

## Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Desersion



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**ABSTRACT:** This study aims to find out the form of criminal responsibility for members of the TNI who commit crimes and the efforts of TNI deserters who commit criminal acts of desertion to reunite. This research is a normative research which seeks to study and explore and find answers about what should be from every problem based on norms, not examining social phenomena that occur as a result of legislation. The approach used in this study is a statutory approach and a conceptual approach. This approach is used because in solving the problems in this study, it will refer to existing and related laws. The results of this study indicate that this form of criminal responsibility can be in the form of a crime of desertion of goods which is a basic crime of imprisonment regulated in article 6a paragraph 2 of the Criminal Procedure Code. And additional punishment in the form of dismissal from military service, this is regulated in paragraph 1 of Article 6b of the Criminal Procedure Code. And efforts that can be made by military deserters who commit these crimes are asked to be accompanied by a lawyer to help resolve the deserters' problem completely.

**KEYWORDS:** criminal responsibility; desertion; military

### I. INTRODUCTION

An organization that is based on rules and includes a 'military' frill has so far been seen as a closed organization by the majority of society. This view does not rule out the possibility of being directed at military courts which so far have been viewed by the public as closed courts, giving rise to negative prejudice from the general public that all law enforcement activities against guilty soldiers are not carried out in the fairest way possible and legal practitioners assess the verdict. Military courts in imposing sentences on soldiers who are guilty of committing minor crimes.

From a legal point of view, members of the military have the same position as ordinary members of the public, meaning that as citizens, all applicable laws apply, both criminal law, civil law, criminal procedures and civil procedures. The difference is that regulations are still needed that are more specific in nature which are tougher and more burdensome for members of the military, this is because there are some actions that can only be carried out by soldiers that are purely military in nature and do not apply to the public, for example: refusing service orders, going against superiors' orders (insubordination), and desertion.

The criminal acts mentioned above reflect the nature of a military person who ignores the ethics and rules of disciplinary law that apply within the TNI. A soldier should be obliged to be in the unit continuously during his service period and may not refuse or even go against service orders. If he wants to leave the unit for some reason, he must first get permission in accordance with the rules that apply within the TNI.

An absolute requirement in military life is to comply with TNI regulations and official orders from every superior in order to uphold life in the military with high awareness. If these matters are violated, it shows that the military is not good and irresponsible in enforcing the Sapta Marga and the Soldier's Oath and if it is maintained, it will only shake the foundations of discipline and order within the TNI.

Some acts that are serious in nature in such a way, if committed by members of the military in certain areas, the threat of punishment from general criminal law is considered too light, because the military is the parent of a small number of community members who already have other provisions in separate courts, namely military courts or courts Military.

Along with the rapid rate of development of information in society, challenges have arisen for military courts, especially military courts, to be able to meet demands from the public for openness of information in Military Courts without abandoning the basic principles of the military. This is what the Military Court is trying to do in order to fulfill the public's sense of trust, especially after being under the Supreme Court of the Republic of Indonesia.

The position and existence of military courts as a component of judicial power in Indonesia is no doubt because the 1945 Constitution as the constitution of the Republic of Indonesia has guaranteed the existence of military courts in Article 24 paragraph (2) of the fourth amendment of the 1945 Constitution, as well as Law no. 48 of 2009 concerning judicial power in

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

Article 18 has also emphasized military justice as part of judicial power, so there is no doubt that military justice is one of the components and strengths of judicial power in Indonesia.

The philosophical meaning of establishing a military justice institution is none other than to take action against TNI members who commit criminal acts, to become a means of control for TNI members in carrying out their duties, so that they can form and foster a strong, professional and law-abiding TNI because the TNI's task is very large to guard and save the nation and state.

Historically, the military court was the same as other judicial institutions, namely having two roofs, which was financial and staff administration under the Ministry of Defence, while technical development was under the Supreme Court. However, the two-roof system began to end with the issuance of Law No. 35 of 1999 concerning amendments to Law No. 14 of 1970 concerning the main provisions of Judicial Power, where in Article 11 the legal basis for the two-roof system was changed to: the judicial bodies referred to in Article 10 paragraph 1, organizationally, administratively and financially are under the authority of the Supreme Court.

The affirmation of the one roof system (one roof system) since the amendment to Law No. 14 of 1970 was amended by Law No. 35 of 1999, then amended again by Law No. 4 of 2004 and finally after the passing of Law no. 48 of 2009 concerning Judicial Power, does not change any provisions regarding the one roof system within the judicial power as emphasized in Article 21 of Law No. 48 of 2009 still regulates administrative and financial matters of the Supreme Court and the judicial bodies under it, in this case the judiciary. in general, with several special courts under them, religious courts, military courts and state administrative courts are under the jurisdiction of the Supreme Court. Thus, the Military Court is one (sub-system) of the State Judiciary (Indonesian Judicial system) which is determined by law and has an equal position and is on a par with other judicial environments.

The TNI is a State instrument whose duty is to defend, protect and maintain the integrity and sovereignty of the State. Every country needs a strong and professional armed forces to protect territorial integrity, uphold sovereignty, protect its citizens and become the glue of national unity.

In Article 1 of the MPR Decree No.VI/MPR/2000 concerning the position of the TNI and Polri, institutionally separate in accordance with their respective roles and functions, namely the TNI as a state instrument in charge of the field of national defense consisting of the Indonesian National Armed Forces (TNI-AD), the Indonesian National Navy (TNI-AL), and the Indonesian National Air Force (TNI-AU), and the National Police as instruments of the state whose duties are more oriented towards creating security and public order in order to protect, protect, serve the community and uphold the law.

The separation of the Polri from the TNI (formerly ABRI) will have legal implications for Polri members who commit criminal acts, namely they will no longer be tried at the Military Court, but at the General Court, as stipulated in Article 7 paragraph (2) MPR Decree No.VII/MPR/2000, namely that Polri members are subject to the powers of the General Court and the TNI are subject to the powers of the Military Courts. MPR Decree No. VII/MPR/2000 was followed up on January 8 2002, with the enactment of Law Number 2 of 2002 concerning the Indonesian National Police in Article 20 paragraph (1) letter a, members of the National Police are no longer TNI Soldiers but as State Servants so that violations of criminal acts committed by members of the National Police fall under the jurisdiction of the General Court (Article 29 paragraph 1 of Law No.2/2002). Criminal acts committed by Polri members after January 8 2002 are no longer tried by Military Courts throughout Indonesia, because the Military Prosecutor does not submit/continue the case to the Military Court, but returns the case file to Military Police investigators for further return to the Provos Polri.

The Military Court is authorized by law as a special court that examines and tries criminal acts committed by groups of people who are organically composed within the TNI, which are specifically formed to carry out the State's duties in the field of implementing National Defense which are subject to and enforced by Military Law.

It is this aspect of the application of Military Law to TNI soldiers that positions the Military Court as a special court in the state justice administration system which adjoins the other three courts. Therefore the Military Court in the act of examining and adjudicating does not culminate in and is supervised by the TNI Headquarters/Dephamkam but culminates in the Supreme Court. In the case of proceedings in the Military Court, it is regulated by special provisions, namely the Military Judicial Procedure Law as regulated in Law Number 31 of 1997 concerning Military Courts. In military life, discipline must be with full faith, obedience and obedience by adhering to the principles that have been stated for every TNI soldier in the sapta marga and soldier's oath which reads:

The contents of the Sapta Marga members of the TNI are as follows:

1. We are citizens of the Unitary State of the Republic of Indonesia, based on Pancasila.
2. We are Indonesian Patriots, supporters and defenders of the State ideology who are responsible and do not know surrender.
3. We are Indonesian Knights, who are devoted to God Almighty, and defend honesty, truth and justice.
4. We Soldiers of the Indonesian National Armed Forces, are the Bhayangkari of the State and the Indonesian Nation.
5. We Soldiers of the Indonesian National Armed Forces, uphold discipline, obey and obey the Leaders and uphold the Soldier's attitude and honor.

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

6. We Soldiers of the Indonesian National Armed Forces, prioritize leadership in carrying out our duties, and are always ready to serve the State and the Nation.

7. We are Soldiers of the Indonesian National Armed Forces, loyal to and keeping promises and the Soldier's Oath.

As a member of the TNI, you must and are obliged to take the soldier's oath before carrying out their duties, namely as follows: By Allah, I swear/promise:

1. That I will be loyal to the Unitary State of the Republic of Indonesia which is based on Pancasila and the 1945 Constitution.
2. That I will obey the law and uphold military discipline.
3. That I will obey my superiors by not contradicting orders or decisions.
4. That I will carry out all obligations with full sense of responsibility to the Army and the Republic of Indonesia.
5. That I will hold all the secrets of the Army to the fullest.

A member of the TNI is required to be as clean as a "white paper" from personal actions that are disgraceful in the eyes of members of the military themselves and especially among the public. Actions/actions under any pretext or form committed by members of the TNI either individually or in groups that violate legal provisions, other norms that apply in life or conflict with official regulations, discipline, order within the TNI are in essence an act/actions that damage the dignity, dignity and good name of the TNI which, if these actions or actions are allowed to continue, can cause unrest in society and hinder the implementation of development and development of the TNI.

For this reason, every member of the TNI must submit to and obey the legal provisions that apply to the military, namely the Military Criminal Code (hereinafter referred to as the KUHPM), the Military Discipline Code (KUHPM), Military Discipline Regulations (PDM) and other regulations. It is these military law regulations that apply to all TNI Soldiers, both enlisted, non-commissioned officers, and officers who commit an act that is detrimental to the unit, the general public and the state which cannot be separated from other regulations that also apply to the general public.

One of the most frequently committed crimes within the TNI is the crime of desertion, in which the TNI soldier withdraws from carrying out his service obligations. In trying the perpetrators of the crime of desertion before being handed over to the Court, the military auditor is authorized to act as a public prosecutor who has the duty and authority to prosecute in criminal cases. After receiving the case files from the investigators (Military Police), the Prosecutor appointed to try members of the TNI must first do so examination of the completeness of the contents of the case file after the case file is declared complete, the military auditor will process the case file by making a *Bapat* (Minutes of Opinion) which contains the statements of the witnesses, the suspect's statements and evidence as well as the conclusions of the Prosecutor regarding the crime that occurred and the article that it was alleged that the Head of the Military Authority made an SPH (Legal Opinion Advice) addressed to *Papera* (Case Handling Officer) which stated that the defendant had committed a crime. Afterwards, *Bapat* and SPH were sent to *Papera* accompanied by a *Skeppera* (Decree on Case Submission) to be asked to sign *Papera*. After receiving the *Skeppera* Military Prosecutor made an indictment, then handed over the case to the Military Court and based on the trial plan from the Military Court, the Prosecutor made a summons to the defendant and the witnesses containing the day, date, time, the case was tried, and after the case was decided the defendant was declared guilty and the case has permanent legal force, the auditor immediately executes the defendant to carry out the crime.

The increase in desertion crimes committed by the military indirectly illustrates the decline in the level of soldier discipline and the enforcement of soldier discipline. Meanwhile, it is a guideline for every TNI soldier that discipline is the pillar, backbone and breath of military life. If the level of discipline is no longer there, it will affect the development of the unit which in the end there will be many violations of not entering the service without permission so that the tasks assigned to each Soldier are neglected.

Based on the statement as stated in the previous paragraph, it raises a problem as follows: 1. What is the criminal responsibility for members of the Indonesian National Armed Forces (TNI) who commit crimes. 2. How can the efforts of deserters from the Indonesian National Armed Forces (TNI) who committed the crime of desertion be reunited.

## **II. CONCEPTUAL FRAMEWORK**

### **A. Overview of Military Crimes**

#### **1. Military Crimes**

Military crimes are crimes committed by military subjects, consisting of:

(1) Pure Military Crime (*Zuiver Militaire Delict*):

Pure military crime is a crime that is only committed by a military man, because it is specific to the military.

(2) Mixed Military Crimes (*Germengde Militaire Delict*):

A mixed military crime is an act that is prohibited which in principle has been determined in other laws, while the threat of punishment is felt to be too light if the act is committed by a military man. Therefore, it is regulated again in the KUHPM accompanied by the threat of more severe punishment, adapted to the unique circumstances of the military.

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

So even though the Criminal Code has been regulated in Article 52 concerning weighting of criminal threats, the criminal threats regulated in the Criminal Code are still felt to have not fulfilled a sense of justice. Therefore it needs to be regulated in the KUHPM specifically. This special understanding is the provisions that only apply to members of the military and in certain circumstances as well.

### **2. Definition of Desertion Crime**

Desertion is the absence of a military officer without the permission of his immediate superior, at a place and time determined by the service, by running away from the unit and leaving military service, or leaving by leaving, running away without permission. This act is an act that should not occur in military life.<sup>1</sup>

a. The term desertion is contained in the KUHPM, CHAPTER III concerning Crimes which are a way for a military man to withdraw from the implementation of service obligations. The crime of desertion is a crime specifically committed by a military man because it is against the law and against the law. The act or crime is regulated in Article 87 of the Criminal Procedure Code, namely: Paragraph 1: Threatened because of desertion, military:

- 1) 1st, Those who leave with the intention of withdrawing forever from their service obligations, avoiding the dangers of war, crossing over to the enemy or entering military service in a country or other power without being justified for that.
  - 2) 2nd Who because of his fault or intentionally makes an absence without permission during peacetime longer than 30 (thirty) days, during wartime longer than four days.
  - 3) 3rd Who deliberately makes absences without permission and therefore does not participate in carrying out part or all of an ordered trip, as described in article 85 number 2.
- b. Whereas the essence of the crime of desertion must be interpreted in that the soldier who commits desertion must reflect the attitude that he has no desire to be in military service. This means a military man who, due to his fault or intentionally, makes an absence without permission without any reason to avoid the dangers of war and cross over to the enemy or in a state of peace is not present at the designated place to carry out the duties assigned to him. The act concerned leaves the unit within a minimum grace period of 30 consecutive days or the act of withdrawing forever. Whereas in daily life, a military man is required to be prepared where he has to be, without difficulty it can be expected of him to become a military capable of carrying out his duties.
- c. In military life, acts of absence at a place to carry out service are determined as a crime, because the appreciation of discipline is very urgent in military life because discipline is the backbone of military life. It is different from the life of non-military organizations, in that the act is not a crime, but a violation of organizational discipline.
- d. If one examines the meaning of the formulation of the act of withdrawing forever from his service obligations, at first glance this act indicates that he will not return to his place of duty which must be interpreted as meaning that the soldier has a will that he has no desire to remain in military service.

### **B. Overview of Military Accountability**

#### **1. Definition of Military Responsibility**

The definition of accountability in general is a form of someone's responsibility for the actions he does. Meanwhile, criminal responsibility is a form of punishment for the perpetrator with the aim of determining whether a suspect can be held accountable for a criminal act that has occurred or not.

From the point of view of the occurrence of a prohibited action (required), a person will be held criminally responsible for these actions if the action is against the law. From the standpoint of being responsible, only someone who is capable of being responsible (*toerekeningsvatbaar*) in general:

- a. State of mind: not disturbed by persistent or temporary illness (temporary), not disabled in growth (stupidity/idiot), not disturbed by shock, hypnotism, overflowing anger, subconscious influence, sleep deprivation, delirium due to fever.
- b. In other words, that the subject is conscious, his mental ability: can realize the nature of his actions, can determine his will for the action, whether to be carried out or not, can know the reprehensibility of the action.<sup>2</sup>

For the definition of military responsibility, it is not regulated in writing in statutory regulations. So it can be concluded by linking it to criminal responsibility, that military responsibility is the ability to be held accountable by members of the military for the mistakes they have made.

The essence of criminal responsibility for a military man is basically more of an act of deterrence or retaliation as long as the convict will be reactivated in military service after completing his sentence. A military (ex-convict) who will return to active duty must become a good and useful military man both because of his own awareness and as a result of the educational actions he received while in a military prison house (military correctional facility). If this were not the case, then the punishment would have no meaning in terms of returning it to the military community.

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<sup>1</sup> Tanpa Tahun. Kamus Istilah Militer. [http : www.Googlesearch.Com](http://www.Googlesearch.Com). Diakses tanggal 5 Agustus 2010 Pukul 11.22.46

<sup>2</sup> Sianturi I, *op.cit.*, h. 249.

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

Things like that need to be the basis for the judge's consideration to determine whether or not it is necessary to impose an additional sentence of dismissal of the convict in addition to the other grounds that have been determined. If the convict is a non-military person, then the essence of carrying out the responsibility for implementing the crime is the same as that regulated in the Criminal Procedure Code.<sup>3</sup>

Members of the military in the crime of desertion can be punished if their actions have fulfilled the elements of the formulation of the crime of desertion, while the ability to be responsible is not really considered because the perpetrator is a military man. The law considers that the military is clearly capable of being responsible because the mental state of a military man when he commits a crime is considered healthy and normal.

### **2. Legal Basis and Forms of Military Criminal Liability.**

The form of military criminal responsibility is to accept all the punishments that have been given to the perpetrators. In this case punishment or sanction can be in the form of dismissal, demotion or revocation of certain rights. This is regulated in Article 6 to Article 31 Chapter II Book I of the Criminal Procedure Code and Article 8 of the ABRI Soldier Disciplinary Law which applies to all military/TNI both regarding norms and sanctions, a unification is held.

As for the form of criminal responsibility for members of the military who commit criminal acts can be resolved according to disciplinary law or the imposition of criminal sanctions through the Military Court. Military disciplinary punishment is an educational act for a military person who is sentenced whose purpose is as an act of military discipline (discipline). Meanwhile, military punishment is more of a combination of military education and deterrence, as long as the convict is not discharged from military service.

Settlement according to disciplinary law is carried out in cases where the crime is committed in such a light nature and is not an act of crime, but contrary to official orders or actions that are not in accordance with the soldier's life system (discipline violation), so that the case can be resolved outside the Court, for example: arriving late at apple time, not respecting superiors and not neatly dressed.

A military person who has committed the violations mentioned above can be held liable for criminal responsibility in the form of disciplinary punishment contained in Article 8 of the ABRI Soldier Disciplinary Law in the form of:

- a. reprimand
- b. mild detention for a maximum of 14 (fourteen) days.
- c. weight bearing for a maximum of 21 (twenty one) days.

Military crimes aim at military education and deterrence of perpetrators of criminal acts, where criminal acts are generally felt to disturb the balance of society. Criminal imposition in criminal acts is considered necessary as the last tool/ultimate weapon against the perpetrators. Forms of criminal responsibility for TNI soldiers who commit criminal acts are regulated in Article 6 of the Criminal Procedure Code, namely:

Principal Crime, including:

- a. Death Penalty, Article 255 of the Military Criminal Procedure Code (hereinafter referred to as HAPMIL) stipulates that the execution of capital punishment is carried out according to the provisions of the applicable laws and regulations and not in public. If the death row convict is a member of the TNI, during the execution of the death penalty he is dressed in daily service without rank and honors.
- b. Imprisonment, imprisonment carries a minimum sentence of one day and a maximum of fifteen years, the execution of which for the military is carried out in the Military Penitentiary (Masmil).
- c. Imprisonment Criminal Imprisonment carries a minimum sentence of one day and a maximum of one year. For convicts who are sentenced to imprisonment in prison regulations, differences are made, where convicts who are imprisoned are given jobs within the walls of a correctional house and the work given is lighter compared to convicts who are sentenced to prison.
- d. Closing Criminals, Closing crimes are crimes that are imposed on perpetrators of criminal acts in the framework of carrying out State duties, but do so excessively. The punishment in the KUHPM is intended to compensate for the good faith of the convict. In Indonesia, it has only been imposed once, namely in the case of the 3 July 1946 incident, the criminal sentence was not carried out.

Additional Penalties include:

- a. Dismissal from military service with or without revocation of his right to enter the Armed Forces. In the context of imposing an additional sentence of dismissal from military service, it is preferable that such dismissal be followed by revocation of his right to enter the armed forces. Because if it is not followed by the word revocation of the right to enter the armed forces, then after being fired from one army there is a fear of joining another. According to the law, the dismissal results in the loss of all rights that he obtained from the armed forces during his previous service. The imposition of a dismissal sentence in addition to the main sentence is seen by military judges as no longer appropriate to be maintained in the life of military society and if a

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<sup>3</sup> Sianturi II, *op.cit.*, h. 69.

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

dismissal sentence is not imposed it is feared that the convict's presence in the military after he has served his sentence will shake the foundations of order in society.

- b. Demotion, Di in practice, the imposition of a demotion sentence is rarely applied, because it is felt to be unfair and does not have much benefit in the framework of military development, especially for High Commissioner and Officers
- c. Revocation of the rights mentioned in Article 35 Paragraph 1 number 1, 2 and 3 of the Criminal Code.

The 1st right to hold a position in general or a certain position; is the revocation of the right to hold office usually if the person concerned commits a crime of office connected with Articles 52 and 52a of the Criminal Code.

The 2nd right to enter the armed forces; is the revocation of the right to enter the armed forces, if according to the judge's consideration that the person is not fit to be in the military society.

The 3 rights to vote and be elected in elections held based on general rules are revocation of the right to vote and be elected. This is usually imposed on a soldier who commits a political crime that is contrary to state ideology, especially against activists of the September 30th Movement, then generally against they are deprived of the right to vote and be elected.

### **III. RESEARCH METHOD**

Legal research is a process to find legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand.<sup>4</sup> This research is a normative research which seeks to study and explore and find answers about what should be from every problem based on norms, not examining social phenomena that occur as a result of legislation. The approach used in this study is a statutory approach and a conceptual approach. This approach is used because in solving the problems in this research, it will refer to existing and related laws.<sup>5</sup>

### **IV. DISCUSSION**

#### **A. Overview of the Crime of Desertion**

Whereas punishment is not retaliation for the perpetrator's mistakes, punishment in the crime of desertion aims to change the behavior of the convict in the future, where prevention and at the same time rehabilitation are targets that must be achieved by a sentencing plan. Because the purpose of punishment for members of the military who commit desertion is more of an act of deterrence or retaliation as long as the convict (military) will return to active duty, sanctions are emphasized on their purpose, namely to prevent the military from committing crimes again. The punishment system for a military man who commits a military crime is regulated in a special punishment system provision regulated in the Criminal Procedure Code.

#### **1. Forms of desertion Based on the provisions of Article 87 of the Criminal Procedure Code, there are two forms of desertion, namely:**

##### **a. The form of pure desertion, namely desertion because of the objectives, among others:**

- 1) Leaving with the intention of withdrawing forever from service obligations. The meaning of forever is not going back to his place of duty. From the fact that the perpetrator has worked for a particular office or company without an agreement with the head of the company, that the job is temporary before he returns to his unit. Even if the perpetrator had told a close friend about his intention before leaving, then not long after leaving he was arrested by the officers, then this incident was considered a crime of desertion. From his service obligations, meaning that if the perpetrator leaves his unit, with the intention of forever and does not carry out his duties and obligations as a military man, then this act is desertion.
2. Go with the intention of avoiding the dangers of war. It means a military man whose departure is intended to avoid danger in battle by running away, for an indefinite period of time, such an act can be said to be desertion during wartime.
3. Go with the intention of crossing over to the enemy. To cross over to the enemy is the intent or purpose of the perpetrator to go and side with the enemy whose purpose can be proven (for example, before leaving he revealed to his close friends to go over to the side of the enemy), then the perpetrator has deserted.
4. Unlawfully entering foreign military service. The definition of entering military service is if the perpetrator's goal is to enter other forces, troops, paramilitary troops, partisans and so on from a rebel organization related to espionage issues, this action includes committing a crime of desertion.

##### **b. Forms of desertion due to time, namely:**

1. Unlawful absence due to his/her fault, the duration of which exceeds 30 days of peace time, for example: a military person who commits a crime of intentional or intentional absence in peacetime for 30 days continues.
2. Unlawful absence due to his/her fault, longer than four days during wartime, for example a military who commits a crime of intentional absence when the country is in a state of war or the military is being assigned its unit in a conflict area.

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<sup>4</sup> Peter Mahmud Marzuki, 2011, *Penelitian Hukum*, Kencana Pranada Media Group, Jakarta, h. 35.

<sup>5</sup> Soerjono Soekanto dan Sri Mamudji, 1985, *Penelitian Hukum Normatif*, Raja Grafindo Persada, Jakarta.

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

3. If absence is legally observed for less than 30 (thirty) days or at least one day, it cannot yet be regarded as a crime of desertion but is referred to as absenteeism without permission which can be resolved according to soldier discipline law.
4. What is meant by not being present without permission for one day here is for 24 hours. As a benchmark for determining absences, it is calculated starting from being absent at the roll call, or when it is needed/important not being present at the designated place to carry out the tasks assigned to him.<sup>6</sup>

For TNI Soldiers who will be subject to disciplinary punishment, their actions must fulfill the conditions set out in Article 5 of Law Number 26 of 1997 (hereinafter abbreviated as the ABRI Soldier Disciplinary Law). What is meant by a violation of soldier discipline is disobedience and serious disobedience to a soldier based on the Sapta Marga and Soldier's Oath to carry out his duties and obligations in accordance with the rules or procedures for soldier's life.

Violations of soldier discipline in accordance with the provisions of Article 5 of the ABRI Soldier Discipline Law include pure disciplinary law violations and impure disciplinary law violations. A pure disciplinary violation is any act that is not a crime, but contrary to official orders or official regulations or actions that are not in accordance with the soldier's life system, for example: being late for an assembly, dressing less neatly/unbuttoned or dirty clothes, long hair and untied shoes polished. The type of punishment for this violation is in the form of disciplinary punishment in the form of physical action or verbal warning to raise awareness and prevent the recurrence of this violation, such as push ups and running around the field.

Meanwhile, violations of impure disciplinary law are any act that constitutes a criminal offense of such a light nature that it can be resolved by law on soldier discipline. What is meant by "such a mild nature" is a crime punishable by imprisonment for a maximum of 3 (three) months or imprisonment for a maximum of 6 (six) months or a fine of a maximum Rp. 6,000,000 (six million rupiah), the case is simple and easy to prove and the criminal act that occurred will not result in disruption of the interests of the TNI or the public interest, for example: Mild maltreatment that does not cause illness or obstruction to carry out work. The type of punishment for this violation is in the form of disciplinary punishment in the form of light detention for a maximum of 14 (fourteen days) or serious detention for a maximum of 21 (twenty one days). The commander or superior who has the right to punish (hereinafter referred to as *Ankum*) is entitled to impose all kinds of disciplinary punishment on any soldier under his commanding authority which is carried out in a disciplinary hearing.

Desertion is a purely military crime and is not a disciplinary violation so that the settlement cannot be resolved through the Soldier's disciplinary law channel and must be resolved through a court hearing. Therefore, those who have the right to try criminal acts of desertion are Military Judges,

Whereas for TNI soldiers who are involved in civil matters (both as Defendants and plaintiffs) then for settlement through courts within the general court environment, and if what is being faced is a problem related to divorce or inheritance according to Islamic law then settlement through the Religious courts. Regarding Military Administrative Lawsuits, if there are individuals or civil legal entities who feel aggrieved by the issuance of a decision issued by military Administrative bodies or officials then in accordance with the Military Administrative Procedure Law Chapter V Law Number 31 of 1997) Lawsuit shall be filed, to the Court High Military. However, until now the Military Administrative Court has not materialized, because there is no government regulation yet, as in the elucidation to Law Number 31 of 1997 Article 353 it is explained that no later than 3 (three) years from the promulgation of this Law, there must be a regulation. his government.

### **2. Elements of the Crime of Desertion**

Looking at the provisions of Article 87 of the Criminal Procedure Code which reads: "Military who because of his fault or intentionally makes absences without permission in peacetime longer than thirty days". Consists of the following elements: 1. Military, 2. Deliberately, 3 . Absent without permission, 4. During peacetime, 5. Longer than thirty days.

### **B. Forms of Accountability for the Military Who Commit the Crime of Desertion.**

Determining the purpose of sentencing is a rather dilemmatic issue, especially in

Determining whether punishment is aimed at retaliating for a crime that has occurred or is a proper goal of criminal proceedings is the prevention of anti-social behavior. Determining the meeting point of the two views if this is not carried out successfully requires a new formulation in the system or purpose of punishment in criminal law. Punishment has several purposes which can be classified based on theories about sentencing. Theory about the purpose of sentencing which revolves around differences in the essence of the basic idea of sentencing can be seen from several views, namely:

a) Absolute theory (retributive);

The absolute theory views that punishment is retribution for the mistakes that have been made so that it is oriented to action and lies in the occurrence of the crime itself. This theory puts forward that sanctions in criminal law are imposed solely because a person has committed a crime which is an absolute consequence that must exist as a retaliation for the person who committed the crime so that the sanction aims to satisfy the demands of justice.

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<sup>6</sup> Pernyataan Bapak Sugiato, selaku Hakim Militer III-12 Surabaya, tanggal 16 Agustus 2010.

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

- b) The teleological theory (objective) views that punishment is not a form of retaliation for the mistakes of the perpetrators, but a means of achieving useful goals to protect society towards social welfare. Sanctions are emphasized on their purpose, namely to prevent people from committing crimes, so they are not aimed at absolute satisfaction of justice.
- c) The retributive-teleological theory views that the purpose of punishment is plural, because it combines teleological principles (goals) and retributive as one unit. This theory has a double pattern, where punishment contains a retributive character insofar as punishment is seen as a moral critique in responding to acts committed Wrong. Meanwhile, the teleological character lies in the idea that the goal of moral criticism is a reform or change in the behavior of the convict in the future. This theoretical view suggests the possibility of articulation of a sentencing theory that integrates several functions as well as utilitarian retribution where prevention and rehabilitation are all seen as targets to be achieved by a sentencing plan. Because the objective is integrative, the objective of sentencing are:
- General and special prevention;
  - Community protection;
  - Maintain community solidarity and
  - Compensation/offset.

In short, "penal system" can be interpreted as "a system of awarding or imposing a sentence". The system of giving/imposing a sentence (penal system) can be seen from 2 (two) angles:

- (1) From a functional point of view (from the point of view of its operation/function/process), the penal system can be interpreted as:
- The entire system (laws and regulations) for functionalization/operationalization/crime concretization.
  - The entire system (laws and regulations) that regulates how criminal law is enforced or operationalized concretely so that a person is subject to criminal (legal) sanctions.

In this sense, the criminal justice system is identical to the criminal law enforcement system which consists of the Material/Substantive Criminal Law sub-system, the Formal Criminal Law sub-system and the Criminal Implementation Law sub-system. The three sub-systems form a unified criminal system, because it is impossible for criminal law to be operationalized/enforced in a concrete way only with one of these sub-systems. The definition of such a sentencing system can be referred to as a "functional sentencing system" or "a sentencing system in a broad sense".

- (2) From the perspective of substantive norms (only seen from substantive criminal law norms), the criminal justice system can be interpreted as:
- The entire system of material criminal law rules/norms for sentencing; or
  - The entire system of material criminal law rules/norms for awarding/imposing and executing sentences;

With this understanding, the entire statutory rules contained in the Criminal Code as well as special laws outside the Criminal Code, are essentially one unit of the criminal justice system, which consists of "general rules" and "special rules" ("special rules"). General rules are contained in Book I of the Criminal Code, and specific rules are found in Books II and III of the Criminal Code as well as in special laws outside the Criminal Code.

Whereas the punishment in the desertion crime aims to change the convict's behavior in the future, where prevention and at the same time rehabilitation are the targets that must be achieved by a sentencing plan. Because the purpose of punishment for members of the military who commit desertion is more of an act of deterrence or retaliation as long as the convict (military) will return to active duty, sanctions are emphasized on their purpose, namely to prevent the military from committing crimes again. The punishment system for a military person who commits a military crime is regulated in a special punishment system provision regulated in the Criminal Procedure Code.

### **C. Factors Causing the Crime of Desertion**

Based on the research that the author has done, it was found that the act of desertion was carried out by members of the TNI military who were motivated by several factors. Which is certainly not a single causal factor, there are always personal motives, and also due to environmental influences. The results of the report on the implementation of the work program of the III-12 Surabaya Military Court explained that a TNI soldier committed the crime of desertion caused by external factors (from outside) and internal factors (from inside). natural).

Internal factors are usually personal in the form of mental unpreparedness to become a soldier, joining the TNI because it fulfills parents' wishes, tasks that are too heavy and inappropriate, disharmony in the household and irregular living habits with a certain background before becoming a soldier can also be triggers. also the misunderstanding of the initial perspective in choosing a soldier's profession, which in reality turned out to be not as beautiful as previously imagined.

While the external factors here are due to the environment. Environmental distractions also have a big impact, especially if it turns out to be exhausting being a soldier, while the economic rewards are limited. So, sometimes some elements are involved in criminal acts, such as a lot of debt here and there so he prefers to leave the unit rather than solving the problem. That is certainly a very concerning incident, but at the same time a challenge to minimize it. This problem not only tarnished the person, but also



## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

tarnished the pride of the corps. As far as we know, the TNI has always put forward a firm stance to protect the dignity of soldiers by enforcing the law.

### **1. Forms of Accountability for the Military Who Commit the Crime of Desertion**

The crime of desertion is a purely military crime committed by a soldier because it is against the law and contrary to the law. Therefore the crime of desertion is a crime not a violation that needs to be punished, so the form of desertion responsibility is regulated in Article 6 KUHPM in the form of: 1. Principal sentence: Imprisonment, this is regulated in Article 6a paragraph 2 of the Criminal Procedure Code where the implementation of punishment for the military is carried out in the Military Penitentiary (Masmil). 2. Additional punishment: Dismissal from military service, this is regulated in Article 6 b paragraph 1 of the Criminal Procedure Code. The imposition of a dismissal sentence in addition to the main sentence is seen by military judges as no longer appropriate to be maintained in the life of military society and if a dismissal sentence is not imposed it is feared that the convict's presence in the military after he has served his sentence will shake the foundations of order in society.

The basis for the Panel of Judges to impose an additional sentence of dismissal is contained in Article 26 of the Criminal Procedure Code which reads:

- (1) Dismissal from military service can be imposed by a judge together with any decision of imposing a prison sentence on a military man who, based on the crime committed, is deemed to be no longer fit to remain in military life.
  - (2) According to the judge, the dismissal results in the loss of all the rights that he received from the Armed Forces during his previous service, with the exception that the pension right will only be lost in cases stated in the pension regulations that apply to the convict.
  - (3) If said dismissal coincides with the revocation of the right to enter the armed forces, according to law it will also result in the loss of the right to own and wear stars, medals or identification marks, insofar as both of them are mentioned last obtained in respect of with his previous service.
2. Efforts by military members who commit acts of desertion so they can return to the unit. There are 2 attempts by a military man to commit a crime of desertion, namely:

#### **a. Can Be Accompanied By Legal Counsel**

One or more legal advisers to accompany him in court and submit legal remedies. The provision of legal assistance and legal advice to members of the TNI is on the orders and permission of Papera (Case Submitting Officer) which is regulated in the provisions of Article 215 to Article 218 of Law Number 31 of 1997 concerning Military Justice which reads in full:

Article 215:

- (1) For the purposes of defending their case, a suspect or defendant has the right to receive legal assistance at all levels of examination.
- (2) Legal aid as referred to in paragraph (1) is prioritized from legal aid services within the Armed Forces.
- (3) The procedures for providing legal assistance as referred to in paragraph (1) are further regulated by a decision of the Commander in Chief.

Article 216:

- (1) The legal adviser who accompanies a suspect at the investigation level or the accused at the examination level at a trial court must be ordered or permitted by the Case Submitting Officer or other official appointed by him.
- (2) A legal adviser who accompanies a civil defendant in a trial of connectivity cases must obtain the permission of the head of the court.

Article 217:

- (1) In the event that a suspect or defendant is suspected or charged with committing a criminal act which is punishable by death or threatened with imprisonment of 15 (fifteen) years or more, the Case Submitting Officer or other official appointed by him is obligated to appoint a legal adviser for the suspect or defendant.
- (2) Every legal adviser appointed to act as referred to in paragraph (1) provide assistance for free or prodeo.
- (3) Legal advisers have the right to send and receive letters from suspects or defendants whenever they wish.

Article 218:

- (1) The legal adviser as referred to in Article 216 has the right to contact and speak with the suspect or defendant at each level of examination for the benefit of defending his case under supervision by the official concerned according to the level of examination.
- (2) A legal adviser who is proven to have abused his rights, in a conversation with a suspect or defendant, according to the level of examination, the prosecutor's investigator or a Military Detention Center officer will give him a warning.
- (3) If the warning referred to in paragraph (2) is violated, further contact is prohibited.

In the event that TNI members use legal assistance from outside legal counsel, the legal adviser must first obtain approval/permission from the papera, and as far as possible for TNI soldiers who are involved in legal issues legal aid is prioritized from the force legal service. The role of the legal adviser here is to defend the rights of the accused both at the level of examination at investigation and trial. During the trial, the role of the legal adviser is to assist the defendant in submitting an

## **Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Deserion**

exception/objection to the Military Prosecutor's indictment, filing a *pledooi* (defense) on the Prosecutor's demands, filing a duplicate of the Prosecutor's replica and other rights of the defendant, for example filing legal remedies against the Judges' Panel of Judges' decision.

Legal remedy is the right of the interested party, because it is also the party concerned himself who must be active by submitting it to the court which is empowered if he wants it. As is known, the law provides the possibility for defendants who are sentenced to reject or not accept the decision handed down by the court. In the Military Criminal Procedure Code (hereinafter referred to as HAPMIL), ordinary legal remedies are distinguished: requests for appellate hearings are regulated in Articles 219-230 HAPMIL, cassation hearings are regulated in Articles 231-244 HAPMIL and extraordinary legal remedies: Examinations at cassation level for the sake of interest law is regulated in Articles 245-247 HAPMIL, review examination. Decisions that already have permanent legal force are regulated in Articles 248-253 HAPMIL.

### **b. Aggravating and Mitigating Punishment**

Before handing down a decision, the Panel of Judges must be very careful in assessing and considering the strength of evidence in the trial process. Besides that, the purpose of the Panel of Judges imposing a sentence is not solely to convict those who are guilty of committing a crime, but also has the aim of educating the person concerned so that he can be convinced to return to the right path so that he becomes a good citizen and soldier in accordance with the philosophy of Pancasila. and Sapta Marga. Therefore, before the Panel of Judges imposes a sentence on the Defendant, it is necessary to consider aggravating matters, namely:

- The Defendant's actions were contrary to the values contained in the Sapta Marga and the Soldier's Oath.
- The Defendant's actions could damage the joints of the soldier's disciplinary life in his unit.
- Return of the Defendant to the unit because he was arrested.

During the time the Defendant deserted he committed another crime

- The defendant repeated his act of desertion.

In deciding desertion, the judge considers the sentence that will be imposed on the defendant so that he can return to his unit, the judge in dropping the case considers the mitigating factors as follows:

- Defendant frankly so that expedite the course of the trial.
- The accused returned to his unit by surrendering.
- The defendant was young and was the first to commit a crime.

## **V. CLOSING**

### **CONCLUSIONS**

Based on the analysis and discussion as presented in the previous paragraph, it can be concluded as follows:

1. That the form of accountability for the crime of desertion can be in the form of a principal punishment, namely imprisonment and additional punishment in the form of dismissal from military service, this is as stipulated in the provisions of Article 6 of the Criminal Procedure Code.
2. That the efforts that can be made by members of the military who commit the crime of desertion are to ask to be assisted by legal advisers and submit legal efforts to reject or not accept the decision handed down by a military court.

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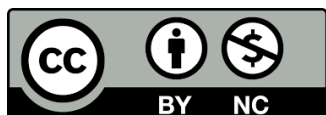
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## Criminal Accountability of Members of the Indonesian National Army (TNI) Who Perform Desersion

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