

JUDICIAL INDEPENDENCE IN THE ENFORCEMENT OF MILITARY CRIMES IN THE INDONESIAN JUSTICE SYSTEM

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Abstract

The military court has the function of carrying out judicial duties in the context of upholding law and justice by taking into account the interests of the administration of state defense and security, which in this case, is carried out by the military. However, it should be remembered that law enforcement through military courts is the last resort (*ultimum remedium*) when disciplinary law enforcement by superiors fails to overcome the existing problems. Military Courts are regulated in Article 10 of Law No. 31 of 1997, that Courts under Military Courts are authorized to try crimes committed in the jurisdiction of defendants, including units in their jurisdiction. The protection of judicial independence is usually considered to cover various aspects that operate at different levels, in this case, external and internal independence and institutional and individual independence. External independence refers to the independence of the judiciary from political branches (Executive and Legislative powers), as well as other non-judicial actors. However, there must be a relationship between the judiciary and political power (especially the executive). The importance of the independence, impartiality, and competence of military courts is recognized by all experts. In a number of presentations, it was noted that, in some countries, the issue of command interference and lack of institutional independence remains a source of concern. Regarding the personal jurisdiction of military courts, the Human Rights Committee has discussed this issue, stating that civilians should not submit to the jurisdiction of military courts except in exceptional circumstances. Military jurisdiction should be set aside in favor of civilian courts in cases where allegations of serious human rights violations are made against military personnel, and that military jurisdiction should be limited to military offenses.

Keywords: *Judicial Independence, Judges, Crime, Justice System, Military, Indonesia*

Abstrak

Peradilan militer mempunyai fungsi melaksanakan tugas peradilan dalam rangka penegakan hukum dan keadilan dengan memperhatikan kepentingan penyelenggaraan pertahanan dan keamanan negara, yang dalam hal ini dilakukan oleh militer. Namun perlu diingat bahwa penegakan hukum melalui peradilan militer merupakan upaya terakhir (ultimum remedium) ketika penegakan hukum disiplin oleh atasan gagal mengatasi permasalahan yang ada. Peradilan Militer diatur dalam Pasal 10 Undang-Undang No. 31 Tahun 1997, bahwa Pengadilan di lingkungan Peradilan Militer berwenang untuk mengadili kejahatan yang dilakukan dalam wilayah hukum atau para terdakwa, termasuk unit-unit yang berada dalam wilayah hukumnya. Perlindungan independensi peradilan biasanya dianggap mencakup berbagai aspek yang beroperasi pada berbagai tingkatan, dalam hal ini independensi eksternal dan internal, serta independensi institusional dan individu. Independensi eksternal mengacu pada independensi peradilan dari cabang-cabang politik (kekuasaan eksekutif dan legislatif), serta aktor non-yudisial lainnya, meskipun harus ada hubungan antara kekuasaan yudikatif dan politik (khususnya eksekutif). Pentingnya kemandirian, ketidakberpihakan dan kompetensi pengadilan militer diakui oleh semua ahli. Dalam sejumlah presentasi, disebutkan bahwa di beberapa negara, isu campur tangan komando dan kurangnya independensi kelembagaan masih menjadi perhatian. Mengenai yurisdiksi

pribadi pengadilan militer, Komite Hak Asasi Manusia telah membahas masalah ini yang menyatakan bahwa warga sipil tidak boleh tunduk pada yurisdiksi pengadilan militer kecuali dalam keadaan luar biasa. Yurisdiksi militer harus dikesampingkan demi pengadilan sipil dalam kasus-kasus di mana tuduhan pelanggaran hak asasi manusia yang serius dilakukan terhadap personel militer dan bahwa yurisdiksi militer harus dibatasi pada pelanggaran militer.

Kata kunci: *Kemerdekaan, Hakim, Kejahatan, Sistem Peradilan, Militer, Indonesia*

A. Introduction

Military criminal law is a criminal law whose subject is military or which, by law, is equated with the military.¹ Military law has a harsh nature, fast, with different procedures from the law in general. These characteristics stem from the military's heavy duty in maintaining and defending the country's sovereignty by fighting with the enemy to enforce national security. The military environment is to examine, try, and decide cases involving the army.

The military justice system should continue on the same path in its future evolution. The chain of command still needs to play an important role in the administration of military justice, especially at the summary court level. However, it needs to be introduced or supported if protection is lacking or insufficient. As it exists today, the military justice system needs better protection of the independence of its judges, courts, prosecutors, legal counsel, and police.

By definition, an independent judge is an impartial judge.² Judges are instructed to make decisions based solely on the merits of the cases brought before them, according to the law and free from outside interference. Substantive justice, due process, and the appearance of justice are important components of the judicial, civil, and military systems. It is not enough for military judges to truly act independently and impartially. To maintain its legitimacy and public confidence, the military justice system should also, as far as possible, satisfy those who appear before

military judges so that cases will be decided fairly, objectively, and impartially, without undue consideration.

The independence of the judiciary is a multifaceted concept; different institutional, legal and operational arrangements are abstractly designed to ensure the independence of the judiciary and can work differently depending on the context, political, legal, and social in which the judiciary operates. Therefore, there is no ideal model for implementing judicial independence in a one-size-fits-all sense. In more concrete terms, judicial independence is the result of various conditions, actions, checks, and balances, which can vary from country to country, with each country having to find its own balance.

The protection of judicial independence is usually considered to include various aspects that operate at different levels, in this case, external and internal independence, as well as institutional and individual independence. External independence refers to the independence of the judiciary from political branches (executive and legislative powers) and other non-judicial actors. However, there must be a relationship between the judiciary and political power (especially the executive). Internal independence focuses on guarantees to protect individual judges from undue pressure from within the judiciary: from other judges and, above all, from judges of high rank. High-ranking judges may, for example, exercise oversight powers over the administration of courts (depending on the organization of the justice system).

¹ Bari, Md Ershadul. *Martial Law in Bangladesh 1975-1979: A Legal Analysis*. London: University of London, 1985.

² Baharuddin, Hamza. "Fungsi Hakim dalam Mendorong Terwujudnya Moral Justice Dalam Perspektif Islam." *Masalah-Masalah Hukum* 43, no. 1 (2014): 67-75.

Institutional independence relates to institutional and legal arrangements designed ex ante by the state to protect judges from undue pressure and influence. From this point of view, the most important factors concern the way in which judges are recruited, evaluated, and disciplined, the governance of justice and the administration of courts. Usually these aspects are regulated by the Constitution or special laws regarding justice. However, institutional independence can work in different ways, according to the context in which it operates, and does not guarantee that judges actually behave independently. Therefore, it is necessary to consider not only the institutional design, but also the concrete behavior of judges. This question concerns the independence of the individual judge, namely the concrete state of mind and behavior, which, among other things, depends on professional socialization and on how to internalize professional values. Although institutional independence is a necessary condition for individual independence, the two concepts are different. Both dimensions are required, both individual judges and courts must be independent and appear independent.

There is concern that military judges may be reluctant to view high-ranking witnesses as less credible. Or, conversely, that complainants of a lower rank may be perceived as less credible. Or that panel members who are higher in rank than military judges may have less respect for military judges' instructions. The jurisdiction of the Military Court is to try crimes committed by members of the military or by persons/agencies/groups that are equated with the law as soldiers, as well as settling and deciding disputes over the administration of the armed forces. With this military court, military members involved in criminal cases cannot be processed through a general court like civilians.³ This is a valid issue, but difficult to verify in practice. The fact that military judges are subject to a disciplinary code of service places judges in a position of

subordination that is incompatible with the exercise of judicial duties. This dynamic may raise concerns that military judges may inappropriately consider the disciplinary consequences that might be faced if judges adjudicate cases in a certain way. Likewise, with the rule of law, military courts are not bound by public law. However, from a legal perspective, there will certainly be questions about the authority of the military court to try the case because the status of the accused has changed to being a civilian. This study aims to describe the authority of the Military Court and to determine the treatment in the Military Court process.

B. Discussion

1. Military Courts in Indonesia

Military life is different from civilian life because they are trained with high discipline to be able to fight for and defend state sovereignty.⁴ The harshness of military life makes it have its own legal rules in addition to the law that applies in general, namely military justice. As one of the executor of judicial power, the existence of military courts has been mandated by the Constitution of the Unitary State of the Republic of Indonesia (UUD NKRI), especially in Article 24 Paragraph (2) which reads: "Judicial power is exercised by the Supreme Court and judicial institutions under it in the general courts, religious courts, military courts, state administrative courts, and by a Constitutional Court".

The military court has the function of carrying out judicial duties in the context of upholding law and justice by taking into account the interests of the administration of state defense and security, which in this case is carried out by the military.⁵ However, it should be remembered that law enforcement through military courts is a last resort (*ultimumremidium*) when disciplinary law enforcement by superiors fails to resolve

³ Wijayanto, Aji Rahma. "Analisis Perlindungan Hak Warga Sipil terhadap Praktik Kekerasan Oknum Keamanan Negara." *Lex Scientia Law Review* 1, no. 1 (2017): 113-120.

⁴ Supriyatno, Makmur. *Tentang ilmu pertahanan*. Jakarta: Yayasan Pustaka Obor Indonesia, 2014.

⁵ Supriyatna, S. "Memahami Urgensi Peradilan Militer dari Sudut Kepentingan Pertahanan dan Keamanan Negara." *Jurnal Yuridis Vol* 1, no. 2 (2014): 183-202.

existing problems.⁶ Military Courts are regulated in Article 10 of Law No. 31 of 1997, that Courts under Military Courts are authorized to try crimes committed in the jurisdiction or defendants, including units in their jurisdiction.

In addition to being mandated by the 1945 Constitution and Law No. 48 of 2009 concerning Judicial Powers, military justice is further regulated in Law No. 31 of 1997 concerning Military Courts. According to the Military Court Law, there are four types of courts within the military, namely: Military Courts, High Military Courts, Major Military Courts, and Military Courts. In addition to the four types of courts, within the scope of military justice there is also connectivity justice (a justice system for crimes committed by military and non-military members).⁷

The procedure for examining connectivity is regulated in Article 198-Article 203 of the Law on Military Justice. This examination occurs when there is a criminal act that is carried out jointly between a person who is included in the jurisdiction of the military court and a non-military person, which means that he is under a general court. If this is the case, then the examination and trial process will be carried out in the general court environment, except with a Minister's decision which decides it as the authority of the Military Court.

2. Scope of Military Law

Military law is a series of specific legal principles, both written and unwritten, which basically apply to the TNI environment and the wider environment in certain circumstances, especially in emergencies or wars, in order to carry out government functions in the field of national defense. Military Law is divided into several fields, including:⁸

1. Military Criminal Law: Military Criminal Law is a special criminal law

that generally applies to the military and which is equated with the military.

2. Military Disciplinary Law: Military Disciplinary Law is a set of legal provisions that regulate the attitude, appearance and behavior of a military person or a person who is subject to the provisions of military discipline law which must comply with official orders, official regulations and life orders for which violators are subject to punishment.
3. Military Constitutional Law: Military Constitutional Law is a special legal provision that applies during an emergency in part or all of the territory of the Unitary State of the Republic of Indonesia or in the military environment.
4. Military Administrative Law: Military Administrative Law is a legal provision that regulates the relationship and legal consequences in the organizational, staffing, material and financial fields that are relevant to the Armed Forces of the Republic of Indonesia.

3. Independence, impartiality and competence of the judiciary in military courts

Military courts should be an integral part of the general justice system and administer justice in a manner that is fully in accordance with international human rights standards, including articles 9 and 14 of the International Covenant on Civil and Political Rights. The Human Rights Committee stated that the independence requirement refers, in particular, to the procedures and qualifications for the appointment of judges, and to guarantees regarding the security of their term of office, the conditions governing their promotion, transfer, suspension and termination of function and the true independence of the

⁶ Sagala, Parluhutan, and Fredy Ferdian. *Yurisdiiksi Peradilan Militer dalam Kekuasaan Kehakiman di Indonesia*. 2017, Available at: <http://www.dilmil-jakarta.go.id/wp-content/uploads/2018/04/Yurisdiiksi-Peradilan-Militer.pdf>.

⁷ Kurniawati, Erna, Adwani Adwani, and Mujibussalim Mujibussalim. "Kewenangan Pengadilan Militer I-01

Banda Aceh Dalam Mengadili Tindak Pidana Umum Yang Dilakukan Oknum Anggota TNI di Aceh." *Syiah Kuala Law Journal* 2, no. 2 (2018): 216-232.

⁸ Oviten, Nico. "Kedudukan Hukum Surat Permohonan Keringan Pidana oleh Anlum dalam Peradilan Militer." *Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya*, 2013.

judiciary from interference politics by the executive and legislative branches.⁹

The independence of military courts and their inclusion in the general administration of the State justice system must be guaranteed by law at the highest possible level; Domestic legislation should include specific guarantees to protect the statutory independence of military judges vis-à-vis the executive branch and military hierarchy and to enhance public confidence, the legal profession and litigants in the impartiality of judges and the judiciary, and the status of military judges including guarantees term of office, adequate remuneration, conditions of service, pension and retirement age, must be determined by law and military judges have guaranteed terms of office until the mandatory retirement age or end of term of office and are dismissed only on the grounds of serious misconduct or incompetence in accordance with established procedures justice stipulated in law.

The roles and functions of presiding officers must be clearly defined by law so that they can act independently of external pressure and be prevented from acting in a manner that could hinder the independent and impartial administration of justice, and that domestic law should identify objective criteria for selection. military judges based on their integrity, ability, qualifications and training. Finally, he reiterated his position that States should consider adopting draft principles governing the administration of justice through military tribunals.

Various military justice systems can be organized along the axis, with a traditional military court system of courts at one end, and a fully "civilized" system at the other. The general trend for change in the military justice system is to move from left to right in the table below. Issues relating to the convening authority system and to the sentencing of sentences with concise procedures raise human

rights concerns. By highlighting the clear trend in military justice with respect to defendants' rights more judge independence; increased use of standing courts; increased right to choose trial instead of summary procedure; and increasing the right to legal representation.

This type of military tribunal is based on a system of convened authorities.¹⁰ The power of attorney of the officers at trial including the persons on trial; costs to be carried; the composition of the court; command over the public prosecutor and military officials, as well as the Judge Advocate General, whose role is to provide advice on legal matters but does not function as an advocate or judge; confirmation of findings and penalties or resubmit proceedings for revision; and decide on the post-confirmation petition. There is no right to appeal against the decisions of the convening authorities, although a court of the armed forces has appellate jurisdiction over military courts.

4. Personal Jurisdiction of Military Courts

The competence of military jurisdiction is also important during the investigation phase. The Working Group has recommended that States should ensure that the civil prosecution service undertakes serious and prompt investigations into all complaints of human rights violations, including enforced disappearances by military personnel.¹¹

The aim of military justice is to advance national security by ensuring discipline within the military; to punish and prevent crimes fairly; to respect human rights; to support democratic institutions; to minimize friction between the military and civilians; to engage and maintain public trust; and to encourage the recruitment and retention of personnel.

There are two basic approaches to determining whether civilians should be tried in military courts, namely the statutory approach and the case approach.¹² The

⁹ Knaul, Gabriela. "Report of the Special Rapporteur on the Independence of Judges and Lawyers." *General Assembly. United Nations: Human Rights Council. Accessed April 10 (2013):* 2016.

¹⁰ Tarigan, Brema Arapenta. *Tinjauan Terhadap Sanksi Bagi Anggota Militer Yang Melakukan Kekerasan Dalam Rumah Tangga (studi kasus di wilayah pengadilan militer II-11 yogyakarta)*. Yogyakarta:

Universitas Atma Jaya Yogyakarta (Doctoral Dissertation), 2018.

¹¹ Kumarajati, Satya. "Analisis Pasal 43 Undang-Undang Pengadilan Hak Asasi Manusia dalam Kasus Penghilangan Orang secara Paksa Tahun 1997/1998." *Lentera Hukum* 5, no. 1 (2018): 132-143.

¹² Somaliagustina, Desi, and Dian Cita Sari. "Kekerasan seksual pada anak dalam perspektif hak asasi

statutory approach establishes a clear dividing line as to who can and cannot be tried by military courts; and ad hoc case-specific approaches. Potential tests that could be applied in the latter approach could include considering whether there will be an abuse of proceedings in military courts, whether the proportionate loss of benefits from civil proceedings will outweigh the benefits of military tribunals in certain circumstances, and whether civil forums are available to try civilians in certain cases.

While it is undeniable that the Convention for the Protection of Human Rights and Fundamental Freedoms absolutely excludes the jurisdiction of military courts to hear cases involving civilians, the existence of such jurisdictions should be subject to very careful scrutiny because only in the very extraordinary determination of criminal charges against civilians in the court is considered in accordance with Article 6 of the Charter. The powers of military criminal justice may not extend to civilians unless there are compelling reasons to justify such a situation, and if so, only on a clear and foreseeable legal basis. The existence of such reasons must be proven in each particular case. In the absence of such justification, we can only conclude that the effect of prosecuting respondents within the military justice system is disproportionate. As a result, the prosecution of the respondent constitutes a violation of the right of the respondent not to be deprived of his or her freedom, except in accordance with the principles of fundamental justice, which are contrary to Article 7 of the Charter.

Each case must be decided based on its own facts. If a State requires a nexus or service connection for military jurisdiction, he asks how that should apply to the prosecution of civilians in military courts. He also asked whether jury membership and the right to counsel should be different when a civilian is being tried in a court-martial.

Military courts have broad jurisdiction to try civilians¹³ as well as hear allegations of human rights violations by military and security-related personnel. Military courts are often a source of impunity because they are used to protect military and security personnel from accountability for human rights violations. Military courts have jurisdiction over ordinary crimes committed by military personnel and ordinary crimes committed against military personnel. In addition, the law provides that "in the case of prosecution for crimes under ordinary law committed by military personnel while off duty and where one of the parties does not belong to the army, the prosecutor or ordinary court investigative judge must defer charges against the member of the army to the competent court of the first instance." Military courts hear the vast majority of cases involving human rights violations committed by security and military personnel. Military courts of the armed forces, in times of peace, have jurisdiction over all crimes and offenses concerning all members of the military. Jurisdiction also applies to all persons who, regardless of whether they are members of the military, commit a crime against a member of the armed forces or equivalent bodies or who commit crimes involving one or more members of the armed forces as a conspiracy or conspiracy.¹⁴ Military courts have jurisdiction over civilians only in limited circumstances where it is in the best interest of the individual.

C. Conclusion

All experts recognize the importance of military courts' independence, impartiality, and competence. In several presentations, it was noted that, in some countries, the issue of command interference and lack of institutional independence remains a source of concern. Appropriate legislative and institutional reforms must be undertaken in countries where

manusia." *Psychopolitan: Jurnal Psikologi* 1, no. 2 (2018): 122-131.

¹³ Laksmana, Setyo Budhi, and Rosalind Angel Fanggi. "Analisis Yuridis Tindak Pidana Penelantaran Orang dalam Lingkup Rumah Tangga Oleh Perwira TNI (Putusan Mahkamah Agung Nomor 201/K/MIL/2012)." *Jember: Universitas Jember (Doctoral Dissertation)*, 2012.

¹⁴ Fitriana, Mia Kusuma. "Yurisdiksi Pengadilan Terhadap Tindak Pidana Umum Yang Melibatkan Militer Dan Sipil." *Arena Hukum* 7, no. 2 (2014): 270-286.

these issues are present. In some countries, there are significant gaps in the exercise of the right to a fair trial. States are expected to take appropriate steps to ensure that the right to a fair trial in military tribunals is fully consistent with the International Covenant on Civil and Political Rights.

Regarding the personal jurisdiction of military courts, the Human Rights Committee has discussed this issue, stating that civilians should not submit to the jurisdiction of military courts except in exceptional circumstances. The Human Rights Court has taken a similar position. It is also noted that international

humanitarian law provides for limited circumstances for trialing civilians before military courts. It is noted that some States prosecute civilians accompanying military personnel on overseas deployments, although this often depends on the particular situation. With regard to the jurisdiction of the subject matter, there are differing views among experts. Military jurisdiction should be set aside in favor of civilian courts in cases where allegations of serious human rights violations are made against military personnel, and that military jurisdiction should be limited to military offenses.

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