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Master's Paper

Whether there are sufficiently effective mechanisms for the protection of the rights of soldiers in the Armed Forces of the Republic of Armenia.

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Content

1. INTRODUCTION

The paper is about the mechanisms due to which soldier rights are or are not fully protected. My paper puts it into question whether we have all the necessary components of law to ensure the protection of Military personnel rights in the Armed Forces of the Republic of Armenia.

The discussion is in the following sequence:

The first part is the illustration of the main human rights issues in the RA Armed Forces, with two fact patterns brought from Armenian reality.

The next paragraph shows the Armenian Law regulating this problem, its pros and cons, mainly focused on National Law ECHR Case law comparison.

The fourth paragraph is concerning the European Law regulating the issue, the two best practices in Europe which provide an efficient basis for soldiers rights protection; United Kingdom and Germany.

In the last part the suggestions are followed with their possible advantageous effects in case of implementation in Armenian legal system.

2. THE PROBLEM

Army which is one of the most important guarantees of state security is considered to be the ''mirror of our society''. As an inseparable part of our society, Armenian Armed Forces too, encounters the same problems that exist in our society. The problems mainly refer to human rights violations in RA Armed Forces, which, to my mind, can in no way be exempted from any part of any society, no matter to what extent it is democratic and civil. The problem is the reason as well as the basis for those violations especially considering the frequency of human rights violation incidents in our Army in recent times.

Below are some fact patterns that will illustrate the problem better.

On July 16, 2010, a 22-year-old Yerevan citizen – soldier Arman Avagyan was killed in one of the military units of Martakert, Nagorno Karabakh. Arman, who was a soldier being in service for 13 months has become the victim of a young commander Vahe Hovinkyan's cruelty. Arman was in the front-line, the commander saw him standing a few meters from the observation post and got furious why the soldier had broken the rules. In order to punish the soldier for "breaking" the rules the 25-year-old commander hit the soldier on his head with a heavy, blunt instrument, due to which the soldier received brain injury and died.[1]

On October 28, 2010 an 18-year-old conscript Erik Grigorian who served in an army unit stationed near Yerevan was beaten up by the unit's deputy commander, Lieutenant-Colonel Armen Bareghamian for oversleeping in the morning. The soldier was taken to a military hospital with a broken nose and other serious injuries as a result of being beaten for more than an hour time long. [2]

[1] Helsinki Citizens' Assembly, Vanadzor Office: ''Again the commander murdered a soldier''. /2010-August-04/ http://www.hcav.am/articles.php/language_eng/date_2010-08 04/article_3718/Again_the_Commander_Murdered_a_Soldier.html

[2] Irina Hohannisyan,"Another Officer Arrested Over Soldier Abuse ", /05.11.2010/ http://www.azatutyun.am/content/article/2212166.html

The 19-year-old soldier Hakob Mirzoyan was subjected to disciplinary isolation in a locked room for as long as ten days for failing to have on his army uniform. As a result of this isolation he underwent a deep neurological stress from which Hakob recovered only after medical intervention of doctors which lasted for almost a year after his military service was over.

The above mentioned fact patterns are only a small part of soldier rights violations in the Army of the Republic of Armenia nowadays. A question arises whether the Armenian Legal System provides sufficient basis for solution of issues arising from this kind of relationships, the relationships between soldiers and their higher ranking officers or between soldiers themselves. If it does, what is the reason of the existing and ongoing anarchy then? If it does not, what legal solution does this problem seek? What kind of rights does a soldier of the Armed Forces of the Republic of Armenia have? Where does the authority of officers end and the rights of soldiers begin? What are the mechanisms of law enforcement in this sphere and what is their level of efficiency?

For finding answers to these and similar questions we must firstly refer to Armenian law regulating these relations by analyzing every important aspect of law, its possible advantageous and disadvantageous consequences trying to find solutions that will fit the needs of Armenia, its legal system and which will be essential in means of protecting these rights.

3. ARMENIAN LEGAL FRAMEWORK

The Armenian Law regulating military relations between military staff are:

- Disciplinary Charter of the Armed Forces of the Republic of Armenia[3]
- Internal Service Regulations of the RA Armed Forces.[4]

These documents are the current regulators of military staff disciplinary relationships in non combat situations in the Armed Forces of the RA.

After studying the Disciplinary Charter and Internal Service Regulations of RA Armed Forces I came to an opinion that the Armenian military legal system

☞ Lacks legal certainty

☞ Imposes unconstitutional penalties

☞ Fails in delineating between penal and disciplinary fields

☞ Lacks a clear mechanism of appealing a superior's decision.

3.1 Lack of Legal Certainty

The principle of legal certainty, as an underlying general principle of law, suggests that legal texts must be clear and precise; it relates to the principle of objectivity, the prohibition of arbitrariness and leaves no room for misinterpretation.

Within this scope of interpretation the lack of legal certainty firstly relates to the rights and obligations of soldiers and officers. Both the Disciplinary Charter and Internal Service Regulations are mainly about the obligations of soldiers and the authority of officers.

The Disciplinary Charter does not provide any single paragraph concerning soldier rights, what fundamental rights, freedoms servicemen have.

[3] Government decision of N 247, 12.08.1996 Disciplinary Charter of the Armed Forces of the Republic of Armenia,

[4] National Assembly 3.12.1996 , Internal Service Regulations of the RA Armed Forces, ՀՕ-99

The main principle of the Charter is that it is based on the *sole leadership of the officer* as it is stated in *Art. 31, Charter*: "Sole leadership is one of the main principles for the formation, management and military inter-relations of the Armed Forces of the Republic of Armenia. […] The discussion of the order is prohibited, and any failure to subordinate is considered a military crime.[…]".[5]

It can be deducted from this article that any order, whether legitimate or not must be followed by lower ranking servicemen, which means that the law does not guarantee any limitations for the unlawful orders to be prohibited.

It also stipulates that the monopoly of decision making in Armed Forces undoubtly belongs to the officer, as he is the "sole leader" in the Army.

The law also does not stipulate in the duties of commanders which penalty to which offense to apply, leaving it to the discretion of officers, which sets ground for subjectivism of higher ranking officers, which, to my way of thinking, directly relates to two general principles of law: necessity and proportionality.

The principle of necessity is one of the main standards of the European Convention of Human Rights (ECHR) as a principle called "necessary in a democratic society" which implies the existence of a "pressing social need". This means that in order for any interference to be reasonable and relevant, it must be proportionate to the legitimate aim pursued. For evaluating the necessity in a democratic society states are allowed to use "a margin of appreciation".[6]

[5] Government decision of N 247, 12.08.1996 Disciplinary Charter of the Armed Forces of the Republic of Armenia, art. 31

[6] Yutaka Arai-Takahashi, *'The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR'*, Internentia, Oxford 2002, pg. 11

Within my scope of appreciation of this field, this principle illustrates the need for the disciplinary penalty to be applied.

As it is stated "In case of any breach of the military discipline or public order by a serviceman, the commander (superior) may limit his actions to reminding him of his military duty, or**, *if necessary***, impose a disciplinary penalty". *Art. 51, Charter (emphasis added).*

The phrase "if necessary" is too vague here to be based on and there is no criterion to evaluate it, as the Law does not provide any "margin of appreciation" for it. Thus, it is up to the superior to decide whether to apply a sanction or not. This unclearness of law encounters the problem of subjectivism by superiors in implementation of their duties.

The principle of proportionality has developed in European Community Law and it is one of the main principles of General International Law.

From the aspect of soldier rights protection the principle suggests whether the penalty imposed is proportional to the misconduct committed. The proportionality of the penalty is decided according to *Art. 91 of the Disciplinary Charter* [7] where it is stated that a proper investigation must be carried out, certain meetings held to decide the punishment, but it does not state clearly what the punishment for certain misconduct is. Thus, deciding the scope of penalties is also at the discretion of superiors who, as I found out, in most cases do not arrange an investigation, because as "sole leaders" of Armed Forces they believe that there is no need to consult with anyone, to hear opinions, and to decide the issue based on certain criteria.

[5] Government decision of N 247, 12.08.1996 Disciplinary Charter of the Armed Forces of the Republic of Armenia, art. 91, hereinafter-Charter

3.2 Unconstitutional Penalties

Articles 54-89 of Disciplinary Charter sets the types of penalties the minimum level of which is reprimand and the severest one is disciplinary isolation. [8]

So, what about the soldier Erik Grigorian who was beaten up by the unit's deputy commander for *oversleeping in the morning*, or Arman Avagyan who was killed from a hit on the head by his commander for *standing a few meters from the observation post*? The facts show that soldiers are mainly subjected to "self-made" penalties of their superiors and they are mainly punished in means of disciplinary isolations which is considered to be the severest type of disciplinary penalty.

To my judgment, the practice of disciplinary isolation is unconstitutional and does not comply with the requirements of international standards.

Firstly, the existence of disciplinary isolators is contrary to *RA Constitution, Art. 16*, [9] which stipulates that each person has a right to liberty and he/she can be deprived of their liberty in no other way than with a court decision.

ECHR Case law has referred to this issue many times in means of court judgments. One of the famous judgments related to this issue is in *Engel and others v. The Netherlands case*, [10] where one of the applicants was detained for four days for being late from service for four hours. The Court stated that "The isolation and detention in an isolator is a specific manifestation of deprivation of liberty".

In the same case the court stated that "The isolated person is considered to be deprived of his liberty, when stored in the lock closed cell and not carrying out soldier duties, which he would implement in military unit".

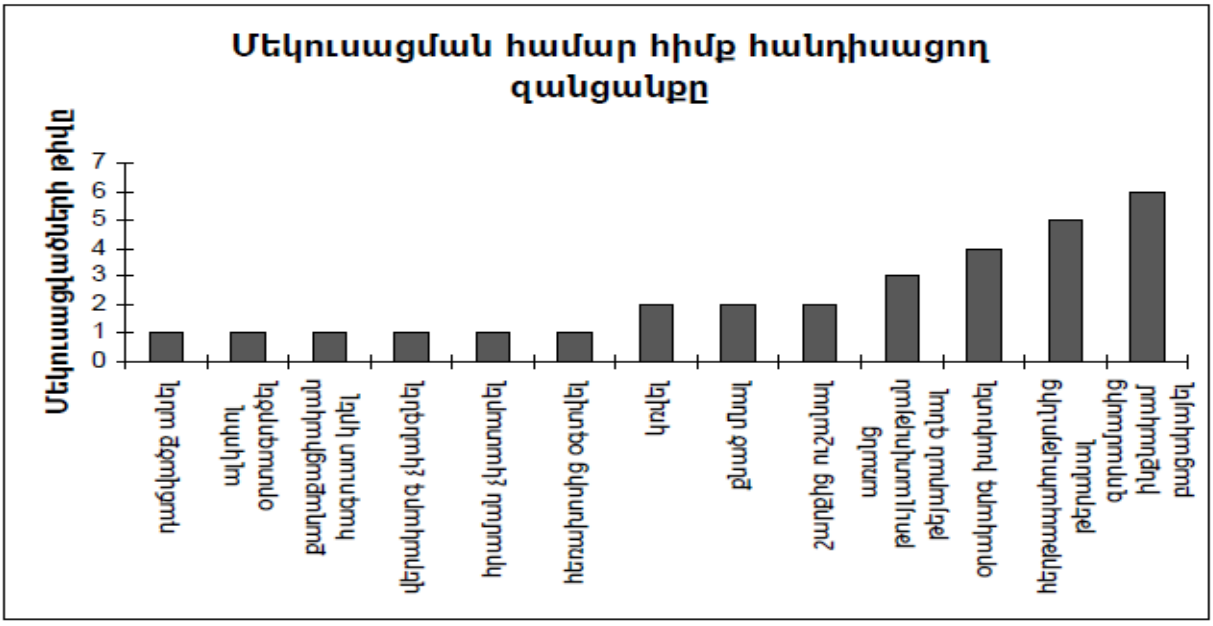
[8] Charter, *supra* , art 54-89

[9] RA Constitution of 27.11.2005, art. 16

[10] Engel and others v. The Netherlands: judgment 6\8\1976, Series A, No. 22.

Thus, the practice of disciplinary isolators is far from being constitutional and is not compatible with international legal standards.

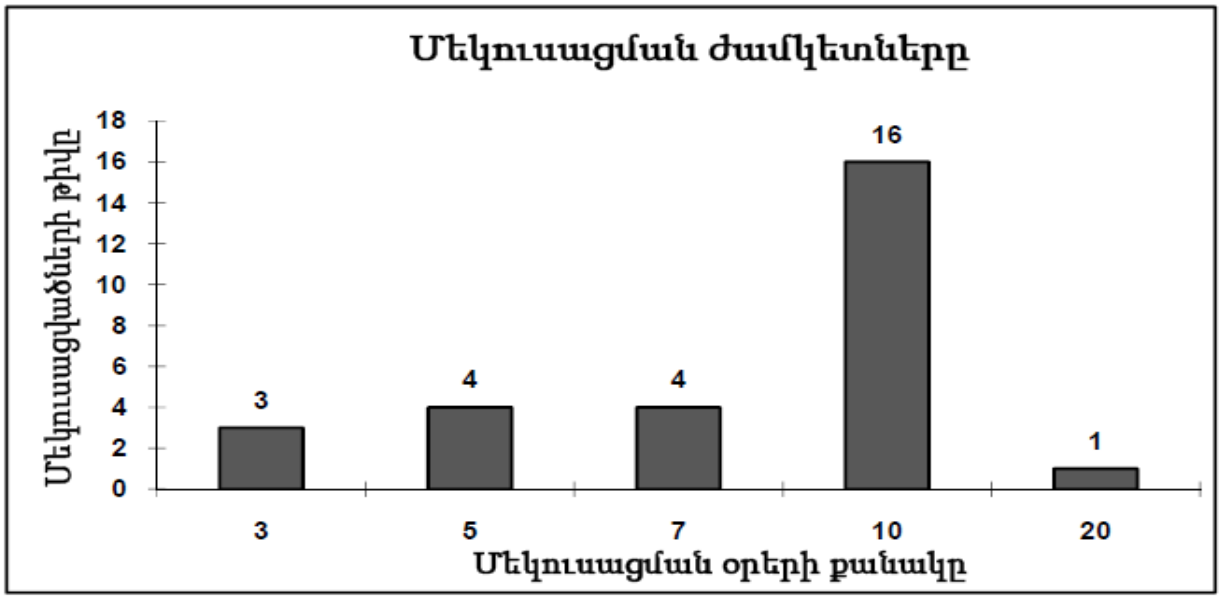
Here are the main misconducts for which disciplinary isolators are applied as concluded in the report of the study of disciplinary cells by Civil Society Institute. [11]



To my mind, for example, going to cafeteria without permission, using telephone, or oversleeping are not the severest misconducts in order for the disciplinary isolation to be applied. So there are no certain criteria in law for finding out what are the minor and severe misconducts to be based on whenever punishing a soldier.'

[11] Report of 2010, Civil Society Institute, "Disciplinary Cell Report on Disciplinary Cells and Battalion, pg 35, hereinafter` Report

The chart below[12] shows the length of isolating a soldier:



As it is seen, isolations are mostly applied for 10 days, which is almost the maximum length of isolating. ECHR has referred to this question stating that "3 day detention belongs to criminal sphere of law, not disciplinary". *Galstyan v Armenia*[13]

Thus according to ECHR Case law, the imposition of disciplinary isolations belongs to criminal sphere, thus it must be applied only in cases where a criminal offense takes place. None of the misconducts presented in the chart can be considered criminal.

3.3 Lack of delineation between disciplinary and criminal fields

Civil servants are to be held accountable for their actions and omissions when they represent a violation of the duties or obligations imposed on them by legislation.

[12] Report of 2010, *supra*, at 31

[13] Galstyan v Armenia, no. 26986/03, 15 November 2007.

The responsibility of civil servants can be grouped into two categories: penal (criminal) and disciplinary (administrative).[14] Usually a penal responsibility also entails an administrative one but not all administrative faults represent a crime. A single fact can simultaneously be an administrative fault and a crime. Only a given number of administrative faults, those most serious or those affecting specifically important and protected public interests, are at the same time defined as crimes in the Penal Code of the Republic of Armenia.

Armenian Military Law does not set any criterion to delineate the types of liabilities when imposing a penalty on a serviceperson. A proper example regarding this delineation is disciplinary isolation in case of *Galstyan v Armenia* with the example that 3 day detention is not a disciplinary, but a criminal liability. The law does not specify the scope of misconducts which are considered to be subject to disciplinary liability. [15]

There is no explanation to the fact that a soldier being subjected to disciplinary isolation for 10 days is within the scope of disciplinary responsibility and not a criminal, as it is stated in RA Constitution that the deprivation of liberty can be decided by no other way than by court decision.

3.4 Appealing a superior's decision

Armenian Military Law also lacks a clear mechanism of appealing a decision of higher ranking officers. Of course, we have institutions where to appeal, but we lack the preciseness of that procedure and public information and also education on this.

[14] Francisco Cardona, *"FOUNDATIONS AND PROCEDURES ON DISCIPLINE OF CIVIL SERVANTS",* October 2002

[15] Report of 2009, HR Defender *"Human Rights Protection & Disciplinary Policy in the RA Armed Forces"*

One of the preconditions for the law enforcement mechanism to be efficient is the mechanism by which the appealing process works. It is stated in law that "[t]he subordinate can appeal the decision to his immediate superior". *Art. 116, Charter*.[16] According to this article, whenever there are any complaints by soldiers they must appeal to their superiors. But the main problem is that the main complaints of soldiers are because of their superiors. So, this article is not effective in means of appealing. This is one of the reasons that soldier do not complain for the protection of their rights. It is senseless and has no policy behind it.

"If the serviceperson finds himself innocent, he can appeal the superior's decision within 10 days, from the moment of the application of the disciplinary penalty". *Art. 93, Charter*.[17] According to this article, the serviceperson cannot appeal after 10 days have passed. What alternative does a soldier have who has been isolated for 10 days then, especially if we consider that "[t]he appellant is not exempted from his military obligations and commands". *Art. 118, Charter.*[18]

3.5 Draft Disciplinary Code of RA Armed Forces

On September 2010, a draft was suggested by Armenian Defense Ministry titled "Disciplinary Code of the Armed Forces of the Republic of Armenia"[19] which is expected to introduce some reforms in the Discipline Code. The new bill proposed is significant in the sense that all the relations in the armed forces will be regulated by the law.

[16] Charter, *supra* , art. 116

[17] *Id.*, art. 17

[18] *Id.*, art. 118

[19] Draft of 2010, Defense Ministry "*Disciplinary Code for the RA Armed Forces"*, Կ-944-06.07.2010-ՊՆ-010/0

If this draft comes into force, the following changes are expected to take place:

- Disciplinary companies come to displace disciplinary isolators

Disciplinary companies suggest an extra time military work. Of course, it is really welcoming that disciplinary isolators may not be used any more, but what the conditions of those companies are is not regulated by law. It had to be included in law where they were to be located, under what regime the work would be done, and generally, what kind of works should be done.

- Soldiers do not have to obey superiors' orders that run counter to RA Constitution and Laws any more: But how are they going to avoid these orders? Will any soldier dare to say "NO" to its superior? This part is too vague in means of interpretation. Authorities do not provide any way for soldiers to expressly speak about their complaints, especially considering the fact that the army is a closed institution and soldiers do not have any connection means for referring to their rights protection.

- "A commander has a right to strengthen the punishment if he believes that it is not proportional to the violation committed, but not the opposite." *Art. 16.8, Draft*

This part of Law is quite illogic and not understandable for me. What is the policy behind the statement that the punishments can be strengthened but not softened if it is found to be not proportionate to the misdeed committed? Who is to decide this issue? Is there any legal basis for this unlawful statement? Of course, it is not.

I share the opinion of lawyer Artur Sakunts from Helsinki Citizens` Assembly Vanadzor Office on this matter.[20]

[20] Interview of Artur Sakunts *"Perversion of the army",* 2010-October-02
http://www.hcav.am/articles.php/language_eng/date_2010-10-02/article_3776/Perversion_of_the_army.html

According to him, there is not much that is effective in this law and "it is just a method for hindering the real problems that our society encounters". He also believes that one of the crucial problems for our army is the unawareness, lack of education and information.

All the above mentioned arguments come to prove that there are no sufficiently effective mechanisms for the full protection of the rights of soldiers in RA Armed Forces.

4. EUROPEAN LEGAL FRAMEWORK

Studying European Law regulating soldier rights protection I found two interesting and different approaches in different countries by which members of military staff can enforce their rights protection in a precise and stable way. These are:

- ☞ German Law on Military Ombudsman
- ☞ Great Britain law on Complaints of Service Personnel.

4.1 German Military Law System: *Wehrbeauftragter des Bundestages (WB).*

The German Ombudsman, known as the Wehrbeauftragter des Bundestages (WB), [21] or Parliamentary Commissioner of the Armed Forces is one of the most profiled mechanisms for inter military relations. This model has been used as a basis for other countries legal systems.

The definition of German Ombudsman is set in *Basic Law of Germany, Art. 45(b)*: "A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the Armed Forces. Details shall be regulated by a federal law".[22]

[21] Basic Law for the Federal Republic of Germany, 23/05/1949, last modified in 2009
[22] *Id.*, art. 45(b)

The office has approximately 50 staff members. Any member of German Armed Forces (Bundeswehr), their family members can initiate a complaint to the military ombudsman.

Another important point is that all the military personnel can directly contact to the ombudsman. No preconditions must be fulfilled for the case to be accepted by the ombudsman, serviceperson can directly turn to ombudsman without going through other military bodies beforehand. This is an excellent model for only focusing on military personnel rights.[23]

A German soldier can bring a complaint against the decision of its superior, while an Armenian soldier cannot put it into question the legality and proportionality of his superior's decision.

4.2 UK Military Law: Complaint

The UK legal framework regulating the remedy rights of soldiers is the one that to my mind must be inseparable part of any military law.

Namely "*Redress of Individual Grievances: Service Complaints"* Act [24] is the core regulator of service personnel relationships in UK Military Law.

As much as I managed to study it, it is accessible, simple, quick and fair especially from the perspective of soldiers; it is the direct link between the Army and Law Enforcement authorities. It is too precise in means of legal interpretation, and the most important that any serviceman will understand its language as it is stated in clear and simple wording.

[23] Georg Nolte & Heike Krieger , *"European Military Law Systems",* De Gryuter Rechtswissenschaften Verlags-GmbH Press, Berlin 2003, pg. 148

[24] UK Defense Ministry, [2008], "*Redress of Individual Grievances: Service Complaints"*

From the perspective of its meaning and value, it has the following aspects, which, from my point of view, are plausible:

1. It gives a right to a complaint even to a person who is no longer subject to Service law, who thinks that they were wronged in such a matter while they were subject to Service law. (Art 5). [25]

   To my mind this opportunity for soldiers to complain even already not being a member of military staff is an excellent opportunity for soldiers, because the roots of lack of complaints comes from fear to be misbehaved by higher ranking servicepersons, especially here in Armenia. If we implemented this law, the complaints would be much more in amount. According to Armenian Law on Human Rights Defender [26], the time limit is a year counting from the time the right has been violated. It does not regulate the factors that our soldiers encounter, mainly the obstacles to complain during military service, especially considering that the two year period of Service. And here is the essences of this law-to give opportunity to complain when already not being a soldier.
2. It has a certain complaint form, which must be fulfilled for the complaint to be admissible. The real pro of this criterion is that authorities can allege neither the preciseness of what the writing is, nor misuse it for accepting the complaint. E.g. RA Human Rights Defender Act does not set any criterion for the complaint to be admissible. It just states what to include in it.
3. It also delineates different type of complaints for the clearness that certain kind of complaints fall within the scope of its regulation.

[25] UK Defense Ministry, [2008] "*Redress of Individual Grievances: Service Complaints",* art. 5
[26] National Assembly 21.10.2003 " *Law of RA on the Human Rights Defender*" ՀՕ-23-Ն

4. It sets separately the existence of Service Complaint Panel, the clear and direct place to go and file the complaint, which is absent in our Legislation.

5. SUGGESTIONS

Here are my suggestions for the Armenian Military Law System to advance a little.

☞ Suggestion 1:

To organize an independent office of "Complaint Panel on Service Personnel Rights Protection" with the direct supervision of the Military Ombudsman.

In a democratic society, from my point of view, the following criteria must be met for this panel to reach the aim pursued:

1. The independence of the institute (office) from the Ministry of Justice
2. Not to be a member of government
3. The institution of the office to be legally defined in RA Military Legal System
4. The authorization of legal capacity of investigation, free to initiate cases
5. Right to access to all kind of information necessary to investigate the case
6. The direct method of a serviceman complaint
7. Direct means of complaints, make an unchangeable complaint form

The existence of the Complaint Panel for the protection of rights of serviceperson will give an opportunity to

- Exercise democratic control in inter-military relations in defense sector
- Promote accountability of military personnel
- Focus on current disciplinary problems which need urgent actions of improvement
- Reach the effectiveness of defense sector.

- ☞ Suggestion 2:

  Educate military staff members, both the soldiers and their higher ranking officers.

  Military personnel of RA are not educated and informed enough to know their place, their role with obligations and rights respectively to protect themselves, or at least to understand that a certain conduct by personnel is not legal.

  To reach the aim pursued I suggest that military personnel, as an obligation in a daily schedule, be taught the rights and obligations they have, the meaning of positions they hold. This will also play an important role in encouraging soldiers while in Service.

- ☞ Suggestion 3:

  In no way to be a handicap for soldiers to keep the connection with the outer world, of course in legitimate limits. Provide in a legally binding way an independent direct connection from any military unit to the Complaints Panel of Military Ombudsman (telephoning, hot line, etc), even when isolated in disciplinary cells, as to give every soldier an opportunity to inform the adequate institution about alleged right violation, as within the time limits he may not manage to do that.

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