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Criminal Law Policy Against General Crimes Perpetrated by Indonesian National Army Soldiers

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Abstract
This paper examines the policy of criminal law in the implementation of the legal process against general crimes committed by Indonesian National Armed Forces Soldiers. Starting from the enactment of Law Number 34 of 2004 concerning the Indonesian National Army, Article 65 Paragraph 2 which regulates soldiers to be subject to the power of military courts in terms of violations of military criminal law and subject to the power of general courts in terms of violations of general criminal law. This brings a very basic change, because so far the military court has the authority to process the law to try all crimes committed by soldiers, both military crimes and general crimes. There are three things that want to be studied and reviewed in this research, namely to review the formal criminal law policy in the legal process against general crimes committed by Indonesian National Armed Forces Soldiers according to Law no. 31 of 1997, according to Article 65 paragraph (2) of Law no. 34 of 2004, and future formal criminal law policies. This type of research is normative legal research with a normative juridical approach. This research provides results, that in order for Article 65 Paragraph 2 of Law Number 34 of 2004 concerning the Indonesian National Army to be implemented properly, all matters (institutions and/or regulations deemed necessary) related to law enforcement must be prepared in advance. However, if this is difficult to do, then the best way is to revise in an integrated manner all relevant laws and regulations, or return to its original function Law no. 31 of 1997 concerning Military Courts.
Keywords: Criminal law policy, Legal process, Soldiers who commit general crimes.

1. Introduction.

Indonesia is a state of law as stated in Article 1 paragraph (3) of the 1945 Constitution, so it is proper for the Indonesian people to uphold the principles of the rule of law, one of which is the principle of an independent and impartial judiciary. The implementation of the principle of an independent and impartial judiciary depends on the independence of the judiciary in carrying out its duties and authorities as explained in the provisions of Article 24 paragraph (1) of the 1945 Constitution which states that: "Judicial power is an independent power to administer justice in order to enforce the law. and justice". Paragraph (2): "Judicial power is exercised by a Supreme Court and judicial bodies under it in the General Courts, Religious Courts, Military Courts,[1]

The elaboration of Article 24 paragraph (1) of the 1945 Constitution, then included in Article 18 of Law no. 48 of 2009, concerning Judicial Power which states: Judicial power is exercised by a Supreme Court and judicial bodies under it in the General Courts, Religious Courts, Military Courts, and State Administrative Courts.[2]

[1]Dahlan Thaib, 2011, *Teori Dan Hukum Konstitusi*, Rajawali Pers, Jakarta, p. 116.
[2]Indonesia, Law on Judicial Power, Law no. 48 of 2009, LN No. 157, TLN. No.5076, ps.1 5th.

Judging from its history, Military Courts have existed since 1946. In the subsequent history of military courts, for the implementation of its operationalization as a formal law, Law no. 31 of 1997 concerning Military Courts, which is regulated in Chapter IV from Articles 69 to 265 concerning Military Criminal Procedure Code. Based on Law no. 31 of 1997 concerning Military Courts, as regulated in Article 69 paragraph (1), it is stated that the responsibilities as investigators are the Ankum, Military Police, and the Prosecutor. Meanwhile, as an assistant investigator, it is the responsibility of the Provos Force.

Indonesian military law stems from the task of the Indonesian military (Tentara Nasional Indonesia) which is part and is one of the systems of Indonesian national law. Therefore, Indonesian military law has a basis, sources and scope that are in line with national law.[3]

In the history of the implementation of military law, the reasons that are considered by the military to hold a separate trial are:

- There is a heavy main task to protect, defend and defend the integrity and sovereignty of the Nation and State which, if necessary, is carried out by force of arms and by means of war.
- There is a need for special organization and special care and education in regard to their main and important task.
- He is allowed to use weapons and gunpowder in carrying out the tasks assigned to him.
- They need and then be treated to strict, severe and distinctive legal rules and norms and supported by severe criminal sanctions as a means of monitoring and controlling every member of the military so that they behave and act and behave in accordance with what is required. required by the main task.[4]

In 2004 the Government and the DPR made legal products in the form of:Law, namely the Republic of Indonesia Law no. 34 of 2004 concerning the Indonesian National Army. One of the contents of the article of the Act is article 65 paragraph (2) of the Republic of Indonesia Law no. 34 of 2004, which contains the following: Soldiers are subject to the power of military courts in terms of violations of military criminal law and are subject to the power of general courts in terms of violations of general criminal law as regulated by law.[5]

With the issuance of Law no. 34 of 2004 concerning the Indonesian National Armed Forces, in particular the rule of article 65 paragraph (2), it will become an obstacle in the implementation of law in Indonesia, because changes made to the judicial system will directly affect the effectiveness of the enforcement of existing laws in Indonesia.

Based on the description above, there are three formulations that become the purpose of this research, namely the first to identify and analyze formal criminal law

[3] S.R.Sianturi, 2010, *Hukum Pidana Militer Di Indonesia*, Badan Pembinaan Hukum Tentara Nasional Indonesia, Third Edition, Jakarta, p. 9.
[4]Ibid., pp. 53-54.
[5]Indonesia, Law on the Indonesian National Armed Forces, Law no. 34 of 2004, LN No. 127, TLN.No. 4439, p. 65 paragraph (2)

policies in the legal process against general crimes committed by Indonesian National Armed Forces Soldiers according to Law no. 31 of 1997, the second is to know and analyze formal criminal law policies in legal proceedings against general crimes committed by Indonesian National Armed Forces Soldiers according to Article 65 paragraph (2) of Law no. 34 of 2004 concerning the Indonesian National Armed Forces and the third is to find out and analyze formal criminal law policies in the legal process against general crimes committed by Indonesian National Armed Forces Soldiers in the future.

2. Research Method

This type of research is normative legal research, namely library research that examines document studies, which uses various secondary data such as legislation, court decisions, legal theory, and can be in the form of opinions of scholars.[6]The problem approach used in this study is a normative juridical approach, and the nature of this research is descriptive analysis, because this study aims to reveal or describe the laws and regulations relating to legal theories that are the object of research.[7]While the type of data used is primary data and is supported by secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials whose collection method is through library research/ documentary.[8] Then analyzed using a normative-qualitative analysis method, namely the data obtained are arranged systematically for further qualitative analysis based on the discipline of criminal law to achieve clarity of problems.

3. Results and Discussion

3.1. The formal criminal law policy in the legal process against general crimes committed by Indonesian National Armed Forces Soldiers according to Law no. 31 of 1997

The military law of a country is a sub-system of that country, because the military is part of a society or nation that carries out special tasks, namely carrying out the duties of the state and nation by using weapons or in other words the main task is to fight, for them norms are applied. or special rules.

Because the military task is the core in the defense and defense of the state, it is necessary to maintain order and high discipline in its organization, so that it seems as if it is a separate group to achieve or carry out its main tasks. For that we need a special

[6] Johny Ibrahim, 2010, *Teori & Metodologi Penelitian Hukum Normatif,* Bayumedia Publishing, Malang, p. 30.
[7] Irwansyah, 2021, *Penelitian Hukum, Pilihan Metode dan Praktik Penulisan Artikel*, Mirra Buana Media, Yogyakarta, p. 50-51
[8]Ibid.. 42-43

law and a separate court separate from the general court, namely military law and military court.[9]

Military Courts have existed since 1946, only the implementation is held concurrently by the Chair, Deputy Chair and members of the District Court, because there are no trained legal experts for military members, to meet these needs, in 1952 the Military Law Academy was established and developed into a Law College. Military (now the Military Law College), so that around 1961/1962 educated personnel in the military were able to fulfill the requirements and since then there has been a transition, if previously the positions of Chairman, Deputy Chairperson and members were held from the District Court and District Attorney's Office, then later transferred to personnel active military educated military law experts. Since then the Military Courts have been formally and materially established. And at the same time, Law no. 8 of 1946 concerning the Rules of Criminal Procedure for Military Courts, as well as in every legislation of the Republic of Indonesia which regulates the composition and powers of the Courts issued later, there is always a provision regarding the existence of a Military Court which is separate from the general court. Then in article 35 of Law no. 29 of 1954 concerning the State Defense of the Republic of Indonesia, states that the Military Court is separate from the general court, as follows:

- The Armed Forces have their own judiciary and the Commanders have the right to hand over cases.
- The structure and powers of the bodies entrusted with the administration of military justice in a broad sense, military criminal law, material and formal, including military discipline law, are regulated by law.[10]

Viewed from a justicial point of view, criminal law in a material and formal sense is part of positive law, which applies to military court justice, besides that the military is also an inseparable part of society. Because the military is part of society, as a result, the military is not subject to generally accepted rules, it also applies special rules called military law.[11]

Courts within the Military judiciary consist of:

- Military Court, abbreviated as Dilmil.
- High Military Court, abbreviated as Dilmilti.
- The Main Military Court, abbreviated as Dilmiltama.
- Military Court of Battle, abbreviated as Dilmilpur.

In the Military Criminal Procedure Code (HAPMIL), the investigators and assistant investigators are the ones who carry out the investigative duties.
Investigators are:

- Superiors Who Have the Right to Punish;
- Military police; and

[9] Moch. Faisal Salam. Hukum Acara Pidana Militer Di Indonesia, Cet. 2, (Bandung: Mandar Maju, 2002),, p. 14
[10]Position Paper of the Indonesian Legal Aid Foundation. "The Bill on Amendments to Law No. 31 of 1997 concerning Military Courts." <http://www.parlement.com/2009/Q4/2235.htm>. 27 April 2009
[11] Fadillah, Agus. "*Kajian Kritis Terhadap RUU tentang Peradilan Militer."*Paper on "Penataan Kerangka Regulasi Keamanan Nasional." Jakarta: Propatria Institute, 2006.

- prosecutor.

While the Assistant Investigators are:

- Army National Army Provost;
- Naval National Army Provost;
- Air Force National Army Provost.[12]

The Military Court regulates the authority of Ankum and Papera.For the purposes of investigation, investigators are authorized to make arrests. The act of arresting and detaining is the authority of the relevant Ankum carried out by Military Police investigators or members of Ankum's subordinates by showing an arrest warrant. Ankum and Papera have the authority to make arrests. For the purposes of the investigation, Ankum with its decision letter, has the authority to detain a suspect for a maximum of 20 (twenty) days and if necessary for the purpose of examination, Papera can extend it.

At the stage of handing over the case, the authority to hand over the case to the court within the Military Court or to the court within the General Court lies with the Case Submission Officer (Papera). The closure of cases for public/military interests is carried out by the TNI Commander. If Papera intends to close the case for the public/military interest, then the Papera hierarchically submits a proposal with considerations and reasons to the TNI Commander. The TNI Commander issues a Decision on Case Closure in the public/military interest after hearing the advice/opinion of the TNI's Auditor General (Orjen). In the Military Criminal Procedure Code, the prosecution stage is included in the case submission stage, and the prosecution is carried out by the Prosecutor who is technically juridically responsible to the Prosecutor General.

In Military Courts, the implementation of pExaminations in trials concerning criminal cases are known as ordinary examination procedures, quick examination procedures, special examination procedures, and connectivity examination procedures. The quick examination program is an event to examine traffic and road transportation cases, while the special examination program is an examination program for the military court of battle. For certain military crimes, the Military Criminal Procedure Code recognizes in absentia justice, namely in the case of dissertation.

3.2. The formal criminal law policy in the legal process against general crimes committed by Indonesian National Armed Forces Soldiers according to Article 65 paragraph (2) of Law no. 34 of 2004 concerning the Indonesian National Army.

The provisions stated in Article 65 paragraph (2) of Law Number 34 of 2004 concerning the TNI are a continuation of Article 3 paragraph (4) of the MPR Decree Number VII/MPR/2000 concerning the Role of the TNI and Polri which states that TNI soldiers are subject to the authority of the military court. in the case of violations of the military criminal law and submit to the power of the general court in the case of violations of the general criminal law.

[12]Indonesia, Law on Military Courts, Law No. 31 of 1997, LN No. 84 of 1997, TLN No. 3713, p. 69.

For the criminal law policy that applies to TNI soldiers in accordance with Article 65 paragraph (2) of Law Number 34 of 2004 concerning the TNI, it is subject to the power of the general court whose procedural law is regulated inUU no. 8 of 1981 concerning the Criminal Procedure Code.

The Criminal Code does not provide an authentic understanding of who is meant by an official (civil servant), but the limitation in Article 92 paragraph (3) of the Criminal Code reads: "All members of the armed forces are also considered civil servants".[13]Thus, the Criminal Code is also applied to members of the Indonesian National Armed Forces, or members of the military.

In general criminal procedure law as regulated in Law no. 8 of 1981,**y**The person authorized to carry out an investigation is every official of the State Police of the Republic of Indonesia (Article 4).[14]Based on the provisions of Article 5 paragraph (1) letter b, expanding the authority of Indonesian National Police officers, including the authority to: arrest, prohibition from leaving the premises, search and confiscation; examination and confiscation of letters; take fingerprints and photograph a person; bring and bring someone before the investigator. The article above is actually a follow-up process and as a logical consequence of the exercise of the authority that is in the hands of the Indonesian National Police, as stated in Article 5 paragraph (1) letter a.

In the process of resolving criminal cases, Indonesian National Police officers are authorized to make arrests (Chapter V part One). Articles 16 to 19 regulate arrests which contain: a report and the length of time an arrest can be made; who has the right to arrest; what is the content of the arrest warrant; when an arrest can be made without an arrest warrant.[15] Regarding when an arrest can be made, the Criminal Procedure Code stipulates as follows: if there is sufficient preliminary evidence (Article 17); if the interest of investigation and investigation requires or requires it (Article 16); if the person, against whom the arrest will be made, is strongly suspected of committing a crime (Article 17). Arrest can only be made with an arrest warrant, except in the case of being caught red-handed (Article 18 paragraph 2).[16]

The continuation of the criminal case settlement process in the general criminal procedure law is detention which is regulated in Chapter V Part Two, Articles 20 to 31. Based on the overall provisions regarding detention, the legislators pay attention to four things, namely the length of detention that can be conducted ; law enforcement officers authorized to make detentions; the limit on the extension of the detention period and its exceptions; things that can suspend detention;[17]

For implementationthe process of examining criminal cases before the Court, based on Law Number 8 of 1981, is initiated by a notification to come to a court hearing which is carried out legally according to the law. After the notification letter is delivered to the suspect, and the public prosecutor has transferred the case to the District Court according to the applicable law.

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[13]The Criminal Code, compiled and translated by Moeljatno, cet. 14, Jakarta : Bina Aksara, 1985), ps. 92
[14]Law on Criminal Procedure Law, No. 8 of 1981, LN No. 76 of 1981, TLN No. 3209. ps. 4
[15]Ibid.
[16]Ibid
[17]Ibid

From the description of the formulation of the Criminal Procedure Code above, which is related to the legal status of TNI Soldiers who are perpetrators of general crimes according to Law number 34 of 2004, it appears that it has not been explicitly regulated in the Criminal Procedure Code, so that the investigator's authority as stated in Articles 6 and 7 of the Criminal Procedure Code cannot be exercised against TNI Soldiers as long as no changes/revisions have been made.

The basic ideas of reformative thinking and legal political directions/lines are contained in TAP MPR/VII/2000, Law no. 48 of 2009 concerning Judicial Power, and Law no. 34 of 2004 concerning the TNI should indeed be the basis for making changes to the legislation, including changes to the Law on Military Courts. However, from the point of view of the policy of reforming or rearranging the overall order (system) of the military criminal law, it is still worth reviewing whether it is appropriate at this time that only the Military Court Bill is being updated.[18]

The renewal of the military criminal law system should include an integral (systemic) renewal, namely the renewal of the entire subsystem which includes: aspects of "legal substance" (*legal substance*),both in the form of military criminal law and military criminal procedural law; aspects of the "legal structure" related to law enforcement agencies/apparatus; and aspects of “legal culture” (legal culture). In the current state of the legal system, if only the Military Court Law (UU No. 31/1997) is amended, which mostly regulates aspects of judicial structure/institution (its competence/jurisdiction) and procedural law, it means that only partial changes have been made. .[19]

It has been stated above, that in carrying out the reform/reconstruction of a comprehensive (integral) Military Criminal Law System, policy measures should be taken by conducting the following studies:

- Study of Aspects of Legal Substance
- Study of Legal Structure Aspects
- Study of Legal Culture Aspects.

From the explanation above, if it is related to the problem of examining TNI soldiers who are perpetrators of general crimes, it can be said that the investigating officers in the general court have not been able to use their authority to the fullest for the current conditions, they still need a fairly clear legal umbrella as a guideline for its implementation.

3.3. Formal criminal law policy in the legal process against general crimes committed by Indonesian National Armed Forces Soldiers in the future.

Criminal law reform must be pursued with a policy-oriented approach ("policy oriented approach") and at the same time a value-oriented approach ("value oriented

[18] Barda Nawawi Arief, Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan, PT Citra Aditya Bakti, Bandung, 2005, p. 11

[19] Barda Nawawi Arif, *”Menuju Sistem Peradilan Militer Yang Sesuai Dengan Reformasi Hukum Nasional dan Reformasi Hukum TNI.* Paper presented at the Military Courts Workshop, Bogor, 27 - 29 March 2006.

approach").[20] Regulations and laws are made to be implemented and obeyed by the community, in legal theory there are three kinds of things that apply the law as a rule:

- The rule of law applies juridically.
- The rule of law applies sociologically.
- The rule of law applies philosophically.

The formation of a law must have a clear goal to be achieved, the existence of an appropriate institution or forming organ where there must be a match between the type and content of the content and can be implemented,

the formation of the Law must be efficient and effective, have clear formulation and openness. Article 65 paragraph (2) of the Law of the Republic of Indonesia No. 34 of 2004 concerning the submission of soldiers to the General Court in terms of committing general crimes and to the Military Courts in terms of committing military crimes, if this article is examined it will be found that there is a discrepancy between the type and material of the content, viewed from the theory of the application of law as a rule, where the Juridically applicable law underlies the determination of rules to higher rules. This shows that in the product of this Law there has been a stipulation that is not at the level of authority of the article, because the Law must refer to a higher law, in this case the 1945 Constitution. Then article 65 paragraph (2) of the Law of the Republic of Indonesia No. 34 of 2004 seems to have been made in a hurry which has resulted in the Act being unable to be implemented, because it must require several amendments to the related Law, which supports the Law to be implemented or effectively enforced.

According to the author, in terms of enactment of a law, what needs to be prepared first is material law material, in this case the material law applied to the military is still based on article 2 of Law no. 39 of 1947 concerning the Military Criminal Code. The enforcement of Article 65 paragraph (2) of the Law of the Republic of Indonesia No. 34 of 2004 sociologically must look at the legal culture of the community affected or regulated by the Act, because this is an influential factor in the success of its implementation.

The TNI in carrying out its duties and responsibilities for national defense supported by all levels of society, of course, must also pay attention to the problem of legal culture (internal discipline) that exists in these community groups, without ignoring the principle of*equality before the law*.[21]

From the results of interviews and opinions in the form of written texts as described previously, the authors observe that there are at least three opinions regarding the application of general judicial jurisdiction to the military. The first opinion requires full implementation. This means that the application of general judicial jurisdiction to the military is carried out starting from the investigation stage until the implementation of the decision. They argue that the Criminal Procedure Code

[20] Sri Endah Wahyuningsih., Urgensi Pembaharuan Hukum Pidana Materiel Indonesia Berdasarkan Nilai-Nilai Ketuhanan Yang Maha Esa, Jurnal Pembaharuan Hukum, Volume 1 No.1 January-April 2014

[21] Yuwana, Hikmahanto. *"Wacana Kewenangan Peradilan Militer dalam Perspektif Law and Development.*Paper presented at the STHM Graduate and Postgraduate Graduation, Jakarta, November 2006.

applies to the military who commit general crimes. The second opinion wants the application of general judicial jurisdiction to the military to be carried out after the existence of a special law that regulates general judicial proceedings for members of the military. This group requires a prior study for the application of general judicial jurisdiction to the military. The third opinion actually wants Article 65 paragraph (2) of Law Number 34 not to be applied. This opinion was expressed by the government who wanted the military court to stick to the old law, namely Law Number 31 of 1997 concerning Military Courts.

4. Closing

With the issuance of Law no. 34 of 2004 concerning the TNI, especially the content of Article 65 paragraph (2), at this time there are no supporting regulations so that this Law can be implemented properly. Thereforeit is necessary to first complete the laws or supporting regulations so that they can be implemented, especially in the field of material law. In addition, sociological and psychological factors greatly influence the implementation of the preliminary examination, because what is being examined is a soldier who has weapons and is specially trained to carry out his duties in carrying out national defense. If a pure general criminal justice system is in effect, then juridical provisions shall apply, namely the rule of law which states expressly that the Police are investigators against members of the military who commit criminal acts. If the systems are combined, the Military Police can remain as investigators against soldiers who commit crimes.

Laws are made to be implemented, but if the law/law only has juridical validity, then there is a possibility that the law is only a dead rule. Therefore, so that Article 65 paragraph (2) of Law no. 34 of 2004 concerning the Indonesian National Armed Forces can be implemented properly, the authors suggest that all things (institutions and/or regulations deemed necessary) related to law enforcement must be prepared in advance. However, if this is difficult to do, then the best way is to revise in an integrated manner all relevant laws and regulations, or return to their original function of Law no. 31 of 1997 concerning Military Courts.

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