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Categorizing Rape in the Early Modern Russian Military Law

With the release of colonel Budanov, who killed a seventeen-year-old Checheyan girl and allegedly raped her, on parole in February 2009 Russian government closed the discussion on the one of the most controversial issues of ‘Russian military operation’ in Chechnya, i.e. that of the conduct of the Russian troops in the republic. Although Budanov was clearly guilty, his main defense strategy based on the assumption that Elsa Kungaeva was a sniper of the Checheyan guerilla and as such was considered an enemy combatant, so what he did was quite justifiable.

Alberico Gentili (1552-1608), an Italian lawyer, would have disagreed with Budanov and his supporters: “It is not lawful to do this wrong [rape. - M.M.], even if it is sometimes lawful to kill women... If a woman fights, why should she not allow war to be made upon her?... But there is no reason why she should suffer so signal an insult [as rape. – M.M.]”¹ So Gentili insisted that rape should be prohibited during the wartime and peace; and this prohibition should not be limited by the civilian population. To ground his argument Gentili made references to Seneca, Statius and Alexander of Imola, insisting, that because women are too weak to bear arms and participate in wars, they should be treated as old, disabled, children and clergy; on the other hand if a woman fights she should be treated as a man.² Gentili started a long tradition of banning rape of women during the wartime in the legal theory, but the reality of war never actually came close to the recommendations of lawyers such as Hugo Grotius, Samuel Puffendorf, Christian Thomasius, Emmerich van Vattel and many others. Armies committed rape over civilian population as evidence from different wars show, two but most famous examples include Thirty Years War and the wars of revolutionary France. Thus rape of women became a symbol of any unjust war and inappropriate combatant behavior in the seventeenth and eighteenth centuries. European military law, which started its formation in the period, paid a lot of attention to rape as a war crime and imposed strict punishments for it. Military Codes of German emperors (Maximilian I, Maximilian II, Ferdinand III), Swedish Kings Gustav Adolfus and Charles IX,

¹ Gentili, *De Jure Belli*, III, 258-259.

² Kelly Down Askin, *War Crimes Against Women* (Martin Nijrhoff Publ., 1997), pp. 26-27.

Prussian kings Frederick Wilhelm and Fredrick II, enacted in the 16th-18th centuries, all specified death penalty for rape.³ Russian military law was no more tolerable.

Russia represents a good example of the country which military law is little known about while the country itself was constantly conducting wars during the seventeenth and eighteenth centuries. The major military efforts were directed against neighbors: Poland (Rzec Pospolita), Sweden and Turkey (the Ottoman Empire). Russia was famous of its extremely 'barbarous' behavior towards civilian population on one hand, and strict regulations of sexuality due to the orthodox influence, on the other.⁴ Foreigners, cruising the lands of Muscovy in the 17th century, gave a lot of details to feel Russian 'barbarity'; two of which were quite disturbing to them – spread of sodomy and the low status of women. Putting sodomy aside for the purposes of this particular presentation, women were treated really badly; they were sold, heavily beaten, raped systematically by their fathers and fathers-in-law, noble women were locked in special houses (*terem*), all of them were severely punished for the murder of their husbands (buried alive up to their shoulders and left to die without food and water).⁵ Almost every traveler would describe the violent sexual behavior of Russian Tsars towards the wives and daughters of their subjects. Swedish diplomat Petrus Petrejjys (?-1622) described Ivan IV in the following manner: 'He was a vile barbarian, an extortioner and a tyrant, great skinflint, blasphemmer, rake, a man of a wild, unjust and proud character, rapist of women,... he was an instigator of the dangerous and unjust wars against his neighbors...'⁶ According to these accounts how Russia could not be a barbarous country whose 'national spirit' resulted in the spread of deviant and violent sexuality?

It was in the seventeenth century when the first military regulations together with the attempt to create a 'European' model of the army appeared. The Code for Artillery (*Ustav ratnykh pushkarskikh del*) appeared in 1621 aimed at regulation discipline and warfare among 'pushkari' (gunners). According to this code the gunners should be punished by death for pillaging and plundering the private lands of the civilian population, for billeting churches, breaking down mills, killing and raping pregnant women and mothers and other cruelties towards civilian population.⁷ On the other hand, the code also regulated everyday sexual behavior of the gunners helping thus to the state to discipline them. The code punished for the

³ See the collection in: *Corpus Juris Militaris* (Leipzig, 1723).

⁴ See about it: Eve Levin, *Sex and Society in the World of the Orthodox Slavs, 900-1700* (Ithaca and London, Cornell University Press, 1999).

⁵ See about the accounts of Russia by foreign travellers: Francesca Wilson, *Muscovy: Russia through foreign eyes, 1553-1900* (London, 1970).

⁶ Petr Petrei, *O nachale vojn i smut v Moskovij* (Moscow, 1997), p. 238.

⁷ 'Ustav ratnykh pushkarskikh i drugikh del, kasajuschisja do voennoj nauki,' in M. Rosengeim, *Ocherk istoriji voenno-sudnykh uchrezhdenij v Rossijindo konchiny Petra Velikogo* (St. Petersburg, 1878), pp. 257-267.

adultery and fornication by depriving the rank and sending away from his cannon in dishonor. The prosecution differentiated in wartime and in peacetime. During the casualties and maneuvers the proceedings were held by the commander-in-chief (*golova*) on the report of the colonels (*voevoda*). In the peacetime all the cases were referred to the special departments called *prikazy* that represented the government. Here the military were treated as a distinct social group but they were subjected to the state law. So the military codes had its jurisdictions only during the war as such and in the camps and quarters. What is also clear that there was a division between rape committed during actual military actions and ‘immoral behavior’ of the military men in camps and quarters. The first crime was treated as a capital crime (same way as murder, desertion, treachery, etc.) and punished by death penalty. The second one invoked dishonor punishments awarded for the less important crimes.

This code was not very effective as the further legal process shows. In 1647, two years before the famous Russian Law Code (*Sobornoe Ulozhenie*) enactment, the government undertook another attempt to regulate the army and introduce the discipline. In the introduction to the new military code (*Uchenie i hitrost' ratnogo stroenija ljudej*) the author goes on and on the unruly army behavior, unchastity of the soldiers and officers, the spread of drunkenness, lechery, blasphemy and other vices: ‘and now contrary to it [the purity and piety of old warriors. – M.M.] there is blasphemy and insults against the God, drunkenness, swearing, lechery, ... and they dishonor women and behave unjust. And you hear how they dare say that these actions are common for military habits and allowed to the military men because they are not monks in the monastery...’⁸ The author even refers to the Ottoman military discipline positioning it as an example of the effective army. This manuscript laid the foundation to the special chapter in the subsequent Law Code (*Sobornoe Ulozhenie*) of 1649. Russian Tsar Alexei Mikhailovitch (1645-1676) was quite concerned with the army discipline and ineffectiveness. Different state departments (*prikazy*) had been collecting reports from all over the borders about plunders and rapes committed by soldiers especially on the Russian-Polish border and passed those to the tsar. The new Law Code indented to regulate all aspects of the Russian life thus contained Chapter 7 ‘Of Military Men.’ Art. 30 of this chapter explicitly said that ‘if those military men going to the tsar’s service or getting back from the service start ... plundering or murdering ... or raping women...then they should be punished by death...’⁹ As *Sobornoe Uozhenie* became a universal

⁸ *Uchenie i hitrost' ratnogo stroenija ljudej*. 1647. – National Library of Russia, f. 536, F.115. P. 15rev-16.

⁹ *Sobornoe Ulozhenie 1649 goda*, in A. G. Man'kov, ed., *Akty zemskih soborov* (Moscow, 1985), pp. 83-256. There is also an English translation, which can be used for reference: Richard Hellie, ed. and trans., *The Muscovite Law Code (Ulozhenie) of 1649, Part 1: Text and Translation* (Irvine, CA: Charles Schlacks, Jr., Publisher, 1988).

law applied in the country, this norm also became one applicable universally in all army divisions. The prohibitions to rape women and 'do wrongs to people' traditionally included in the special czar's orders addressed to the commanders at the beginning of each war from now on acquired a legal basis. These writs specifically stated 'not to do wrongs to them [civil population. – M.M.] and to their wives and children' and to send the perpetrators to the special court where the judges should 'try them justly without any indulgence.'¹⁰ That these norms were actually applied we can see from the court cases coming to the attention to the judges of *Razrjadnyi Prikaz* (Military state department). Only in the year of 1668 (recurrent Russian-Polish war) there were 4 such cases. In one of them the judge ordered an investigation of the gang rape of the tavern service women in Perejaslavl' committed by a squadron of reiters (horsemen) under the commandment of Christian Gogolschen. It was an important precedent as usually foreign officers were excluded from the Russian jurisdiction and were subjected to the jurisdiction of their commanders who ruled according to the German Imperial law or the law of the country they came from.¹¹

Peter the Great did reform Russian law and military law in particular. His Military Code of 1716 although modeled according to Swedish *Kriegsartikul* (Military code) was not a mere translation of it. Peter worked on the text and made extensive amendments, which might show his intentions in terms of disciplining the army. What is more interesting that chapter 20 "Of Sodomy Sin, Rape and Fornication" had been most profoundly amended and changed. Peter undertook several attempts to introduce the new military law. The Rules of Military Conduct (so called Sheremetjev Articles), created in 1702, continued the 17th century tradition of prohibition to rape women 'under the death or cruel punishment according to the degree of the guilt.'¹² The alternative offered (the degree of the guilt) became a novel for the military law and opened a window of opportunity to those who considered rape a means of warfare. The Concise Code of 1708 (so called Menshikov code) reinforced death penalty for rape.¹³

The ambiguity of Russian military law's attitude towards rape is clearly seen from the rape case of 1711, when different groups of officers expressed different verdicts. Two dragoons raped a teenager girl Christina close to Revel (Lifljandia). The *kriegsrecht* (military court) was formed from one major (the chief-judge), one captain, one lieutenant and one under-lieutenant, then several sergeants, corporals and soldiers (one from each regiment). The sentence according

¹⁰ See, for example, writs to Shein and Ismailov, Prozorovsky and Kondyrev (1632); Veljaminov and Isupov, Debeert (1633): *Akty, sobrannye v bibliotekakh i arkhivah Rossijskoj imperiji Arkheograficheskoju ekspeditsieju Imperatorskoj Akademiji Nauk* (St. Petersburg, 1836), vol. 3, no. 206, 207, 223, 224.

¹¹ K. Petrov, ed., *Opisi arkhiva Razrjadnogo prokaza* (St. Petersburg, 2001), p. 264.

¹² NLR, f. 550, Q.II.30, p. 12.

¹³ 'Artikul kratkij,' in Rosengeim, *Op.cit.*, p. 299.

to the law should have been death penalty. But the sentences given by the court members ranged between the following:

- 1) soldiers: whipping by the rod mercilessly;
- 2) corporals: to make run the gantlet (through the battalion once);
- 3) sergeants: to make run the gantlet (through the regiment once);
- 4) under-lieutenants: to beat the major perpetrator (Chernyshov) by a knout and send to the hard labour (Siberian mines); to make run the gantlet (through the regiment 10 times) for the accomplice;
- 5) the captain: to hang;
- 6) the major-chief-judge: death penalty (no specification).

The commander-in-chief, field-marshal prince Boris Sheremetjev confirmed death penalty according to the Menshikov code, but suggested shooting instead of hanging.¹⁴ None of them except Sheremetjev referred to any law; the majority of low rank suggested disciplinary penalties rather than capital punishment in such cases, certainly treating rape as not a capital crime but rather as habitual crime committed during the war. The officers by sentencing to death certainly showed their acknowledgement with the law and willingness to observe the army discipline with harsh punishments. We can also see the punishment was becoming harder as the rank of a judge became higher. I am not sure whether it had something to do with a solidarity issue, but the soldiers definitely thought rape as an offense, but rather disciplinary matter than a capital crime. Officers decisively defined it as a capital crime. This might suggest who actually committed rapes and whether rape was totally appropriate.

Peter the Great put an end to the ambivalence attitudes towards rape. Chapter 20 of his Military Code defined the borders of sexuality. This chapter included the following sexual offenses: bestiality (sex with animals; art. 165); buggery, including rape (art. 166); rape (art. 167); kidnapping and rape (raptus; art. 168); adultery (art. 169); fornication (art. 170, 173, 174); bigamy (171-173); prostitution (art. 175); producing illegitimate children (art. 176); obscenity in speech and songs (art. 177). The list of crimes defines the essence of these offenses: they were considered as crimes against nature rather than against the personality of a victim. They also aimed at disciplining the army than at protecting the population. These offenses reflected what state wanted to be a model sexuality within the disciplined army environment. Moreover, they suggest this model to be universal in the society. The heterosexual marital procreative relations model clearly emerges from this chapter.

¹⁴ Rosengeim, *Op.cit.*, pp. 87-88.

Art. 167 stated, that if a woman, old or young, married or unmarried, in enemy's or friend's land, is raped and she reports, the rapist to be beheaded or sent to galleys forever according to the degree of force used. Art. 168 adds, that if an honest wife, a widow or a maiden is secretly abducted and raped and she sooner or later reports, a rapist to be punished by death – beheaded. These two articles do not say anything new for the European military law as they translate Swedish Military Code into Russian except the alternative punishment for rape which Peter added himself meaning that less force used less capital the crime was. What was new is a commentary, which totally differed from the Swedish text. It starts with the reference to nasty women and how they try to use violence in order to cover their unchaste behaviour and whoredom. Then the Code prescribes that a judge should not believe such a woman, but should hold a very accurate examination, including witnesses' statements and whether she raised a hue and cry. These rules apply to all women (even if they are chaste) if the rape took place in the forest. If there are no witnesses the Code prescribes to pay attention to the material evidence: 1) if her or his robe is torn apart; 2) if there are bruises on them both; 3) if a woman reports very quickly. Upon the last circumstance the codes states, that 'very quickly' means during the day, and if she does not report that very day, comes on the following day or later, she must be suspected of *wanting it*. Otherwise, if the evidence is in place the judge has an authority to use torture towards to the accused or to adjure the accused (depended on the social position; noblemen were almost always adjured). What we see is a clear pattern used in other European countries, for example in England, for the rape cases as if Peter carefully studied judge Hale.

Another comment deals with whores. The Code states that, first of all, a whore could be raped, secondly, the rape of a whore should be punished the same severe as the rape of an honest woman, because violence is violence even committed to a whore and a judge should look into the case but not onto the personality of a victim. This comment is very revolutionary and valuable as it was supposed that in terms of discipline military men should not rape anybody as rape being a sort of disrespect to the will of another person could be interpreted as a potential inclination to disobey commander's orders.

In spite of his own 'enlightened' views Peter used the 'custom' of war quite effective. Thus in 1708 while fighting Ukrainish resistance he ordered his favorite Men'shikov to arrest wives and children of hetman Kochubei and some of his supporters which Menshikov was happy to do. Peter specifically ordered him not to touch women that suggest that Peter kept in mind the possible implications of such actions.

Peter created military law applicable in the Russian army. From now on any royal ordinance about military actions in any territory would order not to touch women during

invasions and cruising enemy's lands.¹⁵ The army was also the only place where the death penalty (different kinds of it) was applied to the perpetrators. The court practice from the state criminal courts gives evidence of corporal punishment for rape rather than death penalty (with the exclusion of child molesting), which had also something to do with the canon law in action. Military courts observed Peter's code representing a good example of the law in action. Death penalty was prescribed in 60% of cases, other 40% had corporal punishment and hard labour. These 60% of cases though included the most aggravated offenses: rape of minors and nuns. Other types of rape, especially that of an adult women, were punished by corporal punishment (to run the gantlet through 1000 people),¹⁶ but still much harsher than in the state system. The subsequent Russian military codes (of 1812 and 1818) maintained death penalty for rape, but in the first half of the 19th century it was rarely applied due to the general assumption of Russia being 'civilized' and as such refusing harsh punishments (an interesting heritage from Catherine the Great's reforms).

To conclude: Russian military law constructed rape as a war crime along with the regulating the army's conduct towards civilian population within the framework of the European process of regulating the warfare. It was quite important for the country as the government introduced the crime of rape through the military law into the state criminal system and turned it into a capital crime starting the tradition of the rationalization of rape. Rape of women, this necessary marker of any early modern and modern war, although a grievous crime, was not viewed in terms of bringing harm to a personality of a woman or as a sign of interpersonal violence, it was not even about women. The lawmakers' efforts concentrated on the general disciplining practices of the army where sexuality became the most obvious and effective tool to keep order and control human behavior. At the same time the sentencing strategies allowed the army command and government officials to manipulate the conquered territories and use rape as a political tool on newly acquired lands. Russia (as well as other European and non-European states) has been using this strategy since.

¹⁵ See, for example, the ordinances from the Russian-Turkish war of 1739: D. F. Maslovskij, ed., *Stavuchanskij pokhod. Dokumenty 1739 goda* (St. Petersburg, 1792), no. 2, 28, 31, 39, 40, 42.

¹⁶ See the collection of cases: RGVIA (Russian State Military Historical Archive), f. 8.