

# Criminal Liability in Cases of Homosexual Conduct Involving Members of the Indonesian National Armed Forces: A Legal and Human Rights Perspective

Limaria Johana Hutagalung<sup>1\*</sup>, Mompong L.Panggabean<sup>2</sup>, Hendri Jayadi<sup>3</sup>

<sup>1,2,3</sup>Master of Law Program, Faculty of Law, Universitas Kristen Indonesia

\* Corresponding author:

Email: [2202190023@ms.uki.ac.id](mailto:2202190023@ms.uki.ac.id)

---

## **Abstract.**

*The issue of homosexuality within the Indonesian National Armed Forces (TNI) raises complex legal problems as it lies at the intersection of national criminal law, military criminal law, military discipline, and human rights protection. Under Indonesian national criminal law, homosexuality as a sexual orientation is not explicitly criminalized. However, in military legal practice, homosexual conduct may be considered a violation of morality, military discipline, and institutional honor. This situation creates legal issues concerning the basis of criminal liability, legal certainty, and the conformity of law enforcement with the principles of the rule of law and human rights protection. The problems examined in this study are how criminal liability is imposed on members of the Indonesian National Armed Forces who engage in homosexual conduct based on Decision Number 24-K/PM.III-12/AD/II/2020, and how Indonesian criminal law reform should address homosexual conduct within the military environment. This research employs normative legal research using statutory, case, and conceptual approaches. The study utilizes primary, secondary, and tertiary legal materials, which are analyzed qualitatively. The results of the study indicate that criminal liability imposed on TNI members in Decision Number 24-K/PM.III-12/AD/II/2020 is fundamentally based on the military legal framework that emphasizes discipline, military ethics, and institutional honor as legal interests requiring protection. However, from the perspective of criminal law and human rights, such application still raises issues concerning the principle of legality and legal certainty, as there is no explicit regulation governing homosexuality within the military environment. Furthermore, national criminal law reform through Law Number 1 of 2023 concerning the Criminal Code has not specifically provided comprehensive regulation for military legal subjects in this context. The conclusion of this study is that a more comprehensive criminal law reform is necessary through harmonization between national criminal law, military criminal law, military disciplinary law, and internal regulations of the Indonesian National Armed Forces, in order to create legal certainty, consistency in law enforcement, and a balance between military institutional interests and human rights protection.*

**Keywords:** Criminal Liability, Homosexuality, Indonesian National Armed Forces, Military Law and Human Rights.

---

## **I. INTRODUCTION**

Indonesia is constitutionally established as a state based on law, as affirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This constitutional principle requires every exercise of state authority, including within military institutions, to be grounded in legality, legal certainty, and respect for fundamental rights. In a rule-of-law state, criminal punishment cannot be imposed merely on the basis of moral disapproval or institutional preference. It must rest on a clear legal basis, individual fault, and fair judicial process. This principle becomes particularly important when criminal law interacts with sensitive issues involving sexuality, morality, military discipline, and human rights.

The issue of homosexuality remains highly contested in Indonesian society. Socially and culturally, same-sex orientation and same-sex conduct are often viewed through religious, moral, and heteronormative frameworks. At the same time, modern psychological literature distinguishes sexual orientation from sexual conduct. The American Psychological Association defines sexual orientation as an enduring pattern of emotional, romantic, or sexual attraction to men, women, or both sexes (American Psychological Association, 2008). This distinction is important because law generally regulates external conduct, not merely internal identity, personal inclination, or private psychological orientation. In psychiatry, homosexuality has also undergone a major conceptual shift. Since 1973, the American Psychiatric Association removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders,

indicating that homosexuality is no longer classified as a mental illness in modern psychiatric science (Drescher, 2015).

In Indonesian positive law, homosexuality as an orientation is not expressly criminalized under the general criminal law system. The old Indonesian Criminal Code did not criminalize consensual same-sex relations between adults in general, although Article 292 regulated obscene acts involving adults and minors of the same sex. The new Criminal Code under Law Number 1 of 2023 also does not expressly criminalize sexual orientation as such. However, Indonesian law does not provide legal recognition for same-sex marriage, since Law Number 1 of 1974 on Marriage, as amended by Law Number 16 of 2019, defines marriage as a bond between a man and a woman. This shows that Indonesian law occupies an intermediate position. It does not generally criminalize homosexual orientation, but it also does not formally recognize same-sex relationships within family law.

The problem becomes more complex in the military context. Members of the Indonesian National Armed Forces are not ordinary civil subjects. They are bound by a special legal regime that emphasizes discipline, hierarchy, obedience to command, institutional honor, and military ethics. Indonesian military law recognizes the importance of discipline as a core element of military life. Law Number 25 of 2014 on Military Discipline Law defines military discipline as awareness, obedience, and compliance with laws, service regulations, and the military way of life. Military personnel are also subject to the Military Criminal Code, including Article 103 paragraph (1), which regulates disobedience to lawful service orders. In practice, this provision may be used to punish conduct considered contrary to internal military norms, including same-sex conduct, when such conduct is interpreted as violating lawful service orders, military discipline, or soldierly ethics.

This legal construction can be seen in Decision Number 24-K/PM.III-12/AD/II/2020, in which a member of the Indonesian Army was criminally punished in connection with same-sex conduct. The case reflects a broader legal issue. Although same-sex conduct between consenting adults is not generally criminalized in civilian criminal law, military personnel may still face criminal punishment when such conduct is constructed as a violation of military orders or military discipline. This produces a normative tension between the special character of military law and the general principles of criminal liability, legality, privacy, and non-discrimination.

Several scholars have emphasized that criminal liability must be based on fault. Moeljatno explains that a person may only be held criminally liable when a criminal act, fault, capacity for responsibility, and the absence of grounds for justification or excuse are established (Moeljatno, 2008). Roeslan Saleh similarly argues that criminal liability involves the transfer of objective blame attached to a criminal act to the offender subjectively, meaning that punishment must be based on personal blameworthiness (Saleh, 1983). Sudarto also warns that criminal law should not be used excessively to punish every act considered morally deviant unless there is a clear legal basis and a real need for legal protection (Sudarto, 1986). These views are relevant because they place limits on the expansion of criminal law, especially when criminal punishment is imposed through broad interpretation of institutional norms.

From the perspective of criminal law theory, the principle of *geen straf zonder schuld*, or no punishment without fault, is central. This principle means that punishment is legitimate only when the offender can be personally blamed for an act that is clearly prohibited by law. It also requires a distinction between moral disapproval, disciplinary violation, ethical breach, and criminal offence. This distinction is crucial in the military context. A soldier may be subject to stricter disciplinary and ethical standards than civilians. However, stricter standards do not automatically justify criminal punishment. Criminal law should remain an *ultimum remedium*, or last resort, particularly where the conduct in question relates to private life and does not clearly injure another person, military operation, or public legal interest.

Human rights theory also provides an important analytical framework. The 1945 Constitution recognizes human rights, including protection of personal dignity, security, and legal certainty. Article 28G paragraph (1) protects personal dignity and security, while Article 28J paragraph (2) allows the limitation of rights only by law and for legitimate reasons such as morality, religious values, security, and public order. Thus, human rights in Indonesia are not absolute, but restrictions must be lawful, necessary, and

proportional. In the military environment, certain restrictions on rights may be justified because of the special nature of military service. However, such restrictions must not eliminate human dignity or become a basis for arbitrary punishment.

International human rights law also recognizes the importance of privacy and non-discrimination. The International Covenant on Civil and Political Rights protects individuals from arbitrary interference with privacy and guarantees equality before the law. In *Toonen v. Australia*, the United Nations Human Rights Committee held that criminalization of consensual same-sex sexual conduct between adults in private violated the right to privacy under Article 17 of the ICCPR and recognized sexual orientation as protected under the principle of non-discrimination (Human Rights Committee, 1994). Although international standards must be interpreted in light of Indonesia's constitutional identity, they remain relevant as a comparative framework for evaluating whether criminal punishment in the military context is consistent with privacy, proportionality, and non-discrimination.

Previous studies have discussed LGBT issues in Indonesian military law, the application of military criminal sanctions, and the relationship between morality and military discipline. Some studies focus on judicial decisions involving same-sex conduct by TNI personnel, while others analyze LGBT issues from the perspective of human rights or military ethics. However, many of these discussions remain fragmented. They often emphasize either the institutional need to preserve military discipline or the human rights argument against discrimination. Fewer studies examine the issue through an integrated framework that combines criminal liability theory, military criminal law, constitutional limitation of rights, and criminal law reform. This gap is significant because the issue is not merely whether homosexuality is accepted or rejected socially. The deeper legal question concerns whether criminal punishment against TNI personnel for same-sex conduct satisfies the principles of legality, fault, proportionality, and human rights protection.

This study is therefore positioned to fill that gap. It does not treat homosexuality merely as a moral controversy, nor does it reduce the military legal system to a purely disciplinary regime. Instead, it examines the legal construction of criminal liability in cases involving homosexual conduct by TNI personnel, particularly through Decision Number 24-K/PM.III-12/AD/II/2020. It also analyzes how Indonesian criminal law reform should respond to such cases, especially in distinguishing between criminal acts, disciplinary violations, ethical breaches, and private conduct protected by human dignity.

The urgency of this research lies in the need to ensure that military discipline is enforced without undermining the basic principles of criminal justice and human rights. The TNI has a legitimate institutional interest in maintaining discipline, honor, and operational effectiveness. However, criminal punishment must remain subject to legality, individual fault, proportionality, and constitutional safeguards. Without clear boundaries, the use of military criminal law may create legal uncertainty and unequal treatment between military personnel and civilians. For that reason, this research is important to provide an academic basis for evaluating criminal liability in homosexual cases involving TNI members and for formulating a more precise, fair, and constitutionally grounded approach to criminal law reform in the military environment.

## II. METHODS

This study employed a normative juridical research method. Normative legal research was selected because the main focus of this study is to examine legal norms, legal principles, legal doctrines, and court decisions relevant to criminal liability in cases involving homosexual conduct by members of the Indonesian National Armed Forces. In legal scholarship, normative legal research is used to analyze law as a system of norms rather than as a social phenomenon measured through empirical field data. Soekanto defines legal research as a scientific activity based on certain methods, systematics, and reasoning aimed at studying legal phenomena through in-depth analysis (Soekanto, 2014). In line with this view, Marzuki explains that normative legal research is a process of finding legal rules, legal principles, and legal doctrines to answer legal issues faced in a particular case or legal problem (Marzuki, 2017).

This research was doctrinal in nature because it relied on legal materials as the main source of analysis. The study did not conduct fieldwork or collect empirical data from respondents. Instead, it examined statutes, legal doctrines, scholarly writings, and judicial decisions. This approach is consistent with

the view of Soekanto and Mamudji, who state that normative legal research is conducted by examining library materials or secondary data as the basic material for legal analysis (Soekanto & Mamudji, 2015). Johnny Ibrahim also explains that normative legal research studies law as positive norms contained in statutes, court decisions, and legal doctrines (Ibrahim, 2013). Therefore, this method was considered appropriate for analyzing the legal construction of criminal liability against military personnel in relation to homosexual conduct.

The specification of this research was descriptive-analytical. The descriptive aspect was used to present a systematic explanation of the legal framework governing criminal liability, military criminal law, military discipline, and human rights protection. The analytical aspect was used to examine how these norms are applied in judicial practice, particularly in Decision Number 24-K/PM.III-12/AD/II/2020. Sunggono explains that descriptive legal research aims to provide a complete description of the object studied, while analysis is used to examine the relationship between legal norms and their application (Sunggono, 2016). Thus, this study did not merely describe the applicable law, but also critically analyzed the legal reasoning used by the court in imposing criminal liability on a member of the Indonesian National Armed Forces.

This study used three main approaches. First, the statute approach was used to examine relevant laws and regulations. According to Marzuki, the statute approach is conducted by reviewing all legislation and regulations related to the legal issue being studied (Marzuki, 2017). In this study, the statute approach was applied to analyze the 1945 Constitution of the Republic of Indonesia, the Indonesian Criminal Code, Law Number 1 of 2023 concerning the Criminal Code, Law Number 31 of 1997 concerning Military Courts, Law Number 34 of 2004 concerning the Indonesian National Armed Forces, Law Number 39 of 1999 concerning Human Rights, Law Number 25 of 2014 concerning Military Discipline Law, and other relevant legal provisions. These legal instruments were examined to identify the consistency, hierarchy, and normative relevance of the legal framework applicable to the issue.

Second, this study used the conceptual approach. This approach was applied to examine legal concepts and doctrines relevant to the research problem. Marzuki explains that the conceptual approach departs from legal doctrines and scholarly views in order to build legal arguments (Marzuki, 2017). In this research, the conceptual approach was used to analyze the concepts of criminal liability, military criminal law, military discipline, human rights, privacy rights, limitation of rights, morality, public order, rule of law, and proportionality. These concepts were used as analytical tools to assess whether the imposition of criminal liability in cases involving homosexual conduct by military personnel is consistent with the principles of legality, fault, proportionality, and human rights protection.

Third, this study used the case approach. The case approach was applied by examining judicial decisions relevant to the issue under study. According to Marzuki, the case approach is used to understand the ratio decidendi or legal reasoning of judges in deciding a case (Marzuki, 2017). In this study, Decision Number 24-K/PM.III-12/AD/II/2020 was used as the main object of analysis. The decision was examined to understand the legal basis used by the military court, the construction of criminal liability, the interpretation of military discipline and lawful service orders, and the compatibility of the decision with criminal law principles and human rights norms.

The legal materials used in this study consisted of primary, secondary, and tertiary legal materials. Primary legal materials are authoritative legal materials that have binding legal force (Ibrahim, 2013). In this study, primary legal materials included the 1945 Constitution of the Republic of Indonesia, the Indonesian Criminal Code, Law Number 1 of 2023 concerning the Criminal Code, Law Number 31 of 1997 concerning Military Courts, Law Number 34 of 2004 concerning the Indonesian National Armed Forces, Law Number 39 of 1999 concerning Human Rights, Law Number 25 of 2014 concerning Military Discipline Law, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and Decision Number 24-K/PM.III-12/AD/II/2020.

Secondary legal materials were used to explain and interpret the primary legal materials. Amiruddin and Asikin state that secondary legal materials include legal textbooks, journals, research reports, theses, dissertations, scholarly articles, and expert opinions (Amiruddin & Asikin, 2016). In this study, secondary legal materials consisted of books and academic writings on criminal law, military criminal law, criminal

liability, human rights, privacy rights, and criminal law reform. These materials were used to strengthen the theoretical and doctrinal basis of the analysis. Tertiary legal materials were also used as supporting materials, including legal dictionaries, legal encyclopedias, and other reference works that assisted in clarifying legal terms and concepts (Soekanto & Mamudji, 2015).

The technique of collecting legal materials was library research. This technique was used because normative legal research relies on written legal sources as the basis of analysis. Ibrahim states that library research is the main technique in normative legal research because the object of the study is legal materials in written form (Ibrahim, 2013). The collection process was carried out by tracing statutory regulations, collecting court decisions, reviewing legal literature, identifying relevant doctrines, and classifying legal materials according to the research questions. A case study was also conducted on Decision Number 24-K/PM.III-12/AD/II/2020 to examine how the military court applied legal norms to the concrete facts of the case.

The legal materials were analyzed qualitatively. Qualitative legal analysis was conducted by interpreting, systematizing, and evaluating legal materials based on legal reasoning. The analysis was descriptive-analytical and prescriptive. Marzuki emphasizes that legal research is prescriptive because it aims to provide arguments regarding what ought to be according to law (Marzuki, 2017). Therefore, this study did not only describe the applicable legal norms, but also assessed whether the application of military criminal law in the case studied was consistent with the principles of criminal liability, legality, proportionality, and human rights protection.

The analysis was conducted through several stages. First, the relevant legal norms were inventoried and classified. Second, the relationship between general criminal law, military criminal law, military discipline law, and human rights law was examined. Third, the court's legal reasoning in Decision Number 24-K/PM.III-12/AD/II/2020 was analyzed. Fourth, the findings were evaluated using criminal liability theory, the principle of no punishment without fault, the concept of lawful limitation of human rights, and the doctrine of criminal law reform. Through this method, the study seeks to provide a comprehensive legal analysis of criminal liability for homosexual conduct involving members of the Indonesian National Armed Forces within the framework of military criminal law, the rule of law, and human rights protection.

### III. RESULT AND DISCUSSION

#### *Criminal Liability of TNI Members in Homosexual Conduct Cases*

The analysis of criminal liability against members of the Indonesian National Armed Forces who commit homosexual conduct must begin with the general doctrine of criminal responsibility. In Indonesian criminal law, a person cannot be punished merely because an act has occurred. Criminal punishment requires the fulfilment of several elements, namely the existence of a criminal act, fault, capacity to be held responsible, and the absence of justifying or excusing grounds. This principle reflects the doctrine of *geen straf zonder schuld*, which means that there is no punishment without fault. Moeljatno explains that criminal liability requires both objective blame attached to the prohibited act and subjective blame attached to the offender (Moeljatno, 2008). Roeslan Saleh also emphasizes that criminal liability is based on the possibility of attributing blame to a person who has committed a prohibited act and who is capable of being legally responsible (Saleh, 1983).

In the military context, criminal liability has a special character. Members of the Indonesian National Armed Forces are not only subject to general criminal law, but also to military criminal law, military discipline law, and the ethical standards of military life. This special position makes the legal assessment of a soldier's conduct different from that of an ordinary civilian. S. R. Sianturi argues that military criminal law serves to maintain discipline, order, obedience, and the honor of the military institution as part of national defense interests (Sianturi, 2010). Therefore, a soldier's conduct is assessed not only in terms of formal legality, but also in terms of its effect on military discipline, institutional integrity, and the moral standards of the armed forces.

The case of Decision Number 24-K/PM.III-12/AD/II/2020 shows this special character of military criminal responsibility. In that case, the defendant, a member of the Indonesian Army, was charged with

committing same-sex sexual acts in a military mess and in an accommodation facility. The Military Court found that the defendant's conduct fulfilled the elements of violating decency under Article 281 paragraph 1 of the Indonesian Criminal Code. The subsidiary charge also referred to Article 103 paragraph 1 of the Military Criminal Code, which regulates deliberate disobedience to lawful service orders. The court imposed imprisonment and additional punishment in the form of dismissal from military service. This indicates that the court did not view the conduct merely as a private sexual act, but as a violation of decency, military discipline, and the moral integrity of the armed forces.

***The Fulfilment of Criminal Liability Elements in Decision Number 24-K/PM.III-12/AD/II/2020***

The first element of criminal liability is the existence of a criminal act. In Decision Number 24-K/PM.III-12/AD/II/2020, the court concluded that the defendant's conduct fulfilled the element of "intentionally and openly violating decency" as regulated in Article 281 paragraph 1 of the Criminal Code. The court relied on witness statements, electronic evidence, WhatsApp conversations, video recordings, and the defendant's confession. These evidentiary materials were used to establish that the defendant had committed same-sex sexual acts with several men. From the perspective of criminal procedure, the combination of witness testimony, electronic evidence, and confession may support the court's conclusion regarding the existence of an act (Moeljatno, 2008).

However, the application of Article 281 paragraph 1 of the Criminal Code raises an important doctrinal issue, especially regarding the element of "openly." In criminal law doctrine, an act may be considered "open" when it is committed in a place that can be seen or accessed by the public. R. Soesilo explains that a violation of decency is considered open when the act occurs in a public place or in a place where it may be directly seen by others (Soesilo, 1996). In the case under study, the conduct occurred in a room within a military mess and in an accommodation facility, which are physically closed spaces. The court interpreted the element of openness contextually by considering the characteristics of the military mess and the possibility that the conduct could be known by other persons. This interpretation may be understood in the military context, but it also raises concerns from the perspective of the principle of legality.

The principle of legality requires that criminal provisions be interpreted carefully and not expanded excessively. Remmelink argues that criminal law must be applied with caution because it directly limits individual liberty through state punishment (Remmelink, 2003). Therefore, the broad interpretation of the element of openness should be examined critically. If every private space can be constructed as an open space merely because there is a possibility that others may know what happens inside it, the distinction between private and public space may become unclear. This creates a risk of overcriminalization and legal uncertainty.

The second element is fault or mens rea. In this case, the court considered that the defendant acted intentionally. The defendant communicated with other persons, agreed to meet them, and actively participated in the conduct. These facts show that the defendant acted consciously and voluntarily. Andi Hamzah explains that intent involves knowledge and will, meaning that the offender knows and wills the act and its consequences (Hamzah, 2017). Based on this theory, the defendant's conduct may be classified as intentional conduct because he knew what he was doing and still carried out the act.

The third element is the capacity to be held criminally responsible. There was no evidence showing that the defendant suffered from mental incapacity, coercion, or a condition that prevented him from understanding the nature and consequences of his actions. Pompe states that a person may be held responsible when he can understand the meaning of his act, realize that the act is contrary to law, and control his will accordingly (Pompe, 1959). In the present case, the defendant's conduct, including his attempt to delete certain recordings, indicated awareness of possible legal and institutional consequences. Therefore, the element of capacity to be responsible was fulfilled.

The fourth element is the absence of justifying and excusing grounds. In the case, there was no evidence of self-defense, statutory command, lawful order, coercion, or mental incapacity that could eliminate unlawfulness or fault. Thus, from the perspective of criminal liability theory, the court's conclusion that the defendant could be held criminally liable was legally understandable. Nevertheless, the doctrinal

debate remains focused on whether Article 281 paragraph 1 of the Criminal Code was the most appropriate legal basis, especially because the conduct occurred in a space that may be regarded as private.

***Military Law Perspective: Discipline, Ethics, and Institutional Honor***

From the perspective of military law, the court's reasoning shows that the defendant's conduct was not treated merely as a violation of general decency, but also as an act contrary to military discipline and soldierly ethics. Members of the Indonesian National Armed Forces are bound by stricter standards than civilians because military institutions rely on discipline, hierarchy, obedience, loyalty, and institutional honor. Law Number 34 of 2004 concerning the Indonesian National Armed Forces confirms that the TNI is a state instrument in the field of national defense. This function gives the TNI a special institutional character that justifies stricter regulation of its members' conduct (Indonesia, 2004).

Military discipline is also regulated in Law Number 25 of 2014 concerning Military Discipline Law. This law defines military discipline as awareness, obedience, and compliance with laws, service regulations, and the military way of life. In this framework, a soldier's conduct may be assessed not only based on whether it violates a general criminal norm, but also whether it damages discipline, order, and the dignity of military service (Indonesia, 2014). Sianturi explains that military criminal law aims to protect military order and discipline because these elements are essential for the effectiveness of national defense (Sianturi, 2010).

The additional punishment of dismissal from military service reflects this military law perspective. In military criminal law, dismissal is not merely a punitive measure. It also functions to protect the honor, discipline, and integrity of the military institution. Faisal Salam argues that dismissal from military service is imposed when a soldier is considered no longer worthy of remaining in the military due to conduct that damages institutional dignity (Salam, 2006). In Decision Number 24-K/PM.III-12/AD/II/2020, the court appeared to conclude that the defendant's conduct was incompatible with the moral and disciplinary standards required of a soldier.

From this perspective, the court's decision can be understood as an effort to protect military discipline and institutional honor. However, the use of criminal law in such cases must remain proportional. Barda Nawawi Arief emphasizes that criminal law should function as an *ultimum remedium*, meaning that it should be used as a last resort when other legal or administrative mechanisms are insufficient (Arief, 2010). Therefore, in future cases, it is important to distinguish between conduct that should be treated as a criminal offence, conduct that should be resolved through military discipline, and conduct that should remain within the domain of ethics or internal institutional regulation.

***Human Rights Perspective: Privacy, Limitation of Rights, and Non-Discrimination***

The issue of homosexual conduct by military personnel also raises human rights questions. Human rights are recognized in Indonesian law as rights inherent in every human being as a creature of God Almighty. Article 1 paragraph 1 of Law Number 39 of 1999 concerning Human Rights defines human rights as a set of rights inherent in human nature and existence as a gift from God Almighty that must be respected, upheld, and protected by the state, law, government, and every person (Indonesia, 1999). This formulation shows that human rights in Indonesia are not purely individualistic, but are placed within a moral and religious framework.

The 1945 Constitution also protects personal dignity, security, and legal certainty. However, Article 28J paragraph 2 of the Constitution allows limitations on rights by law for the purpose of respecting the rights of others and fulfilling moral considerations, religious values, security, and public order in a democratic society (Indonesia, 1945). Therefore, human rights in Indonesia are not absolute. They may be limited when the limitation is based on law, pursues a legitimate aim, and is applied proportionally. Jimly Asshiddiqie argues that limitation of rights in a democratic rule-of-law state is permissible as long as it is legally grounded, legitimate in purpose, and proportional in application (Asshiddiqie, 2011).

In the context of military life, certain limitations on individual rights are more common than in civilian life. Soldiers may be subject to restrictions on political expression, movement, association, and certain aspects of personal conduct. These restrictions are justified by military necessity and the need to preserve discipline and readiness. Nevertheless, military status does not eliminate human dignity or basic legal

protection. The critical issue is not whether a soldier has human rights, but how far those rights may be limited in a lawful and proportional manner.

In cases involving homosexual conduct, the distinction between sexual orientation and concrete conduct becomes important. Modern criminal law should not punish identity or internal orientation. It should focus on concrete acts that fulfil the elements of a criminal offence. If law enforcement targets a person merely because of sexual orientation, it risks becoming discriminatory. However, if law enforcement focuses on conduct considered to violate military discipline or legal norms, the analysis must examine whether the restriction is clear, necessary, and proportional. This distinction is important to prevent criminal law from becoming an instrument of identity-based punishment.

#### ***Weaknesses in the Existing Legal Framework***

The discussion also reveals several weaknesses in the current positive law governing homosexual conduct in the TNI environment. The first weakness is the absence of explicit and specific regulation. Indonesian general criminal law does not expressly criminalize homosexual orientation or consensual same-sex relations between adults. Article 292 of the old Criminal Code only regulates obscene acts by adults with minors of the same sex, which means that its main concern is child protection, not the general criminalization of homosexuality. The new Criminal Code under Law Number 1 of 2023 also does not expressly criminalize homosexual orientation (Indonesia, 2023). This creates a normative gap when similar conduct is committed by military personnel.

The second weakness lies in the interpretation of Article 281 paragraph 1 of the Criminal Code, especially the element of openness. The case shows that courts may interpret the element broadly when the conduct occurs in a military environment. Although this may be justified by institutional context, it creates legal uncertainty. Criminal norms should be formulated and interpreted clearly because they directly affect liberty and legal certainty. Hiariej emphasizes that the principle of legality requires *lex certa*, meaning that criminal provisions must be clear and not vague (Hiariej, 2016).

The third weakness is the lack of harmonization between general criminal law, military criminal law, military discipline law, and internal military regulations. In practice, the same conduct may be treated as a general criminal offence, a military criminal offence, a disciplinary violation, or an ethical breach. This overlap creates uncertainty in determining the proper legal basis, the type of liability, and the appropriate sanction. Barda Nawawi Arief states that criminal law reform must consider synchronization between different legal regimes to avoid disharmony in law enforcement (Arief, 2010).

The fourth weakness is the excessive reliance on morality without a clear legal formulation. Public morality is recognized in the Indonesian constitutional system as a legitimate basis for limiting rights. However, morality cannot stand alone as a basis for criminal punishment without clear legal norms. In a rule-of-law state, moral considerations must be translated into legal provisions that are clear, measurable, and enforceable. Otherwise, criminal punishment may depend too much on subjective moral interpretation by law enforcement institutions.

The fifth weakness concerns the unclear boundary between private life and institutional interest in the military environment. Soldiers are subject to special institutional restrictions, but this does not mean that all aspects of their private life automatically fall under criminal regulation. The law must define when private conduct becomes legally relevant to military discipline, institutional honor, or national defense interests. Without clear boundaries, legal intervention may become excessive and may create tension with privacy and proportionality principles.

#### ***Direction of Indonesian Criminal Law Reform in TNI Homosexual Conduct Cases***

The reform of Indonesian criminal law must address the normative uncertainty shown in these cases. Criminal law reform should not be understood merely as the expansion of criminalization. It should be understood as an effort to build a clearer, more coherent, and more proportional legal system. Barda Nawawi Arief argues that penal reform covers not only the reform of legal substance, but also legal structure and legal culture (Arief, 2010). Therefore, reform in this area must involve the harmonization of general criminal law, military criminal law, disciplinary law, and internal military norms.

The first direction of reform is the strengthening of legal certainty. If the state considers certain conduct by military personnel to have serious implications for military discipline and institutional honor, the law must regulate it clearly. The formulation should define the prohibited conduct, the legal category of the violation, the competent forum, and the appropriate sanction. This is necessary to avoid excessive dependence on broad interpretation of general decency norms.

The second direction is harmonization between the Criminal Code and military law. Members of the TNI are special legal subjects. Therefore, their legal regulation should not rely solely on general criminal law. A clearer relationship must be developed between the general Criminal Code, the Military Criminal Code, Law Number 25 of 2014 on Military Discipline Law, and internal military regulations. Such harmonization is necessary to determine whether a particular act should be treated as a criminal offence, a disciplinary violation, or an ethical issue.

The third direction is strengthening military law as *lex specialis*. Because the military has special institutional needs, certain forms of conduct may be more appropriately regulated through military law rather than general criminal law. However, this special regulation must still comply with the principles of legality, proportionality, and non-arbitrariness. The special character of military law should not become a justification for unclear or excessive punishment.

The fourth direction is the application of criminal law as *ultimum remedium*. Not every morally controversial conduct should be criminalized. Sudarto argues that criminal law should be used selectively because it is the most repressive instrument in the legal system (Sudarto, 1986). In the military context, some conduct may be more appropriately addressed through disciplinary mechanisms, ethical supervision, counseling, or administrative sanctions. Criminal punishment should be reserved for conduct that clearly violates legal interests and seriously affects military discipline or institutional integrity.

The fifth direction is the integration of constitutional values. Indonesian criminal law reform must reflect the balance between individual rights and public morality, as recognized in Article 28J of the 1945 Constitution. The law may restrict individual rights for legitimate purposes, including morality, religious values, security, and public order. However, such restrictions must be clear, necessary, and proportional. This approach is consistent with the Pancasila-based rule of law, which does not adopt absolute individualism but also rejects arbitrary state power.

## 7. Overall Discussion

The findings show that criminal liability in cases of homosexual conduct by TNI members is shaped by the interaction between general criminal law, military criminal law, institutional discipline, morality, and human rights. Decision Number 24-K/PM.III-12/AD/II/2020 demonstrates that courts may impose criminal liability when the conduct is considered to violate decency and military discipline. The elements of criminal liability in the case were generally fulfilled, especially the existence of conduct, intentional fault, capacity for responsibility, and the absence of justifying or excusing grounds.

However, the case also exposes significant weaknesses in the existing legal framework. The broad interpretation of the element of openness in Article 281 of the Criminal Code raises questions about legal certainty. The overlapping use of general criminal law and military criminal law creates uncertainty regarding the proper classification of the conduct. The reliance on moral and institutional considerations without a more explicit legal formulation may also produce inconsistent legal outcomes.

Therefore, the ideal reform of Indonesian criminal law in this area should not merely aim to expand criminalization. It should aim to create a more precise, harmonized, and proportional legal framework. The reform should distinguish clearly between sexual orientation, private conduct, disciplinary violation, ethical misconduct, and criminal offence. Such distinction is necessary to ensure that military discipline can be enforced without abandoning the principles of legality, proportionality, legal certainty, and human dignity.

## IV. CONCLUSION

This study concludes that criminal liability against members of the Indonesian National Armed Forces who commit homosexual conduct must be understood through the interaction between general criminal law, military criminal law, military discipline, soldierly ethics, and human rights principles.

Decision Number 24-K/PM.III-12/AD/II/2020 shows that a TNI member occupies a special legal position. A soldier is not only subject to the general criminal law applicable to civilians, but also to the Military Criminal Code, military discipline law, service regulations, and ethical norms of military life. Therefore, conduct committed by a soldier is not assessed solely as an individual private act, but also as conduct that may affect discipline, institutional honor, and the moral integrity of the military organization.

In the case examined, criminal liability was constructed through the violation of decency norms, military discipline, and the dignity of the TNI institution. The court considered that the defendant's conduct fulfilled the elements of a criminal offence and justified the imposition of imprisonment and dismissal from military service. From the perspective of military law, this approach can be understood because the military requires strict discipline, loyalty, and obedience to maintain institutional effectiveness. However, from the perspective of criminal law and human rights, the case reveals an important legal problem. Indonesian positive law does not yet provide a clear and explicit regulation concerning homosexual conduct in the military environment. As a result, law enforcement still relies on broad interpretation of general norms, especially provisions on decency and disobedience to service orders. This condition may create legal uncertainty and open the possibility of inconsistent judicial reasoning.

The study also finds that reform of Indonesian criminal law is necessary to provide clearer legal direction in handling similar cases in the future. Although Law Number 1 of 2023 concerning the new Criminal Code represents an important step in national criminal law reform, it has not specifically addressed the legal needs of military subjects in cases involving sexual conduct, morality, discipline, and institutional ethics. Therefore, legal reform should not merely expand criminalization. It should instead build a more coherent, precise, and proportional legal framework.

The ideal reform should harmonize general criminal law, military criminal law, military discipline law, and internal TNI regulations. This harmonization is needed to distinguish clearly between criminal offences, disciplinary violations, ethical misconduct, and private conduct. Such reform must also uphold the principles of legality, proportionality, legal certainty, military necessity, and human rights protection. Through this approach, Indonesian criminal law can protect military discipline and institutional honor while still respecting the rule of law and the dignity of every legal subject.

## V. ACKNOWLEDGMENTS

The author expresses sincere gratitude to all parties who provided support, guidance, and encouragement during the preparation of this research. The author extends appreciation to the academic supervisors and lecturers who offered valuable direction, constructive feedback, and scholarly insight in developing the legal analysis presented in this article.

The author also thanks the Faculty of Law and the academic community for providing an intellectual environment that supported the completion of this study. Appreciation is further addressed to colleagues and fellow researchers who contributed through discussions, suggestions, and critical perspectives on criminal law, military law, and human rights issues.

The author is deeply grateful to the family for their continuous prayers, moral support, and encouragement throughout the research process. Their support gave strength and motivation to complete this article.

Finally, the author hopes that this research may contribute to the development of criminal law scholarship in Indonesia, particularly in the study of military criminal liability, legal reform, and the protection of human rights within the framework of the rule of law.

## REFERENCES

- [1]. American Psychological Association. (2008). Understanding sexual orientation and homosexuality. <https://www.apa.org/topics/lgbtq/orientation>
- [2]. Amiruddin, & Asikin, Z. (2016). Pengantar metode penelitian hukum. Rajawali Pers.
- [3]. Arief, B. N. (2010). Bunga rampai kebijakan hukum pidana. Kencana.

- [4]. Asshiddiqie, J. (2011). *Konstitusi dan konstitusionalisme Indonesia*. Sinar Grafika.
- [5]. Asshiddiqie, J. (2011). *Konstitusi dan konstitusionalisme Indonesia*. Sinar Grafika.
- [6]. Barda Nawawi Arief. (2010). *Bunga rampai kebijakan hukum pidana*. Kencana.
- [7]. Drescher, J. (2015). Out of DSM: Depathologizing homosexuality. *Behavioral Sciences*, 5(4), 565–575. <https://doi.org/10.3390/bs5040565>
- [8]. Hamzah, A. (2017). *Hukum pidana Indonesia*. Sinar Grafika.
- [9]. Hiariej, E. O. S. (2016). *Prinsip-prinsip hukum pidana*. Cahaya Atma Pustaka.
- [10]. Human Rights Committee. (1994). *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992. United Nations.
- [11]. Ibrahim, J. (2013). *Teori dan metodologi penelitian hukum normatif*. Bayumedia Publishing.
- [12]. Indonesia. (1945). *The 1945 Constitution of the Republic of Indonesia*.
- [13]. Indonesia. (1945). *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*.
- [14]. Indonesia. (1946). *Undang-Undang Nomor 1 Tahun 1946 tentang Peraturan Hukum Pidana*.
- [15]. Indonesia. (1947). *Law Number 39 of 1947 concerning the Military Criminal Code*.
- [16]. Indonesia. (1947). *Undang-Undang Nomor 39 Tahun 1947 tentang Kitab Undang-Undang Hukum Pidana Militer*.
- [17]. Indonesia. (1974). *Law Number 1 of 1974 concerning Marriage*.
- [18]. Indonesia. (1999). *Law Number 39 of 1999 concerning Human Rights*.
- [19]. Indonesia. (1999). *Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia*.
- [20]. Indonesia. (2004). *Law Number 34 of 2004 concerning the Indonesian National Armed Forces*.
- [21]. Indonesia. (2004). *Undang-Undang Nomor 34 Tahun 2004 tentang Tentara Nasional Indonesia*.
- [22]. Indonesia. (2014). *Law Number 25 of 2014 concerning Military Discipline Law*.
- [23]. Indonesia. (2014). *Undang-Undang Nomor 25 Tahun 2014 tentang Hukum Disiplin Militer*.
- [24]. Indonesia. (2019). *Law Number 16 of 2019 concerning Amendment to Law Number 1 of 1974 concerning Marriage*.
- [25]. Indonesia. (2023). *Law Number 1 of 2023 concerning the Criminal Code*.
- [26]. Indonesia. (2023). *Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana*.
- [27]. Marzuki, P. M. (2017). *Penelitian hukum*. Kencana.
- [28]. Moeljatno. (2008). *Asas-asas hukum pidana*. Rineka Cipta.
- [29]. Moeljatno. (2008). *Asas-asas hukum pidana*. Rineka Cipta.
- [30]. Pompe, W. P. J. (1959). *Handboek van het Nederlandse strafrecht*. W. E. J. Tjeenk Willink.
- [31]. Rimmelink, J. (2003). *Hukum pidana: Komentar atas pasal-pasal terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia* (T. P. Moeliono, Trans.). Gramedia Pustaka Utama.
- [32]. Salam, M. F. (2006). *Hukum pidana militer di Indonesia*. Mandar Maju.
- [33]. Saleh, R. (1983). *Perbuatan pidana dan pertanggungjawaban pidana*. Aksara Baru.
- [34]. Saleh, R. (1983). *Perbuatan pidana dan pertanggungjawaban pidana*. Aksara Baru.
- [35]. Sianturi, S. R. (2010). *Hukum pidana militer di Indonesia*. Badan Pembinaan Hukum Tentara Nasional Indonesia.
- [36]. Sianturi, S. R. (2010). *Hukum pidana militer di Indonesia*. Badan Pembinaan Hukum Tentara Nasional Indonesia.
- [37]. Soekanto, S. (2014). *Pengantar penelitian hukum*. UI Press.
- [38]. Soekanto, S., & Mamudji, S. (2015). *Penelitian hukum normatif: Suatu tinjauan singkat*. Rajawali Pers.
- [39]. Soesilo, R. (1996). *Kitab Undang-Undang Hukum Pidana serta komentar-komentarnya lengkap pasal demi pasal*. Politeia.
- [40]. Sudarto. (1986). *Hukum dan hukum pidana*. Alumni.
- [41]. Sudarto. (1986). *Hukum dan hukum pidana*. Alumni.
- [42]. Sunggono, B. (2016). *Metodologi penelitian hukum*. Rajawali Pers.