DEVELOPMENT CONCEPT OF NON-ALUTSISTA ABUSE BY INDONESIAN NATIONAL ARMY

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ABSTRACT

The purpose of this study is to examine and analyze the principles of regulation of non-alutsista (Main Equipment and Weapon System) abuses of the Indonesian National Army at this time, and to develop the concept of non-weapon abuses of the Indonesian National Army. The method used in this research was empirical juridical by using primary and secondary data types. And the method of data analysis was qualitative descriptive. The findings of this research are the principles of non-armed defense system of the Indonesian National Army (TNI) based on the principle of civil supremacy as formulated in the consideration of Law Number 34 of 2004. This is very contrary to the principle of equality before the law, raises legal certainty and justice issues that have implications for the protection of TNI members from non-alutsista misuse by civilians. Developing the concept of non-alutsista abuses of the Indonesian National Army, namely the reformulation of the Law Substance, the provisions of Law Number 34 of 2004 on the TNI, on the terms and notions of non-armaments in Article 1 Chapter General Provisions and Article 7 Paragraph 2 b Number 14 TNI in the field of military operations other than war to safeguard and protect the occurrence of alleged and non-alutsista piracy; the provisions of the Criminal Code in Article 149 need to regulate the use of non-alutsista TNI by civil society.

Keywords: Development, Non Alutsista Abuse, TNI (National Indonesian Army)

A. INTRODUCTION

The Preamble of the 1945 Constitution of the State of the Republic of Indonesia mandates that the national objective is to protect the entire nation and the whole of Indonesia's blood sphere promotes the general welfare, the intellectual life of the nation, and the participation of a world order based on freedom, eternal peace, and social justice. To achieve the mandate of the 1945 Constitution of the State of the Republic of Indonesia, it requires the joint efforts of all Indonesian people. Such joint efforts are manifested in the roles, functions and duties of each component of the nation are implemented in earnest. State Defense is one of the efforts of the Indonesian nation in achieving national goals.

The nature of national defense is the participation of every citizen as the embodiment of his rights and obligations in the state defense effort. The rights and obligations of each citizen are stipulated in Article 30 paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, while paragraph (2) affirms that the state defense effort is carried out through the defense and security system of the people, namely that the National Army Indonesia is the main force and the people as a supporting force.[1]

In the provision of Article 149 of the Criminal Code (KUHPM), states that: The military which belongs to an armed force prepared for war is prohibited without obtaining written permission from or on behalf of eligible officers: selling, exchanging, awarding, mortgaging, borrowing or storing, or eliminating any goods supplied by the State to him or to any other military, knowing that such goods include clothing or military equipment, shall be punishable by a maximum imprisonment of five years.

In the formulation of Article 149 of the Indonesian Criminal Code as mentioned above it can be seen that military clothing and equipment (non-alutsista) can indeed be lent to other (military) and there is an extended understanding to civilian groups. However, under the provisions of the legality principle, through licensing mechanisms by eligible officers, non-defense equipment may be lent or to evangelize any goods supplied by the state to another military, which is extended to civilians. Thus, it is possible that the use of military uniforms and military attributes have been encountered in society extensively, including those mentioned above, which are also used by the President, are legitimate. In view of that, it is pursued through a licensing system permitted by applicable law.[2]

However, the formulation of Article 149 of the Criminal Law in legally formal may be understood to have justified it, it is not necessarily "in line" with the spirit of law contained in Law No. 34 of 2004 on the TNI Law. Law No. 34 of 2004 which expressly states the principle of civil supremacy. The Criminal Code is the applicable law. However, the law will be applied if

[1]Expanation of Undang-Undang Nomor 34 Tahun 2004 Tentang Tentara Nasional Indonesia

[2]Indonesian Jurisprudence (Volksgeist), that the consequence of Article 149 of the Indonesian Criminal Code, precisely caused civilians even to be captured by the military, but later freed because of unclear arrangements in Article 149 of the Criminal Code.

there is a rule that applies in advance contrary to the rules that apply more recently as felt in the case of KUHPM and Law No. 34 of 2004 on the TNI. The Pancasila Legal System as a legal system of dignity does not want a conflict between the rules of law (anti-nomie). In the perspective of the Dignity Theory of Justice offers solutions to the principle of law. That *lex posterior derogat priori* or in English is known as a later norm supersedes an earlier one.[3]

Law as a system applies the principle that the system is a unity. It consists of elements that interact with each other. In the system is not desired any conflict between the elements that exist in the system, if until a conflict occurs then immediately resolved by the system.[4]

Soldiers, including retired officers, all, if it is coherent[5]with the meaning of the word tool in the Considering the letters (c) of Law No. 34 of 2004 on TNI as mentioned above are also non-defense equipment that should not be used except by the TNI[6]. The abuse of non-alutsista (Main Equipment and Weapon System) is ranging from stickers, clothes, trousers, jackets, helmets, glasses, shoes, to military uniforms and even more "in" again, namely the military and others, civilians used. All of them are easily found to be civilians on the streets, and some even are freely sold to the public, many of them civilians (non-combatants)[7]. In the Vienna Convention, since the Second World War, there has been an understanding of the rule that to distinguish between the Army (Combatants) and the civilians, the members of the army are required to use uniforms, attributes and so on that have been specially made and distributed only especially for members of the military (military), not civilians. The purpose of the arrangement in such an international Convention is to distinguish between the army and civilians. And not only that, the most important thing is that such an arrangement also aims to provide protection to members of the Army.

According to Kadispenau, to speed up the return of uniforms and military attributes (non-alutsista) according to their functions, it is time for all competent parties to sit together, coordinate and seek the best solution for the use of military uniforms and attributes (as conceptualized with non-alutsista) in civil society. Such a view proves that there is problem that requires completion, and in this research the solution from the perspective of legal scholarship.

Decree of the TNI Commander Number Skep / 346 / X / 2004 dated October 5, 2004, concerning Guidelines on the Use of the Army's Uniform Service Clothes, that the use of individual military equipment, which includes uniforms and military attributes, by formal jurisdiction, the use of military uniforms and attributes in the ward TNI AU / TNI has a clear legal rule. However, as a legal product with the status of Commander's Decree, the regulation only regulates the military environment. It does not apply outside the military environment. It is also arrange that civilians do not allow touse military uniforms and attributes.

Then the Regulation of the Chief of Staff of the Air Force No.Kosas / 130 / XII / 2008 on December 2, 2008 on the Guidance on the Use of the Uniform Service Apparel of the Air Force also stipulates that the objectives of the regulation are clear to maintain the solidity of the soldiers, to enhance the sense of discipline, to build the image of the institution and also the responsibility soldier. "Thus, the use of uniforms and military attributes by Indonesian National Air Force/ TNI soldiers is certainly not for the purpose of dashing. However, as an identity as well as a sign of distinguishing military institutions is as combatants against non-military institutions as civilian ".[8]

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[3] Gabriel Hallevy, 2010, *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer-Verlag Berlin Heidelberg, h., 165. Prinsip pengaturan yang sama juga dimengerti dalam Sistem Hukum Pancasila, lihat, Teguh Prasetyo, 2013, *Hukum dan Sistem Hukum Berdasarkan Pancasila*, Cetakan Pertama, Media Perkasa, Yogyakarta, h., 93; Berkenaan dengan prinsip pengaturan yang menjadi isu pokok dari penelitian disertasi ini, maka literatur lainnya dapat dilihat dalam Teguh Prasetyo, 2016, *Sistem Hukum Pancasila* (*Sitem, Sistem Hukum dan Pembentukan Peraturan Perundang-undangan*) *Perspektif Teori Keadilan Bermartabat*, Cetakan Pertama, Nusamedia, Bandung.

[4] *Ibid*.

[5] Jujun S. Suriasumantri, 1988, *Filsafat Ilmu Sebuah Pengantar Populer*, Cetakan Kelima, Pustaka Sinar Harapan, Jakarta, h., 55 points out that: Not all humans have the same requirements for what is considered true, including a small child ..., who with his childish mind has his own truth criterion. For us it is not difficult to accept the truth that 3 + 4 = 7; 5 + 2 = 7 and 6 + 1 = 7; because it can be deductively proven that the three questions are true. Why do we call this right? Because the statements and conclusions he draws are consistent with earlier statements and conclusions that are considered correct. The theory of truth based on the above criterion is called coherence theory.

[6] It is said that TNI retired is a tool that can not be used by civilians, (unless otherwise provided by law, such as when asked for police assistance). In Article 37 Paragraph (2) of Law Number 34 Year 2004 regarding the TNI, it is stipulated that for the security of the state, every soldier who has ended his service in the army, shall have a steady surrender of the army even if he is dismissed with respect or disrespect. In this case it must be understood that all military tactics and techniques ("special anniversary of killing, which is controlled only by the army") can also be said to be the secret of the army..

[7] Yeremia S., 16/12/2016, *Penggunaan Atribut Militer oleh Sipil*, Berita Surat Kabar, Suara Pembaruan, Jakarta.

[8] *Ibid.*

However, it is generally known that the decree of the TNI (Indonesian National Army) Commander was in practice many "violated" by the civilian side. It is proven by the number of uniforms (hats, shirts, T-shirts, pants or related to it, such as helmet, shoes and so on) instead used in the wider community by those who are not Soldiers or active TNI members, above. This can certainly lead to an image, in which case the professionalism of the TNI organization and members becomes "polluted". In particular, the "potential for contamination" occurs as a result of the misuse of such items by unauthorized persons (or perhaps forbidden) to use them.

The Indonesian National Army as a defense tool The Unitary State of the Republic of Indonesia is not a "tool" to do business, or to be a "tool" / politics and so forth[9]. Therefore, based on the phenomenon of non-alutsista misuse (ie tool), by civilians or for civil interests greatly disrupts the interests of the Indonesian Armed Forces as described in the above background, it is very important to conduct in-depth research in relation to the principle of non-defense arsenal of the Indonesian National Army and the development of the concept of non alutsista abuses of the Indonesian National Army by civil society.

B. RESEARCH METHODS

The nature of this research is descriptive research analysis, because researcher was willing to describe the subject and object of research, which is then analyzed to be drawn conclusions[10]. The method of approach in this research was sociological jurisdiction. This study not only examines the norms system in the rule of law, but observes the reactions and interactions that occur when the norm system works in society. Data types used were primary and secondary data[11]. The samples were obtained through field study, it conducted by purposive sampling method[12]. Data analysis in this research was done through qualitative descriptive data analysis.[13]

C. RESEARCH RESULT AND DISCUSSION

1. Principle of Arrangement of Abuse of Non-alutsista as an effort of legal protection for Indonesian Army member

The provision in Chapter II of Law No. 34 of 2004 on TNI, Article 2 (d), states that TNI identity is a Professional Army, ie soldiers who are trained, well-educated, well equipped, not practically politicized, not in business, .. . ". This provision is not followed by strict sanctions.

Access to membership is open to all people. The commissioned officers are selected through an objective selection process based on rank, or appointments made by legislatures, who are people's representatives. As a result of the turbulence that occurred in Europe between the Old Regime and the liberal bourgeois elements, at the end of the eighteenth century, the Old Regime's supporters maintained the existence of the standing army and the latter strove for a national militia form, TNI right now. There is no clear distinction between what politics is and military.

Proven by the unification of military and political leadership, they are on the same premise and look. The prominent meaning of explaining civil and military relations does not exist, because military institutions have not been distinguished from other state and community institutions. Conflict between groups occurs in the political arena stands in parallel with the conflicts that occur in the army. Some argue that civil supremacy or civil control is such an understanding; it is called subjective control of civilians.[14]

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[9]Members of the TNI are human, non-alutsista a TNI soldier used by civilians to become a security guard of his house, etc., also including non-alutsista misuse. The use of non-alutsista such as this, for example by the Police of the Republic of Indonesia (POLRI) must be through the permission of the TNI superiors who are entitled / authorized for it. However, as noted above, such non-alutsista use is not strictly regulated and threatened with strict criminal sanctions in the TNI Law, except for non-alutsista use by the POLRI..

[10]*Ibid.*, h. 183.

[11] Mukti Fajar N.D. dan Yulianto Achmad, *Dualisme Penelitian Hukum, Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010, h. 47.

[12]*Purposive sampling*is a sampling method that is conducted with consideration on the collection of data in accordance with the intent and purpose of the study. See in Irwan Soehartono, *Metode Penelitian Sosial, Suatu Teknik Bidang Kesejahteraan Sosial dan Ilmu Sosial Lainnya*, Remaja Rosda Karya, Bandung, 2004, h. 61. Sedangkan Silalahi menyatakan bahwa "sampel adalah suatu sub setiap bagian dari populasi berdasarkan apakah itu *representative* atau tidak". Lihat dalam Uber Silalahi, *Metode Penelitian Sosial*, Unpar Press, Bandung, 2006, h. 233. Thus the meaning of the above is people who have a certain level of education, certain positions, and a certain age. Purposive sampling in carefully selected samples is therefore relevant to the research method.

[13]*Descriptive analytical is what is obtained from literature research or stated by the speaker in written or oral and also the real behavior, which researched and studied as something intact, see in* Soerjono Soekanto, *Pengantar Penelitian Hukum*, Universitas Indonesia Press, Jakarta, 1986, h. 250.

[14]The description of the difference between subjective civil control and objective civilian control can be found within Heinz Eulau, Samuel J. Eldersveld, and Morris Janowitz (eds.), 1956, *Civilian Control of the Military: Atheoretical Statement, Political Behavior: A Reader in Theory and Method*, Glencoe, h., 379-85.

Along with the turn of the century, in the nineteenth century, subjective control of civilization became obsolete. People began to recognize the division of labor in a society. Technology is evolving, industrialization is widespread. Begin to be born specialize in the military body. There arises the need for specialists, those who have high expertise in engaging in coordination and directing different sections to achieve their own ends.

Generally people start feeling that it is impossible to master one area of expertise while still competent in other areas of expertise. Amateurs in Europe only enter the army of being able to pay and also because of offspring (dynasty) able to direct the armed forces just as a side job, just as in the past. Military science and leadership science in the army evolved as a special field of human knowledge and struggle, therefore to master it all can only be done by those who really concentrate themselves in studying the field alone. It was born a professional military pressure.

The military is no longer able to "multitasking" as entrepreneurs who trade grocery, including also drive engine fighter aircraft or super tanks. The latter then becomes a very exclusive role, determined by skill, rather than social status or popularity in the public eye. The ultimate responsibility of officers is the military security of its clients, the people within the state.

The soldiers and commissioned officers in the various corps are professional autonomous institutions with their own highly specialized skills, as well as their own distinctive and specialized standards, corporate culture and spirit, and a sense of professional responsibility to the country they serve. It no longer reflects the dominant political principles and political parties in society.

Instead reflected on the military's face are the imperative demands of their respective positions, duties and functions as purely professional soldiers performing military functions.[15]

The changes which are described above radically alter the nature of the concept of civil control, or civil supremacy. Concretely, there is a distinction between military officers and other social roles. It then creates an issue of the need for a law that governs modern traits in civil-military relations.

Many soldiers have become professional military advocates for political leaders. When the soldiers enter a special area in line with their professional competence, they are also tempted to enter areas beyond competence (in this dissertation research used their non-alutsista concept).

Consequently, civilian control depends heavily on how far the military leaders adhere to their role as professional advisors. Civilian control will be undermined if the officers who become advisers of politicians in the military then begin to "get out" from their field of ignorance, or if civilian officials make it impossible to carry out their professional vocation.

The law is essentially the norm and each norm must contain value, it is immediately answered that the content of the law is the value. The value referred to here is nothing but a moral or a wider scope of morality.[16]

The legal norm has the support of state power. The legitimate ruler of the state shall ensure the enforcement of legal norms both to individuals and society. Law without power support will only be a dead word. This power should not be arbitrary indefinitely. Laws also restrict the application of state power.[17]

Legal protection for the people is a universal concept, in the sense embraced and applied by every self-regulating state as a rule of law, but as Paul E. Lotulung states, "each country has its own way and mechanism of how to bring about the protection of that law, as well as to what extent the legal protection is provided ".[18]

The verdict which becomes the object of the description or description of the regulation of non-alutsista use in the Pancasila Legal System, namely the decision of the Military Oditur vs. Yogi Gunawan.

In this case, the Military Oditur, the first party in the name is the Plaintiff, in this case representing the public interest, or the interest of the Republic of Indonesia. While the second party is the defendant namely Yogi Gunawan who in this case is a private party. He is an Indonesian Army, and subject to jurisdiction or military law applicable in Indonesia.

In this Decision, there is a weakness in the Arrangement referred to by the Judge who decides the case, namely that the use of Article 149 of the Indonesian Criminal Code only succeeds in capturing the TNI member (Yogi Gunawan). On the other hand, the civilian party involved in the act considered as a crime by the Panel of Judges in the samecase, namely Emi Passe. He did not get the same punishment as was dropped to Yogi Gunawan. The verdict which has been officially published by the Supreme

[15] Samuel P. Huntington, 1957, *The Soldier and the State: The Theory and Politics of Civil-Military Relations*, Bab I dan II, Harvard University Press. Berisi pembahasan yang komprehensif tentang ciri-ciri profesionalisme keprajuritaan dan keperwiraan.

[16] Sidharta, 2006, *Moralitas Profesi Hukum*: *Suatu Tawaran Kerangka Berpikir*, Refika Aditama, Bandung, h.76-78.

[17] Sidharta, *Loc. Cit.*, h. 78.

[18] Paulus E. Lotulung, 1993, *Beberapa Sistem tentang Kontrol Segi Hukum terhadap Pemerintah*, Citra Aditya Bakti, Bandung, h. 123.

Court of the Republic of Indonesia (MARI) is a Decision from the Medan Military High Court with the registration number of PUT / 02-K / PMT-I / AD / III / 2010 court.

The researcher found that the status of the Defendant in Decision Number: PUT/02-K/PMT-I/AD/III/2010 when the Case took place rank / Nrp: Letkol Inf / 31544. The defendant, Yogi Gunawan, was also in office. The position held by the Defendant at that time, namely as Pamen Pusterad. Unity: Pusterad.

In this verdict, it was found that the substance of the demand or *requisitoir* of the Military Oditur consists of five points of interesting argumentation. First, namely the basis of prosecution, in this case that is about the arrangements that are violated by the Defendant, namely violation of the criminal provisions that prohibit the use of non-alutsista (Main Equipment and Weapon System) for the military.

According to the Military Oditur, the Defendant is legally and convincingly proven guilty of committing a crime:

The military belonging to an armed force prepared for war without obtaining written permission from or on behalf of an officer entitled to borrow in the use of any goods supplied by the state to another military, is known that the goods include clothing or military equipment as regulated and threatened in article 149 of the Criminal Code.

On the basis of the formulation of Article or regulation concerning non-alutsista usage as defined in Article 149 of the above KUHPM, the Military Oditur, in this case the High Military Oditur requested that the High Military Court convict the Defendant. By the High Military Oditur who made the Prosecution of the Defendant in the military criminal case, the Defendant was charged with imprisonment for twelve months. In other words, from the standpoint of Indonesian jurisprudence, a violation of the regulation of non-alutsista, as seen in the description of the Yogi Gunawan decision, he should be threatened with five years of imprisonment.

Principles of regulation the misuse of non-alutsista Indonesian National Army is based on the principle of civil supremacy as defined in Law Number 34 of 2004. The regulation on non-alutsista use as defined in Article 149 of the Indonesian Criminal Code only applies to members of the Indonesian National Army. This is very contrary to the principle of equality before the law that raises the issue of legal certainty and justice which implies the non-protection of TNI members from non-alutsista misuse by civilians.

2. Develop the concept of abuse non-alutsista as a Legal Protection Effort for Indonesian Army

According to Sir John William Salmond, a prominent jurist from England, the main purpose of law is justice. To understand the meaning of Justice, he opposes it with injustice. Injustice means the act of violating the rights of others, either in the form of individual actions or in the form of practices based on a particular system. Unfair actions always treat others unfairly. Salmond insists that the law should be an instrument to achieve justice. First, the rules of every law on him must be fair, so that the application by the court will not take sides. Secondly, the law should be able to ensure that the state will treat every citizen fairly, and that every citizen does justice to his neighbor.[19]

According to J. H. Rapar, the principle of justice contradicts:
(1) violation of law, irregularities, inaccuracies, uncertainties, unexpected decisions, not limited by rules;
(2) partiality in the application of rules; and
(3) favorable or arbitrary rules, involving unfounded discrimination of irrelevant differences.[20]

According to Teguh Prasetyo and Abdul Halim Barakatullah, Pancasila as the state fundamental norm and the legal ideas (rechtsidee), it is the guiding stars in the formation, implementation and implementation of law in Indonesia[21]. Therefore, the establishment and enforcement of the law in Indonesia should be based on the values contained in the Pancasila precepts. One such value is justice as it exists in the second precept that is Just and Civilized Humanity. Justice is about humanize human being. The law of creating a dignified society is a law capable of humanizing human beings, meaning that the law treats and upholds human values according to the nature and purpose of life. This is because humans are noble beings as the creation of God Almighty, as stated in the 2nd principle of Pancasila, the just and civilized humanity, which has the value of recognition of the dignity of human beings with all their rights and obligations and get the treatment that fair to human, to self, to nature and to God.[22]As Anis Mashdurohatun puts it, that: Pancasila lays a moral foundation. The Godhead of the Almighty is the foundation that leads the ideals of the state that gives the soul to the effort to organize all that is right, just and good.[23]

[19]Sir John William Salmond, 1966, *Jurisprudence*, (ed), P.J. Frizgerald,: Sweet and Maxwell, London h., 60-65.

[20]J.H. Rapar, 2001, *Filsafat Politik* : Plato, Aristoteles, Augustinus, Machiavelli, Raja Grafindo Persada, Jakarta,h., 219.

[21]Teguh Prasetyo dan Abdul Halim Barakatullah, 2012, Filsafat, *Teori dan Ilmu Hukum: Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermartabat,*Raja Grafindo Persada, Jakartah., 384.

[22] Teguh Prasetyo, 2013, *ibid,*h. 93. See in Teguh Prasetyo, 2015, *Keadilan Bermartabat: Perspektif Teori Hukum*, Cetakan Kesatu, Nusa Media, Bandung.

[23]Anis Mashdurohatun, 2016, *Mengembangkan Fungsi Sosial Hak Cipta Indonesia* (*Suatu Sudi pada Karya Cipta Buku*), UNS Press, Surakarta, h., 259.

Pancasila is the basic relationship of the basic values which are the crystallization of various values that live in a society which is the soul of the nation (volksgeist) in the Indonesian people is the guiding star (leidstar) in the life of society, nation and state of Indonesia.[24]

System Theory gives some emphasis from the essence of the system as a whole that is[25]: about the essence of a system of wholeness (wholeness), about the essence of each part that forms a system (element as a parts of the others), about how it should be in analyzing a unit that large (system) and parts that make up the unit (the parts of the system).

Bellefroid argues that the legal system is the whole rule of law that is structured in an integrated manner based on certain principles.[26] Laws consist of a number of elements/components or functions/variables that always affect and are bound to each other by one or several principles. All elements / components / functions / variables are adrift and organized according to a particular structure or pattern, so that mutual influence[27].

The main principle that links all elements or components of the law is the principle of justice and constitutional principle, in addition a number of other legal principles that apply universally or locally applicable, or apply within and to certain legal discipline.[28]

The application of non-defense equipment use arrangements that apply only to the military as stated in the description of jurisprudence above also raises the question of fairness. Apparently, the description of the jurisprudence above proves that the civil party (Emi Pasee) even had time to be arrested by the authorities, but the processes of law enforcement did not bring the civilians who use non-alutsista can be subject to criminal sanctions. The civil party, in fact, is free from the enforcement of the law regulating the use of non-alutsista because the concerned is not a member or a military party. This has led to injustice, and a violation of the principle of civil supremacy, namely the absence of equality before the law in the rule of law, nor the existence of equality before the law as known in the theory of the State of Law.

The issue of law enforcement (Article 149 KUHPM) above is also exacerbated by the fact that in Law No. 34 of 2004 on the Indonesian Army there has been a regulation on the principle of civil supremacy, only that the arrangement is only included in the general section of Law Number 34 of 2004 and is not endorsed by specific provisions that may prevent the non-alutsista use by civilians in the body of Law No. 34 of 2004 and the absence of threats of sanctions that can serve as a deterrent means for both individuals and civil society in general not to abuse the use of non-alutsista.

Similarly, in the research on the principle of non-defense equipment arrangements there is no visible aspect of legal protection for TNI members, since the Decree of the TNI Commander Number SKEP / 143 / X / 2004 is merely an internal legal product, arranging in and not regulating publicly. This enlarges the issue of legal vacuum, and consequently results in legal uncertainty and issues of dignified justice, namely the legal protection of TNI members and TNI organizations from the use of non-alutsista use by civilians.

In the principle of the state of the law the main thing is that there is equality before the law or the so-called equality before the law. In the principle of equality before the law, the priority shall be all parties without exception subject to applicable laws and regulations. Any violation of law by a legal subject may be subject to legal proceedings and criminalized in accordance with the formulation of pre-determined and applicable provisions without being generally subject to a jurisdiction of the judiciary.

The weakness lies behind the fact that the principle of the law states mentioned above is less well under way in Indonesian jurisprudence, especially Yogi Gunawan story which has been described in the previous chapter. In this case, it seems that there is a difference between the treatment of civilians (Emi Pasee) and citizens who are members of the Indonesian Army (Yogi Gunawan). The different treatments are as follows. The Yogi Gunawan party may be prosecuted for committing a violation of non-alutsista regulations as regulated in Article 149 UKUPM. On the other hand, in case Emi Pasee, despite being exposed to acts of arrest by Military Intelligence officers, but concerned can not be prosecuted in abusing non-alutsista. Such a crippling condition can lead to defiance of two legal values of concern in this study. The first value, the legal certainty value and the second value is fairness.

The violation of the legal certainty because there is a regulation on the use of non-alutsista, as regulated in Article 149 of the Criminal Code, but the formulation of the provisions, the enforcement process and the sanctions can only be imposed to Indonesian Army members only, while civilians who use non-alutsista without permission, or violate the formulation of the

[24]Anis Mashdurohatun, *Constructing And Developing The Social Function Principles In Utilising Copyright Products Related To The Fundamental Rights*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 7, Issue 4 (Aug.) ISSN 2289-1560, 2015.P.88

[25]***Ibid.,*** **h. 44.**

[26]**Mariam Darus Badrulzaman, 1983,*Mencari Sistem Hukum Benda Nasional*, Alumni, Bandung, h. 15.**

[27] **Badan Pembinaan Hukum Nasional, 1995/1996,*Pola Pikir dan Kerangka Sistem Hukum Nasional*, Badan Pembinaan Hukum Nasional, Jakarta, h. 10.**

[28] **Satjipto Rahardjo, 1986,*Ilmu Hukum*, Alumni, Bandung, h. 89.**

provisions of Article 149 is not subject to due process of law, even though it was arrested by the intelligence and also not subject to the same sanctions imposed on military personnel.

The violation of justice is caused the formulation of regulations on non-alutsista looks biased. Intended with one-sidedness, as Indonesian Army members may be subject to sanctions for violating the legal provisions governing the use of non-armaments only because they are members of the TNI, while civilians who may also be said to have committed violations of the same provisions shall not be subject to criminal sanctions just because the concerned is a civilian.

If the state of legal uncertainty and unfairness as mentioned above continue to be left, then over time it will lead to defamation of the rule of law. As it is known, the principle of a constitutional state is a basic principle of the Indonesian state administration recognized in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia, which contains the affirmation that Indonesia is a state of law. The implication of violation of the rule of law in non-alutsista arrangement as mentioned above has resulted in the non-protection of TNI members and also has a significant impact on the TNI organization, ie the image of the institution may be subject to contaminated threats.

Unlike the rule of law which is the basic principle of Volksgeist Indonesia, the principle of rule of law is a basic principle known in the legal system of countries that embrace common law. In the rule of law, the principle of equality before the law is strictly interpreted. Strict interpretation of the principle of equality before the law, namely the submission of every person, be it civilian groups or military groups against a general judicial system.

From the point of view of the principle of the rule of law which gives a strict meaning to the equality before the law principle, the sociological reality of the law in Indonesia that the military is subject to the Special Judicial System while the civilian side is subject to the general judicial system can be viewed as a deviation principle equality before the law. The next result is from the point of view of the rule of law, one may come to the conclusion that in the Legal System in Indonesia there is no equality before the law. Although in this case, it is necessary to note that the meaning of equality before the law does not mean to close the possibility for the military to be subjected to a separate judicial system with applicable laws and regulations. Therefore it follows from the meaning just mentioned above, one may argue that in Indonesia, with the self-subordination of military groups, in the non-defense system arrangements to the system and the individual judicial bodies and the subordination of civilian groups which still can not be processed law and even subject to criminal sanctions in connection with the abuse of non-alutsista. It theoretically can not be called as the absence of equality before the law.

It has been mentioned above that the principle of human rights is a pillar of the rule of law. Applied to the non-alutsista arrangements prevailing in Indonesia today, it can be said that the non-defense equipment arrangements reflected in their implementation in the existing Jurisprudence have not worked properly. In the principle of respect for human rights the preferred thing is that human beings can not be sacrificed for the benefit of society. Between man and society there must be balance. In the context of non-alutsista setting, human, in this case, for example Yogi Gunawan, can not be used as a tool to deterrent effect of others doing the same deed in the future.

Concretely, it can be argued here that in the case of Yogi Gunawan, the Defendant put forward his argument that what he did was in accordance with the provisions of Article 149 of the Criminal Code. According to Yogi Gunawan, the use of his authority as Damdim, an officer who has the authority to grant written permission to Emi Pasee as a member of civil society, is intended to assist Emi Pasee as a civilian party to be able to run his profession as an artist who has been in his coaching.

The judicial process against Yogi Gunawan who disregards the intention (*mens rea)*from Yogi Gunawan, who issued permission to use non-alutsista to Emi Pasee to be able to run his profession as an art worker can be said to have committed a violation of human rights. Human rights are meant here, namely the implementation of the profession of Emi Pasee as an art worker. On the other hand violation of human rights also occurs when the law is imposed on a member of the military who performs actions with good intentions and in his view does not violate the law because it is still in accordance with the provisions of Article 149 of the Criminal Code.

It has been said above that in the principle of legality there is a legal dictation that all government action can only be done if the action has been determined in advance (*lex stricta*) in the prevailing legislation. It should be pointed out here that the non-defense system arrangements contained in Law No. 34 of 2004 are strict, but the provision is not accompanied by a formulation of offenses threatened with criminal defamation for non-alutsista abusers, especially abusers of civilians. The absence of strict formulation provisions (*lex stricta*) that the use of non-alutsista by civilians constitutes a criminal act that is threatened with criminal sanction and formulated in the body of the Law Number 34 of 2004 is seen to be contrary to the principle of legality. This will have further implications or implications, namely law enforcement that is not based on a strict formulation of offense and a pre-formulated criminal threat in the prevailing laws and regulations will lead to arbitrariness or what is known as criminalization.

Montesquieu which has the full name of Charles Louisde Secondat Baron de la Brede et de Montesquie in his De l'esprit des lois, states that "Judge is only a mouthpiece of the law or" *la bouche qui prononce les paroles de la loi* ".[29] In relation to what

[29]A school that teaches that the Judge is just a funnel of law (La bouche qui prononce les paroles de la loi) and is forbidden to create law, generally adopted by nations that embrace the tradition of Civil Law System in the 19th century. See M.D.A. Llyod's Freeman, Introduction to Jurisprudence, London: Sweet & Maxwell, 2001, p.

Montesquieu disclosed earlier in the provisions of Article 5 paragraph (1) of Law no. 48 of 2009 on Judicial Power, that "Judges and judges of the constitution are obliged to explore, follow and understand the values of law and sense of justice living in society". As for the meaning implied in this article, that "the court or judge in the Indonesian legal system is not a passive judge who is a mere mouthpiece of the law" as portrayed by Mostesquieu.

Developing the concept of non-alutsista abuses of the Indonesian National Army, namely the reformulation of the Law Substance, the provisions of Law Number 34 of 2004 on the TNI, on the terms and notions of non-armaments in Article 1 Chapter General Provisions and Article 7 Paragraph 2 b Number 14 TNI in the field of military operations other than war to safeguard and protect the occurrence of alleged and non-alutsista piracy; the provisions of the Criminal Code in Article 149 regulate the use of non alutsista TNI by civil society with reference to the prevailing laws and regulations.

D. CONCLUSION

1. The regulatory principle the abuse of non-alutsista of the Indonesian National Army is based on the principle of civil supremacy as defined in Law No. 34 of 2004. The regulation on the use of non-alutsista as defined in Article 149 of the Indonesian Criminal Code only applies to members of the Indonesian National Armed Forces. This is very contrary to the principle of equality before the law that raises the issue of legal certainty and justice which implies the non-protection of TNI members from non-alutsista abuse by civilians.
2. Developing the concept of abuse of non-alutsista of the Indonesian National Army is by reformulating the Substance of Law, the provisions of Law Number 34 of 2004 on the TNI, regarding the terms and notions of non-armaments in Article 1 of Chapter General Provisions and Article 7 Paragraph 2 b Number 14 the main tasks of the TNI in the field of military operations in addition to war to safeguard and protect the occurrence of piracy of non-weaponry and non-weapon systems; the provisions of the Criminal Code in Article 149 regulate the use of non alutsista TNI by civil society with reference to the prevailing laws and regulations.

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