

Restructuring of the Absolute Authority of Military Courts by General Courts over Military Crimes as an Effort to Achieve Justice and Legal Certainty

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Abstract: This research is motivated by the problem of dual jurisdiction in law enforcement against TNI soldiers who commit general crimes. In a democratic state governed by law, the principle of equality before the law demands equal treatment for every citizen. However, the legal reality shows a disparity where TNI soldiers who commit general crimes (such as murder, corruption, or assault) are still tried through the military justice mechanism based on Law Number 31 of 1997. This contradicts the mandate of Article 65 paragraph (2) of Law Number 34 of 2004 concerning the TNI, which states that soldiers are subject to general justice for general crimes and military justice only for military crimes. The research results show three main findings. First, the current regulation of absolute competence is still dominated by Law Number 31 of 1997, so that general courts do not have the authority to try active soldiers even if they commit general crimes. Second, the obstacles to the implementation of Article 65 paragraph (2) of the TNI Law are complex, including legal obstacles (the unrevised Military Court Law and the absence of implementing regulations), institutional obstacles (institutional resistance and sectoral egos), technical obstacles (the competence of law enforcement officers), and cultural obstacles (differences in work culture and standards of proof between the military and civilian environments). Third, the ideal reconstruction of absolute competence requires a multi-layered approach, namely: (1) Normative revision of the Military Court Law to align with the TNI Law; (2) Clear categorization of criminal acts between general and military crimes; (3) Procedural harmonization of procedural law; and (4) Strengthening institutional cooperation. This reconstruction aims to restore the dignity of military justice for military discipline, while simultaneously transferring jurisdiction over general crimes to general courts for the sake of transparency and public accountability.

Keywords: Absolute Competence, Military Justice, General Justice, General Crimes, TNI Legal Reform.

1. Introduction

In a democratic state governed by the rule of law, law enforcement must guarantee justice and equality before the law for all citizens, without exception. State institutions, including the military, must not place themselves above the law or enjoy immunity from prosecution. The military's role as a means of national defense must remain subject to the principle of civilian supremacy. This means that all actions of citizens, both civilian and military, are measured by the same legal norms when it comes to general criminal offenses. [1]

Sociologically, Indonesian society continues to develop into an increasingly critical, open society, demanding transparency in every law enforcement process. When the public witnesses disparities in the treatment of criminals solely based on their military membership status, trust in the legal system can erode. This unequal legal treatment threatens the legitimacy of law enforcement institutions and deepens the gap between legal norms and perceived substantive justice. [2] When military personnel who commit common crimes are still processed through military justice mechanisms, the public perceives exclusivity and potential conflicts of interest in the judicial process. Military justice, being internal to the institution, tends not to be open to broad public scrutiny. This contradicts the principle of public accountability, a key demand of society in an era of open information. Therefore, it is not surprising that every case of legal violations by military personnel handled internally triggers social anxiety and exacerbates a sense of collective injustice.

Furthermore, in increasingly rights-conscious democratic societies, the perception has emerged that legal procedures for military personnel have two sides: one for civilians and one for the military. This creates an unequal social structure and undermines the principle of equality before the law. In the long term, this structural injustice could lead to the delegitimization of law as a social institution supposed to maintain social harmony and integration. [3]

Within the framework of security sector reform and a just and equal rule of law, regulations regarding judicial jurisdiction over TNI soldiers who commit crimes are crucial to review. Legally, this regulation has received special attention in Law Number 34 of 2004 concerning the Indonesian National Armed Forces (TNI Law), in Article 65. Article 65 paragraph (1) states that student soldiers are subject to the legal provisions applicable to soldiers, which in this context includes military law. However, paragraph (2) explicitly states that soldiers are subject to the authority of military justice in violations of military criminal law and are subject to the authority of general justice in cases of violations of general criminal law. This phrase emphasizes the principle of absolute competence based on the type of crime committed. If a soldier commits a crime that is classified as a general crime, for example murder, assault, rape, or corruption, then the TNI member should be processed through general justice, not military justice. [4]

Moreover, the reality on the ground shows that TNI soldiers are often involved in acts of violence against civilians. This phenomenon underscores the importance of implementing the principle of objective and transparent accountability outside the military's internal jurisdiction. However, the majority of criminal offenses committed by TNI members continue to be handled through military justice mechanisms. This has the potential to undermine the principle of justice, especially when the victims of such violence are civilians. Monitoring by the Commission for Missing Persons and Victims of Violence (KontraS) over the past four years provides a clear picture of the problematic nature of TNI violence and how accountability for such violence remains far from ideal. [5]

Between October 2022 and September 2023, KontraS recorded 59 incidents of violence involving members of the Indonesian National Armed Forces (TNI). The violence took various forms, including 32 cases of assault, 15 acts of intimidation, 11 cases of torture, 3 shootings, 5 cases of sexual violence, 2 cases of inhumane punishment, 4 kidnappings, and 2 cases of arbitrary arrest. These incidents resulted in 70 injuries and 14 deaths.

This data confirms that violence by the TNI is not an isolated phenomenon, but rather occurs in a consistent and massive pattern. Not confined to one branch, this violence was recorded as involving all major branches of the TNI: the Army (49 incidents), the Navy (6 incidents), and the Air Force (4 incidents). This finding indicates that the Army is the most dominant perpetrator of violence, as also reflected in KontraS monitoring reports from previous years. [6]

This situation demonstrates that legal practice does not yet reflect the spirit of legal reform and civil justice as stipulated in the TNI Law and the principles of a modern rule of law. Civilian victims do not have access to a neutral and transparent trial process, as is appropriate in general courts. Law enforcement officials and military institutions continue to rely on the military justice system, which places TNI members under internal jurisdiction, rather than the general justice system. This creates a dual jurisdiction that not only creates legal disharmony but also casts doubt on the principle of equal justice for all citizens.

Judicial practices for TNI soldiers who commit general crimes are still dominated by the jurisdiction of military courts. Judicial practices for TNI soldiers who commit general crimes still refer to Law No. 31 of 1997 concerning Military Justice. Law No. 31 of 1997 states that military courts have the authority to try TNI members who commit crimes, including general crimes. This is regulated in Article 9. [7]

After the enactment of Law No. 31 of 1997 concerning Military Justice, Law No. 34 of 2004 concerning the Indonesian National Armed Forces (TNI) was enacted, which changed some of the paradigms regarding trials for TNI soldiers, especially in cases of general crimes. Ideally, the rules used should refer to Article 65 paragraph (2) of Law No. 34 of 2004. In this article, it is explicitly stated that soldiers are subject to the authority of military justice in cases of violations of military law and are subject to the authority of general justice in cases of violations of general criminal law.

This provision serves as the legal basis for TNI members committing general crimes such as murder, serious assault, rape, or kidnapping, to be prosecuted in general courts, not military courts. However, in reality, impunity persists, with general criminal cases still being handled by military courts. This situation not only deviates from the spirit of the constitution but also contradicts Article 74 of the TNI Law.

In other words, the continued validity of Law No. 31 of 1997 concerning Military Justice following the issuance of the TNI Law is only temporary, pending adjustments. However, as of 2025, there has been no revision to the Military Justice Law. As a result, military justice continues to handle general crimes, even though in principle they should be delegated to general courts as mandated by Article 65 paragraph (2). This represents a form of legislative stagnation that results in dual norms and fosters the practice of legal injustice. In the context of the implementation of Article 74, this stagnation in legal reform renders Article 65 paragraph (2) operationally ineffective and creates a conflict between the stated goals of TNI institutional reform and the legacy judicial regulations, which still retain a militaristic, corporatist character. The reality of criminal cases committed by TNI members demonstrates that soldiers remain protected by internal justice, rather than being brought before an open and accountable general justice system.

Therefore, the reconstruction of the absolute jurisdiction of military crimes to general courts is a form of fulfillment of Article 74 itself, namely, continuing the mandate of the Law to amend all old provisions that are inconsistent with new norms. This also aligns with the principle of equality before the law.

2. Research Methods

This study uses descriptive analytical research. Primary data, including interviews and field observations, serve as the primary data source. [8] The research paradigm is constructivism, with a socio-legal approach and qualitative analysis. The legal theories used for analysis include the rule of law theory as a grand theory, the theory of justice as a middle-range theory, and the theory of legal certainty as an applied theory. [9]

3. Results and Discussion

3.1. Analysis of Absolute Competence Between Military Courts and General Courts in Handling General Criminal Offenses of TNI Soldiers Currently

Given the absolute competence of military courts and general courts, it is clear that they have different authorities in handling general crimes. General courts have the authority to examine, try, and decide criminal cases committed by any person regardless of their position, profession, or background. This authority is general, making general courts the primary judicial forum for general crimes. Therefore, all crimes under the Criminal Code and other specific criminal laws essentially fall under the jurisdiction of general courts, unless legal regulations specify exceptions. [10]

On the other hand, military courts have absolute competence to adjudicate military-related violations or military crimes as stipulated in the Criminal Code (KUHPM). Military courts are established with specific characteristics related to discipline, hierarchy, and the command system within the Indonesian National Armed Forces (TNI). This aims to maintain military order, soldier professionalism, and adherence to official regulations. [11]

Normatively, it arises when the subject of the case is a TNI soldier who commits a general crime. Prior to the issuance of Law No. 34 of 2004, the military's jurisdiction over TNI soldiers was very broad, so that all crimes, both military and general, were tried in military courts. This regulation was comprehensively outlined in Law No. 31 of 1997 concerning Military Justice. However, a paradigm shift occurred after reforms in the security sector and law enforcement. Law No. 34 of 2004 brought fundamental changes by narrowing the jurisdiction of military courts and directing that general crimes committed by TNI soldiers be tried in general courts. This change is consistent with the principle of equality before the law, which affirms that every citizen must be treated equally before the law.

Article 65 paragraph (2) of the TNI Law states that TNI soldiers are subject to military justice if they commit violations of military law, while for general crimes, the resolution is carried out in accordance with statutory

regulations. This norm emphasizes that not all actions of soldiers fall under military jurisdiction, so the distinction depends on the type of crime committed. In practice, the absolute competence of general courts over general crimes committed by TNI soldiers has not been fully implemented. This occurs because Law No. 31 of 1997 has not been revised and still gives broad jurisdiction to military courts. This conflict of norms gives rise to dualism which has an impact on the difficulty of determining the appropriate forum when soldiers commit general crimes.

In theory, the principles of *lex superior derogat legi inferiori* and *lex posterior derogat legi priori* can be used to resolve normative conflicts. The TNI Law, as a newer and higher regulation within the framework of state resilience, essentially overrides the inconsistent provisions of the older Military Justice Law. Therefore, provisions regarding the resolution of general criminal offenses by soldiers in general courts should be the primary reference.

Legal reality shows that many TNI soldiers are still being tried in military courts for general crimes, particularly in cases involving official duties. However, normatively, if the crime is committed outside of official duties or not directly related to military functions, absolute jurisdiction should lie with general courts.

This dualistic, absolute competence arrangement has given rise to academic debate about forum privilege, namely whether TNI soldiers enjoy jurisdictional "privileges" by always being tried in military courts. Many argue that this contradicts the principles of a modern rule of law, as closed trials and a militarized structure are considered less likely to guarantee transparency and accountability. [12]

In an analysis of the positive legal system, the direction of Indonesian legal development is actually moving toward a single system model for handling general crimes. This is already evident in the constitution, the Judicial Power Law, the TNI Law, and Presidential Decree 56 of 2004, which transferred the organization and administration of military justice under the Supreme Court. All of this demonstrates an effort to integrate the judicial system. However, because the Military Justice Law has not been revised, the dualism persists in practice. As a result, there is a difference between *ius constitutum* and *ius constituendum*. Modern normatively, TNI soldiers should be tried in general courts for general crimes, but in practice, many are still brought to military courts due to a lack of operational regulations. [13]

Ultimately, the absolute competence between military and general courts regarding general crimes committed by TNI soldiers is a conceptual and structural issue that requires improvement. The direction of legal reform shows a strong trend toward general courts as a more appropriate, accountable forum, and in line with the principles of the rule of law. Legal reform is needed to ensure that applicable regulations align with constitutional principles and ensure ideal legal certainty in the enforcement of general crimes committed by TNI soldiers.

3.2. Factors Hindering the Implementation of Article 65 Paragraph (2) of the TNI Law in the Implementation of the Justice System for General Criminal Violations by TNI Soldiers

Article 65 paragraph (2) of Law Number 34 of 2004 concerning the Indonesian National Armed Forces basically stipulates that TNI soldiers are subject to the authority of the military courts for violations of military law, while the resolution of general criminal acts is carried out in accordance with the provisions of statutory regulations. This formulation marks a significant shift in the paradigm of law enforcement for TNI soldiers, as it opens the door for general criminal offenses committed by soldiers to be processed within the general justice system. Systemically, this provision is intended to align military justice mechanisms with universal national law enforcement principles. However, this normative regulation has not necessarily been accompanied by changes in the structure, procedures, or practices of judicial administration. [14]

To date, the mechanism for resolving general criminal offenses committed by soldiers is still largely carried out through military courts. This situation creates a mismatch between the ideal legal norm (*ius constituendum*) and its practical implementation (*ius constitutum*). [15] This mismatch also raises fundamental questions about the effectiveness of the principle of equality before the law and the extent to which security sector reforms are truly implemented in the judicial sphere. There are several inhibiting factors in the implementation of Article 65 Paragraph (2) of the TNI Law in handling general criminal acts by TNI soldiers in general courts, including: [16]

a. Legal and Regulatory Obstacles

Legal obstacles are the most fundamental factor that hinders the implementation of Article 65 paragraph (2) of the TNI Law to hand over the handling of general criminal acts by TNI soldiers to general courts. Normatively, Article 65 paragraph (2) of the TNI Law contains the command that "soldiers are subject to the authority of general justice in cases of committing general crimes." However, this command is a delegative norm that requires further legal instruments before it can be effectively implemented in practice. Without additional legal instruments, this norm cannot function as a basis for the automatic transfer of absolute authority. The lack of revision to Law No. 31 of 1997 concerning Military Justice is a major obstacle. The Military Justice Law still stipulates that all criminal acts committed by TNI soldiers, including general crimes, remain within the absolute competence of military justice. Because the hierarchy of norms requires that regulations of a similar or lower level must be in line with the new norms, the validity of Article 65 paragraph (2) of the TNI Law is unable to eliminate the provisions in the Military Justice Law without explicit revision. This creates a condition of norm conflict and dualism of competence, which in legal theory is known as normative disharmony, namely disharmony between newer regulations and regulations that are still in force. In addition to the unrevised Military Courts Law, legal obstacles also arise due to the lack of implementing regulations. To date, there is no Government Regulation or joint regulation between the TNI, the Supreme Court, the Attorney General's Office, and the Police. In fact, Article 65 paragraph (2) requires technical mechanisms such as the process for transferring cases, investigative standards, the authority of investigators (the National Police or the Military Police), and the prosecution mechanism (the Audit Board or the Prosecutor's Office). Without these technical tools, law enforcement officers find themselves in a legal vacuum, making normative provisions impossible to implement.

b. Institutional Barriers and Institutional Resistance

Institutional obstacles are the second factor that hinders the implementation of Article 65 paragraph (2) of the TNI Law, especially in efforts to shift the handling of general criminal acts by TNI soldiers from military courts to general courts. Institutional resistance stems not only from the TNI command structure but also from the military justice system, which has long been accustomed to exercising its authority under the Military Justice Law. This type of obstacle is non-legal in nature, but has a direct impact on the effectiveness of legal implementation. Institutionally, the TNI has a hierarchical, closed command system, and is oriented toward compliance and internal discipline.

c. Barriers to Technical Competence of Law Enforcement Officers

Obstacles in the technical competence of law enforcement officers are one of the important factors that arise. These obstacles concern individual capabilities and institutional readiness to understand the complexity of the authority relationship between the general justice system and the military legal system. Obstacles to the technical competence of law enforcement officers are a structural problem that must be addressed through the creation of an integrated training curriculum, increasing cross-agency understanding, and providing comprehensive procedural guidelines. As long as technical competence is not improved, the implementation of Article 65 paragraph (2) of the TNI Law will only be a normative aspiration that cannot be operationalized in practice.

d. Differences between Law Enforcement Procedures and Standards of Proof

The procedural differences between the military and general justice systems also contribute to the substantive obstacles in implementing Article 65 paragraph (2) of the TNI Law. Each stage of the judicial process, from inquiry, investigation, detention, to confiscation of evidence, has its own characteristics, command structures, and operational standards. In military justice, the investigation is conducted by the Military Police, followed by the Military Audit Office as prosecutor, while in general justice, the investigation falls under the jurisdiction of the National Police, and the prosecution is handled by the Prosecutor's Office. This difference in the authority of law enforcement actors directly impacts the flow of case handling and creates friction when cases involve TNI soldiers in general crimes. In terms of evidentiary standards, the challenges that arise are increasingly complex. The general justice system has more open, accountable standards of proof, and adheres to the principle of due process of law. In contrast, the process of proof in military justice is often internal and follows the principles of service, including strengthening military hierarchy and discipline. This disparity in standards often makes it difficult for investigators in general and military justice to synchronize their actions, particularly regarding the validity of evidence, seizure mechanisms, and procedures for examining witnesses within the military command structure. One of the most common obstacles is the lack of clarity regarding who is authorized

to handle investigations when TNI soldiers commit general crimes. The lack of implementing regulations has led to the emergence of two parallel practices: the National Police conduct investigations as if they were general crimes, while the Military Police investigate based on the perpetrator's status as a soldier.

3.3. Reconstruction of the Ideal Absolute Competence of Military Justice in the Indonesian Justice System to Realize Justice and Legal Certainty in Indonesia

The Military Courts Law (RUU) represents a significant step in advancing security sector reform, particularly reform of the military justice system. After lengthy debate over the jurisdiction of military courts, this development provides space to move on further, equally strategic issues. In a meeting between the House of Representatives (DPR) and the government, it was agreed that deliberations on the Military Courts Bill would proceed to the Working Committee (Panja) level. [17] At this stage, several issues will be discussed, including the mechanism for connected courts and the limitations of general crimes committed by TNI soldiers. Furthermore, a proposal was made to harmonize the provisions of the Criminal Code (KUHP), the Criminal Procedure Code (KUHAP), and the Military Criminal Code (KUHP) before revising the Military Court regulations.

Law Number 31 of 1997 concerning Military Justice is the legal basis that currently governs the military justice system in Indonesia. This law contains provisions regarding criminal law mechanisms and State Administrative Procedure (TUN) for military personnel who commit violations of the law or are involved in administrative disputes. Under this law, military justice has absolute jurisdiction over soldiers and other parties considered equal to soldiers under statutory provisions. In fact, under certain circumstances, a civilian may be subject to military justice if there is a decision from the TNI Commander or approval from the Minister of Justice. This regulation is often seen as problematic because it potentially violates the principle of equality before the law. [18]

The law allows for trials to be declared closed when they involve military or state secrets. However, the criteria for what constitutes a "military/state secret" are not explicitly defined, leaving room for abuse to obscure the judicial process from the public. From a competency perspective, this law affirms that military courts have the authority to adjudicate crimes committed by TNI personnel, including general crimes. This provision is emphasized in Article 9 (a), which states that every soldier is subject to the jurisdiction of military courts regardless of the type of offense.³ This makes military courts the exclusive forum for the judicial process against TNI personnel, even if the crimes committed are not directly related to their official duties. This provision has become the most frequently debated aspect of judicial reform discourse.

In addition to regulating absolute competence, this law also stipulates that the investigation of soldiers is carried out by the Military Police, while the prosecution is carried out by the Military Auditorate.⁴ This arrangement demonstrates that the military justice system has a quasi-integrated mechanism that differs from the general justice system, primarily because the functions of investigation, prosecution, and detention are within the military. This structure was established to maintain military discipline while expediting the internal law enforcement process.

However, Law Number 31 of 1997 is considered not fully in line with the principle of equality before the law, particularly regarding the handling of general crimes by TNI soldiers. Criticism arose because soldiers who commit general crimes are not tried in general courts like other citizens. This debate has intensified since judicial reform and has become more pressing due to a number of general criminal cases involving TNI members over the past two decades. [19]

The reconstruction of the absolute competence of military justice is a strategic issue in legal reform in Indonesia, especially after the presence of Article 65 paragraph (2) of Law Number 34 of 2004 concerning the TNI. This provision emphasizes the duality of jurisdiction between military justice and general justice, so that the reconstruction of authority is a necessity to align judicial practices with the principles of a modern legal state. The initial problem that must be examined is the normative relationship between Law Number 31 of 1997 concerning Military Justice and Article 65 paragraph (2) of Law Number 34 of 2004 concerning the TNI.

Formally, Law 31/1997 still grants broad jurisdiction to military courts, based on the perpetrator's status. Meanwhile, Article 65(2) of the TNI Law signals a shift in function: general crimes committed by soldiers should be handled by general courts. This distinction is not merely a matter of terminology; it also touches on the core of

institutional legitimacy and victims' human rights, as it determines the examining forum, procedural standards, and oversight mechanisms available to the public.

The reconstruction of ideal absolute competence should also establish a time-bound rule for the transfer of cases. For example, a maximum deadline for the transfer of files from the POM to the National Police (Polri) or vice versa to prevent deliberate delays that harm the rights of victims or defendants. This deadline maintains the effectiveness of the process and prevents manipulation. Interviews emphasized the lack of deadlines as one of the roots of the current uncertainty; implementing legislation needs to adopt firm deadlines combined with administrative sanctions for those who obstruct the transfer. [20]

From a human rights perspective, reconstruction must ensure that fair trial standards (judicial independence, access to defense counsel, transparency of proceedings, and oversight of appeals) are fully applied when military cases involving general elements are transferred to the District Court. Judges and prosecutors must be able to balance general norms with military sensitivities without compromising the standard of protecting the rights of the accused. This also includes victims' access to reparations and restoration, a dimension often overlooked in internal military proceedings.

The theory of legal certainty states that effective rules are not only clear in text but also predictable in application. Therefore, the reconstruction must include criteria examples, an enumeration of purely military offenses, and a list of offenses automatically referred to the District Court so that law enforcement officials have predictive guidance in determining the forum.

The ideal reconstruction of absolute competence is a multi-layered reconstruction: normative (amendments to the Law and the Criminal Code), procedural (synchronized Criminal Procedure Code, PP/Perma, deadlines), institutional (MoU, special District Court unit, training), and oversight (Komnas HAM/KY/MA). This approach must integrate the aspirations of justice (Rawls), the morality of the rules (Fuller), and the functional needs of the military to achieve a sustainable balance. [21]

4. Conclusion

The Absolute Competence of Military Courts Over Criminal Acts by TNI Soldiers Has Not Been Fully Implemented The absolute competence of general courts over general crimes committed by TNI soldiers has not been fully implemented. This is because Law No. 31 of 1997 has not been revised and still grants broad jurisdiction to military courts. This conflicting norm has given rise to a dualism that makes it difficult to determine the appropriate forum when soldiers commit general crimes. The implementation of Article 65 paragraph (2) of the TNI Law has not yet fully proceeded as expected. Various normative, institutional, technical, and cultural obstacles still hinder the transfer of authority for examining general crimes by TNI personnel to general courts. Furthermore, the lack of regulatory harmonization and poor inter-institutional coordination have reinforced the status quo, thus preventing significant change in the military criminal justice system. Taking these findings into account, this study believes that strategic regulatory, institutional, and operational measures are necessary to optimally achieve the objectives of legal reform.

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