

# Responsibility of TNI Soldiers Who Commit Lesbian, Gay, Bisexual and Transgender Crimes According to the Military Legal System

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## Responsibility of TNI Soldiers Who Commit Lesbian, Gay, Bisexual and Transgender Crimes According to the Military Legal System

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**Abstract.** Sexual relations do not only occur between different genders, but can also occur between individuals of the same sex. This problem in Indonesia often causes differences of opinion between those who support and those who oppose. It is undeniable that in the military environment there are also deviations in sexual orientation carried out by the perpetrator who is a TNI soldier in the verdict of the Military Court II-08 Jakarta Number 212-K / PM II-08AD / XI / 2020. Finding, analyzing, and explaining the viewpoint of military law on the existence of LGBT in the military environment was the goal of the study. The ruling of the Military Court II-08 Jakarta Number 212-K / PM II-08AD / XI / 2020 clarifies the criminal culpability of TNI soldiers who engage in Lesbian, Gay, Bisexual, and Transgender (LGBT) actions. Legal theory, criminal responsibility theory, and the theory of legal certainty are the frameworks utilized. Normative juridical research is the methodology employed. Based on the findings of this study, the military's official stance on the presence of LGBT individuals in the military has been firmly established by highlighting the ban on LGBT individuals as stated in the TNI Commander's Telegram Letter Number ST/398/2009. As stated in Telegram Letter Number ST/1648/2019 from the TNI Commander, LGBT is one of the behaviors that soldiers are not to engage in since it goes against official orders or is not in line with soldier life norms. Furthermore, it is highlighted in the Supreme Court Circular (SEMA) Number 10 of 2020, in letter D number 1, that disobeying the TNI Commander's Telegram Letter Number ST/398/2009 dated July 22, 2009 and the TNI Commander's Telegram Letter Number ST/1648/2019 dated October 22, 2019, which forbid TNI soldiers from engaging in immoral acts with members of the same sex (Homosexual/Lesbian), can be seen as a violation of official orders under the provisions of Article 103 Paragraph (1) of the Criminal Code. In accordance with the processes or mechanisms for resolving LGBT crimes guided by Law Number 31 of 1997 concerning Military Justice, TNI soldiers found guilty of LGBT acts in the Jakarta Military Court II-08 Number 212-K/PM II-08AD/XI/2020 will face prosecution, sentencing, and criminal penalties in accordance with the specific legal regulations based on Military Criminal Law.

**Keywords** responsibility, criminal, lgbt

### 1. INTRODUCTION

#### Problem Background

One form of sexual behavior that is considered deviant is LGBT (Lesbian, Gay, Bisexual, and Transgender), which is contrary to the norms and values that apply in Indonesian society. LGBT issues in Indonesia often give rise to differences of opinion between those who support and those who oppose it. For Indonesian people who still hold fast to religious norms and traditions, it is not surprising that they oppose it. In addition to reasons based on religious norms, they are also concerned that LGBT can affect the development of adolescents who are searching for their identity, so that it is considered to violate prevailing customs and social norms. Views on sexual behavior that is considered deviant are still considered taboo in Indonesian society which has an Eastern culture. Indonesian society generally holds strong moral, ethical, and religious values, so sexual behavior that is considered deviant tends to be not accepted at all. One form of sexual behavior that is considered deviant is LGBT (Lesbian,

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Gay, Bisexual, and Transgender), which is contrary to the norms and values that apply in Indonesian society. LGBT can be experienced by anyone, including adolescents. In adolescence, many of them are still trying to find out about their sexual identity so that some experiment or consciously undergo this sexual orientation which is considered deviant.<sup>1</sup>

In modern human life, sexual relations do not only occur between different sexes, but can also occur between individuals of the same sex. This is known as homosexual for men and lesbian for women. There are even individuals who can have relationships with more than one sex, known as bisexual. In addition, someone can also change their sex through surgery, either from male to female or vice versa, which is known as transgender.<sup>2</sup> The LGBT issue in Indonesia often gives rise to differences of opinion between those who support and those who oppose it. For Indonesian people who still adhere to religious norms and traditions, it is not surprising that they oppose it. In addition to reasons based on religious norms, they are also worried that LGBT can affect the development of adolescents who are searching for their identity, so that it is considered to violate prevailing customs and social norms. On the other hand, those who support LGBT argue that the state and society must promote the principle of non-discrimination between men, women, transgender, heterosexual, and homosexual. Therefore, it is inevitable that there will be debate from a scientific psychological perspective, theological analysis, and public policy that must be taken by the government. As stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, Indonesia is a country of law. According to this concept, a country of law is one in which the rule of law serves as the supreme authority, and its power is to establish a fair and secure society that protects its citizens' rights.

When it comes to the Indonesian military and law enforcement, there are certain rules and regulations that TNI soldiers must follow. These rules spell out exactly what kinds of behavior are considered violations, crimes, or prohibitions, and those who break these rules face criminal penalties according to military criminal law. The large number of LGBT cases in Indonesia does not rule out the possibility of occurring in the TNI environment, in fact there are several cases of military personnel who often become LGBT. This is very contrary to the norms in the TNI environment where this action can damage the dignity and good name of the TNI. There are no special rules regarding LGBT in Indonesia either in the TNI environment or

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<sup>1</sup> S. Susanti, LGBT dalam Perspektif Masyarakat Indonesia. Jurnal Sosiologi Reflektif, 13(2), 2019, hlm. 227-240.

<sup>2</sup> Marlina, S. D. Identitas Seksualitas dalam Masyarakat Kontemporer. Jurnal Harmoni Sosial, 3(2), 2013, hlm. 142-154

in the general public so that in this case the TNI environment is guided by Article 103 of the Criminal Code and Article 281 of the Criminal Code as the legal basis used by judges in deciding LGBT cases in the TNI environment. It is undeniable that in the military environment there are also deviant sexual orientation deviations carried out by perpetrators who are in fact TNI soldiers who in society may be considered impossible because they see the figure of a soldier who is known to be brave and has discipline and obedience in carrying out existing duties and rules.

The phenomenon of immoral acts with the same sex in the country is not a few cases, even in the TNI environment it is possible. In fact, there are several cases of military personnel who have committed immoral violations related to homosexuality (lesbians and gays) to the point of being tried in military courts. These actions clearly contradict the norms in the TNI environment, these actions are considered to be able to damage the dignity and good name of the TNI. Criminal law has actually categorized homosexual acts as obscene acts as regulated in Article 292 of the Criminal Code. However, the will of the legislators is to protect the interests of minors, on the other hand, the perpetrators of the crime are required to be adults. However, this regulation does not apply if the victim is a minor according to criminal law.

In the context of law enforcement against TNI Soldiers in the military environment in Indonesia, there are legal provisions that strictly regulate TNI Soldiers regarding what actions constitute violations, crimes or prohibitions that are subject to threats in the form of criminal sanctions against violators as regulated in military criminal law. A military man who has committed LGBT behavior can be held criminally responsible in the form of punishment contained in Article 103 of the Criminal Code in the form of dismissal and imprisonment. Accountability in general is a form of a person's responsibility for the actions they have taken. Meanwhile, criminal accountability is a form of punishment for the perpetrator with the intention of determining whether a suspect can be held responsible for a criminal act that has occurred or not. Regarding LGBT crimes committed by TNI soldiers, it is in the decision of case Number at the Military Court II-08 Jakarta Number 212-K / PM II-08AD / XI / 2020, where in the consideration of the Panel of Judges so that the Panel of Judges in sentencing the sentence has considered it both in the form of the main sentence and additional sentences in the form of dismissal from military service

## Problem Formulation

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Based on the background of the problem above, the research problem is formulated as follows

1. What is the perspective (view) of military law on the existence of LGBT in the military environment?
2. What is the criminal responsibility of TNI soldiers who commit Lesbian, Gay, Bisexual, and Transgender (LGBT) acts in the verdict of the Jakarta Military Court II-08 Number 212-K / PM II-08AD / XI / 2020 and is it necessary to make special regulations regarding these acts?

## Theoretical Framework

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Three theories the theory of legal systems, the theory of criminal responsibility, and the theory of legal certainty form the theoretical basis for answering the research questions.

Law and Its Theories a system is defined as an interdependent set of elements or components that work together to form a whole. In R. Subekti's view, a system is an ordered whole whose components are interdependent and structured in a predetermined way; it is the product of deliberate planning with the end objective in mind. Everything in the system, as described by Sudikno Mertokusumo, is interdependent and serves a common purpose.<sup>3</sup>

Institutions, processes, and rules of law make up what is known as the legal system. Niklas Luhman created the theory of the legal system in Germany, while M.C. Burken did the same in the Netherlands. The autopoietic idea, which Niklas Luhman proposed as part of his system theory, makes reference to the diversity of the components' functions. According to Niklas Luhman, the primary components of the system are structured according to their own boundaries, which includes the internal structure.<sup>4</sup> Legal structure, legal content, and legal culture are the subsystems that Lawrence Milton Friedman identifies within the legal system. These three parts show the substantive organization of the legal system, the functions of the legal system, and the level of legal knowledge. When ideas and factors outside of the law intervene, the legal system pauses and adjusts. According to Lawrence Milton Friedman, these three features can be applied to any entity governed by the law.<sup>5</sup>

<sup>3</sup> ibid

<sup>4</sup> Salim, H.S, Perkembangan Teori Dalam Ilmu Hukum, (Jakarta : Rajawali Press, 2012), hlm. 72.

<sup>5</sup> Lawrence M. Friedman diterjemahkan oleh Wishnu Basuki, Hukum Amerika Sebuah Pengantar, (Jakarta : Tatanusa, 2001), hlm. 9



In this context, the ideas and forces put forth by Lawrence Milton Friedman—that are external to the legal system and have the power to move or halt it—can be understood in relation to the efficacy of the law. Specifically, the law will operate or halt depending on the organizers and implementers, who are those who bear the responsibility of upholding the law, including societal leaders and legal officials. A legal system consists of three parts: the legal framework, the legal content, and the legal culture. What makes a well-functioning legal system work are its constituent parts or subsystems. A community's and law enforcement officials' conduct falls under the purview of legal culture, while the operation of legal apparatus and infrastructure are more closely aligned with legal substance, which encompasses all parts of legal regulation or legislation. The number of judges, the organization of the first, appeal, and cassation courts, and the interconnected judicial system are all parts of the system's legal framework. When we talk about the "legal substance," we're referring to all of the norms, principles, rules, and regulations that make up the body of law, whether they're in writing or not. What constitutes "legal culture" are norms, practices, and beliefs as they pertain to the law.<sup>6</sup>

Important components of law enforcement include legal structure, legal substance, and legal culture; issues with the legal system can emerge when any one of these three parts is broken or not functioning as it should. If we want to reach the desired level of law enforcement, we can't afford to disregard the components of the legal system, which are, according to Soerjono, an essential component of that system. When a rule is drafted and passed with absolute confidence due to its logical and clear regulation, we say that it has normative legal certainty.<sup>7</sup> It is rational and leaves no room for question, or alternative readings. It is transparent when it integrates into other systems of rules without causing any conflicts or clashes between them. When laws are established that are unambiguous, long-lasting, consistent, and consequential, and whose execution is not susceptible to subjective factors, we say that there is legal certainty. In addition to being moral imperatives, the law is defined by its factual features, which include certainty and justice. Uncertain and uninterested in being fair legislation is more than simply lousy law.<sup>8</sup> In a just legal system, there is a guarantee of legal certainty. To be effective, rules meant to promote justice must be followed. Justice and legal certainty, argues Gustav Radbruch, are inalienable features of law. Justice and legal certainty,

<sup>6</sup> Ade Maman Suherman, Pengantar Perbandingan Sistem Hukum, (Jakarta : Rajawali Press, 2004), hlm. 11-13.

<sup>7</sup> Soerjono Soekanto, Faktor-Faktor Yang Mempengaruhi Penegakan Hukum, (Jakarta : RajaGrafindo Persada, 2007), hlm. 5.

<sup>8</sup> C.S.T Kansil, Christine S.T Kansil, Engelina R, Palandeng dan Godlieb N Mamahit. Kamus

in his view, are paramount, and the preservation of legal certainty is essential to a nation's security and stability. To conclude, positive law must be followed at all times. In accordance with the principles of absolute legal certainty and the goals to be accomplished, namely, the pursuit of happiness and fairness.

Hans Kelsen argues that the rule of law is based on norms. Norms are assertions that stress the "should" or *das sollen* by incorporating multiple rules for the things that ought to be done. Standards are the end result of deliberate human activity. People are expected to conduct in accordance with the broad standards outlined in laws, both when interacting with other people and with society as a whole. When society adopts these regulations, it limits the ways in which individuals can be burdened or punished. You can be certain in the law because these regulations are in place and will be enforced.<sup>9</sup>

## 2. METHODS

Both normative and empirical schools of thought in law conduct this sort of study. This approach to normative research draws on preexisting legal ideas found in positive law that is codified in writing. Furthermore, studies are conducted to gain a fundamental comprehension of the systemic law as it pertains to societal legal relations or events and the rules that govern them. The next step in finding information, drawing conclusions, and studying a problem is to ensure that all relevant rules and regulations regarding library items are up to date.<sup>10</sup> Primary legal materials consist of binding documents such as constitutional amendments and trademark laws, while secondary legal materials provide explanations and analysis, such as literature and legal journals. Tertiary legal materials provide additional guidance, such as dictionaries and legal reference materials (Mustomi et al., 2024).

As is demonstrated by the law of the cases under investigation. The observed cases undoubtedly hold empirical significance; nonetheless, in normative research, the purpose of studying these cases is to gain a general understanding of how the normative aspect of a legal rule influences legal practice, and to incorporate the analysis's findings into legal explanations.<sup>11</sup> The approach that the researcher uses in this research is based on the rules and theories related to LGBT criminal cases committed by TNI soldiers.

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<sup>9</sup> Achmad Ali. *Menguak Tabir Hukum (Suatu Kajian Filosofit dan Sosiologis)*. (Jakarta: Toko Gunung Agung, 2007), hlm. 82-83

<sup>10</sup> Peter Mahmud Marzuki, *Introduction to Legal Science*. (Kencana, Jakarta, 2008), p. 158.

<sup>11</sup> Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Surabaya : Bayumedia 2005), hlm. 321.

### 3. DISCUSSION

#### Review of LGBT and Military Law

Indonesia is a country founded on Pancasila as the ideology of the nation and state. Pancasila as a benchmark, that the act of homosexual abuse is contrary to the moral values, customs and religions that exist in Indonesia, homosexual abuse is currently more than just an identity, but also a campaign substance and cover for the perpetuation of Same Sex Attraction (SSA).<sup>12</sup> According to Article 29 of the 1945 Constitution, "The state guarantees that every citizen will practice the teachings of his religion." This clearly indicates that Indonesia is a divine state that disagrees with the behavior of homosexual abuse or LGBT (lesbian, gay, bisexual, and transgender). Article 292 of the Criminal Code regulates acts that offend morality or are generally referred to as homosexuality by lawmakers. Since having sexual relations the act of violating morality must be performed by people of the same sex, there's no use in discussing the act of having sexual relations in general; perhaps it would be more appropriate to limit discussion to cases of unnatural sexual relations in light of the fact that this is an element of the criminal provisions governed by Article 292 of the Criminal Code.

So, according to the criminal provisions outlined in Article 292 of the Criminal Code, when someone commits an act that violates morality, it doesn't just mean having sexual relations with someone of the same sex, like through the anus or rectum, but also acts like having sexual relations through the mouth, playing with the genitalia.

Deviant behavior of homosexual sex is one of the problems faced by society and law enforcement officers in the criminal law system as a whole,<sup>18</sup> where criminal law regulates criminal behavior or criminal acts and the requirements of the criminal act itself along with its sanctions where the crime itself originates from social factors or non-legal factors that are constantly developing along with social developments.<sup>19</sup> To improve and develop criminal law through the preparation of legislation that includes criminal provisions, attention must be paid to the use of criminal law for national development goals, acts that are attempted or dealt with by criminal law must be acts that are not desired, and the use of criminal law must consider the principle of costs and results and the capacity or ability of the workforce of law enforcement agencies so that there is no excess of the burden of duty.<sup>13</sup>

<sup>12</sup> Johnny Ibrahim, Theory and Methodology of Normative Legal Research, (Surabaya: Bayumedia 2005), p. 321.

<sup>13</sup> Muladi, Democratization of Human Rights and Legal Reform in Indonesia, (Jakarta: The Habibie Center, 2002), p. 256.



Indecent acts committed by homosexual couples in the view of the consensus of behavioral norms in Indonesia are acts that are considered reprehensible. However, of course the measure of the consensus of behavioral norms cannot be fully used to normalize these acts into legal norms. Various approaches and analyses with various theories must be used in order to obtain strong arguments to state that the act can be made into a criminal law norm or criminalized.

### **LGBT Review According to Islamic Law**

The Islamic faith recognizes the inherent sexual drive in all people, even those of the opposing sex. Marriage is the institution through which this is regulated in Islam. Marriage regulates sexual relations between men and women, which helps to keep human nature in check. Islam forbids any kind of sexual encounters that do not involve marriage because of the existence of prescribed marriage. The disarray it causes in biological relations has the potential to harm the family tree, incite animosity, and even lead to murder.<sup>14</sup> In the Qur'an, this homosexual incident is an important concern, this is proven by the existence of several verses that talk about this, such as Q.S. al-A'raf: 80, QS. An-Naml: 54, QS. Asyu'ara: 165; and QS. Hud: 77-82. Allah SWT says in the letter An-Naml verse 54, as follows, And (remember the story of) Luth, when He said to his people: "Why do you do fahisyah while you show it? Why do you approach men to satisfy your lusts, instead of approaching women? Actually, you are a people who don't know. (Q.S.an-Naml [27]: 54-55).

Sayid Sabiq liwat, often known as homosexuality, is a more terrible jarimah than adultery and a Shariah prohibition. What a risky and immoral thing to undertake, going against all logic and common sense. There are varying views among fiqh scholars on the appropriate punishment for homosexuals, with some proposing the following: (1) the death penalty; (2) the imposition of physical violence on male offenders in hadiths like fornication; and (3) the imposition of ta'zir punishment.

### **LGBT Review According to Military Law**

Military Criminal Law is part of the positive law that applies to the justiable of the military court, which determines the basis and regulations regarding prohibited and required actions against TNI members who violate it are threatened with criminal penalties and also determines in the case of violators who are responsible for their actions and also determines

<sup>14</sup> NYoman Serikat Putra Jaya, Criminal Law Reform, (Bandung: Alumni, 2005), p. 43.

the method of prosecution, sentencing and implementation of criminal penalties, in order to achieve justice and order.

There are two categories of military crimes: pure or mixed (*zuiver militaire delict*) and mixed (*gemengde*) military crimes. Prohibited acts, as outlined in military regulations, are synonymous with pure military offenses. There is a connection between military goals and both the classification of pure military crimes and their particular characteristics.<sup>15</sup> The term "mixed military crimes" refers to transgressions that involve both positive and negative aspects; in other words, they involve something that should not be done, as dictated by other regulations.

The only real distinction between civilian and military-related crimes is that the target is the military. The specifics of the many kinds of offenses that violate morality are laid out in the Criminal Code's CHAPTER XIV. Linked to the morals crime as a whole, as in articles 281, 282, and 283. When members of the TNI commit crimes that go against moral principles, they face the full force of Indonesian law, including penalties such as imprisonment and dismissal from military service, as outlined in Article 281 paragraph (1) of the Criminal Code, Article 26 of the Criminal Code, and Article 190 paragraph (1), paragraph (3), paragraph (4) of the Republic of Indonesia Law Number 31 of 1997 concerning Military Justice.

Military justice in Indonesia is governed by Law Number 31 of 1997, which is a systematic approach based on the concept of national criminal procedure law. This law specifies the procedure or mechanism for resolving LGBT crimes committed by members of the Indonesian National Army (TNI AD). The mechanism for resolving criminal cases including Lesbian, Gay, Bisexual, Transgender (LGBT) crimes in the Military Court environment according to Law Number 31 of 1997 concerning Military Courts.<sup>16</sup>

### **Regulation of the Military Legal System for Soldiers Who Commit Military Crimes.**

#### **a. Military Legal System**

As distinct branches of military law, there is military criminal procedure law and military criminal law. To set it apart from the universally applicable General Criminal Procedure Law, it is considered special law. At the same time, Military Criminal Law governs certain groups (the military) or individuals (those whose laws and regulations are subject to it) and differs from General Criminal Law in certain respects.<sup>17</sup>

<sup>15</sup> Sudarto, Law and Criminal Law, (Bandung: Alumni, 2007) p. 159.

<sup>16</sup> Hasan Zaini. LGBT in the Perspective of Islamic Law. Scientific Journal of Syari'ah, Vol. 15, No. 1, January-June 2016, p. 71.

<sup>17</sup> Moch. Faisal Salim. Military Justice in Indonesia. (Bandung: Mandar Maju, 2006), p. 27.

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When it comes to military personnel, both the general criminal law and military criminal law are applicable; nevertheless, just because there is military criminal law does not imply that general criminal law does not apply. According to Article 1 of the Military Criminal Code, it reads as follows: "This Code applies general criminal rules, including Chapter Nine of Book One, except for deviant rules stipulated by law."<sup>18</sup> When seen through the lens of justiciability, Military Criminal Law (in both its material and formal senses) is a branch of positive law that governs the administration of justiciable military justice. It establishes the rules and regulations that govern what counts as an offense, when an offender can be prosecuted, and how severe the punishments will be in order to establish a system of law.<sup>19</sup>

For crimes committed by a TNI soldier together with a civilian who are each subject to justiciable justice where the military is subject to military justice and civilians are subject to civil justice, the settlement process is carried out in a connected manner with the provision that if the interests of the military are more harmed, then they will be tried in a military court, but civilians who are more disadvantaged will be tried in a general court.<sup>20</sup> In resolving cases in the military court environment, there are several stages, such as the investigation stage, the prosecution stage, the examination stage in court, and the decision implementation stage. The stages are based on Law Number 31 of 1997 concerning military courts.<sup>13</sup>

b. **Military Legal Discipline.**

Discipline is very important to ensure the efficiency of the military organization as a whole, including efficiency in each unit. Discipline in military life is like law in civil society. Because discipline must be enforced in the military, so that violations of discipline must be punished.<sup>21</sup> Military disciplinary law is essentially a law of soldier discipline born from the Armed Forces of the Republic of Indonesia (ABRI), because in the law of discipline there are definitely rules in the soldier's environment to maintain behavior and honor in its environment, as regulated in Law Number 40 of 1947 concerning the Military Disciplinary Code (KUHDT) before finally being replaced by Law Number 25 of 2004 concerning Military Disciplinary Law.<sup>29</sup>

<sup>18</sup> Moch. Faisal Salim. Military Criminal Law in Indonesia. (Bandung: Mandar Maju, 2006), p. 30.

<sup>19</sup> Hari Soebagijo, Criminal Law Policy in the Examination of TNI Soldiers Who Commit General Crimes, Journal Law Reform, Vol. 7, No. 1, April 2011, p. 28.

<sup>20</sup> Tiarsen Buaton. Military Justice in the Judicial Power in Indonesia. Military Law Journal, Vol. I No. 2, November 2007, p. 77.

<sup>21</sup> Natsri Anshari. Changes in Military Disciplinary Law: Discipline versus Justice. Journal of Law

Military disciplinary law as regulated in Article 1 paragraph (3) of Law Number 25 of 2004, that military disciplinary law is a regulation and norm to regulate, foster, enforce discipline, and the order of life that applies to the military. For all actions and/or actions carried out by the military that violate the law and/or military disciplinary regulations and/or carry out actions that are contrary to the principles of military life based on the Sapta Marga and the soldier's oath. Any violation that will reduce the spirit of a soldier to carry out his duties will always disrupt the effectiveness of his unit. If the unit is in battle, any form of refusal, no matter how small, to carry out duties will cause quite fatal dangers.

For members who violate disciplinary regulations, they can be subject to disciplinary sanctions as regulated in Law Number 25 of 2004 concerning Military Disciplinary Law. In its implementation, if there is a violation of discipline against a soldier, then a disciplinary penalty is imposed by the direct superior of the violator, in a disciplinary judge's hearing, consisting of the troop commander and his staff. A violation of soldier discipline is an action that is not in the statutory regulations or positive law, and only contradicts the service regulations and is not in accordance with the soldier's way of life. There are 2 (two) forms of disciplinary violations, namely pure disciplinary violations and impure disciplinary violations as regulated in Article 5 paragraph (1) of Law Number 25 of 2004 concerning Military Disciplinary Law. Pure disciplinary violations here are any actions that are not criminal acts, but contradict service orders or actions that are not in accordance with the soldier's way of life. Impure disciplinary violations are criminal acts, but because the actions committed are very light, the punishment can be resolved by the superior who has the right to punish (ANKUM).

The imposition of punishment on soldiers in general must be carried out quickly and sometimes feels harsh. This is done to prevent negative effects on other soldiers and to maintain the solidarity of the unit. Initially, the requirements for being subject to disciplinary punishment as stipulated in Article 6 to Article 8 of Law Number 25 of 2004 concerning Military Disciplinary Law are all acts that are contrary to service orders, service regulations or acts that are not in accordance with military regulations, and acts that violate criminal laws and regulations of such a minor nature

The relationship between military discipline and military justice shows a fairly complex interrelationship. Initially, the military justice system was formed to protect and improve military discipline. Military courts have not become an independent instrument of justice but remain a special part of the entire mechanism for protecting military discipline. Discipline is the only way to maintain law and order, and expanding the jurisdiction of

military courts is a way to strengthen discipline. Military justice requires discipline, namely the act of obeying regulations and order. Compliance is very necessary to train so many soldiers properly, efficiently, and effectively.

c. Criminal Sanctions for Soldiers According to Military Law

Military crimes regulated in the Criminal Code are divided into 2 (two) parts, namely pure military crimes (Zuiver Militaire Delict) and mixed military crimes (Gemengde Militerire Delict).

1) Pure military crimes (Zuiver Militeire Delict)

A crime that is committed solely by a member of the armed forces is considered a pure military crime due to the inherent military character of the offense. Articles 87 and 107 of the Criminal Code address desertion and insubordination, respectively, while Article 118 of the Criminal Code regulates the act of leaving a guard station.

2) Mixed Military Crimes (Gemengde Militerire Delict).

Mixed military crimes are defined as those that are explicitly forbidden or mandated by other laws (either the Criminal Code or other laws that contain military criminal sanctions outside of the Criminal Code), but are subsequently regulated in the Criminal Code again, either because of a particular military situation or some other reason that necessitates a stronger criminal threat.

The Most Common Forms of Criminal Punishment The reason being that this is in accordance with the Criminal Code. under accordance with the terms of Article 11 of the Criminal Code, the death penalty under the Military Criminal Code is essentially identical to the death penalty in the Criminal Code, the death penalty is a punishment carried out by tying the convict's neck with a rope tied to the gallows and the executioner as the executor drops the board where the convict stands. Imprisonment or confinement in military courts is different from imprisonment in general courts, where in military courts if a convict is sentenced while the convict has not been dismissed from military service, then the sentence will be carried out in the Military Correctional Institution, whereas if the convict is dismissed from military service, then the sentence will be carried out in the General Correctional Institution.

Separation of places to serve sentences for convicts with military status and general convicts is mandatory, because the nature of the implementation between Military Correctional Institutions and General Correctional Institutions is different. Because in General Correctional Institutions for civilian convicts is intended so that they can re-



socialize in the surrounding community, the guidance system must be based on the rules of social interaction in society. While in Military Correctional Institutions, the guidance system is where convicts who have completed their sentences will be returned to their units. The imposition of imprisonment on military convicts is a deprivation of liberty, but basically prioritizes an act of education or guidance rather than revenge, as long as the convict will be reactivated in military service after serving his sentence. Because military convicts after completing their sentences are expected to become good and useful military personnel, both from their own awareness and from the results of educational actions given while serving their sentences if military convicts do not change their behavior so that they are no longer suitable to be in a military environment then they will be discharged from military service as regulated in Article 38 of Law Number 2 of 1988 concerning Soldiers of the Armed Forces of the Republic of Indonesia.

Imprisonment is a punishment that is threatened to perpetrators of crimes that are considered minor such as *culpa* crimes and *dolus* crimes. As regulated in Article 14 of the Criminal Code, it states that if a person is found guilty of committing a crime formulated in this law and he will be sentenced to imprisonment as the main punishment of not more than 3 (three) months, the judge has the right to determine by decision that the punishment is carried out as imprisonment. In the Criminal Code, there is no mention of a fine, which does not mean that a military person cannot be sentenced to a fine, because the military is still subject to the Criminal Code as regulated in Article 1 of the Criminal Code and basically a fine is imposed depending on the judge's decision.

Types of additional criminal penalties according to Article 6 of the Criminal Code and Article 10 of the Criminal Code are related to dismissal from military service with or without revocation of his right to enter the Armed Forces. In this case, it is meant that without his right to enter the army if it is not revoked, then after being dismissed from the army, he will enter another army. The measure of imposing a dismissal penalty in addition to the main penalty is the military judge's view of the crime committed by the accused/convict based on which value is no longer worthy of being maintained in the life of the military community. This dismissal penalty is carried out by the judge because the judge has the view that after the convict has served his sentence so as not to disturb the joints of order in the military community. Not worthy here means that the military lacks the characteristics that a military person should have, so it is not at all intended that he no longer has the ability to carry out military services according to his expertise. Revocation of rights is an additional penalty to the main penalty, namely dismissal from military service

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as regulated in Article 29 of the Criminal Code. One of the revocations of rights is dismissal from military service

d. Military Discipline for LGBT Crimes.

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Military discipline is being aware of, obeying, and complying to implement rules and regulations that apply to the military, as well as service regulations and life rules. This is stated in Law Number 25 of 2014, which pertains to Military Disciplinary Law. 19  
The military is a part of a country's war forces that are regulated by the provisions of laws and regulations. Law 25 of 2014, which addresses military discipline, states that "All Military soldiers in carrying out their duties and obligations must act and behave in a disciplined manner by complying with Military Disciplinary Law" (Article 7, paragraph (I)).

According to Law 25 of 2014, it is explained that TNI members are required to have obedience and be obedient to their superiors, in addition TNI members must uphold honor and always avoid actions that can tarnish and damage the good name of the military and its units, even though TNI soldiers commit crimes, they must still be punished without any privileges, where the process of examining cases in court is carried out according to military pre-trial procedures regulated in Law Number 31 of 1997 concerning Military Justice. 39 21

Based on Article 6 of the Criminal Code, it is explained that the criminal penalties stipulated in the Criminal Code include, among others:

- 1) The main penalty is the death penalty, imprisonment, detention, and imprisonment
- 2) Additional penalties are in the form of dismissal or dismissal from military service with or without revocation of the right to enter the armed forces, demotion, and revocation of the rights mentioned in Article 35 paragraph (I) of the Criminal Code. 3 4

According to Article 130 paragraph (1) of the Military Criminal Code, "Military who refuse or intentionally disobey a service order, or arbitrarily exceed such an order, are threatened for their intentional disobedience, with a maximum prison sentence of two years and four months." This section pertains to LGBT crimes in Military Law that involve disobeying service orders. In addition, the TNI Commander's Telegram Letter Number ST/398/2009 states that LGBT behaviors are prohibited. Based on the TNI Commander's Telegram Letter No. ST/398/2009 dated July 22, 2009 in conjunction with Article 53 ayat (2) letter h PP No. 39 of 2010 concerning the Administration of TNI Soldiers, it is stated that "LGBT is one of the acts that should not be carried out by a soldier and is contrary to service orders or acts that are not in accordance with the norms of soldier life. Where a TNI soldier who commits an immoral act with the same sex (homosexual/lesbian) according to the considerations of authorized officials cannot be retained to remain in military service." 20 2 2 3 9

According to the Circular of the Supreme Court (SEMA) No. 10 of 2020, in Letter D number 1, it is stated that, "violations of the TNI Commander's Telegram Letter Number ST/398/2009 dated July 22, 2009 in conjunction with the TNI Commander's Telegram Letter Number ST/1648/2019 dated October 22, 2019, which regulate the prohibition for TNI soldiers from committing immoral acts with the same sex (Homosexual/Lesbian), the provisions of Article 103 Paragraph (1) of the Criminal Code are applied as an act of violating service orders." This ban on LGBT individuals is seen as a violation of service orders and can lead to criminal sanctions." The Criminal Code and its procedural legislation are both *lex specialis* of the Criminal Code, therefore any military man found guilty of a crime is subject to both statutes.

A special law must supersede a general law, as stated in the phrase *Lex Specialis Derogaat Legi Generali*. Article 103 and Articles 1 and 2 of the Criminal Code establish a strong link between the two codes, which is the basis for the implementation of general criminal law inside the military community. According to Article 28 (1) 1 of the Criminal Code, which addresses transgressions of morals, and Article 103 Paragraph (1) of the Criminal Code, which addresses non-compliance, the Criminal Code and the Criminal Code both control and stress LGBT-related criminal legislation inside the TNI. Actions that are considered sexual deviations or LGBT often give rise to negative views from the community because they are not in line with existing norms in society, this behavior is considered to violate legal norms, is often considered to be an act that can cause discomfort, and is considered a violation of the law

### **Criminal Liability of TNI Soldiers in Lesbian, Gay, Bisexual, and Transgender (LGBT) Crimes**

#### **a. Case Decision**

The Military Court II-08 Jakarta which sat in Jakarta in examining and trying criminal cases at the first level has issued a verdict Number 212-K/PM II-08/AD/XI/2020 in the case of the Defendant, Ade Gunawan, Rank Captain Arh, 1111001788068, Position Danrai Rudal C, Yonarhanud Unit 1/PBC/1 Kostrad.

The criminal demand (*Requisitoir*) of the Military Prosecutor requested to the Panel of Judges which in essence is to declare the defendant proven guilty of committing a crime: "Officials who commit indecent acts with their subordinates". The criminal code's Article 294 Paragraph (2) Ke-1 regulates and threatens the offender with a punishment. The military prosecutor asked for the death penalty as a punishment for the offender: The

penalty is a year in prison. Decreased when the Defendant was serving his sentence of further criminal punishment and temporary detention: Served no longer in the military.

Two pages of the TNI Commander's telegram letter number ST/1648/2019 dated October 22, 2019, pertaining to TNI soldiers, comprise the evidence presented by the Military Prosecutor in the form of letters who committed immoral violations with the same sex (homosexual/lesbian). And 2 (two) sheets of the Army Chief of Staff's Telegram Letter Number ST/2694/2019 dated September 5, 2019 concerning TNI Soldiers who committed immoral violations with the same sex (homosexual/lesbian). That the Defendant based on the Military Prosecutor's Indictment at the Military Prosecutor II-07 Jakarta Number Sdak/212/X/2020 dated October 27, 2020 has been charged with committing a crime. Regarding the Military Prosecutor's indictment, the defendant stated that he fully understood the indictment that was charged against him.

At the trial, the defendant was accompanied by a Legal Counsel. In the trial, the defendant explained that the defendant became an Indonesian Army soldier through the Military Academy education in Magelang in 2007, graduated in 2011 and was inaugurated with the rank of Second Lieutenant, then the defendant took the Sesarcab Arhanud education at the Pusdik Arhanud Malang, after graduating he continued to take the Cakra Kostrad soldier standardization in the Kostrad Sangga Buana Training area for 3 (three) months, after graduating the defendant was placed in Yonarhanud 1/PBC/1 Kostrad until now with the rank of Captain Arh, Position Danrai Rudal C Yonarhanud 1/PBC/1 Kostrad. Before this case, the defendant had committed a crime of abuse of authority and had been investigated and sentenced to 3 (three) months in prison with a probationary period of 6 (six) months in 2013.

The defendant is the acting Commander of Battery C Yonarhanud 1/PBC/1 Kostrad, so that all personnel of Battery C Yonarhanud 1/PBC/1 Kostrad are subordinates and under the control and guidance of the defendant. The defendant regretted and admitted the actions that the defendant had committed against the defendant's members which the defendant should not have done as a superior, and the defendant's attitude did not reflect a disciplined attitude in morality as a soldier and the defendant apologized to the leadership of Pangdivif 1 Kostrad and Danyon Arhanud 1/PBC/1 Kostrad, then the defendant asked the family, especially the defendant's wife and the members whom the defendant had treated badly.

The mitigating factors for the defendant were that the defendant was polite in giving testimony at the trial and the defendant admitted his mistake, his oversight, deeply regretted his actions, and promised not to repeat them again. While the aggravating factors were that



the defendant's actions were committed against members of Battery C Yonarhanud 1/PBC/1 Kostrad which should have been the responsibility of the defendant as their commander; the defendant's actions had the potential to damage the discipline and mentality of the soldiers of Battery C Yonarhanud 1/PBC/1 Kostrad; the defendant's actions were contrary to the Sapta Marga point five, the Soldier's Oath point two and damaged the image of the TNI institution, especially the defendant's unit in the eyes of the public;

Military Court II-08 Jakarta processed and sentenced the defendant for a prior criminal act of abuse of authority, which occurred before the conduct in this case. The offender was found legally and demonstrably guilty of the crime: "An official who commits an indecent act with a person who because of his position is his subordinate" according to the Panel of Judges at the Military Court II-08 Jakarta. Therefore, sentencing the defendant with the main sentence: imprisonment for 8 (eight) months. Determining that the time the defendant was in detention was deducted entirely from the sentence imposed. And an additional sentence in the form of being dismissed from military service

b. Criminal Liability of TNI Soldiers in the Decision of the Military Court II-08 Jakarta Number 212-K/PM II-08AD/XI/2020.

The criminal liability of TNI soldiers in cases of LGBT acts in the Decision of the Military Court II-08 Jakarta Number 212-K / PM II-08AD / XI / 2020 can show the existence of a normal psychological condition of the defendant who is able to understand the meaning and consequences of the LGBT acts committed by the defendant against the victim, the defendant realizes that he will not repeat the mistake of LGBT acts and knows that LGBT acts can damage the morale and discipline of soldiers which is detrimental to the unit concerned in fostering and preparing soldiers in facing the implementation of personnel duties or the units he leads.

The LGBT acts committed by the defendant have fulfilled the basic elements of a criminal act from there being a certain consequence of the perpetrator's actions in the form of losses to the interests of others, indicating the necessity of a causal relationship (causaal verband) between the perpetrator's actions and the loss of certain interests.<sup>31</sup> The criminal liability of TNI soldiers in cases of LGBT acts in the Decision of the Military Court II-08 Jakarta Number 212-K / PM II-08AD / XI / 2020 refers to the elements of military crimes by adopting the elements of criminal acts in general crimes. Military Court II-08 Jakarta in Decision Number 212-K/PM II- 08AD/XI/2020 there are charges compiled by the Prosecutor which are compiled alternatively, namely:



- 1) First Alternative: Article 294 paragraph (2) ke-1 of the Criminal Code which reads:  
"Officials who commit indecent acts with people under their orders or with people who are entrusted or handed over to them to be guarded."
- 2) Second Alternative: Article 281 paragraph (2) of the Criminal Code which reads:  
"Anyone who intentionally and openly violates morality."
- 3) Third Alternative: Article 103 paragraph (1) of the Criminal Code which reads:  
"Military who refuse or intentionally disobey a service order or arbitrarily exceed such an order."

The first instance panel of judges proved the first alternative charge which was proven legally and convincingly to have committed the crime of "An official who commits an indecent act with a person under his command" as per Article 294 paragraph (2) 1 of the Criminal Code with the following considerations:

- 1) The defendant did not care and did not obey the applicable provisions so that the defendant who was an officer and also a commander had committed an indecent act with his subordinates only for the sake of fulfilling his lusts so that it violated moral norms and religious norms.
- 2) The defendant as a commanding officer certainly understands the rules and regulations in the life of a soldier and must be able to be his subordinate, but the defendant actually committed an indecent act with his subordinates.
- 3) As a result of the defendant's actions, members who are subordinates of the defendant feel uncomfortable in carrying out their duties in the unit led by the defendant and can damage the morale and discipline of soldiers which is detrimental to the unit concerned in fostering and preparing soldiers in facing the implementation of personnel and unit duties.

Legal regulations specifically related to LGBT actions committed by TNI soldiers from this case are very necessary considering that in the legal process of imposing criminal penalties on TNI soldiers with charges of LGBT actions based on Military Criminal Law materially and formally to be able to be held accountable for their actions by means of prosecution, sentencing and implementing criminal penalties in accordance with the procedures or mechanisms for resolving Lesbian, Gay Bisexual Transgender (LGBT) crimes guided by Law Number 31 of 1997 concerning Military Justice, which is compiled based on a systemic approach with the concept of national criminal procedure law.

#### 4. CONCLUSION

Based on the description above, the conclusions drawn are:

- a. The validity of the military's stance on LGBT individuals in the military is supported by the prohibition of LGBT in the TNI Commander's Telegram Letter Number ST / 398/2009 and the TNI Commander's Telegram Letter Number ST / 1648/2019, which state that LGBT is an unacceptable behavior for soldiers and goes against official orders or military standards. The Supreme Court Circular (SEMA) No. 10 of 2020, in Letter D number 1, explains that violating the TNI Commander's Telegram Letter Number ST/398/2009 dated 22 July 2009 and the TNI Commander's Telegram Letter Number ST/1648/2019 dated 22 October 2019, which prohibits TNI soldiers from involving in immoral acts with members of the same sex (Homosexual/Lesbian), is considered a violation of service orders and is subject to the provisions of Article 103 Paragraph (1) of the Criminal Code.
- b. Criminal liability of TNI soldiers who committed Lesbian, Gay, Bisexual, and Transgender (LGBT) acts in the verdict of the Jakarta Military Court II-08 Number 212-K/PM II-08AD/XI/2020 with charges of LGBT acts has special legal rules based on Military Criminal Law in material and formal terms to be held accountable for their actions by means of prosecution, sentencing and implementation of criminal penalties in accordance with the procedures or mechanisms for resolving Lesbian, Gay Bisexual Transgender (LGBT) crimes guided by Law Number 31 of 1997 concerning Military Justice, which is compiled based on a systematic approach with the concept of national criminal procedure law, in this case the Criminal Procedure Code (KUHP), and the TNI Commander's Telegram Letter Number ST/1648/ 2019 dated October 22, 2019 concerning TNI Soldiers who committed immoral violations with the same gender (homosexual/lesbian), and the Army Chief of Staff Telegram Letter Number ST/2694/2019 dated September 5, 2019 concerning TNI soldiers who commit immoral violations with the same sex (homosexual/lesbian) needs to be strengthened through regulations at the TNI Commander level to impose criminal penalties that have a deterrent effect on TNI soldiers as perpetrators of LGBT acts.

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