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Rechtsvacuum Phenomenon Military Administrative Court Arrangements

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ABSTRACT

This article aims to deconstruct a comprehensive analysis to answer the problem of rechtvacuum in the military administrative justice system. Historically, military administrative court judges have rejected challenges to military administrative decisions on the grounds that there are no implementing regulations from the military justice law. Even the state administrative court also rejected the lawsuit of the military administrative decision because it was not his competence. The research method used is normative juridical with a statutory and conceptual approach, with descriptive analytical techniques. Based on the results of the analysis, it can be said that the consequences of the rechtvacuum of the military administrative court create legal uncertainty and human rights are ignored and as if members of the army are immune to the law. Then a judge is not allowed to reject a case on the basis that there is no punishment.

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PRELIMINARY

The state of the law is stated in carrying out there are 3 (three) basic principles, namely: respect for the law, equality before the law and the application of the law does not conflict with legal procedures (Ihsan, 2021: 283-292). As the constitution states, Indonesia is a state of law, intending to create a structure of social order and a just and prosperous state. This goal will be achieved when the country has a strong defense system to maintain state sovereignty. The preamble of the 1945 NRI Constitution has stated that the establishment of the Unitary State of the Republic of Indonesia is to protect the entire Indonesian nation and all Indonesian bloodshed, as well as promote general welfare, life education, and participate in realizing world order based on independence, lasting peace, and social justice. In realizing all the mandates and ideals of the state to create social order,

state welfare and sovereignty cannot be separated from state efforts to strengthen state defense.

So for the security of the country, the state formed the Indonesian National Army. As mentioned in Article 1 Paragraph (7) of Law 34 of 2004 concerning the Indonesian National Army, the Indonesian National Army formed by the state has a function as a "deterrent against every form of military threat and the armed threat from outside and within the country to the sovereignty, territorial integrity and safety of the nation".

The Indonesian National Army as part of Indonesian citizens cannot be separated from the possibility of violating the law in carrying out their duties. When viewed from the point of view of the Indonesian judicial system, military members who commit violations of the law, these members can be tried in Military Courts. As a basic principle of the rule of law, it means that there are no exceptions whatsoever when members of the military violate the law, it must be able to be tried legally and considered equal before the law.

Concerning the military justice system, it has long been in place in Indonesia to prosecute military members who violate the law. Since Indonesia was colonized by the Dutch, the Dutch have implemented their courts in Indonesia known as "Krijgsraad" and "Hoog Militarir Gerechtsof". The Krijgsraad is a temporary military court authorized to try offenses committed by non-military persons and is not classified as indigenous, while the Hoog Militarir Gerechtsof is a continuation of legal remedies on appeal. This trial included "prosecuting military criminal acts in which members of the Dutch army in Indonesia (Dutch East Indies) i.e. KNIL" and "Dutch navy" were examined in the first instance, namely: Krijgsraad dan Hoog Militarir Gerechtsof (Ihsan, 2021: 283-292).

The military has a special legal privilege, namely military law. The military has its judicial institution to resolve problems that occur within the military, namely the Military Court. Military Courts are courts established specifically to handle cases in the military field to create legal certainty and justice for everyone. Military courts only have authority over the resolution of cases that occur within the military. When there is a legal problem, the military court is obliged to conduct an examination and decide a case. Military courts were established for several reasons. The military whose members are people who are trained, educated, and prepared for combat, then the reason must be established in special military courts so that they must be treated strictly.

In 1997 the Law on Military Courts number 31 of 1997 was passed, as article 9 states that military courts have the following powers: (1) The trial of an offense which may be brought against a person who at the time of committing the offense is; a) a soldiers, b) by law are equated with soldiers, c) members who are equated as soldiers under the law, d) by decision of the commander with the approval of the Minister of Justice must be tried by a court within the Military Court. (2) Investigate, supervise, and decide administrative disputes of the armed forces. (3) Combine cases claiming compensation in the criminal case concerned at the request of the party who suffered losses due to the criminal act as the basis for prosecution while combining the two cases into one case.

The existence of military courts as a special court is also seen from the authority it has given to examine, adjudicate, and decide claims of military administrative disputes against administrative bodies/officials by persons/legal entities. In administrative settlements within the scope of military areas, which in the military justice law also regulates military administrative courts. This is a general understanding of the scope of military courts, whereby the High Military Court and the Main Military Court, in addition to being authorized to try criminal cases, are also authorized to examine, by adjudicating and deciding cases of the armed forces. administrative disputes by the procedural law concerned (Agustina, 2016: 180-194).

Judging from the authority given to military courts that can examine, by adjudicating, deciding cases of "Military Administrative Decisions" (MAD), the provisions of article 1 number 34 of the Military Justice Law, have provided limitations on MAD, namely:

> *"The Administrative Decree of the Armed Forces of the Republic of Indonesia, hereinafter referred to as the Armed Administrative Decree is a written determination issued by the Administrative Agency or Officer of the Armed Forces of the Republic of Indonesia containing legal actions based on the provisions of the applicable laws and regulations and relating to the implementation of the development and use of the Armed Forces of the Republic of Indonesia and the management of state security defense in the field of personnel, material, facilities and services of a concrete, individual and final nature that give rise to legal consequences for persons or civil law entities".*

The dominant dispute gives rise to a lawsuit because it arises from the actions of State Administrative Officials and Military Administration Officials in issuing a decision or policy that has a detrimental impact on civil law persons/entities. These actions should be avoided so as not to cause disputes that occur between Military Administration Officers and civil law persons/entities. If that happens, it will be detrimental and that's where legal protection is needed for those who feel aggrieved.

However, the reality on the ground is far from the expectation of legal protection for justice seekers. Institutionally the Military Administrative Court (MAC) has been regulated in Law 31/1997. However, this is inversely proportional where until now, the running of PTUM has not run smoothly because there is no government regulation governing its implementation. In fact, by the mandate of Article '353 Law 31/1997,' it is stated: "This Law shall enter into force on the date of promulgation, specifically regarding the Military Administrative Procedure Law, its application shall be regulated by Government Regulation no later than 3 (three) years from the promulgation of this Law." Based on the mandate of Article 353, which should have been on October 15, 2000, a Government Regulation was drafted and implemented by the High Military Administrative Court, as Law 31 of 1997 was promulgated on October 15, 1997.

The Military Administrative Court (PTUM) has been inactive for 26 (twenty-six) years, just because of the inactivity of this judiciary does not mean that it has not caused legal and social problems in the military environment until now. Legal and judicial gaps have legal and sociological implications for Indonesian Army soldiers or persons/entities in dispute with Indonesian Army officials because military personnel and/or persons/legal entities are responsible for losses after the decisions of Military Administration Officials are issued, but this is reflected without access, which should be achieved through the MAC for aggrieved persons/legal entities (Agustina, 2016: 180-194).

This can be seen from several examples of cases involving TUM officials' decisions that harm individuals/legal entities such as; the first case, the appointment of Mayjen Untung Budiharto as Pangdam Jaya. The promotion has been criticized by families of victims of the 1997-1998 kidnappings from student activists and civil society organizations (Kontras, 2022b). As is known, Untung Budiharto is a member of the Rose Kopassus team. Based on the verdict of the Jakarta High Military Court and cassation, Untung and several of his colleagues in the Mawar team were guilty.

Several civil society organizations and families of victims who are members of the civil society coalition have filed a lawsuit against the decision of the Commander of the Indonesian National Army n°Kep dated May 1, 2022, regarding the revocation and addition of positions in the Indonesian National Army. The decision on which Untung's appointment as Pangdam Jaya was based was challenged at the Jakarta State Administrative Court and the Jakarta High Military Court II.

However, both lawsuits were nil. Because the Jakarta High Military Court II did not accept the lawsuit on the pretext that it "did not have a structure to handle cases related to military administration." While the Jakarta State Administrative Court also rejected the lawsuit because it was not the competence of the court, the panel of judges fully stated;

> *"With the rechtsvacuum regarding the Military Court which has the authority to examine, adjudicate, and resolve administrative disputes of the Armed Forces/Military nor then mutatis mutandis becomes the domain/authority of the State Administrative Court."*

The second case, the judicial review of the military justice law to the Constitutional Court conducted by PT. Sukhawati Loka Funeral represented by Sumarsiasih as Director (applicant) where in her posita, the applicant felt aggrieved by his right to the issuance of telegram ST/1994/2015 dated July 15, 2015, issued by the Chief of Staff of the Army National Army regarding the termination of cooperation in the use of assets belonging to the military department of Kodam Jaya. In addition, the Plaintiff also filed a lawsuit through the Jakarta Military High Court II and the chairman of the Jakarta Military High Court II rejected the lawsuit immediately without trial with the contents of the answer letter which read:

> *"The state administrative lawsuit of the armed forces has indeed been regulated but until now the operationalization of military administrative regulations has not been formed because there is no government regulation governing its implementation."*

From the description above, it can be seen how weak the military justice law is in handling military administrative cases. Although some laws and regulations regulate the settlement of military administrative cases it is still difficult to realize due to the unavailability of government regulations.

In the absence of regulations implementing the law, there is a rechtsvacuum in the military administrative court. The rechtsvacuum causes the absence of legal certainty in resolving military administrative cases. This can create the impression that there is no certainty of law and justice for people who feel aggrieved by Military Administration decisions.

So from the exposure of data, facts, and legal issues above, researchers intend to deconstruct with a comprehensive analysis to answer the problem of rechtsvacuum in the military administrative justice system.

METHOD

The research method of this article uses normative juridical with a statutory approach and a conceptual approach. Peter Mahmud Marzuki asserts that "the statutory approach is carried out by reviewing all laws and regulations related to the legal issue being addressed" (Peter Mahmud Marzuki, 2017). The conceptual approach is "an approach that provides an analytical point of view of problem-solving in legal research by looking at aspects of legal concepts behind it by moving from various views and doctrines that develop in legal science" (Ani Purwati, 2020).

There are 2 (two) legal materials in this study, namely primary legal materials and secondary legal materials. The primary legal material is legislation related to regulating rising land. Meanwhile, those used as secondary legal materials are textbooks, legal dictionaries, legal journals, and commentaries on court decisions (Peter Mahmud Marzuki, 2017). As for the collection technique for primary legal materials, researchers will first classify laws and regulations based on the hierarchy of laws and regulations and then compile them systematically. As for secondary legal materials, documentary collection techniques are used.

The collection of legal materials will be analyzed, by applying the technique of analyzing legal materials "content analysis". This technique shows an integrative method of analysis and conceptually tends to be directed at finding, identifying, processing, and analyzing legal materials to understand meaning, significance, and relevance (Burhan Bungin, 2007).

RESULT AND DISCUSSION

Consequences of a Rechtsvacuum in Military Administrative Court

The judiciary has an important role in national and state life, especially in a state of law. A judiciary is a place for justice seekers to file and request that disputes submitted be decided by judges wisely and fairly. The state has provided guarantees to all citizens, this is guaranteed in the law regarding legal certainty and the upholding of the principle of "equality before the law". As constitutionally stated;

> *"Everyone has the right to recognition, assurance, protection, and fair legal certainty and equal treatment before the law."*

In carrying out its duties and functions, the state establishes the judiciary as an instrument to enforce the law represented by judges. Judges in exercising their rights and authority in examining, adjudicating, and deciding must be independent (without pressure) and not take sides with anyone. One of the characteristics of the rule of law is "the existence of the judiciary as the embodiment of an independent and impartial judicial institution" (Hosein, 2016: 29). An independent judicial power (without pressure) will be a strong foundation that places the law in a central position that will later provide legal certainty to justice seekers.

If the state provides legal protection and certainty for its citizens, where the state's duties, work, and state authority (represented by the government civil apparatus) are referred to as "State Administrative Agencies or Officials", which have intense relations with the community, it is very open to the possibility of differences of opinion, clashes, and disputes between State Administrative Officials and Persons/Legal Entities (Yusrizal, 2015: 42). The State Administrative Officer has the right and authority to represent the state to issue a State Administrative Decree, which if later the decision is issued by the State Administrative official, for persons / legal entities when they feel aggrieved have the right to take legal action by filing a lawsuit against the decision in the State Administrative Court as stipulated in Law number 5 of 1986 concerning State Administrative Court.

Unlike the Military Administrative Court (MAC) which although included in the legal system in Indonesia, courts in the military sphere have special authority to examine, prosecute, and decide cases only for the military. MAC has an important role in administrative matters in Indonesia. This MAC is an effort by the state to ensure the legal protection of its citizens and provide human rights protection. Administrative disputes arising from Military Officers have been regulated in the Law on Military Justice.

Starting from 2 (two) examples of cases that have been submitted by researchers previously, regarding Military Administration decisions that harm people/legal entities such as; In the first case, Appointed Maj. Gen. Untung Budiharto as Pangdam Jaya. The plaintiff regrets the decision of the DKI Jakarta State Administrative Court Judges Panel dated June 16, 2022, which decided not to accept lawsuit No. 87/PLW/2022/PTUN. The JKT filed by the civil society union's legal team was filed in protest against the revocation of the Jakarta PTUN decision against the appointment of Maj. Gen. Untung Budiharto, who was a member of the Rose Kopassus team, was convicted in a case of disappearance of activists in 1997-1998, to be the commander of the Regional Military Command (Pangdam Jaya). In considering the verdict, the panel of judges of the Jakarta Administrative Court opined;

"With the rechtsvacuum regarding the Military Court which has the authority to examine, adjudicate, and resolve administrative disputes of the Armed Forces/Military nor then mutatis mutandis becomes the domain/authority of the State Administrative Court."

In addition, the Civil Society Union's lawsuit over the same dispute on April 1, 2022, filed with the Jakarta Military High Court II also received no response. Although the Registrar of Military Justice has verbally refused on the grounds of unavailability of tools and procedural law, it has not received the written response promised by the Registrar (Kontras, 2022a).

This means that in practice decisions about military management cannot be examined through any legal mechanism. It also clearly opens the veil of monopoly and even immunity in the Indonesian National Army, which in a democratic country must not be an element that cannot be touched by law. The lack of openness means that any military decision is unlikely to receive public comment or criticism.

The trial of the appointment of Pangdam Jaya by the Commander of the Indonesian National Army is indeed a document for improvement because so far decision-making in the Indonesian National Army has been biased and full of subjectivity. Meanwhile, challenges continue to increase as the situation changes. The lack of room for improvement has closed the possibility of improving existing systems.

The second case, the judicial review of the military justice law to the Constitutional Court conducted by PT. Sukhawati Loka Funeral represented by Sumarsiasih as Director (applicant) where in her posita, the applicant felt aggrieved by his right to the issuance of telegram ST/1994/2015 dated July 15, 2015, issued by the Chief of Staff of the Army National Army regarding the termination of cooperation in the use of assets belonging to the military department of Kodam Jaya. In addition, the Plaintiff also filed a lawsuit through the Jakarta Military High Court II and the chairman of the Jakarta Military High Court II rejected the lawsuit immediately without trial with the contents of the answer letter which read:

"The state administrative lawsuit of the armed forces has indeed been regulated but until now the operationalization of military administrative regulations has not been formed because there is no government regulation governing its implementation."

In response to the two cases above, substantially and legally, Military Administration cases cannot be submitted to the State Administrative Court because Military Administrative Decisions are excluded from State Administrative Decisions in the State Administrative Court Law (Mahanani, 2021: 76-89). This is reflected in Article 2 of the Law on the State Administrative Court affirming that;

"Not included in the meaning of the State Administrative Decree according to this law, among others, the State Administrative Decree concerning the Administration of the Indonesian National Army."

As stated above, it can be said that the State Administrative Court does not have the competence to adjudicate State Administrative disputes whose material content is about the seven forms of decisions formulated in Article 2 including Military Administration. So again this remains the domain of the authority of the Military Administrative Court, which is expressly and clearly stated in Article 9 paragraph (2) of the Military Administrative Law, namely: "the military administrative court has the authority to examine, adjudicate, and decide administrative disputes of the armed forces."

The argument that until now has not issued a Government Regulation on Military Administrative Procedure Law as stipulated in Article 353 of Law 31/1997, turns out that the principle of administrative justice or administrative justice in military life has received less serious attention. This has been evident since the promulgation of the Military Courts

law on October 15, 1997, until now, Government Regulations as implementing regulations of the Military Administrative Court have not been formed, which creates a domino effect for justice seekers, both civil law persons/entities whose interests are harmed by Military Administrative decisions do not have access to justice.

So on the polemic of the rechtsvacuum in the field of military administrative justice, the researcher stated that this has serious consequences that need attention, namely;

1. There is no guarantee of legal protection for persons / legal entities aggrieved by military administrative decisions;
2. Human rights are neglected by the arbitrariness of military administrative officials;
3. The army is above the law in the rule of law, so that the principle of the rule of law is neglected;
4. The principle of equality before the law is set aside.
5. Lack of access to substantial justice.

From the consequences arising from this polemic over the rechtsvacuum of the military administrative court, it can be said that the existence of a military administrative court is indispensable, based on several reasons, namely:

1. To limit the powers and arbitrary actions of military administrative officials/bodies;
2. Provide guarantees of legal protection for soldiers/persons/legal entities against arbitrary actions committed by military officials/administrative bodies;
3. Provide military court guarantees as the last bastion of legal protection for justice seekers who are harmed by the decisions of military administrative officials/bodies.

Deconstruction Overcoming the Rechtsvacuum of Military Administrative Courts

The administration of justice in Indonesia both in the general court and the special military court is a mandate from the country's constitution. The judiciary provides legal protection to legal subjects to defend their rights to prevent arbitrary acts (Yulia, 2018: 94). The court is an institution to carry out legal remedies that can be used by all citizens, both civilian and military, to seek justice and truth in a legal problem that is being experienced. The existence of the court needs to be strengthened by rules governing the judicial system.

The rule of law is used as a reference to carry out law enforcement. Regulations have the following functions: (Hsb, 2017: 109-122)

1. Discretive means that the law is a guide in building to form a society to be achieved by the goals of state life.
2. Integrative means as a builder of national unity.
3. Stabilitative means to maintain and maintain harmony, harmony, and balance in state and community life.
4. Perspective means a good complement to the attitude or actions of citizens in the event of conflict in state and community life.
5. Corrective means a correction of the attitude of action both state administration and citizens in case of conflict of rights and obligations to obtain justice.

According to Givers, in (Trubus Rahardian dan Endar Pulungan, 2007) explaining the function of law in general: "First, the law serves as a tool to divide rights and obligations among members of society. The rule of law specifies the requirements that different or reciprocal social traffic participants can make. Second, the function of law is to distribute decision-making power to public affairs and problems. Third, the function of law is to determine how disputes should be resolved. Thus, the law designates an organization that can make binding decisions in the settlement of disputes between members of society and establishes rules on how this organization should operate in resolving disputes. conflict, then the law acts as a dispute resolution mechanism".

Government Regulations are laws and regulations set by the president to carry out laws as they should. The legal basis for government regulations is contained in Article 5 Paragraph (2) of the 1945 Constitution which states that the president establishes government regulations to implement laws. Thus, the laws that have been formed and passed, it is necessary to have government regulations as derivatives of regulations. According to A. Hamid S Attamimi, the characteristics of government regulations, namely: (A. Hamid S, 2021)

1. Government regulations cannot first be formed without a law being their parent;
2. Government regulations cannot include criminal sanctions if the relevant law does not include criminal sanctions;
3. The provisions of government regulations cannot increase or decrease the provisions of the relevant law;
4. Government regulations may be adopted even if the provisions of the relevant law do not expressly require it;
5. The provisions of government regulations contain regulations or combinations of regulations and the stipulation of government regulations does not contain mere determinations.

Talking about law number 31/1997 on military courts, which was not followed by the making of government regulations as implementing regulations regarding military administrative courts resulted in military administrative courts not being able to carry out their functions properly. The absence of government regulation on military administrative justice to date will result in no legal certainty in the field of military administration, so there is a rechtsvacuum in the institution of military administrative court. The rechtsvacuum is due to the absence of procedural law as a formal law in carrying out justice. Theoretically, the way of regulation of procedural law or formal law can be divided into two parts, namely:

1. The provisions of the case procedure shall be regulated together with its material law or in structure, the competence of the body conducting the judiciary in the form of law.
2. The provisions of litigation procedures are regulated by themselves respectively in the form of legislation or other regulations. (Harahap, 2005)

The absence of government regulations as implementers of laws regarding military administrative courts which causes a rechtsvacuum, in fact, cannot be justified the court to reject cases on the grounds that there is no governing law. As stipulated in the law which expressly states that "the court is prohibited from refusing to examine, try and decide a case filed under the pretext that the law does not exist or is unclear, but is obliged to examine and try it".

Talking about law enforcement in the aspect of military institutions, ideally, it can be carried out by a good judiciary, by looking at the functions of courts and courts that can be reviewed from various aspects, namely: (Manan, 2007)

1. In terms of state objectives. The State and government of the Republic of Indonesia were established to advance the general welfare in the form of maximum prosperity and social justice for all Indonesian people. This prism is also related to the courts and judicial bodies as institutions that carry out state functions. The definition of happiness, prosperity, and social justice is not only in an economic sense but also includes rights such as applying laws to all one's rights and receiving equal treatment and opportunities with each other, regardless of location and origin.
2. Regarding the achievement of objectives such as justice, order, social balance, satisfaction of justice seekers and others. This function is considered the traditional function of courts and justice, that is certainty.

3. In case of legal compliance. The essence of law enforcement is to apply and enforce the law. Thus, courts and judicial authorities are responsible for resolving cases according to law. In practice, the obligation to break the law often has different legal connotations by courts and lawsuits.

Based on the rules of justice, judges may not reject cases because the law is absent, incomplete, or vague law (Mertokusumo, Sudikno dan Pitlo, 1993) and when the judge is about to pass judgment on a person's case the judge must be able to provide a solution to a conflict contained in a case being tried. The judge must find the law himself (rechtvinding) to complement the existing law, in explaining the concrete events faced by him to be used as a basis for deciding a case (Sudaryono, 2012: 51-68). This is in line with Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which states:

> *"Judges and Constitutional Judges are obliged to explore, follow and understand the legal values and sense of justice that live in a society."*

Based on the above law, the judge in trying the case should act as follows: (Khalid, 2014: 9-36)

1. In cases where the law or the law is clear, it is only necessary to apply it;
2. In cases where the law is still vague, the judge will interpret the law or law through the method of interpretation commonly applicable in legal science;
3. In cases where there is no written law governing it, the judge must find the law by exploring and following the legal values that live in the community.

Legal discovery is bound up to the principle of ius curia novit, meaning a court of knowledge. This principle stipulates that every judge is presumed to be aware of the case being examined or decided (Markus Suryoutomo & Mahmuda Pancawisma Febriharini, 2020: 103-116). Judicial investigations are carried out by two parties, namely judges and lawyers. The official in question is a scholar who conducts an analysis of legal phenomena and dynamics, which is then elaborated into legal doctrine (Markus Suryoutomo & Mahmuda Pancawisma Febriharini, 2020: 103-116).

Because justice seekers always hope that the cases submitted can be decided by professional judges based on legal justice, also containing moral justice and social justice values (Markus Suryoutomo & Mahmuda Pancawisma Febriharini, 2020: 104-116). Judges if it is necessary to conduct investigations into cases where the legal regulations are unclear or even have no law, this is done to find the law as a rechtvinding that provides justice for justice seekers.

CLOSING

The polemical consequences of the rechtsvacuum in military administrative courts, namely: the absence of guarantees of legal certainty for legal persons/entities aggrieved by military administrative decisions; human rights are neglected by the arbitrariness of military administrative officials; The Indonesian National Army is above the law in the rule of law, so the principle of rule of law is neglected; the principle of equality before the law is set aside; lack of access to substantial justice.

The absence of government regulations as an implementation of the military administrative court law results in a rechtsvacuum that cannot be justified by the court rejecting the case because there is no governing law. So a judge should be wise in interpreting the law to find the law by exploring and following the legal values that live in society based on legal justice, moral justice, and social justice.

Furthermore, this also needs to be a serious concern for the government and the House of Representatives of the Republic of Indonesia which must immediately revise the military

justice law along with its implementing regulations because the current military justice law is no longer relevant to the times.

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