



Legality of Using Military Legal Counsel in Defending Military Families Who Are Involved in Criminal Cases in District Court

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Abstract

In the Constitution of the Republic of Indonesia, legal protection is regulated in Article 28D paragraph (1) of the 1945 Constitution which stipulates: "Everyone has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law." This article accommodates to ensure that everyone can be protected from detrimental and discriminatory legal actions so that the spirit of article 28D can be fulfilled. A legal advisor is someone who meets the requirements determined by or based on law to provide legal assistance (article 1 paragraph [13] Law no. 8 of 1981 concerning Criminal Procedure Law, Criminal Code). Nowadays it is generally known that legal advisors more often come from Civilians even though it is known that the military also has legal advisors from the military, so what is the legality of this? Can legal advisors from the military take proceedings in courts other than military courts and can they help people who have problems with the law?. The object of this research is the legality of legal advisors from the military in proceedings in district court. This research is normative legal research, so to obtain research results, the data needed is secondary data. In legal research, secondary data, from the point of view of its binding strength, can be divided into primary legal materials such as binding statutory regulations, secondary legal materials, which provide explanations of primary legal materials, namely by using research results, work from legal circles and so on. as well as tertiary legal materials.

Keywords: *Legality; Legal Advisor; Military*

Introduction

The Indonesian state has the objectives contained in the 1945 Constitution of the Republic of Indonesia (UUD 1945), namely to protect the entire Indonesian nation and all of Indonesia's blood, promote general welfare, educate the life of the nation, and participate in implementing world order based on freedom and eternal peace. and social justice therefore in order to achieve the State's goal of advancement general welfare, the State has the authority to regulate its society, especially in the field of law enforcement.

The Unitary State of the Republic of Indonesia is a legal state (*legal state*) which is based on Pancasila and the 1945 Constitution, which, among other things, upholds human rights (HAM) and guarantees every citizen equal status under the law (*equality before the law*). In the Constitution of the Republic of Indonesia, legal protection is regulated in Article 28D paragraph (1) of the 1945 Constitution which stipulates: "Everyone has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law." This article accommodates to ensure that everyone can be protected from detrimental and discriminatory legal actions so that the spirit of article 28D can be fulfilled.

One of the legal protections based on the Pancasila principles is providing legal assistance to the community as regulated in Article 1 paragraph (2) of the 1945 Constitution which states that Indonesia is a legal state which has the obligation to protect and recognize the human rights of every individual or its citizens. Legal assistance, protection and recognition of human rights is one of the government's efforts with the aim of establishing law enforcement, which is one part of the process with the aim of obtaining justice.¹

The definition of Legal Aid in general means an effort to help people who do not really understand or are less capable in the field of law. Legal services in the narrow sense of the underprivileged in the narrow sense are those provided free of charge, both inside and outside the court.²

The guarantee of human rights in our Constitution does not provide special restrictions for Indonesian National Army (TNI) Soldiers. This strengthens the position that the human rights of all citizens in Indonesia, including soldiers, are guaranteed by the Constitution. However, their function as state armed forces and the discipline that accompanies it, opens up space for several limitations on the human rights of military members. However, it must be realized that there are three things that must be fulfilled in providing these limitations, namely that they must be regulated and confirmed in law, they must be proportional, and they must be valid temporarily (*sunset principle*).³

Then with the existence of a Military Court within the Military scope to try members of the TNI who commit criminal offenses which is in accordance with the mandate of the Constitution which states that all people, in this case not limited by profession, including all people who are Indonesian citizens have the right to obtain legal protection, legal assistance and legal certainty. Then with this and in accordance with the Law of the Republic of Indonesia Number 31 of 1997 concerning Military Justice (hereinafter referred to as the Military Justice Law) and in this law it is known as a Military Legal Advisor who provides legal assistance to TNI members who are caught in legal problems.

A military legal advisor is someone who, according to the provisions of the applicable laws and regulations, meets the requirements to provide legal assistance according to the method regulated in this Law (Military Justice Law). It's too much of a question about this, but it's different if the Military Legal Advisor takes the case in the District/General Court.

¹ Erman Syarif, (2022). "Problems of Legal Assistance for Poor Communities in Indonesia", JDIH article. Taken back from <https://jdih.lampungprov.go.id/detail-post/problematika-bantuan-hukum-bagi-masyarakat-miskin-di-indonesia#:~:text=Menurut%20Undang%20Undang%20Nomor%2016,cuma%20kepada%20penerima%20bantuan%20hukum>

² Irman Putra and Arief Fahmi Lubis, (2019), *Providing Legal Assistance for TNI Soldiers and TNI Civil Servants as an Implementation of Human Rights Values*, Jakarta:INTELEKTIVA Journal Vol 01 no 01 August 2019, 111. Taken back from <https://www.jurnalintelektiva.com/index.php/jurnal/article/view/723>

³ Al Araf. (2007), *Military Justice Reform in Indonesia* Jakarta: Impartial, Pp. 42.

Equality before the law must be interpreted as dynamic, that is, following developments over time and not static. Which means that if all people are equal before the law, then treatment must also be balanced (*equal treatment*) for everyone. The existence of the principles of equality before the law and fair treatment for the whole community constitutes a violation of human rights which means it is in conflict with the constitutional rights of citizens.⁴

Providing legal assistance by advocates/legal advisors is of course very important to protect and defend the rights of perpetrators of criminal acts in the process from investigation to trial. Criminal procedural law provides opportunities for legal assistance, but nowadays not everyone has excess assets, sometimes to get the services of a legal advisor, of course a lot of money has to be spent, of course this can be a dilemma, although sometimes there are quite a few lawyers who offer to provide assistance on a regular basis. Free or free which we usually know as free.

Based on Article 54 of the Criminal Procedure Code, it can be concluded that this article determines the right of every person to obtain legal assistance whether the person is economically capable or not. It is also hoped that this legal assistance can prevent unfair and inhumane treatment of suspects or defendants who are classified as poor or so-called *due process of law* or fair legal process.⁵

The existence of legal assistance, in this case legal advisors/advocates, anticipates that law enforcers in the investigation stage will not be arbitrary towards suspects, especially towards those who are less capable and who do not understand the law. Basically, the main task of the Legal Advisor is to provide a legal opinion. as well as legal advice in order to distance clients from conflict, while in judicial institutions (court proceedings) legal advisors propose or defend their clients.⁶

In the military world, there are units that have a role in providing legal assistance. For example, in the Army there is the Army Legal Directorate, one of whose duties is to provide legal assistance to TNI soldiers.

With the above background, the author is interested in studying more deeply about legalityMilitary Legal Advisors proceed in military courts andIs it possible for military legal advisors to provide legal assistance to civilians by writing an article entitled "Legality of military legal advisors in defending military families involved in criminal cases in district court".

Method

The object of this research is the legality of legal advisors from the military in proceedings in district court. This research is normative legal research, so to obtain research results, the data needed is secondary data.⁷ In legal research, secondary data, from the point of view of its binding strength, can be divided into primary legal materials such as binding statutory regulations, secondary legal materials, which provide explanations of primary legal materials, namely by using research results, work from legal circles and so on. as well as tertiary legal materials, namely materials that provide instructions and

⁴ Asnauti, Ibrahim, 2018, "*The role of legal advisors in assisting suspects during investigations to create a fair legal process*", Legality: Journal Vol X Number 1, 66-67 Retrieved from <http://legalitas.unbari.ac.id/index.php/Legalitas/article/view/157/142>

⁵ Yudha Pandu, 2004, *Client & Advocate in Practice*, PT. Abadi, Jakarta, p. 43

⁶ Suhrawardi K Lubis, 2012., *Legal Profession Ethics*, Sinar Garfika, Jakarta, p. 28

⁷ Ibrahim, Johnny. "*Normative Legal Research Theory and Methodology*". Malang: Bayumedia Publishing.

explanations for primary and secondary legal materials, for example dictionaries, encyclopedias, and so on. The data collection technique used is the document study technique. The analysis technique used is qualitative. This research is deepened by examining legal policies related to questions regarding the content or substance they regulate. In order to reveal in more depth the implementation of legal policy adjustments regarding the legality of legal advisors from the military in court proceedings, a qualitative research method was chosen (*qualitative research*) with a descriptive approach. The choice to use a qualitative approach or method is an attempt to look for something that is sometimes difficult to find when using quantitative research methods.

Results and Discussion

1. Legal Basis for Military Counsel in Proceedings in District Court

Many people who do not know much about the role of the TNI in carrying out their duties, many people consider the TNI only a defense tool based on political policy. This is based on Law Number 34 of 2004 concerning the TNI in Article 5 where the article reads "The TNI plays a role as an instrument of the state in the defense sector who carry out their duties based on state policies and political decisions."

However, you need to know that in the TNI, there are many various branches or departments, whether in the Army, Navy or Air Force, where these departments are in the military, they are usually called Corps, this corps is a department or task where each corps has its own specialization, we take an example. Corps in the TNI AD such as the Cavalry Corps have a combat specialty using armored combat vehicles (ranpur) then there is Arhanud which is a corps belonging to the TNI AD which specializes in air defense with the help of cannons to prevent air violations by aircraft belonging to outside parties who do not have permission to entering Indonesia's air defense area which has the potential to threaten the country's sovereignty.

Among the many corps that the author has described above, there is a corps belonging to the TNI AD which is specifically in the field of law, namely the Chk corps or legal corps (hereinafter referred to as the legal corps) which has the task of providing Legal Aid, Legal Support and Legislation, this chk corps is in Each TNI branch also has a special corps (hereinafter referred to as the legal corps) which handles all internal TNI problems in the legal field.

Throughout the history of the founding of the TNI, there have been several statutory provisions governing legal aid that have been in force within the TNI, namely as follows:

- a. Decree of the President of the Republic of Indonesia Number 16 of 1963 concerning the Establishment of an Extraordinary Military Court (Mahmilhub) which was later changed to Law Number 5 of 1969. Article 4 of the Law.
- b. Supreme Court Circular Number 2 of 1973 concerning Military Legal Advisors.
- c. Furthermore, according to the instructions of the TNI AD Dirkom No. B/243/VI/1979, those who can be provided with legal assistance by appointed Kodam legal officers are expanded to:
 - 1) Agencies or bodies within the Indonesian Army within the local jurisdiction of Kotama.
 - 2) Officials and members of the TNI AD as well as civilian employees of the Army as individuals, both those who are still on active service or in preparation for retirement or retirement and warakawuri and their families in the local Kotama jurisdiction.
 - 3) Those who have official ties or work relationships with the Indonesian Army in the local Kotama jurisdiction.

- 4) Those who do not fall into groups a to c after first being consulted/allowed by the TNI AD Dirikum.

d. Instructions for implementing legal aid that are still valid within the TNI today are:

- 1) Decree of the Chief of Army Staff Number: Skep/87/III/1997 dated 5 March 1997 concerning the Administrative Manual on Legal Aid and Advice.
- 2) Technical Instructions for the Chief of Naval Staff Number: JUKNIK/01/I/1980 dated 25 January 1980 concerning Technical Instructions for Providing Legal Assistance within the Indonesian Navy.
- 3) Decree of the Chief of Staff of the Air Force Number: Skep/20/III/2004 dated 16 March 2004 concerning the Indonesian Air Force Implementation Manual regarding Legal Assistance. These three Decrees standardize the legal aid arrangements in each force.

e. Then it was strengthened again by the Technical Guidelines for Criminal Legal Assistance in the TNI Environment which was ratified by the TNI Commander Number Kep/ 1447/ Civil Law and State Administration in the TNI Environment.

Based on the provisions above, the history of legal aid in the military environment in Indonesia from the start has regulated restrictions on legal aid for TNI Soldiers who are affected by legal problems, namely prioritizing legal aid originating from within the TNI with the characteristic of a line of command or orders from superiors. Internal groups can even provide legal assistance to the families of TNI soldiers and civil servants who serve within the TNI to carry out proceedings in the general court environment. Thus, it is difficult for legal assistance from external circles to enter the military legal environment.

2. Legal Assistance for Civilians by Legal Advisors from the Military

Every Indonesian citizen has the right to get legal assistance, in any matter related to anything, and there are no restrictions even from any circle, as long as he is still an Indonesian citizen he has the right to get legal assistance at any time. so not only when facing legal problems with the police, judges or courts and/or dealing with other fellow citizens. Legal assistance can be requested for criminal, civil, state administration, labor cases and so on. There is no prohibition at all on getting legal assistance regarding anything, anytime and anywhere.⁸ Legal aid is also regulated in Republic of Indonesia Law Number 34 of 2004 concerning the TNI as stated in Article 50 Paragraph (2) letter f.⁹ Apart from active soldiers, legal assistance also applies to their families.

Article 105 of Law Number 31 of 1997 concerning Military Justice states: "In the event that a Suspect commits a criminal act, before the investigation begins by an Investigator, the Investigator is

⁸ YLBHI and PSHK, 2006, Guide to Legal Aid in Indonesia: Your Guide to Understanding and Resolving Legal Problems, Sentralisme Production, Jakarta, p. 46

⁹ Article 50 Paragraph (2) Republic of Indonesia Law no. 34 of 2004 concerning the Indonesian National Army: Soldiers and student soldiers receive official care and services, which include:

- a. decent income;
- b. family allowance;
- c. housing/dormitory/mess;
- d. health care;
- e. mental development and religious services;
- f. legal aid;
- g. health and life insurance;
- h. pension; And
- i. military operations assignment insurance

obliged to notify the Suspect of his right to receive legal assistance or that he must be accompanied in his case by Law advisor". The explanation of Article 105 explains: "In order to uphold human rights, from the stage of the investigation of the suspect it has been explained that the suspect has the right to be accompanied by a legal advisor during the examination at the court hearing." Based on the explanation of this article, the right to obtain legal assistance is only at the trial stage in court, not from the investigative examination. This is a weakness in the investigation process in the TNI environment which is different from civil society in general, because in this explanation there is a restriction that assistance by legal advisors can only be carried out during examinations in court. Furthermore, if we trace the provisions of Article 106 of the Military Justice Law which reads as follows: (1) In the event that an investigator is conducting an examination of a suspect, the legal advisor can follow the course of the examination by watching and hearing the examination. (2) In the event of a crime against State security, the Legal Advisor may be present to see but not hear the examination of the suspect.

In the article above, legal assistance can be provided from the investigation stage. Thus, the provisions of Article 106 and Article 105, especially the explanation, are not in sync, therefore Article 105 and its explanation need to be revised so that there are no multiple interpretations. Furthermore, Article 106 can be appreciated as a provision that embodies the basic rights of soldiers to obtain legal assistance from the time of investigation, although with restrictions. This limitation can be seen in the explanation of Article 106 which explains that legal advisors participate in the examination process passively, so that legal advisors are limited to their involvement by just watching and listening during the suspect's examination or when the investigator takes the BAP (Investigation Report) from the suspect.

Another problem also arises, if military interns can get legal assistance from the military, then what about their families, can they get legal assistance from the military? Of course the answer can be with certain conditions, we know. Together, getting the services of an advocate or legal advisor is not cheap and requires a lot of money. pretty high.

So, who has the right to receive legal treatment in the military, we quote the Technical Guidelines for Criminal Legal Assistance in the TNI Environment which was approved by the TNI Commander Number Kep/1447/XII/2018 Dated 28 December 2018 concerning Technical Instructions for Criminal Legal Assistance in the TNI Environment and Number Kep/1448 /

- a. Units within the TNI.
- b. TNI soldiers and TNI civil servants.
- c. Families of TNI Soldiers and TNI PNS, consisting of:
 - 1) Wives/husbands of TNI soldiers and TNI civil servants;
 - 2) Children of TNI soldiers and TNI civil servants; And
 - 3) Widows/widowers, parents, in-laws, siblings, in-laws and nephews of TNI Soldiers and TNI Civil Servants;
- d. TNI Soldiers' Wives Organization.
- e. Retired TNI officers, retired civil servants, warakawuri, widows/widowers of retired TNI civil servants and veterans in the TNI environment.
- f. People who are equated with TNI soldiers.
- g. Student Soldier.
- h. Cooperatives and Foundations within the TNI.
- i. Business entities established by cooperatives and foundations within the TNI.
- j. Partners from cooperatives and the TNI environmental foundation.

k. Those who have a working relationship in order to support the basic duties of the TNI.

Referring to point c and sub-points, it has been explained that for civilians it is limited to these points, so if there are TNI family members who want legal assistance, they can submit it to the nearest TNI legal office using a letter shown to their unit commander.

Then there are the requirements for applying for legal assistance using the services of a military legal advisor:

- a. Families of TNI soldiers and TNI civil servants must attach their TNI soldier and TNI civil servant membership cards, birth certificates and family cards;
- b. For retired TNI officers, retired TNI officers, warakawuri, widows/widowers of retired TNI civil servants and veterans within the TNI environment, attach a Retirement Decree and/or Veteran Identification Card; And
- c. For TNI cooperatives and TNI Foundations, attach a Power of Attorney requesting legal assistance from the management of the cooperative/foundation in accordance with the AD/ART.

If you are a member of a military family then make a letter requesting legal assistance which is presented to Ankum according to the area where you live.

And then, to further reassure the Military Legal Advisor himself, he must have a law degree, this is stated in the Decree of the TNI Commander Number Kep/1447/XII/2018 dated 28 December 2018 concerning Technical Instructions for Criminal Legal Assistance within the TNI and Number Kep / 1448/

- a. Implementing criminal legal assistance is personnel (soldiers/PNS) in TNI AD legal units who have a Bachelor of Laws qualification.
- b. Mastering Criminal Law and General/Military Criminal Procedure Law.
- c. Proficient in court martial law

So from the requirements above, of course not just any soldier provides legal assistance, but only those with a legal title and are in a legal unit, then TNI soldiers who provide legal assistance before being distributed to legal units throughout Indonesia are first educated at the Army Legal Education Center. where in this place they are equipped and reminded how to carry out procedures and activities like a qualified law graduate.

The Military Justice Law regulates legal assistance from within the TNI which does not charge fees for its services from TNI Soldiers or the families of Soldiers who are experiencing criminal legal problems. In its implementation, this legal assistance is based on orders with the knowledge and permission of the superior command (Papera), so that every implementation can be controlled because the TNI's hierarchical system in every activity implementation requires reporting in every activity.

Conclusion

The role of legal assistance for TNI soldiers and their families is very necessary to deal with the legal problems they face. Internal legal assistance from the TNI itself is regulated so that the person concerned must have at least a law degree so that in the future it should be regulated in the provisions of the law to have accreditation from an independent institution.

So that it is then necessary to re-create certain regulations if there is a legal advisor from the military who is taking the case, so that at the time of registration to register a case in the District Court if there are civilians who are litigating in the District Court with the Military as their legal advisor, it will be as easy as when it is a civilian Advocate. accompany their clients in proceedings at the District Court, because many District Courts do not yet know that military legal advisors can proceed in District Court so it takes time to register because of the need to take care of the administration which can be said to take longer than usual.

Then for Legal Advisors from the Military themselves, they must have a law degree, this is found in the TNI Commander Number Kep/ 1447/ Technical Instructions for Civil and State Administrative Legal Assistance within the TNI where the conditions for providing criminal legal assistance include:

- d. Implementing criminal legal assistance is personnel (soldiers/PNS) in TNI AD legal units who have a Bachelor of Laws qualification.
- e. Mastering Criminal Law and General/Military Criminal Procedure Law.
- f. Proficient in court martial law

So from the requirements above, of course not just any soldier provides legal assistance, but only those with a legal title and are in a legal unit, then TNI soldiers who provide legal assistance before being distributed to legal units throughout Indonesia are first educated at the Army Legal Education Center. where in this place they are equipped and reminded how to carry out procedures and activities like a qualified legal graduate who is ready to be deployed.

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