in criminal law? The answers to this question vary widely in time and space, according to the different meanings that punishment can assume. During the passage of the Ancien Régime Europe to the great codifications, as well in the colonies affected by it, pardon changes its place in the legal dynamics, following alterations on the very sense of State punishment.

The visions on criminal law before the 18th century are deeply marked by the idea of political power nurtured then. I am talking about the notion of judisdictionalist conception of power (*concepção jurisdicionalista de poder*⁶), by which the monarch acts more than anything else as a judge. But his acts are ordained according to theological ideas: the king is a representative of God on Earth, and, as such, he must have the Lord as his example and guide. That is why there are two main virtues of governors: love⁷ and fear. In criminal law, they are converted in pardon and punishment. A good king must

⁶ For more details regarding how the monarch's power worked at the time, see the work of Antônio Manuel Hespanha (2015: 297 and ff.).

⁷ On the relevance of this notion for the law in general during the early modernity, see the text of Antônio Manuel Hespanha (2010a).



know how to balance both poles. When a subject committed some fault, he should, as a severe father, impose upon him the right punishment, presented as compensation for the offence against the crown. But, at the same time, as a good lord, he was also capable of offering a prompt forgiveness, one many times unmerited. The logic presiding this dynamic, not justified by merit, is the idea of grace.

This notion, also known as economy of gift (*economia das mercês*), is based on the idea of an exchanges of gifts not equivalent among them, different from the logics of the market. In this last one, two people exchange benefits of the exact same value. In grace, different people give each other non-equivalent benefits, and the relationships not always links the same individuals. The difference between the gifts generates a debt of gratitude, which boosts a new gift giving, starting a cycle of successive donations. Moreover, it is important to remember that this is a deeply hierarchical world. The distance between the statuses of the king and the subjects enlarges even more the size of the debt. Hespanha (2010b) has already compared this description to the theory of economy of gift developed by Marcel Mauss (2003 [1950]).

Clemency is thus one of two faces of a single coin, deeply coupled with punishment. It is administered by the monarch through its jurisdictional power, which is, at the same time, scary and merciful. What brings those extremes together is the notion of grace, into which converge the simultaneous objectives of preservation of royal power and salvation of the souls of the subjects. Those many connections can be seen in the entry “grace” of the dictionary of Raphael Bluteau (1721: 108):

Grace. Favor. Gift. Benefit (...). The grace of princes [is] validity. Personal favour (...). A temple, which door is their favorited. That is why the Persians call them *eyes and ears of the prince* (...). The *grace* of the king is not a gift from fortune, it is the will of God, which in the eyes of the sovereign, when they see the subject, stimulates a certain inclination of affection towards him (...). From there follows that the ones who win the *grace* of the prince shall not assign this favor to the fortune, but to God, and shall not profit from this favor to their own estimation, but to do good to everyone⁸.

Throughout the 18th century, with the advancement of Enlightenment, all those structures started to be heavily questioned. The spectacular punishments started being

⁸ Portuguese original: “Graça. Favor. Mercê. Benefício (...). A graça dos príncipes [é] Benevolência. Valimento. (...) Um Templo, cuja porta, são seus validos. Por isso os Pesianos lhes chamão *Olhos, & orelhas do Príncipe*. (...) A *Graça* do rei não é donativo da Fortuna, he vontade de Deos, que nos olhos do Soberano, quando vê ao vassallo, excita uma certa inclinação, & promensaõ, de affecto para ele (...). Donde se segue, que os que lograõ a *Graça* do Príncipe, não haõ de atribuir este favor à fortuna, mas a Deos, & naõ se haõ de valer do dito favor para a própria estimação, mas para fazer bem a todos”.



regarded as heinous⁹ and the constant pardoning, as a source of uncertainty. The direction of those projects was similar to utilitarianism: citizens should be certain of the State answer to their crimes, so they could calculate if they would commit them or not. This assurance would promote the humanization of penalties: unavoidable punishment, though softer, would have a higher deterrent effect than the horrible dispositions of Book V of the Ordinations. This way of thinking is very well expressed by Beccaria (s.d. [1764]: 80):

As punishments become more mild, clemency and pardon are less necessary. Happy the nation in which they will be considered as dangerous! Clemency, which has often been deemed a sufficient substitute for every other virtue in sovereigns, should be excluded in a perfect legislation, where punishments are mild, and the proceedings in criminal cases regular and expeditious.

Between the late 18th and the early 19th century, criminal law was transformed¹⁰. In many places, death penalty was abolished¹¹; judicial arbitrium¹² was questioned by the anti-case law ideology (CAVANNA, 2005, p. 41); and judicial liberty was restricted. Despite all of that, with very rare exceptions, pardon continue to be displayed in most legal orders – and especially on the Brazilian one¹³.

Established on the article 101, § 8th of the constitution of 1824¹⁴, pardon was of crucial relevance and was supported by many jurists in that period. To Antônio Herculano de Souza Bandeira Filho (1876, pp. 24-25), imperial clemency existed “to correct the errors and injustices that courts can commit, to assign the circumstances and equity, to which the courts, subject to the rules of strict law, cannot follow”¹⁵. Other important role would be the recognition of the atonement and regeneration of convicts before the full serving of the sentence (CASTRO, 1887). Similar arguments were used by Zacarias de Góis e Vasconcelos (1862) and Brás Florentino Henriques de Souza (1864).

⁹ About this process, see the classic from Michel Foucault (2014).

¹⁰ The main issues of those reforms were discussed by Giovanni Tarello (2008) as a part of the “penal issue” in the transition between the centuries.

¹¹ For the issue of death penalty, see for all the text from Pietro Costa (2007).

¹² On the concept of *arbitrium* on the *ius commune*, see the book from Massimo Meccarelli (1998).

¹³ About the adaptation of pardon to the Brazilian legal system in the 19th century, I would quote the dissertation of Arthur Barrêto de Almeida Costa (2017).

¹⁴ Portuguese original: “Art. 101. O Imperador exerce o Poder Moderador (...) VIII. Perdoando, e moderando as penas impostas e os Réos condenados por Sentença” (BRASIL, 1824).

¹⁵ Portuguese original: “para corrigir os erros e injustiças, que pôdem commetter os Tribunaes, para attender á circumstancias e á equidade, a que os Tribunaes, sujeitos ás regras do direito stricto, não podem attender”.



The institution, therefore, continued to be important in the administration of general problems of the Brazilian legal order (COSTA, 2017) and was particularly useful in the management of slave uprisings (RIBEIRO, 2005; PIROLA, 2015).

3 – The second Council of State

After the analysis of grace and its legal consequences – especially pardon –, it is now the moment to better understand one of the main institutions in which it was debated: the Council of State.

The Council of State existed in three different moments of Brazilian history. Between 1822 and 1824, it was known as the Council of Crown Prosecutors. With the Constitution of 1824, it was recreated in a different shape. It continued as such until 1834, when it was extinct by the Additional Act (BRASIL, 1834). In 1841, it was recreated by law (BRASIL, 1841), and maintained the same configuration until the end of the empire.

The second council was created by the constitution in the articles 137 to 144. There should be 10 councilors with unlimited terms and the conditions for nomination were de same for the Senate. The counselors would be summoned to discuss “all important issues, and general measures of the public administration”, and in “all situations in which the emperor exercises attributions of the moderating power”¹⁶ (article 142). Therefore, the institution had the role of helping the emperor to keep the equilibrium between the different branches. It was also frequently consulted about political issues.

This version of the Council was a target for many critiques issued by the Viscount of Uruguay (1862). He resented what was, from his point of view, the highly pollical character of the institution. Another problem was the absence of the ministers of state in the discussions, since they were not automatically members. How to discuss a certain issue without the mostly knowledgeable employee on the subject, the one responsible for executing the deliberations? Other problem was that the Council would be heard only for highly difficult issues. Apparently, a good measure to avoid the overload of the

¹⁶ Portuguese original: “em todos os negócios graves, e medidas gerais da pública administração”; “em todas as ocasiões em que o Imperador se proponha a exercer qualquer das atribuições próprias do Poder Moderador”.



institution, Uruguay saw this rule with different eyes. Without being able to solve simpler doubts, the administration would not be helped by its highest organ when it needed to solve questions that, despite not being legally challenging, were recurrent in practice, and determined the difference between the good and bad functioning of the State. The life terms of councilors were not praised either: this rule compromised the possibility of renovation of the organ, imposing upon the future governments the burden of the choices of past ones. This would have even been one of the reasons of the extinction of the Council in 1834:

For instance, the State councilors from the time of Peter I could not well serv after the April 7th¹⁷. I am convinced that the persons of the Council of State helped its extinction. A corporation made of creatures from one reign cannot serve the reaction that brought it to an end, and give councils that inspire trust, and moral force to the acts of the new power. The Regency heard the Council of State, but by formality, and when the Constitution expressly demanded it. The true councilors were non-official, and, to use the current expression, they were the men of government (URUGUAY, 1862: 238)¹⁸.

Silvestre Pinheiro Ferreira (1835: 183-184), in his joint commentary to the Brazilian Constitution and the Portuguese Constitutional Charter, only criticizes the unlimited term of the counselors.

The Council of State ended up being extinguished by the Additional Act of 1834. In a process of decentralization, the provinces gained a lot of power, and the Provincial Councils were created, even with legislative prerogatives. In this movement, the political council of the emperor was suppressed as well, finishing the time frame of this research.

4 – The convicted and their crimes on the pardon pleas to the Council of State

Legal mercy, as a prerogative of the moderating power, was analyzed by the Council of State, an auxiliary organ of the monarch. The period studied here is marked by crisis and

¹⁷ The day of the abdication of Peter I, the first Brazilian emperor.

¹⁸ Portuguese original: “Por exemplo os Conselheiros de Estado do tempo do Sr. D. Pedro Iº não podião servir com proveito, por bastante tempo, depois do 7 de Abril. Estou persuadido de que o pessoal do Conselho de Estado concorreu para a sua supressão. Uma corporação composta de creaturas de um Reinado não pôde servir a reação que lhe pôz termo, e dar conselhos que inspirem confiança, e deem força moral aos actos do novo poder. A Regencia ouvia o Conselho de Estado, mas por formalidade, e quando a constituição o exigia expressamente. Os verdadeiros Conselheiros erão extra-officiaes, e, para me servir da expressão da moda, erão os homens da situação”. (URUGUAI, 1862: 238).



instability: the recently-created empire was always involved in external wars and internal rebellions. The Uruguay War, the riot of the smoke year (revolta do ano da fumaça), the carrancas rebellion¹⁹: many movements agitated the life of the new country. Violence and the threat of fragmentation were always lurking. Due to political disagreements in Brazil and the dispute over the Portuguese throne, the first Brazilian emperor resigned in 1831 and went back to Europe. The time frame treated here, therefore, watches a growing instability and saw two different actors on the throne: Peter I and the regency.

First, I will show general characteristics of the cases and penalties imposed on the convicted that made their way to the Council of State. After that, I will discuss the results of the Council's deliberations. Finally, I will analyze the reasons to decide presented by the counselors.

Graphic 1 Pardon cases annually analyzed by the Council of State between 1828 and 1834

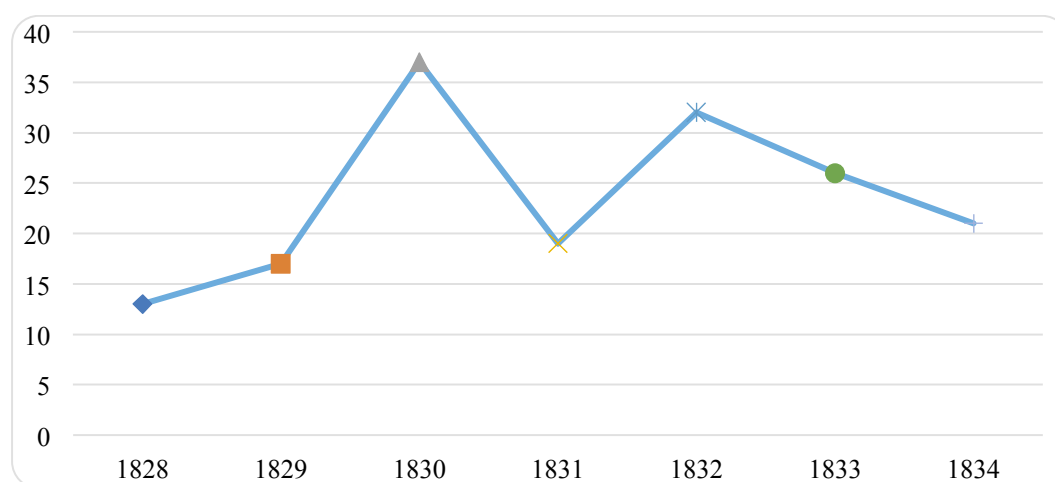


Table 1 Types of crimes committed by the defendants on the cases analyzed by the Council of State

Crime	Quantity	Percentage
Death/Murder	42	24,1%
Insubordination/	20	11,5%

¹⁹ On this rebellion and its political repercussions, see the works of Marcos Ferreira de Andrade (1999, 2017).



Disobedience/etc		
Wounds/Aggression	12	6,8%
Theft	9	5,1%
Finding of weapons	8	4,6%
Robbery	8	4,6%
Sedition	7	4%
Abuse of free press	6	3,4%
Counterfeit currency	5	2,9%
Others ²⁰	33	18,9%
Unknown	24	13,8%

Graphic pne deserves to be looked at with particular attention. The period from which the data were extracted begins in 1828 and 1834²¹: exactly in the middle of this the Criminal Code of 1830 is promulgated. This means that most facts the Council dealt with and represented in this graphic happened still while the Book V of Philippine Ordinations was in force. By a matter of fact, the first explicit quote from the code only appears on a consultation in March 16th of 1832. Therefore, the very description of the criminal facts follows the “draft technique” of the Ancien Régime. That is to say, one cannot see the modern description of the criminal offense, direct and clear, but instead a detailed, and, sometimes, even curious, account of the particular circumstances of the felony, going down to details that we would nowadays find frivolous and unnecessary. Counselors call a certain crime not by the name of “aggression”, but by “to hit with a stick the ouvidor of the county of Espírito Santo”²²; not simply “extortion”, but “to extort money from jailed persons”²³; instead of “prevarication”, the “evil done to the

²⁰ Under “others” I grouped the following crimes: threat (2 cases); article 99 of the Criminal Code (1); *assuada* (1); bankruptcy (1); bigamy (1); slap (2); calumny (1); seditious letters (1); political crimes (2); let an incarcerated person flight away (2); steal weapons from a guard (1); defection (3); extortion (1); forgery (2); injury (2); wrong done to a commission (1); prevarication (1); wrong imprisonment (2); gang/leader of thieves (2); brawl (1); treason (1). Among the 12 crimes of harm/aggression, 2 were against superiors; and, among the 42 murders, 1 was actually an attempt and 5 were committed by slaves against their masters or relatives.

²¹ Even though I consulted it too, the period between 1824 and 1828 had no cases of pardon. I do not know if this change is due to some alteration on the recording, or if it is related to some actual institutional change on the analysis of the cases. The lack of statutory evidence in favor of the second hypothesis makes the first one more credible.

²² Portuguese original: “haver dado com um pau no ouvidor da Comarca do Espírito Santo”. Consultation from 01/04/1831.

²³ Portuguese original: “extorquir dinheiro dos presos”. Consultation from 08/02/1833.



commission to send recruits”²⁴. This is why there was a relevant degree of variation among the *nomini iuris* of crimes, what forced us to gather them into some groups. For instance, under the general name of “wrongs against superiors”, I placed actions called by names so different as “insubordination”, “disobedience”, “escape”, “riot”, “to shoot superiors” and “resistance against superiors”²⁵.

This situation sheds light on an important aspect of the legal thought of Ancien Régime regarding how actions were legally determined:

Note that the expression “legal syllogism”, which would come to have so much success under legalism, has here [on *Ancien Régime*] other structure. The major premise is not the statutory law (or a legal concept), but the factual situation, which is consistent with the idea that the solution does not follow a legal rule, and rather the immanent law to a concrete situation. (HESPANHA, 2015: 583)²⁶.

Talking not only about criminal law, but all the particular way in which the pre-modern legal thought was structured, Hespanha shows that reasoning does not depart from an abstract norm imposed by the State (which, in the field of criminal law, would correspond to the description of a crime [tipo penal]), but comes from a factual situation seen by the legal community as relevant. From it comes the fact that the need, already present before the modernity, that criminal behavior was explicitly described in a statute, had a different meaning than the one assumed under legalism in the 1800’s:

In this one, the demand that the crime be explicitly stated in law represents a guarantee for the citizen, because the statutory law is understood as a civilized way to establish law. On the other hand, on the previous law, the demand that the criminal behavior be explicitly described in the statutory law was an indication of the great seriousness of the disrespect of the criminal for the law of the community²⁷ (HESPANHA, 2015: 608).

What one can see on the descriptions of criminal behavior on the second Council of State is the precise moment of transition to the principle of legality. On the

²⁴ Portuguese original: “mal desempenhado à comissão de remessa de recrutas”. Consultation from 15/11/1833.

²⁵ Portuguese original: “insubordinação”; “desobediência”; “fuga”; “motim”; “atirar em superiores”; e “resistência a superiores”.

²⁶ Portuguese original: “Note-se que a expressão “silogismo judiciário”, que viria a ter tanto sucesso no legalismo, tem, aqui [no Antigo Regime], outra estrutura. A premissa maior não é a lei (ou um conceito jurídico), mas a situação de facto, o que é consistente com a ideia de que a solução não decorre de uma regra jurídica, mas antes do direito imanente a uma situação concreta”.

²⁷ Portuguese original: “Neste, a exigência de que o crime esteja previsto expressamente na lei representa uma garantia para o cidadão, pois se entende a lei como a forma cidadã de se estabelecer o direito. Em contrapartida, no direito anterior, a exigência de que o comportamento delitivo estivesse expressamente previsto na lei servia para indicar a suma gravidade do desrespeito do criminoso pelo direito da comunidade”.



period analyzed, the refined modern technique, in which the crime is always called by the name given by the code²⁸, in a deep expression of legality, was still not a reality. This is due to the presence of the Philippine Ordinations as the source of the definitions of criminalized behavior.

The crimes being saw, let us move to the punishment.

Table 2 Penalties to which the convicted were subject when pardon was analyzed by the Council of State.

Penalty	Quantity	Percentage
Forced labor	41	21,8%
Imprisonment	37	19,6%
Death	31	16,4%
Galleys	25	13,3%
Fine	14	7,4%
Exile to a certain place (<i>degredo</i>)	14	7,4%
Loss of patent	5	2,7%
Whipping	5	2,7%
Perpetual inability to hold a public	3	1,6%
Reparation of damage	2	1,1%
Loss of military wage	1	0,5%
Loss of public office	1	0,5%
Exile from a certain place (<i>desterro</i>)	1	0,5%
Ordinary penalty ²⁹	1	0,5%
Not informed	7	3,7%

²⁸ It is not possible to say that jurists in the first decade of the Independence in Brazil were un-technical simply because they do not follow the terminology from the Ordinations. The fact that we nowadays think that the code and its lexical choices are responsible to set the criterium of technicality actually shows the legalism under our legal thought. Despite some exceptions: even nowadays, there are many accusations of untechnicality against the laws. But the most recurrent criterium is the option of the code and when this one is constant and coherent, doctrinal considerations are usually reduced to footnotes.

²⁹ Those were the one established by law, and not by the judge's *arbitrium*.



On table two, it is possible to see the great variety (15) of penalties to which the defendants were subject, and the relative marginality of incarceration. This form of punishment, which is the main one nowadays, appears in only 20% of the cases. It is evidence that carcerocentrism (carcerocentrismo), that would prevail by the end of the 19th century³⁰, was still far away of the scene on the third and forth decade of the 19th century. Moreover, as one can see on table three, the penalty of prison is the lighter one among the four types that can be measured in years. Therefore, prison seems to have been a somewhat softer penalty, both quantitatively and qualitatively. Nevertheless, it appeared in a relevant amount of cases in the Council, even if not in the majority of them, and is important to understand the punitive dynamic of those times.

Table 3 Medium duration of the penalties to which the convicted were subjected when their cases arrived to the Council of State.

Penalty	Medium duration (years)	Perpetual penalties	Sample	Penalty not informed
Prison	3,41	2	37	2
Forced labor	5,26	1	41	7
Exile to a certain place (<i>degredo</i>)	6	1	14	1
Galleys	7,3	6	25	0

Now, we will deal with the defendant's profession and their legal condition. Those two categories are not equivalent but were used together on the records to qualify somehow the defendant. Moreover, they are a good indication of what kind of problem the imperial administration faced with the help of pardon.

Table 4 Defendants by legal condition (slaves, freed etc.) and by profession.

Profession/Legal condition	Quantity
Military	65
Slave	21
Foreigner	10

³⁰ Regarding this theme, see the work of Ricardo Sontag (2016).



Peace judge	2
Freed man	5
Dark skinned	3
Priest	2
Creole	1
Unknown	79

There is an important minority of cases of slaves and freed men, who had a harsher treatment. However, this will be discussed later. The spotlight belonged to military defendants, which represented more than a third of the cases where the profession of the convicted is known. This can be credited to the need of stabilization of the recently independent empire, in which conflicts to keep independence and to secure borders lurked at the limits of the nation. Also, the relevant number of foreigners – especially Portuguese – stimulated distrust about the fidelity of some of the inhabitants of the new-born Empire. It is important to add that most of the military that appeared on the Council of State were of low ranks. Some of them had higher posts, but never from the very top³¹.

Table 5 Results of the consultations of the Council of State when the defendant was free or slave.

Result		Free defendant ³²	Slave defendant ³³
Commutation	Pardon	22%	6%
	Commutation <i>stricto sensu</i>	16%	6%
No commutation		24%	56%
	Majority for commutation	15%	13%

³¹ It was possible to find 33 soldiers, 1 *furriel*, 2 *cabos*, 4 recruits, 1 major, 3 sergeants, 1 *contramestre*, 4 lieutenants, 4 mariners, 1 capitan, 6 *alferes* and, finally, 7 military with unspecified ranks.

³² Numeric values: Commutation - 60 times, being: pardon – 34; commutation *stricto sensu* – 26. Non-commutation: 36. Discrepancy - 47, being: majority for commutation – 22; majority for non-commutation – 15; draw – 8; not informed – 2. Not informed: 10.

³³ Numeric values: commutation – 2 times, being: pardon – 1; commutation *stricto sensu* – 1. Non-commutation: 9. Discrepancy: 5, being: majority for commutation – 2; majority for non-commutation – 2; not informed – 1.



Discrepancy	Majority of non-commutation	10%	13%
	Draw	5%	6%
	Not informed	1%	0%
Not informed		7%	0%

In this table, it is possible to see, above all, the harsher approach of the Council towards slaves. But the data should be looked cautiously, since the ones referring to slaves were found in much minor numbers than the ones of free people. Most of their cases happened in the beginning of the frame of this research, when the counselors appeared to be more severe. This might have distorted our sample. Therefore, the evidence presented above shall be confirmed or discarded by further investigation of other sources.

Table 6 Opinion from the Emperor or the Regency relative to the opinion of the Council.

Attitude of the Emperor or the Regency		Numeric Value
Follows the opinion		69
Goes against the opinion ³⁴		1
Discrepant opinion	Follows the majority	1
	It is impossible to determine the majority	3
There is no opinion	The Emperor commutes	1
	The Emperor does not commute	11
No information		12

³⁴ The opinion recommends the commutation to a certain penalty and the Emperor decides to commute, but to a higher penalty than the one recommended.



The emperor does not
decide

68³⁵

From the table above, it is possible to say that the opinion of the Council was widely respected: in every case in which it decided, the moderating power followed at least the minority opinion³⁶. However, when the regency came to power, the decisions stopped to appear on the records: the documents state laconically that the regents would “discuss it later”. It is possible to understand why this started to happen: now the power was exercised by three people, and not just one. It was much harder to leave the discussions with a fix opinion of three people than when the emperor had to simply state his single opinion. Other hypothesis is that the Council only was heard as a matter of mandatory formality, as stated by the Viscount of Uruguay and described on section three of this paper. Both hypotheses are credible, and is possible that reality, complex as it always is, would reveal that both factors were present. The deepening of the argument would demand a more extensive research about the political dynamics of the regency times, with the discussion of the complete records of the Council. However, this is not the objective here.

5 – Deciphering the sphinx³⁷: reasons to decide on the pardon appeals

Now that the relations between the emperor’s decisions and the opinions of the councilors have been determined, it is possible to scrutinize the contents of the rulings.

³⁵ One case by Peter I, and the rest by the regency.

³⁶ It is important to stress that “to follow the minority opinion” does not mean to contradict the Council of State. In the meetings, both the councilors and the Emperor (later, the Regency) took a seat. All opinions issued during the meetings were registered in the records and were therefore available to the moderating power. There was no mandatory opinion from the Council, but issued majority and minority opinions. The Emperor always followed one or the other, never abandoning at least one of the paths suggested by the Council.

³⁷ Reference to the work of Silvana Mota Barbosa (2001), important to understand the moderating power in Brazil.



Table 7 “Reasons to decide” mentioned by the councilors of State while discussing pardon cases (1828-1834)³⁸.

Justification	Frequency	Percentage
New analysis of the case	46	37,7%
Passion of Christ	24	19,7%
Correction of legislative flaws	14	11,4%
Personal circumstances of the defendant	11	9%
Generic motivation	10	8,2%
The time in prison had purged the guilt	1	0,8%
Others	16	13,1%

Table seven presents the arguments used by the councilors of State, regardless of being used by the majority or the minority, to justify the concession or not of pardon to the convicted. It is not possible to know exactly which ones were the crucial reasons for the decision, since the councilors argued, but did not use to write down a single opinion with the official justifications. Thus, the expression “reasons to decide” is employed here in an approximative meaning. Also, in some cases, the records show some data about the defendant, and in what grounds his request was based, but nothing at all about how the councilors viewed the arguments. This is why we cannot know for sure if they were really employed in the discussions; I evaluated contextually if they could or could not be labeled as a “reason to decide”. The drafting technique of the records also lead to a sparse registration of the decisions and their reasoning, as the secretaries did not write down the exact words of the councilors. Therefore, the records contain much more information about the final decisions than their bases. The sources, thus, despite being very rich, are somewhat sparse, and demands and additional interpretative effort. My objective, however, was to better understand the conceptual pillars of pardon and how they were used between the third and fourth decades of the

³⁸ I could not find any information on the “reasons to decide” of 68 cases. The number of the frequencies is higher than the total number of cases because many defendants had their commutations evaluated by more than one argument.



nineteenth century, during the transition to the age of codifications. To fulfill this task, it is not that important to rebuild the precise thinking of the councilors, but to capture the ideas that were being employed by them as a group. Therefore, the minor variations that might have occurred do not hurt the general conclusions that these data can provide. Even with some imperfections, the documental series is valid.

The limitations being clarified, we can now understand the concepts I drafted from the sources, and the justifications that appear in the records of the Council of State. The various “reasons to decide” can be divided in seven different categories, as shown in table seven: “new analysis of the case”, “correction of legislative flaws”; “personal circumstances of the defendant”, “the time in prison had purged the guilt”, “generic motivation”, “passion of Christ” and “others”.

New analysis of the case. Those are the situations in which the councilors scrutinize the facts once again. Investigating the correction of the procedure followed by the judges, evaluating again the evidence, rethinking which crime was committed, the councilors of State acted in those moments much more as judges than as auxiliaries of the moderating power. In those situations, the Council of State worked almost as another court which would be later validated by the emperor. They used as arguments for pardoning or keeping the sentence many facts associated with the circumstances of the crime: the defendant was a minor (8 cases), advanced age (1), the defendant was a recruit (1), absence of premeditation (1), weapon of the crime (1), absence of intention (1), lack of evidence (2), the defendant was the leader of the criminal action (2), the action was not a crime (4), nullities of the procedure (2), and, very broadly, unnominated aggravating circumstances (6) and attenuating circumstances (1)³⁹. Finally, in many cases there was an unspecified quotation of the “gravity of the crime” (16). “New analysis of the case” corresponds to 37,7% of the arguments employed.

In 24 cases, or 19,7% of them, pardon was granted “in attention to the passion, and death of Our Lord Jesus Christ, which is celebrated today”⁴⁰. This can be seen as a memento of Ancien Régime practices, in which pardon had the role of celebrating the

³⁹ The consideration of aggravating and attenuating circumstances is not a Brazilian specificity. Thomas Kootkas (2007) analyses how pardon worked in Finland throughout the 19th century, when that nation was a Russian grand-duchy. According to Kootkas, pardon there played a role of softening the harshness of the pre-modern system of criminal law. Therefore, aggravating and attenuating circumstances were widely taken into account by the emperor in the decision to commute, since they were not present in the penal laws. Moreover, the social position of the defendant, the fact that he supported a large family and had a good reputation were also important.

⁴⁰ One can see, for example, the consultation of 16/04/1829.



figure of the monarch, and was given in feast days to reinforce the spectacle and to boost the joy of the public.

Correction of legislative flaws. This notion contains the cases in which pardon seems to be used to fill a legal loophole, or when clear equity grounds were present. In these last cases, there was an obvious sensation that the plea should be at least heard, but, at the same time, there was no clear rule that authorized the request of the convicted. I also included the cases in which the convenience of prison administration demanded the diminishing of the sentence, or another change on the rules of its serving, but, at the same time, law did not empower the judge with the needed legal tools to make those changes. In this case, and in accordance to the widespread aversion to the growing of judge's power present in those times, the intention was to give to the sovereign all the discretionary power that could not be eliminated. This larger liberty was balanced by the overview of the Council of State. Among the particular justifications allocated in this category, one can find: a case in which the higher court diminished the punishment; or requests that penalties served before in a case of flight be considered, in what would be called today criminal detraction (*detracção*) (3 cases); a defendant convicted to forced labor that later became unsuited to work due to the loss of an arm (1); incompatibility of the penalty with the female sex⁴¹ (2). Reasons that we understood

⁴¹ The brutality of criminal repression was considered, in some aspects, unnecessary faced to the particular characteristics then thought to be part of the feminine sex. The footnote 170a of the *código criminal do Império do Brasil – comentado e anotado com os princípios do direito...*, which discuss the article 43 ("death penalty shall not be imposed on the pregnant woman, and she shall not even be judged, if she deserves it, not for 40 days after the birth") of the Criminal Code is exemplary: "a pena, esse remédio do crime, na frase de Bonneville, deve ser proporcionada à gravidade da afecção e curabilidade do culpado, sendo inútil e por conseguinte funesto, arbitrário, ilegítimo, o que excede esta medida, e parece que em matérias de crimes a consideração do sexo feminino, como a da idade, deveria ser uma circunstância essencialmente atenuante. E basta considerar que, sendo a mulher reduzida a um estado necessário de menoridade e incapacidade, como collocar-a, esse ser tão fraco, esse menor, sobre o mesmo nível do homem, seu senhor e seu mestre, sendo que a sua debilidade relativa de corpo, de temperamento e de inteligência deveria ser em vista da severidade das leis penas uma causa geral de atenuação, parecendo repugnante, em condições tão desiguais e diferentes, aplicar-se-lhe os mesmos rigores penas que os homens (...). Elevemos a mulher e tenhamos em consideração a sua menor perversidade, sem o egoísmo com que nos tempos antigos se a fazia servir (*ancila*), escrava (*serva*), uma coisa (*res patris familia*), podendo ser repudiada, cedida, vendida, tendo o marido o direito de a matar (*ius vitae et necis*). Attenda-se à sua fraqueza na imposição da pena, mas eleva-se, porque Deos a collocou perto do homem para ser o agente íntimo da sua felicidade, da sua moralidade, da sua salvação. (...) Menos precoces no crime, mais acessíveis à emenda, mais dadas à virtude conjugal e doméstica, mais laboriosas, mais probas, mais econômicas, mais piedosas e resignadas, tudo isso nos leva à conclusão de que a pena de morte para a mulher é uma barbaridade sem razão de ser, e o rigor para com elas, na medida daquele para com os homens, é uma prova de que a pena nem sempre corresponde ao delito. Infelizmente, nesse sentido, o espírito utilitário tem se substituído à antiga generosidade da idade média. (...) a pessoa do sexo frágil raramente recalcitra no crime, a menos que não seja dominada por uma causa estranha, como a loucura. Aconselha com palavras doces a uma mulher que cometeu qualquer crime, e a vereis banhada em lágrimas e com o seu coração repassado em dor exclaimar: pequei e fui uma insensata!" (PESSOA, 1885: 115-114).



that were related to the convenience of prison administration were: the place in which the defendant requested to serve the sentence was closer to his family (1); pardon would help to free spaces on a crowded prison (1)⁴²; absence of a prison suited to the female sex (2); factual impossibility to serve the sentence. I also found two cases in which the defendants were convicted to a penalty and waited for a long time for their execution. The imposition of the penalty would hardly come, and the suffering arising from the expectation of the execution was not a part of the original sentence, what made it unfair. One case was of death sentence, and the other one was of prison combined with a fine, but, since the defendant was poor, he could not pay it and, therefore, was kept jailed. Under “correction of legislative flaws” I placed 14 justifications - 11,5% of the total.

Personal circumstances of the defendant. This category houses three different sub-categories. The first one points the good previous life of the defendant, what indicates that the crime was a simply and forgivable deflection of his normal behavior. The councilors quote: value of the defendant/previous services (2 cases); 5 cases in which some authority spoke in favor of the defendant in the records (recommendation from the court itself [2] or from a military superior [3]). The second sub-category comprises situations in which specificities of the life of the defendant makes the punishment particularly and unfairly harsh. The councilors talked about the poverty of the defendant [2], and one case of a military convicted to the loss of his salary, when it was his only source of income. The third sub-category has a single case, in which the indignity of a defendant was quoted as an obstacle to his commutation. It is important to remember that this category is about the person of the defendant, and not to aggravating or attenuating circumstances of the crime. This category has 11 cases, or 9% of them all.

Generic motivation. This category, with 10 cases, shows vague justifications which say almost nothing about what the councilors had thought – but, maybe, something about the laziness of whoever wrote the records. They are: “there were no reasons to commutation” (9 cases) and “there were reasons to commutation” (1).

⁴² This argument could be dangerous – indeed, if the prisons were at full capacity, only pardon request could be successful. Conveniently, it was used only once, in the case of a foreign defendant who had been causing some trouble in Brazil. A punctual use, to free the country from a quite specific problem.



The time in prison purged the guilt. The one that, from the point of view of almost all the public law scholars in late 19th century Brazil, was the main reason for the very existence of pardon, appeared in just one case, or 0,8%.

Others. This category houses the cases loosely connected to the other ones, and that could not provide much insight in capturing general trends. They are: the pardon from the victim or a next of kin (3 cases)⁴³; a co-defendant who committed the same crime had already been pardoned (3); in the case, the commutation would almost mean the freeing of the defendant, since the penalty would become too light (2); commutation would risk the military discipline and, therefore, the safety of the troops (1). Also, I could find some denials of pardon based on the lack of bureaucratic paperwork. In those cases, it is possible to mention the lack of some document (2 cases) or of the whole original lawsuit (1); there were also 4 cases in which the request was denied because the ordinary appeals were still pending. This last reason derived from the extraordinary nature of pardon: it was used to correct unfairness when the legislative and judiciary could not act anymore. Therefore, any intervention before the final ruling of the judiciary would mean an unlawful intervention of the moderating power against another branch of the State, risking the equilibrium the Emperor himself was responsible to keep. “Others” gathers 16 reasons, or 13,1% of the whole.

6 – Managing instability in times of change: final remarks

Pardon is a legal tool on the halfway between criminal and constitutional law. In Brazil, during the first half of the 19th century, it was important for both dimensions in helping the legal order to face different crisis. From the criminal point of view, royal mercy helped to bring more justice and to soften the severe provisions of the Philippine Ordinations while the Criminal Code of 1830 was still not in force. It was also important to correct procedural flaws and the excessive harshness of judges even after the Code

⁴³ Monica Stronati (2009: 571-574) shows how in Italy the victim’s forgiveness was important of the filing of the pardon requests. It was seen as a sign of the atonement of guilt, and well valued on the opinions issued during the processing. Its relevance was so high that many ministry letters recommended that it should be taken in account. It is something from the *longue durée*, as shown by Marco Bellabarba (1999): from 16th to 17th century, both in Tuscany of Medicis and the Piemonte of Savoy, pardon was more easily granted when it was predated by the forgiveness of the victim or of its family. In Brazil, its relevance was smaller. This was probably due to the existence of the official institution of the victim’s pardon, which extinguished lawsuits in the cases of the private crimes in which there was no accusation from the justice. In Italy, the institution was no longer part of the code, and its concerns must be transversally considered.



came to light. From the constitutional point of view, pardon was used to reward services made to the nation and to properly manage the discipline of the army. This was extremely relevant in times in which instability reigned and riots popped constantly.

The Council of State gave important support to the Emperor and later to the Regency in those tasks. As an organ gathering important politicians and jurists, its opinion was very prestigious at the time, and even further. The role of the Council, however, was not uniform. It was very present while Peter I ruled, but it became progressively void after the Regency came to power, until its final extinction by the Additional Act of 1834, on the context of the decentralization reforms. Be it on the evaluation of the services rendered by the convicted, of the lawful administration of justice or of the fairness of laws, the councilors effectively contributed to shape how law and justice were understood in the dawn of independent Brazil.

This also helps to better understand what the Council was and how it worked. It was not only a political institution, or a legal one: it brought both things together. It shaped legal devices and constitutional institutions in order to control deviance, discipline slaves and the military and to bring stability to a shaken land. Criminal law is an important part of this task. But punishment is just one side of this branch of law: pardon is also a part of discipline. By effectively changing how laws are applied and rewarding trustworthy subjects, it can strengthen the ties between citizens and the emperor. But this is too a proof of the links between pardon, the Council of State and the politics of a specific regime. After the first emperor abdicated in 1831, the institution gradually lost its meaning, as their members were compromised by another context. This may explain its final demise.

Finally, I would like to stress out the implications of this research on our understanding of the construction of legality. This phenomenon was not an abrupt and absolute change from tradition to innovation: it was rather a slow process in which old stiles of thought, concepts and devices were transformed and accommodated into a new structure. The Council could deal very well with cases that happened before and after the creation of the code. The new types of crimes coexisted with old practices, such as the pardon commemorating the passion of Christ. Actually, pardon itself is an old instrument, that was being used in an old-fashioned way, as a resource to show off the never-ending mercy and glory of the crown. We should wait a few years to watch the



transformation of it into a more modern instrument. The institutional continuity from the old and new times might explain the slow changes.

At the end of the day, seemingly incompatible practices could be brought together to stabilize the country and face the challenges of transition.

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