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## Deciding Desertion Cases in Absentia: Trials and Implications

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### Abstract

Military members are bound by strict laws and regulations, ensuring that all actions must align with the established legal frameworks. One of the most critical offenses within the Indonesian National Armed Forces (TNI) is desertion, given its significant impact on the integrity of the troops. This necessitates specific regulations for swift resolution and legal certainty. In cases where military personnel accused of desertion cannot be located, the judicial approach is particularly crucial. Employing a normative juridical method involves analyzing and interpreting legal principles and theoretical matters related to the crime, supported by an empirical juridical method that gathers insights from criminal law experts and law enforcement to reinforce the normative data. If the accused remains absent, the process to try the crime of desertion can proceed in absentia, according to Law No. 31 of 1997 concerning Military Justice, Article 143, which allows for a trial if the defendant does not appear by the time of the third summons. This provision ensures that proceedings can continue, upholding necessary discipline within the military. Judges deciding on cases of desertion consider three main aspects: juridical, based on formal statutory provisions; sociological, considering the social background of the defendant and the broader societal impact; and philosophical, focusing on ensuring that the punishment serves as a deterrent and upholds military discipline, aiming for a fair and just outcome. This comprehensive approach helps the military judicial system effectively address desertion, maintaining troop integrity and ensuring justice is served, even in the defendant's absence.

### A. Introduction

The Indonesian National Army (TNI) plays a crucial role as a specialized segment of the public tasked with defending the state and its people. Governed by military laws and



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regulations, all *TNI* actions must adhere strictly to applicable legal standards. As an instrumental entity in national defense and security, the *TNI* maintains a consistent approach towards safeguarding civilians and upholding their safety.<sup>1</sup>

*TNI* personnel undergo rigorous education and training to ensure they can perform their demanding and specialized duties effectively. This training emphasizes the importance of following commands meticulously, utilizing power judiciously, and operating efficiently. As legal awareness among the public increases, *TNI* soldiers are expected to exercise greater caution in their conduct to avoid any actions that might contravene established legal norms. In a world of rapidly evolving military contexts characterized by high levels of uncertainty and complexity, the *TNI* is expected to exemplify professionalism.<sup>2</sup> This includes displaying leadership qualities, loyalty, honesty, rule adherence, discipline, and an inspirational spirit that sets a standard for all Indonesians.

Distinct legal protocols apply to military personnel compared to civilian citizens, especially concerning the timing and application of sentences.<sup>3</sup> While military members are subject to the same laws as civilians, the procedures followed by military personnel accused of crimes differ, due to the jurisdiction of military justice over such matters, whereas civilians are subject to general justice.<sup>4</sup>

Indonesia recognizes four types of judicial settings: general courts, religious courts, military courts, and administrative courts<sup>5</sup>, as established by the Indonesian Constitution.<sup>6</sup> Military criminal law, first instituted in Indonesia in 1798, has evolved based on situational needs and historical experiences.<sup>7</sup> This branch of law has, over decades, performed political-ideological functions and experienced significant politicization.<sup>8</sup> The Military Court, a specialized judiciary, holds the authority to adjudicate certain cases involving military personnel, specifically those pertaining to military crimes. Law Number 48 of 2009 on Judicial Power clarifies that the Military Court's mandate includes the examination, trial, and decision-making on military criminal cases in compliance with existing laws and regulations (Article 25 Paragraph 4). Furthermore, the judiciary under the Supreme Court comprises judicial bodies that include general, religious, military, and state administrative courts.

The administration of justice in Indonesia is governed by Law Number 48 of 2009 concerning Judicial Power. This law establishes that judicial power represents an independent authority of the state, tasked with administering justice to uphold law and order based on

<sup>1</sup> Chalim, Munsharif Abdul, And Faisal Farhan. "Peranan Dan Kedudukan Tentara Nasional Indonesia (Tni) Di Dalam Rancangan Undang-Undang Keamanan 102 Nasional Di Tinjau Dari Perspektif Politik Hukum Di Indonesia." *Jurnal Pembaharuan Hukum* 2, No. 1 (2016): 102-110.

<sup>2</sup> Cara Wrigley, Genevieve Mosely, Michael Mosely, Defining Military Design Thinking: An Extensive, Critical Literature Review, *She Ji: The Journal Of Design, Economics, And Innovation*, Volume 7, Issue 1, (2021).

<sup>3</sup> Dewi, Nadia Novianti Kusuma. "Pertanggungjawaban Pidana Bagi Anggota Tni Yang Melakukan Tindak Pidana Kesusilaan Dengan Orang Yang Bukan Anggota Keluarga Besar Tni (Study Putusan Nomor: 5-K/Pmu/Bdg/Al/Iv/2019)." *Transparansi Hukum* 6, No. 1 (2023). Dewi, Nadia Novianti Kusuma. "Pertanggungjawaban Pidana Bagi Anggota Tni Yang Melakukan Tindak Pidana Kesusilaan Dengan Orang Yang Bukan Anggota Keluarga Besar Tni (Study Putusan Nomor: 5-K/Pmu/Bdg/Al/Iv/2019)." *Transparansi Hukum* 6, No. 1 (2023).

<sup>4</sup> Warsono, April 2019, Penyelesaian Tindak Pidana Disersi Secara In Absensia Di Pengadilan Militer Ii-10 Semarang, *Jurnal Spektrum Hukum*, Vol. 16, No. 1, Hal-139.

<sup>5</sup> Eny Kusdarini, Anang Priyanto, Sri Hartini, Suripno Suripno, Roles Of Justice Courts: Settlement Of General Election Administrative Disputes In Indonesia, *Heliyon*, Volume 8, Issue 12, (2022)

<sup>6</sup> Ni'matul Huda, Dodik Setiawan Nur Heriyanto, Allan Fatchan Gani Wardhana, The Urgency Of The Constitutional Preview Of Law On The Ratification Of International Treaty By The Constitutional Court In Indonesia, *Heliyon*, Volume 7, Issue 9, (2021).

<sup>7</sup> Imanuel, Dennis Raja. "Proses Penyelesaian Tindak Pidana Desersi Dilingkungan Tni." *Lex Crimen* 5, No. 3 (2016).

<sup>8</sup> Ija Suntana, Tedi Priatna, Four Obstacles To The Quality Of Constitutional Law Learning In Indonesia, *Heliyon*, Volume 9, Issue 1, (2023)

Pancasila, in alignment with the principles of the Republic of Indonesia as a Law State. It underscores the independence of the judiciary, emphasizing its freedom from the influence of other state powers, as well as from coercion or recommendations from extrajudicial entities, except as explicitly allowed by law.

In the context of the military, members are expected to adhere to specific regulations that reflect the discipline integral to military service. One of the prevalent issues within the Indonesian National Armed Forces (*TNI*) is the crime of desertion. Despite regulations, desertion remains a common problem, often exacerbated by internal and external factors that hinder expected standards of conduct. Desertion severely undermines organizational integrity and military honor. Article 87 of the Military Criminal Law (*KUHPM*) mentions the following regulations.

(1) Threatened for desertion

1st, those who leave with the intention of withdrawing forever from their service obligations, avoiding the dangers of war, crossing over to the enemy or entering military service in a country or other power without being justified for that.

2nd, those who because of their fault or intentionally make absences without permission during peacetime longer than thirty days, during wartime longer than four days.

3rd, those who intentionally make absences without permission and because they do not participate in carrying out part or all of an ordered trip.

(2) Desertion committed in peacetime, is punishable by imprisonment for a maximum of two years and eight months.

(3) Desertion committed during war time, is punishable by imprisonment for a maximum of eight years and six months.

The completion of criminal acts within the Indonesian National Armed Forces (*TNI*) necessitates specific regulations to ensure a consistent approach among officials tasked with resolving criminal cases. Desertion, given its significant impact on the integrity of the troops, is categorized as a high-priority crime that requires immediate and definitive legal resolution. Accordingly, Law Number 31 of 1997 concerning Military Courts explicitly addresses the adjudication of desertion crimes, particularly when the accused is absent from the trial.

The law stipulates that in cases of desertion, if the accused absconds and remains unlocated after six consecutive months, and after three legally executed summonses have failed to secure their presence at trial, the case can be adjudicated in absentia. This provision is crucial as it ensures that the judicial process can proceed even without the accused's presence, thereby not hindering the delivery of justice. It is specified that the six-month period commences once the case file has been transferred to the court.

However, the use of in absentia trials in desertion cases raises concerns about the principles of fair trial. Typically, the presence of the defendant is vital as stipulated in Law no. 8 of 1981 (Article 154 paragraph 4), which mandates that if a defendant, legally summoned, fails to appear without a valid reason, the examination should be postponed, and another summons should be issued. This principle ensures that the defendant has every opportunity to defend themselves, reflecting a fundamental right in legal proceedings.

The approach to handling these cases involves both a normative juridical method, analyzing and interpreting legal principles and theoretical concerns through literature reviews and legal texts, and an empirical juridical method, which supports the normative findings with insights from criminal law experts and law enforcement officials. This dual approach aims to thoroughly examine the legal frameworks and their application, ensuring that military law enforcement upholds the laws effectively while respecting the rights of the accused.

## B. Discussion

Military criminal law governs the behavior of military personnel, specifying what constitutes violations or crimes, and outlines the obligations, prohibitions, and associated penalties for those found in breach of these regulations. According to Amiroeddin Sjarif, military law often receives limited attention, perceived as relevant primarily to military members. However, this perspective is not entirely accurate. Military law functions as a vital sub-system within a nation's legal framework, given that the military is an integral part of society. The scope of military law can be broadly divided into two categories: material and formal military criminal law. Material military criminal law, as defined by Moch Faisal Salam, includes regulations that contain orders and prohibitions aimed at upholding legal order, with criminal penalties for non-compliance. On the other hand, formal military criminal law, or criminal procedural law, involves regulations that define judicial powers and the procedures for examination, investigation, prosecution, and sentencing of military personnel who violate material criminal law. This ensures the enforcement and maintenance of the material law.

Military Crime in the Military Criminal Code is divided into two parts, namely:

- a. Pure Military Crime (*Zuiver Militaire Delict*), which can only be committed by a military person, because of its special military nature;
- b. Mixed Military Crime (*Gemengdemilitaire Delict*); a crime that has been regulated in other laws, but because the threat of punishment is felt to be relatively light if it is committed by a military man, the provisions regulated in other laws are rearranged. in the Military Criminal Code with more severe punishment. 38

Examples of Pure Military Crimes and Mixed Military Crimes:

- a. Examples of Pure Military Crimes:
  - 1) The crime of desertion as regulated in Article 87 of the Military Criminal Code (*KUHPM*);
  - 2) Insubordinate Crime as regulated in Articles 105-109 of the Criminal Procedure Code
- b. Examples of Mixed Military Crimes:
  - 1) Rape committed by a military during the war. If rape is committed in a peaceful state, then the rapist is subject to the punishment that applies in the Criminal Code. But if it is done during the war then it will be subject to the provisions of the Criminal Procedure Code.
  - 2) Theft of military equipment where the military is given the task of guarding it, then the military who commits the theft is not subject to the provisions stipulated in the Criminal Code, but is subject to the provisions stipulated in the Criminal Code. The existence of military law does not mean that general criminal law does not apply to the military. However, for the military it applies to general criminal law as well as military criminal law. Article 1 of the *KUHPM* reads: (amended by Law No. 39 of 1947) "For the application of this Code the general criminal law provisions apply, including the ninth chapter of the first book of the Criminal Code, unless there are deviations determined by Constitution".

The special regulations that apply to the military are as follows:

### a. Military Compulsory Law

The law governing military conscription is Law Number 66 of 1958, as published in State Gazette No. 117/1958. This legislation underscores the concept that a nation's defense can only be effectively realized if preparations are made during peacetime as follows.

- 1) Armed Forces Reserves consisting of compulsory military personnel who were educated and trained periodically during peacetime;
- 2) Trained people consist of those who are not included in the armed forces (voluntarily or compulsorily) to perform non-military specific defense tasks, and assist the armed forces in carrying out their tasks directly or indirectly.

The military must be distinguished from trained people, because if the military is obligated the person concerned is active service as a military man, until the mandatory period is over.

b. Voluntary Military Act

To become a voluntary military member, or a permanent member of the military, one must comply with the regulations set forth in Law No. 19 of 1958. This law ratifies Emergency Law No. 26 of 1957 concerning Members of the Armed Forces Based on Voluntary Service Association (Voluntary Military) (State Gazette of 1957 No. 83). A voluntary military member is defined as an individual who enters the armed forces based on a voluntary commitment, meaning they willingly choose to become members of the military. This process involves individuals who actively seek and accept the responsibilities associated with voluntary military service.

c. Army Discipline Regulations (*PDT*)

Every citizen who enters military service, whether mandatory or voluntary, is required to adhere to strict discipline from the moment they are appointed as a soldier. This discipline is governed by the rules set out in Government Regulation No. 24 of 1949, which outlines the army discipline regulations. In military life, discipline is not just encouraged but absolutely necessary. It demands that every soldier must: 1) Comply with all army regulations and all official orders from each superior as well as regarding small matters in an orderly, precise, perfect and high awareness; 2) Uphold life in a new and regular army. In the life of the army, the discipline must be with full confidence, obedience and obedience, loyalty to superiors by adhering to the principles that have been stated in the *saptamarga* and soldier's oath.

d. Soldier Honor Regulations

Respect is always done with eyes fixed on the party being honored, and the person receiving the honor is always obliged to repay the honor.

Types of military honors:

- a) Respect for greatness, which is delivered to:
  - 1) Corpses in military ceremonies;
  - 2) National flag in official ceremonies;
  - 3) Head of state/deputy head of state;
  - 4) National anthem in official ceremonies;
  - 5) Army banners;
  - 6) Minister of Defense/Army Commander;
  - 7) Force Commander;
  - 8) Disaster;
  - 9) All high ranking officers;
  - 10) Regional Commander/equal official.
- b) Military honors are typically accorded to all service members or fellow rank holders as a way to strengthen corps camaraderie. The grand military salute involves a gun salute for soldiers equipped with long weapons, and a sword salute for those in ceremonial command roles.
- c) The Military Discipline Law Code, as outlined in the Republic of Indonesia Law Number 25 of 2014, addresses the consequences for members of the military who violate discipline laws. According to this law, those found in violation of military discipline can be subjected to disciplinary action. This action is carried out by the violator's direct superior within the context of a disciplinary judge's hearing, which typically includes the Troop Commander and his staff. The specific nature of disciplinary violations and the corresponding punishments are detailed as follows.
  - 1) Not specified in criminal regulations;
  - 2) Contradictory to an official order or service regulation;
  - 3) Not allowed to happen in the order and order of the army.

d) Military Criminal Law and Military Criminal Procedure Law are special laws that differ from general criminal law and general criminal procedure law.

In legal terms, an absenteeism court is a judicial process that allows for the examination and conviction of a defendant in absentia, meaning the individual is not physically present in court. This procedure is particularly relevant for cases of desertion, a crime specific to military personnel characterized by the illegal or intentional withdrawal from one's service obligations without permission. Desertion occurs at or from the place where the service member is assigned and is considered a severe violation of military discipline and law. .

Desertion is regulated in the Military Criminal Code contained in Article 87:

(1) Threatened for desertion, military:

1st, those who leave with the intention of withdrawing forever from their service obligations, avoiding the dangers of war, crossing over to the enemy or entering military service in a country or other power without being justified for that.

2nd, those who, due to their fault or intentionally, are absent without permission during peacetime longer than thirty days, during wartime longer than four days.

3rd, those who intentionally make absences without permission and because they do not participate in carrying out part or all of an ordered trip.

This article explains that there are three types of desertion:

1) Desertion for the purpose, as referred to in Paragraph (1) 1st:

a) Leaving and meant withdrawing forever from his service obligations.

b) Avoiding war.

c) Crossing over to the enemy.

d) Unlawfully enlisted in the military service of a foreign country.

2) Desertion due to time, as referred to in Paragraph (1) 2nd:

a) Unlawful absence due to his fault, the duration of which exceeds thirty days of peacetime.

b) Unlawful absence due to his fault, four days longer during wartime.

c) Unlawful absence due to intention, during peacetime longer than thirty days and during wartime longer than four days.

3) Desertion as a result, as referred to in Paragraph (1) 3: Generally included in the meaning of Article 85 2 coupled with an element of intent on the part of the perpetrator. 44

The desertions carried out as referred to above, the provisions of this article can be applied to the perpetrator. Desertion is also regulated in Article 89 of the *KUHPM* it is explained:

"Punished with capital punishment, life imprisonment or temporary imprisonment for a maximum of twenty years:

1st, Desertion to the enemy;

2nd, (Amended by Law No. 39 of 1947) Desertion during wartime, and from troop units, ships or airplanes assigned to the security service, or from a place or a post that is attacked or threatened with attack by the enemy. Desertion to the enemy is the meaning with the intention of crossing over to the enemy as referred to in Article 87 Paragraph (1) 1st. Desertion to the enemy means that the perpetrator must already be in the area or the enemy's side or in other words the perpetrator has really cooperated and provided an advantage to the enemy. This act can also be classified as an act of military treason as referred to in Article 64 of the Criminal Code in conjunction with Article 124 of the Criminal Code.

The primary characteristic of the criminal act of desertion is defined as an unauthorized absence by a military person from a designated place where they are required to be and fulfill their duties and service obligations. This absence can manifest in various forms such as traveling, hiding, defecting to the enemy, enlisting in the military of another country, or intentionally causing oneself to be left behind. Desertion is notably prevalent within the military

justice environment compared to other crimes.<sup>9</sup> The term "*in absentia*," derived from Latin, means "not present." Legal scholar Andi Hamzah explains that in Latin legal terminology, "*in absentia*" or "*absentium*" refers to being in a state of absence. It is termed "*absentia*" in French and "*absentie*" in English. Aggravation in the context of desertion, also known as repetition or recidivism, occurs when the perpetrator has previously been convicted of a similar crime, in this case, desertion or deliberate unlawful absence. Sanctions for desertion vary between peacetime and wartime conditions. During peacetime, the penalty for desertion is outlined in Article 88 paragraph (2) of the *KUHPM* (Military Criminal Code)<sup>10</sup>, while sanctions for aggravated desertion during wartime are detailed in Article 88 paragraph (1) *KUHPM*. It is important to note that while the *KUHPM* does not provide a written definition of criminal actions, it clearly specifies the punishment for military personnel committing desertion in Article 87 *KUHPM*.<sup>11</sup>

The concept of trying or imposing a sentence in absentia involves conducting a trial and potentially sentencing a defendant without their presence in court. Typically, criminal proceedings necessitate the accused's presence at an open court hearing, as stipulated in Article 1 sub 15 of the Criminal Procedure Code, which defines the accused as a suspect who is prosecuted, examined, and tried in court. However, in absentia proceedings deviate from this norm by allowing the legal process to proceed and conclude without the defendant being physically present.

This form of trial is particularly applicable in the military context, where maintaining discipline is crucial. Military life hinges on discipline, which serves as its backbone, and any absence of military members from their designated duty stations is treated as a criminal act, unlike in non-military organizations where such an act might be regarded merely as a breach of organizational discipline.<sup>12</sup> The rationale behind this stern approach is to preserve the integrity and operational readiness of the military forces.<sup>13</sup>

Further clarifying this, Article 143 of Law No. 31 of 1997 defines an *in absentia* examination as one conducted in the interest of swiftly resolving cases to uphold military discipline. Specifically, this applies in situations where the accused has absconded and remains unlocated for six consecutive months despite being legally summoned three times consecutively without a valid reason for their absence. In such cases, a judgment can be issued in their absence, once the grace period of six months has elapsed after the case file is transferred to the Court. Article 143 provides requirements for desertion trials to be conducted in absentia, namely:

- a. The deadline for the case file is 6 (six) months from the date of handing over to the court;
- b. Has been summoned to court 3 (three) times;
- c. It can be applied to desertion cases where the investigation is carried out in absentia.

The judge's consideration is a critical element in ensuring that a judicial decision embodies justice (*ex aequo et bono*), legal certainty, and provides benefits to the involved parties. It is essential that these considerations are addressed with thoroughness, accuracy, and care. If a judge's considerations are found to be insufficiently thorough, accurate, or careful,

<sup>9</sup> Priambada, Bintara Sura, Andi Sutrasno, And Hervin Rahadian Janat. "Proses Penuntutan Terhadap Anggota Militer Yang Melakukan Tindak Pidana Kekerasan Dalam Rumah Tangga Di Lingkungan Militer." *Syntax Literate; Jurnal Ilmiah Indonesia* 7, No. 7 (2022): 9410-9418.

<sup>10</sup> Pratama, Tri Utoyo. "Kajian Yuridis Tindak Pidana Desersi Dengan Pemberatan (Analisis Putusan No. 9-K/Pm. I-02/A1/Ii/2020)." *Jurnal Ilmiah Mahasiswa Hukum [Jimhum]* 2, No. 2 (2022).

<sup>11</sup> Nurcahyo, Raden Indra Dwi, And Dini Dewi Heniarti. "Tinjauan Umum Terhadap Tindak Pidana Desersi Yang Dilakukan Oleh Prajurit Tni Dalam Perspektif Sistem Peradilan Pidana Militer Dihubungkan Dengan Pasal 87 Kuhpm." *Prosiding Ilmu Hukum* (2019): 894-901.

<sup>12</sup> Amu, Robi. "Kajian Hukum Pidana Militer Indonesia Terhadap Tindak Pidana Desersi." *Jurnal Legalitas* 5, No. 01 (2012).

<sup>13</sup> Bryan Bilven, Boglárka Nyúl, Anna Kende, Exclusive Victimhood, Higher Ethnic And Lower National Identities Predict Less Support For Reconciliation Among Native And Chinese Indonesians Through Mutual Prejudice, *International Journal Of Intercultural Relations*, Volume 91, (2022)>

the resulting decision is at risk of being overturned by higher courts, such as the High Court or the Supreme Court.

#### 1. Juridical Considerations

Juridical considerations are the basis upon which judges evaluate the law as a comprehensive system that encompasses legal principles, norms, and rules. Within these juridical considerations, judges assess the appropriateness of the sentences to be imposed on defendants during trials. The foundation for these considerations includes juridical facts presented during the trial, as well as legally mandated elements that must be incorporated into the decision. Key components considered in the decision-making process include the public prosecutor's indictment, statements from the accused and witnesses, evidence presented, and relevant articles from criminal law regulations.

#### 2. Sociological Considerations

Decisions that fulfill sociological considerations are those that align with the norms and customs prevalent within the community. According to M. Solly Lubis, sociological considerations reflect community demands or needs that require resolution to ensure societal benefits. These considerations incorporate approaches based on the background, socio-economic conditions, and values existing within society, adjusting judicial decisions to match the rules, principles, and beliefs prevalent in the community. This approach underscores the importance of judges possessing a deep understanding of sociology and psychology, enabling them to render decisions that are legally sound while also being socially relevant and responsive to the needs of the community they serve. This synthesis of legal and sociological insight forms a critical aspect of a judge's considerations when making decisions.

#### 3. Philosophical Considerations

Philosophical considerations in judicial decisions focus on the value of justice for both the defendant and the victim. Justice is generally defined as fairness and impartiality, emphasizing the principle that everyone should be treated equitably and receive their due rights. In the context of philosophy, as reflected in the foundational values of the state, justice is achieved when principles such as not causing harm to others and treating every individual according to their rights are fulfilled.

The primary responsibility of a judge is to adjudicate, which involves the processes of receiving, examining, and deciding criminal cases. In carrying out these duties, judges are guided by the Criminal Procedure Code (*KUHAPMIL*), which is founded on the principles of freedom, honesty, and impartiality. Some of the judges' considerations in deciding a case include:

##### 1. Juridical Considerations

It must be reiterated that judicial considerations are those made by a judge, based on the legal facts presented during a trial. By law, these considerations must be included in the decision. Known as *Ratio Decidendi*, these are the arguments or reasons that judges use as legal grounds to form the basis of their rulings.

The judge's considerations which are classified as juridical considerations are:

- a. Public Prosecutor's Indictment
- b. Defendant's Statement
- c. Witness Statement
- d. Evidence
- e. Articles of Criminal Law Regulations.

##### 2. Philosophical Considerations

Philosophical considerations focus on the value of justice for both the defendant and the victim. Justice is commonly understood as fair and impartial treatment, aligning with the notion that



everyone should be treated equitably and without bias. In philosophical terms, as reflected in the foundational values of a state, justice is exemplified when two key principles are upheld: not to cause harm to anyone, and to ensure that every individual receives their rightful due.

### 3. Sociological Considerations

Sociological considerations involve elements that focus on the factual context surrounding a case, such as the background of the crime, its consequences, the defendant's personal circumstances, socio-economic status, family environment, and religious factors. According to Article 5, paragraph (1) of Law No. 48 of 2009 on Judicial Power, judges are mandated to explore, follow, and understand the legal values and sense of justice prevalent in society. Factors that must be considered sociologically by a judge in making a decision on a case, include:

- a. unwritten sources of law and values that live in society.
- b. good and bad characteristics of the defendant as well as the mitigating and aggravating values of the defendant.
- c. the presence of peace, mistakes, the role of the victim.
- d. the environment in which the law applies or is applied.
- e. cultural factors

From a theoretical and practical perspective, a judge's decision is a formal pronouncement made in court cases that are open to the public. This decision comes after adhering to the general process and procedural law of criminal procedure and typically includes verdicts of conviction, acquittal, or dismissal of all charges. These decisions are documented in writing with the intention of resolving the case. It is challenging to pinpoint precisely which factors contribute most significantly to these decisions, as they are likely influenced by a complex interplay of elements rather than a single, predominant cause.<sup>14</sup>

Soedarto emphasizes that judicial independence is crucial, particularly to ensure the objectivity of judges in rendering their decisions. This independence allows the judge to make decisions based on the matters at hand, free from external pressures or influences.<sup>15</sup>

1. The decision regarding the event, is whether the defendant committed the act he was accused of.
2. Decisions regarding the law, namely whether the actions committed by the defendant constitute a crime and whether the defendant is guilty and can be punished.
3. Decision regarding the sentence, whether the accused can indeed be punished.

In sentencing military personnel guilty of the crime of desertion, judges carefully consider both aggravating and mitigating factors to ensure that the imposed penalties are just. This balance aims to maintain relevance in the court's decisions, especially when dealing with members of the military who act against discipline. The underlying considerations for justifying the crime of desertion often refer to Article 143, which focuses on resolving cases promptly and maintaining discipline to preserve the integrity of the troops.

Article 143 is both limitative and imperative in its formulation, clearly delineating the bounds and requirements set by law. As such, judges and law enforcers are mandated to strictly adhere to what is stipulated in the law, ensuring legal certainty and fairness. This approach restricts judicial discretion to the explicit dictates of the law.

In cases where the law lacks clarity or does not cover a specific scenario, new interpretations may be developed through *recht vinding* (law finding) or *recht schepping* (law creation). This flexibility is crucial for addressing legal gaps and evolving societal standards but is only invoked when absolutely necessary. The provisions, such as the six-month grace period mentioned in the law, are not without purpose; they serve specific aims within the

<sup>14</sup> T. Woolley, J.A. Round, M. Ingram, Global Lessons: Developing Military Trauma Care And Lessons For Civilian Practice, *British Journal Of Anaesthesia*, Volume 119, Supplement 1,(2017).

<sup>15</sup> Soedarto, *Kapita Selektta Hukum Pidana*, (Bandung: Alumni, 1986), Hal-74.

judicial process, reinforcing the intent of the legislation and ensuring that justice is served in line with legal and societal expectations.

In order to properly adjudicate desertion cases in absentia, it is essential to adhere to the stipulations outlined in Article 143. This article mandates a six-month time limit for the investigation of desertion cases conducted in absentia. Any proceedings that fail to comply with these formal requirements are considered invalid, as they contradict the law's explicit provisions. The rationale for allowing desertion cases to be tried in absentia under Article 143 is to expedite case resolution and to uphold military discipline, essential for maintaining the integrity of the troops.

In cases where the desertion has caused issues not only to the unit but also to the broader agency and country, it is crucial that military personnel who desert and whose whereabouts are unknown are promptly dealt with. This approach not only maintains the integrity of the forces but also serves as a deterrent to other military members, reinforcing the importance of duty and adherence to military regulations within Indonesia.

The Panel of Judges, when imposing sentences on deserters, must be convinced that the punishment will deter further incidents of desertion. The judges take into consideration both juridical and sociological factors, assessing the gravity of the sentence based on the rules applicable and the non-exemplary conduct of the defendant, which has harmed the state, its agencies, and military units. This acts as a legal precedent to enforce discipline among other military members, encouraging them to embody the spirit of chivalry and uphold their responsibilities.

According to Lawrence M. Friedman's framework, which includes legal structure, legal substance, and legal culture, the handling of desertion cases, particularly in absentia, needs to consider these elements. Article 141 paragraph (10) in conjunction with Article 143 of Law Number 31 of 1997 on Military Justice outlines that proceedings can occur in the absence of the defendant if they cannot be located. This aligns with the legal structure, which demands professionalism and leadership, and the legal culture, which dictates how soldiers should respond to crimes such as desertion.<sup>16</sup>

### C. Conclusion

In adjudicating the case, the judge considered three key aspects: juridical, sociological, and philosophical considerations. Juridical considerations involve interpreting the law as a comprehensive system that encompasses legal principles, norms, and rules. Sociological considerations take into account the social background of the defendant and aim for decisions that harmonize with the prevailing societal norms and customs. Philosophical considerations focus on achieving justice for both the defendant and the victim, emphasizing the values underpinning the legal system.

The decision-making process for crimes of desertion committed by military personnel also involves weighing aggravating and mitigating factors. This ensures that the penalties imposed are just and serve the broader goal of maintaining discipline within the military ranks. Thus, the judge's approach in sentencing is designed to be relevant and fair, holding military members accountable for their actions.

Indonesian National Armed Forces should increase preventive measures against desertion, particularly among members with the ranks of *Bintara* and *Tamtama*. This could involve greater supervision and engagement by superiors who have the authority to discipline (*ANKUM*). By being more attuned to the activities and needs of their subordinates, *ANKUM* can minimize neglect and enhance the rapport between ranks, fostering a more cohesive

<sup>16</sup> Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence) Termasuk Interpretasi Undang-undang (Legisprudence)*. Jakarta: Kencana Prenada Media Group, 2009, hlm. 204.

military environment. This proactive approach could potentially reduce the incidence of desertion and strengthen the overall effectiveness of the military forces.

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