

## **Changes in the Legitimacy of Military Prosecutions in Indonesia (Case Study for the Establishment of a Junior Attorney General for Military Crimes at the Indonesian Attorney General's Office)**



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**ABSTRACT:** Military institutions throughout the country have a special judicial mechanism known as military justice. Judicial jurisdiction does not look at criminal acts based on the subject of the perpetrator, but based on the offense or crime committed. The formation of the organizational structure and working procedures of the Deputy Attorney General for Military Crime (Jampidmil) at the Indonesian Attorney General's Office can bridge the need for criminal prosecution of subjects of civil law and subjects of military law. This study aims to describe the change in the legitimacy of military prosecution in Indonesia with the establishment of a new work unit at the Indonesian Attorney General's Office, namely the Deputy Attorney General for Military Crimes. The type of research used is normative juridical. This research focuses on laws relating to the structure and how the process or procedures for enforcing military law in the military prosecution system.

**KEYWORDS:** Deputy Attorney General for Military Crimes, connectivity crime.

### **1. INTRODUCTION**

#### **1.1. Background**

The military institution is a unique institution because of its unique role and position in the state structure. As the backbone of national defense, military institutions are required to ensure the discipline and readiness of their soldiers in dealing with all forms of threats to the security and safety of the state. For this reason, almost all military institutions throughout the country have a special judicial mechanism known as military justice.

The implementation of military justice is carried out starting from investigation, prosecution, examination at trial and execution, which is different from the general court, not only technically but also law enforcement officers who participate in the process of resolving cases within the military court. With Anku (the superior who has the right to punish), the Military Police and the Prosecutor as an investigator, as well as the Prosecutor as a prosecutor, and a Judge appointed as a Military Judge. The levels of the judiciary within the scope of the military courts also consist of the Military Courts, the High Military Courts, the Main Military Courts and ending with the Supreme Court.

Some people view that the existence of military criminal law and military justice which is specifically enforced in the military environment is a form of discrimination that is not in line with the principles of equality process and equality treatment<sup>1</sup>, causing disparities in the application of criminal law. Indonesia as a state of law (Rechtsstaat) must also apply the principle of equality before the law, namely the principle of equality before the law, this is also explained in the constitution that all citizens have the same position in law and government and are obliged to uphold the law and government with no exceptions. (Article 27 paragraph (1) of the fourth amendment of the 1945 Constitution. Thus, all Indonesian citizens receive equal treatment in the eyes of the law, regardless of position, ethnicity, caste, or social strata. Differences of opinion regarding the implementation of military crimes and military justice still occur. This surfaced when it was discovered that TNI members were involved in criminal cases that attracted public attention.

On the other hand, the implementation of civil and military prosecutions in Indonesia is still running separately until now. Whereas in the elucidation of article 57 paragraph (1) of Law Number 31 of 1997 concerning Military Courts, it stipulates that the prosecutor general of the TNI in carrying out his duties in the technical field of prosecution is responsible to the Attorney General of the Republic of Indonesia through the commander in chief. The explanation in the article has a point of contact with Law No. 16 of 2004 concerning the Indonesian Attorney General's Office (Law 16/2004), the authority of the Attorney General as the highest public

<sup>1</sup> Mulyana, Asep. 2020. Hukum Pidana Militer Kontemporer. Jakarta : Gramedia Widiasarana Indonesia. hlm 1

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prosecutor remains as regulated in Article 18 paragraph (1): "The Attorney General is the leader and In controlling the implementation of the duties and authorities of the Prosecutor's Office, the Attorney General is also the leader and the highest person in charge in the field of prosecution. This means that the Attorney General is not only the highest leader in the Prosecutor's Office but also the highest leader in the field of prosecution in any agency authorized by law. The exercise of this authority is always accompanied by a legal principle, namely "Dominus Litis", which means that no other body has the right to prosecute, except the Prosecutor. Etymologically, "Dominus" comes from the Latin, which means "owner". Meanwhile, "Litis" means "thing". So that "Dominus Litis" can be translated "owner or controller of the case"<sup>2</sup>.

In MPR Decree No VI of 2000 concerning the Separation of the Indonesian National Army and the Indonesian National Police, it is clear that there is a separation of roles between the Indonesian National Armed Forces (TNI) and the Indonesian National Police (POLRI). The TNI plays a role in national defense while the POLRI plays a role in state security. Related to the legal position of the TNI as stated in the MPR TAP No.VII of 2000 concerning the Role of the National Army and the Role of the Indonesian National Police in article 3, that Indonesian National Army Soldiers are subject to the power of military courts in the case of violations of military law and are subject to the power of the general judiciary in the case of violations of general criminal law. Meanwhile, POLRI is subject to the power of the general judiciary.

## 1.2. Problem Formulation

Based on the background that has been discussed previously, this research is based on the following questions:

1. Is the formation of the Deputy Attorney General for Military Crime in accordance with the applicable laws and regulations?
2. How has the Legitimacy of Military Prosecution Changed in Indonesia with the formation of a new work unit at the Indonesian Attorney General's Office, namely the Junior Attorney General for Military Crimes?

## 1.3. Research Purposes

The purposes of this research are:

1. To describe whether the formation of the Deputy Attorney General for Military Crimes is in accordance with the applicable laws and regulations.
2. To describe the Changes in the Legitimacy of Military Prosecutions in Indonesia with the establishment of a new work unit at the Indonesian Attorney General's Office, namely the Deputy Attorney General for Military Crimes.

## 2. RESEARCH METHODS

Research with a normative juridical type essentially shows a provision, the research approach is carried out so that researchers get information from various aspects to find the issues to be answered, as for the approach in this study, namely:

- a. The law approach (status approach) is a juridical approach research on legal products<sup>3</sup>. This statutory approach is carried out to examine all laws and regulations related to the research to be researched. This legal approach will open up opportunities for researchers to study whether there is consistency and conformity between one law and another.
- b. The conceptual approach<sup>4</sup>. This approach is carried out because there is no or no rule of law for the problems at hand, this conceptual approach departs from the views and doctrines that develop in legal science, thus giving birth to an understanding of law and principles laws that are relevant to the problems at hand
- c. Comparative approach is an approach taken to compare the laws of a country with the laws of other countries<sup>5</sup> in order to obtain similarities and differences between these laws.

## 3. FINDINGS AND DISCUSSION

### Strategic Steps with Changes in the Legitimacy of Military Prosecutions in Indonesia

#### 1.1. Revision of the Law on Military Courts in accordance with TAP MPR VI / VII

One example of the dualism in handling cases is between the Prosecutor's Office and the Military Orditur in handling military criminal cases. The same thing was also conveyed by Tiarsen Buatun who stated that there were possible problems with the submission of soldiers to the general court which included several aspects, namely:

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<sup>2</sup> //komisi-kejaksaan.go.id accessed 15 August 2020

<sup>3</sup> Peter Mahmud Marzuki. *Penelitian Hukum*. (Cet. 6. Jakarta: Kencana, 2010),93

<sup>4</sup> Johny Ibrahim. *Teori & Metodologi Penelitian Hukum Normatif*. (Cet 3. Malang: Bayumedia Publishing, 2007), 306

<sup>5</sup> <http://e-journal.uajy.ac.id/11868/4/MIH022543.pdf> accessed 5 October 2021

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- 1) investigative matters,
- 2) the problem of the Keankuman and Kepaperaan institution,
- 3) claimant issues,
- 4) the matters of the trial judge,
- 5) locus delicti problem,
- 6) execution execution issues,
- 7) the imposition of additional laws in the form of dismissal from the military service and
- 8) socio-cultural and psychological problems.

Specifically regarding the prosecution issue, Tiarsen Buaton stated that in the Criminal Procedure Code it is stated that the prosecutor in a criminal case is a prosecutor, while in the Law of the Republic of Indonesia Number 31 of 1997 concerning Military Courts (hereinafter referred to as Law No. 31 of 1997) it is stated that prosecutors in military courts is a military prosecutor, when a soldier is tried in a general court, it is asked who the prosecutor is, whether the prosecutor or the military prosecutor. The author agrees with Tiarsen Buaton regarding the dualism of the prosecution institution in the case if a soldier of the Indonesian National Armed Forces (TNI) is involved in a criminal act or commits a criminal act that results in ambivalence or bias in determining the most competent prosecution agency to prosecute perpetrators of military crimes. Considering that the Criminal Procedure Code mentions prosecutors as prosecutors of criminal cases, while Law No. 31 of 1997 mentions military directors as prosecutors of military criminal cases.

Barda Nawawi Arif said that if only the Military Court Law (UU No. 31/1997) which regulates judicial structure/institutional aspects (competence/jurisdiction) and procedural law was changed, would mean only making partial changes, this would cause some problems considering these following matters:

1. TAP MPR No. VII/2004, states (article 3:4a), states: "TNI soldiers: subject to the power of the general judiciary. in the case of violations of general criminal law. In MPR Decree No. VII/2004 requires/observes the existence of 2 (two) norms for TNI soldiers, namely:
  - a. structural/institutional norms: namely "norms regarding the power (institution) of the general judiciary for TNI soldiers"; and
  - b. Substantive norms: That is "norms regarding violations of general criminal law by TNI Soldiers"
2. Political Decisions in TAP MPR No. VII/2004 should be embodied in a law (article 3 of TAP MPR NO. VII/2004), the point is that there must first be:
  - a. Structural/institutional Law: namely "Law on Institutions/judicial institutions for TNI soldiers who violate general criminal law"; and
  - b. Substantive Law (Norms): namely "Law on material criminal law for TNI soldiers who violate general criminal law".

Seeing that both laws must exist, it can be seen from article 65 (2) of Law no. 34/2004 concerning the TNI which affirms:

"Soldiers are subject to the power of the military courts in terms of violations of military criminal law and are subject to the powers of the general courts in terms of violations of general criminal law regulated by law.

- 1) Structural aspects / judicial institutions:
  - a) The current condition, the structural aspect is regulated in:
    1. UU no. 48/2009 on judicial power; and
    2. UU no. 31/1997 on Military Courts.
  - b) UU no. 48/2009 on judicial power only regulates "trial of connectivity" (article 16) does not regulate individual trials" against TNI soldiers. This means that this law does not regulate the power of the general judiciary as referred to in article 3 (4a) of TAP MPR No. VII/2000, namely criminal justice against members of the TNI who violate the general criminal law personally (individually).
  - c) In Law no. 31/1997 stipulates the "congeniality trial" (Article 198) and "general court" for TNI soldiers who violate the military criminal law and the general criminal law personally (Article 9 of Law No. 3/1997) jo. Article 2 of the Criminal Code).
  - d) With the UNregulated (not yet functioning) general judicial power for TNI soldiers who personally violate the general criminal law (the "individual trial") has not been regulated by the Law on Judicial Powers No. 4/2004 (already become Law No. 48/2009), as referred to in Article 3 (4a) of TAP MPR No. VII/2000, then starting from Article 3 (4b) of TAP MPR No. VII/2000, the TNI soldier must "submit to the jurisdiction of the judiciary as regulated by law". This is confirmed in article 65 (3) of Law no.

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34/2004 regarding the TNI as stated above. This means, it is still subject to "individual justice" as regulated in Law no. 31/1997 (Article 9 of Law No. 31/1997 in conjunction with Article 2 of the Criminal Procedure Code).

- e) If the provisions of Article 9 of Law no. 31/1997 military courts, in particular the judicial authority of TNI soldiers who violate TNI soldiers who violate general criminal law, are CHANGED or REMOVED/DELETED, there will be a 'JUDICIAL VACANCY', because:
  1. Provisions/mandates in Article 3 (4b) of TAP MPR No. VII/2000 cannot be implemented, and
  2. UU no. 4/2004 (became Law No. 48/2009) DOES NOT or DOES NOT REGULATE the power of the general judiciary as referred to in Article 3 (4a) of MPR Decree No. VII/2000, especially the judiciary for TNI soldiers who violate the general criminal law personally (individually).
- 2) Substantive Aspect (material criminal law):
  - a) The substantive aspect (material criminal law) regarding violations of general criminal law by TNI soldiers, as long as it is regulated in the KUHPM.
  - b) The Criminal Code (WvS) only regulates the subject of people (or citizens) in general, and does not regulate military subjects (TNI soldiers).
  - c) So there has been no amendment to the KUHPM and there is no law that specifically regulates TNI soldiers who violate the general criminal law, as referred to in Article 3 (4a) of TAP MPR No. VII/2000.
  - d) With no amendments to the Criminal Procedure Code or the absence of the Special Law, it means that the provisions in Article 2 of the Criminal Procedure Code which states: "Against criminal acts not listed in this law, committed by people who are subject to the authority of the military judiciary, the law shall be applied." general criminal offense, unless there are deviations stipulated by law".
  - e) This means that the material criminal law norms currently apply to TNI soldiers who commit general crimes (violations of general criminal law) as stated in Article 3 (4a) of TAP MPR No. VII/2000, regulated in the Criminal Code. This means, it is the Military Court that applies the provisions in Article 2 of the Criminal Procedure Code. It is impossible for the material criminal law norms for the military/TNI soldiers that are in the KUHPM, to be applied by the PU (judicial).

Finally, Barda Nawawi Arif, concluded (Resume) as long as the material criminal law for the military (KUHPM) has not been changed, it is difficult to apply the ideas or "political decisions" contained in TAP MPR No. VII/2000, that against "TNI soldiers submit to the power of the general court in terms of violations of the law, general crimes".

However, the agreement that has been reached between the DPR and the Government in terms of new jurisdiction is limited to two things, namely TNI soldiers who commit general crimes are tried in public courts; and the abolition of the connectivity court. To complete the agreement, it recommends several matters relating to the jurisdiction of military courts:

1. The jurisdiction of the military court based on the alleged crime (*ratione materiae*) is only limited to military crimes regulated in the military Criminal Code (KUHP).
2. Criminal acts of gross violations of human rights and war crimes should not be the jurisdiction of military courts.
3. The jurisdiction of the military courts based on the perpetrators of criminal acts (*ratione personae*) is only limited to those who are members of the military and are equal.
4. The jurisdiction of the military court based on the place where the crime occurred (*ratione loci*) is only limited to the battlefield when Indonesia is in a war situation. In the case of military operations other than war, this is not considered a "war situation".
5. The jurisdiction of the *materiae*, *personae* and *loci* above applies in a peaceful situation. In a war situation, the jurisdiction of the *materiae*, *personae* and *loci* above can be expanded if and only if there is a decision/approval of the DPR.
6. In principle, in peacetime the jurisdiction of military courts should be limited. However, it is also necessary to consider removing the jurisdiction of military courts in peacetime.
7. All provisions regarding the use of connectivity cases in all laws and regulations must be removed, including all internal provisions of the TNI which regulate connectivity cases.
8. Military administrative jurisdiction must be removed from the military justice system.

At the same time formulated about the organization and structure of military justice, among others:

1. To avoid command influence, military law corps personnel should be brought under Babinkum, by moving Babinkum under the Ministry of Defense.

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2. The functions of developing military personnel as well as organizational, procedural, administrative, and financial development within the military judiciary must be separated from TNI Headquarters and handed over to the Ministry of Defense entirely.
3. In handling cases, the military court is still under the Supreme Court. However, at the MA level, Supreme Court Justices must have civil status.

### 1.2. Prosecutor's Regulation on Jampidmil SOP

Burhanuddin said he had also started to involve many parties to discuss the standard operating procedures (SOP) regarding Jampidmil. He hopes that the resulting SOP will really provide a good administrative system<sup>6</sup>.

Decree of the Attorney General of the Republic of Indonesia Number 159 of 2021 concerning amendments to the Decree of the Attorney General of the Republic of Indonesia Number 159 of 2021 concerning Amendments to the Decree of the Attorney General of the Republic of Indonesia Number 249 of 2020 concerning Standard Operating Procedures within the Attorney General's Office of the Republic of Indonesia

### 1.3. Socialization of the Duties of the Deputy Attorney General for Military Crimes

In this socialization and FGD event, Deputy Attorney General for Military Crimes (Jampidmil), Vice Admiral TNI Anwar Saadi, SH. opened and gave a speech in front of the participants. Jampidmil said that the military criminal sector is a new structure in the Attorney General's Office which was formed this year based on Presidential Regulation Number 15 of 2021. So it is necessary to socialize its duties and functions both at the Attorney General's Office, TNI, University and to the public.

## 4. CONCLUSION

Based on the results of research and discussion, conclusions and suggestions can be formulated as follows:

With the formation of a new work unit at the Attorney General's Office, namely the Junior Attorney General for Military Crimes, there has been a change in the legitimacy of military prosecutions in Indonesia, especially general crimes. This is in line with TAP-MPR No. VII / MPR / 2000, which states that TNI soldiers who commit general crimes are tried in the General Court. The change in the legitimacy of military prosecutions in Indonesia requires the Deputy Attorney General for Military Crimes to take strategic steps, namely:

- Revision of the Law on Military Courts in accordance with TAP MPR VI/VII
- Prosecutor's Regulations regarding Jampidmil SOPs
- Socialization of the Duties of the Deputy Attorney General for Military Crimes

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