



## Ratio Legis of Giving Task of Indonesian Military in Handling Terrorism Act as a Part of Military Operation Other Than War

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### **Abstract**

Ratio legis is the reason or purpose for making a law, ratio legis is a thought that becomes philosophical basis or content behind the inception of the law. Related to ratio legis, the legislation in every country has different characteristics in arranging it, specifically in the legislation related to the defense certainly has its defense strategy which is adjusted to geographical condition, threat and ideology. State defense is aimed to defend the wholeness of a state, state sovereignty and nation's safety from threat and disturbance to the wholeness of nation and state. Then state defense of Indonesia can be understood as a total defense system that involve all citizens, regions and other national resources. System of defense is prepared early by the government and held totally, integrated, directed, and continued to enforce state sovereignty, wholeness of region and nation's safety from the threat of system of stte defense which then it needs to be formulated into instrument of law or legislation. This study uses normative legal research, analyzing relation of article 30 UUD 1945, article 7 UU No. 34 year 2004 on Indonesian Military (TNI) and article 43 UU No. 5 Year 2018 on Eradication of Terrorism Criminal Act and other regulation related to legal issues of regulating terrorism eradication from the perspective of state defense and safety, specifically giving task of Indonesian Military in solving terrorism act as a part of Military Operation other than war. The aim that wants to be achieved is finding consistency and conformity among related laws namely giving task of Indonesian Military in handling terrorism act and its relation to Military Operation other than war. From the study, it obtains an argument to answer actual issue of terrorism eradication from the relevant and urgent defense and safety perspectives for Indonesia that becomes the focus of this study.

**Keywords:** *Ratio Legis; Defense System; Terrorism; Military Operation Other Than War*

### **1. Introduction**

The essence of state defense for Indonesian is all attempts of total defense that its implementation is based on awareness of rights and obligation of citizen and belief on self strength (Indonesian National Army Headquarters, 2007). System of defense of Indonesia is total defense that involve all citizens,

regions and other national resources and it is prepared early by the government, held totally, integrated, directed and continuous to enforce state sovereignty, defend wholeness of region and safety of all people from all threats.

Total defense is that in the implementation of state defense it will involve all citizens, using national resources and all regions of country in the attempt of state defense, while belief on self strength means that spirit of relying on self strength is the main asset in defending state sovereignty by opening up the opportunity of created cooperation with other countries.

Considering that Indonesian is a nation that loves peace, but it tends to love independence or sovereignty. Indonesian will never attack other countries as long as the interest of nation and state are not threatened, it means that the aim of war is merely to defend the territory of Indonesia when there is threat from other countries thus defense system that is developed is total defense system (Sishanta), that functions to achieve and defend all territories of country of Republic of Indonesia and safety to all people from all types of threat, that prioritize approach of war and peace value, free and active foreign policy, doctrine of archipelagic concept, doctrine of national resilience, doctrine of total people's defense, integration of people's army and Geopolitic and Geostrategy.

Self-defense principle in UN charter is followed universally in all states in the world. It is because it is related to existence of a state. There is a development of situation that terrorism is getting stronger and bigger in spreading threat and damage emerged should be seen as an act that enable to do an "armed" attack to the state and society. In this context, as a step of response, a state may defend based on principle of *self-defense* and *collective self-defense* mentioned in Article 51 UN charter:

*Nothing in the present Charter shall impair the inherent right of individual of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.*

Even traditionally armed attack is frequently defined as a armed attack done by state, there is no words in Article 51 UN Charter that states armed attack only comes from a state. In other hand, Article 51 UN Charter does not differentiate armed attacks done by state and non-state actor (Dominika, 2008). In this context, the characteristics of terrorist that use violence and create psychological fear and treat victim indiscriminately, make terrorist to be able to be treated as combatant status as regulated in international humanitarian law. Hence, terrorist can be categorized as non-state unlawful combatant that enable to do armed attack to the state and society. Individual criminal act, riot, and cannot justify the implementation of armed conflict law, but as acts that legally become domain of implementation of system and process of national law. Therefore, as long as the country determines the political process that a terrorism act is decided as an act of armed attack to the state, thus it is legal for that state uses military power to combat terrorism.

In term of implementation of state defense, TNI perform a policy of state defense in the form of military operation that basically consists of military operation for war and military operation other than war. Military operation includes planned activities conducted by military unit with target, time, place, and logistic support that is determined previously through detailed plan. In contrast, military operation other than war such as civic mission, the helps to Police of Republic of Indonesia in term of security and public order duties, the helps to government, safety of marine/ flight, Search and Rescue, shelter aid, and handling natural disaster victim. Military operation other than war is done based on legislation.

## 2. Methodology

Research conducted in this dissertation is legal research related to academic activity. Black's Law Dictionary defines legal research as (Garner, 1999):

1. *The finding and assembling of authorities that bear on a question of law.*
2. *The field of concern with the effective marshalling of authorities that bear on a question of law.*

Named as legal research in academic activity, it is aimed to differentiate this legal research from the practical legal research, as written by Peter Mahmud Marzuki, that legal research is a process to find regulations of law, principles of law, and also doctrines of law in order to answer faced legal issues (Marzuki, 2005). Academic legal research is related to the attempt to give worthy contribution for the development of jurisprudence through new jurisprudence, or find new argumentation, or find new concept to terms that are viewed established in jurisprudence.

Legal research is done by using method that is in line with special characteristics of jurisprudence that is different from social science or natural science (Bruggink, 1999). To obtain the validity in this study, dissertation entitled reformulation of regulating terrorism eradication from the perspectives of state defense and state safety uses normative legal research. Normative research that is meant is doing review on any regulations related to the research theme (Ibrahim, 2006). Bernard Arief Sidharta (2000), normative research is a doctrinal method with prescriptive optic for hermeneutically finding rules of law that determine juridical obligation and rights of legal subject in certain situation of society based on and in term of applied structure of law by always referring to positivity, coherence, justice and human prestige, where in its implementation (be able to and frequently) use method and product of social science research.

## 3. Result & Discussion

### 3.1. Definition of Ratio Legis

Definition of ratio legis according to Black's Law Dictionary is the reason or purpose for making a law (Black, 1991), ratio legis is a thought that becomes a philosophical basis or the content behind the law (Marzuki, 2005). Related to ratio legis, legislation in every country has different characteristics in arranging it, specifically on the legislation related to defense it has certainly its defense strategy that is in accordance with geographical condition, threat and ideology. State defense is aimed to defend wholeness of territory of country, state sovereignty and safety of all nations from threat and disturbance to the wholeness of nation and state (Indrawan, 2016). Then state defense of Indonesia can be understood as total defense system involving all the citizens, territories and other national resources. Defense system is prepared early by the government and held totally, integrated, directed, and continued to enforce state sovereignty, wholeness of territory and safety of nation from threat of defense system of state which then needs to be formulated into instrument of law or legislation (Kahfi, 2006).

In this study it uses legal approach, it conducts a review of few related law with legal issues that become focus of the research, namely regulating terrorism eradication from state defense and safety perspectives, specifically giving task of Indonesian Military (TNI) in handling terrorism act as a part of Military Operation of Defense System (OMSP). The aims that want to be achieved are finding consistence and conformity among related laws namely giving task of Indonesian Military in handling terrorism act and its relation to OMSP, then by reviewing it obtains an argument to answer actual issue of terrorism eradication from the relevant and urgent defense and safety perspectives for Indonesia that become focus of this study.

### 3.2. Ratio Legis of Military Operation without War

Threat that is faced by Indonesian is estimated greater that may comes from non traditional threat, either international or domestic. Therefore, strategic policy of Indonesia that is aimed to face and handle non traditional threat is a priority and very urgent. In its implementation, it prioritizes TNI by using military operation other than war (Suryokumoro, 2006). TNI performs military operation other than war with all components of other nations in one integrated attempt based on escalation level of faced threat. To every threat and disturbance of safety, TNI will always prioritize prevention effort as the best way in order to avoid victim and greater impact.

In New Order era, there is a term of military operation of domestic safety (Opskamdagri), Opskamdagri this time is a part of concept of military operation other than war (OMSP) that is followed by Law Number 34 Year 2004 on Indonesian army but it is more detail, that concept is adopted from the concept of Universal Military Operation Other Than War (MOOTW) that was born in early 1990's. MOOTW in military science is known as peace mission that is commonly done with police, because police also has missions of domestic, regional, bilateral and also international safety under the umbrella of UN.

Ratio legis of Law Number 34 Year 2004 on TNI is known from part of General Explanation of the Law. The reason or philosophical basis of Law Number 34 Year 2004 had been written in Preamble of Constitution of Republic Indonesia 1945, in which strictly mandate national objective namely to protect all people and homeland of Indonesia; and participate in performing world order based on independence, eternal peace, and social justice. To achieve the mndate, it needs an attempt with all Indonesians in the form of role, function and duty of every component of nation and done seriously (Santoso, 2014).

Sociologically state defense is one of attempt forms of Indonesian in achieving national objective. The essence of state defense is the engagement of every citizen as the form of rights and obligations in the attempt of state defense. Rights and obligations of every citizen is regulated in Article 30 paragraph (1) Constitution of Republic of Indonesia 1945, while paragraph (2) it is stated that attempt of state defense is conducted through system of total people's defense and security, which Indonesian Army is the main strength and people as the supporting strength.

Regarding juridical foundation Article Number 3 Year 2002, it mentions that the main strength according to Law Number 3 Year 2002 on State Defense, TNI as the main component in state defense system which is government tool that has a duty to defend, protect and save state wholeness and sovereignty, in Article 30 paragraph (5) Constitution of Republic Indonesia Year 1945 it is stated that structure, position, relation, and authority of TNI and Police of Republic of Indonesia (Polri) in conducting their duties, including requirements of engagement of citizen in the attempt of state defense and security and things related to state defense and security are regulated in Law.

National reform of Indonesia that is supported by spirit of Indonesian to arrange nation's better life and future has obtained basic change in systems of state administration and statehood. The amendment is followed up such as through institutional structuring based on development of environment and demand of duty in the future. Change in statehood system has an implication to TNI, for example a gap between of TNI and Polri, which cause the need for re-arrangement of role and function of each Provision of Peoples Consultative Assembly Number VI/MPR/2000 on Separation of National Army and Police of Republic of Indonesia and Provision of Peoples Consultative Assembly Number VII/MPR/2000 on Roles of National Army and Police of Republic of Indonesia, and also becoming a juridical reference in developing Law that regulate National Army of Indonesia.

TNI is developed professionally based on interest of politics of state referring to value and principle of democraton, civilian supremacy, human rights, national stipulation of law, and international stipulation of law that are stratified, by the support of state budget maintained transparently and accountably.

Based on the explanation of philosophical, sociological, juridical basis, the clarity and firmness on how to formulate policy in tackling every threat are not seen. In Article 7 Article (2) Law Number 34 Year 2002 it states that TNI has main duty in doing military operation other than war (OMSP). OMSP is an operation done by TNI including: handling armed-separatism act, terrorism, border protection, strategic protection national vital object, armed insurgency, and helping Polri to do missions of security and public order (Sjamssoeddin, 2014).

### 3.3. Handling Terrorism Act

Related to Terrorism eradication, ideally TNI has 3 (three) roles done in military power capacity to face terrorism (Ministry of Defense, 2010):

- a. Defensive anti terrorism is the steps to protect society, territory, public infrastructure, and infrastructures of information and communication from terrorism act. This step of defensive anti-terrorism needs capabilities of intelligence; development of early warning; the ability of saving the territory;
- b. Attempt of prevention of terrorism attack to decrease, prevent and stop/paralyze terrorism act.
- c. Comprehensive attempt to help the government to handle the consequence or impact of terrorism act to the society and stabilize the condition after the attack. Some abilities that should be prepared including to mobilize troops appropriately to help terrorism victim.

This role urges development of special strength in the circle of TNI that enable to move quickly to destroy, defend, and protect from terrorism attack. Strength of TNI needed is that the army who enable to move quickly supported by command, control, communication and modern intelligence agency (Purbopranoto, 1981). They also should be equipped by striking capability. Another capability that should be owned is the capability to have an interaction and communication with the society to protect society's rights and develop trust to support the success of military operation. Furthermore, specifically in Indonesian context, in the future of military power it should enable to give protection to the society from the consequences of terrorism act specifically attack which involve the use of nuclear, biological, and chemical weapon.

Briefly the military capacity that should be developed in eradicating terrorism including: the effective intelligence's capability; readiness and high level mobilization of troops; capability to fight; defense capability. Specifically, military operation to eradicate terrorism consisting of:

- a. Operation for rescue and the hostage release. It is an operation with the most dangerous level. It also needs highest accuracy level in planning execution.
- b. Operation that is done when a terrorism act happens either to paralyze, to end the terrorism act, or to save the building, transportation, all infrastructures, and dangerous materials in the field.

- c. Operation of monitoring is military operation in dangerous area to recover and save territories of terrorism so it can function normally.
- d. Operation to spy and arrest terrorist. This operation is done by special unit of anti-terror.

For need of military operation to eradicate terrorism, each partner of military power has a duty: ground forces help the police and or political authority in reporting, blocking, neutralizing, and cleaning targeted territories of terrorism act and protecting society from all consequences and dangerous situation caused by terrorism act. Air forces observe, espionage and also conducts air territory defense and strategic places, and gives air aid to units that support the war in fighting terrorism, and giving help to the civil institution of government. Moreover, the sea force monitors the sea territory, and protects port and facilities to guarantee navigation safety and military and civil sites at beach, and performs urgent action.

Military operation of eradicating terrorism should be based on principles as follows:

- a. Value and norm of democraton. Mobilization of military power should keep referring to the democraton principles either in terms of obtaining political legality to the performed military operation or preventing human rights violation. In practice, this principle is translated into SOP form (Standart Operating Procedure) and RoE (Rules of Engagement) thus troops in the field are not doubtful in performing the operation. This Roe becomes the basis of operational responsibility of performing military operation. In addition, RoE also becomes the indicator of situation development in the field by different handling approach in every situation.
- b. Clear objective principle. All military operations including fighting terrorism should be tightly limited by determined objective in planning operation. All supporting units of operation should know certainly and clearly operation objective. Clear objective also makes the operation of eradicating terrorism to be able to run efficiently.
- c. Military operation should also be effective by dividing the duty which is not *overlapping* one another. In many cases, operation to eradicate terrorism is frequently performed in multi-agencies. In this situation, it should prevent the emergence of some institution or actors in doing the same functions. Intelligence of Polri, TNI, Customs, and Immigration should do the function of intelligence in accordance with the authorities of each institution and coordinate properly.
- d. Centered command, is that anti-terror military operation should be controlled and in one command. Centralization of command clarifies *resources* mobilization, organizing efficiency of, the use of *resources*, and responsibility. Centered command also eases institutional and technical in having cooperation with other institutions.
- e. Mobility and flexibility are the ability to mobilize troops quickly and move units and the equipments, and communication and information systems. They should also be flexible to situation change that requires changes of tactic and operation strategy in the field.

Military power enables and even is equitable to be engaged in the attempt of eradicating terrorism either viewed from legal, technical-ability, or political aspects. Legally, military is mobilized to fight terrorism either domestic law or legal provision of international law (Supriyatno, 2014). By technical-ability, military has various abilities of early warning, execution or protection and recovery of situation and territory or society as the impact of terrorism act. Moreover, politically, mobilization of military power in eradicating terrorism is a political decision that is taken based on graded assessment of threat made by political decision maker.

In international relation, the use of military power to eradicate terrorism is not an uncommon practice, even in the country which system and practice of democratisation has been established. UN also opens a space for the country to use military power to fight terrorism for example by giving authorization of attack to Afghanistan based on resolution of United Nations Security Council. Therefore, it is quite astonishing if the use of military power is considered to enable leading to remilitarism or give the opportunity to the military to enter public and political space, and human rights violation.

If we pay attention clearly to the role of TNI from legal aspect in eradicating terrorism, it has been regulated in Article 7 Article (2) Law Number 34 Year 2004 about TNI, specifically on main duty TNI in performing military operation other than war (OMSP). One of OMSP is handling terrorism act that should be based on political decision of country. Hence, legally the role of TNI in handling terrorism act has a strong legal basis.

This article becomes the basis of engagement of TNI in operational form namely terrorism enforcement. In this case there is an operation which place TNI under the control of Police (BKO) by consideration that type and level of terrorism threat is considered to be domain of threat to the order and security of society and hence the operation is law enforcement approach.

Operational control aid (BKO) is mechanism of TNI engagement under control of of other situation, in this case police, based on assessment that the situation is still able to be controlled by police power as a power of law enforcement that still enable terrorism threat. BKO only happens when the police needs strengthening either in quantity or in the term of need to use certain ability of TNI for duties under control of police. Situation of BKO either for strengthening or for using certain ability of TNI should be seen as situation that has not needed military approach namely situation of security in term of enforcement of public order and law enforcement.

In eradicating terrorism done by the police and if it is needed it uses BKO mechanism, it assumes that government has not assessed the certain condition to be dangerous and thus the mechanism of enforcement is enough to be done through operation of police. Therefore, in the situation of approach of the police it is still considered enough, government is assumed to have assessment of situation in the field where TNI looks that it is not the time to be plunged for eradicating situation of terrorism act (Atmasasmita, 2002).

Then if the police ask the engagement of TNI, if the demand is fulfilled, thus the engagement of TNI should be seen as the form of mobilization that needs decision from political authority. Police and TNI cannot decide by themselves on mobilization of TNI to help the police. This problem cannot be given to Commands in the field in which many cases is really depended on the mechanism of personal relation. This practice should be avoided thus it needs regulation on relation between TNI and Polri in eradicating Terrorism or other operation form in performing military operation other than war (OMSP).

BKO which engage TNI strength should be constantly based on a decision of stakeholder of political authority. Police cannot merely engage TNI in an operation of eradicating terrorism through mechanism of BKO, because the engagement of TNI is not the authority of police. Engagement of force of TNI is relatively small, limited in technical problem, for example ability of individual duty, without engaging primary weapons system TNI and not touching related basic thing, that engagement certainly keeps needing a consultation with House of Representatives.

Second operation is an operation of enforcement where TNI takes over operation because the type and gradation of happening terrorism threat is seen to have greater threat to the national security and order. Force of TNI in a great number, engaging bigger resources and the owned primary weapons system. This operation makes big impact to the national stability to protect national interest and Polri to

keep doing its duty. In contrast, operation is performed by TNI since the beginning if terrorism act is a part of armed insurgency that threaten wholeness and sovereignty of Republic of Indonesia.

Consequently, the government should be thorough and enable to determine quickly gradation of terrorism threat, developed situation, and force of TNI that will be used. It should be stated that use of military force to eradicate terrorist is a common practice in all countries such as Woyla Operation 1981, Entebbe Operation 1976, operation of Russian personnel for hostage release in 2002 and 2004, and other cases. One is failed and the other succeeds. Basically, military force is legally used to eradicate terrorism through analysis of threat and political decision to use military force. The main key is that political system should give flexible space to make a decision of using military force, including eradicating terrorism. Development of situation and level of response to the situation becomes the domain of political authority.

The form of third engagement is by utilizing capacity of intelligence TNI to detect and information gathering on terrorism. Detection capacity of ground, sea, and air forces of TNI can be used to see individual and border protection (Nugroho, 2014). The usage should be limited only on detection and information gathering, and early warning. Aspect of law enforcement keeps being attached to police authority, except the law enforcement in the context of territorial violation of ground, sea, and air included in domain of state defense specifically related to the sovereignty violation of territory of the country. Big homework is making effective institution thus all capacities intelligence from all institutions of security can be used maximally for eradicating terrorism. Idle capacity argument from all apparatus and institutions of security that should be used is the strong argument because eradication of terrorism needs cooperation with all parties.

### **Conclusion**

Terrorism act happened in Indonesia is a serious crime and threaten ideology of state, state safety, state sovereignty, humanity values and any aspect of social life, nation's and state's ways of life. Terrorism act is international, organized, and has wide network and certain aim, thus the eradication needs to be treated specially, to be planned, to be directed, to be integrated, and to be done continuously.

An act using armed power or other violaton act done by international terrorism networks or the one who has cooperation with high exalation domestic terrorism are assessed that they threaten state sovereignty, wholeness of territory of country, and nation's safety. Terrorism makes terror situation or fear widely, which can cause massive victim, and/or cause damage or destroy strategic vital object, natural environment, public facility, international facility with ideology, political, or security disturbance motives. Therefore, it is viewed as an urgent matter to handle terrorism acts.

TNI as the main component of state defense in doing its duty based on policy and state political decision, which function as antidote of each form of military threat and armed threat from foreign and domestic to the sovereignty, wholeness of territory, and nation's safety, actor for each form of threat and restorer for condition of the disturbed state safety caused by confusion of security. Related to this, Article 43I Law Number 5 Year 2018 had mandated TNI to handle terrorism act which is a part of TNI's duty in military operation other then war (OMSP). In handling terrorism act it is done based on main duty and function and of TNI, which is regulated by Presidential Regulation.

The achieved target as a legal basis for TNI in implementing the mandate of Law to handle Terrorism acts that are part of TNI's duty in performing military operation other than war (OMSP). Besides, adjusted to formulation Terrorism from Law Number 5 Year 2018, which main point is that an act that use violation or violation threat that makes terror situation or fear spreading widely, which cause massive victim, and/or make damage or destroy strategic vital object, natural environment, public facility, international facility with ideology, political, or security disturbance motives.



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