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Polish Military Articles of 1775

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POLISH MILITARY ARTICLES OF 1775

The military codification of 1775 may be classified among the most essential changes of law as introduced the reign of Stanisław August. It contained two parts: that referring to the substantive law known as *The Military Articles* and that referring to the procedural one known as *The Legal Military Procedure*. The new domineering tendencies that are detectable in the codification from 1775 intervened with the old noble patterns and were symptomatic of the epoch which shattered the feudal system. The researcher of the substantive part of the codification from 1775 is particularly interested finding how *The Military Articles* were drafted, what were, their sources, the range of application as well as the influence of foreign and domestic legislation on them. The impact that the humanitarian ideas and the Enlightenment philosophy had on the substantive part of the most important 18th century codification of military criminal law of the Noble Polish Republic (*Artykuły wojskowe i Proceder prawny wojskowy. 1775*) is worthy of notice (a detailed depiction of the presented issues can be found in the book by W. Organiściak: *Kodeksy wojskowe w Polsce roku 1775*).

The former Polish military law was inconsistent and was characterized by the vices similar to those that could be found in the commonly applied law. Personal and territorial provincialism was typical. The aforementioned law had a great number of sources. It was supplied with a subsidizing rule and was dominated by customary norms. All that made it difficult to grasp which norms were binding. The attempts to change the status quo were made and in the mid 18th century the collections and compendia of military law were prepared. An important step to put the military law of 18th century in order was the decision of parliament of 1766 which tried to liquidate the inconsistency that plagued the system of military criminal law. The members of Parliament advised, that the codification of law be made and they ordered the Royal Military Commission to prepare new military articles. The reforms in the army of the Polish Republic was interrupted temporarily during the Bar Confederacy. The work on reforming military law was resumed during the proceedings of delegation parliament in 1773–1775. The proceedings were adjourned in 1775 while *The Legal Military Procedure*, *The Military Articles* and official regulations were issued. (*Artykuły wojskowe z konstytucji wyjęte*. Published by the Bar confederates after 5th August 1769; *Artykuły wojskowe konfederatów barskich*, p. 111).

It should be emphasised that in the literature there may be found the opinions on how the Military Articles of 1775 were drafted and what they derived from what these views are not sufficiently source-supported. K. Górski and T. Korzon identified the changes in the military law with the articles drawn up by Marshal F. K. Branicki, attributing their authorship to him. However, apart from some remarks about the analogies of the discussed Articles with the Prussian system and brief description of the codification in question the two authors do not give any interesting information concerning the preparation of *The Military Articles* (K. Górski, 1894, pp. 240–241; T. Korzon: t. III, p. 243).

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M. Kukiel claimed that the parliamentary delegation, while putting the military issues in order "... rewrote in detail the duties of particular military ranks and formulated the law of military penalties, that were cruel for soldiers (on that occasion following the Prussians)". J. Korwin, E. Pomianowski, S. Rutkowski, the authors of the work about the history of military education in Poland, observed that *The Military Articles* "... pervaded with the Prussian spirit came into effect in the Prussian army and without any amendments were introduced in 1790 in the Polish army". (M. Kukiel, 1949: p. 167; J. Korwin, E. Pomianowski, S. Rutkowski, 1965: p. 75).

It should be mentioned that due to the damage of a vast part of the records of the Military Commission, it is not possible to comprehensively identify the time, the method of preparing and the authors of *The Military Articles*. On the basis of the pre-war inventory of the Old Acts Archives in Warsaw one can conclude that on occasion of the session of the parliamentary delegation in May 1775 indefinite military rules were adopted. (AGAD Inwentarz: Konsygnacja Akt Dawnych Wojskowych in section 80 call number: 5-5 informs that the following regulation came in to being in 1774: *Regulamin czyli prawa i Artykuły wojskowe dotyczące powinności i kar dla występnych oraz przepisy podług których rozmaitych wyznań ludzie przysięgę wykonać winni 1774*; BJ call number 92/61, vol. 2. p. 527-528, 599-601; *Protokół albo opisanie zaszyłych czynności na delegacji od stanów Rzeczypospolitej na sejmie ekstraordynaryjnym warszawskim...dnia 19 v 1773 roku wyznaczonej...*, 1775: p. 177, 191, 193; *Diariusz sejmu ordynaryjnego pod znakiem konfederacji O.N. agitującego się*, 1776: p. 5, 10).

In view of the gaps and inconsistencies of the research it is interesting to note that there was found an interesting clue that allows to identify the source on which the legislator acted while drafting the military codification of 1775. This clue was the document produced by great royal Marshal Franciszek Ksawery Branicki and sent to King Stanisław August with regard to a serious argument about the command over the army at the turn of 1775 and 1776 (The copy of F.K. Branicki's letter AGAD ML dz.VII call number 69. p.46-47; J. Białek, 1929: pp. 108-123; W. Konopczyński, 1917: p. 317; AGAD Zbiór Popielów, call number 27, p. 28).

Marshal Branicki, who protected the power that he exercised and the influence that he exerted on the royal army, invoked the old military law, including *The Military Articles* from 1609, the most fundamental 17th century codification of the military law in Poland, king Władysław IV's Articles from 1632 for foreign recruitment as well as, this being most interesting, "...fresh Codex Juris Militaris from old law and military articles or regulations collected, by the great royal marshal and generals drafted and discussed by the military commission of the Polish Republic corrected by the parliament appointed delegation, with amendments accepted and signed..." (AGAD ML dz.VII call number 69 pp. 46-47). The above quoted note from the session of the Continuous Council, scarce information about the records of parliamentary proceedings and the range of competences of the Military Department of the Continuous Council, in which one reads: "... all acts concerning military regulation in subdelegation completed, in delegation accepted, by the Parliamentary Statute approved and to the castle sent will be under close scrutiny..." all seem to show that *The Military Articles* were established by the Military Commission, of higher royal officers presided by Marshal F.K. Branicki. The role of the delegation parliament was to appoint the commission which corrected the project and approved of it together with its amendments (*Protokół albo opisanie zaszyłych czynności na delegacji od stanów Rzeczypospolitej na sejmie ekstraordy-*

naryjnym warszawskim... dnia 19 v 1773, p. 177, 191, 193; *Diariusz sejmu ordynaryjnego*, 1776, p. 5, 10).

While making an attempt to answer the questions concerning the sources of *The Military Articles* of 1775, we should notice that in the research on the question, the opinion that *The Military Articles* from 1775 were a faithful copy of the Prussian regulations. Nevertheless, none of the authors of this view gives any reliable source of their information. What was only emphasized was the literal reprint of Prussian Articles. In the 17th century the Brandenburg Military Articles were initially based on the Swedish patterns. In the 18th century in Prussia, the Military Articles were repeatedly amended. Furthermore, we know that after the amendment in 1713 those regulations did not apply to officers who were subjected to a different judiciary (S. Salmonowicz, 1981: p. 672–673). One of the then known sources which can possibly indicate similarity of the Polish *Military Articles* of 1775 to Prussian regulations are the War Articles of 1764 issued for Western Prussia and known as *Newly-confirmed Military Articles* (*Nowo potwierdzone Artykuły wojskowe...*, Potsdam 17 November 1764; *Artykuły wojenne od Króla JMci Pruskiego...*, Potsdam 18 November 1787).

Helpful in setting the sources of *The Military Articles* from 1775 can also be *The Military Articles* of 1749 by August III Wettin (AGAD Archiwum Radziwiłłów, dz. VII call number. 5).

Similarity of Saxon, Prussian and Polish codification can be proven by giving an example of article 13 of *The Military Articles* of 1775. The article forbids gambling, and its equivalent in the Prussian regulations of 1764 and the Saxon ones produced in 1749. However, there should be emphasised that the Polish *Military Articles* of 1775 are much more comprehensive and include varying penalties with respect to recidivism. The norms abolishing gambling can be also found in the previous Military Articles, which were in force in the Noble Polish Republic. Generally, comparison of the contents of *The Military Articles* of 1775 with the Prussian and Saxon regulations contradicts the opinion that the Polish Articles were created as a result of a simple reception of the Prussian regulations or were exclusively following their pattern. The analysis of the Polish, Prussian and Saxon regulations arises a few comments on relations among the above mentioned codifications. 12 articles of the regulations of 1775 do not have any equivalents in both previous codifications. On the other hand, 5 regulations of the Polish, Prussian and Saxon articles are fairly similar (despite changed editing). At least 18 other articles in the three analysed codifications of military law reveal a significant similarity and 10 only some general similarity, but Polish editing was always modified and more comprehensive. It should be emphasised that Polish legislator, while following the spirit of the Enlightenment, took into consideration some of postulates of the humanitarian school in criminal law on occasion of making up *The Military Articles* of 1775. Moreover, the authors of *The Military Articles* of 1775 seem to have used both previous codifications simultaneously. It is worth mentioning here that most of norms included in the three 18th century codifications of military law have their equivalents already in *Władysław IV's Military Articles for Foreign Recruitment*, which were based on the Swedish regulations of 1621, i.e. on the Military Articles by Gustaw II Adolf. Furthermore, it should be underlined that some contrastive research has revealed a significant similarity of contents between almost half of the Military Articles of 1775 and former regulations of the domestic military law, they being in force in the old Polish Republic and specifically: the Military Articles of Lithuanian Marshals Krzysztof and Janusz Radziwiłł, *Marshal War*

Articles of 1609 and the Saxon *Articles* by king August II. Some of the norms were taken over from the 18th century military rules. Therefore, above quoted words uttered by Marshal F.K. Branicki are certified as they indicated the fact that the military law codification was mainly formed on the basis of the previous regulations of military law of the Nobiliary Polish Republic (W. Organiściak, 2001: pp. 29–40).

There are some doubts about to which territories of the old Noble Polish Republic (if only to the Crown, or to Lithuania, too), from when and with respect which formations, i.e. in the national or foreign recruitment, the regulations of the *Military Articles* of 1775 applied. It cannot be excluded that the codification of 1775, which doubtless was in force in foreign formations, began to apply to the whole army of the nobiliary Polish Republic or at least to this army in the Crown from 1776 (E. Rostworowski, 1957: pp. 52–53, 137, 154). However, Teodor Ostrowski well-informed about the twists and turns of the old Polish law presents the issue of the military courts in his work *Civil or Particular Law of the Polish Nation* published in 1784. He writes: “Each regiment or division has its own separate judge or auditor who, according to the *Military Articles* from 1609 or regulations from the years they followed, adjudicates” (T. Ostrowski, 1784: p. 72). The above quotation proves that the most essential 17th century Polish codification of the military law i.e. *The Marshal Articles* of 1609 continued to be applied and that together with the codification of 1775 there were according to the subsidizing rule – some other previous military regulations, resorted to. In my opinion, it is most likely that in 1775–1790 there were in force the old regulations, including *The Marshal Articles* of 1609 for the army of national recruitment, the *Military Articles by August II* of 1698 and *The Military Articles of August III* of 1749 along with the regulations of *The Military Articles* of 1775 for the army of foreign recruitment. On the other hand the *Military Articles* seemed to be almost the only codification of the military substantive criminal law since 1790 i.e. since the time of re-implementation of the codification of 1775, as well during the Targowica Confederation, and the Kościuszko Insurrection. They were even applied during a short period, in the army of the Duchy of Warsaw. (*Volumina Legum*, 1952, p. 189; A. Lityński, 1983, p. 5; *Pisma Tadeusza Kościuszki*, 1947, p. 58; AGAD AKP, call number 317a, p. 24.; L.A. Sułek, 1982, pp. 179–182).

The provision of *The Military Articles* of 1775 varied, depending on military ranks. They were different for the privates, for the non-commissioned officers and for officers. The officers were subjected to specific penal regulations which made up a separate part of *The Military Articles* of 1775. They regulated mainly political offences and some military ones such as: insubordination, treason, contacts with an enemy. Among more significant changes, which were inserted into the military law by the introduction of *The Military Articles* of 1775, detailed regulation of the issue of crime and penalty is what deserves attention. The previous solutions were conducive of the development of the judges' arbitrary decisions, which – due to the system of indefinite penalties – led to numerous abuses. This situation was severely criticised by the representatives of the humanitarian school. They demanded that the statutory law be the only source of law. They postulated the precise legal definitions of the acts that were subjected to penalty. The regulations of *The Military Articles* accepted the rule *nulla poena sine lege*. On the other hand the analysis of the regulations of the codification of 1775 allows to conclude that another fundamental rule of criminal law: *nullum crimen sine lege* was supposedly only partly in force. The point is that in case of a legal loophole the legislator advised to resort to the commonly applied law and, as a last resort, even to apply

analogy. The above regulations, introducing compulsory publication of law and regular instructing of soldiers in legal matters, as well as lenient penalties to which the soldiers ignorant in the military regulations, were subjected prove that the authors of the codification of 1775 were those Polish lawyers who in their legislative practice followed the concepts of Enlightenment philosophers and the authors of the humanitarian school in the criminal law (*Artykuły wojskowe*, 1775: art. 48; *Proceder prawny wojskowy*, 1775: pp. 54–58).

While comparing regulations of military law of the Noble Polish Republic with those of the *Military Articles* of 1775, one may conclude that in the latter only the military offenses were penalised. In case of other offenses as committed by the soldiers the legislator ordered to penalise them on the basis of commonly – applied law. In few cases only, such as offenses against the property of the civilians' or woman's honour, the codification of 1775 provided for particular regulations, which, however, did not differ significantly from those found in the commonly – applied law. Due to such a normalisation a detailed division between the military offences and those of the commonly – applied law was established. It is worth mentioning that with respect to most military offenses included in *The Military Articles* of 1775 the penalties were considerably mitigated when compared with those found in the previous regulations of criminal law of the nobiliary Polish Republic. The above phenomenon can be seen particularly in relation to the most serious crimes such as: desertion, insubordination or duels. Interesting is the fact that this significant mildening of penalties had an impact on the military judiciary, which especially during Kościuszko Insurrection produced mostly lenient judgments in the humanitarian spirit. It should be observed, however, that the regulations of *The Military Articles* of 1775 did not – despite widespread tendencies of the Enlightenment eliminate the penalties for sorcery and other crimes against religion. Nevertheless the penalties for such crimes became considerably milder. (L. Ratajczak, 1975: pp. 352–353, 357; Archiwum Państwowe Kraków, Archiwum Chodkiewiczów: sygn. 1244, pp. 13–14, call number 1245, pp. 117–119, 223–225, call number 1264, pp. 1–2, 29, 33–36, 43, call number 1244, pp. 19–22).

Humanitarians demanded that the capital punishment be limited or even abolished. *The Military Articles* did not materialize these postulates. This cannot be surprising in view of the military aspect of the Articles. On the other hand while following the spirit of epoch, the authors of the codification of 1775 assumed that imposing a capital punishment on the accused could be justified only in the case of unquestionable evidence of the commission of criminal act and after it had been confirmed that a suspect acted intentionally and often in the circumstances of double desertion. Moreover, the regulations of *The Military Articles* of 1775 frequently made it possible to apply the capital punishment alternatively with life sentence combined with fortress works (*Artykuły wojskowe*, 1775, art. 8, 15, 26; T. Rawski, 1994: p. 38).

It is worth mentioning here that an excellent example of implementing humanitarian ideas in the old military law was given by Karol Stanisław Radziwiłł, who in Lithuania in the *Military Articles for the Radziwiłł's Militia*, which was an almost faithful copy of *The Military Articles* of 1775, abolished the death penalty (still applicable in the codification of 1775) and replaced it with life sentence combined with earthworks or castle works (AGAD, Archiwum Radziwiłłów, dz. VII, call number 260: *Artykuły wojskowe dla milicji księcia Karola Stanisława Radziwiłła wojewody wileńskiego* published after 1775: art. 3, 4, 5, 6, 8, 16, 20, 24, 27, 28, 30, 42, 45, 48).

The reforms of Polish military law in 1775, despite its reference to humanitarian ideas, did not do away with the cruel or humiliating penalties. However, while comparing the regulations of the codification of 1775 with those of the previous military law, it may be concluded that we deal with an essential advancement. For instance, since 1775 stigmatising was adjudicated only on occasion of imposing life imprisonment and fortress works. Another regularity followed the commonly – applied law pattern. The role of penalties which infringed the honour of the accused was diminished. It became particularly clear after publishing *The Military Articles* of 1775, in which such penalties occurred rarely. Also in comparison with contemporary Polish project *The Collection of Judiciary Law* by Andrzej Zamojski from 1778, the military codification of 1775 proves to be progressive document. It may be concluded that the military law tended toward the elimination of cruel and dishonourable penalties which were still applicable in the law. In the military law the tendency to eliminate such penalties preceded the tendency to this end as observable in the commonly – applied law. (M. Mikołajczyk, 1998: p. 273–274; E. Borkowska-Bagieńska, 1986: p. 300–303; *Proceder prawny*, 1775: p. 160, 162; *Artykuły wojskowe*, 1775, art. 35, 41).

In the 18th century a penalty of degradation was applied much more commonly. It was a typical military sanction that referred to honour and property. It led to the lowering of the soldier's pay. On the basis of degradation penalty it can be observed how the idea of the Enlightenment influenced *The Military Articles* of 1775. Before a soldier was degraded the judiciary frequently tried to impose on him a lenient penalty, for example temporary standing on poles or chaining him for a short time. In the case of recidivism first a temporary degradation was adjudicated, and then after the accused committed the same crime for the third time a perpetual degradation was adjudicated. By means of those solutions the Enlightenment concepts were partly implemented. This provided the soldier with a chance to improve to the regular society. The degraded soldiers, after they had served their sentence, were given an opportunity to gain back the previous rank and the place in the military hierarchy (*Artykuły wojskowe...* 1775, art. 10, 11, 12, 19, 25, 26, 32, 44).

One of the most common sanctions that may be found in *The Military Articles* of 1775 was a penalty of running through rods. The priority given to this sanction resulted certainly from the fact that it was necessary to keep beating as a penalty that was suitable for gradating physical pain. This cruel type of penalty could be only inflicted by the court after the penalty had been authorized by the superior instance. It is worth emphasizing that under the influence of the humanitarian school the legislators made an attempt to eliminate unlimited beating subordinates by their officers and non – commissioned officers. Military regulations of the 18th century forbade to beat soldiers with no limits for minor offences. Therefore, detailed regulations were introduced specifying who for what how many times and with what tool (cane, rod or sword) could flog the a subordinate. However the maintaining in *The Military Articles* of 1775 of such penalties as running through rods or beating, deserves a negative evaluation (*Artykuły wojskowe* of 1775 art. 11, 12, 13, 18, 35; Archiwum Państwowe w Krakowie Podhorce, I, call number 119. *Regulamin o dyscyplinie i karności* art. 26; *Regulamin egzekucunku dla regimentów piechoty*, 1775, p. 150–151; *Regulamin służby obozowej i garnizonowej kawalerii...* 1775, p. 267.; *Regulamin egzekucunku dla brygad kawalerii narodowej i pułków przedniej straży wojska Obojga Narodów*, 1790. pp. 220–221).

A change of attitude of some military commanders who certainly under the influence of the Enlightenment ever more frequently favoured to liquidation of the penalty of beating, can be proven among others by an order of the 5th of August 1789 as given by general Wincenty Potocki, the commander of the royal horse guard, who abolished the penalty of beating with respect to all cavalry sergeants in the regiments of the royal horse guard. The preserved documents on the practice of military judiciary show that particularly during the Kościuszko Insurrection the soldiers were penalised only by a lenient beating with sticks and no longer by the previously applied running through rods or other more severe corporal punishments. (AGAD Militaria z Jabłonnej, call number 8; Archiwum Chodkiewiczów sygn. 1244, pp. 21–22, call number 1264, p. 43).

While summing up the remarks made in the Polish codification of military law of 1775, we may conclude that its penal catalogue did not differ much from that known for military law before 1775. An essential novelty consisted in the re-evaluation of some sanctions in favour of other ones. That is, in the codification of 1775 there are hardly any cruel penalties. One of the most important changes was the limitation of capital punishment after 1775 in favour of life imprisonment combined with forced labour.

The authors of *The Military Articles* of 1775 followed the ideas of the Enlightenment philosophers and some previously detectable tendencies, and ordered to apply penalties of imprisonment combined with forced labour. At the same time the utilitarian attitude to ward penalty appeared. There should be also emphasised that a significant change consisted also in the enlargement of the penal catalogue. Lenient penalties varied depending on the potency of the offence responsibility for it and the recidivism. Thanks to the 1775 law, the use of indefinite penalties, which were frequently applied in the 16th and 17th military law, was almost completely dropped.

In conclusion, the reform of the Polish military substantive law of 1775 was introduced partly under the influence of the humanitarian school in criminal law and became a significant achievement in modifications of the legal system of the Nobiliary Polish Republic. *The Military Articles* of 1775, which originally were supposed to be only an attempt to systematise military law, became – in the epoch of king Stanisław August Poniatowski – one of few successful codifications in force yet in times of the Duchy of Warsaw. What is more, it had been, in fact, one of few codifications that were in force at time of the Duchy of Warsaw. Moreover it had been fact one of few *ius speciale* codifications that were introduced in Poland on such a scale since the time of Renaissance.

The codification of military substantive law of the Nobiliary Polish Republic was, in fact, far from being the best Enlightenment model, nevertheless, the whole range of solutions proves that the substantive part of the military codification of 1775 implemented some of the postulates of the humanitarian school in the area of criminal law. They were as follows: introduction of a graduated penalty according to responsibility for a crime, introduction of defined sanctions and dealing with recidivism, replacement of capital punishment with life imprisonment as combined with forced labour, more frequent application of forced labour penalty for serious crimes, almost complete elimination of arbitral or dishonourable penalties and the use of reformatory measures. More importantly, the above changes are found to be reflected in preserved documents of military practice of the judiciary, particularly of the time of Kościuszko Insurrection.

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