

## Effectiveness of Additional Criminal Penalties of Dismissal from Military Service for TNI Soldiers who Commit LGBT Acts

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**ABSTRACT:** LGBT acts are a serious concern, especially in the TNI environment because their actions can harm the values of the life of TNI soldiers who are upheld by the Sapta Marga, the Soldier's Oath and the Eight Obligations of the TNI. Currently, LGBT acts are faced with a legal vacuum, but several cases regarding LGBT in the TNI environment, in addition to the main criminal offense, are subject to additional criminal penalties in the form of being dismissed from military service which results in the termination of service to the country. This study uses normative legal research through research on court decisions, literature and in-depth research with interviews with related stakeholders. The results of this study, it is necessary to have provisions and parameters for whether or not TNI soldiers are worthy of being maintained in the TNI environment which are clear in order to accommodate additional criminal penalties for LGBT acts while still considering the public interest, legal interests, and military interests so that the application of additional criminal penalties for being dismissed from military service runs effectively. This is done to realize justice in LGBT cases both in cases in this study and cases that may occur in the future.

**KEYWORDS:** LGBT, military, soldiers, parameters, military interests.

### I. INTRODUCTION

One of the nations that has a variety of ethnic, cultural, religious and linguistic diversity is Indonesia, which has diversity but remains a unified whole known as *bhineka tunggal ika*. The meaning of *bhineka tunggal ika* underlies harmony and unity in Indonesia, appreciating ethnic, religious, racial and cultural diversity as a source of national wealth.

*Bhineka tunggal ika* as one of the legal principles for national legal development where Indonesia is a legal state that upholds human rights which are not only outlined in the 1945 Constitution (UUD) but in social life are also implemented. This means that "law is also understood as a collection of rules both as a result of formal legislation and from custom, where a certain country or society claims to be bound as a member or as a subject".<sup>1</sup>

"Every citizen's actions are regulated by law, every aspect has its own rules, provisions and regulations".<sup>2</sup> The implementation of human rights must also be accompanied by clear rules so that it is expected to regulate behaviors that are considered deviant, one of which is influenced by foreign culture. "The rise of foreign cultures that are not in accordance with the norms of decency of our nation is one of the factors that brainwash our young generation to behave improperly".<sup>3</sup>

Foreign cultures that contradict the norms of decency, one of which is the deviation of LGBT (lesbian, gay, bisexual, transgender) decency. LGBT has become controversial with the norms of decency, religion and customs that emerged around 1990, which replaced the phrase for the gay community because it is not only gay but bisexual, lesbian and transgender.

According to psychiatrist Fidiansyah (Deputy Section of Religion Spirituality and Psychiatry of the Indonesian Psychiatric Medical Association (PDSKJI), that "LGBT includes mental illness, and can be transmitted to others".<sup>4</sup> In Indonesia, LGBT not only ignores the norms of decency, but also ignores the religious norms that are clearly outlined in Pancasila, namely in the first principle. The first precept emphasizes that the state strongly upholds religious norms by not ignoring other norms that exist in the five precepts of Pancasila.

<sup>1</sup> Zanubiya, S. S. A., Afhdali, D. R., dan Irwan Triadi, 2023, *Perwujudan Upaya Penegakan Hukum Unggul Menjadi Ius Constituendum: Berkarakter Bela Negara Dan Religiusitas*. Iblam Law Review Volume 3 Nomor 3, hlm 343-352.

<sup>2</sup> Muhammad, Faiz Emery, Harefa, Beniharmoni, 2023, *Pengaturan Tindak Pidana Bagi Pelaku Penipuan Phisning Berbasis Web*. Jurnal USM Law Review Volume 6 Nomor 1, hlm 226-241.

<sup>3</sup> Suriata, I. Nengah, 2019, *Aktualisasi Kesadaran Bela Negara Bagi Generasi Muda Dalam Meningkatkan Ketahanan Nasional*. Public Inspiration Jurnal Administrasi Publik Volume 4 Nomor 1, hlm. 47-56.

<sup>4</sup> Kusnadi dan A. Muh Ilham Septian, 2020, *Isu LGBT (Lesbian, Gay, Biseksual & Transgender) Dalam Al-Qur'an*. Media Intelektual Muslim Dan Bimbingan Rohani Volume 6 Nomor 2.

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LGBT until now in national law has not been outlined in national legal regulations nor does it explicitly prohibit LGBT behavior, but in some regions in Indonesia, one of which is Aceh, regulates the prohibition of same-sex relationships and sets severe penalties for violators.

The prohibition of LGBT behavior is not explicitly regulated in national law but intersects with the provisions of article 292 of the Criminal Code, which prohibits homosexual acts against any person who is not an adult (child). While the new Criminal Code that was passed is set forth in article 406 and article 414 of the Criminal Code, the elements in these articles provide criminal penalties for obscene acts to children of the same sex as him/her committed by adults, both male and female.

Based on the articles mentioned above, it can provide a picture of a legal vacuum where “criminal law does not regulate how criminal threats or legal consequences of homosexual behavior committed by adults of the same sex which creates a vacuum of norm”.<sup>5</sup> Its limitations only provide arrangements for homosexual behavior where the victim is a child, so that LGBT perpetrators prefer to do it with fellow adults without fear and worry about the rule of law that regulates it, but the public assessment of the act is a deviant act that violates the norms of decency and religion.

The LGBT phenomenon is not only spreading among civil society, but has now spread into the TNI, where some TNI soldiers have joined the LGBT group, which is said to damage and dilute the discipline, identity and soul of Sapta Marga.

This is not in line with the work of the Indonesian National Army (TNI) so far as a state defense institution that has a very strong force in maintaining the sovereignty of the Republic of Indonesia both land, sea and air.

In its development, LGBT actions that occur in the TNI environment have the potential to interfere with the implementation of tasks resulting in problems that make TNI Soldiers face the law. TNI soldiers are not only subject to the Military Criminal Code (KUHPM), but are also required to comply with the Criminal Code (KUHP) and applicable laws and regulations.

The aforementioned provision is contained in article 2 of the KUHPM which reads “against criminal offenses not listed in this code, committed by persons subject to the power of military judicial bodies, general criminal law is applied, unless there are deviations stipulated by law”.

The rules that bind TNI Soldiers are clearly regulated in the KUHPM whose legal subjects are TNI Soldiers who commit criminal acts/military crimes. Some of the LGBT cases that occurred within the TNI have been applied with article 103 of KUHPM which reads “the military, who refuses or willfully disobeys a service order, or arbitrarily exceeds such an order, shall, for willful disobedience, be punished by a maximum imprisonment of two years and four months”.

The article is currently applied in several court decisions with the consideration that TNI Soldiers who commit such acts have fulfilled the element of disobeying a service order so that a sentence can be imposed. The article can be said to fill the legal vacuum against LGBT acts until now has not been explicitly regulated in the positive law in force in Indonesia so that the application of article 103 of the Criminal Code is considered to have fulfilled to ensnare TNI Soldiers who commit LGBT acts, where TNI Soldiers do not obey superior orders, namely the order to prohibit LGBT acts within the TNI issued by the TNI Commander through Telegram Letters Number ST/398/2009 and Number ST/1648/2019 whose contents regulate the prohibition for TNI soldiers to commit immoral acts with the same sex.

Based on this, LGBT acts are considered inappropriate in the TNI environment because they are contrary to military discipline and are a serious offense because it is the same as disobeying superior orders. Several court decisions issued by the Military Court to resolve LGBT cases such as in Military Court II-08 Jakarta and Military Court I-05 Pontianak imposed the main punishment along with additional punishment of dismissal from military service for LGBT perpetrators.

The additional punishment of dismissal from military service with or without revocation of the right to enter the TNI if his actions are deemed unfit to be in the TNI environment. “The additional punishment of dismissal from military service described by KUHPM also cannot be abandoned from several reasons for the implementation of special criminal laws that are more severe for a military person”.<sup>6</sup> This is because TNI Soldiers have a greater responsibility than civilians to maintain order and peace.

For TNI Soldiers, dismissal from military service is considered the end of their career and service in the TNI with additional consequences, namely the termination of the rights received so far. In this case, the Judge should be able to pay attention and consider it thoroughly before the additional punishment of dismissal from military service is imposed on the perpetrators.

The considerations mentioned above, among others, whether or not the TNI Soldier can be guided in improving his behavior considering that the state has spent a lot of budget to educate a TNI Soldier, so that rehabilitation efforts may be taken into consideration but only considering the applicable legal provisions.

Basically, what actions need to be criminalized and what actions are not criminalized, criminal law has its own criteria such as actions that are disliked or hated by society and are detrimental or can cause victims. The prevention and control of acts carried

<sup>5</sup> Erfan, Riswan, 2015, *Kriminalisasi Perbuatan Cabul Yang Dilakukan Oleh Pasangan Sesama Jenis Kelamin (Homoseksual)*, Jurnal Arena Hukum Volume 8 Nomor 2, hlm. 240.

<sup>6</sup> Sutarto, Faizal Akbar, 2022 *Eksistensi dan penerapan pidana pemecatan dari dinas militer sebagai pidana tambahan dalam perspektif hukum pidana khusus*, JISPENDIORA Jurnal Ilmu Sosial Pendidikan Dan Humaniora Volume 1 Nomor 2, hlm 146-157.

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out through criminal law are acts that are undesirable and cause harm in the community which are considered as despicable acts where the role of criminal law must continue to protect individuals/groups of society from despicable acts.

By looking at the religious, social, cultural, and medical perspectives, LGBT acts should have met the qualifications of these despicable acts and the sanctions that should be put forward are more rehabilitative. This is in line with the legal development that is being promoted in this country with the issuance of the new Criminal Code that prioritizes rehabilitative because the problem cannot be solved only by imprisonment or by fining as much as possible.

The problem may lie in the awareness of the perpetrator, whether imprisonment with additional dismissal of the perpetrator can be effective for the perpetrator when he returns to society or remains in his previous behavior. Based on this, the author formulates the problem, namely How the effectiveness of additional punishment dismissed from military service to TNI Soldiers who commit LGBT acts can be implemented? And how is the principle of military interest a legal consideration in the application of additional punishment in the form of dismissal from military service for TNI Soldiers who commit LGBT acts? With the purpose of the study, namely to analyze the implementation of additional punishment in the form of dismissal from military service for LGBT perpetrators has effectively realized legal certainty and justice and to analyze the applicability of the principle of military interests into legal considerations in the settlement of LGBT cases within the TNI.

## **II. RESEARCH METHODS**

The research method used is normative juridical research method by approaching concepts and theories, approaching legislation related to this research. Normative juridical research where the law as a system of norms, principles, rules from legislation, doctrine and agreements.

The scope of this research is carried out by drawing on legal principles, which are carried out on written and unwritten positive laws.<sup>7</sup> One of the legal principles applied in a case in the military environment, especially LGBT actions, namely the military interests where the principle is still balanced with the interests of the law so that the punishment of the perpetrators can run according to positive law.

The legal research approach in this study is as follows:

1. Case approach in the research by using LGBT cases committed by TNI Soldiers who were imposed principal punishment and additional punishment dismissed from military service.
2. "Statutory approach (status approach) or juridical approach, namely research on legal products". This approach is carried out to examine the laws and regulations related to the research. This statutory approach will allow researchers to study "whether there is consistency and compatibility between one law and another".<sup>8</sup>
3. The conceptual approach is carried out because there is no or no legal rules for the problem at hand, this conceptual approach departs from the views and doctrines that develop in law, giving birth to legal notions and legal principles that are relevant to the problem at hand.

This research uses a qualitative type of research through case studies of problems contained in several court decisions of different jurisdictions and ranks, including the following:

1. Decision of the Pontianak Military Court with Number 13K /PM.I-05/AD/II/2024.
2. Decision of the Jakarta Military Court with Number 231K/PM.II-08/AU/XII/2020.

The nature of this research is descriptive and analytical which aims to describe the provisions of the applicable positive law and analyze the suitability of its application in the practice of implementation of additional punishment in the form of dismissal from military service for TNI Soldiers who commit LGBT acts aimed at providing normative recommendations as a form of legal prescriptions in the form of suggestions, proposals and ideal legal recommendations.

## **III. DISCUSSION AND RESULT**

In the military environment, dismissal from TNI service is a severe sanction that marks the end of a soldier's career and service. Therefore, TNI soldiers are expected to uphold discipline and obey all regulations, both those that apply internally within the TNI and those regulated in national legislation. One form of offense that is of serious concern is LGBT behavior, which until now has not been explicitly regulated in the Criminal Code or KUHPM, so the handling still relies on an approach based on the principle of military interests. In some cases, LGBT perpetrators are still processed through military courts using the article on disobedience to service orders and are sentenced to additional punishment in the form of dismissal from military service.

Case studies such as the decisions of the Pontianak Military Court No. 13K/PM.I-05/AD/II/2024 and the Jakarta Military Court No. 231K/PM.II-08/AU/XII/2020 show how LGBT acts within the TNI are legally processed with a disciplinary approach. In both cases, the defendants, who were active soldiers, were proven to have committed same-sex relations in various forms, both

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<sup>7</sup> Soerjono Soekanto, 1996, *Pengantar Penelitian Hukum*, Jakarta, UI Press, hlm. 63.

<sup>8</sup> Peter Mahmud Marzuki, 2010, *Penelitian Hukum*, Kencana Prenada Media, Jakarta, hlm. 93.

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with fellow TNI members and civilians. Although not specifically regulated in the Criminal Code or KUHPM, their actions were charged under Article 103 paragraph (1) of the KUHPM on disobedience to service orders. The court decision sentenced both of them to imprisonment and dismissal from military service. This indicates that the principle of military interest is used as a basis for maintaining order, discipline, and the integrity of military institutions from behavior that is considered internally deviant.

### **A. Effectiveness of Additional Punishment of Dismissal from Military Service for TNI Soldiers Who Commit LGBT Actions.**

Basically, the application of punishment is a fundamental component in the implementation of criminal law, this is stated by Chairul Huda who argues that “punishment is an important part of criminal law, this is said because punishment is the culmination of the entire process of holding someone accountable who has been guilty of committing a criminal offense”.<sup>9</sup>

Chairul Huda further stated that “a criminal law without sentencing would more be a declaratory system pronouncing people guilty without any formal consequences following from that guilt”.<sup>10</sup> Chairul Huda's opinion can be described that crime without punishment is more of a declarative system that declares a person guilty without the formal consequences that follow the form of guilt so that “the punishment imposed is not only aimed at private interests, but also public interests”.<sup>11</sup>

In general, the punishment imposed in the scope of criminal law is based on the applicable positive law in the form of main punishment, but in addition to the main punishment, additional punishment can be applied along with the main punishment. The regulation of additional punishment in general criminal law is outlined in article 10 of the Criminal Code, but if the subject is TNI Soldier, the applicability of both the main punishment and additional punishment refers to the Criminal Procedure Code where “the Criminal Procedure Code does not adopt the rules of general criminal law originating from the Criminal Code in a compressive manner”.<sup>12</sup>

The types of criminal arrangements for TNI Soldiers are outlined in Article 6 of the KUHPM which reads:

1. The main punishments are
  - 1st, Death penalty;
  - 2nd, Imprisonment;
  - 3rd, imprisonment;
  - 4th, imprisonment (Law No. 20 Year 1946)
2. Additional punishments:
  - 1st, Discharge from military service with or without deprivation of the right to enter the Armed Forces;
  - 2nd, Demotion;
  - 3rd, Deprivation of the rights mentioned in Article 35 of the first paragraph in the 1st, 2nd and 3rd numbers of the Criminal Code.

The additional punishment mentioned above, dismissal from military service with or without revocation of the right to enter the armed forces, can be applied to TNI Soldiers which will have the most detrimental impact on the career of a TNI Soldier. The additional punishment of dismissal from military service results in the loss of status as a TNI Soldier and its inherent rights so that this additional punishment is most feared by TNI Soldiers. In addition to being outlined in the KUHPM, this dismissal sanction is also outlined in Article 53 paragraph (1) of Government Regulation Number 39 of 2010 concerning the Administration of Soldiers of the Indonesian National Army which reads: "Soldiers are dishonorably discharged from military service because:

1. sentenced to additional punishment dismissed from military service based on a court decision that has obtained permanent legal force; or
2. has a character and/or actions that can obviously harm the discipline of the army or the TNI institution.

By paying attention to the arrangements contained in the KUHPM and Government Regulation Number 39 of 2010, it can provide a clear picture that the applicability of the decision to be dismissed from military service can be applied to TNI Soldiers who commit offenses. Apart from the military justice mechanism, dismissal from military service can be through the mechanism of military disciplinary law.

The sanction of being dismissed from military service applied to TNI Soldiers who commit violations of military disciplinary law is based on article 12 paragraph (1) of Law Number 25 of 2014 concerning Military Disciplinary Law, when TNI Soldiers

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<sup>9</sup> Huda, Chairul, 2006, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kealahan, Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana*, Jakarta, Kencana Prenada Media, hlm.125.

<sup>10</sup> Ibid.

<sup>11</sup> Abdul Wahid, Muhamad Irfan, 2001, *Perlindungan Terhadap Korban Kekerasan Seksual (Advokasi Atas Hak Asasi Perempuan)*, Bandung, P.T. Refika Aditama, hlm. 143.

<sup>12</sup> Sutarto, Faizal Akbar, 2022, *Eksistensi dan Penerapan Pidana Pemecatan Dari Dinas Militer sebagai Pidana Tambahan dalam Perspektif Hukum Pidana Khusus*, Jispendiora Jurnal Ilmu Sosial Pendidikan Dan Humaniora Volume 1 Nomor 2, hlm.146-157.

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have repeatedly committed disciplinary violations by ignoring the discipline that must be obeyed in their unit, Even though the unit has made efforts to provide guidance, the TNI Soldier still repeats his actions and is sentenced to disciplinary punishment more than 3 (three) times in the same rank and according to the consideration of the authorized superior the TNI Soldier should not be retained to remain in the military service so that the TNI Soldier can be dishonorably discharged. The dismissal is through an Honor Council hearing for TNI Soldiers in the rank of Officers, while for TNI Soldiers in the rank of Non-Commissioned Officers and Tamtama through tiered staff advice.

Administratively different, dishonorable dismissal for TNI Soldiers where TNI Soldiers have been sentenced more than 2 (two) times based on court decisions that have obtained permanent legal force, but do not include additional punishment in the form of dismissal from military service and based on the assessment of officials who have the authority TNI Soldiers cannot be maintained in the military service,

Additional punishment in the form of dismissal from military service to TNI Soldiers through the military justice mechanism is based on legal facts so that the Panel of Judges has confidence in the actions of the TNI Soldier is considered no longer suitable to be maintained as a TNI Soldier, then in addition to the main punishment is added with an additional punishment in the form of dismissal from military service and then administratively processed if it has obtained permanent legal force in accordance with Article 53 paragraph (2) letter c of Government Regulation Number 39 of 2010.

In addition to the article above, Article 53 paragraph (2) letter h of Government Regulation Number 39 of 2010 can also be applied to TNI Soldiers who commit other acts that are not appropriate for a Soldier and are contrary to official orders or official regulations or acts that are not in accordance with the norms of Soldier life which in the judgment of the authorized official cannot be maintained to remain in the military service.

The regulation of dishonorable dismissal in the government regulation does not explicitly mention the requirements or factors that can be used as legal considerations in making decisions on whether or not to dismiss TNI Soldiers who commit violations so that it is necessary to have requirements or factors why the dismissal is carried out and it is hoped that the correlation between *das sollen* and *das sein* can be in line

In law, there are the terms *das sollen* and *das sein*. However, *das sein* is not always in line with *das sollen*. The definition of *das sollen* itself is a legal rule that explains the expected conditions in this case explaining why TNI soldiers can be fired. While *das sein* is considered a real situation in this case is an explanation of the position of the case, the basis for the legal considerations of the Panel of Judges applying additional punishment dismissed from military service.

### 1. Research Approach to the Decision on the Implementation of Additional Penalty Dismissed from Military Service to TNI Soldiers Who Commit LGBT Actions.

In connection with this, the researcher has taken 2 (two) military court decisions in the previous discussion to be used as research references in analyzing the implementation of additional punishment in the form of dismissal from military service for TNI Soldiers who commit LGBT acts who are sentenced to additional punishment of dismissal from military service. The points of consideration used as a research approach and in-depth interviews with 2 (two) decisions, namely the Pontianak Military Court Decision Number 13K /PM.I-05/AD/II/2024 and the Jakarta Military Court Decision Number 231K /PM.II-08/AU / XII/2020. The main points of consideration of the Panel of Judges in the Pontianak Military Court Decision Number 13K /PM.I-05/AD/II/2024 which applies an additional punishment of dismissal from military service are as follows:

- a. That juridically the basis for the imposition of additional punishment in the form of dismissal from military service used by the Panel of Judges is Article 26 paragraph (1) of KUHPM which states “dismissal from military service with or without revocation of the right to enter the Armed Forces, such additional punishment may be imposed by the Judge together with the verdict of the main punishment to a military person who based on the crime committed is deemed unfit to remain in the military”, however the KUHPM does not provide parameters/measures of a person deemed unfit as a soldier, the assessment of this matter is left to the opinion and interpretation of the judge.
- b. That to measure the unfitness of a soldier to be or not to be retained in the military service, the Panel of Judges is guided by SEMA No. 3 of 2015 concerning the Application of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2015 as Guidelines for the Implementation of Duties for the Courts where in letter D of the Formulation of Military Chamber Law to avoid the subjectivity of Judges, the imposition of additional punishment of dismissal can be seen from the aspect of the perpetrator (subjective), the aspect of the act (objective), the aspect of the consequences / impact caused and the aspect of the circumstances accompanying the perpetrator's actions.
- c. That in the case of the position of the criminal offense committed by the Defendant in this case correlated with the benchmarks as mentioned above, the Panel of Judges can raise the following matters:
  - 1) Regarding the aspect of the perpetrator (subjective), namely the rank and position of the perpetrator when committing the criminal offense as follows: a) That when the Defendant committed the criminal offense charged in this case, the Defendant held the rank of Serda with the position of Danru Watkesum Kima Yonif 645/Gty.; and b) That with the status of rank and position and seeing that the Defendant is a member of the TNI soldiers who must be an example for his colleagues, but this

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was not done by the Defendant, who actually repeatedly committed sexual deviations which are very taboo and not allowed to occur in the TNI environment.

- 2) Regarding the aspect of the act (objective), namely the criminal offense committed by the Defendant, the length of punishment imposed and the impact that may be caused as follows: a) That judging from the quality of the Defendant's actions which have committed acts of sexual intercourse with the same sex (homosexual) which in fact these acts have been prohibited based on the Telegram Letter of the TNI Commander, the Kasad Telegram Letter and the Telegram Letter of the Pangdam XII/Tpr, the Defendant should be obliged to avoid these prohibitions; b) That the Defendant since 2021 has had same-sex sexual relations and this act was carried out by the Defendant while carrying out Dikjurbakes education and after serving the Defendant continued to commit this deviant act and was last carried out in 2023, this does not show awareness for the Defendant of his mistakes, but instead repeatedly engages in deviant sexual activities that have the potential to transmit various diseases.
- 3) Regarding the aspect of consequences, namely the impact on the good name of the unit and the development of soldier discipline in the unit and making it difficult to develop unit soldiers as follows: a) That the actions of the Defendant who repeatedly committed deviant sexual acts have in fact damaged the image of the TNI and the Defendant's unit in the eyes of the community; and b) That from a military point of view, the actions of the Defendant who had same-sex sexual relations showed the identity of the Defendant who ignored all warnings from the leadership not to commit same-sex sexual acts, therefore for the sake of order and enforcement and legal certainty in the life of a military organization, such actions must be immediately taken firm and proportional legal action so as not to affect the disciplinary life of other soldiers.
- 4) Regarding the circumstances accompanying the Defendant's actions as follows: a) That the Defendant has been a soldier since 2021 so that it is considered that the Defendant is a soldier who already knows how to serve in the TNI environment, thus seen from the period of service of the Defendant in the TNI environment, the Defendant should have known which orders must be carried out and which orders should not be carried out, the actions of the Defendant have damaged the discipline of soldiers and the image and authority of the TNI unit; and b) That the Defendant knows the sanctions for soldiers who have same-sex sexual relations (homosexual / lesbian), therefore if in this case the Defendant is sentenced to additional punishment of dismissal from military service, then actually the Defendant himself wishes it.

Based on the considerations contained in the decision, the researcher conducted a deepening interview regarding the considerations to one of the military judges in the case. The main points in the in-depth interview of the Pontianak Military Court Decision Number 13K /PM.I-05/AD/II/2024 are as follows:

- a. The purpose of the Panel of Judges is not merely to punish people guilty of committing criminal offenses, but also has the aim of educating so that the person concerned can insyaf and return to the right path, becoming a good citizen in accordance with the philosophy of Pancasila.
- b. The juridical basis related to the imposition of additional punishment of dismissal from military service is Article 26 paragraph (1) of KUHPM which states that dismissal from military service with or without revocation of the right to enter the Armed Forces, the additional punishment can be imposed by the judge along with the verdict of the main punishment to a military person who based on the crime committed is deemed unfit to remain in the military, but KUHPM does not provide parameters/measures of a person deemed unfit to remain as a soldier, the assessment is left to the opinion and interpretation of the judge.
- c. To measure the unfitness of a soldier to be able or not to be retained in the military service, the Panel of Judges is guided by the Supreme Court Circular Letter Number 3 of 2015 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2015 as Guidelines for the Implementation of Duties for the Courts where in letter D of the Formulation of Military Chamber Law to avoid the subjectivity of judges, the imposition of additional punishment of dismissal can be seen from the aspect of the perpetrator, the aspect of the action, the aspect of the consequences caused and the aspect of the circumstances accompanying the perpetrator's actions.
- d. The Panel of Judges may not be guided by the Supreme Court Circular Letter because the Panel of Judges has the confidence not to be guided by the Supreme Court Circular Letter in providing legal certainty.
- e. Based on the legal facts attached to the Defendant, the Panel of Judges is of the opinion that the Defendant is no longer fit to be retained as a TNI Soldier because it is feared that he will interfere with the interests of the military organization.

In connection with the research approach mentioned above, the researcher approaches the second decision which is the reference for this research. The main points of consideration of the Panel of Judges in the second court decision which is the approach in this study, namely the Jakarta Military Court Decision Number 231K / PM.II-08 / AU / XII / 2020 which applies an additional penalty of dismissal from military service as follows:

- a. That the legal norm of imposition of additional punishment of dismissal from military service is regulated in the provision of Article 26 of KUHPM which states "dismissal from military service with or without deprivation of the

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right to enter the Armed Forces other than those provided for in Article 39, may be imposed by the Judge concurrently with the verdict of imposition of the main punishment to a military person who by virtue of the crime committed is deemed no longer fit to remain in the military”.

- b. That to measure the unfitness must be seen from the quality of the crime/act committed by the Defendant and its effect on the Unit in fostering the discipline of the Soldiers in the Unit, as well as for the community.
- c. That the imposition of additional punishment of dismissal from military service must include and imply a meaning that the Defendant really cannot be nurtured anymore to return to being a good soldier and his presence in the military community after serving his sentence will shake the joints of order in the military community. That in the case of the position of the criminal offense committed by the Defendant in this case correlated with the parameters as mentioned above, the Panel of Judges raises the following matters:

Based on the considerations contained in the decision, the researcher deepened his legal considerations of the Jakarta Military Court Decision Number 231K / PM.II-08 / AU / XII / 2020 to one of the military judges at the II-08 Jakarta Military Court. The points in the in-depth interview of the court decision are as follows:

- a. In general, the aim of the Panel of Judges in this case is to maintain a balance between the public interest, the military interest and the legal interest.
- b. In particular, the objective of the Panel of Judges in this case is not merely to punish the guilty but also to educate the Accused to become a righteous person.
- c. The Defendant's actions do not reflect the attitude of a Soldier, who should be able to maintain an attitude and be responsible for all actions and be an example to his juniors not to commit acts that are contrary to the law, religious norms, and values that live in general society and military society, but because he was unable to resist the desire to commit sexual deviations the Defendant did it with Witness-1 repeatedly. The Defendant's actions will also destabilize the joints and order in the lives of other TNI Soldiers.
- d. In terms of military interests, the Defendant's actions are very contrary to the TNI Organization which has noble goals that were born from the people and fight with the people, which means that every breath of life of a TNI Soldier is also the breath of life for the people of Indonesia. In addition, the Defendant's actions can influence other soldiers which results in the mental damage of soldiers while soldiers are required to always be in a state of readiness to carry out tasks both in carrying out unit tasks and the main tasks of the TNI in maintaining the integrity and sovereignty of the Unitary State of the Republic of Indonesia, in the end the Defendant's actions will interfere with the development of discipline and the orderly life of Soldiers in the Unit.
- e. The Defendant's actions are very shameful and unusual for a Soldier who in his life is guided by Sapta Marga, the Soldier's Oath and the Eight Obligations of the TNI.
- f. The Defendant's actions have the potential to transmit diseases in society so that it is dangerous for the survival of the nation's life so that same-sex acts must be disconnected and eradicated, and as a Soldier the Defendant should be a good example instead of being one of the perpetrators which as a result can damage the morals and mentality of the nation's future young people.

Based on the two research approaches above, the consideration of judges in deciding LGBT cases there are 2 (two) references to the circular letter of the Supreme Court of the Republic of Indonesia in imposing additional punishment. The two circular letters can be described by researchers in a matrix as follows:

No	Circular Letter	Formulation	Researcher's opinion
1.	Letter D Formulation of the Military Law Chamber Supreme Court Circular Letter Number 3 Year 2015.	<p>Additional punishment of dismissal.</p> <ol style="list-style-type: none"> <li>a. Juridically, the basis for imposing additional punishment of dismissal by the Judge is Article 26 of KUHPM which emphasizes that the Defendant is deemed unfit and no longer suitable as a TNI soldier. KUHPM does not determine the parameter/measure of a person being deemed unfit/appropriate, but in practice it is left to the opinion and interpretation of the judge.</li> <li>b. To avoid the subjectivity of the Judge in imposing additional punishment of dismissal, it can be used as a benchmark on the aspects of the perpetrator (subjective), actions (objective), aspects of the consequences and</li> </ol>	<p>The formulation in the circular letter, the researcher argues that Article 26 of KUHPM has not explicitly regulated what actions can be applied to the additional punishment of dismissal but only mentions the feasibility and inappropriateness of being a TNI Soldier which results in a legal vacuum so that in this case this circular letter was issued which measures inappropriate / appropriate is left to the interpretation of the judge based on subjective, objective, impact and accompanying circumstances in the act. Interpretation requires extensive knowledge of the act, provisions and background. Interpretation can also lead to risks that will</p>

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		<p>circumstances accompanying the perpetrator's actions.</p> <p>c. The subjective aspect, namely the rank and position of the perpetrator when committing a criminal offense, namely whether in the level of rank and position the Defendant is worthy / deserves to commit the act in casu.</p> <p>d. Objective aspect, the criminal offense committed by the Defendant, the length of the punishment imposed and the impact that may be caused become the measure of imposing additional punishment of dismissal.</p> <p>e. e. The impact on the good name of the unit and the development of soldier discipline in the unit whether it has an impact on the image of the unit and makes it difficult to develop soldiers in the unit.</p> <p>f. The circumstances accompanying the actions of the Defendant as a repetition or previously committed offense.</p>	<p>later be faced such as injustice, legal uncertainty and lack of public trust. To avoid this, there should be a clearer formulation of legal provisions related to the additional punishment of dismissal against LGBT perpetrators.</p>
2.	<p>Letter D Formulation of the Military Law Chamber number 1 Circular Letter of the Supreme Court of the Republic of Indonesia Number 10 of 2020.</p>	<p>Application of Law Against TNI Soldiers who Commit Homosexual/Lesbian Acts. Violation of the TNI Commander's Telegram Letter Number ST/398/2009 dated July 29, 2009 Juncto Telegram Letter of the TNI Commander Number ST/1648/2019 whose contents regulate the prohibition of TNI Soldiers committing immoral acts with the same sex (Homosexual / Lesbian), the provisions of Article 103 Paragraph (1) of the Criminal Procedure Code are applied as an act of violating service orders.</p>	<p>The formulation in the circular letter, the researcher argues that LGBT acts until now have not been clearly regulated in the applicable legal provisions so that this circular letter is a guideline for judges in deciding the case. The substance of Article 103 paragraph (1) of KUHPM only regulates the act of violating official orders, LGBT acts have been prohibited in the telegram letter but in the context of dismissal is not mentioned, if the perpetrator of LGBT does not know the prohibition is considered to know and can be punished under the article and imposed additional punishment of dismissal. This illustrates the need for clear provisions to regulate LGBT acts to avoid differences in substance and fill the legal vacuum.</p>

Both circulars only apply to military courts, so there needs to be a legally enforceable provision that can accommodate LGBT acts. Some countries directly have provisions related to LGBT acts, these countries include:

- South Korea, there are provisions governing LGBT conduct in article 92-6 of the military penal code. "The law does not explicitly refer to same-sex relationships but prohibits 'anal sex' or 'other indecent acts' while on duty".<sup>13</sup>
- Nigeria, on December 16, 2024 President Bola Tinubu has signed into effect the ban on homosexuality, lesbianism, bestiality, cross-dressing, and other acts deemed contrary to the ethics of the armed forces provided for in Section 26 of the revised Armed Forces Terms and Conditions of Service. A copy of the document obtained by our correspondent on Saturday reads in part, "An officer shall not engage in homosexuality, lesbianism and bestiality".<sup>14</sup>

<sup>13</sup> Guinto, Joel, 2023, *South Korea court upholds ban on gay sex in the military*, BBC News, diakses dari [https://www.bbc.com/news/world-asia-67236048?utm\\_source=chatgpt.com](https://www.bbc.com/news/world-asia-67236048?utm_source=chatgpt.com), tanggal 20 Mei 2025.

<sup>14</sup> Odeniyi, Solomon, 2025, *Tinubu approves ban on homosexuality in military*, Punch Most Widely Read Newspaper, diakses dari [https://punchng.com/tinubu-approves-ban-on-homosexuality-in-military/?utm\\_source=chatgpt.com](https://punchng.com/tinubu-approves-ban-on-homosexuality-in-military/?utm_source=chatgpt.com), tanggal 20 Mei 2025.

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c. Turkey, there are provisions of the Turkish Armed Forces Health Regulations, Article 17 “Mental Health and Diseases,” explaining “that cases of ‘advanced sexual disorders,’ which are ‘apparent throughout one’s life,’ may cause unpleasant situations in the military environment”.<sup>15</sup>

The three countries mentioned above in the view of the researcher emphasize on a step to maintain discipline, prevent acts from occurring in the military environment, and the mental health of the soldiers. This is the same as the consideration of the Panel of Judges in the two decisions that are references to research where the case that occurred in Pontianak, the LGBT act was carried out in addition to biological needs there were material benefits obtained by the Defendant, while the case that occurred in Jakarta in addition to biological needs, the Defendant is an officer who must be an example of discipline for members below him.

2. Analysis in theoretical perspective towards the implementation of additional punishment dismissed from military service to TNI soldiers who commit LGBT acts.

a. Analysis in the perspective of legal certainty theory.

Based on the deepening of the consideration of the Panel of Judges in both decisions, LGBT acts committed by TNI Soldiers are faced with the theory of legal certainty related to additional punishment dismissed from military service intersects with the norms. LGBT behavior is an act of sexual deviation that is not in accordance with the norms of religion, decency and the rules that apply in the TNI environment.

Based on this, researchers try to underline the LGBT acts related to a violation of the norms that apply both religion, decency and rules in the TNI environment because “legal certainty is defined as the clarity of norms so that it can be used as a guide for people who are subject to this regulation”.<sup>16</sup>

Legal certainty in terms of religious norms that mention the prohibition of LGBT acts has not been explicitly regulated in the 1945 Constitution, but only intersect, first in Article 29 of the 1945 Constitution which reads:

(1) The state is based on the Almighty God.

(2) The State guarantees the freedom of each citizen to embrace their respective religions and to worship according to their religions and beliefs.

Second, Article 28J paragraph (2) of the 1945 Constitution which reads “In exercising his rights and freedoms, every person shall be subject to the restrictions established by law with a view to ensuring recognition and respect for the rights and freedoms of others and to meet just demands in accordance with moral considerations, religious values, security, and public order in a democratic society”.

Everyone is guaranteed to embrace and believe in and worship according to their respective religions. As we all know, the religions embraced by Indonesian citizens include Islam, Christianity (Catholic and Protestant), Hinduism, Buddhism and Confucianism. As for each religion clearly both in its holy book and beliefs of its teachings suggest about LGBT actions as follows:

1) The religion of Islam in the Al-Quran letter Al Hujurat verse 13 which reads:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَىٰكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ ﴿١٣﴾

Which means, “O people, indeed We have created you from a male and a female. Then, We made you into nations and tribes so that you may know one another. Indeed, the noblest among you in the sight of Allah is the most pious. Verily, Allah is the All-Knowing and the All-Absorbing”.

The letter can be interpreted that God Almighty has created humans from men and women, so this means that it is their nature to be paired between men and women, not men with men or women with women.

2) Christianity (Catholicism and Protestantism) is outlined in the Bible in the book of Leviticus as follows:

“A man shall not have sexual intercourse with a man; God abhors it” (Leviticus, 18:22).

“If a man has sexual intercourse with another man, they have committed an abominable and detestable act, and both shall be put to death. They shall die for their own wrongdoing”. (Leviticus, 20:13).

In connection with the meaning of the book that God Almighty really hates the act of intercourse with the same sex so that this can be interpreted LGBT acts are very contrary to Christianity (Protestant and Catholic).

3) Hinduism as outlined in the Vedas which reads:

“Ihaiva stam mavi yaustam, visvam ayur vyasnutam, kridanatau putrair naptrbhih, modamanau sve grhe” (Rgveda X.85.42).

“Yes, married couple, may you remain here and never be separated. May you both attain a life full of happiness. May you, play with your sons and grandsons. Live in this house happily”. (Rgveda X.85.42).

<sup>15</sup> Wikipedia, 2025, *Pink certificate*, Wikipedia Free Encyclopedia, diakses dari [https://en.wikipedia.org/wiki/Pink\\_certificate?utm\\_source=chatgpt.com](https://en.wikipedia.org/wiki/Pink_certificate?utm_source=chatgpt.com), tanggal 20 Mei 2025.

<sup>16</sup> Halilah, Siti, Arif, Mhd Fakhurrahman, 2021, *Asas Kepastian Hukum Menurut Para Ahli*, *Siyasah Jurnal Hukum Tata Negara* Volume 4 Nomor 2.

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4) Buddhism in its teachings does not explicitly explain the prohibition of LGBT behavior, but its followers have several things to do, namely the Buddhist Pancasila. The third precept in the Buddhist Pancasila intersects with LGBT actions which reads: “Kamesu micchacara veramaṇi sikkhapadam samadiyami”

Which means

“I resolve to train myself to avoid immoral behavior”

5) In Confucianism, the teachings of this religion do not explicitly reject LGBT acts and include same-sex marriage, either between men or women, but it supports marriage between men and women to produce offspring. The main purpose of marriage in this religion is harmony, which means there is love, as outlined in the book *Susi* which reads:

“If families love each other, the whole country will be in love. If families give in to each other, the whole country will be in an atmosphere of mutual submission”. (Tai Hak IX,3).

Based on some of the religious teachings that Indonesian citizens are recognized as adhering to both explicitly and intersectively, researchers argue that LGBT actions are contrary to the purpose of religious norms, namely “for humans to become better in their behavior, including avoiding the prohibitions of God Almighty and carrying out His commands”.<sup>17</sup>

The five religious teachings both believe in God Almighty by believing in their respective holy books so that if you believe in God Almighty means staying away from His prohibitions, including staying away from LGBT actions. This is because God Almighty has created human beings in pairs between men and women to become a family and give birth to offspring.

Furthermore, if legal certainty is interpreted in terms of the norms of decency where “The general understanding of the norms of decency is the attitude or rules that originate from the human heart and conscience”.<sup>18</sup> Based on this understanding, if the norm of decency is associated with LGBT acts, especially in Indonesia, it is still unacceptable in the community because LGBT acts are often considered contrary to the norm of decency because they are not in accordance with the views of society regarding proper sexual relations, which are based on religious teachings and customs.

Such views include community rejection of same-sex relationships, restrictions in local regulations and religious and cultural narratives that view LGBT acts as a form of sexual deviance.

Currently, there are no explicit provisions regulating LGBT acts in national law that directly criminalize a person's sexual orientation or gender identity, but such acts have met the elements of certain moral offenses, such as sexual abuse or unlawful intercourse.

The actions of the Defendants in the two decisions cannot be included in the elements of the offense of decency, but the actions of the Defendants are contrary to the norms of decency because their attitudes and actions do not reflect the attitude and conscience of a TNI Soldier so that in the view of the researcher it can have a negative impact if they remain in the TNI environment.

The last point of view, if the legal certainty of LGBT acts is examined from the point of view of internal rules within the TNI which is interpreted in regulations and doctrine. The regulations and doctrine within the TNI currently do not accommodate the prohibition of LGBT, but there are some prohibited acts contained in Article 15 letter k of the TNI Commander Regulation No. 44/2015 on Military Discipline Regulations which reads “Every military person is prohibited from committing other acts that are not appropriate for a soldier and/or contrary to official orders or official regulations”.

The actions in letter k above, can overlap but must be preceded by a prohibitive order that regulates LGBT actions committed by TNI Soldiers. With the dynamics of the rise of LGBT acts in the TNI environment, the institution poured a prohibitory order through a telegram letter, namely by reissuing the previous TNI Commander's Telegram Letter Number ST/398/2009 reissued the prohibition through the TNI Commander's Telegram Letter Number ST/1648/2019 which regulates the prohibition for TNI Soldiers to commit immoral acts with the same sex.

In law enforcement in the TNI environment, it is not just law enforcement but there are greater interests, namely institutional interests. This illustrates that an order must be in line with its legal interests in the law enforcement process within the TNI.

The telegram letter of the TNI Commander can contain soldier development policies, such as a commitment to impose severe punishment for violating soldiers. The telegram letter of the TNI Commander can also contain rules to avoid misunderstandings and minimize legal problems.

The telegram letter of the TNI Commander in the view of the researchers is not a legal basis for the *judex facie* to impose additional punishment of dismissal, but rather as an internal institutional regulation, which can be used as a consideration of circumstances that aggravate the imposition of additional punishment of dismissal.

<sup>17</sup> Wikipedia, *Norma Agama*, diakses dari [https://id.wikipedia.org/wiki/Norma\\_agama](https://id.wikipedia.org/wiki/Norma_agama) , pada tanggal 14 Maret 2025.

<sup>18</sup> Yusuf, Muhamad Aris, *Pengertian Norma Kesusilaan, Fungsi, dan Ciri-Cirinya*, Gramedia Blog, diakses pada <https://www.gramedia.com/literasi/pengertian-norma-kesusilaan/?srsltid=AfmBOooE7VT5vLWriuQzUwUHihxlcWOWV32Mhdplm2Ml0nC5pmcyPd> , tanggal 14 Maret 2025.

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The telegram letter of the TNI Commander is not used as a form of institutional intervention in law enforcement in the military justice environment even though there is a clause that states the head of the work unit can provide recommendations for dismissal for the perpetrator, but the existence of these recommendations should not affect decision making in the military justice environment.

Based on the analysis in the perspective of the theory of legal certainty on the consideration of the Panel of Judges in the two decisions that became the reference of this study by linking the norms of religion and decency as well as the rules applicable in the TNI, the researcher argues that the LGBT act is an act that contradicts both the norms of religion and decency and the discipline of soldiers, although only the provisions contained only intersect but can be interpreted as conflicting acts.

LGBT actions are very far from the values of soldier discipline which in every action is always guided by Sapta Marga, the Soldier's Oath, and the Eight Obligations of the TNI, so that the researcher's thinking is in line with the consideration of the Panel of Judges against the Defendants in both decisions that the application of additional punishment in the form of dismissal from military service is considered to realize legal certainty in the settlement of cases of LGBT actions.

This makes the additional punishment of dismissal from military service feasible to be applied to the Defendants or perpetrators of LGBT acts in the future, but its legal certainty requires clarity of rules to fill the legal vacuum that occurs both the act and the parameters of worthy / inappropriate to be maintained in the TNI environment.

Legal certainty is an important foundation to ensure that additional punishment for LGBT acts is not just a repressive tool, but a legitimate, fair, and effective instrument in achieving the purpose of punishment.

Without legal certainty, the application of additional punishment can be discriminatory, disproportionate, and cause injustice, namely first, the uncertainty of the rules on when and how additional punishment is imposed can open a gap for abuse, second, the inconsistency of decisions from one case to another can undermine public confidence in the justice system, third, the rights of the accused can be violated if additional punishment is imposed without a clear legal basis.

b. Analysis in the perspective of justice theory.

The meaning of justice in this country has been implied in the ideological foundation, namely the Fifth Precept of Pancasila which reads "Social justice for all Indonesian people". The fifth principle illustrates that "this principle emphasizes the importance of prioritizing social justice as the basis for the development and progress of the Indonesian nation".<sup>19</sup>

This is in line with the Judges' consideration of the LGBT acts committed by the Defendants in the two verdicts that are references to this research, where the legal facts that occur are that LGBT acts can hamper unit readiness and can endanger the health, education and morale and motivation of soldiers to carry out their daily duties.

In order to maintain order, enforcement and legal certainty in the life of a military organization must receive firm and proportional action but still pay attention to justice for the Defendants, institutions and society. "Building public trust in the legal system and improving access to justice are key steps to creating a safer and fairer environment for all".<sup>20</sup>

The firm and proportional actions imposed by the Panel of Judges in the two decisions by applying additional punishment of dismissal from military service must be carefully considered in making their decisions so as not to harm and harm several parties, both the Defendants, the TNI institution and the judicial institution.

Subjectively, both the institution and the judiciary still pay attention to the rights of the Defendants to be equal before the law, but objectively the actions of the Defendants can injure and harm the institution, this researcher describes objectively the actions of the Defendants as follows:

- 1) The defendant did not admit his actions.
- 2) The Defendant's actions are contrary to the norms of life of TNI soldiers.
- 3) The Defendant's actions are contrary to the Soldier's Oath, Sapta Marga and (eight) TNI obligations.
- 4) The Defendant's actions are contrary to the norms of decency, religious, social and ethical norms of Indonesian society.
- 5) The Defendant's actions can damage the discipline of soldiers in general and the Defendant's unit in particular.
- 6) The Defendant's actions are very embarrassing and can defame the TNI in the eyes of the public.
- 7) The Defendant's actions can spread venereal disease in the community.
- 8) The Defendant's actions can endanger the future of the nation's young people.

From the description of LGBT actions above, it has a negative impact on the institution and society so that if left unchecked, these actions can spread both within the TNI and society so that decisive and proportional action is needed aimed at realizing

<sup>19</sup> Suwarta, Thomas Harming, *Makna dan Contoh Sikap Sila Ke-5 di Lingkungan Rumah, Sekolah, dan Masyarakat*, diakses pada <https://mediaindonesia.com/humaniora/576594/makna-dan-contoh-sikap-sila-ke-5-di-lingkungan-rumah-sekolah-dan-masyarakat>, tanggal 19 Maret 2025.

<sup>20</sup> Prasetyo, H., Waluyo, B., Subakdi, S., Roring, E. B. 2024, *Fenomena Main Hakim Sendiri dan Dampaknya terhadap Keamanan yang Berujung Pidana:(Sosialisasi Pengabdian Masyarakat di Kelurahan Pangkalan Jati)*, Kolaborasi Jurnal Hasil Kegiatan Kolaborasi Pengabdian Masyarakat, Volume 2 Nomor 3, hal.104-115.

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justice. Corrective justice is the right choice according to the researcher's view, which is in line with the Panel of Judges in both decisions.

Corrective justice serves to correct wrongful acts or injustice, such as in this LGBT act which aims to restore the disturbed balance due to actions that harm the parties, both the Defendants, institutions and society, not as retaliation for the actions of the Defendants but first, corrective justice for the Defendants is one of self-introspection that their actions are contrary to both the norms and the joints of soldier life.

Second, corrective justice for the institution of LGBT behavior does not spread widely within the TNI. Third, corrective justice for the community is implemented so that the actions of the defendants do not spread in the community.

The three designations of corrective justice in the view of the researcher can be taken into consideration by law enforcers in resolving LGBT cases in the future so that additional punishment in the form of dismissal from military service can be implemented to TNI soldiers who commit LGBT acts.

In criminology, justice is not only about punishment, but also how the legal system and society handle offenses, treat perpetrators and victims, and prevent crime effectively and fairly. The Defendants and other LGBT perpetrators can be said to be perpetrators and can also be victims as a result of the LGBT acts they have experienced as in the case that occurred in Pontianak.

The Defendant was threatened to engage in same-sex relations, which illustrates that the Defendant is also a victim. The Defendants in criminology basically acted due to an intense interaction relationship so that the Defendants followed the act. Edwin H. Sutherland in the Differential Association theory suggests "social interaction has a major influence on the formation of deviant behavior. The more intense and closer a person's relationship with individuals or groups that support criminal / deviant behavior, the more likely the individual will follow it (Sutherland, 1939)".<sup>21</sup>

Meskipun sampai saat ini belum ada ketentuan peraturan perundang-undangan yang mengakomodir bagi pelaku perbuatan LGBT namun telah mencerminkan keadilan sebagaimana seharusnya keadilan tersebut tidak berpihak pada satu pihak saja melainkan keadilan harus diberikan secara objektif, tidak memihak, dan mempertimbangkan kepentingan semua pihak secara proporsional.

### c. Analysis in the perspective of punishment theory.

The implementation of additional punishment in the form of dismissal from military service in the two decisions that are the references of this research is based on Article 26 paragraph (1) of the Criminal Procedure Code which reads "Dismissal from military service with or without deprivation of the right to enter the Armed Forces, other than those provided for in article 39, may be imposed by the judge simultaneously with every verdict of death penalty or imprisonment to a military person who, based on the crime committed, is deemed no longer suitable to remain in the military".

Furthermore, when referring to the provisions of article 39 of KUHPM which reads "Along with the verdict of death penalty or life imprisonment, except for the punishments specified in article 67 of the Criminal Code, no other punishment may be imposed, other than dismissal from military service with revocation of the right to enter the Armed Forces".

Based on the provisions of the aforementioned article, additional punishment in the form of dismissal from military service can be imposed by the Panel of Judges along with the verdict of the main punishment to a military person who, based on the crime committed, is deemed unfit to remain in the military.

The parameters/measurements of whether a person is fit or not, the KUHPM itself does not contain an explanation, but in practice it is left to the opinion and interpretation of the judge. Measuring the eligibility of a soldier to be or not to be retained in the military service, the Panel of Judges in the two decisions in their considerations guided SEMA Number 3 of 2015 concerning the Application of the Formulation of the Results of the 2015 Plenary Meeting of the Supreme Court Chamber as Guidelines for the Implementation of Duties for the Courts where in letter D of the Formulation of the Law of the Military Chamber, the imposition of additional punishment is seen from several aspects as follows:

- 1) Subjective aspects, namely the rank and position of the perpetrator when committing a criminal offense, namely whether at the level of rank and position the Defendant is worthy / deserves to commit a criminal offense in casu.
- 2) Objective aspects, namely the criminal offense committed by the Defendant, the length of the punishment imposed and the impact that may be caused become a measure of imposing additional punishment of dismissal.
- 3) The impact on the good name of the unit and the development of soldier discipline in the unit whether the actions of the Defendant have an impact on the image of the unit and make it difficult to develop soldiers in the unit.
- 4) The circumstances accompanying the Defendant's actions as a repetition or previously committed offense.

Supreme Court circulars, as is known, are only software issued by the Supreme Court of the Republic of Indonesia as guidelines and directions for the implementation of judicial duties in Indonesia which function for judicial law enforcers in applying consistent laws and procedures. The position of the circular letter of the Supreme Court of the Republic of Indonesia

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<sup>21</sup> Wakhidatul Mubarakah, Anis Widyawati, 2025, *Teori Differential Association Edwin Sutherland Dalam Tindak Pidana Pencurian Ringan, Causa Jurnal Hukum dan Kewarganegaraan* Volume 11 Nomor 7.

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does not have binding legal force in general but only in the judicial environment to provide guidelines and directions so that decisions do not conflict between one court and another.

Some of the aspects mentioned above, aim to avoid the subjectivity of judges where in general “the birth of a judge's belief in practice cannot be separated from his struggle in the evidentiary process”.<sup>22</sup> Submissiveness of judges in making decisions by reducing differences in legal interpretation and preventing uncertainty in the judicial process in bridging the legal vacuum, but the implementation of additional punishment in the form of dismissal from military service for TNI Soldiers who commit LGBT acts in both decisions or for other perpetrators can be applied when correlated with the theory of punishment.

To answer these questions, we will first explain several theories of punishment in the imposition of criminal sanctions as follows:

- 1) Absolute theory or retaliation theory (*vergeltings theorien*) which states that the essence of a punishment is retaliation, which states that the imposition of criminal sanctions is imposed because someone commits an offense and should be punished for his actions without thinking about the benefits of imposing punishment. So it can be said that the imposition of punishment is an absolute demand, not only something that needs to be imposed but becomes a necessity.
- 2) Relative theory or goal theory (*doel theorien*), which is a theory based on the basis that punishment is a tool to enforce order (law) in society, the goal is to enforce order in society and to enforce the order, punishment is needed.
- 3) The combined theory (*vernegings theorien*) is a combination of absolute and relative theories so that punishment is given as a retribution for bad acts, but also aims to correct the perpetrator and protect society.

The three theories basically have the same benefits, namely to provide a deterrent effect and impose criminal sanctions or punishment against the perpetrators of criminal acts, where the difference lies in their nature. While related to the application of additional punishment in the form of dismissal from military service for TNI Soldiers who commit LGBT acts, the actions of the Defendant who committed LGBT acts are sexual deviations that are not in accordance with religious norms, morality and rules that apply in the TNI environment.

Based on this, the researchers further connect the three theories of punishment above with the two decisions as follows:

- 1) The Absolute Theory basically states that a crime must be punished because of the wrongdoing committed. From these two rulings, it can be considered that LGBT acts are crimes that must be punished as a form of retribution without considering their social benefits. Such punishment is considered inhumane, especially in the context of an individual's right to sexual orientation. However, the actions of the defendants are deemed to undermine the discipline of military personnel, thus necessitating retribution for their actions.
- 2) The relative theory basically states that the punishment in both rulings aims to prevent LGBT acts from happening again, where there are two forms of prevention: general and specific. The general form of prevention is that the punishment of LGBT acts aims to scare other TNI soldiers from committing LGBT acts. The specific form of prevention is that the punishment of the defendants aims to change their behavior so that they do not repeat their actions.
- 3) The combined theory regarding the punishment of the two decisions can be said to be hasty because, fundamentally, the approach in this theory is not only about punishment but also considers the social and rehabilitative aspects for the defendants. The approach should focus more on counseling the defendants and education, such as establishing legal prohibitions against such acts that can be disseminated to other TNI personnel.

Of the three theories of punishment correlated with the two above-mentioned verdicts, according to the researcher's view, the Panel of Judges placed greater emphasis on the relative theory, whereby the legal consideration was to prevent similar acts from occurring and to change the behavior of the defendants by imposing additional penalties.

The researcher's perspective differs in this regard. The researcher argues that the punishment for LGBT acts should instead prioritize the combined theory, where, in addition to the act deserving retribution for its destructive impact on military discipline, but also aims to improve the behavior of the perpetrators through self-reflection and to protect society by rehabilitating/healing the defendants or other LGBT perpetrators through counseling and guidance so that if the TNI soldiers are dismissed from military service and return to society, they will not repeat their actions.

The researcher's analysis of the implementation of additional punishment in the form of dismissal from the military for the defendants in the two decisions referenced in this study is as follows:

- 1) The imposition of additional penalties on TNI soldiers who engage in LGBT activities is based on Letter D of the Military Chamber's Legal Formulation No. 1 of the Supreme Court of the Republic of Indonesia Circular Letter No. 3 of 2015, which refers to Article 26 paragraph (1) of the Military Criminal Code (KUHPM) as a guideline for judges in imposing additional penalties of dismissal from military service. however, the criteria for determining whether an individual is still fit for military

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<sup>22</sup> Triantono, Marizal, Muhammad, 2021, *Parameter Keyakinan Hakim Dalam Memutus Perkara Pidana*, Justitia et Pax, Volume 37 Nomor 2.

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service require careful consideration, ensuring that judges' opinions and interpretations are not based solely on their subjective views but also on how the objectives of punishment can be accommodated in each decision. This aligns with the legal scholar Leonard's view that the purpose of the relative theory of punishment is "to prevent and reduce crime. Punishment should be intended to change the behavior of criminals and others who are potentially or likely to commit crimes."<sup>23</sup> The defendants' behavior must be changed because it contradicts the values of military discipline so that similar acts will not occur again in the future, as these two verdicts can be used to pressure other soldiers who engage in LGBT acts, which will result in the termination of a soldier's career.

- 2) The defendants in both verdicts were subjectively ranked as First Officers (Pama) and Non-Commissioned Officers with positions ranging from section heads to squad commanders within the Indonesian National Armed Forces. Based on the defendants' ranks and positions, it can be said that they were not in a position to engage in LGBT activities. The background of the defendants is that they are officers who should serve as role models for members of lower ranks, while one defendant is a squad commander leading members of his squad. Objectively, their actions and the resulting consequences could disrupt military interests, such as operational readiness and the spread of sexual deviance within the TNI. Therefore, the researcher believes that firm action, including criminal prosecution and even the termination of the defendants' careers in both rulings or other LGBT perpetrators, is necessary.
- 3) The defendants in the legal facts set forth in both decisions did not repeat criminal acts that had permanent legal force. Even though they did not repeat criminal acts, it is deemed appropriate to impose the penalty of dismissal from military service on the Defendants, even though the act in question may be considered remediable, as explained by the Chairman of the Military Chamber of the Military Court, who stated, "In 2008, the first LGBT-related case was heard within the TNI, and the decision was referred back to the unit commander for remediation due to the pressure faced during military operations."<sup>24</sup> This may be taken into consideration by the judge in returning the case to the unit commander so that the application of additional penalties can be minimized for the defendants, considering that they can still be treated, as the World Health Organization (WHO) has not yet included LGBT behavior in the list of mental illnesses to date. However, if this is not caused by the conduct of military operations but rather by lifestyle developments, the imposition of additional penalties, such as dismissal from military service, should be considered legally because "military personnel who commit criminal acts may be subject to harsher criminal penalties as stipulated in the Military Criminal Code, as such actions can tarnish the reputation of the institution, given that 'military personnel are rigorously trained to protect and ensure national security.'"<sup>25</sup>
- 4) The LGBT acts of the defendants in the legal facts in both decisions, the defendants' sexual orientation is not accommodated within the elements of the offense of indecency. However, Paragraph D of the Military Court's ruling, Article 1 of the Supreme Court of the Republic of Indonesia's Circular Letter No. 10 of 2020, states that it constitutes a violation of the Commander of the Indonesian National Armed Forces' Telegram No. ST/398/2009 dated July 22, 2009, in conjunction with the Commander of the Indonesian National Armed Forces' Telegram No. ST/1648/2019 dated October 22, 2019, which prohibits Indonesian National Armed Forces personnel from engaging in indecent acts with persons of the same sex (homosexuality). No. ST/1648/2019 dated October 22, 2019, which prohibits TNI personnel from engaging in immoral acts with persons of the same sex (homosexual/lesbian), the provisions of Article 103(1) of the Military Criminal Code (KUHPM) are applied as acts violating military orders. Prosecution based on Article 103(1) of the Military Criminal Code could become a time bomb if TNI personnel who engage in LGBT acts do not receive socialization or information regarding the TNI Commander's Telegram No. ST/398/2009 and No. ST/1648/2019, thereby rendering the substance of their actions insufficient to meet the requirements of Article 103(1) of the Military Criminal Code related to military orders. The researcher argues that there needs to be provisions in both national and military law to accommodate the application of additional penalties for TNI personnel who engage in LGBT activities. Regulations are made and enacted with certainty because they are clear and logical, so that "there will be no doubt due to multiple interpretations, thereby avoiding conflicts or contradictions in norms."<sup>26</sup>

Based on several points raised by the researchers, both from the judge's considerations and the researchers' analysis from the perspective of norms and the three theories above, it is considered that the imposition of additional penalties, such as dismissal from military service, on LGBT offenders is a measure that can be implemented against the defendants and other LGBT offenders. This is in line with the characteristics of modern criminal law, which include the following:

- a. Influenced by developments in social sciences, such as sociology, anthropology, and criminology.

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<sup>23</sup> Opcit, Effritadewi, Ayu.

<sup>24</sup> Detikcom, *Ketua Kamar Militer MA Buka-bukaan Ada Kelompok LGBT di TNI-Polri!*, diakses pada <https://www.youtube.com/watch?v=NAzYeO8-PLY>, pada tanggal 22 Maret 2025.

<sup>25</sup> Antasia, Pramudita, Triadi, Irwan, 2023, *Penegakan Hukum Terhadap Pelaku KDRT Yang Dilakukan Anggota Militer Dan Perlindungannya Bagi Korban*, Jurnal Penelitian Ilmu-Ilmu Sosial Volume 1 Nomor 4.

<sup>26</sup> Hutapea, Tumbur Palti, Rahayu, Sari, 2021, *Pemidanaan Perkara Kesusilaan dalam Relevansinya Sebagai Perbuatan Melanggar Perintah Dinas*, Jurnal Hukum dan Peradilan Volume 10 Nomor 3, hlm. 443-462.

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- b. Recognizes that a person's actions are influenced by their personality, biological factors, and social environment (sociological factors).
- c. Holds a deterministic view because humans are seen as having no free will but are influenced by their character and environment, so they cannot be blamed or held accountable.
- d. Rejects retribution based on subjective guilt. Accountability for a person's guilt must be replaced by the dangerous nature of the perpetrator.
- e. The perpetrator's accountability is more of an action for the protection of society (public protection and criminal rehabilitation). Criminal punishment must remain oriented toward the characteristics of the perpetrator, hence the need for individualized punishment aimed at the perpetrator's resocialization. The focus is on the perpetrator (*daderstrafrecht*), thereby prioritizing criminal intent (subjective elements and fault) over criminal acts (elements of illegality and action).<sup>27</sup>

Furthermore, the additional criminal punishment in the form of dismissal from the military imposed on the defendants is relevant to the objectives of punishment, which Roman authors grouped into three objectives, namely:

- a. Rehabilitating the criminal.
- b. Deterring people from committing crimes.
- c. Preventing certain criminals from committing other crimes, namely criminals who cannot be rehabilitated by other means.<sup>28</sup>

By imposing additional penalties in the form of dismissal from military service on the defendants and other LGBT perpetrators, the punishment is not intended as retribution for their actions, but rather as a means to change their behavior and prevent such actions from occurring again in the future, both for the defendants and other LGBT perpetrators.

On the other hand, if such LGBT acts are allowed to continue, they could influence the community if the perpetrators are returned to society. Therefore, if additional penalties are imposed, clear regulations are needed to accommodate their implementation, and counseling and supervision of former military personnel are required to minimize the potential influence on society and ensure that the additional penalties imposed are effective and optimal, based on legally binding regulations.

### **B. The Principle of Military Interest as a Legal Consideration for the Application of Additional Punishment in the Form of Dismissal from Military Service for TNI Soldiers Who Engage in LGBT Activities.**

#### 1. The Basic Provisions of Military Interests in Military Criminal Law.

In essence, laws are created based on the reasons behind their creation, which are based on legal actions, and these legal actions are based on legal principles. Legal principles that are appropriate to their function according to legal teachings will play a role in providing clear and consistent guidance in the creation of (criminal) laws and in their enforcement.<sup>29</sup> Legal principles are the foundation of law itself, ensuring that the laws that are created remain grounded in legal principles.

Legal principles play a very important role in various fields of law, including military criminal law, which is a specific area of law that applies to the military (and those treated as such), in addition to other criminal laws.<sup>30</sup> Military criminal law has specific principles related to military duties and functions as outlined in the explanatory notes to Law No. 31 of 1997 on Military Courts, as follows:

- a. Principle of unity of command.
- b. Principle of commanders being responsible for their subordinates.
- c. Principle of military interests.

Based on these three principles, the principle of military interest is one of the principles applied in the scope of military justice. The principle of military interest, as explained in Law No. 31 of 1997 on Military Justice, is related to the conduct of defense and security, making military interest the most important consideration, surpassing the interests of groups or individuals. However, in the process of resolving cases, it is balanced with legal interests.

Based on this, it can be interpreted that military interests in military courts hold the same standing as legal interests, so military interests cannot be simply ignored in the enforcement of the law. The principle of military interest is often used as a basis to justify the actions of soldiers for the sake of national security and stability.<sup>31</sup>

The principle of military interests accommodated in Article 5 paragraph (1) of Law Number 31 of 1997 concerning Military Courts, which reads, "Military courts are the executors of judicial power within the armed forces to uphold law and justice with

<sup>27</sup> Opcit. Sianturi, S.R., hlm. 19.

<sup>28</sup> Ibid, Hlm 27.

<sup>29</sup> Rukmini, Mien, 2006, *Aspek Hukum Pidana Dan Kriminologi (Sebuah Bunga Rampai)*, P.T. Alumni, hlm. 84.

<sup>30</sup> Sianturi, S.R., 2010, *Hukum Pidana Militer Di Indonesia*, Badan Pembinaan Hukum Tentara Nasional Indonesia, Jakarta, Cetakan Ketiga, hlm. 18.

<sup>31</sup> Wicaksono, Aditya dkk, 2025, *Penerapan Asas Kepentingan Militer Terhadap Prajurit TNI Yang Melakukan Tindak Pidana Dalam Sistem Peradilan Militer di Indonesia*, Jurnal Mahasiswa Humanis Volume 5 Nomor 1, hlm. 163.

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due regard to the interests of national defense and security.” This article emphasizes that military justice has two objectives in its implementation, namely:

- a. Enforcing the law and justice, especially against TNI soldiers who commit legal violations.
- b. Paying attention to the interests of national defense in law enforcement within the TNI by taking into account the following strategic and operational aspects of national defense:
  - 1) Strategic Aspects of National Defense.
    - a) Maintaining national security stability is a major consideration, especially since TNI soldiers play an important role in national defense operations.
    - b) The enforcement of the law does not weaken national defense institutions, both in terms of public trust and the effectiveness of national defense institutions in carrying out their duties.
    - c) Maintaining state secrets and national security in legal cases involving strategic information, such as espionage or misuse of TNI information, the judiciary must ensure that sensitive information is protected for the sake of national security.
  - 2) Operational Aspects of National Defense.
    - a) The law enforcement process does not hinder the national defense mission. For example, TNI personnel on duty in conflict areas who commit violations must undergo the law enforcement process with adjustments to the judicial mechanism so as not to disrupt the national defense mission being carried out.
    - b) Legal enforcement against TNI personnel must not disrupt operational readiness and the effectiveness of the troops.
    - c) The implementation of legal enforcement against TNI personnel who commit unlawful acts during military operations must consider the urgency of the task being carried out by adjusting the legal enforcement process to operational needs.

Based on the strategic and operational aspects of national defense, law enforcement is still carried out with consideration of its impact on national defense interests so as not to interfere with the effectiveness of the TNI in carrying out its duties and maintaining national stability and state secrets.

In addition to the scope of military justice, the TNI General Audit Office can also apply the principle of military interests in the performance of its duties. The application of this principle is enshrined in Article 5(2) of Law No. 31 of 1997 on Military Courts, which states: “The Military Prosecutor's Office is the executive body of the state's governmental authority in the field of prosecution and investigation within the Armed Forces, based on delegation from the Commander-in-Chief, while considering the interests of national defense and security.”

The above points highlight the importance of the principle of military interest as a consideration in cases within the TNI, including LGBT cases, which are currently a prominent issue within the TNI due to the lack of clear regulations in the law. However, in the enforcement of military law, such cases are prosecuted under Article 103(1) of the Military Criminal Code, which classifies LGBT-related acts as violations of military orders.

The relevance of this provision to the principle of military interest lies in how the institution must maintain the effectiveness of the TNI in safeguarding the sovereignty and territorial integrity of the Republic of Indonesia, particularly through TNI personnel in fulfilling their roles, duties, and functions as outlined in Article 5 of Law No. 34 of 2004, which states that the TNI serves as the state's instrument in national defense, carrying out its duties based on the state's political policies and decisions.

Furthermore, the functions of the TNI as outlined in Article 6(1) of Law No. 34 of 2004 are as follows:

- a. Defense against all forms of military and armed threats from outside and within the country to the sovereignty, territorial integrity, and safety of the nation.
- b. Action against all forms of threats as referred to in paragraph (1) letter a.
- c. Restoration of national security conditions that have been disrupted due to security disturbances.

In relation to the above duties and functions, it is clear that the TNI is at the forefront in defending the integrity of the territory of the Republic of Indonesia, maintaining the sovereignty of the state, and protecting the entire nation and the blood of Indonesia from all forms of threats and disturbances, both from within and outside the country.

This noble duty is carried out by TNI personnel, so if there are indications of LGBT behavior among TNI personnel, it can have a negative impact on TNI personnel who are not involved in LGBT behavior, causing them to be influenced by such behavior, which in turn affects the operational execution of their duties. TNI personnel are deployed with various training and preparation, and if they are not operational, the effectiveness of defense duties can be disrupted.

Based on this, military interests must be balanced with legal interests, where legal certainty, justice, and punishment for the accused are realized. John Rawls stated that “justice in social institutions is the highest virtue and truth in the system of thought.”<sup>32</sup> Furthermore, John Rawls also argued that “justice is balance, proportionality, and harmony between the interests of the general

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<sup>32</sup> Op.cit. Alifia, Hlm. 134.

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public, including the state.”<sup>33</sup> The basic principle of military interests in the substance of law enforcement against military crimes ensures that legal processes within the military continue to run without disrupting combat readiness and national security, while remaining under national legal control and not being used to abuse power.

### 2. Implications of the Principle of Military Interest as a Legal Consideration in the Application of Additional Punishment in the Form of Dismissal from Military Service for TNI Soldiers Who Engage in LGBT Activities.

In the process of law enforcement, law enforcement officials in the military judiciary must not only consider legal interests but also military interests, so that there is a balance between legal and military interests in the process of law enforcement. This is not a form of intervention/influence from superiors in the TNI but a mandate from the law.

Article 126(2) of Law No. 31 of 1997 states that in certain cases, if public interests or military interests so require, the Commander-in-Chief or unit commander may consider closing the case by issuing a decision to close the case for the sake of public interests or military interests. Additionally, the Commander or unit commander resolving LGBT issues through the military judicial system is closely tied to the interests of the institution as a tool for national defense.

Such institutional interests are one of the considerations of military interests, thereby minimizing issues including LGBT-related acts, or in other words, relying on the principle of *ultimum remedium*. This principle signifies that military criminal law serves as the last resort for addressing LGBT-related issues within the Indonesian National Armed Forces (TNI).

The enforcement of military judicial law from the perspective of military interests tends to be detrimental and has the potential to cause conflicts between law enforcement officials and the commander of the defendant being tried. One of the law enforcement officials in military courts is the military judge, who is given very broad authority in carrying out their duties.

This makes judicial independence a high priority, with the expectation that decisions will be made in the interests of justice based on the One Almighty God, accountable both vertically to God Almighty and horizontally to the community and institutions. Therefore, military judges must remain independent and free from intimidation, coercion, other influences that shape opinion, and free from family and friendship ties.

Judicial decisions play a crucial role, as they involve the judge's considerations in resolving the cases they handle. These considerations can be reviewed from various perspectives, including regulatory approaches and military interests.

The existence of the principle of military interests within the TNI is one of the principles applied by military judges in imposing additional penalties in the form of dishonorable discharge in various cases, one of which is discussed in this study, namely LGBT.

LGBT cases within the TNI are currently a matter of debate as to whether they can be resolved criminally through military courts. Some LGBT cases are resolved by charging the perpetrators under Article 103 of the Military Criminal Code (KUHPM), which seems to be outside the substance of the act, as the substance should pertain to LGBT issues, which are not yet regulated but are applied under Article 103 of the KUHPM regarding violating official orders.

The enforcement of the law in such legal issues is not merely to punish the guilty soldier but to educate and set boundaries through the applicable positive law. In connection with this, the researcher has adopted an approach through court decisions and interviews with several judges who presided over the two military court decisions referenced in this study. The approach to applying the principle of military interest is as follows:

#### a. Research approach to Pontianak Military Court Decision Number 13K /PM.I-05/AD/II/2024.

The main points of consideration by the Panel of Judges in the Pontianak Military Court Decision Number 13K /PM.I-05/AD/II/2024 regarding the use of the principle of military interest are as follows

“that from the perspective of military interests, the defendant's act of engaging in same-sex sexual relations demonstrates the defendant's disregard for all warnings from his superiors not to engage in same-sex sexual relations. Therefore, for the sake of order and the enforcement and certainty of law in military organizational life, such acts must be met with firm and proportionate legal action so as not to affect the discipline of other soldiers.”

Based on the considerations outlined in the decision, the researcher conducted an in-depth interview with one of the military judges in the case regarding these considerations. The main points of the in-depth interview regarding the court decision are as follows:

- 1) That the purpose of the Panel of Judges is not merely to punish those who have committed criminal acts, but also to educate them so that they may repent and return to the right path, becoming good citizens in accordance with the philosophy of Pancasila.
- 2) That the defendant sought personal satisfaction in committing LGBT acts, thereby undermining the discipline of military personnel and disregarding military orders prohibiting LGBT acts within the TNI. This was taken into consideration by the court in terms of military interests.

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<sup>33</sup> Sudana, E. H., Gozali, D. S., Yusran, A. 2022, *Asas Keadilan dalam Pengadaan Tanah bagi Pembangunan untuk Kepentingan Umum*, Notary Law Journal, Volume 1 Nomor 1, hlm 49-62.

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- 3) That the defendant received financial gain from engaging in LGBT activities, thereby undermining military discipline and disregarding military orders prohibiting LGBT activities within the TNI. This was taken into consideration by the court in terms of military interests.
- 4) That based on the facts attached to the Defendant, the Panel of Judges opined that the Defendant's actions were not the result of a mental illness and that he was no longer fit to remain as a TNI soldier because it was feared that he would disrupt the interests of the military organization.

### b. Research approach to the Jakarta Military Court Decision Number 231K/PM.II-08/AU/XII/2020.

The main considerations of the Panel of Judges in the Jakarta Military Court Decision Number 231K/PM.II-08/AU/XII/2020 regarding the use of the principle of military interests are as follows:

- 1) The defendant's actions are in direct conflict with the noble objectives of the Indonesian National Armed Forces (TNI), which were born from the people and fight alongside the people, meaning every breath of life for the Indonesian people.
- 2) The defendant's actions could influence other soldiers, resulting in damage to their mental state, while soldiers are required to always be ready to carry out their duties, both in carrying out unit tasks and the main duties of the TNI in maintaining the integrity and sovereignty of the Unitary State of the Republic of Indonesia. Ultimately, the defendant's actions would disrupt the discipline and order of the soldiers' lives in the unit.

Based on the considerations outlined in the verdict, the researcher conducted an in-depth interview with one of the military judges at the Jakarta Military Court II-08 regarding these considerations. The main points of the in-depth interview regarding the court's verdict are as follows:

- 1) That the defendant's actions are punishable by relatively severe penalties, and if the defendant's actions are allowed to continue without strict sanctions, it will have an impact on the training of personnel in the unit, especially the defendant's unit.
- 2) That the defendant's behavior and actions do not reflect the character of TNI soldiers who respect their fellow TNI members, and that the defendant's actions have caused the victims to feel uneasy in carrying out their duties, thereby disrupting the performance of their duties.
- 3) From a military perspective, the Defendant's actions have tarnished the TNI's image in the eyes of the public and set a bad example for other soldiers, as the Defendant's actions clearly violate the law and have demonstrated to fellow soldiers and the public that such inappropriate behavior still occurs within the TNI institution. , so that if the Defendant's actions are not met with firm action and sanctions, it is feared that such actions will be imitated or spread to other soldiers, and this will make it difficult for leadership to enforce discipline and order within the unit. Therefore, for the sake of order, enforcement, and legal certainty in military life, such actions must be immediately addressed with firm and proportional legal action so as not to affect the discipline of other soldiers.

Based on consideration and in-depth analysis of the two decisions above, it can be observed that the application of the principle of military interest in law enforcement within the TNI is not merely a matter of law enforcement, but rather involves a greater interest, namely the military interest in the operational readiness of TNI soldiers in maintaining national sovereignty and stability.

This illustrates that the application of the principle of military interest to LGBT acts must be in line with legal interests in the process of law enforcement within the TNI, whether administratively, disciplinarily, or through military judicial mechanisms, and must be carried out by "considering the theory of punishment and the principle of justice in every decision."<sup>34</sup>

3. Analysis from a theoretical perspective on the application of the principle of military interest as a legal consideration in the application of additional penalties in the form of dismissal from military service for TNI soldiers who engage in LGBT activities.

Based on several points raised earlier by researchers regarding both the regulation and implications of the principle of military interests in law enforcement against TNI soldiers who engage in LGBT activities, the relevance of the principle of military interests to the theories of legal certainty, justice, and punishment can be analyzed as follows:

#### a. Analysis of Legal Certainty Theory.

Article 126 paragraph (2) of Law Number 31 of 1997 stipulates that in certain cases where public interest or military interests so require, the Commander may consider closing a case by issuing a decision to close the case in the public interest or military interest. This article explicitly establishes the applicability of the principle of military interests to both cases, which are to be resolved within the military court system, thereby ensuring legal certainty through positive law.

The contribution of positive law in applying the principle of military interests is balanced with legal interests in resolving LGBT cases in the two military court decisions referenced in this study as follows:

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<sup>34</sup> Wicaksono, A., Sagala, P., Jaeni, A., 2025, *Penerapan Asas Kepentingan Militer Terhadap Prajurit TNI Yang Melakukan Tindak Pidana Dalam Sistem Peradilan Militer Di Indonesia*, Akademik, Jurnal Mahasiswa Humanis, Volume 5 Nomor 1, hlm. 162-168.

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- 1) In both decisions, the interests of individuals, institutions, and the law are balanced in the sense that the interests of the defendants can serve as a lesson for each individual that such actions are contrary to religious norms, morality, and undermine the foundations of community life. As for institutional interests, LGBT actions can undermine the foundations of military life and affect the operational readiness of TNI personnel in carrying out their duties. The recognition of positive law in protecting the rights of individuals and institutions provides certainty regarding what can and cannot be done with respect to those rights, so that the interests of individuals and institutions are balanced with the interests of the law, namely for the sake of order and the enforcement and certainty of the law in military life. Therefore, such actions must be met with firm and proportionate legal action so as not to affect the discipline of other military personnel in the performance of their duties.
- 2) Law is applied consistently by law enforcement agencies, where positive law provides certainty regarding this matter, making law enforcement more predictable. In the two military court decisions referenced in this study, military courts serve as the vanguard of law enforcement in creating legal certainty. The LGBT acts committed by the defendants are acts that can undermine the moral values, discipline, and esprit de corps of military personnel, as well as the orderly conduct of military life within the Indonesian National Armed Forces (TNI). If the defendants are not given appropriate and firm sanctions and are allowed to remain in military life, this will set a bad precedent for other military personnel in terms of law enforcement and will complicate the development of discipline, personnel development, and unit development. It is hoped that firm action, balancing military and legal interests as mandated in Article 126(2) of Law No. 31 of 1997, will be the appropriate step for both the unit and law enforcement authorities in providing legal certainty for the benefit of society and the TNI.

Based on the above, the theory of legal certainty is clarity and regularity in rules, positive law establishes clear and detailed rules so that they can be obeyed by the community and law enforcement agencies. Both military court decisions continue to balance the principle of military interests with legal interests, from the transfer of the case by the Case Transfer Officer to the implementation of the decision, so that the imposition of criminal penalties on the defendant is expected to create legal certainty for both individuals and institutions.

Legal considerations in applying the principle of military interests in LGBT cases cannot be used to override the law as a whole, but only as considerations in limited and measured situations, in accordance with the principles of legality, proportionality, and accountability.

### b. Analysis of the Theory of Justice.

The theory of justice originated from the progressive and revolutionary thinking of John Rawls, who argued that “justice in social institutions is the highest virtue and truth in a system of thought.” In both rulings, it is evident that the application of the principle of military interests can be an effective tool for maintaining military stability and integrity, but it must be done proportionally without disregarding justice for the defendants.

The application of the principle of military interest in the two military court rulings referenced in this study, where the defendants engaged in LGBT activities, was based on the protection of a greater military interest, namely the deviant lifestyle of TNI soldiers and the operational readiness of TNI soldiers, which could have significant implications for the performance of their duties. This is in line with John Rawls' theory of justice, which is relevant to the military institution as a tool of national defense. The military interests used in the resolution of this case are for the protection, stability, and interests of the people, so military interests can be considered corrective justice, as Aristotle stated that

“corrective justice is related to correcting or rectifying something that is wrong, providing compensation to the injured party, or imposing appropriate punishment on the perpetrator of the crime.”<sup>35</sup>

Furthermore, if the application of military interests in both verdicts was misused to oppress the defendants, then those military interests would be interpreted as contrary to the principle of justice enshrined in the constitutional basis of Article 28D paragraph (1) of the 1945 Constitution, which reads, “every person shall have the right to recognition, guarantees, protection, and certainty of fair law and equal treatment before the law.”

The justice of the two military court decisions referenced in this study, according to Article 28D paragraph (1) of the 1945 Constitution, can be interpreted as follows:

- 1) The legal system used in resolving LGBT acts by the defendants does not override their rights from abuse of power.
- 2) The law is fixed and does not change according to the wishes of interest groups, thereby guaranteeing that the defendants are subject to legal proceedings in accordance with positive law.
- 3) The defendants receive legal protection in accordance with positive law.
- 4) The defendants are treated equally before the law, so there is no discrimination based on race, religion, social status, or position.
- 5) The enforcement of the law against the defendants' LGBT acts is carried out fairly, transparently, and without bias.

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<sup>35</sup> Munawaroh, Nafiatul, 8 *Teori Keadilan dalam Filsafat Hukum Menurut Para Ahli*, diakses pada <https://www.hukumonline.com/klinik/a/teori-keadilan-dalam-filsafat-hukum-lt62e268cc4bb9b/>, tanggal 18 Maret 2025.

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The two military court rulings, in the context of Article 28D(1) of the 1945 Constitution, essentially ensure that the law must apply fairly to all individuals, including the defendants, without regard to their rank or position, where one defendant is an officer and another holds the position of squad commander, thereby preventing legal uncertainty or discrimination against LGBT individuals in the enforcement of the law.

Furthermore, when considering the court's reasoning in imposing the sentences in both rulings, it is evident that the decisions were not solely based on legal provisions but also took into account the sense of justice within society and the TNI.

The legal consideration regarding the principle of military interest should focus on the criminal acts committed by the defendants, which are deemed detrimental to the lives of other soldiers or the community, as such incidents serve as a shock therapy for the defendants whose behavior has been considered disruptive within the TNI. Every legal decision imposing additional punishment of dismissal from military service should always consider legality, morality, and proportionality to ensure justice without weakening the nation's defense capabilities.

### c. Analysis of Punishment Theory.

Analysis of Punishment Theory. Punishment is the last resort in resolving issues that are suspected of constituting criminal acts. In the two decisions referenced in this study, the application of basic and additional penalties was also the last resort to take firm action against the defendants.

Such firm action is not merely retaliatory but also aims to prevent future crimes within the TNI environment, both through specific prevention by punishing the perpetrators and general prevention to deter other soldiers. This aligns with the Latin adage "nemo prudens punit, quia peccatum, sed ne peccetur (to ensure the public truly fears committing crimes, severe penalties and public enforcement are necessary)."<sup>36</sup>

This Latin adage is similar to the military interests applied in the two decisions referenced in this study, which, from the perspective of criminal theory, place greater emphasis on the objectives of punishment. According to Erdianto Effendi, punishment has two objectives, namely:

- a. The objective of protecting society, to rehabilitate and resocialize the convicted person, restoring the balance that has been disrupted by the crime (customary reaction) so that the existing conflict can be resolved.
- b. The spiritual objective of Pancasila, which is that punishment is not intended to cause suffering and is prohibited from degrading human dignity.<sup>37</sup>

Punishment of defendants is not solely for the benefit of the institution; rather, in military courts, punishment must consider the context of military duties and the responsibilities of soldiers in safeguarding national security.<sup>38</sup>

In light of the above explanation, the relevance of the principle of military interest to the theory of punishment has been illustrated. The firm and proportionate legal action taken against defendants who commit LGBT acts is based on legal considerations regarding the purpose of punishment, so as not to affect the discipline of other soldiers as the frontline in national defense.

The principle of military interest in criminal punishment is a principle that considers the needs, interests, and continuity of military duties. In this context, criminal punishment for LGBT offenders is not only intended to deter and enforce the law, but must also consider the continuity of national defense functions.

## CONCLUSIONS

Some explanations as described above; in this case the authors draw conclusions from this research are as follows:

1. Additional criminal implications in the form of dismissal from military service can be considered in the settlement of LGBT cases where the dismissal is based on article 26 of KUHPM by guiding the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2015 and the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2015. The circular letter aims to fill the legal vacuum against LGBT acts but the effectiveness has not been realized because it requires clear legal provisions both in the act and in the regulation of worthy and unworthy of being retained as TNI Soldiers. The LGBT actions can injure the joints of the life of soldiers who are in conflict either intersect or directly against the norms, decency and rules that apply in the TNI environment so that the implications of additional punishment in the form of dismissal from military service becomes one of the considerations to take decisive action and proportional through punishment. The purpose of the punishment is carried out with the aim of self-correction and preventing the act from being repeated by both the Defendants in the decision that is the reference of this research and the LGBT perpetrators in the future.

<sup>36</sup> Muladi, Barda Nawawi, 1984, *Teori-Teori Dan Kebijakan Dalam Pidana*, Bandung, Alumni, hlm. 142.

<sup>37</sup> Erdianto Effendi, 2011, *Hukum Pidana Indonesia Suatu Pengantar*, Bandung: Rafika Aditama, hlm. 141.

<sup>38</sup> Susanto, A., Zahri, S., Hayatuddin, K., 2023, *Penerapan Pasal 281 Kitab Undang-Undang Hukum Pidana Tentang Perkara Asusila Yang Dilakukan Prajurit TNI* (Studi Kasus Putusan Pengadilan Militer I-04 Palembang Nomor 21-K/PM. I-04/AD/IV/2021), Doctrinal Volume 7 Nomor 2, hlm. 1-24.

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2. The application of the principle of military interests remains balanced with the legal interests in military criminal offenses in the Explanation of Law Number 31 of 1997. Military courts can apply the principle to uphold law and justice by taking into account the interests of the implementation of national defense and security. The application of this principle in LGBT cases can be a legal consideration by studying it from the strategic and operational aspects of national defense in applying additional punishment in the form of dismissal from military service. This is done because LGBT actions are considered as actions that can affect the implementation of tasks such as the operational readiness of the Defendants and other TNI Soldiers who are prepared as the frontline of national defense that adheres to Sapta Marga, the Soldier's Oath and the Eight Obligations of the TNI.

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