

## **Legal Analysis of The Authority of Military Courts in Trying Officers Who Commit General Crimes**

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**Abstract.** *The purpose of this study is to determine the authority of the military court in trying members who commit general crimes and to analyze the authority of the military court in trying members who commit general crimes in the future. The approach method used in this study is the normative legal method. This type of research uses descriptive analysis research. Secondary data in this study were obtained through literature studies and to support secondary data as the main data in this study. The results of this study are (1) The authority of the military court to try members who commit general crimes is regulated in several regulations, including Article 3 paragraph (4a) of MPR Decree Number VII/MPR/2000, Law Number 34 of 2004 concerning the Indonesian National Army, and Law Number 31 of 1997 concerning Military Justice. The differences in jurisdiction in these regulations create legal uncertainty and give rise to inconsistency in determining which court has the authority to try military members who commit general crimes. This uncertainty also has the potential to reduce the level of public trust in the justice system, because the public may see inconsistency in law enforcement as a form of injustice. This legal uncertainty can also have an impact on the rights of the accused and victims, where legal protection and basic rights that should be provided may not be fully guaranteed. (2) The authority of the military court to try members who commit general crimes in the future should be that the military court in trying should only have the authority to try violations related to military duties as regulated in the Military Criminal Code (KUHPM). Then if a military soldier commits a general criminal violation, he must be tried in a general court like other citizens. As the Military Court Law, in essence this court was created to try violations related to military duties themselves.*

**Keywords:** *Authority; Criminal; Military; Offenses.*

## 1. Introduction

Based on Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the Republic of Indonesia is a state of law. A state of law is a type that is commonly found in nations around the world. A state of law has left behind the type of state that governs based on the will of the ruler.<sup>1</sup> Since this change, the country has been governed based on laws that have been made and provided previously and the rulers are also subject to these laws.<sup>2</sup> This means that no one is above the law, both officials and ordinary citizens are obliged to obey the law.<sup>3</sup>

The rampant general criminal acts committed by certain TNI soldiers and the perceived low verdicts of the military courts that tried these cases as well as allegations of several human rights violations by certain soldiers that were not fully resolved gave rise to public distrust of the Military Court institution because it was considered to have violated the values of justice, thus becoming a strong reason for Law Number 31 of 1997 concerning Justice. The military must be changed considering that the legal system in this law regulates that all forms of criminal acts committed by TNI soldiers, both military crimes and general crimes, must be resolved through military courts.

The military justice system also lacks clarity regarding guarantees for civil rights for military members when they are dealing with military justice, such as the right to be accompanied by a lawyer/legal advisor, the right to know the reasons for their arrest and/or charges, the right not to be intimidated and tortured, the right to contact and meet family and other rights that are not regulated at all in the military justice system, because basically soldiers or military members are also citizens (citizens in uniform) so that they also have the same rights before the law as other citizens, where the state must guarantee that these rights are fulfilled.

The criminal acts referred to in Article 9 number 1 of Law Number 31 of 1997 above include military crimes and general crimes. However, the provisions regarding judicial jurisdiction over TNI soldiers who commit criminal acts have undergone quite significant changes after the reformation. This can be seen in the provisions of Article 3 paragraph (4) letter a of MPR Decree Number VII/MPR/2000 and is reaffirmed in Article 65 paragraph (2) of Law Number 34 of 1997.<sup>2004</sup> on the Indonesian National Army. The two articles essentially state that TNI soldiers are subject to the authority of the Military Court in cases of committing military crimes and are subject to the authority of the General Court in cases of committing general crimes.

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<sup>1</sup>EY Kanter and SR Sianturi, Principles of Criminal Law in Indonesia and their Application, Stora Grafika, Jakarta, 2002, p. 6

<sup>2</sup>Satjipto Rahardjo. A Legal State that Makes Its People Happy. Genta Publishing, Yogyakarta, 2009, p. 2.

<sup>3</sup>Philipus M. Hadjon. Legal Protection for the Indonesian People, Civilization, 2007 p. 75.

Based on the provisions of Article 3 paragraph (4) letter a of MPR Decree Number VII/MPR/2000 and Article 65 paragraph (2) of Law Number 34 of 2004 above, it can be seen that there are two judicial jurisdictions that apply to TNI soldiers who commit criminal acts, that is Military Courts and General Courts. Military Courts have the authority to try TNI soldiers who commit military crimes, while General Courts have the authority to try TNI soldiers who commit general crimes. This is different from the judicial jurisdiction applicable to TNI soldiers who commit crimes in Law Number 31 of 1997 which is only given to Military Courts.<sup>4</sup>

Ironically, reality shows that the provisions of Article 3 paragraph (4) letter a of MPR Decree Number VII/MPR/2000 and Article 65 paragraph (2) of Law Number 34 of 2004 have not been implemented to date, especially concerning the jurisdiction of the General Court over TNI soldiers who commit general crimes. As a result, the implementation of judicial jurisdiction for TNI soldiers who commit general crimes still uses and is based on Law Number 31 of 1997. This is a consequence of the provisions of Article 65 paragraph (3) of Law Number 34 of 2004 which in essence states that if the jurisdiction of the General Court is not functioning, so TNI soldiers who commit crimes are tried in the Military Court, both for military crimes and general crimes.<sup>5</sup>

The situation and conditions above show that there is a gap between the normative provisions (*dasSole*) with the reality on the ground (*das Sein*) concerning the jurisdiction of the General Court over TNI soldiers who commit general crimes

The purpose of this research is to analyze the authority of military courts in trying members who commit general crimes and to analyze the authority of military courts in trying members who commit general crimes in the future.

## 2. Research methods

The approach used in conducting this research is through a Normative legal approach. Legal discussion means a discussion based on laws and other regulations. While normative discussion is by examining library materials or secondary data alone.<sup>6</sup>

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<sup>4</sup>Lisnawaty W. Badu and Apripari, Initiating Military Crimes as Absolute Competence of Military Justice in Criminal Cases, *Jurnal Legalitas*, Vol. 12, No. 1, 2020, p. 58-81

<sup>5</sup>Rahmani Samsul, The Authority of Military Courts in Examining and Trying Criminal Acts of Misuse of Firearms, *Iqtishaduna: Scientific Journal of Students of the Department of Islamic Economic Law*, Volume 2 Number 1 October 2020, p. 21-29

<sup>6</sup>Soerjono Soekanto and Sri Mahmudji, *Normative Legal Research, A Brief Review*, Jakarta: Raja Grafindo Persada, 2003, p. 13

### 3. Results and Discussion

#### 3.1 Analysis of the Authority of Military Courts in Trying Members Who Commit General Crimes

Indonesia as a state of law based on Pancasila and the 1945 Constitution (hereinafter referred to as the 1945 Constitution), aims to realize a safe, orderly, prosperous, just and prosperous society, nation and state, one of the most important factors in realizing this national goal is the aspect of national defense. The opening of the 1945 Constitution states that the purpose of establishing the Indonesian state is to protect all Indonesian people and all of Indonesia's territory, advance public welfare, educate the nation's life and participate in implementing world order based on independence, eternal peace and social justice. The realization of all social life systems that are orderly, safe, prosperous, just and prosperous cannot be separated from maximum national defense efforts.<sup>7</sup>

The Military Court is authorized by law to act as a special court (*lex specialist*) which examines and tries criminal acts committed by groups of the population which are organized as part of the TNI, specifically to carry out state duties in the field of organizing national defense which is subject to and enforced by military law.

The aspect of the application of Military Law to TNI soldiers is what positions Military Courts as special courts in the state justice system that coexists with the other three courts, namely general courts, religious courts and state administrative courts. So based on this provision, TNI members who commit general crimes are not tried in general (civil) courts.

According to Sianturi, perpetrators of a general crime (which is not listed in the Military Criminal Code), which is carried out by people who are subject to the authority of military courts, are subject to general criminal law, unless there are deviations stipulated by law.<sup>8</sup>From Sianturi's statement it is clear that TNI members who commit general crimes remain subject to the authority of the Military Court.

According to Barda Nawawi Arief, the material legal norms that currently apply to TNI soldiers, who commit general crimes (violations of general criminal law) as referred to in Article 3 (4a) of MPR Decree Number VII of 2000, are regulated in the Criminal Code, this means that it is the Military Court that applies the provisions in Article 2 of the Criminal Code. It is impossible for the material

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<sup>7</sup>Erna Kurniawati (et. al), The Authority of the Military Court I-01 Banda Aceh in Trying General Criminal Acts Committed by TNI Members in Aceh, *Syah Kuala Law Journal*, Vol. 2, No. 2, 2018, p. 216-233

<sup>8</sup>Sianturi, 2010, *Military Criminal Law in Indonesia*, Babinkum TNI, Jakarta, p. 58

criminal legal norms for the military/TNI soldiers contained in the Criminal Code to be applied by the General Court.<sup>9</sup>

Absolute judicial jurisdiction, or often known as absolute competence, is related to the authority of the judicial environment to examine and decide a case, while relative judicial jurisdiction, or often called relative competence, is related to the authority of a similar court in examining and deciding a case.

The provisions regarding the jurisdiction of the courts over TNI soldiers who commit crimes are regulated in Article 9 number 1 of Law Number 31 of 1997 which basically confirms that the court that has the authority to try TNI soldiers who commit crimes is the Military Court, both military crimes regulated in the KUHPM (Military Criminal Code) and general crimes regulated in the Criminal Code and various other laws outside the Criminal Code.

The regulation regarding judicial jurisdiction in Indonesia can be seen from the provisions of Article 24 of the 1945 Constitution of the Republic of Indonesia which was followed up by Law Number 14 of 1970 which was then amended by Law Number 48 of 2009 concerning Judicial Power which stipulates that judicial power in Indonesia is exercised by a Supreme Court and the Judicial Bodies under it in the general judicial environment, religious judicial environment, military judicial environment and state administrative judicial environment and by a Constitutional Court.

As the reform movement rolled, there was a significant change in the authority to try TNI soldiers who committed general crimes. This fundamental change occurred because of the rapid pace of information development in society which had implications for the emergence of demands for military justice, especially the Military Court which was still considered very closed and often imposed sentences that were considered light to military members who committed crimes, thus injuring the sense of justice.

This significant change was marked by the birth of MPR Decree Number VII/MPR/2000 concerning the Role of the Indonesian National Armed Forces and the Role of the Indonesian National Police, where through this MPR Decree in line with the process of democratization and globalization and facing future demands, it is necessary to improve the performance and professionalism of the defense and security forces through restructuring the role of the Indonesian National Armed Forces and the role of the Indonesian National Police, considering that these two institutions fundamentally have different doctrines in carrying out their roles and duties. The TNI has a doctrine that is oriented towards destroying the enemy to defend the sovereignty of the state, while the Polri carries out government duties in the field of law enforcement with the authority to conduct investigations and

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<sup>9</sup>Barda Nawawi Arief, 2006, Before the Military Justice Law Was Amended, Advocacy Magazine Edition 6, December 2020

inquiries into alleged criminal acts so that a separation of roles is carried out, namely the role of the TNI in the field of defense and the role of the Indonesian National Police in the field of security.

Article 2 paragraph (1) and paragraph (2) of MPR Decree Number VII/MPR/2000 states that the TNI is a state apparatus that plays a role in the framework of state defense and has the main task of upholding state sovereignty, the integrity of the territory of the Unitary State of the Republic of Indonesia (NKRI) which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia, and protecting the entire nation and all of Indonesia's territory from threats and disturbances to the integrity of the nation and state, while the Polri is a state apparatus that has a role in maintaining public security and order, enforcing the law, providing protection and services to the community.

This separation of roles was followed by a change in the paradigm of the criminal justice system that applies to the military or TNI soldiers so that there are two judicial jurisdictions for military personnel who commit crimes as regulated in Article 3 paragraph (4) letter a of MPR Decree Number VII/MPR/2000 which reads: "TNI soldiers are subject to the authority of the Military Court in cases of violations of military law and are subject to the authority of the General Court in cases of violations of general criminal law."

The provisions of Article 3 paragraph (4) letter a of MPR Decree Number VII/MPR/2020 are further emphasized by the issuance of Law Number 34 of 2004 concerning the Indonesian National Army, where the provisions of Article 65 paragraph (2) state that: "TNI soldiers are subject to the authority of the Military Court in cases of violations of military law and are subject to the authority of the General Court in cases of violations of general criminal law as regulated by law."

Referring to the MPR Decree Number VII/MPR/2020 concerning the Role of the Indonesian National Armed Forces and the Role of the Republic of Indonesia Police as well as Law Number 34 of 2004 concerning the Indonesian National Armed Forces mentioned above, the military or TNI soldiers who commit general criminal law violations (criminal acts) are subject to the authority of the General Court and the military who commit military criminal law violations are subject to the authority of the military court.

Submission to the authority of the General Court (civilian) for military members (TNI soldiers) who commit crimes or violations of general criminal law as mandated through MPR Decree Number VII/MPR/2020 and Law Number 34 of 2004 concerning the TNI has not been implemented in judicial practice to date. Trials against military members who commit violations of general criminal law are still carried out by the Military Court, this is due to the transitional provisions in Article 74 of Law Number 34 of 2004 concerning the TNI, which reads:

(1) The provisions referred to in Article 65 shall apply when the new law on Military Courts is enacted.

(2) As long as the new Military Court Law has not been formed, it remains subject to the provisions of Law Number 31 of 1997 concerning Military Courts.

Article 74 of Law Number 34 of 2004 essentially mandates the formation of a new military court law as a replacement for Law Number 31 of 1997, so that as long as the new Military Court Law cannot be realized, the military (TNI soldiers) who commit general crimes remain subject to the jurisdiction of the Military Court in accordance with Law Number 31 of 1997.

Legal uncertainty in the regulations on the authority of military courts to try members who commit general crimes leads to doubts in law enforcement practices about which authority should be applied in certain cases. Military courts may continue to process general criminal cases committed by military members, even though general courts should have the authority according to the latest provisions. This creates inconsistency in the application of the law and can result in inconsistent treatment of lawbreakers based on their status as military members.

Differences in jurisdiction can affect the legal rights of individuals and the outcome of the judicial process itself. If general criminal cases involving military personnel are processed in military courts, this can result in decisions that are inconsistent with the principles of general justice, given that military courts may have different procedures and considerations than regular courts.

This uncertainty also has the potential to reduce the level of public trust in the justice system, because the public may see inconsistencies in law enforcement as a form of injustice. This legal uncertainty can also impact the rights of the accused and victims, where legal protection and basic rights that should be provided may not be fully guaranteed.

### **3.2 The Authority of Military Courts to Try Members Who Commit General Crimes in the Future**

In the processThe resolution of a criminal case requires procedures by a certain legal institution that have been determined in the law. When someone commits a crime, he will be processed and investigated and followed up with an investigation process to prove the validity of his actions.<sup>10</sup>

In the legal world in Indonesia, it is known that "The judiciary is the last bull of law enforcement and justice". The judge is the most important position in the world of justice. From the perspective of law enforcement, judges are seen as perfect

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<sup>10</sup>HA Afandi, *Non-Legal Factors in Military Cases*, Chandra Pratama, Jakarta, 2004, p. 6

human beings, know everything that falls within their authority, and must not openly admit their ignorance of the matters they are handling.<sup>11</sup>

With the aspect of justice in the current military justice system being the main focus, especially with the planned changes to Law No. 31 of 1997 concerning Military Justice, with various cases that have occurred receiving quite touching attention among the public, for members of the military who... committing a crime, Military Justice has become a safe haven. Where military law is a special legal basis, written or unwritten, that applies in the Armed Forces environment, where the law affects the interests of National Defense. In the world of law in Indonesia, it is known that "The Court is the last straw for Law Enforcement and Justice". Judges are the most important position in the world of Justice. From a law enforcement perspective, judges are seen as perfect human beings, knowing everything that is within their authority, and must not openly admit their ignorance of the cases they are handling.<sup>12</sup>

The character of the military justice system like this is indeed effective in upholding justice related to military service itself. Because it is built in accordance with the spirit of soldiers such as the existence of a ranking and hierarchy system. On the other hand, if a military court like this tries general criminal violations committed by soldiers, it will actually be a problem because it will conflict with the principle of the rule of law, namely equality before the law because in military justice all implementation of the justice system is carried out by TNI soldiers themselves, meaning that the process and trial will be different from non-military people if they commit general crimes.

Based on various concepts, legal principles, legal theories as explained above, it is only right that military law reform be carried out. The principle of equality before the law requires that all citizens be treated equally before the law without exception.<sup>13</sup> Equality before the law means that whoever he is (a citizen) when committing the same violation of the law must be processed with the same process and tried in the same court. The consequence of the concept of equality before the law is that TNI soldiers when committing general criminal violations must be processed and tried in general courts like other citizens.

Then this provision was followed by Law Number 34 of 2004 concerning the Indonesian National Army, Article 65 paragraph (2) and (3), which reads as follows:

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<sup>11</sup>Halim Talli, Integrity and Active-Argumentative Attitude of Judges in Case Examination, Jurnal al-daulah, Vol. 3 No. 1, 2014, p. 6

<sup>12</sup>A. Rahmani Samsul (et. al), The Authority of Military Courts in Examining and Trying Criminal Acts of Misuse of Firearms, Iqtishaduna: Scientific Journal of Students of the Department of Islamic Economic Law, Volume 2, Number 1, October 2020, p. 21-29

<sup>13</sup>Muhammad Ishar Helmi, Implementation of the Principle of Equality Before the Law in the Military Justice System, Jurnal Cita Hukum. UIN Syarif Hidayatullah Jakarta, Vol. I, No. 2 December. 2013, pp. 32-45



(2) Soldiers are subject to the authority of military justice in cases of violations of military criminal law and are subject to the authority of general justice in cases of violations of general criminal law.

(3) If the general judicial authority as referred to in paragraph (2) is not functioning, then soldiers are subject to the judicial authority regulated by law.

The formulation of the norms of Article 3 paragraph (4) and Article 65 paragraph (2) is actually an implementation of the principle of equal treatment before the law (equality before the law). The mandate of the people in the two laws above requires that military personnel who commit general criminal law violations must be tried in general courts, then when military personnel commit military law violations, they must be tried in military courts.

The mandate of the people above also requires that the jurisdiction of the military court be limited, the military court in trying must only have the authority to try violations related to military duties as regulated in the military criminal code (KUHPM). then if a military soldier commits a general criminal violation, he must be tried in a general court like other citizens. Thus the term criminal act in Article 9 of Law Number 31 of 1997 concerning Military Justice which states that the Court within the military justice environment has the authority to try criminal acts committed by a person...." The term criminal act in Article 9 must be changed to "the military court only has the authority to try military crimes."

If we look more deeply into the position and structure of the military court as regulated in the Military Court Law, in essence this court was created to try violations related to military duties themselves, therefore in the military court system there is the character or soul of the military soldier himself such as the existence of a chain of command, a ranking system and hierarchy.

The renewal of military law, specifically on the jurisdiction of the military court to try, is also intended to restore the function of the military court to its natural state, namely to only have the authority to try criminal offenses related to military duties themselves. Then, military personnel as citizens who have the same rights and obligations as other citizens must be treated equally before the law, meaning that when military personnel commit general criminal offenses, they must be processed and tried in the same court as other citizens.

Judicial jurisdiction does not see criminal acts based on the subject of the perpetrator. But based on the offense or crime committed. Therefore, general crimes committed by TNI members should be included in the general criminal justice environment, and no longer the realm of military justice.

#### 4. Conclusion

The authority of the military court to try members who commit general crimes is regulated in several regulations, including Article 3 paragraph (4a) of MPR Decree Number VII/MPR/2000, Law Number 34 of 2004 concerning the Indonesian National Army, and Law Number 31 of 1997 concerning Military Justice. The difference in jurisdiction in these regulations creates legal uncertainty and inconsistency in determining which court has the authority to try military members who commit general crimes. This uncertainty also has the potential to reduce the level of public trust in the justice system, because the public may see inconsistency in law enforcement as a form of injustice. This legal uncertainty can also have an impact on the rights of the accused and victims, where legal protection and basic rights that should be provided may not be fully guaranteed. The authority of the military court to try members who commit general crimes in the future should be that the military court in trying should only have the authority to try violations related to military duties as regulated in the military criminal code (KUHPM). then if a military soldier commits a general criminal offense, he must be tried in a general court like other citizens. As the Military Court Law, in essence this court was created to try violations related to military duties themselves, therefore in the military justice system there is the character or soul of the military soldier himself such as the existence of a chain of command, the existence of a ranking system and hierarchy. The renewal of military law, especially in the jurisdiction of the military court to try, is also intended to return the function of the military court to its nature, namely so that it only has the authority to try criminal offenses related to military duties themselves.

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