

SÁNDOR ISTVÁN KARDOS**The Extension of the Military Criminal Procedure is it and expansion or restriction of rights****A katonai büntetőeljárás kiterjesztése, mint a jogok szűkítése vagy bővítése****Abstract**

The basic functional condition of military organizations is the full respect of rules regulating the activity. The system of military criminal procedures is a part of maintaining order. Beginning with 1st January 2014 military criminal jurisdiction has to be applied to the members of the police not only in case of military crimes but also in case of other crimes related to service.

The author states that military criminal procedure – when evaluating crimes against the common law and taking into consideration the procedural specificity – can be interpreted as a restriction of rights to a certain extent in the case of offender members of the police. Based on data included in this research the imposed restrictions on the procedural rights do not go beyond those ones which had existed before and which had been applied against a professional policeman in military investigations. Thus the new system of criminal procedures does not bring along constitutional disadvantage for the police personnel.

Absztrakt

A katonai szervezetek működésének alapfeltétele a tevékenységet szabályozó normák maradéktalan betartása. A rend fenntartásának része a fegyveres szervezetek esetében a katonai büntetőeljárások rendszere. Jogszabályi változás miatt 2014. január 01-től a katonai büntetőeljárás szabályait kell alkalmazni a rendőrségen a katonai bűncselekményeken kívül a szolgálati tevékenységgel összefüggésben elkövetett egyéb bűncselekmények esetében is.

A szerzős megállapítja, hogy a katonai büntető eljárásjog alkalmazása a köztörvényes bűncselekmények elbírálása során - figyelemmel az eljárási sajátosságokra - bizonyos fokú jogkorlátozásként értelmezhető a rendőr elkövetők esetében. A tanulmány adatai alapján az eljárási jogok bevezetett korlátozása nem terjed ki túl azon a szinten, amely egy hivatásos állományú rendőrrel szem-

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ben a katonai nyomozások révén már létezett. Ezáltal a büntetőeljárások új rendszere nem jelent alkotmányos hátrányt a rendőri állomány számára.

1. INTRODUCTION

The functioning of states with military aspect is unimaginable without the full implementation of orders and instructions. The functioning of the hierarchical subordination and superordination brings to life a system of sanctions which is unknown in the so called civilian world. In case of infringement of norms, the evaluation of the perpetrator could go along several ways of proceedings, in the case of law enforcement organizations¹ the collective notion of measures is positioned under the so called disciplinary power.

In the case of police personnel,² in the legal background of treating cases of discipline we can find the Service Act³ and the Discipline Code⁴ The disciplinary power provides a wide scale of procedures and prescribes several tasks to the leadership in charge of the police. Handling discipline as a commander's activity at law enforcement organizations does not cover only the "classic" forms of disciplining, but also means investigating various military crimes that are within the competence of the commander; as well as cases of indignity in the events of out of service violation of rules.

Within the scope of handling discipline problems in military organizations we see the system of military justice, the "uniqueness" of which is given by the person committing the contravention, who is, in this case, the soldier. We can define who a "soldier" is by citing the Penal Code.⁵ It states who exactly the soldier is, and, as a consequence, all military penal regulations apply to the person who is a full member of the Hungarian Armed Forces, the law enforcement bodies, the Parliamentary Guard, the Hungarian Penitentiary Service, the professional disaster management bodies or the civilian national security service. Military justice procedures show differences in several areas of implementation.

¹ Act XLIII. of 2010 on the central administrative bodies and on the standing of the members of the Government and secretaries of state section 1, article 5: the branches of the law enforcement organizations are the police, the Hungarian Penitentiary Service, the professional disaster management bodies and the civilian national security service.

² This research focuses exclusively on the policemen in service and in charge of the general law enforcement duties. From 1st January 2011 the police stands on three pillars: the organization for the general policing tasks, which is the National Police Headquarters (ORFK), the organization for prevention and detection of internal crimes, which is the National Protective Service (NVSz), and the Counter Terrorism Center (TEK).

³ Act XLIII. of 1996 on the service status of professional law enforcement employees The 11/2006. (III. 14.) Order of the Minister of the Interior on the Disciplinary Code for the professional law enforcement employees

⁴ The 11/2006. (III. 14.) Order of the Minister of the Interior on the Disciplinary Code for the professional law enforcement employees

⁵ Act C. of 2012 on the Criminal Code, section 127. article 1

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In this paper – partly based on my personal experience – I will try to examine whether the extension of the effect of the 2014 act of military justice is a restriction or an expansion of rights in the case of members of the police force when committing non-military criminal acts.

2.1. THE SYSTEM OF MILITARY PENAL PROCEDURES

To have a closer look at the topic, a brief introduction to the system of military criminal procedures is indispensable. Military penal procedure is a part of the general criminal prosecution; it characterizes only military organizations, it is meant to sanction special behavioral patterns not present in relations within other forms of employment. The separation of the military penal procedure from the general penal justice is relative. Despite the unique properties and the complexity of standards it is a part of the general penal justice system. The separate system of rules makes it possible for sanctioning principles to apply within the special framework of military organizations in case of infringement of requirements. The special and legal objects of military prosecution are also identical: the order and discipline of service; that is, violation of service regulations is at the base of the bearings of the case. The legal sources of the military justice system are the following: the charter law, in the case of police organizations the Police Law,⁶ regulations on service and regulations on employment conditions.

The combined norms of the above define the tasks, the functioning frameworks and the rules that apply to military organizations.

2.2. FORMS OF BEHAVIOR ANALYZED AND SCRUTINIZED WITHIN THE MILITARY PENAL PROCEDURE

In my interpretation, the forms of behavior analyzed and scrutinized within the framework of military penal procedures can be classified into two groups. Military crimes falling under the scope of the Penal Code⁷ - let us call them the classic group – which will make up the first group. According to law, a military penal procedure is required when the soldier⁸ commits a military crime during his period of service and which is indicated specifically by name in chapter XLV of the Penal Code.⁹

⁶ Act XXXIV. of 1994 on the law enforcement bodies

⁷ Act XIX of 1998 on the code of criminal procedure, section 470, articles 1, 2, 3

⁸ Ibid. 5

⁹ section 434. absconding, 435. arbitrary leaving, 436. shirking responsibility from service, 436. evading service, 436. infringing duties in service, 439. shirking responsibility from duty, 440. infringing reporting duty, 441. service abuse, 442. rebellion, 443. noncompliance preventing rebellion, 444. noncompliance with orders, 445. violence against superior or person in charge, 446. violence against person protecting commander of person in charge, 447. offending service dignity, 448. instigation, 449. offence of subordinate, 450. superior's power abuse, 451. neglecting subordinate, 452. omitting taking measures when in charge, 453. omitting control, 454. endangering safeguarding, 455. commander offences, 456. evasion of combat duties, 457. disruption

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The other, “interpretative” group came to life after the amendment of 1st January 2014 of the Penal Code, as the change in rules and standards expanded the circle of actions which are subjects of the penal analysis and which have been committed by members of the police force. According to the new regulations, crimes committed at the place of employment and related to service, committed by a professional member of the police force, the Parliamentary Guard, the Hungarian Penitentiary Service, the professional disaster management bodies, or the civilian national security service must be treated within the framework of a military penal prosecution even if those actions do not fall into *the classic category of military crimes*.¹⁰

2.3. JUSTIFYING THE SEPARATION OF THE MILITARY PENAL JUSTICE SYSTEM

One can ask the question of how to interpret the separation of the military criminal justice system within the new rules of investigation. The amendment of law has created a new legal environment first of all for the investigating organizations, secondly for the discipline handling activities of the police force. According to the new regulations, military investigation organizations have to assess types of behavior formerly not being within their competence; therefore the investigators did not evaluate those acts.

The crimes that belong to the “classic” group used to be treated under special legislation, separately, and in my opinion, given these special circumstances of committing the offence, the existence of a special, personalized prosecution system is justified in the present and will be justified in the future as well. The investigation and the separate system in the penal procedure do not carry legal or constitutional uncertainty or any enhanced procedural “exposure” for the members of the police. We can declare – in harmony with the title of this paper – that in the case of the policemen counting as soldiers, the special procedural order of the military penal justice system that bears the uniqueness of the analyzed actions, does not mean any limitation on their rights. The so called “military” regulations account for the specific professional activity of organizations with military character.¹¹ With the specific set of regulations a legislative demand has been created for a procedural system applicable to the military only.

The individual system of criminal legislation, in other words, the set of military penal rules for the military and the police organizations are justified by the complex system of tasks and rights established by law not present with other forms of other organizations. Service being based on a hierarchical system, of a special importance, accompanied by significant risk factors demands enhanced order and discipline from the whole personnel

¹⁰ Act XIX of 1998 on the code of criminal procedure, section 29 – defined by Act CLXXXVI. of 2013, section 66. – in effect from 1st January 2014

¹¹ Article in periodical: Farkas Ádám: Jogtörténeti adalékok a büntetőkodifikáció katonai büntetőjogi kérdéseire, *Hadtudomány*, XXI. évfolyam 1-2. szám. Budapest: 2012. 112-125. oldal. ISSN 1215-4121

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and for that it is inevitable to have at disposal a specific procedural and disciplinary system that matches the individual military criminal events.

There is a need for enhanced, orderly leadership activity when taking proper measures in the military organizations due to the specific service tasks they carry out. The significant criminal liability of the executive subordinates helps maintaining the strong order of taking measures.

In the case of police organizations, the specific or unique "area" of action is defined by the fact that law enforcement organizations are in possession of legal force as a monopoly, which is a condition of performing their function legally.¹² Within that framework the police are in possession of the right to wear service guns and other instruments in the events of taking coercive measures (*such as handcuffs and gas spray*) as well as the right to use them.

Closely connected to the topic above we find the system of guarding, watch-keeping, and standby as well as the system of measures or actions with rights-limiting coercive nature implemented against citizens during investigations and other procedures. The lawful and professional use of these rights and duties can be executed exclusively due to the high degree of organization and discipline maintenance within the hierarchical system. An important element of the effectiveness of the system has to be the military penal system. Similarly to the police, the military is characterized by special duties. The army appears as an overweight, pressure putting group due to the arms it possesses, due to its military discipline, its hierarchical structure, its high degree of organization, its professional awareness and the feeling of belonging. To all those above we find attached the monopoly on the military and warfare knowledge.¹³

We can state that related to acts of breaches against which military criminal law procedures are taken, we witness a special case of criminal liability in accordance with the specific set of duties. The legislative intention linked to the armed forces and the higher level of requirements and sanctions are very important instruments for the enhanced demands of service.

Let us give a few examples of the intentions of the legislator. The police patrol is late for service. Independently from the delay level, his infraction is "misconduct" on the list of military criminal offences. Opposed to other employment forms, in civilian life for example, this does not go beyond a breach of a disciplinary rule. An even more outstanding is the infraction named "violating the reporting requirement."

Violation of the reporting requirement by the policeman counting as a soldier has to be followed by a penal procedure even in its basic form, while in the "civilian sphere" these types of behavioral forms between the super and subordinate levels are not sanctioned in

¹² Article in periodical: Finszter Géza: Módszertani szempontok a rendőrségi korrupció kutatásához, *Belügyi Szemle*, XLIX. évfolyam 11. szám. Budapest: 2000. 3-32. oldal. ISSN 1218-8956

¹³ Article in periodical: Joó Rudolf: *Civil-katonai kapcsolatok*. In: Gazdag Ferenc: Biztonságpolitika. SVHK -Budapest: 2001. 9-11. oldal. ISBN 963 8117 77 X

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any form by the code of criminal procedures. We have to mention that depending on the level of the impact the contravention had made onto service, a stricter criminal procedure also can be carried out against the member of the police.

Based on the facts presented above we can state that the member of the military is faced with specially enhanced requirements when brought under scrutiny for actions of infringement that outside the military framework are hardly ever sanctioned and which bring along criminal liability. In my opinion this situation can be interpreted as a general restriction of rights of a certain degree.

2.4. EXPANDING THE EFFECT OF THE MILITARY CRIMINAL PROCEDURE

The above mentioned amendments to the regulations of criminal justice procedures resulted in changes on the list of definitions of military criminal acts and it put military investigation and the whole penal procedural system into a whole new light. The soldier/policeman is not only liable for the military crime he has committed, but for the so called "other" criminal behavior that can be related to service. The procedure has to follow the military judicial order. The change poses the question of whether the modifications mean restriction or expansion of the procedural rights of the policeman subjected to the legal proceedings.

I believe that in case of police perpetrators the amendment to the law can be interpreted as a certain restriction of the rights of the suspect brought under the procedure. Nevertheless, the implementation of the special rules of the military criminal jurisdiction in the case of non-military infringements is within the logic of the system of enhanced requirements for the members of the armed forces.

The expansion of the system of the military criminal procedure for the crimes committed by the policeman, for offenses linked to service and at the same time to other offenses included in the common law, even if it means a restriction of the procedural right, it does not mean a restriction on rights in a way that had not existed earlier in military investigations.

In the "military-like" procedure carried out against the professional individual counting as a soldier, the restriction of any right reaches only a level that existed formerly in the regulations for the "classic" military crimes.

The new regulations on military service requirements integrate harmoniously in the previous, more demanding provisions laid down by the legislation in force.¹⁴

2.5. MILITARY INFRINGEMENTS CONFERRED UPON THE DISCIPLINARY JURISDICTION

When discussing the expansion and restriction of rights in military criminal procedure we cannot omit the evaluation of the system¹⁵ of military infringements scrutinized in criminal

¹⁴ Even earlier the scope of the 1. article of section 470. of Act XIX. of 1998 on the criminal procedure covered any crime committed by the professional soldier member of the Hungarian Armed Forces

¹⁵ Code of criminal procedure article 485

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jurisdiction. The expansion of behavioral forms to which military penal procedures apply, has not affected the already existing legal institution of military violation being transferred to disciplinary jurisdiction. This legal institution can only be applied to contraventions, just as before. At the base of the transfer of those behavioral forms to disciplinary procedure is that the goal of the punishment can be reached by disciplinary means, and the prosecutor can confer the case upon the commander for evaluation. The commander carries out the procedure exercising his guaranteed discretion.¹⁶

Military contraventions being transferred to the legal institution of disciplinary jurisdiction applies only to the "classic" types of military violations in this paper. The background norms shape the order and the legal guarantees of those procedures, but in all cases it depends on the commander which means of disciplining he prefers from those existing at his disposal. The general system of values the manager considers important can be strongly enforced by implementing the penalties for contravention of the rules.

The legal institution mentioned above provides a more favorable procedural circumstance for the suspect than a prosecutor's or judge's assessment. The sentence imposed in most cases is financial penalty, and when establishing the sum one has to relate to the previous practice of the military organizations of the responsible district courts.¹⁷ All in all, the practical experience shows that the size of financial penalties is smaller than those imposed by criminal procedures.

Moreover, observing the maximum length (30 days) of the disciplinary procedure, the transferred military contravention cases result in faster and shorter closures compared to penal procedures. In my opinion interests linked to the swiftness of actions and termination of cases as well as the quick enforcement of sanctions affect the general moral and disciplinary state of the personnel.

A further "benefit" with regard to the suspects is that when a military violation act is transferred to disciplinary procedure it is the manager who establishes the size of the penalty, a person who knows the suspect well, who is his subordinate, thus he has a wide set of criteria to evaluate the case and to set out the punishment.

Military infringements being tried within the framework of a disciplinary procedure, based on the facts stated above, creates a favorable legal environment for the evaluation of various forms of behavior. The institutions of prosecution use the option in a growing number of cases, and the increasing number of military criminal procedures transferred to disciplinary procedures justifies the relevance and effectiveness of the system.

¹⁶ Disciplinary Code article 37

¹⁷ Disciplinary Code article 37, section 4

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	Years evaluated									
	2004.	2005.	2006.	2007.	2008.	2009.	2010.	2011.	2012.	2013.
Military crimes judged by prosecutorial and judicial institutions (nr of people)	150	168	147	140	169	250	203	170	155	175
Cases transferred to disciplinary procedure (nr of people)	17	13	9	9	17	54	86	74	86	91
The ratio of the cases transferred to disciplinary procedures (%)	11,33	7,73	6,12	6,11	10,05	21,60	42,36	43,42	55,48	52,00

Table 1: Military criminal cases terminated with a sentence upon the guilty defendant, the number of investigations transferred to the disciplinary procedure and their ratio between 2004 and 2013 (professional members of the police force) – Author: Kardos Sándor István, source: statistics from the Staff Regulations and Disciplinary Department of the Hungarian National Police Headquarters.¹⁸

Summarizing the analysis of the system of military offenses transferred to disciplinary procedure, we can state that both regarding the procedural principles and regarding the perpetrators, this institution creates a favorable legal environment. Moreover, there are several opinions supporting the tendency that all offenses might be “automatically” transferred to the disciplinary procedure.¹⁹ I believe that there is no reason for all cases to be tried as disciplinary cases automatically. It is appropriate in each case that the prosecutor states his position before deciding on the measure, which is to ensure the evaluation of the military crime and to see if it is liable for a disciplinary procedure.

Regarding the advantages of the disciplinary procedure one might ask why the expansion of military investigation has not opened the possibility of transfer of common law offences related to service to disciplinary procedure. One might wonder if this situation can be interpreted as a restriction of rights in the case of the police personnel. *The regulation in its present form – in my opinion – is in maximal harmony with the basic principles of disciplining.*

The commander in the possession of the disciplining power conferred on him by the prosecutor can only assess contraventions strictly related to service, committed by infrig-

¹⁸ The number of the cases transferred to the disciplinary procedure is not a part of the set of closed cases by the prosecuting and judging institutions, the two are independent and separate clusters of data. At the time of writing this paper the 2014 figures were not yet at disposal.

¹⁹ PhD thesis: Kardos Sándor: A magyar katonai büntetőjog múltja és jelene, PhD thesis, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, 2003.

<http://www.debreceniiteltotabla.hu/doc/bunteto/Kardos/MagyarKatonaiBuntetojog.pdf>, letöltés ideje: 2015. február 10.

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ing internal code rules. These are violations that are related to everyday activities, which are committed within the boundaries of the military community, and define the process of service, both in its professionalism and in its effectiveness.

The commander in the possession of the disciplining power – partly based on his professional experience – and he is in the position to be able to evaluate the breaches occurring within the military life, on their merits, objectively and with respect to the policing-professional viewpoint in a far-reaching manner. In case of infringement of the common law even the most experienced commanders are not in the professional position to be able to adopt a well-founded opinion. Moreover, not even “the best” police commander needs to be in the possession of up-to-date experience on general criminalistics, investigation and routine on common law offences investigation to be able to judge with responsibility any crime committed by his subordinate.

Taken into account everything discussed above we can state that the policeman's rights are not restricted in any way if his lesser crimes against the common law are not judged by his commander, but a prosecuting institution. It is the professionalism of the investigating body which guarantees that in the case of offences not closely related to service, the principles of investigating, criminalistics, and procedure are thoroughly applied. I believe that present judicial procedural circumstances are suitable, but the transfer of common law offences to disciplinary procedures – even though connected to service – is not justified in the future either.

3. CONCLUSIONS

For the functioning of the police as a military organization a basic condition is the certainty that the members fully and completely obey the laws and rules. The enhanced order requires a unique discipline handling activity not known by other organizations, of which the system of military criminal procedures is an important asset.

From 1st January 2014, based on the amendments enforced by legislation, military criminal procedures have to be applied not only in case of military crimes but in case of other offences and crimes committed which are linked to the service activity as well. The new regulation partially restricts, partially expands the procedural rights of the offender members of the police. Military criminal procedure being applied to the common law offences – taken into account the procedural uniqueness – can be interpreted as a certain restriction on the offender's rights. The rate, however, does not go beyond the measures previously used against the professional policeman and applied in military investigations.

The changes of law continue to keep the possibility of assessing military offences in disciplinary procedures exclusively. However, in the case of offences committed within the “military framework,” closely related to service, one can observe the spectrum of expectations of the commander exerting the disciplining power.

Based on the regulatory system we find how the right to swift procedures applies to, and that the procedural order is favorable for the person brought under scrutiny. It is very

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important on the other hand that the case can be transferred to disciplinary procedure only on the orders of the prosecution.

The favorable legislative environment on its own cannot be the reason for transferring the non-military offenses still linked to service to disciplinary procedure. The amendment to the law did not make that possible even though the system of the military criminal procedures has been expanded. Investigation of crimes against the common law requires special skills in criminalistics, which can be applied mostly within the power of the prosecution institution entitled by law to carry out investigations.

The expansion of the military criminal procedural system is in harmony with the military structure, and with the hierarchical and special nature of the police. The extension of the military procedural order over crimes against the common law committed by the personnel can be interpreted as a restriction of rights. In my opinion this new system of criminal procedures, even if restrictive, does not result in constitutional disadvantage for the police personnel.

Key words: military criminal procedure, police, procedural rights, restriction of rights

Kulcsszavak: katonai büntetőeljárás, rendőrség, eljárási jogok, jogok korlátozása

BIBLIOGRAPHY

1. Bögöly Gyula: *A katonai büntetőeljárás hatálya a rendvédelmi integráció tükrében*. In: Hautzinger Zoltán: Tanulmányok a „Határőrség és rendőrség - az integrált rendvédelem” című konferenciáról. Pécsi Határőr Tudományos Közlemények – Magyar Hadtudományi Társaság. Pécs: 2007. pp. 167-170. ISSN 1589-1674
2. Cséka Ervin: *A büntetőeljárási jog alapvonalai*, Bába kiadó, Szeged: 2007. ISBN 978-9683-9717-35-0
3. Farkas Ádám: Jogtörténeti adalékok a büntetőkódifikáció katonai büntetőjogi kérdéseire, *Hadtudomány*, XXI. évfolyam 1-2. szám. Budapest: 2012. pp. 112-125. ISSN 1215-4121
4. Finszter Géza: Módszertani szempontok a rendőrségi korrupció kutatásához, *Belügyi Szemle*, XLIX. évfolyam 11. szám. Budapest: 2000. pp. 3-32. ISSN 1218-8956
5. Hautzinger Zoltán: *A magyar katonai büntetőeljárás fejlesztési irányai*, Dialógus Campus Kiadó, Budapest-Pécs PTE ÁJK, Pécs 2011. ISBN 9789639950627
6. Joó Rudolf: *Civil-katonai kapcsolatok*. In: Gazdag Ferenc: Biztonságpolitika. SVHK -Budapest: 2001. ISBN 963 8117 77 X
7. Kardos Sándor: *A magyar katonai büntetőjog múltja és jelene*, Doktori (PhD) értekezés, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, 2003.
8. <http://www.debreceniitlotabla.hu/doc/bunteto/Kardos/MagyarKatonaiBuntetojog.pdf> letöltés ideje: 2015. február 10.
9. Pápai-Tarr Ágnes: *A büntetőeljárás gyorsításáról*, Gondolat Kiadó, Budapest: 2012. ISBN 978-963-693-416-3