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## The Development of Military Jurisdiction in Hungary

According to some, undoubtedly creditable sources, the Hungarian history of military criminal rules dates back to a few centuries ago, when the first permanent armies were set up.<sup>1</sup> Although it is evident that there have always been armed fights between tribes and states through the history of mankind and armed troops were involved in wars.

In the beginnings all men fit for military service were called up when there was need, because there were no separate armies at the time. It seems only natural, though that during military service their performance was assessed with different measures than in civil life and that different laws had to be implemented to judge behaviour during military service or at times of war. The rules of military criminal law developed gradually to meet these requirements.

The main target of the present paper is to demonstrate how justice was served in the army and how the Military Criminal Code developed in a more and more systematic framework. This, in fact, is in the centre of our attention; although the scope of the present paper does not make it possible to discuss how justice was administered in the courts martial in equal detail.

With the above in mind, the regulations of military judgement before the battle of Mohács in Hungary are only reviewed briefly in legal literature, because there was no permanent army, as we understand it today, at the time<sup>2</sup>. There are also very few sources about the military jurisdiction during the war of independence led by Ferenc Rákóczi and the military justice during the war of independence of 1848-49.<sup>3</sup> The discussion of the latter is fairly brief,

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<sup>1</sup> For a brief historical overview see: PAPP Kálmán, *Katonai büntetőtörvényeink és a jogfejlődés*, Bűnügyi Szemle, 1913, and VARGA J. János, *Katonai bírászkodás a XVI-XVII. századi dunántúli nagybirtokon és a végvárakban*, Századok, 1977, 444.

<sup>2</sup> PÁLFFY Géza, *Katonai igazságszolgáltatás a királyi Magyarországon a XVI-XVII. században*, Budapest, 1995, 80.

<sup>3</sup> BEÉR, János, CSIZMADIA, Andor, *Az 1848-49. évi népképviselési országgyűlés*, Budapest, 1954, 570-573.

because at times of war, although military justice is practiced, the substantive and procedural principles may be different from those at times of peace.

The Military Criminal Code<sup>4</sup>, which was in force in Hungary until 1930, was enacted with the patent of the Emperor in 1855 in Austria, before the Austro-Hungarian Monarchy was instituted in constitutional law.<sup>5</sup> The Military Code of Procedure was issued in 1912.<sup>6</sup>

As regards military substantive law, Act II/1930 is not only the first truly Hungarian Military Code of Justice, but one, which outlines the basic principles, some of which are unchanged even today<sup>7</sup>.

### I. The specific nature of military criminal law

Military criminal law, which is meant to protect life and service relations taking the special features of the military organization into account, is part of general criminal law. Thus, military criminal law stipulates the legal liability of the military, lists military crimes and legal sanctions. Military criminal law is exercised in the course of military justice.

It is also possible to draw a distinction between criminal law and military criminal law from the perspective of the general and the specific. The difference between the two is, undoubtedly, due to the differences between civil and military circumstances, the functional features of military conditions and the special legal status of the military.

Nevertheless, the basic rules of criminal law (at least at the present stage of development) apply to military criminal law as well. As a general rule, despite its special features, military criminal law remains an integral part of the general institution of criminal law, making provisions for the general principles of criminal law to be effective under the special conditions of the military organization.

At the beginning of the twentieth century General Kálmán Papp, Chief Judge Advocate said, „*As regards the different stages in the development of military justice, we can say that they seem to be in good agreement with the changes in the military organisation. At times when the army meant the people, civil law was basically the same as*

<sup>4</sup> IFJ. SZABÓ Sándor, *A Katonai büntető törvénykönyv a magyar jogforrástan szempontjából*, Budapest, 1916.

<sup>5</sup> LENGYEL István, *A magyar katonai igazságszolgáltatás szervezete 1867-1914*, Budapest, 1996, 42.

<sup>6</sup> Act XXXIII/1912.

<sup>7</sup> SCHULTHEISZ Emil, *A katonai büntetőtörvény magyarázata*, Budapest, 1931, 82.

*military law, while at times when the army – as a body with a special mission – became a separate institution, military justice became a separate field of criminal law as well.*<sup>8</sup>

The author suggests that it is only justifiable to speak about military criminal law and the emergence of the special legal rules pertaining to it after the first permanent armies were organised. It does not mean that there had not been laws applicable to the military before the regular army; it only means that both the rules and the procedures were the same as in the general criminal law practices.

The rules of military justice are applied in courts martial, together with the rules of general criminal law since the military – like anyone – are obliged to conform to the laws of society. Courts martial may administer justice to civilians as well, through *conexitas* – material or personal relevance to military cases – when the rules of general criminal law are applied. Being a separate body with specific living conditions and service relations, the army requires separate military criminal law, where the individual's status can be characterised with the predominance of duties over rights, rather than a balance between the two. The military are expected to sacrifice their life, they must not spare efforts when performing duties and they are obliged to place military interests above their own individual interests.

There is a special relationship between law and morale, too, as there are certain moral duties underlying certain legal duties, which can be enforced. While in general criminal law moral duties are above legal, enforceable ones, in military law virtue (a moral norm) often becomes a legally prescribed duty, which can be enforced.

Consequently, military systems are characterised by discipline, centralism and subordination, which has a bearing on military criminal liability and which is expressed in the regulations and interdicts of military criminal law.

Military discipline is similar to other forms of discipline, meaning compliance and obedience above all. Socialisation, any form of the division of labour involves organisation, supervision and control. Obedience to political power – e.g. the state – can be explained with the human desire for social order. People usually agree that there should be order in society, but they often disagree on the possible ways leading to it.<sup>9</sup>

Naturally, any form of supervision and control in an organisation requires subordination and furthermore, any hierarchical system requires obedience and discipline so that it becomes possible to impose injunction and the power of disposing on its members.

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<sup>8</sup> PAPP Kálmán, *i.m.*

<sup>9</sup> For a deeper analysis see SZABÓ Miklós, *Engedelmesség és engedetlenség – Államelmélet*, Miskolc, 1997.

In this respect military discipline is the same duty to obey as that in civil life. The special feature of military discipline, however, is that there is a wide range of means available to impose obedience and disciplinary punishment for offences against rules of service inflicted by superiors.

The special features of military discipline should be looked for in the range of duties and the possibility of discipline being imposed on the individual, which are rooted in the special conditions of the military organisation.

Military discipline is not an abstract entity, but a general feature, by which life in the army is actuated and which means full compliance with the regulations of service. Thus, it follows that breach of discipline usually involves an offence against rules of service or insubordination as well.

Centralism is the other special feature of military organisations, which, like discipline, is meant to enhance the achievement of the purposes of the body. It affects relationships vertically, creating clearly hierarchical subordination.

Centralism, manifesting in subordination, serves the unity of will and action within the army.

Subordination regulates relations and, undoubtedly, serves the achievement of the central object. Through the structure of centralism each individual of the military is in a situation of superiority and inferiority at the same time, being both higher and lower in rank than somebody else. Subordination is not merely an organisational strategy; it is a value in its own right, guiding communication within the organisation, thus contributing to efficiency.

Subordination, in this way, has two aspects. On the one hand, it involves the obligation to obey to orders, while on the other; it also involves the automatic and unquestionable respect of subordination itself, for its own sake, irrespective of any given order.

Consequently, the rules and norms of military criminal law are different from general criminal law, even at times of peace, let alone times of war or in emergencies, when general norms give way to norms more suited to the special situation, even if they are not in full agreement with the general principles underlying the constitution of the country

## **II. The brief history of military criminal law and procedure in Hungary**

Through the development of military jurisdiction the principles underlying civil jurisdiction were modified.

Modern European polities are constitutionally governed. Their constitution is based on the division of power between different branches of government, so that the legislative, the executive and the judiciary are relatively autonomous from each other.

In the old constitution of Hungary the judiciary were not autonomous bodies, independent of the executive branch. They were in fact part of it, mainly at lower level.

Before 1848 the judiciary were partly independent of the executive branch, because none of the judges of the Royal Court, which was an Appeal Court, were allowed to take part in administrative procedures. In the Royal Court of Seven only the Palatine or the Lord Chief Justice exercised executive power. In the County Courts and the Town Courts the sub-prefect, the magistrate and all the jurors were engaged in executive as well as judiciary procedures. In the beginnings there was no need expressed for the judiciary to be autonomous

Act IV/1869 includes the principle of the separation of the judiciary and the executive branches. The act provides, „all sentences shall be passed in the name of the King and judges shall be appointed by the King and paid by the Treasury.”<sup>10</sup>

The separation of the judiciary from the executive power was prescribed by Act XXXI/1871, which terminated County and Town Courts and their jurisdiction replacing them with Courts of First Instance.

Laws in Hungary prescribed the qualifications required for judges for the first time. They also included the law of incompatibility with rather strict rules, most of which apply up to the present day since they reflect the basic tenet of constitutional government declaring that the judiciary are autonomous, who should only submit themselves to the laws of the country and that they cannot be removed, displaced or defrauded of their income, except in cases specified in the law (Act IV/1869).

The division of power and the difference between the legislative and the administrative branches can only be observed if the constitution guarantees that jurisdiction is independent of political or any other influence.

There are rules emphasising the importance of the autonomy of the judiciary in our old constitutions as well<sup>11</sup>, which, however could not actually be enforced in the lack of the necessary institutions.

It is worth noting that Act 12/1791 includes the institutional guarantee of the autonomy of the judiciary saying that jurisdiction should be carried out in

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<sup>10</sup> Act IV/1869.

<sup>11</sup> E.g. 1471.12, 1492.10., 1566.25., 1613.34., 1618.13., 1647.137., 1655.53 and Act2/1622 and Act 1/1638.

the manner prescribed by law and the „*King should not change the process arbitrarily.*”

It is Act IV/1869, after all, which stipulates that the judiciary should only consider the written and unwritten laws when they administer justice, and which includes the necessary institutions to enforce this rule, declaring that courts of justice can only be set up by law and that judges cannot be removed or displaced while proposing the law of incompatibility.

Act VIII/1871 is, perhaps less known, but is of equal importance because it includes the criminal and disciplinary liability of the judiciary. „*The judiciary have the right to judge the conduct of a judge.*”

This law provided for the autonomy of the judiciary making it impossible for the executive power to interfere with jurisdiction. For disciplinary investigation against Lord Chief Justices at the Supreme Court, at High Courts or Courts of the First Instance a board of arbitration was commissioned in each case. It had twelve members, six of which were appointed from the senior members of the Supreme Court and the other six from the 36 selected members of the Upper House.

This review of the separation of the judiciary and the executive branches makes it possible for us to demonstrate that the development of military jurisdiction did not actually lead to the same result.

In criminal cases against the military the independence of the judiciary from the executive power is not salient.

A possible reason for the fact is military discipline. In hierarchical systems superiority involves the authority to punish inferiors, which naturally curtails the power of the judiciary.

Royal military jurisdiction in Hungary was based on §54, Act XI/1868 and §23, Act IXI/1868.

Legal administration, the drafting and announcement of laws and regulations on the jurisdiction, fell within the competence of the Minister of Defence.

An important principle, characteristic of military jurisdiction and setting it apart from civil jurisdiction, was the supremacy (*ius gladii et aggratiandi*), the Commander-in Chief of the Royal Army enjoyed over all the military judiciary in Hungary.<sup>12</sup> It was possible for The Commander-in-Chief to confer the supremacy on his deputy, or on some other commander, to whom a court martial was officially designated. Members of the courts martial, performing the duties of either prosecutor or judge, were below the commander in position, which meant that they had to follow his orders. Apparently, this arrangement left no room for the guarantees of the independence of the

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<sup>12</sup> Act VII/1871.

judiciary. It was possible to command judge advocates to another place in peace and in war alike.

Contrary to the principle of the autonomy of the judiciary, judge advocates were below the commanders in rank in disciplinary cases as well.

The above mentioned supremacy, the right to punish or grant a pardon, included the authority to carry out criminal investigation (impeachment, the institution of proceedings), to order detention or inquiry, to add a clause to writs, decisions, to pass, announce and execute sentences, the power to mitigate a sentence or give parole as long as this power was not restricted. This restriction, however, only meant that an officer higher in rank exercised supremacy. Thus, the Supreme Court Martial had supremacy over colonels and officers higher in rank.

Judicial supremacy could only be delegated to commanders who were „Chief Justices”, which meant that there was a judge advocate in their force.

The commander exercising supremacy had to observe laws and the regulations of the Military Criminal Code of Justice. All reports, requests, orders and other mail related to a judicial case were issued with the signature of that commander.

In the second half of the 19<sup>th</sup> and the 20<sup>th</sup> centuries, there were larger and larger permanent armies and there were very important codes compiled as well. Let us refer to the 1855 patent of the Emperor, which enforced the Criminal Code, or Act XXXIII/1912, regulating military criminal procedures, or Act II/1930, which can be regarded the first Military Criminal Code of Justice in Hungary.

After World War II the substantive and procedural laws of military jurisdiction and the organisation of the military judiciary were modified. The procedural law, although modified several times, was in force till 1946. The 1740/1946 Decree of the Prime Minister set up military Prosecutor's Offices at places with regional army headquarters and ordered that courts martial should open at the same places.

This document significantly curtailed the authority of the commander in military criminal cases, conferring all such authority (with a few exceptions) to the Prosecutor's Offices and the courts martial. The Minister of Defence appointed the military prosecutors, while the Military Attorney General's office was conferred to the Attorney General. The High Court Martial of the Curia served as the court of the second instance in military cases. The Attorney General, or in his absence, the Deputy Chief Judge Advocate had the right of supervision over the Military Prosecutor's Offices.

Act III/1946 on the organization of military tribunals of appeal came into force on 20 February, 1946.

The law provides for a separate Military Appellate Division (with a presiding judge and four members) within the Curia to take over the earlier competence of the Courts Martial. The presiding judge was the President or the Deputy President of the Curia. Two of its members were judges, designated by the Curia, while the other two were active or retired judges advocates, appointed by the President of Hungary on the joint recommendation of the Minister of Defence and the Minister of Justice.

The judge advocates, in this capacity, fell under the supervision of the President of the Curia and regulations applicable to the other members of the Curia applied to them as well (disciplinary responsibility, the autonomy of judges, the interdict of dismissal or displacement, the law of incompatibility, etc.).

Procedural regulations for the Military Appellate Division were the same as those for the High Court Martial, which, however could be modified by decrees (!) issued jointly by the Minister of Justice and the Minister of Defence in line with the Procedural Criminal Law.

It was necessary, according to the preamble, because the restructuring of the army created new conditions, which made it difficult to reorganize the High Court Martial and that of the Chief Military Prosecutor's office. The cases under way, however, made it necessary to have a court of appeal in military cases.

1948 saw another restructuring of the institutions of military jurisdiction. Act LXII/1948 included a new military criminal code, while LXIII/1948 provided for the institutions of military jurisdiction and with the modification of appeal it basically provided new procedural regulations. The social changes of 1947-48 are well known.

Act LXII/1948 and Act LXIII/1948 reflect the principle that in military criminal cases the provisions of the Criminal Code are applicable, unless the special conditions in the army, or military interests, make the application of special military laws necessary. It is easy to trace the basic principles of the political system in both Acts. Note that the personal competence in military jurisdiction was also extended.

While Act LXIII/1948 provided for the supervision of the Minister of Defence over the Military Prosecutor's Offices, Decree 13/1953 integrated all the twenty-three Offices into the system of civil prosecutors and the Minister of Defence did not have the right of supervision over them.<sup>13</sup>

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<sup>13</sup> The changes were practically impossible to follow, since there were 43 different regulations on the organisation, the supervision and the competence of the Military Prosecutor's Offices alone.



Decree 3/1955 (I.11) by the Council of Ministers annulled the Ministry of Defence's right of supervision over Courts Martial, integrating them in the system of the Courts of Justice.

The next regulation on the Courts Martial and the Military Prosecutor's Offices was Decree 14/1957 by the Cabinet, abolishing all the Military Prosecutor's Offices commencing from 28.02.1957.

Act V/1961 and Decree 8/1962 annulled separate substantial or procedural military laws, integrating them in the general laws and regulations.

After the change of the political system, Act LXVI/1991 abolished separate Courts Martial and provided for Military Divisions to be set up within the County Courts of Justice. The Military Prosecutor's Offices, although integrated in the general Prosecutor's Offices, were organised according to the military hierarchy.

It is to be noted that it seems necessary to have a separate Military Criminal Code, and there are separate laws besides the civil Criminal Code in every member state of the European Union.

Professor I. A. Wiener, member of the Codification Select Committee, commissioned to compile the new Criminal Code, proposes that the Military Criminal Code should be a separate unit. It seems justified because it specifies special crimes, which can be committed by special subjects. According to him, the separation of legislation would mean taking the stand that the perpetrator or the accomplice of a military crime must be one of the military. An outsider may only be an accessory.

When examining the substantive and procedural military laws, effective to the present day, we can trace the norms presented in the historical review.

The condition that the perpetrator of a military crime can only be one of the military, a civilian may only be involved as a person inciting or otherwise assisting the commission of a crime, is retained. Likewise, the regulations on juvenile delinquency are excluded. Acting on order is not considered a complete plea in bar, or termination of service is no ground for abandoning suit even today. Prisoners serve their sentence in separate institutions, in military detention-rooms, which are similar to penitentiaries in civil life. A sentence cannot be redeemed by communal work, not to mention the inclusion of the secondary punishment concerning rank, the most severe measures of which can be administered as principal penalty.