

# MILITARY CRIMINAL JURISDICTION UNDER TURKISH LAW\*

*Türk Hukukunda Askerî Ceza Yargılaması*

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**I. Introduction**, II. Military Prosecution, III. Courts-Martial, 1. The Establishment of Courts-Martial, 2. Jurisdiction in Courts-Martial, 3. Members in Courts-Martial, 4. Judicial Procedure, 5. Pre-Trial Proceedings, IV. Summary Punishment, 1. General Overview, 2. Disciplinary Tribunals, 3. Offences under the Code of Establishment and Judicial Procedure of Disciplinary Courts, **Conclusion**

## ÖZET

Askeri yargı silahlı kuvvetlerin varlığından doğan iki yükümlüğünün sonucudur. Bunlar hizmet için her an hazır bulunma ve emirlere itaatin sağlanmasıdır. Dolayısıyla orduları bulunan hemen hemen tüm ülkelerde askeri yargı bulunmaktadır. Makalede; Türk hukukunda askeri yargıya ilişkin temel düzenlemeler anlatılmaktadır.

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**Anahtar Kelimeler:** Askeri yargı, askeri adalet, askeri mahkeme, disiplin mahkemesi, askeri disiplin

### ABSTRACT

Military justice is the result of two obligations arising from the existence of the armed forces: these are being ready for service at any time and providing strict obedience to orders. Thus military justice exists in almost all countries having armed forces. This article explains the basic provisions related to military jurisdiction under Turkish law.

**Keywords:** Military jurisdiction, military justice, court-martial, disciplinary tribunal, military discipline

### I. Introduction

Because of its long history, the Turkish law has a complex and detailed military jurisdiction system.<sup>1</sup> According to the article 145 of the Turkish Constitution, military jurisdiction consists of courts-martial and disciplinary tribunals.<sup>2</sup> The courts-martial are competent judicial authorities for military crimes and military-related crimes of military personnel,<sup>3</sup> crimes committed in a military zone,<sup>4</sup> or crimes committed by military personnel against another military personnel.<sup>5</sup>

Courts-martial used to be authorized to try the crimes of civilians.<sup>6</sup> They were competent if the civilian commits one of the specified military crimes listed in the Military Penal Code,<sup>7</sup> if the civilians either resists or assaults legally authorized military personnel on-duty,<sup>8</sup> and if the civilian commits a

<sup>1</sup> Sahir Erman, *Askeri Ceza Hukuku, Umumi Kısım ve Usul, yeniden gözden geçirilmiş ve genişletilmiş 7. bası*, İstanbul: Üçdal Neşriyat, 1982, n. 223. Military service is mandatory for each Turkish male citizen for a period of fifteen months. Service age is 21. If he is a student, age limit may rise up to 31, according to the Military Service Code.

<sup>2</sup> Turkish Constitution Law # 2709, article 145 reads; "Courts-martial and military disciplinary tribunals shall exercise military justice. These courts shall have jurisdiction to try military personnel for military offences, for offences committed by them against other military personnel or in military places, or for offences related to military service and duties."

<sup>3</sup> Code of Establishment and Judicial Procedure of Courts-Martial Law # 353, article 9, Turkish Constitution article 145.

<sup>4</sup> Code of Establishment and Judicial Procedure of Courts-Martial article 9.

<sup>5</sup> *Ibid.*

<sup>6</sup> Constitution article 145, Code of Establishment and Judicial Procedure of Courts-Martial article 11.

<sup>7</sup> Such military crimes include spying on military secrets and against national security. Military Penal Code Law # 1632, articles 54-59.

<sup>8</sup> Courts-martial are not authorized to try the crimes of civilians in peacetime.

crime against a military personnel in a designated military area.<sup>9</sup> However, the law changed in 2006 and the courts-martial now have no jurisdictional authority to try non-military persons.

Parliament has promulgated various laws on military justice. Some of them include; the competency of courts-martial,<sup>10</sup> the structure and procedure of courts-martial,<sup>11</sup> the judicial procedures of courts-martial,<sup>12</sup> the relationship between military judges/military prosecutors and the commanding officers; privileges and immunities of military judges and prosecutors; and immunities of the judges.

Article 145 is the basic law of the military jurisdiction system. The basic codes of the military jurisdiction are based upon this specific article of the Constitution. There are four main codes: (1) The Military Penal Code, (2) the Code of Establishment and Judicial Procedure of Courts-Martial, (3) the Code of Establishment and Judicial Procedure of Disciplinary Courts; and, (4) the Military Judges Code.

Turkish law has standing courts-martial and disciplinary tribunals.<sup>13</sup> During martial law, ad hoc courts-martial may work. Turkish Grand National Assembly shall declare martial law or a state of emergency in a specific region/regions, or all the country.<sup>14</sup> The martial law courts-martial work just like other ordinary courts-martial. Their procedures are stated in the Code of Establishment and Judicial Procedure of Military Courts.<sup>15</sup> Each courts-martial but disciplinary tribunal has an office of the military prosecutor. Civilian prosecutors can also work with military prosecutors only at ad hoc courts-martial.

## II. Military Prosecution

There are at least two prosecutors in each of the offices of the military prosecutor. The military prosecutor is the main authority to investigate. There are other assisting vice-prosecutors working on behalf of the prosecutor. All prosecutors and vice-prosecutors are military judge branch

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<sup>9</sup> Code of Establishment and Judicial Procedure of Courts-Martial article 11.

<sup>10</sup> *Ibid.*, article 1.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, articles 1-3.

<sup>13</sup> Constitution article 145.

<sup>14</sup> Sadi Çaycı, "Avrupa Birliği'ne Giriş Sürecinde Türk Askeri Hukukunun Durumu," *Stratejik Analiz Dergisi*, Ağustos 2006, s. 54.

<sup>15</sup> Constitution article 91 reads; "The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having the force of law. However, the fundamental rights, individual rights and duties included in the first and second chapter of the second part of the Constitution and the political rights and duties listed in the fourth chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency."

officers. Military prosecutors work on behalf of the Republic and the Army. They have constitutional right to work independently.<sup>16</sup>

Military prosecutors are main authorities to investigate cases. They issue all indictments. They represent the Turkish Armed Forces during trials. They can work with all other law enforcement authorities during investigations.

Offices of military prosecutors are established under the organizational charts of the units. The booklet<sup>17</sup> indicates in which headquarters there can be prosecutor's office. The case file is sent to the commander by the chain of command. The commander, consulting his legal adviser, issues an investigation order and refers the case file to the prosecutor. The prosecutor looks over the case and may delegate one of vice prosecutors. The prosecutor or vice prosecutor continues investigation of the case.

In some situations, military prosecutors may open a case file by their own initiatives without requiring an investigation order. The military prosecutor may open a case file if the case requires a grave imprisonment according to either the Military Penal Code or the Turkish Penal Code. The military prosecutor may also investigate a case if; there are exigent circumstances, some precautions are necessary to collect evidence, or a suspect has been caught and law enforcement authorities or marshals, such as the prosecutor or one of the vice-prosecutors, witnessed the crime or there is a homicide or suicide.

The prosecutor shall decide whether these circumstances exist. If they exist, the prosecutor does not require an investigation order to commence the investigation. However, prosecutors are to notify the headquarters as soon as they commence investigation. The commander cannot appeal or object to the investigation, nor can he halt it in any way.

All military and civilian units, personnel, and other law enforcement officials are to assist prosecutors. They cannot reject or delay the prosecutor's official requests. Prosecutor works primarily with law enforcement authorities. Prosecutors are to protect discipline and public order. They are to collect evidence both in favor of and against the accused during both the investigation and the trial. Military prosecutors can make a deal with the accused or suspected persons.

Military prosecutors can make one of three decisions at the end of their investigations: First, the prosecutor may find that the case lacks grounds for

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<sup>16</sup> Constitution article 145, Code of Establishment and Judicial Procedure of Courts-Martial article 97.

<sup>17</sup> "Jurisdiction Areas of the Military Courts" published by the Ministry of Defense (classified document).

trial.<sup>18</sup> Article 105 reads, “If the prosecutor is not persuaded with the case file referred sent by the commander, or he does not find enough evidence to accuse the suspect, the prosecutor must order that there is a lack of grounds for trial.” The suspect or the victim, as well as the commander has the right to object to this decision. In case of an objection, the closest court-martial solves the dispute.

Second, the prosecutor can decide that there is sufficient evidence to issue an indictment.<sup>19</sup> Article 114 reads, “If a military prosecutor finds enough evidence to file a lawsuit or is convinced that there are adequate reasons to accuse the suspect, then the prosecutor issues an indictment for the case and refers it to the court-martial.” However, the court-martial can reverse the indictment for legal grounds. If the prosecutor does not issue an indictment, the Minister of Defense shall order the prosecutor to continue the investigation or even to issue an indictment.

Third, the prosecutor can decide to temporarily postpone the investigation.<sup>20</sup> There are circumstances the suspect might be missing or having a mental disease. The victim has the right to request an investigation. For minor offences, the victim’s right to petition is a precondition of the investigation and the victim has to exercise this right within six months. If the victim does not exercise this right within six months, then the prosecutor cannot investigate the event and shall postpone the investigation temporarily.

### **III. Courts-Martial**

#### **1. The Establishment of Courts-Martial**

The Code of Establishment and Judicial Procedure of Courts-Martial is the basic law. It states where the courts-martial are established. Article 1 reads; “Courts-martial are to be established at the Corps level or higher.” However, the Ministry of Defense is the sole authority to decide to establish courts-martial in a specific unit. Thus, the requests of military authorities for new courts-martial must be sent to the Ministry of Defense through the chain of command. Ministry of Defense decides whether to establish a new court.

The Ministry of Defense published a booklet<sup>21</sup> showing the courts-martial in Turkey. There are thirty-two courts-martial in Turkey.<sup>22</sup> The Ministry of Defense has the power to relocate, abolish, or establish new courts-martial.<sup>23</sup> The Military Jurisdiction Department of the Ministry of Defense supervises the management of courts-martial.

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<sup>18</sup> Military Judges Code, Law # 357, article 105.

<sup>19</sup> *Ibid.*, article 114.

<sup>20</sup> *Ibid.*, article 106.

<sup>21</sup> The Jurisdiction Areas of Courts-Martial Booklet.

<sup>22</sup> *Ibid.*, p. 2.

<sup>23</sup> Code of Establishment and Judicial Procedure of Courts-Martial articles 1-2.

## 2. Jurisdiction in Courts-Martial

The Ministry of Defense is to facilitate the jurisdiction of all courts-martial. The Military Supreme Court is the highest standing court in military jurisdiction system. All courts-martial verdicts can be appealed to the Military Supreme Court by the accused, the prosecutor, the defense counsel, the victim(s), or the commander. The Military Supreme Court is the final authority in each case.

Courts-martial are competent to hear the case if; military personnel commits a military crime; military personnel commits a crime against another military personnel; military personnel commits a crime in military zones; the committed crime is a result of a military personnel's mission or duty.<sup>24</sup> All military offenses and punishments are codified in the Military Penal Code. The others are not military offenses.

According to the Personnel Code,<sup>25</sup> the Code of Conduct<sup>26</sup> and the Military Penal Code,<sup>27</sup> military personnel are composed of generals/admirals, officers, NCOs,<sup>28</sup> privates, sergeants, corporals, soldiers and cadets. Civilian personnel working in various units of the Turkish Armed Forces and Ministry of Defense are military personnel too. However, civilian personnel in the Ministry of Defense can only be tried in courts-martial if he is charged with "attempt to assault a line officer" or "disobedience to a lawful order related to the service". Military prosecutors cannot prosecute civilians in other circumstances.

All military personnel have the same due process rights before the courts-martial as guaranteed by the law.<sup>29</sup> There is no separate category for various groups of soldiers. The categories of persons subject to courts-martial do not change during wartime. However, the number of military personnel increases rapidly than the peacetime, and thus, the number of cases might increase.

Courts-martial do not have a role in disciplinary cases. Courts-martial do not hear appeals of administrative disciplinary punishments. Nor have courts-martial any role in the administrative or summary punishment system. There are disciplinary tribunals and line officers within administrative punishment system.

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<sup>24</sup> Code of Establishment and Judicial Procedure of Courts-Martial articles 9-11.

<sup>25</sup> Personnel Code, Law # 926, article 1.

<sup>26</sup> Code of Conduct, Law # 211, article 1.

<sup>27</sup> Military Penal Code article 3.

<sup>28</sup> Non-commissioned officers.

<sup>29</sup> Constitution article 19 reads; "Everyone has the right to liberty and security."

### 3. Members in Courts-Martial

There are at least three members in courts-martial. Two of them are officers from military judge branch. The President appoints them.<sup>30</sup> The other member is a senior officer selected by the commander. Judges are to have a law degree.<sup>31</sup> Following graduation, the lawyer must pass the exam. If succeeded, the lawyer will be a member of the military judge branch. Then he or she gets in service training at the Ministry of Defense for a year. If the lawyer does not have any military background, there is additional military training in a military unit for three to six months. Following the apprenticeship period, the lawyer can be appointed as an intern prosecutor or an intern judge by the President. The internship program lasts three years. Finishing three years, the lawyer can be a judge or a prosecutor.

The third member in courts-martial is a senior military officer who has graduated from a military academy or a university. He is not a lawyer. The legal advisor, on behalf of the commander, issues the list of officers to work as a member in courts-martial. However, the senior judge at the court decides who is the third member for each case. The third member may vary for each case.<sup>32</sup> But, unlike members in courts-martial, all prosecutors and vice prosecutors are lawyers and are to be members of the military judge branch.

The military judge branch officers have permanent service in the court. Unless working at least four years in courts-martial, they cannot be appointed to any other duty. The President has the authority to appoint the military judge branch officers. The third member serves for only one year.

All prosecutors, vice prosecutors, and judges are also military personnel. They wear uniforms and have ranks. However, the Constitution and other statutory codes require that,<sup>33</sup> they be entitled to judicial privileges and immunities. They are not subject to criminal or summary punishment.<sup>34</sup> If they break the law, the Minister of Defense delegates an inspector from the Military Justice Inspection Department. The inspector investigates the case, makes a report to the court, and the judge can be subject to disciplinary punishment or even can be tried.

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<sup>30</sup> Military Judges Code article 18.

<sup>31</sup> Faculty of Law is a four-year civilian education in Turkey.

<sup>32</sup> Generally, these members change weekly.

<sup>33</sup> See Personnel Code, Military Judges Code and Code of Establishment and Judicial Procedure of Courts-Martial.

<sup>34</sup> Nur Centel, "Türk Hukukunda Askeri Yargıda görev Yapan Hakimlerin Hukuki Statüsü," *Askeri Yargıtay'ın 90'inci Kuruluş Yıldönümü Sempozyumu (6-7 Nisan 2004)*, Ankara: Genelkurmay Basımevi, 2004, s. 111.

Minister of Defense is the only person to give a disciplinary punishment to military judge branch officers.<sup>35</sup> The unit commander has no authority to give any kind of disciplinary punishments to military judge branch officers.<sup>36</sup> The Constitutional Court can try the members of the Military Supreme Court.<sup>37</sup> The President is the sole authority to appoint the military judge branch officers.<sup>38</sup> Once they are appointed to a court, they cannot be appointed to any other post for at least four years.<sup>39</sup>

#### 4. Judicial Procedure

All procedures of the courts-martial and disciplinary tribunals are open to the public.<sup>40</sup> The accused is entitled to have a defense counsel at the government's expense provided he is an enlisted military personnel and cannot afford one. If the accused requests a lawyer, the court refers the request to the local bar. The bar provides a lawyer for the accused. The government pays the attorney's fees. The victim or the victim's parents, children, or spouse can be a party during trial. If he or she has seriously been wounded or dead, the keens of the victim have right to sue the accused.

An accused is to be present during the trial.<sup>41</sup> However, the accused can be tried *in absentia* if he demands so.<sup>42</sup> In case of grave offenses, the accused must be present during the defense phase of the trial.<sup>43</sup>

The office of the prosecutor executes the sentence. After the sentence is executed, the prosecutor sends the case file back to the court where it is

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<sup>35</sup> The sanctions and punishments applied to the officers of military judge branch, are totally different from those of other officers. For example, they cannot be detained or put into a jail without a court decision. Military Judges Code article 29.

<sup>36</sup> *Ibid.*, article 23.

<sup>37</sup> Constitution article 148 reads; "The President of the Republic, members of the Council of Ministers, presidents and members of the Constitutional Court, of the High Court of Appeals, of the Council of State, of the Military Supreme Court, of the Military High Administrative Court, their Chief Prosecutors, Deputy Chief Prosecutor, and the presidents and members of the Supreme Council of Judges and Public Prosecutors of the Republic, and of the Audit Court shall be tried for offences related to their duties by the Constitutional Court standing as the Supreme Court. The Chief Public Prosecutor of the Republic or Deputy Chief Prosecutor of the Republic shall act as prosecutor in the Supreme Court. The judgments of the Supreme Court are final. The Constitutional Court shall also perform other functions given to it by the Constitution."

<sup>38</sup> The President appoints members of the Military Supreme Court from among three candidates nominated for each vacant position by the Plenary Assembly of the Military Supreme Court. Constitution article 156.

<sup>39</sup> Military Judges Code article 16.

<sup>40</sup> Constitution article 19, Code of Establishment and Judicial Procedure of Courts-Martial article 138.

<sup>41</sup> Code of Establishment and Judicial Procedure of Courts-Martial article 128.

<sup>42</sup> *Ibid.*, article 136.

<sup>43</sup> *Ibid.*, article 136/III-IV.

archived. The accused, the prosecutor, the commander, or the victim can appeal the decisions of courts-martial to the Military Supreme Court. If none of them appeals the verdict within seven days, the verdict becomes final. All verdicts can be referred to the Military Supreme Court. Inspectors of the Ministry of Defense supervise the Office of Prosecutors each year.<sup>44</sup> The inspectors inspect the files, which were not referred to the Military Supreme Court.

Military jurisdiction is only for military personnel. If there is a dispute with civilian courts on jurisdictional competency, the Court of Jurisdictional Disputes decides on the issue. This court consists of members both from the Military Supreme Court and the Appeal Court. However, the Court of Jurisdictional Disputes is not a military court. It is one of the higher courts in Turkey. It decides when two courts dispute over a specific case. In case of a dispute about the judicial authority of two courts, the Court of Jurisdictional Disputes decides which court is competent to hear the case.

### **5. Pre-Trial Proceedings**

When a company commander realizes that one of his military personnel has committed a crime, that commander is to prepare a case file.<sup>45</sup> The commander must gather all the evidence, take proper measures to illuminate the case, and follow certain procedures. If the situation is urgent, the commander informs the prosecutor. The prosecutor should be called in case of a homicide or a crime in Military Penal Code or in the Penal Code entitling a grave imprisonment such as murder or rape. In this case, the prosecutor starts investigating the case without waiting for an investigation order from the commander.

If the situation is not urgent, the commander takes appropriate measures to clarify the situation and prepare all the documents for the case. The unit commander refers the case file to the superior commander in three days. The commander's legal advisor<sup>46</sup> looks over the file, prepares a referral (investigation order) and refers the case file to the prosecutor. After receiving the investigation order, the prosecutor investigates the case, collects the evidence, and makes a decision whether or not to sue.

Like most countries, the punishments and sanctions in the Turkish military law are harsher during war than they are in peace. For example, disobedience to orders is prohibited in the Military Penal Code article 87.

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<sup>44</sup> Inspectors also inspect the prosecutors once a year and prepare an efficiency report for each prosecutor.

<sup>45</sup> Most units are stationed in areas far from the main bases in Turkey. For this reason, it is only possible to reach a legal adviser or to a military prosecutor if the unit is stationed in a main military base.

<sup>46</sup> If a unit has an office of the military prosecutor, the commander can have a legal advisor who is a member of the military judge branch.

According to first paragraph of article 87, if a soldier does not obey the orders, or he/she rejects to obey the orders, he/she may be fined from one month to one year in prison. The second paragraph is about the wartime disobedience to orders. If a soldier disobeys orders during the state of emergency, the fine may be up to five years imprisonment in jail. If a soldier disobeys orders during war, the maximum punishment will be ten years imprisonment. According to article 91 of the Military Penal Code, if a soldier attacks a superior, he/she may be fined from six months to ten years in prison. If a soldier attacks the superior during the state of emergency or war times, he shall be sentenced to fifteen to thirty years in prison.

Turkish penal law does not have different rules for units abroad. The courts-martial or the discipline tribunal of that unit abroad is competent for the original headquarters of its own organizational chart. However, there are some Turkish disciplinary tribunals abroad because they follow their headquarters.<sup>47</sup>

Turkey has been a party to the European Human Rights Convention since 1954. Turkey also accepted the right of appeal to the European Court of Human Rights for her citizens in 1988. The Convention is part of Turkey's domestic law. If any provision is against the Convention, it has to be changed. Judges are to apply the rules of the Convention. The courts-martial are to respect the rights afforded by the Convention.<sup>48</sup>

#### **IV. Summary Punishment**

##### **1. General Overview**

Every commanding line officer has a duty and legal right to discipline their subordinates. The rules and the procedure for summary punishment system are clearly stated in article 171 of the Military Penal Code. As mentioned below, there are also disciplinary tribunals in the summary punishment system.<sup>49</sup> These tribunals are established at the headquarters superior than regimental level.<sup>50</sup> Commanding officers either impose a summary punishment or refer the case to disciplinary tribunals. Procedural rules of discipline tribunals are in the Code of Establishment and Judicial Procedure of Disciplinary Courts.<sup>51</sup>

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<sup>47</sup> There are disciplinary tribunals in both Kosovo and Bosnia.

<sup>48</sup> Feridun Yenisey, "Sempozyumun Değerlendirilmesi, Askeri Yargıda görev Yapan Hakimlerin Hukuki Statüsü," *Askeri Yargıtay'ın 90'ıncı Kuruluş Yıldönümü Sempozyumu (6-7 Nisan 2004)*, Ankara: Genelkurmay Basımevi, 2004, s. 131.

<sup>49</sup> Disciplinary tribunals are legal courts too. See Constitution article 145.

<sup>50</sup> However there is an exception for battalions under the command of IFOR in Bosnia and KFOR in Kosovo. For peacekeeping operations, which Turkish Armed Forces participated, see [www.tsk.mil.tr](http://www.tsk.mil.tr).

<sup>51</sup> Law # 477.

If a soldier leaves the base without permission, it is called AWOL.<sup>52</sup> If he comes back within twenty-four hours, the company commander disciplines the soldier. The case file cannot be sent to the disciplinary tribunal. However, if the soldier is absent more than twenty-four hours to seven days, the case file can either be sent to the disciplinary tribunal or the company commander can discipline the soldier. If the soldier's desertion period exceeds seven days, the commander's legal adviser must send the case file to the office of the military prosecutor via the commander's investigation order.<sup>53</sup>

Similar to most military justice systems, Turkish law has a military punishment system. The Military Penal Code and the Code of Establishment and Judicial Procedure of Disciplinary Courts are the legal basis for sanctions. The Military Penal Code article 171 shows the military authorities authorized to punish their subordinates. There is no difference between wartime and peacetime. Therefore, these punishments do not vary during war.

The criminal offences are different from non-criminal disciplinary offences. If an offence is punishable under the Military Penal Code, it is a criminal offence. However, if an offence is not written in the Military Penal Code, it is an offence under the Code of Conduct; therefore, it is a disciplinary offence. The Code of Conduct addresses non-criminal disciplinary offences. Small breaches of the Code of Conduct are subject to summary punishment. If an offence, which is not criminal in nature of the Code of Conduct, occurs, the unit commanders discipline their subordinates to protect law and order in the military.

## 2. Disciplinary Tribunals

Turkey has both courts-martial and disciplinary tribunals for disciplinary offences. Disciplinary offences are non-criminal. The booklet lists each disciplinary tribunal in detail with its locations and their area of judicial authorities.<sup>54</sup> According to the latest booklet printed in July 2000, there are 230 disciplinary tribunals in Turkey.<sup>55</sup> The disciplinary tribunals are legal courts.<sup>56</sup> A disciplinary tribunal is composed of three members and a disciplinary officer. The disciplinary officer should be a military judge branch officer. If it is not possible to appoint a military judge branch officer, the commander appoints an officer as a disciplinary officer. The disciplinary officer works like a kind of prosecutor on behalf of the commander.

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<sup>52</sup> Absence without leave.

<sup>53</sup> Almost all legal advisers are senior officers of military judge branch.

<sup>54</sup> Legal Jurisdiction Areas of Disciplinary Tribunals, Ankara: The Chief of Turkish General Staff, 2001.

<sup>55</sup> *Ibid.*, p. 7.

<sup>56</sup> Constitution article 145.

The commander selects the members of disciplinary courts for a period of one calendar year. They are all military personnel having ranks. However, they are not lawyers. If an officer is accused, all the members are to be officers. For all other accused personnel, one of the members has to be chosen among the NCOs of the unit.

Company commanders decide whether to punish a breach themselves or to send the case file to the disciplinary tribunal. The disciplinary officer inspects the case file and investigates the situation on behalf of the commander. The commander decides whether to charge the soldier. Commanders can discipline soldiers on their own instead of writing an indictment to the tribunal. The commander is also authorized to prosecute. The disciplinary officer assists the commander.

The accused has certain procedural and due process rights at the tribunal. The accused can have a defense counsel or consult a lawyer. If the accused cannot afford a lawyer, the tribunal gets him an attorney from the local bar. There are also time requirements. The disciplinary tribunal must reach a final decision within five months of the date of the offence. This period includes the time necessary for appeal procedure. The accused cannot be punished or accused of the same offence after five months passed.

### **3. Offences under the Code of Establishment and Judicial Procedure of Disciplinary Courts**

The Code of Establishment and Judicial Procedure of Disciplinary Courts includes fifteen disciplinary offences punishable by disciplinary tribunals.<sup>57</sup> These offences are either tried by the disciplinary tribunals or punished via the summary punishment system. The unit commander either punishes the soldier or sends the case file to the disciplinary tribunal. The Code of Establishment and Judicial Procedure of Disciplinary Courts articulates the following offences:

A. Disrespectfulness to line officers or superiors: The military service requires that soldiers be respectful to their superiors. A soldier who does not respect line officers or superiors shall be punished up to one-month imprisonment.

B. Disobedience to orders: A soldier who does not properly obey orders shall be punished up to two months in jail.

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<sup>57</sup> These offenses are; disrespectfulness to line officers or superiors, disobedience to orders, intention to lie, absence without leave, misinforming the commander on the desertion attempts, losing or damaging to military equipment, borrowing money or accepting gifts from subordinates, ignorance to subordinates, cursing or harming subordinates, disobeying on-duty rules, causing displeasure in service, drunkenness and prohibited clubs, gambling, membership in prohibited associations, and reading prohibited books.

C. Intention to lie: The military service requires honesty. A soldier who lies the commander shall be punished up to one-month imprisonment.

D. Absence without leave (desertion): If a soldier leaves the base or barracks without permission for twenty-four hours to seven days, he or she shall be punished ten days to one-month imprisonment. If a soldier on leave does not come back at the end of the leave for twenty-four hours to seven days, he shall also be punished up to seven days to one-month in jail.

E. Misinforming the commander on the desertion attempts: If a soldier knowing about a desertion attempt of other soldiers does not inform line officers about the attempt, whenever the desertion happens, that soldier shall be punished seven days to two months imprisonment.

F. Losing or damaging military equipment: Military personnel who intentionally loses or damages military equipment shall be punished up to two months in jail depending on the value of the military equipment.

G. Borrowing money or accepting gifts from subordinates: A line officer who gives his subordinates orders which are unrelated to service, or accept gifts or borrows money from subordinates shall be punished ten to two months imprisonment.

H. Ignorance to subordinates: A line officer who ignores his subordinates shall be punished up to fifteen days a in jail.

I. Cursing or harming subordinates: A superior who curses or harms a subordinate shall be punished up to two months imprisonment.

J. Disobeying on-duty rules: A guard while on duty deserts his specified area, violates the written rules of the guard service, or breaks the rules of Code of Conduct on duty shall be punished up to two months in jail.

K. Causing displeasure in service: Soldier who causes displeasure among his/her friends shall be punished up to one-month imprisonment. If a soldier calls another soldier as a liar, or if he/she blames another soldier because of his/her religious beliefs or sexual behaviors, he/she is accepted to have broken the law, as mentioned in this article.

L. Drunkenness and prohibited clubs: Soldiers who go to brothels, casinos, bars, or other restricted clubs and get drunk shall be punished seven days to one month in jail. If the soldier is drunk while on duty, the limit of the imprisonment is fifteen days to two months.

M. Gambling: Gambling military personnel shall be punished up to one-month imprisonment.

N. Membership in prohibited associations: Military personnel who join prohibited associations shall be punished ten days to two months in jail. Some of these associations include; political parties, labor organizations, illegal organizations.

O. Reading prohibited books: Military cadets and enlisted personnel who read books and publications prohibited by the Chief of Turkish General Staff shall be punished up to fifteen days imprisonment. Some examples include; hardcore porn books (related to children porn), propaganda books of political parties, propaganda books of illegal terrorist organizations.

If the crime under the Code of Establishment and Judicial Procedure of Disciplinary Courts is committed, the unit commander has two options: First, the unit commander may punish the soldier. In this case, the commander writes a memorandum to the soldier, explains the situation, and gives the soldier an opportunity to defense himself. The memorandum and defense must be in writing. After considering the defense, the commander orders an appropriate punishment for the soldier. The soldier can object to the summary punishment. In case of an objection, the commanding authority of the unit commander says the final word.

The second option is to send the case file to the disciplinary officer. In this case the disciplinary officer investigates the situation on behalf of the commander. If the disciplinary officer believes that the soldier should be tried before the disciplinary court, the disciplinary officer prepares the indictment. The court decides whether the soldier is guilty. Even if the unit commander believes that the soldier has broken the law, it is the commander's option whether to file a lawsuit at the disciplinary court by an indictment, or to discipline the soldier.

The soldier does not have a right to choose between summary punishment and a court trial. Most soldiers prefer summary punishment instead of being accused by the disciplinary officer at the disciplinary tribunal. The graveness of punishment is why soldiers prefer a summary punishment instead of taking the case to the tribunal. If the tribunal finds the accused guilty, the punishment period may exceed the accused's service period by the same amount of time the accused spends in detention or in jail. But, if the line officer gives a summary punishment, the punishment period cannot exceed the accused's mandatory service period.

Summary punishments and sanctions include written warning, reduction in monthly payment, canceling off-duty periods, extra service, restriction to limits,<sup>58</sup> and arrest in quarters. The applicability of each punishment is the same for different categories of soldiers. The limits of the punishments, however, differ for various categories of soldiers.

The minimum summary punishments can be imposed at the company level. The sanctions can be imposed both by a tribunal and by the line

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<sup>58</sup> Restriction to limits means; a soldier who has been punished by a certain period of time in restriction to limits, cannot leave the base after working hours. He/she has to live in a designated room after working hours, i.e. he/she has to stay there. There aren't any guards, but he/she cannot leave that specified place in the base.

officers. If the case file has been sent to the disciplinary tribunal, the final verdict of the tribunal has to be declared.<sup>59</sup> Approval of judge is not required when a specific punishment is imposed. However, the line officers should consult with the legal advisers or disciplinary officers before ordering any kind of administrative punishments or impose sanctions to their subordinates. Although consultation is recommended, it is not mandatory. The administrative disciplinary authorities have full discretion to exercise their disciplinary powers in summary punishment cases.

It is possible for a superior officer to annul a summary punishment imposed by his subordinate. Line officers, however, cannot annul their own summary punishment, however, their superiors can. The superior can either replace the annulled punishment by a new one and change the original punishment, or send the case file to the tribunal. The superior officer is bound by the principle of “*reformatio in pejus*”,<sup>60</sup> and therefore, neither the superior officer nor the tribunal can change the punishment to the disadvantage of the offender.

Superior officers can directly impose a summary punishment instead of the officer who is normally competent to do so. If the superior officer is the line officer and the disciplinary offence has occurred directly against himself or if he has witnessed the offense, then the line officer should not impose the punishment.

All military personnel can object to a summary punishment. Every senior superior is authorized for the objection process. It is not possible to bring the objection before a tribunal or a court, nor can it be appealed. However, the objection suspends the execution of the punishment. Turkish law does not have automatic review of summary punishment. The unit commander must inform all summary prosecutions and sanctions to the superior headquarter.

Military High Administrative Court<sup>61</sup> does not have any role in summary punishment system. A person who has been fined by line officers or by disciplinary tribunals cannot appeal or object to the Military High Administrative Court.

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<sup>59</sup> If a case file is sent to the disciplinary tribunal, a soldier cannot be sued or punished by a line officer or by another court. The decision of the disciplinary tribunal shall govern.

<sup>60</sup> An accused who objects/appeals the verdict cannot be sentenced more than the final decision of the tribunal/court.

<sup>61</sup> Article 157 of Turkish Constitution reads; “The Military High Administrative Court shall be the first and last instance for the judicial supervision of disputes arising from administrative acts and actions involving military personnel or relating to military service, even if such acts and actions have been carried out by nonmilitary authorities. However, in disputes arising from the obligation to perform military service, there shall be no condition that the person concerned be a member of the military body.”

### **Conclusion**

The military jurisdiction system is unique in Turkey. It consists of the summary punishment system and the courts-martial system. The summary punishment system consists of both disciplinary tribunals and commanding officers' discipline. The summary punishment system is too complex and difficult to understand for ordinary soldiers. If a soldier falls asleep during guard duty, it is a breach of article 56 of the Code of Establishment and Judicial Procedure of Disciplinary Courts and can be disciplined by the company commander. However, the company commander can discipline the soldier or send the case file to the disciplinary tribunal. Instead of disciplining the soldier, most commanders prefer to send the case files to the tribunals.

There are basically three reasons why commanders prefer to send the case file to the tribunal: First, the length of punishment is different. Company commanders can punish soldiers up to seven days arrest in quarters. But if the tribunal finds the soldier guilty for the same offense, the punishment is up to two months in jail. For the breach of article 56, most punishments vary between ten to fifteen days imprisonment. Second, the military service period can be affected by the sentence. The sentence given by unit commanders does not adversely affect the service period of the soldier. However, if the tribunal orders punishment, the sentencing period does not count. Third, commanders view this as a fairness issue in practice and they try to be fair. One of the best ways to be fair for summary punishments is to send the case file to the tribunal instead of ordering punishment.

The education and the training level of unit commanders on legal issues are vital. If an offense is committed within military units, the unit commander's first response is crucial for the success of criminal investigation. Although the commander is the initial authority for the case, he must be very careful because the prosecutor keeps on the following investigation. The training period for ordinary soldiers especially for enlisted personnel is also very important. During their mandatory fifteen-month service period, the faster they learn the jurisdiction system, the quicker they adapt themselves to it.

The law and order in Turkish Armed Forces has to be preserved and taken care of by each soldier. Administrative branches and sections in Ministry of Defense, along with courts-martial, are working within this system. They all try to improve it by following the rules of European Court of Human Rights and Military High Administrative Court's decisions.