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THE AUTHORITY OF MILITARY COURT IN PROSECUTING RETIRED MEMBERS OF INDONESIAN NATIONAL ARMY

Amanda Rosaline Fajar Sari¹, Bambang Suheryadi^{2}*

¹Department of Criminal Law, Faculty of Law, Universitas Airlangga, Surabaya, Indonesia

²Department of Criminal Law, Faculty of Law, Universitas Airlangga, Surabaya, Indonesia.

*Correspondence Author: bamsuheryadi@fh.unair.ac.id

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ABSTRACT

Background: There are cases involving Retired Members Indonesian National Army prosecuted in the Military Court. Retired Members Indonesian National Army are considered civilians, which should be prosecuted in the General Court. This irregularity triggers debates on how the Military Court's authority is exercised in prosecuting Retired Indonesian National Soldiers.

Objective: This study aims to describe the authority of Military Court in prosecuting Retired Members Indonesian National Army, as well as to learn the treatment carried out by Military Court when the accused is a Retired or active member of the army.

Method: Doctrinal Research was used as the method of the study, with the approach based on the principles and systematics of law in the regulation of existing legislation, namely statute approach and conceptual approach.

Result: The Military Court has the authority to prosecute Retired Members Indonesian National Army if the criminal act is committed by a retired officer at the time of serving as an active member of the army. The difference treatment received by the Retiree when on trial at the Military Court was related to military clothing.

Conclusion: The Military Court still reserves the right to prosecute retired officers who commit crimes during their serving time in the army. The treatment of the Military Court to the Retirees during trial is that they are not permitted to wear complete official clothing.

INTRODUCTION

The Indonesian National Army, or abbreviated as TNI, are the forces of the Indonesian state. As a military, the TNI consists of three armed forces, namely the Army (TNI-AD), the Navy (TNI-AL), and the Air Force (TNI-AU) (Sagala and Ferdian, 2017). The Indonesian National Army is privileged as they have to carry out such a heavy duty of defending the country (Chang, Zhang and Wang, 2020). One of the privileges is having its own legal rules that specifically regulate the lives of its military members (Kyaw, 2019). This special rule is also called military law.

Military criminal law is a criminal law whose subject is "Military" or those based on the law are equated with the Military (Armeiy, 2020). Military law has its nature of being tough, fast, with a different procedure compared to the law in general (Wilson *et al.*, 2020). These characteristics come from the military's formidable task in maintaining and defending the sovereignty of the country by conducting battles with the enemy to uphold national security. Military environment is to examine, try and decide cases involving the TNI.

The jurisdiction of the Military Courts is to prosecute crimes committed by members of the military or by a person/legal entity/group that is equalized by the law as a soldier, and also settle and decide the administrative dispute of the armed forces. With this military court, members of the military involved in a criminal case cannot be processed through the general court like civilians. Likewise with the rule of law, military justice has the specialty of not being bound by public law.

Retired soldier, or abbreviated as *retd* is a title given to retired members of TNI who have finished their term of service and have been declared inactive in the military. An example of a criminal case involving a retired TNI member is the DjajaSuparman corruption case. DjajaSuparman is a former Commander of Kodam V/Brawijaya who retired in 2006. In 2013 Lt. Gen. (*retd*) DjajaSuparman got entangled in a corruption case involving land swaps belonging to Kodam V/Brawijaya where DjajaSuparman was considered to have committed a violation as he had released the land without permission from the Minister of Finance and Kasad (Indonesian Army Chief of Staff). By a military court, DjajaSuparman was sentenced to 4 years in prison because he was considered to have caused financial losses of Rp13.3 billion. The DjajaSuparman case is interesting because the criminal act of corruption was carried out when he was serving as a member of the Army, but this case was only tried when DjajaSuparman had entered his retirement.

From the perspective of civilians, the DjajaSuparman case received a positive response because it was considered as part of the eradication of corruption.

However from a legal perspective, it would certainly be a question of the authority of the military court to try the case since the defendant's status has shifted to a civilian. This study aims to describe the authority of the Military Court in prosecuting retired members Indonesian National Army and to find out the treatment in the Military Courts' process when the defendant is a retired military officer or an active member of the army.

RESEARCH METHOD

The legal research type in use in this study was Doctrinal Research. Hutchinson (2010) stated that Doctrinal Research 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, and predicts future development'. Doctrinal Research aims to produce a systematic explanation of the legal rules that are relevant to the legal issues being discussed and then analyze the relationship between various existing regulations.

Statute Approach and Case Approach were used in this study. Statute Approach is an approach carried out by examining all laws and regulations relating to the legal issues (Marzuki, 2005). The laws and regulations in use for this study were laws and regulations relating to military criminal law and military justice. Whereas the Case Approach examines cases related to the legal issues at hand that have become court decisions with permanent legal force (Marzuki, 2005). The cases used in this study were the Djaja Suparman corruption case and the Suyitno and Darsup Yusuf corruption cases. Based on such understanding, this research approach emphasizes the applicable laws and regulations which are also related to legal cases occurring in the military environment.

Legal Sources: The 1945 Constitution of the Republic of Indonesia, Law Number 1 of 1946 concerning the Criminal Code Act, Law Number 39 of 1947 concerning the Code of Military Criminal Law, Law Number 8 of 1981 concerning the Criminal Procedure Code, Law Number 31 of 1997 concerning Military Courts, Law Number 34 of 2004 concerning the Indonesian National Army, TNI Commander Regulation Number Perpang/4/IV/2007 dated 18 April 2007 concerning Appointment Case Submission Officer in the TNI Environment, DILMILTAMA Decision Number 01-K/PMU/BDG/AD/I/2014, 2015 on behalf of Lt. Gen. (retd) Djaja Suparman, S.IP., MM, DILMILTAMA Decision Number 26-K/PMU/BDG/AU/XII/2011 on behalf of the TNI Young Marshal (retd) Suyitno, DILMILTAMA Decision Number 01-K/PMU/BDG/AD/I/2012 on behalf of Maj. Gen. TNI (retd) Darsup Yusuf.

RESULTS AND DISCUSSION

Military Court's Jurisdiction on Retired Members of the National Indonesian Army

Military Justice in Indonesia

Military life is different from the life of civilians since they are trained in high discipline to be able to fight and maintain the sovereignty of the country. The hard life of the military makes it have its own legal rules in addition to the applicable law in general, namely military justice. As one of the executors of judicial power, the existence of military justice has been mandated by the Constitution of the Unitary State of the Republic of Indonesia (UD NKRI) especially in Article 24 Paragraph (2), which reads: "Judicial power is exercised by a Supreme Court and the judiciary below it in the general court, religious court, military court, state administrative court, and by a Constitutional Court".

Military justice functions to carry out the duties of the judiciary in order to enforce law and justice by taking into account the interests of the implementation of national security and defense, which in this case is carried out by the military. However, it should be remembered that law enforcement through military court is a last resort (*ultimumremidium*) when disciplinary law enforcement by superiors fails to overcome the existing problems (Sagala and Ferdian, 2017). Military Courts are regulated in Article 10 of Law Number 31 of 1997, that the Courts under Military Courts have the authority to adjudicate crimes committed in the jurisdiction or defendants, including a unit within their jurisdiction.

In addition to being mandated by the 1945 Constitution and Law Number 48 of 2009 concerning Judicial Power, military justice is further regulated in Law Number 31 of 1997 concerning Military Justice. According to the Military Court Law there are four types of courts in the military environment, namely: Military justice, high military justice, major military justice, military court fighting. In addition to the four types of court, within the scope of military justice there is also *koneksitas* justice (justice system for crimes committed by military and non-military members).

The procedure of *koneksitas* inspection is regulated in Article 198-Article 203 of the Military Court Law. The inspection occurs when there is a criminal offense that is carried out jointly between a person who is included in the jurisdiction of military justice and someone who is non-military, which means they are under general justice. If this is the case, then the examination and trial process is carried out within the scope of the general court, except when a Ministerial decree decides it as the authority of the Military Court.

Scope of Military Law

Military law is a series of special legal principles, both written and unwritten, which basically apply to the TNI environment and wider environment in certain circumstances, especially in emergencies or wars, in order to carry out government functions in the field of national defense (Nasional and RI,

2008). Military law is divided into several fields, including (Nasional and RI, 2008):

- a) **Military Criminal Law:** Military Criminal Law is a special criminal law which generally applies to the military and that is equalized to the military.
- b) **Military Discipline Law:** Military Discipline Law is a set of legal provisions governing the attitude, appearance and behavior of a military person or someone who is subject to the provisions of military disciplinary law that must be in accordance with official orders, official regulations and the order of life whose violators are subject to punishment.
- c) **Military Constitutional Law:** Military Constitutional Law is a special legal provision that applies during emergencies in part or all of the territory of the Republic of Indonesia or in the military environment.
- d) **Military Administrative Law:** Military Administrative Law is the legal provisions governing legal relations and consequences in the fields of organization, personnel, material and finance that are relevant to the Indonesian Armed Forces.

Subject of Military Law

Groups of people that are subject to Military Law, among others (Roels-Sianturi, 1985):

- a) **Military,** which according to statutory regulations are those who are Soldiers of the Indonesian Armed Forces. Soldiers consist of two types, namely compulsory soldiers who dedicate themselves to the military service because they are required by law, and a voluntary soldier who dedicates himself to the military service on his own will.
- b) **People who are equal in status with the military,** namely: ex-military members who are still used for military service, people who are given the rank of military titular, people who are militarized and members of militarized organizations or bodies.
- c) **Foreign military who participate in military forces or military operations with the permission of the authorities, or who become prisoners of war.**
- d) **In a state of emergency or danger and during war, Military Law also applies to the following people:** Residents of Indonesian territory who are in an area declared as applicable to Military Law or carrying out activities which are detrimental to national security, residents of foreign territories who during a war conduct efforts that harm the interests/security of the Indonesian army occupying the territory or its territory are controlled by the Indonesian military and stated applicable to Indonesian Military Law.

Basis of Retired Members of the National Indonesian Army being Prosecuted in the Military Court

Retired TNI soldiers are members of the TNI who have entered retirement or in other words have retired. Being no longer an active member of the TNI,

retired TNI are no longer part of the military and the status of retired TNI has turned into civilians. The shift of the status of an officer from a military member to a civilian means a change in the rule of law attached to them. As an active member of the TNI, they must comply with military criminal law, but by the time they enter retirement, the military criminal law is no longer valid to them and general criminal law becomes valid, as it is to other civilians.

Retired members of TNI who commit a criminal act will be imposed by a criminal law rule that applies to civilians, then the examination and trial process will be carried out in general justice. One of them is DjajaSuparman case. He is a former Commander of Kodam V/Brawijaya retired in 2006. DjajaSuparman was entangled in a corruption case involving land swaps belonging to Kodam V/Brawijaya and was tried in military court after entering his retirement period.

Tempus Delicti

A crime must occur in a certain place and time. Therefore, the criminal law recognizes the term *locus delicti* and *tempus delicti*. *Locus delicti* is the place where a crime is committed while *tempus delicti* is the time when a crime is committed (Nina Septiana Jasri, ND). The time and place of the crime is important in criminal practice. The importance of knowing *Locus* and *Tempus Delicti* is mainly related to Article 143 of the Criminal Procedure Code. According to the Article, the material requirements for an indictment is accurate, complete and clear statement about the criminal act charged by mentioning the time and place the crime was committed (Massie, 2017). If an indictment does not state the place and time of the crime, the indictment will be declared null and void by law as stipulated in Article 143 paragraph (3) of the Criminal Procedure Code.

Tempus delicti has a critical role related to the following matters (Hamzah, 2008):

a) To determine legality principles of the conduct (Article 1 of the Criminal Code).

By knowing the *tempus*/time of the crime, it will be known whether or not there are legal rules governing the act. If it is unknown, then based on the principle of legality, the person cannot be convicted. If there is a change in the rule of law, *tempus* can be used to determine which rule of law will be used.

b) To determine whether the defendant is capable or not responsible when committing criminal acts (Article 44 of the Criminal Code).

c) To determine whether or not the defendant has reached 18 years of age. Determination of age is critical to decide what legal actions will be given to the perpetrators of criminal acts. If the perpetrators at the time of committing crimes have not reached 18 years old, they will be tried in juvenile criminal justice based on Law Number 11 of 2012 concerning the Juvenile Justice System.

- d) To determine the expiry period (*verjaring*) which is calculated since the day after the criminal act occurred (Article 79 of the Criminal Code).
- e) To find out the act in a state of red-handed capture/*op heterdaad* (Article 57 HIR).

Determination of *tempus delicti* is not an easy matter to identify. Actions that cause an effect that is prohibited by the rule of law will cause difficulties if the action and effect occur at two different times. There are several opinions about the time of the crime, which is the time of conduct and the time of effect. The time of conduct is when the crime was committed, while the time of effect is the time when the result of a criminal act occurs.

With regard to retired TNI who were tried in the Military Courts, a retired TNI can be tried in Military Courts if the criminal acts are committed while he was still an active member of the TNI. If a criminal act is committed when he has retired, then it cannot be tried in a Military Court environment. Crimes committed when they are no longer active members of the TNI are in the authority of the General Courts because the status of the perpetrators has become civilians.

Differences in Criminal Procedure Law for Active Military Members and Retired Members of Indonesian National Army in Military Courts

Legal Process of Military Criminal Procedure for Active Military Members

The Military Court Law does not provide a strict definition of the legal procedure, as well as the Military Court Law. For this reason, some legal experts/scholars provide definitions related to the understanding of criminal procedural law. According to Moeljatno, procedural law is: "the law governing the procedures for implementing material law and criminal procedure law is the law governing the procedures for implementing/maintaining material criminal law" (Sofyan, 2012).

R. Soeroso argued: "procedural law is a collection of provisions with the aim of providing guidance in the search for truth and justice in the event of a provision in material law so that there is a relationship between procedural law and material law" (Sofyan, 2012).

From the definitions given by legal scholars, it can be concluded that formal criminal law/criminal procedure law are legal provisions that contain guidelines for the implementation of material criminal law enforcement. Therefore, military criminal procedure law is a collection of rules/procedures for carrying out military criminal law enforcement.

The purpose of criminal procedure law can be seen in the Preamble letter c of the Criminal Procedure Code, which states that criminal procedure law aims to make people understand their rights and obligations and foster the attitudes of

law enforcers to fit their respective functions and authorities in order to create justice, order, and legal certainty for the realization of the rule of law in accordance with the mandate of the 1945 Constitution.

Legal scholars also provide opinions on the purpose of criminal procedure law, one of which is Andi Hamzah. He believed that criminal procedure law aims to seek and find material truth to create an orderly law and achieve orderly, peaceful, peaceful, just and prosperous society (Andi, 1985).

Criminal Case Examination Process according to Military Criminal Procedure Code

General criminal procedure law uses the provisions of the Criminal Procedure Code, while military criminal procedure law uses the provisions of Law Number 31 of 1997 concerning Military Justice. The process of resolving criminal cases in the military environment is almost the same as resolving general criminal cases. The only difference is the authorities and its stages. In the settlement of cases in the TNI environment, there are four stages, namely (Mangalede, 2017) :

1) Investigation Stage

Investigation within the military court is an authority inherent in the commander and its implementation is carried out by the POM. The big difference between the KUHAP and KUHAPM in the investigation stage can be seen from the parties having authority to conduct an investigation. Investigators of general criminal acts based on Article 6 paragraph (1) of the Criminal Procedure Code consist of: Police officers of the Republic of Indonesia, Civil Servants Officers who are given special powers by law. Whereas investigators in the military sector were conducted by (Sobarna, 2017): Superiors who Have the Right to Punish (ANKUM), Military Police; and *Oditur*. Specifically for Military Police and *Oditur*, both have the authority to carry out ANKUM's orders to detain the suspect and report results of the investigation to ANKUM. *Oditur* is an *Oditurate* official (a body within the military that is authorized to exercise authority in the field of investigation and prosecution). ANKUM also has the authority to detain a suspect who is a soldier under his command. The final stage of the investigation process is the submission of the case file of the investigation results to the Case Submission Officers (Papera), ANKUM and *Oditur* as the public prosecutor. The investigation process can be terminated with a Papera decree based on the legal opinion of the *Oditur*.

2) Case Submission Stage

After the investigation process is finished and the case file of the investigation result is submitted to Papera, ANKUM and *Oditur*, the next step is the case submission. Submission of cases is Papera's action to submit criminal cases to the court in the military court and court in the general court of competent authority by demanding that the case be examined and tried according to applicable law.

3) Court Trial Examination Stage

The stage after the transfer of cases by the *Oditur* to court is an examination before a court hearing. Courts in the military environment are divided into four: military court, high military court, main military court and battle military court. Each court has a different authority. In criminal cases, the division of tasks between the courts is based on the rank of the defendant. Military members who have the rank of Captain and lower will be tried at the first level in the Military Court and the level of appeal in the High Military Court. Members of the military with the rank of Major and above will be tried at the first level in the High Military Court and the appeal level at the Main Military Court. The existence of strata in prosecuting within Military Courts also has an impact on those involved in the trial process.

4) Implementation of Decisions Stage

Supervision of decision implementation will be carried out by the Head of Court at the first level. Implementation of conditional crimes is assisted by the commander concerned, which aims that the commander can provide guidance to the convicted person, preventing them to repeat mistakes. Specifically for cases of compensation, the decision implementation is carried out by the Registrar as a bailiff (Sumaperwata, 2007).

Legal Process for Military Criminal Procedure for Retired Members of TNI

The difference between active military and retired military officers in the trial process is regarding the use of military uniforms. Active military members wear military clothing when undergoing trial, while retired officers are not permitted to wear military uniforms even though they are tried in the Military Court. That is because the status has shifted into civilians. When military personnel enter retirement, they must lay down all positions and ranks and switch to becoming civilians. By becoming civilians, retired TNI are given the rights as civilians which are prohibited in military setting, such as engaging in political activities, business activities, becoming party members, and activities in general elections. Conversely, retired TNI lost their rights as members of the military. When serving as the TNI, military members are required to wear official clothing or military uniforms as regulated in Article 40 paragraph (1) of Law Number 34 of 2004 concerning the TNI jo. Decree of the Commander of the Armed Forces Number Skep/346/X/2004 concerning Guidelines for the Use of TNI Uniform Service Clothes.

In the Geneva Conventions of 1949, a distinction principle was initiated. According to the distinction principle, a country in war is divided into two populations, namely combatants and civilians. The difference between the two can be seen from the attributes they are wearing. Soldiers wear military uniforms and attributes, while civilians wear civilian clothes. The existence of this difference aims to protect civil society from targets of violence/attacks in the event of war/armed conflict. Given the different attributes, it will be easy to identify which groups are military and which are civil society.

The implication is that military groups are groups that go to war, thus may be attacked, while civil society does not go to war so they cannot become targets of violence. Based on these reasons, civilians are not allowed to wear military uniforms and attributes. Someone who comes from non-military circles is prohibited from using military clothing to anticipate misuse of military attributes, such as wearing military clothing as an excuse to commit a crime. Therefore, members of civil society who wear military attributes without rights will be imposed with charges of criminal act of fraud.

Analysis on the Authority of Military Justice in the Criminal Case Committed by Retired Members of Indonesian National Army

Lt. Gen. (retd) DjajaSuparman is a former member of the Indonesian Army. From 1997 to 1998 he became Regional Military Commander V/Brw with the rank of Major General of the TNI. In 1997, the Directorate General of Highways (Bina Marga) planned to build the SimpangSusunWaru-Tanjung Perak toll road. This development was carried out by PT. Jasa Marga as the toll road manager and PT. Citra MargaNusaphalaPersada (PT.CMNP) as the company that won the tender for the construction of the toll road project. On January 6, 1998, PT. CMNP submitted an application for borrowing the Kodam V/Brw land located in Waru/Menanggal in preparation for toll road construction. The request was approved by DjajaSuparman by issuing a letter Number B/97/II/1998 signed by Kasdam V/Brw Brigadier General SyamsulMaarif. The permission grant was done without the knowledge and approval of the Kasad. For the release of land, PT. CMNP gave money in the amount of Rp17,640,000,000.00 (seventeen billion six hundred forty million Rupiah) to the Regional Military Command V/Brw. The money was given through four stages. After the fourth stage, PT. CMNP requested the minutes of the money handover to DjajaSuparman as the Military Commander V/Brw. He then made two minutes: the first official report stating that PT. CMNP gave some money to the Kodam V/Brw, and the second official report stating PT. CMNP provided assistance to Kodam V/Brw in the form of Natura assistance. Some of the funds provided by PT. CMNP was then used for the construction of Kodam V/Brw and part of it, Rp13,344,252,200 (thirteen billion three hundred forty four million two hundred fifty two two hundred Rupiah) was the amount of money which use could not be accounted for by DjajaSuparman. In 2013, he was charged with corruption for releasing the Kodam V/Brw land without the consent of the Kasad and could not be held responsible for a number of funds provided by PT. CMNP, thus has harmed the state finances. According to the judge's consideration, in light of the facts, the Defendant was proven to have committed corruption as regulated in Article 1 paragraph (1) letter b Jo. Article 28 of Law of the Republic of Indonesia No. 3 of 1971. At the level of appeal through Decision Number 01 K/PMU/BDG/AD/I/2014, the panel of judges changed the basic criminal law to 5 years 6 months in prison and a fine of Rp30,000,000 (thirty million rupiah) and pay a refund money of Rp13,344,252,200.

The basis of the judge's consideration in making such a decision is because there were circumstances incriminating the Defendant, among others:

- 1) The Defendant's actions of donating the Kodam V/Brw land did not follow the provisions of the rules in the Decree of the Minister of Finance Number 470/KMK.01/1994 dated 20 September 1994;
- 2) Defendant's letter to Kasad on 30 April 1998 stated that PT. CMNP Tbk provided compensation in Natura, while in fact PT. CMNP provided funds in the amount of Rp17,640,000,000. This shows that the Defendant had deceived the Kasad;
- 3) The defendant had no good intention and did not regret his actions by not returning the remaining funds;
- 4) The Defendant's actions have given a bad image to the institution and reduced the authority of the TNI;
- 5) The defendant's actions should not occur in the capacity and status of the Defendant as Military Commander V/Brw with the rank of Major General of TNI.

Based on the case, the criminal act of corruption committed by Lt. Gen. (ret) Djaja Suparman occurred while he was still an active member of the TNI, namely when he served as Military Commander V/Brw. Meanwhile, the examination and trial process occurred when Djaja Suparman had entered retirement. He retired in 2006. The authority of the Military Court in examining, adjudicating and deciding corruption cases involving Djaja Suparman as a criminal offender can be seen from the *tempus* of the case. The corruption crime was committed by Djaja Suparman in 1998 when he served as Commander of V/Brw. By serving as Military Commander V/Brw, his status at that time was an active member of the TNI. When viewed from the *tempus*, the military court has the authority to adjudicate the case, but when viewed from the type of case, namely the corruption case, the authority to adjudicate should fall to corruption court. Military Courts are intended specifically for TNI soldiers, but when it relates to corruption cases, Article 5 of Law Number 46 of 2009 concerning Corruption Criminal Court states that the Corruption Criminal Court is the only court that has the authority to examine, hear and decide on criminal corruption cases. With the existence of Article 5 of the TIPIKOR (Criminal Act of Corruption) Law, the Military Court no longer has the authority in handling the Djaja Suparman case.

CONCLUSION

According to the Military Courts Law, those that can be tried in a Military Court are Soldiers, persons who are likened to Soldiers, members of an agency/service/group that are equated as Soldiers under the law, and people who according to the Commander's decision with the Minister of Justice's approval must be tried in Military Justice. In addition to prosecuting members of the military who are still active in service, the Military Court also has the authority to prosecute retired TNI officers if the criminal acts were committed by retired officers when they were active members of the TNI.

While undergoing the examination process at the trial, active members of the military wear military service clothing, while retired military personnel wear civilian clothing. In addition, although in a temporal manner, Military Courts can prosecute retirees. However in corruption cases, the Military Courts should give the authority to judge to the Corruption Court because in the Corruption Act it is clear that the sole authority to adjudicate all corruption cases falls to the Corruption Court.

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