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THE INCIDENCE OF THE GENDER PERSPECTIVE IN DRAFTING THE NEW ARMED FORCES DISCIPLINARY REGIME LAW

The aim of this paper is to elucidate how Resolution 1325 of the Council of the United Nations on Women, Peace and Security has created the need to apply the gender perspective into national legislation; more particularly, into the Draft of Organic Law for the Armed Forces Disciplinary Rules.

The influence of gender perspective in the search for a more successful approach to equality between men and women within the process of modernization and improvement of the Armed Forces, where hierarchy and discipline are the founding stones, has been remarkable.

Consequently, legislator has been led to foresee not only new disciplinary types, adjusted to a more modern social reality where core personal legal principles must prevail, but also exceptional situations closely associated to that figure.

Gender Perspective, Armed Forces, Disciplinary Rules, Resolution 1325 of the Council of the United Nations, Policy, Legislation, Draft Law, Security and Defense

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INTRODUCTION

Spain's commitment within the international community to issues of Peace, Security and Defence has been demonstrated in numerous initiatives. Of these, many are closely linked to the Government Action Plan¹ for the application of United Nations Security Council Resolution 1325² on Women, Peace and Security.

This Resolution, representing a substantial change in the conception of international security, has greatly influenced legislative development in some United Nations member states, which have incorporated by law into their own internal rulings the premises represented by the Gender Perspective.

The influence of the Gender Perspective in the configuration of a modern legal code adapted to the 21st century has evolved gradually. It is now, with the drafting of the new Disciplinary Regime Law of the Armed Forces (still in draft phase), that this influence has again come to the fore; not only to cover the provisions of Law 30/2003, of 13th October, concerning measures for incorporating the valuation of the gender impact on regulatory provisions drawn up by the Government, but also to grant it a well-founded and necessary practical value.

Using analysis as a methodological system, this paper aims at exposing in a methodical manner the global meaning of the gender perspective, the evolution of military norms inspired by the principle of material equality, and the influx of the perspective into all disciplinary types and into the special provisions of the new law, and finishing off with the main conclusions from what has gone before, which will also be presented as open lines for reflection and future research.

As primary and secondary sources of information, we have used the studies and analyses of some of the most notable national experts on gender issues in the Armed Forces, as well as contributions from lawyers of considerable renown in the field; and, of course, the required documents for the drafting of the future disciplinary regime

1 Approved by the Council of Ministers, 30th November, 2007.

2 Approved at the 4213th session, held on 31st October, 2000.

bill, which will be the object of analysis in the following pages.

One of the fundamental objectives of the present paper is to exhibit and portray the importance of and the influence currently exercised by the gender perspective in such a relevant field as the disciplinary regime of the Armed Forces, which are structured as an essential and profoundly hierarchical organisation, where unity and discipline play a crucial role in achieving the goals set out in article 8.1 of the Constitution.³

AN APPROACH TO THE GENDER PERSPECTIVE

With any present-day precise definition of the gender perspective one cannot avoid some closely linked meanings that affect the content and purpose of the term, such as : “gender”, “integration” and “equality”. Thus, and without prejudice to the definition of Gender formulated by the World Health Organisation in 2011⁴ and the reference currently provided⁵, the gender perspective could be conceived as the mechanism that permits men and women to perceive and evaluate certain issues, according to their interests, needs and priorities. As a result, the identified personal and social attributes of gender will influence a more complete estimation of the developments and the effects that could come about, thus achieving the targets in the most efficient and egalitarian manner.

For numerous reasons, men and women tend to appreciate facts from different angles that take into account diverse, although not necessarily opposing, circumstances or factors, This is the principal reason why the opinion of both has to be taken into account , with the same level of importance, when it comes to addressing any problem or situation and thus obtain a better solution or adopt a more suitable decision.

People, both as individuals and as elements belonging to social groups cannot remain outside the legal regulations in force. Nevertheless, neither can regulations overlook the accelerated rate of evolution both in individuals and in society. For this

³ “The Armed Forces, constituted by the Army, Navy and Air Force, have as their mission to guarantee the sovereignty and independence of Spain, to defend its territorial integrity and constitutional rule”.

⁴ “The concept of Gender refers to stereotypes, social roles, acquired condition and position, behaviour, appropriate activities and attributes that each particular society constructs and assigns to men and women”.

⁵ Cf. www.who.int/topics/gender/es/index.html (11/11/2013 a las 15:00 horas). “Gender refers to the socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for men and women. The distinct roles and behaviour may give rise to gender inequalities, i.e. differences between men and women that systematically favour one group”.

reason the gender perspective must be ever-present in the creation and later application of legal norms, understood in the terms described previously, with the aim of fulfilling the goals of equality, one of the highest values of the legal system advocated by Spain, as a social and democratic State of Law.

With this objective, and in line with article 9.2 of the Constitution, the public authorities have the duty to promote conditions that will ensure that the equality of individuals and the groups in which they are integrated are real and effective; to remove the obstacles that impede or make difficult their fulfilment and facilitate the participation of all citizens in political, economic, cultural and social life. The corresponding authorities have been charged with implementing policies on the basis of the Gender Perspective and the Principle of Equality, integrating them actively in the realm of education, health, culture and the military, thus responding to the new reality of the Armed Forces.

REGULATORY DEVELOPMENTS

The constitutional state that we know today in Spain underwent countless changes in numerous spheres over the centuries. As a result of the need to adapt to new social realities, these constant transformations have been echoed in the legal system, and most specifically in defence issues, affecting the main resource of the Armed Forces : its military personnel.

The development of the Armed Forces has expanded to such an extent that it has affected the private and professional lives of military personnel. And this is clear from a gender equality, that has become progressively effective over more than 20 years, that has contributed towards higher levels of preparation, capacity and availability of its members; while at the same time achieving greater professionalism and professionalisation.

Article 14 of the 1978 Constitution states that *“Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social conditions or circumstance”*. Nevertheless, the incorporation of women into the Spanish Armed Forces did not occur until ten years later, when the Royal Decree Bill 1/1988, of 22nd February, came into force.

Despite its integration being considered as somewhat tardy in comparison with other western nations,⁶ its progression in Spain has been gradual but decided. In this

6 [SORIN. Katia; BOSCH Jolanda; FROTIEE Brigitte; KÜMMEL Gerhard; MOELKER René; PORTERET Vincent. Female military in the West, What lessons for France, Germany, Canada,](#)

sense, some of the most notable examples are:

The Royal Decree 984/1992, of 31st July, approving the Rules of Procedure for Troop and Navy personnel of the Armed Forces, that authorised professional soldiers to apply for all posts, except those of a tactical or operative nature (Legion, Paratroopers, Special Operations) on account of their physical and biological characteristics, or in submarines or smaller ships, on account of issues concerning infrastructure and living conditions. The Armed Forces Personnel Regime Law 17/1999, of 18th May, guaranteed full professional equality, eliminating all limitations imposed on women relating to postings .

The creation of the Military Observatory for Equality between Women and Men in the Armed Forces ,⁷ (originally called Observatory on Women in the Armed Forces), was set up to analyse the processes involved in the selection, integration and permanence of women, which was to become one of the main pillars in bringing about effective equality between male and female military personnel.

More than 20 years were to pass, following the authorisation of the presence of women in the Armed Forces, before legal regulations were put in place to make that qualitative leap on questions of equality, thus adapting to the reality of the day.

The need to take into account the presence of women within the Armed Forces, and in the overall regulatory code governing the Institution, was reflected in the Organic law 3/2007, of 22nd March, for the effective equality of men and women.⁸

The parallel Law 39/2007, of 19th November, relating to the military profession,⁹ and the most recent Organic Law 9/2011, of 27th July, on the rights and duties of the members of the Armed Forces, have further confirmed and reinforced the demand for effective and regulatory equality between men and women in the Armed Forces. Thus

Netherlands, the United Kingdom. First quarter 2005. Centre of Social Studies, French Ministry of Defence.

7 Article 1.6 of the Order PRE/525/2005, of 7 March, promoting the Council of Ministers Agreement to adopt measures to favour equality between men and women.

8 Article 65.- *“The norms relating to the personnel of the Armed forces shall promote the efficacy of the principle of equality between men and women, especially in matters relating to access, training, promotion, postings and administrative situations”*.Article 66 of the Organic law 3/2007, of 22 March, for the effective equality of men and women.- *“The norms on service personnel of the Public Administration departments in issues of equality, prevention of gender violence and reconciliation with personal, family and professional life, will be applied in the Armed Forces, with the adaptations deemed necessary and in the terms established in their specific legislation”*.

9 Article 6.1 *“Equality of treatment and opportunities is a principle that will be applied in the Armed Forces in accordance with the provisions of Organic law 3/2007, of 22 March, for the effective equality of men and women and that shall be especially present in the development and application of this law in relation to access, training and the military career”*.

section III of the Preface to the Organic law 9/2011 states that in the application of the Organic Law 3/2007, and the Law 39/2007, the gender criterion in the regulation of the exercise of rights and liberties, the effectiveness of equality between male and female military personnel and the elimination of all discrimination on account of sex or gender are fundamental principles of this law.

Furthermore, the Additional Eighth Provision of the Organic Law 9/2011 establishes that: *“The Government shall within the space of one year present to the Lower House of Parliament a Draft Reform Bill of the Organic Law on the Disciplinary Regime of the Armed Forces 8/1998, of 2nd December. The text shall take into account the doctrine of the European Court of Human Rights, the Constitutional Court and the Supreme Court on fundamental rights and guarantees in the exercise of disciplinary powers in the military sphere and their necessary adaptation to the full professionalisation of the Armed Forces, and the presence of women and the organisation and missions indicated in the Organic Law on National Defence”*.

THE NEW ARMED FORCES DISCIPLINARY REGIME LAW

Discipline as an essential rule for the correct functioning of the Armed Forces, hierarchy as the situation between command, subordination and responsibility in the discharge of duties, and Unity as the manifestation of loyalty and fellowship among colleagues in the fulfilment of missions, these are guidelines which, through the means provided by the State, must rule the daily acts and functions of the military in order to achieve maximum efficiency in their mission.

The observance and fulfilment of these rules cannot be satisfied without the existence of a framework of equality between the men and women who make up the Armed Forces, as provided for in article 13 of the Royal Decree 96/2009, of 6th February, which approves the Royal Ordinances for the Armed Forces,¹⁰ and article 4 of the Organic Law 9/2011.¹¹

This is the backdrop against which work commenced on the creation and future

10 Article 13.- (The military) *“Will ensure the application of criteria and norms relative to the effective equality of men and women and the prevention of gender violence”*.

11 Article 4.1.- *“In the Armed Forces there shall be no discrimination whatever on account of birth, racial or ethnic origin, gender, sex, sexual orientation, religion or convictions, opinions or any other personal or social condition or circumstance”*.

Article 4.2.- *“The corresponding authorities shall promote the necessary measures to guarantee that, within the Armed Forces, equality between men and women is real and effective, and shall impede any situation of discrimination; especially in access, delivery of service, training and the military profession”*.

enforcement of the forthcoming Disciplinary Regime legislation. The Plenary Session of the Judiciary at its meeting of September 2012, delivered its opinion on the Armed Forces Disciplinary Regime Organic Preliminary Draft Bill, as did the Permanent Commission of the Council of State on 26 May, 2011 (File 829/2011); and later in a statement adopted unanimously, this time on the Draft Bill, at a session held on 4 April, 2013, (File nº 83/2013), from which the following consideration is of interest for the matter in hand:

The Preliminary Section of the draft bill states that the Organic Law “*aims to regulate the disciplinary regime within the Armed Forces with the ultimate goal of guaranteeing the observance of the rules of behaviour for the military; in particular, discipline, hierarchy, and unity, which in accordance with the Constitution and the rest of prevailing legislation, constitute a code of conduct for the members of the Armed Force*”.

According to the provisions of the Gender Impact Report contained in the Regulatory Impact Analysis Report¹² drafted by the Technical General Secretary of the Ministry of Defence, the disciplinary draft bill “*contains all the possible offences that infringe on the effective equality of men and women and the non-discrimination of the members of the Armed Forces (...) whereby it is considered that its impact, in terms of gender, will be positive..*”.

A beneficial effect is therefore expected, deriving from the inclusion of all the possible offences of this type and grading them as: minor (articles 6.27 y 6.28 of the Preliminary Draft bill), serious (article 7.27 of the preliminary draft bill) and very serious (article 8.11 of the preliminary draft bill).

DISCIPLINARY TYPES

The Armed Forces Disciplinary Regime Draft Bill presented on 10th May last to the Spanish Lower House for its study, states in article 5 that disciplinary faults are those actions and omissions, wilful or imprudent, included in the law.

The influence of the Gender Perspective is included in some of the disciplinary types qualified as minor, (article 6), serious (article 7) and very serious (article 8) offences.

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¹² Essential and obligatory tool for rendering effective the principle of equality in the contents of all legal norms in the framework of the General administration of the State, as provided for in Royal Decree 83/2009, of July 3rd, which regulates the Normative Impact Analysis Report.

Article 6.27

“Incorrectness in the fulfilment of the norms or measures designed to guarantee equality between men and women of the Armed Forces”.

Article 6.28

“Expressions or manifestations of contempt on account of birth, racial or ethnic origin, sex, sexual orientation and identity, religion, convictions, opinion, incapacity or any other condition or personal or social circumstance”.

Article 7.27

“Carrying out, ordering or tolerating acts which, in any manner, impinge on intimacy, personal dignity or dignity in the workplace or constitute discrimination on account of birth, racial or ethnic origin, sex, sexual orientation and identity, religion, convictions, opinion, incapacity or any other condition or personal or social circumstance”.

Article 8.12

“Carrying out, ordering or tolerating acts which affect the sexual liberty of people or imply sexual and sex-based harassment professionally or any other acts which, in any manner and repeatedly, impinge on intimacy, personal dignity or dignity in the workplace or constitute discrimination on account of birth, racial or ethnic origin, sex, sexual orientation and identity, religion, convictions, opinion, incapacity or any other condition or personal or social circumstance”.

The extraordinary coincidence in the content of the serious and very serious offences as stated in articles 7.27 y 8.12 respectively, is only broken by the difference by the latter precept in its reference to sexual liberty as an affected legal right.

While one might tend to highlight a priori the benefits of considering this very serious offence as a real crime detailed in the Military Penal Code or in the Ordinary Penal Code,¹³ it is equally important to clarify that it was considered more appropriate to qualify in a disciplinary manner undefined facts that could affect a legal right as subjective as sexual liberty. So, in spite of the fact that traditionally the violation of sexual liberty involved violent action associated with sexual offences, at the present time there are activities of a sexual nature –exhibitionism- which, without violence being involved, that can damage the sexual liberty of the passive subject.¹⁴

Without prejudice to the amendments introduced by the Parliamentary Groups

¹³ The underlying problems in relation to sexual harassment will be dealt with as a criminal offence in the Draft Bill of the new Military Penal Code Organic Law.

¹⁴ HERREA MORENO. Myriam. *Violencia en la Violación. Aspectos dogmáticos y victimológicos. Artículos doctrinales de derecho penal: La problemática del bien jurídico protegido en la criminalidad sexual violenta.* Noticias Jurídicas. June 2002.

CiU; IU, ICV-EUiA, CHA: the plural Left; and ERC-RCat-CatSí on the inclusion of “associative affiliation”, as well as “language or nationality –including those within the Spanish state–” in the causes for discrimination in articles 6.28, 7.27 y 8.12, the following amendments in relation to the work in question should be emphasised:

1. Firstly, the amendment drawn up by the Catalan Parliamentary Group (Convergència i Unió) criticising, as had previously been denounced in the Report by the General Council of the Judiciary, the possible violation of the principles of legality, criminality and legal security¹⁵ that may derive from the use of unspecific legal expressions and concepts (“*incorrectness in the fulfilment*”, “*irrespective acts or adopting an attitude of contempt*”, “*performing acts which in any manner impinge on intimacy*”).

The regulatory predetermination of illicit conduct must define the prohibited action with the greatest possible accuracy and precision, in the same way that broad and vague terminology only produces a lack of definition and legal uncertainty.¹⁶

In spite of this, it is equally worthwhile to point out that in practice, there can be numerous acts or expressions susceptible of violating the legal rights protected by these precepts; it being the duty therefore of the sanctioning authorities, when it comes imposing disciplinary sanctions or not, to weigh up all those external circumstances that could have had an influence on the action or expression, one of these contexts being that provided by the gender perspective.

In all the disciplinary types mentioned the necessary concurrence of misconduct or imprudence is indicated. Therefore, in the case of article 6.27 of the Bill, a clear example of the violation of the disciplinary type would be the fact of distorting or not respecting the clause relative to the protection of maternity in the announcement of a national defence training course, further training or higher studies, according to the provisions of Royal Decree 293/2009, of 6th March, which approves of maternity protection measures in the area of teaching within the Armed Forces.¹⁷

15 Article 25.1 of the Spanish Constitution.- “*No one can be condemned or sanctioned for actions or omissions which at the time they take place do not constitute an administrative offence, breach or infringement, according to the prevailing legislation at the time*”.

16 Constitutional Court rulings 196/1991, 17th October; 95/1992, 11th July; and 270/1994, 17th October..

17 Article 3 General measures

1. In the field of national defence further training and higher studies.

a) In general, when on account of pregnancy, birth or in the postnatal period the professional female soldier cannot do the prior selection tests, or finds herself unable to attend the course, having been designated as a student, she shall have a right to:

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1. A place reserved in the same course the next time it is held. In the case of the same situation persisting, she may exercise the right to reserve a place on a second and final staging of the same course.
 2. The exemption of age requirements, should these figure on the following occasion that the course is held.
 3. The exemption of having to provide a different qualification to that required for the initial staging of the course.
 4. The staging of the course should not be accounted for as complete.
 5. In the case of where selection tests were a pre-requisite to being designated as a pupil, the female military professional shall be exempt from having to repeat these except in the case of medical or physical tests, the evaluation of which played a determining role in the corresponding selection process.
- b) Where on account of pregnancy, birth or in the postnatal period the female military professional leaves the course, having surpassed the number of absences regulated or established according to the corresponding course, in the next course that she attends in accordance with the provisions of section 1.a).1. of the article, she will be exempt from having to repeat the modules, subjects or assignments already carried out.

Notwithstanding the previous paragraph, where there is a question of modules, subjects or assignments where the physical condition, ability or aptitude in carrying out a certain activity, the course or, as appropriate, the corresponding study plans shall determine whether the aforementioned exemption can be applied.

2. In the field of vocational training:

During vocational training the pupil who is pregnant, in childbirth or in the postnatal period shall have the right to:

- a) Not to be excluded from the corresponding military training centre either on the grounds of insufficiency of psycho-physical conditions, nor for failing to pass the tests scheduled by the study programme within the stipulated time-frame.
- b) Take up residence outside the centre.
- c) Not to be taken into account as completed the tests, courses or examinations, which she has been unable to attend on account of her situation.
- d) If on account of pregnancy, childbirth or post-natal motherhood, the pupil is obliged to repeat any academic course, she will be exempt from having to repeat any modules, subjects or assignments, except where these are medical or physical tests the evaluation of which were determining in the corresponding course or where the study plan provides for the obligatory attendance at any of these.

Article 4 Particular measures

Taking into account the structure, duration and workload of the course, in the study programme, or,

2. On the other hand, the amendments introduced by the Socialist Parliamentary Group, which propose modifying articles 6.28, 7.27 y 8.12 by replacing the term “sex” with “gender”, considering that *“the essential element that provokes discrimination is not the sex in itself, but the combination of human arrangements arising from which a society transforms biological sexuality and attributes distinct roles that diminish the possibilities and opportunities of women”*.

Out of respect for the principle of political and trade union neutrality that applies to the military, we shall not discuss questions of a political nature. However, we do consider it necessary to make known the commitment shown by the main parliamentary groups in relation to the gender perspective in the construction of the new disciplinary regime law, and how it has been the object of debate and controversy aimed at reaching a common goal: the effective, real, efficient and immediate equality between the men and women that make up the personnel of the Armed Forces.

On the basis of these precepts, not only does one hope to obtain the protection of certain personal legal rights, such as sexual liberty, personal and professional dignity, equality and non-discrimination, but also to adapt to the Organic Law 9/2011, regulating the rights and duties of the members of the Armed Forces, incorporating the protection of the rights that it guarantees and sanctioning any interference with the duties imposed.

failing this, in the corresponding announcement recognition of the following rights shall be accorded, insofar as possible to female pupils and female training personnel who for reasons derived from their situation of pregnancy, childbirth or post-natal motherhood, cannot attend or are absent from any of the Armed Forces training courses:

- a) Modules, subjects or assignments where physical attendance can be replaced by distance learning.
- b) The possibility of passing tests on alternative dates, but always before the end of the course.
- c) Determination of the modules, subjects or assignments where individual examination can exempt the pupil from repetition at a later date.
- d) Adapting the annual leave schedule, permits and licences to guarantee compatibility between her situation and the teaching scheme.

Article 5 Accreditation of the situation

In order to avail of the general measures determined in this royal decree and the particular measures that could figure in the corresponding announcement, female personnel and training course students should produce a form of justification to the corresponding body in charge, or, as appropriate, to the director of the corresponding military training centre, in the form of the required official medical certificate, stating the grounds for non-attendance or for not undergoing the previous selection process.

SPECIAL CASES

- Serious infringement provided for in article 8.14 of the Bill

Article 8.14 of the bill, provides the following pre-condition for committing a very serious infringement, *“condemned by a firm ruling in application of laws distinct from the Military Penal Code to a prison sentence for an intentional crime, or to a prison sentence greater than one year for an offence committed through imprudence, in either case where it affects the service or public image of the Armed Forces or military dignity, or causes damage to the Administration”*.

At first sight, this disciplinary type cannot be included along with those previously mentioned, because of the range of criminal offences that it can embrace, without being necessarily related to the gender perspective. However, there is scope for those crimes of sexual or gender violence under the Ordinary Penal Code, of even greater significance for the Institution, in particular if they are committed in couples, whose members are posted to the same unit.

Consequently, article 19 of the Bill, provides for, among other measures, suspension as a possible sanction for very serious offences, extending its duration to that provided for in the sentence for cases cited in article 8.14. With this new draft the range of offences and the duration of the suspension from work would be that established under the existing article 66 of the Disciplinary Regime Organic Law 9/1998.¹⁸

With regard to the female soldier victim of gender violence, who is therefore eventually obliged to change her posting to ensure her protection or her right to comprehensive social assistance without prejudice to her preferential right to occupy another posting that may be vacant and whose provision would be necessary under article 101 of the Military Career law; and the right to geographic mobility recognised in the Royal Decree 456/2011, of 1st April, which approved the regulation of military personnel postings¹⁹. In view of the evaluation granted to the gravity of the charges,

¹⁸ *“In the case of the previous article, the offending serviceman shall be served with sanction of separation from service or suspension of employment up to the duration of the sentence as a maximum if this is above three years imprisonment for any offence, or where lower it would be for intentional crimes of homicide, injury, threats, and intimidation against sexual liberty, against heritage and against the socio-economic order and against public health and falsehoods In other cases the sanction of loss of posts on the promotional ladder or the suspension of office for a maximum time period coinciding with the duration of the sentence.*

¹⁹ Art. 27.1 *“The military service woman victim of gender violence who is obliged to move to a different posting in order to ensure her own protection or right to comprehensive social assistance, can request the assignment of a post, if possible of similar category, in the same municipal area or in another different one, without being subject to the minimum permanency requirement*

Art. 27.4.- *“In the case of there being no vacancy with the required characteristics, the applicant will be*

the possibility of remand in custody, the damage of such an indictment to the Armed Forces and the public concern it could give rise to, article III of the Military Career law (in the draft proposed in the Third Final Disposition of the Disciplinary Regime Bill) provides for a possible administrative agreement on the suspension from office of the military serviceman who is charged, indicted, or in respect of whom an interim measure has been adopted in a criminal procedure (for gender violence) or a disciplinary procedure for a very serious offence, expressly establishing whether the said suspension also carries with it the termination of service.

Therefore committing a crime of gender violence could not only produce the initiation of a case for having committed a serious offence as provided for in article 8.14, but also the possible suspension of office with the termination of service. Besides should the accused be a member of troop and navy military personnel with a temporary service contract, under given mandate or legal provision, there would be grounds for a rescission of the contracted commitment.²⁰

Similarly, the proposal to modify article 112 of the Military Career Law²¹ envisages termination of service in the case of suspension from duties if, as a result of the sentence, the accused military serviceman has to go to a penitentiary establishment to comply with the deprivation of liberty imposed in the sentence ; or when a disciplinary suspension sanction or suspension from office is imposed for a very serious offence for a period greater than six months.

- The enforcement of house arrest for minor infringement

The gender perspective has had a notable influence on the military legal order that protects the reconciliation of family, personal and professional life, without constituting an obstacle to the enforcement of disciplinary responsibilities.

Article 15 of the Armed Forces Disciplinary Regime Bill regulates remand in custody from one to fourteen days, for committing one of the minor offences provided for in article 6. Its content, similar to that of the Organic Law 8/1998²² in force, imposes house arrest or detention at the unit, barracks, base, vessel or establishment indicated in the disciplinary resolution. The sanctioned military serviceman continues

informed of the closest municipalities and units to those requested so that she can give her preferences.

20 Formulation provided for in articles 118 of Law 39/2007, and article 10.2. of Law 8/2006, of 24th April of rank and file servicemen, according to the content of the Disciplinary Law Bill. At present these precepts include intentional crime as the immediate cause for the rescission of contractual commitment.

21 Section Six of the Third Final Disposition of the Armed Forces Disciplinary Regime Bill.

22 Article 13.- “The arrest of one to thirty days consists in the restriction of the freedom of movement of the accused and implies his presence for the duration of the arrest at his home or at the Unit workplace, barracks, base, vessel or establishment indicated...”.

to participate in the activities of the unit during the period of arrest and remaining within the confines of the place indicated during the remainder of the time.

As certain sectors point out,²³ it is up to the Authority with sanctionary powers to indicate the place where the sanction is to be enforced, in accordance with the specific circumstances of the offence (place where it was committed, level of disciplinary repercussion...) the exemplary nature of the measure, its appropriateness or not, the living conditions of the place of detention; and, of course, the advisability or not of the military serviceman's presence in the Unit in question.

Accordingly, taking as unquestionable the premise that the private residence of the military serviceman be considered as a possible place for the custodial detention, and that he is obliged to remain there for the effective duration of the arrest, while he is freed from service, the Authority with sanctionary powers in application by analogy of paragraph two, article 227 of the Military Criminal Procedure Law²⁴ on provisional custody, could authorise permission to leave home for “*any other justified cause*”, that is to say: for just and reasonable reasons in terms of ethical and social valuations.²⁵

This indefinite legal concept must cater for the inherent conditions for the reconciliation of the family and professional life of the sanctioned serviceman, such as the care for under-age children and their educational and basic sanitary needs. Thus, paying close heed to the principle of *numerus apertus* with regard to the military serviceman's personal circumstances, house arrest is permissible and the authorisation for the accused to leave home in the fulfilment of functions in compliance with his personal life.

In spite of all this, the sanctioning Authority could opt to deny the enforcement of house arrest, in which case the arrested military serviceman could request to absent himself from his post for the time necessary to carry out an unavoidable duty of a public or private nature related to family and professional commitments, such as those previously referred to, according to section 6 of the Second Norm of Annex II of the Ministerial Order 121/2006, of 4th October, which approved of the norms relating to the working day and hours of work, holidays, permits and licences of the Military Personnel of the Armed Forces, and their later modifications.

23 ESQUIVIAS LÓPEZ-CUERVO. Antonio; JOLY PALOMINO. Federico; MARTÍN VICENTE. Manuel. *Comentarios a la Ley Disciplinaria Militar*. 2nd Edition. January 2000.

24 Article 227.- The detainee in provisional custody “*Can equally leave (the place where the sentence is being served), with the authorisation (of the Judge) to attend religious practices or to receive medical assistance, which, being necessary, cannot be provided in the place of custodial detention, or for any other justifiable cause in the opinion of the ruling Judge or Military Court*”.

25 GARCIA LABAJO. Juan Manuel *Comentarios a la Ley Disciplinaria de las Fuerzas Armadas*. Ministry of Defence. Madrid. 2000.

The indefinite prolongation of the duration of the permission in order to fulfil the aforementioned duties could be solicited when the sanctioned military serviceman belongs to a one-parent family; or when the other parent, whether employed by the military or not, is posted in another locality or deployed in a different operational zone.

In these cases, a clash between personal (caring for the family) and professional interests (maintenance of discipline) may occur, whereby the extensive and extensible application of article 227 Military Criminal Procedure Law in relation to article 15 of the Disciplinary law would be almost mandatory; extensive, in that it affects the fundamental and constitutional rights of the military serviceman, such as the right to education, the right to access to redress through the courts, or the rights to healthcare provision and extensible in that it affects those (generally children, who are minors) who depend solely and unilaterally on the military serviceman.

To further facilitate the task of the Authority which has to decide on these circumstances, the Constitutional Court, in a ruling 61/2013, of 14th March, recognised the new right to non-discrimination for reasons of family and reconciliation; as well as the duty of the public authorities to protect the family and children in accordance with article 39 de la Constitution.²⁶ This duty of protection –states the ruling- “*must prevail and provide guidance for the solution of any doubt in interpretation*” in the application of a norm that affects the reconciliation of family and professional life.

- The Suspension or Non-Execution of Sanctions

The Gender Perspective is one of the multiple factors that have had an influence on the drafting of article 63 of the Armed Forces Disciplinary Bill, regulating the suspension or non-execution of disciplinary sanctions.

In accordance with its wording and even more specifically, in accordance with the terms of article 70 of the Organic Law 8/1998 in force, this precept allows for the agreement to suspend the sanction for a period less than prescribed, or the definitive non-execution of the sanction not only ex officio but also on application by a party, when “*exceptional circumstances of a personal nature (...) indicate a just cause and do not prejudice discipline.*”

Furthermore, article 72 of the Project also provides the sanctioned party during the disciplinary appeal process, to “*request the suspension of sanctions for very serious and serious offence during the appeal process, when its execution could have damaging consequences that would be impossible or difficult to repair or the appeal is based on one*

26 Article 39.1.- *The public authorities ensure the social, economic and legal protection of the family.*

Article 39.2.- *The public authorities furthermore ensure the comprehensive protection of children, equal before the law irrespective of their affiliation, and that of their mothers, whatever their civil status. The law enables paternity testing.*

of the grounds for automatic nullity provided for in the common administrative regulatory process”, the suspension can also be withheld for justified reasons if it were to prejudice military discipline.

The novel nature of these precepts in which the Gender Perspective has considerable influence, is to be found in the opportunity that the law affords to the military serviceman to make the Sanctioning Authority aware of the existence of facts and circumstances of a personal nature such as those described in the previous heading, that justify such a suspension or non-execution.

These are hybrid forms of material (varying *de facto* extralegal situations) and formal suspension (based on a legal ruling)²⁷ that aim to avoid causing greater damage than was possibly committed with the disciplinary offence, as could arise in the case of detaining in a military disciplinary establishment for a serious or very serious offence a military serviceman in charge of a child of under 12 years of age in a single-parent family.

These legal tools that the legislator has introduced into the regulations are primarily aimed at establishing a system capable of protecting the individual rights of the military serviceman, without detracting from the process or its completion and furthermore, the effective search for a balance between such rights and discipline.

- NON Disciplinary measures on board warships

As an entirely new measure and a clear exponent of the influence that the Gender Perspective has had on the drafting of the new Armed Forces Disciplinary Bill, the fourth additional Provision of the Act states: “*without prejudice to his or her disciplinary powers, the commanding officer of a warship can agree on board substantiated measures not of a disciplinary nature consisting in limitations or restrictions of access to certain areas of the ship, in order to put a stop to situations of aggression, harassment or violence that constitute an alleged serious or very serious infringement of military discipline, while at the same time it being necessary to protect the potential victims of the alleged offender*”.

In proceedings for the presentation of amendments to the Disciplinary Bill, the Parliamentary Groups CiU; IU, ICV-EUiA, CHA: the Plural Left proposed the suppression of this additional provision, arguing that the faculty of the Commanding Officer of a warship to adopt precautionary measures limiting or restricting the freedom of movement of one or various individuals, so as to provide adequate protection to the alleged victim of harassment, violence or acts of aggression that could violate his or her most basic fundamental rights, should rather be adopted by a legal body with all the guarantees, given the severe repercussion on the fundamental rights and rights to public freedom of the alleged aggressor, the military serviceman.

27 MATAMOROS MARTÍNEZ. Rafael. *Comentarios a la Ley Disciplinaria de las Fuerzas Armadas*. Ministry of Defence. Madrid. 2000.

The constitutional and procedural rights and guarantees proposed in the amendment are not going to be questioned. However, we must firmly bear in mind the necessary and preventive protection that should always assist an alleged victim of harassment or violence, most especially when the events can take place in such an isolated location as a warship.

The Ministerial Order 12/2012, of 28th February, approving the Norms governing command and internal regime of the units of the Navy, entrusts to the Commanding Officer of a ship the enforcement of rules of behaviour for the military personnel. Not only that, it empowers him or her to ensure the safety of the ship, its crew and the personnel on board, exercising his or her authority so as to avoid arbitrariness and promote discipline, loyalty and companionship.²⁸

As a result, in the same way that the members of the Security Forces can enforce restrictions on the freedom of movement of citizens in the civil sector, in accordance with the Criminal Justice Act, when there are indications that a criminal offence has been committed, similarly the Commanding Officer of a ship is sufficiently legitimised to restrict freedom of movement as a precautionary measure in favour of the protection of a higher legal right.

CONCLUSIONS

1. The concerns and experiences of women and men constitute an essential element in the drafting, execution, follow-up and evaluation of the decisions taken at political, economic, social and legal level. In our regulatory framework, there have been clear strides made in matters of equality between men and women. Nevertheless, there is still a long road to travel to reach maximum effectiveness, and along the way we will need continue to combat the persistent demonstrations of discrimination proceeding from social and educational

28 Article 9.2.- *“He or she shall at all times constitute an example for the crew by observing the rules of military behaviour and the traditions of the Navy”.*

Article 9.3.- *“He or she y shall exercise their authority, equity and firmness, avoiding all arbitrariness and promoting responsibility, personal satisfaction and mutual respect”.*

Article 10.3.- *“He or she shall promote among his or her subordinates the determination to succeed, the exercise of responsibility, discipline, honour, courage, la initiative, loyalty and companionship”.*

Article 15.3.- *“A Commander has the double function of preparing and using the ship. He or she shall dedicate his or her attention to the security of the vessel, the crew and personnel on board always mindful of the peculiarities of the marine environment”.*

stereotypes.

2. It will be the passage of time and case studies, among other factors, that will determine whether the undefined legal concepts contemplated in the articles outlined will cause a greater problem than the one they are attempting to resolve. In spite of that, and a priori, one senses that the inclusion as minor, serious and very serious the types of infringement that affect the effective equality of men and women and the non-discrimination of the members of the Armed Forces will have a beneficial effect on the personnel of the military Institution.
3. With the package of measures envisaged in the Regulation concerning postings and in the Disciplinary Bill, which fall within the overall framework of the modernisation of the Armed Forces and the improvement of their working conditions, it is hoped to achieve full equivalence with the Organic Law 1/2004, of 28th December, regarding Comprehensive Protection Measures against Gender Violence, and by extension for service women victims of gender violence with the rest of public servants.
4. Bearing in mind the difficulty, it would have perhaps been preferable to establish the degree or intensity of damage to discipline that these special cases previously described could incur, and that reflect the constant confrontations on a daily basis between personal, family and professional life and how to make major efforts to reconcile these without prejudicing military discipline.
5. Although the new content in the Additional 4th Provision could be appreciated as a notable achievement in the struggle against and the prevention of gender violence in the realm of the Armed Forces deployed in ships, its content could be qualified as insufficient, as it does not address the decisions facing a contingent commander of army troops deployed in an operations zone or an aircraft commander during a journey in situations of armed conflict.
6. In terms of public opinion, which views the Armed Forces more and more as an integral part of society, the legal modifications outlined mark an important advance in issues of equality, and from a broader perspective, the accomplishment of a further chapter derived from the content of Resolution 1325 of the United Nations Security Council.

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