


## Criminal Policy of Imposing Community Service for the Crime of Absence Without Leave Committed by the Military

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### Abstract

**Introduction:** Community service is one of the main punishments as a sub-system in the imposition of punishment in the sanction system in the Criminal Code. Currently, the sanction system in the Criminal Code and the crimes that occur are interesting to discuss and analyze.

**Purposes of the Research:** Community service is one of the main punishments as a sub-system in the imposition of punishment in the sanction system in the Criminal Code. Currently, the sanctions in the Criminal Code and the crimes that occur are interesting to discuss and analyze. From this, the question is whether the imposition of community service can be applied to military crimes that occur in the Criminal Code, and how the future criminal policy will be for the renewal of military law.

**Methods of the Research:** Normative legal approach method, namely by legal research conducted by examining library materials or secondary data periodically (in addition to the existence of sociological or empirical legal research which mainly examines primary data) by looking at the provisions of existing laws and regulations, through literature review.

**Results Main Findings of the Research:** The legal basis for imposing Social Work sentences in Indonesia is regulated in National Law Number 1 of 2023 concerning the Criminal Code, Article 65, so it is necessary to reform criminal law, especially military criminal law because the purpose of punishment for the military is not only retribution but also guidance and prevention because if the perpetrator of the crime is a military person, it can have a very broad impact both for military interests and public interests.

**Keywords:** Criminal Policy; Social Work; Military Criminal.

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## INTRODUCTION

Criminal sanctions in relation to a crime are always interesting to discuss, study and analyze. Not only in a theoretical perspective, but also in a practical level. Criminal sanctions in a country will always be linked to the achievement of a punishment for a crime that occurs. On the other hand, criminal sanctions actually also reflect the cultural values of a nation. Therefore, the choice of the type of sanctions adopted by a country is always explored from the cultural values of the nation and then discussed by criminal law experts and criminologists whether a certain type of criminal sanction is appropriate and feasible to be applied in the country's criminal law system.

The criminal sanction system in Indonesian criminal law generally still adopts and applies a criminal sanction system derived from criminal sanctions inherited from the Dutch colonial government. The system of grouping criminal sanctions in the national legal system is grouped into two types, namely Principal Criminal and Additional Criminal. Among the

types of criminal sanctions in the national criminal law system, Social Work Criminal is adopted.

The term Criminal Law contains a meaning in it, namely concerning sanctions (sanctie/sanction) which are characteristic of Criminal Law so that they distinguish it from other branches of law, thus Criminal Law (Material) is interpreted as a legal provision/statute that determines acts that are prohibited/abstain from being carried out and the threat of sanctions for violating the prohibition. According to Sudarto, Criminal Law can be viewed from a dogmatic perspective which includes three main problems, namely: 1) Prohibited acts; 2) People who commit the prohibited acts; 3) The punishment threatened for violating the prohibition.<sup>1</sup> Sudarto's view above is not much different from the view of Wilhem Sauer who later became known as Trias Sauer stated that there are three basic understandings in criminal law, namely:<sup>2</sup> 1) Unlawful Nature (Unrecht); 2) Mistake (Schuld), and 3) Criminal (Straf). These three issues are the main issues in Criminal Law, discussions of criminal law, either explicitly or vaguely, must discuss one or all three of these issues. In other words, the main discussions in Criminal Law revolve around (1) Prohibited Acts/Criminal Offenses, (2) Mistakes or Responsibilities in Criminal Law, and (3) about Criminal.

The Criminal Sanctions formulated in the National Criminal Code and the Criminal Sanctions formulated in the Military Criminal Code are generally the same. According to articles 64, 65 and 66 of the Criminal Code, criminal penalties are divided into main penalties, additional penalties and special penalties for certain criminal acts, namely:<sup>3</sup> Criminal penalties consist of: a) main penalties: 1) imprisonment; 2) detention; 3) supervision; 4) fines; 5) social work. b) additional penalties: 1) revocation of certain rights; 2) confiscation of certain goods; 3) announcement of the judge's decision; 4) Payment of compensation; 5) Revocation of certain permits; 6) fulfillment of local customary obligations. c) Special penalties.

While according to article 6 of the Criminal Code, penalties are divided into Main and Additional penalties, namely:<sup>4</sup> a) Main penalties: 1st, Death penalty; 2nd, Imprisonment; 3rd, Imprisonment; 4th, Cover-up penalty. b) Additional penalties: 1st, Dismissal from military service with or without revocation of the right to enter the Armed Forces; 2nd, Demotion; 3rd, Revocation of the rights mentioned in Article 35 paragraph one in numbers 1, 2 and 3 of the Criminal Code. The main difference between the two is that the Criminal Code does not recognize the existence of criminal fines, supervision and social work and Additional Criminal Codes in the Criminal Code at number one and number two, are more internal to the military, namely dismissal from military service and demotion.

Military justice based on Law Number 31 of 1997 in terms of criminalization for a military person is basically an act of education or guidance rather than an act of deterrence or retaliation as long as the convict will be reactivated in military service. Regarding everything related to the law applicable to the military, it is regulated separately by military law but is not separate from the law that applies in general, although the Criminal Code is coded separately outside the Criminal Code, this is clearly seen in Article 187 of the Criminal

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<sup>1</sup> Soedarto, *Criminal Law and the Development of Society. A Study of Criminal Law Reform*, (Bandung: Sinar Baru, 1983), p. 62

<sup>2</sup> Ibid

<sup>3</sup> Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (KUHP) Article 64

<sup>4</sup> Republic of Indonesia Law Number 39 of 1947 concerning the Military Criminal Code (KUHPM) Article 6

Code which reads:<sup>5</sup> "The provisions in Chapter I to Chapter V of Book One also apply to acts that can be punished according to other laws and regulations, unless otherwise determined by law".

Giving a signal of dualism where general provisions also apply to other laws and regulations that are threatened with criminal penalties, in addition to the signal of dualism where the military is not only subject to military justice but also subject to general justice, this is contained in military law based on article 1 of the Criminal Code:<sup>6</sup> "For the implementation of this law, the provisions of general criminal law apply, including the ninth chapter of the first book of the Criminal Code, unless there are deviations stipulated by law". Therefore, the military is limited by military laws and regulations so that all actions taken must also be based on applicable laws and regulations. So that the military is educated and trained to obey orders or decisions without denying the orders or decisions and to carry out the orders or decisions in an efficient and effective manner.

But in reality, there are still many military personnel who commit violations in carrying out their duties and obligations. Any act or action in any form carried out by military personnel, either individually or in groups, that violates legal provisions, other norms that apply in life or is contrary to official regulations, discipline, and rules of order in the Indonesian National Army environment, which in essence are acts or actions that damage the authority, dignity and good name of the Indonesian National Army. If these acts or actions are allowed to continue, they can cause unrest in society and hinder the implementation of Indonesian National Army development and development.

This shows that if a military person carries out an act or action that violates applicable provisions both in the community and in the military environment, they should be punished. Because this punishment is a step taken as a means to uphold and uphold a sense of justice for all citizens. The Criminal Code is a guideline for the application of sanctions for Criminal Acts committed by a military person. In addition, the perpetrators of a general crime (which is not regulated in the Criminal Code) are general, including the military. It can be interpreted that the military who commit general crimes that are not regulated in the Criminal Code are also said to have committed a crime, and this also applies to the legislation on such crimes, namely the Criminal Code.

Criminal acts or crimes or violations committed by the military always develop following the development of society in its environment, so that the punishment imposed is often not a stand-alone principal punishment but is also imposed with additional punishment. Based on the description above. The author wants to know the relationship between principal punishment and principal punishment regulated in the Criminal Code and Criminal Code, especially regarding the application of social work punishment to criminal acts committed by the military.

## METHODS OF THE RESEARCH

In writing this thesis, the author conducted research activities using the following methods or methods: 1) Research Type: The type of legal research used is the normative legal research type. Normative legal research or library legal research is legal research conducted by examining library materials or periodic secondary data (in addition to

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<sup>5</sup> Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (KUHP) Article 187

<sup>6</sup> Republic of Indonesia Law Number 39 of 1947 concerning the Military Criminal Code (KUHPM) Article 1

sociological or empirical legal research which mainly examines primary data).<sup>7</sup> The normative or library legal research includes:<sup>8</sup> a) Research on legal principles; b) Research on legal systematics; c) Research on the level of vertical and horizontal synchronization; d) Comparative law; e) Legal History. To support this research, the author uses legal theories and current laws and regulations. This research is descriptive analytical. Descriptive research is intended to provide data that is as accurate as possible about humans and other phenomena<sup>9</sup>, namely to obtain a picture and provide an explanation of the provisions and legal theories regarding the application of Social Work penalties to criminal acts committed by the military. 2) Data Collection Method: The data collection method used is document study or library materials. Where document study is a tool for data collection carried out through written data using content analysis.<sup>10</sup> (Content Analysis is any technique for making inferences by objectively and systematically identifying specified characteristics of a message). The data used is secondary data consisting of:<sup>11</sup> a) Primary Legal Materials: (1) Primary legal materials are binding legal materials;<sup>12</sup> The Primary Legal Materials used are; (2) Criminal Code (Law Number 1 of 2023 concerning the Criminal Code); (3) Criminal Procedure Code (Law Number 8 of 1981 concerning the Criminal Procedure Code); (4) Criminal Code (Law Number 39 of 1949 concerning the Military Criminal Code); (5) Judge's Decision. b) Secondary Legal Materials: Secondary Legal Materials, are those that provide an explanation of primary legal materials.<sup>13</sup> Secondary legal materials include research, legal papers, magazines, legal journals, the internet related to this problem. c) Tertiary Legal Materials: Tertiary Legal Materials are legal materials that provide guidance or explanations for Primary and Secondary legal materials. for example, dictionaries, encyclopedias. 3) Data Analysis Methods: The research data was analyzed qualitatively<sup>14</sup>, namely against Social Work penalties.

## RESULTS AND DISCUSSION

### A. Sanctions System According to Criminal Law

Sanctions are generally a means of coercion so that someone obeys the applicable norms,<sup>15</sup> therefore for the sake of public order criminal sanctions are really needed as the highest (*ultimate*) means of coercion (*Ultimum Remedium*). Therefore, criminal law is often referred to as the last bastion of law (*het strafrecht is het citadel van het recht*). The regulation of the sanctions system in criminal law, punishment can be seen from the perspective of the study, namely the general provisions of criminal law in Book I. The formulation of criminal threats in Book I of the Criminal Code Chapter III refers to the norms of punishment, especially Social Work as formulated in Article 65 of the Criminal Code, namely: a) imprisonment; b) imprisonment; c) supervision; d) fines; and e) social work. The criminal provisions in Book I of the Criminal Code are formulated as criminal sanctions in the formulation of criminal acts in Book II.

<sup>7</sup> Soerjono Soekanto and Sri Mamudji, *Introduction to Normative Legal Research: A Brief Review*. (Jakarta: Raja Grafindo Persada, 2007); p. 13

<sup>8</sup> *Ibid*

<sup>9</sup> Soerjono Soekanto, *Introduction to Legal Research*, 3rd ed. (Jakarta, UI-Press, 1986), p. 51

<sup>10</sup> *Ibid.*, p. 21

<sup>11</sup> *Ibid*, p. 22

<sup>12</sup> *Ibid*, p 52

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> S.R. Sianturi., *Principles of Military Criminal Law in Indonesia and Its Implementation*. (Jakarta, Center for Military Law Studies, 2013), p. 29



The sanction system in the General Rules of Book I of the Criminal Code, especially the provisions in Article 65 in the Replacement Law, also applies to laws outside the Criminal Code, based on. Article 187 of the Criminal Code<sup>16</sup>. This article is often referred to or termed as a bridge article for regulations or laws that regulate criminal law outside the Criminal Code. The provisions in Chapters I to VIII are determined to apply to criminal provisions outside the Criminal Code, unless expressly deviated from by law. This means that these provisions may not be deviated from by lower-level legislation. In addition, according to Sianturi.<sup>17</sup> Argentum a contrario it can also be emphasized that Article 187 of the Criminal Code does not prohibit the application of Chapter V/Book I to other criminal laws. Therefore, it can be concluded that something that is not prohibited can still be done.

## **B. The Nature of Social Work in the Criminal Code Sanction System and Its Regulations.**

The most important part of a Criminal Code is the criminal punishment system because the Criminal Code without a criminal punishment system would be meaningless. Criminal punishment is an absolute part of criminal law because basically criminal law contains two things, namely the conditions to allow for the imposition of criminal punishment and the punishment itself.<sup>18</sup>

Viewed from the perspective of the convict's loss, criminal (*sanctions*) can affect:<sup>19</sup> 1) The soul of the perpetrator: the death penalty; 2) The body of the perpetrator: whipping with a rattan cane several times, cutting off body parts (eg, fingers), branding (*brandmerk*) and so on; 3) The freedom of the perpetrator: imprisonment, closed punishment, imprisonment, banishment (*verbanning*), exile (*deportatie*), expulsion, repatriation, detention and so on; 4) The honor of the perpetrator: revocation of (certain) rights, revocation of driving license, announcement of judge's decision, warning and so on; 5) Property/wealth: criminal fines, confiscation of (certain) goods, paying the price of an item that has not/has not been confiscated according to the estimate and so on.

Article 85 of the Criminal Code contains how the social work punishment is: 1) Social work punishment can be imposed on defendants who commit a crime that is threatened with imprisonment of less than 5 (five) years and the judge imposes a maximum imprisonment of 6 (six) months or a maximum fine of category II; 2) In imposing social work as referred to in paragraph (1), the judge must consider: a) the defendant's confession to the Criminal Act committed; b) the defendant's work ability; c) the defendant's agreement after being explained regarding the purpose and all matters relating to social work; d) the defendant's social history; e) the defendant's work safety protection; f) the defendant's religion, beliefs, and political beliefs; and g) the defendant's ability to pay the fine. 3) The implementation of social work may not be commercialized; 4) Social work is imposed for a minimum of 8 (eight) hours and a maximum of 240 (two hundred and forty) hours; 5) Community service is carried out for a maximum of 8 (eight) hours in 1 (one) day and can be paid in installments over a maximum of 6 (six) months by taking into account the convict's activities in carrying out his livelihood and/or other useful activities; 6) The implementation of community service as referred to in paragraph (5) is contained in the court decision; 7) The court decision as referred to in paragraph (6) also contains an order that if the convict without a valid reason does not carry out all or part of the community

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<sup>16</sup> *Ibid*, p. 187

<sup>17</sup> S.R. Sianturi. *Principles of Criminal Law in Indonesia and their application*. (Jakarta: Stora Grafika, 2002), p. 505

<sup>18</sup> Niniek Suparni, *The Existence of Criminal Fines in the Criminal and Penal System* (Jakarta: Sinar Grafika, 2007), p. 20

<sup>19</sup> S.R Sianturi. *Principles of Military Criminal Law and Its Application Op. Cit*, p. 452

service, the convict is obliged to: a) repeat all or part of the community service; b) serve all or part of the prison sentence that is replaced with the community service; or c) pay all or part of the fine that is replaced with the community service or serve a prison sentence in lieu of the unpaid fine. 8) Supervision of the implementation of social work is carried out by the prosecutor and guidance is carried out by the community counselor; 9) The court decision regarding social work must also contain: a) the length of imprisonment or the amount of the fine actually imposed by the judge; b) the length of social work to be served, stating the number of hours per day and the time period for completing the social work; and c) sanctions if the convict does not serve the social work imposed.

### **C. The Nature of Social Work Penalties in the Criminal Code Sanction System and Its Regulations.**

Penalties for a military man are basically more of an educational or coaching action than an act of imprisonment or retaliation as long as the convict will be reactivated in military service after serving his sentence.<sup>20</sup> The thing that needs to be understood regarding the sanction system according to the Criminal Code is that the sanctions in the Criminal Code only apply to a military man (or military justice justiciable) but the imposition of sanctions on a military man is not only military criminal law, but also general criminal law and provisions in general criminal law (which are basically also used by military criminal law with some exceptions).<sup>21</sup> Can additional Social Work penalties in the current conditions be applied to the military because a military man is included as a subject of military crimes and also a subject of general crimes. Article 1 of the Criminal Code for the application of this code applies the provisions of general criminal law, including chapter nine of the first book of the criminal code, unless there are deviations stipulated by law.

Article 187 of the Criminal Code which reads:<sup>22</sup> "The provisions in Chapter I to Chapter V of Book One also apply to acts that are punishable by other laws and regulations, unless otherwise stipulated by law". It turns out that article 187 does not determine the authentic interpretation contained in book I of the Criminal Code regarding other laws and regulations. Therefore, the makers of the Criminal Code reaffirmed as stated in the sub-sentence of article 1 of the Criminal Code. However, article 1 of the Criminal Code still refers to the old Criminal Code, namely Article 103 of the Criminal Code, so that the Social Work punishment referred to has not been regulated and cannot be used for Military Crimes.

### **D. Analysis of Criminal Social Work in Military Crimes**

In the Military Criminal Code, the definition of military crimes is not formulated normatively. So there needs to be a limitation on the formulation of military crimes. Based on the doctrine of military criminal law put forward by S. R. Sianturi, in general, military crimes contained in the Criminal Code can be divided into 2 parts, namely: 1) Pure Military Crimes (*Zuivier militaire delict*)<sup>23</sup>: Pure military crimes are prohibited/required actions that in principle can only be violated by a military person, because of their special circumstances or because a military interest requires the action to be determined as a crime; 2) Mixed Military Crimes (*Gemedge militaire delict*)<sup>24</sup>: Mixed military crimes are prohibited or

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<sup>20</sup> *Op. Cit.* p. 69

<sup>21</sup> S.R Sianturi. *Military Criminal Law in Indonesia*. (Jakarta, Center for Military Law Studies, 2013), p. 18.

<sup>22</sup> Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (KUHP) Article 187

<sup>23</sup> S.R. Sianturi., *Military Criminal Law in Indonesia*. (Jakarta: Military Law Study Center, Military Law College "AHM-PTHM", 2013), p. 19.

<sup>24</sup> *Ibid*

required actions that are basically already determined in other laws, but are regulated again in the Military Criminal Code (or in other military criminal laws) due to a specific military situation or because of another nature, so that a more severe threat is needed, perhaps even more severe than the criminal threat in the original crime.

So referring to the definition of S. R. Sianturi above, Colonel CHK Agustinus. P. H. In his dissertation, he argues that:<sup>25</sup> In essence, military crimes are crimes regulated in the Criminal Code, some of which are purely, specific and specifically military, and some are taken from general crimes then added with special elements and reformulated as military crimes in the Criminal Code. There are several military crimes regulated in Book II of the Criminal Code, including Chapter III Crimes that are a way for a military person to withdraw from carrying out service obligations, which are regulated in Articles 85 to 95 of the Criminal Code: a) Absence without permission; b) Desertion; c) Making false or falsifying a leave letter.

These crimes can only be committed by members of the military or people who are equated with the military by law. Regarding members of the military, this is regulated in Article 45, with its expansion regulated in Articles 46, 47, 48, 49, 50 of the Criminal Code. what is meant by military, and its expansion. The difference is due to the doctrine put forward by Sianturi in his book on military criminal law in Indonesia and its application stating that military crimes are only classified into 2 parts, namely pure military crimes and mixed military crimes. This specificity is what distinguishes criminal acts in the Criminal Code and criminal acts in the Criminal Code.

Limitation of the definition of S.R. This Sianturi has not touched on the form of general criminal acts outside the Criminal Code, which apply or can be applied to military subjects designated by Article 2 of the Criminal Code, which is formulated as follows: "For criminal acts not listed in this code, which are committed by people who are subject to the authority of Military Court bodies, general criminal law is applied, unless there are deviations determined by law."

According to Colonel CHK, Agustinus P.H. in his dissertation stated that through Article 2 of the Criminal Code, it has indirectly qualified criminal acts that are not regulated in the Criminal Code as military crimes.<sup>26</sup> This very broad view, that all general crimes committed by the military are also military crimes, can cause confusion in the limitation of military crimes. In addition, the competence of the Military Court underlies Article 25 paragraph (4) of Law Number 48 of 2009 concerning Judicial Power "The Military Court as referred to in paragraph (1) has the authority to examine, try, and decide on military criminal cases in accordance with the provisions of the law."<sup>27</sup>

Which criminal acts are meant by military crimes. Therefore, it is necessary to renew military criminal law, especially regarding the formulation of the limitations of the definition of military crimes in the Military Criminal Code.<sup>28</sup> In addition, criminal law recognizes the principle of *lex specialis derogat lex generalis*. This principle contains the understanding that if an event is regulated by special criminal law and also by general criminal law, then the regulations of special criminal law apply to the event. So that the

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<sup>25</sup> Agustinus. P.H., "Reconstruction of Conditional Sentence in the Renewal of Military Criminal Law" (*Reconstruction of Conditional Sentence in the Renewal of Military Criminal Law*). (Bandung: Doctoral Dissertation, Padjadjaran University, 2017), p. 187

<sup>26</sup> Law of the Republic of Indonesia Number 48 of 2009 concerning judicial power. Article 25 paragraph 4

<sup>27</sup> Colonel CHK Agustinus P.H. *Selected Chapters on Military Criminal Law*. (Depok: Raja Grafindo Persada, 2019), p. 27

<sup>28</sup> Bachsan Mustafa. *Integrated Indonesian Legal System*. (Bandung: PT. Citra Aditya Bakti, 2016), p. 142.

military who commit crimes as formulated in the Criminal Code are subject to the provisions of military criminal law. This includes the sentencing system in the form of principal and additional sentences.

From the description above, the author is of the opinion that for criminal acts formulated in the Criminal Code, if committed by a military person, the additional punishment of Social Work cannot be applied. The descriptions that the author has expressed above are a series made to answer the development and renewal of criminal law, especially military criminal law through a criminal policy that aims to protect society. By making a rule or provision that prevents crime in order to realize a healthy and refreshing cultural life (a wholesome and culturalliving), social welfare (social welfare) or to achieve balance (equality).

The criminal policy that the author hopes for is an effort made to overcome crime that pays attention to protecting society, as well as coaching, especially from crimes committed by the military. The criminal policy intended by the author in this writing is based on: 1) Currently, there are still many military personnel who commit relatively short Unauthorized Absences where the absence without permission is no longer than 30 days; 2) The consequences arising from the results of criminal acts committed by the military can have a broad impact on both the Indonesian National Army institution and the lives of the community; 3) Theoretically, in Article 65 of the Criminal Code (Law Number 1 of 2023) concerning the main and additional penalties, especially Social Work, the Criminal Code also applies and is not deviated from by the Criminal Code. However, Article 1 of the Criminal Code still refers to the old Criminal Code. Thus, the criminal acts listed in the Criminal Code, especially Unauthorized Absences, cannot be subject to Social Work; 4) Social Work can improve the development of Units as well as the image and authority of the Indonesian National Army institution in the community because it will build positive public opinion and increase public trust in military justice; 5) Provide an understanding to the public that Community Service for military personnel who are absent without permission is a firm method applied to military personnel who commit criminal acts even if the period of absence is relatively short.

Thus, to realize the criminal policy intended by the author, for the sake of public interest and military interest faced with the ability of a military person who is trained to guard and maintain state security, if the military commits a crime and based on the consideration of the military judge, he can still be trained to become a better soldier. So that the criminal policy of military criminal law that will come in article 6 of the Criminal Code for the main punishment, is added with Social Work punishment so that Social Work punishment which currently cannot be imposed on the military who commits a military crime contained in the Criminal Code, in the future situation if the military commits a military crime referred to in the Criminal Code, Social Work punishment can be applied.

## CONCLUSION

Currently, Community Service is regulated in the Criminal Code. Law of the Republic of Indonesia No. 1 of 2023, Community Service is regulated in Article 65 of the Criminal Code and cannot be applied to military crimes regulated in the Criminal Code, because: 1) Although theoretically community service can be applied, because Article 187 of the Criminal Code also applies to the Criminal Code, and is not deviated from by the Criminal Code regarding principal and additional penalties, this article is not in line with the Criminal Code because Article 1 of the Criminal Code refers to the Old Criminal Code (Law



Number 1 of 1946). 2) The ultimate goal of criminal policy is the protection of society to achieve the main goal which is often referred to by various terms, for example, the happiness of citizens; a healthy and refreshing cultural life (a wholesome and culturalliving), social welfare or to achieve balance (equality), so that criminal policy is an effort made to prevent crime. So it is appropriate that in the renewal of military criminal law, Article 6 includes additional criminal penalties of social work as a preventive measure to provide justice.

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