

Juridical Analysis of the Acquittal (Vrijspraak) Verdict for a TNI Soldier Committing the Crime of Adultery in the Military Judicial System (Case Study of Military Court Decision No. 10-K/PM II-08/AL/I/2023)

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Abstract

Purpose: This study aims to examine the legal application in adultery cases involving TNI soldiers and analyze the indictment elements in Military Court Decision No. 10-K/PM II-08/AL/I/2023.

Research Methodology: The research used is normative legal research or also called doctrinal legal research, namely research whose data sources are only secondary data.

Results: The crime of adultery in the case of decision Number 10-K / PM II-08 / AL / I / 2023, that the processing of the case carried out by the military auditor on the case which was legally and convincingly proven was obtained through the examination report, the military auditor's demands regarding the proof of the elements of the indictment were declared unacceptable, because the military auditor in compiling the indictment used Article 281 point 1 of the Criminal Code alone, the indictment should have been compiled alternatively using Article 248 or 281 point 1 of the Criminal Code. So that in the application of the processing of the case there is an imbalance or inequality within the scope of the military auditor himself, with the author then making a legal comparison of the decisions that have permanent legal force that occurred in the military court environment.

Keywords: *Juridical Analysis of the Acquittal, Crime of Adultery*

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1. Introduction

TNI soldiers can carry out their duties with a high sense of responsibility and devotion by upholding these values, with this a deep understanding of relevant laws and regulations is a way to maintain professionalism and compliance with legal norms in force in Indonesia. Criminal acts have a form or nature that is contrary to the order or order desired by law or is also commonly referred to as an unlawful act. Viewed from a legal perspective, fundamentally TNI soldiers have the same position as other citizens. They are subject to all applicable legal provisions, including criminal law, civil law, and other legal provisions. This principle is in line with the mandate of the Constitution of the Republic of Indonesia which states that all citizens have the same position before the law and government whatever happens.

Military criminal law plays an important role in maintaining discipline and upholding justice in the military justice environment. Viewed from a specific justiciable perspective, military justice can determine the basis and regulations regarding actions which mean prohibitions and requirements and

for violators are threatened with criminal penalties, which determine when violators can be held responsible for their actions and determine the method of prosecution, sentencing and execution of criminal penalties in order to achieve justice and legal order (S. R. Sianturi, 2020).

TNI soldiers in relation to military criminal law are one of the legal provisions that apply specifically in addition to the general criminal law. The provisions of Article 1 of the Military Criminal Code state that the provisions of general criminal law apply including chapter 9 of the first book of the Criminal Code, unless otherwise specified by law, and Article 2 of the Criminal Code which states that for criminal acts not listed in the Criminal Code, which are committed by people who are subject to the authority of the military justice system, general criminal law applies, unless otherwise specified by law.

The general criminal provisions also apply to TNI soldiers as a whole. One of the general crimes committed by TNI soldiers is adultery. The provisions of the Criminal Code, hereinafter referred to as the Criminal Code, adultery is one of the crimes included in crimes against morality. This criminal act of adultery is regulated in Article 284 paragraph (1) which reads "is threatened with a maximum imprisonment of nine months. First, a married man who commits gendak (overspel); a married woman who commits gendak (jinah). 2nd a man who participates in the act, even though he knows that the other participant is married; an unmarried woman who participates in the act" (S.R. Sianturi, 2010).

The definition of adultery is an act of sexual intercourse between a married man or woman and a woman or man who is not his wife or husband and the act must be done on the basis of mutual consent, which is clear that adultery is only possible if sexual intercourse occurs. This crime of adultery is an absolute complaint offense (Absolute klacht delict), where a complaint from the victimized or aggrieved spouse is an absolute requirement for the perpetrator to be prosecuted. The provisions of Article 284 paragraph (2) of the Criminal Code state that "prosecution is not carried out but rather a complaint from the husband/wife who is polluted, and if they apply Article 27 BW, within a period of three months followed by a request for divorce or separation of table and bed for that reason too".

The case of the crime of adultery committed by TNI AL soldiers, in the Decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023. The information contained in the decision, the witnesses, defendants, and evidence obtained legal facts, namely that the defendant has been proven and admitted to having had sexual intercourse like husband and wife or committed adultery with witness 1 several times in several places that became the locus delicti until witness 1 became pregnant, but when 7 months into the pregnancy, witness 1 had a miscarriage. The processing of criminal cases by the Military Prosecutor should be charged with an alternative charge using Article 284 point 1 or Article 281 of the Criminal Code, but the processing of the case is charged singly using Article 281 point 1 of the Criminal Code.

Evidence in court and based on the judge's considerations, it turns out that the places that are the locus delicti of the case do not fulfill the second element of the article charged, namely the element "intentionally and openly", so that by not fulfilling one of the elements of the criminal act charged by the Military Prosecutor, the Panel of Judges considered that the Military Prosecutor's charges were not legally and convincingly proven, therefore the defendant was acquitted of all charges (vrijspraak) and the defendant's case was returned to the Case Submitting Officer to be resolved according to the Military Disciplinary Law channel. Based on the description above, the author is interested in raising the object of the research into a thesis with the title "**LEGAL ANALYSIS OF A DECISION OF ACQUITTING ALL CHARGES (VRIJSPRAAK) AGAINST TNI SOLDIERS WHO COMMITTED THE CRIMINAL ACT OF ADULTERY IN THE MILITARY COURT (Case Study of the Decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023)**".

1.1. Problem Formulation

Based on the description presented in the background above, the main problems in this thesis are:

1. How is the application of the law in cases of adultery committed by TNI soldiers?

2. What are the elements of the indictment in the application of the Decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023?

2. Literature Review

2.1. Theoretical Framework

2.1.1. Theory of Legal Certainty

Gustav Radbruch in relation to the theory of legal certainty in general means that legal certainty does not always have to be prioritized in every positive legal system as a whole, as if legal certainty must exist first, followed by justice and benefit. Gustav Radbruch then revised his view that the three are equal. Gustav Radbruch, the initiator of the three values of legal objectives from Germany said that good law is the point where the law contains aspects of justice, legal certainty and benefit. This means that although the three values are the objectives of the law, each value has different demands from each other, so that the three values have the potential for conflict and contradiction that causes tension between the three values (*Spannungs verhältnis*) (Hermawan, Respationo, Erniyanti, & Fadlan, 2022; Susanto, 2023). Gustav Radbruch put forward 4 (four) basic things related to the importance of legal certainty, namely, first, the law is positive, especially statutory regulations. Second, the law is based on facts or laws that are formulated to be certain. Third, Facts should be formed from errors in interpretation, and should not be difficult to implement. Fourth, Positive law should not be easily changed (Dokku & Kandula, 2021; Muladi & Arief, 2010; Roy, 2022).

2.2. Conceptual framework

a. A criminal act is an act carried out at a certain time, place and condition, which is prohibited or required and is subject to criminal penalties by law, is unlawful and is accompanied by an error committed by a person who is capable of being responsible (S.R. Sianturi, 2010).

b. In the provisions of Article 284 of the Criminal Code, it is stated that:

(1) Threatened with a maximum of nine months' imprisonment:

1. a. a married man who commits *gendak* (overspel), even though it is known that Article 27 BW applies to him;

b. a married woman who commits *gendak*, even though it is known that Article 27 BW applies to her;

2. a. a man who participates in the act, even though it is known that the co-culprit is married;

b. a married woman who participates in the act, even though it is known by her that the co-culprit is married and Article 27 BW applies to her.

(2) No prosecution shall be carried out except upon a complaint from the husband/wife who is tainted, and if Article 27 of the Civil Code applies to them, within a period of three months followed by a request for divorce or separation from bed and table for that reason as well.

c. Military Prosecutors and High Military Prosecutors, hereinafter referred to as Prosecutors, are officials who have the authority to act as public prosecutors, as executors of decisions or rulings from courts in the military court environment in criminal cases, and as investigators.

d. Analysis is an investigation into an event to find out the actual situation.

e. Juridical is something that according to law or legally.

2.3. Criminal Law

Criminal law in its meaning is a law that regulates violations and crimes against the public interest, where acts that violate public order and interest are threatened with punishment that is a suffering/torture for the perpetrator.

So criminal law is not a law that contains new norms, but criminal law related to society only regulates violations and crimes against norms that concern the public interest.

To provide a clear legal basis, it is impossible for all cases received and resolved by the police to be forwarded to the prosecutor's office and of course there must be regulations, which allow for supervision. Certain cases are better resolved immediately by the police or prosecutor's office will be more felt by the convict and have a good effect on him than being examined for a long time by the court.

2.4. Criminal Acts (Criminal Offenses)

A crime is something concrete, referring to a specific event, for example the death of a person. Criminal law does not prohibit the existence of people dying but prohibits the existence of people dying as a result of the actions of others. If the death of a person is due to natural conditions that determine, due to illness, then the event is not important for criminal law, but if the death of a person is due to the actions of others, then the death event becomes important for criminal law.

The crime is an act or series of human acts that are contrary to laws or other regulations for which acts are subject to punishment. An act can be viewed as a crime if it has met all the necessary requirements. In essence, every criminal act must consist of elements born because of the act, which contains behavior and the consequences caused by it, is an event in the natural world. If one of these elements is absent or not proven, it must be concluded that the crime has not or is not regulated in a law that provides a threat of a criminal penalty.

2.5. Criminal Act of Adultery

The Great Dictionary of the Indonesian Language defines adultery into two meanings, the first is the act of sexual intercourse between a man and a woman who are not bound by a marriage relationship (marriage), and the second is the act of sexual intercourse between a man who is bound by marriage with a woman who is not his wife, or a woman who is bound by marriage with a man who is not her husband.

In the minds of society in general, adultery as explained in the Criminal Code only ensnares people committing adultery if one of them is bound by marriage, meaning that if the person committing adultery and both are not yet married, the act is not punishable. Moreover, Article 284 of the Criminal Code is a complaint offense that does not allow the act to be punished if no one complains from the injured party (husband or wife who is betrayed by their partner). This view should be changed in the criminal law policy in the crime of adultery.

2.6. Legal Basis for the Crime of Adultery

The crime of adultery is regulated in Article 284 of the Criminal Code (KUHP) which can be categorized as one of the crimes against morality. Moral crimes in the Criminal Code are contained in two chapters, namely Chapter XIV Book II which is a crime and Chapter VI Book III which includes types of violations, which are included in the group of moral crimes including acts:

- a. Related to drinks, related to public morality and related to objects and so on that violate morality or are pornographic (Articles 281-283);
- b. Adultery and so on related to indecent acts and sexual relations (Articles 284-296);
- c. Trafficking of women and underage boys (Article 297);
- d. Related to abortion treatment (Article 299);
- e. Intoxicating (Article 300);
- f. Handing over a child for begging and so on (Article 301);
- g. Animal abuse (Article 302);
- h. Gambling (Articles 303 and 303 bis);

The following acts are included in the Criminal Code for violating morality:

- a. revealing or showing something pornographic (Articles 532-535);
- b. relating to drunkenness and alcoholic beverages (Articles 536-539);
- c. relating to indecent acts against animals (Articles 540, 541 and 544);
- d. predicting fate or dreams (Article 545);
- e. selling and so on amulets, objects with supernatural powers and imparting supernatural knowledge (Article 546);
- f. Using amulets as witnesses in court (Article 547);

3. Research methodology

3.1 Type of Research

The type of legal research used is the normative juridical legal research type, namely research that refers to legal norms contained in legislation, data can be obtained through literature studies and taking the decision files of the II-08 Jakarta Military Court as a complement (Soekanto, 2006).

3.2 Nature of Research

This research is descriptive analytical, namely research where knowledge or theory about the object already exists and the author also wants to provide a description of the research object and analyze it.

3.3 Legal materials

Primary Legal Materials are legal materials that have binding force, namely:

- 1) The 1945 Constitution of the Republic of Indonesia;
- 2) Law Number 73 of 1958 concerning Declaring the Applicability of Law Number 1 of 1946 concerning the Criminal Code (KUHP);
- 3) Law Number 39 of 1947 concerning the Military Criminal Code (KUHPM);
- 4) Law Number 8 of 1981 concerning the Criminal Procedure Code;
- 5) Law Number 31 of 1997 concerning Military Justice;
- 6) Law Number 34 of 2004 concerning the Indonesian National Army;
- 7) Law Number 48 of 2009 concerning Judicial Power;
- 8) Law Number 25 of 2014 concerning Military Disciplinary Law;
- 9) Law Number 1 of 2023 concerning the Criminal Code (KUHP);
- 10) Circular of the Supreme Court of the Republic of Indonesia Number 5 of 2021 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2021; and
- 11) Decision of the Military Court II-08 Jakarta Number 10-K/PM II-08/AL/I/2023.

3.4 Data Collection

Data collection is done through document studies or library materials, namely secondary data. Secondary data in legal research can be limited by using document studies or library materials. Visiting various libraries, such as the Military Law College library, the Ditkumad library and the National Library to read, review, and study various literature in this study.

3.5 Data Analysis

This study uses qualitative data analysis methods. Qualitative is data that is described using terms or sentences that are separated based on classification to reach conclusions. Qualitative methods are used as a tool to collect data as well as to conduct analysis, where data is obtained from initial literacy which is continued with a deeper data search and then to assess a specific condition.

3.6 Drawing Conclusions

Drawing conclusions is done using deductive logic, namely by drawing specific conclusions from general questions.

3.7 Position Case

In the criminal case (Case Position Based on the Decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023) committed by the Defendant:

Full name	: Feri Indrianto
Rank, NRP	: Kopda Mes, 115533
Position	: Member of 5 Team 2 Divlam-IV
Unit	: Koarmada I
Place, date of birth	: Kulonprogo, November 4, 1988
Gender	: Male
Citizenship	: Indonesia
Religion	: Islam
Residence	: Nepi Dukuh 4 Kranggan, Galur, Kulonprogo, Yogyakarta

Considering, that in the trial the Defendant withdrew his statement in the BAP regarding having had sexual intercourse like a husband and wife in several hotels, but this withdrawal of information was not accompanied by a basic and logical reason because in his own statement in the trial the Defendant was never forced or pressured when questioned by the Investigator and the statement was given in a conscious state and the statement was in accordance with the statement of the Verbalisan Witness a.n. Sertu Pom Yudha Prasetyo who emphasized that during the examination of the Defendant there was no coercion or pressure.

Considering, that regarding this matter the Panel of Judges gave their opinion that Law Number 31 of 1997 concerning Military Justice and the Criminal Procedure Code does not regulate the withdrawal of information by the Defendant, however, these provisions do not hinder and provide space for the Defendant by basing it on logical reasons. M. Yahya Harahap in his book "Discussion of Problems and Application of the Criminal Procedure Code; Examination of Court Hearings, Appeals, Cassation, and Judicial Review", states that if from the examination at the trial the judge can accept the reason for the withdrawal of the Defendant's statement in the examination report, it means that the statement contained in the investigation report is considered "incorrect" and the statement cannot be used as a basis for helping to find evidence in court and vice versa if the reason for the withdrawal cannot be justified, because the reason for the withdrawal put forward by the Defendant does not have a reason that is based on and logical, then the confession statement contained in the investigation report is still considered correct. The judge can use it as a tool to help find evidence in court. So that based on the matters as stated above, no basic and logical reasons were found for the Defendant to withdraw his statement in the BAP and thus the BAP regarding the Defendant's confession that he had had sexual intercourse like a husband and wife in several hotels is considered correct.

Considering, that the Defendant's statement in the BAP related to the Defendant's confession that he had had a husband and wife relationship with Witness-1 in several hotels as follows: That in January 2021 the Defendant met with Ms. Erni WIdiastuti (Witness-1) in the Sunter Lake area to eat together. Then after finishing eating, the Defendant and Witness-1 went to the Front One Cabin Hotel to check in to a hotel room with the Defendant's name. After being in the hotel room, the Defendant and Witness-1 took a shower after taking a shower the Defendant and Witness-1 only used towels without underwear, then the Defendant and Witness-1 kissed each other on the lips while the Defendant groped Witness-1's breasts until aroused, then with the position of Witness-1's body lying down and the Defendant on top of Witness-1's body then the Defendant directed his erect penis into Witness-1's vagina with a back and forth motion for approximately 30 minutes until the Defendant climaxed and ejaculated on Witness-1's stomach, but before finishing ejaculating, the Defendant reinserted his penis into Witness-1's vagina with a back and forth motion for approximately 15 minutes until the Defendant climaxed and ejaculated on Witness-1's stomach.

That after meeting 3 (three) times, the Defendant and Witness-1 agreed to meet at the Coins Sunter Hotel, which was previously booked by Witness-1 but the Defendant made the payment using the Defendant's money, then after being in the Hotel, the Defendant and Witness-1 took a shower each and only wore towels while chatting. Then after the Defendant was aroused, with Witness-1 lying on his back below, the Defendant directed the Defendant's erect penis into the vaginal opening, with a back and forth motion for approximately 30 minutes until climax, then the Defendant released sperm on the stomach of Witness-1.

Considering, That regarding the Defendant's denial of Witness 4's statement that the Defendant never checked in at Hotel N2, the Panel of Judges is of the opinion that the Defendant's denial which was finally acknowledged by the Defendant after being reinforced by the Verbalisan Witness stating that the Defendant admitted when being questioned at the Lantamal Police Station and in accordance with evidence from Hotel N2, then based on the results of the examination and statements from other Witnesses, the Judge does not accept the Defendant's denial.

Considering, that in order to obtain the truth and true justice in deciding a criminal case, the Judge must be objective in reviewing, assessing and considering valid evidence, namely: Witness statements, Expert statements, Defendant statements, letters and instructions in accordance with Article 172 of Law of the Republic of Indonesia Number 31 of 1997 concerning Military Justice. This objective attitude is guided by the provisions of Article 173 paragraph (6) of Law of the Republic of Indonesia Number 31 of 1997 concerning Military Justice so that in assessing the truth of the Witness's statement, the Judge must seriously pay attention:

- a. Correspondence between the statements of one witness and another.
- b. Correspondence between witness statements and other evidence.

Considering, That referring to the provisions of Article 172 and Article 173 paragraph (1) and paragraph (6) letters a and b of Law Number 31 of 1997, the Panel of Judges will provide its opinion regarding the statements of the Witnesses and the Defendant's statement above as follows regarding the statements of Ms. Erni Widiastuti (Witness-1), Mr. Sunardi (Witness-2), Ms. Dwi Astuti (Witness-3), and Ms. Desi Arsianti (Witness-4) because they are in accordance with each other and also in accordance with the Defendant's statement, moreover the statements of Witness -1, Witness 2 and Witness 3 are all by the Defendant, so that the statements of the Witnesses can be used as evidence.

3.6. Indictment

In his indictment, the Military Prosecutor submitted the Defendant to the Military Court II-07 Jakarta with 1 (one) single charge (the Prosecutor's Charge is Based on the Decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023), where the Defendant has committed the following crimes:

That the Defendant at the times and in the places as stated below, namely around April of the year Two thousand and twenty at the Defendant's house in The Palm Green Residence Housing Block A 14 Gabus Tambun Utara Bekasi Utara or at least in a place that is included in the jurisdiction of the Military Court II-08 Jakarta which has the authority to examine and try this case, has committed the following crimes: "Anyone who intentionally and openly violates morality", in the following manner:

Single Charge: Article 281 point 1 of the Criminal Code

"Anyone who intentionally and openly violates morality".

3.7. Claims

Based on the formulation of the charges against the defendant (Prosecutor's Charges Based on the Decision of the Military Court II-08 Jakarta Number 10-K/PM II-08/AL/I/2023), the Military Prosecutor's Office II-07 Jakarta on December 5, 2023 filed a charge stating that the Defendant Kopda Mes Feri Indrianto Nrp. 115533 was proven legally and convincingly guilty of committing an immoral crime, which "intentionally and openly violates morality". The crime as formulated and threatened with the punishment stated in Article 281 point 1 of the Criminal Code. By considering Article 281 point 1 of the Criminal Code using a single charge and other relevant statutory provisions, the Military Prosecutor's Office II-07 Jakarta demanded that the Defendant Kopda Mes Feri Indrianto Nrp. 115533 sentenced to

Main Criminal: Imprisonment for a maximum of 2 (two) years and 8 (eight) months or a maximum fine of four thousand five hundred rupiah. Reduced by the time the Defendant was temporarily detained.

3.8. Decision

In the verdict of the Panel of Judges against the Defendant Kopda Mes Feri Indrianto, the TNI AL Soldier, responding to the Indictment Letter of the Military Prosecutor II-08 Jakarta Number: PUT/10-K/PM II-08/AL/I/2023 dated April 13, 2023, he was charged with committing a criminal act of immorality as intentionally and openly violating morality, not fulfilling the elements of a criminal act listed in Article 281 point 1 of the Criminal Code. However, regarding the severity of the sentence to be imposed on the Defendant, the Panel of Judges will consider it in this verdict.

According to the elements, and letters related to the existence of a criminal act of immorality. In its decision, the Panel of Judges based on the Criminal Code, the Military Criminal Code, Law Number 31 of 1997 concerning Military Justice, Law Number 48 of 2009 concerning Judicial Power, and other laws related to this case, then:

1. Decision of the Military Court II-08 Jakarta Number: PUT / 10-K / PM II-08 / AL / I / 2023 on Thursday, April 13, 2023, the complete ruling is as follows:

a. Declaring that the Defendant, namely Feri Indrianto, Kopda Mes, NRP 115533, was not proven legally and convincingly guilty of committing a crime "Intentionally and openly violating morality".

b. Acquitting the Defendant of all charges.

c. Declaring that the Defendant's actions were inappropriate in military life and had violated the rules and discipline of soldiers. So it is necessary to return the Defendant's case to the Case Handling Officer to be resolved according to Disciplinary Law channels.

d. Determine evidence in the form of letters:

1 (one) photocopy of the Marriage Certificate in the name of Kopda Mes Feri Indrianto with Ms. Dwi Astuti (Witness-2).

1 (one) photocopy of Family Card No. 3401040609130001 in the name of Kopda Mes Feri Indrianto.

1 (one) photocopy of KTP and KTA in the name of Kopda Mes Feri Indrianto.

1 (one) photocopy of KTP in the name of Ms. Dwi Astuti (Witness-2).

1 (one) photocopy of KPI No. KPI/1/IV/2019 in the name of Ms. Dwi Astuti (Witness-2).

1 (one) photocopy of Jalasena Membership Card in the name of Ms. Dwi Astuti (Witness-2).

1 (one) photocopy of the Family Card of the Service No. KKD/01/I/2017 in the name of Kopda Mes Feri Indrianto.

2 (two) printouts of the Hotel N2 Gunung Sahari voucher via the tiket.com application in the name of Ms. Erni Widiastuti (Witness-1).

1 (one) bundle of printouts of the guest registration check-in at Hotel N2 Gunung Sahari in the name of Ms. Erni Widiastuti (Witness-1).

1 (one) photocopy of the KTP reserved with Hotel N2 Gunung Sahari in the name of Kopda Mes Feri Indrianto. Remain attached to the case file.

e. Charge the court costs to the State.

4. Results and discussions

4.1. Application of law in cases of criminal acts of adultery committed by TNI soldiers

Implementation of Article 1 number (1) of the Republic of Indonesia Law Number 31 of 1997 concerning Military Justice, which stipulates that: The court is a body that exercises judicial power in the military justice environment which includes the Military Court, the High Military Court, the Main Military Court, and the Military Combat Court In the provisions of Article 2 of the Military Criminal Code (KUHPM) against criminal acts not listed in the Military Criminal Code, committed by people who are subject to the authority of the military justice body, general criminal law is applied, unless there are deviations stipulated by other laws. Perpetrators of general crimes not regulated in the KUHPM such as the crime of adultery committed by TNI soldiers whose perpetrators are military personnel are certainly included as justiciable by military justice bodies.

The formulation refers to Article 9 of Law Number 31 of 1997 concerning Military Justice, indicating that the military justice environment has the authority to try criminal acts against soldiers, so that legally Law Number 31 of 1997 concerning Military Justice lays the basis for the position of soldiers in the criminal justice system, whether general crimes or military crimes must still be tried in the military justice environment.

TNI soldiers who commit the crime of adultery in the application of its elements are not regulated in the Criminal Code, so that the elements of the crime in the Criminal Code are not fulfilled, then based on the provisions of Article 1 of the Criminal Code, it is formulated that:

For the application of this law, the provisions of general criminal law apply, including the ninth chapter of the first book of the Criminal Code, unless there are deviations stipulated by law.

From the application of Article 1 of the Criminal Code, it is clear that the Criminal Code applies to soldiers who violate general crimes, which is then linked to Article 103 of the Criminal Code to bridge the application of the Criminal Code to provisions outside the Criminal Code, unless otherwise specified in other laws. The formulation of Article 2 of the Criminal Code contains that:

For criminal acts not listed in this code, committed by people who are subject to the authority of military courts, general criminal law applies, unless there are deviations stipulated by law.

The explanation regarding the criminal act of adultery committed by the defendant was obtained from the legal facts, that it is true that the defendant and witness-1 had a relationship like husband and wife at the Coins Sunter Hotel and at The Palm Green Residence Block. A 14 No. 14, Gabus, Tambun Utara, North Bekasi, the provisions of Article 284 paragraphs (1) and (2) of the Criminal Code can be applied. Military soldiers in the application of criminal law always refer to the Criminal Code, but in the case of the crime of adultery, which is not fulfilled in the Criminal Code, then they use the articles in the Criminal Code.

4.2. Elements of the Charges in the Implementation of the Decision of the Military Court II-08 Jakarta Number 10-K/PM II-08/AL/I/2023

According to western scholars (SIMONS) formulated that "Een strafbaar fiet" is a handling (action/deed) that is threatened with criminal law, contrary to the law (onrechtmatig) carried out with error (schuld) by a person who is capable of being responsible. Then he divided it into 2 (two) groups of elements, namely:

1. Objective elements in the form of prohibited/required actions, due to certain circumstances/problems;
2. Subjective elements in the form of errors (schuld) and the ability to be responsible from the perpetrator.

In the Decision of the Military Court II-08 Jakarta Number 10-K/ PM II-08 / AL / I / 2023, the defendant Feri Indrianto was tried that in processing the case compiled by the Military Auditor using an indictment that was compiled individually based on Article 281 point 1 of the Criminal Code.

The analysis in the Decision of the Military Court II-08 Jakarta Number 10-K/PM II-08/AL/I/2023 related to the theory I use explains that in the application of case processing carried out by the military prosecutor, there is no principle of the theory of legal certainty according to "Gustav Radbruch Bentham, that in the sense of the theory, the law must contain 3 (three) identity values, namely as follows:

- a. The principle of legal certainty (rechtmatigheid). This principle is reviewed from a juridical perspective.
- b. The principle of legal justice (gerechtigheit). This principle is reviewed from a philosophical perspective, where justice is equal rights for everyone before the court.
- c. The principle of legal utility (zweckmatigheid or doelmatigheid or utility).

The goal of law that is close to realistic is legal certainty and legal utility. Positivists emphasize legal certainty, while functionalists prioritize legal utility, and it can be said that "summum ius, summa injuria, summa lex, summa crux", which means that harsh laws can hurt, except for justice that can help it.

Thus, although justice is not the sole objective of law, the most substantive objective of law is justice. There are more and more visions, missions, and objectives that must be achieved by a process of implementing law in court in this era of reform and transformation. Classically, in addition to achieving justice, law also aims to create legal certainty for individuals and for the wider community. There are many other objectives of law that must be achieved in this era of reform and transformation. In this case, the law must be able to harmonize the elements of justice, the elements of legal certainty, and other elements. This is because justice, legal certainty, and other elements often conflict with each other. Therefore, in legal science there is a term "summum ius summa injuria" (the highest justice is the highest injustice).

The elements of immoral crimes in Article 281 point 1 of the Criminal Code include:

The first element is "Whoever".

What is meant by "Whoever" in the Criminal Code is a person or legal entity. That what is meant by a person is as referred to in Article 2 to Article 9 of the Criminal Code, in this case all Indonesian citizens and foreign citizens who are included in the requirements stipulated in Article 2 to Article 9 of the Criminal Code, including members of the Armed Forces (TNI members) in this case the Defendant.

That the element of "whoever" is to find out who or who the people are who are charged or will be held accountable for their actions that have been carried out as formulated in the indictment and based on Article 52 of the Criminal Code the element of "whoever" is every person who is subject to the authority of the Military Court.

That based on the statements of the witnesses under oath, the statements of the Defendant and the evidence presented to the trial and after connecting one with the other, the following legal facts were obtained:

1. That it is true that the Defendant became a TNI AL soldier through the Dikmata PK XXX education in 2010 at Kobangdikal Surabaya then continued the Diver Diver Dikbrivet XLV in 2014 at Pusdiksus, Kodiklatal Surabaya, after graduating he was placed on KRI Teluk Peleng 535 from 2011 to 2013, then transferred to Dislambair Koarmada I from 2015 to the present with the rank of Kopda Mes NRP 115533 Position Member 5 Team 2 Divlam-IV, Koarmada I unit.
2. That it is true that as an active TNI soldier, the Defendant is included as a citizen of the Republic of Indonesia, therefore the Defendant is automatically obliged to submit to the law and all legal regulations in force in Indonesia, so that the Defendant is included as a subject of Indonesian law.
3. That it is true that in the trial the Defendant was able to answer all questions put to him with fluent and correct answers in easy-to-understand Indonesian. In the trial, no legal facts were found that could prove that the Defendant had impaired memory due to an illness, therefore when this crime was committed by the Defendant until the trial, the Defendant was considered healthy and able to be held accountable for all his actions.

That and the description of the facts revealed in the trial, it turns out that the Defendant is an individual who is able to carry out and is responsible for the actions charged in this case. When connected with the understanding of the element "Whoever" as referred to above, then the element "Whoever" in this case is the Defendant.

Thus, the Panel of Judges is of the opinion that the first element, namely "Whoever" has been fulfilled.

The second element: "Intentionally and openly".

That according to M.V.T. what is meant by "intentionally" or intentional is wanting and realizing the occurrence of an action and its consequences.

In terms of the level (gradation) of "intentional" is divided into three, namely:

- a. Intentional as a goal (oogmerk), meaning that the occurrence of a certain action or consequence is truly a manifestation of the intent or purpose and knowledge of the Perpetrator/Defendant.
- b. Intention with definite awareness or necessity. Which is the basis of the perpetrator/defendant regarding certain actions and consequences. In this case, including other actions or consequences that are certain/must occur.
- c. Intention with awareness of the possibility or also known as conditional intention. What is the basis is the extent of the perpetrator/defendant's knowledge or awareness of the prohibited action or consequence (along with the actions or consequences) that may occur.

That in order to know whether the actions of the perpetrator/defendant are included in the first, second or third level (gradation), it must first be known whether the perpetrator/defendant had the intention/purpose or goal to carry out the act and its consequences. If true, then what was done by the perpetrator/defendant is included in the first level (gradation), namely an intention as a goal to achieve something.

Intention does not need to be directed at immoral acts that cause anxiety. It is sufficient that the act is carried out in a place that is open to the public (HR 25 March 1930). Intention also does not need to be aimed at making the act known to the public (HR 16 February 1928).

That what is meant by "open" according to the linguistic meaning is not closed, not forbidden (to the public) namely easy to come to and see by the public, for example open places, fields, roadsides, alleys, alleys, markets and so on or in places that are easy for people to see from public places even though they are carried out in places that are not public. (Hoge Road/HR Decision dated 12 May 1902).

S.R. Sianturi in his book entitled *Criminal Acts in the Criminal Code and Their Descriptions*, explains that what is meant by "open" or "openly" (openbaar or almost the same as openlijk) is in a place where the public can come to that place or in a place that can be seen, heard, or witnessed by the public (who are in that place or in another place). Basically, "open place" or "open" or "in public" is a place where other people or the public can see, hear, or witness it.

Hamzah (1993) explains the meaning of in public as "in a place that is a public traffic". In a place that is a public traffic is certainly wider than in public. In a place that is a public traffic such as a highway, in a park, in a field, in a mall, in a market, at a bus stop and so on.

That based on the statements of the Witnesses under oath, the Defendant's statement and the evidence submitted to the trial and after connecting one with the other, the following legal facts were obtained:

1. That it is true that in mid-2019 the Defendant got to know Ms. Erni Widiastuti (Witness-1) through Michat who is a widow with one child, then continued chatting via Whatsapp, then met for the first time at a coffee shop on Jl. Bugis, Tanjung Priuk to discuss business.

2. That it is true that after meeting 3 (three) times the Defendant and Witness-1 agreed to meet at the Coins Sunter Hotel, which was previously ordered by Witness-1 but the Defendant made the payment using the Defendant's money, then after being in the Hotel, the Defendant and Witness-1 took a shower each and only wore towels while chatting. Then after the Defendant was aroused, with Witness-1 lying on his back below, the Defendant directed the Defendant's penis which was already erect into the vaginal opening, with a back and forth motion for approximately 30 minutes until climax, then the Defendant released sperm on Witness-1's stomach.

3. That it is true that in April 2020 at 22.30 WIB when the Defendant's wife and children had moved to Kulonprogo, Yogyakarta, the Defendant invited Witness-1 to clean the Defendant's house in The Palm Green Residence Housing Complex Block A 14 No.14, Gabus, Tambun Utara, North Bekasi. The Defendant and Witness-1 entered the house via the village route. Once inside the house, the Defendant and Witness-1 swept, mopped and tidied up the items. Then after finishing cleaning, the Defendant and Witness-1 took a shower and then watched TV together in the corridor of the house. After feeling sleepy, the Defendant and Witness-1 entered the main room, then the Defendant and Witness-1 kissed each other on the lips while groping their breasts, after both were aroused with Witness-1 lying on his back and the Defendant on top of Witness-1's body, the Defendant inserted his erect penis into Witness-1's vagina with a back and forth motion for approximately 30 minutes until climax then the Defendant released his sperm onto Witness-1's stomach.

4. That it is true that when the Defendant and Witness-1 had sex like husband and wife at the Defendant's house in The Palm Green Residence Housing Complex Block A 14 No. 14, Gabus, Tambun Utara, North Bekasi with the condition that the Defendant's house borders the village and must pass through the village road, the bedroom door is closed, the house door is locked, no one saw and was not heard by the neighbors next door because the Defendant's house is closed by a high fence and covered with fiber so it is not visible from the outside and the Defendant's house is on the corner closer to the village.

5. That it is true that the Defendant and Mrs. Witness-1 had sex like husband and wife at the Defendant's house only 1 (one) time.

6. That it is true that in February 2021 the Defendant met with Witness-1 in the Danau Sunter area to eat together. Then after finishing eating, the Defendant and Witness-1 went to the Front One Cabin Hotel to check in to a hotel room with the Defendant's name. After being in the hotel room, the

Defendant and Witness-1 took a shower after taking a shower the Defendant and Witness-1 only used towels without underwear, then the Defendant and Witness-1 kissed each other on the lips while the Defendant groped Witness-1's breasts until aroused, then with the position of Witness-1's body lying down and the Defendant on top of Witness-1's body then the Defendant directed his erect penis into Witness-1's vagina with a back and forth motion for approximately 30 minutes until the Defendant climaxed and ejaculated on Witness-1's stomach, but before finishing ejaculating, the Defendant reinserted his penis into Witness-1's vagina with a back and forth motion for approximately 15 minutes until the Defendant climaxed and ejaculated on Witness-1's stomach.

7. That it is true that since the Defendant had a relationship with Witness-1, the Defendant often had sexual intercourse like husband and wife as follows:

a. In January 2020, he had sexual intercourse with the Defendant at the Coint Sunter Hotel, North Jakarta.

b. In April 2020 at the Defendant's house in The Palm Green Residence Housing Block A 14 No.14, Gabus, Tambun Utara, North Bekasi.

c. In August 2020 at a Hotel in the Baturaden area.

d. In September 2020 at the Marbella Convention Center & Spa Anyer Hotel.

e. In September 2020 at Wisma Lux Barkah Kelapa Gading.

f. In October 2020 at a Hotel in the Matraman area, East Jakarta.

g. In December 2020 at the N2 Gunung Sahari Hotel, Central Jakarta.

h. In January 2021 at the N2 Gunung Sahari Hotel, Central Jakarta.

i. In May 2021 at Front One Cabin Hotel, Sunter, Central Jakarta.

8. That it is true that the husband and wife relations carried out by the Defendant were based on mutual consent.

Based on the description above, the Panel of Judges did not find the fact of "intentionally and openly", as the fact revealed in the trial of the intentional and open act carried out by the Defendant.

The Panel of Judges concluded:

a. That the act of sexual intercourse committed by the Defendant with Ms. Erni Widiastuti (Witness-1) in a hotel room that had been rented by the Defendant in a closed condition was not an act that was intentionally carried out openly. Because since a transaction/agreement occurred between the Defendant and Witness-1 with the hotel, the full rights to the room were with the Defendant and Witness-1 so that the hotel room became the personal/private rights of the Defendant and Witness-1 as the renters of the hotel room.

b. That the actions of the Defendant and Witness-1 (Mrs. Erni Widiastuti) were carried out at the Defendant's house which has not been occupied by the Defendant and his family since 2020 because the Defendant's wife and children have moved to Nepi Dukuh 4 Kranggan Galur Kulon Progo since 2020 and the Defendant's house is closed by a high fence and covered with fiber so it cannot be seen from the outside and the Defendant's house is on the corner closer to the village and no witnesses have ever seen the Defendant bring a woman other than the Defendant's wife to the Defendant's house.

c. That according to the meaning of the language "open" is not closed, easily seen by others, for example open places, fields, roads, markets and so on or in places that are easily seen by people from public places.

That from the description of the facts above, the Defendant had sexual intercourse with Ms. Erni Wisiatuti (Witness-1) in a hotel room and also in the Defendant's house with the aim that the Defendant's sexual intercourse with Witness-1 was not known to other people and could not be seen from the outside because the door was locked and other people who entered the hotel room used by the Defendant and Witness-1 as the hotel room tenant must first make an effort to open the door and also the house used is the private property of the Defendant and his family which is no longer occupied with the Defendant's family, so it is concluded that the sexual intercourse carried out by the Defendant with Witness-1 was not an open place or public place that could be visited and seen by other people. Thus, the Panel of Judges is of the opinion that the second element "Intentionally and openly" is not fulfilled.

Considering that because one of the elements, namely the second element, was not fulfilled, the Panel of Judges considered that the next element did not need to be proven again and was of the opinion that the Defendant did not have sufficient valid and convincing evidence to have committed the crime, "Intentionally and openly violating morality", as regulated and threatened with punishment according to Article 281 point 1 of the Criminal Code.

Considering, that with the failure to fulfill one of the elements of the crime charged by the Military Prosecutor in his Indictment, the Panel of Judges considers the Military Prosecutor's Indictment not to be proven legally and convincingly. Considering, that with the failure to prove the Military Prosecutor's indictment above, the Defense of the Defendant's Legal Counsel is declared acceptable and the Military Prosecutor's Claim regarding the proof of the elements of the indictment is declared unacceptable.

Considering, that based on the matters described above which are facts obtained in the trial, the Panel of Judges considers there is insufficient legal and convincing evidence that the Defendant has committed the crime: "Anyone who intentionally and openly violates morality", as regulated and threatened with the punishment stated in Article 281 point 1 of the Criminal Code. Considering, that because the Defendant has not been proven legally and convincingly to have committed the crime as charged by the Military Prosecutor in his indictment, the Defendant must be acquitted of all Charges.

Considering, that although the Defendant was acquitted of all charges, the Defendant's actions in having sexual intercourse with Ms. Erni Widiastuti (Witness-1) in the Hotel room and also at the Defendant's house were immoral and violated the religious teachings that the Defendant believed in and the Defendant's actions were prohibited in the way of life of a Soldier, the Panel of Judges is of the opinion that based on the provisions of Article 189 Paragraph (4) of Law Number 31 of 1997 concerning Military Justice, the Defendant's case is returned to the Case Referring Officer to be resolved according to the Military Disciplinary Law channel. Considering, that because the Defendant was acquitted of all charges, the court costs are borne by the State.

The author's opinion regarding the elements of the Military Auditor's indictment that wrongly charged the defendant is that the Military Auditor should have paid attention to the accuracy and precision in processing the indictment. An indictment that does not meet the requirements can have fatal consequences in the legal process and can influence the judge's decision. Therefore, the professionalism of the Military Auditor in processing the indictment is very important to ensure that the elements of the indictment presented are correct and in accordance with the facts collected.

In this case, the elements of the charges presented must meet the specified requirements, such as the time and place of the crime committed. An indictment that does not meet the requirements may be an indictment that is unclear, incomplete, or does not correspond to the facts collected. This can have fatal consequences in the legal process, such as:

- a. An indictment that does not meet the requirements may not be accepted by the judge and cannot be used as a basis for sentencing.
- b. An indictment that is unclear may not allow the defendant to understand the crime being charged and cannot help the judge in making the right decision.
- c. An indictment that is incomplete may not meet the specified requirements and cannot help the judge in making the right decision.
- d. An indictment that does not correspond to the facts may not meet the specified requirements and can have fatal consequences in the legal process.

To overcome this problem, the processing of cases by the Military Auditor must pay attention to professionalism and accuracy in preparing the indictment. They must ensure that the elements of the indictment presented are correct and in accordance with the facts collected. In this way, the indictment that is prepared can meet the specified requirements and can help the judge in making the right decision.

The provisions in the consideration of the chronology above, that the defendant was proven legally and convincingly to have committed the crime of adultery. The formulation of the provisions of the crime

of adultery for TNI soldiers is not specifically regulated in the Military Criminal Code, so for soldiers who commit the crime of adultery still refer to the provisions of the Criminal Code, namely the provisions of Article 284 of the Criminal Code and can produce Legal Certainty regarding the processing of cases against charges or demands of military prosecutors in the future.

5. Conclusions

5.1 Conclusion

After outlining several things related to the problems in the decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023, the author draws several conclusions as follows:

1. In the case of the decision of the Military Court II-08 Jakarta Number 10-K / PM II-08 / AL / I / 2023, the processing of adultery criminal cases must refer to the provisions of laws and regulations based on Article 143 Paragraph (3) of the Criminal Procedure Code, carefully, clearly and completely. Because in this case the processing of the case carried out by the military prosecutor in preparing the indictment was not based on the provisions of the laws and regulations above, so that in the decision of the military court hearing, the Judge clearly did not find the fact "Intentionally and openly", as the facts revealed in the trial. Thus, the Panel of Judges is of the opinion that the second element "Intentionally and openly" was not fulfilled and the defendant did not have sufficient valid and convincing evidence of committing a crime, "Intentionally and openly violating morality", as regulated and threatened with criminal penalties according to Article 281 point 1 of the Criminal Code, and the defendant must be acquitted of all charges (*vrijspraak*), so the defendant's case was returned to the Case Referring Officer to be resolved according to the Military Disciplinary Law channel in the provisions of Article 189 Paragraph (4) of Law Number 31 of 1997 concerning Military Justice.
2. The crime of adultery in the case of decision Number 10-K / PM II-08 / AL / I / 2023, that the processing of the case carried out by the military auditor on the case which was legally and convincingly proven was obtained through the examination report, the military auditor's demands regarding the proof of the elements of the indictment were declared unacceptable, because the military auditor in compiling the indictment used Article 281 point 1 of the Criminal Code alone, the indictment should have been compiled alternatively using Article 248 or 281 point 1 of the Criminal Code. So that in the application of the processing of the case there is an imbalance or inequality within the scope of the military auditor himself, with the author then making a legal comparison of the decisions that have permanent legal force that occurred in the military court environment.

5.2 Suggestions

Based on the results of the author's analysis, there are several suggestions that can be submitted, including:

1. For TNI soldiers who commit adultery, they must be charged according to the criminal act committed by the defendant by deepening the understanding of the chronology of the case as stated in the examination report, so that further case processing does not have a negative impact on military justice and units in the eyes of the community, and can have a negative impact on soldiers who have behaved well in military service.
2. In case processing, they should be charged with alternative charges using Article 284 point 1 or Article 281 point 1 of the Criminal Code, but the processing of the case is charged singly using Article 281 point 1 of the Criminal Code, the aim is to avoid the defendant being released or freed from criminal liability (Crime liability) and to give the Panel of Judges the option to apply the appropriate law. However, in processing the case, the Panel of Judges was ultimately unable to determine which charge was appropriate to be held accountable to the defendant in connection with the crime he committed. This makes the processing of the case not careful, clear and complete.
3. Future prospects require special training to be carried out for military auditors and prospective military auditors in processing these cases, who should prepare indictments carefully, clearly and completely according to the provisions of Article 143 Paragraph (3) of the Criminal Procedure Code, as well as processing these cases based on applicable laws and regulations.

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