

Military Judgment Considerations Unworthy (Ongeschikt) for The Perpetrator of Immoral Criminal Act

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Abstract. Apart from being committed with civilian cases, cases of decency crime are also encountered with military status, even being processed in military courts. The scope of decency in this study is participating in adultery as formulated in Article 284 of the Criminal Code. The threat of criminal sanctions for decency is not only imprisonment, but additional punishment of dismissal from military service. Military judges in imposing additional sentences of dismissal must be based on reasons for considering whether or not they are eligible to serve in the military environment. There is a disparity problem among military judges in interpreting the inappropriate meaning of a TNI Soldier so that it impacts the image in society.

Keywords: criminal act; decency; TNI soldiers

1 Introduction

Humans are social creatures that live in a society in which there are signs for every member of society in the form of good or bad behavior. Decency is the habit of life of a society, which is in accordance with the conditions or characteristics of the community concerned with the existence of the norms of decency in society, so the community is in an orderly state. [1] On the other hand, if the violation of the norms of decency is not enforced, it will usually arise in the midst of society and constitute a crime that can be categorized as a criminal act.

The norms of decency limit the individual behavior of society so as not to go beyond the limits of decency as an immoral act. Sociologically, the control function of violations of the norms of decency as outlined in national law politics lies in the hands of the community as victims of decency crimes, but juridically lies with the judicial power. [2] Therefore, criminal acts of decency are processed by law enforcement agencies according to the level of the process.

Every person who commits a criminal act will of course be subject to criminal sanctions regardless of whether they are civilian or military. Therefore, of course, there are still elements of TNI soldiers who violate the law, both criminal acts and disciplinary violations, [3] both while serving and outside of service. In this paper specifically discusses Indonesian National Army Soldiers (TNI Soldiers) who commit crimes of decency. The scope of the crime of decency is limited to the offense of "participating in adultery" which is punishable by Article

284 paragraph (1) of the Criminal Code where the perpetrator is a member of the TNI Soldier. A TNI soldier who commits a criminal act of "participating in adultery" is not only subject to 9 months imprisonment, and the threat of additional punishment in the form of dismissal as a TNI Soldier. This is determined in Article 26 of the Military Criminal Code (KUHPM).

The specificity of Military Criminal Law cannot be separated from the specific nature and nature of members of the Military itself, so that the Military criminal law may deviate from the principles of general criminal law general public. [4]

The additional criminal sentence of dismissal is the harshest punishment for a TNI soldier. It is known that the additional criminal sentence of dismissal is carried out if the criminal act is involved in committing adultery committed by TNI Soldiers with fellow soldiers, wives, children, TNI PNS, who are members of the TNI extended family or are popularly known as the TNI Large Family (KBT).

There are strict sanctions arrangements for soldiers involved in decency violations which are formulated in the Telegram Letter of the TNI Commander (ST Panglima) No. 198/2005. However, ST Panglima is not included in the hierarchy category of legislation, so that the military judge cannot be used as a basis for his consideration in a decision. In the meantime, what a military judge takes into account when passing a verdict who considers inappropriate (*ongeschikt*) is a defendant who lacks or does not have the characteristics that should be a soldier. Therefore, it needs to be elaborated in this study which becomes a parameter of 'unfit' for a soldier, because military judges may cause differences in interpretation.

In practice, the Unit Commander as the Supervisor with the Right to Punish (*Ankum*) and / or the Case Delivery Officer (*Papera*) who is the superior of the criminal offender (the suspect / defendant) will proceed to legal proceedings if a soldier under him commits an offense or act. criminal. The legal process referred to is starting from the investigation / investigation process at the Military Police, then delegating it to the Military Oditurate to make an indictment, and after the file is declared complete, it will be registered in the military court for trial. Cases in military court are also quite varied, including general crimes, military crimes, traffic violations, power disputes, military administration. General crimes are also often tried in military courts, one of which is the criminal offense that is being reviewed.

In Indonesia, the Military Court is one of the perpetrators of Judicial Power for the people who seek justice, especially for TNI Soldiers which is regulated based on the Law on Judicial Power in the Military Courts which is implemented by Military Courts (First Level), High Military Courts (Appeal Level) and Courts. Main Military and then culminating in the Supreme Court of the Republic of Indonesia. The position and position of the Military Court which is integrated under the Supreme Court as a follow-up to the One Roof Court policy in accordance with the mandate of Article 24 paragraph (1) and (2) of the 1945 Constitution which is then followed up by Law No. 48 of 2009 concerning Judicial Power, and then technically its implementation through Presidential Decree No. 56 of 2004 which was issued on 9 July 2004 concerning the Transfer of Organization, Administration and Finance of Courts within Military Courts from the Indonesian National Army Headquarters to the Supreme Court, and issued a Joint Decree between the TNI Commander and the Chief Justice of the Supreme Court No. KMA / 065A / SKB / IX / 2004 and No.Skep / 420 / IX / 2004 dated 01 September 2004 concerning Cooperation in the Development of Military Personnel for TNI Soldiers who serve in Courts within the Military Court.

Thus, it is urgent to examine what are the parameters of military judges judging "unworthy" (*ongeschikt*) for a TNI soldier in a criminal case to participate in committing adultery?

2 Research Methods

The method used in this study is a normative legal research method with a statutory approach, a case approach, a conceptual approach. Sources or research materials in the form of primary sources of legal research are sets of rules established and enforced by the state or agency that has authority, for example court decisions, laws, sets of rules issued by the executive branch, regulations, or decisions issued by official authorities, while secondary materials are legal research materials that do not have the authority of power, for example agreements, legal journals or law reviews, legal encyclopedias, books, papers, periodic indexes, and other materials that can be accessed in the online database. [5] Thus this legal research is a series of efforts to search, classify, investigate, interpret legal norms by using scientific methods to find legal truth. [5].

3 Results and Discussion

Criminal law is part of the overall law in force in a country, which establishes the basics and rules for: (1) determining which actions should not be carried out, which are prohibited, accompanied by threats or sanctions in the form of certain penalties for anyone who violates the prohibition. these (criminal acts); (2) determine when and in what cases those who have violated these prohibitions can be imposed or sentenced to the criminal responsibility that has been threatened (criminal liability / criminal responsibility); and (3) determine in what way the imposition of the criminal act can be carried out if there are people who are suspected of having violated the prohibition (criminal procedure / criminal procedure law). [6] Another opinion that a criminal sanction is the furthest response to an unlawful act and thus criminal law plays the a somehow subsidiary role towards other ways of solving social problems or combating undesirable phenomena from a certain essential point of view. [7] Thus it can be concluded that the criminal act of participating in adultery is also a social problem in society that must be resolved immediately through the applicable legal process.

Adultery is (1) an act of intercourse between a man and a woman who is not bound by a marriage relationship (marriage); information; (2) the act of intercourse with a man who is married to a woman who is not his wife, or a woman who is married to a man who is not her husband. [8] Adultery according to Islamic law is an act of intercourse between a man and a woman outside of a legal marriage bond, either by being single with a girl, or having been married consensually. When intercourse is carried out between a man and a woman who is married, it is called *zina muhsan*, while those who have never been married are called *zina ghair muhsan*. [9]

If traced in the legislation that a criminal act of participating in adultery as threatened by Article 284 of the Criminal Code:

- (1) By a maximum imprisonment of nine months:
 - 1st.
 - a. A married man who commits adultery, even though it is known that Article 27 BW applies to him;
 - b. A married woman who commits adultery;
 - 2nd.
 - a. A man who participates in the act, even though he knows that the guilty party is married;

- b. An unmarried woman who participated in the act, even though she knew that the guilty party was married and Article 27 BW applies to her. [10]

In addition to committing adultery in addition to being committed as a civilian, criminal cases are still encountered among the military who have the status of TNI Soldiers. The threat of punishment in Article 284 paragraph (1) of the Criminal Code is a maximum of 9 months in prison, however, specifically among the military, there is a threat of additional punishment in the form of dismissal as a TNI Soldier. This is stipulated in the KUHPM.

In contrast, the homosexual / lesbian TNI soldiers are more specifically regulated in a Supreme Court Circular Letter (SEMA) No. 10 of 2020 concerning the Enforcement of the Formulation of the Plenary Meeting Results of the Supreme Court Chamber of 2020 as a Guidelines for the Implementation of Tasks for the Court. One of the formulation of the Law of the Military Chamber states that the application of the law against TNI soldiers who are homosexual / lesbian is a violation of the Telegram Letter of the TNI Commander Number ST / 398/2009 dated 22 July 2009 in conjunction with ST Panglima TNI No. ST / 1648/2019 dated 22 October 2019, which regulates the prohibition of TNI soldiers from committing immoral acts of the same sex (homosexual / lesbian), the provisions of Article 103 Paragraph (1) of the Indonesian Criminal Code are applied as an act of violating official orders. This SEMA is not a legal basis but a supervision for military judges in considering and deciding cases.

The additional criminal penalty in the form of dismissal is the heaviest punishment for a TNI soldier. It is known that the additional criminal sentence of dismissal is carried out if the criminal act of participating in adultery is proven to have been committed by the defendant with fellow soldiers, wives, children, TNI civil servants, who belong to the TNI extended family or are popularly known as the TNI Large Family (KBT). Moreover, there is a firm sanction arrangement for soldiers who are involved in decency violations as formulated in the Telegram Letter of the TNI Commander (ST Panglima) No. 198/2005. However, ST Panglima is not categorized as a legislative hierarchy, so it cannot be used as a basis for consideration by military judges in making decisions.

Meanwhile, the military judge's consideration when imposing an additional sentence of dismissal in his decision is if it is deemed inappropriate (*ongeschikt*) a defendant who lacks or does not have the characteristics that should be a soldier. However, the parameter of 'unfit' for a soldier is not completely clear, because military judges in Indonesia may have different interpretations on this matter. The measure for the imposition of the punishment of dismissal in addition to the main punishment is the military judge's view of the crimes committed by the defendant based on which the value of being no longer worthy of being maintained in the life of the military community. It can be felt how great this trust has been transferred, it must be a warning to military judges if they are to uphold justice. If this sentence of dismissal is imposed, in the military judge's view, it must include or implies a meaning, that if the punishment of dismissal is not imposed, the presence of the convicted person in the military after he has served his sentence will shake the principles of order in military society. [1]

Some of the provisions that serve as the legal basis for dismissal of TNI Soldiers are described as follows: [4]

- 1) Article 6 letter b-1 KUHPM, states; "Additional criminals are dismissed from the Military Service with or without deprivation of their right to enter the Armed Forces."
- 2) Article 26 of the Criminal Code, states:
 - (1) Dismissal from military service with or without revocation of the right to enter the TNI, other than what is stipulated in Article 39, may be imposed by a judge concurrently with any decision to impose a death sentence or imprisonment for a military person who

on the basis of the crime he has committed is deemed no longer worthy. remain in military circles.

(2) According to the law, the dismissal will result in the loss of all the rights he received during his previous service, with the exception that the pension rights will be lost in the cases stated in the pension regulations applicable to the convicted person.

(3) If the dismissal coincides with the revocation of the right to enter the TNI, according to the law it also results in the loss of the right to own and wear stars, honorary signs, medals or identification marks, as long as the latter is obtained in connection with the service assigned. earlier.

- 3) Article 29 Paragraph (1) KUHPM, states:
 - (1) Additional penalties regarding dismissal from military service with or without revocation of the right to enter the TNI and regarding demotion shall take effect on the day that the judgment can be implemented.
 - (2) If one of the additional sentences mentioned in paragraph (1) is imposed, if the convict is not in temporary detention at the time the sentence is determined to live it, then according to the law the convict is detained.
 - (3) The detention referred to in paragraph (2) shall be served at a place determined by the Commander / Officer of the Direct Commander who carries the convict, in such a manner so that the convict may not have any contact with other military personnel. During this detention the convict is not allowed to carry out his service.
- 4) The provisions of Article 29 paragraph (2) and paragraph (3) of the KUHPM contain the following meanings:
 - The case has BHT (permanent legal force) because it uses the word convicted.
 - The authority for detention lies with the unit commander (Ankum) because he explicitly appoints the commander / officer in direct command.
- 5) Article 35 Paragraph (1) of Law of the Republic of Indonesia Number 26 of 1997 concerning the Discipline Law for ABRI Soldiers (TNI), states: "Soldiers who have repeatedly violated disciplinary law and / or clearly do not care about all the disciplinary laws imposed so that in the view that it is no longer appropriate to be maintained as a soldier, then such a soldier is dishonorably discharged from the army service."
- 6) Article 53 Paragraph (1) Government Regulation Number 39 Year 2010:
 - (1) Soldiers are dishonorably discharged from the army service because:
 - a. Sentenced to an additional sentence of dismissal from military service based on a court decision that has obtained permanent legal force; or
 - b. Having a clear character and / or action can be detrimental to the discipline of soldiering or TNI.
- 7) Article 53 Paragraph (2) Government Regulation Number 39 of 2010 concerning the Administration of TNI Soldiers states that the authority to impose administrative penalties lies with the officials determined by this Government Regulation, so that if the imposition of criminal charges by the Military Court against TNI Soldiers is not accompanied by additional punishment of dismissal, however At the Accused Unit, Ankum / Papera considered that the Soldier could no longer be defended as a Soldier, the Unit could process administratively, the TNI Soldier could be fired administratively on the condition that he had been sentenced to more than 2 (two) times based on a court ruling that has gained strength. fixed law.
- 8) Article 62 of Law of the Republic of Indonesia Number 34 of 2004 concerning TNI:
 - (1) Soldiers are dishonorably discharged because they have a character and / or actions that can clearly harm soldiering discipline or the TNI.

(2) Dismissal as referred to in paragraph (1) of an officer after considering the opinion of the Officer Honorary Council.

(3) The provisions referred to in paragraph (1) and paragraph (2) shall be further regulated by a Government Regulation.

- 9) Telegram Letter of the TNI Commander Number: STR / 198/2005, states; "Regarding the proposal of disrespectful dismissal of TNI members who commit immoral offenses against fellow Soldiers, wives / husbands / children or who involve civil servants, wives / husbands in the TNI environment."

Several provisions which are used as the legal basis for dismissal of TNI Soldiers in terms of the provisions of Article 26 paragraph (1) of the KUHPM and the provisions stipulated in the Criminal Code can be explained as follows: [4]

- 1) In terms of the provisions of Article 26 paragraph (1) KUHPM

The basic norm for military judges to impose additional punishment on the Defendant in the form of dismissal from military service with or without revocation of his right to enter the Armed Forces is the provision as stipulated in Article 26 paragraph (1) of the KUHPM. The provisions of Article 26 paragraph (1) of the KUHPM stipulate that dismissal from military service (with or without revocation of the right to enter the Armed Forces) must pay attention to the provisions of Article 39 of the KUHPM, so that the provisions for imposing additional penalties on dismissal from Military service must take into account the following matters:

- a. Can be imposed by a judge concurrently with the imposition of a basic sentence in the form of capital punishment or life imprisonment for a military person.
- b. Can be imposed on a military person who on the basis of a crime committed is sentenced to a basic sentence of imprisonment while being deemed unfit remains in military circles. According to SR. Sianturi that is meant to be inappropriate is inappropriate or does not exist or lacks the characteristics that should be for a military person, not because the person concerned is no longer capable of carrying out military service. So in other words, if the person concerned is retained in military service, it will have a bad impact so that it will interfere with the formation of the Unity in connection with the offense or criminal act he has committed.
- c. Additional punishment is dismissal from military service not only because the person concerned committed a particular crime but every form of crime. Thus, if the judge is going to impose an additional sentence of dismissal in a decision, it is necessary to include article 26 of the KUHPM as the basis for the imposition of additional punishment of dismissal, however, the provisions of article 26 of the KUHPM are not elements of a criminal act that must be proven by the judge, but are provisions that are *mutatis mutandis* which should be used by the judge in imposing an additional sentence of dismissal from military service.

- 2) Judging from the provisions stipulated in the Criminal Code

The basic norms for the imposition of additional criminal dismissal from office in the Criminal Code are regulated in the provisions of Article 35 paragraph (2) of the Criminal Code which states that the Judge is not authorized to dismiss an official from his position if the special rules stipulate another ruler for dismissal, so that the provision recognizes the *lex specialis* principle of the provisions of the KUHPM which are the legal basis for military judges in imposing additional penalties on dismissal of TNI Soldiers.

From the analysis of several decisions in cases involving committing adultery, military judges often consider several things, namely:

- a. An assessment of the nature, nature and consequences of actions.

As a soldier, he must uphold Pancasila, the laws and regulations, the Soldier's Oath, 8 (eight) Mandatory TNI which is a norm that must be obeyed by a TNI soldier while still in military service. Therefore, when immoral acts committed by TNI soldiers, of course, will damage the joints of the unity of life in the internal agencies.

- b. Motivation for the perpetrator of a criminal act to participate in committing adultery. Military judges must also know whether the defendant's motivation for committing the crime was due to factors outside the defendant, lack of guidance or supervision in the place where he was serving.
- c. The consequences for the image of the institution. It is worth considering how the image of the institution is when a criminal act is involved in committing adultery. This can be seen from the public's view of military institutions which are likely to be negatively assessed as a result of criminal acts.
- d. The impact that arises in the disciplinary fostering of soldiers in agencies. As a result of a criminal act of participating in adultery, the perpetrators are both members of the same institution or extended family of the same institution. This will shake the stability of the relationship between soldiers which will result in the lack of unity among soldiers.

4 Conclusion

From the description above, it can be concluded that several parameters of military judges assessed as 'unworthy' (ongeschikt) for a TNI soldier in a criminal case to participate in committing adultery. First, an assessment of the nature, nature and consequences of actions that soldiers uphold Pancasila, laws and regulations, the Soldier's Oath, 8 (eight) Obligatory TNI. Second, the motivation of the perpetrator of a criminal act to participate in committing adultery, for example factors outside the defendant, lack of guidance or supervision in the place where he is serving. Third, the consequence on the image of the institution is the presence of negative public views as a result of criminal acts. Fourth, the impact that arises in fostering discipline for soldiers in institutions. This can shake the stability of the relationship between soldiers which results in the lack of unity among soldiers. The parameters set out in the consideration of the decision at least provide real objectivity for the sake of upholding justice in a court decision.

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References

- [1] M. F. Salam, *Hukum Pidana Militer di Indonesia*, Bandung: Mandar Maju, 2006, p. 109.
- [2] H. Christianto, „Norma Kesusilaan sebagai Batasan Penemuan Hukum Progresif Perkara Kesusilaan di Bangkalan Madura,“ *Jurnal Hukum & Pembangunan*, vol. 46, no.1, pp. 1-22, 2016.
- [3] T. P. D. Hutapea, „Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit TNI Dalam Putusan Pengadilan,“ *Jurnal Hukum dan Peradilan*, vol. 7, no.1, pp. 67-86, 2018.
- [4] I. Anwari, „Penjatuhan Pidana Tambahan Pemecatan Prajurit TNI Dari Dinas Militer Dan Akibatnya,“ *Makalah, Manado*, 2012.

- [5] A. Alkostar, *Metode Penelitian Hukum Profetik*, Yogyakarta: Universitas Islam Indonesia, 2018, p. 146.
- [6] Moeljatno, *Asas-Asas Hukum Pidana*, Edisi Revisi, Jakarta: Rineka Cipta, 1994, p. 4.
- [7] Parnell, Philip C., and Stephanie C. Kane, *Crime's power. Anthropologists and the ethnography of crime*, New York: Palgrave, 2003, p. 250.
- [8] KBBI, „<https://kbbi.kemdikbud.go.id>, “Kemendikbud RI, [Online]. Available: <https://kbbi.kemdikbud.go.id/entri/zina>. [Cit. 29 March 2021].
- [9] Ishak, „Analisis Hukum Islam tentang Perbuatan Zina dalam Pasal 284 KUHP, “*Kanun Jurnal Ilmu Hukum*, vol. 56, no.16, pp. 165-178, 2012.
- [10] Moeljatno, *Kitab Undang-Undang Hukum Pidana*, Jakarta: PT. Bumi Aksara, 2011.