



UvA-DARE (Digital Academic Repository)

'Gelijk hij gecondemneert word mits deezen'. Militaire strafrechtspleging bij het krijgsvolk te lande, 1700 - 1795

Dorreboom, M.L.

Publication date
2000

[Link to publication](#)

Citation for published version (APA):

Dorreboom, M. L. (2000). *'Gelijk hij gecondemneert word mits deezen'. Militaire strafrechtspleging bij het krijgsvolk te lande, 1700 - 1795*. Cabeljauwpers.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

SUMMARY

Dutch historiography about the seventeenth and partly about the eighteenth century has been predominated by maritime history. Especially the history of the seventeenth century in the Netherlands, with its halo of economic power and political hegemony in Europe, has attracted the attention of late-nineteenth and early twentieth century historians. This phenomenon had been noticed by the historian Zwitter, who in his thesis made this assertion. For a large part Dutch maritime activities, discovery voyages and the maintenance of sea power to defend its maritime interests, were responsible for the Republic's economic prowess and political predominance. Small wonder therefore that until recently Dutch historians and authors of romantic history prose emphasised the position of the Dutch Republic as a seventeenth century Sea Power, more or less neglecting the fact, that in order to maintain its independence, this Republic of seven Confederate Provinces had to maintain a sometimes formidable army as well. Eighteenth century historiography until recently suffered under the stigma of a less glorious economic decline and the loss of Big Power status, to which the Republic had to adapt itself. Consequently eighteenth century historiography including that of the Dutch military land forces fared badly in comparison with the attention bestowed on the Dutch Republic as a seafaring nation in the seventeenth century. Only in the last part of the twentieth century historians have increasingly focused on the history of the eighteenth century. The aspect of criminal law in the Republic as well as of that on the high seas received similar attention, and it must be admitted that in this respect the eighteenth century got its fair share, but until now no profound research has been conducted into eighteenth century military criminal law, its procedures and its application.

At the end of the sixteenth century the army of the United Provinces had been a field army, its existence brought about by the conflict of these Provinces with their sovereign Philips II of Spain, a conflict that had mushroomed into a veritable fight for independence. The military successes of Maurits, and later of his brother Frederik Hendrik resulted in the conquest of towns and cities during the first half of the seventeenth century, so that part of the army was garrisoned in border garrisons. In winter time, when hostilities ceased, troops were entirely garrisoned. When, then and in successive years, the army took to the field, part of the garrison troops were placed at the field commander's disposal by the garrison towns. The economic situation in the United Provinces made a standing army of professional soldiers possible. Military personnel contracts were for life, but during the eighteenth century provisions were made

for military service contracts of a given time limit. Owing to the institution of military reforms, initiated by Maurits and his cousin Willem Lodewijk, the army was widely respected in the seventeenth century as one of the best in Europe. Military tactics in the seventeenth century were based on the siege and conquest of cities, and these tactics still prevailed in the eighteenth century. Over the years military hardware had changed as regards the use of fire arms. Muskets with fuses were replaced by fire arms with flints and the use of lances and halberds decreased considerably.

Military criminal law was based upon the so-called "articulbrief" (1590), a collection of 82 articles, depicting crimes and misdemeanours and their applicable punishments, the penal provisions. Moreover "placaten" (publications), "keuren" (statutes) and resolutions had over the years amended these articles. In 1705 the articulbrief had been subjected to some changes. However, these changes did not affect the principals of military justice in any way; only some penal provisions were modified.

Eighteenth century military penal provisions were applicable without exception to all land forces. Procedural military law consisted partly of unwritten law. During the eighteenth century procedural differences, as originally existing in the northern provinces had gradually diminished and finally were phased out.

Where as regards procedures little had been put on paper, it appeared a necessity to the "auditeur-militair" Van Hasselt, the military prosecutor in Arnhem, to compile a book on military criminal procedure in 1762. Three years later he compiled a supplement and augmentation, but in 1776 he rewrote the 1762 edition, adding the supplemental data to it. Apart from this literary source Van Hasselt compiled other books regarding military criminal procedures, such as have been listed in the first chapter of this thesis (§ I.3.1). Some books of other eighteenth century authors have also contributed to a lesser degree toward the research into this subject, as for instance Boomhouer's *Miles Desertor* (1731; a Treatise on Desertion) but evidently the archives had to be searched for prime material in relation to military sentences and related material, in order to create a panorama of the aspects concerned.

The courts-martial considered themselves often at liberty to deviate from the plaintiff's demand according to law. The articulbrief provided the courts-martial the opportunity to balance the crime and the punishment, where a

sentence was at variance with the spirit of the articulbrief. A decided reticence as regards the application of death sentences was noticeable.

Culprits at the receiving end of justice found themselves more often than not running the gauntlets of their comrades-in-arms, whereby the suspicion is warranted, that the infliction, although not negligible, was nevertheless bearable by the lenience with which their colleagues in all probability chose to wield their faggots, leather throngs or similar implements. Punishment of criminal behaviour of a particularly abject nature such as stealing and robbery was usually the province of the town's executioner, when available, who executed on behalf of the court-martial floggings by rod, lashings by whip and performed the hangings.

Criminal justice in the Dutch Republic based itself as regards procedure on the so-called "extraordinary" procedure, a procedure that at the end of the sixteenth century took precedence over the "ordinary" procedure. The latter was based on the accusatory procedure and was seldom used when meting out criminal justice in the first instance, after the extraordinary procedure came into fashion. In the ordinary procedure accuser and accused stood before a passive judge. When there was no accuser there was no lawsuit. The extraordinary procedure was inquisitorial, and criminal procedures were conducted by a prosecutor on behalf of the governing authority. Its aim was swift justice and no barrister stood by the accused. Extraordinary criminal proceedings had become possible since governmental bodies had tightened their grip on society, a prerequisite that until the end of the sixteenth century had been deficient. Only in appeal cases a criminal law suit was still conducted with the aid of two solicitors in "ordinary-procedure" fashion, in accordance with the accusatory procedure.

Military criminal justice in the first instance was performed in similar mode as regards the extra-ordinary procedure. In the eighteenth century a military criminal lawsuit in the first instance against military personnel up to the rank of subaltern officers was usually conducted before a court-martial, convened in the garrison town of the accused. This had not always been the case. Originally the regiments provided a court martial for its men by its own officers. The eighteenth century military organisation in garrison towns and the office of military justice had adapted to each other, so that only foreign regiments, such as Swiss, and the Guard regiments retained their own courts martial. Normally a civilian lawyer occupied the function of "auditeur-militair", military prosecutor, as a side line. He did not receive a regular

salary, but was remunerated by each company with a certain allowance, and he could furthermore demand financial compensation for a number of duties that had been allotted to him. Although he was not considered a member of the military, he was put on a par with a lieutenant.

Military lawsuits and lawsuits against civilians had their similarities, but their differences as well. A court martial consisted invariably of seven officers. The presiding officer was highest in rank. The garrison commander could be the presiding officer, but he could delegate this function to another officer of the garrison. The president had a vote with the other six officers, and after the voting he passed the judgement. The prosecutor, the "auditeur-militair", mostly had an academic background, in contrast with many a bailiff in the land, who, in contrast with the military procecutor, acted both as prosecutor and as non voting president.

Military sentences by a court-martial required the stadtholder's approbation in his capacity of captain-general of the unified land forces. During the two forcible vacancies of the stadtholder's seat, 1650-1672 and 1702-1747, the States-General abrogated this approbation procedure.

Appeal was only possible when a confession had not been forthcoming from the accused. Appeal cases went originally before the "Raad van State", the State Council, as well as criminal lawsuits in first instance against officers of superior rank, and military criminal lawsuits of a particularly complex nature. In the beginning of the seventeenth century however Maurits van Oranje-Nassau in his capacity of captain-general elevated the court martial of the field army to the status of "Hoge Krijgsraad", the Supreme Court Martial, which presumed upon the competencies of the State Council in military judicial matters.

The existence of this Supreme Court Martial and its powers, previously the province of the State Council, must have been a bone of contention from the beginning of its institution. It is therefore not surprising that at the moment of the abolition of the office of stadtholder in 1650 its powers were instantly curbed to the original level when, after the sudden death of William II in 1650, the appointment of a succeeding stadtholder was considered unnecessary by the States of five provinces. The State Council was reinstated in its original role of arbiter in appeal cases and as military court for accused staff officers. The abolition of the stadholdership proved to be only of a temporary nature for when the authorities, faced with threatening military and political circumstances

they elevated William III of Orange-Nassau to the position of stadtholder in 1672. The Supreme Court Martial again made in-roads on the prerogatives of the State Council on behest and active support of William III. Once more cut to size after William's death in 1702, the Supreme Court Martial revived again in 1747 when William IV entered the stage as stadtholder and captain-general. The involuntary demise of the Supreme Court Martial occurred in 1783, when the powers of the then stadtholder William V proved insufficient to salvage its existence against the political opposition of the magistrates, who were in constant strife with William V over his prerogatives. Closely connected with this conflict was the tedious bickering over the jurisdiction of military courts in relation to the range of crimes, committed by military personnel. Military jurisdiction decreased or increased in latitude in accordance with the availability of a stadtholder and his power to enforce his prerogatives.

Every suspected military criminal was placed into custody. This applied to officers as well, barring exceptional cases, when house arrest was imposed. Interrogations of a suspected criminal focused on the extraction of a confession, regarded as the "Regina Probatonis", the queen of evidence, opening the way to administer swift justice. The procurement of a confession was an effective way to cut off the possibility of an appeal, the rule "confessus non appellat" being applicable. If the defendant chose to deny the accusation, torture or threat of torture might make the accused more malleable to confession. In theory these procedures were only permitted in severe cases of suspected criminal conduct, where prescribed punishment for the suspected crime would result in death or flogging with related loss of honour. An eighteenth century lawyer, Bavius Voorda, stated that in his opinion torture was often applied too easily, whereby the rules constraining its applicability during interrogations of accused civilians were neglected, torture often being regarded as a "palliative", as he deprecatingly wrote. Although no proof could be found of a more careful approach in relation to torture or threat of torture, it seems that military criminal procedures in this field were more reticent than civilian courts. Where in military criminal sentences mention has been made about a voluntary confession after the accused had been subjected to the application of torture implements, it is unclear whether the sentence referred to factual torture, or that the wording in the sentence merely made reference to a threat of torture, where the implements had been shown to the strapped-in prisoner.

Condemned military criminals were punished in a more or less harmful manner. Officers received sentences in accordance with their social status and they were not subjected to corporal punishment. Cashiering, a fine, or temporary incarceration or a combination of these were the disciplinary measures against straying officers. If an officer was condemned to death and the execution not mitigated, he was put to death by the sword. The lower ranks could usually expect short term incarceration, running the gauntlet, flogging, banning, and death by hanging or shooting. Running the gauntlet had its advantage as being a punishment not dishonouring the victim, whereby the condemned could be retained for military service, unless dishonour and cashiering were expressly stated in the sentence. Running the gauntlet was applied very frequently. According to the law deserters deserved a death sentence, but this ultimate judicial consequence was not always adhered to. As of 1748 the States-General decided that in future deserters were to be punished by a lifelong sentence "ad opera publica", forced labour with shovel and wheelbarrow, for the maintenance of fortresses and walls. Owing to the leniency of William IV and his successors who, when consenting to approve the sentences, nevertheless in nearly all cases of desertion commuted these sentences in favour of the condemned, this resolution of the States-General became a dead letter. After 1748 many a sentence of a deserter was commuted by the stadtholder William IV and, after his death (1751), by his widow Princess Anna, mother and Regent of the minor new stadtholder. After the Princess Regent had deceased too (1759) the Duke of Brunswick, guardian of William V and acting captain-general, continued this policy. When William V came of age and took the reins, he was even more generous in this respect and nearly all deserters met their fate running the gauntlets, or even only received a gaol sentence for a couple of days on bread and water.

Where desertion was a despicable crime according to the *Articulbrief*, deserters were nevertheless the main beneficiaries where the act of pardon was concerned. Pardon for a crime could be requested, and a request as such could have its effect, particularly when a death sentence had been passed. Deserters were sometimes pardoned by droves, unasked, but the occasional massive offer of pardon appeared to have been made necessary by personnel demands of the situation, when a threat of armed conflict hung in the air, or war had already been declared.

SUMMARY

Criminal justice in the Netherlands in the eighteenth century had no unequivocal answer where a criminal *attempt* was concerned. This goes as well for military criminal justice. A rule of law, differentiating between a crime and a criminal attempt did not exist. When deciding about the culpability of the attempt and its judicial consequences one had to rely on what various jurists had put on paper according to their conceptions about Roman law and jurisprudence. This uncertainty as to the degree of culpability has been highlighted by Boomhouer in his book *Miles Desertor* (1731). Other examples found in the archives indicate this lack of a rule, distinguishing between a criminal offence and an attempted one. Van Hasselt, going into this subject of an attempted crime in his *Onderricht* (1776, the enlarged second edition of his book on military criminal procedure), has given an opinion on the matter. In an "Advys Decisoir" on attempted desertion and the application of torture Van Hasselt has approvingly cited the juridical advice of two jurists in a lawsuit on attempted desertion. They were of the opinion that a suspected criminal attempt could in no way be judged as the crime itself. However, during the Ancien Régime a distinction between the two has not always been made. The advice of a well trained lawyer, if sometimes sorely needed, was not always invoked.

When in 1795 the United Republic was dissolved, the political cards were reshuffled. The tenets of the Ancien Régime made room for the forces of reform. They affected the conceptions regarding military law as well. It took a mere four years, before the revised concepts of military criminal law took shape, when in 1799 the new Statutes of Criminal Law for military personnel came into effect.