

The effectiveness of jurisprudence application in law enforcement in Indonesia: Case study of LGBT-related crimes in military courts

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Abstract

This research examines the effectiveness of jurisprudence in law enforcement in Indonesia, focusing on LGBT-related criminal cases within the military justice system. Although the Indonesian Penal Code (KUHP) does not explicitly prohibit homosexual conduct between consenting adults, LGBT cases in the military have become a significant legal issue, given that the Indonesian National Armed Forces (TNI) uphold discipline, morals, and ethics. The Supreme Court, through its jurisprudential ruling, has determined that homosexual conduct within the TNI can be prosecuted under Article 103 paragraph (1) of the Military Penal Code (KUHPM) regarding "Refusal of military orders." While this ruling breaks through the principle of legality by interpreting the law analogically, the jurisprudence has proven effective in reducing the incidence of immoral acts involving same-sex soldiers. This study aims to evaluate the extent to which jurisprudence can serve as an effective legal instrument in addressing the legal void concerning LGBT conduct in military courts. Furthermore, the research explores the impact of applying jurisprudence on justice and stability in military law enforcement, considering the prevailing social and religious norms in Indonesia. The findings of this research are expected to contribute to the development of more comprehensive and fair legal policies in handling similar cases.

Keywords: Jurisprudence, LGBT, military courts, law enforcement, Indonesian National Armed Forces (TNI)

Introduction

Jurisprudence is one of the unwritten sources of law that plays a significant role in the development of law in Indonesia. Its existence often serves as a solution in the midst of legal gaps, particularly when existing legislation is insufficient to regulate emerging societal issues^[1]. One of the legal issues currently developing and requiring attention is criminal acts involving the Lesbian, Gay, Bisexual, and Transgender (LGBT) community within the Indonesian National Armed Forces (TNI). Although LGBT behaviour is not explicitly regulated in the Indonesian Penal Code (KUHP), its presence presents new legal challenges for law enforcement officers, particularly within the military sphere. Recently, Indonesian society was shocked by the rising number of LGBT cases within the TNI. The directive from the TNI leadership at the time was to resolve these cases through criminal legal channels, despite the absence of clear laws prohibiting LGBT conduct. Article 292 of the Indonesian Penal Code (KUHP) only prohibits homosexual acts with minors but does not explicitly ban homosexual relationships between consenting adults. This posed a challenge for judges in military courts, who were tasked with upholding the law while considering the strong moral, religious, and customary values in Indonesia.

Throughout the long history of human civilization, LGBT behaviour has been mentioned in various Holy Scriptures, both in Islam and Christianity. The story of the people of Prophet Lot in the Qur'an and the destruction of the cities of Sodom and Gomorrah in the Bible are examples of how homosexual conduct is considered a serious violation of religious teachings. In Indonesia, LGBT behaviour contradicts religious values and Eastern customs, making it difficult for society at large to accept the existence of the LGBT community. On the other hand, in Western countries, LGBT rights have been recognized and protected on the

basis of freedom and human rights, including the right to same-sex marriage.

However, despite LGBT behaviour being strongly at odds with moral and ethical norms in Indonesia, criminal law has yet to explicitly regulate it as a criminal offence, except in the context of Article 292 of the Penal Code (KUHP), which only applies if the perpetrator is an adult engaging with a minor. In the context of military justice, this issue becomes more complex, given that the TNI, as an institution, upholds the discipline and moral integrity of its members. In the absence of specific criminal laws addressing LGBT behaviour within the military, the jurisprudence issued by the Supreme Court has become a crucial instrument in dealing with such cases.

The Supreme Court, as the highest judicial body, through its ruling, determined that immoral acts committed by same-sex TNI soldiers can be considered a criminal offence under Article 103 paragraph (1) of the Military Penal Code (KUHPM) concerning "Refusal of military orders." Although this decision involves the use of analogical interpretation and breaches the principle of legality^[2], the jurisprudence has proven effective in reducing the number of immoral offences committed by TNI soldiers. This policy reflects the need to address the legal void in criminal law related to LGBT behaviour within the military, while ensuring that conduct deemed immoral can still be subjected to clear legal sanctions.

This research aims to examine the effectiveness of the application of jurisprudence in law enforcement in Indonesia, particularly in handling LGBT-related criminal offences within military courts. The analysis of this case will provide insights into how jurisprudence can function as a flexible legal instrument to fill legal gaps, as well as its impact on justice and order within the military environment.

Research method

This study employs a normative juridical approach combined with qualitative analysis. The normative juridical approach is utilised to examine the legislative framework related to the application of jurisprudence, particularly concerning LGBT criminal cases within military justice. The research relies on secondary data, including primary, secondary, and tertiary legal materials.

Primary legal materials include relevant statutes such as the Indonesian Criminal Code (KUHP), the Indonesian Military Criminal Code (KUHPM), and decisions from the Supreme Court that establish jurisprudence regarding LGBT offences within the military. Secondary legal materials consist of legal literature, textbooks, scholarly journals, and articles pertinent to the topic. Tertiary legal materials include legal encyclopaedias, dictionaries, and other legal documents.

The analysis method used is descriptive-analytical, where the researcher explains and evaluates the relevant laws and jurisprudence, assessing their effectiveness in legal enforcement. Additionally, case studies of military court decisions related to LGBT issues are conducted to examine the application of jurisprudence in military judicial practice. The study employs document analysis as a data collection technique, gathering and analysing various legal documents and court decisions relevant to the application of jurisprudence in handling LGBT cases within the military. This technique is particularly relevant in normative legal research, focusing on the interpretation and application of existing laws^[3].

Result and discussion

The effectiveness of jurisprudence application in law enforcement

Indonesia is a state governed by the rule of law, and to realise this status, the country has an obligation to carry out national legal development in a planned, integrated, and continuous manner within a national legal system. This system must ensure the protection of the rights and obligations of all Indonesian citizens in accordance with the 1945 Constitution. The application of the rule of law in Indonesia is affirmed in Article 1 Paragraph (3) of the 1945 Constitution^[4].

In every rule of law state, the principle of legality is a fundamental requirement. The principle of legality asserts that an act can only be subject to criminal punishment if it has been clearly defined as a criminal offence in the prevailing legislation prior to the act being committed. This principle aligns with Article 1 of the Indonesian Penal Code (KUHP), which stipulates that an act can only be criminally punished based on existing legal provisions. If there are legal changes after the act has been committed, the defendant must be sentenced under the legal provisions most favourable to them^[5].

The principle of legality essentially imposes a restriction on the freedom of citizens by the government, requiring that any limitation on such freedom must first be established by law. Laws, in general, must provide guarantees to citizens against arbitrary government actions. The exercise of authority by governmental bodies must be grounded in written law, specifically formal statutes, to ensure that every legal enforcement process is based on legal certainty.

Written law (legislation) is never entirely comprehensive, clear, or exhaustive in regulating societal life. It often lags behind societal developments, making it necessary for laws

to be continuously updated and adapted to remain current and relevant. To address the shortcomings of written law, measures must be taken to prevent these gaps from becoming too evident and causing injustice within society. In this regard, the role of the judiciary is crucial in mitigating the negative effects of these legal deficiencies.

The judiciary, through the role of judges, holds the responsibility of upholding justice within society. Judges are not merely the voice of legislation but are also required to explore and reflect the values of justice that exist within society. The expectation is that when the law fails to satisfy the sense of justice in the community, judges are tasked with realising that justice. This aligns with the mandate of Article 5 of Law No. 48 of 2009 on Judicial Power, which states that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live within society^[6].

Judges carry a significant duty and responsibility, as they must be able to deliver a sense of justice within society, even when existing laws do not fully address emerging issues. To address matters that are not clearly regulated by law and to ensure that judicial decisions provide justice for the parties involved in legal proceedings, judges may refer to the principles outlined in Article 5 of the Law on Judicial Power. This article mandates judges to explore, follow, and understand the legal values and sense of justice that live within society.

The implementation and development of legislation, in addition to being carried out by legislative bodies, can also occur through the judiciary via judicial rulings. In relation to Soetandyo Wignjosoebroto's perspective, legal reform through judicial decisions falls under the category of law reform in its broader sense^[7].

The reform of legal substance in this context, particularly unwritten law, is carried out through the legal discovery mechanism as stipulated in Article 5 of the Law on Judicial Power. This provision grants judges and constitutional judges the authority to explore, follow, and understand the legal values and sense of justice that exist within society, especially regarding issues that have not been explicitly regulated, either because they are not yet addressed in written law or because there is ambiguity in the legal provisions. This process is commonly referred to as legal discovery (*rechtsvinding*), although its application is generally more prevalent in the realm of civil law, while in criminal law it is constrained by the principle of legality.

N.E. Algra and others, in their theory of legal discovery, note that discussions on legal discovery usually—often implicitly—include a limitation, specifically a limitation on discovery by civil (private) judges. Several factors contribute to this, including the fact that knowledge of private law has developed more robustly than other areas of law. This is connected to the second factor, that historically, most prominent legal scholars were private judges, who, in their discussions of legal discovery, either implicitly or explicitly based their views on the experiences of civil judges. The third factor is that civil judges have relatively greater freedom. This freedom is tied to the fact that legal relationships between citizens are often governed by only a small portion of written legal rules, partly because parties have considerable autonomy to deviate from written law and regulate their legal relationships independently. Additionally, broad terms such as good faith, good customs, not against the law, and reasonable conduct increasingly

play a significant role in civil law. Ultimately, it is the judge who determines the meaning of these terms in concrete cases.

While criminal judges are, within the maximum and minimum limits set by law, relatively free to determine the type and severity of punishment, they are always bound by the principle that they can only punish acts expressly defined as criminal offences by pre-existing legal provisions (Article 1 of the Penal Code). For instance, they cannot include acts not covered by any legal provision, even if the act is similar to a punishable offence defined by law (prohibition of the application of law by analogy)^[8].

Based on Article 32 of Law Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 on the Supreme Court, the Supreme Court is tasked with exercising the highest level of supervision over the administration of all judicial bodies under its authority in the exercise of judicial power. As the highest court of the land, the Supreme Court functions as a court of cassation and judicial review, ensuring that all laws and regulations across the entire territory of the Republic of Indonesia are applied fairly, accurately, and correctly^[9].

The Supreme Court, as the highest judicial authority, is also expected to provide guidance and direction to lower courts through its rulings in resolving legal issues. The Indonesian judicial system must establish legal unity to ensure that Indonesian law produces consistent and orderly decisions, thereby achieving legal certainty and a sense of justice. This legal unity and guidance are, in part, achieved through the jurisprudence issued by the Supreme Court.

The Supreme Court, through the Research and Development Centre for Law and Judiciary, has stated that jurisprudence is a legal product of the judiciary, consisting of previous judicial rulings that have obtained permanent legal force, concerning new and noteworthy cases from a legal science perspective or a new legal interpretation or reasoning of a legal norm. These rulings are followed by other judges or courts in deciding similar cases. In addition to being related to the formation of law, jurisprudence is also closely linked to the development of legal scholarship in Indonesia, as it supports legal reform and development. It is also associated with judicial accountability and oversight. Jurisprudence plays a significant role in Indonesia, not only as a source of law but also as guidelines for judges in deciding cases, particularly in reducing disparity in judicial decisions^[10].

The function of jurisprudence in judicial decision-making is to fill legal gaps, as judges, according to the law, are not permitted to reject cases on the grounds that there is no applicable law. Jurisprudence provides a reference for judges to resolve cases where existing legal provisions are insufficient or unclear^[11]. Legal gaps can only be addressed and covered through "judge-made law," which will serve as a guideline in the form of jurisprudence until comprehensive and codified legislation is established^[12].

Jurisprudence, as it is currently understood, refers to the rulings of the Supreme Court that are final and validated by the Court as a court of cassation, or to the Supreme Court's own decisions that are final. This means that jurisprudence derives from judicial rulings or court decisions that have been confirmed through cassation decisions, as well as from rulings issued directly by the Supreme Court when they present groundbreaking interpretations differing from those of lower courts. This is in line with the provisions outlined in the Supreme Court Circular/Instruction Number 02 of

1972 regarding the Collection of Jurisprudence. One point of this instruction states that the collection of jurisprudence is solely conducted by the Supreme Court; neither private nor government bodies are permitted to undertake this task. The Supreme Court is the only constitutional institution responsible for this collection, which serves as a *richt-lijn* (guideline or instruction to be followed by judges in adjudicating cases). The cases that become *richt-lijn* are primarily those where the law has been affirmed in cassation, either through adjudication by the Supreme Court itself or by rejecting cassation^[13].

With the establishment of the Constitutional Court (MK) as a key judicial authority, the term jurisprudence has expanded to include decisions from the MK on certain legal issues. Jurisprudence, as a source of law, now encompasses not only the rulings from the Supreme Court but also those from the Constitutional Court. The jurisprudence of the MK, in addition to binding the MK itself, also binds other judicial bodies in relation to specific concrete legal issues^[14]. Jazim Hamidi and Winahyu Erwiningsih, as cited by Enrico Simanjuntak, align with M. Yahya Harahap in stating that jurisprudence, aside from being a source of law, serves several functions within the judicial realm. Specifically, these functions include: (1) Establishing a uniform legal standard in cases that are similar or identical where the law does not provide explicit regulations; (2) Creating a sense of legal certainty within society by applying consistent legal standards; (3) Ensuring legal consistency and predictability in the resolution of cases; (4) Preventing disparities in judicial decisions on similar cases, so that any differences in rulings between judges do not lead to discrepancies but rather reflect case-specific variations; (5) Thus, jurisprudence can be seen as a manifestation of legal discovery^[15].

From both theoretical and practical perspectives, jurisprudence has been accepted as a source of law in both civil law and common law systems. However, the binding nature of jurisprudence for judges differs between these systems. In common law systems, jurisprudence is regarded as a body of legal science, often referred to as precedent. In contrast, in civil law systems, jurisprudence is understood as judicial decisions that serve as references for lower courts. Although these distinctions were once more pronounced, contemporary legal developments have blurred the lines, with both systems increasingly influencing and integrating aspects of each other^[16].

Jurisprudence fundamentally serves several functions^[17]: 1. By establishing consistent rulings in similar cases, it enforces a uniform legal standard. 2. This uniform standard fosters a sense of legal certainty within society. 3. With legal certainty and consistency in similar cases, judicial decisions become predictable and transparent. 4. The presence of a uniform legal standard helps prevent disparities in judicial decisions on similar cases. Should differences in rulings occur among judges in the same case, they should not lead to disparities but rather be seen as case-specific variations.

Efendi Lotulung hopes that with the guidance provided by jurisprudence, consistency in judicial decisions will be achieved and controversial rulings will be avoided. This, in turn, will ensure legal certainty and foster trust in the judiciary and legal enforcement, both nationally and, particularly, at the international level^[18].

In the preparation of jurisprudence^[19], the Supreme Court distinguishes between the terms "jurisprudence" and "landmark decision." A landmark decision refers to a final and binding court ruling that contains significant legal principles not yet covered by existing law and aims to provide legal certainty. In contrast, jurisprudence refers to final and binding court decisions that establish important legal principles and are recognised and followed by other judges in similar cases to ensure legal certainty. The criteria for a landmark decision include: it being a final and binding judgment that introduces new legal principles (*rechtsvinding*), addressing issues arising from societal changes, reflecting the direction of legal development, and being the first of its kind without prior similar decisions by other judges.

Jurisprudence, on the other hand, is characterised by: it being a final and binding decision, introducing new legal principles (*rechtsvinding*), addressing issues arising from societal changes, reflecting the direction of legal development, and being consistently followed by other judges over time. The relationship between jurisprudence and landmark decisions lies in their shared objectives: both aim to provide legal certainty, introduce new legal principles, and address emerging legal issues. However, their characteristics differ: jurisprudence focuses on identifying and applying consistent elements from previous decisions to aid current judges, while landmark decisions address new legal issues not yet covered by existing legal sources.

The Military Court, as one of the judicial bodies under the Supreme Court, is also a part of the judicial power within the Armed Forces/TNI. Its role is to enforce the law and administer justice while considering the interests of national defense and security. As the judicial authority within the Armed Forces/TNI, the Military Court has the authority to adjudicate criminal offenses committed by individuals who, at the time of the offense, are: (a) military personnel; (b) individuals who, according to the law, are equated with military personnel; (c) members of a group or office or body, or those equated or considered as military personnel according to the law; (d) individuals not falling under categories (a), (b), or (c) but who, by decision of the Commander-in-Chief with the approval of the Minister of Justice, must be tried by a Military Court^[20].

Indeed, military judges must navigate a complex landscape where they balance legal certainty and justice with the specific needs of national defense^[21]. The mandate of Article 5 of the Judicial Power Law requires them to interpret and apply legal principles in a way that acknowledges both the general society and the unique military context. This dual focus ensures that while they uphold legal standards, they also consider the broader implications for national security and the operational integrity of the armed forces.

Not long ago, Indonesian society was stirred by reports of the growing presence of lesbian, gay, bisexual, and transgender (LGBT) communities within the Indonesian National Armed Forces (TNI). The directive from the TNI leadership at that time was to address LGBT issues through criminal law channels. This posed a new challenge for law enforcement, as there was no explicit legal framework prohibiting LGBT activities. Existing regulations only addressed criminal penalties for homosexual acts involving minors, specifically under Article 292 of the Indonesian

Penal Code (KUHP), which prohibits homosexual acts with minors but does not explicitly ban consensual homosexual relations between adults.

The existence of lesbian, gay, bisexual, and transgender (LGBT) individuals has been noted throughout human history, as recorded in religious texts of both Islam and Christianity. In Islam, the Quran recounts the story of the people of Prophet Lot (Lut), who engaged in homosexual acts. According to the Quran, this led to divine punishment, as Allah destroyed the people of Lot for their behavior^[22]. In Christian teachings, the cities of Sodom and Gomorrah are known for God's wrath due to the widespread immoral behaviour of their inhabitants. According to the Bible, the men of these cities engaged in homosexual acts, leading to their destruction as a divine punishment^[23]. The situation surrounding LGBT rights and visibility in Indonesia is indeed complex, given the country's strong religious and cultural norms. While LGBT individuals in Indonesia are increasingly visible and vocal about their rights, the legal framework remains restrictive. The legal system, specifically the Criminal Code, does not criminalize same-sex relations between adults, except in cases involving minors under Article 292. This creates a challenging dynamic where, despite growing visibility and activism, there is no comprehensive legal recognition or protection for LGBT individuals in the context of same-sex relationships among adults. The tension between advancing human rights and traditional cultural values remains a significant issue, and the legal system's limitations contribute to the complexity of addressing LGBT issues within the Indonesian context.

Concerns about same-sex immoral acts were notably expressed by a group called AILA (Aliansi Cinta Keluarga), composed of mothers from professional backgrounds such as employees and lecturers. They were deeply troubled by the perceived moral decline among the youth, particularly those involved in adultery and LGBT activities. AILA filed a judicial review with the Constitutional Court, challenging Articles 284, 285, and 292 of the Penal Code, arguing that these articles were problematic for family integrity.

They contended that Article 284, which addresses adultery, not only affects married individuals but also involves many young people who are not married. For Article 285, they argued that rape is not confined to female victims but can also involve male victims. Regarding Article 292, they claimed that same-sex relations occur not only with minors but also with adults.

The Constitutional Court, in Decision Number 26/PUU-XIV/2016, rejected the petition, stating that while the petitioners' concerns were not without merit, the issues raised were considered "Open Legal Policy." In other words, these matters fall under the jurisdiction of the legislative bodies, specifically the DPR (People's Consultative Assembly) and the Government. At that time, the Court anticipated that regulations and criminalisation of immoral acts, including LGBT behaviour, would be addressed in the ongoing discussions of the National Penal Code^[24].

After the enactment of the Indonesian Criminal Code with Law No. 1 of 2023, there were no provisions for regulating or penalising LGBT activities. As a result, LGBT individuals continue to engage in such behaviours, disregarding societal moral and ethical standards. For the time being, civil society has remained silent and has not protested. Regarding the presence of lesbian, gay, bisexual,

and transgender (LGBT) communities within the Indonesian National Armed Forces (TNI), Indonesian criminal law does not specifically address or penalise same-sex acts by TNI personnel. However, this issue is governed by internal regulations set by the TNI Commander, which are reinforced by the Chief of Staff of the Army, Navy, and Air Force through Telegram Orders. These orders explicitly prohibit TNI personnel from engaging in same-sex acts.

The internal TNI regulations include Telegram ST/398/2009 dated 22 July 2009 and Telegram ST/1648/2019 dated 22 October 2019. These orders prohibit TNI personnel from engaging in same-sex acts (homosexuality/lesbianism), and violations are classified as breaches of military orders under Article 103 of the Military Penal Code (KUHPM). In practice, cases of same-sex conduct by TNI personnel, commonly referred to as LGBT cases, are investigated and prosecuted by the Military Prosecutor's Office, with charges possibly brought under Article 103 KUHPM (for breaching military orders) or Article 281 of the Criminal Code (for public acts of indecency)^[25].

Before the issuance of SEMA No. 10 of 2020, Military Judges faced a challenging decision when adjudicating cases involving LGBT-related indecency. They had to balance between legal certainty and military interests. This often influenced several first-instance military court rulings that resulted in the acquittal of defendants, as these courts viewed the Telegram Orders from the TNI Commander as not constituting a specific order for the defendants, and considered the defendants' ignorance of the internal regulations.

The inconsistency in first-instance military court rulings led both defendants and Military Prosecutors to pursue legal remedies up to the cassation level. In its ruling on the cassation appeals, the Supreme Court found the defendants involved in LGBT cases guilty, based on the internal TNI regulations including the Telegram Orders and directives from each Chief of Staff. Consequently, the Supreme Court overturned the acquittals of the first-instance military courts and declared the defendants guilty.

The continued flow of LGBT cases revealed ongoing discrepancies in opinions among fact-finding courts. The Supreme Court eventually addressed the issue, asserting the urgent need for clear regulation and strict sanctions for same-sex indecency cases within the TNI to ensure legal uniformity among military judges. Despite the existing legal vacuum due to the lack of specific provisions in the Criminal Code, and the public's demand for such regulations, the matter remained inadequately addressed^[26].

In an effort to address the legal vacuum, the Supreme Court, upon receiving cassation appeals, ultimately declared that defendants involved in LGBT cases could be found guilty based on the internal TNI regulations, such as the Telegram Orders and directives from the respective Chiefs of Staff. To ensure that all judges in both first-instance and appellate military courts adhere to this guidance, and motivated by both moral and legal responsibilities, the Supreme Court issued Circular Letter No. 10 of 2020. This Circular, derived from a plenary meeting of the Military Chamber of the Supreme Court, emphasises the internal TNI regulations (including the TNI Commander's Regulations, Army Chief of Staff's Regulations, Naval Chief of Staff's Regulations, Air Force Chief of Staff's Regulations, Telegram Orders, and similar directives) which strictly prohibit any TNI personnel from engaging in same-sex indecency. This

prohibition is underscored as a direct order, constituting an element of a criminal offence as outlined in Article 103(1) of the Military Penal Code (KUHPM), which qualifies as "Failure to comply with orders". Through Circular Letter No. 10 of 2020, the Supreme Court has established a new legal norm or rule, which is now followed by all judges within the military court system.

Several cassation decisions by the Supreme Court have addressed previous *judex facti* rulings, either overturning acquittals where defendants were found not guilty and subsequently released—leading the Military Prosecutor to file a cassation appeal—or upholding convictions where the *judex facti* had found defendants guilty of violating Article 103(1) of the Military Penal Code (KUHPM), imposing primary penalties of imprisonment and additional penalties such as dismissal from military service. In its cassation rulings, the Supreme Court has confirmed that such actions are indeed in accordance with Article 103 of the KUHPM, resulting in the defendants being convicted and sentenced, with additional penalties including dismissal from the military. Notable among these decisions is Supreme Court Decision No. 96 K/MIL/2020^[27], Supreme Court Decision No. 135 K/MIL/2020^[28] and Supreme Court Decision No. 162 K/MIL/2020^[29] have demonstrated a consistent stance by the Supreme Court regarding the examination and adjudication of LGBT-related criminal cases. Consequently, it can be concluded that LGBT activities carried out by military personnel can result in imprisonment and dismissal from military service.

The Supreme Court's consistent stance has been compiled in the Supreme Court Jurisprudence Compilation Book, which is now awaiting formal approval from the Chief Justice of the Republic of Indonesia to be established as a Decision of the Chief Justice. Additionally, the Supreme Court's consistent position on LGBT cases has been discussed in the Plenary Session of the Military Chamber in 2020 and was decided to be included in the Legal Formulation of the Military Chamber. This formulation has been incorporated into Supreme Court Circular No. 10 of 2020 concerning the Implementation of the Legal Formulation Resulting from the Plenary Session of the Supreme Court Chamber in 2020 as a guideline for judicial duties^[30].

According to Supreme Court Circular No. 10 of 2020, the application of the law to TNI personnel who violate internal TNI regulations (such as the Commander's Regulations, Army Chief's Regulations, Navy Chief's Regulations, Air Force Chief's Regulations, Telegrams, etc.) cannot be based on Article 103 paragraph (1) of the Military Penal Code (KUHPM) as an infraction of orders, except when the violation pertains to Telegrams from the TNI Commander No. ST/398/2009 dated 22 July 2009 and Telegram No. ST/1648/2019 dated 22 October 2019, which specifically prohibit acts of sexual misconduct with the same sex (homosexuality/lesbianism). Internal TNI regulations prohibiting other types of misconduct, aside from same-sex sexual conduct, cannot be deemed as violations of orders under Article 103 paragraph (1) of the KUHPM. Despite the clear guidance in SEMA No. 10 of 2020, which forbids the application of Article 103 paragraph (1) to internal TNI regulations that do not address same-sex misconduct, some lower court officials have misinterpreted this. Nonetheless, the Supreme Court has consistently upheld this position by rejecting cases that fall outside the specified prohibitions. In Decision No. 255 K/MIL/2024 dated 14 August 2024, the

Supreme Court concluded that the defendant was not proven guilty beyond reasonable doubt of the offence charged under Article 103 paragraph (1), resulting in the defendant's acquittal^[31].

The fact-finding consideration that led to the defendant's acquittal from the charge under Article 103 paragraph (1) of the Military Penal Code (KUHPM) appears to involve a misapplication of the law, in that the element of "failure to comply with a service order" as defined in Telegrams from the TNI Commander No. ST/398/2009 dated 22 July 2009 and No. ST/1648/2019 dated 22 October 2019, which prohibit acts of sexual misconduct with the same sex (homosexuality/lesbianism), was not correctly applied under Article 103 paragraph (1) KUHPM as a violation of a service order. The court's findings in this case revealed that the defendant conducted a live broadcast on TikTok in the Staff Intel Kodim room using his black Oppo Reno 6 mobile phone, with a TikTok account created in April 2023, for a duration of 40 seconds. During this live broadcast, the defendant was dressed in full TNI AD (Army) uniform, seated in a chair, smiling, and responding to comments from followers about his activities and the tattoos on his right and left arms. The broadcast was viewed by 48 people, and the defendant received likes and gifts from the viewers.

Since the rulings by judges or courts that were upheld by the Supreme Court as the Court of Cassation, or the decisions made by the Supreme Court itself, the number of LGBT cases within the TNI environment has significantly decreased. This indicates that the Supreme Court's jurisprudence has been effective in aiding the legal enforcement process in Indonesia, particularly within the Military Court system. Furthermore, this jurisprudence has indirectly facilitated the smooth operation of national defence and security, and has managed to fill legal gaps by providing legal certainty for those seeking justice.

Conclusion

To address the legal needs within the military judiciary while considering the importance of national defence and security, the Supreme Court had to step in when there was a legal void regarding sexual crimes involving individuals of the same sex. Despite the fact that public demands had been submitted through legal channels, including judicial reviews to the Constitutional Court as a passive legislature and demands to the DPR as an active legislature, the public had not yet received legal certainty. Both legislative bodies had neither acknowledged nor regulated such acts as criminal offences. Consequently, the Supreme Court had to implement a "Penal Policy" through its rulings to be followed by other judges in similar cases. As the highest judicial authority, the Supreme Court established a legal principle that acts of sexual misconduct by LGBT individuals within the TNI environment constitute a criminal offence under Article 103(1) of the Military Criminal Code (KUHPM). This policy was adopted despite necessitating an analogue interpretation and breaching the principle of legality. Through this jurisprudence, such actions were classified as crimes of "Disobedience to Orders" under Article 103(1) of the KUHPM. This legal principle was incorporated into jurisprudence and proved highly effective in reducing incidents of sexual misconduct among TNI personnel involving individuals of the same sex.

Recommendation

To enhance the effectiveness of implementing restorative justice in the handling of Information and Electronic Transactions (ITE) crimes in Indonesia, several key steps need to be taken. Firstly, it is essential to develop clear and comprehensive regulations regarding the application of restorative justice in ITE cases. This should include detailed operational guidelines and standard procedures for law enforcement and related institutions. Additionally, intensive training and outreach on the concepts and procedures of restorative justice must be carried out to improve the understanding and skills of law enforcement officers, lawyers, and the public. Adequate resources should also be allocated to support the implementation of restorative justice, including funding for mediation and necessary infrastructure development. Furthermore, the public should be informed and educated about restorative justice to increase their acceptance and participation in the process. Regular monitoring and evaluation of the implementation of restorative justice in ITE cases are also necessary to identify strengths and weaknesses and to make any required adjustments to policies and procedures. Further research and case studies are crucial to gaining deeper insights into the implementation and effectiveness of restorative justice, helping to identify and apply best practices. These measures are expected to enable restorative justice to be implemented more effectively, offering fairer and more holistic solutions for both victims and offenders, and supporting a more efficient judicial system in Indonesia.

References

1. Bagir Manan. *Hakim Sebagai Pembaharu Hukum*, Jakarta: Varia Peradilan, IKAHI, Mahkamah Agung Republik Indonesia, 2011.
2. Mertokusumo Sudikno. *Penemuan Hukum: Sebuah Pengantar*. Yogyakarta: Liberty, 2008.
3. Mertokusumo Sudikno. *Legal Discovery: An Introduction*. Yogyakarta: Liberty, 2008.
4. *The 1945 Constitution of the Republic of Indonesia*.
5. *The Indonesian Criminal Code*
6. Law Number 48 of 2009 concerning Judicial Power.
7. Wignjosoebroto. *Pembaruan Hukum Masyarakat Indonesia Baru*, Forum Keadilan, 2006, 18(8).
8. Mr. NE Algra, *et al*, *Pengantar Ilmu Hukum*, Bandung, Binacipta, 1983.
9. <https://www.mahkamahagung.go.id/id> accessed on 10 September 2024, at 11:48 WIB.
10. Puslitbang Hukum, Peradilan. *MA-RI, Kedudukan dan Relevansi Yurisprudensi Untuk Mengurangi Disparitas Putusan Pengadilan*, Jakarta: Balitbang Diklat Hukum dan peradilan MA-RI.
11. *Algemene Bepalingen van Wetgeving voor Indonesie (AB)*
12. Mertokusumo Sudikno. *Mengenal Hukum (Suatu Pengantar)*, Yogyakarta. Liberty, 2003.
13. Circular/Instruction of the Supreme Court of the Republic of Indonesia Number: 02 of 1972 dated 19 May 1972.
14. Simanjuntak Enrico. *Peran Yurisprudensi dalam Sistem Hukum di Indonesia*, Jurnal Konstitusi, 2019, 16(1).
15. *Ibid.*
16. Lotulung Paulus Efendi. *Peranan Yurisprudensi Sebagai Sumber Hukum*. Jakarta. Badan Pembinaan Hukum Nasional, 1997.

17. Ibid
18. Ibid.
19. Nursobah Asep. Mahkamah Agung, <https://kepaniteraan.mahkamahagung.go.id/>, The Registrar of the Supreme Court Leads a Coordination Meeting on the Compilation of Jurisprudence and Landmark Decisions, 1997-2020.
20. Article 9 of Law Number 31 of 1997 on Military Courts.
21. The General Explanation of Law Number 31 of 1997 on Military Courts of Indonesia, second paragraph.
22. Q.S. al-Hijr [19] : 72-74.
23. Genesis 19:1-29.
24. Hamidi, Jazim. & Hakim, Lukman Nur. Zina Dan Gerakan LGBT: Quo Vadis Kebijakan Hukum Pidana (Penal Policy) Dalam Penyelamatan Moral Bangsa (Anotasi Putusan Mahkamah Konstitusi Nomor 26/PUU-XIV/2016), *Jurnal Hukum & Peradilan*, 2018, 07(2).
25. Article 281(1) KUHP (The Indonesian Criminal Code).
26. Hamidi, Jazim. & Hakim, Lukman Nur.
27. Judgment of the Supreme Court No. 96 K/MIL/2020
28. Judgment of the Supreme Court No. 135 K/MIL/2020
29. Judgment of the Supreme Court No. 162 K/MIL/2020
30. Supreme Court Circular No. 10 of 2020.
Judgment of the Supreme Court No. 255 K/MIL/2024