

THE PRINCIPLE OF EXECUTORIAL IN ADDITIONAL PENALTY OF DISMISSAL IN MILITARY COURT DECISIONS

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ABSTRACT:

Purpose of the study: The principle of carrying out the execution of additional penalty of dismissal on the decision of the military court aims to find new legal principles and theories as a solution to the problem of obscurity and norm inconsistencies in the articles of additional penalty of dismissal from military service. Legally the authority to carry out military court decisions is with the Military Oditur, but factually it is exercised by Ankum.

Methodology: To answer the legal issues regarding the difference between *das sollen* and *das sein*, a research was carried out using a normative juridical methodology that wanted to examine the legal norms that led to multiple interpretations and norm inconsistencies in the *Kuhapmil* (Military Criminal Code) articles and the TNI (Indonesian National Army) Administration law.

Main Findings: Philosophically the dismissal of soldiers from military service aims to expel those concerned from the TNI institution because they are not worthy of being defended as soldiers by considering the principles of organizational interests, military interests and executorial principles in order to create legal certainty, benefit and justice. As a reference to the execution of dismissal decision carried out by Military Oditur in coordination with Ankum to determine the status of the convicted person to be no longer a member of the

military. Research on principles of executorial in additional penalty of dismissal from military service is the researcher's idea because no one has examined the issue beforehand so that this idea was purely born from the researcher's own thoughts.

Applications of this study: this study can be useful in military court

Novelty/Originality of this study: The new in this study that may find new legal principles and theories as a solution to the problem of obscurity and norm.

KEYWORDS: principles of executorial, penalty of dismissal, military court decisions

INTRODUCTION:

Legally, the execution of military court decisions that have obtained permanent legal force are carried out by Military Oditur in accordance with Article 254 paragraph (1) of Law Number 31 of 1997 concerning Military Courts (hereinafter referred to as *Kuhapmil*). In general, a military court decision contains the basic penalties in the form of capital punishment, imprisonment, confinement or fines or additional penalty of dismissal from military service. The execution of imprisonment or confinement is carried out in the Military Correctional Institution (*Lemasmil*) which execution is carried out by Military Oditur (Article 256 in conjunction with 254 of *Kuhapmil*). There is a blurring and

disharmony of norms in the execution of decisions against convicts with additional penalty of dismissal from military service, namely in Article 256 paragraph (1) KuHapmil and Article 53 paragraph (1)a of Government Regulation No. 39 of 2010 concerning the Administration of TNI Soldiers (PP No. 39/2010).

Factually, the decision of additional penalty of dismissal from military service is to be carried out by a superior who has the right to punish (Ankum), which was submitted administratively to the official in charge of appointing and dismissing the soldier. Is the execution of the additional penalty of dismissal ruling by Ankum in accordance with legal procedures that can fulfill a sense of justice for the convicted, military oditur and military community? In one criminal decision, the execution was carried out by two different institutions that have different duties, responsibilities and authorities. Philosophically, the dismissal from military service is the authority of the official who has the authority to appoint a soldier because he has a character and behavior that is not in accordance with the requirements of military organization. Is the Military Oditur authorized to execute a military court ruling which ruling contains an additional penalty of dismissal from military service?

Based on military administrative law, the decision of additional penalty of dismissal from the military service is carried out by Ankum as regulated in Article 53 paragraph (1)a of PP No. 39/2010 which states, soldiers were discharged disrespectfully from the military service because they were sentenced to additional penalty of dismissal from military service based on a court decision that had permanent legal force. Based on the provisions of Article 1 number 9 of KuHapmil that Ankum is authorized by law to impose disciplinary action and conduct investigations. Legally

Ankum was not authorized to execute a military court ruling that contained additional penalty of dismissal from military service. There is a blurring and disharmony of norms in the articles of the execution of the additional penalty of dismissal decision, so it is necessary to do legal research to find new legal principles and theories to solve the legal issue. This research is intended to find solutions and provide legal certainty in order to uphold law and justice to maintain the authority of military courts. Thus, this research is entitled "The Principle of Executorial in Additional Penalty of Dismissal from the Military Service in Military Court Decisions. Based on that, the problem research in this article is: (a) what is the philosophical value of the additional criminal dismissal from military service in military court rulings for soldiers in military organization? And; (b) What legal principle is used as a reference for military judges to ruling additional criminal dismissal from military service?

LITERATURE REVIEW:

Research on the principle of executorial in additional penalty of dismissal in military court decisions uses several legal theories as a knife of analysis. Theories used to solve legal issues include authority theory, power theory and executorial theory.

Theory of Authority

In a state of law, the authority of state officials is given only by law. According to Indroharto, sources of authority originating from laws and regulations include attribution, delegation, and mandate (Ridwan, HR. 2008). Attribution is the granting of authority by lawmakers to an organ of government. Delegation is the delegation of authority from one governmental organ to another governmental organ. Mandates occur when governmental organs permit authority to be carried out by other organs on their behalf.

The authority of the Oditur to carry out additional penalty of dismissal from military service is the attribution authority stipulated in Article 254 paragraph (1) of Kuhapmil.

Theory of Power

Power is the ability to influence the thoughts or behavior of other people or group of people so that they are willing to do something they want. According to **Miriam Budiardjo**, power is the ability of a person or group of people to influence the behavior of other person or group of people in such a way that the behavior is in accordance with the desires and goals of those who have the power. (Budiardjo, Miriam. 1995) Robert A. Dahl said power refers to the ability to influence others or from one party to another party.

Ankum was given power by law to lead, regulate and control all soldiers under the authority of his command. Based on his authority, Ankum could have, not carried out a court decision against its members who were given an additional penalty of dismissal administratively by reason of not having the authority to execute the court's decision. Thus, the court's ruling did not fulfill one of the legal goals of being useless which could tarnish a sense of justice and the authority of the military court.

Theory of Executorial

The term execution implies that the losing party, inevitably must obey the decision voluntarily, so that the decision must be forced upon him with the help of legal force. (Hamzah, Andi. 2009). Execution of court verdict is the implementation of a court ruling that no longer has legal remedies, the ruling is voluntarily obeyed by the prosecutor and the defendant. Military court decisions can be carried out if they have permanent legal force. Legally the authority to carry out military court decisions is with the Military Oditur. Executorial theory

requires that every decision must be implemented to uphold law and justice and maintain the authority of military and state courts.)

METHODOLOGY:

Research is a scientific activity to analyze and construct law methodologically, systematically and consistently (Soekanto, Soerjono. 1986). Legal research is a process to search for and find legal principles to answer legal issues according to the prescriptive character of legal science (Marzuki, Peter Mahmud. 2011). The method chosen in this study is normative juridical legal research which wants to examine legal norms starting from the 1945 Constitution, Kuhapmil, Government Regulation regarding Administration of TNI Soldiers, Regulations of the TNI Commander and Regulations of the Chief of Staff of the Force. This study uses a statutory approach and a conceptual approach.

DISCUSSION/ANALYSIS:

Philosophical Value of Additional Penalty of Dismissal from the Military Service

In military criminal law, in addition to basic penalties, additional penalties are also regulated. Article 6 of the Military Criminal Code (KUHPM) states that penalties include: a. the Principal penalties consist of: capital punishment, imprisonment, confinement and closing sentence; b. Additional penalties: Dismissal from military service, demotion, revocation of certain rights. In essence, additional penalty is only useful to add to the principal penalty which cannot be handed down independently without the principal penalty because it is in addition to the principal penalty (Sianturi SR. 1996). The punishment for a member of the military is basically an act of education or fostering so that the soldier returns to become a member of the military with the spirit of Sapta Marga, obedient to the Oath of

Soldiers and the Eight Mandatory Forces of the TNI (Sianturi, SR. 2010). A military member who has finished serving his sentence must return to being a good member of the military and is useful for his unit, the state and nation, both on his own conscious basis and as a result of fostering at the Military Correctional Institution (Lemasmil).

The basis for consideration of the panel of military judges sentenced additional penalty of dismissal because they considered that the Defendant was no longer worthy of being defended as a member of the military who possessed an undeserved character in the military organization. The soldier has a character that can seriously harm soldier discipline or the TNI because he is acting contrary to official orders or official regulations or actions that are not in accordance with the norms of the soldier's life so that he cannot be maintained to remain in the Army Service (Article 53 PP 39/2010).

Execution of Military Court Decisions

The judiciary in Indonesia adheres to the principle of fair trial, which is an indicator of community development with a fair legal system. Without the application of the principle of a fair trial, the people's trust in the law and the justice system will collapse. In the criminal justice system, the term due process of law is known, which stands for a good, right and fair legal process. A fair trial is a protection effort to guarantee the rights of every citizen not to be punished unjustly. The legal process of law enforcement officers not only carries out their duties in accordance with the law, but also ensures that all the rights of the suspect/defendant are treated according to applicable legal procedures. A fair legal process is also obliged to implement the principles underlying a fair legal process, even though the legal principle does not constitute a positive legal regulation (Muladi. 1998).

Execution of court decisions that have obtained permanent legal force, carried out by Military Oditur in Lemasmil. If the convicted person is dismissed from military service, then a prison sentence or imprisonment is carried out at the Public Penitentiary (general prison). Before serving a prison sentence or imprisonment in the general prison, the soldier's status must be dismissed from the military organization (TNI). The authorized official determines the status of dishonorable discharge, for Soldiers with the rank of Colonel and higher are by the President, and soldiers with the rank of Lieutenant Colonel and lower are regulated by TNI Commander Regulations (Article 55 paragraph (1) PP No. 39/2010).

Execution of the additional penalty of dismissal from the military service based on Article 12 of the Army Chief of Staff Regulation Number 84/XII/2008 dated December 12, 2008 was carried out by Ankum who proposed a hierarchy to the competent authority. After the authorized official accepts the proposal from Ankum, it is then forwarded by the PDW to the Army Chief of Staff. The PDW will issue a Provisional PDTH Decree against soldiers of Non-commissioned Officer ranks. The Army Chief of Staff with the authority to issue PDTH Decree which is definitive for soldiers holding Non-commissioned Officer ranks, and issue temporarily PDTH Decree for Soldiers with Second Lieutenant to Lieutenant Colonel ranks and forward the PDTH proposal to the TNI Commander towards Soldiers with Second Lieutenant to Lieutenant Colonel ranks. The TNI Commander after accepting the PDTH proposal from the Army Chief of Staff, will issue a PDTH Decree against soldiers with Second Lieutenant to Lieutenant Colonel ranks, and forward the PDTH proposal to the President for Colonel to General ranks.

Legally, the execution of the dismissal decision is to be carried out by the Military Oditur, but in reality, the execution was carried

out by Ankum to be forwarded to the competent authority. Ankum with its authority sometimes does not propose the process of dismissing soldiers who are under the authority of its command to the PDW on the grounds that it is not the authority of Ankum to carry out an execution of a military court ruling. Judicially, such an attitude of Ankum is not wrong because the execution of a military court decision is not an authority of Ankum. To overcome this problem, it is necessary to look for the formulation of the principles of execution of the sentence for dismissal from military service.

Executorial Principles of Military Court Judgments

Court decisions that can be executed include: decisions that have permanent legal force (*inkracht van gewijde*), decisions which are of a punitive nature (*condemnatoir*). There are exceptions to the principle of execution, namely the decision that can be implemented first (*uitvoerbaar bij voorraad*), and the implementation of the provisional injunction. The implementation of military court decisions that have permanent legal force in military criminal cases are carried out by Military Oditur. In the implementation of the execution, the judge also has the role to supervise the implementation of the execution. Judges must know that decisions that have been decided are implemented properly based on the principles of humanity and justice. In carrying out the court's decision, a military oditur must know and understand the procedure for implementing the court's decision. In the implementation of additional penalty in the form of dismissal from military service, the Military Oditur should coordinate with Ankum to propose to the authorized officials against soldiers who have been dismissed by a military court. After the issuance of the PDTH decree, Military Oditur will execute the convicted in

general prison. The principles of the implementation of additional penalty of dismissal from a military court decision include the principles of organizational interest, military interests and executive principles.

Principles of Organizational Interest

The TNI organization was formed to support the achievement of national interests for the sake of maintaining the establishment of the Unitary Republic of Indonesia (NKRI) based on the Pancasila and the 1945 Constitution, maintaining the integrity of the Unitary Republic of Indonesia, protecting the entire nation from armed threats and disturbances (Article 7 paragraph (1) TNI Law). The TNI organization wants the soldiers who guard it are people who have the spirit of a knight as the implementation of the values of the Sapta Marga, Oath of Soldiers and the Eight Mandatory Forces of the TNI. The distinctive character of TNI soldiers is to believe and be devoted to God Almighty, loyal to the Unitary Republic of Indonesia, moral and subject to the law, disciplined and obedient to superiors and responsible for carrying out obligations as soldiers (Decision of the TNI Commander. 2018).

Every Indonesian citizen has the broadest opportunity to become a TNI soldier with the following requirements: to believe and be devoted to God Almighty; loyal to the Unitary Republic of Indonesia; has no criminal record; physically and mentally healthy; not losing their right to become a TNI Soldier (Article 7 paragraph (1) of the TNI Law). However, if after becoming a soldier it turns out there is a character that is contrary to the values of soldiering, the soldier can be dismissed, either through military court or filed administratively. Soldiers who were dismissed from military service by a military court were carried out through the mechanism of military criminal law. Whereas the TNI soldier who was

dismissed administratively was carried out by Ankum which was processed through military administrative law.

Based on the principle of organizational interest, TNI soldiers who are not fit to be retained as members of the military and who are not trusted to oversee TNI organization can be dismissed from military service. Dismissal through law or administrative channels is done by Ankum by submitting it to the authorized official. Whereas dismissal through criminal law is processed through the mechanism of military criminal procedure and dismissal through a court decision in the form of an additional penalty of dismissal from military service which execution is carried out by a Military Oditur.

Principles of Military Interest

Additional penalty in the form of dismissal from military service is one of the principles of military interest because soldiers who are no longer worthy of defense are deemed necessary to be dismissed from military institution because they do not meet the requirements according to the needs of military organization. An additional penalty of dismissal is required to consider the principle of military importance. Based on the etymology of the word, the principle of military importance can be interpreted as the necessity required by the army or soldier in carrying out its duties and functions in carrying out governmental tasks in the field of national defense (Tambunan, A.S.S. 2005).

The concept of military importance must always be the basis for consideration for military judges to impose additional penalty of dismissal from military service. The principle of military importance means that military organization must be commanded by good people, not committing crimes, not breaking the law. The principle of military importance is often spelled out as restriction and

proportionality. The principle of restriction requires the use of authority objectively and based on the rule of law. The principle of military importance in carrying out the execution of additional penalty of dismissal by Military Oditur so that its implementation can be carried out in an orderly, efficient, effective and accountable manner.

Principles of Execution of Additional Penalty of Dismissal

Law enforcement in the military environment cannot be separated from the five related sub-systems, namely Military Police (MP), Military Oditur, Military Judges/Military Judicial Institutions, Legal Counsel and Lemasmil. These five sub-systems are known as the integrated criminal justice system. Military Oditur is an institution authorized to exercise state power in the field of prosecution and execution of court decisions. The process of settling a criminal case is considered successful in law enforcement if the execution of the decision of a judge which has permanent legal power (*inkracht van gewijisde*) is carried out properly, in accordance with applicable legal provisions. In principle, the execution of the decision additional penalty of dismissal from military service is inseparable from the execution of the corporal punishment and payment of court fees. After there was a determination that the soldier's status was no longer a member of the TNI, the Military Oditur immediately moved the convicted person to the general prison to separate the fostering. Fostering of prisoners in Lemasmil is intended for prisoners who are still members of the military with the aim that they return to being soldiers who are *Sapta Margais* and loyal to the Unitary Republic of Indonesia.

Based on the facts, the Military Oditur only carries out its authority in 2 segments, namely carrying out the sentence of corporal punishment and payment of the case fee, while

the additional penalty of dismissal was carried out by Ankum. Supposedly, the authority to execute the decision of additional penalty of dismissal is carried out by Military Oditur. In carrying out the execution of the sentence for dismissal, the Military Oditur coordinates with Ankum so that the administration of the soldier is submitted to the oditur to propose the dismissal process to the officer who is authorized to appoint and dismiss the soldier. After the issuance of the decree of dismissal and status of the soldier has been determined as an ordinary citizen, the Military Oditur then moves the convicted person to general prison to be fostered to become a good citizen and ready to return to the community.

CONCLUSIONS:

Based on the description above, the following conclusions can be drawn:

- a. In juridical terms, additional penalty of dismissal from military service on military court decisions are carried out by military oditor with three elements of duty, namely first, carrying out corporal punishment (capital punishment, imprisonment, or confinement); second, carrying out the decision of additional penalty of dismissal from military service; and third, the implementation of payment of court fees. But in reality the implementation of additional penalty of dismissal was carried out by Ankum through a military administrative legal process.
- b. Philosophically the dismissal of a member of the military is carried out to expel the soldier from military organization because he has a character that can seriously harm TNI institutions. The legal principle which becomes the reference material for military judges to pass the decision of additional penalty of dismissal by considering the principles of organization, military interests and the principle of executorial.

SUGGESTIONS:

Based on the above conclusions can be suggested as follows:

- a. The execution of additional penalty of dismissal from military service should be carried out by Military Oditur so that decisions can be carried out efficiently, effectively and accountably.
- b. Military judges in imposing additional penalty of dismissal from military service to consider the principles of the interests of TNI organization, the principle of military interests and the principle of executorial to uphold law and justice in order to maintain the authority of military court.

LIMITATION AND STUDY FORWARD:

Researchers realize that the results of this study are not yet perfect, so it is necessary to be continued by subsequent researchers to enrich the treasury of jurisprudence, particularly military criminal procedural law.

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