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Use of Discretion in Criminal Acts by the Police in Hart's View

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Abstract . This research discusses the application of discretion often causes problems. However, on the one hand, discretion is also helpful for the Police in carrying out the investigation and investigation process so that they can quickly solve a problem that arises in the field. Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia was born to try to put discretion into the practice of criminal law. The Criminal Procedure Code describes how discretion is applied, but the measure of the application of discretion, whether this discretion is better to exist or not, the value of discretion applied in Indonesia, and how we can exercise discretion. It has yet to be answered, and it is often a problem in the field because it seems arbitrary; for this reason, it is necessary to revise Law Number 2 of 2002 concerning the Police, which explains what discretion is and how it is applied. The research method used is normative legal research, which traces the legal literature linked to the discretionary concept approach presented by Hart.

Keywords : Discretion, Police, Hart

1. BACKGROUND

Realizing these legal objectives requires means, namely law enforcement. Law enforcement itself can be interpreted as taking action against any violation or deviation from statutory regulations, through a criminal justice process involving the role of police officers, prosecutors, advocates or lawyers, and also judicial bodies (Asshiddiqie, 2006). Meanwhile, in a broader sense, law enforcement can be interpreted as: activities to implement and apply the law and take legal action against any legal violations committed by legal subjects, either through judicial procedures or through arbitration procedures and other dispute resolution mechanisms (alternative resolutions or conflicts resolution) (Asshiddiqie, 2006).

Faal (1991) states that law enforcement does not blindly treat anyone and under any conditions as stated in the law, but rather there are filters which he calls discretion. Rahardjo (1995) also has almost the same view as M. Faal, also emphasizing that law enforcement is essentially the application of discretion (policy) which makes legal decisions not strictly regulated by law but also based on wisdom between law and ethics.

Another legal expert's view on the application of discretion is Wayne R. LaFave as quoted by Soekanto (2004), Wayne R. LaFave stated that law enforcement as a process, in essence is the application of discretion which involves making decisions that are not strictly regulated by legal rules, will but has an element of personal judgment. Regarding the existence of discretion in law enforcement, this was also stated by Hoffmaster (1982), who explained that discretion

as used in the realm of law is defined as the authority to decide, within the limits permitted by law, regarding punishment, recovery or payment, and generally to regulate matters related to procedures and administration.

Law enforcement practices in the field often use discretion by the Republic of Indonesia Police. Every citizen has the right to obtain a guarantee of legal certainty specifically by the POLRI (Polisi Republic of Indonesia) as a law enforcement agency at the beginning of the criminal law enforcement process. Viewed from a law enforcement perspective, in accordance with Article 13 of Law No. 2 of 2002 concerning the Police of the Republic of Indonesia regulates the duties of the POLRI, namely: (1) has the duty to maintain security and public order; (2) enforce the law; and (3) provide protection, protection and services to the community. Therefore, the main task and function of the National Police, apart from being a protector of the community, is also a law enforcer (Adnyani, 2021).

The enforcement of this discretion often becomes a debate between investigators and prosecutors, as well as investigators and legal advisors regarding the actions taken by investigators in the field. So this article will discuss HLA A Hart's views regarding the discretion carried out by the Police of the Republic of Indonesia.

2. THEORETICAL STUDY

Several years earlier and separated by seas, HLA Hart had begun an entirely new intellectual project at Oxford University, combining the study of law with the latest forms of analytic philosophy. Hart began his career as a philosopher after World War II at a time when Oxford philosophy was buzzing with new forms of linguistic analysis. Under the strong leadership of JL Austin, Hart's group of philosophers aimed to clarify concepts by studying the ordinary use of words. Drawing on his pre-World War II experience as a lawyer, Hart saw an opportunity to make a distinctive contribution to the movement by analyzing concepts in legal discourse: what is meant by a right, or a duty, or an obligation, or even "the law" itself? (Shaw, 2013).

Hart explained several years later that in the philosophy of law, "it is true that we can use, as Professor J. L. Austin put it, 'a sharpened awareness of words to sharpen our awareness of phenomena.' In 1952, Hart became Professor of science law, the first time a philosopher had occupied the office and devoted himself fully to his new style of informed analytical jurisprudence. Process theorists watched closely, proposed that Harvard invite Hart to stay for a year at Cambridge as a visiting professor. The infatuation with the process at Harvard has spurred interest in other forms of legal theory that could contribute to the process (Shaw, 2013).

HLA Hart, in his article entitled Discretion, explained that gaining an understanding of the definition or meaning of discretion is very difficult. However, by formulating questions, then trying to find and understand the answers, it will be easier for us to understand the meaning of discretion. In this case HLA Hart raised 5 (five) questions, namely:

1. *What is discretion, or what is the exercise of discretion?*
2. *Under what conditions and why do we in fact accept or tolerate discretion in a legal system?*
3. *Must we accept discretion or tolerate discretion, and if so, why?*
4. *What values does the use of discretion menace, and what values does it maintain or promote?*
5. *What can be done to maximize the beneficial operation of the use of discretion and to minimize any harm that it does?* (Hart, 2013)

Meanwhile, Roscoe Pound as quoted by Wayne R. LaFave defines discretion as: "² *an authority conferred by law to act in certain conditions or situation in accordance with an official's or an official agency's own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals* " (LaFave, 1965).

Howard Abadinsky also expressed his opinion that: "*In law enforcement, discretion often refers to the use of good common sense or a degree of flexibility* " (Hart, 2013). Complementing the opinions of Hart, Pound and Abadinsky, Thomas J. Aaron also expressed his opinion about discretion, namely: "*discretion is a power or authority conferred by law to act on the basis of judgment or conscience, and its use is more an idea of morals than law* " (Abadinsky, 1984). Meanwhile, Sam S. Souryal said that morality is behavior that is very similar to integrity, thus it can be said that in the use of discretion you must also prioritize considerations of integrity over law (Souryal, 1998).

From the views of Hart, Pound, Abadinsky, Aaron, and Souryal mentioned above, it can be summarized that the important points that need to be underlined in the theory of discretion are: 1) Discretionary decisions are rational, the main concern is the way the decision is made; 2) Discretion is an idea or ideas about morals, which is located in a gray zone between law and morals; 3) Discretion refers to the use of good common sense or a degree of flexibility; 4) The use of discretion should emphasize moral considerations more than legal considerations; 5) The use of discretion must also prioritize integrity over the law.

⁴ 3. RESEARCH METHODS

The method used is a legal research method using literature studies related to law enforcement in the traffic sector using a conceptual approach regarding ⁹ the application of

restorative justice and statutory regulations related to the cases raised. The laws and regulations related to this writing are:

- a. Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia
- b. Law Number 8 of 1981 concerning the Criminal Procedure Code
- c. Government Regulation Number. 2 of 2003 concerning Disciplinary Regulations for Members of the Indonesian National Police
- d. Regulation of the Chief of Police of the Republic of Indonesia Number 14 of 2011 concerning the Professional Code of Ethics for the National Police of the Republic of Indonesia

Apart from the two approaches above, this research also uses a conceptual approach by discussing Hart's HLA theory regarding Discretion.

4. RESULTS AND DISCUSSION

The authority of the Police can be seen in the formulation of the authority of the State Police of the Republic of Indonesia in Article 18 paragraph (1) of Law Number 2 of 2002. This is an authority that originates from the principle of general obligations of the Police (plhtmatigheids beginsel), namely a principle that gives authority to Police officials to act or does not act according to his own judgment, within the framework of his general obligations to guard, maintain order and ensure public security. In the Criminal Code (KUHP) Article 48 states that: Anyone who commits an act under duress cannot be punished. Article 49 states that: anyone who resorts to forced defense of himself or another person, the honor of morality or his own or another person's property because there is an attack or threat of attack that is very close at that time, which is against the law, will not be punished (Rudiantoro, 2014).

Different from the Criminal Code, the Criminal Procedure Code formulates discretion in Article 5 paragraph (1) letter a number 4 and Article 7 paragraph (1) letter j, the formulation reads: Article 5 paragraph (1) letter a number 4:

"Investigators, because of their obligations, have the authority to carry out other responsible actions according to law

Article 7 paragraph (1) letter j:

"Investigators, because of their obligations, have the authority to take other responsible actions according to law.

It can be seen from the formulation or formulation of the article and/or explanation of the article above that the discretionary norm is: carrying out other actions according to the law that are responsible. In this case, the Criminal Procedure Code does not explain further about

discretionary norms, but the meaning of discretionary norms can only be captured through the interpretation of the phrase in this sentence. Furthermore, to explain the sentence phrase which is interpreted as a discretionary norm, in the Explanation of Article 5 paragraph (1) letter a number 4 and the Explanation of Article 7 paragraph (1) letter j of the Criminal Procedure Code it only states what is meant by other actions, namely: actions from the Investigator or Investigating Officer for the purposes of inquiry and investigation, provided that:

- 1) does not conflict with a legal rule;
- 2) is consistent with the legal obligations that require the action to be carried out;
- 3) must be appropriate, reasonable, and included in the scope of the position;
- 4) reasonable considerations based on compelling circumstances;
- 5) respect human rights. These five conditions can also be interpreted as limits on the use of discretion.

If we refer to the formulation or formulation of the article and the explanation of the article above, it can be felt that the discretionary norms regulated in the Criminal Procedure Code are still too broad, so that it can trigger multiple interpretations or different interpretations between one law enforcement officer and another. other. As a result, understanding and implementation can vary, this can of course also trigger legal uncertainty. Apart from that, on the one hand, this condition can be used as an excuse (excused) for why the use of discretion is still erroneous or inappropriate. On the other hand, it can also happen that law enforcement officers can actually interpret or understand well, but instead take advantage of existing weaknesses, of course with the aim of seeking profit for themselves.

The discretionary norms contained in the Criminal Procedure Code need to be revised or implementing regulations made from the provisions of these norms with derivative statutory regulations that explain the discretionary norms more clearly and in detail, making implementation easier and avoiding multiple interpretations and legal uncertainty. Ideally, these discretionary limits are made clearer and more straightforward and apply imperatively, if they are not guided and implemented they will receive sanctions.

The Police Law only adopts the Criminal Procedure Code, as formulated in Article 16 paragraph (2) which reads: in order to carry out the duties as intended in Article 13 and Article 14 in the field of criminal proceedings, the National Police has the authority to: carry out other actions according to the law that are responsible . What is meant by these other actions are: Investigative and investigatory actions that are carried out if they meet the following requirements: a) do not conflict with any legal regulations; b) is consistent with the legal obligations that require the action to be taken; c) must be appropriate, reasonable and included

in the scope of the position; d) reasonable considerations based on compelling circumstances; and e) respect human rights. It is very clear that the formulation of discretionary norms only quotes the formulation of Article 5 paragraph (1) letter a number 4 and Article 7 paragraph (1) letter j of the Criminal Procedure Code.

Discretionary norms, apart from being formulated in Article 16 paragraph (1) letter l, are also formulated in Article 18 paragraph (1) of the Police Law, which reads: In the public interest, officials of the Indonesian National Police in carrying out their duties and authority can act according to their own judgment. Meanwhile, what is meant by "acting according to their own judgment" is an action that can be taken by members of the Indonesian National Police who, in acting, must consider the benefits and risks of their actions and are truly in the public interest. Furthermore, the application of Article 18 paragraph (1) is also limited by Article 18 paragraph (2), namely: Implementation of the provisions as referred to in paragraph (1) can only be carried out in very necessary circumstances by paying attention to statutory regulations, as well as Code of Professional Ethics for the National Police of the Republic of Indonesia.

It is also felt that the formulation of discretionary norms contained in the Police Law is still too broad in meaning, for example the formulation of discretionary requirements is stated in the form of a sentence phrase: a) must consider the benefits and risks of the action and is truly in the public interest; b) carried out in very necessary circumstances taking into account statutory regulations, as well as the Code of Professional Ethics for the National Police of the Republic of Indonesia. It can certainly be felt that these two phrases are still difficult to understand and make it difficult to implement.

The limits of discretion in the Police Law also still quote the formulation of limits of discretion in the Criminal Procedure Code, as stated in Article 16 paragraph (2) which reads: Investigative and investigative actions are carried out if they meet the following requirements: a) do not conflict with a rule of law; b) is consistent with the legal obligations that require the action to be taken; c) must be appropriate, reasonable and included in the scope of the position; d) reasonable considerations based on compelling circumstances; and e) respect human rights. Apart from that, the Police Law itself also provides limits on discretion, as regulated in Article 18 paragraph (2) which reads: Implementation of the provisions as intended in Article 18 paragraph (1) can only be carried out in very necessary circumstances by paying attention to statutory regulations, invitation, as well as the Professional Code of Ethics for the National Police of the Republic of Indonesia. From these two formulations, it can also be felt that the

meaning of the sentence formulation is still too broad, making it difficult to interpret correctly, besides that it is also difficult to guide and implement.

So, from Hart's point of view, there are 5 main points that must be discussed by the Republic of Indonesia Police Institution, namely:

1. What is meant by discretion, or what is meant by the exercise of discretion?

The first point explains that the definition of discretion must be included in a law, and how to implement this discretion so that arbitrariness does not occur. When arbitrariness or abuse of power occurs, what mechanisms are in place to handle it?

2. Under what conditions and why do we accept or tolerate discretion in the legal system?

The second point, Hart explains that there must be a mutual agreement between law enforcers, why we must tolerate discretion in the legal system, there must be a juridical, philosophical and sociological study, regarding the need for discretion to be present in a law

3. Should we accept discretion or tolerate discretion, and if so, why?

If point 2 talks about how to include it in legislation, then the point is when we look at how discretion is implemented, if we accept its implementation, we must also know the reasons why we accept its application in society, so as not to cause legal problems.

4. What values are threatened by the use of discretion, and what values are defended or promoted?

The fifth point, Hart describes " *values* ", what values are the basis or are understood as the implementation of discretion in society, if discretion does not have positive value, why should it be implemented?

5. What can be done to maximize the profitable operation of the exercise of discretion and to minimize the harm it causes?

The fifth point, Hart asks a question, which invites legislators to think about the benefits or disadvantages of implementing discretion in legislation.

So the Criminal Procedure Code and the Law on the National Police of the Republic of Indonesia must be able to answer the statements and questions above. Hart does not define what discretion is in a sentence formula, but he invites us to think about what discretion is, how it is applied, how to control it so as not to cause *abuse of power* , whether it has values that can be applied in society and, what are the benefits of applying discretion in the life of criminal law in Indonesia

5. CONCLUSIONS AND RECOMMENDATIONS

The application of discretion often causes problems, but on the one hand discretion is also useful for the Police in carrying out investigations and investigation processes, so that they can quickly resolve problems that arise in the field. Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia, was of course born to try to incorporate discretion into the practice of criminal law, and the Criminal Procedure Code describes how discretion is applied, but the measure of the application of discretion, whether this discretion is better or not there is no value in the discretion applied in Indonesia, how can we exercise discretion. It has not been answered, and often becomes a problem in the field because it seems arbitrary, which is why it is necessary to revise Law Number 2 of 2002 concerning the Police which explains what discretion is and how it is applied.

6. REFERENCE

- Adnyani, N. K. S. (2021). Kewenangan Diskresi Kepolisian Republik Indonesia dalam penegakan hukum pidana. *Jurnal Ilmiah Ilmu Sosial*, 7(2)
- Barry Hoffmaster, *Understanding Judicial Discretion*, Law and Philosophy, Vol. 1, No. 1, (1982)
- H. L. A. Hart, *Discretion*, Harvard Law Review, December 2013, Vol. 127, No. 2 (December 2013)
- Howard Abadinsky, *Discretionary Justice: An Introduction To Discretion In Criminal Justice*, (Springfield: Charles C. Thomas Publisher, 1984)
- Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006)
- M. Faal, *Penyaringan Perkara Pidana Oleh Polisi (Diskresi Kepolisian)*, Cetakan Pertama, (Jakarta: PT Pradnya Paramita, 1991)
- Rudiantoro, Joko. "Diskresi Kepolisian Dalam Mengatasi Tindakan Anarki Di Masyarakat." *Jurnal Ius* 2 (2014)
- Sam S. Souryal, *Ethics in Criminal Justice: In Search of the Truth*, Second Edition, (Cincinnati: Anderson Publishing Co., 1998).
- Satjipto Rahardjo, *Masalah Penegakan Hukum*, (Bandung: Alumni, 1995)
- Shaw, G. C. (2013). HLA Hart's lost essay: discretion and the legal process school. *Harv. L. Rev.*, 127, 666-727
- Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, Edisi 1, Cet. 5, (Jakarta: Raja Grafindo, 2004)
- Wayne R. LaFave, *Arrest; The Decision to Take a Suspect into Custody*, (USA: The American Bar Foundation, 1965).

Peraturan Perundang-undangan

- a. Undang-Undang Nomor 2 Tahun 2002 tentang Kepolisian Negara Republik Indonesia
- b. Undang-Undang Nomor 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana
- c. Peraturan Pemerintah Nomor. 2 Tahun 2003 tentang Peraturan Disiplin Anggota Kepolisian Negara Republik Indonesia
- d. Peraturan Kepala Kepolisian Republik Indonesia Nomor 14 Tahun 2011 Tentang Kode Etik Profesi Kepolisian Negara Republik Indonesia

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