

Forms of Police Discretion in Efforts to Terminate Criminal Cases

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Abstract: *The purpose of this study is to examine and analyze the form of implementation of the termination of criminal cases within the scope of the Police as a discretionary function. In this writing, the author uses a normative legal method with research specifications in the form of descriptive analysis. With the existence of discretionary authority by the police, the police have the authority to break through a form of legal rigidity that emphasizes the side of legalism alone, without paying attention to the social systems that live in society in achieving a form of real welfare and justice. In fact, the police's discretion in terms of terminating the investigation is carried out by investigators as a response to social phenomena while still adhering to the limits regulated by applicable legal norms. Two conflicting sides of the law are linked to the applicable legal practice that the use of police discretion is not yet very firm in its legal regulations, but if the police accept the withdrawal of the complaint by taking a stance not to continue the case to the further legal process (transferring the case file to the prosecutor's office), then in this case the police have used Discretion with the Restorative Justice method.*

Keywords: *Emphasizes; Investigators; Justice.*

1. Introduction

Case screening begins at the investigation level in the form of police actions which in practice are called police discretion. At the prosecution level, there is the authority of the prosecutor to deposit a case which is usually called the opportunity principle. Meanwhile, at the trial level in the form of a judge's decision to acquit, conditional sentence, or release and a fine. At the correctional level in the form of a sentence reduction or remission. The screening of cases that enter the criminal justice process is a manifestation of the practical needs of the criminal justice system, both because of the goals and principles and because of the increasingly diverse modern schools of thought today, both in the scope of the development of criminal law and criminology which are consciously or

unconsciously, directly or indirectly influence the values of development that exist in today's society.¹

Currently, the police have a law as a rail in carrying out their duties as public servants, namely Law No. 2 of 2002 concerning the Indonesian National Police. This law was formed in the context of maintaining domestic security (kamdagri) through maintaining public security and order, law enforcement, protection, patronage, and service to the community. This main task is in line with the function of the police, namely maintaining public security and order, law enforcement, protection, patronage and service to the community, but then in carrying out its duties it must uphold human rights. Public security and order can be seen from the upholding of the law, the ability to foster and develop the potential and strength of the community in preventing, preventing, and overcoming all forms of violations of the law and other forms of disturbances that can disturb the community.²

However, there are conditions in which law enforcers, especially the police, are sometimes required to carry out or are forced to carry out policies or other actions that are often referred to as "discretion" which are actually not expected. Discretion can be interpreted as the authority of a Police Officer to choose to act or not act legally or illegally in carrying out his duties. Discretion allows a police officer to choose between various roles (maintaining order, enforcing the law, or protecting the public) in carrying out his duties.

Of course, the police's discretion itself has things that encourage or hinder its implementation in the field. Talking about police discretion in the criminal justice system, a relationship will be found between law, discretion, police, investigations and the criminal justice system. Indonesia is a country based on law, so people's lives cannot be separated from the rule of law. This is in accordance with what is contained in the 1945 Constitution Article 1 paragraph (3) that "the state of Indonesia is a state of law".³

With the existence of discretionary authority by the police, the police have the authority to break through a form of legal rigidity that emphasizes the side of legalism alone, without considering the social systems that live in society in achieving a form of real welfare and justice. From this, the form of discretion given to the Police is a form of breakthrough towards real law enforcement while still providing a form of real justice by considering the risk and benefit aspects of an action carried out.

It is no longer a public secret that many cases at the Police level in the Republic of Indonesia have been dismissed due to peace between the perpetrator and the

¹Anthony F. Susanto, *The Face of Our Justice*, Refika Aditama, Bandung, 2004, p 86

²Supriyanto, (2018), *Legal Analysis of Police Discretion in Efforts to Eradicate Narcotics Crimes at Blitar City Police*, Balitar Islamic University, *SUPREMASI Scientific Journal of Law*, 8 (2), p 19.

³Haris Wahyu Sunarno, Akhmad Khisni. (2002), *Analysis of Criminal Liability as Doer of Preening Criminal (Case Study in the Blora State Court)*. *Jurnal Daulat Hukum*, 3 (1), March, p 223

injured party, even though the case is not at all a complaint offense as stated in the provisions of the Criminal Code.

Termination of an investigation in a law enforcement process is the realization of the objectives of the law as stated by Gustav Radbruch, among others: others include justice, certainty, and benefit.⁴In this context, the termination of the investigation must provide a guarantee of legal certainty, especially regarding the fulfillment of the rights of the suspect as part of legal protection for the community. Normatively, the procedure for termination of the investigation is regulated in the provisions of laws and regulations, both the Criminal Procedure Code, related laws and technical implementing regulations such as the Chief of Police Regulation (Perkap).⁵

In fact, the police discretion in terminating the investigation is carried out by investigators as a response to social phenomena while still adhering to the limits regulated by applicable legal norms. In order to measure this, the Law on Judicial Power, Article 38 paragraph (1) states that "in addition to the Supreme Court and the judicial bodies below it and the Constitutional Court, there are other bodies whose functions are related to judicial power". If you look at the explanation of the article, it is stated that what is meant by other bodies whose functions are related to judicial power are the Police, Prosecutors, Advocates, and Correctional Institutions. Investigators carry out Termination of Investigation of a case as a series of processes for implementing judicial power in accordance with the formulation of the Article in the Law.

Based on the description above, the researcher is interested in conducting research to find out how police discretion brings functionalization to the option of terminating criminal cases at the investigation stage, by...The aim of this research is to study and analyze the form of implementation of the termination of criminal cases within the scope of the Police as a discretionary function..

2. Research Methods

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and regulations and other documents related to this study.

3. Results and Discussion

3.1. Termination of Criminal Case

⁴Bernard L Tanya, (2011), *Legal Politics: Agenda of Common Interests*, Yogyakarta, Genta Publishing, p 2

⁵Michael Ken Lingga, Marthinus Johannes Sapteno, John Dirk Palsabessy, (2023), *Police Discretionary Powers in Terminating Investigations*, Pamali, 3 (1), March, p 3

Termination of criminal cases is divided into two, namely termination of criminal cases at the Investigation stage and the prosecution stage. Termination of cases at the Investigation stage is when the Investigator issues a letter of termination of Investigation. This letter is a notification from the Investigator to the Public Prosecutor that the case has been terminated.

Termination of investigation is the authority of the investigator as regulated in Article 7 paragraph (1) sub i, Criminal Procedure Code (KUHP). The reasons for investigators to terminate the investigation are due to (a) There is insufficient evidence; (b) The incident turns out not to be a crime; (c) The investigation is terminated by law. The sentence there is insufficient evidence which is the reason for terminating the investigation as described in Article 109 paragraph (2) of the Criminal Procedure Code seems to be in line with the intent of Article 183 of the Criminal Procedure Code regarding proof of the occurrence or non-occurrence of a crime also related because the minimum limit of evidence is not met, namely at least two pieces of evidence. Moving on from the elements of the crime that have just been mentioned, then if it is said that the termination of the investigation because the incident turns out not to be a crime contains the intention that the incident that occurred after being investigated or investigated did not contain elements of a crime.⁶

The legislators in this case did not actually explain what was meant by the term investigation terminated by law. In connection with tracing this intent, the question now arises whether the expression terminated by law has the same meaning as terminated in the interests of law or closed by law. If it is said that the termination of the investigation in the interests of law contains the intention that the incident is not a criminal act or there is insufficient evidence as explained in the first and second reasons for terminating the investigation. Whereas if it is said to be closed by law, it means that the suspect or defendant has died and/or *negis in idem*.

Based on the purpose of the review of the principle of *Ne bis in idem* as mentioned above, it is clear that this principle can not only be applied at the prosecution level to stop the prosecution but it is not wrong to apply it at the investigation level so that the investigation is stopped. Talking about stopping the prosecution, the meaning must be separated from setting aside the case for the sake of public interest, although in principle both of these things can be said not to transfer the criminal case to the competent court.

Closing a case in the interests of the law as stated in Article 14 sub h of the Criminal Procedure Code is a reason for terminating prosecution which is emphasized by the formulation of Article 140 paragraph (2) a of the Criminal Procedure Code. Article 140 paragraph (2) a of the Criminal Procedure Code, stipulates that in the event that the public prosecutor decides to stop prosecution because there is

⁶R. Soenarto Soerodibroto, (1979), Criminal Code and Criminal Procedure Code, PT. Raja Grafindo Persada, Jakarta, p 98

insufficient evidence or the incident turns out not to be a criminal act and/or the case is closed by law, the public prosecutor shall state this in a decision letter.⁷ Termination of a criminal case during prosecution is carried out based on the authority of the Public Prosecutor, namely on the principle of *dominus litis*.

The legal policy of terminating criminal cases in the form of implementing criminal regulations is realized by the Police through regulations on restorative justice efforts which also serve as legal legitimacy in terminating investigations formed in the form of Police Regulations. No. 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice containing legal substance that regulates material, formal and special requirements in terminating investigations based on the achievement of restorative justice in criminal cases. In line with the termination of prosecution in restorative justice efforts, the Prosecutor's Office through the Indonesian Prosecutor's Office Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. With the existence of this Regulation, prosecutors in Indonesia no longer need to hesitate to close small cases because in *Dominus litis* the authority to prosecute is the domain of the public prosecutor.

3.2. Implementation of Termination of Criminal Cases within the Police Scope as a Discretionary Function

The police in its position in a state of law has a very important place. The police are the spearhead in enforcing Indonesian law. Currently, the police have a law as a rail in carrying out their duties as public servants, namely Law No. 2 of 2002 concerning the Indonesian National Police. This law was formed in order to maintain domestic security (*kamdagri*) through maintaining public security and order, law enforcement, protection, shelter, and service to the community.⁸

Every product of the Law that regulates the authority of the Police, always includes a blank authority whose contents are left to the Police themselves to determine. This authority is none other than the discretionary authority of the investigator.⁹ In this authority, a law enforcement officer, in this case the police, has very full authority in taking a stance and taking action to exercise discretionary authority in filtering criminal cases that are considered minor and ineffective if resolved through the Criminal Justice Process, therefore the investigator's discretion is very closely related to the effectiveness of a case.

Thus, the police's duty to uphold public security and order is an extension of and in accordance with the 1945 Constitution of the Republic of Indonesia. The consequence of this duty is that it requires authority, including the discretionary authority of investigators.

⁷M. Kardjadi, (1981), *KUHAP (Complete Criminal Procedure Code, Complete with Appendices Relating to Criminal Procedure in Indonesia, Politeia, Bogor, p. 74*

⁸Ismail Ali. (2022), *Implementation of Discretionary Authority in Supporting Police Duties and Functions at Tempe Police, LEGAL: Journal of Law, 1 (1), May, p 4*

⁹M. Faal, (1991), *Screening of Criminal Cases by the Police (Police Discretion), Pradnya Paramita, Jakarta, p 115*

Police discretionary actions are taken to filter cases, which are light cases and which are serious cases.¹⁰ According to M. Faal, the investigator's actions for the purposes of the investigation are subject to the following conditions:

- a) Does not conflict with any legal regulations.
- b) In line with legal obligations that require official action to be taken.
- c) The action must be appropriate and reasonable and within the scope of the position.
- d) Based on appropriate considerations based on compelling circumstances.
- e) Respect human rights.¹¹

Two conflicting sides of the law are linked to the prevailing legal practice that the use of police discretion is not yet firmly regulated by law, however, if the police accept the withdrawal of the complaint by taking a stance not to continue the case to further legal proceedings (transferring the case files to the prosecutor's office), then in this case the police have used discretion with the Restorative Justice method.

If the police have successfully collected evidence that shows that at least two pieces of evidence have been fulfilled for a crime allegedly committed by the suspect, the police must continue the case to the prosecutor's office and become input for the prosecutor's office for the next process up to the court and correctional institution. In such cases, the police do not have the authority to stop the investigation into the crime that occurred. The police's authority to stop the investigation is only based on reasons that are not criminal acts; insufficient evidence; or by law. The police are not given the authority to stop a case on the grounds that it was settled out of court or to set aside the case for certain considerations or to resolve the case with a restorative justice approach. Such conditions have made the police leadership take internal policy steps based on an awareness of the importance of the concept of restorative justice as the soul and personality (*volkgeist*) of Indonesian society and in order to realize a sense of justice in society. The police leadership is committed that there will be no more cases that harm the public's sense of justice.

Currently, society needs law enforcement that accommodates interests and resolves problems fairly and accommodates the aspirations of the will of the community itself, especially the interests of the recovery of victims who have been the disadvantaged party and have not received attention. The implementation of law enforcement duties by the Police at the practical level in the field, in addition to law enforcement that prioritizes formal law, is also faced with taking other policies with various considerations in law enforcement in the form of non-formal

¹⁰Siti Mardiyati, et al. (2023), Basic Considerations of Investigators in Applying Police Discretion to Traffic Crimes, Discipline: Civitas Akademika Magazine of the Youth Pledge Law College, 29 (4), December, p 143

¹¹M. Faal, (1991), Op.Cit, p 115

ones that are oriented towards community justice. This is what underlies the idea of carrying out restorative justice or implementing restorative justice in the realm of the Police in investigation and investigation activities.

In the current practice of criminal law enforcement, especially in the Police, in order to accommodate the implementation mechanism of restorative justice, under the leadership of the Chief of Police Listyo Sigit Prabowo, Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice was born. The handling based on Restorative Justice is exempted for disturbing criminal acts, acts of terrorism, state security, corruption, repeat crimes and crimes against people's lives.

The presence of Perpol No. 8 of 2021 concerning Restorative Justice provides space for members of the Police in the Criminal Investigation Unit to resolve cases more quickly and provides normative guidelines for acting to resolve criminal cases using the restorative justice method. In terms of handling cases as determined by Perpol No. 8 of 2021, it can be seen that when there is a criminal complaint report, that is when restorative justice is attempted. However, in its implementation, restorative justice is carried out in all initial stages of criminal proceedings, from investigation to investigation.

One of these developments is the emergence of the idea of conflict resolution that does not only focus on the legal process in court, but is resolved by the conflicting parties by restoring the existing situation. Termination of criminal cases is based on a balance in terms of criminal regulations (straf/punishment) with regulations on actions (maatregel/treatment/measures) and the possibility of combined sanctions between criminal and actions (double track system), considering the heterogeneity of crime problems, as well as awareness of the importance of appropriate therapy for victimless crime.¹²

In the configuration of termination of investigation due to restorative justice efforts, the advantage of the use of discretion by investigators in resolving criminal cases is that settlement through non-litigation channels can reduce the backlog of cases in the judicial institution and greatly fulfill the aspect of the effectiveness of punishment. Case settlement is generally handed over to the perpetrator and victim. Another advantage that is also very prominent is the low cost. As a form of substitute for sanctions, the perpetrator can offer compensation that is negotiated/agreed upon with the victim. Thus, justice¹³ be the fruit of a mutual agreement between the parties themselves, namely the victim and the perpetrator, not based on the prosecutor's calculations and the judge's decision.

In the theory of justice, Hans Kelsen in his book *General Theory of Law and State*, is of the view that law as a social order can be declared just if it can regulate human

¹²Septa Chandra. (2014). Legal Politics of Adopting Restorative Justice in Criminal Law Reform, *Fiat Justisia Journal of Legal Studies*, 8 (2), April-June, p 272

¹³Pan Mohamad Faiz, (2009), John Rawls' Theory of Justice, *Constitutional Journal*, 6 (1), p 140

actions in a satisfactory way so that they can find happiness in it.¹⁴Hans Kelsen's view is a positive view, individual justice values can be known by legal rules that accommodate general values, but the fulfillment of a sense of justice and happiness is still intended for each individual. Furthermore, Hans Kelsen put forward justice as a subjective value consideration. Although a just order assumes that an order is not the happiness of each individual, but the greatest happiness for as many individuals as possible in the sense of a group, namely the fulfillment of certain needs, which by the ruler or law maker, are considered as needs that should be met, such as clothing, food and shelter. But which human needs should be prioritized. This can be answered by using rational knowledge, which is a value consideration, determined by emotional factors and therefore subjective.¹⁵

4. Conclusion

The Police have used Discretion with the Restorative Justice method. The Police have taken internal policy steps based on the awareness of the importance of the concept of restorative justice as the soul and personality (*volkgeist*) of Indonesian society and in order to realize a sense of justice in society. The presence of Perpol No. 8 of 2021 concerning Restorative Justice provides space for Police members in the Criminal Investigation Unit to resolve cases faster and provide normative guidelines for acting to terminate criminal cases using the restorative justice method.

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