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## **The Evolution of Military Justice in Late Colonial Guatemala, 1762-1821**

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During their nightly rounds, on August 2, 1787, the city magistrate, Don José Antonio Castañedo and his constables found dragoon José Ruiz walking the streets of Nueva Guatemala de la Asunción. After a brief but tense interrogation and a swift search, they discovered Ruiz with a knife. In an effort to implement the royal decree prohibiting the possession of sharp steel weapons, Castañedo immediately arrested a rambunctious Ruiz and took him to the public jail. In the formal inquiry following his incarceration, Ruiz refused the jurisdictional authority of the city magistrate, claimed to be a soldier, and immediately demanded the legal protection of the *fuero militar*, that is, the military exemption from prosecution in civil or criminal courts. His irreverence to civil authority was so explicit that, during interrogation, when asked to state his *calidad* or

racial/social status, Ruiz replied: "I could be mulatto, or even the devil ... All I know for sure is I am a soldier." Magistrate Castañedo, however, was unimpressed with Ruiz's corporate affiliation. He ignored it, proceeded with the trial, and sentenced him to pay the fees of the proceedings.

Yet without checking the veracity of Ruiz's alleged military status, Don Pedro José Tosta y Hierro, the royal attorney of the criminal court, was reluctant to retain him in jail and confirm magistrate Castañedo's sentence. Accordingly, Tosta y Hierro solicited Don Prudencio de Cózar, Sergeant Mayor of the Dragoon Regiment, Ruiz's enlistment record as proof of his military status. As Ruiz's superior officer in charge of supervision of discipline and training, Cózar complied with the request and provided the document. Once military status was confirmed, the royal attorney granted Ruiz the protection of the *fuero militar*, and released him from the public jail. As stipulated by military ordinance, the fate of dragoon José Ruiz was eventually determined by the military jurisdiction. The *auditor de guerra* or military law judge, taking into account his "rustic nature," punished him to 15 days of confinement in the brig of the Dragoon Regiment, and ordered the Colonel of the Regiment to warn Ruiz against carrying prohibited weapons and disrespecting the authority of ordinary or civil justice.<sup>1</sup>

The *fuero militar* mattered in the social world of late colonial Guatemala because, for one, it conveyed a special social distinction to those otherwise dispossessed and racially discriminated. For another, in the multiple jurisdictions of Spanish colonial society, it delineated the juridical domain of the emergent military corporation. In this sense, the *fuero militar* ordered the social world of soldiers differently. Indeed, for a commoner such as dragoon José Ruiz, a mulatto weaver, the *fuero* afforded him the freedom from

incarceration in the public jail and the release from a costly legal fine. Equally important, it granted him the legal right to have his case remitted from the criminal court to the military jurisdiction, where he was punished within the physical, political, and social confines of the barracks. Most important for the Spanish American transformation of military privilege, even his punishment was lenient, for, under the strict regulations of either the General Ordinances of the Army and the Militia Regulations of 1769, the protection of the *fuero* was either immediately lost or could not be invoked in cases of open resistance to ordinary justice. Ruiz's open resistance to Magistrate Castañedo certainly qualified him to a *desafuero*. Undoubtedly, Ruiz's military status, the legal privilege that status accorded him, the corporatist behavior of Sergeant Major Don Prudencio de Cózar, and the legal rationalization of the military law judge exempted him from both a severe civil and military punishment. For members of the tributary racially mixed lower classes were usually sentenced to harsher punishments in civil and criminal courts.<sup>2</sup> Certainly, the *fuero militar* brought Ruiz social recognition and, albeit for a moment, blurred racial discrimination. Undoubtedly, the exemptions and prerogatives granted to Ruiz by military law were "an astonishing and remarkable taste of social equality."<sup>3</sup>

The historiography of the Bourbon military reforms, however, has not treated this "taste of social equality" as an intrinsic juridical manifestation of that body of normative laws shaping the military institution and of the system of courts enforcing them. Instead, the

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<sup>1</sup> Archivo General de Centro América (hereafter AGCA), A 2.2 esp. 895, leg. 44, 1787.

<sup>2</sup> For the legal discrimination suffered by free blacks, mulattos and *zambos*, see Julio César Méndez Montenegro, *Autos Acordados de la Real Audiencia de Guatemala, 1561-1801: Documentos Inéditos para la Historia del Derecho Indiano Criollo* (México: B. Costa-Amic, 1976), 177-178, 186-188, and 228.

<sup>3</sup> Allan J. Kuethe, "The Status of the Free Pardo in the Disciplined Militia of New Granada," *The Journal of Negro History* 56, No. 2 (April 1971): 110.

pioneering works of María del Carmen Velázquez and Lyle McAlister exclusively examined the *fuero militar* in terms of its negative impact on existing social and civil institutions. Both historians, for example, argue that the implementation of military privilege in New Spain disrupted the administration of justice, for officers and soldiers utilized their legal exemptions to evade prosecution in criminal and civil courts and to make a mockery of justice. Hence, McAlister, building on Velázquez's research, concludes that military privilege destroyed respect for law and order, rendered the military institution immune from civil authority, and created the basis for a praetorian tradition in post-independent Mexico.<sup>4</sup>

In the 1970's and 1980's critical evaluations of McAlister's thesis on militarism appeared. In his study of the Bourbon Army of New Spain, for example, Christon Archer argues that the irresponsible praetorian military tradition found by McAlister was conspicuously absent before 1810. For the army was, according to Archer, undisciplined, disorganized, and lacked the corporate spirit to participate or even dominate politics.<sup>5</sup> Hence, the *fuero militar* was not the origin of militarism in New Spain. On the contrary, it was the disruption of the Bourbon state after Napoleon's invasion of Spain in 1808, the massive peasant revolt led by father Miguel Hidalgo in 1810, and the wars of independence thereafter the root causes of the expansion of military legal privilege at the expense of other jurisdictions. Certainly, Archer's administrative, financial, political, and social analysis of the army advanced our understanding

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<sup>4</sup> María del Carmen Velázquez, *El estado de guerra en Nueva España, 1760-1808* (México: El Colegio de México, 1950), 155-156. Lyle N. McAlister, *The "Fuero Militar" in New Spain, 1764-1800* (Gainesville: University of Florida Press, 1957).

<sup>5</sup> Christon I. Archer, *The Army in Bourbon Mexico, 1760-1810* (Albuquerque: University of New Mexico Press, 1977), 7 and 116.

of the emergent institution and the way these factors influenced the implementation of military corporate privilege.<sup>6</sup>

In his study of military reform in New Granada and Cuba, Allan Kuethe argues that McAlister thesis cannot be extended to these regions as a whole. For the *fuero militar* must be related to other Bourbon reforms and to the socio-political rivalry between the Spanish and the Spanish American born, or Creole elite. Once the *fuero* is placed within this context, Kuethe argues, its impact varied considerably from region to region. For example, in the heartland of New Granada, military privilege was weakened by an unsuccessful marriage between the emerging military institution and the Creole aristocracy. As a consequence, an enduring praetorian military tradition failed to take root. On the contrary, in the areas around the commercial port of Cartagena de Indias, the military was the defender of the colony; therefore, in this region, the military was closely implicated in the social, economic, and political designs of the Creole aristocracy and Spanish merchant class; as a result, it won general acceptance and corporate privileges were upheld and a praetorian tradition can be discerned.<sup>7</sup>

In his work on Cuba, Kuethe shows that Bourbon military reform worked because commercial privileges were linked to military reform, and conflicts between creole planters and royal bureaucrats were kept at a minimum; therefore, jurisdictional disputes over the *fuero militar* were infrequent and even immaterial. As a result, military privilege became an elitist affair. Praetorianism took then its

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<sup>6</sup> Although Ben Vinson's recent work on the free-colored militia of colonial Mexico shows the inconsistencies and regional variation in the application of the *fuero militar*, he is not concerned with the evolution of military jurisprudence per se and the genesis of a praetorian tradition. Instead, his principal focus is on the implications of military corporate privilege on the formation of racial identity. Hence, his conclusions on military privilege fall outside the debate over the genesis of militarism. See, *Bearing Arms for his Majesty: The Free-Colored Militia in Colonial Mexico* (Stanford: Stanford University press, 2001), 173-198.

<sup>7</sup> Allan J. Kuethe, *Military Reform and Society in New Granada, 1773-1808* (Gainesville: University of Florida Press, 1978), 4-6.

social roots. This conflation of military and elite privilege is also clear in Margarita Gascón's study of the militia corps in Santo Domingo, where the military imperatives of a frontier society generated a Creole dominated militia.<sup>8</sup> Undoubtedly, Kuethe's and Gascón's contributions to our regional understanding of the Bourbon military and the way Creole/Spanish rivalry affected the implementation of military privilege is indispensable to any understanding of the *fuero militar* in Spanish America.

Finally, there is the case of colonial Peru. To understand the way military privilege worked and to test McAlister's thesis, Leon Campbell consults 200 hundred jurisdictional disputes. It is in this research approach that we see, for the first time, a legal analysis of military privilege. On the one hand, he shows that the weak organization of the army, its failure to suppress the Tupac Amaru rebellions, and the vitality of other established colonial institutions effectively prevented the Peruvian army from challenging or even dominating the civilian government. On the other hand, in terms of military law, Campbell argues that military courts approximated those of their civil counterparts; that military judges showed military men no compassion for fear of being derided as weak leaders; and finally that military law judges consistently allowed commandants to apply severe punishments to their soldiers in order to preserve military discipline. Consequently, the problem of an autonomous and irresponsible military jurisdiction failed to manifest itself prior to independence in Peru.<sup>9</sup> It is Campbell's research on military privilege that brings us closer to an understanding of military law and how the system of courts set up to enforce it actually worked.

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<sup>8</sup> Allan J. Kuethe, *Cuba, 1753-1815, Crown, Military, and Society* (Knoxville: The University of Tennessee Press, 1986), xii-xiii. For the Santo Domingo case see, Margarita Gascón, "The Military of Santo Domingo, 1720-1764," *Hispanic American Historical Review* 73 No. 3 (August 1993): 431-452.

<sup>9</sup> Leon G. Campbell, *The Military and Society in Colonial Peru, 1750-1810* (Philadelphia: The American Philosophical Society, 1978), xiv-xv, 207, 209, 192 and 207.

For this reason, it is within Campbell's research methodology that this research on the evolution of military privilege in Guatemala finds its approach. To get at the way in which the *fuero militar* actually worked and discern a course of military justice, I also examined jurisdictional disputes. Accordingly, this paper focuses on how the *fuero militar* became an actuality of the legal system and a realization of military law. Hence, it assumes what the historiography previously described has demonstrated. Namely, one cannot fully apprehend the complexity of military legal privilege without accounting for its social, political, and institutional contexts. To this end, I propose the following. First, the *fuero militar* was not simply a body of legal privileges and prerogatives Bourbon Kings and their colonial administrators granted the military to create an imperial defense apparatus in Spanish America. Military legal privilege ordered those aspects of social life deemed necessary for imperial defense. As such, it is constitutive of an embryonic *derecho militar* or military jurisprudence.<sup>10</sup> Second, as an integral part of that body of normative legislation enacted to order and administer Spanish America, the transformation of the *fuero militar* belongs to the history of *derecho indiano* or Spanish colonial law.<sup>11</sup> Third, since the *fuero militar* was enacted in Spain but executed, rejected, or modified in America, and equally important, demanded by its newly constituted legal subjects, it is also local legislation. Therefore, the *fuero militar* is an integral part of *derecho indiano criollo* or Spanish

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<sup>10</sup> For an insightful comment on *derecho embriónico* see, Santiago Gerardo Suarez, *Las Milicias: Instituciones Militares Hispanoamericanas* (Caracas: Academia Nacional de la Historia, 1984): 219.

<sup>11</sup> For a succinct definition of *derecho*, see Frank Jay Moreno, "The Spanish Colonial System: A Functional Approach," *The Western Political Quarterly* 20, No. 2 (June 1967): 315; Rafael Altamira y Crevea, *Manual de Investigación de la Historia del Derecho Indiano* (México: Instituto Panamericano de Geografía e Historia, 1948), 1; and Alfonso García Gallo, *Metodología de la Historia del Derecho Indiano* (Santiago: Editorial Jurídica de Chile, 1971), 16-17.

American colonial law.<sup>12</sup> Finally, as the *fuero militar* ordered social life, it produced an organic legal ideology for the military institution, one that organized human masses and created the terrain on which soldiers moved and acquired consciousness of their position in society.<sup>13</sup>

To be sure, in the multiplicity of judicial systems that underscored the nature of colonial society, Bourbon kings created, granted, and ultimately guaranteed the legally defined prerogatives of their newly created colonial army. Yet common men enlisted "not simply as a cog in the military machine, but as cognizant members aware that the King also legislated for them."<sup>14</sup> For this reason, in terms of a theoretical approach to colonial law, the *fuero militar* will be dialectically analyzed as enacted royal legislation, that is, as law *strictu sensu*, and as orders, pronouncements, judicial deliberations, and decisions made by local military and political officials. This way, the *fuero militar* will be apprehended as positive law, namely, as law realized, applied, and lived. This way, an ideology can be ascertained, one created by the enactment and realization of military law as colonial authorities sought to implement what was possible and appropriate for good government.<sup>15</sup>

Military personnel did not always enjoyed legal privilege in Guatemala. The *fuero militar* and the legal exemptions it accorded military men changed over time. To be sure, before Charles III's military reforms and the Militia Regulations of 1769, the *fuero militar* was a limited and carefully monitored legal privilege. For example, in 1696, Captain General Don Gabriel Sánchez de Berrospe issued a writ stating that soldiers, captains, sergeants, and field

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<sup>12</sup> For a definition of *el derecho indiano criollo*, see García Gallo, *Metodología*, 60; and Victor Tau Anzoategui *¿Qué fue el derecho indiano?* 2ed. (Buenos Aires: Editorial Abeledo-Perrot, 1982), 35-42.

<sup>13</sup> Antonio Gramsci, *Prison Notebooks*, ed. Q. Hoare and G. Nowell-Smith (London: Lawrence and Wishart, 1971), 377.

<sup>14</sup> Suárez, *Las Milicias*, 219.

<sup>15</sup> See, Altamira y Crevea, *Manual de Investigación*, 27-28.



marshals did not enjoy the *fuero* in their daily life, except when in active military duty. Finally, he declared that captains or corporals who commit injurious crimes, resist, or obstruct the jurisdiction of ordinary justice forfeited their military privilege. Hence in those cases, ordinary judges were in their jurisdictional right to indict, prosecute, sentence the accused, and execute the verdict without any political interference from captain generals.<sup>16</sup>

The limits of military privilege established by Captain General Don Gabriel Sánchez de Berrospé in 1696 were restated and expanded early in the following century. For example, on 7 April 1738, in common accord between Captain General Don Pedro Rivera y Villalón and the *audiencia* or Royal High Court, the Captaincy General decreed that civil cases against militia captains and other militia officers while off duty were within the jurisdiction of ordinary justice.<sup>17</sup> Besides these tangible limits, the above decrees also discouraged direct appeals to the Captain General. By dissuading direct appeals, the colonial government effectively legislated the highest-ranking military officer and political authority out of military jurisprudence. As a result, the Captain General only supervised the administration of military justice as the judge of second instance. Both decrees were, however, reflective of local reality, one that lacked the presence of an organized military institution in the region. In terms of the application of military law, royal judges or *oidores* of the *audiencia* acted as *auditores de guerra* and successfully prosecuted cases involving military personnel. This smooth running of the military court, however, was to suffer its first phase of transformation in the 1770's.

This first transformation was brought about by three events, one internal to the military institution and the other two external to the army. In terms of internally induced change, in late 1770, as part

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<sup>16</sup> AGCA A2.2 exp. 8 leg. 1 1696.

of the military reforms of Charles III, there arrived on the Atlantic shores of the Kingdom of Guatemala 41 Spanish veteran officers.<sup>18</sup> Then, in December 1777, a battalion of 399 Spanish veteran troops disembarked.<sup>19</sup> With this increase in fresh regular troops from the peninsula, jurisdictional conflicts naturally multiplied. For career Spanish officers began, fully aware of their legal status, to guard their military prerogatives and those of their troops against the encroachment of local political administrators and ordinary justice. Equally important, the political arena on which these jurisdictional disputes emerged and were solved began to sustain a reconfiguration of forces. The first sign of this new political arrangement was the appearance of the Captain General as the primary source of jurisdictional dispute settlement. From this period onward, direct appeals from civil authorities to the Captain General became visible in the records, for local civil authorities began to periodically demand the direct political intervention of the Captain General in military affairs. As a result, the Captain General's political power expanded into the previously neglected military judicial domain. Certainly, by 1776, the *auditor de guerra* could not quietly and alone decide the fate of military personnel and the scope of military jurisdiction. The Captain General was now to fulfill his role as both the judge of first and second instance.

The appearance of the Captain General in the judicial arena of military law was not engendered solely by the inner workings of a local political administration defending itself against a growing and potentially antagonistic military institution. On the contrary, the active role of the Captain General in military matters coincided with a period marked by two external factors. One was a transcendental natural disaster and the other a climax of a regal policy toward

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<sup>17</sup> Méndez Montenegro, *Autos Acordados de la Real Audiencia*, 160-161.

<sup>18</sup> AGCA A2.17 exp. 6983 leg. 302 1770.

<sup>19</sup> AGCA A2 exp. 6955 leg. 302 folio 45.

American *audiencias*. On the one hand, the visible participation of the Captain General in jurisdictional disputes concurred with the much disputed relocation period between the catastrophic earthquake of 29 July 1773, and December 1775, when the royal decree ordering the relocation of the capital city to the Valley of La Ermita was received in Santiago de Guatemala. This period of disaster was dominated by the political struggle between two factions. These two groups fiercely disputed the relocation of the ravaged capital Santiago de Guatemala to the Valley of La Ermita. Captain General Martín Díaz de Mayorga led the relocation faction against that of Archbishop Pedro Cortés y Larraz. In this political struggle, Captain General Mayorga prevailed, for the Royal Decree of 21 September 1775, ordered the relocation of Santiago de Guatemala. As a result, in January 1776, the Creole dominated city council of the capital found itself in desperate need of the Crown's assistance to build the new capital. This financial pressure and the actions of Bourbon reformers such as Captain General Mayorga to reassert royal control over local interests temporarily weakened the autonomy of the new capital's city council and strengthened that of the Captain General.<sup>20</sup>

On the other hand, the expansion of the Captain General's power took place at the time when American *audiencias* themselves were in a period of transition. A transitional period Mark Burkholder and Dewitt Chandler call "from impotence to authority." Namely, American *audiencias* were at the climax of Secretary of the Indies Julián Arriaga's policy of attrition against Creole influence in these civil tribunals. Arriaga's policy was successful in the Kingdom of Guatemala. By the end of 1775, the Royal High Court had no native

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<sup>20</sup> Cristina Zilbermann de Luján, *Aspectos socio-económicos del traslado de la Ciudad de Guatemala (1773-1783)* (Guatemala: Academia de Geografía e Historia, 1987) and Inge Langenberg, "El traslado de la ciudad de Guatemala y sus consecuencias para la población y sociedad urbana al fin de la época colonial (1773-1824)," *Anuario de Estudios Americanos* 36 (1979): 358-359 and 370-371.

Guatemalan and only one Creole *oidor* on the bench. Naturally, the conflictive political atmosphere of the relocation period, the peninsular dominated *audiencia*, and the increased power of the Captain General affected the interpretation and realization of military law. After all, the distinctive feature of the legal phenomenon is not the enactment of a law per se but its practical application.<sup>21</sup>

Yet, Captain General Mayorga's newly found power did not become obstructive to the administration of military justice. In fact, his political intervention in the workings of military jurisdiction expedited the application of martial law. In addition, Captain General Mayorga's renewed political power did not become obtrusive to the implementation of military justice. Namely, Mayorga respected military officers' interpretation and implementation of military law. This was particularly the case when military law dealt with discipline, a quintessential military affair. Overall, in spite of the growth of military personnel, the political conflicts of the relocation period, and the regal consolidation of the *audiencia*, legal reasoning was not thwarted and military courts worked smoothly. This was to change, however, between 1779 and 1783, when a second phase of transformation of military law came into being.

On the morning of 20 October 1779, British forces, responding to Spanish declaration of war against England in the American War of Independence, attacked and captured the strategic located San Fernando de Omoa Fort on the Atlantic coast of the province of Honduras. Responding to the potential military threat this occupation represented to the kingdom, the new Captain General Don Matías de Gálvez mobilized and lead to war a total of 437 soldiers and 34 officers organized in the Veteran Battalion, the Dragoon Squadron, and the Militia Battalions of Chiquimula and

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<sup>21</sup> Csaba Varga, *The Place of Law*, 95.

Acasaguastlán. On 29 November 1779, 40 days after the initial English attack, the British defenders of the fort capitulated to Spain. After his military success at Omoa, Captain General Gálvez decisively mobilized his troops to repossess all the territories loss or threatened by British forces on the Atlantic coast. By the end of the Honduran and Nicaraguan military campaigns, Gálvez had an army of approximately 15,000 troops at his disposal.

Military victory affected law application. Officers of the victorious and militarily strategic Militia Battalion of Chiquimula quickly realized this new political atmosphere. As a case in point, on 23 August 1780, Micaela Vivar went to the house of Doña Guadalupe and Doña Francisca Orrego to seek shelter from a violent husband. Later that day, Micaela's husband, Manuel Feliciano Ramirez, arrived in the Orrego home and threatened Micaela with a sword. While Ramirez was threatening violence, Don Manuel Orrego, a militiaman from the Militia Battalion of Chiquimula, arrived and demanded Ramirez leave. Instead of departing, Ramirez hit Don Manuel with his sword. Meanwhile Don Manuel's brother Don José, a militiaman from the same battalion, arrived. All three men began to fight and Don Manuel wounded Ramirez with a stone. The Orrego brothers were arrested and put in the public jail. Since military men, under the legal exemptions of the *fuero militar*, could not be imprisoned in a public jail, Lieutenant Gregorio Martínez de Garrido, serving as the Orrego's defense attorney, demanded their release, dismissal of the criminal charges, and the immediate arrest of Manuel Feliciano Ramirez for abusing his wife. The crown attorney of the criminal court, Don Pedro José Tosta y Hierro, complied with Lieutenant Garrido's demands. He ordered the release of the Orrego brothers from jail, did not penalize them with the cost of the legal proceedings, and ordered the immediate arrest of Ramirez. The

*auditor de guerra*, Don Joaquín Plaza y Ubilla, and Captain General Gálvez decisively approved Tosta y Hierro's judicial decision.<sup>22</sup>

This case illustrates three important features of the second transformation of military law. First, the Captain General was an active military man, a cadre, on whose political support, for the first time, military officers could depend. Second, this case illustrates how military officers, fully aware of their recent military victory under the command of their Captain General, seized the political moment and demanded the legal prerogatives accorded to them and their troops by the *fuero militar*. Third, the legal proceedings show how the political context brought about by British military threat to the region limited the royal attorney's influence on military privilege. For law application is not simply the implementation of law, but a type of decision-making where, in this case, Spanish American imperial defense now demanded a solution in accordance with military law, and in harmony with the social goals of a militarily threatened colonial society. From this moment forward, military justice was dispensed by members of the military institution, that is, the Captain General, military officers, and, although a civilian royal attorney, the military law judge. Moreover, with the appearance of military officers in the political arena, jurisdictional disputes became a more complicated legal affair. That is, this period witnessed an increase in the scope of military law, both in the range of civil and criminal actions and in the persons who were influenced by it. Naturally, civil authorities protested at every turn. As a result, legal and political leadership was required to discern the boundaries of jurisdictions, to solve in a practical manner jurisdictional conflicts, to establish procedures for an appropriate transfer of legal cases, and to deliver both the quantity and quality of the justice demanded.

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<sup>22</sup> AGCA A2.2 exp. 841 leg. 41 1780.

Captain General Gálvez provided the much needed political leadership. On 28 June 1782, he sent *auditor de guerra* Plaza y Ubilla a set of temporary regulations governing the *fuero militar*. He decreed that, due to the considerable militia forces created and the military privileges they enjoyed, these regulations needed to be implemented immediately.<sup>23</sup> The issuance of the regulation governing the *fuero* was a direct result of both zealous military officers and civilian authorities. Consequently, this local legislation is a distinct feature of the second phase in the transformation of military law. Unlike his predecessors, Gálvez's aggressive military defense in the region and his political initiative guaranteed that the enactment of martial law and its actual application coincided in matters strategic to military affairs. However, in December 1782, *auditor* Joaquín Plaza y Ubilla was promoted to the Mexican *audiencia*. His three years of service as military law judge in the *auditoría de guerra* of the Kingdom of Guatemala were insufficient to unravel the intricacies of legal conflicts and law application. Much like the situation before him, after his departure to Mexico City, the *auditoría de guerra* was inconsistently filled by different interim attorneys and royal judges of the *audiencia*. Legal leadership even when it coincided with Gálvez's political pilotage was thus absent during this period. This lack of direction was, nonetheless, to change between 1783 and 1802, when a third phase of transformation of military law took place.

The entrance of foot soldiers into the political arena of legal reasoning inaugurates this third phase of legal transformation. Military officers, in their quest to defend their corporate privileges, facilitated the actual participation of common soldiers in the implementation of military privilege. Yet, common soldiers did not simply use this mechanism to claim their newly bestowed military

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<sup>23</sup> AGCA A1.2 folios 94-108 leg. 1541 1782.

privilege. The rank and file demonstrated an awareness of their new position in society and the role of their *fuero* in defining that position. For instance, on 29 February 1788, Pedro Alcántar, a militia from the 8<sup>th</sup> Company of the Militia Battalion of Sacatepéquez, was imprisoned for an illicit affair with Ana Polanco. The ordinary judge prosecuting the case, without any consideration to his military status, ordered 25 lashes as punishment for soldier Alcántar. Soon after the sentence was implemented publicly, Alcántar felt so ashamed that he left the city of Antigua, Guatemala. Naturally, Alcántar's sentence and departure affected the rest of his cadre. The sergeant of the 8<sup>th</sup> company, Ricardo Mendes, reported the uneasiness felt among the soldiers of his company after Alcántar's very public punishment. Mendes also informed his military superiors how this incident made his soldiers question the value of military service. To this end, Sergeant Mendes recalled his soldiers asking: "if we do not enjoy the protection of the *fuero*, why should we sacrifice ourselves to royal service?" The case was transferred to the Captain General for resolution. *Auditor* Aguilar demanded explanations for this incident of the prosecuting judge. After explanations were provided, Aguilar absolved the judge of any wrong doing, but warned him that a similar incident involving military personnel cannot occur a second time; otherwise, he will have to deal directly with the Captain General.<sup>24</sup>

Then beginning in 1789, the office of the military judge showed an unprecedented continuity. Namely, for 13 years the *auditoría de guerra* had only two royal judges performing its military law advocacy and counsel duties. This was the period of Don Joaquín Vasco y Bargas and Don Francisco de Robledo de Albuquerque. These two *auditores* not only brought stability and uniformity to the post, but also devised and implemented new military legislation. For instance, when judge Vasco y Bargas took the

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<sup>24</sup> AGCA A2.2 exp. 901 leg. 44 1788.



duties of *auditor de guerra* in late 1789 he began a process of legal systematization, that is, of logically ordering often contradictory laws, of setting legal precedents, and of establishing procedures. Examples of Vargas' meticulousness, proficiency in law, and flexibility in law enactment and application abound. A case in 1789 illustrates his ability to assemble decrees and deliberate cogent legal pronouncements. In late 1789, military and civilian authorities of the Province of Verapaz requested counsel on a jurisdictional dispute involving a corporal and four soldiers accused of theft. In his pronouncement, *auditor* Vargas recounted former Captain General Matías de Gálvez's *fuero* regulations of 28 June 1782 and the Royal Decree of 26 February 1783 approving Gálvez ordinances and amending articles dealing with theft. He thus reasoned that based on the 1783 royal amendment, theft, unless committed within a garrison or while on campaign, was to be prosecuted by ordinary judges.<sup>25</sup>

Assembling laws into a coherent body of regulations and applying them consistently were not *auditor* Vasco y Vargas' sole judicial concern. He understood that the administration of military justice was the responsibility of the Captaincy General and political harmony tantamount to good government. To this end, he enforced military law in ways that adapted to local circumstances and, by establishing precedents and new procedures, prevented further jurisdictional conflict in the realm. As a case in point, on 16 April 1791, *auditor* Vasco y Vargas delivered a pivotal judicial elaboration. On this date, responding to the request of Sergeant Mayor Manuel Martínez of the Dragoon Regiment to incorporate soldier Felipe de Jesús Guzmán into the military jurisdiction, Vargas improved the procedural rulers set by former *auditor* Joaquín Plaza de Ubilla in 1782 and simplified jurisdictional procedure for the military institution. In his judicial decision, he affirmed that for holding and

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<sup>25</sup> AGCA A1 exp. 57608 leg. 6935 1783 and AGCA A2.2 exp. 904 leg. 44

disciplined companies, only the "visto bueno" or approval of the Colonel or their immediate commanding officers was necessary to effectively incorporate soldiers into the military jurisdiction. From that date forward, *auditor* Bargas reasoned the proper procedure to incorporate a soldier into the military jurisdiction was to present ordinary judges a soldier's military enlistment record together with the approval of the immediate commanding officer.<sup>26</sup> Bargas' judicial elaboration not only resolved potential jurisdictional disputes and dissipated procedural confusion, but it also adapted local reality into legal reasoning. For in the Kingdom of Guatemala, there were few disciplined or formal companies. Instead, there were holding companies that once disciplined were gradually incorporated into existing militia battalions. Consequently, the procedure stipulated in the *Reglamento de Milicias de Cuba* for disciplined militia corps was unfeasible for Guatemalan local conditions. By establishing a procedure that reflected local reality, *auditor* Barga's juridical elaboration made law application a practical processing of the multifaceted and changing reality of legal enactments. He thus realized the function of a colonial jurist. Namely, Don Joaquín Vasco y Bargas operated and cultivated the law to ensure the realization of the Spanish colonial legal complex or *derecho indiano* and the production of its logical offspring, *derecho indiano criollo*.

Undoubtedly, *auditor* Bargas' work facilitated the smooth functioning of the colonial legal system. To be sure, his office was overwhelmed with unprecedented number of cases and great political pressure from officers to solve them. This compelled him to request a 500 *pesos* annual salary raise for his post. To show the unprecedented amount of work reaching his office, Bargas asked chief notaries, Don Juan Hurtado and Don Ignacio Guerra y Marchán, to compile an inventory of the cases received in the

*auditoría de guerra* and of those resolved. Bargas reported that from 1789 to June 1794, a total of 6,174 cases had actually reached the *auditoría de guerra*. Of those cases, a total of 208 judicial elaborations were made, 15 depositions were taken, 346 decrees were issued, and 272 cases were resolved.<sup>27</sup> In spite of the king's refusal of a salary increase, by the time of his retirement in August 1796, the *auditoría de guerra* under the Vasco y Bargas held at its disposal a logical organization of military laws, and a number of legal precedents to deal with local circumstances. This organization generated efficiency in the administration of military justice after Vasco's retirement. For example, between 23 September 1796 and April 1800, *auditor* Robledo had applied military law consistently and uniformly and resolved a total of 270 cases.<sup>28</sup> It is this unprecedented continuity and efficiency in the *auditoría de guerra* and the participation of common soldiers in the implementation of military law the features of the third phase of transformation of military law.

Moreover, this proficiency in law in the *auditoría de guerra* precluded two potential problems inherent in two other infamous Bourbon administrative reforms: the intendancy system and free trade. Indeed, jurisdictional disputes between the Captaincy General and the first intendants over military affairs were, as far as the records consulted show, nonexistent. It was clear that the Captaincy General administered military privilege and dispensed military justice. What is also clear is that, by the 1790's, the King and his colonial representatives understood the indispensability of the army to protect royal interests in the region. Colonial administrators realized that to consolidate reform and maintain control over all the regions of the kingdom, a large bureaucracy was necessary but

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<sup>26</sup> AGCA A2.2 exp. 161 leg. 9 1791.

<sup>27</sup> AGCA A2.2 exp. 181 leg. 10 1794.

<sup>28</sup> AGCA A2.2 exp. 266 leg. 12 1800.

insufficient. Indeed, amidst the declining political influence of the church in the region, a large army was required to quell internal rebellions and fight potential imperialist wars.

It is this political understanding of the centrality of the military institution and its codification in a series of royal decrees that mark the fourth and final phase of transformation. For instance, contrary to custom, the Royal Decrees of March 1801 and January 1802 stipulated that, in the event of a vacancy in the Captain General office, the Sub-inspector of the Army and Militias, Don Roque Abarca, not the senior judge of the *audiencia*, was to assume temporarily the presidency of the *audiencia* and the Captaincy General.<sup>29</sup> Against tradition, these two royal decrees mandated that political and military command now resided in a military officer, a career military man. Then the 12 March 1802 Royal Decree restricted the jurisdictional domain of the auditor to strictly military affairs and further concentrated judicial power in the hands of the Captain General. Namely, the decree declared *auditores* sole dependents of the Captain General for nomination. Second, their jurisdiction resided with the Captaincy General, not the civil tribunal. Third, it limited their duties to those prescribed in the Royal Ordinances of the Army.<sup>30</sup> From 1803 forward, this decree made it unfeasible for a royal judge of the *audiencia* to simultaneously hold office of *auditor*. By disassociating the *auditoría de guerra* from the *audiencia*, the civil tribunal of colonial government, the 1802 royal decree centralized the administration of military justice in the office of the Captain General and transformed the military law judge into a different kind of bureaucrat, one outside the political pressures of ordinary law and *audiencia*.

Yet, this concentration of judicial power in the hands of the Captain General did not translate into a miscarriage of justice.

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<sup>29</sup> AGCA A1.2 exp. 16241 leg. 2246 1802.

Records show that the 1803-1819 tenure of *auditores* José Tomás y Zelaya and Joaquín Ibañez exhibited consistency and uniformity in the application of military law. Certainly, the 1811-1814 seditious revolts in San Salvador, Nicaragua and the Belén conspiracy did not effect the implementation of military law. In fact, Guatemalan Creole officers and the colonial army successfully suppressed those open revolts. For this reason, the final phase of transformation is one of legal consolidation. Namely, for the first time, military jurisprudence and the imperatives of survival of the colonial state coincided. By dispensing military justice from within the juristic system, the Captain General not only validated and secured the supervision of military discipline, but also guaranteed royal justice and political legitimacy in the realm.

The foregoing analysis has suggested that the evolution of military justice during the late colonial period was the product of both exogenously and endogenously induced change. On the one hand, short-term external challenges affected the scope of military law, both in the range of criminal actions and in the persons who were influenced by it and took advantage of its remedies. On the other hand, the internal dynamics of the army and of military law influenced the systems of courts designed to enforce military law and administer justice. Legal change did not occur in a vacuum, of course. In reshaping aspects of legal procedure and redefining areas of military law, *auditores de guerra* were responding to the practical requirements of an increasingly self conscious military corporation, the exigencies of law enforcement, and the imperatives of good government. This dynamic process led to four phases of transformation of military justice. The last phase, 1803-1818, was argued as one of consolidation, a period when military law was intrinsic to the Bourbon colonial state. It is this consolidated legal-

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<sup>30</sup> AGCA A1.2 leg. 1541 folio 389 1802.

bureaucratic institution that survived political independence from Spain in 1821. For example, in 1823, the *auditoría de guerra* behaved much like its colonial counterpart. In fact, up until that year, Don José Cecilio del Valle, the *auditor de guerra* since about 1819 was still in the post.

But what about McAlister's thesis on praetorianism? Or Archer's thesis on the genesis of militarism? Or Kuethe's and Gascón's argument about a successful marriage between creoles and Spaniards and military privilege? In the absence of a debilitating rivalry between Creoles and Spaniards, a breakdown in the Bourbon government, and independence wars in Guatemala, I hope my analysis of military privilege has shown that legal and political military dominance over civil institutions was not a colonial phenomenon in Guatemala. The military institution functioned just like any other legal corporation in colonial society. Namely, any nepotism and corruption among military men were behaviors no different than those of other corporations of the *ancien régime*.<sup>31</sup> Moreover, as these *ancien régime* institutions were transplanted to Spanish America, they developed a colonial style of relation between elites and plebeians. Clientelism and the different patronage systems within the military institution expressed both the vertical nature of social relations and the particular modalities of Spanish domination. Finally, I hope my account of military privilege and the evolution of military justice has demonstrated that militarism in the Guatemalan political system is not the result of a colonial juridical tradition.<sup>32</sup> On the contrary, I hope to have accounted for an anti-essentialist corporatist model. It is my suspicion that it is in the course of the

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<sup>31</sup> Jean Pierre Didieu, "Procesos y redes. La historia de las instituciones administrativas de la época moderna, hoy," in *La pluma, la mitra y la espada: Estudios de historia institucional en la edad moderna* (Madrid; Barcelona: Marcial Pons Ediciones, 2000), 16.

<sup>32</sup>For an engaging anti-tautological account of the military in Latin America see, Alain Rouquié, *The Military and the State in Latin America* (Berkeley: University of California Press, 1987), 1-13.

civil wars between liberals and conservatives of the Central American Confederation, and, after its break-up, the Guatemalan republic of the 19<sup>th</sup> Century that we find the external factors affecting the expansion of military privilege over civil institutions and the creation of military power. I am thinking here of the establishment of the state, the professionalization of the army, the development of military legal and bureaucratic autonomy, different patterns of recruitment and promotion, and economic dependency. This is not to say that military colonial law is not a factor in this institutional development. To be sure, research on the fate of colonial officers and military judges presiding over the *auditoría de guerra* must take place; only then we will fully understand the extent of continuity and change in the Guatemalan military institution after political independence in 1821.