

UNSUR PENGENDALIAN YANG EFEKTIF PERIHAL HUBUNGAN SUBORDINAT DALAM PERTANGGUNGJAWABAN PIDANA KOMANDAN DAN ATASAN PADA PELANGGARAN HAK ASASI MANUSIA YANG BERAT

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INTISARI

Penelitian ini bertujuan untuk mengetahui serta menganalisis pertimbangan majelis hakim perihal unsur pengendalian yang efektif pada pertanggungjawaban pidana komandan dan atasan sebagaimana diatur Pasal 42 UU Pengadilan HAM dan untuk menganalisis serta mengkaji prospek perumusan Pasal 42 UU Pengadilan HAM, khususnya unsur pengendalian yang efektif di masa mendatang.

Penelitian ini merupakan penelitian hukum normatif yang dilakukan dengan meneliti bahan pustaka atau data sekunder berupa bahan hukum primer, bahan hukum sekunder, dan bahan hukum tersier. Penelitian ini menggunakan metode pendekatan undang-undang, pendekatan komparatif, pendekatan kasus, pendekatan historis, dan pendekatan konseptual. Data dalam penelitian ini dianalisis menggunakan analisis data kualitatif yang disajikan dalam bentuk deskriptif dan preskriptif. Penarikan kesimpulan dilakukan secara deduktif. Hasil penelitian menunjukkan tidak ada konsistensi pertimbangan Majelis Hakim pada penerapan pertanggungjawaban pidana komandan dan atasan. Hal tersebut tecermin pada dua putusan Pengadilan HAM kasus Timor-Timur atas nama Adam Rachmat Damiri dan pertimbangan mayoritas Majelis Hakim dalam putusan Pengadilan HAM kasus Paniai atas nama Isak Sattu. Kedua putusan tersebut dalam frasa pengendalian yang efektif tidak memperhatikan dan menerapkan pertimbangan Majelis Hakim praktik peradilan pidana internasional pada ICTY dan ICTR yang merupakan preseden yang diterima umum dalam praktik internasional.

Prospek pembaharuan Pasal 42 UU Pengadilan HAM Penulis kualifikasikan menjadi empat hal. Pertama, mengodifikasi Pasal 42 ke dalam KUHP Nasional atau menambahkan beberapa kualifikasi dalam Pasal 37 huruf b KUHP Nasional. Kedua, menghilangkan frasa “dapat” dan menambahkan frasa “secara pidana” dalam reformulasi bunyi Pasal 42. Ketiga, frasa “efektif” diartikan sebagai tindakan pengendalian secara nyata sesuai dengan teks asli Statuta Roma dalam bahasa Inggris. Keempat, menambahkan keterangan atau penjabaran dalam bagian Penjelasan Pasal UU Pengadilan HAM. Unsur pengendalian yang efektif dalam pertanggungjawaban komando yang diuraikan dalam ICTY dan ICTR dapat dijadikan rujukan penafsiran.

Kata Kunci: Pelanggaran HAM Berat; Pertanggungjawaban Pidana; Hukum Pidana Internasional.

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***ELEMENT OF EFFECTIVE CONTROL REGARDING SUBORDINATE
RELATIONSHIP IN COMMAND AND SUPERIOR CRIMINAL
RESPONSIBILITY IN GROSS VIOLATIONS OF HUMAN RIGHTS***

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ABSTRACT

This research aims to identify and analyze Judges consideration regarding the element of effective control in terms of command and superior criminal responsibility as stipulated in Article 42 of the Law on Human Rights Court and to analyze and assess the prospects for reformulation of Article 42 of the Law on Human Rights Court, especially the element of effective control in the future.

This research is a normative legal research conducted by examining library materials or secondary data in the form of primary legal materials, secondary legal materials, dan tertiary legal materials. This research employs statute approach, comparative approach, case approach, historical approach, and conceptual approach. Data in this research were analyzed using qualitative analysis methods and presented in descriptive and prescriptive form. The conclusions were drawn using deductive methods. The results of this research show that there is no consistency in the consideration of the Panel of Judges on the application of criminal responsibility of commanders and superiors. This is reflected in two decisions of the Human Rights Court in the East Timor case on behalf of Adam Rachmat Damiri and the majority consideration of the Panel of Judges in the Paniai Human Rights Court decision on behalf of Isak Sattu. Both decisions in the phrase effective control do not pay attention to and apply the considerations of the Panel of Judges of international criminal justice practice at the ICTY and ICTR, which are generally accepted precedents in international practice.

The prospect to reformulate Article 42 of the Human Rights Court Law is qualified into four things. First, codifying Article 42 into the KUHP National or adding several qualifications in Article 37 letter b of the KUHP Nasional. Second, eliminating the phrase "may" and adding the phrase "criminally" in the reformulation of Article 42. Third, the phrase "effective" is defined as real control measures in accordance with the original text of the Rome Statute in English. Fourth, adding information or elaboration in the Explanation section of the Article of the Human Rights Court Law. The element of effective control in command responsibility as outlined in the ICTY and ICTR can be used as a reference for interpretation.

Keyword: *Gross Violations of Human Rights; Criminal Responsibility; International Criminal Law.*

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