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Part I – Ethical and Property Dilemma

Part II – The Political Roles in the Restitution

Part III – THE LEGAL ASPECTS: Rehabilitation and Restitution

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HOLOCAUST AND RESTITUTION

Part III

THE LEGAL ASPECTS: Rehabilitation and Restitution

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THE MILITARY JUDICIARY IN POST-WAR YEARS*

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The organizationof military judiciary was subject of frequent changes in the period just after WWII. By-law on military courts and organization and competence of military courts of 1944 reinstated a new and uniform organization of military judiciary in the whole country. The by-law was replaced by the Law on organization and competence of military courts in Yugoslav army of August 24, 1945 that set up a system of military courts after the fashion of military judiciary in the USSR. New legal act on military courts was the Law on military courts, enacted towards the end of 1947. The Law on military courts introduced military courts system with two levels, consisting of first instance courts and the Supreme military court. Acts on military courts enacted just after WWII military courts gave them quite a wide competence regarding criminal law, primarily due to high degree of society militarization after WWII.

Key words: military judiciary, World War II, criminal law

Supreme headquarters of People's liberating army and Partisan detachments of Yugoslavia on May 24 1944 enacted the By-law on military courts and organization and competence of military courts (hereinafter the By-law) (*Зборник НОР*-а, 273–274) that legally regulated organization of military courts formed during the war in People's liberation army of Yugoslavia. The basis of military judiciary, according to the By-law, made corps mili-

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tary courts. Corps courts were operating as 3 persons panels,[1] deliberating crimes of military personnel – members of corps and crimes by other persons at the territory where corps were operating. The By-law envisaged also forming of military courts by corps military zones that would be competent for soldiers, NCOs and officers of that corps military zone. Courts of military zones were also empowered for prosecuting perpetrators of military crimes carried out at unliberated or temporarily abandoned territory.[2] Divisions that were not a part of the corps but territorially based, formed military courts covering same scope as military court of corps territory. Superior military court was organized under the auspices of Supreme Headquarters (later under auspices of Ministry of defense) and had permanent court panels at headquarters and certain corps. This court was first and last level for judging generals and high officers and it had competency over extreme cases of war crimes. Superior military court had so called superior competency, for it could take over any case from competence of military courts. Each panel of judges of a military court had a secretary, jurist by profession. Supreme Headquarters designated president and vice-president of corps military court upon proposal of principal headquarters. Members of panel of judges for each corps military court or corps region were designated by appropriate corps headquarters with obligation to inform the Superior military court. Panels of Superior military court were designated by Supreme Headquarters upon proposal by the Superior military court. The By-law did not envisage a right to appeal against sentences by a military court.

By Modification and amendment to the By-law on military courts of January 12 1945 introduced were changes to the system of penalty measures military courts sentenced. Supreme commander through the Decree of February 11 1945 formed courts under the auspices of divisions, and under the auspices of army headquarters a panel of Supreme military court, presided by commissioner of military legal department of the army. Through that decree, effectively was imposed new organization of military judiciary, without changing the By-law on military courts and organization and competence of military courts (Архив Војноисторијског

1 One of the panels was adjoined to corps headquarters, others to headquarters of division forming that corps.

2 Panel of military court of corps zone consisted of an officer and one NCO or soldier of corps military zone, with president or vice president of corps military court presiding the panel.

института, к 25 А, рег. број 14–5). The second By-law on modification and amendment of the By-law on military courts was enacted on April 27 1945. Those modifications and amendments overruled amendments of January 12 1945, more precisely military courts were returned a right to sentence to 20 years of prison or life sentences (Архив Војноисторијског института, к 119/4, рег. број 2–31/2).

The By-law introduced new military judicial system by forming corps military courts and courts of corps military regions, and by revoking of military courts of military zones, brigades and squads. It can be concluded significance of the By-law comes from the fact that same legal act apart from organizational standards also incorporated "provisions of substantive law and formal law for military judiciary" (Чулиновић 1946, 199), that set up new and uniform organization of military judiciary in the whole country. Procedure norms in the By-law and its amendments ruled out a right to appeal against decisions of military courts in the first instance. All sentences by the first instance courts were, ex officio, checked by higher instance military court where accused persons were sentenced to death, penal servitude or degradation. Rather, these sentences could be executed only after approval by higher military court.

This By-law was replaced by the Law on organization and competence of military courts in the Yugoslav army of August 24, 1945 (*Службени лист ДФЈ* 1946, 56).[3] The Law on organization and competence of military courts (hereinafter the Law) defined organization of military judiciary that consisted of military courts for each division, naval fleet and military zone, then military courts of the army, navy, independent corps and Military court for city of Belgrade. The supreme court for Yugoslav army and navy was Supreme court of Democratic Federative Yugoslavia, which indicated the Law followed the concept where military courts were a part of regular judicial system. Military judges possessed immunity over criminal prosecution, which meant they could not be investigated or put into custody without authorization by Temporary people's parliament of DFY. Competence of military courts covered crimes by servicemen or war prisoners. First instance military courts were courts of divisions or military zones, except when crimes were committed by officers, generals or admirals. Military courts of

3 The Law was later modified and ammended by the Law on confirmation and modifications and ammandements of the Law on organization and competence of military courts in the Yugoslav army of 17.7.1946. (See: *Службени лист ДФЈ* 1946, 58)

the armies were deliberating in the first instance crimes of officers, in the second instance „those cases that were in the first instance judged by military courts of divisions and military zones".[4] Therefore, one of the criteria to appoint competence of military courts was ratione personae of the perpetrator. Supreme court of DFJ in the first and last instance judged crimes of generals and admirals, in the second instance those cases that were in the first instance judged by military courts of armies. That solution, that supreme court of military judiciary was the supreme court in the state, was taken over from military judicial system of the USSR, where Military collegium of the Supreme court of USSR was an organizational unit of highest regular judicial institution in the USSR. Military collegium in USSR was in charge on decisions of military courts in the second instance and in the first instance when accused were officers of general or admiral rank, or persons performing duties of a general or admiral. Organization and formation of military courts was defined by the president of Military collegium of Supreme court of the USSR together with defense minister (Јовановић 1964, 61–62).It is interesting to note that military judiciary of FNRJ established by the Law of 1945 had similarities not only with Soviet, but also to other military judicial systems of the time. In the Uniform Code of Military Justice of USA enacted in 1950, envisaged were three levels of courts: common military court (judging servicemen for all military crimes), special military court (judging certain crimes of servicemen) and military court having shortened procedure (judging misdemeanors). Courts established by the Law of 1950 were judging in two instances except in cases where accused were generals or admirals and in cases that resulted in death penalty. Deliberation in the third instance was done by military court of appeal made of three judges appointed by the president of USA upon proposal or with consent of the Senate (Јовановић 1964, 34–39).

According to the Law, Superior military court, until then the highest institution of military judiciary, without any changes was supposed to continue its activities as Military committee of Supreme court of DFJ (Гојковић 1999, 133). Anyway, legal setting where highest court in the country is also the highest institution in military judiciary was never used in practice, for supreme commander through special decree established Supreme court of the Yugoslav army within reorganized Ministry of defense.

4 Competence of navy courts was organized in the same manner.

In 1946 enacted was the Law on forming and competence of court for marine prize of war (*Службени лист ФНРЈ* 1946, 28) that had competence over decisions concerning ships and their cargo that Yugoslav navy confiscated as a prize of war. Disputes over prize of war was judged in the second instance by Supreme court of FNRJ. The Court for prize of war was judicial institution with specialized competence. Specificity of this court was that panel of judges (consisted of a navy officer and two civilian specialists) and that regulations for operations and organization of this court were jointly determined by a minister of defense and minister of navy of FNRJ. That implied composite character of this judicial institution, but due to its competence characteristics of a military judicial institution prevailed.

In the same year enacted was the Law on confirmation and modifications and amendments of the Law on organization and competence of military courts in the Yugoslav army (*Службени лист ДФЈ* 1946, 58). Enacting of the Law on confirmation and modifications and amendments of the Law on organization and competence of military courts in the Yugoslav army brought about forming of Supreme court of Yugoslav army as the highest institution of military judiciary in the country, and organizational legislature was made compatible with real situation in military judiciary organization. Article 20 of the Law envisaged possibility of enlargement of competence of military courts to civilians under special circumstances, upon decision of federal government. That legal option, according to certain authors, implied that military courts could in wider sense be considered regular ones (Чулиновић 1946, 177). Much more acceptable explanation is that possibility of widening personal competence essentially confirmed superiority of military courts over general, regular courts. The Law on confirmation and modifications and amendments of the Law on organization and competence of military courts in the Yugoslav army stipulated that military courts consisted of military judges, adjudicators, secretaries and administrative staff. Military judges had to be both jurists and officers. Court secretary was also both officer and jurist by profession, and in deliberations had a right of consultative voting. Military courts of divisions, naval fleet and military zones were deliberating in panels consisting of a president or his deputy, and two adjudicators selected from military ranks. Military judges at all levels and judges of military panel at Supreme court were appointed and discharged by Presidency of Temporary People's parliament of DFJ, while adjudicators of military courts for the territory of federal units were appointed by presidencies of parliaments of respective federal units.

"Intermediate and final orders" stipulated competence of minister of defense to revoke or form military courts and determine real competence of military courts over servicemen for "crimes against fatherland", while for other persons who were not serving in the army, military courts were competent only for acts committed during the war, crimes that induced extremely severe consequences, or if such an act was specially dangerous for defense or military security of the state.

The Law on confirmation and modifications and amendments of the Law on organization and competence of military courts in the Yugoslav army (hereinafter: the Law of 1946) stipulated more precise competence of military courts[5] than articles of previous law. It also established new procedure for selecting judges where president, his deputy and other judges of supreme military judicial institution were appointed and discharged by People's parliament of FNRJ at a joint session of both houses of parliament, while all other judges were appointed by supreme commander. That reflected „narrowing" of selection principle for judges of military courts, in comparison to the one established by the Law of 1945 (Малобабић and Лукић 1970, 629). An important change is that the Law of 1946 stipulated existence of Supreme court of Yugoslav army as the highest judicial institution in the Army, and in that way "military judiciary was separated from a regular one" (Костић 1970, 448). Finally, the Law of 1946 linguistically modified text of the Law, so term judge applied to persons who are professionally and regularly performing role of military judge and "persons who serve as judges along with their regular service within the army, i.e. lay magistrates" (Љубановић 1989, 25).

New legal act on military courts, the Law on military courts (*Службени лисш ФНРЈ* 1947, 105), was enacted at the end of 1947. The Law on military courts introduced military court system comprising two instances, having courts of the first instance and Supreme military court. Courts were no longer organized by

5 In the period between enactment of the Law on organization and competence of military courts and enactment of the Law on confirmation and modifications and ammandements of the Law on organization and competence of military courts, member of parliament from Demokratska stranka Dr Dragić Joksimović delivered to the Presidency of Temporary people's parliament in September 1945 a proposed Law on citizen rights at military courts. Motive for this proposal was the fact that accused were in very difficult position at military courts, so proposed law was intended to improve their position through giving right to lawyers to read court acts, right to copy sentences, something that was not allowed by the Law on organization and competence of military courts, for legally binding finished cases were considered military secrets. (See: Керановић 1996, 161)

military units, but territorially (Службени лист ФНРЈ 1947, 105).[6] Supreme court of the Yugoslav army was both court of appeal and ultimate court of appeal (Art. 11). Significant competence over military court in comparison to previous laws was given to supreme commander, who stipulated number, seat, designation and competence of courts, upon proposal of minister of defense. Previous law had these issues exclusively in competence of minister of defense. Military courts were given certain competence over civil law, for they were deliberating wrongdoing by servicemen in the course of their service. Supreme military court performed as both court of appeal and ultimate court of appeal, only occasionally deliberating cases in the first instance. Court panels consisted of three persons, a judge and two jurors, servicemen of different rank depending on the defendant.[7] Panels of Supreme military court comprised only judges, and the Law specified that in cases involving reimbursement of damages one of jurors had to be officer of administrative military profession (Art. 15). Military courts in the first instance deliberated in panels of three members where two members were lay magistrates, selected among officers and NCOs who were performing other regular service besides court duty. Only in matters concerning request for protecting legality or issuing of instructions, Supreme court of Yugoslav army was making decisions at general sessions.

Despite the Law on military courts in Art. 1 proclaimed court independence, the Law did not obtain real guarantees for independence of military courts. There are lots of reasons for such statement. First of all, immunity from legal prosecution for military judges narrowed, since they were selected by supreme commander instead by parliament, as was stipulated by the Law of 1945. Supreme commander was appointing and discharging military judges, but neither conditions for appointment, nor reasons for discharge were specified. The Law on military courts stipulated minister of defense should supervise courts, but that act did not specify range of the supervision, leaving space for arbitrary interpretation.

The Law on modifications and amendments of the Law on military courts of January 23, 1950 (*Службени листи ФНРЈ* 1950, 11) enlarged competence of

6 Miloš Gojković considers that was essentially a combined system, where military courts were competent for certain territory, but also units positioned in that territory. (See: Гојковић 1999, 144)

7 When on trial was NCO, soldier or civilian, on juror was NCO, when officer was accused both jurors were officers, and when accused was a general, one of jurors had a rank of a general.

military courts in civil matters by transferring into competence of military courts deliberations of disputes over reimbursement of damages state incurred from civilians serving Yugoslav army.

For shaping military judiciary after WWII important regulation was the Law on military crimes of 1948 (*Службени лисш ФНРЈ* 1948, 107). The Law "systematized military crimes, defined who is consider to be a serviceman" and solved certain general issues regarding criminal accountability (Гојковић 1999, 145). Apart from substantive criminal norms, the Law on military crimes of 1948 also contained regulations on competence of military courts that supplemented the Law on military courts. The Law on military crimes became obsolete when the Penal code came into effect on March 2, 1951 (*Службени лисш ФНРЈ* 1951, 13), for it also covered military crimes. The Penal code widened competence of military crimes to litigations for damage imbursement when damage was inflicted by civilians working for military institutions and companies if deliberations at military court were considered important for public defense.

The organization and competence of military courts in FNRJ followed solutions from regulations specifying organization and competence of military courts in the USSR.[8] The military judiciary of USSR, according to the Law of 1938, formed military courts of the first instance (organized at level of army, flotilla, aggregated units), superior military courts that made military judiciary of second instance (deliberating officers with high rank or duties). Only in 1941, after battles with Germany started, the USSR enacted new regulation on military courts, the By-law on military courts, that implemented war military courts in war zones and zones of military operations (Јовановић 1964, 67).

Regulations on military courts enacted immediately after WWII defined very wide competence of military courts regarding criminal law, primarily due to high degree of militarization of society after WWII. The Law of 1945 gave two roles to military courts: a role in separate military judiciary and another one as a part of

8 Regulations on organization of functioning of military courts in the USSR were contained in the By-law on military courts and prosecution services of 1926. According to the By-law of 1926, military courts were general federal courts that apply general federal substantive and processign law, and appropriate laws of federal republics. The Law on organization courts of the USSR, federal and autonomous republics of 1938 stipulated both organization and competence of military courts. The Law on general conscription of 1st September 1939 revoked territorial system of forming armies, and that reflected in the manner lay magistrates were selected for military courts. (See: Гоце-Гучетић1964, 30)

regular judiciary of FNRJ. Legal alterations in 1946 made military courts specific courts, functionally separated from regular judiciary with general competence. Hierarchy principle was one of norms that made foundation of military courts and enabled control of military judicial activity. Superiority was implemented ex officio, through a system of legal redresses and through mandate higher courts had over lower ones. Military courts were also characterized by known specificities of judicial institutions. They were specialized institutions of the state, with very unreliable guarantees regarding their autonomy and independence, primarily because regulations enabled "commanding chain" to influence court decisions. Territorial principle, as a third norm military judiciary was set upon, was combined with functional principle, for courts were formed for military zones, but also for certain units. Principle of electiveness of judges, as already mentioned, first was limited, and later abolished by the Law on military courts of 1950, "replaced by administrative appointment, by its antipode" (Малобабић and Лукић 1970, 629). Despite organizationally detached from regular judiciary as per the Law of 1946, military judiciary remained a part of criminal law system of FNRJ. Such a conclusion comes from the fact that supreme court for both regular and military judicature was the Supreme court of FNRJ., and from the fact that military courts, with small exceptions, applied same regulations for criminal proceedings and substantive law as regular courts did (Костић 1970, 449).

In accordance with the By-law and acts enacted regarding its implementation a network was made that, as certain authors assume, consisted of hundred and seventy military courts that were deliberating just in the first instance, and eight courts having competence for both first and second instance. The supreme institution of military judiciary was, as was already mentioned, Superior military court, exceptionally having competence in the first instance for the cases allocated by supreme commander. Apart from that, this court through its decisions „directed practice of all military courts and de facto acted as the highest instance of military judiciary – supreme military court" (Гојковић 1999, 131–132). Other authors consider number of military courts in 1945 was less than that. For instance, Marko Kalodjera consider that in 1945 at entire territory of the state there were altogether 157 military courts, having competence just in the first instance of criminal law. This could be considered more reliable, for it comes from number of preserved entries of military courts of first instance from that period (Калођера 1986, 31–32). Out of that number it is certain that 31 first instance military courts were seated

in the territory of Serbia. Network of military courts in the territory of NP Serbia could be estimated by appointments of military adjudicators by presidency of People's parliament of Serbia. Namely, soon after enactment of the Law on organization and competence of military courts in the Yugoslav army started appointments of military adjudicators for military courts in the territory of Serbia (terms used in official communication were "Serbia" and "federal unit of Serbia"). Decisions of presidency of People's parliament of Serbia appointed to Military court under the auspices of National defense corps of Yugoslavia, Military court of III army and Military court of I army a total of 48 adjudicators (Службени гласник Републике Србије 1945, 30). From the Decision on appointment of adjudicators indirectly can be concluded that three more military courts (Military court of KNOJ headquarters and military courts of I and III army) had in 1945 their seat or executed competence at the territory of NP Serbia.

Revoking of divisions caused revoking of military courts of these divisions, and in January 1946 courts of military zones were also revoked. At the beginning of 1947 revoked were military courts of KNOJ. After reorganization in 1947 active were 19 military courts of divisions, military courts of naval fleet and Military court for city of Belgrade, all of them deliberating in the first instance, and Supreme court of Yugoslav army, as supreme military court in the country (Гојковић 1999, 138). Within territory of NR Serbia were seats of following military courts in the first instance: Military court for the city of Belgrade, Military court in Kragujevac, Valjevo, Novi Sad, Subotica, Niš and Priština. Legal zone of military courts often covered territory of several republics, so it can be assumed listed military courts only partly were competent within territory of NR Serbia.

Wide competence of military courts was reflected by the number of criminal cases deliberated by military courts. In 1945 first instance military courts solved 33,884 criminal cases. In those solved cases 12,844 servicemen and 28,558 civilians were accused. In the following year, 1946, 12,983 criminal cases were solved with 11,631 servicemen and 11,801 civilian accused. In 1947 military courts solved 7,606 cases, involving 5,303 servicemen and 5,821 civilian (Калођера 1986, 35). Despite wide competence of first instance military courts, number of criminal cases deliberated by these courts was diminishing due to exhaustion of certain elements of their competence, those related to criminal acts committed during WWII. In the same period, Supreme court of Yugoslav army deliberated in first and last instance relatively small number of cases. So in entire 1945 (as Superior

military court under the auspices of Supreme headquarters and Ministry of defense from August 31 1945) in the first instance decided on 33 cases with 209 accused persons, in 1946 just a single case (the case of JVUO commander), while in 1947 and following years it did not deliberate any cases in the first instance (Калођера 1986, 35).

Enactment of the Law on military courts in 1947 and reorganization of armed forces in 1948 reflected in organization of military judiciary. At the beginning of 1948, upon legal authorization and a proposal from ministry of defense to decide on number, seat, designation and territorial competence of first instance military courts, supreme commander signed the act declaring 14 first instance military courts. Essentially, this act reorganized former military courts of armies, navy and certain divisions into first instance military courts, while the rest of courts were revoked. Out of 14 military courts, five of them had their seat in the territory of NR Serbia, courts in Belgrade, Novi Sad, Niš, Kragujevac and Priština. In the following years the number of military courts decreased, so at the end of 1951 the network of first instance military courts included those in Belgrade, Novi Sad, Skopje, Sarajevo, Zagreb, Ljubljana, Split and Kragujevac from 1954 (Калођера 1986, 38–39). The seats of first instance military courts were, as can be seen, in the seats of largest military formations. Besides those military formations, first instance military courts were competent for other units and military institutions within their legal zone.

From 1948 to 1951 number of criminal cases at military courts again increased. In 1948 there were 4,822 cases solved, with 6,173 accused persons, in 1949 5,339 cases with 7,263 accused persons, in 1950 5,402 solved cases with 7,411 persons, and in 1951 5,932 cases involving 7,848 persons. Increased number of accused persons resulted from processing crimes related to disagreement with the USSR and IB, for they involved crimes and persons mostly within the competence of military courts. In the following years, with a decrease of this type of criminal cases, decreased also a number of persons accused at military courts. In 1952 solved were 4,267 cases, in 1953 3,771 cases, and in 1954 3,652 cases (Калођера 1986, 45).

Conclusion

Military courts after WWII were characterized by known specificities of judicial institutions. They were specialized institutions of the state, with very unreliable guarantees regarding their autonomy and independence, primarily because regulations enabled "commanding chain" to influence court decisions. Territorial principle, as a third norm military judiciary was set upon, was combined with functional principle, for courts were formed for military zones, but also for certain units. Principle of electiveness of judges, as already mentioned, first was limited, and later abolished by the Law on military courts of 1950, "replaced by administrative appointment, by its antipode". Organization and competence of military courts in FNRJ accepted regulation of organization and competence of military courts in the USSR. Since legal zones of military courts often spread to several republics, it is impossible to reliably identify specifics of military courts functioning in certain republics or AP Vojvodina. Besides, military courts were federal military judicial institutions, depriving republics influence over their activities. Having all these facts in mind, and scarcity of data on functioning of military courts, it is not possible to point out specifics of functioning of military courts in NR Serbia.

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Rezime:
Prevesti naslov rada

Organizacija vojnog sudstva bila je izložena čestim promena u periodu neposredno nakon Drugog svetskog rata. Uredbom o vojnim sudovima i ustrojstvu i nadležnosti vojnih sudova iz 1944. godine uspostavljena je nova i jednoobrazna organizacija vojnog sudstva u čitavoj državi. Uredba je zamenjena Zakonom o uređenju i nadležnosti vojnih sudova u Jugoslovenskoj armiji od 24. 8.1945. godine koji je uspostavio sistem vojnih sudova po uzoru na vojno sudstvo u SSSR-u. Novi zakonski propis o vojnim sudovima bio Zakon o vojnim sudovima, koji je usvojen je krajem 1947. godine. Zakon o vojnim sudovima uveo je dvostepeni vojno sudski sistem sastavljen od prvostepenih sudova i Vrhovnog vojnog suda. Propisima o vojnim sudovima donetim neposredno nakon Drugog svetskog rata veoma široko je bila postavljena nadležnost vojnih sudova u materiji krivičnog prava, što je pre svega bilo izraz visokog stepena militarizacije društva nakon Drugog svetskog rata.

Ključne reči: vojno sudstvo, Drugi svetski rat, krivično pravo

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