

# CHAPTER I

## BACKGROUND

### 1.1 Background

Eugene R. Fidel described Military law is a law that is used to ensure proper discipline in a military body and is the “core legal activity”.<sup>1</sup> From his definition, two main important elements can be concluded as part of military law, which is “discipline” and “core legal activity”. Both elements suggest that military law is a legal activity that has the purpose to ensure the discipline of the military body itself. “Core legal activity” in the military suggests all kinds of legal activities, for which in this thesis, the judicial legal activities will be the ones to be discussed. Inside the military law, there are laws to punish military members who commit to which the law is known to be criminal law.<sup>2</sup> The criminal law inside a military law system varies between states depending on their jurisdiction. In the Indonesian Armed Forces, the criminal law in the military law is known as the Indonesian Military Criminal Code or “Kitab Undang-Undang Hukum Pidana Militer” [“KUHPM”].

The existence of a criminal law inside the military law makes it indisputable that a court or an adjudicating body is needed to try individuals for their crimes. This inevitability aligns with Dubber’s opinion that military law is often depicted

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<sup>1</sup>Eugene R. Fidell, “*Military Law*”, *The Modern American Military*, Vol 140, Number 3, Summer 2011, pg. 166

<sup>2</sup>Moch. Faisal Salam, *Hukum Pidana Militer di Indonesia*, (Bandung: Penerbit Mandar Maju, 2006), pg. 26

as a law that is emphasized in punishing the military members.<sup>3</sup> The courts in the military are commonly known as Military Courts. Dubber stipulated that the jurisdiction of a Military Court is different for each country. In this matter, there are no “customary” practices to its jurisdiction as there are no commonly agreed facts that the Military Court’s jurisdiction more or less rests within the same matter. Under certain circumstances, the formation or history of the creation of the courts plays a major role in the existing functional court.

The Military Court in Indonesia per se predates Indonesia’s independence since the Dutch occupation already introduced Military Courts. In the times of Dutch occupation, Military Courts were established to adjudicate the Dutch Navy also known as *Koninklijke Marine* [“KM”] and the Dutch Indonesian Ground Forces also known as *Koninklijk Nederlandsch Indisch Leger* [“KNIL”].<sup>4</sup> During these times, the purpose of the court is to uphold military discipline in the Dutch Navy and Dutch-Indonesia Ground Forces. The courts during that time use the now known KUHPM as their substantive law in adjudicating cases. After independence was gained on the 17<sup>th</sup> of August 1945, Indonesia inherited that KUHPM and the court’s practice due to the 1945 Constitution of the Republic of Indonesia [“1945 Constitution”],<sup>5</sup> Transitional Provision. As of today, the

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<sup>3</sup>Markus D.Dubber and Tatjana Hornle, “*The Oxford Handbook of Criminal Law*”, (Oxford: Oxford University Press, 2014), pg.329

<sup>4</sup> “SEJARAH PERADILAN MILITER DI INDONESIA”, <https://www.dilmiltama.go.id/home/index.php/tentang-pengadilan/profile-pengadilan/sejarah-pengadilan-militer.html>, accessed at 30 March 2020

<sup>5</sup>PEN. When the writer of this thesis refers to the term “1945 Constitution” then it is referring to the 1945 Constitution of the Republic of Indonesia after the fourth amendment. Should the writer meant 1945 Constitution prior to, or in regards to a certain amendment, an additional identification of the the “1945 Constitution” will be provided in the body of text.

Military Court in Indonesia is no different than it was during Dutch Colonial times as the substantive law and the practice was inherited from those times.

The existence of a Military Court in Indonesia is recognized in Article 24 Verse 2 of the 1945 Constitution, stipulating that the courts under the Supreme Court include Military Court. With power residing from the Supreme Court of Indonesia and the position below the Supreme Court of Indonesia, as a legal consequence, Military Courts in Indonesia are the same in its level as any other General Courts such as civil courts for non-military members. The Military Court in Indonesia operates under Law Number 31 Year 1997 Concerning Military Court [**Military Court Law**], in which its jurisdiction is laid out under Article 9 Verse 1 which stipulates that the court's jurisdiction are for military members or civilians considered as military members that have committed an alleged crime. The crimes also include general crime in "Kitab Undang-Undang Hukum Pidana" [**KUHP**].

This means the Military Court's jurisdiction is to adjudicate cases where a military member commits an alleged crime regardless of whether the crime falls within general crime or military crimes. Military members are subject to two court jurisdictions since the General Courts also retain jurisdiction for General Crime. This is further strengthened by Article 11 of Military Court Law which acknowledges that for a criminal crime to be conducted there can be more than one court to exercise its jurisdiction over the case. Article 11 supports Article 9 in this matter by acknowledging the possibilities that a military member may be retained by more than one court. However, Article 11 will not be the main legal

issue since the writer writes this paper in concerns of Article 9. Consequently, the military members will enjoy privileges as surely one of the courts will be more beneficial than the others.

On the other hand, it would be unfair that civilians are adjudicated in General Court and military personal who conduct general crime is subject to the Military Court. Civilians who are only subject to General Courts for committing a general crime cannot possibly enjoy the benefits the military members are enjoying since they have no option but to only submit to one jurisdiction. Benefits in the Military Court for military personals are common, as there has been a long stigma in Indonesia that the court is exclusive, as the regulations on military law are heavily sided on the military, considering the law on the Military Court was enacted during the New Order Regime.<sup>6</sup>

As of “after-reformation”, the government wanted the military personal subject to fair treatment; where military members who commit a general crime are subject to General Court and military crimes subject to Military Court. It is through People’s Representative Decision TAP MPR No. VII/2000 in which the government decides for a recall on the Military Court’s adjudication to provide fair treatment and prevention of privilege. The follow-up was through Article 64 of Law Number 34 Year 2004 Regarding Indonesia Armed Forces [**“Indonesia Armed Forces Law”**] where military members who commit general crime are subject to General Court and military crime subject to Military Court. The problem is Indonesia did not change the jurisdiction of the Military Court and still

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<sup>6</sup>Kontras, *Menerobos Jalan Buntu Kajian Terhadap Sistem Peradilan Militer Di Indonesia*, (Jakarta: Kontras, 2009), p. 37

acknowledges the Military Court Law for the formal proceedings. Consequently, Military Courts still retain their jurisdiction and therefore providing privileges by overlapping jurisdiction with the General Court, although, ideally as meant by the MPR's Decision and the Indonesia Armed Forces Law is for the military court to be only to adjudicate military crimes.

Indonesia is a state law, evident in Article 1 Verse of the 1945 Constitution. As a state law, one of its obligations is to ensure the application of Equality Before The Law in its country.<sup>7</sup> Equality Before The Law is also guaranteed in Article 28 D Verse 1 of the 1945 Constitution where every citizen is entitled to equal treatment before the law. Therefore, Indonesia is under the obligation of its constitution to ensure equal treatment in its country and all aspects and for this research, jurisdictions of the courts to its people.

However, as stated above, the existence of the Indonesia Armed Forces Law still does not guarantee Equality Before The Law as wanted by the TAP MPR, therefore returning it to its original stance; mere government's plan. The government's purpose of providing equality before law then becomes a mere *ius constituendum*.<sup>8</sup> Furthermore, the government decides to leave things as it is as no one wants to tackle the issue with no new laws enacted concerning Military Court up until the present date the author writes this thesis. In practice, practically the court operates under Military Court Law. That means, in practice, the court still retains its rights to adjudicate cases based on Article 9 Verse 1 of Military Court

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<sup>7</sup>Julita Melissa Walukow, "Perwujudan Prinsip Equality Before The Law Bagi Narapidana Di Dalam Lembaga Pemasyarakatan Di Indonesia", *Lex et Societatis*, Vol 1, Number 1 January 2013, p.163

<sup>8</sup>A. Mulya Sumaperwata, *Hukum Acara Peradilan Militer*, (Bandung: Pasundan Law Faculty Alumnus Press, 2007), p. 110

Law which is now at question since the author submits it is explicitly against the constitution.

The aforementioned TAP MPR or the decision of the people's representative has already been a clear warning and realization that this issue of the Military Court jurisdiction is an ongoing issue. The clear action to execute TAP MPR was with the new Indonesian Armed Forces Law, however, without the law of the Military Court changed then all the actions of the people's representative would be rendered useless as the practice of the court's jurisdiction prevails.

The facts stated above create a legal issue of whether the Military Court is against the 1945 Constitution, which both recognizes the Military Court's existence but also recognizes Equality Before The Law principle. To dissect the legal issue at hand, this thesis shall start with how the Military Court is regulated in Indonesia. This thesis would further scrutinize the constitution to understand the frame of Indonesia as a state law that is obliged to implement Equality Before The Law in its proceedings. The last dissection of this thesis would be whether the regulation on the Military Court is against the principle of Equality Before The Law is recognized under the 1945 Constitution. It is important to solve the legal issue introduced above so that the government and the military can abide by the constitution. Practically, citizens and military members also need a strong law to protect their equality, as required by the 1945 Constitution.

## **1.2 Formulation Of Issues**

Based on the background elucidated above, the author has presented a general background on Military Court law. The Military Court Law, under Article 9 Verse 1, elucidated that the court retains jurisdiction over Indonesia Armed Forces Member who commits both military crime and general crime. The General Courts too retain jurisdiction over the military members who commit a general crime. Civilians on the other hand can only be subject to one single jurisdiction which is the General Courts for a general crime. The military members being subject to two different courts means that one of them will always be beneficial to the others. When compared to a civilian who has no option but one jurisdiction, the opportunity retained by the military members is considered privileged. Consequently, there is an alleged breach of the Military Court Law is against the principle of Equality Before The Law under the 1945 Constitution. Therefore, the research formulation is as follows.

1. How is Equality Before The Law stipulated in Article 28 D Verse 1 of the 1945 Constitution applied in Indonesia's court of law?
2. How Article 9 Verse 1 of Law Number 31 Year 1997 Concerning Military Court is against the principle of Equality Before The Law which is stipulated in Article 28 D Verse 1 of the 1945 Constitution?

## **1.3 Research Purpose**

The research purpose of this thesis is intended to find a proper answer to the formulation of the issue as elucidated above. The formulation of the issue

presented above revolves around the notion of Equality Before The Law principle is mandated by the 1945 Constitution. Conclusively, the research purpose is:

1. To analyze how Equality Before The Law principle under Article 28 D Verse 1 of the 1945 Constitution is applied in the court of laws in Indonesia.
2. To elaborate on how Article 9 Verse 1 of Military Court Law is against Equality Before The Law under Article 28 D Verse 1 of 1945 Constitution.

#### **1.4 Research Benefits**

Research benefits in this thesis incorporate theoretical benefits and practical benefits. Theoretical benefits are meant as benefits theoretically where the benefits can be assumed and not yet realized in reality. On the other hand, practical benefits are benefits from this thesis that immediately took place upon the completion of the thesis.

##### **1.4.1 Theoretical Benefits**

The theoretical benefits of this thesis are to provide a solid answer on the legal issue of the Military Court as stated in the background. This thesis, theoretically, will give answers to questions regarding the Military Court, giving a reasonable and valid ground to answer the legal issue and formulation of the issue.

##### **1.4.2 Practical Benefits**

The practical benefits of this thesis are to inform readers and enrich the legal studies about jurisdictions of Military Courts that are against the principle of Equality Before The Law and also to give a contribution to the legal field of military law studies.



## **1.5 Writings Systematic**

Writings systematic of this thesis and their short explanation will be as follows:

### **1. Chapter 1: Background**

This section of the thesis will cover the background on this thesis in which the existence of Military Court under Law No.31 Year 1997 is against the 1945 Constitution's acknowledgment of Equality Before The Law. The main legal issue is the Military Court that violates the constitution of Indonesia. To dissect the legal issue at hand it has been divided into three formulations of issues which are, how is the Military Court regulated, what is Equality Before The Law under the 1945 constitution, and whether or not the regulations on the Military Court is against the constitution in respect to Equality Before The Law.

### **2. Chapter 2: Literature Reviews**

This chapter of the thesis will describe the theories that will be used in this thesis, later on, used in Chapter 4 of the thesis in regards to analysis. This chapter will rely upon theories and doctrines with sources that can be questioned responsibly.

### **3. Chapter 3: Research Methodology**

This chapter will elaborate on the research methodology used for this thesis. This thesis will use a normative research methodology. Normative research methodology means using secondary data to research the current legal issue at hand.

### **4. Chapter 4: Research Findings And Analysis**

This chapter of the thesis will analyze the formulation of issues and scrutinize them systematically and to find the answers to the legal issue at hand. This section will rely on the author's analysis of the current legal issue, to come up with a solid answer regarding the legal issue stipulated in the background. The author would also analyze a case to show the military courts practice in retaining absolute competence over military members who committed general crime.

#### 5. Chapter 5: Conclusion and Recommendation

This chapter of the thesis will conclude the analysis conducted in Chapter 4, which in turn will conclude the answers to the formulation of issues. The author of this thesis will further provide recommendations concerning the legal issue stipulated in the background.

