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Debate of strong state, good state and rule of law. Additions to the beginning of the Austro-Hungarian Monarchy's Military Legal debates

Hungarian history of law identifies the foundation of the Austro-Hungarian Monarchy that is, the Compromise of 1867 with the restoration of constitutionalism and the formation of the rule of law. With this – namely the establishment of the voluntary restraint of the rule of law and parliamentarian division of power – absolutism and neoabsolutism's professional modern state took a huge step towards the ideal of good state. However, this historical change also had issues penetrating the whole period of dualism, of which history of law has not written much until present day. This issue is being the field of military law.

We could also say that in the field of military law dynastic endeavours' strong state conception got into a debate with the conditions of good state and the rule of law. This debate was born together with the compromise. Its base was given by the national army – common army, however, a more expanded law-making skirmish was hiding in the background, which in fact encompassed the whole of military law during the years. Besides the always renewing debates on defence, we can list the question of border regions, the always postponed questions of military criminal law and the debate on the competence of military courts here, the latter one giving the subject of this current study.

My study aims at presenting some additives regarfing one slice of the significant department of defense (henceforth: DOD), military law namely, the military criminal law debate in the system of the „compromise" with which the age's greatest politicians dealt, placing the criminal law proposal and its parliamentary debate which failed on 7th December 1868 in the centre.

1. The forgotten prologue: bill concerning the sphere of competence of military courts

We can maybe declare that DOD and military law questions belong to the most critical points of the Compromise, as they were the first to sharpen the tension between dynastic lead and parliamentarism and pointed out to the significance of imperial interest and its fundamental nature against national and at the same time, rule of law endeavours. Military criminal law can be regarded as a similarly sensitive area of this issue. On the one hand, it is because in 1867, in areas being under the rule of the House of Habsburg, the material military criminal codex took effect with the order of the Emperor on 15th January 1855, and partly because procedural regulations originating from the time of Maria Theresa were in effect. On the other hand, this area was closely related to the terrorism of Haynau, and via its retaliatory nature and inquisitory rules to the bloody military order of an ancient age; which legal sources fully fell outside of the Hungarian constitutional legal order and the good state's – as rule of law – system of ideals.

Then, when the Parliament introduced general military service after the first debate on defence, and as they then said, they drove the „nation's crème" under military criminal power, the need for change regarding military criminal law, the need for rule of law legislation seemed evident. Hence, the court and the government created a bill which did not fulfil the expectations at all.

The bill of 15th November 1868 – as reaching the end of the year and the period of legislation – was introduced to the House by Boldizsár Horváth on 29th November. The minister highlighted that the bill is a significant step forward, and regarding concrete facts, it is also a progress in that „it completely ceases military courts' civil sphere of competence and thoroughly regulates it in criminal cases, hence, it will prevent many conflicts in the future in everyday

practice."[1] However, the recognition of constitutional significance and the mentioning of surely remarkable concrete facts proved to be little to stop anger.

Antal Csengery was the first to rise to speech after the minister[2], highlighting that because of the general military service, the whole legislation has got to change at that exact time when the new defence laws – and together with them general military service – come into effect. However, this bill – as Boldizsár Horváth immediately pointed it out – could have only been realized via being in breach of House Rules. Though, regarding the rest of the debate, it was perfectly sufficient to – as a critical issue – formulate the need for complex legislation. The next – and at the same time last – speaker of the day of speech was Ferenc Deák himself[3], who, given the bill's nature, made a proposal to reverse the precursory investigation's order for the sake of professionalism. The President acceded to this proposal and transferred it to the legal committee, hence, set forth the parliamentary debate deviating from the usual negotiating mode.

The legal committee made its report on the proposal public on 2nd December, to which it attached the proposal's modified version for the Parliament to discuss it in a substantive debate.[4] The fact of

[1] A selection from Boldizsár Horváth, Minister of Justice's speech from 29th November 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának naplója tizenegyedik kötet*. Atheneum press, Pest, 1868, 171.

[2] See: CCCXXVIII. national sitting's minute, 29th November 1868. In: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának naplója tizenegyedik kötet*. Atheneum press, Pest, 1868, 171-172.

[3] See: CCCXXVIII. national sitting's minute, 29th November 1868. In: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának naplója tizenegyedik kötet*. Atheneum press, Pest, 1868, 172.

[4] "The committee of law welcomed that proposal of the Minister of Justice which was presented to the House of Representatives and the House delivered it to him for negotiation and opinion, which, via regulating the competence of military courts gives a strong base of orientation in the future and avoids previously common mistakes between civil and military

modification itself indicates that the text handed in by the government was not simultaneous with the Parliament's expectations.

On 4th December, Imre Ivánka handed in a proposal, and Ernő Simonyi and his companions an alternative bill for the previously handed in bill, which were followed by the report of the central committee. With this, we can worthily say that a truly sharpening debate took off on the competence of military courts, but much more on military criminal law and power licences hiding behind them.

Imre Ivánka's 3rd December proposal can be regarded as the debate's starting point. On the one hand, it is because he opens his counter-opinion with a criticism on form, with which he discovers a contradiction of the proposal with 54. § of the defence act. On the other hand, he forms substantive criticism and demands coming from them when he declares that:

(1) the government has to present a financial military criminal proposal as „the proposal in front of us nor lists >>military sins and faults<< in detail, neither determines the degree of penalty that shall be scored on them”[5];

(2) the regulation on the expansion cases of military court competences are not adequately accurate, hence, „the bill which regulates <<cases of DOD court competence expansion>> shall be presented in front of the House”[6];

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authorities. For this, the committee of law negotiated the proposal in detail and from the point of view of legal negotiation, presented the proposal's new structure to the House." – Text of the committee of law's report nr. 418, which was followed by the edited proposal. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet*. Atheneum press, Pest, 1868, 85.

[5] Selection from Imre Ivánka's proposal nr. 435. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet*. Atheneum press, Pest, 1868, 110.

[6] Selection from Imre Ivánka's proposal nr. 435. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet*. Atheneum press, Pest, 1868, 110.

(3) the bill on the competence of military courts shall only be presented to the Parliament with the financial military criminal proposal, the proposal on cases of extended competence and the proposal on limitation connected to registration obligatory laid down in the defence act.

With this, Ivánka not only attacked the constitutionally really important – and at the same time concerned – proposal but also highlighted all those – if we can say – even more significant public law conditions which penetrated the whole question of military criminal law and which at the same time put emphasis on the intolerability of absolutist inheritance and the national, rule of law legislation's primate.

As for national legislation's primate, Ernő Simonyi, Károly Bobory, Sándor Csanády, István Pataky and József Madarász went even further with their alternative proposal which only consisted of the following two parts:

"1. § Soldiers of actual military service are subject to military courts regarding personal and criminal claims and their service violations in strict sense.

2. § In every other case, 2 § of Act XXIII of 1847/48's regulation shall be applied via extending it on all Hungarian authorities."[7]

Allusion to paragraph 2 of act on royal free cities[8] is – as I see it – not only important because up against of the alignment construction it referred back to the 1848 conditions but because regarding the competence of military courts, it endeavoured to strengthen municipalities and keep the previously typical opportunist

[7] Selection from proposal nr. 426. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 111.

[8] „2 §They are subject to the city in municipality, police, criminal and private law aspect – except counties' seats and soldiers performing actual military service, however, only regarding personal and criminal claims and service violations in strict sense, every people and goods being in the city, without exeption". See: article XXIII of 1848 on *"royal free cities".*

competence regulation – extending to certain not criminal nature, personal relations. This endeavour – true, as a minor opinion – was a sharp and open resistance against the new directions and the new times' state of affairs.

Following the open steps caused by the proposal presented by the government and reformed by the legal committee – that is Imre Ivánka's and Simonyi and his companions' proposal –, a supportive report of the central committee was handed in, which presenter was Kálmán Széll. It said that the „central committee, formed from nine departments' presenters, both fundamentally and in detail accepted the proposal on the competence of military courts in accordance with the wording of the legal committee and through acceptance, the (writer) recommends it to the House of Representatives – with a few punctuations in wording."[9]

The central committee's decision was orally presented by Kálmán Széll on 6th December, followed by the substantive debate of the proposal in which the first speaker was Imre Ivánka. Ivánka introduced his speech with that „no one can have it as their aim that as the general military service comes into force, all young people from 20 to 32 years of age – in all relations even if not performing actual military service – are placed under military courts, in not yet strictly described and determined circumstances".[10] Following this – as in his proposal too –, he named the most significant need, namely that „all those military acts shall be examined which are in effect at the present time…"[11]

[9] Selection from the report of the Central Committee: See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 112.
[10] Selection from Imre Ivánka's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 374.
[11] Selection from Imre Ivánka's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 374.

After Ivánka, Ernő Simonyi rose to speak, who, on the one hand spoke against the proposal, on the other hand against military criminal jurisdiction and the whole of criminal law when he ascertained that these – and the proposal's regulations – are against civil freedom. The highlight of his argumentation was given by the criticism on the extending cases of military courts' competence, which, according to Ernő Simonyi, was determined as a legalized assault, hence, an attack against constitutional and general civil life. Simonyi ended his speech with that „this is again one of those proposals of which I am concerned that do not directly originate from the Hungarian government but are consequences of the relation formed by Act XII of the previous year. This is again a community achievement, gentlemen! This proposal was given to the Hungarian government by the ministry of Vienna to have it accepted by the Parliament […].”[12] Hence, with this, Simonyi did not only form a sharp and strong opinion against military criminal law and jurisdiction but also against the whole system of the compromise, in which the Hungarian government was marked as a puppet.[13]

In this speech he also mentioned those constitutionally solicitous elements which penetrate the whole question. According to this, he criticizes (1) the regulation of extraordinary competence-expansion, and (2) the problem of financial regulation. According to him: „They refer to that military extremes are determined in the military code. But I have a question: do we know the military code? Does the House know what it votes for when this act is being

[12] Selection from Ernő Simonyi's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 376.

[13] Sándor Csiky spoke with a similar, nearly anti-compromise feeling, who, referring to the 1848 individual and constitutional state and its military power, highlighted that "the army then could only consist of military and was pledged to the nation's constitution […]" - Selection from Sándor Csiky's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 385.

formed? I have a question: would not it be more constitutional if the Hungarian government proposed such proposal which regulates laws on military violations?"[14] With this sharp and closing notification a viewpoint was formed which sealed the fate of the proposal and set forth a nearly fifty-year military criminal law debate.

The sharp criticism affected the minister as a call, who also spoke to answer them. On the one hand, he placed the emphasis on the setback of Simonyi's proposal, according to which regarding certain not military criminal cases, it would have further kept on the competence of military courts. On the other hand, Boldizsár Horváth called the attention to the cultivation of common law and military crimes, and to that the extraordinary authorizations called as „state of assault" need to be regulated as no one wishes for such conditions, however, the lack of legislative regulation in case of existence is nothing else but the possibility of arbitrariness.

Ferenc Deák joined the debate at this point, who at the same time handed in a modification for the more accurate regulation of extraordinary authorization.[15] Partly, he put the „state of assault" into the foreground of his speech and laid down that it is such a not novel circumstance from which God shall save the country, but which at the same time has to be regulated, more accurately, legislatively regulated, as this question cannot belong to the circle of either the government, or the military arbitrariness. Besides Deák's sharp notice which meant to advance legal security, he formed two moderately toned criticisms, which, as I believe, have significant content. The first one was that military violations are not determined and no Hungarian legislation aims at them, hence, the wording gives place to arbitrariness but at least to an extremely wide interpretation.

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[14] Selection from Ernő Simonyi's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 377.

[15] See: modification nr. 445 of Ferenc Deák. In: Selection from Ernő Simonyi's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 177.

The second notification was that the proposal fully ignores the thought of possible special limitation of military crimes that is, it is completely apathetic to that circumstance if the military service terminates after the crime but before the impeachment. Hence, regarding the most innocent crimes committed as a soldier, impeachment becomes almost eternal. According to his suggestion, special limitation rules shall be formed regarding the termination of service so that people returning back to civil life do not always have to fear from military impeachment.

As the closing of his speech, Deák basically gave ultimatum for the government, according to which he can only support the modified proposal. With this cadence Deák, as wise man of the nation, turned the direction of the debate because as the father of „equalization" he distanced from the extreme denial but worded those really urgent moral and rule of law criticisms which must be remedied in order to support the proposal. However, with this, Deák simultaneously made the government think and strengthened the self-confidence of people having more extreme thoughts than him.

As its example we can cite Sándor Csanády's speech, who saw the remedy of competence debates in the drastic narrowing of military court competences. Besides, he laid down that: „I, dear House, considering this proposal as an attack against the nation and freedom, I ask the House: now, that the days of the Parliament are counted anyways – thanks to the God of Hungarians – do not endeavour to top up its operation by accepting this law. Since gentlemen, the country has already given up its self-sufficiency and independence. It has put the right of authorization on the nation's finance and blood into foreign hands."[16] With this, a new, sharp attack was formed again against the whole Compromise under the aegis of the military criminal law debate.

Following this, the debate was determined by the strengthening of what has been said, then by the punctuation of the

[16] Selection from Sándor Csiky's speech from 6th December 1868. See: *Az 1865-dik évi deczember 10-dikére hirdetett Országgyűlés Képviselőházának Irományai VII. kötet.* Atheneum press, Pest, 1868, 382.

legislation's wording, during which they highlighted those circumstances to which Imre Ivánka and Ferenc Deák called the attention. The punctuation of the legislation's wording set the debate into a seemingly endless and relentless fight of standpoints. That was the point when Kálmán Tisza joined the debate along with several other representatives.[17] Taking all these into account, the debate continued on the following sitting.

On the sitting of 7th December, the prosecution of the debate – referring to the punctuation of its standpoint – was first scheduled to the afternoon, then Boldizsár Horváth, Minister of Justice, considering what has been said and the resistance of the House of Representatives, withdrew the proposal in the name of the government.

2. Continuation of the military criminal law case

Following the 1868 debate – thanks to other military questions as well[18] –, it became obvious that military law and military criminal law questions became the most delicate questions of the dualistic state. This was grounded by the fact that most of these questions were regulated by absolutist sources from before 1867, which do not correspond to the conditions of the developing rule of law and constitutionalism which was theoretically restored with the „equalisation". All this was recognized by the Parliament and the government, making efforts to adjust this issue from time to time.

Its example was the newer – and again failed – proposal of 1872 on arranging the competence of military courts, which caused a similarly heated debate at the plenum as the above mentioned proposal, and which, similarly to that, only and exclusively aimed at competence questions. At the same time, it can be shown from

[17] Such were: Gyula Schwarz, Boldizsár Halász, Gábor Várady. László Somogyi, Sándor Csiky, Sámuel Bódis.

[18] Such question besides military criminal law was the recurrent defence debate in 1868, 1889 and 1912, or the civilization of the Border area in 1872.

cabinet minutes that despite of these circumstances and the sharp criticisms of the government from time to time, the Hungarian government continuously sought to forward the military criminal law codification, in which the Vienna court was adamant until 1912. Cabinet minutes from the 1870s, 1880s justify this thought.

The question of the widely interpreted military criminal law was already on the agenda of the Cabinet in 1871. On 24th July, István Bittó, Minister of Justice read his document in connection with the modification of military criminal procedure, written to the common Ministry of Defence. In the draft, based on Boldizsár Horváth, previous Minister of Justice's standpoint, he noted that regarding councils it would be important that the judge included in first instance case shall not be included in cases of superior forums.[19] However, in spite of the constructive suggestions, negotiations were not successful. The military procedure and the question of jurisdiction service was a recurring issue in the Cabinet, especially in the years of 1875[20], 1880[21] and 1882[22].

[19] State Archives of Hungary (henceforth: MOL) – *Cabinet Minutes 24th July 1871*, sitting 33, point 5.

[20] It was noted in point 6. of the Cabinet's 41. sitting on 18th June 1875 that the Minister of Justice – Béla Perczel – undertook several other proposals, such as preparing the later worked out civil criminal code and working out the proposal on the competence of military courts. MOL – *Cabinet Minutes 18th June 1875*, sitting 41; point 6.

[21] It was noted in point 11. of the Cabinet's 9. sitting on 20th February 1880 that the Cabinet accepted the Minister of Justice's proposal regarding the competence of military courts and authorized him to forward it to the Defence Minister. MOL – *Cabinet Minutes, 20th February 1880*, sitting 9; point 11.

[22] It was noted in point 17. of the Cabinet's 33. sitting on 3rd July 1881 that the common defence ministry and the Hungarian Ministry of Justice – and together with it the Cabinet – had serious tensions between themselves regarding the directions and solutions of the military law and justice codification. The minute lays down with regards to the proposal on military court organizations that the Minister of Justice – Tivadar Pauler – sticks to his previous standpoint, which does not correspond to the common

In the minute of the Cabinet's 24th sitting on 13rd June 1882, point 1. is about a contradiction between the common ministry of justice and the Hungarian Cabinet with regards to the case of military criminal procedure. The Cabinet highlighted the differences between the two authorities in several points. Among the old differences (1) the military main court of justice and the marine main court of justice's seat, (2) referring to the army and military bodies with indicators „emperor and royal" or „common", (3) the formation of mixed investigation committees, (4) and the application of civil faculty was set forth. By the common Minister of Defence, the followings were named as new differences: (5) Vienna's insistence on the exclusion of public from national interest, (6) rules of listing in defence, and (7) Vienna's rejection of taxative listing of grounds of nullity. Besides this, the minute highlights that the Minister of common defence's attention must be called upon that at the final formation of the proposal, conciliating with the Hungarian Minister of Justice is inevitable.[23] On the one hand, this note perfectly shows that the contradiction between the parties simultaneously comes from constitutional and legal areas, on the other hand, it shows that progressive legal thinking, namely, the innovations and guarantees of the rule of law appeared in the Hungarian standpoint, which were not wished to be called to life and be accepted by Vienna on the area of military criminal law – because of the concept of dynastic heritage, defence sovereignty and together with it strong national power and strong nation.

This legislative debate and endeavour escalated more and more, which was facilitated by the domestic civil legislation and development of law, and the fact that domestic military legal life's and legal literature's significant figures joined the criticism of the existing situation. All these circumstances, the development of law and finally, the political constraint – or rather the blunting of the

ministry's standpoint. The minute says that the Cabinet – agreeing with Pauler – holds its previous standpoint. MOL – *Cabinet Minutes, 3rd July 1881, sitting 33*; point 17.

[23] MOL – *Cabinet Minutes, 13rd June 1882*, sitting 24; point 1.

political bout that had become a defence war by 1912 – gave way to the 1912 codification. After long decades – true, without an individual Hungarian military criminal code –, articles XXXII. of 1912 and XXXIII of 1912 were born, hence, military criminal procedure could reborn as the result of a nearly 50-year debate and political fight, in the name of the rule of law.

Summary

Regarding military law and military criminal law, we should highlight that – however, our legal history has not dealt much with these areas but – they proved to be decisive in the political debates of dualism and accompanied the whole period of the Monarchy. Its reason can be that armed forces, as the final guarantee of every nation were so decisive from the point of view of dynastic endeavours and strong state that the court in Vienna and the Emperor only let parliamentarian forms and the innovations of the development of law in the rule of law prevail to the most needed degree for a long time. With this, we could say that military law basically became the soil of the debate between the strong state and the rule of law in the dualism, which brought about a significant change in the year of 1912.

Hence, in order to understand the significance of the 1912 legislation in the Hungarian history of law, it is inevitable to investigate its antecedents and circumstances in detail. Its first momentum was the above mentioned 1868 proposal regarding the competence of military courts, which was followed by several further stages in the „fight" for the rule of law, which stages are yet to be discovered.

This complicated story full of debates showed that innovative, rule of law and good state legislative endeavours were present in the Hungarian political life regarding these areas all along, and that among excellent politicians of the dualism there was only a negligible minority opinion against military criminal law, and the majority view was the endeavour of military criminal law's improvement, which is worth to think about even in today's relations.